# 1NC

## 1NC

### 1NC – T-Exemptions

#### ‘Scope’ is the extent of the area dealt with by the core laws.

Buccirossi et al. 9, LEAR and EUI, “Measuring the deterrence properties of competition policy: the Competition Policy Indexes,” September 2009, https://www.learlab.com/wp-content/uploads/2016/03/competition\_policy\_indexes\_final\_sept09\_2\_1296464280.pdf

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004. 47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

#### It’s 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.

### 1NC – FTC CP

#### The United States federal government should substantially increase funding and staffing for the Federal Trade Commission, and substantially increase enforcement efforts utilizing existing antitrust law. The United States federal government should not apply antitrust law to blockchains.

#### The counterplan solves FTC enforcement and competition broadly

Baker 15 – Jonathan B. Baker, Professor of Law, American University Washington College of Law, “Antitrust, Competition Policy, and Inequality,” *Georgetown Law Journal Online*, 2015, 104 Geo. L.J. Online 1

Greater antitrust enforcement generally would improve the distribution of income and wealth by reducing the impact of market power, particularly if the agencies fully embrace the consumer welfare standard. But federal and state antitrust enforcement today is limited by agency budgets. Because every enforcement action has an opportunity cost, the agencies limit the intensity of their enforcement efforts and have to pick and choose which matters to pursue. They similarly are constrained in their ability to litigate multiple cases against deep-pocketed defendants, which may lead them to accept weaker settlements. Private plaintiffs add additional enforcement capacity, but they cannot employ the investigative tools available to the government, so they have less ability to uncover and challenge many types of anticompetitive conduct. If federal and state agency antitrust budgets were increased, the agencies could do more to protect consumers and reduce inequality, even without any changes in antitrust law. Although this proposal would need to compete for scarce tax dollars with other policies for combating income and wealth inequality, it may be more feasible politically to increase antitrust budgets than to adopt policy alternatives incorporating more direct redistribution. In addition, even a modest increase in those budgets may have beneficial effects on deterrence.

### 1NC – CIL CP

#### The United States federal government should substantially increase prohibit anticompetitive practices by participants in the blockchain nucleus 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

### 1NC – Biz Con DA

#### The economy is growing – the plan throws a wrench into the fragile recovery

Zandi 3/24 – Mark Zandi, chief economist at Moody’s, “Tough to Handicap the U.S. Outlook,” 3/24/22, <https://www.moodys.com/researchdocumentcontentpage.aspx?docid=PBC_1323358>

The most likely near-term outlook—our baseline—remains that the U.S. economic recovery will evolve into a self-sustaining expansion in coming months (a 50% probability). But recession is a serious threat (35% probability), and dreaded stagflation—high inflation and high unemployment—has become a meaningful possibility (10% probability). While more of a stretch (5% probability), events could turn out better for the economy, since there is evidence that underlying productivity growth is reviving.

Despite all the economy has had to deal with, odds are that the current economic recovery will evolve into a self-sustaining expansion. That is, by late this year, the economy will return to full employment. This is consistent with an unemployment rate in the low 3s and an employment-to-population ratio for prime-age workers of over 80%. Real GDP growth will throttle back to the economy’s potential growth rate of near 2%. Inflation should also moderate back to the Fed’s target of close to 2%, but this will take longer, until late 2023. For this sanguine outlook to come to pass, the pandemic must continue to fade—with each new wave of the virus less disruptive to the economy than the one before it—and the worst of the fallout from the Russian invasion of Ukraine on oil and other commodity prices must be at hand. It is critical that the Fed gets monetary policy more or less right, which means quickly normalizing interest rates over the next 18 months. We also need to catch a break, so that nothing else goes materially wrong for the economy.

#### The plans unprecedented ruling defining the crypto value chain signals a coming wave of crushing regulations.

Konstantinos Stylianou, Professor of Competition Law @ U of Leeds, JSD UPenn, LLM Harvard, ‘19, "What can the first blockchain antitrust case teach us about the crypto-economy?," Harvard Journal of Law & Technology, http://jolt.law.harvard.edu/digest/what-can-the-first-blockchain-antitrust-case-teach-us-about-the-crypto-economy

United American Corp. v. Bitmain provides an ideal setting to assess the role of crypto-economy players and the limits of the legality of their business conduct. The case’s focus on federal antitrust law is unprecedented, and it will be interesting to see how the court approaches the questions raised therein, especially in comparison to a similar case filed in California against Coinbase, a popular crypto-exchange, whose legal basis is California’s state unfair competition law (which is broader in scope than the Sherman Act). But, legal arguments aside, this case is also rich in conspiracy theories and investor drama, which provides a rare behind-the-scenes glimpse into the interests that make the crypto-economy spin.

It is questionable whether the lawsuit will achieve its goal. Doing so would establish legal firsts whose consequences can extend far beyond the boundaries of the case itself. To uphold, for example, that mining mobilization can underpin an antitrust offense would risk serving as an implicit acknowledgement of the legal bindingness of cryptocurrency whitepapers and their decentralization and democratic ideals. This, in turn, can add pressure onto other areas of law and policy-making. For example, whitepaper stipulations have been a source of confusion and friction in financial regulation, where authorities have departed from the descriptions and characterizations found in whitepapers when classifying cryptoassets under existing regulated categories (e.g. while most cryptoasset whitepapers emphasize decentralization, the SEC has considered classifying some of them as securities, whose definition requires some sort of centralized management and decision-making). Similarly, an acknowledgement of standing for UnitedCorp under any of the above-mentioned capacities would serve as an illustration of how the legal system views the structure of the cryptoasset value chain, since it would establish a direct commercial relationship between two players of the crypto-economy. In turn, a conclusion on who provides services to whom in the market can be influential for taxation purposes and broader economic policy.

#### Economic decline causes extinction.

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.

### 1NC – Hashing Power CP

#### The United States federal government should prohibit anticompetitive business practices that create profitable, small, significant non-transitory decreases computing power used to mine blocks relative to the competitive level on a candidate market.

#### The counterplan applies antitrust to blockchain without a theory of granularity. The counterplan makes allocations of computing power, not just price, cognizable as an anti-competitive harm to consumer welfare.

Deuflhard, Florian and Heller, C.-Philipp, NERA Economic Consulting, 9-3-21, Antitrust Economics of Cryptocurrency Mining (September 3, 2021). Available at SSRN: https://ssrn.com/abstract=3917012 or http://dx.doi.org/10.2139/ssrn.3917012

To assess competition, economists and antitrust practitioners typically start by defining the relevant antitrust markets.23 Relevant markets may be defined along a product, geographical and temporal dimension, though typically the first two dimensions are of most practical relevance. A common approach is to ask whether a candidate market is worth monopolizing. If so, then a relevant antitrust market has been found since no relevant substitute outside the candidate market exists to constrain the hypothetical monopolist. If some candidate market is not worth monopolizing, then the candidate market is typically expanded, and the process is repeated.

24 This is known as the hypothetical monopolist test (HMT). The HMT is most often implemented by testing whether a small, but significant non-transitory increase in the price relative to the competitive level on a candidate market would be profitable for a hypothetical monopolist. This is known as the SSNIP test. If such a price increase, typically taken to be 5% or 10%, is indeed profitable for the hypothetical monopolist, the candidate market is a relevant antitrust market. If not, then the next candidate market will also include the next most substitutable product to the products included in the initial candidate market until a small price increase is profitable.

The HMT and the SSNIP test may also be applied, with some modification, to delineate relevant antitrust markets for cryptocurrencies.25 The following figure shows a stylized cryptocurrency ecosystem at the example of Bitcoin. The blockchain’s individual blocks contain both a coinbase transaction, giving the mining reward to the miner who successfully solved the hash puzzle. The mining market is highlighted in the red dashed box and will be the focus of the subsequent analysis. Note that there may also be other relevant markets. For example, the various transactions in the mempool essentially compete for inclusion in the latest block by setting appropriate transaction fees. In addition, the retailers which are part of transactions are presumably competing in a variety of product markets for consumers. The cryptocurrency itself may compete with other cryptocurrencies for use by consumers in peerto-peer value transfers. Crypto exchanges, meanwhile, compete off-chain in a market for providing access to blockchains to retail customers.26

We now discuss how the HMT and SSNIP test may be applied to the market for cryptocurrency mining. While miners do not set prices themselves, they respond to the expected mining reward (which depends on the price of a cryptocurrency) for different cryptocurrencies and based on this select the blockchains to mine on. In practice, directly applying the SSNIP test would often require estimating a complete system of demand equations to appropriately determine by how much demand would fall when prices on the candidate market are raised by 5%-10%. While, in practice, this is often challenging, if not impossible, the SSNIP test may nevertheless be a useful guide for market definition by highlighting the degree of product substitutability as the key factor behind market definition.

For mining markets, it seems more reasonable to consider a hypothetical monopolist choosing how much computing power to allocate to a cryptocurrency, instead of looking at prices as usual. For a hypothetical monopolist that controls a share of the total mining resources of one or several cryptocurrencies, one may then ask whether a reduction in the computing power used to mine these cryptocurrencies by 5% to 10% is profitable.

To see how applying such a small, but significant non-transitory decrease in computing power test – the SSNDCP test – may be applied, we consider the following hypothetical example. Suppose we start by considering the relevant market to be the mining of the cryptocurrency of interest, which we will call CompCoin. We assume that CompCoin extends its blockchain with a PoW that entails a reward per block of Euro 1,000.27 The total hashrate for this cryptocurrency under competition is X and several miners contribute towards this total figure. Suppose now a hypothetical monopolist miner of CompCoin reduced computing power applied to this cryptocurrency by 10%, that is to 0.9×X. If no other node begins mining CompCoin, this reduction is profitable for the hypothetical monopolist. It will continue receiving the per block reward of Euro 1,000 but will have to invest less energy to solve the PoW problem.

The reason no other node starts mining CompCoin could be that the puzzle used by CompCoin requires a type of ASIC chip not used to mine another cryptocurrency. Miners with computer chips better tailored toward other cryptocurrencies might find their hashrate for CompCoin too low to profitably shift resources towards it. In the longer term, it may be possible that other miners acquire ASICs designed specifically for CompCoin and start mining CompCoin too. Suppose that other miners will find it optimal to redirect total computing power of Y towards CompCoin. The expected profit per block of the hypothetical monopolist would then be

𝐸𝑢𝑟𝑜 1,000 0.9𝑋 0.9𝑋 + 𝑌 − 0.9𝑐𝑋

where 𝑐𝑋 is the variable cost of computing power. This would need to be compared to the hypothetical monopolist’s profit before the reduction in computing power, which is just 𝐸𝑢𝑟𝑜 1,000 − 𝑐𝑋. By comparing the two expressions and rearranging, we find that a 10% reduction in computing power is profitable if

𝑌 ≤ 9𝑐𝑋 2 10 × 𝐸𝑢𝑟𝑜 1,000 − 𝑐𝑋.

If the above expression holds, mining CompCoin is the relevant antitrust market under the SSNDCP test. If it does not, the relevant market needs to be expanded to include those cryptocurrencies or miners that would most likely redirect computing power to CompCoin. To apply the above formula, it is necessary to first provide an estimate of the amount of computation power that would switch from other cryptocurrencies to the candidate relevant market. Denote by 1⁄𝐴 the relative efficiency of the switching miner in terms of effective hashrate. The effective hashrate in the miner’s original cryptocurrency is thus given by 𝐴𝑌. Denote by R the amount of the reward in the original cryptocurrency in Euro and Z the amount of computational power provided by other miners in the alternative cryptocurrency. Switching computational power Y from the previous cryptocurrency to the candidate market as a result of the reduction in the hashrate is optimal if the following condition holds:

𝐸𝑢𝑟𝑜 1,000 𝑌 𝑌 + 0.9𝑋 ≥ 𝑅 𝐴𝑌 𝐴𝑌 + 𝑍

Note also that another condition is that under existing market conditions, such a switch should not be profitable (since otherwise we would have observed the miner to have contributed Y to the candidate market). This implies that the following condition must also hold:

𝐸𝑢𝑟𝑜 1,000 𝑌 𝑌 + 𝑋 < 𝑅 𝐴𝑌 𝐴𝑌 + 𝑍

Some issues that may become relevant when assessing the relevant market for mining cryptocurrencies are the production technologies that are included in the relevant market. In the history of Bitcoin there are several distinct phases that depend on the primary technology used to solve the cryptographic puzzles for the PoW mechanism.28 When Bitcoin was started and relatively unknown with low prices, bitcoins could be mined by practically anyone with a personal computer. Over time, graphic cards turned out to be more suitable for solving mining puzzles and increasingly sophisticated sets of graphics cards were built to mine bitcoin. Nowadays mining of many cryptocurrencies is dominated by miners making use of applicationspecific integrated circuits (ASICs). These computer chips are specifically designed to deliver optimal performance for solving cryptographic hash puzzles.

The current generation of ASICs for bitcoin mining vastly exceeds the efficiency of CPUs, so that bitcoin mining using a personal computer is no longer economically viable. In terms of the equations above, this would imply that for a miner using a personal computer, A is likely to be very large. Some cryptocurrencies, such as Ethereum and Litecoin, were specifically designed to be resistant to ASICs by either having a memory-intensive (rather than computing-intensive) hash puzzle or simply by using multiple hash functions in the hope of making it more difficult to design an ASIC to solve a currency’s hash puzzle more efficiently. Such differences in the design of cryptocurrencies should tend to make them less substitutable from a miner’s perspective so that cryptocurrencies using different hash functions might not be in the same market. Cryptocurrencies sharing a hash function for the mining puzzle would in turn be expected to be closer substitutes for miners and thus be more likely to be part of the same relevant market.

#### That independently turns the case. The plan’s “nucleus” standard is too vague and causes regulatory confusion that discourages blockchain uptake.

Thibault Schrepel [their author], Professor of Law @ Utrectht, ’20, "Antitrust without Romance," New York University Journal of Law and Liberty 13, no. 2 (2020): 326-432

On the other hand, the legality tests applied to non-pricing strategies, which are increasingly the focus of new investigations conducted by antitrust authorities against companies operating in digital markets, are fuzzier.375 For instance, judges applied the profit sacrifice test in the Aspen 376 and Trinko cases. 3 This test is also indirectly enshrined by the European Commission in its Guidelines on the priorities for the application of Article 102 TFEU to exclusionary practices. At the same time, judges have employed the balancing test in the Microsoft 378 and C.R. Bard v. M3 System cases.379 In other instances, courts have applied the disproportionality test, with the Department of Justice and the Federal Trade Commission arguing for its applicability in the Trinko case.2 This test appears between the lines in the Guidelines for the Application of Article 102, in which the Commission claims that the analysis should determine whether "the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking."3

81 The European Commission applied it in its Google decision of 27 June 2017.382 In short, antitrust authorities use different tests to analyze non-pricing strategies, creating confusion and facilitating the expression of personal interests.

Moreover, the balancing and disproportionality tests commonly used in these types of cases cannot possibly be objectively measured by Courts of Appeal.383 Comparing the amplitude of pro-competitive effects with anticompetitive effects in the balancing test is more a legal utopia than a real possibility since it is a matter of comparing an actual state of competition with a hypothetical one. 3

Consequently, assessment of the effects can vary widely from one court to another2w Finally, the Department of Justice underlined that the application of this test leads judges to give too much weight to static effects, as opposed to the more difficult to assess dynamic effects. 36 The disproportionality test fails to meet the criteria identified by the OECD.387 How to evaluate the reasonableness and proportionality of practices remains far too enigmatic, and one should question if antitrust authorities should be given the power to evaluate companies' strategies. Giving them the ability to do so offers room for moralism.

In short, these tests create jurisprudential inconsistency that is detrimental to the public while beneficial to personal interests. They constitute another door, separate from the one opened by new legal concepts, for moralism to enter antitrust law. Only measurable tests and concepts will ensure that antitrust authorities work in the direction of their statutory objective. This Article is not calling for less enforcement, but different enforcement, based on empirical and verifiable grounds that would sustainably protect antitrust authorities' decision-making from romance.

### 1NC – Court Clog DA

#### Federal courts are managing caseloads now.

Nekritz ‘12/15 [Alyssa; 12/15/21; “A look at pandemic backlog in court proceedings and resources”; <https://www.ncsc.org/information-and-resources/info-and-res-page-card-navigation/trending-topics/trending-topics-landing-pg/the-pandemic-caused-delays-in-many-court-proceedings.-what-are-states-doing-about-backlog>; NCSC; TV]

About one third of U.S. courts saw an increase of over 5% in backlogs. This increase would have been larger had courts not adapted quickly to online operations. Several types of court proceedings, particularly trials, were delayed. Some court professionals are optimistic that the existing backlogs will be resolved quickly. Others are worried backlogs will continue.

In order to avert for a growing backlog, some states have or are dropping non-violent criminal cases when courts reopen . Other prosecutors are prioritizing repeat offenders. Although it is important for the court system to manage the cases timely, there are staunch critics who believe dismissal is a bad idea. Critics argue adjournments and the associated delay can create access to justice concerns, placing courts in a tough position.

Other state courts, like Florida and Washington, have requested more retired judges to assist pulled judges out of retirement and temporarily increased staffing to help with backlogs. Some jurisdictions continue to look for effective ways of addressing their backlogs.

NCSC’s Effective Criminal Case Management Project conducted extensive data collection on felony and misdemeanor cases. The project built resources on case flow management to help courts process cases efficiently.

Courts continue to innovate and NCSC is tracking pandemic related backlogs. More data will be necessary to draw conclusions about future impacts. Revisit the 2020 CCJ/COSCA Pandemic Backlog Report for more resources on dealing with a surge in civil cases. Additionally, courts can access the ECCM’s Cost of Delay Calculator (PDF and Excel) to compute a simple estimate revealing how quickly and significantly the costs of delay accumulate across a court.

#### Antitrust cases are resource-intensive and intersect with other domains of law. Specifically, spills over to patent litigation.

Warren ’15 [Daniel R. Warren, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis]

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

#### Efficient court review underpins patent-led innovation. That averts nuclear war and a host of existential threats.

Rando ’16 [Robert J; Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14] [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

## AT: Blockchain

### 1NC – AT: Blockchain

#### Crypto causes lone wolf terrorism – regulations don’t solve it

Check 13 – Terence Check, J.D. Candidate, Cleveland-Marshall College of Law, 5/5/13, “Shadow currency: how Bitcoin can finance terrorism,” http://theworldoutline.com/2013/05/shadow-currency-how-bitcoin-can-finance-terrorism/

This “crypto-currency” has already been the inspiration for several online robberies where cyber-thieves hack into a computer to steal the vital electronic information at the heart of Bitcoins. Beyond cyber-larceny, the secrecy of Bitcoin poses unique, and even frightening security challenges for a world that has yet to fully understand the problems posed by the internet age.

For example, consider the various national and international anti-money laundering statutes. These laws seek to prevent the illegal flow of currency between criminals, terrorists and other unsavory characters. But these laws require that there are actual shipments of cash between countries and criminal networks (or at the very least funds transfers between banks).

The Bitcoin protocol promises to remove the fundamental risk in money laundering: the risk of interception and detection. By using a monetary exchange like Mt.Gox, criminals can buy Bitcoins at the market rate and then they can sell to a confederate across the world at a higher price, effectuating the exchange of money. Even if Bitcoin performs poorly, it nevertheless provides an opportunity to exchange money via the anonymous P2P network.

The Silk Road can make Bitcoin even more insidious. While the Silk Road, as site policy, forbids the sale of destructive items (stolen credit cards, explosives, etc.), it could be a matter of time before a similar website arises. Then, the firearms laws of the Western world will become virtually useless. Guns can be disassembled, and their parts shipped piecemeal through the postal service. Even substances like Tannerite could be bought and shipped across the globe, providing new opportunities for destructive capacity. If this alone is not enough to compel attention to the growing black market on cyberspace, consider the following.

Bitcoin can make security and law enforcement measures less effective by simply removing the possibility of detection. Terrorist cells or lone wolf operators can get supplies and currency by using the anonymous underbelly of the internet. Government agents are able to detect terrorists through logistical networks (Usama bin Laden was found through his courier). Counter-terrorism, for better or worse, succeeds when it has human networks to exploit. Terrorists need accomplices, handlers, recruits, and suppliers. Sooner or later, one of the individuals in this vast network becomes frightened or disillusioned with the cause and becomes a government informant. Remove the extended logistical network that exposes terrorists to investigation at a critical juncture (where their plans are neither theoretical nor well-supplied enough to implement) and there may be grievous results.

So what legal paths can be utilized to make sure such a development does not occur? The easiest and most effective way to deal with this threat is to make sure that it never comes into fruition. The Silk Road is difficult to take down given its place within the “Deep Internet”, but an arms-trading counterpart may be more susceptible to infiltration and dismemberment.

#### Lone wolves will use WMDs---extinction

Gary A. Ackerman 14 & Lauren E. Pinson, Gary is Director of the Center for Terrorism and Intelligence Studies, Lauren is Senior Researcher and Project Manager for the National Consortium for the Study of Terrorism and Responses of Terrorism, An Army of One: Assessing CBRN Pursuit and Use by Lone Wolves and Autonomous Cells, Terrorism and Political Violence, Volume 26, Issue 1

The first question to answer is whence the concerns about the nexus between CBRN weapons and isolated actors come and whether these are overblown. The general threat of mass violence posed by lone wolves and small autonomous cells has been detailed in accompanying issue contributions, but the potential use of CBRN weapons by such perpetrators presents some singular features that either amplify or supplement the attributes of the more general case and so are deserving of particular attention. Chief among these is the impact of rapid technological development. Recent and emerging advances in a variety of areas, fromsynthetic biology 3 tonanoscale engineering, 4 have opened doors not only to new medicines and materials, but also to new possibilities for malefactors to inflict harm on others. What is most relevant in the context of lone actors and small autonomous cells is not so much the pace of new invention, but rather the commercialization and consumerization of CBRN weapons-relevant technologies. This process often entails an increase in the availability and safety of the technology, with a concurrent diminution in the cost, volume, and technical knowledge required to operate it. Thus, for example, whereas fifty years ago producing large quantities of certain chemical weapons might have been a dangerous and inefficient affair requiring a large plant, expensive equipment, and several chemical engineers, with the advent of chemical microreactors, 5 the same processes might be accomplished far more cheaply and safely on a desktop assemblage, purchased commercially and monitored by a single chemistry graduate student.¶ The rapid global spread and increased user-friendliness of many technologies thus represents a potentially radical shift from the relatively small scale of harm a single individual or small autonomous group could historically cause. 6 From the limited reach and killing power of the sword, spear, and bow, to the introduction of dynamite and eventually the use of our own infrastructures against us (as on September 11), the number of people that an individual who was unsupported by a broader political entity could kill with a single action has increased from single digits to thousands. Indeed, it has even been asserted that “over time … as the leverage provided by technology increases, this threshold will finally reach its culmination—with the ability of one man to declare war on the world and win.” 7 Nowhere is this trend more perceptible in the current age than in the area of unconventional weapons.¶ These new technologies do not simply empower users on a purely technical level. Globalization and the expansion of information networks provide new opportunities for disaffected individuals in the farthest corners of the globe to become familiar with core weapon concepts and to purchase equipment—online technical courses and eBay are undoubtedly a boon to would-be purveyors of violence. Furthermore, even the most solipsistic misanthropes, people who would never be able to function socially as part of an operational terrorist group, can find radicalizing influences or legitimation for their beliefs in the maelstrom of virtual identities on the Internet.¶ All of this can spawn, it is feared, a more deleterious breed of lone actors, what have been referred to in some quarters as “super-empowered individuals.” 8 Conceptually, super-empowered individuals are atomistic game-changers, i.e., they constitute a single (and often singular) individual who can shock the entire system (whether national, regional, or global) by relying only on their own resources. Their core characteristics are that they have superior intelligence, the capacity to use complex communications or technology systems, and act as an individual or a “lone-wolf.” 9 The end result, according to the pessimists, is that if one of these individuals chooses to attack the system, “the unprecedented nature of his attack ensures that no counter-measures are in place to prevent it. And when he strikes, his attack will not only kill massive amounts of people, but also profoundly change the financial, political, and social systems that govern modern life.” 10 It almost goes without saying that the same concerns attach to small autonomous cells, whose members' capabilities and resources can be combined without appreciably increasing the operational footprint presented to intelligence and law enforcement agencies seeking to detect such behavior.¶ With the exception of the largest truck or aircraft bombs, the most likely means by which to accomplish this level of system perturbation is through the use of CBRN agents as WMD. On the motivational side, therefore, lone actors and small autonomous cells may ironically be more likely to select CBRN weapons than more established terrorist groups—who are usually more conservative in their tactical orientation—because the extreme asymmetry of these weapons may provide the onlysubjectively feasible option for such actors to achieve their grandiose aims of deeply affecting the system. The inherent technical challenges presented by CBRN weapons may also make them attractive to self-assured individuals who may have a very different risk tolerance than larger, traditional terrorist organizations that might have to be concerned with a variety of constituencies, from state patrons to prospective recruits. 11 Many other factors beyond a “perceived potential to achieve mass casualties” might play into the decision to pursue CBRN weapons in lieu of conventional explosives, 12 including a fetishistic fascination with these weapons or the perception of direct referents in the would-be perpetrator's belief system.¶ Others are far more sanguine about the capabilities of lone actors (or indeed non-state actors in general) with respect to their potential for using CBRN agents to cause mass fatalities, arguing that the barriers to a successful large-scale CBRN attack remain high, even in today's networked, tech-savvy environment. 13 Dolnik, for example, argues that even though homegrown cells are “less constrained” in motivations, more challenging plots generally have an inverse relationship with capability, 14 while Michael Kenney cautions against making presumptions about the ease with which individuals can learn to produce viable weapons using only the Internet. 15 However, even most of these pundits concede that low-level CBR attacks emanating from this quarter will probably lead to political, social, and economic disruption that extends well beyond the areas immediately affected by the attack. This raises an essential point with respect to CBRN terrorism: irrespective of the harm potential of CBRN weapons or an actor's capability (or lack thereof) to successfully employ them on a catastrophic scale, these weapons invariably exert a stronger psychological impact on audiences—the essence of terrorism—than the traditional gun and bomb. This is surely not lost on those lone actors or autonomous cells who are as interested in getting noticed as in causing casualties.¶ Proven Capability and Intent¶ While legitimate debate can be had as to the level of potential threat posed by lone actors or small autonomous cells wielding CBRN weapons, possibly the best argument for engaging in a substantive examination of the issue is the most concrete one of all—that these actors have already demonstrated the motivation and capability to pursue and use CBRN weapons, in some cases even close to the point of constituting a genuine WMD threat. In the context of bioterrorism, perhaps the most cogent illustration of this is the case of Dr. Bruce Ivins, the perpetrator behind one of the most serious episodes of bioterrorism in living memory, the 2001 “anthrax letters,” which employed a highly virulent and sophisticated form of the agent and not only killed five and seriously sickened 17 people, but led to widespread disruption of the U.S. postal services and key government facilities. 16¶ Other historical cases of CBRN pursuit and use by lone actors and small autonomous cells highlight the need for further exploration. Among the many extant examples: 17¶ Thomas Lavy was caught at the Alaska-Canada border in 1993 with 130 grams of 7% pure ricin. It is unclear how Lavy obtained the ricin, what he planned to do with it, and what motivated him.¶ In 1996, Diane Thompson deliberately infected twelve coworkers with shigella dysenteriae type 2. Her motives were unclear.¶ In 1998, Larry Wayne Harris, a white supremacist, was charged with producing and stockpiling a biological agent—bacillus anthracis, the causative agent of anthrax.¶ In 1999, the Justice Department (an autonomous cell sympathetic to the Animal Liberation Front) mailed over 100 razor blades dipped in rat poison to individuals involved in the fur industry.¶ In 2000, Tsiugio Uchinshi was arrested for mailing samples of the mineral monazite with trace amounts of radioactive thorium to several Japanese government agencies to persuade authorities to look into potential uranium being smuggled to North Korea.¶ In 2002, Chen Zhengping put rat poison in a rival snack shop's products and killed 42 people.¶ In 2005, 10 letters containing a radioactive substance were mailed to major organizations in Belgium including the Royal Palace, NATO headquarters, and the U.S. embassy in Brussels. No injuries were reported.¶ In 2011, federal agents arrested four elderly men in Georgia who were plotting to use ricin and explosives to target federal buildings, Justice Department officials, federal judges, and Internal Revenue Service agents.¶ Two recent events may signal an even greater interest in CBRN by lone malefactors. First, based on one assessment of Norway's Anders Breivik's treatise, his references to CBRN weapons a) suggest that CBRN weapons could be used on a tactical level and b) reveal (to perhaps previously uninformed audiences) that even low-level CBRN weapons could achieve far-reaching impacts driven by fear. 18 Whether or not Breivik would actually have sought or been able to pursue CBRN, he has garnered a following in several (often far-right) extremist circles and his treatise might inspire other lone actors. Second, Al-Qaeda in the Arabian Peninsula (AQAP) released two issues of Inspire magazine in 2012. Articles, on the one hand, call for lone wolf jihad attacks to target non-combatant populations and, on the other, permit the use of chemical and biological weapons. The combination of such directives may very well influence the weapon selection of lone actor jihadists in Western nations. 19

#### Global adoption of cryptocurrency creates a parallel financial system – that displaces the dollar as the reserve currency and allows evasion of U.S. sanctions

Dudley 19 – Col. Sara Dudley, assigned to Joint Special Operations Command, “Evasive Maneuvers: How Malign Actors Leverage Cryptocurrency,” 2019, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-92/jfq-92\_58-64\_Dudley-et-al.pdf

Cryptocurrency transactions expand the international financial competitive space by creating an alternative to a fiat-based monetary system that skirts international financial mechanisms set to detect and intercept suspicious activities. Digital currencies also thwart U.S. Government sanctions policies, which rely on their effectiveness for tracking sales and trade conducted in USD. Outside of digital banking tools designed to disrupt rogue parties from receiving money, cryptocurrencies also negate military capabilities that are able to destroy physical cash stockpiles or target enemy financiers. The two effects of cryptocurrencies create a synergistic effect that allows rogue actors to cooperate in a secondary value transfer market impervious to the established world economic order. In doing so, cryptocurrencies present a viable means to unseat the USD as the recognized global reserve currency.

Upsetting the World Financial System and Unseating the USD as World Currency. While the USD has remained the dominant reserve currency following Bretton Woods, two nations have challenged the USD’s dominance. In 2009, China and Russia called for the International Monetary Fund (IMF) to develop a new global currency, arguing that inflation and deficit spending in the United States would devalue reserves held in USD.6 Today, the USD is still the most widely held reserve currency, and nearly two-thirds of all international trade is done in USD. Conducting trade in USD requires the use of the U.S. banking system to support the transactions, and all those transactions are subject to U.S. laws intended to protect international financial markets from bad actors. National security legislation that impacts the financial system includes anti–money laundering, countering the financing of terror, sanctions, the Foreign Corrupt Practices Act, and the USAPATRIOT Act.

The United States gains economic and diplomatic advantages through the strength of the U.S. financial markets in conjunction with the heavy use of the USD in world market trade. As a result, the United States can sustain large budget deficits, enforce sanctions, and dictate terms in international trade. From a strategic standpoint, competitors benefit by reducing U.S. dominance in world currency markets and international trade. Andrei Kostin, the head of Russia’s second largest bank, VTB, indicated that Russia intends to find alternatives to the USD, suggesting, “This whip that the Americans use in the form of the dollar would then, to a great extent, not have such a serious impact on the global financial system.”7 Many rogue nations that desire to move money for malign intent echo Kostin.

Cryptocurrencies offer such an option for rogue actors: a new option for those desiring alternatives to the USD and the affiliated banking and trade regulations. Referred to as a “money-laundering revolution” by a hacker and suspected terrorist’s defense lawyer in New York City, nonstate actors reveal the benefits of functioning within the weakly regulated space of digital currency markets not tied to the USD.8 Cryptocurrencies fueled illegal trade by criminal organizations on the “Silk Road,” the online equivalent of a black market Amazon.9 While not widely adopted, jihadist networks have raised funds through cryptocurrencies on Internet-based, crowdsource platforms. These platforms empower them to evade the international banking system stopgaps, which were instituted to hinder money laundering and prevent terror funding.10

With the technology and expertise at hand, a future digital economy is becoming a potential threat to the USD. The use of cryptocurrencies to evade traditional bad-actor countermeasures in the world financial system, and avoid the regulatory requirements of using the USD entirely, exposes burgeoning weakness in U.S. dominance of funding. The simultaneous migration from the USD, and the loss of the ability to control sanctions, would dilute a primary economic tool that the United States uses to curb confrontational behaviors, promote regime change, and limit access to products affiliated with national security.

#### Enforcing sanctions through the power of the dollar solves global nuclear war

Joshua Zoffer 20, Investor at Cove Hill Partners, Fellow at New America, JD Candidate at Yale University Law School, AB from Harvard University, “To End Forever War, Keep the Dollar Globally Dominant”, The New Republic, 2/3/2020, https://newrepublic.com/article/156417/end-forever-war-keep-dollar-globally-dominant

In early 2016, Obama Treasury Secretary Jack Lew cautioned that the dollar’s dominance as a global currency rested, in part, on the U.S. government’s reluctance to fully weaponize it. If foreign markets and governments “feel that we will deploy sanctions without sufficient justification or for inappropriate reasons,” he warned, “we should not be surprised if they look for ways to avoid doing business in the United States or in U.S. dollars.” Lew’s case stemmed from the more fundamental view that the dollar’s international role is “a source of tremendous strength for our economy, a benefit for U.S. companies and a driver of U.S. global leadership”—in other words, a role worth keeping. This view is emblematic of American financial governance since the Second World War. U.S. economic analysts, especially at the Treasury, have jealously guarded the dollar’s role and the many benefits it offers: the ability to run large deficits at low cost and disproportionate influence over the structure of the global economy, among others. Yet in their recent article in The New Republic, David Adler and Daniel Bessner argue the U.S. should abandon these advantages. In their view, the dollar’s role has encouraged American militarism and should be relinquished to curb such behavior. Dollar hegemony is not without cost, but to renounce it would be a profound mistake. Adler and Bessner’s view neglects the sizable economic benefits the dollar’s role confers on the U.S., as well as its possible use as an antidote to military adventurism. It ignores the enormous good that can be done with deficit spending, much of which has gone to the American military but could instead fund progressive programs. And it elides the inability of the U.S. and its global trading partners to shift away from dollar dominance without creating worldwide financial distress. Adler and Bessner are right that the U.S. has misused its privilege, but Washington should not abandon it; rather, American leaders should seek to transform it. Generations of American policymakers have been right to protect the dollar’s key currency role for economic reasons. Most notably, dollar hegemony affords the U.S. the ability to run large and prolonged budget and balance-of-payments deficits. The dollar represents 62 percent of allocated foreign exchange reserves, is used to invoice and settle roughly half of world trade, and accounts for 42 percent of global payments. Because governments, banks, and businesses worldwide need lots of dollars, the world market always stands ready to absorb new U.S.-dollar-denominated debt without charging higher interest rates. Adler and Bessner correctly point out that the rest of the world considers the dollar’s role as the world’s reserve currency to be an “exorbitant privilege,” a term coined in the 1960s by then French Finance Minister Valéry Giscard D’Estaing. The ability to spend beyond its means has enabled the U.S. to fund its impressive military might, whether one views that power as the fountainhead of Pax Americana or the source of illegitimate military adventurism. But these economic benefits go beyond just deficits. The demand for dollars also pushes up the dollar’s value against other currencies, enhancing American purchasing power and offering consumers access to imports on the cheap. The dollar’s role also means American firms rarely need to do business in foreign currencies, reducing transaction costs and exchange-rate risks. More broadly, America’s central economic role gives it outsize influence at crucial moments. At the height of the financial crisis that began in 2008, the Federal Reserve was able to inject vital liquidity into the global financial system by selectively offering dollar swap lines to trusted foreign central banks. Dollar hegemony enabled the U.S. to act swiftly, effectively, and on its own terms. In addition, the dollar’s role offers a potent alternative to kinetic military action as a means of pursuing foreign policy objectives. The dollar’s broad use means access to dollar liquidity—which in turn requires access to the U.S. financial system—is essential for foreign governments and businesses. For foreign banks, especially, being cut off from dollar access is essentially a death sentence. That makes sanctions that do so a powerful tool in the international arena. In 2005, for example, the U.S. used the dollar to strike a devastating blow against North Korea without firing a single shot or even formally enacting sanctions. Using authority provided by Section 311 of the Patriot Act, the Department of the Treasury crippled Banco Delta Asia, a bank accused of facilitating illegal activity by the North Korean government, by merely threatening to cut off its access to the American financial system. Deposit outflows began within days; within weeks the bank was placed under government administration to avoid a full collapse. Pyongyang was hit hard, as other banks ceased their business with it to avoid meeting the same fate. Similarly, though the Trump administration has worked hard to undo it, the Joint Comprehensive Plan of Action with Iran to limit the development of nuclear weapons was made possible, in part, by painful dollar sanctions that brought Iran to the table. Far from being a proximate cause of military conflict, the dollar’s central global role has often been used to contain adversaries without military intervention. Still, skeptics are right to point out that the dollar’s role has indirectly funded American interventionism and that dollar sanctions have been overused, provoking the ire of American allies. But these facts suggest we should use our dollar power to forge a more progressive U.S. order, not abandon the advantage altogether. America’s exorbitant privilege need not fund warships and missiles: The same low-interest borrowing could be used to fund a new universal health care system, expand access to higher education, or pursue any number of large-scale social policy objectives, including financing global public goods that no other country or consortium of countries is prepared to fund, such as climate change mitigation.

#### All aff evidence is theoretical – the technology isn’t there yet – their own author agrees.

Dr. Thibault Schrepel, LL.M. (The aff’s Blockchain Daddy), ’21, “Computational Antitrust: An Introduction and Research Agenda” Stanford Computational Antitrust VOL. 1 2021

Eventually, technical questions will get technical answers. The most critical challenge for developing computational antitrust is related to the interaction between our legal systems and technical tools. This is a human challenge. As one author put it in 1962, “we must bear in mind that it is not machines that have changed the lives of men, but the adaptations that men themselves have adopted in response to machines. It is not the invention of tools, however subtle, complex, or powerful, that constitutes man’s greatest achievement, but the ability to use the tools that man has developed within himself.”81

Providing this challenge a satisfying answer will require West Coast Code and East Coast Code to cooperate.82 This collaboration requires coders (computer scientists, data scientists, developers) and the antitrust community (companies, policymakers, regulators) to prepare their respective fields so computational antitrust can thrive. Coders will be required to devote their time to developing the recipes—the programming of sequences of specific instructions to achieve a specific result. Companies and agencies will provide the ingredients—which requires identifying the ones needed and how to get them (i.e., how to transform data into information). In the end, these recipes and ingredients will complement each other; the nature of one will change the nature of the other.

Institutional changes will facilitate the cooperation of these two communities. Several actions are required in this regard. First, one will be required to create proper incentives for computational antitrust development. On the side of coders, computer scientists, and data scientists, this implies the creation of different reward systemsto ensure they get (and stay) involved in the field. On the side of companies and agencies, this requires enlarging the teams dedicated to these subjects and giving them appropriate means.83 Second, one will have to establish the conditions for sustained collaboration between companies and agencies. Computational antitrust should not become a zero-sum game in which the gains made by companies or agencies systematically penalize the other. One must question the creation of safe harbors, new procedural rules, and, overall, a less confrontational approach between the different stakeholders. They will cooperate if they have a vested interest in doing so.84 Of course, achieving such cooperation will be difficult; Justice Holmes’s “bad man” will not disappear.85 But it is possible.

#### Private blockchains circumvent – impossible to verify theory of granularity without permitting regulators into the chain.

Pat Treacy, Senior Partner, Bristows LLP, and Alex Latham, Trainee Solicitor, Bristows LLP, ’20, “Blockchain and competition law” European Competition Law Review https://www.bristows.com/app/uploads/2021/01/2020.12-ECLR-Blockchain-and-competition-law.pdf

Blockchains can be public (permissionless) or private (permissioned). A public blockchain can be used by anyone and its participants are anonymoussave for unique user identifiers. Any user can add blocks to the chain and can transact with other users at will. By contrast, private blockchains are operated in a similar way as private servers currently: a defined set of host users have access and authority to control all aspects of the chain. Private blockchains have the potential to lead to entrenchment of power within a blockchain system, as a select group of people can effectively act as gatekeepers because of the restricted access to digital keys.

“Open” in this sense refers to the open-source nature of the underlying code upon which the blockchain is built. Open-source blockchains allow for coders with the requisite level of skill to make changes to the chain, shifting certain parameters and presenting alternatives to the current rules which govern its operation.

2.3 Consensus algorithms and forking

Blockchains use consensus algorithms so that everyone can trust the state of the ledger. In essence, these are a set of rules that apply to everyone, with certain pre-conditions governing the mechanism for how blocks are added to the chain. Arguably the most well-known consensus algorithm is Proof-of-work (PoW), the algorithm used in the cryptocurrency Bitcoin.4 This involves special nodes in the system known as “miners” who compete against each other to solve a computationally expensive mathematical challenge. In Bitcoin, minerslisten for broadcasts of transactions that should be added to the blockchain. They then aggregate these broadcasts into a block of transactions which is combined (“hashed”) with the solution to a complicated cryptographic puzzle. The global network of miners are trying to solve the next step in the puzzle so that it can be used to verify (“frank”) the last set of transactions that have taken place across the Bitcoin network. If the miner solves the cryptographic puzzle first, then the miner broadcasts the new block across the network and is rewarded with newly minted Bitcoin.5,6

In Bitcoin’s case, the system is set up so that on average the global computing power presently engaged in mining will find a new solution (and so can create a new block recording the latest transactions) every 10 minutes.7,8 As computational power increases, the network will dynamically adjust the difficulty of the challenge to ensure that the block time remains constant. Controls like the one illustrated above have divided opinion and with open-source blockchains dissenting programmers have the power to alter the code and change the rules of the consensus algorithm, imposing new, more favourable conditions. This creates a fork in the chain (see fig.1) asthe new version will no longer be compatible with the previous chain and will not receive the necessary software updates.

Some more well-known incidences of this are the offshoots of Bitcoin; Bitcoin Cash and Bitcoin Gold which split in August 20179 and October 201710 respectively. Participants could easily convert currency for both of these forks, initially one Bitcoin equalled one of the new unitsso there were low switching costsin both cases.

3. The new regime – power structures within blockchain

Before exploring how competition law maps onto blockchain technologies it is first sensible to investigate where power may collect within such a system and the potential creation of concentrated areas of power that could pose a threat to competition.

3.1 Founders and core developers

Blockchain founders and core developers are the original designers of the software and are responsible for implementing the rules of the blockchain as they are originally laid down.11 Once live, public blockchains are evolving and consensus driven systemsso core developers remain influential only through reputation and understanding of the technology. As a computer-based network technology driven by software, blockchain is not a static creation and will require updates in the forms of new software releases. One operational risk of blockchain isthat only a few people truly understand how thissoftware works. Whilst founders and core developers no longer have active control over the blockchain, those using the technology must place their trust in this small group of individuals with the expertise to make desirable policy choices and implement them accurately into the underlying code.12

Large public blockchains are, therefore, in effect operated by an amorphous group of ever-shifting members with no one definitively in charge. Historically, updates to blockchain have been made voluntarily by a small group of skilled individuals invested in the underlying decentralised ethos of the technology. The dispersed nature of those making the updates means that when core developers feel there needs to be a change in the underlying software (i.e. modifying the block time or total number of Bitcoin) there must be a consensus in developers (and subsequently a consensus in users) to adopt the technology. The lack of centralised power means that as no one is directly responsible for the code, voluntary core developers may be vulnerable to exploitation and the lack of a guiding force behind most of the technology means that extraneous operators could pay to influence the underlying rules of the chain. Centralised private blockchains have someone in charge of management and repair, whilst this sacrifices a degree of freedom it does mean that risk management and policy decisions are attributable to someone and therefore can be monitored and improved.

3.2 Miners

Competition involving miners is present on a single blockchain (i.e. competition amongst miners) and also across several blockchains in multi-cryptocurrency systems (competition for miners).13 The competition amongst miners on a single blockchain is a fundamental aspect of the mining process.14 It is the competition for the transactional incentive that drives the addition of blocks to the chain and maintainsthe underlying integrity of the blockchain.15 As incentives grow, competition for the reward of appending blocks will increase. The key economic decision taken by miners is how much computational power to invest in search of the reward. From a game theory perspective, the decision to participate as an active miner is dependent on the cost margin between generation of computational power and economic reward gained from appending blocks to the chain. In this theoretical model, mining itself is monopoly-proof, as you cannot exclude a competitor by cutting down costs—profits will always be positive regardless of the margin obtained by other competitors.16 Realistically this does not work as mining is not an independent system, the resource commitment necessary to mine a block, outside systems and transactional costs all play into mining decisions. As blockchain mining has become an increasingly lucrative venture, the energy required to solve the computational puzzles has grown in parallel and competition amongst miners is fierce, with miners now needing specialised hardware to compete effectively and large “mining pools” sharing resources to spread their processing power over networks of miners.17

Mining pools introduce a consolidated aspect into a blockchain’ssupposedly decentralised system.18 As miners have pooled their risk and organised, the computational power and number of mining pools has grown, pools now account for almost 100% of all Bitcoin mining activity. 19

Maintained by a pool manager, who takes a cut from miners’ rewards as a fee, miners participate in a fee contract which apportions how miners’ computational contribution maps onto their final reward. Reassuringly, while some pools have gained significant market share, none of these large pools retained this over time, possibly signalling an economic system with factors that suppress dominance.20 Underlying mining technology may also change the balance of power, application-specific integrated circuits (ASICs) are chips designed for mining a specific cryptocurrency and increase the efficiency of those who use them. If pools can leverage economies of scale to shape the competitive landscape through technology then this may raise significant competition concerns and could lead to a call for mandatory licensing. In a multi-cryptocurrency ecosystem, blockchains are competing against each other for computational power. Large mining pools wield considerable power as they have the potential to make or break a new blockchain by choosing to mine for it. In future, migration of miners across platforms may be subject to significant scrutiny by competition authorities, particularly if certain blockchains are allowed to fail or are deliberately bypassed by an exploitative mining pool (see section 4.1).

3.3 Users

Users generate the transactions that are recorded in the blockchain; the power that they exercise is the decision to participate in the blockchain. Aside from simple supply and demand, such as a greater number of users driving up the value of Bitcoin in relation to fiat currency, the blockchain with the most users will add blocks to the end of the chain more quickly and therefore be more trustworthy. More users can also be leveraged for transaction fees, should these be present on the specific blockchain, and like digital platforms, can add value by developing new compatible programs.21

One user-related dynamic specific to blockchain is how they attract users compared to traditional digital structures.22 Successful digital platforms benefit from network externalities i.e. the usefulness of the service increases as the number of users increases. As Amazon recruits more products to its website, the more useful it becomes to individual consumers. Similarly, as more consumers use Amazon, the more useful the platform becomes for businesses looking to sell products to as many consumers as possible.23 Blockchain scales in an inverse way due to its token offering system.24 Where a blockchain issues tokens to represent a scarce asset, initially there is a high incentive for users to join as they can amass tokens more easily and will be rewarded disproportionately highly for mining efforts. As more users join and the blockchain stabilises with a critical mass of participants, tokens are harder to obtain as there is a larger community of users. In this way blockchains incentivise different patterns of behaviour because of the reversed economic incentives. The blockchain incentive structure prevents entrenchment and promotes early adoption, opening the door to the prospect of shifting power in a competitive marketplace.

As referenced in the previous section, users as well as miners choose whether a blockchain will fork through their choice to follow the new system of rules or to stick with the existing one. The threat of possible forks in the chain, coupled with the low switching cost, means that there should be competitive pressure from users and miners on open-source blockchainsto efficiently manage the interests of the various nodes active in its ecosystem.

3.4 Other forces

The increasing computational power of mining pools necessarily leads to an arms race where any addition of power which raises the global processing power imposes a negative effect on other pools as the blockchain compensates by raising the difficulty of the problem being solved.25 This arms race of mining has a real world cost due to the vast reserves of energy now needing to be consumed—at the moment aggregate electricity devoted to Bitcoin mining alone exceeds 70 TWh per year, roughly the annual energy consumed by Chile in 2018.26 This may give rise to issues involving the underlying energy companies, it is not beyond the realms of possibility that we could see arrangements between energy companies and mining pools, possibly with built in blockchain related remuneration structures. Energy costs may also be driving the geographic location of mining activity, with some 70% now understood to be taking place in China because of the low local cost of the dedicated ASIC processors and of electricity. 27

Considerations arising from all the above could give rise to a whole host ofsubsidisation orstate aid arguments which competition authorities must be alive to. Another future point to consider is the concern surrounding some cryptocurrencies, namely bitcoin, regarding the deflationary aspect of the currency due to itsfinite supply. As mentioned atFN6, Bitcoin isin effect a finite resource. As the reward miners gain for processing the 10 min ledger chunks of transactions diminishes, the existing system of decentralised validation will no longer function and with no centralised authority to step in, alternative solutions must be found. One mooted solution is that transaction fees can be introduced which eventually rise to a level sufficient to keep mining profitable. The structure and quantum of these transaction fees may raise future competition law concerns.

4 Direct interaction with competition law Those involved in blockchain technology will have potential interactions with both arts 101 and 102 of the TFEU. The technology presents a number of issues including: the potential for information sharing and co-ordination; possible abuse of dominance; and the difficulty of applying current legal presumptions to blockchain.

4.1 Horizontal information exchange

As explained above, the essence of blockchain technology is that it provides a decentralised ledger, accessible to all in the network. Coupled with the anonymous nature of blockchain, this presents a tempting opportunity for firms to collude.28 If competitors within a market use a single blockchain then it provides an opening for an art.10129 arrangement or what some have called “cartel management for groups that don’t trust each other”.30 It has been suggested that the transparency and trust derived from the operation of a cartel via a specific blockchain with identifiable users presents the opportunity for firms to identify deviations by cartel participants and punish them using smart contracts, or to identify on which terms collusion is most suitable.31

If market-wide blockchains are set up then the potential for unmonitored tacit co-ordination may increase. As blockchain is still at its core merely a record of ownership, some have suggested that a pragmatic effects-based approach is preferable.32 The potential for anti-competitive effects depends on the quality and type of data stored on the blockchain, as well as the market structure of the industry using the technology. Use of a blockchain itself can be competition-neutral, it is the abuse of the technology that leads to monitoring and information sharing. As such, any effects based analysis will need to weigh the potential benefits of the technology against its potential for collusion. Adding a regulatory node into the chain to observe and collect information, especially for private blockchains, may be the answer. Anothersolution could be ex ante regulation that institutes compulsory regulatory involvement in protocol design (the underlying rules of a blockchain) and could enable agenciesto retain accessto certain encrypted information broadcasted to participants.33

Given that blockchain technology is built on consensus and information sharing, if anti-competitive collusion is identified, it will also be very hard for undertakings to avoid “decisive influence”34 decisions against them as all undertakingsinvolved in the chain were party to the same data, any “public distancing”35 will also be technically complex.36 It is also plausible that third party operators of a blockchain used to disseminate sensitive information may be subject to “hub and spoke”37 claims against them.

The case of UnitedCorp v Bitmain38 in the US gives us a window into another possible collusive practice, one akin to more familiar litigation involving market manipulation. In December 2018 UnitedCorp, a diversified technology company,sued Bitmain, the largest Bitcoin mining pool, over an alleged anti-competitive scheme. UnitedCorp alleged that a number of investors and mining pools colluded to support a specific fork of bitcoin over an alternative and as a consequence caused the price of the forks to fall, causing damage to UnitedCorp’s investments. This draws obvious parallels with litigation concerning uneconomic bids from energy traders or false quotes from LIBOR traders that caused those markets to artificially deviate from their economic fundamentals. Whilst the case did not progress, it raises interesting questions around the concept of harm39 and the difficulty of proving a practice is anti-competitive in a complex blockchain ecosystem.40

4.2 Vertical information exchange

Where a blockchain consists of vertically related parties, applications such as smart contracts give rise to concerns that an upstream undertaking may maliciously use the chain to regulate its downstream buyers. Automated contracts or shared access to data may facilitate practices such as resale price maintenance or selective distribution systems, a particularly relevant issue post-Ping & Coty. 41

One strategy to combat this may be to separate usage of the blockchain into distinct groups, for instance, users and record keepers or buyers and sellers, in order to prevent access to the aggregate-activity information that drives the behaviour.

42 Separation methods like this compromise the core decentralised nature of blockchain and set the stage for the centralisation v decentralisation debate regulators and industry must have if blockchains are to be widely implemented.

4.3 Dominance

One major issue regarding dominance will be the approach to assessing how the operation of a blockchain could give rise to dominance. There are several metrics that could be used to assess this; number of users, recorded transactions, market power, participation of key industry players and governance structures will all inform the approach that competition enforcement agenciestake.43 If a blockchain is deemed to be a necessary service or is classified as dominant with regard to the factors above then art.102 TFEU44 could bite.

It is important at this point to return to the distinction between private and public blockchains. Many of the problems that may arise from dominance do not apply to the latter. Exclusionary abuses like “refusal to deal” require gatekeeping built in to the underlying code of the blockchain and are therefore irreconcilable with the “public” aspect. Tying and predatory pricing models are also difficult to implement due to the decentralised consensus model, if software updates with additional obligations or higher transaction fees were implemented then they would only be adopted if users controlling 51% of the global processing power were convinced to implement them. In a predatory pricing model this would require a blockchain to first lower its fees to attract users and then somehow convince the 51% to agree voluntarily to adopt a price increase. Similarly, due to low switching costs across blockchains, exploitative abuses are unlikely, as any exploitative behaviour would lead to migration of users across to a different blockchain. Discriminatory abuses covered under art.102(c) could occur, however, as everyone has access to the record of transactions, any such abuses would be visible to all and instantly detectable.4

The potential for abuse grows considerably if a private blockchain becomes truly essential. If a blockchain requiring permission to enter became “indispensable for competing in a market”46 then this bringsrefusal to access issues to the fore.47 Many of the abuses listed above could arise in the context of private blockchains in the same way that they may apply to dominant technology companies at the moment. Access to data is a topic being explored by many agencies at the moment and the suspicion surrounding Big Tech is an indication of how authorities might view private permissioned blockchains that monitor and store data whilst still retaining centralised control. In the case of dominant blockchains, one remedy open to competition authorities might be to introduce mandatory forks. This would involve the authority creating an alternative competing blockchain that forked off the existing dominant chain, analogous to a forced break up of companies. This approach would not be without its challenges as the fork would require different parties to co-ordinate in their uptake of the new technology in order for it to become competitive.

Public open blockchains present a problem for law enforcement due to the evidentiary quality of the records held within them. In conventional record keeping, records have a physical signature and date and are placed in proximity to other records like them, this means that the perpetrator of an act is identified as soon as the practice is recognised. With blockchain determining the genuineness of the author, and therefore the legal entity to pursue, enforcement is challenging as there is no explicit and stable link between a transacting user and a real world legal entity.

48 There have been efforts to implement tracking services on large blockchains,49 however, asisthe case with the many digital technologies, clandestine techniques can often develop in concert or faster than the efforts to detect them.50 Furthermore, blockchain platforms cannot simply be closed or shut down as the decentralised nature of blockchain means that there is no central entity to target and therefore enforceable remedies are challenging.

Current techniques are not completely defunct; if users who transact know each other’s identity in real life then they can whistleblow to agencies if they are being subjected to an anti-competitive practice and then directly identify the entity behind the transactions. Another solution may be to directly implement legal requirements into the code of the blockchain itself.51 Whilst lawmakers will wish to be careful to avoid stifling the nascent technology, built-in regulation would provide a channel into the blockchain through which the law can act. Any such system would need to be fair, and may involve legal or tax advantages to induce core developers to include regulatory mechanisms, butsuch a proposal does provide one example of how authorities can penetrate the barriers that blockchain currently presents.

6. Conclusion

Blockchain is a revolutionary technology with the potential to radically transform how users of digital commerce transact with each other. Prompted by its potential to circumvent traditional enforcement methods, some may see this as a chance to implement the sort of ex-ante regulation that some think should have been applied to the current digital giants before they grew into the colossi of today. Conversely, it is also vitally important to safeguard innovation and prevent the law from stifling this transformative technology.

This article has highlighted some of the aspects of the blockchain ecosystem which are of interest from a competition law perspective. The decentralised nature of public blockchains leaves core developers vulnerable to exploitation and the lack of a guiding force behind most of the technology means that extraneous operators could pay to influence the underlying rules of the chain. Mining pools represent the greatest threat as potential silos of power. However, as yet, the top pools seem unable to maintain their market share over time. This may change if certain mining technology becomes essential and is owned by a single pool or, perhaps less likely, if pools strike anti-competitive deals with energy providers. Regarding information exchange, collusion remains a significant issue for all types of blockchain given the shared nature of the data within the system. The ability to have certainty of transaction across a clandestine private network potentially presents a golden opportunity for cartel collaboration and therefore opens the door to misuse. Whilst public blockchains are less likely to give rise to an abuse of dominance, private blockchains present many of the same issues that agencies are faced with today in other contexts. The counter-point is that the centralised power present in these private blockchains would make it easier to include mandatory regulatory nodes,software updates and monitoring if regulation were thought appropriate, and also much easier to enforce a competition law regime if necessary. Whose remit this would fall under remains to be seen, it is possible that units like the UK’s new digital markets task force52 will take up the challenge. However, with the level of specialist knowledge required, agencies may need dedicated blockchain units to truly tackle these issues.

#### No enforcement. Blockchain makes identification and remediation of anticompetitive practices technologically impossible.

Lika Kapanadze and Nika Sergia, New Visions University, ’21, “The Challenges of Blockchain Technology to Antitrust Law” https://openscience.ge/bitstream/1/2670/1/Lika%20Kapanadze%20%20Samagistro.pdf

7. Effectiveness of Antitrust Law

Anticompetitive practices that violate antitrust laws are usually detected and then stopped and sanctioned by the public authorities. However, doing so in relation to the blockchain technology is tricky, as identities of the perpetrators are anonymous, it is impossible to determine the relevant jurisdiction and remedy the anticompetitive practices due to the immutability of the blockchain.

Antitrust authorities have no ability to detect anticompetitive practices as well as the identification of users who engage in those practices, due to the privacy and pseudonymity of the users.98 If new technologies develop, that enable tracking such practices and perpetrators by the public authorities, it would significantly affect the cornerstone “values” of the blockchain and change the nature of it. Therefore, it is highly unlikely, to implement such technologies on the blockchain. Besides, inherent nature of the blockchain creates a real barrier to antitrust enforcement authorities to remedy, delete or stop anticompetitive practices, since the network is distributed, and no one is in control, but at the same time everybody is, except for the authorities themselves.99 Even if authorities will have a power to track the practices and determine the identities of the perpetrators, they will not be able to stop such practices. Immutability of blockchain ensures, that platform will continue to function (as long as the people who interact with it pay the transaction fees charged by miners who support the blockchain) and there is no server to shut down the blockchain, even if authorities impose strict regulation or penalties on the original parties who developed or promoted such blockchain.100 In other words, if anticompetitive practices are implemented on a blockchain and public authorities detect them, authorities will not be able to stop it and blockchain will continue to perform the transactions.

Anonymity of the parties creates another challenge as well - business transactions on the blockchain are encrypted and location of the transacting users (and thus, legal entities behind the users) is completely unknown, making it impossible to determine the relevant jurisdiction.101 In contradiction with blockchains, determining the jurisdiction on the internet is simple and it is based on internationally recognized jurisdiction principles (territorial jurisdiction, effective jurisdiction, personal jurisdiction, passive personal jurisdiction, protective jurisdiction, and universal jurisdiction), namely, each internet user is subject to national legal regime, where they decide to create content and enable it online.102 In technical terms, every computer or device that goes on the internet needs its own IP address and the main central authority, the Internet Corporation for Assigned Names and Numbers, manages and controls assigning and distributing such IP addresses and domain registrations in the regions and continents, making it easy to detect parties ’locations on the basis of the registrations of IP Addresses.103 In case of blockchain, the data storage is virtually everywhere making it impossible to determine jurisdiction on the blockchain and its transactions.104 In traditional law, and in absence of any agreement stating otherwise, blockchain disputes would be normally settled by state courts, but in this digital economy not only it is impossible to determine the jurisdiction, but also there is no technical necessity for the stakeholders to be attached to any jurisdiction at all.105 For that reason, self-regulation of the market participant may play an important role, one part of which could be dispute settlement by an arbitral tribunal, and other part of which could be compliance of blockchains with a potentially unwieldy number of legal and regulatory regimes and settle disputes in courts.106 The success of the former approach solely depends on the enforcement. The states retain certain control over private arbitration with recognition and enforcement procedures, and as jurisdiction on the blockchain is not recognized by any state jurisdiction, it would be difficult to have the awards enforced.107 The latter approach is also unclear, as the transactions may occur simultaneously in a few different places, which again makes it nearly impossible to determine the competent jurisdiction and even if jurisdiction were to be determined, state courts would not be able to decide any dispute fast enough compared to the rapidly proceeding blockchain applications without having any technological expertise to sufficiently understand the mechanism of blockchains

8. “Law is Code” Paradigm

As demonstrated in the previous chapter, there are no effective ways to apply antitrust law to the blockchain, and almost every measure used before seems to be extreme and drastic in the context of blockchain, jeopardizing the blockchain technology and its true nature. Considering above, it appears necessary to code and integrate legal requirements into the technology itself - this is the concept of “law is code.”108

#### No jurisdiction. All major blockchain miners are *not* US companies.

BRIAN P. MILLER, Counsel of Record, AKERMAN LLP, ’18, “UNITED AMERICAN CORP., a Florida company, Plaintiff v. BITMAIN, INC.” UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA Case 1:18-cv-25106-KMW Document 1 Entered on FLSD Docket 12/06/2018

The China International Capital Corporation (“CICC”) is one of China’s leading investment banking firms that engages in investment banking, securities, investment management, and other financial services. 50. CICC has the exclusive mandate for the Initial Public Offering of Bitmain Technologies Ltd. 51. Bitmain Technologies Ltd. – founded in 2013 by Jihan Wu and Micree Zhan – is the largest designer of what is referred to as “ASIC” or Application Specific Integrated Circuit chips for mining operations. The Bitmain ASIC chip powers the Antminer series of mining servers that are the dominant servers operating on a number of cryptocurrency networks such as Bitcoin and Bitcoin derivatives.

52. Estimates of Bitmain’s market share for ASIC servers ranges from 67 to 80% and it is estimated that Bitmain controls well in excess of 60% of the world’s cryptocurrency mining computer (hashing) power. 53. Bitmain also operates Antpool and BTC.com, two of the largest Bitcoin and Bitcoin Cash mining pools in the world. As of December 2, 2018 (based on a 7 day average) these two pools collectively controlled 31% of Bitcoin mining and 40% of Bitcoin Cash ABC.

Bitcoin.com is a privately‐owned company registered in the off shore islands of St Kitts and Nevis under the organization of Saint Bitts LLC (with headquarters in Tokyo). Bitcoin.com provides Bitcoin and Bitcoin Cash services, such as purchasing and selling these cryptocurrencies, and choosing a wallet for both. It has servers and programmers in the United States and operates the Bitcoin.com pool (currently 7.4% of Bitcoin Cash ABC) with hash power provided by Bitmain. It also offers other services such as news, an online store and online gaming.

55. Bitcoin.com was founded and remains owned by Roger Ver (“Ver”), a U.S. natural citizen who renounced his U.S. citizenship in 2014 after obtaining a Saint Kitts and Nevis passport. Upon information and belief, Ver is currently living in Tokyo. 56. Ver is a self‐described “Bitcoin Angel Investor” and became interested in cryptocurrencies early in Bitcoin’s history. He invested in a number of Bitcoin projects and startups including the Kraken trading platform, Ripple and BitInstant – founded by ex-convict Charlie Shrem.4 57. Ver is a strong advocate of Bitcoin Cash and the original forking of Bitcoin into Bitcoin and Bitcoin Cash in 2017. He has openly supported the development and implementation of the ABC version of Bitcoin Cash.

#### That means no solvency and independently destroys global growth, trade and innovation – international antitrust causes global backlash.

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.

#### Cannot solve disarm – Russia, China, and North Korea will never give up their nuclear weapons let alone adopt blockchain tech.

#### Texas blackout empirically denies CI impacts.

#### No blackouts impact and no attacks that can take down the grid.

Lewis ’20 [James Andrew; 8/17/20; senior vice president and director of the Strategic Technologies Program at the Center for Strategic and International Studies; "Dismissing Cyber Catastrophe," https://www.csis.org/analysis/dismissing-cyber-catastrophe]

A catastrophic cyberattack was first predicted in the mid-1990s. Since then, predictions of a catastrophe have appeared regularly and have entered the popular consciousness. As a trope, a cyber catastrophe captures our imagination, but as analysis, it remains entirely imaginary and is of dubious value as a basis for policymaking. There has never been a catastrophic cyberattack.

To qualify as a catastrophe, an event must produce damaging mass effect, including casualties and destruction. The fires that swept across California last summer were a catastrophe. Covid-19 has been a catastrophe, especially in countries with inadequate responses. With man-made actions, however, a catastrophe is harder to produce than it may seem, and for cyberattacks a catastrophe requires organizational and technical skills most actors still do not possess. It requires planning, reconnaissance to find vulnerabilities, and then acquiring or building attack tools—things that require resources and experience. To achieve mass effect, either a few central targets (like an electrical grid) need to be hit or multiple targets would have to be hit simultaneously (as is the case with urban water systems), something that is itself an operational challenge.

It is easier to imagine a catastrophe than to produce it. The 2003 East Coast blackout is the archetype for an attack on the U.S. electrical grid. No one died in this blackout, and services were restored in a few days. As electric production is digitized, vulnerability increases, but many electrical companies have made cybersecurity a priority. Similarly, at water treatment plants, the chemicals used to purify water are controlled in ways that make mass releases difficult. In any case, it would take a massive amount of chemicals to poison large rivers or lakes, more than most companies keep on hand, and any release would quickly be diluted.

#### Alt causes to warming – other countries, failing Paris agreement, fossil fuel dependence.

#### No chance of catastrophic warming – most recent studies

Bailey 22 – Ronald Bailey, science writer and author of multiple books, citing Roger Pielke, Jr., Professor of Environmental Studies at the University of Colorado, “Worst-Case Climate Change Scenarios Are Highly Implausible, Argues New Study,” 2/9/22, https://reason.com/2022/02/09/worst-case-climate-change-scenarios-are-highly-implausible-argues-new-study/

Before rushing to kit out your climate prepper bunker, you might want to take a look at the new study by University of Colorado climate change policy researcher Roger Pielke that confirms what the Intergovernmental Panel on Climate Change found in August 2021, namely that the worst-case climate scenario is increasingly unlikely, and that while our future will be warmer, it will not be catastrophically so.

These dire predictions were based on calculations derived from a scenario of the future in which fossil fuel and agricultural emissions over the course of this century would boost atmospheric carbon dioxide to nearly 1,400 parts per million (ppm) by 2100. The current level of atmospheric carbon dioxide is just under 420 ppm, and that is up from the pre-industrial level of about 280 ppm. Largely as a result of this increase in atmospheric concentrations of greenhouse gases, global average temperature has risen to around 1.1°C above the pre-industrial level.

Climate researchers labeled this worst-case scenario "RCP8.5," and it has been somewhat updated in the new Intergovernmental Panel of Climate Change's Sixth Assessment Report (IPCC AR6) on the physical science basis of climate change and given a new moniker of SSP5-8.5.

The IPCC's AR6 report, released in August 2021, now acknowledges that "the likelihood of high emission scenarios such as RCP8.5 or SSP5-8.5 is considered low in light of recent developments in the energy sector."

The recent developments in the energy sector to which the AR6 report refers are that fossil fuel usage is likely to be fairly flat for the next 50 years. One of the main ways that the RCP8.5 scenario goes off the rails of plausibility is that it projects a six-fold rise in global coal consumption per capita by 2100. Since future coal consumption is likely to remain flat or decline, that means that global carbon dioxide emissions will be "approximately in line with the medium RCP4.5, RCP6.0 and SSP2-4.5 scenarios."

For some years now, University of Colorado climate change policy researcher Roger Pielke, Jr., and his colleagues have been pointing out that the development of the global economy is highly unlikely to trace the high emissions pathways that led to the worst projected outcomes. Nevertheless, climate studies based on the RCP8.5 scenario are the ones being relied upon by people making their predictions of dire climate calamity by the end of this century.

Pielke and his colleagues have published a new study in the journal Environmental Research Letters that argues that these intermediate emissions scenarios are much more plausible than the high end scenarios that engendered fears of climate catastrophe. "These scenarios project between 2 and 3 degrees C of warming by 2100, with a median of 2.2 degrees C," they conclude. They do, however, acknowledge that "these scenarios also indicate that the world is still off track from limiting 21st-century warming to 1.5 or below 2 degrees C."

These new calculations are based on the future energy use and energy policy projections found in the International Energy Agency's latest World Energy Outlook report. That report concludes that, instead of rising six-fold, global coal consumption will peak during this decade. On the other hand, the U.S. Energy Information Administration projects that world coal consumption will continue to rise slightly through 2050, but that's still far from the sixfold increase entailed in the RCP8.5 scenario.

To assess plausibility of most of the IPCC scenarios, Pielke and his colleagues ask which of the scenarios have projected carbon dioxide emissions growth errors and divergences of less than 0.1 or 0.3 percent per year over the observed growth rates between 2005 and 2020. That is, which scenarios tracked what actually happened with carbon dioxide emissions over the last fifteen years? Next they further parse how well the scenarios similarly track actual emissions beginning in 2005 through the IEA's projections of future emissions to 2050.

The chart above displays the plausibility of the various IPCC emissions scenarios by tracking how well they match likely cumulative emissions of carbon dioxide over the course of this century. The scenarios that closely track actual and projected IEA emissions are marked with blue dots (0.1 percent) and triangles (0.3 percent). "All of the plausible scenarios," explains Pielke in his Substack newsletter The Honest Broker, "envision less than 3 degrees Celsius total warming by 2100. In fact, the median projection is for 2100 warming of 2.2 degrees Celsius." He adds that that "is within spitting distance of the Paris Agreement goal of holding temperatures to a warming of 2.0 degrees Celsius."

Under the 2015 Paris Climate Change Agreement, signatories committed to "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."

So man-made global warming of 4°C by 2100 above pre-industrial levels is not a real possibility.

"Is the world ready for good news on climate?," asks Pielke. Yes, we are.

## AT: FTC

### 1NC – AT: FTC

#### Blockchain *participants* are governed by antitrust law even if *blockchains* are not. “Theory of granularity” is a redundant regulation – vote neg on presumption.

Massarotto, Giovanna, Center for Technology Innovation and Competition (CTIC), University of Pennsylvania; UCL Centre for Blockchain Technologies (UCL CBT) ’21, Can Antitrust Trust Blockchain? Algorithmic Antitrust, Springer, 2021, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3622979 or http://dx.doi.org/10.2139/ssrn.3622979

Similar to the nineteenth century, where society created corporations to separate people from entities devoted to business, a decade ago it introduced a new decentralized entity/infrastructure to operate. Differently from traditional corporations, in decentralized blockchains, people participate and interact with the blockchain network through a digital identity. Digital identity can be identified as “the digital data corpus being built by users and digital systems” (Fehér, K., 2019) that enable people and any other entity to access computers and interact with computer networks. Blockchain is a decentralized computer network and in public blockchain, such as bitcoin blockchain, people’s digital identity is characterized by pseudonyms to protect privacy. The same creator of bitcoin is still known under the pseudonym of Satoshi Nakamoto, no one was able to reveal his real identity.

Satoshi Nakamoto is likely to be only one of the several pseudonyms that the founder of bitcoin uses to interact on the Internet. There is often the wrong assumption that we have only a digital identity that follows us everywhere; but this is basically not true. Every day, we create, for example, a number of email and social media accounts. Digital identity is different from our passport or social security number, and it is naïve to think that we should have only one digital identity (Ou, 2017). Similar to corporations that were created as a separate entity from its owners, digital identity is something separate (although related) to its creator.

In other words, blockchain creates a network made up by blockchain participants who interact with each other by using digital identities. Blockchain is basically the platform that enables people to interact to do much of their regular work more efficiently bypassing intermediaries. Similar to a buyer group, as we have seen, participants in the blockchain group/network are basically users that leverage their force of acting together to get goods and services that are usually provided through intermediaries.

Thus, what kind of entity is blockchain? A deeper inquiry is necessary, but as any group such as associations, consortiums or networks, blockchain does not appear immune from antitrust scrutiny. By considering the US and EU competition law, which are the main antitrust jurisdictions, we can observe that antitrust law is giving an increasing importance to the economic effects of practices in the affected markets, rather than formalistic legal definitions of entities relevant for antitrust legislation. The US antitrust law clearly emphasizes this point as under Section 7 of the Sherman Act, antitrust law is applicable to potentially any “person,” including “corporations and associations existing under or authorized by the laws” (Section 7 of the Sherman Act). In Europe, Article 101 and 102 of the TFEU applies to undertakings and associations, which exercise an economic activity (Lianos, 2018). Therefore, blockchain can easily fall into both the US and EU antitrust jurisdictions.

As outlined above, a set of rules set into a protocol governs the blockchain network. But, a group of people wrote the protocol and is leading the blockchain growth. The fact that these people are using digital identities does not make them less liable.

#### Nonunique: FTC regulating blockchain under competition law *now*.

Michael Ross, Partner, Jenner & Block, ’18, “Blockchain, Antitrust, and Standard Setting” https://jenner.com/system/assets/publications/18303/original/Ross%20FinTech%20Weekly%20Sept%2019%202018.pdf?1538157243

Finally, the FTC regulates in the areas of antitrust and consumer protection. In March 2018, the FTC announced in a blog post that “It’s Time for a Blockchain Working Group.” That blog post noted that the FTC had recently brought charges against the organizers of a scheme that fraudulently promised payments for recruiting cryptocurrency investors. The charges fell under the FTC’s consumer protection aegis—not antitrust—but the blog post called out antitrust (i.e., “competition policy”) as an area of potential focus for the regulator. Not much detail was provided, however: the post highlighted the possibility of legacy businesses thwarting innovation by disruptive technologies as a potential antitrust concern, but otherwise did not review the types of antitrust issues that may become a focus.

Since then, the FTC has not made significant news in the blockchain/antitrust arena. But the FTC did recently announce a series of hearings—starting this fall—focused on the intersection of technology and antitrust law. Those hearings will encompass more than blockchain, but some of the public comments submitted touch on the technology. The hearings, and any resulting action, will be worth watching to see if they shed any light on where the FTC may go in the area.

#### FTC not key – DOJ *already* regulates blockchain.

Paddy Baker, ‘20, "US Antitrust Chief Says Protecting Blockchain From Competitive Abuses Is Top Priority," No Publication, https://www.coindesk.com/markets/2020/09/04/us-antitrust-chief-says-protecting-blockchain-from-competitive-abuses-is-top-priority/

A U.S. Department of Justice (DoJ) official said blockchain deserves the full protection of antitrust law because it has the potential to mount an effective challenge to monopolies. In a speech published last week, Makan Delrahim, assistant attorney general at the DoJ's Antitrust Division, said blockchain could prevent or limit the concentration of market power, improving competition in a whole host of industries. He said: "[I]t is of utmost importance that we prevent competitive abuses in markets where blockchain may offer consumers and business lower-cost or higher-value options." Delrahim said the Antitrust Division would try to understand how businesses are implementing blockchain solutions as well as the possible effects it could have on market competition. He also said the division would try to anticipate how incumbents could try to stop or limit the potential of blockchain solutions so they can maintain market-dominant positions. This could include using private blockchains to deny rivals access to crucial market infrastructure, he said. Thibault Schrepel, an assistant professor in Antitrust Law at Utrecht University School of Law and faculty affiliate at Standford University's CodeX Center, told CoinDesk the antitrust chief could be subtly hinting that blockchain could disrupt big tech monopolies. In his speech, Delrahim added that critical questions remain, such as whether existing intermediaries have any place at all within a blockchain-based market system. It's also possible, the antitrust chief said, that the role of blockchain could change over time as it faces further mainstream adoption.

#### HR promotion fails – hypocrisy.

Graham E. Fuller 21, MA Degree in Russian and Middle Eastern Studies from Harvard University, Former Vice Chairman of the National Intelligence Council at the CIA, Former Senior Political Scientist at RAND, and Current Adjunct Professor of History at Simon Fraser University, “Hell Hath No Fury Like a Superpower in Decline”, Responsible Statecraft, 3/22/2021, https://responsiblestatecraft.org/2021/03/22/hell-hath-no-fury-than-a-superpower-in-decline/

It is simply astonishing that in approaching a new course of relations with Russia, President Biden should have called Vladimir Putin “a killer” and lacking “a soul.”

It is similarly astonishing to have chosen an important opening moment in our delicate relationship with China to employ derogatory language. Did Blinken believe that flashing testosterone at the first high-level meeting of Beijing’s foreign policy leadership would help achieve the diplomatic goals Washington seeks? One wonders who the secretary of state was trying to impress — Beijing or a U.S. domestic audience?

The United States undoubtedly has its own grievances towards China, and China likewise possesses many grievances towards the United States. But surely this name-calling and accusatory language are immature and counterproductive in terms of future U.S.-China or, for that matter, China-Russian relations.

And what message do these events send to other world leaders? It raises serious questions about the professionalism and vision of the new administration’s leadership as to whether Washington is any longer responsible or capable of the “global leadership” about which it talks so incessantly.

When both the U.S. president and his secretary of state seem to have chosen such ill-considered approaches to Russia and China, it certainly will make many other countries quite hesitant to sign on to an American vision and style of global leadership.

The degree of hypocrisy about “killing” or “foreign interference” is likewise disturbing if not myopic. U.S. policies over the past 20 years or more have shown a great willingness to kill in great quantity in a failing effort to achieve political goals that have stunningly failed in nearly every case. Consider the hundreds of thousands of Iraqi, Syrian, Somali, Libyan, Iranian, Afghan, and Pakistani civilians who are perceived as little more than “collateral damage” in endless U.S. military interventions. Not to mention American assassinations of high-level foreign officials such as Iranian General Qassem Soleimani who also happened to be perhaps the most revered public official in Iran.

Antony Blinken, seemingly without embarrassment, speaks of the United States as upholding “the rule of law globally” in the self-deception or the belief that such is the case. In fact, Washington has always expected other countries to support the international rule of law — although exempting good friends like Israel and Saudi Arabia. The United States invariably defends its own “exceptionalism” in pointedly not signing onto International law when it suits its interests. That includes foreign assassinations and the launching of several wars without authorization at the international level, provoking “Color Revolutions,” and refusing to ratify UN Conventions on the Law of the Sea or the Rights of the Child, or honor adverse judgments by the International Court of Justice. And It is difficult to understand how Blinken feels comfortable at lecturing China on its domestic failings at a time when U.S. democracy and social policy have never presented a more damaging face to the world.

#### FTC is fine now.

Volkov 2/10 – Michael Volkov, CEO of The Volkov Law Group LLC, where he provides compliance, internal investigation and white collar defense services, “The New Era of Antitrust Enforcement,” 2/10/22, https://www.corporatecomplianceinsights.com/new-era-antitrust-enforcement/

Risk managers and CCOs take note: DOJ and FTC have signaled a new era of antitrust enforcement. Leadership at both agencies is revamping guidance, and years-long efforts are beginning to bear fruit. Any company operating in a concentrated market could feel the effects of these changes.

There is no question that we are facing a “perfect storm” of antitrust enforcement. Antitrust enforcement is fast-becoming an area of rare bipartisanship. Republicans resent the growing power and influence of technology and social media companies. Democrats are concerned about the growth of the rich, large companies and political influence.

Jonathan Kanter, the confirmed Assistant Attorney General of the Antitrust Division, has already signaled that enforcement changes are coming. He received bipartisan support in his confirmation, reflecting the expectation of aggressive enforcement. At the same time, congressional attempts to address antitrust issues in the marketplace are gaining steam.

Lina Kahn, the FTC Chairperson, has been a little bit more controversial, given her prior statements opposing Google and Facebook. Since her initial controversy, the FTC is settling down to business and continuing its enforcement action against Facebook in federal court.

Increasing Collaboration Between FTC and DOJ and a Revamped Approach to Merger Enforcement

Kanter gave a speech recently before the New York Bar Association at which he outlined his vision for enforcement and the need to update antitrust perspectives beyond the limited view of the past three decades. In recognition of the new era, the Justice Department and the FTC have initiated a review of both the Merger Guidelines and Vertical Conduct Guidelines. These revisions are expected to significantly alter DOJ’s and the FTC’s approach to merger and civil enforcement.

#### Alt cause – supply chain focus.

McKeown 2/18 – James T. McKeown, partner at Foley & Lardner, LLP, “Antitrust Scrutiny of Supply Chain Issues Continues,” 2/18/22, https://www.foley.com/en/insights/publications/2022/02/antitrust-scrutiny-supply-chain-issues-continues

The spring thaw has yet to set in, but Washington this month has been a hotbed of antitrust regulatory activity impacting supply chains. On February 15, the Federal Trade Commission (FTC) announced that Lockheed Martin scrapped a $4.4 billion acquisition of its supplier, Aerojet Rocketdyne, in the face of a complaint the Commission filed earlier this year to block the deal. The complaint alleged that the acquisition would eliminate the last independent U.S. supplier of missile propulsion systems and give Lockheed the ability to cut off its competitors’ access to these key components. The Commission argued the deal would not only harm rival defense contractors but further consolidate markets critical to national security.

The announcement marked the second time in a week that parties walked away from a significant vertical merger under challenge by the FTC. The day before, the Commission announced that Nvidia Corp., a maker of semiconductor chips, was dropping its $40 billion bid to acquire Arm Ltd., two months into litigation with the FTC. Arm creates and licenses designs for computer chips used in a variety of devices, from smartphones to driver-assistance systems. The Commission said the proposed merger would lessen competition by giving Nvidia control over Arm’s chip designs and access to confidential information Arm’s licensees, including Nvidia competitors, shared with Arm. The FTC touted the result as “particularly significant because it represents the first abandonment of a litigated vertical merger in many years.”

The announcements come as the FTC has changed its thinking about vertical mergers, combinations of companies in different stages of the supply chain. In September 2021, the Commission voted to withdraw its approval of the Vertical Merger Guidelines published jointly with the Department of Justice (DOJ) the year before. The Guidelines recognized that vertical mergers “often” benefit consumers because the combined company no longer has to pay the markup required by an independent supplier, a concept known as the “elimination of double marginalization” (EDM). Writing for a three-member majority, FTC Chair Lina Khan expressed skepticism that any savings in input costs are passed on to the consumer, calling the Guidelines’ reliance on EDM “theoretically and factually misplaced” and vowing to overhaul the Guidelines.

Last month, the FTC and DOJ issued a request for information (RFI), seeking public comment on revisions to “modernize” the Guidelines’ approach to evaluating vertical and horizontal mergers. The RFI noted that while DOJ did not withdraw from the Guidelines, it “shares the Commission’s substantive concerns with economic and legal errors in them.” The comment period does not close until March 21, so it remains to be seen what if any impact the revised Guidelines will have on the agencies’ treatment of vertical mergers. The FTC’s statements around the withdrawal together with its enforcement actions against Lockheed and Nvidia may, however, portend greater scrutiny of these transactions.

In another move with potential consequences for supply chains, the DOJ Antitrust Division and FBI on February 17 announced an initiative to investigate and prosecute companies that exploit supply chain disruptions to overcharge consumers and collude with competitors. The announcement warns that individuals and businesses may be using supply chain disruptions from the COVID-19 pandemic as cover for price fixing and other collusive schemes. As part of the initiative, DOJ is “prioritizing any existing investigations where competitors may be exploiting supply chain disruptions for illicit profit and is undertaking measures to proactively investigate collusion in industries particularly affected by supply disruptions.” DOJ has formed a working group on global supply chain collusion and will share intelligence with antitrust authorities in Australia, Canada, New Zealand, and the UK.

With the continued enhanced antitrust scrutiny of all manner of commercial activities, companies considering vertical mergers or price increases to curb supply chain constraints should actively monitor these developments.

#### Expanding the rule of reason unduly burdens federal agencies – high costs, delays, and complex litigation sap resources.

Chopra & Khan ’20 [Rohit; Commissioner @ Federal Trade Commission; and Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Case for “Unfair Methods of Competition” Rulemaking,” *The University of Chicago Law Review* *87*(2), p. 357-380; AS]

The current approach to antitrust also makes enforcement highly costly and protracted. In 2012, the American Bar Association (ABA) published the report of a task force that sought to “study ways to control the costs of antitrust litigation and enforcement.”9 The task force, the authors explained, was “a response to concerns” about both “the costs imposed on businesses by the American system of antitrust enforcement” and “the length of time required to resolve antitrust issues both in litigation and in enforcement proceedings.”10 Out-of-control costs undermine effective antitrust enforcement by agencies and private litigants, but may advantage actors who profit from anticompetitive practices and can treat litigation as a routine cost of business. Professor Michael Baye and Former Commissioner Joshua Wright have noted that generalist judges may be ill-equipped to independently analyze and assess evidence presented by economic experts.11 Because determining the legality of most conduct now involves complex economic analysis, courts have effectively “delegate[d] both factfinding and rulemaking to courtroom economists,” making courtroom economics “not just inevitable but often dispositive.”12 In fact, paid expert testimony now is often “the ‘whole game’ in an antitrust dispute.”13

Paid experts are a major expense. Some experts charge over $1,300 an hour, earning more than senior partners at major law firms.14 Over the last decade, expenditures on expert costs by public enforcers have ballooned.15 In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.16 Another component of the burden is that antitrust trials are extremely slow and prolonged.17 The Supreme Court has criticized antitrust cases for involving “interminable litigation”18 and the “inevitably costly and protracted discovery phase,”19 yielding an antitrust system that is “hopelessly beyond effective judicial supervision.”20 That it can easily take a decade to bring an antitrust case to full judgment means that by the time a judge orders a remedy, market circumstances are likely to have outpaced it.21 The same 2012 ABA report suggested that lengthy, costly litigation may be contributing to reduced government-enforcement efforts over time relative to the expansion of the US economy.22

# 2NC

## CP – FTC

### Solvency – 2NC

#### The counterplan increases FTC budgets and staffing and implements a bevy of antitrust enforcement actions – that solves advantage two because it substantially decreases market power and increases competition – that’s Baker.

#### There is no impact to any solvency deficits because there’s no threshold for how credible the FTC has to be – the counterplan is clearly a massive increase over the status quo that is good enough to solve their impacts.

#### The counterplan implements an arsenal of enforcement actions – it radically expands antitrust effectiveness and reduces market power

Baker 18 – Jonathan B. Baker, Research Professor of Law at American University, former Director of the Bureau of Economics at the Federal Trade Commission, “Unlocking Antitrust Enforcement,” *The Yale Law Journal*, Volume 127, Number 7, May 2018, https://www.yalelawjournal.org/pdf/AntitrustIntro\_2i9njqbr.pdf

There is no antitrust law without antitrust law enforcement. Legal action turns economic and jurisprudential theory into litigation, remedy, prohibition, deterrence, and precedent that advance competition.

This Collection, Unlocking Antitrust Enforcement, demonstrates that tools to advance antitrust enforcement already exist, and they are well-suited to confront today’s U.S. antitrust challenges. The Features arrive at a critical moment, when economic forces mirror the industrial concentration and economic inequality of the turn of the twentieth century. Recall that the impetus for the creation of U.S. antitrust laws was the growing power of Industrial Age trusts, combinations of holdings within and across industries that dominated important economic sectors like oil, steel, and tobacco. Trusts exercised what reformers saw as outsized political power, and they were blamed for the rise of economic inequality in the early years of the twentieth century. Public outrage at their economic dominance spurred the passage of the Sherman Act in 1890,1 and, fueled by a decade of merger mania, the Clayton2 and Federal Trade Commission Acts3 in 1914. One leading proponent of antitrust reform captured the prevailing mood when he warned of the “gross inequality in the distribution of wealth and income which giant corporations have fostered.”4 Today, we see similar economic trends. The United States has a market power problem; one that may well extend beyond individual markets to slow economic growth and widen economic inequality.5 But there is also an arsenal of antitrust-enforcement actions that can be used to preserve and garner the benefits of competition.

The nine Features in this Collection primarily focus on the efforts that can be undertaken by the federal antitrust agencies: the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Together, these Features lay the foundation for an overarching enforcement agenda, one written in the long, but receding, shadow of the Chicago School, which brought economic analysis to the forefront of antitrust but failed to fully capture the realities of competition and the private actions that can curb it. This agenda can be implemented immediately, relying on the “dynamic potential” of the antitrust laws, 6 which “evolve[] as circumstances change and learning grows.”7

### AT: Blockchain Key to AI/ML

#### This card says blockchain once and is clearly about broader FTC effectiveness, not specific to blockchain. absolutely no chance the impact is intrinsic to blockchain.

## Adv 1

### XT – Terror Turn

#### Crypto causes terrorism – it’s a critical source of financing for terrorist cells, who will utilize the cash flows to develop advances in WMD technology that’ll escalate and cause extinction – that’s Check – the plan’s claim to expand “global uptake” of crypto because innovation and investment will be limited now IS THE LINK because further crypto uptake legitimizes cryptocurrencies as a source of value, which are restrained now.

### Terror IL – AT: Global Crypto Inevitable

#### Increasing the stability and viability of crypto enables its use by terrorists

Dion-Schwarz 19 – Cynthia Dion-Schwarz, PhD, Research Staff Member at the Institute for Defense Analyses, “Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats,” 2019, https://www.rand.org/pubs/research\_reports/RR3026.html

As terrorist methods and cryptocurrencies develop, the utility of these approaches and systems for terrorist organizations remains unclear. Nevertheless, there are many factors that could signal an uptick in the importance of cryptocurrencies to terrorist organizations. We expect that there will be some use of cryptocurrencies by terrorist groups, but the extent of that use will depend on the viability of these systems.

The primary factors that will increase viability for use by terrorist organizations are broader use, better anonymity, lax or inconsistent regulation with associated improved security, and adoption in adjacent markets. Conversely, the primary factors that will decrease viability for use by terrorist organizations are continued instability and infighting in the community, robust international regulation and law enforcement in conjunction with the intelligence community, and increasing or continuing security breaches and hacks of systems. We briefly discuss each of these factors in this chapter.

Factors Increasing the Viability of Cryptocurrency Use

Broader Use of Cryptocurrency

A first indicator that cryptocurrency is becoming more feasible for use by terrorist organizations is that the market continues to grow. A growing market presumably will require increased reliability of the system and more-widespread usage. Growth will increase the volume of transactions— a critical limitation of current systems—and greater adoption of these systems will spur improvements in ease of use. As use becomes more common across the world, the current lack of acceptance of these systems, especially in areas where terrorist organizations operate, could disappear.

#### The aff increases the transaction volume of crypto – that allows terrorists to hide amidst the other transactions – right now terrorist transactions are too obvious

Dion-Schwarz 19 – Cynthia Dion-Schwarz, PhD, Research Staff Member at the Institute for Defense Analyses, “Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats,” 2019, https://www.rand.org/pubs/research\_reports/RR3026.html

Transaction volume is a critical limitation for reliable transfer. Low volume makes the price more sensitive to transactions and makes the transfer of large amounts of money expensive; the price increases when the currency is purchased by those trying to transfer the money and drops again when it is sold at the other end. Because of this, large transaction volumes are important for any terrorist group attempting to use a particular cryptocurrency. This is a particularly critical concern for smaller and newer cryptocurrencies, in addition to concerns about the security and reliability of any new system.

The other critical problem with low volume is the traceability of transactions. This problem manifests in two ways. As mentioned earlier, large transactions have impacts on price; demand increases are reflected in publicly visible prices, making the transaction nonanonymous. In addition, a public ledger, even one with robust technical anonymity, cannot mask the fact that large volumes or high-value single transactions appear. Because transactions are posted publicly for all to see (including law enforcement), changes in average volume are easy to detect. Thus, a sudden spike in volume is enough to attract attention.

#### Crypto is generally unusable by terrorists now – it’s only useful once it’s acceptable, stable, and widely accepted

Dion-Schwarz 19 – Cynthia Dion-Schwarz, PhD, Research Staff Member at the Institute for Defense Analyses, “Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats,” 2019, https://www.rand.org/pubs/research\_reports/RR3026.html

Most terrorist groups are currently constrained in their ability to use cryptocurrency because of the limited acceptability and usability of these currencies in the regions in which terrorist groups operate. Even if a group receives and manages these funds, they cannot easily be used to pay for expenses where vendors and members expect cash, either in stable currencies like dollars and euros, or in local currencies. For instance, few Bitcoin ATMs exist in the Middle East, making it difficult to exchange bitcoins for fiat currencies. Bitcoin ATMs tend to be more prevalent in Europe and the United States, where local banking and currency laws provide something of a deterrent to illicit use.

### Terror IL – 2NC

#### It’s reverse causal – lack of funding is the one factor limiting terrorism now – crypto allows them to skirt that key barrier

Dion-Schwarz 19 – Cynthia Dion-Schwarz, PhD, Research Staff Member at the Institute for Defense Analyses, “Terrorist Use of Cryptocurrencies: Technical and Organizational Barriers and Future Threats,” 2019, https://www.rand.org/pubs/research\_reports/RR3026.html

[CTF = counterterrorism finance]

Terrorists require significant funding to carry out attacks and other activities. Indeed, there is reason to believe that, if terrorist groups were better funded overall, there might be more-frequent, more-successful, and larger attacks.1 There are several reasons that support this belief. First, more funds for operations would presumably lead to increased funding for the structures that enable these attacks, which include recruiting and training attackers and inspiring potential lone wolves. Second, groups facing less monetary pressure (i.e., those that are better funded) also might be more willing to take risks, such as larger or riskier attacks.2 Lastly, and perhaps more contentiously, increased funds can be used directly for additional and larger attacks. It might be difficult to directly link increased funds to terrorist attacks, although in specific documented cases, “the literature often describes shortages of cash as a problem for terrorist operations.”3 It is therefore plausible that the relative lack of attacks, and especially the lack of higher-cost large attacks, is partly because of overall funding constraints.

Since the September 11, 2001, terrorist attacks (9/11), law enforcement agencies have developed and implemented several successful approaches for preventing the flow of fiat (i.e., government-issued) currencies to terrorist groups. In particular, as intelligence and counterterrorism agencies have identified finance strategies employed by terrorist organizations, they have been able to curtail terrorist fundraising.4

However, the success of counterterrorism finance (CTF) strategies in reducing terrorist access to fiat currencies has raised concerns that terrorist organizations might increase their use of such digital cryptocurrencies as Bitcoin to support their activities.5 Bitcoin is both a protocol for securely storing and transmitting tokens (virtual coins) and the name of the unit of value in the system. Bitcoin revolves around a public ledger called the blockchain, which is maintained by an online distributed network of computers that track transactions and maintain a complete history of verified transactions. Any user of the system can participate in all aspects of its operations, including all transactions, and no single participant has control. To support anonymity and transaction ownership, Bitcoin transaction participants are identified by a unique string of random numbers rather than by a name or other personal information.

Furthermore, the challenge posed by cryptocurrencies extends beyond Bitcoin. Many new cryptocurrencies have emerged, all with differing properties tailored for different audiences, some of which might align with terrorists’ needs. These include such other alternative currencies (“altcoins”) as Omni Layer (MasterCoin), BlackCoin, and Monero, which are touted as more private and secure than Bitcoin and therefore are seemingly tailor-made for illicit activities.6 Another cryptocurrency is Zcash, which uses transactions that are not identified by any owner, thereby offering a higher degree of privacy. Zcash also offers a higher degree of privacy, which could make it even more difficult for law enforcement to trace illicit transactions and could be extended to allow offline use and transfer of the currency. Other types of cryptocurrencies have been proposed, including Hawk, which aims to allow fully private contracts and transactions on the Ethereum blockchain. Like Bitcoin, the Ethereum blockchain is a distributed computing platform and operating system.

Increased use of cryptocurrencies by terrorists could undermine the successes of CTF. Although terrorist organizations have sometimes been reluctant to adopt new methods when old methods are effective, CTF pressures can create incentives for terrorists to innovate, as we have seen in other domains.7 We might expect terrorist groups to expand their use of cryptocurrencies in cases where their access to alternative financial systems is limited, or where cryptocurrency provides significant benefits over alternatives.

#### No defense – anti-money-laundering laws require traditional middlemen and bank ledgers – crypto gives a blank check to terrorist groups

Dudley 19 – Col. Sara Dudley, assigned to Joint Special Operations Command, “Evasive Maneuvers: How Malign Actors Leverage Cryptocurrency,” 2019, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-92/jfq-92\_58-64\_Dudley-et-al.pdf

While the international financial community certainly has shown both intrigue and aversion to the potential disruptions in world monetary markets, distributed ledger technology also introduces challenges pertaining to national security. The presence of various middlemen, such as financial institutions, afforded governments the ability to track and trace malign activity through the traditional financial system ledgers. With cryptocurrencies, reputable banks no longer validate an individual’s credentials and record his information with each transaction. Rather, anonymity in cryptocurrencies protects point-to-point transactions captured between digitized wallets and encryption keys. This change in the traditional process for managing financial transactions undermines regulatory anti–money laundering efforts performed by financial institutions, which are intended to thwart players attempting to skirt sanctions and finance terror groups. While perhaps not immediately obvious to the casual observer, nonstate actor use and increasing state actor pursuit of cryptocurrencies extend the competitive space into the international financial domain and spotlight cryptocurrency as a national security issue that should concern the Department of Defense (DOD) and Intelligence Community.4

The rapid growth of weakly regulated financial and technology markets creates vulnerabilities for safeguarding the international financial system from malign actors. Hence, the nexus of crime, corruption, and terrorism finds refuge in these emergent financial systems.5 Aside from the benefits of cryptocurrencies, which include providing an attractive means for malign actors to conceal illicit funding and business, and to earn currency by mining, the technology attributes alone attract malfeasance. While the distributed blockchain ledger remains resistant to cyber criminals, the storage of the digital coins (that is, private key encryptions) remains a system weakness.

While pointed out earlier that traditional ledger systems are vulnerable, theft of cryptocurrencies requires less hacking skill than penetrating the centralized ledger systems, which banks have hardened. Secure digital storage of the private and public key information associated with cryptocurrency exists outside the blockchain within individual computers, exchange markets, and businesses established to provide offline, or cold-storage. Similar to a brokerage house converting shares of a company into cash for a seller, cryptocurrency exchanges support the transition of the digital currency back into a fiat currency like the USD. Theft of the encryption keys for a coin gives a criminal carte blanche to spend it without the need for identification. Due to the need to secure the encryption keys from theft by hackers, some exchanges and separate businesses now exist to safeguard the encryption keys offline in the equivalent of digital safe deposit boxes. The introduction of these cryptocurrency technologies disrupts not only financial markets but also efforts to monitor and maintain the integrity of financial exchange. The anonymity of use, low barriers to entry, and weak regulation and limited legal jurisdiction in the cryptocurrency marketplace represent an opportune platform for illicit actors. The initial forays of criminal, corrupt, and terror networks into the cryptocurrency markets foreshadow the future challenges of starving large-scale, bad actors of funding.

### Terror Impact – AT: General Nuke Terror D

#### Terrorists have the motive and capability for nuclear attacks – most recent evidence

Bunn 21 – Matthew Bunn, James R. Schlesinger Professor of the Practice of Energy, National Security, and Foreign Policy at Harvard Kennedy School,” Twenty years after 9/11, terrorists could still go nuclear,” 9/26/21, https://thebulletin.org/2021/09/twenty-years-after-9-11-terrorists-could-still-go-nuclear/

Unfortunately, that possibility was all too real. Investigations after the attacks uncovered focused al Qaeda efforts to get nuclear, biological, and chemical weapons. The nuclear program reported directly to Ayman al-Zawahiri, now the leader of the group, and got as far as carrying out crude but sensible conventional explosive tests for the bomb program in the Afghan desert. Weeks before 9/11, Osama bin Laden and Zawahiri met with two senior Pakistani nuclear scientists and discussed how al Qaeda could get nuclear weapons.

But that was then. Today, both al Qaeda and another major jihadist terror group, the Islamic State, have suffered tremendous blows, with their charismatic leaders dead and many others killed or captured. A US-led counterterrorism coalition destroyed the Islamic State’s geographic caliphate in Iraq and Syria. In recent years, many terrorist attacks have not been much more sophisticated than driving a van into a crowd. Al Qaeda has not managed to carry out a single successful attack in the United States since 9/11. Is a terrorist nuclear attack still something to worry about?

The short answer, unfortunately, is “yes.” The probability of terrorists getting and using a nuclear bomb appears to be low—but the consequences if they did would be so devastating that it is worth beefing up efforts to make sure terrorists never get their hands on a nuclear bomb’s essential ingredients. To see the possibilities, we need to look at motive, capability, and opportunity.

Motive. Violent Islamic extremists desperately want to strike back at the “crusader forces” who have inflicted such punishing blows on their organizations. And both the Islamic State and al Qaeda would like a spectacular action to put them firmly back at the forefront of the violent Islamic extremist movement. Years ago, al Qaeda spokesman Sulaiman Abu Ghaith argued that because Western actions had killed so many Muslims, al Qaeda had “the right to kill four million Americans, one million of them children.” That kind of hatred still festers. (Abu Ghaith is serving a life sentence in a US prison.)

Nuclear explosives are only one of the paths to mass slaughter that terrorists have pursued. Nuclear efforts must compete for terrorists’ attention with tried-and-true conventional weapons, biological weapons—whose dangers the pandemic has highlighted—chemical weapons, and more. Many of these other types of weapons would be easier for terrorists to acquire, and so their use may be more likely. But the history-changing power of a mushroom cloud rising over a major city has proved attractive to terrorists in the past and may again.

Capability. Government studies make clear that if a sophisticated, well-funded terrorist group got hold of the needed plutonium or highly enriched uranium (HEU), they might well be able to put together a crude nuclear bomb. Unfortunately, it does not take a Manhattan Project to build a bomb, when you have weapons-usable fissile material. Indeed, the group needed to make a crude bomb might not have a footprint much bigger than the 9/11 attackers had. Despite the enormous destruction that has been rained on al Qaeda and the Islamic State over the last 20 years, a cell of terrorists could be working on a nuclear project even now, somewhere far from US attention and drone strikes.

#### International consensus is on our side---nuclear terror is possible and likely

Matthew Bunn 16, Professor of Practice at Harvard University's John F. Kennedy School of Government, with Martin B. Matlin, Executive Director of the Project on Managing the Atom at Harvard’s Belfer Center for Science and International Affairs, Nicholas Roth, Research Associate at the Belfer Center’s Project on Managing the Atom, and William H. Tobey, Senior Fellow at the Belfer Center for Science and International Affairs at Harvard Kennedy School, “Preventing Nuclear Terrorism: Continuous Improvement or Dangerous Decline?” March 2016, http://belfercenter.ksg.harvard.edu/files/PreventingNuclearTerrorism-Web.pdf

In recent years, countries and international organizations around the world have joined in highlighting the importance of the nuclear terrorism threat. United Nations Secretary General Ban-Ki Moon, for example, has warned that, “Nuclear terrorism is one of the most serious threats of our time. Even one such attack could inflict mass casualties and create immense suffering and unwanted change in the world forever. This prospect should compel all of us to act to prevent such a catastrophe.”26 Two years later, Mohammed El Baradei, then Director General of the IAEA, described “an extremist group getting hold of nuclear weapons or materials” as “the gravest threat faced by the world.” Classified government studies in several countries, including, among others, Russia, the United Kingdom, and Australia, have confirmed the conclusion of U.S. government studies that it is plausible that a sophisticated terrorist group could make a crude nuclear bomb if it possessed the necessary materials.

At the first Nuclear Security Summit in 2010, the assembled leaders agreed that, “nuclear terrorism is one of the most challenging threats to international security.”27 At that summit and subsequent ones, many heads of state have emphasized the threat in their remarks.

Russia, despite its decision not to participate in the 2016 Nuclear Security Summit, has clearly concluded that nuclear terrorism is a serious threat. Russia first proposed the International Convention on the Suppression of Acts of Nuclear Terrorism (ICSANT), with President Vladimir Putin warning in 2004 of the urgent need to avert “any attempts by terrorists to get hold of nuclear weapons or any other nuclear materials.”28 In 2005, Putin joined with U.S. President George W. Bush in the Bratislava nuclear security initiative, describing nuclear terrorism as “one of the gravest threats our two countries face.”29 In 2006, Bush and Putin joined in launching the GICNT, which the two countries continue to co-chair.

Senior Russian officials have offered even more alarming assessments of the threat. In 2001, for example, General Igor Valynkin, then commander of the force that guards Russia’s nuclear weapons, confirmed two incidents of terrorist teams carrying out reconnaissance at nuclear weapon storage facilities (whose locations are a state secret in Russia).30 The Russian state newspaper reported two additional incidents of terrorists carrying out reconnaissance on nuclear weapon transport trains.31 In 2005, Russian Interior Minister Rashid Nurgaliev—in charge of the forces that guard most Russian nuclear facilities—announced that “international terrorists have planned attacks against nuclear and power industry installations” and intended to “seize nuclear materials and use them to build weapons of mass destruction for their own political ends.”32 In 2007, Anatoly Safonov, then Putin’s special representative for counter-terrorism (and former deputy chief of the FSB, Russia’s domestic security agency) warned that “we know for sure, with evidence and facts in hand, about this steady interest and a goal pursued by terrorists to obtain what is called nuclear weapons and nuclear components in any form.”33 In 2011, a joint report by U.S. and Russian experts summarized the threat in a way that is still relevant today:

“Nuclear terrorism is a real and urgent threat. Urgent actions are required to reduce the risk. The risk is driven by the rise of terrorists who seek to inflict unlimited damage, many of whom have sought justification for their plans in radical interpretations of Islam; by increased availability of weapons-usable materials; and by globalization, which makes it easier to move people, technologies, and materials across the world.

Making a crude nuclear bomb would not be easy, but is potentially within the capabilities of a technically sophisticated terrorist group, as numerous government studies have confirmed. Detonating a stolen nuclear weapon would likely be difficult for terrorists to accomplish, if the weapon was equipped with modern technical safeguards . . . Terrorists could, however, cut open a stolen nuclear weapon and make use of its nuclear material for a bomb of their own.

The nuclear material for a bomb is small and difficult to detect, making it a major challenge to stop nuclear smuggling, or to recover nuclear material after it has been stolen. Hence, a primary focus in reducing the risk must be to keep nuclear material and nuclear weapons from being stolen, by continuously improving their security . . .”34

One way to estimate the threat posed by nuclear terrorism is by thinking of it as the product of would-be perpetrators’ intentions and capabilities, minus efforts by others to mitigate the danger:

Threat = (Intentions × Capabilities) – Mitigating Actions

Today, both terrorist intentions and terrorist capabilities remain deeply worrisome. While a broad international coalition is working to defeat both IS and al Qaeda, the danger posed by large and sophisticated violent extremist organizations is likely to persist for years to come. As will be described in this report, great progress has been made in improving nuclear security, the most critical area of mitigating action. But given the scale of the threat, much more remains to be done.

### Arab Banking DA – 1NC

#### Crypto crushes Hashemite monetary controls – causes Jordanian financial crisis.

Al-Naimi et al, Assistant Professor in Finance and Risk, Ahmad A; Al-Trad, Esra'a; Yousef, Razan A. ‘21 “TRENDS OF FINTECH AND CRYPTOCURRENCIES JORDAN RECAPITULATION” International Journal of Entrepreneurship, suppl. Special Issue 4; Arden Vol. 25, (2021): 1-17.

MENA & JORDAN'S STAND ON CRYPTOCURRENCY

The evolution of cryptocurrencies has been met with a variety of regulatory and legislative responses across national jurisdictions, with few signaling approval of the general transactional and functional aspects of cryptocurrencies, while some others responding with legislative prohibitions or restrictions. This diversity of 2 legislative responses signals on one hand the perplexity of authorities as to the full possibilities of cryptocurrencies Abramowicz (2016). This diversity of 2 legislative responses signals on one hand the perplexity of authorities as to the full possibilities of cryptocurrencies, and on the other hand a realization of the inadequate oversight and governance role those authorities would have in the fully disinter mediated nature of cryptocurrency transactions (Adhami & Giudici, 2019). However, over the past few years, a greater sense of initiative has been expressed by regulatory authorities regarding the cryptocurrency space. Above all, the stimulus has come from investors and civil society groups who have been wronged by fraudulent or deceptive practices; as well as the severe decline that occurred after Christmas Day, 2017, from which many late-entrant investors have yet not recovered, and they therefore articulated the need for some sort of protection through traditional regulatory authorities. In addition, there has been an increasing body of evidence that cryptocurrencies can be used in money-laundering or terrorist-financing (AML/CFT) as well as other nefarious activities (Ahvenainen, 2018). This also behooves governments to intervene and close the gap for such actors to misuse virtual assets.

"IRS Virtual Currency Guidance: Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply" mention as a Per IRS, bitcoin is taxed as a property and the U.S. Treasury classified bitcoin as a convertible decentralized virtual currency in 2013 The Commodity Futures Trading- Commission, CFTC, classified bitcoin as a commodity in September 2015. The Bitcoin was mentioned in a U.S. Supreme Court opinion (on Wisconsin Central Ltd. v. United States) regarding the changing definition of money on 21 June 2018 Farquhar, Peter (22 June 2018). (The US Supreme Court just spoke about a bitcoin future for the first time". Archived from the original on 22 June 2018) If money services businesses, including cryptocurrency exchanges, money transmitters, and anonymizing services (known as "mixers" or "tumblers") do a substantial amount of business in the U.S., they are required to register with the U.S.FinCEN as a money services business design and enforce an Anti-Money Laundering (AML) program, and keep appropriate records and make reports to FinCEN, including Suspicious Activity Reports (SARs) and Currency Transaction Reports (CTRs) ("Prepared Remarks of FinCEN Director Kenneth A. Blanco, delivered at the 2018 Chicago-Kent Block (Legal) Tech Conference". Fincen.gov. U.S. Department of the Treasury. 9 August 2018. Retrieved 13 August 2018).

In February 2014, Central Bank of Jordan warned the public against use of Bitcoin and other Cryptocurrencies available to trade (Obeidat, 2014). Thus, it is safe to say that Bitcoin is neither banned nor illegal, but it is discouraged in Jordan, like the stand Saudi Arabia and Lebanon have on the Cryptocurrency. The Central Bank of Jordan had issued a circular to all banks operating in the Kingdom, currency exchange companies, financial companies and the payment service companies prohibiting them from dealing with virtual currencies, particularly in bitcoins but that did not discourage the small businesses and local vendors from using Bitcoin. The UAE has been prejudiced by recent FATF guiding principle to amend is regulatory framework to incorporate cryptocurrencies Chohan (2017).

CONCLUSION

The emergence of fintech has also redefined the roles of conventional financial intermediaries for example, in the fintech lending market, the increasing lending volume will give rise to commission revenue, which could then lead to an underestimation of the credit risk of the counterparty, and this is where the insurance sector could hopefully take part. Unfortunately, most of the articles are focusing on the main players and have neglected those at the supporting and back-end level, such as security, insurance, IT infrastructure, and others. In the context of developing countries like Jordan and MENA countries that are not financial centers such as Hong Kong or Singapore, there will probably be no significant consequences in terms of direct job losses because of fintech innovation. Congruently, Cryptocurrencies are an incredibly transparent alternative to the traditional fiat currencies that we are used to, and it is an alternative that improves the society. Like anything that represents a change in society, it will have to go through a significant amount of resistance before it can be widely accepted and used. Nevertheless, thanks to the effective and secure technology provided by blockchain, borrowing, lending, and saving money will become infinitely more efficient and transparent. Additionally, crypto-currency lending offers P2P investors and access to the global market. In process, they can lend to anyone, anywhere, who significantly decreases the systemic risk attached to the ebb and flow of local economic conditions, and thanks to the lack of overheads and low operational costs associated with crypto lending platforms, investors get to enjoy even higher returns. There is no doubt in the fact that Crypto-currency is the future of world currency, as already Seventeen other countries have similar AML requirements as U.S.A., But as of 2018 U.S. FinCEN receives more than 1,500 SARs per month involving cryptocurrencies which leads to a strong requirement to design a strong global AML Programme to build a strong and safe environment for an increased use of Crypto-currencies.

While,The Central Bank of Jordan still prohibits financial institutions from dealing in virtual cryptocurrencies or facilitating the transaction in any way, switching them for another currency, opening accounts for customers to deal with them, receiving remittances for them or for the purpose of buying or selling them, Being an illegal currency because there is no obligation on any central bank to exchange its value for money, and to deal with it has a high risk of fluctuating its value significantly, the risks of financial crimes and electronic pirates, and the risk of losing its value because there is no guarantor or assets against it. As the Cryptocurrencies are the main umbrella under which all types of legal and illegal cryptocurrencies, types of cryptocurrencies, illegal virtual currencies, electronic money, and cryptocurrencies issued by central banks are legal currencies. The definition and legality of cryptocurrencies continues to vary among countries and international organizations where there is no unified definition or legal framework that combines them, but there is a holistic agreement in terms of the concept that cryptocurrencies depend in their composition on encryption techniques in protecting their transactions and mostly depend on the use of blockchain technology in their circulation, and it can be said that any type of cryptocurrency based on encryption can be called exchanged currencies, but virtual currencies remain at the forefront of other types of cryptocurrencies based on encryption science. Although virtual cryptocurrencies have several benefits for the economic and individual population in light of their distinctive features, there are many risks and challenges they face, specifically the risks of fraud, money laundering and terrorist financing, which are considered in their entirety a direct threat to the security and stability of the financial system, which calls for regulatory authorities to regulate or ban them in the context of the state.

#### Arab financial retrenchement lights every corner of the middle east on fire overnight.

DOUGLAS HALLWARD-DRIEMEIER Counsel of Record for ROPES & GRAY LLP, ’17, “RIEF OF UNION OF ARAB BANKS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT” JOSEPH JESNER, ET AL., PETITIONERS v. ARAB BANK, PLC https://www.scotusblog.com/wp-content/uploads/2017/09/16-499-bsac-union-of-arab-banks.pdf

Petitioners’ broad theory of corporate liability would threaten all banks in the Middle East, forcing them to constrict severely their activities in order to avoid potentially devastating liability. Under petitioners’ theory, any bank would be liable simply for failing to intercept transactions that are even tangentially related to terrorist activities. Under their view, there is no need to demonstrate a direct connection between the transaction and the terrorist activity that harmed the plaintiffs, nor to show that the bank should have prevented the transaction. Even a bank that—like respondent—has complied with all of its regulatory obligations under the laws of the United States and the domestic laws of the countries where it operates could be subjected to liability. Given the political conditions that currently exist in the Middle East, petitioners’ theory amounts to virtual strict liability for financial institutions operating in the region. In many of the countries in which UAB’s members operate, violent conflict is a pervasive feature of everyday life, and has been for decades. Many designated terrorist organizations have active, pervasive presences. Conflict with Israel has marked much of the last seven decades of the Palestinian Territories’ history. Hamas—which has been designated a terrorist organization by the United States—retains de facto control of the Gaza Strip, and exerts a heavy influence over the entire Palestinian Territories. The situation in Iraq has been similarly unstable for many decades. Since the 1980s, Iraq’s history has been one of virtually constant war, first with Iran, then Kuwait, then among segments of the country’s Shia and Kurdish populations. Since the U.S.-led invasion in 2003, there have been years of fighting between insurgents and occupying forces, and now Iraq now confronts the growing influ- ence of the Islamic State. The Islamic State also has a strong presence in Syria, which is in a state of civil war, and where the al-Nusrah Front—another U.S.- designated a terrorist organization—is also active. Lebanon, too, has a recent history of armed conflict: a protracted civil war, several terrorist attacks, and ongoing violence in the border regions. Though Jordan has been one of the safer countries in the region, it has recently experienced attacks on security forces from violent extremist groups.This turmoil, and the presence of so many terrorist organizations, already creates significant challenges to banks operating in the region. To mitigate the risks of terrorist financing, UAB’s members already must comply with the myriad regulatory requirements imposed by countries throughout the Middle East and elsewhere. See pp. 27-33, infra. Many banks—including respondent—take additional proactive steps to combat terrorist financing that go far beyond the regulatory requirements. See pp. 16-17, infra. At the same time, they must continue to provide effective, reliable financial services to their customers, thereby helping to maintain economic stability and to connect local business interests to the rest of the region and the world. These are vital aspects of the region’s movement toward peace and prosperity. These functions would be threatened, however, by the aggressive common law expansion the petitioners pursue here. Any bank that fails to meet the required risk management standards is already subject to severe regulatory penalties. See pp. 27-33, infra. UAB and its members are committed to those regulatory standards and to holding banks accountable to meet them. Res-pondent consistently exceeds those standards. See, e.g., Gill v. Arab Bank, PLC, 893 F. Supp. 2d 542, 565 (E.D.N.Y. 2012) (stating that the Bank has long taken the optional step of instituting computerized screenings of all global branches against OFAC lists of designated terrorists); C.A. App. 1978-1798, ¶ 19. Petitioners, however, push for relaxed standards of liability under which Middle Eastern banks could barely function without exposure to liability. Given the current climate, there is a significant possibility that some transaction may have had a remote tie to regional conflict, such as transfers involving relatives of combatants or opposition groups—as alleged by petitioners—and that the activities of those groups may be alleged to be violative of international law. As regulators recognize, it is not feasible for banks to eliminate any possibility that funds passing through the banks will never be remotely related to illicit activities. See pp. 27-33, infra. Petitioners would supplant that regulatory regime with a rule of federal common law holding banks to a virtual strict liability standard whenever a jury determines that funding somehow related to activities violating international law passed through the bank. MiddleEastern banks’ potential liability would be essentially limitless. The existential threat of ATS liability against Middle-Eastern banks would hinder, rather than help, international efforts to prevent terrorist financing. The primary drivers of those efforts are domestic regulators and banks themselves. Domestic regulators cooperate with one another through formal agreements and the sharing of strategy and intelligence. Banks are partners in the fight against terrorist financing. Every indication suggests that respondent has not only met but exceeded the anti-terrorist financing requirements to which it is subject, including those of Jordan, Lebanon, Palestine, and Israel. C.A. App. 6297-6309, ¶¶ 73- 103 (explaining that respondent’s policies exceeded standards of the Palstine Monetary Authority and were more advanced than those of Israeli banks); id. at 4061- 4065, ¶¶ 25-31 (explaining that respondent’s policies and practices conformed with international best practices); id. at 4087-4100, ¶¶ 15-62 (describing Lebanon’s efforts to prevent terrorist financing and respondent’s record of maintaining high standards for compliance and of receiving “high ratings with no findings of any significant deficiencies”). Indeed, respondent is an industry leader in the proactive steps it has taken to detect and eliminate terrorist financing. Since the mid1990s, it has screened account applicants and financial transactions against local blacklists as well as internal bank blacklists. See Gill, 893 F. Supp. 2d at 565. Long before it was legally obliged to do so, respondent screened clients and transactions against the list of individuals and entities designated by the U.S. government as terrorists. See pp. 27-33, infra. Imposing liability on respondent, despite its industry-leading example in combatting terrorist financing, would signal to other banks that such efforts are pointless. Rather than encouraging cooperation with regulators and increased vigilance, subjecting respondent to liability would lead to a large-scale retrenchment in the Middle East’s formal financial sector.

#### Middle east war causes extinction.

Beres 20[Prof. Louis René Beres, Emeritus Professor of International Law at Purdue, “War And Pandemic: Expanding Complexities Of Israeli Nuclear Strategy,” Modern Diplomacy, May 7, 2020, https://moderndiplomacy.eu/2020/05/07/war-and-pandemic-expanding-complexities-of-israeli-nuclear-strategy]

By definition, any future nuclear crisis between Israel and designable enemy states would be unique or sui generis. This means, among other things, that Israel’s Prime Minister and his principal national security advisors ought never become overly-confident about predicting specific nuclear crisis outcomes or their own expertise in being able to successfully manage any such unprecedented crises. Moreover, as hinted at earlier in this essay, such expertise could be more-or-less affected by any ongoing disease pandemic. After all, Israel’s own decision-makers, like pertinent enemy decision-makers, would be meaningfully vulnerable to all virulent forms of biological “insult.”

There is more. There are no real experts in nuclear conflict situations. This statement includes a now-sitting American president who had earlier placed a far-reaching and wholly baseless faith in North Korea’s Kim Jung Un (“We fell in love”), and ho still reveals no serious intellectual understanding of US nuclear deterrence obligations. None at all.

Other thoughts dawn. Israeli strategic analysts must continuously upgrade any proposed nuclear investigations by identifying the core distinctions between intentional or deliberate nuclear war and between unintentional or inadvertent nuclear war. The tangible risks resulting from these different types of possible nuclear conflict are apt to vary considerably, in part because of certain hard-to-quantify or calculate “pandemic variables.” Moreover, those Israeli analysts who would remain too exclusively focused upon any deliberate nuclear war scenario could sometime too casually underestimate a more authentically serious and even sweeping enemy threat.

In principle, any such underestimations could produce lethal or prospectively existential outcomes for Israel. To make the avoidance of these underestimations sufficiently problematic, nuclear war risks in the Middle East could be created or enhanced via various “spillover effects” from nuclear conflict situations in other regions. Presently, regarding Israel, the most credible “ignition points” for any such creation would be India-Pakistan escalations and/or North Korean aggressions. It goes without saying, of course, that such additionally portentous escalations and/or aggressions could themselves be affected by various Covid-19 considerations

While any North Korea-Middle East nuclear intersections may at first appear far-fetched, literally any crossing of the nuclear threshold on this planet could sometime impact nuclear use in certain other far-flung places.

This does not even take into account historic ties between destabilizing North Korean nuclear technologies and the traditional Arab  state enemies of Israel. The most obvious case in point is Syria, and Israel’s remediating preemption (Operation Orchard) undertaken back in September 2007.[13]

There is more. Israel could soon need to respond to expectedly bewildering conditions generated by any US war with Iran. This is the case, moreover, even if Iran were itself to remain entirely non-nuclear.[14] Again, IMOD and the Prime Minister will need to anticipate such conditions in a suitably systematic and dialectical fashion.

Always, international relations represent a system. What happens in any one component of this system can more-or-less frequently impact what happens in another. Sometimes, the cumulative impact of regional or global interactions can also be “synergistic.” In these very dense circumstances, by definition, the calculable “whole” of any relevant interactions will prove to be greater than the simple sum of pertinent “parts.” Here, too, the presence of pandemic factors could represent a relevant and significant “force multiplier.”

In thinking about nuclear strategy, Israeli planners must calculate holistically, broadly, considering the world as a multi-actor totality, one where consequential outcomes will have to be assessed in their most conceivably complex intersections.

 Also noteworthy here is a seemingly subtle but still meaningful difference between inadvertent nuclear war and accidental nuclear war. Any accidental nuclear war would have to be inadvertent; conversely, however, there could take place various recognizable forms of inadvertent nuclear war that would not be accidental. The policy-related differences here would not by any means be insignificant.

Most critical, in clarifying this connection, would be potentially serious errors in calculation, whether committed by one or both (or several) sides. The most evident example of any such grievous mistakes would concern more-or-less plausible misjudgments of enemy intent or capacity as might emerge during the course of some particular crisis escalation. Such consequential misjudgments would most likely stem from an expectedly mutual search for strategic advantage taking place during an ongoing competition in nuclear risk-taking.

 In orthodox military parlance, this would mean a determinable multi-party search for “escalation dominance.” Accordingly, such a search could be affected by any Covid-19 triggered conditions of chaos.

To achieve a proper or (better still) optimal start in this sort of required theorizing, Israeli analysts would first need to pinpoint and conceptualize the vital similarities and differences between deliberate nuclear war, inadvertent nuclear war, and accidental nuclear war.

Subsequently, undertaking various related investigations of rationality and irrationality within each affected country’s decision-making structure would become necessary. One potential source of an unintentional or inadvertent nuclear war could be a failed strategy of “pretended irrationality.” To wit, a posturing Israeli prime minister who had somehow too “successfully” convinced enemy counterparts of his own irrationality could unwittingly spark an otherwise-avoidable enemy preemption.

At this time, correspondingly, US President Donald Trump has toyed vis-à-vis North Korea with displaying an intermittent  or occasional posture of “pretended irrationality,” but to no apparent avail. In part, this tangible lack of success may be due to the president’s earlier public declarations concerning alleged benefits of feigned irrationality.

 There is more. An Israeli leadership that had begun to take seriously an enemy leader’s self-declared unpredictability could sometime be frightened into striking first itself. In this diametrically opposite or reciprocal case, Jerusalem would become the preempting party that could then claim legality for its allegedly defensive first-strike. Under authoritative international law, as we have already noted, a permissible preemption could possibly be taken as a proper expression of “anticipatory self-defense.”[15]

Also worth considering amid any such chess-like strategic and legal dialectics is that the first scenario could end not with an enemy preemption, but with Israeli decision-makers deciding to “preempt the preemption.” Here, Israel, sensing the too-great “success” of its own pretended irrationality, might then “foresee” an enemy’s resultant insecurity. They might then decide (correctly or incorrectly) to “strike first before they are struck first themselves.”[16]

The dense strategic dialectic[17] in such cases would be multi-factorial  and complicated, perhaps even bewildering.[18]

One final point warrants concluding emphasis. A future Israeli posture of feigned or pretended irrationality need not be inherently misconceived or inconceivable. Years ago, in precisely this conceptual regard, Israeli Minister of Defense Moshe Dayan declared: “Israel must be seen (by its enemies) as a mad dog, too dangerous to bother.”

Looking ahead, such seemingly “out-of-the-box” Israeli security postures are uncertain and untested, but they are not necessarily mistaken prima facie or beyond any serious consideration. Moreover, the credibility of such potential military postures could be enhanced by considering certain more conspicuous characterizations of a last-resort “Samson Option.”[19] The key point of any such characterizations would be not to prepare for some actual “final battle” (an outcome that could be in no single country’s overall best interests), but rather to better convince a pertinent existential adversary of Israel’s willingness to take certain extraordinary risks to ensure its own survival.

While Israel has yet to exploit this particular modality of strategic thinking, Russia made precisely such a calculation with its Burevestnik missile –  a self-declared “vengeance nuclear weapon.” Plainly, Moscow is not hoping to employ such a missile as part of any operational policy, but instead to signal the United States that it is prepared to “go to the mat” with the Americans, even in starkly unpredictable nuclear terms. The Russian “point” here is not to “fight a nuclear war,” but to successfully influence the choices that its American rival will most expectedly make.[20]

Inevitably, this means to best maximize Russia’s nuclear deterrent.

Going forward, a major focus of changing Israel’s nuclear strategy will have to be the country’s longstanding posture of deliberate ambiguity or “bomb in the basement.”[21] The Prime Minister surely understands that adequate nuclear deterrence of increasingly formidable enemies could soon require lessrather than more Israeli nuclear secrecy. Accordingly, inter alia, what will soon need to be determined by IDF planners will be the operational extent and subtlety with which Israel should communicate assorted core elements of its nuclear posture; that is, its corollary intentions and capabilities to selected enemy states.

To protect itself against any enemy strikes that could carry utterly intolerable costs, IDF defense planners will need to prepare to exploit every relevant aspect and function of Israel’s nuclear arsenal. The success of Israel’s effort here will depend not only upon its particular choice of targeting doctrine (“counterforce” or “counter value”), but also upon the extent to which this key choice is made known in advance to enemy states and (at least sometimes) to these foes’ sub-state surrogates. Before such enemies can be suitably deterred from launching first strike aggressions against Israel,[22] and before they can be deterred from launching retaliatory attacks following any Israeli preemptions, it may not be enough for them merely to know that Israel has the bomb.

In extremis atomicum, these enemies will also need to believe that Israeli nuclear weapons are sufficiently invulnerable to first-strike attacksand that they are pointed menacingly at appropriately high-value targets.

The key message here is obvious and straightforward. Removing the bomb from Israel’s “basement” could enhance Israel’s nuclear deterrent to the extent that it would enlarge enemy perceptions of secure and capable Israeli nuclear forces.[23] Such a calculated end to deliberate ambiguity could also underscore Israel’s willingness to use these nuclear forces in reprisal for certain enemy first-strike and/or retaliatory attacks.[24]

From the standpoint of successful Israeli nuclear deterrence, IDF planners must generally proceed on the assumption that perceived willingness is always just as important as perceived capability. In all cases, Israel’s nuclear strategy and forces must remain fully oriented to deterrence, and never toward actual war fighting. Already, with this in mind, Jerusalem/Tel Aviv has likely taken appropriate steps to reject tactical or relatively low-yield “battlefield” nuclear weapons, and, as corollary, corresponding plans for counter-force targeting.

For Israel, without conceivable exception, nuclear weapons can make sense only for deterrence ex ante, not revenge ex post.[25]

There are various attendant problems of nuclear proliferation amongst enemy states.[26] These new nuclear powers could implement protective measures that would pose additional hazards to Israel. Designed to guard against preemption, either by Israel or by other regional enemies, such measures could involve the attachment of “hair trigger” launch mechanisms to nuclear weapon systems and/or the adoption of “launch on warning” policies, possibly coupled with pre-delegations of launch authority.

This means, most plainly, that Israel could become increasingly endangered by steps taken by its newly-nuclear enemies to prevent an eleventh-hour preemption. Optimally, Israel would do everything possible to prevent such steps, especially because of the expanded risks of accidental or unauthorized attacks against its own armaments and populations. Still, if these steps were somehow to become a fait accompli, Jerusalem might then calculate, and quite correctly, that a preemptive strike would be both legal and operationally cost-effective.

The expected enemy retaliation, however damaging, might appear more tolerable than the expected consequences of enemy first-strikes  –  strikes likely occasioned by the failure of “anti-preemption” protocols.

There is also the related matter of conventional deterrence.  In some circumstances, enemy states contemplating a conventional attack upon Israel might be dissuaded only by the threat of a strong conventional retaliation. Hence, inasmuch as a conventional war could quickly escalate into an unconventional war, Israel’s conventional deterrent could sometime prove indispensable in offering protection against chemical/biological/nuclear war[27] as well as conventional war.[28]

Arguably, a persuasive conventional deterrent is a sine qua non of Israel’s security. This is the case irrespective of the persuasiveness of Jerusalem’s nuclear deterrent, and/or the availability of any reasonable preemption options.

Reciprocally, Israel’s conventional and nuclear deterrents are interrelated, even intertwined.  For the foreseeable future, any enemy states that would launch an exclusively conventional attack upon Israel would almost surely have to maintain multiple unconventionalweapons capabilities in reserve.  Even if Israel could rely upon conventional deterrence as its “first line” of protection, that line would necessarily be augmented by Israeli nuclear deterrence in order to prevent any intra-war escalations initiated by enemy states.

Looking ahead, Israel must prepare to rely upon a distinctly multi-faceted doctrine of nuclear deterrence. In turn, this doctrine will need to be purposefully less ambiguous and more determinedly “synergistic.” Its core focus must embrace prospectively rational and non-rational enemies, and include both national and sub-national foes.[29]

These intersecting requirements are not for the intellectually faint-hearted.

Hence, they are offered here for strategic consideration and refinement to the Few, not to the Many.

Over time, any such prudential reliance should prove agreeably “cost-effective.” In any event, whether directed at nuclear or non-nuclear adversaries (or both), Israel’s nuclear strategy will play an increasingly important role in that country’s national security planning. At some point, Israel and Iran –  resembling the United States and the Soviet Union during the Cold War – could find themselves like “two scorpions in a bottle”[30] or perhaps enclosed like two “scorpions” amid three or four others.

What happens then? Will Israel be ready? A positive answer is possible only if the task is viewed in Jerusalem and Tel-Aviv as a preeminently intellectual one, a struggle not just about comparative ordnance or competitive “orders of battle,” but about “mind over mind.” In these times. of course, all relevant matters of mind will have to include various considerations of biology/pathology as well as the more usual military ones.

Fortunately, Israel has always been in recognizably prominent possession of what is most durably important. This largely overlooked factor is intellectual power. Going forward with its imperative strategic tasks, Israel’s senior planners and prime minister may have to more fully appreciate the primacy of such an antecedent or primary power. This would mean, inter alia, looking far beyond the more usual focus on high-technology military solutions, including various altogether unprecedented factors concerning virulent disease pandemic.

Among other things, these biological variables could impact actual processes  of crisis decision-making in Jerusalem and/or in certain enemy capitals, impacts with certain still-unknown force-multiplying effects that at some point could also become synergistic.

At that stage, the “whole” injurious impact of the pandemic on pertinent Israeli decision-making would have become more-or-less greater than the simple sum of all relevant “parts.” Immediately, therefore, because it would be impossible to anticipate in detail such a profound impact in all or even most of its plausible disease-based consequences, the optimal course for Israel must be to hew in general to certain strategic postures recognizably averse to excessive threat-making or risk-taking. Going forward, in these expansively uncertain times, Israel’s defense and security decision-makers should consider maximizing their inclinations to more cooperative or collaborative interactions with particular adversarial counterparts. Nonetheless, as long as the country maintains its “ace in the whole” nuclear strategy, which should be for a very long time, Jerusalem must keep up its efforts to ensure a refined and uniformly credible national nuclear strategy. And this strategy should continue to emphasize deterrence ex ante, not revenge ex post.

Otherwise, “It’s a hard rain gonna fall.”

In Israel, nuclear war must always be viewed only as a terminal disease. This means that any actual use of such weapons, by Israel and/or by its enemies, would necessarily signify an irremediable policy failure. Though assorted threats of nuclear reprisal must still reserve a residual place in Israel’s core defense planning processes – indeed, a place that is both important and indispensable – this perilous “sticking place” must also display very clear and understandable boundaries. In the final analysis, such boundaries should represent the coherent result of certain prior intellectual triumphs achieved by Israel’s policy analysts and decision-makers, victories that today must include a suitable awareness of pertinent “pandemic variables.”

Otherwise, in a literal instant, “hard rain” could drown several thousand years of civilizational progress and entire libraries of a once-sacred  poetry.

### XT – Dollar Turn

#### Decentralized, global blockchain collapses dollar primacy – creates a parallel financial system that displaces US-led Bretton Woods institutions as the guarantor of the world’s reserve currency value – it independently facilitates sanctions dodging that collapses the credibility of US dollar hegemony – Zoffer says key to deter global nuclear war.

#### Dollar centrality caps all global conflict AND prevents great power war with Russia and China

Dr. Salvatore Babones 17, Professor of Sociology at the University of Sydney, “Money Talks: The Rise of Geoeconomics Is Playing Right Into Washington’s Hands”, World Politics Review, 10/3/2017, https://www.worldpoliticsreview.com/articles/23295/money-talks-the-rise-of-geoeconomics-is-playing-right-into-washington-s-hands

Geopolitics is dead. Long live geoeconomics. Since the turn of the millennium, the geoeconomics of sanctions and sweeteners has slowly been replacing the geopolitics of diplomacy and war. With U.S. forces actively engaged across a wide swath of Africa and the Middle East, the transition from geopolitics to geoeconomics may not seem all that obvious. But on closer inspection, it becomes clear that military intervention these days is limited to places that lack functioning economies that can be effectively sanctioned. Most of the world, and all of the economically productive world, lies in the sphere of geoeconomics.

That economically productive section of the world, spanning the Atlantic and Pacific basins with North America at its center, incorporates more than 80 percent of global GDP into an interwoven fabric of transnational production networks. In this zone of integration, outright war is obsolete as a tool of foreign policy. Those who suggest that the “great powers” of today might repeat the mistakes of 1914 and stumble into war fail to understand that 21st century economic integration is much deeper than the international trade of the early 20th century. It’s hard to imagine China invading Taiwan when Taiwanese firms employ more than 15 million people in China itself.

The U.S. still maintains by far the most powerful—and most expensive—military force in the world. China will find it very difficult to catch up, even more so as its economic growth slows. But military power is less and less the main source of American influence in the world. If the U.S. was the preeminent geopolitical power of the 20th century, it is the geoeconomic behemoth of the 21st. The U.S. may account for a declining share of global GDP, but its corporations increasingly dominate global value chains and its institutions hold overwhelming sway at international forums. Just as important, the U.S. is at the center of the financial, technological, educational and other networks that form the backbone of the 21st-century global economy.

The centrality of the U.S. in the 21st-century economy makes it a new kind of sanctions superpower.

Geoeconomic power is generated more by centrality than by sheer size, and the centrality of the U.S. in the 21st-century economy makes it a new kind of sanctions superpower. Few people are even aware of EU sanctions that are not part of larger American-coordinated efforts. Countries don’t worry much about being the target of Russian economic sanctions, and China tends to offer economic carrots rather than punish with economic sticks. The EU, Russia and China all have some geoeconomic power, but only the U.S. has the power to exclude individuals, firms or even entire countries from participation in the larger global economy. In the realm of geoeconomics, the U.S. isn’t just a major player, or even the lone superpower. Quite simply, it exercises many of the functions of a global government.

The New Middle Kingdom

The U.S. is in effect the spider at the center of the web of the integrated global economy. This position makes it disproportionately influential and by far the most powerful player in the new great power game of geoeconomics. The dominance of the U.S. dollar is well known, and the global financial system has been centered on the U.S. since the end of World War I, when France, Germany and the United Kingdom all found themselves financially dependent on New York, America’s financial capital. But today the virtual infrastructure of the internet, operating systems, app stores and the entire online economy is also centered on the U.S., as are the worlds of higher education, science, medicine, publishing, business services and a host of other “post-industrial” industries.

From Asia to Europe, the giants of China, Japan and Germany also host key nodes in the 21st-century economy, but American firms and institutions predominate because they occupy leading positions not just in one or two fields, but in nearly every field simultaneously. This generates network effects that multiply American influence. What’s more, many of the leading firms and institutions that are not American are based in countries that are closely allied to the United States. Twenty-two of the 28 EU member states are also members of NATO; Canada, Australia, Japan and South Korea are all close U.S. allies; Taiwan is in effect a U.S. protectorate.

The world’s only major economic power that is not a U.S. ally is China, but China is highly dependent on investment from and exports to the U.S. and its allies. Many of the most productive and profitable niches in China’s own economy are foreign-owned, with China’s moribund state-owned enterprises claiming the majority of what remains. Even China’s world-class internet companies are locked into an American-managed industrial infrastructure. Google search may be blocked in China, but 99 percent of Chinese mobile phones run Google’s Android or Apple’s iOS operating system.

The centrality of the U.S. in what has been called the “zone of integration” created by the globalization of the world’s economy is a new phenomenon, but it’s not unprecedented. In the premodern era, before the emergence of a single global economy, the world was fragmented into separate regional economies. One of those regional economies was the East Asian economy centered on China. The English word for China descends from the ancient Roman and Greek name, “Sinae,” or the “the land of the Qin,” named for China’s founding Qin Dynasty (221-206 B.C.). But in Chinese, China is simply Zhongguo, the “Central State” or, more poetically, the “Middle Kingdom.” Premodern China was always at the center of its own world.

In all the other major languages of East Asia, China is also called by some variant of Zhongguo. Some other countries even defined themselves in relation to China. Japan is the “land of the rising sun”—as seen from China. The “nam” in Vietnam means “south,” placing Vietnam to the south of China. Japan and Vietnam, along with Korea, Mongolia, Tibet and much of Southeast Asia, once formed an integrated economic region centered on China. The Chinese name for this area, which represented the world as seen from China, was tianxia, meaning “sky-encompassed” or “all under heaven.”

By the time of the Ming Dynasty (A.D. 1363-1644), the Chinese tianxia was an integrated economic zone covering all of East Asia and extending at times into the Indian Ocean as far west as Somalia and Tanzania. This precursor to globalization with China at the center was the historical inspiration for Chinese President Xi Jinping’s One Belt, One Road initiative, known as OBOR. The two components of OBOR—the Silk Road Economic Belt and the 21st-Century Maritime Silk Road—are explicitly designed to put China back at the economic center of the Afro-Eurasian landmass. The Chinese government clearly appreciates the geoeconomic value of centrality.

The problem for China is that although the OBOR strategy of “build it and they will come” might work for the physical infrastructure of ports and railways, it is not an effective way to improve China’s position in the virtual infrastructure of the 21st-century economy. Centrality in human networks depends very little on physical connectivity. China can send all the rail cars in the world chugging across Central Asia to Western Europe, but it won’t change the fact that Western Europeans are more likely to use Facebook than WeChat—and more likely to educate their children in North America than in China.

The fact that Chinese parents are themselves beating down the doors to educate—and even give birth to—their children in North America makes the prospect of a new Chinese tianxia even more remote. Instead, as Chinese individuals seek out the most advantageous positions for themselves and their families in global economic networks, they reinforce the centrality of the U.S. in those networks. As a result, the U.S. is becoming a kind of new Middle Kingdom of what might be called an American Tianxia. The emerging American Tianxia is very different in language, culture and politics from the old Chinese tianxia, but it does share one crucial trait: the leveraging of network centrality into world-spanning geoeconomic power.

The Zone of Irrelevance

The historian Wang Gungwu, writing in 2013, was the first to suggest that the Chinese term tianxia might be applied to today’s American-centered world. He described the word tianxia as depicting “an enlightened realm that Confucian thinkers and mandarins raised to one of universal values that determined who was civilized and who was not” and suggested that today’s American Tianxia performs the same function. Replace “Confucian thinkers and mandarins” with “political pundits and NGOs” and you get the point.

The globalized people who participate in the networks of the American Tianxia—the journalists, think tankers, businesspeople, academics and other opinion leaders who are much more closely tied to the U.S. than to, say, Syria or North Korea—get to mold the image of nations and their leaders, with clear results. It’s no mystery what they think of Assad, Kim Jong Un or Abu Bakr al-Baghdadi—or even Vladimir Putin and Recep Tayyip Erdogan, who are skating on thin ice. By contrast, Saudi and Emirati attempts to stigmatize Qatar have fallen flat, since Qatar is in many ways the most liberal of the Gulf states. And with a reported 11,000 U.S. military personnel based in Qatar, it is unlikely that the U.S. would ever bring its full geoeconomic power to bear against the Qatari government. Reversing his initial condemnation of Qatar, even U.S. President Donald Trump is now offering to mediate the dispute.

China can send all the rail cars in the world chugging toward Western Europe, but it won’t change the fact that Europeans are more likely to use Facebook than WeChat.

The world may seem to be awash in conflict today, but terrible as those wars may be, they are concentrated in countries that are peripheral to the larger global economy. Conflict hotspots like Syria, Afghanistan, South Sudan, Ukraine, Myanmar and Yemen are only tenuously connected to the outside world and are completely excluded from sophisticated global production networks. They form what from a geopolitical perspective has been called the “zone of intervention” but which from a geoeconomic perspective might just as well be called the “zone of irrelevance.” Who wins these wars may make an enormous difference to the people who live in the countries affected, but it will have no meaningful impact on the larger global economy.

Geoeconomic stigmatization via the imposition of economic sanctions is also focused on countries that are relatively isolated from global economic networks. Autarkic Russia is routinely criticized for its democratic failures, yet globally networked China is not a democracy at all. It is perhaps no coincidence that while it costs the U.S. very little to sanction Russia, it would cost a fortune to sanction China. The distinction between civilization and barbarism in the American Tianxia may be based on the acceptance of universal values, but it is mainly American pundits and NGOs who make the distinction, and these days they’re much better networked with China than with Russia. As a result, China tends to get a pass from the Western expert class, at least for now. Russia does not.

The few remaining “hot” conflicts or crises that affect economically consequential areas of the world, like the ones in Iraq and North Korea, are legacies of 20th-century geopolitics. They also involve countries that are not themselves integrated into 21st-century value chains. Iraq may be oil-rich and North Korea surrounded by advanced economies, but neither is itself very well networked economically. Their very irrelevance, ironically, limits their susceptibility to geoeconomic pressure. Islamic State forces in Iraq must be confronted by military power precisely because they have no formal economy to govern, even if they have overseen a black market for oil. North Korea is similarly relatively immune to sanctions because its economy is so meager.

China is particularly careful to keep its geopolitical conflict zones clear of geoeconomic entanglements. China has broadly supported the U.S. in applying economic sanctions on North Korea because China no longer has any geopolitical use for North Korea. By contrast, in the South China Sea, where China does have geopolitical interests, it ensures that these do not interfere with the smooth functioning of important economic systems. It may be true that one-third of global ocean trade passes through the South China Sea, but it is less often pointed out that most of that trade is China’s. Thus China speaks loudly but carries a small stick when it comes to the possibility of real conflict in the South China Sea.

China’s recently resolved Doklam Plateau standoff on its border with India and Bhutan similarly illustrates China’s separation of geopolitics from economics. The Doklam Plateau is almost literally in the middle of nowhere. China’s road-building there was in many ways similar to its island-building in the South China Sea. Both represent the development of infrastructure in remote locations in order to establish a permanent Chinese presence in previously unoccupied territories. They are bold geopolitical provocations, but they are geoeconomically irrelevant. With China, as in the rest of the world, geopolitical conflicts are confined to the zone of irrelevance. In the parts of the world that matter, geoeconomics is the order of the day.

Belts and BRICS

With its OBOR initiative, China is at the forefront of moving from geopolitics to geoeconomics as the basis of its foreign relations. Unlike in the Doklam and the South China Sea, China has no territorial ambitions along its belt and road routes. Instead, it seeks to leverage economic statecraft for political gain. For example, not long after Chinese state-owned shipping company COSCO made a major investment in Athens’ port of Piraeus, the Greek government blocked an EU effort to criticize China’s human rights record. Similarly, at China’s behest the Dalai Lama has repeatedly been denied a visa to enter South Africa. South Africa is a major beneficiary of Chinese largesse that has gained entry into the BRICS summit club—joining Brazil, Russia, India and China—entirely at China’s behest.

The problem for China is that it does not control access to major global networks that people value for their own sake. As a result, China’s geoeconomic checkbook diplomacy is fundamentally transactional. This is very different from the classical Chinese tianxia, under which the countries of East Asia valued access to China’s learning, technology and unique products and thus were willing to accept the trappings of nominal Chinese suzerainty in exchange for the privilege of trading with China. In the old tianxia, China was the center of the world and could use that position to its advantage. In the new geoeconomics, China must pay full price to meet its foreign policy goals.

In its exercise of geoeconomic power, China rewards while the U.S. punishes.

The most recent BRICS summit in early September is a case in point. Just a week before the opening of the summit in Xiamen, in eastern China’s Fujian province, Chinese and Indian troops were facing off on the remote Doklam Plateau 1,700 miles to the west. But Xi presumably didn’t want to see the crisis disrupt an economic summit on his own home turf; early in his career he had served as deputy mayor of Xiamen and governor of Fujian. So he bought India off with a geopolitical withdrawal in order to meet his geoeconomic goals.

China can afford its many geoeconomic initiatives—the BRICS-sponsored New Development Bank, its own Asian Infrastructure Investment Bank, multiple OBOR initiatives, diplomatic offensives to isolate Taiwan—but the fact that it has to pay for them underlines the point that for China, geoeconomics is a costly game. China has to buy its friends. The U.S., by contrast, gets its friends for free. People are even willing to pay to join the U.S. “club,” as when countries buy U.S. airplanes or military hardware as the price of U.S. friendship.

In its exercise of geoeconomic power, China rewards while the U.S. punishes. That’s because the U.S. is in the enviable position that mere access to its geoeconomic infrastructure is valuable in itself. Countries are not paying China for the privilege of joining OBOR; China is paying them to join. China has effectively paid India to keep quiet and stay in the BRICS, paid Greece to plead its case at the EU, and paid dozens of African countries to allow Chinese state-owned firms to build infrastructure at below-cost rates. China even donated a new headquarters building for the African Union—and sent a Chinese crew to Addis Ababa to build it.

By contrast, more than a million international students—nearly a third of them Chinese—pay to study in the U.S., subsidizing American colleges while absorbing American values. More than 500 foreign companies are listed on the New York Stock Exchange, subjecting themselves to U.S. government oversight, and the U.S. dollar is on one side of the deal in 88 percent of all international currency transactions. The whole world relies on the American-dominated internet, the American-provided Global Positioning System (GPS) and American-owned computer and mobile phone operating systems. It is difficult to do business of any kind in today’s integrated economy without using U.S.-linked systems of one kind or another, which is why the U.S. is uniquely powerful in the imposition of economic sanctions.

Geoeconomics isn’t everything, and sanctions may not be able to solve all of the world’s geopolitical crises. Sometimes boots on the ground and missiles in the air are the only ways to achieve important policy and humanitarian goals. But geoeconomics is increasingly important, and in that realm, the U.S. is vastly more powerful today than postwar America was in its Cold War heyday. It is worth remembering that the U.S. at its geopolitical zenith struggled to contain an impoverished China in the Korean War and failed to contain an impoverished North Vietnam in Southeast Asia. Today, geoeconomic centrality gives the U.S. much more power to influence the policies and behaviors of other countries than military force ever did. Hegemony is dead. Long live centrality.

### 2NC – AT: “We Said ‘Regulated’ Crypto Good”

#### Shenanigans across the board…

#### Allowing anticompetitive practices on the blockchain causes global crypto forks – that discourages worldwide crypto uptake.

BRIAN P. MILLER, Counsel of Record, AKERMAN LLP, ’18, “UNITED AMERICAN CORP., a Florida company, Plaintiff v. BITMAIN, INC.” UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA Case 1:18-cv-25106-KMW Document 1 Entered on FLSD Docket 12/06/2018

Nakamoto’s Whitepaper makes express that nodes in the system “vote with their CPU power, expressing their acceptance of valid blocks by working on extending them…” While nodes “can leave and rejoin the network,” it has always been understood that it is the nodes that are mining the blockchain that are able to “vote with their CPU power.” 65. By essentially bringing in mercenaries from another network (the BTC network) to temporarily mine the Bitcoin Cash network during the software upgrade and then leave, Bitmain and Bitcoin.com effectively hijacked the blockchain. Their actions diluted the “vote” being exercised by the existing nodes6 during the upgrade, violated the ground rules of the network that other users had relied on and respected for years, and artificially pumped up the chain implementation with computer hashes to dominate the temporary software upgrade.

66. To appreciate the effective hijacking of the blockchain, one need only look at the percentage of Bitcoin blocks being awarded – and the diversity of the miners to which they were being awarded – immediately before and after the network upgrade on November 15, 2018. 67. The following pie chart illustrates the distribution of Bitcoin Cash Blocks during the week immediately preceding the network upgrade (as reported by coin.dance). Bitcoin.com and the Bitmain pools (AntPool, BTC.com, and ViaBTC) were collectively awarded 27.6% of the blocks during the preceding week.

The next pie chart illustrates the distribution of Bitcoin ABC Blocks on November 16, 2018, the day after the upgrade. Bitcoin.com and the Bitmain pools (AntPool, BTC.com, and ViaBTC) were being awarded 100% of the blocks immediately after the network upgrade.7 But the scheme did not end there. The next day on November 16, 2018, Bitcoin ABC through defendants Amaury Sechet, Shammah Chancellor, and Jason Cox, implemented a “poison pill” in the chain referred to as a “checkpoint.

. The implemented checkpoint is problematic because it also “centralized” what should be a decentralized market due to the way the checkpoint was added and its location close to the tip of the blockchain. 71. The integrity of a blockchain depends on a consensus being reached on the longest blockchain and that blockchain being accepted by all nodes on the network. While in theory the blockchain ledger becomes more and more immutable as time passes, a fork can arise at any depth on the chain and become the main chain if that is the consensus.

72. The decision by Bitcoin ABC to “lock down” the block chain after an arbitrary number of blocks close to the tip of the blockchain – through a mechanism referred to as “checkpoints” and “Deep Reorg Prevention” – will allow anyone with 51% hashing power to quickly cement control of the blockchain ledger. They would also cement control over future changes to Bitcoin cash functionality as well as changes to the consensus rules. Combining this checkpoint power with the hashing power of Bitcoin ABC backers amounts to centralization. Anyone who combines hashing power and checkpoints in this fashion will be able to override any consensus reached by the rest of the network, forcing others to conform or create an unwanted hard fork. 73. Making a centralized checkpoint that destroys the core principle of decentralized consensus was a significant and fundamental change to the blockchain that was made without consulting other Bitcoin development groups and the community at large.

74. Indeed, as early as the next day after the update, individuals in the cryptocurrency industry such as Andreas Brekken (self-proclaimed “advisor to some of the most successful blockchain projects in the world” and software engineer at Kraken), held online forums acknowledging that Bitcoin ABC developers and crypto exchanges such as Kraken agreed to implement centralized checkpoints. See https://www.youtube.com/watch?v=UjAHJY0QZhs; see also https://brekken.com/about. Brekken goes on to admit in the video “this has been planned for a long time” and “we knew within 30 minutes we had it.” The following is a screenshot of the referenced video:

Indeed, days after Bitcoin.com hijacked the network and introduced checkpoints, Lujan himself tweeted the following on behalf of and regarding Bitcoin.com taking control:

Shortly after Bitcoin.com and Ver’s hostile takeover of Bitcoin Cash, Kraken – a well-known Bitcoin exchange8

in which Ver himself is a principal investor – and Kraken’s CEO Jesse Powell, decided that Kraken would maintain the BCH ticker for the ABC chain and indicated to users that the SV chain was a high-risk environment. By doing so, Kraken and Powell effectively recognized the ABC chain as the official blockchain of Bitcoin Cash and the “winner” of the network upgrade.

77. As a result of the aforementioned market manipulation, the value of the cryptocurrency that Plaintiff mines in its BlockchainDomes has fallen significantly. The combined value of the forked currency is lower than the pre-fork currency and the resulting confusion has been severely detrimental to the market overall. Some trading platforms have chosen to list only one of the two resulting currencies, thus reducing liquidity and the value of the currencies.

78. The Defendants’ collective actions and manipulation of the market by among other things, violating the Nakamoto Whitepaper and consensus rules and hijacking the Bitcoin Cash network have created significant uncertainty and a lack of confidence in the network. Under normal decentralized market conditions, this type of uncertainty would not exist.

79. Plaintiff has suffered and continues suffering significant damages through the loss of value of the currency – a direct result of the centralization of what should be a decentralized network and the lack of democracy within the network as anticipated by the industry.

#### Adapting principles of antitrust to blockchain key to public uptake.

Massarotto, Giovanna, Prof @ Iowa, ’19, From Digital to Blockchain Markets: What Role for Antitrust and Regulation (January 26, 2019). Available at SSRN: https://ssrn.com/abstract=3323420 or <http://dx.doi.org/10.2139/ssrn.3323420>

Again, the success of blockchain technology relies on trust of participants. To maintain trust and create the foundation for a single universal blockchain platform, regulators need to create the conditions to get that consensus. Regulators need to set equal rules and oversee the compliance of those rules to ensure a stable environment when self-regulation appears to be insufficient. This would help to create and maintain compatibility and confidence especially in a public and universal blockchain. 160

In a perfect world, self-regulation would be ideal.161 As one looks back on the Internet regulatory framework, it is true that the “Internet is the least regulated part of the telecommunications world today,”162 and it is also true that the fundamental compatibility rule is enforced.163 Although it is the least regulated, Internet is still public in nature and governed by public rules enforced by public bodies.

2. What Regulation for the Blockchain Network?

The blockchain technology is in its infancy and the creation of a universal public blockchain is merely an idea. At this moment it might be difficult to elaborate specific forms of regulation for new markets that we cannot even envisage, but Internet can certainly be used as a useful model of reference both to anticipate and to regulate a future single blockchain network. Similar to the Internet, government agencies might start theorizing rules to guarantee the compatibility in a public blockchain platform and prevent an uncontrolled centralization and private supervisory powers. Sir Tim Bernes Lee suggested the adoption of a Magna Carta or Bill of rights for the Web to prevent Internet fragmentation and get everybody on the Web.164

Should we theorize a Magna Carta for the Blockchain?

The blockchain network would certainly raise some specific legal and ethical issues, which cannot yet be envisaged. Thus, let us start from what we already known about the Web and the Internet regulations to anticipate and prevent some negative consequences that might also affect the creation of a single blockchain. Regulators are encouraged to create rules to protect ethical principles in blockchains;165for example rules to prevent access by minors or people that might be interested in using a blockchain to commit crimes. This regulation may also cover the uncontrolled exchange or storage of sensitive information,166 or generally illegal and speculative activities. 167

Similar to the Internet, a public universal blockchain might need rules to guarantee nondiscrimination among market players. A regulator may choose to adopt a net-neutrality regulation to prevent a paid prioritized blockchain in a single universal blockchain. 168 In the U.S. and in Europe, net neutrality or open internet regulation169 have allowed corporations, including Google and Facebook, to act without the interference of the big Internet providers companies, creating a ‘neutral’ environment where each company can benefit from the same Internet speed, and indiscriminately grow.170

Learning from the Internet, a paid prioritization blockchain network could generate a dual speed blockchain which would require one to pay for the benefits of a high speed blockchain, or use a slower speed one for free. 171 This duality might be prevented through the creation of developing technologies. The lightning network has the potential to make blockchain transactions faster and less expensive. It is based on a payment channel that is simple and fast. Parties pay a fee only once and can transact back and forth without paying fees to miners. With each transaction, parties sign a balance sheet confirming the new balance and when their transactions are completed, the parties pay to close the channel. The lightning network is a technology less developed than blockchain and therefore too soon to make some predictions; however it clearly demonstrates again how the creation and development of new technologies can provide more organic solutions which are more ideal than regulation.

B. Some Considerations

If we look back historically, regulation and guidelines are fundamental components in the prevention of forms of inequality, illegal activities, and the abuse of market power in free and open markets. Presently there are no regulations to guide the growth and ensure an environment of trust among blockchain providers and users. Antitrust surveillance is the first step in preventing monopoly and collusion among network participants, in addition to overseeing markets until regulations are in place.172

Regulators and antitrust enforcers have a huge responsibility in the development of blockchain markets that we cannot fully envisaged presently although we know it very possibly might include the creation of a universal public blockchain. By its nature, the competitive market process looks for innovative and unanticipated solutions. As outlined above, antitrust, regulation and innovation are not separate issues.173 The path of innovation largely depends on the action of both regulators and antitrust agencies. Markets rely on the trust of users. Market speculation, uncontrolled centralization and private supervisory powers can all promote a lack of trust rather than trust.

#### Blockchain monopolization discourages public adoption.

Massarotto, Giovanna, Center for Technology Innovation and Competition (CTIC), University of Pennsylvania; UCL Centre for Blockchain Technologies (UCL CBT) ’21, Can Antitrust Trust Blockchain? Algorithmic Antitrust, Springer, 2021, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3622979 or http://dx.doi.org/10.2139/ssrn.3622979

4.4.2. Vertical concentration

In the discussion of blockchain concentration, we need to consider possible vertical concentration along the value chain of bitcoin mining (Cong, He & Li, 2018). Bitmain, as we have seen, runs Antpool one of the largest bitcoin mining pools, in addition to being the largest worldwide Bitcoin hardware manufacturer. Companies like Bitmain risks to monopolize all aspects of the Bitcoin marketplace: antitrust agencies should consider such risks.

About eighty percent of cryptocurrencies users use intermediaries, such as Coinbase, to custody their cryptocurrencies (Werbach, 2018). Coinbase is another example of centralization as it is the most successful Bitcoin wallet that has a clear centralized structure (Beikverdi & Song, 2015). Coinbase is very similar to payment platforms, such as PayPall, that controls your information with the possibility to block a client that does not follow its rules. Blockchains, such as Cardano, are also criticized for being centralized as few participants hold more than seventy percent of all Cardano coin ADA’s total supply (Medium, 2019).

In summary, the re-centralization and concentration phenomena in blockchain is effective and leads to both antitrust and security issues. Moreover, if the decentralization fails, there are no many reasons why someone should prefer blockchain from any other database.

#### Blockchain integrity key to blockchain adoption. Ensuring the stability of blockchain technology promotes public trust and investor confidence.

Massarotto, Giovanna, Center for Technology Innovation and Competition (CTIC), University of Pennsylvania; UCL Centre for Blockchain Technologies (UCL CBT) ’21, Can Antitrust Trust Blockchain? Algorithmic Antitrust, Springer, 2021, Forthcoming, Available at SSRN: https://ssrn.com/abstract=3622979 or http://dx.doi.org/10.2139/ssrn.3622979

The word trust appears frequently in the context of blockchain. We often hear that blockchain is a trustless technology. But the meaning of trust in the blockchain ecosystem seems to be controversial. The issue dealing with antitrust is particularly intriguing, as this discipline centers around the word trust.

This Section 4.1 investigates the meaning of trust exploring whether the so-called trustless blockchain technology should be immune from the antitrust scrutiny. In contrast to centralized platforms, in public blockchain you do not need to trust a third party intermediary (e.g. banks) by using a blockchain. In his white paper, Satoshi Nakamoto claimed to have introduced “a system for electronic transaction without relying on trust,” potentially making bitcoin and blockchain immune from the antitrust scrutiny (Nakamoto, 2008). Thus, at the first glance someone could argue that blockchain is exempted from antitrust surveillance.

However, Satoshi Nakamoto’s claim is not entirely true. The peer-to-peer network bypasses centralized platforms, but its functioning relies on the network of participants in the chain, which (as explained in Section 2.2) is governed by a protocol. In other words, you need to trust the technology and who set the protocol, instead of an intermediary (Shein, 2019). The success of blockchain relies on the trust of people in this new technology: blockchain and DLT in general is not an exception to this fundamental economic principle (Massarotto, 2020).

The truth is that the agreed algorithm protocol establishes mutual trust among the participants in the network by validating transactions based on a peer-to-peer mechanism (Puthal, Malik, Mohanty, Kougianos & Yang, 2018). This means lowering the costs of checking digital information, though the cost of verifying offline information remains the same. Professor Kevin Werback observed that bitcoin and blockchain do not eliminate trust, but they introduced a new form of trust by inverting the problem. People “make payments confidently with a decentralized digital currency” because they “pay people with it” (Werbach, 2018). Professor Werback defined a fourth structure of trust in blockchain.

I personally believe that trust is always the same trust, from cryptocurrencies to the context of antitrust. What does change is the context where this term is employed that can significantly change its meaning. Rather than trusting your competitor from not competing with you, or the government and judges for correctly enforcing the rules, or a bank for keeping your money safe, you trust the technology—the protocol (Schneir, 2019). This brings us back to the cryptoanarchy movement. You adopt a blockchain and you buy bitcoins because you trust a computer protocol more than the bank system and the government’s regulation.

If something goes wrong, bitcoin protocol enables the majority of the network to create a fork to reverse the consequences of hacking or bugs. The possibility to fork a blockchain keeps blockchains constantly under competitive pressure. In case a fork “offers better governance or is more competitive, it will quickly gather users and developers since switching costs are extremely low” (p. 8). This does not occur in private and permissioned blockchains, where there is not a real decentralized platform; they are very similar to traditional databases.

Up until May 2020, there were three hard forks in the bitcoin network (Bitcoin XT, Bitcoin Classic and Bitcoin Unlimited), but none reached the consensus, namely the majority of hash power. In 2016, a hard fork succeeded in Ethereum to repair the failure of ‘The DAO’ launched in Ethereum platform. At that time, the world seemed to be ready for a venture capital firm entirely self-governed by a smart contract running on a blockchain—Ethereum. The enthusiasm was so high that DAO raised $150 million in only a few months.

Unfortunately, a project aimed to be remained in the history for proving the validity of DAO, is now the symbol of a tremendous failure. A bug in its smart contract enabled a hacker to drain about $ 50 million. Some blockchain purists argued that this was part of the game and the hacker just performed something that the computer code permitted (Kolber, 2018). However, Ethereum opted to fork its blockchain and the fork successfully created Ethereum classic, which maintains the original blockchain, and the new Ethereum with the theft reversed (Leising, 2017).

This episode certainly led many to distrust DAO, and DLT, confirming that these technologies are not immune from the economic principle of trust. In the history of bitcoin and blockchain, The DAO of 2016 is not the only episode that discouraged people from investing in DLT. Silkroad and BitInstant are other two symbolic examples of how these technologies can be used to commit or incentivize crimes, such as money laundry, selling drugs, and other illegal goods and services on the Web (Planet Compliance, 2017). These episodes seriously affected the reputation of bitcoin and the DLT ecosystem. The price of Bitcoin, for example, dropped from 140$ to 110$ after the FBI shouted Silk Road, the website for selling drugs administered by Ross Ulbrich, where all transactions were conducted using bitcoins (Hern, 2013; “Bitcoin value drop”, 2013).

Likewise, DLT is not trustless from an antitrust perspective. As explored in the following Section 4, some types of blockchain may create the perfect conditions for companies to collude. Moreover, as previously observed, participants need to trust each other, raising the issue of whether this might imply some sort of collusive conduct among blockchain participants that is relevant for antitrust scrutiny.

In summary, the magnitude of DLT is enormous, but like any promising technology, DLT can be used for enabling people and markets to do what they do more efficiently, or creating more harm than benefit. DLT requires trust in order to increase its reputation and attract business. We are living in a reputation-based system—today, the economic principle of trust is even more relevant.

We commonly hear the slogan: “Don’t trust anyone with more money that their reputation is worth” (Schneir, 2019b). Reputation will be far more important in dealing than ever the credit ranking now (Schneir, 2019b)—blockchain marketplace is the next testing ground. Antitrust and effective forms of regulation will be critical to increase the reputation of the market and build—trust—in DLT as well as in any markets (Zak , 2017; Massarotto, 2020a). On the other hand, the adoption of blockchain technologies by the same government agencies might increase cryptoanarchy purists’ trust in government’s regulation.

4.2. What Kind of Entity is Blockchain?

Before exploring possible antitrust concerns, it is worth investigating blockchain’s identity in order to verify if this entity can be directly liable for antitrust violations. Antitrust presumes that there is a defined entity or a set of entities that aim to market power, which in case of monopolization, conduct or agreements in restraint of trade, can be investigated. Otherwise, as Professors Catalini and Tucker observed, it is basically impossible to prosecute antitrust conduct in the context of blockchain. (Catalini, C. & Tucker, 2018; Lianos, 2018)

Should blockchain be considered as a firm, or a network that enables people and companies to interact or something different? The decentralized nature of blockchain can, as we have seen, help antitrust agencies in preserving competition in today’s centralized platforms. On the other hand, the inherent decentralization of blockchain brings new challenges for antitrust enforcers in terms of defining blockchain’s identity.

### AT: Turn

#### 3---Russia and China won’t embrace decentralized crypto because it threatens their own economic control, even if it’d also dethrone U.S. hegemony

Nicholas Ross Smith 19, Assistant Professor of International Studies at the University of Nottingham Ningbo China, August 2019, “International Order in the Coming Cryptocurrency Age: The Potential to Disrupt American Primacy and Privilege?,” Rising Powers Quarterly, 4(1), pp. 77-97

It is undeniable that for the majority of rising powers in the current international system, there is a consensual belief that the LIO is too American-centric in its current incarnation. As alluded to earlier with regards Russia’s efforts to undermine the LIO, the BRICS grouping is one example of how rising powers have found mutual interest in addressing the perceived unfair LIO. Further to that, the emergence of the G20 as arguably the most influential forum for international financial governance, rather than the traditionally more influential G7, is a further example of rising powers trying to exert more influence (Wade 2011). However, despite these efforts, as argued above, challenging the United States’ primacy and position as arbiter of the international order is a significant undertaking because none of these challengers, even in unison, has the financial capabilities to end the United States’ financial hegemony at this stage.

However, since cryptocurrencies could, in theory at least, be seriously damaging, in the long-term, to the United States’ power position in international politics, it is reasonable to think that for the countries that are determined to modify (or even end) the American-led LIO, supporting and encouraging the growth of cryptocurrencies might become a tangible policy in the future for disaffected rising powers. For instance, China and Russia are two countries which have long-term grand strategic objectives of removing American privilege and forging a “fairer” international order in its place (Schweller & Pu 2011; Smith 2020a). Therefore, it is plausible that both China and Russia might consider using cryptocurrencies to further these aims, especially as both have demonstrated a strong fascination with the technology in recent years. Right now, this seems more of a possibility for Russia because, unlike China, it cannot realistically challenge the United States’ financial might through conventional means – it would become something of an asymmetrical weapon (Smith 2019). Russia also has far less interdependence with the United States as China (even in light of the current US-China trade war) which gives it more room to maneuver. While the potential for countries like Russia (or China) to weaponize cryptocurrencies against the United States’ privileged international financial position has not been rigorously examined yet, there does seem, in theory, to be two potential ways a revisionist power, could utilize cryptocurrencies.

One potential strategy is that either China or Russia could turn themselves into a haven for the independent cryptocurrencies that have taken the world by storm. As discussed earlier, independent cryptocurrencies like Bitcoin arguably have the most counter-hegemonic potential because they are decentralized and largely anonymous. Furthermore, they have proven quite difficult for states to regulate – including for the United States. Thus, if independent cryptocurrencies were supported by large players – and, to this end, China and/or Russia would certainly constitute a large player – the more they could eat away at the United States’ privileged financial status, especially if other countries were to follow suit. Of course, this is very much a soft strategy: an indirect way for states to harness the counter-hegemonic power of independent cryptocurrencies. Thus, such a strategy encompasses more of a “wait and see” plan than being a concrete top-down policy as independent cryptocurrencies remain a technology putatively beyond the control of states.

The challenge for Vladimir Putin or Xi Jinping here is that promoting independent cryptocurrencies could undermine the strict control that financial elites in both countries exert over the economy. For instance, both China and Russia ranked as “mostly unfree” on the 2018 Index of Economic Freedom, coming 110th and 107th, respectively, out of 186 countries (The Heritage Foundation 2018). Thus, becoming a safe haven for these largely anonymous and decentralized currencies could be extremely subversive to either Russia’s or China’s tight control of its economy and their taxation systems. This possibly explains why both Russia and China, to date, have tread a cautious line regarding their policies on independent cryptocurrencies. Regarding China, in 2017 it banned cryptocurrency exchanges and initial coin offerings (ICOs) while also clamping down on Bitcoin mining operations and Chinese-developed coins, such as OneCoin (Yang 2018). The most recent stance in Russia – it is important to note that Russia’s stances on independent cryptocurrencies have been prone to wild fluctuations so far – regarding cryptocurrencies is that it should be illegal for them to be used “as private money and money surrogates” as only the state-controlled ruble should have that privilege (Chang 2018). Nevertheless, Putin has a personal relationship with the co-founder of Ethereum, Vitalik Buterin, so it is hard to predict exactly what Russia’s eventual position on independent cryptocurrencies will be (del Castillo 2017).

Ultimately, this first hypothesized strategy represents a fine balance between costs and benefits for Russia and/or China. The benefits are potentially massive as independent cryptocurrencies could hypothetically significantly undermine the United States’ financial clout. But, at the same time, this is hardly a guaranteed outcome as there are still lingering questions as to the eventual counter-hegemonic properties of cryptocurrencies. Furthermore, the lack of executive oversight reduces the “strategic” value of such a plan because the substance of it working is dependent on external factors which the state has less control over. Then, there is the obvious domestic costs of promoting these cryptocurrencies, which, given the state of both Russia’s and China’s economies (and broader political systems) could well be too high a price for either of their leaders to gamble with.

### 2NC – Link

#### Cryptocurrency is currently limited, untrustworthy, and volatile – that prevents it from being used to evade sanctions – the plan creates trust in a stable global alternative to the dollar

Dudley 19 – Col. Sara Dudley, assigned to Joint Special Operations Command, “Evasive Maneuvers: How Malign Actors Leverage Cryptocurrency,” 2019, https://ndupress.ndu.edu/Portals/68/Documents/jfq/jfq-92/jfq-92\_58-64\_Dudley-et-al.pdf

Combining Generates National Security Threats. A breakdown in international financial market transactions in USD and in the applications of international sanctions combine to generate a noteworthy national security threat. At the moment, malign actors hiding illegal transactions in cryptocurrency markets, or renegade companies skirting sanctions to generate short-term profit, represent a general nuisance to the overall maintenance of the international financial system. However, if rogue state actors cooperate to establish their own secondary market system of cryptocurrency transactions to trade among themselves, the effectiveness of using the global financial system to thwart these regimes would be significantly challenged.35

Unless rogue states coordinate to support all import and export transactions inside a single cryptocurrency, they would still need to convert open market cryptocurrencies to fiat currency. Currently, the cryptocurrency space displays wild fluctuations in value and demonstrates the instability of speculative investments and early market normalization. Since the value of each competing cryptocurrency remains purely based on investor confidence, currency prices tend to increase and decrease rapidly. Rogue nations releasing national digital currency tied to underlying assets presents a contemporary equivalent to the gold standard. If developed, trust among rogue actors in other digital marketplaces could allow for the free flow of illicit trade and funding among participant nations. Disconcertingly similar to the Cold War model, one could imagine this type of alternative market system leading to independent states choosing to operate in one or multiple marketplaces. This type of parallel digital market system challenges both nonkinetic (financial markets) and kinetic (DOD) means by which the United States might disrupt illicit actor funding. As of July 28, 2018, open market cryptocurrencies represent under 1 percent of currency assets internationally, hence they do not represent an immediate financial market threat. However, this growing revolution in the establishment of cryptocurrencies harkens back to concepts introduced by Frederick Hayek in his 1976 essay, “Denationalisation of Money.” Hayek proposed the need to remove the central bank monopoly over issuance of currency, which is the organizing principle of current cryptocurrencies. While the USD emerged as the stable world currency of choice, the functioning of U.S. Federal Reserve monetary policy as the de facto World Bank leaves many countries dissatisfied.

#### Dollar hegemony is resilient to all potential challenges except decentralized crypto

Nicholas Ross Smith 19, Assistant Professor of International Studies at the University of Nottingham Ningbo China, August 2019, “International Order in the Coming Cryptocurrency Age: The Potential to Disrupt American Primacy and Privilege?,” Rising Powers Quarterly, 4(1), pp. 77-97

The idea that the United States’ privileged financial position, underpinned by its dollar hegemony, is in terminal decline has certainly gained some popularity in the last year or two, partly due to the aforementioned increased focus of China and Russia towards challenging it. However, a similar surge in proclaiming the United States’ exorbitant privilege dead occurred after the onset of the global financial crisis in 2007 (Calleo 2009; Layne 2012). Yet, as Fichtner (2017, 3) demonstrated, “contrary to conventional wisdom, Anglo-America’s share in financial wealth has increased since the financial crisis” to a point where it “permeates almost every political economy in the world and influences political and economic decision-making.” Furthermore, the main challenger to the US dollar in recent years, the Euro, suffered a significant material and credibility plunge due to the eurozone crisis and there are lingering doubts as to its long-term viability (Maggiori, Neiman & Schreger 2019).

Consequently, a fair assessment is that the United States’ dollar hegemony is far more resilient than most have expected as it has withstood, to date, both significant external challenges and a global financial crisis. Norrloff (2014) argues the collapse of the United States’ dollar hegemony cannot happen without a significant shift in the international system – i.e. the emergence of a legitimate challenger. However, as it currently stands, such a shift is not likely to occur in the short-to-medium term future because China, and the rest, are simply too far off to challenge the United States’ primacy. Consequently, the United States’ insulated position as the prime unit of international politics and the arbiter of the LIO, and its privileged position of having the US dollar as the global reserve currency (which in turn gives it more international power), represents a kind of unique self-reinforcing bulwark (in the current system at least) against hegemonic decline.

The challenge from the emergence of cryptocurrencies

There is a potential looming challenge to the United States’ dollar hegemony (and, gradually, its international primacy) beyond the putative efforts of China and Russia. This challenge does not come from a state, but rather from a stateless, bottom-up technological phenomenon: independent cryptocurrencies. Concisely, an independent cryptocurrency is a digitalized asset that is “constructed to function as a medium of exchange, premised on the technology of cryptography, to secure the transactional flow, as well as to control the creation of additional units of the currency” (Chohan 2017). Thus, unlike fiat currencies which rely on central authorities – namely central banks – to manage them and keep them secure, independent cryptocurrencies rely on harnessing new and developing (usually decentralized) cryptographic technologies (Narayanan et al. 2016). The most well-known cryptographic technology at the moment, first devised by Bitcoin but later adopted by not only numerous other cryptocurrencies but also businesses and organizations in general, is a “blockchain(1)” (Nakamoto 2008).

#### the plan allows decentralized coins to scale and threaten the dollar

Billy Bambrough 20, journalist, founding editor of Verdict.co.uk, covered bitcoin and cryptocurrency since 2012, published in CityAM, the Financial Times, and the New Statesman, 5/17/20, “The U.S. Just Destroyed A Potential Dollar Rival—Is Bitcoin Next?,” https://www.forbes.com/sites/billybambrough/2020/05/17/the-us-just-destroyed-a-potential-dollar-rival-is-bitcoin-next/?sh=7638e9f878b5

The U.S. Federal Reserve and president Donald Trump are fearful of challengers to the almighty dollar.

Bitcoin, a new form of digital money called cryptocurrency that is scarce and exists independently of government, heralded a wave of technological rivals to the dollar—with Facebook creating libra and China digitalizing its yuan.

This week, the U.S. financial regulator shut down messaging app Telegram's decentralized crypto project—igniting fears the U.S. could again try to destroy bitcoin if it becomes a threat to the dollar's shaky supremacy.

Following a long-running battle with the U.S. Securities and Exchange Commission (SEC), Telegram walked away from its blockchain-based Telegram Open Network (TON) and its native cryptocurrency, gram.

"Unfortunately, a U.S. court stopped TON from happening," Telegram's founder and chief executive Pavel Durov revealed this week, drawing a line under the embattled two-and-a-half year project.

Back in 2018, Telegram, now based in Dubai and boasting 400 million monthly active users, raised a staggering $1.7 billion from almost 200 private investors to fund development of the TON network and gram token.

The SEC blocked Telegram's much-hyped public fundraiser just two months later. In October last year, the SEC ordered Telegram to halt the sale of gram tokens, finding it in violation of the Securities Act.

This week, the SEC hammered home the final nail in the TON coffin.

"The U.S. court declared that grams couldn't be distributed not only in the United States, but globally," Durov wrote.

"Why? Because, it said, a U.S. citizen might find some way of accessing the TON platform after it launched. So, to prevent this, grams shouldn’t be allowed to be distributed anywhere in the world—even if every other country on the planet seemed to be perfectly fine with TON."

Durov argued the SEC decision "implies other countries don’t have the sovereignty to decide" what's good or bad for their own citizens.

"We, the people outside the U.S., can vote for our presidents and elect our parliaments, but we are still dependent on the United States when it comes to finance and technology. The U.S. can use its control over the dollar and the global financial system to shut down any bank or bank account in the world," Durov wrote, adding the U.S. can also force American iPhone-maker Apple and Android developer Google to ban apps.

"Unfortunately, we—the 96% of the world’s population living elsewhere—are dependent on decision makers elected by the 4% living in the U.S."

The decision maker in question, U.S. president Donald Trump, has made it clear competitors to the dollar are not welcome.

"We have only one real currency in the U.S.A. and it is stronger than ever, both dependable and reliable," Trump said last year in an outburst against Facebook's libra, bitcoin and cryptocurrencies. "It is by far the most dominant currency anywhere in the world, and it will always stay that way. It is called the United States dollar!"

Trump's tirade was sparked by news Facebook, now counting one third of the world's population among its monthly users, was developing a "global currency" based on bitcoin's blockchain technology.

Facebook's crypto project has, however, been severely hobbled by regulators. A digital wallet supporting major currencies is now expected to launch in October. The "global currency" libra will likely never materialize.

This heavy-handed approach to digital currencies by governments and regulators has worried some in the bitcoin and cryptocurrency community.

"Going forward, either the project is fully decentralized or it has to be fully regulated," said blockchain pioneer and managing director of investment management firm Yeoman's Capital David Johnston.

Fortunately, highly decentralized cryptocurrencies and blockchains, such as bitcoin and ethereum, are very resistant to censorship and government control.

Previous attempts to ban or even "shut down" bitcoin itself have failed. Last year, it was revealed federal prosecutor-turned bitcoin and cryptocurrency expert Katie Haun was asked to look into "shutting down" bitcoin by her boss at the U.S. attorney’s office in 2012—something she said would have been impossible.

However, other countries, including China, Russia and Iran, have been able to restrict bitcoin use by cracking down on banks and companies offering crypto services.

China outlawed crypto exchanges in 2017 and went on to crack down on many bitcoin mining operations. China is now gearing up to launch a digital version of the yuan—something that itself threatens the dollar's dominance if it doesn't catch up.

"The trend for the next few years will likely be national cryptocurrencies, so the American monetary authorities do not need competitors [such as TON and libra] with such a wide audience coverage," said Alex Kuptsikevich, FxPro senior financial analyst, adding the current size of the bitcoin and crypto market "does not pose a threat to the U.S. monetary power."

"The American regulator could very much complicate the conversion of crypto into fiat. This is not happening just because the market is small. That's why the issue is not on the top of the agenda. Nevertheless, we cannot rule out such a scenario after the official digital dollar appears."

Decentralized cryptocurrencies are still reliant on government and company-controlled services and while they can't be shut down they can be stifled.

"We are in a vicious circle: you can’t bring more balance to an overly centralized world exactly because it’s so centralized," Durov wrote, underscoring what he sees as the gravity of the situation.

### XT 1NC 3: Theoretical

#### 1. Two framing issues for evaluating solvency

#### a) The aff is only *part* of a proposal, not the entire proposal. It is insufficient to solve. There are many remaining issues with the blockchain that they do not solve. Their own author says a massive funding effort is key to just get to a stage of theoretical valuation.

#### b) most of their cards are speculative – they are untested theories that expect distant implementation. Every DA and turn we read is faster and more likely.

#### 2. Even if the tech *did* exist, humans aren’t capable of using it and regulators cant understand it because of bounded rationality.

Daryl Lim, Professor of Law @ University of Illinois at Chicago, '21 "Can Computational Antitrust Succeed?" Stanford Computational Antitrust. Vol. 1 2021.

Reflecting on computational antitrust, Eleanor Fox noted that “[w]hen you talk about data, you also have to talk about values . . . And assumptions.”66 Fox touches on a fundamental obstacle to the success of computational antitrust. Humans are not designed to process vast amounts of quantitative data, a problem the economic literature calls “bounded rationality.”67 They rely on heuristics such as ideology to navigate the world, shaped by personal experiences, beliefs, and biology.68 When humans code, their coding is not value-neutral, and biases may seep into the algorithmic code, filtering into training data and the weights judges may assign to the algorithm.69 Algorithms will likely be path-dependent, as Tom Nachbar observed, “based on decisions made in previous iterations of the program— prompting a cascading search for purpose.”70

Of course, training datasets themselves may contain biases and lead to unfair and legally erroneous decisions. For example, a case from the 1970s would likely have been decided on Chicago School’s terms, weighing potential losses to dynamic efficiency more than the intervention’s potential gains.71 Earlier cases may be more Neo-Brandeisian by comparison, favoring small businesses because of a political preference for atomism over economic efficiency.72 Moreover, the training data may identify the criteria for evaluation and replicate the problems as we advance if based on bad theories. This problem is all the more systemic in reinforcement learning, where the reward may be a biased identification, generating even more bias over time, raising the risk of what Nachbar labeled “snowballing unfairness.”73

Andrew Selbst expressed concern that using AI in adjudication exchanges one problem-bounded rationality for another: the inability to oversee or understand how AI decides completely.74 Sophisticated algorithms are too complicated to be read and evaluated even by data scientists and software engineers.75 Moreover, the massive scale of datasets makes it hard to scrutinize their contents and perpetuate algorithmic bias thoroughly.76

#### 3. This is magnified by courts being generalists – they don’t know anything about the technical details of blockchain and won’t effectively enforce the plan. [ Note – duplicated on DA]

Rowell, 17 – Professor and University Scholar at the University of Illinois College of Law (Arden, ARTICLE: ENVIRONMENTAL LAWMAKING WITHIN FEDERAL AGENCIES AND WITHOUT JUDICIAL REVIEW, 32 J. Land Use & Envtl. Law 567)

II. ENVIRONMENTAL RESISTANCE TO JUDICIAL CONTROL

Building on a long tradition in administrative law, Walker and other authors in this Symposium have noted the high level of deference that courts generally afford agencies when they are acting within the zone of their expertise--a deference that amounts to a kind of "Chevron space" for regulating without judicial interference. n9 Here, I want to build on that general background to suggest [\*570] that, where the injuries an agency is managing are environmental in nature, the agency often enjoys a "bonus" to the level of discretion it can exercise--an extra-large "space" that extends even beyond the normal "Chevron space" for regulating without judicial interference. This bonus space for supplemental environmental discretion comes from the nature of environmental injuries, which tend to be dispersed, causally complex, and nonhuman--and thus particularly difficult to manage through the judicial system, for reasons summarized below. The practical result is to provide additional insulation from judicial review--or a greater "space without courts"--for agencies managing environmental injury.

Courts are generalists; the greater the expertise needed to trace causality, and the greater the burden of technical information needed to trace multiple causes and multiple effects, the greater courts stand at an institutional and informational disadvantage to agencies, and the more willing they are to defer. n10 Of course expertise is a traditional justification for agency involvement in any type of administrative law, and concurrently a functional limit on the judicial role. n11 Yet for environmental law, this complexity interacts with its other features: particularly, with the fact that its impacts are often distant in space and time, and that they may be nonhuman in character, despite having potentially important implications for human populations.

U.S. courts adjudicate "cases and controversies," a fundamental institutional role traceable to the Constitution, and embodied most strikingly in the judicial doctrine of standing. n12 To establish standing, courts require plaintiffs to satisfy each element of a three-prong [\*571] test: (1) that the plaintiff has suffered a concrete and particularized injury in fact that is actual or imminent; (2) that the injury is fairly traceable to the action of the defendant; and (3) that it is likely, and not just speculative, that the injury will be redressed by a favorable decision by the court. n13 Plaintiffs unable to establish any of these elements are barred from bringing a judicial claim, regardless of the substance of that claim--even if the statute explicitly grants the plaintiff a statutory right to sue, as many environmental statutes do. n14 This functionally excludes plaintiffs who experience a general injury rather than a particularized one; who have experienced a probabilistic injury, or expect a future injury, rather than a concrete or imminent injury; who are unable to trace the causal chain of harm; or who cannot show that the harm experienced is remediable by courts.

Consider the classic Lujan v. Defenders of Wildlife as a case in point. n15 In the case, which concerned the extraterritorial reach of the Endangered Species Act, the Supreme Court failed even to reach the question of whether the Department of the Interior had acted within its discretion. In light of a probabilistic injury accruing indirectly to foreign endangered nonhuman animals, even a sophisticated environmental group was unable to effectively establish standing to challenge the agency action. Because even the most skeptical of judicial review standards will not overturn an agency action if there is no standing, the standard of deference offered to the agency thus became immaterial. As a result, the agency in Lujan had--as environmental agencies often do--functional discretion that stretches beyond even the permissive bounds of Chevron deference.

This does not mean that plaintiffs claiming environmental injury will always be excluded from a courtroom on the basis of standing; n17 while environmental injuries may tend to be dispersed across time and space, causally complex, and nonhuman in character, not all injuries are equally these things. That said, modern [\*572] standing doctrine categorically excludes exactly those types of injuries that are most characteristic of environmental injury: n18 injuries that tend to be spatially dispersed across a population and/or that tend to occur in the future rather than immediately will struggle to establish concrete and particularized injury in fact; injuries for which causal proof is too complicated or challenging to establish, even where causation does exist, will struggle to establish that an impact is fairly traceable to the actions of the defendant; and injuries for which the primary damage is to nonhuman plants, animals, or ecosystems will struggle to establish redressibility--and injuries that combine these qualities will struggle on all three prongs.

In sum, agency decisions regarding environmental injury enjoy even greater insulation from judicial review than non-environmental decisions, because the agency gets not only the benefit of general discretion, but also the "bonus space" from protections afforded by the fact that dispersed, causally-complex, and nonhuman injuries are often functionally excluded from judicial review. Agencies administering environmental law thus enjoy an unusually broad--and significantly court-less--policy space in which to make substantive decisions. This means that the dynamic Walker notes for general agencies--that their internal decisionmaking processes increase in substantive importance as discretion broadens n19--applies with heightened force to environmental contexts, where agency discretion is unusually expansive.

#### 4. To the extent the aff does apply – it applies antitrust badly! Enforcers will replicate biases..

Giovanna Massarotto, Adjunct Professor University of Iowa, Research Associate UCL CBT, & Ashwin Ittoo, Associate Professor, University of Liege, ’21, “CAN AI REPLACE THE FTC?” https://orbi.uliege.be/bitstream/2268/252996/1/SSRN-id3732766.pdf

Now that we have clarified the FTC role and powers within the U.S. antitrust law enforcement framework under Section 5 of the FTC Act and the main AI techniques relevant for our project, lets explain why we considered interesting the investigation of AI techniques in the enforcement of antitrust law.

As mentioned, today there is a growing interest in the application of ML techniques to the legal domain. However, some previous applications of AI algorithms in the law enforcement did not meet the expected results questioning its validity in the law enforcement. Compas is only a symbolic example of algorithm employed in the U.S. legal system with the aim to make the judicial mechanism more efficient. Compas was trained to assist judges in Florida in defining whether a defendant was likely to re-offend34 and should remain in jail or release while the trial was pending.35

Yet, the algorithm clearly showed bias in the system. According to the study conducted by the independent online newsroom Propublica, “defendants predicted to re-offend who actually did not were disproportionately black.”36 This algorithm exhibits the risks related to the adoption of AI techniques, which can lead to bias at scale if the algorithm is not correctly built and trained. A natural question to ask is whether it is worth to devise algorithm to enforce law, including antitrust law.

### XT 1NC 4: Private Blockchains

#### The plan is insufficient to solve – theory of granularity is one of many necessary steps. The key is getting access to blockchains which the plan wrongly assumes that competition agencies already have. Malicious actors will continue anticompetitive practice knowing practices remain hidden.

#### Major companies will exclusively use private blockchains, and will claim IP to prevent regulators from policing them. The aff does nothing.

Ryan C. Thomas and Peter Julian, Partners @ Jones Day, ’20,“BLOCKCHAIN TECHNOLOGY: A FUTURE ANTITRUST TARGET?” The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association Vol 30, No. 2 Fall 2020

In a “permissioned” (or private) blockchain, an administrator decides which nodes can join the network—the blockchain can be “open” to the public or only to the nodes that have the administrator’s permission.49 Private blockchains are likely to have fewer participants, greater potential for information sharing among participants, and less visibility into transactions from outside the blockchain.50 As a consequence, they are the architecture that large companies may most often use to interact with suppliers, customers, or other partners.51 In this respect, private blockchains lose many of the hallmarks of the original form of the blockchain technology, namely a radically open system in which any user can make verifiable pseudonymous transactions and see a history of all past transactions.52 Private blockchain networks in particular can spawn antitrust concerns, given the potential lack of transparency around competitor interactions. Unlike public blockchains, private distributed ledgers:53

• Have an owner who controls or delegates membership, mining rights and rewards, and maintains the shared ledger, including potentially the right to override, edit, or delete the entries on the blockchain.

• Have an owner or designated participants who are responsible for resolving discrepancies, often outside of a proof-of-work system. For example, the consensus mechanism to validate transactions may be “proof of stake” in which a node’s power to validate a transaction depends on its economic “stake” in the particular blockchain network. The idea is that with a larger stake the node will not approve transactions that would undermine the ledger’s integrity.

• Have a limited membership, often without user anonymity, in which participants can match user identifiers to real-world entities.

• Host data that are not readable or writable by the public; consequently the information exchanged cannot be reviewed by nonmembers who lack access. These attributes often make private blockchains more attractive for business applications. Private blockchains also can scale significantly better than public blockchains because they can use less computationally intensive consensus mechanisms. Likewise, private blockchains are often better suited for regulated industries that must follow mandated processes, such as “Know Your Customer” anti-money laundering and antiterrorism regulations that require customers to prove their identity.54

#### Private blockchains put regulators in a double bind. Either users are public and anonymous, in which case they are impossible to prosecute, or they are private and permissioned, in which case they are impossible to charge. The aff does not change this problem.

Almudena Arcelus et al, Mihran Yenikomshian, Noemi Nocera, 3-7-2021, "Mitigating Antitrust Concerns When Competitors Share Data Using Blockchain Technology," Harvard Journal of Law & Technology, https://jolt.law.harvard.edu/digest/mitigating-antitrust-concerns-when-competitors-share-data-using-blockchain-technology

Fundamentally, blockchain technology is a way to record, process, and authenticate data without centralizing the data or engaging in manual processing. Since blockchain technology uses sophisticated encryption methods, it becomes difficult for an individual to manipulate the data. Blockchain technology can be very useful for conducting transactions or collaborating when trust between the parties is low, such as between anonymous people on the internet or between two competitors.

There are two models of blockchain networks: public and private. A public blockchain relies on decentralized governance and is typically open to the public. A private blockchain is operated by an administrator who is responsible for either performing or delegating the task of granting access to the network.

When blockchain technology is used to share data between competitors, legitimate competition concerns may arise regarding the applications. Many collaborations might be driven by economies of scale or scope. However, they could also involve risks associated with new ways of enforcing traditional anticompetitive practices, including active collusion (price-fixing), information exchange, exclusion of competitors, and standard-setting.

Despite the risks, data sharing with blockchain technology might dramatically increase efficiency for an industry, leading to lower costs, or might even be unavoidable, such as if it were to become a requirement of legislation. We argue that most of the antitrust challenges arising from the adoption of blockchain technology can be alleviated when appropriate network design and regulatory oversight strategies are put into place.

II. Why would competitors collaborate using blockchain technology?

Blockchain technology is a distributed ledger technology whose features makes it amenable to a large variety of applications. The ledger is immutable and tamper-proof thanks to its distributed structure, meaning that it is shared by and synchronized across multiple users, and the use of cryptographic hash functions. Blockchain also allows for the automation of processes that would otherwise need human intervention via the implementation of so-called “smart contracts,” computerized transaction protocols (pieces of software) that “automatically execute the terms of a contract.”[1] These applications are useful when conducting transactions on the internet when trust between parties is low. Similarly, in the instance of two competitors sharing data, trust may also be low, and having smart contracts that execute without human intervention when certain conditions are met ensures that no party will gain the upper hand over another by not honoring an agreement.

Because of blockchain’s security and automation, potential blockchain applications span numerous industry sectors, including banking, legal services, real estate, stock trading, health data, and food production, among others. The supply chain and autonomous vehicle sectors are two examples of applications that make clear how blockchain solutions can be a source of efficiencies for transacting parties.

A supply chain is a process that provides a path for the movement of goods and services from the supplier to the end customer. Two of the main potential use cases of blockchain technology in supply chain management are product source tracking and automated transactions.[2] In the case of product source tracking, blockchain technology can allow companies and consumers to track the entire product life cycle throughout the supply chain.[3] The technology can provide an indisputable record of all the data related to shipment status, storage environment conditions, and other milestone conditions.

For example, blockchain technology could be used to verify the authenticity of a high-end handbag for sale. The technology would allow a purchaser to see when and where the bag was created and all the entities that took possession of the bag (even temporarily) to the point of sale. This technology could virtually eliminate counterfeiting attempts for many products.

In the case of automated transactions, a blockchain system can act like an incontestable enforcer among all the parties involved in a trade via the use of smart contracts, facilitating financial transactions among unknown parties without dispute. This can ensure safe cargo shipping, even in cross-border trades, and can minimize paperwork, save on labor cost, and ensure data protection. As an example, major software providers such as IBM[4] and Oracle are actively developing private blockchain solutions for firms managing complex supply chains. By thinking of the blockchain as an audit trail to track a particular product throughout its life cycle, firms can gain unmatched insight into the status, condition, and location of every product in the pipeline in real time.

A second application of blockchain is related to the automotive industry in general and to autonomous vehicles (AVs) in particular. Autonomous vehicles, or self-driving cars, are vehicles capable of sensing the environment and moving safely with little to no human input. The AV technology, when widely implemented, has a potential for disruption in multiple areas, including shipping, human transportation, and vehicle ownership.

There are various fundamental applications of blockchain to the development of AV technologies, but the most promising application relates to sharing test data and digital identities. Developing autonomous technologies requires testing, which can be expensive and time consuming, and, especially when it comes to actual road testing, requires multiple permits and authorizations. This can dramatically limit the amount of data that each company can obtain and process.

In addition, most vehicle manufacturers operate in fierce competition with each other and have little incentive to collaborate on research or exchange data freely. Blockchain technology can deliver a solution in which each piece of data is catalogued, labeled, and immutably branded by the company that generated it. All the data can then be traded[5] between different companies in an open market, which can facilitate cooperation between competitors and significantly speed up the development of AV technologies.

Such solutions can be applied to many different fields of research, accelerating the development in multiple areas of technology. For instance, the Mobility Open Blockchain Initiative (MOBI), a project currently testing these ideas, includes prominent members from the automotive industry that normally compete with one another, such as BMW, Ford, GM, Honda, and Renault.[6] Another project in this sector is Toyota’s partnership with the Massachusetts Institute of Technology (MIT)[7] to explore a blockchain solution to the management of vehicle testing data. Finally, IOTA, a permissionless distributed ledger technology firm, has announced several recent partnerships in this sector. These include a 2018 partnership with Volkswagen[8] to develop a Digital Car Pass to collect and communicate car data, and a partnership with Jaguar Land Rover[9] to develop a smart wallet for vehicles, enabling drivers to earn money and pay for selected services while on the go.

III. What are the concerns about anticompetitive uses of blockchain?

Despite the potential efficiency gains spurred by collaboration on blockchain platforms, some have argued that the adoption of blockchain technology by firms will lead to anticompetitive outcomes.

Networks with distributed ledgers that make certain sensitive data, such as price, accessible to competitors potentially could aid in collusion, such as price-fixing and bid-rigging. Specifically, competitors that form or participate in blockchain ventures might use price, cost, or output data to enter into unlawful horizontal agreements.[10] Because the ledger is distributed, everyone has access to everyone else’s transaction data, which contain prices and quantities. This could provide cartelists with a very powerful monitoring tool to detect deviation from agreed-upon prices, as well as transparent data that allow those who collude to reach terms on price or market share, for example. Firms in oligopolistic markets may achieve cooperation tacitly with this level of information.

Additionally, some believe[11] that if a specific private, permissioned blockchain network becomes critical to competing in a market, it is possible that certain competitors could be excluded from the blockchain and thereby be barred from competing in the market, depending on who administers the network. This could occur if relevant players in a particular market coexist in the same permissioned blockchain and hold the credentials to grant access. In such a scenario, these players may have an incentive to prevent new firms from entering the blockchain. Entrants would then need to compete without this resource.

Finally, if a market relies on a decentralized network, governments may not have entry points into the network to enforce regulations, and might also have trouble identifying perpetrators if the network offers users anonymity.[12][Start footnote 12\*\*[10]. See Thibault Shrepel, Collusion by Blockchain and Smart Contracts, 33 Harv. J.L. & Tech. 1 (2019), https://jolt.law.harvard.edu/assets/articlePDFs/v33/03-Schrepel.pdf.] Identification issues are particularly acute for public, anonymous blockchains, such as the one implemented for Bitcoin, while entry points may be contentious in permissioned blockchains.

Consequently, we believe that the impact blockchain has on competition will depend on whether firms actively utilize thoughtful network design strategies to promote competition, and whether regulators create and enforce clear guidelines for firms to follow while designing and operating their blockchain networks. We discuss these points in the next section

#### 4. More evidence.

Antonio Capobianco, OECD, ’18, “DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE” DAF/COMP/WD(2018)47, https://one.oecd.org/document/DAF/COMP/WD(2018)47/en/pdf

5. Should competition agencies be given permission to access blockchains? This might enable them to monitor trading prices in real-time, spot suspicious trends, and, when investigating a merger, conduct or market have immediate access to the necessary data without needing to impose burdensome information requests on parties. 16. Similarly, easy access to the information on a blockchain for a firm’s owners and head offices would potentially improve the effectiveness of its oversight on its own subsidiaries and foreign holdings. Competition agencies may assume such oversight already exists, but by making it easier and cheaper, a blockchain might make it more effective, which might allow for more effective centralised compliance programmes.

### XT 1NC 5: No Enforcement

#### Blockchain users are anonymous – they cannot be prosecuted because no one knows who they are. This is why bitcoin is a major risk for terrorism and money laundering. 1NC evidence is far more strongly worded than the aff – it says enforcement is “impossible” and regulatory have “no ability.” Aff evidence is speculative about capabiliites that don’t yet exist.

#### Their own author agrees – the plan is only one part of a massive proposal. Anonymity is the death of antitrust.

Thibault Shrepel ’19 Collusion by Blockchain and Smart Contracts, 33 Harv. J.L. & Tech. 1 (2019),

Answers to these questions are necessary because blockchain must be free from monopolization, abuses of dominance, and collusive agreements to produce the maximum good. Answering these questions requires an in-depth analysis of two pillars. The first is substantive. Blockchain challenges law enforcement by making it possible to im-plement illegal practices more efficiently with the help of smart contracts. The contours of what the technology allows must therefore be precisely defined. The second is procedural. Blockchain challenges the law’s enforceability because of its technical characteristics. Blockchain is pseudonymous and immutable, which creates issues regarding the detection of practices as well as the identification of perpetrators. I will address these two pillars by studying the birth of collusive agreements through blockchain, their life, and their deat

#### Impossible to remediate - blockchains are immutable. antitrust enforcers cant reverse any illicit transaction, so antitrust authorities have no remedies in the toolbox. Every block is linked to the block before and after it, so to change any one transaction you have to change them all, and to change them all, you need to solve millions of cryptography puzzles at once.

#### Everyone is anonymous and you can’t turn it off – even if attribution is perfect, it solves nothing

Kapanazde 21 [Lika, Master of Laws, Comparative Private and International Law at New Vision University. "The Challenges of Blockchain Technology to Antitrust Law." https://openscience.ge/handle/1/2670]

Anticompetitive practices that violate antitrust laws are usually detected and then stopped and sanctioned by the public authorities. However, doing so in relation to the blockchain technology is tricky, as identities of the perpetrators are anonymous, it is impossible to determine the relevant jurisdiction and remedy the anticompetitive practices due to the immutability of the blockchain.

Antitrust authorities have no ability to detect anticompetitive practices as well as the identification of users who engage in those practices, due to the privacy and pseudonymity of the users.98 If new technologies develop, that enable tracking such practices and perpetrators by the public authorities, it would significantly affect the cornerstone “values” of the blockchain and change the nature of it. Therefore, it is highly unlikely, to implement such technologies on the blockchain. Besides, inherent nature of the blockchain creates a real barrier to antitrust enforcement authorities to remedy, delete or stop anticompetitive practices, since the network is distributed, and no one is in control, but at the same time everybody is, except for the authorities themselves.99 Even if authorities will have a power to track the practices and determine the identities of the perpetrators, they will not be able to stop such practices. Immutability of blockchain ensures, that platform will continue to function (as long as the people who interact with it pay the transaction fees charged by miners who support the blockchain) and there is no server to shut down the blockchain, even if authorities impose strict regulation or penalties on the original parties who developed or promoted such blockchain.100 In other words, if anticompetitive practices are implemented on a blockchain and public authorities detect them, authorities will not be able to stop it and blockchain will continue to perform the transactions.

### XT 1NC 6: International Circumvention

#### Mining pools are global – users link their IDs to thousands of nodes distributed around the globe. Prefer recent evidence that accounts for the China ban.

Joe Coroneo-Seaman, Production 12-6-2021, "‘Great mining migration’: Power-hungry Bitcoin leaves China," Dialogo Chino, https://dialogochino.net/en/climate-energy/49089-great-mining-migration-power-hungry-bitcoin-leaves-china/

Mass exodus

“The crackdown in China has resulted in a mass exodus of miners,” explains Peter Wall, CEO of North American cryptocurrency mining firm Argo Blockchain. “Displaced Chinese miners are searching the globe for appropriate hosting sites for their machines.”

Countries with access to cheap electricity like Canada, Russia, Kazakhstan and, especially, the United States are now seeing a surge in interest from Chinese miners looking to partner with local firms. Latin American nations with similarly affordable electricity rates and a weak institutional framework for the industry are also emerging as destinations for the industry.

Venezuela and Paraguay are among those looking to attract miners unable to operate in China and Argentina could become a global bitcoin mining destination, with Canada-based Bitfarms announcing it had begun construction of a 210 MW Bitcoin mining facility in Argentina, the largest in the country. The mine will source its power directly from the Maranzana gas power station.

In September, El Salvador’s president Nayib Bukele made headlines when he adopted the currency as legal tender, despite experts voicing concerns that the attendant increase in demand for electricity would make the country more dependent on energy imports than it already is.

So how will this “great mining migration”, as it is described in cryptocurrency circles, shape Bitcoin’s carbon footprint?

“We hope that the long-term impact of this migration is the re-installation of machines in jurisdictions in which mining operations can be powered by renewable energy,” says Wall.

The short-term reality may not be so rosy. In July, Beijing-based crypto-mining giant Bitmain agreed to move a batch of its mining machines to a 180 megawatt (MW) facility in Kazakhstan whose electricity is supplied by a local coal power plant. Given that just 1% of Kazakhstan’s energy mix is renewables, this may not be a one-off. In Canada, oil and gas company Black Rock Petroleum has agreed to host up to 1 million Bitcoin-mining machines relocated from China, with the first 200,000 units sourcing power directly from a natural gas well.

#### This means every antitrust case regarding the blockchain gets instantly thrown out – no plaintiff could ever have standing.

TUART D. LEVI, ALEXANDER C. DRYLEWSKI, GIYOUNG SONG AND THANIA CHARMANI, SKADDEN, ’19, “EMERGING DISCOVERY ISSUES IN BLOCKCHAIN LITIGATION” Legal Tech News. An ALM Publication.

Jurisdiction: Because blockchain networks are decentralized, they generally involve a limitless number of computers globally distributed. Accordingly, these networks may not have a presence, or involve parties engaging in activities, in any one physical location. Therefore, blockchain litigation may involve questions around personal jurisdiction, extraterritorial application of U.S. laws, and judgment collection, and jurisdictional discovery may be sought where these issues arise. In some cases, courts are able to navigate disputes over jurisdiction where a party is an identifiable “on-ramp” to a blockchain or where the conduct at issue occurred before full decentralization took place. For example, in the Tezos securities litigation, the court held that the defendant was subject to personal jurisdiction based on factual allegations that the websites were in English, hosted in the U.S., and the offering was designed to accommodate U.S.-based participation. In finding there was proper extraterritorial application of the Securities Exchange Act of 1934, the court considered where the website was hosted and operated, and whether “a network of global ‘nodes’” in the blockchain were “clustered more densely in the United States than in any other country.” On the other hand, a Colorado federal court in Shaw v. Vircurex recently dismissed on personal jurisdiction grounds a class action brought by an investor in a defunct online digital currency exchange after its operators allegedly froze customer funds while descending into insolvency. The court held there was no evidence that the account process involved any negotiations (which, in a traditional transaction, would have taken place at least in part in Colorado) or that the defendants purposefully directed their activities at Colorado or even knew that the injury would be felt there.

#### Even if they establish standing and win the case, injunctive relief can’t be enforced abroad – countries just won’t cooperate.

Ben Bradshaw et al is a par tner and Julia Schiller a counsel in the Washington, DC office of O’Melveny & Myers LLP, Remi Moncel is an associate in O’Melveny’s San Francisco office, ’17, "International Comity in the Enforcement of U.S. Antitrust Law in the Wake of in Re Vitamin C," Antitrust 31, no. 2 (Spring 2017): 87-93

Having found that Chinese law required defendants to violate U.S. antitrust law, the Second Circuit went on to consider whether the remaining factors in the Timberlane/ Mannington Mills balancing test weighed in favor of dismissal. The court concluded that they did.32 Of particular note, the court found that while the plaintiffs may have been unable to obtain a Sherman Act remedy in another forum, complaints as to China’s export policies could be adequately addressed through diplomatic channels and the World Trade Organization, of which both the United States and China are members.33 The court found it significant that there was no evidence that the defendants acted with the express purpose or intent to affect U.S. commerce or harm businesses in particular. Moreover, the regulations at issue were intended to assist China in its transition from a staterun economy and to remain a competitive participant in the global Vitamin C market.34 Finally, the court recognized that according to MOFCOM the exercise of jurisdiction had already negatively affected U.S.-China relations, and it would be unlikely that the injunctive relief obtained by the plaintiffs in the district court would be enforceable in China, just as a similar injunction issued in China against a U.S. company would be difficult to enforce in the United States.35 Upon consideration of all of these factors, the court concluded that exercising jurisdiction was inappropriate and dismissed the case.

#### The aff has 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.

#### 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.

#### 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

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

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

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

### XT – Remaining Impact Business

#### Disarm spillover is silly obv – just because blockchain COULD verify arms control treaties doesn’t mean there’s latent political will to sign those now – how are the US and Russia going to negotiate one given Ukraine?

#### Blockchain’s only relevant for arms control if the chains are private and controlled by states – opposite what the plan promotes!

Michal Onderco 21, Associate Professor of International Relations in the Department of Public Administration and Sociology at Erasmus University Rotterdam; and Madeline Zutt, research associate at Erasmus University Rotterdam, 2021, “Emerging technology and nuclear security: What does the wisdom of the crowd tell us?,” Contemporary Security Policy, 42(3), pp. 286-311

Our third finding focuses on whether emerging technologies could enhance or impede nuclear disarmament efforts. Some work has already exposed how new technologies have the potential to strengthen nuclear disarmament and verification measures. A prototype “SLAFKA” was recently jointly developed by a nuclear regulator in Finland (STUK), the University of New South Wales in Australia, and the Stimson Center in the United States which tests whether a distributed ledger technology (DLT) can effectively safeguard nuclear material (Stimson Center, 2020). A DLT platform is “a system of electronic records that enables independent entities to establish consensus around a “ledger”—without relying on a central coordinator to provide the authoritative version of the records” (Rauchs et al., 2018, p. 23). Blockchain is the most well-known type of distributed ledger. Importantly, blockchain is structured in such a way that all who participate in the shared ledger must agree upon a set of records or data, and this data cannot be changed or tampered with by one actor alone (Rockwood et al., 2018). When it comes to accounting for nuclear materials, blockchain could be used by member states to confidentially and securely provide data to the IAEA (Vestergaard, 2018). By using a shared ledger system, the transmission of data by a member state would be visible to other member states, while maintaining the anonymity of participants (Rockwood et al., 2018).

In a recent report, Burford (2020) notes that the characteristic features of blockchain, namely its immutability and security as a data management tool, are uniquely suited to “help to build technical capacity among [non-nuclear weapons states] and habits of cooperation among NPT parties, while protecting proliferation-sensitive data” (p. 21). Finally, others have noted that advances in image-recognition software combined with the increased sophistication in and availability of satellite imagery could open up space for more actors to get involved in verification activities (Kaspersen & King, 2019). This would make verification more robust by allowing a greater number of states to participate in what has traditionally been the domain of states that are more technologically superior.

### XT – AT: Grid

#### No blackouts impact – services are quickly restored, and companies have strengthened their defenses. No attacks can produce them either – operational challenges and lack of skills and tools mean hackers can’t take down the grid – that’s Lewis.

#### Hardening and monitoring check critical infrastructure

Melendez ’20 [Steven – Fast Company, “‘We’re always ready’: Would the U.S. win a cyberwar with Iran?,” 1-15-20, https://www.fastcompany.com/90450348/were-always-ready-would-the-u-s-win-a-cyber-war-with-iran]

The good news, experts say, is that the worst-case scenario is highly unlikely. Iranian military leaders know that a violent cyberattack on civilian targets would likely result in serious retaliation from the United States and its allies. “The strategy that I see right now is they want to retaliate without dragging themselves into an all-out war with the U.S.,” said Carmel, the chief strategy officer at Cybereason. When Iran first retaliated for Soleimani’s death, for instance, it appeared to pick U.S. military targets in Iraq that did not result in any casualties, effectively capping the cycle of escalation. That same strategic thinking would likely guide Iran in any future cyberattack, Lewis suggested. “If they turned out the lights in an American city, they would probably expect a violent U.S. response,” he said. “If they wipe the data from another casino, they might think they could get away with it.” Of course, U.S. forces are always hunting for evidence of digital incursions—and are reportedly increasingly willing to use offensive cyberpower to prevent or preempt attacks. “It wouldn’t surprise me if Cyber Command is monitoring the Iranians to see if they should interfere,” said Lewis. In such cases, the costs of electronic snooping—probing U.S. systems for potential vulnerabilities—can escalate quickly. At the same time, Carmel said, U.S. organizations have begun to invest more in technology to detect and stop cyberattacks sooner rather than later. With enough time and effort, practically any computer system can be hacked, but more robust monitoring and defensive capabilities have limited the number of soft targets, and increased the resources required to cause widespread damage. “America’s a really big country, and so there’s millions of targets, and some of them are really tough,” noted Lewis. “Some of the ones the Iranians would want to hit like the really big banks, they probably wouldn’t have the capability.”s

#### Blackouts happen all time---no cascading effect AND a litany of alt causes

Hassan Haes-Alhelou et al. 19., Mohamad Esmail Hamedani-Golshan, Takawira Cuthbert Njenda, and Pierluigi Siano. \*Department of Electrical and Computer Engineering, Isfahan University of Technology, Iran. \*\*Department of Electrical Power Engineering, Faculty of Mechanical and Electrical Engineering, Tishreen University, Lattakia. \*\*\*Department of Management & Innovation Systems, University of Salerno, Italy., 2-20-2019, "A Survey on Power System Blackout and Cascading Events: Research Motivations and Challenges," MDPI, <https://www.mdpi.com/1996-1073/12/4/682> \*numbers edited for easier reading

In this section, we consider some of the blackouts that have occurred in the USA. Table 4 shows the total number of blackouts recorded in the USA from 2008 to 2015 [54,56]. The least amount of power outages was 2169 [2100], recorded in 2008 and it left 25.8 million people stranded. The following year, 2840 outages were recorded and 13.5 million people were affected [54]. This was the least number of people affected as recorded from 2008 to 2015 [56]. Out of the 3149 outages that occurred in 2010, 17.5 million people were affected [54]. The highest recorded number of people affected was 41.8 million when 3071 outages occurred in 2011. In 2012, 2808 outages were recorded leaving 25.0 million people without power. Of the 3236 power outages that occurred in 2013, 14.0 million people were affected. The largest number of power outages occurred in 2014 and 14.2 million people were affected [56]. Lastly, in 2015 out of the 3571 recorded power outages a total of 13.2 million people were affected [56]. The numbers are just not mere statistics but indicate the severity of the recorded power outages. Even though Table 4 focuses on the number of outages and the people affected, the impacts of these outages can be far reaching [57]. USA is used as a case study example but different countries across the globe experience similar power outages with some resulting in the total collapse of the power system. Table 5 shows the summary of the recorded outages in 2015 [56]. Of the 3571 recorded outages a total of 13,263,473 customers were affected. In total, the outages lasted for approximately 122 [120] days in terms of lost time [54]. An average of 3714 people were affected per each outage that occurred and each outage lasted for at least 49 min [54]. The loss in monetary value amount to billions of US$ [54].

Of the 3571 outages recorded in 2015, we also considered the top ten states with the highest number of recoded outages [54]. In Figure 3, it can be seen that California was the most affected with 417-recorded outages which is about 25% of the recorded outage. Indiana had the least amount of recorded outages amounting to 100 in the same year. From the analysis of blackouts, the major cause was weather conditions. Therefore, the areas with the highest number of outages indicated areas that had more abnormal weather conditions. In what follows, we show the major causes and events that might lead to a blackout situation. We firstly highlight the significant causes that led to blackouts in USA in 2015. As explained earlier, power outages affect millions of customers and have serious further economic effects [54,56,58,59]. Generally, the causes of power outages range from natural disasters, aging power systems, and maloperation of protection systems or operators. Some of the major causes of power system blackouts as recorded in the USA in 2015 are described in what follows. On 17 November, a windstorm with a speed of about 70 mph destroyed electrical power lines leaving nearly 180,000 customers affected [54,56]. Trees falling on electrical power lines further worsened the effect. A storm which was classified as more severe than Hurricane Sandy left 280,000 people without power after destroying electrical power infrastructure on 23 June [54]. During the same period, 250,000 customers were affected in the Philadelphia region [54]. A power outage, which was caused by an underground fire on 15 July, left 30,000 people without power [54]. Further investigations indicated that the problem was aging equipment. An increased demand of power on 20 September when the weather temperatures were very high led the utility to curtail some loads in order to balance the generation and demand. About 150 MW of power was curtailed, leaving 115,000 San Diego customers without power [57]. On 7 April, a metal said to have broken loose from a power line at a switching station led to the interruption of power supply from two power stations [56]. Thousands of people were affected in Washington DC and Maryland. On 14 July, Birmingham experienced severe power cuts due to bad weather. A frosty storm which hit Oklahoma city on 28 November led to power cuts which affected 110,000 residents [54]. The main reason was that power lines were coated with ice to an extent that they became heavy and broke. Similarly, on 14 February, a cold front which brought severe winds of over 50 mph left 103,000 customers in need of power [56]. On 24 December, 60 mph winds led to power cuts leaving nearly 105,000 homes and businesses without power.

#### Warming is silly – climate MONITORING does not equate to climate ENFORCEMENT – card is a purely theoretical proposal that IoT could be used in conjunction with climate treaties and international agreements, not that it will be – alt causes like every other country outweigh.

### XT – AT: Warming

#### No warming impact – empirics disprove bio-d losses and even extreme levels don’t threaten extinction because crops aren’t sensitive to temperature increases. Even if sea levels rise, most land would remain – that’s Ord.

#### Even extreme warming won’t cause extinction

Dr. Toby Ord 20, Senior Research Fellow in Philosophy at Oxford University, DPhil in Philosophy from the University of Oxford, The Precipice: Existential Risk and the Future of Humanity, Hachette Books, Kindle Edition, p. 110-112

But the purpose of this chapter is finding and assessing threats that pose a direct existential risk to humanity. Even at such extreme levels of warming, it is difficult to see exactly how climate change could do so. Major effects of climate change include reduced agricultural yields, sea level rises, water scarcity, increased tropical diseases, ocean acidification and the collapse of the Gulf Stream. While extremely important when assessing the overall risks of climate change, none of these threaten extinction or irrevocable collapse.

Crops are very sensitive to reductions in temperature (due to frosts), but less sensitive to increases. By all appearances we would still have food to support civilization.85 Even if sea levels rose hundreds of meters (over centuries), most of the Earth’s land area would remain. Similarly, while some areas might conceivably become uninhabitable due to water scarcity, other areas will have increased rainfall. More areas may become susceptible to tropical diseases, but we need only look to the tropics to see civilization flourish despite this. The main effect of a collapse of the system of Atlantic Ocean currents that includes the Gulf Stream is a 2°C cooling of Europe—something that poses no permanent threat to global civilization.

From an existential risk perspective, a more serious concern is that the high temperatures (and the rapidity of their change) might cause a large loss of biodiversity and subsequent ecosystem collapse. While the pathway is not entirely clear, a large enough collapse of ecosystems across the globe could perhaps threaten human extinction. The idea that climate change could cause widespread extinctions has some good theoretical support.86 Yet the evidence is mixed. For when we look at many of the past cases of extremely high global temperatures or extremely rapid warming we don’t see a corresponding loss of biodiversity.87

[FOOTNOTE]

We don’t see such biodiversity loss in the 12°C warmer climate of the early Eocene, nor the rapid global change of the PETM, nor in rapid regional changes of climate. Willis et al. (2010) state: “We argue that although the underlying mechanisms responsible for these past changes in climate were very different (i.e. natural processes rather than anthropogenic), the rates and magnitude of climate change are similar to those predicted for the future and therefore potentially relevant to understanding future biotic response. What emerges from these past records is evidence for rapid community turnover, migrations, development of novel ecosystems and thresholds from one stable ecosystem state to another, but there is very little evidence for broad-scale extinctions due to a warming world.” There are similar conclusions in Botkin et al. (2007), Dawson et al. (2011), Hof et al. (2011) and Willis & MacDonald (2011). The best evidence of warming causing extinction may be from the end-Permian mass extinction, which may have been associated with large-scale warming (see note 91 to this chapter).

[END FOOTNOTE]

So the most important known effect of climate change from the perspective of direct existential risk is probably the most obvious: heat stress. We need an environment cooler than our body temperature to be able to rid ourselves of waste heat and stay alive. More precisely, we need to be able to lose heat by sweating, which depends on the humidity as well as the temperature.

A landmark paper by Steven Sherwood and Matthew Huber showed that with sufficient warming there would be parts of the world whose temperature and humidity combine to exceed the level where humans could survive without air conditioning.88 With 12°C of warming, a very large land area—where more than half of all people currently live and where much of our food is grown—would exceed this level at some point during a typical year. Sherwood and Huber suggest that such areas would be uninhabitable. This may not quite be true (particularly if air conditioning is possible during the hottest months), but their habitability is at least in question.

However, substantial regions would also remain below this threshold. Even with an extreme 20°C of warming there would be many coastal areas (and some elevated regions) that would have no days above the temperature/humidity threshold.89 So there would remain large areas in which humanity and civilization could continue. A world with 20°C of warming would be an unparalleled human and environmental tragedy, forcing mass migration and perhaps starvation too. This is reason enough to do our utmost to prevent anything like that from ever happening. However, our present task is identifying existential risks to humanity and it is hard to see how any realistic level of heat stress could pose such a risk. So the runaway and moist greenhouse effects remain the only known mechanisms through which climate change could directly cause our extinction or irrevocable collapse.

This doesn’t rule out unknown mechanisms. We are considering large changes to the Earth that may even be unprecedented in size or speed. It wouldn’t be astonishing if that directly led to our permanent ruin. The best argument against such unknown mechanisms is probably that the PETM did not lead to a mass extinction, despite temperatures rapidly rising about 5°C, to reach a level 14°C above pre-industrial temperatures.90 But this is tempered by the imprecision of paleoclimate data, the sparsity of the fossil record, the smaller size of mammals at the time (making them more heat-tolerant), and a reluctance to rely on a single example. Most importantly, anthropogenic warming could be over a hundred times faster than warming during the PETM, and rapid warming has been suggested as a contributing factor in the end-Permian mass extinction, in which 96 percent of species went extinct.91 In the end, we can say little more than that direct existential risk from climate change appears very small, but cannot yet be ruled out.

#### Warming doesn’t rise to extinction – new studies.

Nordhaus ’20 Ted Nordhaus, an American author, environmental policy expert, and the director of research at The Breakthrough Institute, citing new climate change forecasts. [Ignore the Fake Climate Debate, 1-23-2020, https://www.wsj.com/articles/ignore-the-fake-climate-debate-11579795816]

Beyond the headlines and social media, where Greta Thunberg, Donald Trump and the online armies of climate “alarmists” and “deniers” do battle, there is a real climate debate bubbling along in scientific journals, conferences and, occasionally, even in the halls of Congress. It gets a lot less attention than the boisterous and fake debate that dominates our public discourse, but it is much more relevant to how the world might actually address the problem. In the real climate debate, no one denies the relationship between human emissions of greenhouse gases and a warming climate. Instead, the disagreement comes down to different views of climate risk in the face of multiple, cascading uncertainties. On one side of the debate are optimists, who believe that, with improving technology and greater affluence, our societies will prove quite adaptable to a changing climate. On the other side are pessimists, who are more concerned about the risks associated with rapid, large-scale and poorly understood transformations of the climate system. But most pessimists do not believe that runaway climate change or a hothouse earth are plausible scenarios, much less that human extinction is imminent. And most optimists recognize a need for policies to address climate change, even if they don’t support the radical measures that Ms. Thunberg and others have demanded. In the fake climate debate, both sides agree that economic growth and reduced emissions vary inversely; it’s a zero-sum game. In the real debate, the relationship is much more complicated. Long-term economic growth is associated with both rising per capita energy consumption and slower population growth. For this reason, as the world continues to get richer, higher per capita energy consumption is likely to be offset by a lower population. A richer world will also likely be more technologically advanced, which means that energy consumption should be less carbon-intensive than it would be in a poorer, less technologically advanced future. In fact, a number of the high-emissions scenarios produced by the United Nations Intergovernmental Panel on Climate Change involve futures in which the world is relatively poor and populous and less technologically advanced. Affluent, developed societies are also much better equipped to respond to climate extremes and natural disasters. That’s why natural disasters kill and displace many more people in poor societies than in rich ones. It’s not just seawalls and flood channels that make us resilient; it’s air conditioning and refrigeration, modern transportation and communications networks, early warning systems, first responders and public health bureaucracies. New research published in the journal Global Environmental Change finds that global economic growth over the last decade has reduced climate mortality by a factor of five, with the greatest benefits documented in the poorest nations. In low-lying Bangladesh, 300,000 people died in Cyclone Bhola in 1970, when 80% of the population lived in extreme poverty. In 2019, with less than 20% of the population living in extreme poverty, Cyclone Fani killed just five people. “Poor nations are most vulnerable to a changing climate. The fastest way to reduce that vulnerability is through economic development.” So while it is true that poor nations are most vulnerable to a changing climate, it is also true that the fastest way to reduce that vulnerability is through economic development, which requires infrastructure and industrialization. Those activities, in turn, require cement, steel, process heat and chemical inputs, all of which are impossible to produce today without fossil fuels. For this and other reasons, the world is unlikely to cut emissions fast enough to stabilize global temperatures at less than 2 degrees above pre-industrial levels, the long-standing international target, much less 1.5 degrees, as many activists now demand. But recent forecasts also suggest that many of the worst-case climate scenarios produced in the last decade, which assumed unbounded economic growth and fossil-fuel development, are also very unlikely. There is still substantial uncertainty about how sensitive global temperatures will be to higher emissions over the long-term. But the best estimates now suggest that the world is on track for 3 degrees of warming by the end of this century, not 4 or 5 degrees as was once feared. That is due in part to slower economic growth in the wake of the global financial crisis, but also to decades of technology policy and energy-modernization efforts. “We have better and cleaner technologies available today because policy-makers in the U.S. and elsewhere set out to develop those technologies.” The energy intensity of the global economy continues to fall. Lower-carbon natural gas has displaced coal as the primary source of new fossil energy. The falling cost of wind and solar energy has begun to have an effect on the growth of fossil fuels. Even nuclear energy has made a modest comeback in Asia.

## Adv 2

### XT 1NC 1: Squo Solves

#### Block*chains* are exempted from antitrust law, but blockchain *users* are not. Every anticompetitive practice on a blockchain can already be policed by targeting the legal entity responsible for facilitating the transaction. If I refuse to deal with you on a blockchain, I am still liable under the Sherman act.

#### Prefer our evidence – Schrepel is not speaking about American antitrust law, but about global antitrust law generally. That’s why he says “competition law” and teaches in the Netherlands. In *America* all these anticompetitive practices are *already* covered.

#### Their “theory of the firm” explanation is science fiction – antitrust law is already sufficient to cover anticompetitive blockchain practices without considering the “nucleus.” Prefer evidence citing the head of the DOJ antitrust division and the majority of FTC commissioners over a Scandinavian tech bro.

Ryan C. Thomas and Peter Julian, Partners @ Jones Day, ’20,“BLOCKCHAIN TECHNOLOGY: A FUTURE ANTITRUST TARGET?” The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association Vol 30, No. 2 Fall 2020

Blockchain and other emerging technologies, like artificial intelligence and “big data” analytics, are evaluated under the same antitrust laws and analytical framework as “old tech,” like smokestack industries.55 In the United States, use of blockchain technology primarily raises potential issues under Sherman Act § 1 (no collusion), Sherman Act § 2 (no monopolization), Federal Trade Commission (FTC) Act § 5 (no unfair competition), and Clayton Act § 7 (no anticompetitive transactions).56

In recent years, politicians, competition agencies, and mainstream media in the United States and around the world have devoted significant attention to the question of whether technology companies, and more broadly, “high tech” products or services, should be subject to different antitrust enforcement rules. Although there is not always unanimity across or even within jurisdictions, U.S. leadership at the DOJ and a majority of the FTC Commissioners have made statements suggesting that existing laws are sufficient. In 2019, for example, the head of the DOJ Antitrust Division addressed this directly: “Some have suggested changing the antitrust laws, creating new agencies or even regulating the conduct of some firms . . . it bears repeating that our existent framework is flexible enough to detect harm in any industry and emerging ones.”57 In 2018, another DOJ official voiced similar sentiments:

Lately, there has been discussion about whether certain conduct—the use of computer algorithms to set prices, for example—should attract the same level of scrutiny as “traditional” price fixing conduct. To be clear, where competitors agree to restrict competition between them, whether by agreeing to display identical gasoline prices at gas stations on opposite street corners, or by fixing prices using advanced technology like online trading platforms or algorithms, they violate the Sherman Act. The agreement to fix the price is the illegal act; the means through which the agreement is carried out is less important.58

This statement directly implicates Sherman Act § 1, which prohibits anticompetitive collusion, such as price fixing, bid rigging, or market allocation.59 Depending on how a blockchain is formed and operated, it may also implicate other antitrust laws, including those that prohibit monopolization and anticompetitive transactions. For most blockchain collaborations among rival businesses, however, the greatest practical antitrust risk involves collusion and improper information sharing. Participants might use blockchain technology to facilitate a “naked” agreement to fix prices or allocate markets or customers, or to improperly share competitively sensitive data, which might reduce competition. As the head of the DOJ Antitrust Division recently hypothesized:

#### Shrepel’s “theory of granularity” is incoherent bunk and kills antitrust.

Katopodi ’21 [Eleni; 2021; LL.M PhD Candidate (University of Augsburg) and Research Associate, Technical University of Munich; EU and Comparative Law Issues and Challenges Series (Eclic 5) – Special Issue; “Blockchain Market: Regulatory Concerns Arising from the ‘Diem’ Example in the Field of Free Competition1,” https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18821/10289]

In order for the reader to answer this question, they have to go through the analysis of another essential term: the notion of ‘firm’ adapted to the requirements of the blockchain technology in competition law. In the traditional doctrine, the enterprise is the smallest economic unit, in which free competition law can be applied. The fact that the introduction of the blockchain complicates the boundaries of the company and makes its traditional definition redundant has given rise to a number of theoretical views with a view to redefining it.24 Initiating from the classic Ronald Coase’s theory of transaction costs as the most contributing factor to the more modern ‘theory of granularity’ introduced by Schrepel one thing is to be guaranteed; the issue still remains unsolved.

According to this latest theory, there is a narrow ‘nucleus’ among users of the same blockchain, which can define and control the entire structure of it, therefore bear the sole liability. This control is identified on the basis of various quantitative criteria, such as the technical capacity, the capacity to interfere with the blockchain economic value or the capacity to influence the blockchain norms. 25 However, even Schrepel’s well-structured theory presents gaps to the extent that the concept of undertaking as an entity engaged in economic activity within a structured market is unfortunately lost. Users of blockchain can be natural persons with no involvement into the business market. The narrow ‘nucleus’ may consist of the sum of those people that cannot constitute in any case legal entities.

Of course, the adoption of the ‘theory of granularity’ challenges the interpreter who will give in to it to face significant evidentiary difficulties immediately afterwards. These mainly focus on the proof that a blockchain user actually belongs to the ‘nucleus of a blockchain’ on the basis of the above criteria. Could in the decentralized ecosystem of the blockchain, however, still be expected a centralized classical dominant undertaking, which controls the market in one of the traditional and prescribed ways? According to the author, something like that would not be possible for typical permissionless blockchain. If this were accepted, it would probably jeopardize the whole antitrust legal system and result in the impunity of the responsible ones for stopping the prohibited conduct. Therefore, to the question of whether there can be a monopoly without a monopolist, the answer inevitably ends up being positive. This is partially confirmed through the wording of the MiCa Regulation (see below). Naturally, there is an exception and this theoretical structure can easily be applied in permissionless blockchains that are organized in a different way; especially within those ecosystems only few people have the right to write the code and actually run the blockchain. In similar situations, this is deemed applicable. Nonetheless, such ecosystems are far from being the rule.

Secondly, even taken for granted that the answer to the previous question would be positive, it is a real fact that blockchain and non-blockchain institutions are in a thorough competition with one another. In this framework, every time a definition is going to take place the market will be defined rather broad, excluding per se the possibility of diagnosing dominance of one actor. For example, that is the case if one considers the market for online payments, in which companies, such as PayPal or VISA payments, are also major players. Blockchain reduces significantly the transaction fees, yet it does not itself constitute a separate market. Only under the scenario that one could argue that there is a separate market for infrastructure, there might be an argument for the inclusion of blockchain technology in it. Namely, to the extent that mining cryptocurrencies and verifying transactions are also subject to fees, just like the normal payments, the existence of a broader market cannot be doubted. However, even then, this theory overlooks the various functions of blockchain and focuses only one; the use as a payment system.

### XT 1NC 2: FTC now

#### FTC doing fine now – actively purusing competition policy and signalled new era of enforcement – Ross. No reason blockchain is key.

#### FTC is fine now.

Volkov 2/10 – Michael Volkov, CEO of The Volkov Law Group LLC, where he provides compliance, internal investigation and white collar defense services, “The New Era of Antitrust Enforcement,” 2/10/22, https://www.corporatecomplianceinsights.com/new-era-antitrust-enforcement/

Risk managers and CCOs take note: DOJ and FTC have signaled a new era of antitrust enforcement. Leadership at both agencies is revamping guidance, and years-long efforts are beginning to bear fruit. Any company operating in a concentrated market could feel the effects of these changes.

There is no question that we are facing a “perfect storm” of antitrust enforcement. Antitrust enforcement is fast-becoming an area of rare bipartisanship. Republicans resent the growing power and influence of technology and social media companies. Democrats are concerned about the growth of the rich, large companies and political influence.

Jonathan Kanter, the confirmed Assistant Attorney General of the Antitrust Division, has already signaled that enforcement changes are coming. He received bipartisan support in his confirmation, reflecting the expectation of aggressive enforcement. At the same time, congressional attempts to address antitrust issues in the marketplace are gaining steam.

Lina Kahn, the FTC Chairperson, has been a little bit more controversial, given her prior statements opposing Google and Facebook. Since her initial controversy, the FTC is settling down to business and continuing its enforcement action against Facebook in federal court.

Increasing Collaboration Between FTC and DOJ and a Revamped Approach to Merger Enforcement

Kanter gave a speech recently before the New York Bar Association at which he outlined his vision for enforcement and the need to update antitrust perspectives beyond the limited view of the past three decades. In recognition of the new era, the Justice Department and the FTC have initiated a review of both the Merger Guidelines and Vertical Conduct Guidelines. These revisions are expected to significantly alter DOJ’s and the FTC’s approach to merger and civil enforcement.

#### FTC competition policy *ongoing now*.

Howard Ullman, Counsel @ Orrick, ‘18, "Potential Antitrust Issues Lurking in Blockchain Technology," Antitrust Watch, https://blogs.orrick.com/antitrust/2018/06/20/potential-antitrust-issues-lurking-in-blockchain-technology/

Although these issues are nascent, they are not wholly theoretical. For example, on March 16 the FTC announced that it is creating a Blockchain Working Group to look at, inter alia, competition policy. “Cryptocurrency and blockchain technologies could disrupt existing industries. In disruptive scenarios, incumbent companies may sometimes seek to hobble potential competitors through regulatory burdens. The FTC’s competition advocacy work could help ensure that competition, not regulation, determines what products will be available in the marketplace” (FTC Blog Post). And in January of this year, the Japan Fair Trade Commission also indicated that it may look into the competition policy issues involving blockchain-based cryptocurrencies.

#### Alt cause – supply chain focus.

McKeown 2/18 – James T. McKeown, partner at Foley & Lardner, LLP, “Antitrust Scrutiny of Supply Chain Issues Continues,” 2/18/22, https://www.foley.com/en/insights/publications/2022/02/antitrust-scrutiny-supply-chain-issues-continues

The spring thaw has yet to set in, but Washington this month has been a hotbed of antitrust regulatory activity impacting supply chains. On February 15, the Federal Trade Commission (FTC) announced that Lockheed Martin scrapped a $4.4 billion acquisition of its supplier, Aerojet Rocketdyne, in the face of a complaint the Commission filed earlier this year to block the deal. The complaint alleged that the acquisition would eliminate the last independent U.S. supplier of missile propulsion systems and give Lockheed the ability to cut off its competitors’ access to these key components. The Commission argued the deal would not only harm rival defense contractors but further consolidate markets critical to national security.

The announcement marked the second time in a week that parties walked away from a significant vertical merger under challenge by the FTC. The day before, the Commission announced that Nvidia Corp., a maker of semiconductor chips, was dropping its $40 billion bid to acquire Arm Ltd., two months into litigation with the FTC. Arm creates and licenses designs for computer chips used in a variety of devices, from smartphones to driver-assistance systems. The Commission said the proposed merger would lessen competition by giving Nvidia control over Arm’s chip designs and access to confidential information Arm’s licensees, including Nvidia competitors, shared with Arm. The FTC touted the result as “particularly significant because it represents the first abandonment of a litigated vertical merger in many years.”

The announcements come as the FTC has changed its thinking about vertical mergers, combinations of companies in different stages of the supply chain. In September 2021, the Commission voted to withdraw its approval of the Vertical Merger Guidelines published jointly with the Department of Justice (DOJ) the year before. The Guidelines recognized that vertical mergers “often” benefit consumers because the combined company no longer has to pay the markup required by an independent supplier, a concept known as the “elimination of double marginalization” (EDM). Writing for a three-member majority, FTC Chair Lina Khan expressed skepticism that any savings in input costs are passed on to the consumer, calling the Guidelines’ reliance on EDM “theoretically and factually misplaced” and vowing to overhaul the Guidelines.

Last month, the FTC and DOJ issued a request for information (RFI), seeking public comment on revisions to “modernize” the Guidelines’ approach to evaluating vertical and horizontal mergers. The RFI noted that while DOJ did not withdraw from the Guidelines, it “shares the Commission’s substantive concerns with economic and legal errors in them.” The comment period does not close until March 21, so it remains to be seen what if any impact the revised Guidelines will have on the agencies’ treatment of vertical mergers. The FTC’s statements around the withdrawal together with its enforcement actions against Lockheed and Nvidia may, however, portend greater scrutiny of these transactions.

In another move with potential consequences for supply chains, the DOJ Antitrust Division and FBI on February 17 announced an initiative to investigate and prosecute companies that exploit supply chain disruptions to overcharge consumers and collude with competitors. The announcement warns that individuals and businesses may be using supply chain disruptions from the COVID-19 pandemic as cover for price fixing and other collusive schemes. As part of the initiative, DOJ is “prioritizing any existing investigations where competitors may be exploiting supply chain disruptions for illicit profit and is undertaking measures to proactively investigate collusion in industries particularly affected by supply disruptions.” DOJ has formed a working group on global supply chain collusion and will share intelligence with antitrust authorities in Australia, Canada, New Zealand, and the UK.

With the continued enhanced antitrust scrutiny of all manner of commercial activities, companies considering vertical mergers or price increases to curb supply chain constraints should actively monitor these developments.

#### Globally, blockchain is being regulated for anticompetitive practices – in crypto, the shipping industry, and more. Even their *own author* filed a brief supporting the FTCs action against facebooks news cryptocurrency.

Nicky Morris, Uledger Insights, ’20,"Will Libra be template for antitrust actions against permissioned blockchain networks?," Ledger Insights - enterprise blockchain, https://www.ledgerinsights.com/antitrust-permissioned-blockchains-libra/

It took just two months after Facebook unveiled Libra for governments on both sides of the Atlantic to start questioning whether the Libra network and currency might pose antitrust concerns. It is Facebook’s access to 2.7 billion users that concerns the authorities. And Libra’s potential to compete with national currencies.

In a recent article for the Michigan Law Review, academic Dr. Thibault Schrepel (Harvard & Utrecht University School of Law) outlined the potential antitrust issues relating to Libra. Some of the factors that Schrepel raised could be applied to other permissioned networks. Moreover, there’s a risk that any organization could threaten an antitrust complaint if it’s displeased with an industry-owned network.

In other words, the threat of antitrust could be the Achilles heel of permissioned blockchains.

Libra is designed to be permissioned initially and eventually permissionless. That transition will happen when there’s technology available that can “deliver the scale, stability, and security needed to support billions of people.” It’s possible that may never happen, although Libra predicted five years.

Schrepel points out that permissioned blockchains are not anti-competitive per se. Still, compared to permissionless, the big difference is there is a group of people capable of directing the network in an anti-competitive manner. As a result, it’s open to scrutiny.

And other permissioned blockchains are concerned. At the start of every Hyperledger discussion, an antitrust statement is read out. And in talking to organizations, the topic of antitrust comes up regularly, usually how to avoid anti-competitive behavior.

Libra’s antitrust weaknesses

Schrepel runs through a list of areas where Libra risks falling foul of antitrust legislation. First, he focuses on collusion.

Libra is an association of undertakings and hence could be construed as a cartel. Side agreements between members could attract attention. While Libra has not yet launched, there are already strong linkages between several firms. Some Libra Association members are venture capital companies that have invested in startups, which are also members.

There’s also a technical risk of collusion, claims Schrepel, because a small group of users validates transactions.

Next, there’s the risk of monopolization. Facebook’s wallet subsidiary Calibra will be the exclusive wallet on Facebook and WhatsApp. As a result, it will be the dominant Libra wallet and therefore hold additional influence over Libra. So Facebook being one of potentially a hundred Libra Association members won’t necessarily be antitrust protection.

As potentially the dominant wallet, Calibra also becomes a gatekeeper and can charge fees for the use of Libra.

Competition authorities tend to use antitrust laws for privacy issues as well. The wallet subsidiary says it won’t share Calibra data with Facebook “unless people agree to permit such sharing.”

There’s also the Libra Association’s role as gatekeeper, which gives it the power to change how the network works and eject or accept members.

Countering these issues, are potential vested interests of the competition authorities.

Conflict of interest?

One of the most interesting points raised by Schrepel, is whether competition authorities can be impartial given they are arms of a government where Libra potentially challenges the national currency. He points to the fears of the political elite of the growing power of Big Tech.

Schrepel is the editor of an antitrust blog, and has written two major papers re blockchain: “The theory of granularity. A path for antitrust in blockchain ecosystems.” And “Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox.”

Other blockchain competition examples

Libra isn’t the first to attract antitrust interest. Down under, the Australian Securities Exchange (ASX) is implementing its blockchain-based replacement settlement system, CHESS. Multiple market participants, including share registrars, are concerned about the ASX abusing its position.

Elsewhere, there are two big consortia involved with international shipping, and both are treading carefully when it comes to antitrust. One is TradeLens, a joint initiative between IBM and Maersk, which was never incorporated.

Dominant players in two sectors would have owned a TradeLens joint venture. The terms and conditions on the website state “the TradeLens Collaboration is not an entity”. Each of the companies markets the project and earns revenues from the partners it attracts.

Additionally, U.S. legislation puts significant restrictions on shippers talking to each other. As a result, TradeLens managed to get a limited antitrust exemption to let shippers publish and subscribe to data about cargo movements and some other activities. But there are still restrictions about discussing vessel capacity, rates and charges.

Across the globe, the Global Shipping Business Network (GSBN) has yet to get off the ground. The consortium has signed up three major shipping lines and several big ports which plan to be shareholders. But so far, they are only letters of intent as regulatory go-ahead is awaited.

### XT 1NC 3: DOJ Solves

#### Normal means would have the aff enforced exclusively by the DOJ blockchain antitrust division. There is no difference between the plan and status quo in terms of agency leadership.

Evan Miller, Senior Associate Vinson & Elkins, and Hill Welford, ve law, ’20, “DOJ Antitrust Signals Focus on Blockchain Competition” https://www.velaw.com/insights/doj-antitrust-signals-focus-on-blockchain-competition/

Blockchain competition may soon find itself in the antitrust crosshairs. In a recent speech on protecting innovation through antitrust,1 the head of the Department of Justice’s (“DOJ”) Antitrust Division, Assistant Attorney General Makan Delrahim, signaled that DOJ plans to focus some of its attention on blockchain technology. Delrahim noted the importance of the Antitrust Division understanding this emerging technology to avoid a situation where “entrenched monopolists have taken anticompetitive actions to eliminate the threat from blockchain technology to their business models.”

To get up to speed quickly, the Antitrust Division has launched a new training initiative through which Antitrust Division staff and the front office complete foundational blockchain technology coursework. Delrahim and some staff have already completed the course, which, according to Delrahim, has highlighted the “transformational effect that blockchain solutions may have on technology, businesses, and society in general over the coming years,” including “many industries and issues the Division analyzes, from financial services and credit monitoring to healthcare and health insurance.”

Delrahim touted the potential for blockchain-based platforms to prevent or limit market power by eliminating or reducing the role of the intermediary that typically operates between platform participants, thereby enabling “all the benefits of network effects, while minimizing or eliminating the market power that usually comes with those benefits.” But he also raised concerns about the potential for abuse of blockchain technology by firms already holding market power. Delrahim cited as a risk the potential for incumbent firms to use blockchains to collude or exclude competition, using a hypothetical in which a seafood harvester conditions access to a permissioned blockchain offering supply chain tracking and quality assurance on competitors agreeing to certain prices or output quantities. Companies could also use smart contracts to implement anticompetitive schemes, Delrahim suggested.

Delrahim’s comments make clear that the Antitrust Division is gearing up to closely scrutinize conduct and ventures that involve blockchain technology, to ensure that current companies are neither impeding the development and implementation of this new technology nor using blockchain technology to coordinate with competitors in violation of antitrust laws.

Given the new and nuanced antitrust risks that this technology may present, we recommend that companies seek the advice of antitrust counsel before engaging in blockchain projects with actual or potential competitors. Below, we have provided a few high-level implications of Delrahim’s recent comments.

The Antitrust Division’s training initiative will equip staff with knowledge regarding legitimate business uses for blockchain technology. This means that the Antitrust Division will be more likely to accept legitimate business justifications for blockchain-based partnerships between industry competitors, but also will identify and scrutinize projects where the addition of blockchain technology appears to be a pretext for competitors to coordinate their activities.

Permissioned blockchains are likely to receive closer scrutiny, as they create the potential for existing members to condition the admission of new members on their participation in anticompetitive conduct. Permissioned blockchains could also draw complaints from excluded competitors.

The Antitrust Division is examining how blockchain technology will impact network effects and incentives to build and develop blockchain-based platforms. Developments here could impact arguments made in competition cases involving traditional digital services and platforms.

Acquisitions of blockchain companies that are reportable under the Hart-Scott-Rodino Act may receive close attention.

### XT 4 – No HR

#### Alt causes to HR promotjion – hypocrisy due to interventions – no reason the plan overwhelms. Authoritarian actors like China and Russia comparatively outweigh.

#### Norms don’t stop conflict.

Ferry 18 Jean Pisani-Ferry, Economics Professor with Sciences Po of Paris and the Hertie School of Governance of Berlin, former campaign director for Emmanuel Macron and Commissioner-General of France Stratégie, the Founding Director of the think tank Bruegel. [Should we give up on global governance? Policy Contribution 17, October 2018, https://bruegel.org/wp-content/uploads/2018/10/PC-17-2018.pdf (table 1 omitted)]

C. Obsolescence of global rules and institutions Although the previous argument primarily rests on the broad pattern of international trade and finance, the adverse effects of external liberalisation can be compounded by inadequate governance. As far as trade is concerned, two cases in point are, first, inertia in the categorisation of countries, especially the fact that emerging countries, including China, still enjoy developing country status in the WTO; and, second, failures to enforce the adequate protection of intellectual property (an issue on which the EU recently joined the US and filed a complaint at the WTO against Chinese practices; see European Union, 2018). These grievances, and others concerning subsidies or investment, are not new: they were clearly spelled out by policymakers from the Obama administration (see for example, Schwab, 2011, and Wu, 2016). The underlying concern is that the systemic convergence on a market economy template that was expected from participation in the WTO has failed to materialise. The rules and institutions of global trade have brought shallow convergence but not the deeper alignment of economic systems that was hoped for. More generally, existing rules and institutions were conceived for a different world. This is very apparent in the trade field: the GATT/WTO framework dates from what Baldwin (2016) has called the “first unbundling” of production and consumption. They were not designed for the “second unbundling” of knowledge and production that gave rise to the emergence of global value chains. For decades, the implicit assumption behind the structure of trade negotiations has been that nations have well-defined sectoral trade interests: they are either exporters or importers. But in a world of global value chains, they are both importers and exporters of similar products simultaneously. Even if the principles of multilateralism remain valid, important features of the rules and institutions in which they are embedded are increasingly outdated. In the same way, opening to capital movements was supposed to result in net financial flows from savings-rich to savings-poor countries. What has happened instead is a massive increase in gross flows resulting in the interpenetration of financial systems and the coexistence of sizeable external assets and liabilities. The consequence has been the emergence of a global financial cycle (see for example Rey, 2017) and of policy dilemmas that are quite different from those arising in a simple Mundell-Fleming framework, in which interdependence takes place through net inflows and outflows of capital. Developments in the climate field further illustrate the point. The 1997 Kyoto Protocol was negotiated under the assumption that the bulk of greenhouse gas emissions would continue to originate in the advanced countries. But by the time the Protocol was meant to enter into force, it was clear already that the hypothesis was deeply wrong. The exemption of developing countries from emissions reductions was one of the reasons why the US did not ratify the treaty. The failed Copenhagen agreement of 2009 was an attempt to replicate Kyoto on a global scale, but there was no consensus for such an approach. Rules can be reformed and institutions can adapt. But this is a long and demanding process, especially when it requires unanimity, when participating countries have diverging interests and when changes require ratification by parliaments where there is no majority to support them. Global rules therefore exhibit a strong inertia that often prevents necessary adaptations. Trade rules, amendments to which require unanimity, are a case in point. Institutions are nimbler and can adapt to changing priorities or perspectives on interdependence. The IMF for example has succeeded in adjusting to major changes in the international economic regime and major shifts in the intellectual consensus. But even institutions face limitations to their ability to keep up with underlying transformations. This is one of the reasons why solutions to emerging problems have often been looked for outside the existing multilateral, institution-based governance framework (Table 1). D. The imbalances of global governance A further reason for popular dissatisfaction with global governance is its unbalanced nature. The deeper international integration becomes, the broader the scope of policy its management should cover, and the more acute the tension between the technical requirements of global interdependence and the domestically-rooted legitimacy of public policies. This is most apparent in the field of taxation. International tax optimisation by multinationals has become an issue of significant relevance and it is estimated that 40 percent of their profit is being artificially shifted to low-tax countries – with major consequences for national budgets (Tørsløv et al, 2018). But the fact that taxation remains at the core of sovereign prerogatives limits the scope and ambition of initiatives conducted at international level. The result, which can be regarded as an illustration of Rodrik’s trilemma, is that global coordination in tax matters falls short of what equity-conscious citizens regard as desirable and, at the same time, exceeds what sovereignty-conscious citizens consider acceptable. The imbalances of global governance are by no means limited to the taxation field. The same can be found in a series of domains, for example biodiversity and the preservation of nature. E. Increased complexity The final obstacle to multilateral solutions has to do with the sheer complexity of the challenges global governance has to tackle. In recent decades channels of international interdependence have both multiplied and diversified. They now link together countries with significantly differing levels of technical, economic or financial development. Because they have developed outside the scope of negotiated rules and established institutions, some of channels of interdependence also escape the reach of international agreements to an unprecedented degree. This is especially, but not only, the case of the internet and the multiple networks that rely on it. The world does not fit anymore the usual representation whereby individual nations trade goods, capital and technology. Even putting aside geopolitical consequences and assuming a shared commitment to openness and multilateral solutions, such complexity is bound to test the limits of existing international governance arrangements.

# 1NR – Round the First

## FTC

### XT 1NC 1: Squo Solves

#### Block*chains* are exempted from antitrust law, but blockchain *users* are not. Every anticompetitive practice on a blockchain can already be policed by targeting the legal entity responsible for facilitating the transaction. If I refuse to deal with you on a blockchain, I am still liable under the Sherman act.

#### Prefer our evidence – Schrepel is not speaking about American antitrust law, but about global antitrust law generally. That’s why he says “competition law” and teaches in the Netherlands. In *America* all these anticompetitive practices are *already* covered.

#### Their “theory of the firm” explanation is science fiction – antitrust law is already sufficient to cover anticompetitive blockchain practices without considering the “nucleus.” Prefer evidence citing the head of the DOJ antitrust division and the majority of FTC commissioners over a Scandinavian tech bro.

Ryan C. Thomas and Peter Julian, Partners @ Jones Day, ’20,“BLOCKCHAIN TECHNOLOGY: A FUTURE ANTITRUST TARGET?” The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association Vol 30, No. 2 Fall 2020

Blockchain and other emerging technologies, like artificial intelligence and “big data” analytics, are evaluated under the same antitrust laws and analytical framework as “old tech,” like smokestack industries.55 In the United States, use of blockchain technology primarily raises potential issues under Sherman Act § 1 (no collusion), Sherman Act § 2 (no monopolization), Federal Trade Commission (FTC) Act § 5 (no unfair competition), and Clayton Act § 7 (no anticompetitive transactions).56

In recent years, politicians, competition agencies, and mainstream media in the United States and around the world have devoted significant attention to the question of whether technology companies, and more broadly, “high tech” products or services, should be subject to different antitrust enforcement rules. Although there is not always unanimity across or even within jurisdictions, U.S. leadership at the DOJ and a majority of the FTC Commissioners have made statements suggesting that existing laws are sufficient. In 2019, for example, the head of the DOJ Antitrust Division addressed this directly: “Some have suggested changing the antitrust laws, creating new agencies or even regulating the conduct of some firms . . . it bears repeating that our existent framework is flexible enough to detect harm in any industry and emerging ones.”57 In 2018, another DOJ official voiced similar sentiments:

Lately, there has been discussion about whether certain conduct—the use of computer algorithms to set prices, for example—should attract the same level of scrutiny as “traditional” price fixing conduct. To be clear, where competitors agree to restrict competition between them, whether by agreeing to display identical gasoline prices at gas stations on opposite street corners, or by fixing prices using advanced technology like online trading platforms or algorithms, they violate the Sherman Act. The agreement to fix the price is the illegal act; the means through which the agreement is carried out is less important.58

This statement directly implicates Sherman Act § 1, which prohibits anticompetitive collusion, such as price fixing, bid rigging, or market allocation.59 Depending on how a blockchain is formed and operated, it may also implicate other antitrust laws, including those that prohibit monopolization and anticompetitive transactions. For most blockchain collaborations among rival businesses, however, the greatest practical antitrust risk involves collusion and improper information sharing. Participants might use blockchain technology to facilitate a “naked” agreement to fix prices or allocate markets or customers, or to improperly share competitively sensitive data, which might reduce competition. As the head of the DOJ Antitrust Division recently hypothesized:

#### Shrepel’s “theory of granularity” is incoherent bunk and kills antitrust.

Katopodi ’21 [Eleni; 2021; LL.M PhD Candidate (University of Augsburg) and Research Associate, Technical University of Munich; EU and Comparative Law Issues and Challenges Series (Eclic 5) – Special Issue; “Blockchain Market: Regulatory Concerns Arising from the ‘Diem’ Example in the Field of Free Competition1,” https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18821/10289]

In order for the reader to answer this question, they have to go through the analysis of another essential term: the notion of ‘firm’ adapted to the requirements of the blockchain technology in competition law. In the traditional doctrine, the enterprise is the smallest economic unit, in which free competition law can be applied. The fact that the introduction of the blockchain complicates the boundaries of the company and makes its traditional definition redundant has given rise to a number of theoretical views with a view to redefining it.24 Initiating from the classic Ronald Coase’s theory of transaction costs as the most contributing factor to the more modern ‘theory of granularity’ introduced by Schrepel one thing is to be guaranteed; the issue still remains unsolved.

According to this latest theory, there is a narrow ‘nucleus’ among users of the same blockchain, which can define and control the entire structure of it, therefore bear the sole liability. This control is identified on the basis of various quantitative criteria, such as the technical capacity, the capacity to interfere with the blockchain economic value or the capacity to influence the blockchain norms. 25 However, even Schrepel’s well-structured theory presents gaps to the extent that the concept of undertaking as an entity engaged in economic activity within a structured market is unfortunately lost. Users of blockchain can be natural persons with no involvement into the business market. The narrow ‘nucleus’ may consist of the sum of those people that cannot constitute in any case legal entities.

Of course, the adoption of the ‘theory of granularity’ challenges the interpreter who will give in to it to face significant evidentiary difficulties immediately afterwards. These mainly focus on the proof that a blockchain user actually belongs to the ‘nucleus of a blockchain’ on the basis of the above criteria. Could in the decentralized ecosystem of the blockchain, however, still be expected a centralized classical dominant undertaking, which controls the market in one of the traditional and prescribed ways? According to the author, something like that would not be possible for typical permissionless blockchain. If this were accepted, it would probably jeopardize the whole antitrust legal system and result in the impunity of the responsible ones for stopping the prohibited conduct. Therefore, to the question of whether there can be a monopoly without a monopolist, the answer inevitably ends up being positive. This is partially confirmed through the wording of the MiCa Regulation (see below). Naturally, there is an exception and this theoretical structure can easily be applied in permissionless blockchains that are organized in a different way; especially within those ecosystems only few people have the right to write the code and actually run the blockchain. In similar situations, this is deemed applicable. Nonetheless, such ecosystems are far from being the rule.

Secondly, even taken for granted that the answer to the previous question would be positive, it is a real fact that blockchain and non-blockchain institutions are in a thorough competition with one another. In this framework, every time a definition is going to take place the market will be defined rather broad, excluding per se the possibility of diagnosing dominance of one actor. For example, that is the case if one considers the market for online payments, in which companies, such as PayPal or VISA payments, are also major players. Blockchain reduces significantly the transaction fees, yet it does not itself constitute a separate market. Only under the scenario that one could argue that there is a separate market for infrastructure, there might be an argument for the inclusion of blockchain technology in it. Namely, to the extent that mining cryptocurrencies and verifying transactions are also subject to fees, just like the normal payments, the existence of a broader market cannot be doubted. However, even then, this theory overlooks the various functions of blockchain and focuses only one; the use as a payment system.

### XT 1NC 2: FTC now

#### FTC doing fine now – actively purusing competition policy and signalled new era of enforcement – Ross. No reason blockchain is key.

Volkov 2/10 – Michael Volkov, CEO of The Volkov Law Group LLC, where he provides compliance, internal investigation and white collar defense services, “The New Era of Antitrust Enforcement,” 2/10/22, https://www.corporatecomplianceinsights.com/new-era-antitrust-enforcement/

Risk managers and CCOs take note: DOJ and FTC have signaled a new era of antitrust enforcement. Leadership at both agencies is revamping guidance, and years-long efforts are beginning to bear fruit. Any company operating in a concentrated market could feel the effects of these changes.

There is no question that we are facing a “perfect storm” of antitrust enforcement. Antitrust enforcement is fast-becoming an area of rare bipartisanship. Republicans resent the growing power and influence of technology and social media companies. Democrats are concerned about the growth of the rich, large companies and political influence.

Jonathan Kanter, the confirmed Assistant Attorney General of the Antitrust Division, has already signaled that enforcement changes are coming. He received bipartisan support in his confirmation, reflecting the expectation of aggressive enforcement. At the same time, congressional attempts to address antitrust issues in the marketplace are gaining steam.

Lina Kahn, the FTC Chairperson, has been a little bit more controversial, given her prior statements opposing Google and Facebook. Since her initial controversy, the FTC is settling down to business and continuing its enforcement action against Facebook in federal court.

Increasing Collaboration Between FTC and DOJ and a Revamped Approach to Merger Enforcement

Kanter gave a speech recently before the New York Bar Association at which he outlined his vision for enforcement and the need to update antitrust perspectives beyond the limited view of the past three decades. In recognition of the new era, the Justice Department and the FTC have initiated a review of both the Merger Guidelines and Vertical Conduct Guidelines. These revisions are expected to significantly alter DOJ’s and the FTC’s approach to merger and civil enforcement.

#### Globally, blockchain is being regulated for anticompetitive practices – in crypto, the shipping industry, and more. Even their *own author* filed a brief supporting the FTCs action against facebooks news cryptocurrency.

Nicky Morris, Uledger Insights, ’20,"Will Libra be template for antitrust actions against permissioned blockchain networks?," Ledger Insights - enterprise blockchain, https://www.ledgerinsights.com/antitrust-permissioned-blockchains-libra/

It took just two months after Facebook unveiled Libra for governments on both sides of the Atlantic to start questioning whether the Libra network and currency might pose antitrust concerns. It is Facebook’s access to 2.7 billion users that concerns the authorities. And Libra’s potential to compete with national currencies.

In a recent article for the Michigan Law Review, academic Dr. Thibault Schrepel (Harvard & Utrecht University School of Law) outlined the potential antitrust issues relating to Libra. Some of the factors that Schrepel raised could be applied to other permissioned networks. Moreover, there’s a risk that any organization could threaten an antitrust complaint if it’s displeased with an industry-owned network.

In other words, the threat of antitrust could be the Achilles heel of permissioned blockchains.

Libra is designed to be permissioned initially and eventually permissionless. That transition will happen when there’s technology available that can “deliver the scale, stability, and security needed to support billions of people.” It’s possible that may never happen, although Libra predicted five years.

Schrepel points out that permissioned blockchains are not anti-competitive per se. Still, compared to permissionless, the big difference is there is a group of people capable of directing the network in an anti-competitive manner. As a result, it’s open to scrutiny.

And other permissioned blockchains are concerned. At the start of every Hyperledger discussion, an antitrust statement is read out. And in talking to organizations, the topic of antitrust comes up regularly, usually how to avoid anti-competitive behavior.

Libra’s antitrust weaknesses

Schrepel runs through a list of areas where Libra risks falling foul of antitrust legislation. First, he focuses on collusion.

Libra is an association of undertakings and hence could be construed as a cartel. Side agreements between members could attract attention. While Libra has not yet launched, there are already strong linkages between several firms. Some Libra Association members are venture capital companies that have invested in startups, which are also members.

There’s also a technical risk of collusion, claims Schrepel, because a small group of users validates transactions.

Next, there’s the risk of monopolization. Facebook’s wallet subsidiary Calibra will be the exclusive wallet on Facebook and WhatsApp. As a result, it will be the dominant Libra wallet and therefore hold additional influence over Libra. So Facebook being one of potentially a hundred Libra Association members won’t necessarily be antitrust protection.

As potentially the dominant wallet, Calibra also becomes a gatekeeper and can charge fees for the use of Libra.

Competition authorities tend to use antitrust laws for privacy issues as well. The wallet subsidiary says it won’t share Calibra data with Facebook “unless people agree to permit such sharing.”

There’s also the Libra Association’s role as gatekeeper, which gives it the power to change how the network works and eject or accept members.

Countering these issues, are potential vested interests of the competition authorities.

Conflict of interest?

One of the most interesting points raised by Schrepel, is whether competition authorities can be impartial given they are arms of a government where Libra potentially challenges the national currency. He points to the fears of the political elite of the growing power of Big Tech.

Schrepel is the editor of an antitrust blog, and has written two major papers re blockchain: “The theory of granularity. A path for antitrust in blockchain ecosystems.” And “Is Blockchain the Death of Antitrust Law? The Blockchain Antitrust Paradox.”

Other blockchain competition examples

Libra isn’t the first to attract antitrust interest. Down under, the Australian Securities Exchange (ASX) is implementing its blockchain-based replacement settlement system, CHESS. Multiple market participants, including share registrars, are concerned about the ASX abusing its position.

Elsewhere, there are two big consortia involved with international shipping, and both are treading carefully when it comes to antitrust. One is TradeLens, a joint initiative between IBM and Maersk, which was never incorporated.

Dominant players in two sectors would have owned a TradeLens joint venture. The terms and conditions on the website state “the TradeLens Collaboration is not an entity”. Each of the companies markets the project and earns revenues from the partners it attracts.

Additionally, U.S. legislation puts significant restrictions on shippers talking to each other. As a result, TradeLens managed to get a limited antitrust exemption to let shippers publish and subscribe to data about cargo movements and some other activities. But there are still restrictions about discussing vessel capacity, rates and charges.

Across the globe, the Global Shipping Business Network (GSBN) has yet to get off the ground. The consortium has signed up three major shipping lines and several big ports which plan to be shareholders. But so far, they are only letters of intent as regulatory go-ahead is awaited.

### XT 4 – No HR

#### Alt causes to HR promotjion – hypocrisy due to interventions – no reason the plan overwhelms. Authoritarian actors like China and Russia comparatively outweigh.

#### Norms don’t stop conflict.

Ferry 18 Jean Pisani-Ferry, Economics Professor with Sciences Po of Paris and the Hertie School of Governance of Berlin, former campaign director for Emmanuel Macron and Commissioner-General of France Stratégie, the Founding Director of the think tank Bruegel. [Should we give up on global governance? Policy Contribution 17, October 2018, https://bruegel.org/wp-content/uploads/2018/10/PC-17-2018.pdf (table 1 omitted)]

C. Obsolescence of global rules and institutions Although the previous argument primarily rests on the broad pattern of international trade and finance, the adverse effects of external liberalisation can be compounded by inadequate governance. As far as trade is concerned, two cases in point are, first, inertia in the categorisation of countries, especially the fact that emerging countries, including China, still enjoy developing country status in the WTO; and, second, failures to enforce the adequate protection of intellectual property (an issue on which the EU recently joined the US and filed a complaint at the WTO against Chinese practices; see European Union, 2018). These grievances, and others concerning subsidies or investment, are not new: they were clearly spelled out by policymakers from the Obama administration (see for example, Schwab, 2011, and Wu, 2016). The underlying concern is that the systemic convergence on a market economy template that was expected from participation in the WTO has failed to materialise. The rules and institutions of global trade have brought shallow convergence but not the deeper alignment of economic systems that was hoped for. More generally, existing rules and institutions were conceived for a different world. This is very apparent in the trade field: the GATT/WTO framework dates from what Baldwin (2016) has called the “first unbundling” of production and consumption. They were not designed for the “second unbundling” of knowledge and production that gave rise to the emergence of global value chains. For decades, the implicit assumption behind the structure of trade negotiations has been that nations have well-defined sectoral trade interests: they are either exporters or importers. But in a world of global value chains, they are both importers and exporters of similar products simultaneously. Even if the principles of multilateralism remain valid, important features of the rules and institutions in which they are embedded are increasingly outdated. In the same way, opening to capital movements was supposed to result in net financial flows from savings-rich to savings-poor countries. What has happened instead is a massive increase in gross flows resulting in the interpenetration of financial systems and the coexistence of sizeable external assets and liabilities. The consequence has been the emergence of a global financial cycle (see for example Rey, 2017) and of policy dilemmas that are quite different from those arising in a simple Mundell-Fleming framework, in which interdependence takes place through net inflows and outflows of capital. Developments in the climate field further illustrate the point. The 1997 Kyoto Protocol was negotiated under the assumption that the bulk of greenhouse gas emissions would continue to originate in the advanced countries. But by the time the Protocol was meant to enter into force, it was clear already that the hypothesis was deeply wrong. The exemption of developing countries from emissions reductions was one of the reasons why the US did not ratify the treaty. The failed Copenhagen agreement of 2009 was an attempt to replicate Kyoto on a global scale, but there was no consensus for such an approach. Rules can be reformed and institutions can adapt. But this is a long and demanding process, especially when it requires unanimity, when participating countries have diverging interests and when changes require ratification by parliaments where there is no majority to support them. Global rules therefore exhibit a strong inertia that often prevents necessary adaptations. Trade rules, amendments to which require unanimity, are a case in point. Institutions are nimbler and can adapt to changing priorities or perspectives on interdependence. The IMF for example has succeeded in adjusting to major changes in the international economic regime and major shifts in the intellectual consensus. But even institutions face limitations to their ability to keep up with underlying transformations. This is one of the reasons why solutions to emerging problems have often been looked for outside the existing multilateral, institution-based governance framework (Table 1). D. The imbalances of global governance A further reason for popular dissatisfaction with global governance is its unbalanced nature. The deeper international integration becomes, the broader the scope of policy its management should cover, and the more acute the tension between the technical requirements of global interdependence and the domestically-rooted legitimacy of public policies. This is most apparent in the field of taxation. International tax optimisation by multinationals has become an issue of significant relevance and it is estimated that 40 percent of their profit is being artificially shifted to low-tax countries – with major consequences for national budgets (Tørsløv et al, 2018). But the fact that taxation remains at the core of sovereign prerogatives limits the scope and ambition of initiatives conducted at international level. The result, which can be regarded as an illustration of Rodrik’s trilemma, is that global coordination in tax matters falls short of what equity-conscious citizens regard as desirable and, at the same time, exceeds what sovereignty-conscious citizens consider acceptable. The imbalances of global governance are by no means limited to the taxation field. The same can be found in a series of domains, for example biodiversity and the preservation of nature. E. Increased complexity The final obstacle to multilateral solutions has to do with the sheer complexity of the challenges global governance has to tackle. In recent decades channels of international interdependence have both multiplied and diversified. They now link together countries with significantly differing levels of technical, economic or financial development. Because they have developed outside the scope of negotiated rules and established institutions, some of channels of interdependence also escape the reach of international agreements to an unprecedented degree. This is especially, but not only, the case of the internet and the multiple networks that rely on it. The world does not fit anymore the usual representation whereby individual nations trade goods, capital and technology. Even putting aside geopolitical consequences and assuming a shared commitment to openness and multilateral solutions, such complexity is bound to test the limits of existing international governance arrangements.

## Court Clog

### 1NR – Kick

#### Concede litigation inevitable – means Courts inevitably clogged. Not gong for it.

## Hashing CP

### 1NR – Condo

#### Condo’s good – we get what we did:

#### Neg flex – the neg is always reactive – the aff gets the 2AR and has infinite prep to stake out 2AC strategy. Condo restores competitive equity.

#### Negation – the neg only has to disprove the aff – condo simulates effective negation by testing from multiple angles. Their interp evades clash by insulating the case from contradiction.

#### Critical thinking – forces smart 2AC choices, adaptation, and logic – that offsets 2AC process clarification and vague plans and impact turns aff choice.

#### Logic – the judge should endorse the best policy – proving the counterplan is bad doesn’t prove the plan is good, means you should judge kick the CP if it doesn’t solve.

#### Ideological flex – debaters are risk-averse – condo enables argumentative diversity and innovation which maximizes portable benefit.

#### Reasonability – add-ons, perms, straight-turning the net benefit, and 2AC choice check – they need to prove in-round strategic damage, or substance crowdout outweighs. Going for one in the 2NR and strategically conceding contradictions solves.

#### Reject the argument, not the team – voting aff won’t dissuade condo in other debates.

#### Dispo

### 1NR – PICs

#### Critical thinking — PICs reward in-depth research and promote nuanced clash — that’s key to education

#### Reciprocity — they should have written a better plan-text — 2AC process clarification and vague plans means PICs are necessary for competitive equity

#### Logical decision-making — the judge should vote for the best policy, anything else isn’t real-world which turns their offense

#### Add-ons, perms, and strategic concessions check — the net-benefit proves it’s rooted in the literature

#### All CPs are PICs — international, agent, and states CP PIC out of USFG — delay, consult, conditions PIC out of certainty/immediacy — there’s no bright line for what constitutes a PIC

#### Reject the argument — deterrence isn’t real and didn’t impact the 2AR

## Biz Con

### 1NR – Biz Con

#### Concede no spillover – takes out the link turn because blockchain is siloed from other economic activity and tech which means they cannot access an internal link to the economy.

#### Also concede tons of antitrust action now and that oil prices, Ukraine, supply chain chaos and aging populations thump growth – which are all the warrants in their cards for recession now that blockchain does not stop

#### All the turn also beg the question of beating the case defense

## CIL

### 2NC – OV

#### 1. Counterplan solves the aff – it compels prohibitions on participants in the blockchain nucleus through invoking norms of customary international economic law instead of domestic antitrust statutes. That’s legally synonymous and equally as efficacious as the plan since the aff has no reason the process of expanding Sherman, Clayton, or the FTC is key.

#### 2. Revitalizing CIL solves extinction – disintegration incites nuclear conflict, nationalist lash-out, and disintegrates the LIO. That’s broadly an impact filter which caps every transnational threat – that’s Arcuri.

#### 3. Framing issue was the 2AC was largely unwarranted blips that lacked any organization – 1AR should not get to blow up arguments.

#### 4. Nuke war, eco collapse, and biotech are all existential. Recommitting to CIL solves.

Shany ’21 [Yuval; 2021; Hersch Lauterpacht Chair in Public International Law; Hebrew University of Jerusalem Legal Studies Research Paper Series, “The COVID-19 Pandemic Crisis and International Law: A Constitutional Moment, A Tipping Point or More of the Same,” No. 21-9]

Significantly, these two narratives of historical development of international law are not mutually exclusive. First, certain developments can be understood as clean breaks from the past, whereas others are the product of a long-term process. Second, identifying historical trajectories depends on the focal length of the historical lenses used: What is viewed as a major shift in direction at the time in which events take place, might be regarded decades or centuries later as a minor course correction, a short period of instability, or a mere point on a pattern showing the overall trajectory. And third, the two narratives may merge to generate processes of change, accelerating in particular moments in time due to ‘tipping points’ generated by certain dramatic events.5 Indeed, it would appear that certain important developments in international law can be described as part of long-running trends punctured by sudden fluctuations correlating to dramatic events. For example, the evolution of IHL norms governing non-international armed conflicts can be narrated as stemming from a gradual process of restraining violence in and around the battlefield that started picking up momentum in the mid- 19th century, with certain regulatory peaks occurring after and in connection with major international crises such as World War Two, Vietnam and the Global War on Terror (e.g., Common article 3 in 1949, the 1977 Additional Protocols, and the development of laws governing transnational or asymmetric armed conflicts in the 2000s).

The COVID-19 Pandemic as the Harbinger of a Constitutional Moment

The question before us is whether COVID-19 has the potential for generating a constitutional moment or a tipping point for the development of international law separating between epochs or significantly accelerating already-occurring trends? Discounting serendipitous changes in the course of history (the ‘unknown unknowns’ of historical change), such a question invites an assessment of whether a structural change in international law can be envisioned or required in the near future, or whether the current crisis might facilitate such a change or accelerate existing trends going in this or the other direction. If the answers to these questions are in the negative, then the reaction to the COVID crisis is likely to showcase ‘more of the same’ for international law.

One possible vision of a percolating crisis that might lead to a new epoch in international law is found in the writing of my Hebrew University colleague, the historian Yuval Noah Harari. Among the major challenges confronting humanity in the 21st century, which he has identified, are nuclear war, ecological collapse and technological disruption (e.g., dangerous applications of AI and biotechnology).6 What’s common to these challenges is their potential for catastrophic consequences, and the need for close global cooperation in order to effectively address them. In addition, they all fit into a Frankensteinian crisis narrative: Scientific, technological and economic progress getting out of control and creating a threat to the survival of human civilization (at least in its current form). Noah Harari advocates in response to the looming threats a change of paradigm of international relations, a new epoch perhaps, which is based not only on tight global cooperation,7 but also on giving a prominent role for scientific knowledge in policy debates.8 Arguably, such a new international relations paradigm would also require a corresponding new international law paradigm.

#### 5. Expanded IEL stops plastic, nuclear, and endocrine disrupting waste – extinction.

Picard ’21 [Michael Hennessy; 2021; Research Fellow at the Institute of Advanced Studies; Hebrew University of Jerusalem Legal Studies Research Paper Series, “Exploring the Planetary Boundaries’ Wasteland: International Law and the Advent of the Molysmocene,” p. 204-217]

In their own ways, these neologisms convey some truths about the global conditions of life on Earth. Yet, as this chapter argues, they fall short in their attempt to provide a clear description of a contemporary era that has become saturated with pollution and waste.13 The descriptive limits of these neologisms are threefold. First, they draw the contours of a dystopian present inheritor of our (the human species’) many moral (and mortal) sins, while Earth destruction and pollution should be conceived as normal and logical consequences of human activities and not as an immoral abnormality. Second, these neologisms rest on a productivist/ destructive reading and, therefore, a highly deterministic account of a future in the making, and that is now unfolding right before our eyes. Yet, every day, a new world is being redesigned in the ashes of our productivist/destructive world.

Finally, these terms stress the effects of specific social configurations, whether they be colonial (Plantatiocene) or capitalistic (Capitalocene), as they are based on an ‘epistemic sediment’ of the Holocene, namely that of appropriation and accumulation ‘which is reactivated in many critical commentaries on the Anthropocene’.14 As this chapter argues, social configurations not only assemble life and nature, that is, productive forces on a global scale; they also organise the redistribution and dispersion of pollution around the globe, a fact that is often ignored.15 We inhabit waste, dirt and pollution.16 And waste, dirt and pollution inhabit us.17 Waste is a fundamental physical determinant of life and death in all known ecosystems.

Because of the descriptive, moral/ethical and normative lacunae that we sketched above, we wish to revive an old concept: Molysmocene. The term Molysmocene was coined in the 1960s by a French marine biologist named Maurice Fontaine18 to refer to a future wasteland era – an era in which we presently live.19 Molysmos means ‘defilement’, ‘filth’ or ‘stain’ in Greek (μολυσμός). In the Letters to the Corinthians, the Apostle Paul reveals in his second epistle: ‘Therefore, having these promises, beloved, let us cleanse ourselves from all defilement [molysmos in Greek] of flesh and spirit, perfecting holiness in the fear of God’ (2 Corinthians 7:1).

One may ask why we chose to use the term Molysmocene, and to add yet another neologism to the already long list. Three reasons explain this choice. First, pollution, waste and dirt collectively embody the law’s residual category or missing object par excellence.20 As Philippe Sands and colleagues underline, in the case of ‘wastes – which traditionally have been regulated incidentally to the attainment of other objectives – the overall international response has been fragmented, ad hoc and piecemeal’.21 This situation is partly caused by the lack of reliable data.22 However, available data tend to indicate that household and municipal solid wastes represent an extremely small percentage of all the wastes generated. For instance, a 2012 Canadian government report calculated that household and municipal waste amounted to less than 3 per cent of all the waste created. The majority, some 97 per cent of all the solid waste, was made of oil sands tailings, mine tailings, mine waste rock and livestock manure.23

More troubling, the report did not include data on manufacturing and agricultural waste (other than manure). In addition, the extreme tonnage of industrial waste, its heterogeneity and industries’ self-reporting deficiencies present vexing problems not only for accounting but also for the law, both domestic and international. As a result, mining, petrochemical and other synthetic waste (such as submarine tailings disposal, or microplastic and textile effluence) remains largely invisible to both domestic and international environmental law.24 The persistent perception that waste and pollution are not urgent concerns and that they are less harmful than one might think has been intentionally created by States and corporations, such as the petrochemical and mining sectors, which question scientifically established consensus on toxicity levels by setting up impossible standards of proof.25 Ecological risks, although visible and evident to both the corporations that create them and the affected communities that suffer from these risks, are rendered less visible to the governance bodies in charge of regulating them.26 By resurrecting the term Molysmocene from the abyss of marine biology, we modestly endeavour here to reintroduce the critical issue of toxic waste as a matter of concern in collective legal consciousness.

Second, waste – as an object, a phenomenon and an experience – is universal (however unevenly distributed around the globe), very much like the Capitalocene, for instance, is. However, contrary to the latter, waste’s universality will always remain with humans and non-humans, notwithstanding the survival of neoliberal capitalism.27 Very little of human waste is biodegradable, and the waste that is not is now being buried in the Earth’s crust and may become part of our species’ geological legacy.28 While waste has always been part and parcel of human and nonhuman activities,29 with the rise of industrial extraction and technological mass production, mineral and synthetic markers show how human waste and pollution have become a major geological force in the context of the Molysmocene.30

Third, the Molysmocene makes explicit a commonly shared, yet implicit, commonality that exists among all the other neologisms: each rests on an explicit characterisation of the global distribution of wealth (affluence) but remains silent on the issue of pollution, waste and dirt (effluence).31 The Molysmocene, however, foregrounds the idea that affluence and effluence are mutually constitutive, because they inevitably form what ecological economists call the ‘joint production’ of (neg)entropy or wealth/waste.32 In sum, the Molysmocene is the dark mirror of the Anthropocene: life is lived with, on, in and through waste, pollution and dirt. One of the most critical challenges today is that the joint production of (neg)entropy has reached a stage of irreversible overaccumulation by contamination. The overaccumulation of waste functions in tandem with the disruptive relations between property and prosperity. While the financial sector continues to accumulate unprecedented profits, resource extraction is surpassing the Earth’s natural regeneration rates, while often having the greatest impact on those most vulnerable to exploitation.33 The production of wastes is greater than can be absorbed by the planet’s sink mechanisms.34 Thus, in stratigraphic terms, sedimentary deposits of trash now form part of a new geological record, as waste is becoming a new layer of the Earth’s crust on the top of the lithosphere. This crust of civilisational waste (explicated by global plastics pollution, among others) we call the littersphere. The biosphere, the atmosphere and the lithosphere are increasingly conditioned by their interaction with the toxic littersphere. For example, some parts of the oceans are so polluted with plastic waste that international shipping lanes must be rerouted for freighters to reach their destination and unload yet more containers of disposable plastic.35 If the Molysmocene characterises a world fossilised by the unprecedented accumulation of anthropogenic waste across the globe, what does it tell us about the operation of the law?

This chapter is essentially a conceptual study investigating the legal implications of the Molysmocene. Environmental governance of planetary boundaries not only rests on definitional misunderstandings, miscalculated environmental costs and methodological inconsistencies; 36 it also carries pitfalls in the framing of environmental issues themselves. However, what if the shortcomings of environmental regulation are part of a more fundamental problem: the erasure of waste from most discussions on planetary boundaries? What if the lack of an understanding of waste flows is one of the most crucial limitations in advancing towards a comprehensive regime of international environmental law?37 Without knowledge of the extent and severity of the global waste crisis, scientists argue, it is impossible to develop coherent strategies to mitigate ecological harm. Therefore, this chapter attempts to shift our gaze towards a legal object, which has now become so visible that it can no longer be erased from human perception: waste.

Our hypothesis is that the breaching of planetary boundaries may partly be attributed to waste production in the Molysmocene. We argue that waste has irreversibly encroached, and continues to encroach, on the planetary boundaries of the Earth system. In order to successfully carry out their goals, calls for global environmental governance must therefore at least: (i) consider waste as a primary threat to the preservation of planetary boundaries; (ii) consider international law’s historic role in facilitating waste accumulation and dispersion; (iii) acknowledge the pivotal role waste may have in shifting and reordering the boundaries of law itself. We discuss each of these issues below.

2. THE BOUNDARIES OF PLANETARY WASTE

What is commonly referred to as the threat to planetary boundaries constitutes a sanitised normativity to address the global impact of human waste. The planetary boundaries concept is a framework designed to guide sustainable development policies and to help identify a safe operating space for humanity within the confines of the planetary boundaries. While we support the idea of identifying Earth’s limits to human activities and their negative externalities, we are uncertain that it sets the right boundaries or limits, because it does not include and/ or fully consider the aspect of waste. Other researchers appear to also share our scepticism. A recent study suggests that the planetary boundaries might provide an incomplete picture because the model tends to underplay the significance of waste generation, waste’s relation to all of the planetary boundaries and the impacts of waste on the entire Earth system.38 The study suggests: ‘[t]hough seldom emphasized, the crux of the limits to sustainable environmental dynamics lies in waste (mis-)management, which sets where boundary values might be.’39 The study concludes that ‘waste accumulation’ is the ‘primary problem’40 and the source of transgression for at least six of the nine planetary boundaries originally identified by Rockström and his team.41 In light of the need to more explicitly include waste as a central consideration in the planetary boundaries framework, we enumerate below the nine planetary boundary transgressions commonly referred to in the context of the Anthropocene and translate them into the language of the Molysmocene, which, we believe, more accurately details the scope and severity of global waste distribution.42

The first boundary, climate change, results from the steady increase in atmospheric carbon dioxide emissions, that is, air pollution:43 ‘CO2 concentration has risen from 280 parts per million (ppm) on the eve of the industrial revolution to 400 ppm in 2013, a level unmatched for 3 million years.’44 Primary sources of carbon dioxide pollution come from hazardous activities such as cement production, deforestation and burning of fossil fuels such as coal, oil and natural gas. Climate change is essentially instigated by the great acceleration in greenhouse gas-based pollution.

A second boundary, ocean acidification, is related to CO2 pollution, as it decreases the pH of water, killing corals, shellfish and plankton.45 Ocean acidification is closely linked to a third planetary boundary, which is the rate of biodiversity loss; a central concern and part of the debate focusing on the Sixth Mass Extinction event.46 This extinction is caused by, among other sources, industrial and consumer pollution, such as pesticides on land or plastic waste in oceans. Modern farming and transportation methods pollute water tables, rivers and estuaries with excessive nitrates and CO2, which in turn increases global warming and biodiversity loss. Global freshwater (itself another boundary) and its rich biodiversity is polluted by chemical and industrial waste, which now also affects climate patterns and water cycles.47 Biochemical flows of pesticides and chemical fertilisers, such as phosphorous and nitrogen, contribute to the pollution of fragile and diverse ecosystems,48 while toxic chemical contamination from persistent organic pollutants and other endocrinal disruptors have been shown to be a major factor of biodiversity loss. A recent study shows that more than 40 per cent of the global insect population has become extinct as a result of the intensive use of pesticides and anthropogenic eradication campaigns.49 Similarly, persistent organic compounds have caused dramatic reductions in bird populations and impaired reproduction and development in marine mammals.50 It is thus clear that both biodiversity and biosphere integrity more generally are severally impacted by human waste.

Entropic deforestation, industrial agriculture and the dumping of various pollutants are also responsible for land-system change. Land-system change is a fourth boundary transgression,51 and in this context relates to land converted to cropland and land for waste deposits (more generally known as landfill sites). Many countries, such as the United States, are now running out of landfill space for their municipal, commercial, mining, hazardous and radioactive wastes.52 The fifth boundary, stratospheric ozone depletion, is caused by chemical pollution, aerosol loading and the release of dust and smoke.53 Atmospheric aerosol loading, the sixth boundary, is caused by the same chemical pollutants, which accumulate within the atmosphere at varying levels depending on the region.54 The seventh boundary relates to the large quantities of chemical fertilisers such as nitrogen and phosphorus used in agricultural production, of which only a fraction is consumed by the plants or animals, with the rest accumulated in soil, lakes, rivers and oceans.55 As was already intimated above, human pressures on freshwater reserves and systems, the eighth boundary, disrupt normal water cycles. Overconsumption and pollution caused by municipal, commercial and industrial waste leaking and waste dumping seriously endanger global water reserves.56 Finally, chemical pollutants such as persistent organic pollutants, heavy metals and radionuclides, as well as the release of novel chemical entities, could have potentially irreversible and unpredictable synergic effects on living organisms.57

In sum, the human-driven production of waste may be considered as one of the principal drivers of planetary boundary transgression. This amounts, in the words of French geographer and Marxian theorist, Henri Lefebvre, to a *terracide* – the killing, destruction or death of the Earth.58 When garbage pushes back, the Anthropocene – the geological epoch shaped by humans – becomes the Molysmocene – a geological epoch shaped by the waste of humans. What role does international environmental law play in organising waste accumulation and dispersion and, ultimately, in disrupting Earth system processes?

3. BOUNDARY BINARIES: SOVEREIGNTY AND PLANETARY BOUNDARIES

International law is a set of norms, practices, institutions and discourses associated with the production of order, unity and coherence, while the idea of waste, pollution and dirt, by its very nature, remains synonymous with disorder and anarchy. The international legal order was historically construed in terms of its ability to distance and externalise waste that was seen to be created by the ‘uncivilised’ in the name of and for the benefit of the ‘civilised’.59 The common definition of waste is deeply rooted in the colonial legacy of international law. Waste was a metaphor used by European States to classify peoples between orderly, productive and sovereign communities, on the one hand, and ‘unproductive’ and ‘wasteful’ agents (including in particular indigenous peoples), that were also deprived of legal subjectivity as a result of such a classification, on the other hand.60 From Locke, to Vattel, to the League of Nations, the appeal to the legal concept of waste was instrumental in dispossessing ‘savages’ from their uncultivated land (or the more commonly used ‘waste land’) for the purpose of accumulation, enslavement and enclosure.61 In the pre-industrial era, the idea of waste, and everything that went with that impulse, was therefore construed as a legal, moral and ethical justification for the colonisers’ political economy of plunder in the so-called New World. International law, by expelling ‘superfluous’ peoples regarded as ‘wasteful’ in the colonies, enshrined the right for its legal subjects – States – to extract valuable resources from within their boundaries.62 Even marginalised people in cities faced a similar fate.63 According to one interpretation, enclosures in England were ‘a struggle over the land-use designation of “waste” in which advocates of the enclosures came to see open lands as a wasted commons’.64 Waste became the shameful antithesis to wealth in England, both in the colonies and in cities which, with England at the time being a colonial superpower that determined the foundations of international law, helped shape the political economy and social norms of the international legal order. Waste and pollution constituted an affront to authority and an injury to political and social legitimacy, and were seen to be an impediment to the creation of wealth.

‘Cleaning’, ‘organising’, and ‘unifying’ are thus constitutive of the ‘good’ international legal order and must be interpreted, in the context of the Molysmocene, as purifying rituals in which legal subjects purged themselves of defilement. As the British anthropologist Mary Douglas astutely underlined in 1966, dirt and pollution are not isolated phenomena; they are a part of a classificatory system and organising scheme of the order itself:

Dirt then, is never a unique, isolated event. Where there is dirt there is system. Dirt is the by-product of a systematic ordering and classification of matter, in so far as ordering involves rejecting inappropriate elements. This idea of dirt takes us straight into the field of symbolism and promises a link-up with more obviously symbolic systems of purity.65

International law plays such an organising, unifying and purifying role: it constitutes and institutes orderly normalness structured around affluence, while discarded waste is meant to be expelled from the realm of sovereignty and legal subjectivity. However, with time, international law’s creation of impregnable sovereign boundaries allowed the trespassing of planetary boundaries.66 From 1750 onward, that is, with the advent of the industrial age, and in sharp contrast to the earlier colonial period, ‘waste’ became associated with polluted water and air, which were considered to be side effects of economic development and industrialisation. 67 International law thus allowed legal subjects associated with the State to exploit and acquire territory and property at the expense of the biophysical properties of the Earth – which gradually became saturated, as a result, by the overaccumulation of waste in the industrial era. With the global expansion of modern capitalism in the nineteenth and twentieth centuries, international law became mainly preoccupied with affluence, that is, the production, distribution and protection of wealth.68 Effluence and all the negative externalities generated by the creation of wealth have, at least until very recently, been a peripheral matter of concern from which many marginalised and vulnerable people still suffer today;69 the colonial legacies of the wealth created by waste still continue under the guise of (global) unequal ecological exchanges and ecological debts.70 International law is therefore associated with the structural disadvantages faced by the global south in being confronted with the disproportionate amount of waste generated by the industrialised global north and exported to the global south. As a 2018 World Bank report points out:

Solid waste management is a universal issue that matters to every single person in the world. […] For example, the East Asia and Pacific region is the region that currently generates most of the world’s waste at 23%. And although they only account for 16% of the world’s population, high-income countries combined are generating over one-third (34%) of the world’s waste. […] And with over 90% of waste openly dumped or burned in low-income countries, it is the poor and most vulnerable who are disproportionately affected.71

The colonial legacy of the concept of waste also inhabits the historical evolution of international law. The 1941 Trail Smelter Arbitration case, an ‘iconic’72 event in the history of international environmental law, is revered in the field for having created two core principles of contemporary international environmental law: States’ duty to prevent transboundary environmental harm and the duty to compensate damages. In this case, offensive fumes from one country troubled the sovereign sense of order and wellbeing of another country. International law was summoned to re-establish that order by designing new rules governing relations between sovereign States and by recognising a duty not to cause transboundary air pollution and harm. This threshold implicitly recognises a right to pollute as long as it does not harm another sovereign State.73 As one commentator observed, ‘in the process [of the Trail Smelter Arbitration], air pollution became an accepted, culturally sanctioned consequence of industrial capitalism, and ‘smoke eating’ a normal part of everyday life’.74

The more recent problem of global plastic pollution further illustrates the underlying ‘right to pollute’ logic found in the working of international environmental law and, more generally, global governance mechanisms.75 A 2015 study shows that the global production of plastic rose from 2 million metric tons (Mt) in 1950, to 380 Mt in 2015. The total amount of plastics produced from 1950 through to 2015 is 7800 Mt. Half of this – 3900 Mt – was produced between 2002 and 2015.76 Ultimately, ‘around 4900 Mt – 60% of all plastics ever produced – were discarded and are accumulating in landfills or in the natural environment’.77 And yet, there is nothing in international environmental law that seeks to explicitly and comprehensively tackle this disaster. As it stands, international environmental law applicable to plastic pollution remains at best inefficient and at worst non-existent. One of the main challenges is to accurately monitor and mitigate the environmental load of the plastic industry by tracing the physical flows of plastic pollution across the many global supply chains and to regulate these. Much like dark matter in the realm of particle physics, the world of microplastics remains in the shadows of human perception. At the current stage of scientific understanding, only 1 per cent of the synthetic tide visibly ends up on the ocean surface, while the remaining 99 per cent is unaccounted for.78 How should international environmental law regulate this issue – admittedly a very difficult task? Another aspect of this challenge, which also reflects the inadequacies of global plastics governance, emanates from our restricted definition of ‘plastic waste’. As geographers point out, we tend to exaggeratedly focus on downstream plastic waste (curbing consumers’ behaviour and so on) instead of engaging in serious policy reforms to curb the production of plastics.79 International environmental law seems unable and unwilling to address this issue.

A further concern and difficulty for international environmental law is that most plastic pollution is released during extraction and production processes, which vastly exceeds the waste produced after consumption. Spanning a complex network of global supply chains, various sources of land, air and water pollution are seldom addressed by environmental law. The CO2 emissions from oil extraction, transportation and refining, as well as the microparticles released by petrochemical production sites, are just two examples of the wide scope of plastics contamination, which continues to fail to be monitored by national and international environmental agencies.80 Although the 1996 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters calls on all parties to establish national pollution registers, there is no internationally agreed strategy for the collection of data.81 The erosion of the efficacy of such information disclosure obligations reflects, among others, the dominance of capitalist, corporatised and consumer-driven market perspectives on social welfare within the main body of environmental law.82 Relatedly, the Protocol on Pollutant Release and Transfer Registers, which was signed by 38 States and which entered into force in 2009, is not designed to reduce pollution levels.83 While admittedly critically necessary and a step in the right direction, it must ‘merely’ enhance public access to information through the establishment of coherent, integrated, nationwide pollutant release and transfer registers. Yet, many carbon-intensive countries around the world – specifically Canada, the United States, China and some Latin American States and African States – are not parties to the Protocol.84

A final concern, which also complicates international environmental law’s response to the problem of global plastic pollution, is that plastic is not geographically equally produced and dispersed. It is unevenly distributed both at the source and at the sink. A 2016 MacArthur Foundation report found that, at the source, 95 per cent of plastic producing companies are headquartered in the European Union and the United States.85 Moreover, ‘the United States, Europe and Asia jointly account for 85% of plastics production, roughly split equally between the United States and Europe on the one hand and Asia on the other’.86 The global plastic demand is expected to reach 334,83 Mt and a value of approximately USD 654,38 billion by 2020.87 The MacArthur Foundation report further adds that at the sink, 82 per cent of all plastic leakage in the environment occurs in Asia, due mainly to a lack of waste management infrastructure.88 An estimated 4.4 to 12.7 million metric tons of plastic waste are thus added to the oceans annually, which often ends up on South Asian shores.89 A 2017 study concluded that up to 95 per cent of the world’s ocean plastic waste originates from just ten rivers: eight in Asia and two in Africa.90 With reference to the plastic life-cycle, one is tempted to conclude that international law clearly contributes to ordering and structuring the production, circulation, distribution and dispersion of plastic, from the oil well to the merchant shelves and to the landfills. However, when one looks at the plastic death-cycle, international environmental law seems to all but disappear from the picture. Net flows of plastic waste continue to be dispersed in the form of plastic pellets, microfibres and industrial externalities outside of sovereign jurisdictions, impacting riverbeds, streams and oceans across sovereign borders.91 Whereas plastic wealth accumulates on the enclaved telluric grounding of the sovereign Behemoth, plastic waste is immersed into the ebb and flow of a thalassic Leviathan.

These relative and variable legal processes not only illustrate the anthropocentric ontology of international law and of international environmental law in particular,92 but also highlight the anthropocentric sovereign enclosure of the world by extractive and capital-driven States, which rests on planetary exposure to an unsustainable accumulation of waste. As a consequence, the terra nullius of the Anthropocene is now facing the terra saturate of the Molysmocene: an emerging world in which waste has engulfed the planetary boundaries.

Terra nullius was a legal fiction engineered to dispossess ‘non-civilised’ peoples from their lands and activities.93 With the planet now saturated with waste, terra saturate more accurately expresses this new geological condition. International law accelerated, or at least has not prevented, the transition from terra nullius to terra saturate. Human production of waste as matter out of place, according to Mary Douglas,94 engineered a planet out of space, in the words of Michel Serres.95 Therefore, in the Molysmocene, waste must be conceived of as a strategy for land appropriation.96 Moreover, the foregoing analysis that we have conducted through the lens of the Molysmocene would suggest that colonial expansion is what caused a massive increase of waste accumulation and pollution, which transformed a bountiful land into a toxic void; precisely the terra nullius that ‘uncivilised’ people were accused of ‘wasting’.

4. WASTE SHIFTING AND REORDERING THE BOUNDARIES OF INTERNATIONAL LAW

The rise of the Molysmocene compels us to radically shift our understanding of international law. *Terra saturate* is deeply intertwined with international law in the twenty-first century. In terra saturate international law, and in the present case international environmental law, are strategies of avoidance and of redistributive affluence which, ultimately, reproduce the structural toxic tropes of the Anthropocene. How do we survive in a world saturated with waste? How does or should international law operate in such a world? How does or should international law organise the distribution of affluence and effluence in the context of ever-increasing waste?

In this section, we argue that the *Molysmocene* is in a process of reconfiguring the boundaries of international law. Kotzé and French coined the term *Lex Anthropocenae* to designate the need for transformative public and private global governance efforts to better protect Earth system integrity and tackle the socio-ecological crisis.97 Along similar lines, in this section we wish to stress the importance of *Lex Molysmocenae*. We argue that the very ubiquity of waste is itself a source of normativity;98 generally associated with ‘disorder’, waste forces itself upon us to reorder the law. This is so because waste is now (re)drawing the biophysical parameters of risk analysis that frame social and legal responses to the socio-ecological crisis.99 This new Lex Molysmocenae does not rest on the fragmented reality that exists between specialised institutions or various branches of international law. Rather, it emerges from the convergence of international environmental law and international political economy to incorporate waste into global value chains. In other words, the negative externalities of globalisation – once discarded and managed by environmental law – are increasingly now being recycled into positive values and goods that are regulated by international economic law.100

The 2017 Chinese ban on foreign waste imports is illustrative of this reordering of the boundaries of global economic and environmental regulation. When China decided to ban the import of foreign waste, the effects (political, legal, economic and otherwise) of this decision, rippled throughout the world. For example, the World Bank estimates that 270 million tonnes of waste are recycled every year.101 According to the Bureau of International Recycling, all this recycled waste has developed into a USD 200 billion industry globally.102 Yet, on 31 December 2017, China, which used to be the global recycling trade centre of the world, abruptly closed its borders to imports of recycled material following the enactment of the so-called National Sword policy.103 The policy imposes new standards for scrap imports which most countries cannot technically meet (such as 0.5 per cent contamination levels for paper, wood, ferrous and wire cables imports).104 This was a difficult requirement for many countries to fulfil, especially countries in Europe, as well as the United States. In the case of Europe, plastic waste exports from the European Union grew by more than 400 per cent from 2002 to 2015, with more than 85 per cent of the European Union’s plastic waste exports going to China in 2012.105 As for the United States, waste was its largest export to China, contributing 16 million tons in 2016, which amounted to a total of USD 5.2 billion. Between 1988 and 2016, China imported USD 81 billion worth of plastic waste. Since the ban was imposed, western countries have been struggling to find new dumping sites for their plastics.106 Rather revealingly, the the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989,107 but instead to the World Trade Organization (WTO),108 despite the fact that rubbish and pollution remain rarely adjudicated by WTO panels and committees.109 This means that waste, though formally managed and regulated under domestic and international *environmental* norms, currently rather seems to be considered a commodity that must be regulated by international *economic* law. The Chinese notification to the WTO is therefore a clear example that waste has become a global commodity reordering the boundaries of law itself.

### 2NC – AT: PDB

#### 1. Can’t solve the net benefit – CIL only gains force of law if elevated in contravention to domestic statute. The perm aligns the international norm and domestic law, so it can’t establish that U.S. commitments pursuant to CIL supersede domestic legal jurisprudence. That’s Banks.

#### 2. Conflict – the U.S. needs to signal that it’s willing to void federal statutes. The perm creates statutory support for CIL, deflecting the precedent of independent enforceable obligations.

Kundmueller ‘2 [Michelle; May 1; Attorney specializing in constitutional law, candidate for a J.D. and M.A. in Political Theory from the University of Notre Dame, B.A. from Flagler College; Journal of Legislation, “Note: The Application of Customary International Law in US Courts: Custom, Convention, or Pseudolegislation?” vol. 28]

III. Uses, Abuses, and Implications of Customary International Law in Domestic Law

Debates over the role of customary international law in domestic courts continue to produce differing opinions about the role of customary international law within the U.S. legal structure. While there is general agreement that customary international law plays some role, the extent of this role remains unclear. Three of the most important of the unanswered questions are covered in this section of this Note: (1) whether customary international law has the potential to trump federal legislation, (2) whether customary international law is federal law without empowering legislation from Congress, and (3) which political branch holds ultimate control over the interpretation of customary international law. The resolution of these issues will determine the power of customary international law in U.S. legal systems. In doing this, it may also change the balance of power between the respective federal branches by expanding the judiciary's ability to overrule federal law. In the final analysis, the answers to the preceding questions will determine whether customary international law or Congress controls in domestic legislation. The following section examines some currently viable theories about the power of customary international law in the U.S. legal system.

A. Dominance of Customary International Law over Federal Law

Jordan J. Paust, who has authored a book and several law review articles on the subject of customary international law, asserts that the incorporation [\*366] of this body of law into domestic law is required by the Constitution. He claims that "customary international law has been directly incorporable, at least for civil sanction and jurisdictional purposes, without the need for some other statutory base." 20 According to Paust, "the Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts." 21

Based on his claims of constitutionally mandated incorporation of customary international law, Paust delineates the areas of domestic law that this affects. In some applications, customary international law enhances the power of the "Executive under Article II, section 3 to 'take care that the Laws be faithfully executed.'" 22 In other applications, customary international law restricts the Executive: "Supreme Court and other opinions have also recognized that while exercising Presidential war powers, the Executive is bound by customary international law." 23 In addition to affecting the President and therefore indirectly the Legislative branch, Paust claims that customary international law directly shapes Congressional power because it "can limit the exercise of an otherwise appropriate Congressional power and thus can function partly as an aid for interpreting the extent of constitutional grants of power." 24 The power of customary international law also affects the courts, where it "may be relevant to an adequate interpretation of various sorts of Congressional power in order to functionally enhance such powers." 25 Finally, Paust claims that the "latter process of incorporation might include an enhancement of the power of Congress under Article I, section 3, clause 18 to enact legislation 'necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'" 26

Because customary international law thus pervades the federal government, alternately limiting and expanding the powers of the respective branches, it becomes a defining body of law in relationship to the federal government. Hence, Paust writes, "in the case of an unavoidable clash between fundamental human rights supported by customary international law and a federal statute, the human rights (which have a constitutional status) [\*367] must prevail." 27 In normal conflicts between codified (treaty) international law and federal statute, the last-in-time rule applies; this rule dictates that whichever law was most recently enacted controls. 28 Paust claims that this rule dictates that, in conflicts between customary international law and federal statutes, customary international law always controls. 29 As Paust theorizes, "customary international law would necessarily be 'last in time,' since custom is either constantly re-enacted through a process of recognition and behavior involving patterns of expectation and practice or it loses its validity and force as law." 30 By this reasoning, custom is always a controlling authority in the face of a directly conflicting federal statute.

The extent to which Paust claims that customary international law influences and controls domestic law leads to the question of who, within the U.S. legal system, decides upon the content, interpretation, and manner of application of international law. While all three branches of the federal government will have some indirect control in forming customary international law, it also limits the scope of each. Hence, whichever branch is empowered to control the application and interpretation of this body of law within the domestic legal structure will be that much stronger, relative to the coordinating branches. In Paust's view, the judicial branch is responsible to "identify, clarify, and apply" this body of law. 31 In response to concerns that this role improperly changes the balance of powers, he asserts that "it is precisely because the federal judiciary has both the power and responsibility to identify and apply customary international law in cases otherwise properly before the courts that there is no violation of the separation of powers when federal courts apply international law while interpreting federal statutes." 32

In an article on human rights law and domestic courts, Richard B. Lillich explores the role and the ramifications of customary international law in United States law. Like Paust, Lillich bases his understanding of the role of customary international law on the finding that "customary international law, while not mentioned in the Constitution, is part of the law of the land to be determined and applied by the courts whenever appropriate in making a decision." 33 Based on this, Lillich states that "the starting point in ascertaining what international human rights norms have been received into customary international law--and therefore are rules of decisions for domestic [\*368] courts--commonly is thought to be the Universal Declaration of Human Rights . . . ." 34 The status of the Universal Declaration of Human Rights as a source of the customary international law rests solely on its position as evidence of existing customary international law. Lillich admits that, while the Universal Declaration of Human Rights resolution was adopted without a dissenting vote by the U.N. in 1948, it is not legally binding as a treaty, as it has never been ratified. 35

Thus, to the extent Lillich is correct that the Universal Declaration of Human Rights reflects--at least in part--customary international law, and to the extent that both Paust and Lillich are correct that customary international law is part of United States law which should be enforced and interpreted by the courts, it should also "be directly enforceable in domestic courts." 36 Most customary international law claims in U.S. courts have been based on a statute which provides for such a claim. The most common example of this is the Alien Tort Statute, which dates back to the Judiciary Act of 1789 and provides for federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations of a treaty of the United States." 37 The point of Lillich's suggestion is that, while there is nothing wrong with providing statutorily for the incorporation of customary international law, as has been done in the past, it is unnecessary or redundant.

The implications of Lillich's claim that customary international law may and ought to be directly incorporated into United States law even without statutory support are far reaching. He advocates that judges ought to use human rights law--and implicitly all of customary international law--without statutory support. Not only could claims be brought in federal and state courts without the benefit of enabling statutes, but, under the mirror principle, the United States has an obligation, enforceable domestically, to live up to the provisions of customary international law. 38 Beyond this direct effect, which has the potential to permit the voiding of a federal statute on the grounds that it conflicts with customary international law (as defined and recognized by the judiciary), Lillich predicts that customary international law should have the "greatest impact on domestic law in the future by influencing the courts' approach to constitutional and statutory standards." 39 This means that the Constitution, federal law, and state law should be interpreted in light of customary international law. As Lillich states, "litigants and judges already have invoked the Universal Declaration [of Human Rights] for precisely this purpose." 40 Lillich hails this new world of customary international law's direct and indirect incorporation into United States law as offering "significant as well as virtually limitless possibilities for achieving greater protection of the rights of individuals." 41

#### 3. Specifically true for antitrust – courts won’t decide on CIL grounds if an equally applicable domestic rule exists.

Meessen ’84 [Karl M; Professor of Law at the University of Augsburg, American lawyer, specializing in the field of European Commission Law, International Competition, International Trade, International Commercial Arbitration. Member of Norr, Stiefenhofer & Lutz; October 1984; “Antitrust Jurisdiction under Customary International Law”; The American Journal of International Law, Vol. 78, No. 4; TV]

To date, international antitrust cases have only been brought before domestic courts. Those courts, of course, have to apply domestic law. International law is applicable only to the extent that domestic law so provides. Also, when a domestic court has to decide an individual case, it need not determine whether a certain rule is part of domestic law or of international law as long as it is satisfied that the rule exists. Before a domestic court, proof of the existence of a rule of unwritten law is brought by citing as many domestic precedents as possible. Again, it seems to be immaterial whether those precedents reflect customary international law or only domestic rules of conflict of laws. Thus, there seem to be good reasons to subscribe to Lowenfeld's preference for some blend of public law, public international law and private international law.34

In international antitrust practice, however, there are cases where it does matter whether an assumed rule is one of international law or of conflict of laws. Domestic law may attribute a different rank to the two sets of rules. In Germany, for instance, rules of general international law prevail over any statutory law.35 Similarly, within European Community law, secondary legislation enacted by organs of the Communities is void if it violates general international law.36 And, on the level of relations between sovereign states, domestic rules of conflict of laws cannot, of course, be relied upon at all.

The two legal systems interact in the process of forming new rules of unwritten law. Rules of conflict of laws may be part of state practice and thereby contribute to the formation of customary international law, and rules of customary international law may be referred to when ascertaining or interpreting principles of conflict of laws. But, in contrast to reciprocal influences on the contents of new rules, their actual creation follows entirely different lines.

First, the emphasis in the creation of conflict-of-laws rules is on judge-made law. Domestic courts are easily accessible and may give regular guidance on the development of the law, whereas international adjudication is the exception rather than the rule. Customary international law is mainly formed by the-it is hoped, parallel, but usually divergent-practice of some 160 independent states, acting through their legislative, executive and/or judicial branches.

Second, the role of legal publicists in the creation of new rules is different as well. In conflict of laws, theoretical approaches may be conceived specifically for adoption into judge-made law. The function of scholars of international law offers less opportunity for creative thinking: they may compile and analyze state practice, but they cannot replace it with their own concepts.

Finally, the perspective for analysis is different, too. The- perspective of conflict of laws lies within a state. It is directed to domestic interests, both public and private. Foreign interests are relevant only insofar as they form part of the state's foreign policy, for instance, if they reflect considerations of reciprocity. The perspective of international law stands above the sovereign states. It demands neutrality vis-a-vis the interests of particular states and it implies that, in general, the interests of the individual have to be articulated by sovereign states.

These three differenceshould be kept in mind when state practice is surveyed and analyzed in the next two sections of this paper. They all derive from the same plain truth: domestic rules of conflict of laws make up part of one lawmaking system organized by one constitution and usually based on a broad consensus of values and interests. The decentralized making of international law does not enjoy any of those benefits and is therefore bound to offer a more modest yield of legal rules. But, as should also be remembered, modest answers of international law may often be supplemented by richer ones of conflict of laws.

#### 3. CIL is codified only when it proves it can override conflicting statute – the perm renders it mere gap-filler.

Wouters ‘2 [Jan and Dries Van Eeckhoutte; June 2002; Professor of International Law and the Law of International Organisations, Leuven University, and Of Counsel at Linklaters De Bandt; Research Assistant, Institute for International Law, Leuven University; Institute for International Law Working Paper, “Giving Effect to Customary International Law Through European Community Law,” No. 25]

1. Introduction

Being part of general international law, customary international law1 is in principle binding on all subjects of international law, including international organisations like the European Union2, the European Community and all of the EU’s Member States.3 The breach of rules of customary international law will entail the international responsibility of the subject(s) involved. However, for private individuals, what matters most is the question of whether and to which extent they are able to rely on a rule of customary international law before the courts in order to see their rights protected. In most domestic legal systems, national courts are under certain conditions willing to accept that a private individual invokes a rule of customary international law to interpret a domestic rule in conformity with customary international law; to derive a right out of a rule of customary international law; or - the strongest and most far-reaching use - to contest the legality of a rule of domestic law. However, this last type of reliance on customary international law is especially severely restricted if not rendered impossible in the case-law of many States.4

Although the case-law of the European Court of Justice (“Court of Justice”) has for many years taken rules of customary international law into account 5, it is only very recently, in the Opel Austria judgment6 of the European Court of First Instance (“Court of First Instance”) and in the Racke judgment7 of the Court of Justice, that the Community courts have explicitly relied on customary international law to test the validity of acts of EU institutions.

These two cases raise a variety of issues which will be analysed in this contribution. First, the question arises as to what the precise position of customary international law is in Community law8 (2). Secondly, Racke and Opel Austria raise the question under which conditions rules of customary international law can be invoked in Community law in order to challenge the validity of acts of EU institutions or rules of national law. This requires a careful analysis of the reasoning followed in the judgments concerned (3). In the third place, it should be examined how the Community courts’ case-law on the invocability of customary international law relates to their case-law on the invocability of treaties to which the EC is a party (4). It would be interesting to see whether there is any incoherence between the two lines of case-law and whether the outcome of a case before the Community courts could differ depending on the formal source of international law involved. Based on the insights acquired in the previous sections, we will end our contribution with some reflections relating to the nature of customary international law (5).

A preliminary remark should be made as to the terminology used in this contribution. The concept of “invocability” is often used interchangeably with that of “direct effect”. In the present contribution, however, we prefer the term “invocability” as it better catches the different manners in which customary international law can be used by private individuals, in particular the review of the legality of domestic (be it national or EC) rules and the interpretation of those rules in conformity with customary international law.9 The use of the term “invocability” also helps to distinguish our analysis, which concerns the relationship between the international legal order and domestic (national or EC) legal orders, from the context in which the notion of “direct effect” is typically used, namely the relationship between rules of Community law and rules of national law.10 When the term “direct effect” is used hereinafter, it will be in reference to the Court of Justice’s wellestablished case-law concerning the rights of private individuals derived from Community acts and/or their right to invoke EC law before a national court in order to assess the compatibility of national law with EC law.

2. The position of customary international law in Community law

Much has been written about the initial reticence of the Court of Justice regarding the relationship between general international law and EC law.11 One can find a specimen of such reticence in the Dyestuffs case (1972), a competition law case in which the Court avoided the problem of the limits which customary international law imposes on the EC’s jurisdiction in cartel cases.12 [FOOTNOTE] 12 Case 48/69, ICI v Commission [1972] ECR 619. As is known, the Court avoided the problem of customary law of jurisdiction by following the Commission’s argument that the parent companies outside the EC, by giving pricing instructions to their EC-based subsidiaries, were acting as a single entity so that the Commission’s decision could be seen as a simple application of the territoriality principle. One may compare this with the thorough examination of customary international law of jurisdiction by Advocate General Mayras in his opinion in this case: [1972] ECR 619, at 692-697. The Court avoided this question again in Joined Cases 6/73 and 7/73, Istituto Chemioterapico Italiano and Commercial Solvents v Commission [1974] ECR 223, points 36-41. [END FOOTNOTE] As Timmermans has rightly stressed, the Court’s initial reticence can largely be explained from its efforts to safeguard the autonomy of Community law vis-à-vis international law.13 However, since then the Court of Justice has made numerous references to customary international law, even though the wording used often blurs the precise formal source of the rule (typically, reference is made to “the general rules of international law”14, “the rules of (public) international law”15, “principles of international law”16 or even simply to “public international law”17 or “international law”18).

This is not to say, though, that through the Community case-law, the precise legal status and place of customary international law within the hierarchy of norms has been clear. Before Opel Austria and Racke the Court of Justice mainly relied on customary international law (i) to demarcate the limits of State or EC/EU jurisdiction and powers, (ii) as providing rules of interpretation and (iii) as a ‘gap-filler’ in the absence of specific EC rules. Although this may have been implicit in earlier case-law (see below), before the aforementioned judgments the Community courts had not explicitly confirmed the possibility that customary international rules could be relied upon to challenge the validity of Community acts (iv).

#### 4. The perm prevents precedent-setting – including the plan obviates the showdown between CIL and domestic law.

Kundmueller ‘2 [Michelle; May 1; Attorney specializing in constitutional law, candidate for a J.D. and M.A. in Political Theory from the University of Notre Dame, B.A. from Flagler College; Journal of Legislation, “Note: The Application of Customary International Law in US Courts: Custom, Convention, or Pseudolegislation?” vol. 28]

V. Conclusion

This Note has attempted to demonstrate some of the difficulties of applying customary international law in U.S. courts. At every level, there are unanswered questions. Many of these issues, like how "general" a practice or its acceptance must be in order to constitute customary international law, can only be given imprecise answers. Not only are these general problems inherent in all legal questions involving line-drawing in the defining of customary international law, but there is a virtual war being waged over where that line should be drawn and by whom. This issue, in turn, raises questions of constitutional importance, the gravity of which it is almost impossible to overstate. Practical concerns about the balance of powers, no less than theoretical misgivings over undermining our government's consentbased authority and legitimacy, demand our attention as the possibility of directly incorporating customary international law, perhaps even when in direct contravention of federal statute, comes closer to becoming a reality.

Current cases do not present any of these possibilities as realities. They do, however, contain the beginnings of what could become fundamental structural changes in customary--and hence, United States--law should the judicial system prove dominant in determining customary international law. Current cases show U.S. courts, on a fairly modest level, defining, determining, and applying customary international law. The cases have yet to produce a real showdown between domestic, either constitutional or congressional, and customary law. To date, congressional and executive actions and statements have been taken as one type of evidence in determining the content of customary international law, but they have not served as dispositive or controlling in the face of overwhelming evidence that customary international law as a whole dictates a contrary outcome.

This, of course, is the real issue. What happens when the will of the people or a dictate of the Constitution conflicts directly with customary international law? No doubt, our courts will do their best to interpret creatively so as to avoid such a conflict, but, eventually, the conflict will come, and a decision will be made. The conflict is inevitable due to the nature of modern customary international law. No longer delegated to issues traditionally understood as exterior, modern customary international law is beginning to define relationships between governments and their citizens and amongst citizens. [\*378]

The conclusions of this Note are three. First, there is an impending constitutional crisis, with the potential to alter the fundamental structure of our laws and the legal authority (if not the power) of the American people. Second, in this eminent struggle, Congress ought to take the lead, controlling through legislation the authority of customary international law in domestic matters and thus circumventing the potential conflict between international and domestic law by upholding the supremacy of U.S. law in domestic matters. The courts will by necessity play a crucial role, for they must concur that this role belongs to the legislature and that federal law is supreme. Third, U.S. courts must, in their role as interpreters of customary international law, hold ever present in their determinations the recognized definition of customary law, which encompasses both a custom and a convention element: the practice of nations ought not be ignored. By this means, they will be surer of applying customary international law as it exists, rather than as courts and commentators wish it to be.

#### 5. Alignment guts spillover – only CIL as supreme signals commitment to transnational antitrust.

Zwarensteyn ’13 [Hendrik; 2013; J.D., Ph.D., Professor of Business Law at Michigan State University; Some Aspects of the Extraterritorial Reach of the American Antitrust Laws, EBook]

(6) The creation of a special judiciary for antitrust matters in the various countries could in turn, lead to the establishment of a supra-national Court for Antitrust Matters, to which decisions of national antitrust courts could be submitted for review. It follows that the establishment of such an international tribunal, to be meaningful and relevant, implies that not only the decisions of the national courts of the member nations, but also the national laws themselves will be subject to scrutiny against the background of generally recognized and accepted principles of international antitrust law; this means that the member nations would have to recognize the supremacy of this supra-national tribunal in matters of antitrust enforcement in the international community of nations.

#### 6. Mootness – the perm eliminates the Court’s ability to issue a binding judgement on the primacy of CIL.

Wermiel ’19 (Stephen; Fellow in Law & Government at American University Washington College of Law; 8/29/19; “SCOTUS for law students: Battling over mootness”; <https://www.scotusblog.com/2019/08/scotus-for-law-students-battling-over-mootness/>; SCOTUS Blog; accessed 10/3/19; TV)

What is mootness and when does it apply? As a general matter, a case becomes moot when the parties no longer have an interest that can be resolved by the court’s decision. The rule is derived from Article III of the U.S. Constitution, which defines “the judicial power” as extending to “cases” and “controversies.” The Supreme Court has long interpreted this language to mean that federal courts have jurisdiction to decide only those cases in which the parties have concrete interests that will be resolved by a judicial decision. Those tangible interests must be present at every stage of the lawsuit, the court has said, from initial filing to final decision. A principal theory behind the case and controversy requirement – and behind the mootness doctrine, as well – is that courts will reach the best decisions when the cases they decide are litigated in a process that is truly adversarial on behalf of parties who have a real stake in the outcome. When tangible interests are no longer present for the parties in a dispute, a case may become moot. The theory, again, is that parties to a case may not make the best arguments and engage in zealous advocacy if they no longer have genuine, tangible interests in the outcome. Typically, a dispute will become moot because no issues remain that will have a real effect on the litigants. In one well-known example, DeFunis v. Odegaard, the Supreme Court ruled that the claim of a white law student that he was denied admission to law school because of his race and the operation of an affirmative action plan was moot because the student had been allowed to attend law school while the case was pending and was close to graduating. A determination by the Supreme Court that the student was or was not denied admission because of his race would not have affected that individual student’s status or interests, the justices said.

#### [ ] That’s critical to the net benefit.

Bruch 6 – (Carl, Attorney and Co-Director of International Programs at the Environmental Law Institute (ELI), Is International Environmental Law Really Law?: An Analysis of Application in DomesticCourts, 23 PaceEnvtl.L. Rev. 423, http://digitalcommons.pace.edu/pelr/vol23/iss2/)

A. Ambiguity of International Environmental Law in Judicial Decisions As the cases cited above show, domestic courts increasingly look to international environmental law. In some cases, the courts are clear as to the legal effect of the particular provision of inter-national environmental law. International environmental law may be binding or persuasive. In many cases, though, the precise role of international law is ambiguous, vague, or inconclusive. In these instances, the decisions consider, cite, and discuss international environmental law in support of the ultimate holding, but the weight that the court accords international environmental law is unclear. It could serve as a cause of action, a rule of decision, an interpretive aid, or a principle of national law notwithstanding the international status of the principle, or as "commonsense.137 However, in many cases, the court refers to international environmental law without ex-plaining the legal status of the specific norm within the context of the judicial decision. A survey by Professors Bodansky and Brunn6e of experiencesof domestic courts in applying international environmental law also noted this ambiguity. They observed that, "In a perhaps sur-prisingly large number of cases, courts refer to norms of interna-tional environmental law without explaining whether they regard them as rules of decision, as an interpretive aid, or as principles that, despite currency at the international level, are simply drawn from national sources."'38With respect to principles of international environmental law, Professors Bodansky and Brunn~e noted that many decisions seemed to view the principles "as reflecting 'common sense,"' par-ticularly in cases that interpreted and applied the precautionaryprinciple.139A variety of reasons for the ambiguity might be posited.140 Insome instances, the status of the legal provision might be unclear. For example, while many cases relate to the precautionary princi-ple, there is controversy over whether the precautionary principle constitutes a principle of customary international law, or if it is anelement of soft law, or if it is simply a good idea ("common-sense").14' Accordingly, courts might seek to avoid taking a posi-tion regarding the international legal status of a particularprovision. Similarly, there might be uncertainty within a country about the role of international law in domestic judicial deci-sions.142 In other words, the domestic legal culture may be de facto suspicious of international law. In order to avoid being over-ruled or treading unnecessarily into controversial areas, courts might blur the specific nature of the international provision before them. In some instances, judges might not be particularly familiarwith international law or its relationship with domestic law. Judges often are steeped in domestic law, its operation, and its interpretation but have not been trained in international law or practiced international law. Accordingly, they might be reluctant to apply international law, even if they are in a monist state and thus theoretically bound to give legal effect to the relevant provi-sions of international law. A lack of fluency regarding the precise role of international law in domestic litigation may also contributeto judges giving more weight to international law than would bemerited under conventional legal theory (e.g., in a country with adualist system). Even if a judge does accord appropriate weight to interna-tional law, the judge might be intentionally vague about the ratio-nale. This might be, for example, because other judges (e.g., thoseto whom the decision might be appealed) may be less familiar withor even hostile to international law, as discussed above.

### 2NC – AT: Hakami

#### Their ev goes neg – CIL doesn’t have to be a rule to be effective---the CP establishes a prohibition with a contingent U.S. justification, rooted in custom---that will be recognized as law, even if not a ‘rule.’

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

The rulebook denies that such positions can be CIL, but it implicitly recognizes their legal significance. If a position must have broad support in the practice and opinio juris to satisfy the two-element test and qualify as CIL, then it must gather quite a bit of steam before then. Before it operates as a rule, it must be treated and accepted as law by some actors and in certain respects but not by or in others. International lawyers sometimes try to capture this reality by sayings things like, “x is emerging as CIL,” or “there is a trend toward x becoming CIL.” These statements themselves reveal the inadequacy of describing CIL as a set of rules. No matter whether x is gaining traction and on the way to becoming a rule, it is at the moment not one. It is fragmentary and might never turn into a rule. And yet, it still might have some force as CIL.

Adherents to the rulebook might say that we should reserve the label “CIL” exclusively for normative positions that have become entrenched like rules. Positions that are more mercurial or contingent might be called something else—if not “emergent CIL,” maybe “soft law.”128 The different labels presumably would be intended to mean something. They would signify that normative positions that do not function like rules are not really CIL and cannot accurately be characterized as such. But why not? If the goal is to describe the normative material that is produced through the CIL process and that global actors in the ordinary course regard and use as they do CIL, then non-rule-like positions must be included. These positions routinely have force as CIL. To call them something else just because they do not operate as rules is weirdly tautological: “Non-rule-like positions cannot be CIL because they are not rules.” It also is misleading. It obscures important parts of the practice of CIL.

Take a question that lies at the heart of international humanitarian law (IHL): Who may be targeted for attack in wartime? The answer in interstate conflicts is relatively straightforward and rests on the fundamental distinction between combatants and civilians. Members of state armed forces generally qualify as combatants, wear uniforms or other identifying insignia, and are targetable unless they are hors de combat. 129 By contrast, civilians are not targetable unless they directly participate in hostilities.130 In many conflicts involving armed nonstate groups, the distinction between combatants and civilians—and the targeting rules that depend on it—is blurred.131 Members of these groups often blend in with the general population, rather than identify themselves as such.132 Moreover, membership itself can be more fluid. Loosely organized armed groups consist of people who participate in different capacities or to varying degrees over time. 133

In 2009, the ICRC released a document—the Interpretive Guidance on the Notion of Direct Participation in Hostilities—that aimed to clarify the targeting norms that apply, mostly as a matter of CIL, in conflicts against nonstate groups. 134 The positions that the ICRC adopted in the Interpretive Guidance were controversial135 and incompatible with the known views of a number of militarily active states.136 Thus, the ICRC did not contend that its positions satisfied the secondary rules of CIL or had the status of primary rules. It said only that they “reflect the ICRC’s institutional position[s] as to how existing IHL should be interpreted

Yet because of the ICRC’s standing in IHL, its institutional positions are legally salient. The positions that it took in the Interpretive Guidance are not always treated as CIL, but they sometimes are, and even when they are not, they are “the main reference point for any discussion of the subject.”138 Of course, the ICRC itself invokes these positions as the best iterations of CIL when it discusses or tries to educate people on IHL.139 Some national prosecutors, militaries, and courts have also treated the positions as CIL.140 For example, prosecutors in Germany have invoked the Interpretive Guidance to justify terminating criminal investigations into attacks on people who, though not at the time participating in hostilities, regularly fought for armed nonstate groups.141 Likewise, the Supreme Court of Israel cited the Interpretive Guidance in 2018 to explain why attacking demonstrators near the security barrier with Gaza could be consistent with IHL.142 In these cases, the positions that the ICRC articulated in the Interpretive Guidance have CIL effect. To insist that they cannot be CIL, just because they do not operate as rules, is to obscure the various ways in which they are actually used and received as CIL in the practice of law.

The precautionary principle is another example. The principle does not function as a CIL rule because global actors take very different positions on what it entails and whether and how it applies in discrete settings.143 But any suggestion that it is not part of CIL—that there is only, as the International Tribunal for the Law of the Sea said in 2011, “a trend towards making [it] part of customary international law”—is misleading.144 For decades, states have used the principle beyond what treaty law indicates to make, justify, or challenge particular governance decisions.145 These states have treated the principle as CIL, if not across the board, as they would a rule, more circumstantially.

International adjudicative institutions have occasionally done the same. These institutions have repeatedly declined to clarify the precautionary principle’s CIL status,146 but they have in discrete settings applied the principle as CIL—in ways that radiate beyond the specific texts in which it appears. 147 For example, in the 1998 Beef Hormones case, the Appellate Body of the World Trade Organization (WTO) determined that it was “unnecessary, and probably imprudent” to opine on the principle’s status in CIL.148 The Appellate Body further noted that the principle was not codified in the WTO agreement at issue.149 However, the Appellate Body then said that the principle “finds reflection” in, and in certain circumstances may inform, what states do under that agreement.150 The Appellate Body effectively used the precautionary principle as CIL. It licensed states to restrict trade consistently with the precautionary principle, even though the text of the WTO agreement did not provide for that result.

The ICJ’s 2010 Pulp Mills judgment is similar. Like the Appellate Body in Beef Hormones, the ICJ in Pulp Mills declined to resolve the CIL status of the precautionary principle.151 Nevertheless, the ICJ noted that “a precautionary approach may be relevant in the interpretation and application of the” bilateral treaty at issue.152 It then determined that the treaty obligation

to protect and preserve [the aquatic environment] . . . has to be interpreted in accordance with [what] . . . may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. 153

Here, the ICJ used the precautionary principle as “general international law” to define the treaty obligation at issue. It gave the principle CIL force.

Where does this leave us? In the everyday practice of international law, CIL looks nothing like the rulebook conception. It does not derive from in telligible and generally applicable secondary rules. It emerges more organically, through an unstructured process in which the participants apply variable criteria to justify their normative positions in CIL. These disjointed interactions define the content of CIL. While they sometimes are sufficiently stable to generate conduct norms that operate like rules, they often are not. Much of CIL’s content is inconstant and contingent, not fixed or generalizable, as rules would be.

B. The Law in Customary International Law

CIL is not the only kind of law that lacks secondary rules and manifests in variable conduct norms. The common law is similarly “untethered.” 154 Digging into the analogy is instructive because it helps explain how CIL can be recognizable as law, without conforming to the rulebook. After all, the common law plainly is law and does not so conform.

#### She explicitly says the arguments their 2AC makes are flawed! The unique process of the CP endows custom with legitimacy, producing acceptance.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

In insisting that CIL has certain secondary rules, the rulebook conception breeds a prominent set of attacks on its legitimacy. According to the rulebook, the secondary rules help keep CIL consensual and therefore legitimate.183 They are supposed to weed out tendentious claims about CIL— claims that are biased in favor of some actors, at the expense of others—so that CIL’s content has enough support to be legitimate as law.

This logic is evident in the ILC Conclusions. The accompanying commentary underscores that the metasecondary rule for CIL—the two-element test—works to separate the wheat from the chaff. “It serves to ensure that the exercise of identifying rules of customary international law results in determining only such rules as actually exist.” 184 Without the two-element test and other secondary rules, the commentary explains, we cannot be sure that a given practice has a sufficient degree of “acceptance among States that it may be considered to be the expression of a legal right or obligation.”185 The secondary rules thus are supposed to save CIL from a serious legitimacy problem. If people do not rigorously apply these rules, if they treat tendentious claims as CIL, then CIL will lack the requisite degree of acceptance to create legitimate law.

The same logic animates the persistent attacks on CIL’s legitimacy.187 Critics of CIL assume that the rulebook’s secondary rules are what keep it consensual and therefore legitimate. They argue, however, that these secondary rules do not work. And in the absence of meaningful secondary rules, the critics claim that CIL cannot be consensual or legitimate; it must just be a foil for some actors—usually, the most powerful actors—to impose their own biases on everyone else.

My account of CIL reveals that this logic is flawed. CIL derives what legitimacy it has not from any secondary rules but from the process through which it is developed and used. Because this process is unstructured, and authority within it is diffusely held, normative positions must be accepted and treated as CIL in order to have the force of CIL. Those who want a position to be CIL must work to earn support for it from other participants in the process. This serves to check (though not eliminate) the effect of biased or tendentious claims in CIL.188 A normative position becomes entrenched enough to operate like a conduct rule only if it actually acquires widespread support. The support that entrenches the rule also evinces some consensus for it.

### 2NC – AT: No Remedy

#### All the remedies available to the pla would be aviable for the CP – Sherman and Clayton aren’t necessary to access the same legal remedies to prevent anticopmeititve practices.

#### There exist plenty of potential nascent international competition law norms for the US to invoke.

Waller ’99 [Spencer Weber; Associate Dean and Professor of Law, Brooklyn Law School; 1999; “An International Common Law of Antitrust”; <https://lawecommons.luc.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1495&context=facpubs>; New England Law Review; TV]

I will focus primarily on treaty and custom to suggest that we already live in a world with certain identifiable international competition rules constituting international law. While the concept of establishing international law by treaty is straightforward, the concept of customary international law is not. The Restatement (Third) of the Foreign Relations Law of the United States defines customary law as "a general and consistent practice of states followed by them from a sense of legal obligation."' " Whether or not this particular definition captures every nuance of the meaning of customary international law, it is broadly consistent with the holding of the International Court of Justice on the subject and the writings of international law scholars. ' 2

There is already substantial treaty law within the WTO system that has explicit competition law components, although nothing amounting to a unified whole. These provisions can be found in the General Agreement on Trade and Tariffs (GATT) covering trade in goods, as well as the newer Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on Technical Barriers to Trade (TBT), the Agreement on Trade Related Investment Measures (TRIMS), the General Agreement on Trade and Services (GATS), the various sector agreements negotiated pursuant to the GATS, and other parts of the WTO family of agreements.' 3 At least some of these agreements contains explicit rules governing the behavior of private parties in addition to governmental units.

Other functioning competition systems derived from treaties include: the elaborate competition rules and enforcement system of the European Union, less developed rules within the North American Free Trade Area, a fascinating but little known set of rules governing trans-border competition enforcement in the Australian New Zealand Free Trade Area, new rules in the free trade area between Canada and Chile, the competition protocol in the Mercosur agreement, and the ongoing negotiation of competition issues in the Free Trade of the Americas Agreement. Other treaties to consider include: the soft law of the resolutions of the United Nations relating to restrictive business practices, multinational enterprises, and the transfer of technology, the multiplying web of cooperation treaties between antitrust enforcement agencies, and the thousands of Bilateral Investment Treaties and other systems for the resolution of disputes between investors and host governments. 1 5

Turning to state practice, the question of any customary international law in the area depends on the nature of state practice in the competition field and the rules that states have adopted out of a sense of obligation. Customary international law thus bears much in common with the common law and also has the classic advantage of the common law's emphasis on solving problems first and figuring out the rules later.

There has been a rush to embrace and adopt competition law across a wide range of geographies, stages of development, former and present ideological frameworks, and political circumstances. Gesner Oliveira, the head of the Brazilian Antitrust Enforcement Agency, has been a leader in characterizing a common set of stages in the development of competition law for new antitrust regimes. He has contended that systems develop from a modest program of domestic enforcement relying on technical assistance from abroad to a robust enforcement system that actively cooperates at the international level and participates in the work of regional and international organizations in cooperating, harmonizing competition law, and creating core principles of true international competition law.' 6 There is a growing body of state practice, as well as both soft and hard international law, that supports this characterization of the state of international competition rules arising out of the work of international organizations such as: the EU, the European Economic Area, the Europe Agreements between the EU and the countries of Eastern and Central Europe, the Organization of Economic Co-operation and Development, the Asian Pacific Economic Cooperation, the Strategic Impediments Initiative talks between the United States and Japan and their aftermath, Mercosur, NAFTA, and others.

The hardest part of the customary international law game is inducing which specific rules have achieved such widespread acceptance arising out of a sense of obligation that they should be deemed binding rules of customary international law. Without entering into a fruitless debate as to which specific rules of competition law have achieved such status (i.e., anti-cartel rules, monopolization, etc.), let me suggest that a strong case can be made that international law requires that if a nation chooses to have competition rules, it must enforce those rules in a non-discriminatory manner.

Treaty and customary international law provides two frameworks in which to measure this non-discrimination principle: namely the familiar rules of both "national treatment" (NT) and "most favored nation" (MFN). NT rules prohibit treating foreign products, services, or producers less favorably than domestic producers, while MFN rules prohibit treating one trading partner less favorably than another trading partner enjoying MFN privileges.

These are familiar concepts within the WTO system and exist in virtually every trade agreement between nations. Even the current existing versions of NT and MFN obligations within the WTO will cover many classic competition problems, although certainly there will be situations where individual cases may not fit well within the existing rules.

The current system can be used to resolve a variety of competition problems and build a body of law that can point the way toward more elaborate codes, if feasible and desirable, in the future. For example, either under or over-enforcement of seemingly neutral competition based on the domestic or foreign status of the petitioners or the respondents would be captured within most definitions of either NT or MFN. A similar argument can be made that it is a violation of non-discrimination principles to exempt export cartels in any antitrust system with a general anti-cartel policy for its own domestic economy. It also should be a violation to exempt exporters from antitrust rules and at the same time seek to impose liability on foreign firms for harm solely to exporters. Similarly, a nation with its own antitrust rules and notions of extraterritoriality, in theory or in practice, would arguably be in violation of one or both of these principles if it sought to use blocking statutes or similar devices to shield its firms from antitrust liability imposed by foreign systems which use similar notions of jurisdiction to prescribe.

#### CIL is an ideal vehicle for reaching convergence on issues of tentative consensus, such as economic law.

Hakimi ’20 [Monica; 2020; James V. Campbell Professor of Law at the University of Michigan Law School; Michigan Law Review, “Making Sense of Customary International Law,” https://repository.law.umich.edu/cgi/viewcontent.cgi?article=6084&context=mlr]

B. Achieving Normative Settlement

Assuming that any number of normative positions are reasonable and legitimate, picking one and settling it in law has value that is independent of [\*1528] its content. Normative settlement can enhance CIL's regulatory effect by allowing people to know the consequences of their decisions and to coordinate their behavior accordingly. Although a better settlement is preferable to a worse one, some settlement might be better than none at all.

The question for CIL is whether its elasticity makes it ill-suited to achieve a settlement. Recall that this question underlies the debate about the efficacy of CIL. Critics contend that, because CIL is so capacious, it has a hard time settling what must be done--or therefore regulating behavior. The participants can too easily argue their way out of their obligations. This critique suggests that CIL works best as a regulatory tool when its conduct norms are sufficiently precise and entrenched to operate like rules and stymie further contest. The critique thus discounts the relevance of the normative material in CIL that is not rule-like. However, this material routinely also contributes to normative settlements and has regulatory purchase.

1. Settlement in Conduct Rules

An important strand of research already emphasizes that arguing in law helps the participants find and settle on common normative positions--and thus establish new conduct rules. A legal contest invites the participants to focus on the issue in dispute, to crystallize their own views, to feel out their competition, and eventually to converge on conduct rules that they all are willing to accept. The contest is not just a distraction from, a waystation for, or an impediment to settlement. It often is essential to achieving a settlement.

CIL is an especially suitable vehicle for having these contests because it is so pliable--not rigid, like rules. Global actors can easily use CIL to advance a diverse range of legal claims and thus catalyze the kinds of interactions that generate new conduct rules. The resultant rules might stay in CIL or might be prescribed in a new treaty. Remember what happened on the continental shelf. As the claims of coastal states gained traction, they were codified as treaty rules and then accepted as rules of CIL. CIL's malleability facilitated the formation of these rules by giving states a relatively easy way [\*1529] to instigate juris-generative interactions. All the United States had to do was issue a proclamation advancing its legal claim. Here, the non-rule-like character of CIL was an ingredient for, not an impediment to, establishing stable conduct rules that regulate behavior.

Of course, CIL's plasticity can then work to undercut the very rules that it helped to produce. Again, this would not necessarily be a problem. Rules that had been desirable might become outmoded. Their downsides might be newly apparent and significant. Or precisely because they function as rules, they might be too crude to regulate certain governance issues. But in any event, CIL rules do not always unravel. Some CIL rules are deeply entrenched and extremely hard to change, even though they are also at times violated. The prohibition of torture is an example. Moreover, where CIL helps generate new conduct rules that are codified in treaty law, as it did on the continental shelf, the settlement can be further insulated from CIL's own vicissitudes.

The key point is that CIL's malleability does not consistently detract from its capacity to establish stable conduct rules. Its malleability is sometimes how it produces such rules. Any effort to evaluate its efficacy along this dimension thus should account not only for the part of CIL that already manifests as rules but also for all of the other stuff that contributes to rule formation, whether in CIL or in treaties that grow out of CIL. The rulebook conception skews the analysis; it leads people to diminish the non-rule-like material in CIL that helps to produce settled rules.

### 2NC – AT: PDCP

#### Severance ­– voting issue for neg ground and deterrence:

#### 1. “Core antitrust laws” –

#### A) They’re only Sherman, Clayton, and the FTC.

Pfaffenroth ’21 [Sonia K, Justin P Hedge, and Monique N Boyce; July 1; Partner at Arnold and Porter, Former Deputy Assistant Attorney General for Civil and Criminal Operations for the Antitrust Division of the US Department of Justice; Counsel at Arnold and Porter; Senior Associate at Arnold and Porter; Mondaq, “United States: A Comparison Of Proposed Antitrust Legislation In 2021: Federal And New York State,” https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1086194/a-comparison-of-proposed-antitrust-legislation-in-2021-federal-and-new-york-state#:~:text=At%20the%20federal%20level,%20there,;1%20(2)%20the%20Federal]

At the federal level, there are **three core antitrust laws**: (1) the Sherman Act, in which Section 1 outlaws "every contract, combination, or conspiracy in [unreasonable] restraint of trade," and Section 2 outlaws any "monopolization, attempted monopolization, or conspiracy or combination to monopolize";1 (2) the Federal Trade Commission Act, which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices";2 and (3) Section 7 of the Clayton Act, which prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."3 Criminal violations of the Sherman Act carry a maximum penalty of a $100 million fine for corporations, and a maximum penalty of 10 years in prison and a $1 million fine for individuals. A prevailing plaintiff in a civil suit can recover treble damages and attorneys' fees. But federal law currently does not provide for civil penalties when the government brings an antitrust case, only injunctive relief.

#### B) The counterplan imposes prohibitions by expanding the scope of obligations under customary international law, NOT domestic antitrust statutes. That proves the counterplan competes via both text AND function.

#### C) CIL displaces U.S. law.

Henkin ’87 [Louis; February 1987; University Professor at Columbia University; Harvard Law Review, “The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny,” vol. 100]

The relationship between international and United States law, then, cannot be determined by declaring international law to be common law and therefore inferior to legislation. It has to be determined by reference to some principle that would locate the United States on the monist-dualist spectrum. In fact, one could advance persuasive arguments that customary international law supersedes any United States law and should be given effect even when it conflicts with a subsequent act of Congress. The law of nations, including both treaties and customary international law, is binding on the United States. The framers of the Constitution respected the law of nations, and it is plausible that they expected the political branches as well as the courts to give effect to that law. 100 Other countries have accepted the supremacy of international law: their courts give effect to international law over domestic legislation. 101 Our legal system subordinates treaties to subsequent congressional acts, because the Court has determined that the supremacy clause imposes that hierarchy. But no similar textual basis exists for subordinating customary international law. Customary international law is universal and lasting and has better claim to supremacy than do treaties, which govern only the parties and can be readily terminated or replaced by those parties.

#### D) Custom is a distinct, internationally derived basis – it’s silent on domestic law.

Hepburn ’18 [Jarrod; 2018; McKenzie Postdoctoral Research Fellow at Melbourne Law School, University of Melbourne, DPhil, MPhil and BCL from Balliol College, University of Oxford; American Journal of International Law, “Domestic Investment Statutes in International Law,” vol. 112]

\* ‘FILs’ = Foreign Investment Laws

The Effect of Domestic Limitations Clauses

Many cases and commentators have held that domestic statutes of limitation do not apply to claims before international tribunals. 300 This principle is perhaps confined to situations where an international tribunal is ruling on an alleged breach of international law. Most of the cases addressing the issue have related to international law breaches: of investment treaties (in Wena v. Egypt, Biedermann v. Kazakhstan, Maffezini v. Spain, Bogdanov v. Moldova, and Energoalians v. Moldova) or custom (in the Gentini and Spader arbitrations). 301 The Wena tribunal even specified that, in its view, domestic time-bars "do not necessarily bind a claim for a violation of an international treaty before an international tribunal." 302 If FIL protections are treated as unilaterally assumed international obligations, as considered in Part III, then FIL claims are equivalent to claims under treaty or custom, and domestic time-bars would not be applied. But the cases just cited arguably say nothing about claims before international tribunals for breaches of domestic law. 303 If, therefore, FIL protections are treated as domestic law obligations, the application of domestic time-bars might be plausible.

#### 2. “Expand the scope” –

#### A) ‘Scope’ refers to the breadth of competition law.

Buccirossi ‘9 [Lear and Eui; September 2009; Researchers for the Directorate General for Economic and Financial Affairs of the European Commission; Competition Policy Indexes, “Measuring the Deterrence Properties of Competition Policy: The Competition Policy Indexes,” https://tinyurl.com/sbpbv553]

Also Hilton and Deng have tried to provide a quantitative summary measure of competition law. Their objective has been to gauge the size of the overall “competition law net” by collecting information on the breadth of the law and on its penalty and defence provisions in 102 countries over the time period January 2001 to December 2004. 47 Their scope index differs from the CPI in that it tries to provide a summary description of the areas covered by competition law rather than an evaluation of its quality. Indeed, the scope index does not attempt to measure how the law is effectively enforced, nor the degree of independence of the CA or the quality of the law. 48

#### B) ‘Expanding the scope’ requires broadening the number of activities the law applies to.

Collins, 21 [Collins English Dictionary; copyright updated 2021; Collins Cobuild, “Expand the Scope,” https://www.collinsdictionary.com/us/dictionary/english/expand-the-scope]

**expand** **the** **scope** These examples have been automatically selected and may contain sensitive content that does not reflect the opinions or policies of Collins, or its parent company HarperCollins. I wanted to work internationally and expand the scope of my possibilities. Times, Sunday Times Labour has called for the government to expand the scope of the test to include consideration of the impact of any merger on research and development and science. Times, Sunday Times Most opponents are small-government conservatives who are outraged at any attempt to expand the scope of government, particularly when it involves their personal healthcare decisions. Times, Sunday Times The move was cited by the developer to be to expand the scope of indie videogames, and not as a market strategy. Retrieved from Wikipedia CC BY-SA 3.0 https://creativecommons.org/licenses/by-sa/3.0/. Source URL: https://en.wikipedia.org/wiki/Afterfall: InSanity Such results expand the scope of asymmetric hydroboration to more sterically demanding alkenes. Retrieved from Wikipedia CC BY-SA 3.0 https://creativecommons.org/licenses/by-sa/3.0/. Source URL: https://en.wikipedia.org/wiki/Metal-catalysed hydroboration **Definition** of 'expand' expand (ɪkspænd) Explore 'expand' in the dictionary VERB If something expands or is expanded, it becomes **larger**. [...] See full entry COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers **Definition** of 'scope' scope (skoʊp) Explore 'scope' in the dictionary UNCOUNTABLE NOUN [NOUN to-infinitive] If there is scope for **a particular** **kind of** **behaviour** **or activity**, people have the opportunity to **behave** **in this way** or **do that** **activity**. [...]

#### C) Custom involves and alters no legislation – any other interpretation shreds precision.

Hameed ’17 [Asif; 2017; Fellow in Law at Selwyn College, University of Cambridge, D.Phil in Law at the University of Oxford; Chinese Journal of International Law, “Some Misunderstandings About Legislation and Law,” vol. 16]

II.D.iii. The third problem

41. In the remaining analysis I will treat the expression "general and abstract" as describing a single property-namely, the generality of the legal norm in question. 52 This, I think, is the gist of Talmon′s understanding of legislation. Even so, his formulation faces a further problem. A formulation of legislation, if it is to be a formulation of legislation (as opposed to anything else), must be discriminating. For our purposes, the formulation must discriminate between legislation and other types of law.

42. Talmon′s formulation of legislation fails to discriminate. It indicates that any legal norm that is "general and abstract" (and I take this to mean "general") is legislative. This would indicate, for example, that many norms of customary international law count as (international) legislation.

43. In international law writing there can sometimes be a lack of clarity about the different types of law-making. Legislating is often treated as a synonym for law-making, rather than as one type of law-making which is to be distinguished from others. 53 This includes some of Talmon′s own writing on the matter. He states that "for a long time, the perceived wisdom was [...] that the states are the legislators of the international legal system". 54 If this is true, what legislation have States been producing (according to received wisdom)? Does customary international law constitute legislation (when made by States)?

44. It would appear so. Talmon goes on to explain how international lawyers have used the expression "international legislation" to "describe the conclusion of lawmaking treaties [...] the making of customary international law", and so on. 55

[FOOTNOTE] 55Ibid. And as noted earlier, a similar approach has been taken by other writers-e.g. Higgins, above n.53. But the approach is not universally shared. See e.g. Skubiszewski, above n.34, 1255 where he states that "[w]riters employ the term [legislation] to describe such divergent phenomena as the making of customary international law (which is a clear perversion of the concept of legislation)". [END FOOTNOTE]

45. But consider customary law again. The problem emerges with particular clarity in relation to national legal systems. When legislation and customary law are recognized as sources of law in national legal systems, a clear distinction is drawn between them precisely because they are different types of law. This is true, for instance, of the various legal systems that recognize indigenous custom as a source of law; and the distinction matters, because a given customary norm may be pre-empted or displaced by legislation. 56 In spite of this, Talmon′s formulation transforms custom into legislation, since many customary norms will be general.

#### 3. Its – the pronoun refers to the U.S., is possessive, and exclusive.

Brent ’10 [Douglas; June 2; Attorney and Co-Chair at Stoll Keenon Ogden LLP, JD from the University of Kentucky College of Law, BA from the University of Kentucky; Commonwealth of Kentucky Before the Public Service Commission, “Reply Brief on Threshold Issues of Cricket Communications, Inc,” http://psc.ky.gov/PSCSCF/2010%20cases/2010-00131/20100602\_Crickets\_Reply\_Brief\_on\_Threshold\_Issues.PDF]

AT&T also argues that Merger Commitment 7.4 only permits extension of “any given” interconnection agreement for a single three year term. AT&T Brief at 12. Specifically, AT&T asserts that because Cricket adopted the interconnection agreement between Sprint and AT&T, which itself was extended, Cricket is precluded from extending the term of its agreement with AT&T. Id

This argument relies upon an inaccurate assumption: that the agreement (contract) between Sprint and AT&T, and the agreement (contract) between Cricket and AT&T, are one and the same. In other words, to accept AT&T’s argument the Commission must conclude that two separate contracts, i.e. the interconnection between Sprint and AT&T in Kentucky (“Sprint Kentucky Agreement”) and the interconnection between Cricket and AT&T in Kentucky (“Cricket Kentucky Agreement”), are one and the same.

Upon this unstated (and inaccurate) premise AT&T asserts that “the ICA was already extended”; id. at 14, and “the ICA Cricket seeks to extend was extended by Sprint . . . .”; id. at 15, and, finally, “Cricket cannot extend the same ICA a second time . . . .” Id. (emphasis added in all). Note that in the quoted portions of the AT&T brief (and elsewhere) AT&T uses vague and imprecise language when referring to either the Sprint Kentucky Agreement, or the Cricket Kentucky Agreement, in hopes that the Commission will treat the two contracts as one and the same.

But it would be a mistake to do so. The contract governing AT&T’s duties and obligations with Sprint is a legally distinct and separate contract from that which governs AT&T’s duties with Cricket. The Sprint Kentucky Agreement was approved by the Commission in September of 2001 in Case Number 2000-00480. The Cricket Kentucky Agreement was approved by the Commission in September of 2008 in Case Number 2008-033 1.

AT&T ignores the fact that these are two separate and distinct contracts because it knows that the merger commitments apply to each agreement that an individual telecommunications carrier has with AT&T. Notably, Merger Commitment 7.4 states that “AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement . . . . As written, the commitment allows any carrier to extend “its” agreement. Clearly, the use of the pronoun “its” in this context is possessive, such that the term “its” means—that particular carrier’s agreement with AT&T (and not any other carrier’s agreement). Thus, the merger commitment applies to each agreement that an individual carrier may have with AT&T. It necessarily follows then, that Cricket’s right to extend its agreement under Merger Commitment 7.4 is separate and distinct right from another carrier’s right to extend its agreement with AT&T (or whether such agreement has been extended).

#### 4. ‘Of’ locates the coverage in antitrust laws.

McKeown ’11 [Margaret; 2011; Judge on the US Court of Appeals for the Ninth Circuit; Lexis, “Simonoff v. Expedia, Inc,” 643 F.3d 1202]

Our recent decision in Doe 1 is central to our analysis. There we considered a forum selection clause in AOL's website user agreement that [\*\*5] provided for "exclusive jurisdiction for any claim or dispute . . . in the courts of Virginia." Id. at 1080. We concluded that the choice of the preposition "of" in the phrase "the courts of Virginia" was determinative—"of" is a term "'denoting that from which anything proceeds; indicating origin, source, descent, and the like.'" Id. at 1082 (quoting Black's Law Dictionary 1080 (6th ed. 1990)). Thus, the phrase "the courts of" a state refers to courts that derive their power from the state—i.e., only state courts—and the forum selection clause, which vested exclusive jurisdiction in the courts "of" Virginia, limited jurisdiction to the Virginia state courts. Id. at 1081-82.

### 2NC – AT: Uncertainty

#### 1. No part of the counterplan’s uncertain – it’s a single clear standard which legally prohibits the exact same anticompetitive conduct as the plan. The only difference is invoking norms of international law instead of core domestic statutes.

#### 2. No impact to uncertainty – no 1AC internal link depends on it, just prohibiting the anticompetitive practices. It applies just as much to the aff which sets a vague antitrust standar.

#### 3. Stabilizing international law through direct incorporation is the only way to make law certain and predictable – the unchecked unilateralism of national law is destabilizing.

Noyes ’9 [John E.; 2009; Professor of Law, California Western School of Law, President of the American Branch of the International Law Association; Publicist, “The United States and the Law of the Sea Convention: U.S. Views Concerning the Settlement of International Law Disputes in International Tribunals and U.S. Courts,” https://bjil.typepad.com/publicist/2009/03/publicist01-noyes.html]

Yet refusing to allow direct application of the Convention in U.S. courts would also carry costs. It is consistent with some U.S. traditions to regard international law, even as it applies to individuals, as fully justiciable law, like domestic statutory and case law. In this view, applying the Convention in U.S. cases concerning individuals would be an ordinary exercise of judicial authority. In general, direct application of the Convention in cases involving individuals could have the salutary effect of promoting respect for basic human rights in other countries. There may be other benefits of such application as well. Recognizing the direct applicability of the Convention’s prompt release articles in U.S. court, for example, could defuse conflicts with other states. In addition, the U.S. tradition of promoting international trade and commerce – reflected in the Medellín dissent’s concern that the majority’s decision “threatens to deprive … businesses [and] property owners …. of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide”[103] – suggests an historically strong reason not to read the Medellín Court’s non-self-execution holding too broadly. The concern with safeguarding commercial relationships also counsels against writing the non-self-executing provisions of the Advice and Consent Resolution too broadly, or at least counsels in favor of insuring that U.S. legislation fully implements Convention provisions.

If the Convention were self-executing, U.S. courts might help to build state practice and help to reinforce interpretations of the Convention that favor U.S. positions. It is unlikely that U.S. courts would reach decisions construing the Convention in ways that were antithetical to the views of the U.S. Executive Branch. First, U.S. courts could invoke a variety of other prudential abstention doctrines, such as the political question doctrine, to avoid hearing cases that might adversely affect truly sensitive matters of U.S. foreign policy. Both the majority and dissent in Medellín signaled this concern, noting that U.S. courts should not hear such politically sensitive cases. Second, when U.S. courts do apply treaties directly, the courts often accord great weight to the suggestions of the Executive Branch concerning the interpretation of the treaties.[104]

We would do well to remember the original justifications for including the third-party dispute settlement provisions in the Convention. These justifications – which U.S. officials articulated and supported during UNCLOS III – include promoting certainty, predictability, and stability, with respect to rules that greatly benefit the United States.[105] These dispute settlement provisions can help deter illegal behavior, as well as promote the peaceful settlement of disputes. Domestic enforcement of Convention provisions can also serve this end. At the most fundamental level, the Convention furthers the rule of law in the world – the values of using agreed-upon rules and procedures to resist unilateral assertions of jurisdiction or sovereign control, resolving differences even-handedly according to established rules, and providing stable expectations for international actors. Giving full effect to provisions for third-party dispute settlement at the international and national levels would help further these values.

#### 4. CIL is certain and clear enough for regular enforcement.

LSG ’6 [Law Society's Gazette; 2006; “Legal Update: Law Reports,” Lexis]

Held, for the purposes of these proceedings, the court accepted that customary international law was, without the need for any domestic statute or judicial decision, part of the domestic law of England and Wales, since the Crown did not challenge that proposition.

Customary international law recognised a crime of aggression and understood it with sufficient clarity to permit the lawful trial of those accused of the crime. It did not lack the certainty of definition required of a criminal offence.

It was at least arguable that war crimes, recognised as such in customary international law, would be triable and punishable under English domestic criminal law. However, war crimes were distinct from the crime of aggression. A crime recognised in customary international law might be assimilated into the domestic criminal law of England and Wales. But the authorities did not support the proposition that that result followed automatically (R v Keyn (Ferdinand) (The Franconia) (1876-77) LR 2 Ex D 63 considered and Hutchinson v Newbury Magistrates Court, Independent, 20 November, 2000 applied).

#### 5. It’s not abnormal – integration of CIL in other areas is common AND predictable.

Stephens ’97 [Beth; 1997; Visiting Professor of Law, Rutgers University School of Law-Camden. J.D; Fordham Law Review, “Human Rights on the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Law of Our Land: Customary International Law as Federal Law After Erie,” 393]

The United States has played an increasingly important role in the development of customary international law over the past fifty years, first as one of the two superpowers, now as the only one. As the law of the sea evolved over the course of this century, for example, the United States played an active role, blocking disfavored rules and obtaining acceptance of others. 308

In another field, the executive branch has recognized that many provisions of the laws of war are binding on the United States as customary international law, even where the United States has not ratified the relevant treaties. For example, although the United States has not ratified the Protocols to the Geneva Conventions, 309 the government considers some of the Protocols' provisions to be binding as customary international law norms. 310 The Reagan administration's approach to the Protocols is illustrative. Having decided not to sign Protocol I due to disagreement over certain key provisions, the executive branch undertook a careful review of which of its provisions were nonetheless binding on this country as customary international law. A Department of State attorney observed at the time, "This question is not an academic one, but has considerable practical importance," because the United States would consider itself legally bound by those [\*457] rules that reflected customary international law. 311 Clarity as to which rules were binding was necessary to guide U.S. military commanders, as well as U.S. allies.

In practice, customary international law thus fits comfortably within the U.S. legal system. As illustrated by these examples, the executive branch participates in the formation of customary norms, sifts through emerging norms, and offers guidance as to which norms have reached binding status. 312 Federal courts asked to enforce international norms draw upon the expertise of the executive branch, as well as international sources and the opinions of scholars. The suggestion that the United States could suddenly find federal courts imposing a new norm upon the states is inconsistent with the reality of both the international law process and that of the United States.

#### 6. Outcome – the policy effect AND signal are identical.

Crootof ’16 [Rebecca; 2016; Executive Director of the Information Society Project, ISP Research Scholar, and Lecturer in Law at Yale Law School; Harvard National Section, “Change Without Consent: How Customary International Law Modifies Treaties,” 41 Yale J. Int'l L. 237]

Because most states will be party to constitutive treaties like the Hague and Geneva Conventions, subsequently developed customary international law might initially appear indistinguishable from subsequent practice evidencing agreement to modify a multilateral treaty. Some states parties to a treaty will engage in practices apparently at odds with their treaty obligations, some states parties may complain about such conduct, and most states parties will remain silent. Over time, however, once-contested practices - here, interference with an occupied territory's political process - will face less and less criticism, until it seems that a general consensus has arisen that the practices are permissible, notwithstanding the apparently contradictory treaty text. Whether this process is characterized as subsequent state practice evidencing agreement to a modification or as subsequently developed customary international law modifying a treaty might therefore appear to be a difference of terminology only, with little practical import.

### 2NC – AT: Structural Confusing

#### 1. Not specific to antitrust – it’s a unique domain of voluntary AND binding economic cooperation because countries generally converge on the need for stronger competition law – that’s Banks.

#### 3. Empirics and statistics disprove – CIL is legally binding AND uniformly followed.

Sekulow ’20 [Jay; Spring 2020; Chief Counsel at the American Center for Law & Justice and at the European Centre for Law & Justice, PhD from Regent University, JD from Mercer University, and Robert Weston Ash, Senior Counsel at the American Center for Law & Justice, Master of International Public Policy from the School of Advanced International Studies (SAIS) of the Johns Hopkins University, JD from Regent University; South Carolina Journal of International Law and Business, “The Issue of ICC Jurisdiction Over Nationals of Non-Consenting, Non-Party States to the Rome Statute: Refuting Professor Dapo Akande's Arguments,” vol. 16]

I. General Overview of Applicable International Law

International law can be defined as "the system of rules, principles, and processes intended to govern relations at the [\*9] interstate level, including the relations among states, organizations, and individuals." Article 38 of the Statute of the International Court of Justice (ICJ) lists three primary and several secondary sources of international law. The three primary sources are: (1) "international conventions . . . establishing rules expressly recognized by the contesting states" (commonly referred to as "conventional international law" and generally binding on the parties to the respective convention); (2) "international custom, as evidence of a general practice accepted as law" (commonly referred to as "customary international law" and generally binding on all nations); and (3) "the general principles of law recognized by civilized nations." Secondary sources of international law include "judicial decisions," "teachings of the most highly qualified publicists of the various nations," as well as principles of equity and fairness. For purposes of this analysis, we will focus primarily on the relationship and interaction between conventional international law and customary international law as they apply to the jurisdictional reach of treaty-based, international criminal courts on nationals of non-consenting, non-party States.

Conventional international law is found in conventions, treaties, and similar negotiated agreements between and among States as well as agreements between States and other international actors (like the United Nations or NATO), and it is only binding on the parties to such agreements. Accordingly, it is a consent-based legal regime. Customary international law, on the other hand, is law based on custom that develops over an extended period of time and is considered binding on all States. Although it is not necessarily written law, customary international law is nonetheless considered "law" because States generally comply with its requirements because they believe that they have a legal obligation to do so. "To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative." We would point out that this is not the case with the Rome Statute. Although approximately two-thirds of all States have acceded to the treaty, one-third of all States--including three permanent members of the UNSC--representing two-thirds of the globe's population have not. It is difficult to understand how such statistics support "virtually uniform, extensive and representative" State practice. Further, "[n]ot all state practice results in customary law . . . . Consistent state practice becomes law when states follow the practice out of a sense of legal obligation encapsulated in the phrase opinio juris sive necessitatis."

#### 4. Judicial incorporation is distinct – it’s not mere common law, but constitutionally grounded interpretations of the Supremacy Clause---extensive legal histories confirm that norm of custom is binding AND applied.

Paust ’99 [Jordan; 1999; Law Foundation Professor, University of Houston Law Center; Michigan Journal of International Law, “Customary International Law and Human Rights Treaties Are Law of the United States,” vol. 20]

II. The Bradley-Goldsmith Errors and Fallacies

It is astonishing, therefore, to read a co-authored claim that the overwhelming patterns of expectation that customary international law is law of the United States, part of our law, and federal law is merely a "modern position" developed in the last twenty years. n26 Equally bizarre and unreal is the notion that customary international law was not incorporated by the federal judiciary for federal decision-making or, as Professors Curtis Bradley and Jack Goldsmith claim, that "throughout most of this nation's history, CIL [customary international law] did not have the status of federal law ... [and] lacked the supremacy, jurisdictional, and other consequences of federal law." n27

Contrary to their ahistorical assertions, actual patterns of use of customary international law throughout our history demonstrate that what they term the "modern position" was generally endorsed long ago and has been evidenced fairly consistently in the continuous use of customary international law both directly and indirectly by federal courts for more than 200 years. n28 More specifically with respect to their concern about human rights, n29 such rights were of fundamental importance to the Founders and there has been significant attention to a rich and wide array of human rights ever since the formation of the United States. n30 In fact, Chief Justice Marshall recognized in 1810 that our judicial tribunals "are established ... to decide on human rights." n31 Federal courts had been using human right precepts prior to Chief Justice Marshall's affirmation of judicial authority and responsibility, and have done so ever since. n32 Further, what Professors Bradley and Goldsmith consider to be "new" law regulating "a state's treatment of its own citizens," n33 including customary legal rights of individuals against states, especially human rights, is not new. Indeed, it is partly what our nation and much of the Bill of Rights, especially the Ninth Amendment, were founded upon. n34 Moreover, one should not confuse the supposed lack of direct remedies of individuals at the international level prior to World War II with a lack of individual rights under international law and various remedies in domestic legal processes. n35 Although rare, such remedies at the international level had been recognized. n36

Much of Professor Bradley and Goldsmith's reasoning rests on an erroneous premise that customary international law was and is merely "general common law." n37 Because customary international law is not mere "common law" but part of the "law of the land" and "laws of the United States" within constitutionally-based judicial authority and responsibility, n38 their nearly obsessive focus on Erie R.R. Co. v. Thompkins, n39 and Swift v. Tyson, n40 neither of which addresses international law or has had any demonstrated impact on actual patterns of federal court use of customary international law, is significantly flawed and misleading. Additionally, use of what are merely "common law," "law merchant," or "maritime" and "admiralty" cases and arguments of others who rely on such cases are seriously misplaced. n41 For example, Bradlely and Goldsmith reference United States v. Hudson & Goodwin, n42 a case that addresses mere "common law" and makes no mention of the law of nations or international law. n43 Further, Bradley and Goldsmith's references to cases and opinions using the phrases "laws of the United States," "law of the land," and "our law," are incomplete and potentially misleading. n44

Their disfavored theory requires that "all law applied by federal courts ... be either federal law or state law" n45 and recognition that "if CIL [customary international law] is not federal law, then there is no basis for the federal judiciary to enforce CIL...." n46 If so, the inescapable fact of continued use of customary international law in the federal courts and overwhelming patterns of supportive expectation, regardless of customary international law's domesticated name or classification (which clearly has not been merely "state law"), speak loudly with respect to the general validity of their theory and its erroneous premise. Moreover, this use continued after Erie and its supposedly relevant reasoning. Additionally, if Erie, which is not on point, requires that mere "common law" have some sort of authorization, n47 such a need is met with respect to customary international law given its constitutional bases in Articles III and VI of the U.S. Constitution as well as in other constitutional provisions and various federal statutes (also providing subject matter jurisdiction). n48

A thorough inquiry into actual patterns of legal expectation documented in numerous federal court opinions demonstrates that customary international law has long been incorporated by the federal judiciary for federal decision-making and that the sweeping claim of Professors Bradley and Goldsmith that customary international law lacked supremacy consequences, n49 lacked jurisdictional consequences, n50 and lacked "other consequences of federal law" n51 is erroneous. Further, if general common law lacked such consequences and did not bind the states, use of the law of nations by state courts at various times in our history, often with recognition that such law is binding, and related recognitions by the federal judiciary also stand in opposition to claims that customary international law was mere common law and was not considered binding. n52 Similarly, if "general common law" was not considered part of the "Laws of the United States," n53 it is telling that customary international law certainly was. n54 One case that Professors Bradley and Goldsmith cite, Ker v. Illinois, n55 actually declares that a state court "is bound to take notice" of the law of nations, "as ... is ... the courts of the United States." n56 Another case cited, Huntington v. Attrill, n57 actually recognizes that questions of international law involve concurrent duties since they "must be determined in the first instance by the court, state or national, in which the suit is brought," and adds both that such questions can be brought in federal courts and that the federal court "must decide for itself, uncontrolled by local decisions." n58

There are simply no known federal cases ruling that states can violate customary international law, and although, as Professors Bradley and Goldsmith point out, there are rare cases (late in our history) denying merely Supreme Court jurisdiction to review state rulings (a denial that is no longer authoritative), n59 at least two such cases actually reaffirm that state courts are "bound to take notice" of and are bound "as fully" to apply customary international law. n60 Not one of the cases noted declares that international law is not part of the law to be applied in lower federal courts. Indeed, these cases recognize that federal courts have the same duties as states with respect to cases that originate in federal courts. That others make broad, historically indefensible statements concerning such rare and specific rulings and ignore other recognitions even in such cases, is regrettable but of no authoritative support for even more erroneous generalities.

### 2NC – AT: Spillover

#### Appleis to the aff – no one would collaborate after the plans dometic policy.

#### The combination forwards a new interpretation of i-law – that goes global.

Dr. Rebecca Crootof 16, PhD in Law from the Yale University Graduate School of Arts and Sciences, JD from Yale Law School, Executive Director of the Information Society Project, ISP Research Scholar, and Lecturer in Law at Yale Law School, “Change Without Consent: How Customary International Law Modifies Treaties”, Yale Journal of International Law, 41 Yale J. Int'l L. 237, Summer 2016, Lexis

Additionally, recognizing the existence of new customary international law is "deeply entangled" with the making of new customary international law. It is not simply a matter of states acknowledging a new customary rule and negotiating superseding treaties in its shadow. Rather, as Myres McDougal has described it, the process is one of "continuous interaction … in which the decision-makers … unilaterally put forward claims … and in which other decision-makers … weigh and appraise these competing claims … and ultimately accept or reject them." As a result, "any decision relating to the [customary international law] norm - even a decision that might reasonably be characterized as a "finding' - has some prescriptive effect." The very fact that states considered, debated, or accepted the possibility of unilateral abrogation of the respective treaties contributed to the recognition of the customary international law upon which those abrogations would have been grounded - as well as the underlying possibility of unilateral treaty abrogation based on the development of new customary international law.

#### The entire world will model the U.S.’ pioneering move.

Marc G. Carns 17, LL.M., University of Nebraska-Lincoln, JD from the University of Oklahoma, MBA from the University of Oklahoma, Chief of Cyber Special Programs Law at the 24th Air Force Kelly Field, Judge Advocate in the United States Air Force, “Consent Not Required: Making The Case That Consent Is Not Required Under Customary International Law For Removal Of Outer Space Debris Smaller Than 10cm”, Air Force Law Review, 77 A.F. L. Rev. 173, Lexis

In recent years it has been proposed that development of customary international law need not be developed by actions over extended periods of time. Modern arguments assert that customary international law can be developed almost instantaneously based on an action and resulting acquiescence by some, especially those most affected, if not all of the international community. Dean Scharf calls those who are "first" to test the waters by taking action which might develop into customary international law as "custom pioneers." Though not exact analogies, Dean Scharf examined the proposals of Professor Myers McDougle of Yale Law School and Professor Anthony D'Amato of Northwestern University as they related to the inception of instant customary law. Professor McDougle posited an approach called "continuous claim and response." In such a system, one state acts upon another, and then analyzes the response of the state acted upon. If favorable, [\*212] the development of customary international law begins, especially if other states either passively or actively indicate concurrence with the behavior. As Dean Scharf puts it, this is a backward-looking formulation, relying on jumping in to test if the water is hot or cold and determining the answer once in the water. In contrast, Professor D'Amato proposes what is called an "articulation and act" test. In this formulation, the test is somewhat opposite, akin to a state indicating that it intends to jump in the water, and either following up by doing so or asking the affected state how it would respond. This can take the form of a draft instrument, a broad statement in the U.N. General Assembly, or some other articulation of a proposed course of intended action. This approach has been called the "modern custom" since it reflects a more forward-looking approach. The articulation is intended to produce a response for which the initiating State can then gauge the acceptability of or receptiveness to the act.

A demonstration of Dean Scharf's continuous claim and response theory, and one of the first clear indicators of the occurrence of "instant" customary international law, was initiated by U.S. President Harry S. Truman. On September 28, 1945, President Truman set forth the following Proclamation:

I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf. Having concern for the urgency of considering and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extents to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the [\*213] continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

The lead up to the Proclamation was anything but instant. Prior to the Law of the Sea Conventions of 1958, maritime law had been largely governed by custom with a few small agreements between a minority of countries. Since Roman times, the sea was considered "res communis," belonging to everyone, but not to be owned by anyone. This approach would be challenged through the centuries, some arguing for a much more controlled and owned environment, while others argued the contrary. In 1608 the Dutch Statesman and Scholar Hugo Grotius made a convincing argument for the position that ownership of the seas was inappropriate, and that there should be the free use of the seas by everyone. Scholarship of Hugo Grotius would come to epitomize the "freedom of the seas" philosophy, which deemed the oceans to be an "infinite resource, and that anyone could exploit them, or use for travel and transport....outside a 'territorial' sea of about 3 nautical miles from land." This would be generally accepted as the custom through the early 1900's, with countries exerting control over waters adjoining their coasts. The 3-mile rule would eventually evolve to reflect a more "war-like" approach, limited to reflect not just a 3-mile rule, but also reflective of the "distance that a cannon could shoot from shore." This distance remained a "rule of thumb" and while some states treated it differently, the general rule persisted, limiting control to some variance of relative proximity to shoreline through the early 1900s.

Because of this history, when President Truman issued his Proclamation, it clearly went against well-established custom. However, it was acceptable to other countries because it was not without considerable benefit [\*214] to them as well, even if against the existing custom. Not only was it of obvious economic advantage to states, but in simplest terms the continental shelf was "an extension of the land mass to the coastal nation and thus naturally appurtenant to it." The importance of couching this in logical terms revealed two notable key attributes. First, it made sense to other countries, and was advantageous to them in their own claims for resources and wealth that were beyond the customary 3 mile rule. Second, it was replicable by any state, such that it did not require any change or expense in operations to claim the additional land conjoined with their coasts. It simply "was." This was a powerful advantage for countries, big and small, to be able to both replicate and benefit from an action without having to take on any additional responsibilities or obligations.

Thus, in what amounted to a page of text, President Truman demonstrated to the world the United States' resolve to act in a manner contrary to history and without international consent. At the same time, it also demonstrated the ability to rapidly evolve customary international law in a way that both suited the United States and made sense for the rest of the world. It was not lost on history that the Proclamation received no opposition from any state. Furthermore, many states quickly declared the Truman Proclamation to be valid and mirrored its premise. Hence, by 1950, 30 coastal states had enacted some declaration extending their territory past historical boundaries. By 1950, scholars, including Sir Hersch Lauterpacht, concluded that the actions taken by the United States, and adopted by members of the international community, had the effect of establishing a virtually "instant" [\*215] customary international law. By 1958, the Proclamation had taken up permanent roots in the 1958 Convention on the Continental Shelf.

# 2NR

#### Proves CP key – the entire world will model the U.S.’ pioneering move.

Marc G. Carns 17, LL.M., University of Nebraska-Lincoln, JD from the University of Oklahoma, MBA from the University of Oklahoma, Chief of Cyber Special Programs Law at the 24th Air Force Kelly Field, Judge Advocate in the United States Air Force, “Consent Not Required: Making The Case That Consent Is Not Required Under Customary International Law For Removal Of Outer Space Debris Smaller Than 10cm”, Air Force Law Review, 77 A.F. L. Rev. 173, Lexis

In recent years it has been proposed that development of caustomary international law need not be developed by actions over extended periods of time. Modern arguments assert that customary international law can be developed almost instantaneously based on an action and resulting acquiescence by some, especially those most affected, if not all of the international community. Dean Scharf calls those who are "first" to test the waters by taking action which might develop into customary international law as "custom pioneers." Though not exact analogies, Dean Scharf examined the proposals of Professor Myers McDougle of Yale Law School and Professor Anthony D'Amato of Northwestern University as they related to the inception of instant customary law. Professor McDougle posited an approach called "continuous claim and response." In such a system, one state acts upon another, and then analyzes the response of the state acted upon. If favorable, [\*212] the development of customary international law begins, especially if other states either passively or actively indicate concurrence with the behavior. As Dean Scharf puts it, this is a backward-looking formulation, relying on jumping in to test if the water is hot or cold and determining the answer once in the water. In contrast, Professor D'Amato proposes what is called an "articulation and act" test. In this formulation, the test is somewhat opposite, akin to a state indicating that it intends to jump in the water, and either following up by doing so or asking the affected state how it would respond. This can take the form of a draft instrument, a broad statement in the U.N. General Assembly, or some other articulation of a proposed course of intended action. This approach has been called the "modern custom" since it reflects a more forward-looking approach. The articulation is intended to produce a response for which the initiating State can then gauge the acceptability of or receptiveness to the act.

A demonstration of Dean Scharf's continuous claim and response theory, and one of the first clear indicators of the occurrence of "instant" customary international law, was initiated by U.S. President Harry S. Truman. On September 28, 1945, President Truman set forth the following Proclamation:

I, Harry S. Truman, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and sea bed of the continental shelf. Having concern for the urgency of considering and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control. In cases where the continental shelf extents to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles. The character as high seas of the waters above the [\*213] continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

The lead up to the Proclamation was anything but instant. Prior to the Law of the Sea Conventions of 1958, maritime law had been largely governed by custom with a few small agreements between a minority of countries. Since Roman times, the sea was considered "res communis," belonging to everyone, but not to be owned by anyone. This approach would be challenged through the centuries, some arguing for a much more controlled and owned environment, while others argued the contrary. In 1608 the Dutch Statesman and Scholar Hugo Grotius made a convincing argument for the position that ownership of the seas was inappropriate, and that there should be the free use of the seas by everyone. Scholarship of Hugo Grotius would come to epitomize the "freedom of the seas" philosophy, which deemed the oceans to be an "infinite resource, and that anyone could exploit them, or use for travel and transport....outside a 'territorial' sea of about 3 nautical miles from land." This would be generally accepted as the custom through the early 1900's, with countries exerting control over waters adjoining their coasts. The 3-mile rule would eventually evolve to reflect a more "war-like" approach, limited to reflect not just a 3-mile rule, but also reflective of the "distance that a cannon could shoot from shore." This distance remained a "rule of thumb" and while some states treated it differently, the general rule persisted, limiting control to some variance of relative proximity to shoreline through the early 1900s.

Because of this history, when President Truman issued his Proclamation, it clearly went against well-established custom. However, it was acceptable to other countries because it was not without considerable benefit [\*214] to them as well, even if against the existing custom. Not only was it of obvious economic advantage to states, but in simplest terms the continental shelf was "an extension of the land mass to the coastal nation and thus naturally appurtenant to it." The importance of couching this in logical terms revealed two notable key attributes. First, it made sense to other countries, and was advantageous to them in their own claims for resources and wealth that were beyond the customary 3 mile rule. Second, it was replicable by any state, such that it did not require any change or expense in operations to claim the additional land conjoined with their coasts. It simply "was." This was a powerful advantage for countries, big and small, to be able to both replicate and benefit from an action without having to take on any additional responsibilities or obligations.

Thus, in what amounted to a page of text, President Truman demonstrated to the world the United States' resolve to act in a manner contrary to history and without international consent. At the same time, it also demonstrated the ability to rapidly evolve customary international law in a way that both suited the United States and made sense for the rest of the world. It was not lost on history that the Proclamation received no opposition from any state. Furthermore, many states quickly declared the Truman Proclamation to be valid and mirrored its premise. Hence, by 1950, 30 coastal states had enacted some declaration extending their territory past historical boundaries. By 1950, scholars, including Sir Hersch Lauterpacht, concluded that the actions taken by the United States, and adopted by members of the international community, had the effect of establishing a virtually "instant" [\*215] customary international law. By 1958, the Proclamation had taken up permanent roots in the 1958 Convention on the Continental Shelf.

### 2NR – AT: Certainty

#### Finish Noyes

s with other states. In addition, the U.S. tradition of promoting international trade and commerce – reflected in the Medellín dissent’s concern that the majority’s decision “threatens to deprive … businesses [and] property owners …. of the workable dispute resolution procedures that many treaties, including commercially oriented treaties, provide”[103] – suggests an historically strong reason not to read the Medellín Court’s non-self-execution holding too broadly. The concern with safeguarding commercial relationships also counsels against writing the non-self-executing provisions of the Advice and Consent Resolution too broadly, or at least counsels in favor of insuring that U.S. legislation fully implements Convention provisions.

If the Convention were self-executing, U.S. courts might help to build state practice and help to reinforce interpretations of the Convention that favor U.S. positions. It is unlikely that U.S. courts would reach decisions construing the Convention in ways that were antithetical to the views of the U.S. Executive Branch. First, U.S. courts could invoke a variety of other prudential abstention doctrines, such as the political question doctrine, to avoid hearing cases that might adversely affect truly sensitive matters of U.S. foreign policy. Both the majority and dissent in Medellín signaled this concern, noting that U.S. courts should not hear such politically sensitive cases. Second, when U.S. courts do apply treaties directly, the courts often accord great weight to the suggestions of the Executive Branch concerning the interpretation of the treaties.[104]

We would do well to remember the original justifications for including the third-party dispute settlement provisions in the Convention. These justifications – which U.S. officials articulated and supported during UNCLOS III – include promoting certainty, predictability, and stability, with respect to rules that greatly benefit the United States.[105] These dispute settlement provisions can help deter illegal behavior, as well as promote the peaceful settlement of disputes. Domestic enforcement of Convention provisions can also serve this end. At the most fundamental level, the Convention furthers the rule of law in the world – the values of using agreed-upon rules and procedures to resist unilateral assertions of jurisdiction or sovereign control, resolving differences even-handedly according to established rules, and providing stable expectations for international actors. Giving full effect to provisions for third-party dispute settlement at the international and national levels would help further these values.

#### 4. CIL is certain and clear enough for regular enforcement.

LSG ’6 [Law Society's Gazette; 2006; “Legal Update: Law Reports,” Lexis]

Held, for the purposes of these proceedings, the court accepted that customary international law was, without the need for any domestic statute or judicial decision, part of the domestic law of England and Wales, since the Crown did not challenge that proposition.

Customary international law recognised a crime of aggression and understood it with sufficient clarity to permit the lawful trial of those accused of the crime. It did not lack the certainty of definition required of a criminal offence.

It was at least arguable that war crimes, recognised as such in customary international law, would be triable and punishable under English domestic criminal law. However, war crimes were distinct from the crime of aggression. A crime recognised in customary international law might be assimilated into the domestic criminal law of England and Wales. But the authorities did not support the proposition that that result followed automatically (R v Keyn (Ferdinand) (The Franconia) (1876-77) LR 2 Ex D 63 considered and Hutchinson v Newbury Magistrates Court, Independent, 20 November, 2000 applied).

#### 5. It’s not abnormal – integration of CIL in other areas is common AND predictable.

Stephens ’97 [Beth; 1997; Visiting Professor of Law, Rutgers University School of Law-Camden. J.D; Fordham Law Review, “Human Rights on the Eve of the Next Century: U.N. Human Rights Standards & U.S. Law: The Law of Our Land: Customary International Law as Federal Law After Erie,” 393]

The United States has played an increasingly important role in the development of customary international law over the past fifty years, first as one of the two superpowers, now as the only one. As the law of the sea evolved over the course of this century, for example, the United States played an active role, blocking disfavored rules and obtaining acceptance of others. 308

In another field, the executive branch has recognized that many provisions of the laws of war are binding on the United States as customary international law, even where the United States has not ratified the relevant treaties. For example, although the United States has not ratified the Protocols to the Geneva Conventions, 309 the government considers some of the Protocols' provisions to be binding as customary international law norms. 310 The Reagan administration's approach to the Protocols is illustrative. Having decided not to sign Protocol I due to disagreement over certain key provisions, the executive branch undertook a careful review of which of its provisions were nonetheless binding on this country as customary international law. A Department of State attorney observed at the time, "This question is not an academic one, but has considerable practical importance," because the United States would consider itself legally bound by those [\*457] rules that reflected customary international law. 311 Clarity as to which rules were binding was necessary to guide U.S. military commanders, as well as U.S. allies.

In practice, customary international law thus fits comfortably within the U.S. legal system. As illustrated by these examples, the executive branch participates in the formation of customary norms, sifts through emerging norms, and offers guidance as to which norms have reached binding status. 312 Federal courts asked to enforce international norms draw upon the expertise of the executive branch, as well as international sources and the opinions of scholars. The suggestion that the United States could suddenly find federal courts imposing a new norm upon the states is inconsistent with the reality of both the international law process and that of the United States.

#### 6. Outcome – the policy effect AND signal are identical.

Crootof ’16 [Rebecca; 2016; Executive Director of the Information Society Project, ISP Research Scholar, and Lecturer in Law at Yale Law School; Harvard National Section, “Change Without Consent: How Customary International Law Modifies Treaties,” 41 Yale J. Int'l L. 237]

Because most states will be party to constitutive treaties like the Hague and Geneva Conventions, subsequently developed customary international law might initially appear indistinguishable from subsequent practice evidencing agreement to modify a multilateral treaty. Some states parties to a treaty will engage in practices apparently at odds with their treaty obligations, some states parties may complain about such conduct, and most states parties will remain silent. Over time, however, once-contested practices - here, interference with an occupied territory's political process - will face less and less criticism, until it seems that a general consensus has arisen that the practices are permissible, notwithstanding the apparently contradictory treaty text. Whether this process is characterized as subsequent state practice evidencing agreement to a modification or as subsequently developed customary international law modifying a treaty might therefore appear to be a difference of terminology only, with little practical import.