# Doc---BCRR---Round 5

# 1NC

## Offcase

### CP---1NC

#### The United States should only allow the continuation of anticompetitive private cartel practices in cases where foreign plaintiffs cannot secure adequate relief in alternative for a under antitrust law when the president determines it is necessary to prevent condition which may pose a direct threat to the national defense or its preparedness programs.

#### It competes---the counterplan is a regulation, not a prohibition

James Broaddus 50. February 6; Judge on the Kansas City Court of Appeals, Missouri; Westlaw, “City of Meadville v. Caselman,” 240 Mo. App. 1220. https://casetext.com/case/city-of-meadville-v-caselman-1

"Under power conferred on cities of the fourth class `to regulate and license' dramshops, there is no authority to wholly prohibit or suppress. Where there is mere power in a municipality to regulate in a state, with a general policy of conducting licensed saloons, authority to prohibit is excluded. The difference between regulation and prohibition is clear and well marked. The former contemplates the continuance of the subject-matter in existence or in activity. The latter implies its entire destruction or cessation.'" (Citing text writers and cases.)

#### And maintains DPA authority---the plan eliminates it

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Authorities Under Title VII of the DPA

Title VII of the DPA contains various provisions that clarify how DPA authorities should and can be used, as well as additional presidential authorities. Some significant provisions of Title VII are summarized below.

Special Preference for Small Businesses

Two provisions in the DPA direct the President to accord special preference to small businesses when issuing contracts under DPA authorities. Section 701 reiterates89 and expands upon a requirement in Section 108 of Title I directing the President to "accord a strong preference for small business concerns which are subcontractors or suppliers, and, to the maximum extent practicable, to such small business concerns located in areas of high unemployment or areas that have demonstrated a continuing pattern of economic decline, as identified by the Secretary of Labor."90

Definitions of Key Terms in the DPA

The DPA statute historically has included a section of definitions.91 Though national defense is perhaps the most important term, there are additional definitions provided both in current law and in E.O. 13603.92 Over time, the list of definitions provided in both the law and implementing executive orders has been added to and edited, most recently in 2009, when Congress added a definition for homeland security93 to place it within the context of national defense.94

Industrial Base Assessments

To appropriately use numerous authorities of the DPA, especially Title III authorities, the President may require a detailed understanding of current domestic industrial capabilities and therefore need to obtain extensive information from private industries. Under Section 705 of the DPA, the President may "by regulation, subpoena, or otherwise obtain such information from ... any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of this Act [the DPA]."95 This authority is delegated to the Secretary of Commerce in E.O. 13603.96 Though this authority has many potential implications and uses, it is most commonly associated with what the DOC's Bureau of Industry and Security calls "industrial base assessments."97 These assessments are often conducted in coordination with other federal agencies and the private sector to "monitor trends, benchmark industry performance, and raise awareness of diminishing manufacturing capabilities."98 The statute requires the President to issue regulations to insure that the authority is used only after "the scope and purpose of the investigation, inspection, or inquiry to be made have been defined by competent authority, and it is assured that no adequate and authoritative data are available from any Federal or other responsible agency."99 This regulation has been issued by DOC.100

Voluntary Agreements

Normally, voluntary agreements or plans of action between competing private industry interests could be subject to legal sanction under anti-trust statutes or contract law. Title VII of the DPA authorizes the President to "consult with representatives of industry, business, financing, agriculture, labor, and other interests in order to provide for the making by such persons, with the approval of the President, of voluntary agreements and plans of action to help provide for the national defense."101 The President must determine that a "condition exists which may pose a direct threat to the national defense or its preparedness programs"102 prior to engaging in the consultation process. Following the consultation process, the President or presidential delegate may approve and implement the agreement or plan of action.103 Parties entering into such voluntary agreements are afforded a special legal defense if their actions within that agreement would otherwise violate antitrust or contract laws.104 Historically, the National Infrastructure Advisory Council noted that the voluntary agreement authority has been used to "enable companies to cooperate in weapons manufacture, solving production problems and standardizing designs, specifications and processes," among other examples.105 It could also be used, for example, to develop a plan of action with private industry for the repair and reconstruction of major critical infrastructure systems following a domestic disaster.

The authority to establish a voluntary agreement has been delegated to the head of any federal department or agency otherwise delegated authority under any other part of E.O. 13603.106 Thus, the authority could be potentially used by a large group of federal departments and agencies. Use of these voluntary agreements is tracked by the Secretary of Homeland Security,107 who is tasked under E.O. 13603 with issuing regulations that are required by law on the "standards and procedures by which voluntary agreements and plans of action may be developed and carried out."108 The Federal Emergency Management Agency (FEMA), which at the time was an independent agency and tasked with these responsibilities under the DPA, issued regulations in 1981 to fulfill this requirement.109 FEMA is now a part of DHS, and those regulations remain in effect.

The Maritime Administration (MARAD) of the U.S. Department of Transportation manages the only currently established voluntary agreements in the federal government, the Voluntary Intermodal Sealift Agreement (commonly referred to as "VISA") and the Voluntary Tanker Agreement. These programs are maintained in partnership with the U.S. Transportation Command of DOD, and have been established to ensure that the maritime industry can respond to the rapid mobilization, deployment, and transportation requirements of DOD. Voluntary participants from the maritime industry are solicited to join the agreements annually.110

Nucleus Executive Reserve

Title VII of the DPA authorizes the President to establish a volunteer body of industry executives, the "Nucleus Executive Reserve," or more frequently called the National Defense Executive Reserve (NDER).111 The NDER would be a pool of individuals with recognized expertise from various segments of the private sector and from government (except full-time federal employees). These individuals would be brought together for training in executive positions within the federal government in the event of an emergency that requires their employment. The historic concept of the NDER has been used as a means of improving the war mobilization and productivity of industries.112

The head of any governmental department or agency may establish a unit of the NDER and train its members.113 No NDER unit is currently active, though the statute and E.O. 13603 still provide for this possibility. Units may be activated only when the Secretary of Homeland Security declares in writing that "an emergency affecting the national defense exists and that the activation of the unit is necessary to carry out the emergency program functions of the agency."114

Authorization of Appropriations, as amended by P.L. 113-72

Appropriations for the purpose of the DPA are authorized by Section 711 of Title VII.115 Prior to the P.L. 113-172, "such sums as necessary" were authorized to be appropriated. This has been replaced by a specific authorization for an appropriation of $133 million per fiscal year and each fiscal year thereafter, starting in FY2015, to carry out the provisions and purposes of the Defense Production Act.116

Table 1 shows that the annual average appropriation to the DPA Fund between FY2010 and FY2019 was $109.1 million,117 with a high of $223.5 million in FY2013 and a low of $34.3 million in FY2011. Monies in the DPA Fund are available until expended, so annual appropriations may carry over from year to year if not expended. Recently, the only regular annual appropriation for the purposes of the DPA has been made in the DOD appropriations bill, though appropriations could be made in other bills directly to the DPA Fund (or transferred from other appropriations).

Committee on Foreign Investment in the United States118

The Committee on Foreign Investment in the United States (CFIUS) is an interagency committee that serves the President in overseeing the national security implications of foreign investment in the economy. It reviews foreign investment transactions to determine if (1) they threaten to impair U.S. national security; (2) the foreign investor is controlled by a foreign government; or (3) the transaction could affect homeland security or would result in control of any critical infrastructure that could impair the national security. The President has the authority to block proposed or pending foreign investment transactions that threaten to impair the national security.

CFIUS initially was created and operated through a series of Executive Orders.119 In 1988, Congress passed the "Exon-Florio" amendment to the DPA, granting the President authority to review certain corporate mergers, acquisitions, and takeovers, and to investigate the potential impact on national security of such actions.120 This amendment codified the CFIUS review process due in large part to concerns over acquisitions of U.S. defense-related firms by Japanese investors. In 2007, amid growing concerns over the proposed foreign purchase of commercial operations of six U.S. ports, Congress passed the Foreign Investment and National Security Act of 2007 (P.L. 110-49) to create CFIUS in statute.

On August 13, 2018, President Trump signed into law new rules governing national security reviews of foreign investment, known as the Foreign Investment Risk Review Modernization Act (FIRRMA, Title XVII, P.L. 115-235).121 FIRRMA amends several aspects of the CFIUS review process under Section 721 of the DPA.122 Notably, it expands the scope of transactions that fall under CFIUS' jurisdiction. It maintains core components of the current CFIUS process for evaluating proposed or pending investments in U.S. firms, but increases the allowable time for reviews and investigations. Upon receiving written notification of a proposed acquisition, merger, or takeover of a U.S. firm by a foreign investor, the CFIUS process can proceed potentially through three steps: (1) a 45-day national security review; (2) a 45-day maximum national security investigation (with an option for a 15-day extension for "extraordinary circumstances"); and (3) a 15-day maximum Presidential determination. The President can exercise his authority to suspend or prohibit a foreign investment, subject to a CFIUS review, if he finds that (1) "credible evidence" exists that the foreign investor might take action that threatens to impair the national security; and (2) no other laws provide adequate and appropriate authority for the President to protect national security. FIRRMA shifts the filing requirement for foreign investors from voluntary to mandatory in certain cases, and provides a two-track method for reviewing certain investment transactions. Other changes mandated by FIRRMA would provide more resources for CFIUS, add new reporting requirements, and reform export controls.

Termination of the Act

Title VII of the DPA also includes a "sunset" clause for the majority of the DPA authorities. All DPA authorities in Titles I, III, and VII have a termination date, with the exception of four sections.123 As explained in Section 717 of the DPA, the sections that are exempt from termination are

* 50 U.S.C. §4514, Section 104 of the DPA that prohibits both the imposition of wage or price controls without prior congressional authorization and the mandatory compliance of any private person to assist in the production of chemical or biological warfare capabilities;
* 50 U.S.C. §4557, Section 707 of the DPA that grants persons limited immunity from liability for complying with DPA-authorized regulations;
* 50 U.S.C. §4558, Section 708 of the DPA that provides for the establishment of voluntary agreements; and
* 50 U.S.C. §4565, Section 721 of the DPA, the so-called Exon-Florio Amendment, that gives the President and CFIUS review authority over certain corporate acquisition activities.

P.L. 115-232 extended the termination date of Section 717 from September 30, 2019, to September 30, 2025. In addition, Section 717(c) provides that any termination of sections of the DPA "shall not affect the disbursement of funds under, or the carrying out of, any contract, guarantee, commitment or other obligation entered into pursuant to this Act" prior to its termination. This means, for instance, that prioritized contracts or Section 303 projects created with DPA authorities prior to September 30, 2025, would still be executed until completion even if the DPA is not reauthorized. Similarly, the statute specifies that the authority to investigate, subpoena, and otherwise collect information necessary to administer the provisions of the act, as provided by Section 705 of the DPA, will not expire until two years after the termination of the DPA.124 For a chronology of all laws reauthorizing the DPA since inception, see Table A-4.

Defense Production Act Committee

The Defense Production Act Committee (DPAC) is an interagency body originally established by the 2009 reauthorization of the DPA.125 Originally, the DPAC was created to advise the President on the effective use of the full scope of authorities of the DPA. Now, the law requires DPAC to be centrally focused on the priorities and allocations authorities of Title I of the DPA.

The statute assigns membership in the DPAC to the head of each federal agency delegated DPA authorities, as well as the Chairperson of the Council of Economic Advisors. A full list of the members of the DPAC is included in E.O. 13603.126 As stipulated in law, the Chairperson of the DPAC is to be the "head of the agency to which the President has delegated primary responsibility for government-wide coordination of the authorities in this Act."127 As currently established in E.O. 13603 delegations, the Secretary of Homeland Security is the chair-designate, but the language of the law could allow the President to appoint another Secretary with revision to the E.O.128 The Chairperson of the DPAC is also required to appoint one full-time employee of the federal government to coordinate all the activities of the DPAC. Congress has exempted the DPAC from the requirements of the Federal Advisory Committee Act.129

The DPAC has annual reporting requirements relating to the Title I priority and allocation authority, and is also required to include updated copies of Title I-related rules in its report. The annual report also contains, among other items, a "description of the contingency planning ... for events that might require the use of the priorities and allocations authorities" and "recommendations for legislative actions, as appropriate, to support the effective use" of the Title I authorities.130 The DPAC report is provided to the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services.

Impact of Offsets Report

Offsets are industrial compensation practices that foreign governments or companies require of U.S. firms as a condition of purchase in either government-to-government or commercial sales of defense articles and/or defense services as defined by the Arms Export Control Act (22 U.S.C. §2751, et seq.) and the International Traffic in Arms Regulations (22 C.F.R. §§120-130). In the defense trade, such industrial compensation can include mandatory co-production, licensed production, subcontractor production, technology transfer, and foreign investment.

The Secretary of Commerce is required by law to prepare and to transmit to the appropriate congressional committees an annual report on the impact of offsets on defense preparedness, industrial competitiveness, employment, and trade. Specifically, the report discusses "offsets" in the government or commercial sales of defense materials.131

Considerations for Congress

Enhance Oversight

Expand Reporting or Notification Requirements

Congress may consider whether to add more extensive notification and reporting requirements on the use of all or specific authorities in the DPA. These reporting or notification requirements could be added to the existing law, or could be included in conference or committee reports accompanying germane legislation, such as appropriations bills or the National Defense Authorization Act. Additional reporting or notification requirements could involve formal notification of Congress prior to or after the use of certain authorities under specific circumstances. For example, Congress may consider whether to require the President to notify Congress (or the oversight committees) when the priorities and allocations authority is used on a contract valued above a threshold dollar amount.132 Congress might also consider expanding the existing reporting requirements of the DPAC, to include semi-annual updates on the recent use of authorities or explanations about controversial determinations made by the President. Existing requirements could also be expanded from notifying/reporting to the committees of jurisdiction to the Congress as a whole, or to include other interested committees, such as the House and Senate Armed Services Committees.

Enforce and Revise Rulemaking Requirements

Congress may consider reviewing the agencies' compliance with existing rulemaking requirements. A rulemaking requirement exists for the voluntary agreement authority in Title VII that has been completed by DHS, but it has not been updated since 1981 and may be in need of an update given changes to the authority and government reorganizations since that date.133 One of the agencies responsible for issuing a rulemaking on the use of Title I authorities has yet to do so. Congress may also consider potentially expanding regulatory requirements for other authorities included in the DPA. For example, Congress may consider whether the President should promulgate rules establishing standards and procedures for the use of all or certain Title III authorities. In addition to formalizing the executive branch's policies and procedures for using DPA authorities, these regulations could also serve an important function by offering an opportunity for private citizens and industry to comment on and understand the impact of DPA authorities on their personal interests.

Broaden Committee Oversight Jurisdiction

Since its enactment, the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and their predecessors have exercised legislative oversight of the Defense Production Act. The statutory authorities granted in the various titles have been vested in the President, who has delegated some of these authorities to various agency officials through E.O. 13603. As an example of the scope of delegations, the membership of the Defense Production Act Committee (DPAC), created in 2009 and amended in 2014, includes the Secretaries of Agriculture, Commerce, Defense, Energy, Labor, Health and Human Services, Homeland Security, the Interior, Transportation, the Treasury, and State; the Attorney General; the Administrators of the National Aeronautics and Space Administration and of General Services, the Chair of the Council of Economic Advisers; and the Directors of the Central Intelligence Agency and National Intelligence.

In order to complement existing oversight, given the number of agencies that currently use or could potentially use the array of DPA authorities to support national defense missions, Congress may consider reestablishing a select committee with a purpose similar to the former Joint Committee on Defense Production.134 As an alternative to the creation of a new committee, Congress may consider formally broadening DPA oversight responsibilities to include all relevant standing committees when developing its committee oversight plan.

Should DPA oversight be broadened, Congress might consider ways to enhance inter-committee communication and coordination of its related activities. This coordination could include periodic meetings to prepare for oversight hearings or ensuring that DPA-related communications from agencies are shared appropriately. Finally, because the DPA was enacted at a time when the organization and rules of both chambers were markedly different to current practice, Congress may consider the joint referral of proposed DPA-related legislation to the appropriate oversight committees.

Amending the Defense Production Act of 1950

While the act in its current form may remain in force until September 30, 2025, the legislature could amend the DPA at any time to extend, expand, restrict, or otherwise clarify the powers it grants to the President. For example, Congress could eliminate certain authorities altogether. Likewise, Congress could expand the DPA to include new authorities to address novel threats to the national defense. For example, Congress may consider creating new authorities to address specific concerns relating to production and security of emerging technologies necessary for the national defense.

#### Key to pandemic response

J. Mark Gidley et al. 20. J. Mark Gidley chairs the White & Case Global Antitrust/Competition practice. Martin M. Toto and Sean Sigillito. “A Novel Antitrust Defense for COVID-19 Agreements: Section 708 of the Defense Production Act” <https://www.whitecase.com/sites/default/files/2020-04/novel-antitrust-defense-covid-19-agreements-section-708-defense-production-act.pdf>

There is a dire need for the assistance of private industry in developing vaccines and treatments for the SARS-CoV-2 virus, and for the manufacture and distribution of medical and other supplies to aid in the United States’ response to the COVID-19 health emergency. The Government’s recent actions indicate a desire to allow private sector companies to work together to do so quickly.

While many of the needs arising from the ongoing emergency focus specifically on medical supplies, the President’s delegation of Section 708 authority to the DHS as well as HHS potentially opens the door to voluntary agreements within broader sectors of the US economy. Under the right circumstances, and if the business combination could garner the governmental sponsor needed for the voluntary agreement, invoking the Defense Production Act’s antitrust relief provision through the enactment of voluntary agreements could allow for a more robust response to the COVID-19 pandemic.

#### Extinction

Dennis Pamlin & Stuart Armstrong 15. \*Executive Project Manager Global Risks, Global Challenges Foundation. \*\*James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford. February 2015, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, p.30-93. https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

A pandemic (from Greek πᾶν, pan, “all”, and δῆμος demos, “people”) is an epidemic of infectious disease that has spread through human populations across a large region; for instance several continents, or even worldwide. Here only worldwide events are included. A widespread endemic disease that is stable in terms of how many people become sick from it is not a pandemic. 260 84 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 3.1 Current risks 3.1.4.1 Expected impact disaggregation 3.1.4.2 Probability Influenza subtypes266 Infectious diseases have been one of the greatest causes of mortality in history. Unlike many other global challenges pandemics have happened recently, as we can see where reasonably good data exist. Plotting historic epidemic fatalities on a log scale reveals that these tend to follow a power law with a small exponent: many plagues have been found to follow a power law with exponent 0.26.261 These kinds of power laws are heavy-tailed262 to a significant degree.263 In consequence most of the fatalities are accounted for by the top few events.264 If this law holds for future pandemics as well,265 then the majority of people who will die from epidemics will likely die from the single largest pandemic. Most epidemic fatalities follow a power law, with some extreme events – such as the Black Death and Spanish Flu – being even more deadly.267 There are other grounds for suspecting that such a highimpact epidemic will have a greater probability than usually assumed. All the features of an extremely devastating disease already exist in nature: essentially incurable (Ebola268), nearly always fatal (rabies269), extremely infectious (common cold270), and long incubation periods (HIV271). If a pathogen were to emerge that somehow combined these features (and influenza has demonstrated antigenic shift, the ability to combine features from different viruses272), its death toll would be extreme. Many relevant features of the world have changed considerably, making past comparisons problematic. The modern world has better sanitation and medical research, as well as national and supra-national institutions dedicated to combating diseases. Private insurers are also interested in modelling pandemic risks.273 Set against this is the fact that modern transport and dense human population allow infections to spread much more rapidly274, and there is the potential for urban slums to serve as breeding grounds for disease.275 Unlike events such as nuclear wars, pandemics would not damage the world’s infrastructure, and initial survivors would likely be resistant to the infection. And there would probably be survivors, if only in isolated locations. Hence the risk of a civilisation collapse would come from the ripple effect of the fatalities and the policy responses. These would include political and agricultural disruption as well as economic dislocation and damage to the world’s trade network (including the food trade). Extinction risk is only possible if the aftermath of the epidemic fragments and diminishes human society to the extent that recovery becomes impossible277 before humanity succumbs to other risks (such as climate change or further pandemics). Five important factors in estimating the probabilities and impacts of the challenge: 1. What the true probability distribution for pandemics is, especially at the tail. 2. The capacity of modern international health systems to deal with an extreme pandemic. 3. How fast medical research can proceed in an emergency. 4. How mobility of goods and people, as well as population density, will affect pandemic transmission. 5. Whether humans can develop novel and effective anti-pandemic solutions.

### DA---1NC

#### New antitrust is applied globally---offends allies---regs counterplan avoids it.

Herbert Hovenkamp 03. Ben V. & Dorothy Willie Professor of Law and History, University of Iowa. “Antitrust as Extraterritorial Regulatory Policy,” 48 Antitrust BULL. 629 (2003).

Today few of us are sympathetic with the view that the common law exists apart from and somehow transcends the jurisdiction of the courts that make it. Nevertheless, there is a powerful sense in which the rules of antitrust law are regarded as "natural," while explicitly regulatory rules are considered to be purely local, territorial, or political. This view is given considerable support by a powerful neoclassical economic model that views markets as natural, in the sense that they exist separate and apart from state policy making. 32

Within this model antitrust law is a kind of background umpire that does not make first instance choices about price, quantity, quality, new entry and the like, but that does limit the anticompetitive exercise of market power. Antitrust operates as a kind of "macro" version of contract law. The common law of contracts is designed to facilitate and protect the utility of individual private bargains; antitrust is designed to do much the same thing, but for markets as a whole. Under this conception a well defined set of antitrust principles always operates in the background, so to speak, permitting private bargaining to proceed without interference in the great majority of instances, but intervening when competitive processes go awry. Further, widespread agreement exists both inside and outside the United States on a set of core principles pertaining to such things as naked price fixing, market division agreements, and the like. Within this core, problems of extraterritoriality have largely been limited to the technical ones of devising appropriate jurisdictional rules and remedies.

In contrast, the power to regulate is different. Under the traditional view of regulation the power to set price, quantity, quality, or the right to enter a market emanates in the first instance from the government. Further, although there is widespread economic agreement on fundamental principles, regulatory design is much more specific to the sovereign-more likely to reflect the demographics, industrial or employment base, or politics of the particular state imposing the regulation.

For example, nearly all of the 50 states of the United States have an antitrust law. With relatively few exceptions, however, the substantive coverage of these antitrust laws is the same, and mimics federal law. Many states have court decisions or even legislative enactments stating that federal antitrust law should govern the interpretation of that particular state's antitrust law as well. 33 The result is that the coverage of state antitrust law is remarkably similar from one state to the next. But one can hardly say the same thing about each state's regulation of land use, power generation and distribution, taxicabs, liquor pricing, and the like. Whatever homogeneity regulatory theory might produce, the politics of regulation virtually guarantees jurisdiction-specific outcomes.

But homogeneity in antitrust policy also begins to break down when antitrust law moves beyond its fundamental neoclassical concern with cartels or well-defined exclusionary practices, and into areas where its role is more controversial or marginal. This is often the case when the antitrust laws are applied in recently deregulated markets. For example, a common antitrust problem that arises in deregulated industries falls under the general rubric of unilateral refusals to deal. In order to encourage competition, newly deregulated firms may be forced to share their facilities, information, intellectual property, or other assets with new rivals. Devising reasonable "nonregulatory" rules governing refusals to deal in such markets has always extended the antitrust laws to the margin of their competence.

Increasingly, American courts seem willing to apply antitrust law to markets regulated by foreign nations under circumstances where regulatory laws themselves would never reach. For example, neither Congress nor a state legislature would very likely attempt to regulate the customer service or information provision practices of a foreign national's telephone company. But both federal and state courts have done precisely that under the guise of antitrust enforcement.3 4

Antitrust policy makes this thinkable as a result of the confluence of two sets of doctrines. First is the expansive reach of our antitrust laws to practices that have a substantial effect on United States commerce. Second is the very narrow conception of comity that applies in antitrust cases.

As a general matter, comity concerns in the international conflict of laws requires the court to consider the competing interests of domestic and foreign sovereigns. 35 After a half century of debate over the meaning of comity in international Sherman Act adjudication, the Supreme Court gave the doctrine an extraordinarily narrow meaning in the Hartford Fire case.36 That case involved an alleged insurance boycott in which Lloyd's of London participated as reinsurer. Lloyd's conduct-agreeing with some United States insurers not to write reinsurance policies for other United States insurers who wanted to write policies with broader coverage-was neither forbidden nor compelled by British law. To the defendant's claim of comity the Supreme Court replied that the provisions of the Sherman Act governing jurisdiction over transactions in foreign commerce were mandatory. As a result, a federal court could not simply decline jurisdiction on the basis of some general balancing of interests. 37 Rather, "comity" permits a federal court to decline jurisdiction only when there was a "conflict" between the law of the foreign sovereign and United States law. Further, "conflict" was defined not under choice of law principles, but more absolutely, as occurring only when the foreign law compelled the conduct at issue. 38

Perhaps significantly, the activity of the London reinsurers was very likely reachable under United States antitrust law even under ordinary interest analysis principles. British law was found by the Supreme Court to be indifferent to what the London reinsurers were doing. Further, what they were doing was agreeing not to insure against liability for particular toxic pollution risks in the United States, and risk of liability is of course measured in relation to the physical environment and legal regime in which the injury occurs. 39 As a result, the London reinsurers were selling a product especially targeted for United States markets and allegedly participating in a boycott designed to keep broader coverage insurance policies out of that market.

But Hartford Fire's definition of comity is significantly problematic under deregulation. To the extent a foreign sovereign deregulates a public utility or common carrier, that firm enjoys greater discretion to make its own decisions. As a result, considerations of comity may no longer preclude a Sherman Act suit. What makes this especially problematic is the way that the Sherman Act has been used in the United States as a kind of replacement for the regulatory agency. Under comprehensive agency regulation a filed tariff plus regulatory oversight would have governed numerous acts by regulated firms, including pricing, entry into new markets, interconnection obligations and other duties to deal.40 Government relaxation of regulatory restrictions has given firms some discretion over these things but in the process has substituted the antitrust courts as governmental supervisor. In some situations this causes little difficulty because regulation may have been misapplied to a competitively structured industry to begin with.41 In other situations, such as long-distance telecommunication, a competitive environment has developed because of changes in technology, and topto-bottom price and product regulation is no longer necessary.42

But in a third class of situations the application of the antitrust laws is much more "regulatory" and more difficult to defend. These are the cases where unilateral conduct of the kind that was historically supervised by the regulatory agency now comes under antitrust jurisdiction. For example, under the essential facility doctrine a federal court of general jurisdiction may be asked to apply antitrust law to determine the scope of a formerly regulated firm's duty to interconnect with rivals. The circuit courts have applied the doctrine frequently in the telecommunications industry,43 but also to railroads" and natural gas pipelines.4 5 Problematically, supervising interconnection requirements involves the court in highly technical questions about the scope of the duty to deal and perhaps even about the price at which the deal must be made. In these cases we have not really "deregulated" at all; rather, we have simply substituted regulation by a government agency for regulation by a court, often through the highly inefficient and uncertain process of a jury trial. To do that in a purely domestic situation is ill-advised enough, but to do it abroad by taking advantage of the expansive jurisdictional reach of the Sherman Act is completely unjustified.

IV. Extraterritorial antitrust and foreign deregulation

As expansive as the regulatory power asserted by the United States sometimes becomes, it does not generally interfere directly into foreign governments' regulation of their own highly regulated industries. But to a large extent modem antitrust has inherited the regulatory attitude expressed by the Western Union decision discussed above. For several reasons, the idea that the United States Antitrust laws are jurisdictionally exceptional can produce overreaching that is offensive to foreign prerogatives. First, the United States antitrust laws are extremely general and make no distinction between ordinary competitive firms and public utilities or common carriers; the same rules purport to apply to all business firms. Second, the jurisdictional language of the antitrust laws is both mandatory and general to the same extent-that is, the "affecting foreign commerce" language of the basic Sherman Act and the export commerce language of the Foreign Trade Antitrust Improvement Act 6 do not distinguish between regulated and ordinary competitive firms. And third, the limiting doctrines of international law-namely Act of State, foreign sovereign compulsion, foreign sovereign immunity, and comity-do not distinguish among types of firms or types of antitrust complaints. They apply equally to both price fixing, which is at the core of antitrust concern, and to the essential facility doctrine, which lies at or outside its margin.

#### Ends the Japan economic alliance---they respond with diplomatic protest to new extraterritorial antitrust.

Takaaki Kojima 02. Fellow, Weatherhead Center for International Affairs, 2001-2002. “International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy”. https://datascience.iq.harvard.edu/files/fellows/files/kojima.pdf

We are witnessing increasingly widespread and penetrating economic globalization today. As a result of trade liberalization, import restrictions or regulations on trade and investment have decreased substantially, and trans-border business activities face less barrier. At the same time, the role of trans-border business activities, especially those by so-called multinational or global enterprises, have become increasingly important and even dominant in some sectors.

As far as the territorial scope of business activities are concerned, state borders are more or less diminishing to become almost borderless; as for legal regimes, however, sovereign states retain in principle exclusive jurisdiction over their territories and nationals under international law. Business activities are regulated by the domestic laws of sovereign states or by international agreements concluded among sovereign states. The pertinent question is how to coordinate “borderless” business activities within the existing legal regimes governed by sovereign states. In the field of trade law, the measures of each state are restricted by international agreements, in particular under the GATT/WTO regime. In the field of competition law, such an international regime is lacking and the domestic laws of each state regulate private restraints of trade in the relevant markets.

Serious jurisdictional conflicts have transpired in the last several decades between the United States and other states over the so-called extraterritorial application of U.S. antitrust laws on anticompetitive conducts abroad. This problem has also caused diplomatic frictions between the United States and other states, as it concerns state sovereignty. In this essay, the author will review the historical development of international conflicts caused by the extraterritorial application of competition law and attempt to examine the options available to circumvent or solve these conflicts. The main focus will be U.S. antitrust law and its relation with other jurisdictions, mainly the European Union and Japan, considering the grave implications to competition law and policy as well as to the world economy. 2

II. Extraterritorial Application of U.S. Antitrust Laws

Problems concerning the extraterritorial application of U.S. antitrust laws have been discussed in many publications. Of the U.S. antitrust laws, the Sherman Act applies to “commerce … with foreign nations ” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach. In the American Banana case (213 U.S. 347 (1909)), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the U.S. Supreme Court dismissed the complaint on the ground, inter alia, that acts committed outside of the United States are not governed by the Sherman Act. In this case, the territorial principle in the classic sense was applied.

In later decisions such as the American Tobacco case (221 U.S. 106 (1911)) and the Sisal case (274 U.S. 268 (1927)), jurisdiction was exercised over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. In these cases, the territorial principle was applied more flexibly, but it has been observed that this application cannot be argued other than as a sensible and reasonable deployment of the objective territorial theory. 3

An entirely different approach was taken in the Alcoa case (148 F.2d. 416 (1944)), in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them.

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that “in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports,” 4 while F.A. Mann argued that “the type of effect within the meaning of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.” 5 Neverthele ss, since the Alcoa case, U.S. courts have continued to follow the new jurisdictional formula of the effects doctrine.

In response to excessive application of U.S. antitrust laws, especially with respect to courts’ orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation. 6 The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located. The United Kingdom has been one of the strongest opponents to U.S. claims of extraterritorial jurisdiction. The U.K. government stated for instance that “HM Government considers that in the present state of international law there is no basis for the extension of one country’s antitrust jurisdiction to activities outside of that country of the foreign national.” 7 The Protection of Trading Interest law was enacted in 1980, which provides to extensively thwart the extraterritorial application of U.S. antitrust laws. The U.K. government invoked the provisions in the Laker Airways case (1983 W.L.R. 413) in 1983.

Having faced the antagonistic reactions of other states, U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the Timberlane case (549 F.2d. 9 th Cir. (1976)), the court concluded that it had jurisdiction over alleged anticompetitive conducts in Honduras but refrained from asserting extraterritorial jurisdiction after having applied three tests: first, whether the challenged conduct had had some effect on the commerce of the United States; second, whether the conduct in question imposed a burden on U.S. commerce; and third, whether the complaint’s interests of and links to the United States were sufficiently strong vis-à-vis those of other nations to justify an assertion of extraterritorial authority. The Foreign Trade Antitrust Improvements Act enacted in 1976 applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce, The U.S. enforcement agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have adopted this jurisdictional rule of reason formula since the Enforcement Guidelines for International Operations of 1988. However, divergent views exist as to whether the third test of balancing the interests of other states is a rule of international law or just a comity. 8 Furthermore, not all U.S. courts have consistently applied the test of balancing interests. 9

In 1993, the Supreme Court decision in the Hartford Fire Insurance case (113 S. Ct. 2891 (1993)) reaffirmed the effects doctrine, stating that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. The Court then took a restrictive view on the test of balancing interests, stating that the only substantial question is whether there is a true conflict between domestic and foreign law, and held that no such conflict seemed to exist because British law did not require defendants to act in a manner prohibited by U.S. law. 10

Japan maintains the territorial principle and rejects the effects doctrine, stating that the effects doctrine cannot be regarded as an established rule of international law. In the view of the Government of Japan, the extraterritorial application of U.S. domestic laws (including U.S. antitrust laws) based on the effects doctrine is not allowed under general international law. 11 In the Nippon Paper case, where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief of amicus curiae where it stated, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law. 12 Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time (118 S. Ct. 685 (1998)).

#### Japan economic alliance is key to prevent Chinese challenges to the ILO---recovering now but smooth sailing is not guaranteed.

Shihoko Goto 21. deputy director for geoeconomics and senior associate for Northeast Asia at the Wilson Center. "When Trade No Longer Hampers U.S.-Japan Ties". 4-20-2021. https://www.wilsoncenter.org/blog-post/when-trade-no-longer-hampers-us-japan-ties

The April 16th meeting between President Joe Biden and Japanese Prime Minister Yoshihide Suga marked several milestones: not only was it the first foreign leader’s visit to the Biden White House, but it was also the first visit to the United States by Yoshihide Suga as the Japanese prime minister. It was also the first in-person summit meeting between the United States and Japan since the outbreak of a global pandemic. It marked a number of firsts in terms of content too, not least that it was the first time since the 1980s in which trade was not a sore point of contention between the two sides. Instead, trade relations projected as a way forward for further bilateral cooperation in confronting the China threat.

That isn’t to say trade relations between Japan and the United States are now smooth sailing. The U.S. trade deficit with the world’s third-largest economy runs to nearly $68 billion, and although the two sides signed a merchandise trade deal in 2019, the Japanese auto industry remains a point of contention for the United States. Indeed, Japan’s auto exports account for about $54 billion, or close to 80 percent, of the overall trade deficit. Meanwhile, the Biden administration is not expected to lift tariffs on steel and aluminum anytime soon, nor is it expected to make efforts to join the CPTPP in the near future, much to the frustration of Tokyo.

Yet instead of trying to negotiate a breakthrough on the trade front, the Biden-Suga meeting focused on bilateral economic relations based on their shared threat of dealing with China’s ambitions to challenge the regional status quo. Until recent months, Tokyo had aspired to maintain solid relations with China whilst furthering ties with the United States, most notably by endeavoring to decouple economic interests with Beijing from the security threat that China has increasingly been posing upon Tokyo. After the joint 2+2 joint security meeting in Tokyo in March, however, the two countries declared that China’s behavior is “inconsistent with the existing international order, presents political, economic, military, and technological challenges to the Alliance and to the international community.”

Since then, Tokyo has moved even closer to Washington publicly in pushing back against China, as the bilateral statement noted “the importance of peace and stability across the Taiwan Strait,” marking the first time since 1969 that Japan and the United States publicly referred to Taiwan which remains a core interest for China. In short, Japan’s hedging against the United States and maintaining a balancing act between China and the United States is now over. Not only is its security interests even more closely aligned with that of the United States, Japan’s economic interests are now more intertwined with that of the United States than ever.

Rather than focusing on the trade balance, Tokyo and Washington’s economic relations will concentrate more on economic resilience and maintaining free and fair economic rules of engagement in the Indo-Pacific. At the same time, the two countries are expected to work more closely together on competing against China in emerging technologies, from 5G to AI and information sciences.

For Japan, one of the biggest takeaways from the Biden-Suga meeting will be that the days of Japan posing an economic threat to the United States are now over. It will also be putting increasing pressure not only for Tokyo to be prepared to fight back against China on the economic as well as security fronts together with Washington, but it will also push Tokyo to step up its own efforts to compete in the innovation economy that goes beyond manufacturing.

#### ILO is sustainable and prevents great power war but can’t run on autopilot---preventing Chinese aggression is key.

Alan W. Dowd 21. Senior fellow with the Sagamore Institute, where he leads the Center for America’s Purpose. "Capstones: China’s Dream, the World’s Nightmare – Sagamore Institute". No Publication. 4-5-2021. https://sagamoreinstitute.org/capstones-chinas-dream-the-worlds-nightmare/

If China is indeed the future, if China is primed to “rule the world,” if China remakes the international order in its image, it won’t be pretty. A future dominated by the People’s Republic of China (PRC) will be demonstrably worse than the world we know. Just look at how Xi Jinping’s regime treats its own subjects—and plays its current role on the global stage.

NO RIGHTS

Those predictions aren’t outlandish. China already is the world’s top manufacturing nation, top exporting nation and second-largest economy. The PRC was the only major economy to emerge from 2020 claiming GDP growth (if we are to trust Beijing’s books). In the pandemic’s wake, China dislodged the U.S. as the world’s primary destination for foreign direct investment. PRC-backed firms are leaders in the global 5G and AI race. On the strength of a 517-percent binge in military spending since 2000, China bristles with anti-ship and anti-aircraft missiles, deploys a high-tech air force, has a growing and openly hostile presence in space, is doubling its nuclear arsenal, and boasts a 350-ship navy (now the world’s largest). Beijing’s growing cultural reach is evident in everything from its influence over Hollywood, to its puppet-master relationship with the NBA, to its 480 Confucius Institutes (designated by Washington as “part of the Chinese Communist Party’s global influence and propaganda apparatus”).

As President Joe Biden concludes, China is “the only competitor potentially capable of combining its economic, diplomatic, military, and technological power to mount a sustained challenge to a stable and open international system.”

Xi is doing exactly that. But the China challenge starts inside the PRC.

Xi is pursuing what he calls the “China Dream,” which enfolds goals such as sustained economic development, military power modeled after and matching that of the U.S., ideological conformity, “rejuvenation of the Chinese nation” and “complete unification of our country.” Making Xi’s “China Dream” come true is turning into a nightmare for his subjects.

Before leaving his State Department post, Secretary of State Mike Pompeo described what Xi is doing to Uighur Muslims as “genocide,” noting that Beijing has “forced more than a million people into internment camps in the Xinjiang region” and detailing “torture, sexual abuse…rape, forced labor…and unexplained deaths in custody.” As he took the baton from Pompeo, Secretary of State Antony Blinken agreed, affirming that “The forcing of men, women and children into concentration camps, trying to, in effect, re-educate them to be adherents to the ideology of the Chinese Communist Party—all of that speaks to an effort to commit genocide.”

The U.S. government isn’t alone. The Uighur Muslim region, according to a UN human-rights watchdog, “resembles a massive internment camp…a no-rights zone.” More accurately, all of China is a no-rights zone.

Xi’s China is a place where Christian churches are smashed and followers of Christ are sent to reeducation camps; Buddhist temples are bulldozed; Uighur men are packed into freight trains, Uighur women are forcibly sterilized and Uighur babies are forcibly aborted; and bishops and Nobel Peace Prize laureates die in prison. Under Xi, “Religious persecution has increased…with four communities in particular experiencing a downturn in conditions—Protestant Christians, Tibetan Buddhists, and both Hui and Uighur Muslims,” Freedom House reports. Amnesty International adds that “hundreds of thousands of people” are subjected to arbitrary arrest and detention in China, many of them for “peacefully exercising their rights to freedom of expression and freedom of belief.”

There’s a brutal logic to Xi’s brutal response to religious activity. The common denominator of most every religion is that there’s something above, something beyond, something bigger, more enduring and more important than the state. That notion represents a mortal threat to the legitimacy and durability of Xi’s regime, which is founded on the premise that people exist to serve the state—not to use their God-given gifts to serve others and God.

Xi’s capacity to control is growing ever more insidious. The PRC’s new “social credit system” is using mega-databases to monitor and catalogue every aspect of life of China’s 1.3 billion people—financial transactions, civil infractions, social-media postings, online activity—and then reward or sanction Xi’s subjects by feeding all that information to the National Development and Reform Commission, banking system and judicial system. PRC subjects with good social credit scores enjoy waived fees, lower utility bills, promotions and expedited overseas-travel approval, while those with poor social credit scores can be fired from their jobs, expelled from school, blocked from universities, or barred from accessing transportation.

An Orwellian surveillance state, more than a billion people denied religious freedom and other human rights, uncounted numbers tortured in reeducation camps, physicians jailed for following the Hippocratic Oath—that’s the kind of future and the kind of world Xi wants to build. As dissident leader Xu Zhangrun observed in the wake of Beijing’s criminal mishandling of COVID-19, “A polity that is blatantly incapable of treating its own people properly can hardly be expected to treat the rest of the world well.”

NO LIMITS

That idea—the notion that the PRC is incapable of treating the world any better than it treats its own—is not particularly profound. After all, this is a regime that over the decades has erased some 35 million of its subjects and tortured millions more. Regimes like this see no limits on their power. Since they believe nothing is above the state, they rationalize everything they do in the name of the state, the revolution, the Supreme Leader, the Dear Leader, the Core Leader (Xi’s new title). With no moral constraints on what they do, they believe their ends always justify their means.

That backwards worldview informs every aspect of decision-making in the PRC. This doesn’t mean Washington should refuse to talk with Beijing. But we must be ever vigilant when dealing with Xi. A regime that can justify imprisoning, torturing and killing its own people for peacefully practicing their faith can and will justify anything: seizing foreign lands, annexing international waterways, absorbing free peoples, stealing proprietary information, leveraging a pandemic to gain geopolitical advantage, breaking treaties. The godless USSR did those sorts of things, and so has the godless PRC.

“It is difficult to imagine that a government that continues to repress freedom in its own country,” President Ronald Reagan said of the USSR, “can be trusted to keep agreements with others.” And here we are yet again.

Experts in policy analysis, academia and military-security affairs conclude that Xi’s response to COVID-19 “was in breach of international law.” It pays to recall that COVID-19 was a local public-health problem that metastasized into a global pandemic due to Beijing’s incompetence or intention (either cause is reason not to entrust the future to Xi); that Xi’s regime lied about human-to-human transmission; that Xi’s regime willfully allowed millions to leave the epicenter in Wuhan for destinations around the world; that Xi’s regime carried out a premeditated plan to hoard 2.5 billion pieces of protective equipment as the virus swept the globe; that Xi’s regime blocked scientists from sharing findings about genome sequencing for weeks; that Xi’s regime continues to refuse to cooperate with international health agencies.

Xi’s intervention in Hong Kong and assertion of rule by remote-control is a brazen violation of an international treaty.

In and above the East China Sea, Beijing is constantly violating Japanese airspace and illegally loitering PRC coast guard vessels in Japanese waters. All the while, Beijing illegally claims some 90 percent of the South China Sea. Xi has backed up those claims by building 3,200 acres of illegal islands beyond PRC waters. These islands feature SAM batteries and warplanes. Xi promised the PRC wouldn’t militarize these islands. But as America and its allies learned at enormous cost last century, words don’t matter to men like Xi. Strength and the will to wield it are all that matters. Xi has both.

His goal is to control the resource-rich South and East China Seas, assert sovereignty claims in fait accompli fashion, and bring Chinese-speaking lands under his heel. Hong Kong—where only PRC-approved “patriots” are allowed to serve in government—was his first objective. Taiwan is next. Xi has made clear that democratic Taiwan “must and will be” absorbed by the communist Mainland. “We make no promise to abandon the use of force,” he warns. That explains Beijing’s ground-unit exercises, naval drills and bomber sorties around the island democracy.

Nor are Xi’s dreams and designs limited to his immediate neighborhood. Beijing is buying loyalty via development projects (see the Belt and Road Initiative), gaining a toehold in strategically located regions (see PRC control over ports in 18 countries), building an authoritarian bloc (see Russia, Serbia, North Korea, Iran, Venezuela), and fielding a power-projecting military capable of challenging the Free World across every region and every domain—land, sea, air, space and cyberspace. Xi’s relentless cybersiege of the Free World is siphoning away inventions, discoveries, technologies and wealth, penetrating defense firms, and interfering in elections.

For those with eyes to see—who know about the laogai camps and brutalization of Muslims and oppression of Tibet and assault on Christianity—none of this comes as a surprise. What’s surprising is that for 40 years, the trade über alles caucus convinced itself that such a regime could somehow be reformed by access to Buicks and Kentucky Fried Chicken.

TAKING AIM

Xi vows to build what he calls “a more just and reasonable new world order”—one that would supplant the liberal democratic order the United States and its allies began building after World War II. Importantly, the PRC not only has the intent to build a new world order; it has the resources and capabilities to do so—which helps explain why those who designed and uphold the existing world order are answering China’s challenge.

The PRC is a country of 1.3 billion people. Its GDP is already $14.1 trillion. Its economic tendrils—trade, banking, manufacturing, logistics, shipping, technology, super-computing, artificial intelligence—stretch into every part of the globe. All of this is fueling the PRC’s relentless military modernization and buildup. The PRC’s annual military expenditure is at least $261 billion. (Beijing recently announced an increase in military spending of 6.8 percent for 2021). The PRC has a 2-million-man military, the world’s largest navy and an intense focus on its neighborhood.

None of this would be a particularly worrisome if China embraced the values of liberal democracy—the rule of law, individual freedom, religious liberty, free enterprise and free trade, majority rule with minority rights. These are the foundation stones of what Churchill and FDR envisioned when they drafted the Atlantic Charter in 1941. Their vision led to what some call the “rules-based democratic order,” others the “liberal international order,” still others the “free world order.” These terms aim to describe how the peoples of the West have tried to make the world work and indeed manage the world: They embraced and encouraged democratic governance; developed rules and norms of behavior; promoted liberal (freedom-oriented) political and economic institutions; and called upon governments to live up to the responsibilities of nationhood by respecting international borders and promoting good order within those borders. The result has been an unparalleled spread of prosperity, an unprecedented expansion of free government and an unexpected remission of great-power war (which had become an increasingly-destructive feature of the centuries leading up to 1945).

To be sure, many regimes reject the values of liberal democracy. But the PRC, like the USSR before it, not only rejects those values; it possesses the military-technological-industrial-economic assets to challenge those values, erode the liberal international order built upon those values, and forge a new international order or at least bend the existing order toward its own goals. But don’t take my word for it.

“Some seek to challenge the international order—that is, the rules, values and institutions that reduce conflict and make cooperation possible among nations,” Blinken and Defense Secretary Lloyd Austin warn, pointedly adding that “China in particular is all too willing to use coercion to get its way.”

Former national security advisor Gen H.R. McMaster concludes that PRC “leaders believe they have a narrow window of strategic opportunity to…revise the international order in their favor.”

Before he retired as Indo-Pacific commander ,Adm. Phil Davidson told the Senate Armed Services Committee that Xi and his lieutenants are “accelerating their ambitions to supplant the United States and our leadership role in the rules-based international order.”

A NATO panel noted late last year that Beijing’s “approach to human rights and international law challenges the fundamental premise of a rules-based international order.”

These political, diplomatic and military leaders recognize that the liberal order has promoted the peace and prosperity of the Free World for nearly 75 years. But it doesn’t run on autopilot. If we want the benefits of a liberal order that sustains our way of life, we need to sustain the liberal order. As Robert Kagan of the Brookings Institution observes, “The present order will last only as long as those who favor it and benefit from it retain the will and capacity to defend it.” He adds, “Every international order in history has reflected the beliefs and interests of its strongest powers, and every international order has changed when power shifted to others with different beliefs and interests.”

Indeed, the liberal order and its guarantors have arrived at a turning point or breaking point: Either they will marshal the means and will to update, strengthen and preserve the existing order, or Beijing will dramatically transform it. Xi’s callous treatment of his own subjects and contempt for international norms offer a glimpse of what his “more reasonable new world order” would look like.

### CP---1NC

#### Text: The United States federal government should allow relevant agencies to sue to enjoin practices by the private sector where foreign plaintiffs cannot secure adequate relief in alternative fora.

#### The CP PICs out of private enforcement, an inevitable element of antitrust liability under the core antitrust laws---public enforcement is sufficient

Eric McCarthy et al. ‘7. GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, with Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado. “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases.” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>

In comparison, in the European Union, private enforcement actions are rare and play less of a role than public enforcement in the fight against anti-competitive behaviour. Several obstacles hinder actions for damages in member state national courts, including a plaintiff’s limited access to evidence, the unavailability of class actions and the potential that the plaintiff may have to pay the defendants’ costs if the plaintiff loses the case. To address these obstacles and the great diversity of damages actions among the member states, the European Commission recently published a green paper on Damages Actions for Breach of the EC Antitrust Rules.3 The green paper examines those aspects of EU litigation practice that have led to a pronounced underdevelopment of private damages actions in the EU. Since its publication in December 2005, the green paper has sparked significant debate within the international antitrust community about the role of private enforcement of EC Treaty competition law and about damages actions in particular. The general expectation is that private damages actions will emerge (albeit slowly) in the European Union. This article compares the state of plaintiff recovery actions in antitrust cases in the US with that of the EU and explores why the United States is more litigious than the EU.

Private antitrust damages actions in the US

Rightly or wrongly, the United States has earned the reputation of having a ‘litigation culture’ that permeates its entire legal system.4 If that is true, it certainly earned its stripes this past year in the area of antitrust litigation. Although the number of civil cases filed in the United States dropped by 10 per cent from 2004 to 2005, the number of antitrust civil filings, almost all of which were initiated by private plaintiffs, rose by 8.8 per cent.5 In the first six months of 2006, the number of antitrust class actions doubled over the same period in 2005.6 Some experts speculate that “[h]ard-charging regulators, a more aggressive plaintiffs[’] bar, and the implementation of [CAFA]” may contribute to the increase in antitrust litigation.7 But in all likelihood, the explanation is far more elementary. As discussed in greater detail below, the pot of treble damages available to plaintiffs in the United States, as well as pro-plaintiff discovery and procedural rules, make private damages extremely easy and attractive to pursue.

The treble damages remedy

In 1914, the US Congress passed the Clayton Act, codified at 15 USC sections 12-27. Section 4 of the Act extends the Sherman Act’s prohibitions on anti-competitive behaviour and, most notably, allows “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws” to sue for and “recover threefold the damages by him sustained”.8 Treble damages were designed to deter illegal conduct, deprive antitrust violators of the “fruits of their illegal activities” and provide compensation to victims of wrongdoing.9

The Clayton Act’s treble damages provision is not without its critics.10 Many practitioners and policy makers contend that trebling damages creates too great an incentive for plaintiffs to sue. Additionally, they argue, treble damages actions can result in a windfall to plaintiffs. Furthermore, some believe that large fines and the potential for criminal penalties create just as much of a deterrent against violations, without the need for treble damages.11 Nonetheless, the ability of a US private plaintiff to recover treble damages is so sacred and well protected that earlier this year the First Circuit held in Kristian v Comcast Corp12 that, although Comcast could contract with its subscribers to arbitrate antitrust claims, the arbitration agreements could not bar treble damages because “the award of treble damages under the federal antitrust statutes cannot be waived”.13

Although exceptions to the treble damages provision remain few and far between, congress enacted the Criminal Penalty Enhancement and Reform Act (CPERA) in June 2004. CPERA eliminates the treble damages remedy for corporations that qualify for amnesty under the Department of Justice’s Amnesty Programme.14 Under CPERA, a corporation must report its own anti-competitive behaviour to the DoJ and enter into the Corporate Leniency Programme.15 If a private plaintiff sues the corporation for the same behaviour, the civil court may assess single damages against the participating corporation, but only if the judge in the civil action determines that the corporate defendant is cooperating with the civil claimant by providing a full account of the conduct, furnishing all potentially relevant documents, and securing testimony, depositions and interviews from employees.16

Discovery and evidence

Plaintiffs enjoy broad discovery rights in the United States under the Federal Rules of Civil Procedure. These rules provide significant incentives for plaintiffs to file damages suits, even if they have very little factual bases for the underlying claims. At the outset of a case, the parties are obliged to make certain disclosures to one another, including the name of each individual “likely to have discoverable information” and a description by category and location of all documents in the party’s possession or control that it may use to support its claims or defences.17 Thereafter, during the fact-finding or discovery period, plaintiffs may seek a defendant’s business documents through written requests18 as well as answers to questions through written interrogatories.19 Plaintiffs may also ask questions of a defendant’s employees (regardless of seniority), who must sit for depositions and testify under oath.20 Moreover, plaintiffs may seek documents and testimony from non-parties with relative ease.21

Armed with such easy access to a defendant’s or non-party’s documents and employees, plaintiffs with limited evidentiary bases for their lawsuits may be inclined to sue and go on ‘fishing expeditions’ to discover facts to support their case.

Contingent fees

Plaintiffs that file antitrust damages actions in the United States routinely do so on a contingent fee basis. Under such an arrangement with counsel, the plaintiff client does not pay any fees to his or her attorney unless and until the plaintiff collects damages either by settling with the defendant or prevailing at trial. Typically, plaintiffs’ attorneys demand 33 per cent of the recovery as the fee.22 The result is a win for both client and attorney. The fee arrangements allow plaintiffs with limited funds the freedom to pursue their lawsuits without having to fund the litigation along the way. The plaintiffs’ attorney, on the other hand, is attracted to the prospect of treble damages, and thus a larger fee, and therefore is willing to front the litigation costs in the hopes of earning a sizeable fee at the conclusion of the suit.

Class actions

Class actions are the procedural device that enable one or more plaintiff members of a proposed class to sue on behalf of all similarly situated members of the same proposed class.23 Courts in the US have recognised that class actions can be appropriate mechanisms for promoting private enforcement of the antitrust laws.24 In this way, large numbers of potential claimants can prosecute their claims in a cost-efficient manner.25 The objective of any class action lawyer is to get the class certified. To do so, the court must find that the proposed class is “so numerous that joinder of all members is impracticable”, that there are “questions of law or fact common to the class”, that the “claims or defenses of the representative parties are typical of the claims or defenses of the class” and that the proposed class representatives “will fairly and adequately protect the interests of the class”.26 In addition, in most antitrust cases, the court must determine that the “questions of law or fact common to the members of the class predominate over any questions affecting only individual members” and that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”27 Under rule 23, proposed class members are afforded the opportunity to decline to join or to ‘opt out’ of the class. But if the class is certified, all class members who do not affirmatively opt out are bound by the decision in the case and cannot pursue their claims individually. Class actions remain a popular means among plaintiffs’ lawyers to litigate antitrust conspiracy claims because they are regularly certified.

State indirect purchaser actions

In Illinois Brick Co v Illinois,28 the US Supreme Court held that, in order to maintain a claim for damages under section 4 of the Clayton Act, a plaintiff must have purchased the product in question directly from the alleged defendant-antitrust violator. The landmark decision thus precludes plaintiffs in a federal court from seeking alleged damages that were ‘passed through’ from the defendant down the chain of distribution in the form of overcharges. In direct response to Illinois Brick, many US state legislatures passed antitrust statutes that permit indirect consumers (ie, below the direct purchaser in the distribution chain) to sue the alleged violator. Today, 29 states permit such suits, or, alternatively, allow the state attorney general to pursue antitrust claims on behalf of indirect consumers.29 In these ‘Illinois Brick repealer’ states, as they are known, defendants face the real prospect of defending against lawsuits that mirror direct purchaser lawsuits pending against them in a federal court.

Huge jury verdicts and settlements

One natural result of the ease with which plaintiffs can pursue treble damages actions in the United States is huge jury verdicts in private antitrust cases. In Conwood v US Tobacco, the plaintiff manufacturer of moist smokeless tobacco (snuff) sued a competitor, the manufacturer of Copenhagen and Skoal, for unlawful monopolisation in violation of section 2 of the Sherman Act, among other claims.30

The jury awarded plaintiffs approximately US$350 million in damages, which, when trebled, resulted in an award that exceeded US$1 billion. The award is thought to be the largest antitrust jury verdict ever recorded.31

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

The ultimate risk of large jury verdicts inspire settlements even if the defendants litigate the cases for years and at great expense. In 1998, in In re NASDAQ Market-Makers Antitrust Litigation, MDL Docket No. 1023, plaintiffs settled with 37 defendants for a total of US$1.027 billion.34 And in 2003, on the eve of trial, defendant Visa USA settled with plaintiffs in In re Visa Check/Mastermoney Antitrust Litigation, 297 F Supp 2d 503, 506-508 (EDNY 2003) for approximately US$2 billion. Two days later, defendant MasterCard settled for approximately US$1 billion. The combined US$3.05 billion settlement has been described as “the largest antitrust settlement ever”.35 Private damages actions in the EU

In stark contrast to the United States, private damages actions in the EU are few in number and have never played much of an antitrust enforcement role. Although the European Court of Justice (ECJ) in 2001 explicitly recognised a right to damages for breaches of EC competition law,36 plaintiffs have pursued very few damages claims for violations of competition rules. According to a 2004 study (the Ashurst Study), private damages actions based on the violation of either EU or national antitrust rules are in a state of “total underdevelopment” due to various obstacles in bringing such lawsuits.37

To address these obstacles, the EC recently published a green paper, in which the Commission has sparked significant discussion on the present and future role of private enforcement in the EU. This section explores that role.

EU antitrust laws and enforcement

In the EU, there are two levels of antitrust laws and enforcement. The Commission enforces EU antitrust rules at the EU level, which is limited to public enforcement. At the member state level, however, national antitrust authorities and national courts apply both EU and national antitrust laws. Member states permit private enforcement, including damages actions, through national courts.38 Within this two-tiered system, national antitrust authorities and national courts may apply both EU and national antitrust laws, though substantively there is often little difference between the two.

Articles 81 and 82 of the European Community Treaty govern antitrust enforcement. The ECJ long ago decided that these provisions create rights for private parties that national courts must safeguard.39 In Courage v Crehan, the ECJ held that these rights include the right to damages,40 and recently it clarified that such a right includes compensation not only for actual loss, but also for loss of profit plus interest.41 Moreover, with the adoption of Regulation 1/2003,42 the Council of the European Union ‘modernised’ antitrust enforcement by including new procedural rules for the application of articles 81 and 82. In particular, by devoting specific provisions to national courts, the EU legislative branch has recognised the fundamental role that national courts play in the private enforcement of EU antitrust law for the first time since the inception of EU antitrust enforcement in the early 1960s.

The green paper

These developments, however, have not been sufficient to ensure an effective system of private antitrust enforcement, particularly damages actions, throughout 25 jurisdictions with very different legal traditions and markedly diverse substantive and procedural rules. According to the Ashurst Study, to date there have been only 28 successful private actions for damages for violations of the antitrust laws in the EU.43 More often than not, only single large companies that allege anti-competitive behaviour by dominant competitors have pursued private damages actions. For these well-financed plaintiffs, the damages that they seek are large enough to offset the trouble and costs of private litigation before a national court.

In light of the obstacles to private enforcement in the EU, the Commission published its green paper in 2005 to facilitate damages actions, enhance the overall effectiveness of antitrust enforcement and, ultimately, increase compliance with antitrust laws. In response to criticism from those practitioners who fear the adoption of a USstyle system that could lead to ‘excessive litigation’, the Commission has stated that the objective is that of building “an enforcement culture, not a litigation culture”, in which private enforcement would complement public enforcement.44 For each obstacle to damages actions, the green paper proposes several solutions, although the Commission has not yet indicated how it intends to implement any of these solutions (eg, by means of an EU Directive harmonising certain aspects of national law, or thorough ‘soft law’ such as Commission guidelines).

Amount of damages

Treble damages are not available in the EU. It is also not likely that they will be any time soon; the Commission notes that the US treble damages system can lead to “unmeritorious or vexatious litigation”.45 Instead, compensation is limited to the harm suffered, without the possibility of obtaining punitive or exemplary damages. Plaintiffs may thus usually recover only the loss actually incurred, as well as, in some countries, the loss of profits.46 The Ashurst Study, however, revealed that this system of limited recovery provides disincentives to private litigation.47 To provide balance, the Commission proposes to maintain the rule of single damages, while contemplating the possibility of awarding double damages in cartel actions.48 On this issue, it recognises that the addition of double damages will require the implementation of appropriate measures to avoid jeopardising the effectiveness of leniency programmes (eg, successful immunity applicants would be exposed to single damage recovery only).49

#### Private suits decimate investment

Makan Delrahim 20. JD, former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, 9/18/20. “Assistant Attorney General Makan Delrahim Delivers Remarks at IAM’s Patent Licensing Conference in San Francisco.” <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing>

More fundamentally, recognizing a Section 2 cause of action for violations of a FRAND commitment would create an unacceptable risk of “false positive” condemnations of pro-competitive conduct by licensees. The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly “misrepresenting” one’s intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition.

Where contract law remedies exist to remedy and deter breaches of a FRAND commitment, the additional deterrence that Sherman Act remedies offer could deter lawful, pro-competitive conduct—that is, research and development by innovators who make careful cost-benefit calculations as to how much to invest in technologies that may not pay off. Demanding a high price for one’s patented technology is permissible, and expected, conduct in a free market negotiation. A Section 2 cause of action would skew the patent licensing bargain away from the bargaining outcome that a free market dictates.

In particular, where the parties have a subjective disagreement over the meaning of an incomplete contract term, a Section 2 remedy threatens the patent holder with the risk of enormously costly litigation and a possible treble damages award. Bargaining in the shadow of litigation, a patent holder would be wary that a high license demand could be penalized by a significant damages award, whereas a prospective licensee’s low-ball offer would do no such thing. Such a remedy would bestow any putative licensee with disproportionate negotiating power. In turn, the cost-benefit calculation for innovators would change and the prospect of additional dynamic competition likely would decline.

#### The kills economic recovery

Neil Irwin 21, senior economics correspondent for The New York Times, “17 Reasons to Let the Economic Optimism Begin,” NYT, 3/14/21, https://www.nytimes.com/2021/03/13/upshot/economy-optimism-boom.html

17. The post-pandemic era could start with a bang

The last year has been terrible on nearly every level. But it’s easy to see the potential for the economy to burst out of the starting gate like an Olympic sprinter.

That could have consequences beyond 2021. A rapid start to the post-pandemic economy could create a virtuous cycle in which consumers spend; companies hire and invest to fulfill that demand; and workers wind up having more money in their pockets to consume even more.

Americans have saved an extra $1.8 trillion during the pandemic, reflecting government help and lower spending. That is money that people can spend in the months ahead, or it could give them a comfort level that they have adequate savings and can spend more of their earnings.

Things are also primed for a boom time in the executive suite. C.E.O. confidence is at a 17-year high, and near-record stock market valuations imply that companies have access to very cheap capital. There is no reason corporate America can’t hire, invest and expand to take advantage of the post-pandemic surge in activity.

#### Decline cascades and goes nuclear

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### CP---1NC

#### Text: The United States federal government should define anticompetitive private cartel practices in cases where foreign plaintiffs cannot secure adequate relief in alternative for a as a threat to national security

#### Solves the aff---avoids DOJ.

Richard M. Steuer 17. Member of the New York Bar. "The Horizons of Antitrust." St. John's Law Review, vol. 91, no. 1, Spring 2017, p. 177-210. HeinOnline.

As described earlier, some countries assign their competition agencies responsibility for assessing and weighing not only consumer welfare, but other goals as well. This can be daunting, but every town council and zoning board routinely faces the challenge of weighing competing goals, usually with far less analytical support.8 ' Nevertheless, the arguments against assigning competition agencies authority for applying other goals are that these agencies are ill equipped to perform non-economic analysis, and that such an approach would concentrate too much discretion within the competition authorities. If, for instance, the Federal Trade Commission were tasked with conducting a "net benefit" analysis, considering all the goals discussed earlier, it would require greater resources. It also would need the political strength to withstand the criticism it would inevitably attract year in and year out from disappointed parties and their supporters. Some countries, such as Canada and Australia, have established authorities separate from competition authorities to oversee foreign investment, applying a wide variety of goals either apart from consumer welfare or, as in Australia, including consumer welfare. 82 A model like that adopted in Australia would contemplate the creation of a foreign investment review board to advise a cabinet member or the president, who in turn would have authority to disapprove foreign investments, applying a "national interest" or "net benefit" test. If such an arm of government were assigned responsibility in the United States for balancing all these goals in the context of foreign investment, who has the breadth of experience, depth of wisdom, and political respect to make such judgments? The National Economic Council, as has been suggested by the Center for American Progress?" Would its determination be subject to judicial review, and under what standard? What about expanding the responsibilities of CFIUS, as proposed under the Foreign Investment and Economic Security bill,' to apply a "net benefit" test to foreign acquisitions of control regardless of whether those acquisitions pose a threat to national security? Under that proposal, the Committee's determination would be subject to review by the President, but otherwise would be nonreviewable. What about creating a new body, modeled on Australia's Foreign Investment Review Board? How would it be composed and who would appoint its members? Would it be modeled on the Federal Trade Commission, with members from more than one political party serving fixed terms or would it be reconstituted by each administration, like the Council of Economic Advisors? Who would have the ultimate responsibility-the Treasury Secretary? The Commerce Secretary? The President? What would be the threshold for review? Would judicial review be possible and, if so, under what standard? The simplest approach might be to expand the mission of CFIUS by defining "national security" to include economic security, or "national interest," and to create a new advisory board, with adequate staffing, to provide the support that CFIUS would need to fulfill a broader mission with respect to acquisitions of foreign control that do not raise issues of national defense or homeland security. Depending upon the scope of this new authority, there might be calls to add provisions to allow judicial review in those instances where neither national defense nor homeland security is involved." It would be easiest to leave well enough alone, of course, but if the American economy truly is being threatened by the current approach, a new assignment of responsibility should be considered. There are several viable alternatives, as just described, each of which has pros and cons. What is clear is that if the present structure in the United States no longer is working satisfactorily, a new structure needs to be considered.

### K---1NC

#### Anti-trust is a psyop to restore the prestige of capital and cover for union busting---vote neg for socialist governance that refuses faith in competition

Henwood 21 [Doug, American journalist, economic analyst, author, and financial trader, contributor to the Nation. “Why Socialists Should Distrust Antitrust.” Jacobin. July 2021. <https://www.jacobinmag.com/2021/07/antitrust-law-monopolies-small-business-competition-large-corporations-bigness> //shree]

Behind antitrust is a faith in competition as a positive good. As socialists we should take exception to that. We already have too much competitive individualism in this society, and we don’t need any more. We need solidarity. Stimulating the war of each against all isn’t the way to get there.

A better way to handle bigness is to regulate the behemoths and encourage the growth of unions. That would do more to improve working conditions at Amazon than turning it into four or twenty little Amazons. As political economist Sam Gindin pointed out in an interview on my radio show, the deregulation movement of the 1970s and 1980s was a war on regulated oligopolies, and it was accompanied by union busting, wage cuts, and job losses. That could be a portent of life under monopoly busting.

Why is antitrust getting the attention of liberals these days? In his book on the history of American corporate governance, law professor Mark Roe notes that Franklin Roosevelt saw it as a war against “private” socialism that could stave off “government” socialism. We may be seeing something similar now. With socialism polling decently, socialists working their way into the Democratic Party, and the business class in disrepute with much of the population — Gallup reports that 73 percent of the public is either somewhat or very dissatisfied with major corporations, compared to 48 percent in 2001 — pursuing antitrust may be a campaign to restore the prestige of capitalism itself. Fronting small business as the emblem of commerce is a classic bourgeois self-defense strategy.

There’s nothing magic about smallness. Vincent Carosso ends his huge book on the Morgan banking family by quoting an unnamed socialist refusing to curse the peak Morgan, J. P., on his death: “We grieve that he could not live longer, to further organize the productive forces of the world, because he proved in practice what we hold in theory, that competition is not essential to trade and development.” It’s a sentiment worth recovering.

#### Capitalism drives extinction and structural violence

Allinson et al 21 [Jamie Allinson is Senior Lecturer in Politics and International Relations at Edinburgh University and author of The Age of Counter-revolution. China Miéville is the author of a number of highly acclaimed and prize-winning novels including October: The History of the Russian Revolution. Richard Seymour is the author of numerous works of non-fiction, His writing appears in the New York Times, London Review of Books, Guardian, Prospect, Jacobin. Rosie Warren is an Editor at Verso and the Editor-in-Chief of Salvage. All are writing for the Salvage Collective. “The Tragedy of the Worker: Toward the Proletarocene.” Introduction. July 2021. Verso EBook. ISBN: 9781839762963 //shree]

This is the question that vexed us as we set out to write The Tragedy of the Worker. From the vantage point of the present, the history of capitalist development is, as Marx expected, the history of the development of a global working class, the proletarianisation of the majority of the world’s population. But the very same process of that development has brought us to the precipice of climate disaster. Our position, to recall Trotsky’s rationalisation of War Communism in 1920, is in the highest degree tragic.

It is now clear that we will pass what scientists have long warned will be a tipping point of global warming, accelerating the already catastrophic consequences of capitalist emissions. How do we imagine emancipation on an at best partially habitable planet? Where once communists imagined seizing the means of production, taking the unprecedented capacities of capitalist infrastructures and using them to build a world of plenty, what must we imagine after the apocalypse has befallen us? What does it mean that as capitalism has become truly global, the gravediggers it has created dig not only capitalism’s grave, but also that of much organic life on earth?

Our answers to these questions remain rooted in the politics of revolutionary communism. Our stance is not based on the fantasy of a homeostatic nature that must be defended but on the critique of the capitalist metabolism – the Stoffwechsel- that must be overthrown. Earth scientists are accustomed to speak in terms of ‘cycles’ by which substances circulate in different forms: the water cycle, the rock cycle, the nitrogen cycle, the glacial-interglacial cycle, the carbon cycle, and others. One way of registering the catastrophe of climate change is to see these cycles – most of all, but not solely, the carbon cycle – as disordered, under- or over-accumulating. But this is to ignore the more fundamental circuit of which these now form epicycles, like Ptolemy’s sub-orbits of the heavenly bodies: the circuit of capital accumulation, M-C-M′.

This circuit accumulates profit and produces death. Neither is accidental. It is for this reason that the debates that capitalist ruling classes permit among themselves on ‘adaptation’ versus ‘mitigation’ take place on false premises. What is to be mitigated is the impact of climate change on accumulation, rendered through the ideology of ‘growth’ as something that benefits everyone. What we are to adapt to are the parameters of accumulation, sacrificing just enough islands, eco-systems, indigenous – and non-indigenous – cultures to maintain its imperatives for a period of time until new thresholds must be crossed, and new life sacrificed to the pagan idol of capital. Already, capitalist petro-modernity builds a certain quantum of acceptable death into its predicates: at the very least, the 8.7 million killed by fossil fuels each year according to Harvard University are considered a price worth paying for the stupendous advantages of fossil capital. And the sky can only keep going up, as deforestation, polar melt, ocean acidification, soil de-fertilisation and more intense wildfires and storms tear the web of life into patches. If the necropolitical calculus of the Covid-19 pandemic appears crass, just wait until its premises are applied to climate catastrophe.

### T---1NC

#### Private sector is limited to the country’s economy

Collins Dictionary, no date. Definition of 'private sector'. https://www.collinsdictionary.com/us/dictionary/english/private-sector

The private sector is the part of a country's economy that consists of industries and commercial companies that are not owned or controlled by the government.

#### Topical affs can only prohibit entities in the US

U.S. Code, 6 Edition. 2 U.S.C. Title 2 - The Congress. Chapter 17A - Congressional Budget and Fiscal Operations. Subchapter II - Fiscal Procedures. Part B - Federal Mandates. Sec. 658 – Definitions. https://www.govinfo.gov/content/pkg/USCODE-2006-title2/html/USCODE-2006-title2-chap17A-subchapII-partB-sec658.htm

The term “private sector” means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.

#### Vote neg for predictable limits and ground---extraterritoriality provides unique link shield arguments by diminishing the signal of domestic anti-trust

### T---1NC

#### Prohibitions are distinct from remedies that only block the anticompetitive elements of a practice, rather than the practice itself.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

#### Business practices are ongoing conduct defined by the behaviors of many market participants

Kerry Lynn Macintosh 97. Associate Professor of Law, Santa Clara University School of Law. B.A. 1978, Pomona College; J.D. 1982, Stanford University, “Liberty, Trade, and the Uniform Commercial Code: When Should Default Rules Be Based On Business Practices?,” 38 Wm. & Mary L. Rev. 1465, Lexis.

These new and revised articles reflect a strong trend toward choosing default rules 4 that codify existing business practices. 5 [FOOTNOTE 5 BEGINS] In this Article, the term "business practices" is used to refer to practices that emerge over time as countless market participants exercise their freedom to engage in profitable transactions. For an account of the evolution of business practices, see infra Part II. As used here, "business practices" is broader and less technical than "trade usage," which the Code narrowly defines as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. 1-205(2). [FOOTNOTE 5 ENDS] This is particularly true of the recent revisions to Articles 3 (Negotiable Instruments), 4 (Bank Deposits and Collections) and 5 (Letters of Credit).

#### Violation: The plan only increases behavioral remedies that target anticompetitive aspects of the practice---topical affs must increase prohibitions on the practices themselves.

#### Vote neg for limits and ground---infinite behavioral remedies and no link uniqueness for offense.

## Developing Econ Adv

### AT: Cartelization---1NC

#### Cartelization is on the decrease---detection and deterrence working now.

Alain Verbeke and Caroline Buts 8-17. McCaig Research Chair in Management and is a Professor of International Business Strategy at the Haskayne School of Business, University of Calgary. Professor at the department of applied economics of the Vrije Universiteit Brussel. The Not So Brilliant Future of International Cartels. Published by Cambridge University Press on behalf of The International Association for Chinese Management Research. 08-17-2021. Pg. 6-7

As explained in the previous section, we do not dispute the possibility that international cartels could become more important in the future under carefully defined conditions. We are doubtful, however, even when accepting B&C’s broad definition of this governance mode, that international cartels will gain ground more generally, vis-à-vis other forms of governance in international business, when multinational enterprises face increased political risk.

A key element, and perhaps a surprising one, explaining our doubt about the bright future of cartels is four clear trends in cartel regulation that are now creating significant political risk for international cartel members (admittedly not covering B&C’s benevolent cartels). First, competition policy is now a priority for policy makers around the world, as reflected in the progress made in detecting, investigating, and prosecuting cartels (OECD, 2020; OECD, 2021b). Recently published data indicate that 68% of global cartels (with members from at least two different continents) have been prosecuted by multiple jurisdictions, with average cartel fines being very high at €19.3 million (OECD, 2020).

Second, the consequences of being caught as a cartel member have gradually become more severe and far-reaching, both for the orchestrating and the participating companies, and for the employees involved (Ordóñez-De-Hano, Borrell, & Jiménez, 2018). Depending on the jurisdiction, a wide array of sanctions is now being deployed, including personal fines, trade prohibitions, and prison sentences (these have increased sevenfold over a recent five-year period, OECD, 2020). After a finding of cartel-behavior from the competition authority, the legal battle usually continues in the form of lawsuits for damages whereby victims file claims and may also coordinate their actions, e.g., to recover cartel overcharges (Burke, 2019).

Third, cartel investigations have also become more sophisticated. Leniency policies – providing immunity from fines for the first player who admits to the existence of a cartel and discloses information on its functioning – are on the rise. This powerful tool serves both detection and deterrence purposes in the realm of anticompetitive behavior (Margrethe & Halvorsen, 2020; Marvão & Spagnolo, 2018; Miller, 2009). It incentivizes cartel members to become whistle blowers. Companies will be less likely to join a cartel if they know that its members may be enticed to disclose cartel operations, (Brenner, 2009; Vanhaverbeke & Buts, 2020).

A larger number of agencies than before now also have the mandate to conduct ‘dawn raids’, in order to collect evidence of cartel behavior and they can even enter private premises of employees during their search for incriminating material. In addition, sophisticated econometric analyses have become standard practice to provide evidence of coordinated conduct in industry and to calculate cartel overcharges (Parcu, Monti, & Botta, 2021).

Fourth, competition authorities have invested more in outreach, communicating competition rules through dedicated events, online campaigns, and competition networks. Compliance programs have also been on the rise with an increasing number of mainly large companies investing in compliance training to abide by competition rules (De Stefano, 2018).

The increased efforts to fight anticompetitive agreements in industry are now deterring and destabilizing cartels. Following a substantial increase in the number of cartels that have been ‘caught’, the average life span of these cartels is now going down rapidly (OECD, 2020). The fight against illegal, anticompetitive behavior will intensify further in the near future, rather than governments shifting their focus to contemplate potential benefits. At the same time, the beneficial effects have been widely acknowledged of international collaboration forms that are legally allowed by various competition policy regimes (and are therefore not considered cartels), see for instance Martínez-Noya and Narula (2018) on international R&D cooperation.

### AT: ME War---1NC

#### Iraq and Afghanistan war prove no nuclear escalation.

#### Mutual checkmating prevents the impact.

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

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

#### Middle East instability inevitable – erosion of borders, Sunni-Shia split, and Arab-Israeli conflict.

### AT: LA Instability---1NC

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

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

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

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

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

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

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

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

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

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

### AT: Democracy---1NC

#### Global democracy’s dead---backlash and technology destroy the foundations of order

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This task was complicated by the Cold War, but “the free world” (as Americans then called the noncommunist countries) continued to develop along Wilsonian lines. Inevitable compromises, such as U.S. support for ruthless dictators and military rulers in many parts of the world, were seen as regrettable necessities imposed by the need to fight the much greater evil of Soviet communism. When the Berlin Wall fell, in 1989, it seemed that the opportunity for a Wilsonian world order had finally come. The former Soviet empire could be reconstructed along Wilsonian lines, and the West could embrace Wilsonian principles more consistently now that the Soviet threat had disappeared. Self-determination, the rule of law between and within countries, liberal economics, and the protection of human rights: the “new world order” that both the George H. W. Bush and the Clinton administrations worked to create was very much in the Wilsonian mold. Today, however, the most important fact in world politics is that this noble effort has failed. The next stage in world history will not unfold along Wilsonian lines. The nations of the earth will continue to seek some kind of political order, because they must. And human rights activists and others will continue to work toward their goals. But the dream of a universal order, grounded in law, that secures peace between countries and democracy inside them will figure less and less in the work of world leaders. To state this truth is not to welcome it. There are many advantages to a Wilsonian world order, even when that order is partial and incomplete. Many analysts, some associated with the presidential campaign of former U.S. Vice President Joe Biden, think they can put Humpty Dumpty together again. One wishes them every success. But the centrifugal forces tearing at the Wilsonian order are so deeply rooted in the nature of the contemporary world that not even the end of the Trump era can revive the Wilsonian project in its most ambitious form. Although Wilsonian ideals will not disappear and there will be a continuing influence of Wilsonian thought on U.S. foreign policies, the halcyon days of the post–Cold War era, when American presidents organized their foreign policies around the principles of liberal internationalism, are unlikely to return anytime soon. THE ORDER OF THINGS Wilsonianism is only one version of a rules-based world order among many. The Westphalian system, which emerged in Europe after the Thirty Years’ War ended in 1648, and the Congress system, which arose in the wake of the Napoleonic Wars of the early nineteenth century, were both rules-based and even law-based; some of the foundational ideas of international law date from those eras. And the Holy Roman Empire—a transnational collection of territories that stretched from France into modern-day Poland and from Hamburg to Milan—was an international system that foreshadowed the European Union, with highly complex rules governing everything from trade to sovereign inheritance among princely houses. As for human rights, by the early twentieth century, the pre-Wilsonian European system had been moving for a century in the direction of putting egregious violations of human rights onto the international agenda. Then, as now, it was chiefly weak countries whose oppressive behavior attracted the most attention. The genocidal murder of Ottoman Christian minorities at the hands of Ottoman troops and irregular forces in the late nineteenth and early twentieth centuries received substantially more attention than atrocities carried out around the same time by Russian forces against rebellious Muslim peoples in the Caucasus. No delegation of European powers came to Washington to discuss the treatment of Native Americans or to make representations concerning the status of African Americans. Nevertheless, the pre-Wilsonian European order had moved significantly in the direction of elevating human rights to the level of diplomacy. Wilson, therefore, was not introducing the ideas of world order and human rights to a collection of previously anarchic states and unenlightened polities. Rather, his quest was to reform an existing international order whose defects had been conclusively demonstrated by the horrors of World War I. In the pre-Wilsonian order, established dynastic rulers were generally regarded as legitimate, and interventions such as the 1849 Russian invasion of Hungary, which restored Habsburg rule, were considered lawful. Except in the most glaring instances, states were more or less free to treat their citizens or subjects as they wished, and although governments were expected to observe the accepted principles of public international law, no supranational body was charged with the enforcement of these standards. The preservation of the balance of power was invoked as a goal to guide states; war, although regrettable, was seen as a legitimate element of the system. From Wilson’s standpoint, these were fatal flaws that made future conflagrations inevitable. To redress them, he sought to build an order in which states would accept enforceable legal restrictions on their behavior at home and their international conduct. That never quite materialized, but until recent years, the U.S.-led postwar order resembled Wilson’s vision in important respects. And, it should be noted, that vision is not equally dead everywhere. Although Wilson was an American, his view of world order was first and foremost developed as a method for managing international politics in Europe, and it is in Europe where Wilson’s ideas have had their greatest success and where their prospects continue to look strongest. His ideas were treated with bitter and cynical contempt by most European statesmen when he first proposed them, but they later became the fundamental basis of the European order, enshrined in the laws and practices of the EU. Arguably, no ruler since Charlemagne has made as deep an impression on the European political order as the much-mocked Presbyterian from the Shenandoah Valley. THE ARC OF HISTORY Beyond Europe, the prospects for the Wilsonian order are bleak. The reasons behind its demise, however, are different from what many assume. Critics of the Wilsonian approach to foreign affairs often decry what they see as its idealism. In fact, as Wilson demonstrated during the negotiations over the Treaty of Versailles, he was perfectly capable of the most cynical realpolitik when it suited him. The real problem of Wilsonianism is not a naive faith in good intentions but a simplistic view of the historical process, especially when it comes to the impact of technological progress on human social order. Wilson’s problem was not that he was a prig but that he was a Whig. Like early-twentieth-century progressives generally and many American intellectuals to this day, Wilson was a liberal determinist of the Anglo-Saxon school; he shared the optimism of what the scholar Herbert Butterfield called “the Whig historians,” the Victorian-era British thinkers who saw human history as a narrative of inexorable progress and betterment. Wilson believed that the so-called ordered liberty that characterized the Anglo-American countries had opened a path to permanent prosperity and peace. This belief represents a sort of Anglo-Saxon Hegelianism and holds that the mix of free markets, free government, and the rule of law that developed in the United Kingdom and the United States is inevitably transforming the rest of the world—and that as this process continues, the world will slowly and for the most part voluntarily converge on the values that made the Anglo-Saxon world as wealthy, attractive, and free as it has become. Wilson was the devout son of a minister, deeply steeped in Calvinist teachings about predestination and the utter sovereignty of God, and he believed that the arc of progress was fated. The future would fulfill biblical prophecies of a coming millennium: a thousand-year reign of peace and prosperity before the final consummation of human existence, when a returning Christ would unite heaven and earth. (Today’s Wilsonians have given this determinism a secular twist: in their eyes, liberalism will rule the future and bring humanity to “the end of history” as a result of human nature rather than divine purpose.) Wilson believed that the defeat of imperial Germany in World War I and the collapse of the Austro-Hungarian, Russian, and Ottoman empires meant that the hour of a universal League of Nations had finally arrived. In 1945, American leaders ranging from Eleanor Roosevelt and Henry Wallace on the left to Wendell Willkie and Thomas Dewey on the right would interpret the fall of Germany and Japan in much the same way. In the early 1990s, leading U.S. foreign policymakers and commentators saw the fall of the Soviet Union through the same deterministic prism: as a signal that the time had come for a truly global and truly liberal world order. On all three occasions, Wilsonian order builders seemed to be in sight of their goal. But each time, like Ulysses, they were blown off course by contrary winds. TECHNICAL DIFFICULTIES Today, those winds are gaining strength. Anyone hoping to reinvigorate the flagging Wilsonian project must contend with a number of obstacles. The most obvious is the return of ideology-fueled geopolitics. China, Russia, and a number of smaller powers aligned with them—Iran, for example—correctly see Wilsonian ideals as a deadly threat to their domestic arrangements. Earlier in the post–Cold War period, U.S. primacy was so thorough that those countries attempted to downplay or disguise their opposition to the prevailing pro-democracy consensus. Beginning in U.S. President Barack Obama’s second term, however, and continuing through the Trump era, they have become less inhibited. Seeing Wilsonianism as a cover for American and, to some degree, EU ambitions, Beijing and Moscow have grown increasingly bold about contesting Wilsonian ideas and initiatives inside international institutions such as the UN and on the ground in places from Syria to the South China Sea. These powers’ opposition to the Wilsonian order is corrosive in several ways. It raises the risks and costs for Wilsonian powers to intervene in conflicts beyond their own borders. Consider, for example, how Iranian and Russian support for the Assad regime in Syria has helped prevent the United States and European countries from getting more directly involved in that country’s civil war. The presence of great powers in the anti-Wilsonian coalition also provides shelter and assistance to smaller powers that otherwise might not choose to resist the status quo. Finally, the membership of countries such as China and Russia in international institutions makes it more difficult for those institutions to operate in support of Wilsonian norms: take, for example, Chinese and Russian vetoes in the UN Security Council, the election of anti-Wilsonian representatives to various UN bodies, and the opposition by countries such as Hungary and Poland to EU measures intended to promote the rule of law. Meanwhile, the torrent of technological innovation and change known as “the information revolution” creates obstacles for Wilsonian goals within countries and in the international system. The irony is that Wilsonians often believe that technological progress will make the world more governable and politics more rational—even if it also adds to the danger of war by making it so much more destructive. Wilson himself believed just that, as did the postwar order builders and the liberals who sought to extend the U.S.-led order after the Cold War. Each time, however, this faith in technological change was misplaced. As seen most recently with the rise of the Internet, although new technologies often contribute to the spread of liberal ideas and practices, they can also undermine democratic systems and aid authoritarian regimes. Today, as new technologies disrupt entire industries, and as social media upends the news media and election campaigning, politics is

becoming more turbulent and polarized in many countries. That makes the victory of populist and antiestablishment candidates from both the left and the right more likely in many places. It also makes it harder for national leaders to pursue the compromises that international cooperation inevitably requires and increases the chances that incoming governments will refuse to be bound by the acts of their predecessors. The information revolution is destabilizing international life in other ways that make it harder for rules-based international institutions to cope. Take, for example, the issue of arms control, a central concern of Wilsonian foreign policy since World War I and one that grew even more important following the development of nuclear weapons. Wilsonians prioritize arms control not just because nuclear warfare could destroy the human race but also because, even if unused, nuclear weapons or their equivalent put the Wilsonian dream of a completely rules-based, law-bound international order out of reach. Weapons of mass destruction guarantee exactly the kind of state sovereignty that Wilsonians think is incompatible with humanity’s long-term security. One cannot easily stage a humanitarian intervention against a nuclear power. The fight against proliferation has had its successes, and the spread of nuclear weapons has been delayed—but it has not stopped, and the fight is getting harder over time. In the 1940s, it took the world’s richest nation and a consortium of leading scientists to assemble the first nuclear weapon. Today, second- and third-rate scientific establishments in low-income countries can manage the feat. That does not mean that the fight against proliferation should be abandoned. It is merely a reminder that not all diseases have cures. What is more, the technological progress that underlies the information revolution significantly exacerbates the problem of arms control. The development of cyberweapons and the potential of biological agents to inflict strategic damage on adversaries—graphically demonstrated by the COVID-19 pandemic—serve as warnings that new tools of warfare will be significantly more difficult to monitor or control than nuclear technology. Effective arms control in these fields may well not be possible. The science is changing too quickly, the research behind them is too hard to detect, and too many of the key technologies cannot be banned outright because they also have beneficial civilian applications. In addition, economic incentives that did not exist in the Cold War are now pushing arms races in new fields. Nuclear weapons and long-range missile technology were extremely expensive and brought few benefits to the civilian economy. Biological and technological research, by contrast, are critical for any country or company that hopes to remain competitive in the twenty-first century. An uncontrollable, multipolar arms race across a range of cutting-edge technologies is on the horizon, and it will undercut hopes for a revived Wilsonian order. IT’S NOT FOR EVERYBODY One of the central assumptions behind the quest for a Wilsonian order is the belief that as countries develop, they become more similar to already developed countries and will eventually converge on the liberal capitalist model that shapes North America and western Europe. The Wilsonian project requires a high degree of convergence to succeed; the member states of a Wilsonian order must be democratic, and they must be willing and able to conduct their international relations within liberal multilateral institutions. At least for the medium term, the belief in convergence can no longer be sustained. Today, China, India, Russia, and Turkey all seem less likely to converge on liberal democracy than they did in 1990. These countries and many others have developed economically and technologically not in order to become more like the West but rather to achieve a deeper independence from the West and to pursue civilizational and political goals of their own. In truth, Wilsonianism is a particularly European solution to a particularly European set of problems. Since the fall of the Roman Empire, Europe has been divided into peer and near-peer competitors. War was the constant condition of Europe for much of its history, and Europe’s global dominance in the nineteenth century and early twentieth century can be attributed in no small part to the long contest for supremacy between France and the United Kingdom, which promoted developments in finance, state organization, industrial techniques, and the art of war that made European states fierce and ferocious competitors. With the specter of great-power war constantly hanging over them, European states developed a more intricate system of diplomacy and international politics than did countries in other parts of the world. Well-developed international institutions and doctrines of legitimacy existed in Europe well before Wilson sailed across the Atlantic to pitch the League of Nations, which was in essence an upgraded version of preexisting European forms of international governance. Although it would take another devastating world war to ensure that Germany, as well as its Western neighbors, would adhere to the rules of a new system, Europe was already prepared for the establishment of a Wilsonian order. But Europe’s experience has not been the global norm. Although China has been periodically invaded by nomads, and there were periods in its history when several independent Chinese states struggled for power, China has been a single entity for most of its history. The idea of a single legitimate state with no true international peers is as deeply embedded in the political culture of China as the idea of a multistate system grounded in mutual recognition is embedded in that of Europe. There have been clashes among Chinese, Japanese, and Koreans, but until the late nineteenth century, interstate conflict was rare. In human history as a whole, enduring civilizational states seem more typical than the European pattern of rivalry among peer states. Early modern India was dominated by the Mughal Empire. Between the sixteenth century and the nineteenth century, the Ottoman and Persian Empires dominated what is now known as the Middle East. And the Incas and the Aztecs knew no true rivals in their regions. War seems universal or nearly so among human cultures, but the European pattern, in which an escalating cycle of war forced a mobilization and the development of technological, political, and bureaucratic resources to ensure the survival of the state, does not seem to have characterized international life in the rest of the world. For states and peoples in much of the world, the problem of modern history that needed to be solved was not the recurrence of great-power conflict. The problem, instead, was figuring out how to drive European powers away, which involved a wrenching cultural and economic adjustment in order to harness natural and industrial resources. Europe’s internecine quarrels struck non-Europeans not as an existential civilizational challenge to be solved but as a welcome opportunity to achieve independence. Postcolonial and non-Western states often joined international institutions as a way to recover and enhance their sovereignty, not to surrender it, and their chief interest in international law was to protect weak states from strong ones, not to limit the power of national leaders to consolidate their authority. Unlike their European counterparts, these states did not have formative political experiences of tyrannical regimes suppressing dissent and drafting helpless populations into the service of colonial conquest. Their experiences, instead, involved a humiliating consciousness of the inability of local authorities and elites to protect their subjects and citizens from the arrogant actions and decrees of foreign powers. After colonialism formally ended and nascent countries began to assert control over their new territories, the classic problems of governance in the postcolonial world remained weak states and compromised sovereignty. Even within Europe, differences in historical experiences help explain varying levels of commitment to Wilsonian ideals. Countries such as France, Germany, Italy, and the Netherlands came to the EU understanding that they could meet their basic national goals only by pooling their sovereignty. For many former Warsaw Pact members, however, the motive for joining Western clubs such as the EU and NATO was to regain their lost sovereignty. They did not share the feelings of guilt and remorse over the colonial past—and, in Germany, over the Holocaust—that led many in western Europe to embrace the idea of a new approach to international affairs, and they felt no qualms about taking full advantage of the privileges of EU and NATO membership without feeling in any way bound by those organizations’ stated tenets, which many regarded as hypocritical boilerplate. EXPERT TEXPERT The recent rise of populist movements across the West has revealed another danger to the Wilsonian project. If the United States could elect Donald Trump as president in 2016, what might it do in the future? What might the electorates in other important countries do? And if the Wilsonian order has become so controversial in the West, what are its prospects in the rest of the world? Wilson lived in an era when democratic governance faced problems that many feared were insurmountable. The Industrial Revolution had divided American society, creating unprecedented levels of inequality. Titanic corporations and trusts had acquired immense political power and were quite selfishly exploiting that power to resist all challenges to their economic interests. At that time, the richest man in the United States, John D. Rockefeller, had a fortune greater than the annual budget of the federal government. By contrast, in 2020, the wealthiest American, Jeff Bezos, had a net worth equal to about three percent of budgeted federal expenditures. Yet from the standpoint of Wilson and his fellow progressives, the solution to these problems could not be simply to vest power in the voters. At the time, most Americans still had an eighth-grade education or less, and a wave of migration from Europe had filled the country’s burgeoning cities with millions of voters who could not speak English, were often illiterate, and routinely voted for corrupt urban machine politicians. The progressives’ answer to this problem was to support the creation of an apolitical expert class of managers and administrators. The progressives sought to build an administrative state that would curb the excessive power of the rich and redress the moral and political deficiencies of the poor. (Prohibition was an important part of Wilson’s electoral program, and during World War I and afterward, he moved aggressively to arrest and in some cases deport socialists and other radicals.) Through measures such as improved education, strict limits on immigration, and eugenic birth-control policies, the progressives hoped to create better-educated and more responsible voters who would reliably support the technocratic state. A century later, elements of this progressive thinking remain critical to Wilsonian governance in the United States and elsewhere, but public support is less readily forthcoming than in the past. The Internet and social media have undermined respect for all forms of expertise. Ordinary citizens today are significantly better educated and feel less need to rely on expert guidance. And events including the U.S. invasion of Iraq in 2003, the 2008 financial crisis, and the inept government responses during the 2020 pandemic have seriously reduced confidence in experts and technocrats, whom many people have come to see as forming a nefarious “deep state.” International institutions face an even greater crisis of confidence. Voters skeptical of the value of technocratic rule by fellow citizens are even more skeptical of foreign technocrats with suspiciously cosmopolitan views. Just as the inhabitants of European colonial territories preferred home rule (even when badly administered) to rule by colonial civil servants (even when competent), many people in the West and in the postcolonial world are likely to reject even the best-intentioned plans of global institutions. Meanwhile, in developed countries, problems such as the loss of manufacturing jobs, the stagnation or decline of wages, persistent poverty among minority groups, and the opioid epidemic have resisted technocratic solutions. And when it comes to international challenges such as climate change and mass migration, there is little evidence that the cumbersome institutions of global governance and the quarrelsome countries that run them will produce the kind of cheap, elegant solutions that could inspire public trust. WHAT IT MEANS FOR BIDEN For all these reasons, the movement away from the Wilsonian order is likely to continue, and world politics will increasingly be carried out along non-Wilsonian and in some cases even anti-Wilsonian lines. Institutions such as NATO, the UN, and the World Trade Organization may well survive (bureaucratic tenacity should never be discounted), but they will be less able and perhaps less willing to fulfill even their original purposes, much less take on new challenges. Meanwhile, the international order will increasingly be shaped by states that are on diverging paths. This does not mean an inevitable future of civilizational clashes, but it does mean that global institutions will have to accommodate a much wider range of views and values than they have in the past. There is hope that many of the gains of the Wilsonian order can be preserved and perhaps in a few areas even extended. But fixating on past glories will not help develop the ideas and policies needed in an increasingly dangerous time. Non-Wilsonian orders have existed both in Europe and in other parts of the world in the past, and the nations of the world will likely need to draw on these examples as they seek to cobble together some kind of framework for stability and, if possible, peace under contemporary conditions. For U.S. policymakers, the developing crisis of the Wilsonian order worldwide presents vexing problems that are likely to preoccupy presidential administrations for decades to come. One problem is that many career officials and powerful voices in Congress, civil society organizations, and the press deeply believe not only that a Wilsonian foreign policy is a good and useful thing for the United States but also that it is the only path to peace and security and even to the survival of civilization and humanity. They will continue to fight for their cause, conducting trench warfare inside the bureaucracy and employing congressional oversight powers and steady leaks to sympathetic press outlets to keep the flame alive. Those factions will be hemmed in by the fact that any internationalist coalition in American foreign policy must rely to a significant degree on Wilsonian voters. But a generation of overreach and poor political judgment has significantly reduced the credibility of Wilsonian ideas among the American electorate. Neither President George W. Bush’s nation-building disaster in Iraq nor Obama’s humanitarian-intervention fiasco in Libya struck most Americans as successful, and there is little public enthusiasm for democracy building abroad.

## Resource Cartels Adv

### AT: Minerals---1NC

#### Cartels don’t wreck mineral markets

Irena, 19. The International Renewable Energy Agency (IRENA) is an intergovernmental organization. The Commission who created this report is chaired by former President Ólafur Ragnar Grímsson of Iceland, the Commission comprises a diverse group of distinguished leaders from the worlds of politics, energy, economics, trade, environment and development. The Commission is an independent body with members serving in their individual capacity. "A new world: the geopolitics of the energy transformation." (2019). https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/Jan/Global\_commission\_geopolitics\_new\_world\_2019.pdf

This view was given credence in 2008 when China restricted the supply of rare earths to foreign buyers. Markets panicked and international prices soared, because China controlled a substantial part of the global supply of rare earth minerals. In fact, most of the 17 rare earth minerals are not geologically rare. They are abundant and widely distributed, though they are expensive and polluting to mine and produce. This is partly why the US has refrained from contesting Chinese predominance over rare earth production since the 1990s. Rare earths were perceived to be scarce partly because, like all commodity markets, rare earth markets are cyclical. When demand rises, supply takes time to respond because new mining projects have long lead times; the time lag causes prices to spike; high prices can lead companies to overinvest, so a boom is followed by a price collapse and a new cycle starts. This is exactly what happened in the wake of China’s export restriction: as prices rose, investment flowed into mining projects, leading prices to collapse in 2012.120 Furthermore, there are alternatives to the use of rare earths and other critical metals in renewable technologies. Efforts are being made to create cobalt-free batteries, and only a small minority of wind turbines (less than 2% in the US) are built with rare earth elements. Some minerals can also be recycled, re-used and stockpiled, thereby further reducing their perceived scarcity.121 These factors combine to make it **unlikely that cartels will emerge to control these critical materials**. Cartels are hard to form and sustain. In the 20th century, oil was the only major commodity whose price did not fall in real terms, even though cartels were active in tin, coffee, sugar, and rubber. **International trade rules also impede cartelization**. In 2014, the US, Japan and the European Union appealed to the WTO and successfully challenged China’s decision to restrict the export of rare earths. In sum, the energy transformation driven by renewables will provide fewer instances of ‘energy statecraft’, the use of energy resources as an instrument of foreign policy. Electricity, biofuels and other materials critical to the new energy system are unlikely to acquire the geopolitical role and weight of oil and gas.

### AT: Climate---1NC

#### No climate impact

Sebastian Farquhar 17. Project Manager at FHI responsible for external relations, M.A in Physics and Philosophy from the University of Oxford; John Halstead, Global Priorities Project; Owen Cotton-Barratt, Research Associate in the FHI at the University of Oxford, Lecturer in Mathematics at St. Hugh’s College, Oxford; Stefan Schubert, PhD in philosophy, Researcher at the Centre for Effective Altruism; Haydn Belfield, Academic Project Manager, Centre for the Study of Existential Risk, University of Cambridge; Andrew Snyder-Beattie, Director of Research at FHI, “Existential Risk: Diplomacy and Governance,” Future of Humanity Institute, University of Oxford, Global Priorities Project 2017, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

The most likely levels of global warming are very unlikely to cause human extinction.15 The existential risks of climate change instead stem from tail risk climate change – the low probability of extreme levels of warming – and interaction with other sources of risk. It is impossible to say with confidence at what point global warming would become severe enough to pose an existential threat. Research has suggested that warming of 11-12°C would render most of the planet uninhabitable,16 and would completely devastate agriculture.17 This would pose an extreme threat to human civilisation as we know it.18 Warming of around 7°C or more could potentially produce conflict and instability on such a scale that the indirect effects could be an existential risk, although it is extremely uncertain how likely such scenarios are.19 Moreover, the timescales over which such changes might happen could mean that humanity is able to adapt enough to avoid extinction in even very extreme scenarios.

The probability of these levels of warming depends on eventual greenhouse gas concentrations. According to some experts, unless strong action is taken soon by major emitters, it is likely that we will pursue a medium-high emissions pathway.20 If we do, the chance of extreme warming is highly uncertain but appears non-negligible. Current concentrations of greenhouse gases are higher than they have been for hundreds of thousands of years,21 which means that there are significant unknown unknowns about how the climate system will respond. Particularly concerning is the risk of positive feedback loops, such as the release of vast amounts of methane from melting of the arctic permafrost, which would cause rapid and disastrous warming.22 The economists Gernot Wagner and Martin Weitzman have used IPCC figures (which do not include modelling of feedback loops such as those from melting permafrost) to estimate that if we continue to pursue a medium-high emissions pathway, the probability of eventual warming of 6°C is around 10%,23 and of 10°C is around 3%.24 These estimates are of course highly uncertain.

It is likely that the world will take action against climate change once it begins to impose large costs on human society, long before there is warming of 10°C. Unfortunately, there is significant inertia in the climate system: there is a 25 to 50 year lag between CO2 emissions and eventual warming,25 and it is expected that 40% of the peak concentration of CO2 will remain in the atmosphere 1,000 years after the peak is reached.26 Consequently, it is impossible to reduce temperatures quickly by reducing CO2 emissions. If the world does start to face costly warming, the international community will therefore face strong incentives to find other ways to reduce global temperatures.

### AT: Food Wars---1NC

**No resource conflict**

Agha Bayaramov 18. PhD candidate and lecturer at the department of International Relations and International Organization of the University of Groningen. “Review: Dubious nexus between natural resources and conflict.” *Journal of Eurasian Studies* 9(1): 72-81. Emory Libraries.

The arguments of scarcity adherents have been challenged by a number of scholars in terms of qualitative and quantitative findings. According to Stern (2016) the assumptions underpinning the scarcity notion are illogical due to the exaggeration of threats arising from oil ownership from misperceptions of market information. Furthermore, Koubi et al. (2013) explain that despite their strong empirical explanations, scarcity scholars have weak quantitative research results ones that fail to prove the link

between resource scarcity and intrastate or interstate conflict. The reason for this is that some large-N findings contradict early results, which illustrate that the scarcity-conflict nexus is more complicated than scarcity scholars would have us believe. Dinar (2011), meanwhile, argues that natural resource scarcity may in fact be an important force for cooperation between states. However, scholars of natural resource scarcity have hitherto ignored the ways in which scarcity can spur cooperation (Deudney, 1999). Considering these findings, three conclusions can be drawn from this section. First, scarcity is a complex term and it should not be equated with only natural resources. As it is explained by Kester (2016) some countries may suffer from scarcity of technical, knowledge and human capacity rather than natural resources. In light of this, without a proper capacity it is also possible to have scarcity within abundancy of resources. While supporting the scarcity argument, Andrews-Speed (2015) offer an alternative explanation that natural resources are not physically scarce but there are indeed economic, political, environmental and equity barriers that can lead to a scarcity of natural resources. Due to the strong rule of law, decent neighbourly relations and existence of strong norms for compromise and of multilateral institutions, the North Atlantic countries are highly unlikely to utilize force against or declare war to each other. However, these dimensions and buffers are currently lacking in the Middle East, Africa and Asia. As such, the U.S and Europe should work closely with these regions to prevent any resource disputes erupting (Andrews-Speed 15). Similarly, Gleditsch (1998) explains that some highly developed countries have population density, clean water, and land degradation problems but they still do not suffer from environmental violence. Thus the main issue might be that poor economic development, rather than environmental scarcity, leads to conflict. Kester (2016) names this situation as “second-order-scarcity” which refers to a lack of technology, economic capacity, and knowledge to stop resource scarcity. In this regard, it may be scarcity, itself, rather than natural resources that leads to conflict. Second, conflict can be defined differently based on different dimensions. However, the common consensus is that conflict consists of multiple dimensions (political, economic, environmental, historical, cultural, and geographical etc.) rather than single factor. In this regard, scarcity of natural resources is not strong enough, by itself, to induce either interstate or intrastate conflict. It needs in fact to interact with other variables. Finally, related to the previous reasons, scarcity of natural resources might be a contributing or marginal reason for rather than the root cause of a given conflict. In other words, it needs to interact with non-resource factors in order to cause violence.

# 2NC---BCRR---Round 5

## T-Private Sector

#### 2. Topic is aff-leaning

Fiona M. Scott Morton 19. Theodore Nierenberg Professor of Economics at the Yale University School of Management. Previous deputy assistant attorney general for economics at the Antitrust Division of the U.S. Department of Justice. B.A. in economics from Yale University and Ph.D. in economics from the Massachusetts Institute of Technology. "Modern U.S. antitrust theory and evidence amid rising concerns of market power and its effects," Equitable Growth, https://equitablegrowth.org/research-paper/modern-u-s-antitrust-theory-and-evidence-amid-rising-concerns-of-market-power-and-its-effects/?longform=true

The experiment of enforcing the antitrust laws a little bit less each year has run for 40 years, and scholars are now in a position to assess the evidence. The accompanying interactive database of research papers for the first time assembles in one place the most recent economic literature bearing on antitrust enforcement in the United States. The review is restricted to work published since the year 2000 in order to limit its size and emphasize work using the most recent data-driven empirical techniques. The papers in the interactive database are organized by enforcement topic, with each of these topics addressed in a short overview of what the literature demonstrates over the past 19 years. These topics are: Horizontal mergers—mergers and acquisitions involving direct competitors Coordinated effects—the study of conditions under which competitors in an industry tacitly collude Vertical mergers—mergers and acquisitions where a company acquires another company to which it sells goods or services or from which it buys goods or services Exclusionary conduct—actions in the marketplace that deny a competitor access to either suppliers or customers Loyalty rebates—a type of conduct that occurs when a company gives a discount to a buyer for limiting its purchases from the company’s competitors Most Favored Nation clause—this clause requires a seller to give a specific buyer the best terms offered to other (often competing) buyers Predation—the strategy of taking losses in the short run in order to drive out a competitor and retain or gain a monopoly position, permitting prices the later exercise of market power Common ownership—the impact on competition when mutual funds and other types of institutional investors are the largest owners of product market competitors Monopsony power—the anticompetitive exercise of market power by employers (firms) in the labor market for workers Macroeconomics and market power—the impact of competition issues on the larger economy

**---DATA BASE OMITTED---**

The bulk of the research featured in our interactive database on these key topics in competition enforcement in the United States finds evidence of significant problems of underenforcement of antitrust law. The research that addresses economic theory qualifies or rejects assumptions long made by U.S. courts that have limited the scope of antitrust law. And the empirical work finds evidence of the exercise of undue market power in many dimensions, among them price, quality, innovation, and marketplace exclusion. Overall, the picture is one of a divergence between judicial opinions on the one hand, and the rigorous use of modern economics to advance consumer welfare on the other.

#### 1. Private sector is in the United States

Committee on Governmental Affairs 95. Report of the Committee on Governmental Affairs United States Senate together with Additional and Minority Views to accompany S. 1. Unfunded Mandate Reform Act of 1995. https://www.congress.gov/congressional-report/104th-congress/senate-report/1

``Private sector'' is defined to cover all persons or entities in the United States except for State, local or tribal governments. It includes individuals, partnerships, associations, corporations, and educational and nonprofit institutions.

#### 2. Private sector is part of a country’s economy

Ivy Wigmore 13. Content Editor. “Private sector”. https://whatis.techtarget.com/definition/private-sector

The private sector is the part of a country's economic system that is run by individuals and companies, rather than the government. Most private sector organizations are run with the intention of making profit.

#### 3. It’s part of the national economy

Judith Rabwoni and Peter Neema-Abooki 14. Judith Rabwoni Makerere University, Uganda. And Peter Neema-Abooki, Ph.D Makerere University, Uganda. “Involvement of the Private Sector in the Financing of Academic Programmes at the Primogenial University in Uganda.” http://cees.mak.ac.ug/sites/default/files/Involvement.pdf

Private Sector is defined as part of national economy made up of private enterprises including the personal sector and corporate companies and is responsible for allocating most of the resources within an economy (http://www.businessdictionary. com/definition/private-sector.html#ixzz31FrN5HQO). It is therefore distinct from Public Sector, defined as part of the economy concerned with providing basic governmentservices (http://www. investorwords.com /3947/ public\_ sector.htm l#ixzz31FxKL1ud).

## DPA CP

#### The plan amends the statute to supersede presidential authority.

Michael H. Cecire and Heidi M. Peters 20. Michael H. Cecire, Analyst in Intergovernmental Relations and Economic Development Policy. Heidi M. Peters, Analyst in U.S. Defense Acquisition Policy. “The Defense Production Act of 1950: History, Authorities, and Considerations for Congress” Updated March 2, 2020. https://www.everycrsreport.com/reports/R43767.html

Congress may consider enhancing its oversight of executive branch activities related to the DPA in a number of ways. To enhance oversight, Congress could expand executive branch reporting requirements, track and enforce rulemaking requirements, review the activities of the Defense Production Act Committee, and broaden the committee oversight jurisdiction of the DPA in Congress. Congress may also consider amending the DPA, either by creating new authorities or repealing existing ones. In addition, Congress may consider amending the definitions of the DPA to expand or restrict the DPA’s scope, amending the statute to supersede the President’s delegation of DPA authorities made in E.O. 13603, or consider adjusting future appropriations to the DPA Fund in order to manage the scope of Title III projects initiated by the President.

#### That’s implicitly repeals the DPA.

Jesse W. Markham Jr. 09. Marshall P. Madison Professor of Law, University of San Francisco School of Law. “The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Conception of Plain.” Repugnancy, 45 GONZ. L. REV. 437 (2009).

In Credit Suisse, the Court lurched past the traditional narrow confines of the doctrine and recast it in terms that will most likely give rise to more frequent displacements of legislative enactments.14 Credit Suisse acknowledges no departure from precedent.' 5 However, the Court has, in fact, greatly expanded the implied repeal doctrine. As it is currently employed by the Court, the new doctrine bears little resemblance to precedent, obscures a previously simple rule, and exhibits a profound disregard for the sound policy underpinnings of this particular canon of legislative interpretation. By expanding, and even rewording, the "plain repugnancy" standard and introducing a vague factor-based approach, the Court invites the judiciary to find legislative inconsistencies in new and creative ways, placing the courts in an enlarged role of refashioning legislative enactments to resolve these "inconsistencies."' 6 Moreover, the Court has dismantled the traditional implied repeal rule without explaining why it believes the traditional doctrine should be abandoned. Indeed, one of the Court's vaguely expressed rationales for displacing antitrust rules in Credit Suisse-an assertion that antitrust courts are particularly error-prone-is offered without empirical or theoretical support.'7 Viewed more broadly beyond the antitrust law context in Credit Suisse, the restated implied repeal doctrine lacks an analytical justification for its departure from precedent.

The Court's reformulation of the implied repeal doctrine is bad law, bad policy, and should be undone. In Credit Suisse, the Court divested private plaintiffs of antitrust remedies for conduct that securities regulators had already concluded were both anticompetitive and subversive of public confidence in capital markets. 8 Unequivocally, the antitrust case challenged conduct that was illegal under securities regulatory law.19 Although securities regulation and antitrust rules prohibited the conduct in question for overlapping reasons, the revised implied repeal doctrine employed by the Court allowed it to find these congruent laws to be "plainly inconsistent" with one another.20 Taking direction from the Supreme Court's new implied repeal doctrine, courts are encouraged-or at least no longer discouraged--to find inconsistencies between laws they do not like and laws they prefer and, then, narrow or repeal the disfavored statutes accordingly. Indeed, Justice Stevens's concurrence suggests that this is essentially what the Court did in Credit Suisse when it disparaged the private antitrust enforcement process as error prone and found it 21 displaced by securities regulation the Court applied with undisguised reverence.

#### 2---Signal---companies are watching the DPA’s immunity---the plan says it won’t apply in the next pandemic.

Kathleen Murphy 9/20/21. Senior Reporter, FTC Watch. "As pandemic persists, companies can still collaborate, new memo says". No Publication. 9-20-2021. https://www.mlexwatch.com/articles/13511/print?section=ftcwatch

For companies authorized to work together in response to the Covid-19 pandemic under the Defense Production Act, immunity from antitrust prosecution is a perk.

In combating a virus that has killed more than 660,380 US citizens, the government-sponsored voluntary agreements allow companies to collaborate in ways that otherwise would expose them to antitrust liability.

The Federal Trade Commission said the country’s defense against the coronavirus couldn’t be achieved with less anticompetitive effects in a recent memo to the Department of Justice, while recognizing defense plans could allow anticompetitive concerted action. In other words, the 1950 DPA law that lets the president direct “materials, services and facilities” can be leveraged in the vaccination and test kit supply chain.

Competitors who might usually be at each other’s throats can find a way to share information, facilities, or intellectual property they may not normally share. The DPA enables the president to award contracts that supersede any other contract to “promote the national defense.”

But the pandemic has unveiled questions about how closely competitors should work together when they’re united for the common good, with the DPA empowering the government to prioritize company production to further national security goals, said Kathryn Mims, an antitrust partner at White & Case LLP.

Section 708 of the DPA offers antitrust immunity. “It's certainly not a carte blanche to do any kind of collaboration that you want. You have to stay within the borders of the authorized, voluntary agreement,” Mims said.

The law establishes a limited antitrust exemption, which allows companies to get to the front of the line on orders for ingredients and supplies. In March 2021, the Biden administration brokered a deal between pharmaceutical rivals Merck & Co. and Johnson & Johnson to increase the vaccine supply.

President Joe Biden also invoked the DPA to equip Merck facilities for manufacturing the J&J vaccine. Test kit manufacturers are next. On Sept. 9, Biden said he’ll “use the Defense Production Act to increase production of rapid tests, including those that you can use at home.”

FTC signed off

US defense against the Covid-19 pandemic, including making test kits and vaccines, meant the DOJ had to consult with the FTC on whether the defense purposes of the plans could be achieved through less anticompetitive effects. The Federal Emergency Management Agency initiated the inquiry to DOJ under the law, requiring the FTC to make the determination regarding preparedness.

Companies ineligible for the DPA’s Section 708 antitrust immunity may still gain protection from antitrust prosecution through an expedited business review letter from DOJ or the FTC. The DOJ’s antitrust division committed to responding to these pandemic-related letter requests in seven days.

The caveat is that specific requirements of the DPA must be met, and the letter doesn’t provide statutory antitrust immunity, just negates any criminal intent to commit an antitrust violation. The DOJ has never prosecuted a case after approving a business review letter, offering a sort of de facto antitrust immunity.

‘Anticompetitive concerted action’

At the FTC, implementation of the DPA has entailed verifying it’s a real emergency. Then-acting Chair Rebecca Kelly Slaughter told DOJ in May 2021 that while the plans are “still potentially allowing anticompetitive concerted action, the plans of action limit that behavior to circumstances with legitimate exigencies.”

Slaughter’s memo to Richard Powers, acting assistant attorney general for antitrust, released via a Freedom of Information Act request, helps clear the way for companies to team up to resolve the pandemic.

Meanwhile, the law’s implementation has potential long-term effects on companies’ relationships with customers and suppliers, and the law can have wide-ranging applications.

Is it something that manufacturers worry about?

Anne Pritchett of the Pharmaceutical Research and Manufacturers of America said there is concern over how broadly or narrowly the various authorities under the DPA could be extended, including for future pandemic preparedness.

#### Ambiguity means they’ll carefully watch DPA antitrust enforcement---key to solve COVID.

Jeffrey S. Jacobovitz and Micah Kanters 20. Jeffrey S. Jacobovitz, Partner @ Arnall Golden Gregory. Micah Kanters, Associate. "The Impact of Antitrust Enforcement in a COVID-19 Environment". Arnall Golden Gregory LLP. 3-24-2020. https://www.agg.com/news-insights/publications/the-impact-of-antitrust-enforcement-in-a-covid-19-environment/

Further, there remains significant potential for increased use of the Defense Production Act (“DPA”), which provides the President authority to approve “associations of private interests” in support of national defense and exempt those associations from antitrust liability. While use of that authority has been somewhat limited, recent actions indicate it may be increasingly relied upon to address shortages of COVID-19 related supplies. For example, on April 2, 2020, President Trump invoked the DPA directing 3M and six major medical device companies to produce PPE and ventilators. The federal government is likely to continue utilizing this authority in the coming months, particularly as the CARES Act amended the DPA to remove certain funding limitations.

While the COVID-19 pandemic has thrust both businesses and governments into uncharted territory, the long standing antitrust statutes in the United States remain unchanged. Businesses must remain vigilant in ensuring they avoid crossing the line from appropriate cooperation into anticompetitive behaviors that may ultimately result in civil or criminal penalties. To that end, prospective joint ventures and collaborative activities should be submitted to the Department of Justice and Federal Trade Commission whenever possible. While there are indications of somewhat relaxed restrictions, the ambiguity of that shift necessitates continued careful attention to antitrust statutes and enforcement.

#### It’s most predictable---we have the common and precise definition.

Dictionary.com “Inhibit vs. Prohibit”. https://www.dictionary.com/e/inhibit-vs-prohibit/

Prohibit is a transitive verb that means to forbid or prevent. Unlike inhibit, the word prohibit means that an action is being completely prevented. For example: “Angie’s coat was so tight, it prohibited any arm movement.” In this case, Angie isn’t able to move her arms at all. Prohibit is often used to describe the actions of authority figures. It can explain a rule or law. For example, “School rules prohibit cellphone use during class.” A street sign may say “Parking prohibited,” while a sign in a building lobby might say “Smoking prohibited by law.” All of these cases mean that cell phone use, parking in a certain area, or smoking are completely forbidden by their given authority figures, and can’t be done at all.

#### Prohibitions are absolute bans without exemption.

PEDIAA 15. “Difference Between Prohibited and Restricted”. https://pediaa.com/difference-between-prohibited-and-restricted/

Main Difference – Prohibited vs. Restricted

Prohibited and Restricted are used in reference to limitations and prevention. However, they cannot be used interchangeably as there is a distinct difference between them. Prohibited is used when we are talking about an impossibility. Restricted is used when we are talking about something that has specific conditions. The main difference between prohibited and restricted is that prohibited means something is formally forbidden by law or authority whereas restricted means something is put under control or limits.

What Does Prohibited Mean

Prohibited is a variant of the verb prohibit. Prohibited can be taken as the past tense and past participle of prohibiting as well as an adjective. Prohibited means that something is formally forbidden by law or authority. When we say ‘smoking is prohibited’, it means that smoking is not allowed at all, there are no exceptions. Prohibit indicates an impossibility. This gives out the idea that it is not at all possible under any condition or circumstance. The term Prohibited goods is used to refer to items that are not allowed to enter or exit certain countries. For example, the government of South America lists Narcotic and habit-forming drugs in any form, Poison and other toxic substances, Fully automatic, military and unnumbered weapons, explosives and fireworks as prohibited goods. The following sentences will further explain the use of prohibited.

Inter-racial marriages were not prohibited by the government.

He was proved guilty of using prohibited substances.

No one was allowed to enter the grounds; entry was prohibited.

Prohibited imports are the items that are not allowed to enter a country.Difference Between Prohibited and Restricted

What Does Restricted Mean

Restrict means to put under limits or control. Restricted can be either used as the past tense of restrict or as an adjective meaning limited. When we say something is restricted, it means that limits or conditions have been added to it. It does not mean that it is completely impossible. For example, Restricted goods are allowed to enter or exit a country under certain circumstances. A written permission can help you to import or export that item. Likewise, a restricted area does not mean that people are not allowed to enter; it means that a special permission is required to enter the place. Restricted information refers to information that are not disclosed to the general public for security purposes.

The new regulations restricted the free movement of people.

The club was restricted to its members and their family members.

Only the highest military personnel had access to the restricted area.

American scientists had only restricted access to the area.Main difference - Prohibited vs Restricted

Difference Between Prohibited and Restricted

Meaning

Prohibited means banned or forbidden.

Restricted means limited in extent, number, scope, or action

Possibility

Prohibited means that there is no possibility of doing something.

Restricted means that something can be done under certain conditions.

Adjective

Prohibited functions as an adjective derived from prohibit.

Restricted functions as an adjective derived from restrict.

Past tense

Prohibited is the past tense and past participle of prohibit.

Restricted is the past tense and past participle of restrict.

#### That means the counterplan is plan minus.

Antitrust Modernization Commission 07 Deborah A. Garza, Chair. Jonathan R. Yarowsky, Vice-Chair. Bobby R. Burchfield. W. Stephen Cannon. Dennis W. Carlton. Makan Delrahim. Jonathan M. Jacobson. Donald G. Kempf, Jr. Sanford M. Litvack. John H. Shenefield. Debra A. Valentine. John L. Warden. “Report and Recommendations”. https://govinfo.library.unt.edu/amc/report\_recommendation/amc\_final\_report.pdf

Other exemptions apply to narrow areas but provide a broader immunity—often complete immunity from the antitrust laws. Examples include antitrust immunity for marketing alliances between domestic and foreign airlines that are approved by the Department of Transportation;79 the Charitable Donation Antitrust Immunity Act, which gives antitrust immunity to charitable institutions that set the annuity rate for gift annuities or charitable remainder trust agreements;80 the Defense Production Act, which provides antitrust immunity for conduct undertaken in developing or carrying out a voluntary agreement or plan of action for the President that is necessary for the defense of the United States;81 the NeedBased Educational Aid Act, which provides an antitrust exemption to certain joint actions taken by institutions of higher education regarding awards of financial aid to students;82 and the Soft Drink Interbrand Competition Act, which provides an antitrust exemption for the grant of exclusive territories to soft-drink bottlers by soft-drink trademark holders in trademark licensing agreements.83

#### 3. The exemption ends outside of and after emergency

FEMA 21. Posted by the Federal Emergency Management Agency on May 28, 2021. “Pandemic Response Voluntary Agreement Under Section 708 of the Defense Production Act; Plans of Action To Respond to COVID-19”. https://www.regulations.gov/document/FEMA-2020-0016-0053

IV. Antitrust Defense

Under the provisions of DPA subsection 708(j), each Sub-Committee Participant in this Plan shall have available as a defense to any civil or criminal action brought for violation of the antitrust laws (or any similar law of any State) with respect to any action to develop or carry out this Plan, that such action was taken by the Sub-Committee Participant in the course of developing or carrying out this Plan, that the Sub-Committee Participant complied with the provisions of DPA section 708 and the rules promulgated thereunder, and that the Sub-Committee Participant acted in accordance with the terms of the Voluntary Agreement and this Plan. Except in the case of actions taken to develop this Plan, this defense shall be available only to the extent the Sub-Committee Participant asserting the defense demonstrates that the action was specified in, or was within the scope of, this Plan and within the scope of the appropriate Sub-Committee(s), including being taken at the direction and under the active supervision of FEMA.

This defense shall not apply to any actions taken after the termination of this Plan. Immediately upon modification of this Plan, no defense to antitrust claims under Section 708 shall be available to any subsequent action that is beyond the scope of the modified Plan. The Sub-Committee Participant asserting the defense bears the burden of proof to establish the elements of the defense. The defense shall not be available if the person against whom the defense is asserted shows that the action was taken for the purpose of violating the antitrust laws.

#### 4. AND the agencies can police activities within it.

FEMA 21. Posted by the Federal Emergency Management Agency on May 28, 2021. “Pandemic Response Voluntary Agreement Under Section 708 of the Defense Production Act; Plans of Action To Respond to COVID-19”. https://www.regulations.gov/document/FEMA-2020-0016-0053

Each Sub-Committee Chairperson is responsible for ensuring that the Attorney General, or suitable delegate(s) from the DOJ, and the FTC Chair, or suitable delegate(s) from the FTC, have awareness of activities under this Plan, including activation, deactivation, and scheduling of meetings. The Attorney General, the FTC Chair, or their delegates may attend Sub-Committee meetings and request to be apprised of any activities taken in accordance with activities under this Plan. DOJ or FTC Representatives may request and review any proposed action by the Sub-Committee or Sub-Committee Participants undertaken pursuant to this Plan, including the provision of data. If any DOJ or FTC Representative believes any actions proposed or taken are not consistent with relevant antitrust protections provided by the DPA, he or she shall provide warning and guidance to the Sub-Committee as soon as the potential issue is identified. If questions arise about the antitrust protections applicable to any particular action, FEMA may request DOJ, in consultation with the FTC, provide an opinion on the legality of the action under relevant DPA antitrust protections.

## Developing Econ Adv

#### 2. Detection increasing now globally.

Francois Vanherck et. al. 10-28. Alongside other members of Wilson Sonsini Goodrich & Rosati. Associate in the Brussels office of Wilson Sonsini Goodrich & Rosati, where he is a member of the antitrust and competition practice. European Commission Initiates a Series of Antitrust Inspections and Signals Interest in No-Poach Agreements. JD Supra. 10-28-2021. https://www.jdsupra.com/legalnews/european-commission-initiates-a-series-1673359/

On October 12, 2021, the European Commission (EC) announced that it had carried out surprise inspections of companies active in the wood pulp sector due to cartel behavior suspicions. The following week, on October 22, 2021, Margrethe Vestager, head of the European antitrust enforcer, publicly declared that it was "just the start of a series of raids that we're planning for the months to come."1 The EC delivered on its promise just three days later, with the dawn raid of animal health company Zoetis in Belgium over abuse of dominance (i.e., monopolization) charges.

The EC actually started the series in June 2021 with the surprise inspection of a German clothing company following suspicions of cartel behavior, the first in two years and since the COVID-19 outbreak. On this occasion, the EC also reversed its long-standing policy of only confirming inspections once made public, as it issued a press release regarding the inspection before the news had become publicly available. Other national competition authorities in France, Greece, Hungary, Norway, Poland, Portugal, Romania, and Slovenia also announced similar inspections in summer 2021 in a variety of sectors.

Unannounced inspections at company premises (or dawn raids) have long been a critical tool used to detect and prosecute cartels and other types of antitrust infringements. They allow the EC and national competition authorities to search company premises, seize key evidence, and interview relevant employees. However, dawn raids became less frequent following several "mega-cartels" between 2013 and 2017 in the financial, auto-parts, and trucks sectors that led to high fines and substantial follow-on damages litigation. The adoption of the Damages Directive in 2014, which facilitates damages claims of victims of antitrust breaches, also led to a reduction of leniency applications and cartel investigations. In the same October 22, 2021 statement, Commissioner Vestager also explained that "with the number of leniency applications going down, we are investing more effort in building up these other ways of detecting cartels." New detection tools include, for example, the launch of an anonymous antitrust whistleblower tool in 2017 and the creation of intelligence and forensic intelligence units, which, according to Commissioner Vestager, seem to be bearing fruit. On this basis, anti-cartel enforcement in Europe is expected to increase substantially over the coming months.

#### Their ev agrees

1AC Tonhnor 18, \*Author at Proutist Universal; (March 27th, 2018, “A Ticking Time Bomb: Proxy Wars and the Tragedy of the Kurds”, <https://prout.info/blog/2018/03/27/a-ticking-time-bomb-proxy-wars-and-the-tragedy-of-the-kurds/>)

While we can hope that the conflict is localized to the Middle East, there is no guarantee that it will not escalate to a worldwide conflict. But even in a best case scenario, the suffering in the region is far from over and millions more will die or be made refugees before it will get any better. The Middle East, with its vast resources of oil and strategic location between Europe, Asia and Africa, has become the main theater of conflict of our time. There is simply no short term or easy solution to these intertwined conflicts, and a final resolution would require a revolutionary change in the entire region, which would probably include a major change in the role and position of Islam as well. So where will all this end? The short account outlined above is a simplification of the enormous complexities of the Middle East conflicts, leaving out many essential parts, such as the Israeli Palestinian conflict; the war in Yemen; the increased dominance of Iran; the conflict between Saudi Arabia and Qatar, to mention just a few. We have also not covered the motivations behind the involvement of Russia and the United States. Even a brief overview of the situation would require a full length book.

#### 4. No correlation with the aff

1AC Khameni 7, \*R. Shyam, Advisor, Competition Policy, in the Financial and Private Sector Development Vice-Presidency of the World Bank Group, Washington D.C., 2007, (“Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries,” (<https://documents1.worldbank.org/curated/en/397801468174885108/pdf/413340FIAS1Competition1Policy01PUBLIC1.pdf>)

The merits and benefits of fostering open and competitive markets have been recognized in many countries that have adopted various macro- and microeconomic reforms. However, there is wide variation in the economic growth and development of nations. Casual observations indicate that there is also a wide variation in the nature and extent of competition prevailing within and across countries. Moreover, notwithstanding the merits and benefits of competition, there is no consensus or widespread support for promoting competition within and across countries—especially developing nations. This stems in part from the lack of understanding or appreciation of what effective competition can tangibly contribute to the betterment of the lives of ordinary citizens, and in part from ideological differences and the influence wielded by vested interest groups in both government and the economy at large. Although the differences in the economic growth and development of nations cannot purport to be explained by the differences in the prevailing degrees of competition, this paper argues that it is one of the important, if not critical explanatory factors. It is well established that least-developed economies are encumbered by limitations of human and physical capital, governance and institutional structures, and other resource constraints. But they are also prevented from achieving their potential by various types of public policy-based and private sector anticompetitive business practices. The primary message of this paper is that these countries need to take concrete, consistent, and coherent measures to integrate and promote effective competition policy as part of their overall government economic and regulatory framework. An effective competition policy should be viewed as the “fourth cornerstone” of this framework— along with sound monetary, fiscal, and commercial (international trade) policies.

## Resource Cartels Adv

#### 2. BUT Tensions over mineral resources inevitable

1AC Kooroshy et al. 14, \*Jaakko Kooroshy was a Research Fellow in the Energy, Environment and Resources Department; \*Felix Preston is a Senior Research Fellow in the Energy, Environment and Resources Department; \*Siân Bradley is a Research Associate in the Energy, Environment and Resources Department; (December 2014, “Cartels and Competition in Minerals Markets: Challenges for Global Governance”, https://www.chathamhouse.org/sites/default/files/field/field\_document/20141219CartelsCompetitionMineralsMarketsKooroshyPrestonBradleyFinal.pdf)

International commerce is becoming a front line for such tensions over resources – at a time when the global economy is more dependent than ever on global markets and integrated supply chains. New actors, such as sovereign wealth funds and state-owned enterprises, and tightening links between physical and complex financial markets, further complicate the picture.

#### 3. AND instability of CRMs

1AC Umbach 20, \*Frank Umbach, \*S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES SINGAPORE; (April 27th, 2020, “The new "rare metal age" : new challenges and implications of critical raw materials supply security in the 21st century”, <https://dr.ntu.edu.sg/bitstream/10356/143617/2/WP329_V2.pdf>)

The criticality of CRMs can change rapidly in accordance with shifts in the technological, geopolitical and economic environments as these can lead to rapid changes in the demand–supply balance of individual raw materials. Environmental risks, social factors (e.g., the NIMBY phenomenon involving public opposition and social licence for mining) and political factors can further constrain the global and regional supply security of CRMs. Western insistence on regulated “ethical and sustainable mining”42 (as embodied in the United Nations’ “Principles of Responsible Investment”), as well as on the prevention of child labour, human rights abuses and illegal artisanal, small-scale mining, has often been hampered by non-democratic conditions in many producing countries as Chinese and Western 42 For the use of a blockchain-based platform to trace cobalt supplies from the DRC with a view to avoiding human rights abuses, see Henry Sanderson, “Ford to use blockchain in pilot to trace cobalt mined in Congo”, Financial Times, 16 January 2019. 9 companies seek to get the cheapest prices possible. At the same time, Western efforts such as enhanced environmental regulations have also hindered a diversified global supply.

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## Private Enforcement PIC

#### 2.Timeframe---COVID creates an economic brink

Christopher Rugaber 21. Associated Press. “Federal Reserve keeps key interest rate near zero, signals COVID-19 economic risks receding.” https://www.chicagotribune.com/business/ct-biz-fed-interest-rates-economy-20210428-bumyc3ynpza6ri4ygsntmdsmya-story.html.

WASHINGTON — The Federal Reserve is keeping its ultra-low interest rate policies in place, a sign that it wants to see more evidence of a strengthening economic recovery before it would consider easing its support. In a statement Wednesday, the Fed expressed a brighter outlook, saying the economy has improved along with the job market. And while the policymakers noted that inflation has risen, they ascribed the increase to temporary factors. The Fed also signaled its belief that the pandemic’s threat to the economy has diminished, a significant point given Chair Jerome Powell’s long-stated view that the recovery depends on the virus being brought under control. Last month, the Fed had cautioned that the virus posed “considerable risks to the economic outlook.” On Wednesday, it said only that “risks to the economic outlook remain” because of the pandemic. The central bank left its benchmark short-term rate near zero, where it’s been since the pandemic erupted nearly a year ago, to help keep loan rates down to encourage borrowing and spending. It also said in a statement after its latest policy meeting that it would keep buying $120 billion in bonds each month to try to keep longer-term borrowing rates low. The U.S. economy has been posting unexpectedly strong gains in recent weeks, with barometers of hiring, spending and manufacturing all surging. Most economists say they detect the early stages of what could be a robust and sustained recovery, with coronavirus case counts declining, vaccinations rising and Americans spending their stimulus-boosted savings.

#### 2. Results in private action displacement

R. Preston McAfee et al ‘8. The J. Stanley Johnson Professor of Business, Economics and Management at the California Institute of Technology, with Hugo M. Mialon, Sue H. Mialon. “Private v. public antitrust enforcement: A strategic analysis.” Journal of Public Economics 92 (2008) 1863–1875. Elsevier.

We find that the combination of private and public enforcement tends to lead to a greater probability of private than public action, as is observed empirically. In most cases, firms have sufficient incentive to sue if they learn that their rivals have actually violated the antitrust laws. Knowing this, the government has little reason to sue, since it can expect that most of the rightful suits are already being initiated privately. Thus, public enforcement tends to give way to private enforcement when the two are in play. This is consistent with the observation that private antitrust suits have outnumbered public suits in the U.S. by a 9-to-1 ratio from 1970 to 1995.6

#### 3. Wrecks enforcement by public agencies

Daniel A. Crane et al., 15. Associate dean for faculty and research at the University of Michigan Law School, with Keith Klovers, and Adam Speegle. "Private antitrust enforcement: Comparative and policy considerations." In Comparative Competition Law. Edward Elgar Publishing, 2015. https://www.elgaronline.com/view/edcoll/9781849804196/9781849804196.00021.xml

Proponents of private enforcement often argue that putting more ‘boots on the ground’ strengthens antitrust enforcement. We have already shared some skepticism that private antitrust enforcement increases deterrence. Beyond merely failing to achieve its deterrence objectives, private antitrust enforcement can trigger a judicial backlash against antitrust enforcement altogether, as the US experience shows. This backlash can spill over to public enforcement and impair antitrust enforcement by the public agencies. At the same time, however, expanding the private right of action can expand the constituency in favor of antitrust law and hence bolster the overall antitrust enterprise.

#### 4. OR results in duplicative enforcement, which also links to our offense

Kai Hüschelrath 13. Head of the Research Group "Competition and Regulation" at the Centre for European Economic Research, with Sebastian Peyer. “Public and Private Enforcement of Competition Law – A Differentiated Approach.” https://madoc.bib.uni-mannheim.de/33780/1/dp13029.pdf

Turning from the objectives to the central benefits of the private enforcement system it is usually argued that private enforcers have greater incentives, better information and sufficient resources to take on violations compared to public enforcers. This might lead to additional benefits for society through additional deterrence (McAfee et al. 2008). The downside of the private enforcement system is that it can create extra cost, especially when private actions follow public investigation of anticompetitive conduct and, thus, duplicate enforcement efforts. In addition to the general costs incurred by an additional private system, private enforcers also have greater incentives to use antitrust rules strategically and might therefore cause harm to society (see generally McAfee and Vakkur 2004). As a consequence, the cost of innocent firms to prove their innocence may rise. This needs to be traded off against the additional deterrence effects.

#### 2. Severs “prohibitions on anticompetitive business practices”

Reza Rajabiun 12. Visiting Scholar, Ted Rogers School of Information Technology Management, Ryerson University, Toronto, Canada. “PRIVATE ENFORCEMENT AND JUDICIAL DISCRETION IN THE EVOLUTION OF ANTITRUST IN THE UNITED STATES.” Journal of Competition Law & Economics, 8(1), 187–230. https://www.ftc.gov/system/files/documents/public\_comments/2018/08/ftc-2018-0048-d-0049-155185.pdf

Private rights of action complement the capacity of public administrative and prosecutorial agencies in the implementation of statutory or common laws in a wide range of areas, including the protection of human rights, conformity to health and environmental standards, regulation of corporate securities, and prohibitions against anticompetitive practices.1 Victims of harmful acts often have better information about the particular violation than centralized government agencies and prosecutorial authorities do.2 If the expected damages and probability of success in courts are high enough, in some cases, private litigants may also have stronger incentives than public agencies and prosecutorial authorities to identify and deter prohibited be­havior.3 On the other hand, modern administrative agencies are likely to have advantages in terms of scale and scope economies in investigation, prosecution, and punishment relative to decentralized private litigation regimes prone to duplication and delay.4 They also can act in a preemptive manner, for example, by setting industry standards, monitoring compliance through inspections, or blocking potentially undesirable private transac­tions.5 Given these basic differences, the allocation of authority to public regulators and private litigants represents a core problem facing lawmakers responsible for designing substantive and procedural features of legal systems.6

#### 3. Severs how most enforcement would occur

Alden Abbott 21. Senior Research Fellow, Mercatus Center, 3/24/21. “US Antitrust Laws: A Primer.” https://www.mercatus.org/publications/antitrust-policy/us-antitrust-laws-primer

Private Parties

Private parties can also bring suits to enforce antitrust laws. In fact, most antitrust suits are brought by businesses and individuals seeking treble damages for violations of the Sherman or Clayton Acts. Private parties can also seek court orders preventing anticompetitive conduct (injunctive relief) or bring suits under state antitrust laws. Individuals and businesses cannot sue under the Federal Trade Commission Act.

#### 4. Expansion of the antitrust laws necessarily allows for private suits---CP is germane because it’s a distinct model

Kenneth Ewing ‘7. JD, Steptoe & Johnson LLP. “Private anti-trust remedies under

US law.” <https://www.steptoe.com/images/content/1/7/v1/1731/2804.pdf>

One of the most important features of anti-trust enforcement in the US is the large and complicated role played by private remedies. Unlike most jurisdictions around the world, in which only governmental enforcement must be considered, the US grants private parties (and all state governments, acting on behalf of their citizens) a wholly independent right to seek:

Monetary damages.

Court injunctions to order potentially far-reaching changes in anti-trust defendants’ conduct.

In addition, special rules, such as the automatic trebling of damages, award of attorneys’ fees and costs, and aggregation of hundreds to thousands or more claims within a single action on behalf of a class of similarly placed claimants, dramatically increase both the attractiveness of bringing private claims and the stakes for defendants.

#### 5. Enforcement is a central question in the antitrust debate

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

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

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

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

Which body decides guilt or innocence?

What sanctions are imposed for wrongdoers?

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

#### 6. Expanding the scope of core antitrust laws necessarily increases private enforcement

Michael Edmund O'Neill ‘9. Associate Professor, George Mason University School of Law. "Private Vengeance and the Public Good." U. Pa. J. Const. L. 12 (2009): 659. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1128&context=jcl

A long-standing feature of American antitrust law is to use private parties to enforce the nation’s laws prohibiting anti-competitive mer- gers and acquisitions." Indeed, “[t] he reach of the US. antitrust laws, both in terms of subject matter and territorial application, is as broad for private lawsuits as for criminal enforcement actions by the federal antitrust authorities.”312 It is signiﬁcant, then, that the reach of private lawsuits would be co-extensive with the reach of the crimi-nal law in antitrust enforcement. Presumably, the parties seeking en-forcement have an interest in doing so as an interested party. In fact,the Sherman Antitrust Act of 1890 allowed injured parties to seek en- forcement of the nation’s antitrust laws by permitting them treble damages.313 The concept of using the injured party as a means of en-forcing the law, then, has considerable purchase in federal law.

Similarly, the Clayton Act authorizes a private right of action to al-low injured parties to recover the monetary value of the injury in-curred.3H The Act further authorizes private litigants to obtain in-junctive relief.“ To this end, the court may even restructure the market to eliminate the competitive harm created by the unlawful conduct and to ensure that the sued parties cannot continue to pur-sue unlawful enterprises.316 Moreover, Congress also expressly al-lowed private litigants to obtain treble damages as a means of creat-ing an incentive for private antitrust enforcement activity.317 Congress, understanding that federal enforcement authorities alone lacked sufficient resources, attempted to leverage private litigation as a way of improving antitrust compliance with the law.

Interestingly, the ability to bring private litigation spans the full range of conduct deemed unlawful under the antitrust laws— including not simply price fixing cartels, but also output restrictions, territorial allocations, resale price maintenance, other vertical re- straints, and inappropriate mergers, for example. Private parties can even challenge conduct that the government declines to pursue. In fact, private parties can challenge a merger already approved by the relevant federal authorities and actually consummated.” The Act encourages the leveraging of private resources to enforce the law and illustrates just how close the federal government is to using private prosecutions of the criminal law to enforce federal standards.

#### 1. EU proves---litigation culture is significantly less favorable to private suits and they’ve managed with public enforcement alone---single damages are sufficient deterrence, that’s McCarthy and…

Alexander Italianer 13. Director-General for Competition, European Commission, 10/9/13.

“Fighting cartels in Europe and the US: different systems, common goals.” <https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf>

Since the first cartel decision of 1969, the Commission has imposed a total of over €19 billion in fines to 820 companies. A question we often get from members of the public is: why are your fines so large? To this I always respond: what is large? Beauty is in the eye of the beholder. Are the fines still large when compared to, for instance, the annual turnover of the company in question? Under the 2006 fining guidelines, around twelve per cent of companies received the maximum fine of ten per cent of turnover. But fifty per cent of the fines amounted to less than one per cent of turnover.

Are the sums still large when we look at private enforcement? In the US, courts can award treble damages to victims in antitrust cases. Such damages are generally seen in the US as a form of deterrence. If damages are awarded in Europe, courts generally award single damages, in other words, compensation for harm suffered.

Our proposal for a directive on private enforcement of antitrust damages is based on the principle of full compensation, which has been recognised in the case-law of the Court of Justice. Damages actions before civil courts are, in our view, are about compensation. Deterrence is achieved through public enforcement proceedings, in which fines can be imposed.

#### 2. Single damages are optimal deterrence because agencies can sue to stop bad stuff, without creating huge liability---the only function of private suits is to compensate

Žygimantas Juška 18. PhD candidate, Leiden Law School, Leiden University, Leiden.

“The Effectiveness of Antitrust Collective Litigation in the European Union: A Study of the Principle of Full Compensation,” IIC - International Review of Intellectual Property and Competition Law volume 49, pp. 63–93.

The deterrent function is pursued through the imposition of competition fines, which punish the infringer (in other words, specific deterrence). It also deters other persons from engaging in or continuing behaviour contrary to competition rules (in other words, general deterrence).Footnote9 According to the EU, public enforcement is considered to have sufficient means for achieving deterrence.Footnote10 In this respect, it must be borne in mind that EU competition law focuses exclusively on imposing fines on infringing businesses, but Member States are given space to introduce other types of penalties.Footnote11 In order to combat cartels, a majority of EU Member States have incorporated criminal sanctions on individuals (such as imprisonment or criminal fines) in their antitrust enforcement schemes.Footnote12 However, these sanctions have very rarely been imposed in practice.Footnote13 Therefore, public authorities in the EU jurisdictions have failed in setting an example for criminal penalties being effectively utilized in public enforcement.

Achieve Corrective Justice When the Infringement Has Taken Place

This goal can be pursued if two conditions are met.Footnote14 First, corrective justice is achieved if the monetary remedy deprives the wrongdoer of any benefit gained from illegal conduct. This measure may be used when public enforcers impose a sub-optimal fine. As such, the enforcement may be reinforced by imposing additional fines on the wrongdoer in order to fully remedy the anti-competitive situation. Second, corrective justice is achieved when victims are compensated for the harm suffered. According to the Directive on damages actions, the objective of compensation is fulfilled when victims effectively exercise the right to claim and to obtain full compensation for the harm suffered. However, this objective should not lead to overcompensation of the claimants, whether by means of punitive, multiple or other kinds of damages.Footnote15 For this reason, the enforcement of the first condition may not comply with the principle of full compensation, as additional fines (besides damages on fully compensating victims) may be required to ensure corrective justice. As a consequence, only the second condition will be further discussed in this paper.

#### 3. Private parties can still report violations to enforcement agencies, which subsumes any benefits of private antitrust

Tim Reuter 16. Associate Principal with more than 10 years of experience in competition economics at RBB Economics, PhD in competition economics. “Private antitrust enforcement and the role of harmed parties in public enforcement.” Eur J Law Econ (2016) 41:479–507. https://link.springer.com/content/pdf/10.1007/s10657-015-9495-y.pdf

\*\*AA = Antitrust Authority

We investigate in this paper the consequences of introducing private trials on enforcement efficacy, taking into account the fact that private parties have the possibility to report breaches of competition law to the AA. The objective of our paper is to investigate (1) whether the effects of introducing private trials on the number of enforcements errors continues to hold as predicted when also considering the effect on public enforcement and (2) whether the private trial possibility remains a socially desirable instrument under this consideration. As we will discuss in Sect. 1.3, there is considerable evidence that private parties play an important role also in public enforcement. Failing to acknowledge this role and ignoring the interplay between the possibility to privately sue for damages and the incentives to supply information to public authorities introduces a systematic bias in the evaluation of private antitrust enforcement. We address the hence highly topical matter of the enforcement effects of private trials in the light of private incentives to present evidence to the AA to induce public investigations.

Our study establishes that allowing private trials, in contrast to previous results, does not necessarily decrease the probability that guilty firms will go undetected. The mechanism to arrive at this result is as follows. If an injured firm has the possibility to sue, it might no longer be willing to cooperate with the AA, since by bringing suit it can achieve equivalent payoffs that would result from a public prosecution. Thus, going to trial and reporting evidence to the AA are substitutable strategies. However, under the assumption that the court will be more likely than the AA to commit an error, reporting would be superior from a social point of view, because the strength of the private party (initial evidence) is combined with the investigative powers of the authority (as Harrington 2006 argues). Consequently, reporting has a higher social value than suing, but this value might not be fully internalized by the firm due to the private expenses of reporting.

#### 5. Private enforcement is arbitrary

Herbert J. Hovenkamp 11. Ben V. & Dorothy Willie Professor of Law, University of Iowa. "A Primer on Antitrust Damages." (2011). Faculty Scholarship at Penn Law. 1846. https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2848&context=faculty\_scholarship

The wisdom of a contribution rule in antitrust has been controversial, with a fair amount of literature on both sides of the question.55 The current rule of no contribution injects some arbitrariness into private enforcement of the antitrust laws. Theoretically, at the plaintiff's whim one defendant can be held liable for far more than treble the damages that it caused. Another, equally at fault, goes away free. This has prompted arguments that a no contribution rule is overdeterrent, because under it a single firm may be liable for very large damages. The answer, of course, is an argument that a no contribution rule is really underdeterrent, because some firms known to be guilty will not pay anything.

#### 1. Margins---the system is already overdeterrent---adding another layer only has downsides

Jon Nuechterlein and Timothy J. Muris 21. JD, partner and co-leader of Sidley's Telecom and Internet Competition practice, and George Mason University Foundation Professor of Law, served from 2000-2004 as Chairman of the Federal Trade Commission, March. “Private Antitrust Remedies: An Argument Against Further Stacking the Deck.” <https://instituteforlegalreform.com/wp-content/uploads/2021/03/March-2021-Antitrust-Paper-FINAL.pdf>

A defendant’s conduct in such cases generally lacks the features that could possibly justify punitive damages. In most, there was nothing surreptitious about the defendant’s conduct; indeed, it may have been common knowledge to everyone in the relevant business community. Like defendants in many negligence cases, defendants in rule-of-reason antitrust cases could not have predicted with any reasonable degree of certainty that their conduct would later be deemed unlawful. “The line between winning and losing may be exceedingly fine in such cases,”16 but “no matter how close the case, the winner gets a bounty and the loser gets a penalty” in the form of treble damages.17

The leading antitrust treatise describes that outcome as “an embarrassment to antitrust policy,” given “the law’s usual discomfort with imposing unforeseen liability.”18 Moreover, “[t]he practical effect of mandatory trebling is to tilt the settlement process in the plaintiff’s favor because mandatory trebling so inflates the defendant’s cost of losing and the plaintiff’s value of a victory in a rule of reason case.”19

#### 2. “Toxic cocktail” of procedural benefits---magnifies unpredictable negative effects

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Other regimes, most notably the Chinese, the United Kingdom and the Europeans (through the European Commission) have spent years3 studying these matters and have tended to come to relatively clear points of view that are not consistent with the American approach, which itself was the product of a very different time when the Sherman Act was a misdemeanor, the maximum fine was $5,000, no funds were budgeted for enforcement of the antitrust laws and public enforcement was toothless in various ways and focusing often in fact on labor unions as unlawful combinations. 4 Since the advent of this century, most of the world’s governments have addressed the matters above and more. In doing so, they have fled from many of the most familiar features of the American antitrust machine. Indeed, when the European Commission was deeply focused on encouraging private actions, many of the papers and speeches expressed a desire to create a viable damages remedy without the “excesses” of the American system5 and without the “toxic cocktail”6 of procedural benefits that flow to the claimants, and perhaps often to an even greater extent, their lawyers. The principal elements of this “toxic cocktail” seem to refer to many features of the American legal system, but especially:

The mandatory award of one-way attorneys’ fees for plaintiffs, but not for prevailing defendants, which is wholly inconsistent with the applicable rule in most all other countries. The wide open, expensive and extraterritorial documentary and deposition discovery available in cases brought in the courts of the United States, but not generally elsewhere; along with the openness of US courts to exercise vast extraterritorial jurisdictional discovery against foreign persons and companies even before any jurisdiction is established.7

The existence of joint and several liability without any right of contribution or meaningful claim reduction.

The fact that federal clearance of transactions or conduct does not preempt or preclude any or all of the individual states, or any individual, from attacking those transactions or conduct that have been approved or cleared at the federal level.

The policy chaos that has ensued in the wake of the Supreme Court’s decision in Illinois Brick, 8 which generated state legislative or judicial repealers such that indirect purchaser actions prohibited under the Sherman Act are nonetheless available under the laws of more than half of the states and are pursued in federal courts alongside the direct purchaser claims by virtue of diversity jurisdiction.9

Whether taken wholly together, in small clusters, or even individually, these uniquely American procedural features of our competition system have a powerful impact on the companies everywhere and also on the economy of the United States. The wealth transfers generated by this system are enormous. One result is that the lawyers have come to have a truly outsized role in the American economy, a role unlike and far grander than the role they play outside the United States. The purpose of this modest paper is to put some focus upon those features of private damage litigation that seem to be an essential component of any rethinking of American antitrust and competition law and policy. This paper will address these issues at a relatively high policy level while bearing in mind the far larger context set forth in these introductory pages.

#### 3. Settlements---private suits lead to tons of costly settlements, but don’t result in judgements which means companies can keep doing the bad practice

Eric McCarthy et al. ‘7. GC & Chief Legal Officer of Womble Bond Dickinson (US) LLP, with Allyson Maltas, Matteo Bay and Javier Ruiz-Calzado. “Litigation culture versus enforcement culture A comparison of US and EU plaintiff recovery actions in antitrust cases.” <https://www.lw.com/upload/pubContent/_pdf/pub1675_1.pdf>

Additionally, the several aspects of US litigation highlighted above are a catalyst to settlement. Even before discovery begins, some defendants, confronted with the promise of invasive and expensive discovery, will choose to settle with plaintiffs in order to spare their employees from intrusive discovery and to save on exorbitant legal fees. Plaintiffs routinely extract large settlements from defendants after gaining access to corporate documents and information that, although not dispositive of any wrongdoing, are damaging or embarrassing enough to justify settlement. Similarly, class actions may contribute to settlement of private damages actions because, if certified, defendants do not want to risk losing at trial and therefore pay treble damages. The same is true for state indirect purchaser actions. Defendants often settle these suits in order to avoid duplicative litigation costs.32 Settlement is also preferable for many defendants in this situation who rightly fear the application of collateral estoppel if they are adjudicated liable in even one state.33

#### 4. Crushes solvency---private litigation conflicts with and undermines public enforcement so both fail

Daniel A. Crane 19. Frederick Paul Furth Sr. Professor of Law at the University of Michigan.

“Toward a Realistic Comparative Assessment of Private Antitrust Enforcement.”

In *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy*, ed. Damien Gerard, and Ioannis Lianos, pp. 341-54. Cambridge: Cambridge University Press, 2019.

The private-injunction action, like the treble-damage action under s 4 of the Act, supplements Government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive.30

The EU Directive also shows sensitivity to the relationship between public and private enforcement, asserting the need for “coordination of these two forms of enforcement in a coherent manner,”31 and proposing mechanisms for preventing private enforcement from undermining public enforcement, such as limiting private access to self-incriminating materials received as part of leniency applications.32 The reality, however, is that private enforcement cannot help but have spillover effects on public enforcement – not all in the direction of making public enforcement more effective. To the contrary, the US experience shows that a swell of private enforcement can subtly undermine public enforcement, or even choke it off altogether.33 Particularly if private enforcement in particular areas comes to significantly outstrip public enforcement in frequency, with the governing liability norms being predominantly created in private litigation, public litigation can become laden with the baggage of private litigation to the point if ineffectiveness or practical disappearance.

US monopolization law is a case in point. Historically, public antitrust enforcement of s. 2 of the Sherman Act has declined since a high in the 1970s, when the agencies were bringing over three cases a year,34 to the last several administrations where very few monopolization cases have been brought. Over the eight years of the Bush administration, the Justice Department filed no monopolization cases. While running for office in 2007, Senator Barak Obama singled out this ostensibly weak enforcement record for condemnation, characterizing the failure to pursue monopolization cases as “lax enforcement” that harmed consumer interests.35 His Antitrust Division immediately withdrew a report on monopolization offenses disseminated by the Bush administration and promised that the Justice department would be “aggressively pursuing” monopolization cases.36 But, then, over seven and a half years, the Justice Department brought only one monopolization case. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”37 The government’s theory – that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors – broke no new theoretical or practical ground.

What happened to public enforcement against monopolization? Among the several contributing factors is the dramatic rise of private monopolization actions in the later part of the twentieth century. Figure 17.2 below provides a statistical summary of public and private monopolization cases in the federal appellate courts in the post-war period. From the 1950s to the 1970s, the federal agencies filed a modest number of monopolization cases during each five-year period – far fewer than private monopolization cases, but still enough to make a significant impact on the formation of legal norms and market circumstances. But, as private monopolization litigation skyrocketed from the mid 1970s to the early 1990s, public monopolization enforcement receded, both proportionally and absolutely. With a few notable exceptions such as the DC Circuit’s en banc Microsoft decision, the monopolization law made from the 1970s forward was made in the context of private litigation. As the courts reacted to the dramatic rise of private monopolization cases by announcing new restrictions on a variety of exclusion theories – from predatory pricing, to tying, to duties to deal – private monopolization cases began to recede, reaching an apparently stable equilibrium at about half of their peak levels for the last two decades. This dramatic rise and then significant reduction of private monopolization litigation left in its wake public monopolization enforcement, which all but disappeared.

#### 5. Frivolous litigation---private firms will use antitrust strategically in ways that harm competition

R. Preston McAfee et al., ‘5. Professor, Humanities and Social Sciences, California Institute of Technology, with Hugo M. Mialon, and Sue H. Mialon, December. “PRIVATE ANTITRUST LITIGATION: PROCOMPETITIVE OR ANTICOMPETITIVE?” https://www.justice.gov/atr/private-antitrust-litigation-procompetitive-or-anticompetitive

Private firms will generally pursue antitrust actions when it is in the private firm's interest, an interest that could easily diverge from the social interest. Firms may have incentive to use the antitrust laws strategically, which may hinder rather than promote competition. The possibility of strategic abuse of the antitrust laws has been raised by, among others, Baumol and Ordover (1985), Breit and Elzinga (1985), Shughart II (1990), Brodley (1995), and McAfee and Vakkur (2004). McAfee and Vakkur identify several ways in which firms can use the antitrust laws strategically. Let us illustrate several of them with important cases that have arisen in the U.S. courts.

Firms may use the antitrust laws to improve contractual conditions. The antitrust lawsuit filed by the Colorado Chiropractic Council (CCC) and 46 doctors of chiropractic against 9 Colorado hospitals is an example.1 The suit came after a letter from CCC asking for staff privileges and mailed to 30 hospitals in the state. The 9 hospitals that did not respond or responded unfavorably were targeted by CCC. The suit alleged that these hospitals "have effectively restrained and suppressed the free flow of trade resulting in an uncompetitive marketplace." The lawsuit was dismissed from the U.S. States District Court. In his ruling, Judge Finesilver said, "the letter from plaintiffs' counsel ... requests a blanket grant of staff privileges ... closed with a threat to initiate litigation if the defendants fail to respond or respond negatively within 30 days. We find the contention of plaintiff's to be without merit and completely lacking substance as the basis for an antitrust action" (1986 U.S. Dist. LEXIS 17233, 650 F. Supp. 231 at 236).

Using the antitrust laws strategically to modify the terms of a contract can be damaging to the contractual parties and may discourage long term investments under a standard hold-up theory. The hold-up problem exists when parties refrain from working together because they are afraid that they may give the other party increased bargaining power once they cooperate. Contracts resolve the problem and improve efficiency as the parties are now willing to participate in jointly profitable actions. However, if the parties can use antitrust suits to alter the terms of the contract in their favor, then parties will anticipate such opportunistic behavior, which will make it harder for them to cooperate in the first place. Parties will end up experiencing more inefficiencies as they need to write more complex contracts to prevent hold-up and avoid renegotiation costs.

Firms may also take private antitrust actions simply to respond to existing private actions. Qualcomm owns around 40 per cent of the patents related to CDMA (Code-Division Multiple Access, a digital cellular technology that uses spread-spectrum techniques). While the others are held by Ericsson and Nokia, Qualcomm is credited with pioneering the commercial public use of the technology. In 2002, Qualcomm sued Maxim, a billion dollar a year supplier of analog integrated circuits and owner of Dallas Semiconductor, claiming that Maxim infringed five of its patents. As a part of its efforts to throw out the case, Maxim filed an anti-trust suit against Qualcomm in 2004, accusing it of misusing its patents to exclude competition from the market for CDMA technology.2

These situations complicate the task of the courts by aggregating several actions. Moreover, they may have negative effects if they thwart antitrust actions that are pursued for good reason. Of course, they may also have positive effects if they thwart antitrust actions that are pursued strategically, but the counter-suits themselves may also be pursued strategically.

Private antitrust litigation may also be aimed at extorting profitable settlements from successful rivals. An example is AOL's antitrust lawsuit against Microsoft.3 In 2002, just after the U.S. Department of Justice and Microsoft reached a settlement after Microsoft was found guilty of violating the antitrust laws in a government lawsuit begun in 1997, AOL filed the lawsuit against Microsoft through its subsidiary Netscape. AOL purchased Netscape in 1999 after the damage on Netscape had already been done by Microsoft, and waited for 3 years until Microsoft was found guilty of anticompetitive behavior before asking for relief. The settlement of this lawsuit paid AOL $750 million in damages. Although AOL sued on the grounds that the damages to Netscape reduced competition in the browser market, the settlement essentially put an end to competition in this market, by promising AOL a 7 year royalty-free license to use Microsoft's browser. AOL appeared uninterested in restoring Netscape, only in obtaining a profitable settlement from Microsoft.

Finally, private antitrust litigation may be aimed at impeding healthy competition from rival firms. For example, in September 1999, start-up Next Generation Realty sued the leading full-service real estate broker Iowa Realty Co. Inc. claiming that Iowa Realty used its size and influence to force the Next Generation Realty to pay $30 apiece for exclusive-right-to-sell listings.4 Initially, Next Generation filed the suit to require Iowa Realty to share commissions, while Next Generation refused to share commissions on its listings sold. When Iowa Realty declined to reciprocate on that basis, Next Generation accused it of violating Iowa's anti-trust statute. The Iowa Supreme Court dismissed the action stating that the claims were without any merit or proof (686 N.W.2d 206; 2004 Iowa Sup. LEXIS 253).

#### 6. Chilling effect---judicial hesitancy to award damages in private cases limits the scope of antitrust law

William E. Kovacic 18. Global Competition Professor of Law and Policy, George Washington University Law School: Visiting Professor, Dickson Poon School of Law, King’s College London; Non-Executive Director, United Kingdom Competition and Markets Authority, 12/19/18. “Competition Policy in the European Union and the United States: The Treatment of Dominant Firms. Hearing on “A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and the EU.” Senate Judiciary Subcommittee on Antitrust, Competition Policy, and Consumer Rights. https://www.judiciary.senate.gov/imo/media/doc/Kovacic%20Testimony1.pdf

Collectively, these developments have narrowed the scope of the U.S. antitrust system. Most of the critical judicial decisions in this evolution of doctrine have involved private plaintiffs pressing treble damage claims. Perhaps the most interesting area to consider the possible interaction between the private right of action and the development of doctrine involves the fields of monopolization and attempted monopolization law. Litigation involving exclusionary conduct by IBM provides a useful illustration.38 In the late 1960s, the Department of Justice initiated an abuse of dominance case that sought, among other ends, to break IBM up into several new companies. By 1975, roughly 45 private suits had been filed against IBM alleging unlawful exclusionary conduct and seeking treble damages against IBM. The sum of all damage claims in the private cases exceeded $4 billion – a considerable amount at the time.

My intuition is that courts reacted to the private cases with apprehension and were ill at ease with the possibility that a finding of illegal monopolization would trigger the imposition of massive damage awards against IBM. The courts in these matters could not refuse to treble damages if they found liability, but they could interpret the law in ways that resulted in a finding of no liability. IBM paid settlements to a small number of the private claimants, but it achieved vindication in most of the private cases. The results in the private damage cases against IBM and several other leading U.S. industrial firms in this period imbued U.S. monopolization doctrine with analytical approaches and conceptual perspectives that viewed intervention skeptically.

My hypothesis about the American competition policy experience is that U.S. antitrust doctrine would have taken a somewhat different path had there been no private rights of action, or if the damage remedy in private actions had been less potent – for example, limiting recovery to actual damages, or permitting trebling only for violations of per se offenses such as horizontal price-fixing. Specifically, U.S. antitrust doctrine would have assumed a more intervention-oriented character if the power to enforce the American competition statutes were vested exclusively in public enforcement authorities, or if the private right of action had been circumscribed in one or more of the ways indicated above.

#### These problems are unique baggage to private litigation

Daniel A. Crane et al., 15. Associate dean for faculty and research at the University of Michigan Law School, with Keith Klovers, and Adam Speegle. "Private antitrust enforcement: Comparative and policy considerations." In Comparative Competition Law. Edward Elgar Publishing, 2015. https://www.elgaronline.com/view/edcoll/9781849804196/9781849804196.00021.xml

Copying antitrust rules established in private cases in subsequent public cases only makes sense if one is blind to the very different institutional contests of private and public enforcement. Unlike the private case, the FTC was not suing for treble damages or to impose a fine, but rather to prohibit similar settlements in the future. There should have been no concern in the FTC about the abusive potential of class actions or ill-motivated plaintiffs’ lawyers, incompetent juries, or various other forms of private litigation baggage. Whether or not the settlement should have been upheld in the FTC case, it would have made sense to ask some different questions in that case than in the private case.

#### Threat of treble damages undermines innovation

Steven Seidenberg 16. Freelance reporter and attorney who has been covering intellectual property developments in the US for more than 20 years, 7/26/16. “US High Court Restores Treble Damages For Patent Infringement.” https://www.ip-watch.org/2016/07/26/us-high-court-restores-treble-damages-for-patent-infringement/

Although Halo was not surprising, it seems likely to have an important impact on patent litigation. It revives the possibility of treble damages, thus shifting the balance of power when patentees sue alleged infringers.

“It will change the valuation of cases,” said Prof. Bernard Chao, who teaches patent law at the University of Denver. “If there is a risk of a high reward [because of treble damages], this increases the pressure on defendants to settle and to settle for a higher amount.”

The decision also shifts the balance of power between district courts and the Federal Circuit (often known as the country’s “patent court”). By making it easier for district courts to award treble damages and harder for the Federal Circuit to overturn these awards, Halo strengthens the power of district courts and reins in the Federal Circuit. “Halo is really an empowering decision for district courts,” said Natalie Bennet, a partner in the law firm of McDermott Will & Emery.

This new power worries some patent experts, because district courts will vary in their willingness to grant treble damages – thus increasing the uncertainty of patent litigation. This unpredictable risk of treble damages “could have a really chilling effect on innovation,” warned Chao. “It may encourage companies developing new products to stay further away from existing patents, in order to avoid the risk of infringement.”

#### Risk of strategic litigation stifles business growth.

Patrick J. Medeo 18, Judicial Law Clerk at the New Jersey Superior Court, Appellate Division, JD from Rutgers Law School, BS in Business Administration and Legal Studies from Drexel University, “Potential Negative Impacts of Antitrust Litigation on Businesses”, Rutgers Law School Center for Corporate Law and Governance, 4/6/2018, https://cclg.rutgers.edu/blog/potential-negative-impacts-of-antitrust-litigation-on-businesses-by-patrick-j-medeo/

In the United States, antitrust litigation is not solely a matter of government concern. In fact, antitrust enforcement is a tool strategically used by private parties as part of business operations in the United States. By increasing litigation costs, potential damages, risk of suit, and regulatory oversight costs, antitrust litigation can be an impediment on businesses. Further, fear of litigation and associated costs stifles new product development and production in the United States by creating a high barrier to entry in the form of regulatory costs and significant risk of liability. With the number of antitrust cases rising annually, the negative impact on businesses should be of concern for enforcers especially as the number of private claims grows. Properly applied antitrust laws allow both government and private parties the ability to stop or hinder abuses of market power by participants seeking anticompetitive advantages.

A meritorious use of antitrust law by private parties may entail a situation where a cartel of competitors in an industry work together to fix prices, control supplies, and divide market share. In doing so the cartel blocks access to necessary resources for new entrants to the market; through strategic distribution, wholesale, and manufacturing contracts the cartel is able to raise barriers to entry so high that a new entrant would be unable to enter the market or would be unable to effectively compete upon entry. Proper application of antitrust laws by a private party would allow for recourse against the cartel participants and would promote competition in the industry by lowering barriers to entry for new market participants. However, due to the staggering effects that antitrust litigation can have, private parties may also abuse the laws in order to subvert competition.

According to an article published by the International Bar Association in 2009, it was noted how “broad procedural and substantive rules providing incentives to litigation produce economic harm” to companies and employees, specifically emphasizing the role played by antitrust cases. The liability is of such a drastic nature that liability policy premiums “increase (s) of 300 or more percent are not uncommon for [European] companies with a US [stock] listing.” In 2016 alone, there were 853 antitrust cases heard in federal courts, a majority of which were brought by private actors. This is an increase of 10.9 percent from 2015 and a 21 percent increase from 2012, where 702 antitrust cases were filed in federal court alone. [1] As of 2007, the average duration of an antitrust case, from filing to completion, was 24.6 months.[2] Such prolonged cases prove expensive for defendants and can create a disincentive to enter the United States Market as the frequency of them increases.

A poignant example of prolonged litigation is the LIBOR-Based Financial Instruments Antitrust Litigation. With lawsuits dating back to 2007, the private litigation against numerous banks is still in the process of closing, over a decade later. Collectively, the defendant organizations have paid hundreds of millions and potentially billions of dollars to end litigation, with firms like Citigroup paying individual settlements with private litigants upwards of $100 million.[3] The use of private antitrust litigation may be abused by private litigant as a strategic and anti-competitive tool.

Although Antitrust laws are meant to be used to uphold the competitive integrity of US Markets, the laws may also be used by private litigants for anti-competitive ends. This specifically comes into play where non-dominant firms in competitive markets utilize antitrust laws to sue dominant firms. According to a United State Department of Justice paper on the procompetitive and anticompetitive nature of private antitrust litigation, antitrust suits brought by non-dominant firms in competitive markets are more likely to constitute abuses of the law rather than true claims of anticompetitive activity.[4] Further, the use of private antitrust litigation can be highly profitable for nefarious plaintiffs; for instance, not only is the risk of long, complex, and the costly litigation a major deterrent for defendants but it may often lead to profitable settlements for the plaintiffs. In addition to profitable settlements, plaintiffs in private antitrust actions may also be rewarded with easier competition due to fear by defendants of copy-cat lawsuits, this is especially true after a successful government claims. Overall, even where claims may have merit private parties may be less likely to use antitrust laws to impede anticompetitive behavior than use it for their own profit.

Antitrust lawsuits are not only costly because of settlements, litigation costs, and other directly monetary outputs; instead, antitrust may also take a toll on opportunity and operational costs ultimately stifling innovation and go-to-market strategies. A prime example is the strategic use of antitrust laws by Digital Equipment Corp. against Intel in 1997. As illustrated in the Department of Justice’s article “The Strategic Abuse of the Antitrust Laws”, a well-timed antitrust allegation can be effective and profitable for the aggressing party. Although suit was never brought, the prospect of a large scale antitrust battle led to a $700 million settlement deal between Digital and Intel, ending months of patent litigation.[5] The settlement came just after a press release by Digital claiming that Intel was bolstering a monopoly in high power micro processing chips, at the same time the FTC began questioning Intel’s dominance in the chip and semi-conductor market.

In a highly competitive market Digital was able to nearly stop Intel in its tracks by threatening antitrust litigation and utilizing a Public Relations campaign to draw attention to the company’s market power, founded upon verifiable anticompetitive activity or not. The benefits of this strategy for Digital were not limited to a cash settlement, although the settlement was highly profitable more significant gains were made. In the settlement agreement it was stipulated that Digital would be guaranteed discounts on Intel Pentium chips (used in Digital’s computer products instead of its own competing chips), and continued access to the same Intel Pentium chips. Digital’s personal computers, which incorporated Intel chips, represented nearly 25% of its total revenues. By strategically threatening antitrust litigation Digital was able to slow Intel’s growing and usurping dominance in the high-power chip market, where both parties were competing. In doing so Digital added to its cash reserves while forcing Intel to acquire its chip technology. [6] Ultimately the FTC investigation lead to the finding that Intel had withheld information in the patent litigation process, but Digital’s threat antitrust suit forced a settlement exclusive to them and not benefitting other patent litigants against Intel.

Although private parties may, and often do, have a vested interest in utilizing antitrust law to stop anticompetitive behavior strategic uses such as Digital’s are viewed more as abuses. This is because they ultimately do not better competition in the market as a whole, and instead are highly profitable for only the aggressing party. Strategic uses of antitrust such as this appear problematic for businesses. Although they strong arm parties into dealing together, they also hinder development of new products and allow intelligent abusers to systematically restrain their competitors that may otherwise be outperforming other market participants. This may be done regardless of the veracity of their claim. Ultimately, it is the consumer that pays in the form of higher prices, slowed product development and potentially inferior products.

#### Empirical support for frivolous litigation and rent-seeking

Elyse Dorsey et al. 18., Associate at Wilson Sonsini Goodrich Rosati, with Jan M. Rybnicek - Senior Associate at Freshfields Bruckhaus Deringer and Joshua D. Wright, JD, PhD, University Professor and the Executive Director, Global Antitrust Institute, Scalia Law School at George Mason University, Former FTC Commissioner, April. “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking.” CPI Antitrust Chronicle. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3165192

Additionally, the incredibly costly nature of antitrust proceedings exacerbates its vulnerability to rent seeking.39 Antitrust cases and investigations can drag on for years, entail the collecting, processing, and production of millions of documents, and involve tremendous attorneys’ fees. Remedies (or consent terms) can be invasive, last for years, and impair a defendant’s ability to adapt to changing circumstances and thus to remain competitively viable. Looming in the background is the possibility of trebled damages at the end of the day. Consider that an unhappy competitor could embroil a rival in an antitrust quagmire via its own litigation, or by complaining to a government agency and potentially triggering an investigation, that would divert significant amounts of that rival’s resources for years — thereby crippling a rival and diminishing the amount of competition it faces. With so much at stake, conditions are ripe for actors to engage in just such rent-seeking activities in an attempt to appropriate some of this vast wealth for themselves. The empirical evidence and historical record of antitrust actions — particularly during the era when antitrust was explicitly governed by a vague, multi-faceted standard — provide ample support for public choice theory and the economic theory of regulation, while tending to reject the public interest account of regulatory behavior.40

Finally, given this reality, what can be done to mitigate rent seeking? Public choice economics instructs that rent seeking opportunities are diminished when agencies have less discretion (e.g. when rules are clearer) and when another body (e.g. the public, a court, Congress) can more easily hold them accountable for their actions — factors that tend to go hand-in-hand.41 The rule of law thus diminishes incentives for rent seeking and corruption. When these constraining factors are in place, agencies have lowered ability to depart from what is required of them or to otherwise manipulate outcomes to respond to rent-seeking incentives. As such, what antitrust enforcement craves is a clear, well-established standard by which the public and the courts can evaluate agency decisions and identify and correct any deviations that undermine consumer outcomes.

#### Biden’s XO is non-binding and ineffectual.

Posner ’21 [Eric; July 21; Professor at the University of Chicago Law School, fourth-most cited legal scholar in the United States; Project Syndicate, “The Antitrust War’s Opening Salvo,” <https://www.project-syndicate.org/commentary/biden-antitrust-executive-order-what-it-does-by-eric-posner-2021-07>]

US President Joe Biden’s new executive order on “Promoting Competition in the American Economy” is more significant for what it says than for what it does. In fact, the order doesn’t actually order anything. Rather, it “encourages” federal agencies with authority over market competition to use their existing legal powers to do something about the growing problem of monopoly and cartelization in the United States. In some cases, the relevant agencies are asked merely to “consider” ramping up enforcement; in others, they are directed to issue regulations, but the content of those regulations remains largely up to them.

#### Only changes to law matter!

Graham ‘21 [Jed; September 16; Author and analyst; Investor’s Business Daily, “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court,” <https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/>]

Investors don't seem to see a major threat. Google parent [Alphabet](https://www.investors.com/news/technology/google-stock-buy-now/) ([GOOGL](https://research.investors.com/quote.aspx?symbol=GOOGL)), Apple and Facebook stock have hit all-time highs this month. After Khan's ascension as FTC chair, Amazon stock ran to a record, before its second-quarter revenue miss briefly halted its momentum.

Recent antitrust rulings help explain the apparent lack of concern.

The Supreme Court's June opinion rejecting NCAA limits on educational benefits for student-athletes reads like a celebration of noninterventionist antitrust law, William Kovacic, who chaired the FTC under President George W. Bush, told IBD.

"Markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare," Justice Neil Gorsuch wrote. Courts examining business dealings should take care not to "set sail on a sea of doubt," he added, elevating William Howard Taft's warning of the danger of a "shifting, vague and indeterminate" antitrust standard.

The words seemed to carry a not-too-subtle message for the Biden team, Kovacic says. "Until the Congress changes the law, we will continue to endorse the approach we have taken for the last 40 years," he said.

Can Parties Unite On Antitrust Law?

The House Judiciary Committee narrowly passed a package of antitrust measures in June called the Ending Platform Monopolies Act. Amazon has warned of massive disruption from restrictions preventing the biggest online platforms from favoring their own goods and services. "These bills would jeopardize Amazon's ability to operate a marketplace for sellers, potentially resulting in hundreds of thousands of small and medium-sized businesses losing access to Amazon's customers and services."

Another measure would shift the burden of proof for Big Tech acquisitions under antitrust law. Companies with a market cap of $600 billion or more — including Apple, Amazon, Facebook and Google — would have to prove that a proposed merger wasn't anticompetitive.

GOP Sen. Josh Hawley's antitrust bill goes much further, essentially banning acquisitions by companies with a market cap over $100 billion.

Skepticism about Big Tech and excessive corporate power is clearly bipartisan. That helps explain why Khan's nomination as commissioner sailed through the Senate with 21 Republican votes. Yet Biden didn't reveal until after the vote that he intended to name Khan FTC chair, which might have given some senators pause.

Fundamental changes to antitrust law are unlikely to pass the closely divided Congress this year, Goldman Sachs analysts say. Some Democratic lawmakers have voiced opposition to the House antitrust package. Meanwhile, Hawley's Trust-Busting for the 21st Century Act has zero co-sponsors.