# NDT Round 7 Wiki

## 1NC

### 1

#### “Private sector” only refers to companies in the US

US Code – official compilation and codification of the general and permanent federal statutes of the United States

2 USC § 658(9), <https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=2-USC-233312093-1889436064&term_occur=999&term_src=title:2:chapter:17A:subchapter:II:part:B:section:658>

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.

#### Voter for limits and ground – opens the floodgates to affs about companies in random countries, no core DA because those companies have no relationship to U.S. or global economy

### 2

Next is T exemptions

#### “Expand the scope” means broadening the range of claims that can be brought legitimately---that’s distinct from changing what is prohibited

Barrera 96 – J.D., Wayne State University Law School

Lise A. Barrera, “Is the Courtroom the New Front for the Resolution of Publishing Disputes?,” The Wayne Law Review, Vol. 42, Summer 1996, LexisNexis

It is important to note the distinction between the expansion of the scope of section 43(a) and the standard that courts apply in granting relief to claims under this section. The scope of section 43(a) allows plaintiffs to claim the section provides them with protection and thus should grant them relief. The expansion of the scope allows a much broader range of claims to be brought legitimately under section 43(a). Once the scope of the statute allows the claim to be brought, the courts apply a standard to the claim in order to determine whether a plaintiff should be granted relief.22 The standard applied is also the product of years of judicial interpretation. While the scope of section 43(a) is expanding, however, the standard for relief seems to be becoming higher and harder to meet.

**The plan violates – The only way to do that is by reducing an antitrust exemption---the scope of antitrust laws is *only limited* by sectoral exemptions, state action immunity, and Noer-Pennington immunity**

**Kobayashi and Wright 20** – Paige V. and Henry N. Butler Chair in Law and Economics at the Antonin Scalia Law School at George Mason, University Professor and the Executive Director of the Global Antitrust Institute at Scalia Law School at George Mason University and holds a courtesy appointment in the Department of Economics

Bruce H. Kobayashi and Joshua D. Wright, "Antitrust Exemptions and Immunities in the Digital Economy," Global Antitrust Institute, 5-28-2020, https://gaidigitalreport.com/2020/10/04/exemptions-and-immunities/

Introduction

The antitrust laws were designed to regulate private conduct in order to promote competition and protect consumer welfare from exercises of monopoly power by firms. In other words, the antitrust laws, as “the magna carta of free enterprise,”[1] are designed primarily to regulate private conduct, not government conduct and public restraints of trade.[2] Private activity may still fall **outside the scope of the antitrust laws** when it is **exempted specifically** by Congress, heavily guided or **influenced by the governmen**t, or relates to **attempts to petition the government** to take action.

**Antitrust laws’ outer boundaries** fall into **three categories**: (1) **sectoral** or **industry-level exemptions**, which single out an industry or business line from antitrust scrutiny; (2) **state action immunity**, which provides immunity for anticompetitive behavior by state governments and municipalities under certain conditions; and (3) **Noerr-Pennington immunity**, which aims to protect speech in the form of petitioning activity from antitrust liability.[3] The digital economy interfaces with the government in many respects; therefore, the **antitrust laws’ reach**—shaped by these **exemptions** and **immunities**—plays a clear role in guarding consumer welfare.

**Vote neg---**

**[1]---Limits---any other interpretation allows the aff to change *any* determination the courts have made about the legality of private sector practices, which creates an untenable research burden**

#### [2]---Grounds---provides a core mechanism that can predictably and reliably be the focus of neg contestation

### 3

Next is the sovereignty DA

#### Unilateral imposition of extraterritorial antitrust liability escalates to war! — And collapses cooperation on other issues, and trade flows

Salbu 99 – Professor of law and ethics, Georgia Tech

Steven R. Salbu, The Foreign Corrupt Practices Act as a Threat to Global Harmony, 20 MICH. J. INT'L L. 419 (1999), Available at: <https://repository.law.umich.edu/mjil/vol20/iss3/1>

The world is too culturally diverse to accept the external imposition of laws without resentment. 154 [ FN 154] 154. For comparison, consider treaties through which signatories all agree to mutually accepted conditions and terms that apply only to the signatories themselves. Within these bounds, no laws are being applied extraterritorially without the consent of the local sovereignty. In contrast, FCPA-style legislation, now to be adopted in dozens of countries, restricts behavior even in non-signatory nations that have not consented to the intrusion. [End FN] Under these conditions, extraterritorial legal fiat is at the very least insulting and distasteful.'55 Transnational relations likely will be strained by the overreaching of any one nation into the affairs conducted within the borders of another.'56 As one commentator suggests, other nations "may perceive the FCPA as a culturally arrogant encroachment on their ability to govern activities exclusively within their own borders, in accordance with international law principles on territorial sovereignty."''57

While the risk of being perceived as obnoxious and intrusive is hardly insignificant, it pales when compared with a more serious risk--the increased likelihood that transnational relations will become strained,'58 and that nationalistic sentiments will flourish in response to the perceived invasiveness of the extraterritorially applied laws. 5 9 The results of this scenario can range from mounting hostilities over other issues to the severance of trade,' 6 0 and potentially even to military confrontation.161 [Footnote 161] 161. The potential for hostilities over extraterritorial legislation to escalate to the point of military confrontation is a logical possibility, rather than a trend in recent history. Indeed, even U.S. antitrust law, the extraterritorial application of which has evoked substantial retaliatory reaction, has not led to this extreme. See William S. Dodge, Extraterritoriality and Conflict-ofLaws Theory: An Argument For Judicial Unilateralism, 39 HARV. INT'L L.J. 101, 165 (1998) (noting that while extraterritoriality of U.S. antitrust law has evoked blocking statutes and claw-back statutes, it has not caused the cessation of international cooperation). While we have yet to see hostilities over U.S. extraterritorial legislation escalate to the point of war, the potential for such a scenario can never be ruled out. [End FN] Thus, van den Berg observes that extraterritorial application of the Helms-Burton Act in Canada has fueled an "international perception of the United States not only as a cultural imperialist but as a growing legal imperialist."' 62 Perhaps more threatening to the delicate global diplomatic balance, the reach of the Helms-Burton Act has sparked an unforeseen and undesirable alliance between Canada and Cuba, 163 in effect undermining U.S. efforts to apply economic sanction pressures in the latter. Simply stated, laws resented for their overreaching nature can be counterproductive.

Van Wezel Stone identifies similar risks in another area where extraterritorial law has been posited as a possible global solutioninternational labor regulation.'" She notes that because extraterritorial jurisdiction does not aspire to be integrative, it fails to contribute to a common international system of norms and standards.' 65 Instead, extra-territorial jurisdiction tends to undermine international peace and cooperation by creating tension and destabilizing international relations.'" Sovereign nations "react with intense hostility when... activities within their own borders are made the subject of investigation by a foreign nation applying foreign rules and procedures.' 6

The world is not sufficiently homogenized to embrace one conceptualization of morality in gray areas, '6 8 and attempts to force a unified fit via extraterritorial legislation are likely to spark ill will and retaliation.'69 Such hostilities can result, of course, whenever one country imposes its rule upon transactions that occur in another country. The potential is increased when vague laws are applied to the ambiguous conditions of markets in transition, such as communist economies that are in the process of converting to capitalist ones. 70 This suggests a danger in externally-based efforts to unify legal structures addressing such moral issues. Must we therefore throw up our hands in despair, and abandon all exertions to extirpate bribery and corruption? The answer is decidedly no. Abdication of responsibility to improve global markets would be as irresponsible as overweening intrusion into the affairs of other nations. The appropriate middle ground between complacency and invasiveness is persuasion.

#### Respect for fundamental principles of interstate sovereignty is key to avert war! Stepping into other nation’s affairs sparks escalating hostilities that unravel the global diplomatic and economic system

Walt ’20 – Robert and Renée Belfer professor of international relations at Harvard University

Stephen Walt, “Countries Should Mind Their Own Business” Foreign Policy, <https://foreignpolicy.com/2020/07/17/sovereignty-exceptionalism-countries-should-mind-their-own-business/>

What’s the dumbest idea affecting the foreign policy of major powers? There are plenty of candidates—the domino theory; the myth of the short, cheap war; the belief that a particular deity is “on the side” of one nation and will guarantee its success; etc. But right up there with those worthy contenders is a country’s belief that it has found the magic formula for political, economic, social, and international success and that it has the right, the responsibility, and the ability to spread this gospel far and wide.

In some cases, this impulse arises from (mostly) benevolent aims: The leaders of some country genuinely believe that spreading (through force, if necessary) their ideals and institutions to others will genuinely benefit the recipients. Defensive motives may also be operating: A state may believe that it cannot be reliably secure unless other countries have similar if not identical institutions. U.S. leaders once worried that America could not survive alone in a world dominated by fascism, and Joseph Stalin believed the Soviet Union needed “friendly” countries on its borders, by which he meant countries governed by Leninist parties patterned after the Soviet model.

Of course, such claims may simply be a reassuring story that ruling elites propagate to justify aggressive actions undertaken for more selfish reasons. Whatever the motivation, if their efforts were successful the world would gradually converge on a single model for political, economic, and social life. Individual national variations would be modest and declining in importance, limited to purely local concerns (such as national holidays, cuisine, preferred musical styles, etc.). In theory, even some of these features might begin to lose their individual features over time.

This hasn’t happened, however, due to an intriguing paradox. Thus far, the only political form that has commanded nearly universal global acceptance is the territorial state itself, along with the closely related idea of nationalism. As [Hendrik Spruyt](https://press.princeton.edu/books/paperback/9780691029108/the-sovereign-state-and-its-competitors), [Stephen Krasner](https://www.jstor.org/stable/j.ctt7s9d5), [Dan Nexon](https://press.princeton.edu/books/paperback/9780691137933/the-struggle-for-power-in-early-modern-europe), and [others](https://www.amazon.com/Formation-National-Western-Political-Development/dp/0691007721) have explored, the territorial state was only one of several political forms coexisting in early modern Europe, and its eventual emergence as the dominant political form was a contentious process that might have turned out differently. Many factors contributed to its ultimate success, and one of them was the idea of sovereignty: the principle that every government got to run its own affairs as its rulers (or, eventually, its citizens) saw fit. And once that principle took firm hold, individual local variations were reinforced and entrenched.

Add to this notion the emerging idea of nationalism—the belief that different groups of people have distinct identities based on language, culture, shared history, etc. and that such self-aware groups are entitled to govern themselves—and you have a couple of powerful and mutually reinforcing ideals. As John Mearsheimer argues in [The Great Delusion](https://yalebooks.yale.edu/book/9780300234190/great-delusion), nations want their own state so that they can protect themselves in an insecure world, and states often encourage nationalism in order to unify the population and enhance state power.

The gradual spread of these twin ideas—nationalism and sovereignty—has had far-reaching if uneven effects. Nationalism undermined and eventually destroyed the Spanish, Portugeuse, British, French, Belgian, Ottoman, Austro-Hungarian, and Soviet empires, and decolonization eventually swelled the United Nations from its original 50-odd members to nearly 200 states today. In this way, the territorial state became the dominant political form in the contemporary world, but the specific content within each state still varied enormously. Democracies, monarchies, oligarchies, one-party authoritarians, military dictators, religious regimes, etc. all coexisted within the basic framework of the sovereign state, along with a number of different economic systems.

Throughout this process, a number of countries have at one time or another seen themselves as models for the rest, and they have tried in various ways to convince others to adopt their formula. The leaders of revolutionary France sought to topple foreign monarchs and spread liberty to Europe and beyond, and Napoleon subsequently tried to impose his own order on the countries he had conquered. Soviet Russia was explicitly committed to spreading its particular form of socialism, and pan-Arabists, Nasserites, and assorted Islamic fundamentalists have sought to convince or coerce others into adopting their preferred model within the Arab and Islamic world.

Although Americans were initially ambivalent about whether their newfangled republic could be a model for others, confidence that other states would benefit if they become more like the United States grew as the country rose to great-power status and became the world’s strongest power. The impulse to remake the world in America’s image kicked into overdrive when the so-called unipolar moment arrived: The tides of history seemed to be running America’s way, liberal democratic capitalism was said to be the inevitable end point of political and social development, and there were no rival great powers who could prevent the United States from wielding its vast economic and military power in the service of liberal ideals.

Not surprisingly, in the unipolar era the United States increasingly favored a one-size-fits-all approach to other countries. Foreign countries may still have been regarded as formally sovereign, but the United States increasingly sought to influence (if not dictate) some of their national policy decisions. In the military realm, states that sought weapons of mass destruction were sanctioned, ostracized, attacked, or overthrown, even as U.S. leaders declared that America’s own nuclear arsenal was still essential for its security. Rising powers such as China were [advised](https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss8.html) to forgo “advanced military capabilities” on the grounds that this was “an outdated path” that would “hamper its own pursuit of national greatness.”  (For some strange reason, Beijing chose to ignore this friendly advice.) Where possible, the United States sought to recruit new states into security institutions that it already led, thereby obtaining more influence over other states’ security policies.

In politics, Washington sought to promote democracy where and when it could, whether by providing money and advice to nascent civil society groups, supporting human rights more generally, or acting to topple regimes that were unlucky or unwise enough to attract Washington’s particular ire. The goal, as President George W. Bush put it, was “a generation of democratic peace,” and U.S. power could be used to speed up the timetable and get the globe there as quickly as possible.

Lastly, [as my colleague Dani Rodrik argues convincingly](https://press.princeton.edu/books/hardcover/9780691177847/straight-talk-on-trade), U.S. efforts to promote what he calls “hyperglobalization” led other states to alter their domestic arrangements in ways that would attract foreign capital, expand trade opportunities, and bring them into greater conformity with U.S. preferences. Whether in the form of the 1990s Washington Consensus or trade agreements like the stillborn Trans-Pacific Partnership, a world with fewer barriers to the movement of goods, people, or capital left national governments less able to chart their own course or insulate their populations from global market forces. As practiced, globalization meant states either had to put on what Tom Friedman dubbed [“the Golden Straightjacket](https://en.wikipedia.org/wiki/The_Lexus_and_the_Olive_Tree)” or fall by the wayside.

The past 15 years has not been kind to this ambitious vision of a world increasingly united by shared values and similar institutions. Efforts to prevent adversaries from acquiring WMD were only partly successful (and at considerable cost). Key states such as China did not liberalize as expected yet continued to prosper. The spread of democracy slowed, stalled, and [then went into reverse](https://freedomhouse.org/report/freedom-world/2019/democracy-retreat), and the state of America’s own democracy become deeply troubling.

Even before the coronavirus pandemic, a broad backlash against globalization was underway, whether in the form of Brexit, Trumpism, the growing segmentation of the internet, and the partial decoupling of the U.S. and Chinese economies. As I’ve [written elsewhere](https://www.institutfuersicherheit.at/isp-working-paper-the-global-order-after-covid-19/), the pandemic has accelerated and deepened these tendencies, and raised the walls that the United States and others had been trying to lower before the arrival of Donald Trump.

The common taproot to these various trends is simple. It is the desire of leaders or peoples in different states to have a greater say in how they live, even if it means somewhat less material prosperity. The leaders of the Brexit campaign may have been supremely cynical in the many false claims they made to sell their scheme, but the supporters who voted to “take back control” were utterly sincere. They wanted to defend a particular way of life against changes they saw as disruptive and as threats to a cherished “way of life.” Much the same instinct lies behind efforts to curb immigration in many countries, or the every-state-for-itself impulse that is leading many nations to [seek](https://www.usatoday.com/story/news/health/2020/07/12/vaccine-nationalism-threatens-global-efforts-race-stop-coronavirus/5384850002/) a COVID-19 vaccine for themselves first and others later.

What we are seeing, in short, is a reassertion of sovereign independence on the part of great and small powers alike. The Westphalian model of sovereignty has never been absolute or uncontested, but the idea that individual nations should be (mostly) free to chart their own course at home remains deeply embedded in the present world order. The territorial state remains the basic building block of world politics, and, with some exceptions, states today are doing more to reinforce that idea than to dilute it.

Although there are clearly areas where our future depends on states agreeing to limit their own freedom of action and conform to global norms and institutions, greater respect for sovereignty and national autonomy has some obvious benefits. First, states that interfere in foreign countries rarely understand what they are doing, and even well-intentioned efforts often fail due to ignorance, unintended consequences, or local resentment and resistance. A stronger norm of noninterference could make some protracted conflicts less likely or prolonged.

Second, trying to impose a single model on other countries inevitably raises threat perceptions and increases the risk of serious great-power conflict. The Westphalian idea of sovereignty was created in part to address this problem: Instead of continuing to fight over which version of Christianity would hold sway in different countries (one of the key drivers of the wars that preceded the Westphalian peace), European states agreed to let each ruler determine the religious orientation of their realm. Similarly, a powerful state’s efforts to shape the domestic arrangements of another country will inevitably be seen as threatening by the target: Just look at how Americans now react to the possibility of Russian interference in our political system.

Third, creating a more stable international economic order while preserving most of the benefits of trade and comparative advantage will require fashioning trade and economic arrangements that permit great national autonomy, even at the price of slightly lower global growth rates. Not only might this reduce the risk of global financial panics, but allowing individual states greater freedom to set the terms of their international economic engagement could also reduce the anti-free trade backlash that is currently fueling costly trade wars.

Finally, a world in which a single political and economic model prevails is probably impossible anyway, at least for the foreseeable future. To believe that one size could fit all ignores the enormous diversity that still exists in the world and the powerful tendency for ideas and institutions to morph and evolve as they travel from their point of origins. Take pop music: Elvis Presley creates a new amalgam of rhythm and blues, gospel, and rockabilly (with a jolt of testosterone), his influence arrives in England and helps inspire the Beatles, who lead the “British invasion” of America in the 1960s, which then combines with Bob Dylan and the folk music movement to create the sound of groups like The Byrds. Or look at how Lin-Manuel Miranda combined hip-hop with his deep appreciation of traditional Broadway styles to create something new like Hamilton. These examples just scratch the surface of how music changes when different cultural streams begin to interact; I could just as easily have cited examples from Africa, Latin America, the Middle East, [or the Silk Road.](https://www.silkroad.org/)

Because humans are boundlessly creative social beings who resist conformity, and because no social or political arrangements are ever perfect, dissidents will always arise and contending visions will emerge no matter how fiercely they are repressed. Institutions created in one place may travel to other locations, but they will mutate and evolve in the process and exhibit different forms wherever they take root.

And that’s why I’ll raise two cheers for the (partly) sovereign state. A world made up of contending nationalisms is hardly a utopia, with the ever-present possibility of conflict and war and many obstacles to mutual cooperation. But trying to fit a diverse humanity into a uniform box is doomed to fail—and no small source of trouble as well. Even if we hold certain values to be sacred and are tempted to act when other states violate them, continued respect for boundaries and sovereignty is also a norm that can keep simmering rivalries in check. Libya would not have multiple powers interfering in it today had Britain, France, and the United States not decided to meddle there back in 2011.

As A.J.P. Taylor once archly observed, leaders in the 19th century “fought ‘necessary’ wars and killed thousands; the idealists of the 20th century fought ‘just’ wars and killed millions.” Looking ahead, greater respect for national sovereignty and fewer efforts to force the whole world into one way of living will help emerging rivalries stay within bounds and help countries with very different values cooperate on those critical issues where their interests overlap.

**Protectionism causes global wars**

**Palen 17** – historian at the University of Exeter

Marc-William Palen, "Protectionism 100 years ago helped ignite a world war. Could it happen again?," The Washington Post, 6-30-2017, https://www.washingtonpost.com/news/made-by-history/wp/2017/06/30/protectionism-100-years-ago-helped-ignite-a-world-war-could-it-happen-again/

The liberal economic order that defined the post-1945 era is disintegrating.

Globalization’s foremost champions have become the first to signal the retreat in the wake of the Great Recession. Economic nationalism, historically popular in times of economic crisis, is once again on the rise in Britain, France and the United States. We are witnessing a return to the antagonistic protectionist politics that defined a bygone era that ended with World War I — suggesting that today’s protectionist revival threatens not just the global economy, but world stability and peace.

Leading liberal democracies have turned their back on free trade. Britain, through Brexit, announced its retreat from European market integration. Before the parliamentary elections, British Prime Minister Theresa May announced a new Industrial Strategy, which includes state subsidization of select industries and stringent immigration restrictions on foreign workers at “every sector and every skill level.” Despite her post-election collapse in support, May continues to move forward with leaving the European Union single market thanks to an unholy alliance with the Democratic Unionist Party, Northern Ireland’s far-right supporters of Brexit.

Likewise, in the recent French presidential elections the vast majority of candidates ran on a platform of “patriotisme économique.” Marine Le Pen, leader of the French far-right National Front party, made a strong bid for the French presidency through a campaign that combined a condemnation of globalization alongside the promise of extreme economic nationalist legislation and an end to immigration into France. President-elect Emmanuel Macron is now pushing hard for a “Buy European Act” to placate French anti-globalization forces.

But nowhere has the anti-trade turn been more marked than in the United States, where “globalism” has become a dirty word. “Free trade’s no good” for the United States, as Donald Trump put it in 2015. President Trump has threatened to shred the North American Free Trade Agreement and to impose protective tariffs on imports from Mexico and China, two of America’s largest trading partners.

In January, a paranoid Trump pulled the United States out of the Trans-Pacific Partnership negotiations — a massive free-trade deal that included a dozen countries in the Asia Pacific — because he believed that the Chinese were secretly plotting to use it to take advantage of the U.S. market.

And in April, Trump signed a “Buy American, Hire American” executive order that forces U.S. government agencies to purchase domestically made products and limits the immigration of foreign skilled workers.

This widespread fear of the global marketplace and the looming threat of tit-for-tat trade wars herald a return to late 19th-century geopolitics. Then, too, many of the leading economies of the day took shelter behind high tariff walls to halt the forces of globalization. Following the onset of an economic depression in the early 1870s, one industrializing country after another turned against trade liberalization. Trade wars, colonialism and closed markets became the name of the geopolitical game.

In stark contrast to today, back then only Britain stuck to free trade with “all the world.” Yet even free-trade bastion Britain was not without its domestic economic nationalist enemies.

In response to the late 19th-century turn to protectionism among Britain’s competitors, formidable right-wing British organizations like the Fair Trade League and the Tariff Reform League emerged to champion retaliatory tariffs and an imperial trade preference system. And the political leader of the turn-of-the-century British imperial protectionist movement was none other than Joseph Chamberlain, Theresa May’s “political hero.”

“Fortress France” turned away from free trade in 1892, the culmination of a decade-long “protectionist backlash” to the ongoing economic depression. The protectionist measure exacerbated the Franco-Italian trade war, which Italy had started with its turn to protectionism in the mid-1880s. Trade between these countries fell considerably, pushing Italy ever closer to Austria-Hungary and Germany — the Triple Alliance — in the years before the First World War.

The United States, however, topped the list of protectionist states. The political and ideological power of protectionism in late 19th-century America — the Gilded Age — was palpable. The Republican Party, formed as the party of antislavery in the 1850s, fast remade itself as the party of protectionism following the Civil War.

Hoping to protect U.S. industries from the unpredictable gales of unfettered global market competition, the ultranationalist party tacked its sails to the “American System” of high tariffs and government subsidization of domestic industries.

More than a century before Trump’s “America first” policy, slogans like “America for Americans — No Free Trade” filled Republican Party convention halls.

For paranoid Gilded Age Republican protectionists, free trade became tantamount to conspiracy.

The GOP’s lead spokesman on the tariff at that time was a short, cigar-smoking politician from Ohio named William McKinley. “The Napoleon of Protection,” as he was dubbed, had well earned the moniker by the time he entered the White House in 1897.

Like the Trump administration today, McKinley viewed free trade with suspicion, although the target of McKinley’s free-trade conspiracy theories was the industrial powerhouse of Britain instead of Trump’s China. McKinley, throughout his long Republican career, charged his pro-free-trade political opponents with being part of a vast British conspiracy that sought to sap America’s high tariff walls and undermine infant American industries. The conspiracy, he argued, included “free trade leaders in the United States and the statesmen and ruling classes of Great Britain”; American free traders were pawns, agents of “the manufacturers and the traders of England, who want the American market.”

Countering Republican conspiracy theorists, late 19th-century U.S. free traders argued that trade liberalization fostered international stability and peace, and that, by contrast, the era’s global uptick in imperialism and war only illustrated how protectionism fomented geopolitical rivalry and conflict.

Trump, tapping into long-standing Republican fears of free trade, is knowingly returning the GOP to its paranoid protectionist roots — a move against globalization that is also building up populist momentum in Britain and France.

The protectionist resurgence among the leaders of post-1945 globalization — be it Brexit, patriotisme économique, or “America first” — holds dire consequences for the liberal economic order by pitting nations against one another and breeding suspicion, distrust and conspiratorial thinking. The ultranationalism, militarism and tariff wars of the late 19th century spilled over into the 20th century, and ended in world war — suggesting a return to the protectionism of old could damage far more than national economies.

#### Antitrust key—Reverse-causal

--We control uniqueness: *protectionism* is inevitable, but strong trade barriers + the political lawmaking constituencies around them make doing things like tariffs broadly infeasible, so it’s try or die for global trade to prevent antitrust law becoming inflected with a protectionist and arbitrary bent that gets modeled!

Murray 19 – Chief Growth Officer, CheckAlt; Judicial Law Clerk, US Bankruptcy Courts

Allison Murray, JD, Loyola Law School, Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?, 42 Loy. L.A. Int'l & Comp. L. Rev. 117 (2019), Available at: <https://digitalcommons.lmu.edu/ilr/vol42/iss1/3>

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents.1 They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The “our country first, world trade after” mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized.2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States (“U.S.”), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally.4 To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes.5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions that could counteract that progress.6 Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

This paper explores how the near-term enforcement of antitrust and competition laws may be either the last hope for preserving aims toward a free global economy or the final nail in free trade’s coffin. We will begin by examining the background of antitrust and competition laws, explaining the goals and economic theories at the heart of the laws, including the myriad of criticisms. Next, we will take a general view of the prevalence of competition laws in the world market, revealing the differences in underlying theory and enforcement by the top three players on the international trade stage. This paper will finish with the subject most at the center of the recent rise of protectionist rhetoric: the perception of unfair enforcement of antitrust laws among the United States, the European Union, and China.

### 4

Next is the comity CP

#### CP: The United States Federal Government should adopt a rebuttable presumption in favor of deference to foreign governments’ interpretation of their own laws.

#### CP does the opposite of the plan by reaffirming a presumption against extraterritoriality – resolves certainty internal links AND avoids sovereignty and judicial meddling DAs – also deals with any uniqueness presses

Buys ’21 – Professor of Law and Director of International Law Programs at Southern Illinois University School of Law.

Cindy G. Buys, NOT SO RESPECTFUL CONSIDERATION: THE U.S. SUPREME COURT’S DEFERENCE OR LACK THEREOF TO FOREIGN GOVERNMENT STATEMENTS OF LAW, 10 PENN. ST. J.L. & INT'L AFF. 50 (). Available at: <https://elibrary.law.psu.edu/jlia/vol10/iss1/5>

The U.S. Supreme Court’s recent decision in Animal Science illustrates the resulting uncertainty. While it mentions both Rule 44.1 and international comity, the Supreme Court’s holding stated that courts should provide “respectful consideration” to the views of a foreign government as to its own law.126 However, the Supreme Court did not define “respectful consideration” and did not explain whether use of “respectful consideration” may differ depending on whether it is reviewing a decision by an international court or tribunal, a foreign court, or a statement by a foreign government official. Instead, the Supreme Court set forth a five-factor case-by-case test for when it may be appropriate to defer (or not) to a foreign government’s interpretation of its own law.127 While this standard certainly keeps lawyers in business by giving them more to debate, it does little to clarify the law or to provide guidance to future courts and litigants.

In addition, failure to give appropriate weight to statements and decisions by foreign governments and courts on foreign law is likely to lead to negative foreign policy consequences. Since Animal Science, most lower courts applying this new test have not deferred to foreign governments’ interpretations of their own laws, thereby risking harm to friendly relations between sovereign States that doctrines such as Foreign Sovereign Immunity and the Act of State doctrine were designed to prevent.128 For example, in Von Saher v. Norton Simon Museum of Art at Pasadena, the Ninth Circuit Court of Appeals dismissed a case brought by the heir to artwork stolen by the Nazis in the Second World War.129 Throughout the litigation that spanned many years, the various judges discussed the foreign policy implications raised by the California statute on which plaintiff based her claim. Ultimately, the Ninth Circuit dismissed the complaint due to the Act of State doctrine.130 In reaching this holding, the court stated that to allow the case to proceed would require U.S. courts to “re-litigat[e] long resolved matters entangled with foreign affairs” and “second guess” settled restitution decisions made by the Dutch government and its courts pertaining to such artwork.131 The court declined to do so in part to avoid foreign policy complications. A U.S. court’s refusal to accept an interpretation of foreign law by a foreign government likewise risks offending the foreign nation and interfering with U.S. foreign policy.

There are at least two different approaches that U.S. courts might adopt to bring further clarity to this area of law and reduce the possibility of foreign relations conflicts. First, U.S. courts could continue to use the concept of “respectful consideration,” but could start with a presumption in favor of acceptance of the foreign government’s view of its own law.132 This presumption could be rebutted by evidence of the factors past case law suggests are most important, especially situations where different foreign government officials have offered different interpretations of foreign law and one or more of those positions were adopted for purposes of litigation, as occurred in Animal Science. 133

Starting with this presumption recognizes that the foreign government is most familiar and knowledgeable about its own law. It also diminishes the possibility of conflict with the foreign nation through a perceived lack of respect for its sovereignty. Presumptions based on respect for foreign sovereigns are common in international law. For example, the Foreign Sovereign Immunity Act is based on the presumption that foreign sovereigns may not be sued in U.S. courts unless a statutory exception applies. 134 Similarly, there is a presumption against extraterritorial application of U.S. law abroad.135 Adopting a presumption in favor of accepting a foreign government’s view of its own law also makes it more likely that a foreign court will accept a U.S. government interpretation of U.S. law when such a matter comes before the foreign court.

Second, when applying the factors that have been used by courts in the past and those set forth by the U.S. Supreme Court in Animal Science, the courts could create a hierarchy of those factors to guide future cases. In Animal Science, the U.S. Supreme Court suggested the following five factors should be taken into account: “the statement’s clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement’s consistency with the foreign government’s past positions.”136 However, in reviewing past cases, two factors stand out as the most common factors cited when a court refuses to accept a foreign government’s interpretation of its own law: (1) when government officials have offered contrary interpretations of the law either in the current litigation or in the past,137 and (2) when the position taken by the foreign government is new and offered solely for the purposes of the pending litigation (i.e., the “context and purpose” of the statement.)138 Past court decisions have not discussed the transparency of the foreign legal system,139 nor have they discussed the clarity or thoroughness of the statement. Accordingly, these factors from Animal Science could be removed or at least afforded lesser weight.

U.S. courts have occasionally considered the degree of evidentiary support for the foreign government’s statement, such as in Petroleos de Venezuela where the court found that the government offered no evidence in support of its statement as to the proper meaning of Venezuelan law.140 With respect to the role and authority of the entity or official offering the statement, the courts have noted whether the person offering the statement is an attorney general or other prosecutor,141 another executive agency official,142 or a legislator,143 but have not explained why one might be more or less persuasive or authoritative than another. Determining whether to give more deference to a foreign executive branch official as opposed to a member of the legislative branch (or vice versa) opens the door to complicated and sensitive issues regarding the respective weight of the executive and legislative branches of the foreign government and the role of the particular person in that branch. Thus, this factor may be difficult, if not impossible, to apply and should carry less weight. However, as noted above, it makes sense to provide heightened deference to a foreign court’s interpretation of foreign law, at least in legal systems where the courts have the final say as to the meaning of the law.

If these suggestions were followed, a court’s approach to the proper weight to give a foreign government’s interpretation of its own law would proceed as follows. The U.S. court would start with the presumption that the foreign government’s statement is an accurate statement or interpretation of the foreign law at issue. A party contesting the validity or authority of the statement may rebut that presumption by providing evidence of inconsistent statements or interpretations of the same law by the foreign government in the past and showing that the current position is different and was adopted for purposes of litigation. Proof that the statement is an accurate interpretation of foreign law and whether the statement is an official and final position of the government as a whole or only the position of an individual executive officer or legislator would follow as the next most persuasive evidence. Other factors would carry little, if any, weight depending on context.

Applying this test in Animal Science may not have changed the ultimate conclusion of the Supreme Court in that case because the Chinese government submitted different interpretations of its law in the context of two cases, one at the WTO and one in U.S. courts. However, use of the proposed test would provide more guidance and certainty as to how to resolve such issues in the future.

Other commentators have also been critical of the Supreme Court’s use of the “respectful consideration” standard in Animal Science for many of the same reasons outlined here.144 At least one has suggested that the Supreme Court adopt a “more robust, multi-step framework” to better guide lower courts, suggesting a model similar to a multi-step analysis proposed by Justice Breyer in his dissent in Sanchez-Llamas v. Oregon, one of the VCCR cases.145 A major flaw in this proposal, however, is that it still requires lower courts to weigh multiple factors, with little guidance as to the weight or hierarchy to give to each of the factors. It also does not start with a presumption of deference, which is necessary to recognize the expertise of the international or foreign court or government and to avoid foreign policy tensions.146

Adopting a rebuttable presumption does not require U.S. courts to blindly accept statements of foreign law by government officials, but instead allows for flexibility in approaching the issue of what weight to give to a foreign government’s interpretation of its own law. However, this approach orders and limits the factors courts should take into account when making this determination. Doing so will likely bring additional clarity and certainty to this area of law by providing guidance to courts. It also reduces the potential for international friction by starting with a presumption that respects other States’ interpretation of their own law and increases the chance that U.S. statements of law will be respected abroad.

V. CONCLUSION

It is long past time for the U.S. Supreme Court to provide better guidance to lower courts and litigants on the issue of the amount of deference owed foreign governments’ statements as to the meaning of foreign law. The Supreme Court missed the opportunity to clarify this area of law in Animal Science, leading to continued uncertainty and inconsistency. The Court’s failure also creates further potential for unwarranted judicial interference in U.S. foreign relations and decreases the likelihood of foreign courts’ acceptance of U.S. statements of U.S. law. For these reasons, the U.S. Supreme Court should adopt a rebuttable presumption in favor of acceptance of the foreign government’s position as to the meaning of its own law. It also should limit and order the factors to be considered in rebutting this presumption.

### 5

Next is the ITC CP

The United States federal government should expand the scope of the Tariff Act to increase prohibitions on price fixing by the Chinese private sector to defer to executive branch interpretations of comity.

#### Section 337 is a superior alternative to core antitrust laws—super efficient, more predictable, avoids capture, and does overstep exec in foreign affairs

Kieff, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, ‘18

(Scott, “Private Antitrust at the U.S. International Trade Commission,” GWU Legal Studies Research Paper No. 2018-16)

Keeping the private antitrust injury doctrine out of ITC practice also leaves society with a relatively low cost additional option to have private litigants bring antitrust causes of action in a forum – the ITC – that offers a distinct blend of characteristics not available in the federal courts or before the other agencies.62 When a private litigant brings an action in district court under the Clayton Act, the defendant is exposed to at least four significant categories of risk: (1) damages; (2) treble damages, costs, and attorney fees; (3) injunctions to make structural modifications to their business; and (4) class actions. At the ITC, the defendant essentially can only be kept out of the U.S. economy. There is always the risk of over-deterrence and in-terrorem threats to extract settlements; and both the courts and the ITC have various rules at their disposal to police bad-faith litigation tactics. After district court litigation, the reviewing courts typically have a black-box jury verdict and the opinion of a single jurist. After litigation before the ITC, the reviewing courts typically have an extensive administrative record, with the opportunity for it to have been bolstered by the legal advocacy on behalf of the public interest from the ITC’s independent Office of Unfair Import Investigations (“OUII”) as well as potentially by the ITC’s extensive staff of economists, industry experts, and investigators, and that typically includes an administrative law judge’s opinion and the opinion of a plurality of Commissioners. District court proceedings in complex commercial cases like antitrust typically span 3-5 years. ITC 337 proceedings typically span 18 months. Further, while government antitrust enforcement by the Department of Justice Antitrust Division (DoJ) and the FTC inherently involve the political impact of the Executive Branch both as the direct supervisor of the Department and as the one designating the FTC Chair from the members who are typically in the President’s party (and typically backed up by a majority in the President’s party), the ITC is statutorily mandated to have (when all seats are filled) a politically balanced even number of Commissioners with a Chair required to rotate person and party every two years.63 This all adds up to a view of the ITC as one option for private litigants to bring antitrust actions that provides a unique blend of characteristics not available through the other venues.64 And in recognition that ITC action might clash with the foreign policy or domestic policy goals of the Administration,65 it should be kept in mind that ITC Section 337 remedial orders are subject to a statutory period of Presidential Review.66

#### Increasing the ITC’s role creates a model for accountable agency decision-making—agencies like DOJ and FTC are hyper-political and conflict with administration policy

Kieff, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, ‘16

(F. Scott, A Stylized Model of Agency Structure for Mitigating Executive Branch Overreach, in *Liberty’s Nemesis: The Unchecked Expansion of the State*, Dean Reuter & John Yoo Eds., Encounter Books)

With so many reasons to be grateful to the framers and our other intellectual forebears for implementing the many constructive approaches in U.S. institutions and organizations of government, we should not be surprised to fi­nd within our system an existing model of agency structure that goes a long way toward mitigating Executive Branch overreach and other excessive political influence.2 This chapter explores one such model that already exists but is often overlooked: a largely independent commission adjudicating commercial law, with a structure similar to that of the U.S. International Trade Commission (ITC).

Several crucial caveats are due at the outset. The fi­rst is that like most other agencies, the ITC is itself imperfect, a work in progress, and ever a candidate for improvement. The second is that the bulk of the credit for the salutary attributes of the agency model explored in this chapter lies with a few key internal structural elements of the ITC. The focus here is therefore on the rules of the game rather than any particular players or team. The third is that one size rarely fi­ts all and that mitigation of undue political influence from the Executive Branch or elsewhere is just one goal to be weighed against many when conducting an overall assessment of any agency structure.3 Nor is such undue political influence a problem uniquely facing any one administration over others or any one side of the political spectrum over the other. Finally, this chapter builds on and presumes familiarity with the broad and deep legal literature on the theory and practice of administrative agencies.4 With all of these caveats in mind, the agency model explored here in merely stylized or summary fashion is offered to positively engage in constructive dialogue with readers across the political spectrum about one type of tool for mitigating effects that are widely recognized to be pernicious.

Rising from the shadow of the Civil War’s violent political divisions, when the country was funded almost entirely by import tariffs rather than the modern income tax, the essential structure of the agency model explored here traces its intellectual roots to the famous Harvard economics professor Frank W. Taussig, who was appointed the ­first chair of the ITC’s predecessor (the Tariff Commission).5 After having long advocated for a very independent commission so as to de-politicize the import component of U.S. international trade, Taussig oversaw the creation of an agency structured to do only fact-fi­nding, analysis, adjudication, and technical advising, leaving policy-making to the political branches of government.

The ITC is somewhat like the many other independent administrative agencies, such as the Federal Trade Commission (FTC) and Securities and Exchange Commission (SEC). Each of these commissions is often seen as less subject to political pressure than typical Executive Branch agencies, such as the Department of Justice (DOJ) Antitrust Division and the Department of Commerce Patent and Trademark Office (PTO), because each is not within any Executive Branch department.6

But unlike almost all of the other independent commissions, there are several essential statutory features of the ITC’s structure that enable signifi­cantly greater independence, most of which date back to the statute creating the original Tariff Commission:7

• six members, appointed by the President and confi­rmed by the Senate, with no more than three from any one political party;8

• nine-year staggered terms for each member;9

• the position of chair rotates among the members every two years, switching party every time;10

• each member has the same vote on substantive matters;11

• any four members can overrule the chair on administrative matters;12 and

• analytical studies assigned by and technical assistance provided to both political branches, including both houses of Congress.13

As a result of these structural features, the commission staff generally work closely with all six of the commissioners’ offices, recognizing that every two years the chair will rotate and that many of the commissioners have a good chance of serving as chair. This incentivizes close coordination among the members and the commission staff, which has long helped the ITC operate by consensus on internal administrative matters as well as on substantive decisions. Such coordination and support from the staff help ensure the best factual record is assembled and enable resulting published work products, including those for the majority as well as minority dissents and concurrences, to be written with moderation, careful explanation, and citation to the law and record. This, in turn, strengthens external con­fidence in the agency’s expertise and independence among reviewing courts and the elected branches of government, including both houses of Congress, across the political spectrum.

#### DOJ and FTC squabbles render them ineffective and power grabs undermine national security policy—risks war without effective model of executive review

John O. McGinnis, George C. Dix Professor, Northwestern University, and Linda Sun, Associate, Wilmer Pickering Hale & Dorr LLP, 2021, Unifying Antitrust Enforcement for the Digital Age, 78 Wash. & Lee L. Rev. 305

For over a century, the U.S. has maintained a system of dual antitrust enforcement. Antitrust laws are executed by two federal agencies: the Federal Trade Commission (FTC) and the Department of Justice (DOJ) through its Antitrust Division.1 Throughout their histories, the agencies have struggled to navigate their overlapping jurisdiction, often butting heads and creating redundancies.2 With the digital revolution, existing cracks in the system have widened to the point of rendering the current system irrelevant and ineffective. Dual enforcement is a waste of government resources that duplicates efforts, fails to provide the technology industry with reasonable certainty for business and investment decisions, introduces barriers to a cohesive foreign policy and defense strategy, and hinders the development of privacy regulation and enforcement.

Accelerated technological change exacerbates three main problems with the dual antitrust agency system. First, while dual enforcement has always created uncertainty and thus harmed business planning and economic growth, developments in computer technology have made these problems more acute.3 In recent decades, the technology industry has experienced the rise of a handful of dominant companies, such as Facebook, Google, Amazon, and Apple, all central to the economic vitality of the nation.4 Contemporaneously, debate has erupted over how antitrust law should be adapted to regulate these companies, which have introduced new platforms, markets, and products that were not anticipated by traditional tests.5 Advocates for cracking down on tech giants like Apple and Google argue that the companies wield outsized market power and harm competition.6 On the other side, critics of increased competition regulation for the technology sector note that technology advances so quickly that seemingly-entrenched monopolists are in fact easily replaced by competition.7 At such a pivotal moment, the FTC and DOJ have failed to work together effectively. Instead, inter-agency fighting and a divided framework have created uncertainty for the regulation of the economically vital technology industry.8

Second, the growing power and ever widening scope of computational technology has entangled antitrust policy with international politics and national security.9 Electronic technology has increased the avenues of attack and transformed traditional weapons of war.10 Innovations in hardware and software have introduced novel methods of espionage and cyberwarfare such as computational propaganda, trolling, and sophisticated hacking.11 This technological acceleration has led to an international battle for technological dominance that has been dubbed a “technology cold war.”12 China and Russia in particular have dedicated significant resources towards hostile social manipulation or information/influence warfare.13 Ceding control over communications technologies to foreign powers may leave the U.S. vulnerable to surveillance and infrastructure takedowns.14 Hacking groups have targeted U.S. defense contractors and telecommunications companies.15 As both the Obama and Trump administrations recognized,16 antitrust enforcement can impede domestic technological advancement by giving foreign companies—collaborating with foreign governments—a competitive advantage. Because of the increased importance of antitrust to national security, enforcement should be left to the DOJ alone. Its leaders serve at the pleasure of the president, whose office has greater perspective and tools available in protecting the nation and navigating international relationships.

### 6

Next is the states CP

#### Text: The fifty states and all relevant United States territories should increase prohibitions on price fixing by the Chinese private sector by expanding the scope of their antitrust laws to defer to executive branch interpretations of comity.

#### States have the right to enforce federal antitrust law and enact and enforce their own antitrust laws---those state-level laws are not inherently Congressionally preempted.

HLR 20 – Harvard Law Review

“Note: Antitrust Federalism, Preemption, and Judge-Made Law,” Harvard Law Review, Vol. 133, June 2020, LexisNexis

I. THE ANTITRUST FEDERALISM LANDSCAPE

Antitrust federalism, meaning the space carved out for the states in the more generally federal antitrust arena, can be thought of as made up of two "swords" -- the first the states' ability to bring suit under federal antitrust law and the second their ability to enact and enforce their own state antitrust laws -- and one "shield" -- immunity from federal antitrust law for state actions. The swords allow states to attack antitrust offenders, while the shield allows states to defend against federal antitrust action.

All three elements of antitrust federalism find their roots in congressional action or the courts' interpretation of congressional inaction. The power to enforce federal antitrust law as parens patriae for full treble damages -- the first sword -- was granted to the states by Congress in Hart-Scott-Rodino. On the judicial front, the Supreme Court acknowledged state immunity from federal antitrust actions -- the shield -- in Parker v. Brown, noting that the Sherman Act did not explicitly mention its application to state action. Finally, when the Court confirmed that states' ability to make their own antitrust laws -- the second sword and the one discussed in this Note -- was not preempted in California v. ARC America Corp., it considered the same Sherman Act silence.

### 7

Next is ptx

#### Negotiated China competitiveness bill with massive semiconductor investment will pass, but it’s a delicate balancing act to maintain bipartisan support – swift action and being perceived as tough on China is key to the coalition

Meyer 3/23/2022 – national political reporter for The Washington Post and a co-author of the Early 202 newsletter

Theoderic, Jacqueline Alemany is the author of The Early 202, “Time is running out for a deal on the China competitiveness bill” Washington Post, <https://www.washingtonpost.com/politics/2022/03/23/time-is-running-out-deal-china-competitiveness-bill/>

Congress has tied itself into a Gordian knot over one of President Biden’s top legislative priorities: a bill to bolster American semiconductor manufacturing and help the country compete economically with China.

It's Commerce Secretary Gina Raimondo’s job to help cut it — but time is running out.

Raimondo is working to help lawmakers reach an agreement, which would give Democrats another achievement in the midterms. She told reporters in January that Congress “can’t wait until April, May” to pass the bill — a timeline that is now impossible to meet.

In an interview, Raimondo told The Early she thought the bill could be done by Memorial Day — maybe sooner.

“There’s no deadline, per se,” Raimondo said. “We just have stay focused on it and do the work — sit at the table and do the work to reconcile the differences.”

“I'm going to work on this and talk to members of Congress every single day until it does pass,” she added.

While the bill is a top priority for the White House, Senate Majority Leader Chuck Schumer (D-N.Y.) and House Speaker Nancy Pelosi (D-Calif.) to help improve Democrats' standing ahead of the midterms, the negotiations also serve as a political opportunity for Raimondo. The former Rhode Island governor could burnish her reputation as a leading moderate in the party by showing she can help negotiate a deal with Republicans at a time when bitter partisanship reigns.

“One of the most impressive things about Secretary Raimondo is that she is as comfortable, willing and happy to call a progressive member from California as a Republican senator from a deep-red state,” said Scott Mulhauser, who worked as a senior adviser to Raimondo for several months last year before returning to his consulting firm.

Some Republicans have praised Raimondo's work trying to hash out a compromise.

“Amongst many of the Senate Republican staff that I’ve spoken with on this matter, she has been very helpful,” said Ari Zimmerman, a Republican lobbyist at Brownstein Hyatt Farber Schreck who's lobbied on the bill. “She understands the problem in and out.”

But it's still unclear whether a deal will actually come together.

A tough deal

Congress has been laboring to pass the bill for most of Biden's presidency. The Senate cleared its version in June with 19 Republican voters; the House passed its own bill last month with the support of only a single Republican, Rep. Adam Kinzinger (Ill.).

The challenge facing Raimondo and Democratic congressional leaders now is how to strike a deal that keeps at least 10 Senate Republicans on board and still wins the support of wary House Democrats. That task grows harder each day as the midterms approach and Republicans lose any incentive to make compromises that would allow for passage of a bill Democrats could tout ahead of November's elections.

Raimondo insists there is a deal to be had and argued that there’s already bipartisan agreement on “the bones of the bill” — a $52 billion program to combat a global shortage of computer chips by subsidizing manufacturing in the United States.

But lawmakers are at odds over provisions that fall “outside of the core innovation package,” as she put it, such as climate change, financial services and human trafficking. The biggest gap between the two bills is on trade, according to Raimondo as well as several lobbyists tracking the legislation.

“That’s really where the two sides are the farthest apart,” said Brian Pomper, a Democratic lobbyist at Akin Gump Strauss Hauer & Feld who has lobbied on the bill. “And, I mean, they are universes apart.”

Republicans and Democrats are preparing to hash out the differences between the two bills in a conference committee. If negotiations falter, though, Pomper said lawmakers might push to scrap the trade provisions and pass a more limited bill.

“If you really get jammed up on the trade title, I think you’re going to see some members starting to say, ‘Well, why don’t we just ditch the trade title? And let’s do the rest of this bill, which is going to be a lot easier to figure out,” he said.

Not giving up without a fight

But stripping out the trade provisions could alienate Senate Republicans whose votes Democrats need to overcome a filibuster.

The trade language in the Senate bill “was the linchpin that was needed” to pass it last year, said Clete Willems, a former trade negotiator in Donald Trump’s White House who is now a lobbyist tracking the bill. “So I think it’s going to be ultimately included.”

House Democrats who spent months pushing to pass their version of the bill, meanwhile, aren't likely to give up without a fight.

“The things that we're proposing are good for American manufacturing,” said Rep. Earl Blumenauer (D-Ore.), who backed the trade provisions in the House bill. “They're good for the American consumer. Many of my Republican friends are violently opposed to giving special concessions to China. I wouldn't think this would be a heavy lift.”

The China bill, Blumenauer added, is likely the only chance to pass these trade measures before the midterms.

“This is one of the few trains leaving the station,” he said.

#### Plan is perceived as soft on China – sparks backlash from Republicans and moderate Dems

Mills Rodrigo 2/23/2022 – staff writer at the Hill, former Georgetown debater

KARL EVERS-HILLSTROM AND CHRIS MILLS RODRIGO, “Big Tech allies point to China, Russia threat in push to squash antitrust bill” The Hill, 2/23/2022, <https://thehill.com/policy/technology/595414-big-tech-allies-point-to-china-russia-threat-in-push-to-squash-antitrust/>

Big Tech’s numerous allies in Washington are repeating a similar message as they lobby lawmakers to abandon antitrust legislation: The U.S. needs tech giants at full strength to counter China, Russia and other threats to national security.

The last-ditch effort comes as the Senate gears up to consider the American Innovation and Choice Online Act, a bipartisan bill that would prevent dominant digital platforms from favoring their own services and empower antitrust enforcers to scrutinize the largest tech firms.

Despite making it out of the Senate Judiciary Committee by a bipartisan 16-6 vote, the legislation targeting America’s largest tech companies faces an uphill battle.

Many lawmakers who gave the legislation a thumbs-up on the panel cautioned that they would be unlikely to vote “yes” on the floor unless major changes are made.

A handful of those lawmakers specifically expressed concern that stopping tech giants from self-preferencing could unintentionally advantage America’s adversaries.

Russian aggression in Ukraine has only reinforced those industry talking points among lawmakers who are fearful of impending cyber conflicts with Russia and China, according to tech allies.

“When you’re talking about a geopolitical conflict, all of a sudden the terms of the debate change, both for the Democrats and the Republicans. There’s an ongoing shift as people grapple with the magnitude of the global tensions,” said Michael Mandel, chief economist at the Amazon- and Meta-backed Progressive Policy Institute, which opposes the antitrust bill. “You don’t want to be in a position of disassembling your strongest tech companies at the same time you’re fighting a tech war.”

The argument that antitrust enforcement weakens national security is by no means new. AT&T deployed a similar defense of its power in the 1980s.

But tech giants’ hawkish stance on China is a more recent development. Industry lobbyists and tech-backed advocacy groups on both the right and left have inundated lawmakers with calls, emails, op-eds and political ads warning that the antitrust proposal will give Beijing the upper hand in the technological arms race.

The shift from portraying themselves as national champions to a hedge against the Chinese Communist Party has come despite many major tech companies’ big presence in China.

Apple has shifted much of its production to China over the last decade and has established itself as a domestic seller. Meta’s Mark Zuckerberg courted China for years before decrying the Chinese internet model. Google was working to build a censored search engine that could operate in China as recently as 2017. Amazon was chastised by lawmakers last year over a contract with a Chinese company that claimed it could track Uyghurs in real time.

But their current argument began shortly after the House Judiciary Committee published its wide-ranging report on digital marketplace competition and posits that weakening American tech companies would cut into U.S. technology leadership.

The U.S. Chamber of Commerce, which seats Meta and Microsoft executives on its board, argued in a report published last week that legislative proposals under consideration would require affected companies to compete against Chinese government-backed companies such as Huawei and TikTok’s parent company ByteDance “with one hand tied behind their backs.”

The Computer and Communications Industry Association, which represents the big four tech companies, argues that the bill would require U.S. tech giants to share data with foreign competitors and weaken their research and development capabilities while leaving Chinese tech firms untouched.

“Given the current geopolitical environment, now more than ever policymakers need to be aware of the risks of undermining the U.S. competitive advantage in technology products and services,” said Matt Schruers, the tech group’s president.

Most tech giants ramped up their lobbying presence amid the antitrust fight. Amazon and Meta each shelled out more than $20 million on federal lobbying last year, dwarfing the spending of all other companies, according to research group OpenSecrets.

But those figures only scratch the surface of tech giants’ influence.

Meta has disclosed funding more than 100 Washington-centric organizations, including a host of liberal and conservative lobbying groups and influential think tanks such as the American Enterprise Institute and the Brookings Institution.

Amazon backs dozens of groups ranging from nonpartisan groups like the National Security Institute to the liberal Chamber of Progress and the right-wing Taxpayers Protection Alliance, which is running ads warning that the tech bill will “help China win in the end.”

While Apple and Google are less active in backing Washington groups, their CEOs personally met with senators in recent months to lobby against antitrust bills.

“With direct financial ties to the Chinese Communist Party, many Chinese companies present threats to America’s national security,” read a recent ad from the Meta-backed American Edge Project nonprofit. “But some Washington politicians are pushing for new laws that will empower Chinese companies at the expense of America’s tech innovators.”

In September, a dozen former high-ranking national security officials, including former Defense Secretary Leon Panetta and former Director of National Intelligence Dan Coats, penned a letter to lawmakers warning that antitrust proposals would empower China to become the global leader in technological innovation.

The ex-officials echoed industry groups, calling on lawmakers to study the national security impacts of regulating Big Tech before moving forward with the bill. All of those officials sported ties to tech giants in one way or another, Politico reported.

According to two K Street lobbyists with big tech clients, the industry is carrying out a tried-and-true strategy: stalling the bill in an attempt to wait out the clock until the midterm elections, which could usher in a divided and likely dysfunctional government.

Lobbyists noted that the nomination process for Supreme Court Justice Stephen Breyer’s replacement will sap up a chunk of the Senate’s remaining schedule. Resolving the various issues that lawmakers have with the bill will also take time.

Sens. Thom Tillis (R-N.C.) and Ted Cruz (R-Texas) both floated several amendments, although the Texas lawmaker ultimately voted to advance the bill through the committee.

Some Democrats also appeared less than convinced despite reporting the bill favorably. Both members of California’s Senate delegation, Dianne Feinstein (D) and Alex Padilla (D), raised concerns about targeting companies based in their state.

Sen. Chris Coons (D-Del.), a top Biden ally, expressed concerns last month about “potentially unintended consequences on the competitiveness globally of our digital democracy principles on the world stage.”

Proponents of the legislation have pushed back on the national security argument in reports and letters to congressional leadership, countering that monopolies are actually hamstringing innovation more than breaking them up would.

“You have five companies, Google, Facebook, Amazon, Apple and Microsoft, sitting on trillions of dollars of assets and massive amounts of talent,” said Matt Stoller, director of research at the American Economic Liberties Project, contrasting that with the early software industry.

“We are running this monopoly-heavy, top-heavy industrial strategy based on consolidating wealth and power, which doesn’t make any sense because now you only have five companies doing any innovation instead of hundreds or thousands.”

#### Competitiveness bills key to cybersecurity

Montgomery ’22 – Retired Rear Admiral, senior adviser to the Cyberspace Solarium Commission senior fellow at the Foundation for Defense of Democracies, senior director of FDD’s Center on Cyber and Technology Innovation

Evan, “Reconciliation of China bills in Congress could produce big cybersecurity wins” The Hill, March 14, 2022. <https://thehill.com/opinion/cybersecurity/598066-reconciliation-of-china-bills-in-congress-could-produce-big/>

Congress deserves mixed grades for its recent efforts to strengthen the nation’s cybersecurity and improve the resilience of its critical infrastructure. If Republicans and Democrats can find a path forward to integrate the Senate’s U.S. Innovation and Competition Act (USICA) with the House’s America COMPETES Act, Congress could make substantial, long-term investments in America’s technology future.

The two bills would build upon important but insufficient cybersecurity provisions in recent legislation. The Infrastructure Investment and Jobs Act, which President Biden signed into law in November, contained $1 billion to enhance the cybersecurity of state and local governments and established a Response and Recovery Fund for major cyber incidents. Yet that law’s support to specific critical infrastructure sectors was inconsistent and missed some glaring weaknesses, such as those of the water sector.

Similarly, the National Defense Authorization Act (NDAA) for Fiscal Year 2022, which the president signed into law in December, had 40 cybersecurity-specific authorizations. But during conference, Congress dropped some of the most significant provisions, such as mandatory incident reporting.

Now, lawmakers get another bite at the cybersecurity apple as Congress sets up its conference committee to adjudicate USICA (which passed on a bipartisan basis last June) and the COMPETES Act (which passed last week on a nearly partly-line vote).

House and Senate lawmakers have a $52 billion starting point: Both bills contain $52 billion in funding for the CHIPS Act, which establishes a grant program to support domestic semiconductor production. Congress passed the CHIPS Act on a bipartisan basis as part of the FY2021 NDAA.

CHIPS funding is the most headline grabbing (and expensive) single issue in the two bills, but it is by no means the only important cybersecurity and critical infrastructure provision. The USICA and COMPETES bills have similar cybersecurity provisions in three arenas that House and Senate members can easily reconcile and embrace.

First, both bills seek to rectify dramatic shortages in the federal cyber workforce. They invest in STEM education and create rotational cybersecurity positions giving federal employees the flexibility to gain experience and skills. The House bill also expands “CyberCorps: Scholarship for Service,” a critical, ROTC-like program for the federal cybersecurity workforce, from its current $60 million annual budget to $90 million by fiscal year 2026. This will increase both the number of students (future federal employees) and the number of universities and community colleges involved. Such a provision would likely receive bipartisan support in the Senate.

Second, both bills invest in U.S. leadership in international technical standards-setting bodies like the International Telecommunication Union. This arena has become a crucial battlefront in the contest between Western values of a free and open internet and the authoritarian push for ever-greater state control and censorship. Beijing has aggressively sought to gain leadership positions and promote technically flawed proposals in these forums in order to distort and weaponize the bodies against the interests of America and its partners. Both bills thus strive to improve America’s response to Chinese maneuvering.

Third, both bills increase funding for the State Department’s Global Engagement Center, an important agency for battling foreign disinformation campaigns.

Next, the conference members should work to reach agreement in several other areas tackled only in one chamber’s bill.

The House bill, importantly, requires the executive branch to develop a strategy for “information and communication technology critical to the economic competitiveness of the United States.” Such a strategy would ensure that America is not dependent on untrusted vendors beholden to foreign powers or who otherwise have lax security.

Three other provisions of note: the House bill 1) designates “Critical Technology Security Centers to evaluate and test the security of technologies essential to national critical functions,” 2) creates international capacity-building programs to improve the cybersecurity of U.S. allies and partners, and 3) supports the software security and digital privacy work of the National Institute of Standards and Technology.

Meanwhile, the most significant provision unique to the Senate bill creates a National Risk Management Cycle to “identify, assess, and prioritize cyber and physical risks to critical infrastructure.” Understanding these risks is the foundational step to properly resourcing U.S. government efforts to defend against, mitigate, and deter these threats. In its comprehensive March 2020 report on U.S. cyber strategy, the Cyberspace Solarium Commission noted that the U.S. government “lacks a rigorous, codified, and routinely exercised process” for identifying risk. Even where the government has identified critical infrastructure risks, a lack of sustained funding has limited the mitigation and management of the risks over time. A National Risk Management Cycle would begin to rectify this problem.

The Senate version also includes provisions to create regional technology hubs built on partnerships among industry, academia, and workforce groups to support domestic high-tech job growth in areas of the country that have not been historic innovation centers.

A successful bipartisan conference should result in numerous meaningful cybersecurity provisions enacted into law. While not as flashy as CHIPS, they collectively lead to more effective cybersecurity and more resilient critical infrastructure.

#### Cyberattacks go nuclear

Sagan and Weiner ’21 – Stanford Professors [Scott D.; Caroline S.G. Monroe professor of political science and senior fellow at the Center for International Security and the Freeman Spogli Institute at Stanford University; Allen S.; senior lecturer in law and director of the program in international and comparative law at Stanford Law School; 7-9-2021; "The U.S. says it can answer cyberattacks with nuclear weapons. That’s lunacy."; The Washington Post; https://www.washingtonpost.com/outlook/2021/07/09/cyberattack-ransomware-nuclear-war/; accessed 8-15-2021]

Over the July 4 weekend, the Russian-based cybercriminal organization REvil claimed credit for hacking into as many as 1,500 companies in what has been called the largest ransomware attack to date. In May, another cybercriminal group, DarkSide, also apparently located mainly in Russia, shut down most of the operations of Colonial Pipeline, which supplies nearly half the diesel, gasoline and other fuels used on the East Coast — setting off a round of panic buying that ended only when the company handed over a ransom. These incidents were bad enough. But imagine a much worse cyberattack, one that not only disabled pipelines but turned off the power at hundreds of U.S. hospitals, wreaked havoc on air-traffic-control systems and shut down the electrical grid in major cities in the dead of winter. The grisly cost might be counted not just in lost dollars but in the deaths of many thousands of people.

Under current U.S. nuclear doctrine, developed during the Trump administration, the president would be given the military option to launch nuclear weapons at Russia, China or North Korea if that country was determined to be behind such an attack.

That’s because in 2018, the Trump administration expanded the role of nuclear weapons by declaring for the first time that the United States would consider nuclear retaliation in the case of “significant non-nuclear strategic attacks,” including “attacks on the U.S., allied, or partner civilian population or infrastructure.” The same principle could also be used to justify a nuclear response to a devastating biological weapons strike.

But our analysis suggests that using nuclear weapons in response to biological or cyberattacks would be illegal under international law in virtually all circumstances. Threatening an illegal nuclear response weakens deterrence because the threat lacks inherent credibility. Perversely, this policy could also wind up committing a president to a nuclear attack if deterrence fails. While the American public would indeed be likely to want vengeance after a destructive enemy assault, the law of armed conflict requires that some military options be taken off the table. Nuclear retaliation for “significant non-nuclear strategic attacks” is one of them.

The Biden administration is now conducting its own review of the U.S. nuclear posture. The 2018 Trump change is an urgent candidate for reevaluation, but people have generally ignored it up to now. As officials work on this process, they have the chance to take full account of what could be called the “nuclear law revolution” — a growing recognition that international-law restrictions on warfare, and especially those that protect civilians, apply even to nuclear war.

### China Adv

#### Circumvention—courts interpret the plan in the narrowest possible way to favor dominant industry

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This view is so widely entrenched in the legal profession’s understanding of the antitrust laws—including, it must be admitted, this author’s—that it seems presumptuous to claim that the conventional wisdom is wrong, or at least significantly overstated. But it is. While the antitrust statutes may be lacking in some important particulars, they present a readily discernable meaning on many others. As Daniel Farber and Brett McDonnell have argued, “For the conscientious textualist, the statutory texts [of the antitrust laws] have considerably more specific meaning than the conventional wisdom would suggest.”5 And it is not simply the case that the meaning of the statutory texts could be rendered through ordinary methods of statutory interpretation but the courts have failed to see it. Rather, the courts frequently acknowledge that the statutory texts have a plain meaning, and then refuse to follow it.

But it gets worse. The courts have not merely abandoned statutory textualism or other modes of faithful interpretation out of a commitment to a dynamic common-law process. Rather, they have departed from text and original meaning in one consistent direction—toward reading down the antitrust statutes in favor of big business. As detailed in this Article, this unilateral process began almost immediately upon the promulgation of the Sherman Act and continues to this day. In brief: within their first decade of antitrust jurisprudence, the courts read an atextual rule of reason into section 1 of the Sherman Act to transform an absolute prohibition on agreements restraining trade into a flexible standard often invoked to bless large business combinations; after Congress passed two reform statutes in 1914, the courts incrementally read much of the textual distinctiveness out of the statutes to lessen their anticorporate bite; the courts have read the 1936 Robinson-Patman Act almost out of existence; and the Celler-Kefauver Amendments of 1950, faithfully followed in the years immediately after their promulgation, have been watered down to textually unrecognizable levels by judicial interpretation and agency practice. It is no exaggeration to say that not one of the principal substantive antitrust statutes has been consistently interpreted by the courts in a way faithful to its text or legislative intent, and that the arc of antitrust antitexualism has bent always in favor of capital.

#### Courts are institutionally incapable of solving the case – the plan results in a flood of private litigants with incredibly complex decisions, resulting in judicial backlog and international backlash

Wurmnest ‘5 - Research Fellow, Max Planck Institute for Foreign Private and Private International Law, Hamburg, Germany; Dr. iur., University of Hamburg School of Law; LL.M., UC Berkeley

Wolfgang Wurmnest, “Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law” , 28 HastingsInt'l & Comp.L. Rev. 205, <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1633&context=hastings_international_comparative_law_review>

B. Balancing Foreign Regulatory Policy?

Although the Supreme Court firmly established comity considerations to determine the reach of U.S. antitrust law in Empagran, it declined to delve into a classical interest analysis by balancing different connecting factors. The foreign plaintiffs 85 supported by the amici curiae law professors Michaels, Buxbaum, and Muir Watt 86 had argued for adopting a case-by-case solution, taking into consideration different factors, most notably whether the foreign country in which the plaintiff had suffered his injuries efficiently regulates cartels and whether the exercise of U.S. jurisdiction over the plaintiffs claim would cause a conflict with that country's regulatory efforts. In turn, the Supreme Court stated straightforwardly that the consideration of comity considerations on a case by-case basis is "too complex to prove workable." 87 Convinced that antitrust issues are complex by nature, the Court did not want to confer upon U.S. courts the burden of comparing solutions of foreign antitrust law with U.S. regulation, which would only lead to "lengthier proceedings, appeals and more proceedings - to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." 88 Observing that even in a simple price-fixing case such as Empagran, competing briefs reached different conclusions on whether the potential treble damages liability would strengthen (through increased deterrence) 89 or weaken (by impairing amnesty programs)9 " the enforcement of the widespread ban on price fixing, Justice Breyer did not see how a court could simply and expeditiously assess the impact of U.S. jurisdiction on foreign interests. 91

This finding merits approval. Assessing whether the foreign law effectively regulates cartel conduct would confer upon U.S. courts the task of determining whether a foreign sovereign has adequate antitrust laws and whether it enforces its laws efficiently.

It is hard to see how a court could fulfill such a mission, especially with regard to jurisdictions in transition states.92 Typically those countries have recently enacted antitrust statutes and designed enforcement authorities. Panama and Ukraine, where some of the plaintiffs in Empagran sustained their injuries, may serve as an illustrative example. Panama enacted its Competition Act in 1996. 93 It reads like a robust competition law: it not only prohibits horizontal price fixing conspiracies, 94 it also provides for a damage remedy entitling injured parties to seek treble damages,95 and allows enforcement authorities to impose harsh fines.96 Panama's Competition Authority (Commission de la Libre Competencia y Asuntos de Consumidor) lists some activities on its website, including some reports on cases in which it sanctioned anticompetitive conduct. 97

A similar picture is presented in the law of Ukraine, which enacted its Limitation of Monopolism and Prevention of Unfair Competition Act in 1992.98 This act has been frequently amended and, in 2001, became the Law of Ukraine on Protection of Economic Competition.99 It prohibits horizontal price-fixing agreements'00 and provides for a damagesremedy.'0 Furthermore, Ukraine has also established a Competition Authority which may impose fines on companies or individuals. 0 2 The Ukrainian Competition Authority has, at least in one case, fined a company for anticompetitive conduct in a monopolization case.10 Commentators note that, though competition policy in Ukraine is in its infancy, the "competition laws are firmly in place with 27 regional offices and a total staff of 700."' 04

It is difficult to see how a judge shall proceed when confronted with such a situation. The problems of assessing the "adequacy" and "efficiency" of foreign regulatory policy and practice respectively are manifold. First, setting a threshold for "adequacy" of foreign legal norms is already a thorny problem. It is hard to see how U.S. courts can rate foreign antitrust enforcement schemes which are, as pointed out above,' °5 often very distinct from U.S. law. Second, with regard to the "efficiency" of foreign enforcement practices the question arises whether U.S. courts should consider only the foreign "law in the books", or whether they have to investigate the "law in action" and determine whether there is a steady practice by foreign courts or competition authorities respectively to enforce their antitrust rules.

These troubles have led U.S. courts in forum non conveniens cases to refrain from engaging in a detailed analysis comparing U.S. and foreign law' 0 6 for good reasons: any rating of foreign legal systems inevitably leads to diplomatic friction. Even though developing countries have not yet raised objections against the extraterritorial application of U.S. antitrustlaw, it is likely that a state having enacted antirust laws would protest against U.S. court decisions openly labeling enforcement mechanisms of that state as "non-efficient." To avoid such clashes, U.S. courts have generally been very cautious to pronounce judgment on the "quality" of foreign sovereigns' policy choices. For example, in the Bhopal case' 0 7 concerning tort claims of victims from a disastrous gas leak at a chemical plant in Bhopal, India, Judge Keenan was very hesitant to evaluate whether Indian courts were able to manage such a complex mass tort case. He dismissed the action brought by Indian plaintiffs against the American tortfeasor, despite the fact that a litigation before Indian courts would be more burdensome, emphasizing that to retain litigation in this forum "would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules on a developing nation."',0 8 The underlying rationale of this prudent jurisprudence must also apply when assessing the international reach of U.S. antitrust law. Therefore, judges should not take into account the state of antitrust enforcement in foreign jurisdictions.

#### Courts lack institutional capacity to adjudicate extraterritoriality on a case-by-case basis – zeros any internal links that are based on actually winning cases OR deterring future conduct

Dodge ’19 - John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law, member of the State Department’s Advisory Committee on International Law and an Adviser to the American Law Institute’s Restatement (Third) of the Conflict of Laws, served as Counselor on International Law to the Legal Adviser at the U.S. Department of State from 2011 to 2012 and as Co-Reporter for the American Law Institute’s Restatement (Fourth) of Foreign Relations Law from 2012 to 2018

William Dodge, “The New Presumption Against Extraterritoriality” 133 Harvard Law Review 15822, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3429336>

Many scholars have criticized the new presumption. To the extent that these criticisms rest on fears about how the presumption might be applied to jurisdictional statutes and causes of action, the analysis above may allay some concerns.386 But criticisms of the new presumption go beyond questions of its scope. Gardner worries that “the presumption has run away from its stated purpose of effectuating congressional intent. Instead it is generating an ever-growing series of hoops through which Congress must jump if it wants its laws to extend beyond U.S. borders.”387 Buxbaum argues that the categorical nature of the new presumption “is simply incompatible with the effective operation of regulatory statutes in today’s economy, and fails to capture the ways in which domestic and foreign regulatory interests coincide.”388 And Colangelo derides RJR Nabisco’s two-step framework as “needlessly formalistic.”389

This section responds to such criticisms. First, I note that the new presumption against extraterritoriality is significantly more flexible than previous versions. This added flexibility increases the ability of courts to effectuate congressional intent by finding a clear indication of extraterritoriality or by fashioning an appropriate test based on a provision’s focus. Second, I argue that the remaining rigidity in the presumption reflects the institutional limits of courts in statutory interpretation. Courts lack the capacity of administrative agencies to produce finely detailed rules of geographic scope. To an even greater extent, courts lack the institutional capacity to decide on a case-by-case basis that federal law should not be applied. Courts must develop generally applicable tests, and they must do so more at the wholesale than at the retail level. Finally, I note that the formalization of the new presumption against extraterritoriality may promote consistency in statutory interpretation, particularly in the lower federal courts.

As noted above, the new presumption against extraterritoriality is significantly more flexible than previous versions at each step of the analysis.390 At RJR Nabisco step one, it is not necessary to find a clear statement that a statutory provision applies abroad, and a court may consider a provision’s “context” to determine if the presumption has been rebutted. At RJR Nabisco step two, even if the presumption has not been rebutted, the application of a provision will be considered domestic and permissible if whatever is the focus of the statute is found in the United States.

The new presumption’s flexibility in determining whether the presumption has been rebutted is a decided improvement over Aramco, which referred to Congress’s “need to make a clear statement that a statute applies overseas”391 and which was widely read to establish a clear statement rule.392 In a later case, the Supreme Court indicated that it would look at “all available evidence” to determine the geographic scope of a provision.393 But it was not until Morrison that the Court disavowed the presumption as a clear statement rule and instructed courts to consult the “context” of a provision to determine its geographic scope.394 RJR Nabisco reaffirms Morrison in this regard, noting that “an express statement of extraterritoriality is not essential.”395 RJR Nabisco also makes clear that the “structure” of a statute is part of its “context,” and more specifically that one statutory provision may take its geographic scope from another.396 To be sure, the presumption still requires a “clear indication” of extraterritoriality,397 but there are now a number of different ways to meet that requirement.

The new presumption also makes the extraterritoriality analysis more flexible by adding a second step at which applying a provision will be considered domestic if whatever is the “focus” of the provision is found in the United States.398 Traditionally, the presumption against extraterritoriality turned exclusively on where the conduct occurred,399 and the Supreme Court seems to have maintained that understanding until Morrison. 400 Morrison broke the link between the presumption and conduct by recognizing that the focus of congressional concern could be something other than conduct — in Morrison, the “transactions”;401 in RJR Nabisco, the “domestic injury.”402 Thoughtful observers have long noted that “territoriality” and “extraterritoriality” are not self-defining.403 If conduct in one state causes harm in another, each might be deemed to be acting territorially, or extraterritorially, if it applied its law.404 The new presumption against extraterritoriality recognizes the fluidity of these concepts and uses congressional concerns to give meaning to the words “domestic” and “extraterritorial.”

The new presumption’s flexibility gives courts greater leeway to effectuate congressional intent. If the text speaks directly to the geographic scope of a provision, courts will follow that direction.405 But courts may also look to other evidence of congressional intent, like the structure of a statute.406 If the intent inquiry does not reveal a clear indication of extraterritoriality, the new presumption lets courts fashion rules for the geographic scope of a provision based on its purpose.407 If whatever was the focus of congressional concern is found in the United States, the provision will be applied even though the case might be considered extraterritorial in other respects. Instead of “an evergrowing series of hoops through which Congress must jump,”408 the new presumption may be viewed as expanded series of pathways — based on text, intent, and purpose — that courts can use to determine the geographic scope of particular provisions.409 Some of those pathways were simply not available under previous versions of the presumption that looked exclusively to the location of the conduct410 or required a clear statement to rebut the presumption.411

Of course, the Supreme Court might use the new presumption’s flexibility to effectuate its own normative preferences rather than those of Congress. It is certainly possible to read the Court’s decisions since 1991 more cynically than this Article has done — as reflecting a bias against private plaintiffs,412 particularly those asserting civil rights413 or human rights,414 while preserving the power of public officials.415 The more flexible the presumption becomes, the easier it may be for the Court to indulge any biases that it may have. On the other hand, both steps of the new presumption refer expressly to congressional intent, the first by asking “whether the statute gives a clear, affirmative indication that it applies extraterritorially”416 and the second “by looking to the statute’s ‘focus.’”417 It will certainly be possible for courts to manipulate the new presumption, but the fact that they must speak in the language of congressional intent imposes at least some constraints.

Despite its added flexibility, the new presumption against extraterritoriality retains some rigidity, which has been another target of criticism. As Buxbaum has noted, it tends to seize upon “a particular connecting factor,” “regardless of whether other factors in a particular case might trigger a U.S. regulatory interest.”418 Such a categorical approach, she writes, “is simply incompatible with the effective operation of regulatory statutes in today’s economy, and fails to capture the ways in which domestic and foreign regulatory interests coincide and overlap with each other.”419 Buxbaum is right that regulatory interests may interact in a variety of ways and that the ideal scope for a particular regulatory provision may not be the same scope that a court applying the presumption against extraterritoriality would give it. Administrative agencies have been able to devise more fine-grained rules on geographic scope for provisions like the registration requirements of the Securities Act420 and Hart-Scott-Rodino’s premerger notice requirement.421

But courts are not administrative agencies. They do not have the same information about statutory purposes, regulatory options, and conflicts with foreign agencies.422 It would be impossible for a court to develop through statutory interpretation a regulatory scheme that resembles what the SEC has promulgated for the Securities Act or what the FTC has promulgated for Hart-Scott-Rodino. The courts’ lack of institutional capacity is a good reason for courts to defer to agency interpretations of geographic scope.423 But it is also a good reason for them not to attempt similar calibrations on their own.

If courts lack the institutional capacity to develop detailed regulations for the geographic scope of federal statutory provisions, they even more clearly lack the institutional capacity to decide whether to apply those provisions on a case-by-case basis. Section 403 of the Restatement (Third) of Foreign Relations Law advanced a multifactor balancing approach that asked courts to determine whether the application of U.S. law would be reasonable in each case.424 Some lower courts still follow this approach under the name of “international comity,” at least in antitrust cases.425 But it is far from clear that courts have either the capacity or the authority to engage in the case-by-case evaluation of interests that section 403 envisioned.426 Writing for the Court in Empagran, Justice Breyer observed that taking “account of comity considerations case by case” is “too complex to prove workable.”427 And Justice Scalia, who seemed to endorse section 403 in his Hartford dissent,428 later had a change of heart, writing in a subsequent case that “fine tuning” the extraterritorial reach of statutes “through the process of case-by-case adjudication is a recipe for endless litigation and confusion.”429

Besides the new presumption’s categorical approach to determining geographic scope, critics have complained that its two-step framework is “needlessly formalistic.”430 RJR Nabisco’s decision to express the new presumption in a formal framework seems intended to promote consistency in its application. Like the categorical approach, it responds to limits on the institutional capacity of courts — but in this instance, to limits on the institutional capacity of the Supreme Court to supervise the lower federal courts.

Decisions about interpretive methods generally do not carry stare decisis effect.431 The principal exception to this rule is Chevron’s doctrine of deference to administrative agencies.432 Although the Supreme Court is not always consistent in applying the Chevron framework,433 the Court seems to consider that framework precedential.434 Moreover, lower courts appear to treat Chevron’s methodological framework as binding.435

The new presumption against extraterritoriality constitutes a similar methodological framework — like Chevron, it even has two steps. Whether RJR Nabisco’s two-step framework is formally binding as precedent or not, it is likely to be as influential as Chevron. 436 Lower courts tend to follow the Supreme Court’s lead on questions of interpretation.437 The new presumption against extraterritoriality also shares characteristics with Chevron that are likely to make it influential, including its structure, clarity, and the Supreme Court’s expressed intention to apply the new presumption going forward.438 A formal methodological framework is not only more likely to be embraced voluntarily by lower courts, but it also exerts pressure on those courts in other ways. A formal framework structures how lawyers present their arguments to courts, increasing the chances that those courts will frame their own analyses in the same way.439 A formal framework also makes departures from that framework easier to spot and to correct.440

Binding lower courts to a formal interpretive framework for determining questions of geographic scope is likely to make the answers to those questions more predictable and uniform. But in reconfiguring the presumption against extraterritoriality to achieve this goal, the Supreme Court has clearly changed this canon of interpretation.

#### U.S. biotech lead now

Perieteanu & Brooks 21 - Ph.D. serves as the Director of Biopharmaceutical Services for SGS Toronto & Managing Editor

Alex Perieteanu & Kristin Brooks, “A New Era of Vaccine and Biologic Drug Development: As a result of COVID-19, unprecedented investments in vaccines, diagnostics, and treatments have had a tremendous impact on the Biotechnology industry,” 01-12-21, https://www.contractpharma.com/contents/view\_online-exclusives/2021-01-12/a-new-era-of-vaccine-and-biologic-drug-development/

The Biopharmaceutical industry has achieved remarkable success and innovation these past few years, namely the first CAR-T cell therapy and antibody drug conjugate (ADC) approvals. Significantly, the global pandemic has fueled vaccine innovation with the rapid acceleration of RNA based COVID vaccines.

Currently, nine ADCs have received market approval, and in July 2020, the U.S. FDA approved the third CAR-T cell therapy, Tecartus, a cell-based gene therapy for treatment of mantle cell lymphoma (MCL). Additionally, to date, Pfizer-BioNTech’s COVID-19 Vaccine and Moderna’s COVID-19 Vaccine have been approved by the FDA for emergency use.

Along with these advances, there has been a significant increase in outsourcing, particularly related to vaccine manufacture and fill finish, as well as drug research and development, analytical services, and manufacturing.

As the number of advanced therapy medicinal products (ATMPs) in development continue to grow, new production strategies are helping to address the inherent development and manufacturing challenges associated with these therapies.

Alex Perieteanu, Ph.D., Director of Biopharmaceutical Services at SGS Life Sciences discusses the future of vaccines and biologics, how the pandemic is impacting outsourcing and operations, and the challenges and advances in manufacturing cell therapies. –KB

Contract Pharma: With the current COVID climate what do you anticipate for the future of vaccines and biologics?

Alex Perieteanu: As an outcome of COVID-19, we’ve entered a new era of vaccine and biological drug development. The pandemic has demanded unprecedented investment into vaccines, diagnostics, and treatments. In a relatively short period of time, this has had a tremendous impact on the Biotechnology industry and the momentum is likely to continue. Looking at vaccines alone, we’ve seen a rapid acceleration in LNP-mRNA based approaches, a promising technology, but one that had yet to mature to commercialization. That is, until recently, two COVID-19 vaccines have recently received FDA emergency use authorization (EUA) to combat COVID-19.

CP: How has the pandemic impacted outsourcing and operations?

AP: Many organizations have had to carefully evaluate outsourcing strategies, internal capacities, priorities, and risks. It’s of little surprise that we’ve seen an increase in demand across the board. Whether it be for high priority activities related to Covid-19, supply chain diversification, or whether it is simply due to a needing to strategically outsource in order to manage internal capacities.

CP: What capabilities will be needed down the road?

AP: A very difficult question, as almost everything is in demand. With a tidal wave of COVID-19 related investigational new drug applications (INDs), the ability to support GMP level manufacturing as well as analytical testing, is and will be in high demand. Capabilities and experience in the nucleotide and vector-based delivery space (viral and non-viral) are going to be highly sought after in the near term and will continue until the market adjusts to an increased demand.

CP: Are there specific geographical markets that are key?

AP: This pandemic has had a global impact. All markets with established capabilities are likely to see rapid growth in the sector; however, with such high demand, regions or nations whom otherwise do not have significant local production capabilities may look to fund, or partially nationalize some basic levels of production in order to ensure long term supply.

CP: In what services areas are you seeing the most growth?

AP: Development, clinical trials, and manufacturing are all integral parts of bringing a molecule to market, and one cannot be done without the other. We’re seeing proportional growth in all areas.

CP: With the advances in cell and gene therapies, what type of growth do you anticipate? Is the industry positioned to accommodate future growth?

AP: Cell and gene therapies, or advanced therapy medicinal products (ATMPs) offer groundbreaking new opportunities for the treatment of disease or injury. While only a relatively small number of ATMPs have received regulatory approval, the number of active INDs in this category is expected to break 1,000 by the end of 2021.

With a promise to revolutionize medicine, ATMPs are very likely to become a staple in 21st century medicine. The industry has been adapting to the emergence of ATMPs with significant investments in product development, and manufacturing technology. Ultimately, vector delivery systems, complexity of manufacturing, an evolving regulatory landscape, and finally cost remain at the crux these emerging technologies.

### Chevron Adv

#### Multiple factors make EU regulations inevitable – January 6th, Trump and U.S. backlash

Collins 21 – Katie a UK-based news reporter and features writer. Officially, she is CNET's European correspondent, covering tech policy and Big Tech in the EU and UK.

Katie Collins, December 15 2021, “Friends reunited? How the US and EU spent the year reconnecting on tech,” CNET, https://www.cnet.com/tech/tech-industry/friends-reunited-how-the-us-and-eu-spent-the-year-reconnecting-on-tech/

These were important milestones but don't tell the full story. Even post-Trump, the US isn't enamored of Europe's tech rules, which have left Biden and his team on the back foot coming into discussions.

There has been a convergence in perspectives between the US and Europe, said Barker, "but it's convergence on terms that have actually been more set in Europe." Europe has repeatedly said it seeks "alignment" with the US on tech rules, but it's unlikely to budge much given how well established the bloc's policies are on tech.

Where Europe leads, will the US follow?

The last time a US administration attempted to work with allies on tech policy was during the Obama era, but it was a very different time for tech. The relationship between government and big tech was on good terms, and the tide had not yet turned to suggest that tech was anything other than a force for good. But during Trump's turn at the helm, the US relationship with Europe soured and the scourge of disinformation and fallout from the Cambridge Analytica scandal sparked suspicion and scrutiny of tech giants.

It's not as though time stood still in Europe during this era. In fact, this period saw major advances in Europe putting rules in place for regulating tech giants and handing out multibillion-dollar antitrust fines to big tech companies. In 2018, Europe's General Data Protection Regulation, a landmark overhaul of the bloc's privacy laws commonly known as [GDPR](https://www.cnet.com/tags/gdpr/), came into effect. It was part of a decade-long overhaul of digital rules.

"There is a real will to try to have some low-hanging-fruit, quick victories, and I think we'll see that hopefully earlier next year, just to demonstrate goodwill on both sides."

Bart Gordon, director, Trans-Atlantic Business Council

The EU moved even faster in 2021, publishing draft regulation for AI and making major progress on two pieces of [legislation](https://www.cnet.com/tags/legislation/), the Digital Markets Act (designed to tackle anti-competitive practices in tech) and the Digital Services Act (which focuses on moderation and illegal content). Both have been years in making.

"The sophistication of Europe's approach has been driven by a decade-plus of debate," Barker said. "Europe says, 'It's great that you guys are here, it's great that there's been convergence on so many areas of tech regulation... but we can't wait.'"

This urgency was further exacerbated by the Jan. 6 attack on the Capitol, a violent act that resulted in five deaths. It spurred countries around the world to more urgently tackle the virality of disinformation and other incendiary content, Barker added. It also cemented the idea among European leaders that regulation holding tech platforms to account was overdue.

The progress that Europe has made over the past four to five years is making it harder for the US to take a leadership role in discussions. And it hasn't helped that Biden's attempt to take the lead on digital policymaking was scuppered earlier this month when the US was forced to postpone the launch of the Alliance for the Future of the Internet following pushback from digital rights groups. The [proposal](https://www.protocol.com/policy/white-house-alliance-future-internet) was an attempt to rally a coalition of democracies around shared principles for an open web.

## 2NC

### CP ITC

#### The CP is a distinct legal regime not tied to the substantive limits or the inflated remedies of core antitrust laws

Kieff, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, ‘18

(Scott, “Private Antitrust at the U.S. International Trade Commission,” GWU Legal Studies Research Paper No. 2018-16)

One stark difference between the two statutory regimes24 relates to the explicit goals that the statutes state for themselves. The ITC’s statute explicitly states it is to remedy harm to the industry or harm to trade and commerce.25

[begin fn24]

On the one hand are these provisions of the ITC’s statute, under which complainants are seeking to proceed here before the Commission, and on the other hand are the provisions of the Clayton Act under which private parties may proceed in district court.

[end fn24]

By contrast, the Clayton Act explicitly states it is to remedy harm to only the plaintiff itself.26 This difference has particular significance for the issue now before the Commission because the Supreme Court’s source of the private antitrust injury doctrine, its decision in Brunswick, explicitly tied the doctrine to this particular goal of the Clayton Act. More particularly, much of the Court’s discussion in Brunswick focuses on the role the doctrine plays in mitigating the risk of unjustly enriching the plaintiff with damages awards beyond the amount of the particular antitrust harm that plaintiff actually suffered.27 The doctrine makes sense in the context of the Clayton Act proceedings in federal court because it keeps the cause of action focused on that statute’s stated goal of protecting a particular litigant only in so far as that party itself is a proxy for the harm to the market. By contrast, since the goal of the ITC’s statute is to remedy for harm to the industry or to trade and commerce – and such harms would have to be eventually shown in a case like ours before a remedy would be imposed – there is no need to closely tie such broader harms to the market to the precise amounts of harms suffered by the particular complainant.

#### But it is modeled based on the same concerns

Schaumberg, Levi Snotherly & Schaumberg, PLLC, ITC investigation specialist, Chambers Band 1 International Trade lawyer, ‘82

(Tom, “Section 337 of the Tariff Act of 1930 as an antitrust remedy,” 27 Antitrust Bull. 51)

Section 337 of the Tariff Act of 1930' has not met its potential as an antitrust law, nor as an antitrust remedy. While this might be due, in part, to the fact that the antitrust bar does not think of the International Trade Commission (formerly the Tariff Commission) as an antitrust enforcement agency, Congress itself has dealt with § 337 more as an international trade law than as an antitrust law.2 Section 337 should be given serious attention, however, as an antitrust law for a number of reasons. First of all, § 337, like § 5 of the Federal Trade Commission Act,3 is an all-encompassing antitrust law drawing on both the Sherman and Clayton Acts.' Secondly, unlike § 5 of the Federal Trade Commission Act, § 337 lends itself to private enforcement. Thirdly, unlike any other antitrust law, § 337 promises speed. Finally, because § 337 can operate both in personam and in rem, many jurisdictional problems are avoided and relief under that law can be extraordinarily effective.

#### First, litigation abuse—doubling up claims causes abusive litigation and ITC deference which undermines the net benefit

Rosenthal, Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice, and Sheldon, Staff Trial Attorney, Foreign Commerce Section, Antitrust Division, United States Department of Justice, ‘78

(Douglas E. and Thomas E., “Section 337: A View from Two Within the Department of Justice,” 8 GA. J. Int’l & Comp. L. 47)

While it is not clear precisely what lacunae section 337 will fill as an antitrust statute, the ideas of the ITC and its staff are eagerly awaited. But there are pitfalls here which should, if possible, be avoided. One such pitfall is the possibility for abuse inherent in the concurrent jurisdiction of several competing antitrust agencies. If section 337 complaints are filed not because the ITC is the agency best suited to hear a complaint and provide expeditious relief, but because such a suit serves to wear down the respondent in a coordinated litigation attack in several antitrust fora, all based on the same facts and allegations, the ITC can lend itself to the undermining of competition. This possibility is at least raised in the recent Color TV Sets and Stainless Steel Pipe" cases. In these cases section 337 complaints were but one in an interrelated series of actions by domestic firms charging foreign competitors with violations of the trade laws. Other statutes invoked were antidumping, countervailing duty, private antitrust damage actions, and the escape clause, as well as coordinated requests to the Congress and the Executive for statutory protection. Coordinated litigation programs may even raise issues of possible antitrust violations by complainants under the Trucking Unlimited doctrine.49 There it was held that the Sherman Act is violated by a conspiracy unreasonably to restrain trade through the intentional use of judicial and administrative adjudication procedures for that purpose. If a prior concurrent forum has been entered for antitrust relief, the ITC might consider deferring to that forum.

#### And it produces anticompetitive settlement

Rosenthal, Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice, and Sheldon, Staff Trial Attorney, Foreign Commerce Section, Antitrust Division, United States Department of Justice, ‘78

(Douglas E. and Thomas E., “Section 337: A View from Two Within the Department of Justice,” 8 GA. J. Int’l & Comp. L. 47)

The ITC should take care to avoid the following hypothetical situation. X, a Delaware corporation, has obsolete production facilities and a patent of questionable validity. Its strongest competitor is company Y, a German corporation with a modem plant and an aggressive export policy. X files a section 337 complaint with the ITC, and files a Sherman Act treble damage action in a Federal District Court. The German firm can only afford to spend $100,000 to defend both legal actions. This fund is quickly exhausted in responding both to discovery in the antitrust litigation and in the ITC staff inquiries. Y lacks the money properly to defend these legal attacks, let alone to prosecute its strong counterclaim that X has an invalid patent which it has misused. X approaches Y and offers to settle the antitrust litigation and withdraw the section 337 complaints if Y agrees to raise the export price of its product in the U.S. market to that of the products of less efficient X. Reluctantly, Y agrees. The ITC, at the request of X and Y, terminates the section 337 investigation. If such a settlement made on such facts were today to come to the attention of the Justice Department, there is a substantial possibility that the Department would convene a criminal grand jury to investigate it.

#### Second, links to net benefit – The ITC is dramatically more efficient than the FTC or DOJ—it is comparatively more certain and provides a clear, low-cost guidance to business—perm completely undermines signal

Kieff, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, ‘16

(F. Scott, A Stylized Model of Agency Structure for Mitigating Executive Branch Overreach, in *Liberty’s Nemesis: The Unchecked Expansion of the State*, Dean Reuter & John Yoo Eds., Encounter Books)

While these PTO, DOJ, and FTC budget numbers are not offered as precise accountings for detailed comparison, they generally inform the broad discussion in at least two key ways. First, they give a reasonable sense of relative magnitude. For example, while the PTO handles trademarks as well as patents, the trademark side is a much smaller part of the PTO’s overall operation. And while the DOJ and the FTC also handle a much broader set of antitrust matters not involving intellectual property (IP), and the FTC has a large consumer protection docket, both the DOJ and the FTC have been highlighting their IP-focused work in their annual budget justifi­cations for years and both have been devoting resources toward their significant actions relating to IP over the past decade.54 Second, all three of these agencies have deployed various enhanced procedures of a type that lead to the non-enforcement of a patent rather than to its enforcement. Put differently, they all have the direct effect of working against patents, never for them. When the relevant agency (such as the PTO or FTC) only has power to focus on one of the core substantive areas of a patent dispute, such as validity of the patent or the proper remedy for patent infringement, the proceeding often does not include the important self-disciplining tensions that usually cabin the arguments made by parties on both sides of a district court patent litigation, which typically involves all substantive areas of a patent case.55

In contrast to the other administrative agencies discussed here, the ITC uses only a portion of its more modest total budget of $80 million to deploy several signifi­cant sets of professional staff with extensive experience in all three main aspects of IP, mainly patent, cases: (1) validity and enforceability, (2) infringement, and (3) remedy.56 It does so in a time frame widely regarded as signi­cantly faster for the parties than district court litigation, while being at least somewhat less expensive for the parties.57 These groups of ITC staff include the following:

• a large department of expert patent litigators (the Office of Unfair Import Investigations) who operate independently of the commission under formal conict of interest rules in furtherance of their legal duty to represent the public’s interest in each case in which they elect to participate, which is most of them;

• a large department of expert IP (mostly patent) lawyers who represent the commission’s interests in following applicable statutes and precedents for adjudicating patent cases (the Office of General Counsel’s IP team), most of whom have extensive patent experience and many of whom served as law clerks at the CAFC;

• a group of ­five to six administrative law judges and their staff of permanent law clerks, who collectively spend all of their time adjudicating IP disputes, mostly involving patents; and the six commissioners, each of whom has as least one full-time senior counsel with extensive IP experience devoted to IP matters, mostly involving patents.

The numbers tell a compelling story. Section 337 investigations at the ITC are fast, with a median time to adjudication of fourteen months.58 They are also inexpensive for the government to run, with an estimated marginal cost to the ITC per investigation of about $57,000.59 This makes an ITC investigation faster than the PTO’s Inter Partes Review (IPR) and at a very manageable cost to the government.

The relative independence, speed, and expertise of ITC patent proceedings were highlighted when the ITC was recently faced with its most high-pro­le patent case in a generation, which involved the so-called smartphone wars between Apple and Samsung.60 This ITC case happened to result in the enforcement of a patent rather than elimination of a patent or signi­ficant restriction on patent enforcement. ‑e almost unanimous reaction from the major media that had long been calling for faster, more expert adjudication of patent cases was very critical of the outcome, without in most instances even addressing the particular facts or reasoning of the published record or decision.61

In that case, after the ordinary full trial proceedings before the administrative law judge, with active involvement of the expert patent litigation attorneys from the ITC’s Office of Unfair Import Investigations representing the public’s interest, the ITC made special, supplemental solicitations for public input on the public interest. ‑ese solicitations addressed, among other things, concerns about anticompetitive effects of patent enforcement in the context of technological standard-setting organizations and putative commitments to issue licenses on so-called RAND or FRAND (fair, reasonable, and non-discriminatory) terms. The PTO, the DOJ, and the FTC all provided formal submissions, as has occurred in prior ITC proceedings raising similar issues. ‑ey largely reected the FTC’s decade of actions expressing signi­cant skepticism about patent enforcement but focused largely on only the broad, general policy concerns of the FTC about antitrust implications of patents, rather than on the particulars of the case at hand.

The result was an extensive record developed through a thorough factual investigation and detailed legal and economic analysis into the core underlying economics of patent hold-up, including detailed evidence about whether particular parties were surprised, were opportunistic, or made asset-specifi­c investments; what particular patents were related to which particular standards; whether they were essential to those particular standards; what speci­c terms were involved in any relevant licensing commitments that were made; how each of the particular parties acted in relation to those commitments, etc. Based on this record, the ITC issued a detailed decision spanning roughly 150 pages, including approximately 35 pages devoted to the analysis of this evidence, and an accompanying thoughtful dissenting opinion of approximately 10 pages setting forth detailed reasoning closely tied to the factual record, which focuses largely on a dierent reading of the facts relating to the speci­c actions of the parties regarding their particular negotiating behaviors.62

Simply put, the ITC processes and opinions involved highly experienced government staff, with a dramatically faster time frame and signi­ficantly lower cost than district court litigation, relying on government officials having extensive expertise in the relevant technology, economics, industrial dynamics, and law, focused on the facts with extensive and very detailed published opinions that tie the application of the law to the facts of the case. And while the basic remedy often used in ITC proceedings is one that can easily appear to be blunt at fi­rst blush—an exclusion order—the ITC also issues cease and desist orders that are in personam, against only those parties involved in the proceeding, and it has a demonstrated track record of very carefully tailoring orders of either type to mitigate hold-up problems in particular cases.63 This all gave signi­ficant guidance to future government decision-makers and private parties about how the law would be applied to facts of future cases, which would increase certainty and predictability that can help parties organize their affairs and conduct their governmental and commercial activities based on the facts relevant to particular cases.

Yet, when the Executive Branch intervened in the case afterwards to set aside the ITC’s remedy, the only public information it provided was contained in a single three-page letter, containing only a few lines of text explaining how it was based on the facts of this case.64 This provided little information to academics, government officials, and businesses, in the U.S. or around the world, about what facts or reasons triggered this different outcome.

The combination of the response by the public media and the response from the Executive Branch provides little guidance for future decision-makers around the world about how particular types of evidence about what specifi­c types of economic issues will have what particular types of legal signi­ficance in future cases. Instead, whether correct or not, some might read both as suggesting that signifi­cant traction can be gotten using the less legally formal tools of popular sentiment or political influence. The ­field of political economy demonstrates that the efficacy of these sorts of strategies and tactics tend to favor large, established businesses, which sometimes can come at the expense of competition and innovation.65 Signi­ficant concerns have already been raised that political considerations could feature more prominently in IP enforcement in the future.66

#### The CP’s mechanism is faster, more certain, and more limited than the aff—reduces uncertainty

Bert Reise, is a partner with Howrey in the firm's Washington, D.C., office, and Cyrus Frelinghuysen, is an associate with the firm in the Washington office, August 9, 2010, An Overview Of Section 337 Litigation Before The ITC, Law360

There are several reasons why Section 337 litigation is favored over an action before the district courts. One reason is the speed of Section 337 proceedings. Whereas patent litigation in certain federal district courts can last for years, or even indefinitely, Section 337 investigations are handled on an accelerated basis and tend to last about 16 months from the institution of the investigation to a final determination.[23]

Such expedited resolution decreases the uncertainty surrounding the intellectual property rights involved. For example, where technology is progressing rapidly and market share in one generation of products can be affected by the sales performance of a preceding generation, a party would undoubtedly benefit from resolving litigation quickly.

The remedies available under Section 337 may also prove attractive. Although money damages are not available, the commission can issue both exclusion orders barring the importation of infringing items and cease and desist orders against domestic distributors of the goods.

Other reasons why a litigant may choose the Section 337 option include:

- The specialized nature of the forum. The lack of specialization by most district court judges often requires the parties to provide an expensive patent law education to the presiding judge. In contrast, Section 337 investigations are adjudicated by ALJs who specialize in intellectual property law and are used to dealing with technologically challenging subject matter.

- Relief without equitable balancing. Unlike in federal district court, in Section 337 proceedings there is no requirement that the commission balance the traditional equitable factors used to determine whether injunctive relief should be granted before it issues remedial orders.[24]

Instead, Section 337 provides that the commission must issue an exclusion order when there has been a violation, unless the public interest weighs against such an order.[25] Thus, a party who would otherwise be unable to obtain injunctive relief in a district court may succeed in obtaining an exclusion order from the commission.

- The tight protective orders. The protective orders that are routinely issued by the ALJs[26] contain detailed provisions to protect any confidential business information that may be submitted by the parties or nonparty entities during the course of an investigation.[27] The commission's rules allow for the imposition of sanctions when protective orders are breached.[28]

#### To expand core antitrust laws requires the affirmative to modify the Sherman, Clayton, or FTC Acts

Waller 20 – John Paul Stevens Chair in Competition Law, Loyola University Chicago School of Law

Spencer Weber Waller, “The Omega Man or the Isolation of U.S. Antitrust Law,” Connecticut Law Review, Vol. 52, April 2020, LexisNexis

The United States defines the antitrust laws as the substantive provisions of the Sherman, Clayton, and Federal Trade Commission acts along with a small number of subsidiary statutes. This limits the scope of antitrust law to agreements between competitors, monopolization law, and the review of potentially harmful mergers and acquisitions. In contrast, the EU and other jurisdictions have led the world to a broader understanding of the meaning and reach of competition law that is only partially understood or appreciated in the United States. This Section explores that broader vision of competition including market studies and investigations; prohibitions against public anticompetitive conduct; state aids; and the use of public interest factors normally not part of the U.S. vision of the antitrust enterprise.

#### Those three are the only core antitrust laws

FTC ‘ND [Federal Trade Commission; “The Antitrust Laws”; https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws; AS]

The Antitrust Laws

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

#### Perm severs expanding core antitrust laws—expanding § 337 is distinct—that’s a voter, it makes the aff a moving target, it’s impossible to generate stable offense, and it’s anti-educational in the face of an on-point solvency advocate

Rosenthal, Chief, Foreign Commerce Section, Antitrust Division, United States Department of Justice, and Sheldon, Staff Trial Attorney, Foreign Commerce Section, Antitrust Division, United States Department of Justice, ‘78

(Douglas E. and Thomas E., “Section 337: A View from Two Within the Department of Justice,” 8 GA. J. Int’l & Comp. L. 47)

The Sherman, Clayton, Wilson Tariff, and Federal Trade Commission Acts, the core of traditional antitrust legislation, are broad and flexible enforcement tools. This is especially true of the Sherman Act, as construed in the American Tobacco4 case before World War I, and the Alcoa," I.C.1,11 and Watchmakers 7 cases more recently. As the "effects" doctrine has developed, conferring subject matter jurisdiction under the Sherman Act over foreign acts by domestic and foreign persons which have direct, substantial and foreseeable anticompetitive effects in United States commerce, 8 many if not most significant foreign export practices which have an anticompetitive effect in the United States can be reached under the Sherman Act." The Sherman Act is not only enforced by the Department of Justice, but by private "attorneys general," promoting competition through the prosecution of private antitrust claims. 0

One possible justification for adding section 337 to the roster of antitrust statutes in force is the perception that there is a practical problem in obtaining not subject matter, but in personam jurisdiction over some culpable foreign exporters. Section 337 jurisdiction is not over the person but over the imported goods which are the instruments of illegality. It is in rem jurisdiction. Where jurisdiction over the person cannot be effected, it makes good sense to repose jurisdiction in the offending product which can be seized. In fact, in rem jurisdiction is already provided for in section 6 of the Sherman Act and section 76 of the Wilson Tariff Act." These statutes provide long-standing authority in the Attorney General to seize property which is the subject of antitrust violations both to establish jurisdiction and, if necessary, to provide the means for effecting relief from the violation. In fact, section 76 of the Wilson Tariff Act was invoked several times between 1928 and 1931 for just this purpose."

#### The president can veto ANY ITC ruling, while we think he wouldn’t use it in the context of the bad conduct it solves

Brendan McLaughlin, Ropes & Gray, former law clerk for the International Trade Commission’s Office of Unfair Import Investigations, May 18, 2021, Podcast: Talkin' Trade: Introduction to Section 337 and the ITC, https://www.ropesgray.com/en/newsroom/podcasts/2021/May/Podcast-Talkin-Trade-Introduction-to-Section-337-and-the-ITC

There generally aren't closings because the hearing is followed by two rounds of post-hearing briefing. Generally, an opening brief is due within a few weeks of the hearing, followed by response briefs due soon thereafter. This is essentially a party's closing argument, so this briefing is extremely important. After the briefing is complete, the ALJ then issues an “initial determination,” which includes lengthy findings of facts and conclusions of law on all the issues presented. Parties can then petition for a review to the full Commission, and the Commission may ask for additional briefing or may simply issue its decision based on the petitions. If the Commission finds a violation of Section 337, the president—who has delegated this responsibility to the U.S. Trade Representative—has the option of vetoing the exclusion order for any reason. This is called the presidential review period, and lasts for 60 days. In practice, the veto rarely happens—the last time was in 2013 when the Obama administration vetoed an exclusion order in the case between Samsung and Apple involving wireless standard essential patents. Finally, any appeals go to the Federal Circuit. The Commission itself is a party to the appeal, and the winning party at the ITC typically will intervene to participate as well.

#### ITC advisory opinions solve—creates reliable guidelines for businesses

Simms, Principal, Simms & Showres LLP, former attorney at the DOJ antitrust division, ‘82

(J. Stephen, “Scope of Action against Unfair Import Trade Practices under Section 337 of the Tariff Act of 1930,” 4 Nw. J. Int'l L. & Bus. 234)

The Commission reserves the right to reconsider its advisory opinion if the public interest requires. 2 In such cases, ITC rules provide that the Commission will give the party who has received the advisory opinion advance notice of the recision, and allow the party to submit its views to the Commission.28 3 If the ITC refuses to reconsider its advisory opinions, they are not open to judicial review. 84

In addition to the clarifications that it may provide, a Commission advisory opinion is valuable to respondents because they may rely on it in good faith. If the Commission later determines that the respondents are following its advisory opinion yet violating Section 337, the Com- mission will not proceed against the respondents if they "fully, completely, and accurately" presented all "relevant facts" at the time of the advisory opinion. Respondents must discontinue their unlawful actions once the Commission notifies them that its advisory opinion is no longer valid.285 Thus, advisory opinions can effectively modify Commission actions, especially because respondents can rely on the advisory opinions.

Advisory opinions could alleviate the problem of divergent interpretations of final Commission determinations by Customs and the Commission. Presumably, a respondent could present an advisory opinion to Customs as determinative of the meaning of any Commission order applicable to the respondent.2 86 In turn, respondents could use the procedure to avoid possible Section 337 action once Customs allows their goods to enter the United States.

#### The DOJ is subject to capture, means Chinese plantiffs and American companies can influence when it invokes deference which breeds inconsistency

Lambert, Wall Family Chair in Corporate Law and Governance Professor of Law, University of Missouri Law School, November, ‘11/1/21

(Thomas, “Tech Platforms and Market Power: What’s the Optimal Policy Response?” Mercatus Working Paper)

A second important difference between antitrust courts and agencies relates to the decision makers’ incentives. The federal judges determining liability and imposing remedies in antitrust cases have little reason to please the parties before them. Possessing life tenure and fearing no retribution save possible reversal, they are insulated from outside pressure and motivated to make decisions calculated to enhance market output and thereby benefit consumers. The bureaucrats staffing agencies, by contrast, do not enjoy this level of political insulation. Many will have been appointed by or have ties to a political leader, whom they will wish to please. They may also contemplate future employment at one of their regulatees or at a regulatee’s rival. Even absent contemplation of a job change, they may have a stake in one regulatory outcome over another, as the budget or prestige of their agency may be affected by the regulatory choices they make. Their personal interests are therefore less aligned with the public’s interest in maximizing overall market output.

A third difference between antitrust and agency oversight is that antitrust courts’ involvement with parties is limited in duration, while overseeing agencies remain perpetually involved with the firms they regulate. Ongoing oversight requires continuous contact with the regulatee, whose perspective the regulator needs in order to make sound decisions. Eventually, however, the regulator may begin seeing things from the perspective of the regulatee.176 This is especially likely if the individuals with interests adverse to the regulatee’s position are widely dispersed and difficult to organize.177 The benefits to a regulatee from a decision may be outweighed by the aggregate costs it would impose, but if the costs are so widely spread that no individual or group has an incentive to incur the cost of arguing against the decision, the only argument the regulator will hear is that of the regulatee-beneficiary.178 In light of the relationships that develop from perpetual supervision and the common “concentrated benefits-diffused costs” dynamic, agencies possessing continuing oversight over their regulatees are frequently captured by those firms, to the detriment of the public at large.179

#### That zeros the aff

Childson, former chief technologist at the FTC, ‘19

(Neil, “Creating a new federal agency to regulate Big Tech would be a disaster,” October 30, <https://www.washingtonpost.com/outlook/2019/10/30/creating-new-federal-agency-regulate-big-tech-would-be-disaster/>)

Companies find it much easier to influence narrowly focused institutions than institutions with broader law enforcement mandates. Where the latter hear from a wide range of companies with a variety of concerns, the former hear only from one type of company. Think about how much easier it is to talk your way out of a speeding ticket from the local police officer, who knows your family, than it is to deal with an effectively anonymous city cop who pulls over dozens of drivers a day. Similarly, big companies would much rather deal with a select group of bureaucrats whom they know well — and who hear only their perspective most of the time.

Captured agencies don’t hold companies accountable; instead, they act to benefit the industry’s established players, disadvantaging newer firms and the public at large. In worst-case scenarios, such agencies can block new, disruptive competitors that threaten the established, regulated industry.

#### DOJ and FTC decision-making are systematically politicized—that means enforcement does not align with competitive outcomes—undermines solvency

Dorsey et al., Associate at Wilson Sonsini Goodrich, ‘18

(Elyse, Rosati. Jan M. Rybnicek is a 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, “Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking,” CPI Antitrust Chronicle, April)

To the first insight — which theory better explains agency behavior — at least by 1985, prolific public choice economist Robert D. Tollison noted that “many critics have shown[] the historical record of antitrust decisions will not support the public interest theory.”27 Shughart and McChesney similarly explained that, around this time, “scholars who studied antitrust policymaking came away puzzled by evidence they uncovered pointing to a significant gap between the theory of antitrust — widely but not unanimously accepted as a policy tool meant to protect consumers against abuses of market power in the economy — and its application in actual law enforcement practice.”28 They elaborated that “outcomes of large numbers of antitrust cases brought by the U.S. Department of Justice’s Antitrust Division [and] the Federal Trade Commission (FTC)” before about 1980 appeared “inconsistent with law-enforcement philosophy guided by a consumer-welfare standard.”29

Second, during this time, the FTC was frequently and consistently condemned for ineffective enforcement efforts — which were typically at odds with consumer outcomes. For example, The Nader Report on the Federal Trade Commission highlighted the Commission’s numerous failures, illuminating its inability to protect consumers and its particular tendency to respond to political pressures rather than consumer interests.30 Antitrust luminary Judge Richard A. Posner likewise noted in 1969 that the FTC was “rudderless; poorly managed and poorly staffed; obsessed with trivia; politicized;” “lack[ed] both the incentives and the pressures to be efficient;” and that was, “all in all, inefficient and incompetent.”31

Empirical studies of agency behavior and antitrust outcomes during antitrust’s socio-political era reinforced that the antitrust agencies were not, in fact, seeking to maximize the public interest.32 Long, Schramm, and Tollison, for instance, analyzed the role of economic criteria in antitrust enforcement, particularly, “to what extent industry welfare losses, and the components of welfare losses which measure the price of monopoly and the industry size, explain the historical distribution of antitrust cases [between 1945 and 1970] across different manufacturing industries.”33 Their study concluded that “economic variables may influence antitrust decisions,” but that “all the models tested explain[ed] at best about 60 per cent of the variance in cases brought across industries.”34 In other words, measurable public interest factors failed to explain nearly half of DOJ antitrust decisions. Subsequently, Coate, Higgins, and McChesney specifically tested whether FTC decisions were influenced by pressure from Congress.35 Their study found political pressure indeed led the Commission to challenge additional proposed mergers in 1982 and 1986.36

#### But the CP avoids these costs

Kieff, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, ‘16

(F. Scott, A Stylized Model of Agency Structure for Mitigating Executive Branch Overreach, in *Liberty’s Nemesis: The Unchecked Expansion of the State*, Dean Reuter & John Yoo Eds., Encounter Books)

This chapter takes seriously the concerns raised by critics of patent jury trials as an important benchmark against which to measure patent litigation proceedings before the ITC. In so doing, it shows how ITC proceedings go a long way in directly satisfying the concerns raised by critics of patent jury trials without triggering the costs raised by the particular administrative procedures involving the PTO, DOJ, and FTC, which are often advocated by those critics. More specifi­cally, the chapter explores the ways in which proceedings like those conducted at the ITC are signi­ficantly less long, are less expensive, and involve much more (and much more diverse) patent law expertise than the typical patent jury trial. ITC proceedings also are structured to turn on facts rather than political influence. As a result, they have a long track record of reaching outcomes favoring both sides, patentees and alleged infringers, depending on the facts of the particular case.

Given the signi­ficant complexity and thoroughness of each of the organizations and procedures mentioned in this chapter, its discussion of them is far from exhaustive. Rather, the chapter highlights some of the ways that the concerns of the critics of patent jury trials can be meaningfully addressed without triggering what appear to be various deleterious side effects of the reform mechanisms they seek to implement. To the extent that these negative side effects are appropriately considered to be unintended consequences, the chapter outlines important reasons alternative reforms should be considered—for example, increased reliance on patent jury trials and increased reliance on proceedings before the ITC or an ITC analog.67

The chapter explores the ITC as a model agency structure that goes a long way in mitigating the pernicious effects of Executive Branch overreach. The basics are simple: (1) internal structure designed to incentivize the heaven of collaboration and reasoned moderation through the threat of the hell of deadlock and long-standing internal disputes; and (2) a set of substantive law topics that are commercial in nature (thereby giving strong incentives for private parties to bring to the agency the relevant facts on the various sides of each issue) and simultaneously in dispute (thereby providing each side with self-discipline against hyperbole).

#### ITC model solves—it’s forced to weigh foreign policy concerns and is ultimately subject to presidential tailoring

Sun, J.D., Northwestern University Pritzker School of Law, ‘19

(Linda, “The ITC is Here To Stay: A Defense of the International Trade Commission’s Role

in Patent Law, 17 Nw. J. Tech. & Intell. Prop. 137)

With its basis in international trade regulation, the ITC puts a policy and trade lens on patent law. By being a part of the large patent law landscape, the ITC allows views of patent law influenced by public policy and trade to percolate. This broadens how decisions are made and decreases the chance of a “tunnel vision” view of patent law.116

Congress specifically instructed the ITC to consider the public policy of promoting free competition, which “suggests that Congress wanted the ITC to use a nuanced approach in determining patent validity and enforceability, with a focus on protecting U.S. businesses from the negative side-effects of free trade.”117 The ITC has unique trade expertise; the agency investigates trade issues from dumping to tariffs and possesses broad knowledge about trade practices that harm U.S. companies.118 This broad base of information is utilized by the ITC in its determinations of patent validity and remedies. In fact, the law requires the ITC to utilize this information. For example, before implementing an exclusion order, the ITC is required to consider whether the exclusion order is “inconsistent with the public interest, with input from other regulatory agencies.”119 The ITC is also able to order public hearings to determine whether such exclusion orders would harm the public.120 In contrast, district courts are not equipped or required to consider issues of trade and foreign policy.121

A unique element of Section 337 proceedings is the participation of an investigative attorney (or “staff attorney”) from the Office of Unfair Import Investigations.122 Each proceeding has a staff attorney who “participates in discovery, motions, and trial, creating a different case dynamic than that experienced in district court.”123 The staff attorney is a full party to the investigation and “functions as an independent litigant representing the public interest.”124 The addition of a neutral party who advocates for free trade adds a unique perspective to ITC proceedings.

In addition, the President has the authority to veto injunctions issued under Section 337 proceedings based on policy reasons.125 These policy reasons include: “(1) public health and welfare; (2) competitive conditions in the U.S. economy; (3) production of competitive articles in the United States; (4) U.S. consumers; and (5) U.S. foreign relations, economic and political.”126 The President’s decision cannot be appealed to the Federal Circuit.127 The fact that the President can veto ITC decisions makes the ITC a better-positioned forum to make policy decisions as compared to district courts, which are not under the executive branch’s purview.128 Therefore, the ITC is able to incorporate more policy considerations into its patent cases without the same decision costs of district courts. At times, a Presidential veto results in a narrowed or altered remedy from the ITC.129 Incorporating the President’s point of view adds another dimension to ITC patent decisions that sets them apart from district court decisions. Thus, the ITC adds diversity and important public interest considerations to the body of patent law doctrine that informs the Federal Circuit and Supreme Court.

### China

#### New statutory instruction fails—courts brazenly misinterpret clear commands—1nc says that’s true empirically, and it’s inevitable

Crane, Frederick Paul Furth, Sr. Professor of Law, University of Michigan, ‘21

(Daniel A., “Antitrust Antitextualism,” 96 Notre Dame L. Rev. 1205)

This Article has shown that, historically, the judiciary has treated the antitrust statutes as broad delegations to the courts to create a pragmatic common law of competition, even when the statutes plainly said something more specifically prohibitory. What, then, are the strategies available to a reformist Congress seeking to rein in business power through remedial antitrust legislation?

The one strategy that does not seem especially promising is simply writing clearer statutes. The antitrust statutes that the courts wrote down in favor of big business did not suffer from a lack of clarity or, if they did, not in the textual implications the courts chose to ignore. Strikingly, the courts continue to insist that the antitrust statutes are indeterminate delegations of common-law power, even while admitting in candor that they have simply chosen to ignore the statutes’ plain meaning in favor of a common method of deciding antitrust cases. For instance, in Professional Engineers, Justice Stevens remarked for the Court that “the language of § 1 of the Sherman Act . . . cannot mean what it says” and therefore that Congress must not have intended “the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations,” thus justifying the courts in shaping the “statute’s broad mandate by drawing on common-law tradition.”255 Given over a century’s tradition of interpreting antitrust statutes as invitations to continue a common-law process whatever else is suggested by the statute’s text, it is difficult to see how simply accumulating stern new language in new texts would lead to a different result.

#### AND those cases are horribly complex – courts are institutionally incapable of adjudicating them

Parrish ‘9 - Dean and James H. Rudy Professor of Law at Indiana’s Maurer School of Law

“Reclaiming International Law from Extraterritoriality” 93 Minnesota Law Review 815 (2009), <https://www.repository.law.indiana.edu/facpub/894/>

In contrast, American influence over the world is much more circumscribed when domestic law replaces international law. Conducting foreign policy through courts is difficult—this would be true even if extraterritorial lawsuits were limited to U.S. courts. In the United States, exploitative litigation can be filed “because of weak constraints on the kinds of suits that get filed and the potential for perverse incentives to litigants.”242 But these concerns are magnified when dealing with foreign legal systems. Is the U.S. government to keep track of all lawsuits filed abroad that can potentially affect American interests? Even then, national governments have less opportunity and ability to interact and directly influence other countries’ courts. And to the extent that influence exists, national governments find it much easier to deal with foreign affairs issues at government-to-government levels. At minimum, Sovereigntists should be concerned with domestic courts wielding greater influence in developing international law. Whether private litigation—even in a U.S. court—is the best way to resolve complicated transboundary issues is far from clear.243

[FOOTNOTE 243: Hall, supra note 186, at 449 (noting that the U.S. Supreme Court has “admitted that it is not the ideal forum for addressing transboundary pollution disputes, which tend to involve complex technical and scientific issues with major political and economic ratifications”); see also Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 AM. J. INT’L L. 821, 829–31 (1989) (noting the problems with domestic courts deciding issues involving foreign affairs); Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1668 (1997) (arguing that courts are poorly equipped to address questions involving foreign relations); John Yoo, Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act, 20 HASTINGS INT’L & COMP. L. REV. 747, 764 (1997) (“Courts are imperfect tools for gathering information, especially when the relevant issues for decision involve broader political, economic, and social events and trends.”). ]

At the very least, foreign courts will be open to the accusation of parochial biases—with the appearance, if not the reality, that those courts favor foreign over U.S. interests.244

#### That means those cases are totally ineffective! Gives the illusion of progress without actually preventing anticompetitive conduct

Parrish ’17 - Dean and James H. Rudy Professor of Law at Indiana’s Maurer School of Law

Parrish, Austen L. (2017) "Fading Extraterritoriality and Isolationism? Developments in the United States," Indiana Journal of Global Legal Studies: Vol. 24 : Iss. 1 , Article 9. Available at: <https://www.repository.law.indiana.edu/ijgls/vol24/iss1/9>

Under international law and in other countries, however, the turn to unilateral extraterritorial regulation of foreigners (whether through the courts or otherwise) has rarely been viewed as legitimate. The unilateral attempt to prescribe conduct abroad has been roundly viewed as exorbitant and usually inconsistent with international law.65 Unilateral extraterritorial regulation also can be deeply undemocratic and not easily reconciled with principles of self-determination. 66 Aside from the legitimacy question, there is also a pragmatic consideration: progress in international regulation is unlikely to be made in hodgepodge and piece-meal fashion. The move away from multilateral lawmaking leads to fragmentation of the international system 67 and to the perception of American exceptionalism.6 8 In a range of contexts, because the use of extraterritorial laws are highly contentious, attention is diverted away from the alleged violators and the unlawful acts, and directed instead to those bringing the claims.6 9 And after all that, the likelihood of success for such claims remains small, thereby giving the illusion that serious steps are being taken, when in actuality little progress has been made.70

#### AND cases will be taken up selectively and decided on an ad hoc basis – that accomplishes nothing and just sends confusing international signals abroad

Parrish ’12- Dean and James H. Rudy Professor of Law at Indiana’s Maurer School of Law

Parrish, Austen L., "Evading Legislative Jurisdiction" (2012). Articles by Maurer Faculty. 887. <https://www.repository.law.indiana.edu/facpub/887>

The upshot of Morrison's focus discussion, combined with the Ninth and D.C. Circuit decisions, is not just that it encourages courts to do an end-run around legislative jurisdiction analysis. Treating the regulation of foreign activity as "domestic regulation," simply because an adverse impact is felt in the United States, creates a presumption in favor of extraterritorial jurisdiction.

The impact of eviscerating doctrine this way is at least three-fold. First, it potentially promises to increase the amount of extraterritorial regulation through judicial decisions. In a modern, globalized economy, finding some impact on the United States is always possible. 132 Second, it upsets the background default rules upon which Congress legislates. At the very least, it makes those rules less meaningful When a court will apply the presumption against extraterritoriality and when it will choose to ignore it becomes less clear. Third, it encourages more ad hoc decisions and reduces predictability as courts have little guidance as to which rules to follow (at least outside the securities context). In cases where a court is opposed to finding the law applies, the court can invoke a rigorous presumption against extraterritoriality. In cases where a court wishes to provide a remedy, the court can simply define away the problem. Legislative jurisdiction thus becomes overly malleable: providing judges cover to make what otherwise would be tendentious or merits-driven decisions (or, at least, decisions based on other, unwritten considerations) .133 In turn, the presumption against extraterritoriality is rendered too feeble to protect against exorbitant jurisdictional assertions.

Even if a more charitable assessment is made, encouraging courts to sidestep the jurisdictional analysis or engage in a "focus" analysis contributes little but obfuscation to the legislative jurisdiction analysis. It takes a relatively straightforward inquiry into congressional intent and replaces it with a free-wheeling assessment of the legislation's gravitational center. Another problem exists. What courts should consider in determining the "focus" of legislation is uncertain. Presently, the test is so unformed that lower courts have almost no guidance on how to proceed in a principled way. A focused analysis thus may give new life to a broadly-conceived effects test 134-an approach that the Supreme Court appeared to wish to enter with Morrison.

## 1NR

### Chevron

#### The EU refused to hear U.S. criticism about the DMA – they want to assert their authority which makes passage inevitable

Deutsch 21 – Technology reporter at Bloomberg.

Jillian Deutsch, December 14 2021, “U.S. Tech Council Not ‘Fruitful’ on Rules, EU Official Says,” Bloomberg, https://www.bloomberg.com/news/articles/2021-12-14/u-s-tech-council-not-fruitful-on-rules-eu-official-says

The European Union’s much-touted partnership with the U.S. has yet to bear fruit on devising a common approach to regulating big technology firms, a key commissioner said.

Thierry Breton, the bloc’s internal markets commissioner, told a European Parliament committee on Tuesday that the EU-U.S. Trade and Technology Council was “not particularly fruitful at this stage” when it comes to tech regulation. The TTC initiative was launched earlier this year to help forge a common approach to big tech and to competing with China.

He was responding to criticism from the U.S. Secretary of Commerce Gina Raimondo that some of the EU’s prospective tech legislation was unfairly targeting U.S. companies.

“Europe will be taking leadership in terms of the digital space,” Breton said, despite “criticism from the other side of the Atlantic regarding our approach.”

The parliament is debating a law called the Digital Markets Act that is intended to rein in anti-competitive behavior from tech companies with measures that will clearly hit [Alphabet Inc.](about:blank)’s Google, [Meta Platforms Inc.](about:blank)’s Facebook, [Amazon.com Inc.](about:blank), [Apple Inc.](about:blank) and [Microsoft Corp.](about:blank) The parliament’s rules also include the Dutch company [Booking.com](about:blank) and could later impact [Zalando SE](about:blank) and [Alibaba Group Holding LTD](about:blank).

The plan, which is set for final approval by the parliament this week, would place limits on targeting ads to minors and force messaging apps to communicate with each other. Companies face fines as high as 20% of global annual sales for breaches of the law.

‘Serious Concerns’

But Raimondo said last week that Washington had “serious concerns that these proposals will disproportionately impact U.S.-based tech firms and their ability to adequately serve EU customers and uphold security and privacy standards.”

Breton on Tuesday thanked lawmakers for maintaining “100% of the ambition” of the digital law despite heavy lobbying from tech companies.

The statement was a subtle dig at comments made last month by the EU’s antitrust chief, Margrethe Vestager, who urged parliamentarians to quickly pass the Digital Markets Act, as well as the Digital Services Act, which would regulate how companies handle harmful content, saying it “is best to get 80% now than 100% never.”

On Tuesday, Vestager said the interest she’s seeing from lawmakers in Washington on regulating tech is “very encouraging.”

#### Attempts to change the DMA will fail – European leaders view it as essential to their sovereignty

**Broadbent 21**--- Senior Adviser (Non-resident), Scholl Chair in International Business.

Meredith Broadbent, September 15 2021, "The Digital Services Act, the Digital Markets Act, and the New Competition Tool," CSIS, https://www.csis.org/analysis/digital-services-act-digital-markets-act-and-new-competition-tool

The DMA proposal is one in a series of initiatives the European Union is implementing to cement its position as a first-mover of standards and agenda-setter for global technology regulation. It cannot be ignored that many in Europe see the DMA package as an integral part of the European Union’s [ambitions](about:blank) for European “technological sovereignty,” with the overall goal of building independent, self-reliant systems across a wide range of fields, but particularly in the digital sector.

As French president Macron [has characterized](about:blank) his intentions, “If we want technological sovereignty, we'll have to adapt our competition law, which has perhaps been too much focused solely on the consumer and not enough on defending European champions."

These are sentiments that could turn out to conflict with the more ambitious cooperative goals of the TTC. Much like the [GDPR](about:blank), which was concluded in 2016 and implemented in 2018, the DMA is a far-reaching proposal that stands to have profound [effects](about:blank) on the digital economy in Europe and on U.S. national tech champions partnering with European innovators and serving European consumers.

The EU’s Digital Ambitions

After years of calls [from European leaders](about:blank) to introduce more industrial policy into competition enforcement, to promote the creation of national champions, and to assert European “[digital sovereignty](about:blank)” (i.e. protectionism and increased barriers to trade), the European Commission introduced the [Digital Markets Act](about:blank) (DMA) in December of 2020. The legislation is designed to create “contestability” for European digital rivals, and “fairness” for European business users of platform services, by imposing a series of obligations on companies designated as “gatekeepers”.

### DA Sovereignty

#### *China* latches on to the plan’s precedent—Weaponizes it against U.S. and European firms!

Briggs 15 – Co-chair of the Antitrust & Competition practice at Axinn; Professor of International Competition Law, GWU; former Chair of the Section of Antitrust Law of the ABA

John DeQ Briggs, Axinn Veltrop & Harkrider LLP, & Daniel S. Bitton, partner in the Antitrust & Competition practice at Axinn, focused on counseling and representing clients in high-stakes international antitrust matters, including global merger clearance, former legal advisor to the Netherlands Competition and Post and Telecommunications Authorities , Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity, 16 Sedona Conf. J. 327 (2015), https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf

Few if any other legal systems in the world involve circumstances where powerful courts are called upon by private parties to exercise extraterritorial jurisdiction over foreign companies, individuals, and conduct. For many people, including even relatively sophisticated judges, lawyers, and academics, this proposition is seen as unremarkable. The bench and the bar in this country seem to accept the fact of this extraordinary power as if it were an obvious adjunct to “American Exceptionalism.”16 But in nearly all other countries, the exercise of extraterritorial jurisdiction is more rare, and nearly always at the behest of a government acting through its executive branch or its legislature. Foreign courts seem to show more restraint in the exercise of their power, which is in any case more limited than that enjoyed by American courts. This might be changing. As the People’s Republic of China (PRC), along with other powerful countries, observe the American legal system, “learn” from it, and mimic it to their advantage, American or other firms whose conduct outside China can be claimed to have some perceptible effect on Chinese commerce will come to be treated in much the same way that our system treats Asian and European companies. Indeed this is already happening.17

#### That’s a disaster—Becomes their means of going after the old economic superpowers!

Briggs 15 – Co-chair of the Antitrust & Competition practice at Axinn; Professor of International Competition Law, GWU; former Chair of the Section of Antitrust Law of the ABA

John DeQ Briggs, Axinn Veltrop & Harkrider LLP, & Daniel S. Bitton, partner in the Antitrust & Competition practice at Axinn, focused on counseling and representing clients in high-stakes international antitrust matters, including global merger clearance, former legal advisor to the Netherlands Competition and Post and Telecommunications Authorities , Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity, 16 Sedona Conf. J. 327 (2015), https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf

The aggressive extraterritorial application of American law has consequences and will have more consequences as time goes on. Some four decades ago we saw the adoption by some of our closest allies of “claw back” and “blocking” statutes, designed to avoid U.S. discovery, block enforcement of U.S. punitive damages awards, and allow claims in their home countries to claw back U.S. punitive damages awards. Now, as detailed above, we are seeing a substantial number of amicus filings by foreign governments in U.S. courts complaining about extraterritorial assertion of U.S. law and jurisdiction.

But more worryingly, we are also seeing other countries follow U.S. practice and increasingly assert their own law extraterritorially, regularly against American and European multinational concerns. Most notably, the PRC has been flexing its muscle overseas, especially in the antitrust arena, when it deems that foreign conduct or transactions by foreign companies threaten its domestic, often state-owned industries. For example, in 2014, MOFCOM, responsible for antitrust reviews of mergers, blocked an international joint venture by three foreign shipping companies (Danish, Swiss, and French shipping companies) based on what many have perceived to be protectionism rather than antitrust merits;110 both the U.S. and European antitrust authorities had cleared the joint venture reportedly due to significant associated procompetitive efficiencies.111 Earlier this year, despite pleas from President Obama not to devalue intellectual property of American companies to the benefit of Chinese firms using U.S. technology,112 China’s National Development and Reform Commission imposed a fine of nearly $1 billion and several licensing restrictions, including a royalty base cap, on Qualcomm for alleged abuse of dominance with respect to standard essential patents and baseband chips.113

But it is not just the PRC. Other countries are also increasingly bold about asserting their laws extraterritorially, sometimes in questionable ways. France, for example, has pushed for European Union privacy laws to create global obligations for U.S. tech companies to remove information from websites, rather than obligations confined to the relevant EU member state territories.114 A Canadian court recently made a similar, dubious reach across the globe with little consideration for comity, but in a trade secrets case rather than privacy case.115 These cases touch upon a fundamental constitutional right—freedom of speech—which is treated very differently in different countries. One can and probably should seriously question whether one country should be able censor what information is available to the citizens of another country.

There is no reason to believe that other countries will not follow suit, and this could devolve into a sort of “race to the bottom,” especially between the new and old economic superpowers. Right now, the major difference between the U.S. and other countries asserting their laws extraterritorially is still that most other countries do so primarily through civil or administrative government actions, while the U.S. also does so in criminal actions as well as at the behest of private parties in civil punitive damages suits. But that, too, could change. For example, certain countries are adopting criminal antitrust enforcement regimes as well as systems facilitating civil antitrust damages claims, similar to the U.S. system. Perhaps, therefore, it is not too farfetched to believe that the extraditions, jail sentences, and punitive damages awards at some point will start running the other way, and the U.S. might not like it. This may become particularly worrisome when U.S. companies and their executives engage in global conduct that is considered lawful (and perhaps even beneficial) in the U.S., yet unlawful and perhaps criminal in other countries.

#### Our ev postdates – massive free trade recovery globally – assumes COVID – globalization is economically beneficial for business, so the link is only a question of external political factors cutting off free trade flows

Altman ’21 - senior research scholar at the NYU Stern School of Business, director of the DHL Initiative on Globalization at NYU Stern’s Center for the Future of Management, and an adjunct assistant professor in NYU Stern’s Department of Management and Organizations.

Steven Atlman, Caroline R. Bastian is a research scholar at the DHL Initiative on Globalization at the NYU Stern Center for the Future of Management, “The State of Globalization in 2021” March 18, 2021, Harvard Business Review, [https://hbr.org/2021/03/the-state-of-globalization-in-2021](about:blank)

Cross-border flows plummeted in 2020 as the Covid-19 pandemic swept the world, reinforcing doubts about the future of globalization. As we move into 2021, the latest data paint a clearer — and more hopeful — picture. Global business is not going away, but the landscape is shifting, with important implications for strategy and management.

The Covid-19 pandemic is not likely to send the world’s level of globalization below where it stood during the 2008-09 global financial crisis (the worst setback for international trade and capital flows in decades), according to the 2020 edition of the DHL Global Connectedness Index, which we released in December. The index measures globalization based on more than 3.5 million data points on trade, capital, information, and people flows.

The only part of the index showing an unprecedented collapse due to Covid-19 is people flows. Trade has rebounded strongly, capital flows are recovering, and digital information flows have surged. Consider the business implications of developments in each of these four areas:

1. Trade Flows

The rebound of world trade has surpassed even the most optimistic early forecasts. Trade in goods dropped faster in March and April 2020 than during the Great Depression and the global financial crisis. But it started growing again in June and rocketed all the way back to its pre-pandemic level by November. Despite early disruptions, trade turned out to be a lifeline for economies and health care systems. Trade in medical products and electronics (for working from home) soared, as social distancing shifted spending from local services (e.g. restaurants) to imported goods.

The trade turnaround should put to rest the idea that Covid-19 is the last straw for global supply chains. Many companies have already shelved pandemic-era reshoring plans, recognizing that concentrating production at home often raises costs without boosting resilience. Diversification across efficient domestic and/or foreign production locations, along with investments in technology and inventory, usually makes more sense, and surveys show more companies embracing these strategies.

Expect supply chain shifts to accelerate when business travel opens up again, but with most pre-pandemic trends, such as China plus one sourcing, continuing. With trade still flowing, companies risk falling behind competitively if they miss out on imported inputs or export sales. So, efforts to boost resilience need to fit into broader supply-chain strategies addressing shifts in demand and production costs across countries, geopolitical tensions, and advances in automation and other technologies.

2. Capital Flows

Cross-border investment flows were hit even harder than trade by Covid-19. Investors withdrew record amounts of portfolio capital from emerging markets at the onset of the pandemic, but these flows quickly stabilized and then rallied in late 2020. Bold fiscal and monetary policy responses have, thus far, prevented the Covid-19 crisis from turning into another global financial crisis.

International corporate investment, however, is still subdued going into 2021. Foreign direct investment (FDI) flows, which involve companies buying, building, or reinvesting in operations abroad, fell 42% in 2020, to a level last seen in the 1990s. Firms are understandably cautious about investing in new “greenfield” expansion amid a fragile and uneven economic recovery. However, international mergers and acquisitions (M&A) started to show signs of a pickup in late 2020, and the international share of M&A activity held steady last year. Corporate dealmakers do not appear to have become more averse specifically to international transactions.

Prospects for international business investment should brighten as pandemic-induced macroeconomic uncertainty, lockdowns, and travel restrictions begin to lift. But tighter screening of foreign takeovers on national security grounds will remain in place, and supply-chain diversification and partial reshoring will boost prospects for some projects while making others less attractive. The business case for investing in foreign operations will still rest on traditional drivers, such as access to markets and resources, but risk assessments should place greater emphasis on geopolitical factors in the present context.

3. Information Flows

Before the pandemic, there were signs of a slowdown in the globalization of information flows. The growth of international internet traffic, phone calls, royalties, and scientific collaboration had all diminished. But then digital flows surged as the pandemic sent work, play, and education online. International internet traffic soared 48% from mid-2019 to mid-2020, and international telephone call minutes rose 20% in March versus the same month the previous year. According to one study, cross-border e-commerce sales of discretionary goods spiked 53% in the second quarter of 2020. All that said, though, domestic data and calls have also grown significantly during the pandemic. So, we cannot say yet whether information flows have become more — or less — globalized in 2020.

Looking forward, the growth of digital flows will slow down again as the pandemic-induced spike fades. But the 2020 digital flows boom will have accelerated two longer-run shifts in the business environment. First, it expands possibilities for services trade. The Covid-19 crash course in remote work is teaching companies ways of working that can enable them to tap more into foreign talent pools. Second, the expansion of cross-border e-commerce can help smaller companies go global, but it also means that companies of all sizes need to be on the lookout for new competitors riding this wave into their markets.

4. People Flows

While trade, capital, and information flows all had positive roles to play in the pandemic response, personal mobility had to be restricted to curb transmission of the virus, prompting this year’s unprecedented decline in people flows. The number of people traveling to foreign countries fell 74% in 2020. International travel is not expected to return to its pre-pandemic level before 2023.

Business trips were just 13% of international travel before the pandemic, but they play key roles in facilitating trade, investment, and the management of global corporations. Travel supporting companies’ external sales and business development agendas is expected to recover before travel for internal company meetings and participation in conferences and trade shows. This implies that managers in multinational corporations should pay special attention over the medium-term to effects of travel restrictions on internal team functioning and learning and innovation. Remember that global teams are more vulnerable than domestic teams to misunderstandings and breakdowns of trust, especially after long periods without in-person contact.

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So, the pandemic has not halted most types of international flows. Nor has it clearly turned the tide toward deglobalization moving forward. The DHL Global Connectedness Index 2020 report also looks for evidence of the global economy fracturing into rival blocs. U.S.-China decoupling has advanced somewhat since the onset of the trade war in 2018, but these economies remain highly intertwined. China’s share of U.S. trade spiked during the pandemic, and American multinationals such as Walmart, Tesla, Disney, and Starbucks continue to invest there. Moreover, the average distance across which countries trade has been on a modest rising trend since 2016. This casts doubt on the contention that we are seeing a big shift from globalization to regionalization.

Many governments have also taken major steps to open markets over the past year. The Regional Comprehensive Economic Partnership (RCEP) was signed in November, promising to simplify trade across a swath of the Asia-Pacific region that encompasses almost one-third of the global economy. The US-Mexico-Canada agreement (USMCA) entered into force in July, replacing the North American Free Trade Agreement (NAFTA). And trading under the African Continental Free Trade Agreement (AfCFTA) began on January 1, 2021.

These moves are supported by public opinion data. Majorities across several countries want more international cooperation, and polling in the U.S. shows record-high support for globalization in general and for immigration specifically.

The bottom line for business is that Covid-19 has not knocked globalization down to anywhere close to what would be required for strategists to narrow their focus to their home countries or regions. Corporate globalization was never easy, but if international opportunities and competitive threats mattered for a company before the pandemic, they will surely continue to matter in 2021 and beyond. And since countries that connect more to global flows tend to grow faster, we need more rather than less globalization to accelerate the recovery from Covid-19.

#### The global economy is transitioning to a period of “risky managed trade” that risks sliding toward a global protectionist order – the status quo is stable, but violating principles of economic nondiscrimination collapse the system

Alden ’21 - visiting professor at Western Washington University, and a senior fellow at the Council on Foreign Relations.

Edward Alden, “Free Trade Is Dead. Risky ‘Managed Trade’ Is Here.” Foreign Policy, July 20, 2021, [https://foreignpolicy.com/2021/07/20/free-trade-dead-managed-carbon-border-tax-climate-tariffs-trade-war-protectionism-esg-biden-trump-eu-china/](about:blank)

For three quarters of a century, the growth of world trade—which has spread prosperity to much of the planet, including hundreds of millions of people in the developing world—has been underpinned by a simple commandment: Thou shalt not discriminate. In the years after World War II, most nations agreed, for the first time in history, they would treat foreign-made goods the same from almost every country. The United States would, for example, charge the same tariff on a sweater imported from Italy as on one imported from Bangladesh and impose no additional discriminatory regulations. First, this powerful principle allowed many poor countries, such as Bangladesh, to grow by exporting goods. Later, when advances in communications and logistics pushed globalization forward, it allowed companies to spread production around the globe, confident they could make goods in almost any country and export them to any other under identical rules.

But the nondiscrimination principle is now under the most sustained assault it has ever faced. On issues from national security to labor rights to the environment, the world’s largest economies are deciding that nondiscrimination—the bedrock principle of free trade and globalization—must take a back seat to more pressing concerns. The most dramatic abandonment is about to hit: Last week, the European Union unveiled its “[Fit for 55](about:blank)” plan to reduce carbon emissions by 55 percent from 1990 levels by the end of this decade and to reach carbon neutrality by 2050—which will require the most sustained economic upheaval since the Industrial Revolution. Central to the EU’s plan is a carbon border tax, under which Europe plans to charge higher tariffs on imports of products made in ways that generate higher emissions than European producers will be permitted to generate for the same goods. The scheme will start by targeting carbon-intensive sectors such as concrete, steel, aluminum, and fertilizer. The U.S. Congress is developing a similar plan to [tax carbon-intensive imports](about:blank) as part of the coming budget reconciliation package—although the details are still murky. Other new trade restrictions being imposed or considered on both sides of the Atlantic Ocean are based on compliance with labor protections, human rights, and other criteria. For many traded goods, nondiscrimination will become a quaint relic.

Most of these measures are eminently defensible, perhaps even critically necessary, but together, they are leading to an increasingly balkanized global economy—one divided by ideology, social values, and environmental commitments. It will be a less efficient world, one in which companies will need to tailor both investments and production decisions to the values of the countries they wish to sell to. And it will cause more economic conflict. The more these exceptions to the principle of nondiscrimination become entrenched, the easier it becomes to expand those exceptions in the future. As the world moves down this road to closely managed trade, it will need to step cautiously to avoid going too far—and slide back into damaging protectionism.

Nondiscrimination has been the foundation of global trade since the 1947 creation of the General Agreement on Tariffs and Trade (GATT), the forerunner of the World Trade Organization (WTO). [Article 1.1 of the GATT agreement](about:blank)—the founding constitution for modern trade—directs that “any advantage, favour, privilege or immunity” given to the products of any GATT member “shall be accorded immediately and unconditionally” to the same products from any other member. In those years, of course, much of the world remained outside the system, in particular the Soviet bloc of communist countries; China withdrew in 1950. But for GATT members, which, by the mid-1990s, included most of the world, there were very few exceptions to nondiscrimination. Having learned from the wreckage of the 1930s, when high tariff walls killed off much of the world’s trade and deepened the global depression, the founders of the GATT wanted nondiscrimination to be a largely inviolate principle, a bulwark against the descent back into senseless trade wars.

Unfortunately, the exceptions were still large enough to erode that bedrock commitment. Decades of preferential trade agreements and regional trade zones, from the original European Community to the North American Free Trade Agreement (NAFTA) and beyond, offered favorable treatment for countries inside those arrangements at the expense of nonmembers. Some of these arrangements gave preferences to certain outside countries but not others—for decades, the European Community gave special privileges to France’s former colonies. Mexico’s proximity to the large U.S. consumer market and its special access under NAFTA turned it into a manufacturing powerhouse. The GATT system also permits countries to slap tariffs on goods deemed “unfairly traded” due to government subsidies or predatory pricing. Many global steelmakers especially have faced such duties for decades. Critics argue “unfair” and “predatory” can be squishy criteria, subjectively applied to ward off competition.

Recently, these exceptions have mushroomed. Former U.S. President Donald Trump cited national security—[a narrow but permitted GATT exception](about:blank)—to raise taxes on imports of steel and aluminum from some countries. U.S. President Joe Biden is making similar arguments when he insists goods like semiconductors, advanced electric batteries, pharmaceuticals, and critical minerals [be produced primarily in the United States](about:blank). Washington has threatened to block goods deemed environmentally damaging and is currently pursuing a case against Vietnam over its exports of furniture and other wood products made from timber alleged to have been [illegally harvested](about:blank). The European Union, the United States, Britain, and Canada recently [imposed trade sanctions](about:blank) targeted at imports from China’s Xinjiang region to protest Beijing’s treatment of the region’s Uyghur Muslims.

Each exception to the nondiscrimination principle has many defenders. No country, quite reasonably, would let its desire for open global trade threaten its national security. Defenders of U.S. trade restrictions on China argue China’s admission to the WTO and the explosion in trade and investment that followed allowed Beijing to grow richer and advance technologically to the point that it poses a significant security threat. A correction was long overdue. Countries, quite understandably, want their economic policies to reflect their values—who would now argue that trade policies should be blind to deforestation in the Amazon or the exploitation of workers? And climate change is now an existential threat to the planet.

The dilemma with each of these measures is the line between legitimate humanitarianism or environmentalism and selfish protectionism can be vanishingly thinZoetry Agua Punta Cana. The goals of the EU carbon tax are twofold. First, to encourage other countries to make similarly ambitious climate commitments by threatening the loss of European market access while also equalizing competitive conditions for the EU producers who will pay higher costs for switching to clean energy. The latter goal is dauntingly complex. The EU fears what it calls “carbon leakage,” in which companies would increasingly abandon the EU and shift production abroad to take advantage of looser rules in other countries. The new border tax is intended to “[equalise the price of carbon](about:blank) between domestic products and imports.”

The EU has worked hard to try to ensure the new mechanism does not violate WTO rules, but implementation will be messy at best. The means for assessing the carbon content of imports remain unclear, and EU firms are certain to lobby for the highest possible tariffs to protect their competitive edge. In the United States, which has not set a domestic price for carbon, the danger of protectionist discrimination through import tariffs may be even higher. It’s easy to imagine the next step: Targeted countries and companies will complain they’re being treated unfairly, retaliatory tariffs will ensue, and a trade conflict will start that will be difficult to control given the intensity of the societal and political convictions involved.

The same dynamics are in play on other measures, such as labor rights. For decades, U.S. administrations have pushed for tougher labor standards in trade agreements, partly motivated by the desire to see working conditions improve abroad but mostly in response to domestic labor unions that fear being undercut by cheaper foreign workers. The debate over whether lower wages are an integral part of the competitive advantage of developing economies or a pernicious feature of a global race to the bottom remains unresolved. But the advanced economies have become more aggressive in blocking imports over labor rights. The new United States-Mexico-Canada Agreement, for example, allows for [import tariffs to be targeted](about:blank) at a single company’s products if that company is deemed to be wrongly impeding union organizing.

There is much to support in all of this. For too long, trade has been blind to most values other than maximizing wealth and corporate profits. However important the pursuit of profit has been in lifting hundreds of millions of people out of misery and destitution in the developing world, there are other values that matter as much, not least the survival of the planet in the face of climate change.

But as they abandon the old trade order in pursuit of these laudable goals, the EU and the United States, in particular, would be wise to remind themselves repeatedly of another standard enshrined in the WTO: the “less trade-restrictive” principle. Trade negotiators have grappled for decades with the trade implications of national regulations designed to protect human health and safety, from car crash testing standards to drug and food quality regulations. Such regulations are the proper sovereign authority of nations—but they’re also easily abused to keep out foreign competition or applied for political reasons alone, such as Europe’s fears of certain U.S. food exports.

The compromise has been that while countries must be free to take regulatory measures to protect their people, those measures “[shall not be more trade-restrictive](about:blank) than necessary to fulfill the legitimate objective.” A series of WTO dispute cases in the 1990s on issues like U.S. air quality standards for gasoline and the U.S. requirement that the fishing industry protect sea turtles provided sensible standards. The panels in those cases found that although such environmental measures were legitimate under trade rules, they must be implemented in an even-handed way that does not disproportionately harm foreign countries, and those countries must be given time to adapt to the new rules. The panels called for negotiated compromises to resolve disagreements wherever possible.

Although weaker, to be sure, a commitment to less trade-restrictive responses and compromises would provide some needed guardrails against sliding down the proverbial slippery slope. As the world enters a new era of closely managed trade, countries must ensure enlightened discrimination does not become a cover for ruinous protectionism.

#### The Vit C thumper makes no sense – the decision PROVES a resurgence of comity defenses

Arguello ’22 – Partner at Winston & Strawn

Sofia Arguello, “Vitamin C Ruling May Trigger Comity Defense Resurgence” January 7 , 2022, [https://www.winston.com/en/thought-leadership/vitamin-c-ruling-may-trigger-comity-defense-resurgence.html#!/closed\_state?utm\_source=Mondaq&utm\_medium=syndication&utm\_campaign=LinkedIn-integration](about:blank#!/closed_state?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration)

In an August 2021 decision in the long-running In re: Vitamin C Antitrust Litigation, the U.S. Court of Appeals for the Second Circuit dismissed price-fixing claims against several Chinese pharmaceutical companies on international comity grounds, holding that Chinese law essentially required the defendants to engage in the conduct alleged.[1]

The implications of the case go beyond antitrust, and beyond even merits-based defenses.

This article explores a possible resurgence of comity-based defenses in discovery disputes—which have been asserted in the past with mixed success—but which could gain traction now post-Vitamin C.[2]

In Vitamin C, the Second Circuit twice reversed a judgment against defendants for coordinating supply and prices of Vitamin C in China that was later exported to the United States.[3]

In the first instance, the Second Circuit held that the district court was bound to defer to the explanation of Chinese law that was submitted by China's Ministry of Commerce, which said that the defendant companies were bound by Chinese law to engage in the alleged anti-competitive conduct.[4]

The U.S. Supreme Court reversed because, it said, the Second Circuit afforded too much deference to the MOC and should have tested its statements against additional objective sources.[5]

On remand, the Second Circuit once again reversed and dismissed the action. In reaching that decision, the court looked beyond the statement from the MOC and examined the regulations in the Vitamin C industry in China and various other pieces of evidence, including industry records and other administrative materials, all of which corroborated the MOC's position that the defendant companies were required to coordinate on supply and price in accordance with the China Chamber of Commerce for Import and Export of Medicines and Health Products.

The court ultimately concluded that it was impossible for the defendant companies to comply with U.S. antitrust law and Chinese law, and it was required to defer to Chinese law under the principles of international comity.

While Vitamin C is interesting enough on the merits, it also calls for fresh eyes on the role comity ought to play in discovery disputes of international scope.

The Supreme Court first examined international comity in relation to discovery in the 1987 Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa decision, in which the U.S. Supreme Court held that a particularized analysis of the interests of each respective sovereign is required to resolve a comity-based defense to discovery. The court developed a five-factor balancing test for the assessment [6]:

Importance of the information sought in the investigation;

Specificity of the request;

Origin of the information;

Alternative means of obtaining the information; and

Interest of sovereigns — balancing national interests.[7]

Later, in granting discovery of a Chinese defendant's assets, in the 1992 Richmark Corp. v. Timber Falling Consultants decision, the U.S. Court of Appeals for the Ninth Circuit considered the five Aérospatiale factors while adding two more:

Hardship of compliance for the party facing the obligation; and

Likelihood of compliance.

The court also said that factor five — national interests of the respective sovereigns — is the most important.[8] On the facts, the Richmark court held that the evidence sought was not only relevant but crucial to enforcing a default judgment and that there were no other alternative means of obtaining the requested information.[9]

Plus, the United States' “interests in vindicating the rights of American plaintiffs and in enforcing the judgment of its courts” outweighed the interests of China, in part, because China was “unable to identify any way in which [Chinese] interests will be hurt by disclosure.”[10]

In the past few years, litigants are increasingly turning to comity to challenge discovery. In the 2019 In re: Grand Jury Investigation — of possible violations of Title 18 of the U.S. Code, Section 1956 and 50, and Section 1705, for example, the U.S. District Court for the District of Columbia granted a motion to compel compliance with a subpoena issued by the U.S. government to three Chinese banks.

The banks had argued that compliance would violate multiple Chinese laws, including a relatively new one designating the Mutual Legal Assistance Agreement as the exclusive mechanism for the disclosures at issue, which the United States chose to bypass.

Despite that, the court determined that the majority of the Richmark and Société Nationale factors weighed in favor of the United States [11] and, most importantly, that national security was at stake for the United States, but not so for China.[12]

Non-Chinese defendants have raised similar comity arguments with limited success prior to Vitamin C.

Take, for example, the 2017 Knight Capital Partners Corp. v. Henkel AG & Co. decision, in which the U.S. District Court for the Eastern District of Michigan denied a German company's motion to quash based on the German Federal Data Protection Act because the Act “expressly allow[ed] disclosures that are necessary for the purposes of litigation.”

Take also, the 2016 Fenerjian v. Nong Shim Co., decision, in which the U.S. District Court for the Northern District of California held that the Korean Personal Information Protection Act did not prohibit Korean defendants from complying with discovery requests because enforcing the antitrust laws of the United States was an interest of “fundamental” importance and a protective order was put in place to provide confidentiality for any personal information to be disclosed.

Finally, take the 2014 Motorola Credit Corp. v. Uzan decision, in which the U.S. District Court for the Southern District of New York found that Richmark factors favored enforcing a subpoena for bank records located in France, Jordan, and United Arab Emirates but denied enforcement for bank records located in Switzerland because Switzerland's bank secrecy laws were so “seriously enforced” that they had become “an element of [Switzerland's] national identity.”

While the courts overwhelmingly compelled discovery in these cases, the Vitamin C decision may provide a roadmap for more successful comity-based defenses going forward.

First, while a statement from a foreign government on its own may be persuasive, it is not dispositive. Courts must consider both context and incentives in assessing the credibility of government statements that may seem, on their face, self-serving.

Second, courts have devoted much importance to the national interest and hardship factors, requiring, at the very least, an evidentiary showing of how the relevant laws and/or interest of the non-U.S. jurisdiction are violated as well as particularized and unusual burdens on the party opposing the request.[13]

Based on these broad rules, clients doing business in foreign nations or with foreign companies should:

Consider any specific restrictions set forth in their laws and regulations that may be implicated by compliance with a discovery request (whether civil or criminal).

Consider the location of the evidence sought and accessibility (or non-accessibility) of that evidence outside the litigant's home jurisdiction.

Consider whether and how to request support from the relevant government agency in the home jurisdiction.

Gather objective indicia that the specific restrictions against the discovery are established and are regularly and actively enforced in the home jurisdiction.

Gather evidence showing the importance of the specific restriction to the home jurisdiction in terms of national security, national character, etc.

Gather evidence showing specific hardships if forced to comply with the discovery, including as to future business/relationships with the United States.

Consider how both U.S. and home-based legal counsel can work together to maximize the effectiveness of an international comity strategy.

As the Vitamin C case demonstrates, comity defenses are viable but surely require a strategic and comprehensive approach, even at the discovery stage, when disclosure — or nondisclosure — could be critical to the litigation overall.

#### The doctrinal shift is notable and impacts other courts – much better scope of the comity test than the plan

Beninca 8/25/2021 – Partner at Jones Day, PhD

Dr Jurgen Beninca, et al. “Second Circuit—Once Again—Overturns on Comity Grounds Multi-Million Dollar Price-Fixing Judgment” [https://www.jdsupra.com/legalnews/second-circuit-once-again-overturns-on-9587824/](about:blank)

The Situation For a second time, the Second Circuit reversed on international comity grounds, due to a conflict between U.S. and Chinese law, a $148 million price-fixing judgment against two Chinese exporters of Vitamin C.

The Result: Although arising in the antitrust context, the Second Circuit's decision has far-reaching implications, potentially impacting any case in which litigants find themselves in the unenviable position of being caught between competing and diverging legal demands of two or more countries.

Looking Ahead: Foreign litigants likely will view this decision as welcome relief, as the Second Circuit eased the burden for those invoking the international comity defense, emphasizing that courts should focus on whether a true conflict exists, not on whether the litigants face the risk of sanctions if they fail to comply with the foreign country's law. The Second Circuit found that the additional step of demonstrating pain of sanctions, imposed by many lower courts, should not be part of the international comity analysis.

The U.S. Court of Appeals for the Second Circuit recently issued a decision in In re Vitamin C Antitrust Litigation, reversing a $148 million price-fixing judgment against two Chinese exporters of vitamin C, remanding the case with instructions to dismiss the case with prejudice. The Second Circuit reversed on international comity grounds, finding there was a true conflict between U.S. and Chinese law and, as a result, declining to "construe U.S. antitrust law to reach defendants' conduct."

The case dates back more than a decade, when a putative class of U.S.-based vitamin C purchasers filed an action under Section 1 of the Sherman Antitrust Act against four Chinese companies, alleging that the Chinese companies conspired to fix prices and constrain the supply of vitamin C to the U.S. The Chinese companies did not contest that they were price fixing; instead, they argued that Chinese law compelled their alleged anticompetitive conduct. The Chinese government, through the Ministry of Commerce, appeared and agreed that it required price fixing as a means of nurturing its nascent vitamin C industry.

The Chinese companies sought to dismiss the action on, among other things, international comity grounds. The district court denied the request, and the case ultimately went to trial, resulting in a $147 million jury verdict against the non-settling defendants. On appeal in 2016, the Second Circuit reversed, dismissing the lawsuit on the basis of the defendants' international comity argument. The U.S. Supreme Court, however, granted certiorari and vacated the Second Circuit's ruling, a decision we discussed in more detail here. The U.S. Supreme Court remanded the case for further consideration with the instruction that U.S. courts should give "careful consideration but not conclusive deference to foreign governments' submissions in U.S. litigations.

On remand, relying on Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993), the Second Circuit started its comity analysis by asking whether Chinese law required defendants to engage in anticompetitive conduct that violated U.S. antitrust laws, such that a "true conflict" exists.

The Second Circuit drew an interesting—and we anticipate, important—comparison between the true conflict requirement under the international comity doctrine, on one hand, and the foreign sovereign compulsion doctrine, on the other hand. The Second Circuit recognized that a number of courts, including district courts within the Second Circuit, had incorrectly conflated the two. Of most interest to foreign litigants, the Second Circuit emphasized that the true-conflict doctrine requires only that a conflict exist, not that the litigant face the risk of sanctions should it not comply with the foreign country's law.

That represents a notable change. To date, many trial courts have required foreign litigants asserting an international comity defense to demonstrate they will be punished in the foreign country if they fail to comply with the foreign law. In other words, a conflict was not enough; the litigant also had to show that it would be punished. That approach is no longer correct under the Second Circuit's decision, which found that the "exclusive attention" should be on what foreign law facially requires, regardless of "the threat of compulsive sanctions." This approach, the Second Circuit explained, reflects that international "‘comity' is characterized by respect for another country's sovereign authority within its border, not by examination of whether such authority exerts duress-like pressure" on the litigants.

In concluding that a true conflict existed between U.S. and Chinese antitrust law, the Second Circuit also considered "with more than a grain of salt," but nonetheless gave "some weight" to, the statements from the Chinese government as to the proper interpretation of its laws and what requirements those laws imposed on the defendants. The Court then weighed the true conflict together with the other comity factors—including the U.S.'s interest in adjudicating antitrust violations within its jurisdiction with China's interest in regulating its economy within its borders—and held that principles of international comity require dismissal.

The Second Circuit's decision, however, was not unanimous. The three-judge panel split 2-1, with Judge William J. Nardini writing for the majority. Judge Richard C. Wesley dissented, arguing that no true conflict existed between the relevant U.S. and Chinese laws.

#### Comity is strong now – recent case law.

Cardenas et al. 21 – Vinson & Elkins LLP

Natalie Cardenas, Branden Stein, Lindsey Vaala, “Had Enough Vitamin C? Second Circuit Dismisses Antitrust Claims Against Chinese Vitamin C Manufacturers Yet Again,” JD Supra, August 2021, https://www.jdsupra.com/legalnews/had-enough-vitamin-c-second-circuit-2307332/

On August 10, 2021, the United States Court of Appeals for the Second Circuit (the “Second Circuit”) once again drew on principles of international comity to dismiss antitrust price-fixing claims against Chinese vitamin C manufacturers.1 The court found that a true conflict existed between Chinese law and U.S. law, making it impossible for the China-based defendants to comply with both. This, in combination with other international comity factors favoring dismissal, supported the court’s position that U.S. law could not reach the defendants’ conduct abroad. The Second Circuit’s decision strengthens the international comity defense in cases that meet certain criteria, providing foreign companies with a potential shield against U.S. antitrust liability.

#### The Supreme Court’s decision is irrelevant – the Second Circuit still deferred to China on remand.

Cardenas et al. 21 – Vinson & Elkins LLP

Natalie Cardenas, Branden Stein, Lindsey Vaala, “Had Enough Vitamin C? Second Circuit Dismisses Antitrust Claims Against Chinese Vitamin C Manufacturers Yet Again,” JD Supra, August 2021, https://www.jdsupra.com/legalnews/had-enough-vitamin-c-second-circuit-2307332/

The Supreme Court overturned the Second Circuit’s ruling in 2018, finding that the circuit court gave too much deference to the Ministry’s submission.4 The Court held that “[a] federal court should accord respectful consideration to a foreign government’s submission, but is not bound to accord conclusive effect to the foreign government’s statements.”5 The Court remanded the case back to the Second Circuit for reconsideration in accordance with its holding.

Second Circuit Decision

On remand, the Second Circuit followed the Supreme Court’s direction and “carefully consider[ed]” the Ministry’s statements supporting the defendants’ position.6 The court proceeded to apply a multi-factor balancing test to determine whether international comity applied to the case, focusing heavily on the first factor — the existence of a “true conflict.”7

The Second Circuit found that, during the period in question, Chinese vitamin C exporters were required to coordinate on price pursuant to price-fixing controls enacted by the Chinese government. In coming to this conclusion, the court relied on materials, including regulatory documents and the Ministry’s own statements. These sources supported the conclusion that a true conflict existed because abiding by Chinese law would have required the defendants to violate U.S. antitrust law.

#### Link is huge – the decision in Vit C was good – aff is seen as an example of broader issues of extraterritorial bullying.

Perlman 21 – Writer and Reporter for Law360

Matthew Perlman, “Vitamin C Price-Fixing Case: Round 2 At The 2nd Circ.,” Law360, March 2021, https://www.law360.com/articles/1365219

The case has already created geopolitical strife, with the Chinese government calling the case offensive and the issue one it deems important.

Stephen Calkins, a professor at Wayne State University Law School, told Law360 that the Chinese legal system involves more than just written laws and requires looking at different applications and interpretations of legislation, as well as various protocols. This, he said, creates the potential for abuse by the Chinese government and could obscure when it's actually trying to help its own companies.

But in its brief to the Second Circuit after the high court's decision, MOFCOM argued that there's no reason for it to offer anything but a bona fide interpretation of its regulations.

"It would make no sense for a sovereign to appear in U.S. court for the first time to offer untrue statements that could be used against its own interests by other nations, all to support a handful of domestic companies facing litigation abroad," the ministry said in a brief.

Calkins acknowledged that it's politically sensitive to accuse another country of using competition law as a backdoor way to give its own companies an advantage in the global marketplace.

"When you start saying that in writing in court, in an official document, it comes close to assaulting the integrity of a foreign country," Calkins said. "That's what makes it so tricky. It's hard from the outside, really, to have a good understanding of the Chinese legal system."

John Briggs, a partner with Axinn Veltrop & Harkrider LLP, told Law360 that he views the case as an example of a broader issue for international relations, saying it's an example of U.S. courts reaching beyond the country's borders in a way that some consider an exercise in "judicial adventurism" or "extraterritorial bullying."

"No other judicial system in the world so regularly reaches across oceans and borders to issue orders with extraterritorial effects at the behest of private parties," Briggs said, adding that when other countries' courts reach overseas, "they're doing so at the behest of foreign governments."

#### Aggressive targeting of Chinese firms risks conflict – tensions are already high enough and antitrust is uniquely damaging

Scarborough ’19 – Antitrust & Competition Practice Group Leader, Partner at Sheppard Mullin Richter and Hampton LLP

Michael, “Between a Rock and a Hard Place: Vitamin C and the Future of U.S. Antitrust Enforcement Against Chinese Companies” [https://www.sheppardmullin.com/media/publication/1786\_Legal%20500%20PDF.pdf](about:blank)

Putting It All in Context

The Vitamin C decision is but one of a growing collection of obstacles for Chinese companies to navigate when doing business in the US. Recent developments include the ongoing US-China trade war, the rollout of the China Initiative, the passage of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), and the unprecedented extradition of the Chinese citizen CFO of Huawei Technologies, China’s largest smartphone and communications equipment maker. Vitamin C creates additional uncertainty for Chinese companies potentially facing conflicting demands from Chinese and US authorities. The stakes can be particularly high when it comes to antitrust enforcement in the U.S., where prison time, treble damages and class actions are very real possibilities.

The standard articulated by the Supreme Court leaves open the possibility that district courts and courts of appeal may reach decisions that completely or partially reject positions of foreign governments on the interpretation or application of their own laws. Future decisions like this may further raise tensions with China or give rise to even more issues that Chinese companies need to consider. Indeed, in its amicus brief to the Supreme Court, MOFCOM argued that “[r]ejecting a foreign sovereign’s explanation of its own law can imply only two things: that a U.S. court knows a country’s laws better than its own government, or that the foreign government is not being candid.” Either of these implications, MOFCOM warned, were “profoundly disrespectful” and risked an “international incident” and “international discord as a result.” And MOFCOM protested in its most recent amicus brief to the Second Circuit that “[i]t would make no sense for a sovereign [to] appear in U.S. court for the first time to offer untrue statements that could be used against its own interests by other nations, all to support a handful of domestic companies facing litigation abroad” unless it was offering a bona fide interpretation of its own regulations.

#### The aff is perceived a blatant act of aggression in the midst of escalating trade hostilities

Scarborough ’19 – Antitrust & Competition Practice Group Leader, Partner at Sheppard Mullin Richter and Hampton LLP

Michael, “Between a Rock and a Hard Place: Vitamin C and the Future of U.S. Antitrust Enforcement Against Chinese Companies” [https://www.sheppardmullin.com/media/publication/1786\_Legal%20500%20PDF.pdf](about:blank)

Regardless of the ultimate resolution of the Vitamin C case, the new legal landscape—where U.S. courts have discretion to reject the Chinese government’s statements regarding its own laws—could open the floodgate to U.S. antitrust litigation against Chinese defendants. These cases will not be decided in a vacuum, but in the midst of an escalating trade war between China and the United States, at a time when elements of the U.S. government are openly hostile to various Chinese businesses and their products. It is probably unavoidable that political realities will inform the filing and resolution of future cases and the ongoing development of U.S. law in this area.

U.S. enforcers and plaintiffs have long been eager to bring cases against Chinese companies they believe are openly engaging in conduct that violates U.S. antitrust laws. Many of these enforcers and plaintiffs will view the Vitamin C case a s their invitation to proceed. And it is now a very real possibility that not even the pronouncements of the Chinese government itself will be enough to stop them.

#### Escalation likely, goes nuclear

**Kulacki 16**

Gregory Kulacki, China Project Manager in the UCS Global Security Program, The Risk of Nuclear War with China, 2016, [http://www.ucsusa.org/nuclear-weapons/us-china-relations/risk-nuclear-war-china#.Wc8tb8iGMh4](about:blank#.Wc8tb8iGMh4)

Mistrust and misunderstanding have plagued US and Chinese relations for years. Nowhere is this more evident—and more dangerous—than in the contrasting perspectives and policies each country holds on nuclear weapons. **Could simmering tensions lead to a full-blown nuclear war?** More specifically: **could a minor skirmish or conventional war escalate into a full-blown nuclear conflict?** **Numerous factors suggest that it could**—and that the likelihood of nuclear use between the United States and China may be **increasing**. The two countries have a very contentious history. Despite sincere and occasionally successful efforts to cooperate on shared concerns such as climate change and nuclear terrorism, **lack of mutual trust sustains an entrenched and deepening antagonism**. **Both governments are preparing for war.** Their preparations include improvements to their nuclear arsenals, including a trillion dollar investment in the United States. Both governments also believe that a **demonstrable readiness to use** military force­—including **nuclear weapons—is needed to ensure the other will yield** in a military confrontation. **Discussions of contentious issues are exceedingly inadequate**. Their militaries have produced shared understandings of the conduct of naval vessels and aircraft, but strategic dialogues on nuclear forces, missile defenses, and anti-satellite weapons are limited at best. **United States and Chinese officials see the risk of nuclear use differently**. US officials believe that if a military conflict starts, nuclear weapons may be needed to stop it—but Chinese officials assume no nation would ever invite nuclear retaliation by using nuclear weapons first. Their only concern is maintaining a credible threat of retaliation. **These and other factors are exacerbated by recent developments between the two countries, including China’s apparent move toward hair-trigger alert**—**a policy that increases the risk of accidental nuclear war, especially in the early days of its development.**

#### That spills over to set a broader precedent about how the U.S. interprets the sovereignty of foreign countries.

Jacobson et al. 14 – Partner in Wilson Sonsini Goodrich & Rosati's New York office

Jonathan M. Jacobson, Daniel P. Weick, Justin A. Cohen, Scott A. Sher, Bradley T. Tennis, Final Reply Brief for Defendants-Appellants, In Re: Vitamin C Antitrust Litigation Animal Sciences Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., United States Court of Appeals for the Second Circuit, August 2014, LexisNexis

G. FAILURE TO REVERSE WOULD REQUIRE DEEMING CHINA'S SOVEREIGNTY LESS SUBSTANTIAL THAN THAT OF THE U.S. AND WOULD SERIOUSLY HARM U.S. INTERESTS

Regardless of the specific doctrinal lens adopted, the judgment below clearly "rais[es] the question of whether our antitrust laws ought to be interpreted as giving greater deference to the sovereignty of individual U.S. states than to the sovereignty of foreign governments." Michael N. Sohn & Jesse Solomon, Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict, 28 ANTITRUST 78, 78 (2013). Appellees' attempts at technical distinctions of specific cases fail to rebut the point. Cf. Appellees-Br.46.

Moreover, the same can be said about federal programs. The federal raisin price regulation program, which is largely driven by agreements among private producers enforced by the U.S. government, provides a useful comparison. See Horne v. USDA, 750 F.3d 1128 (9th Cir. 2014) (upholding the program). If the reasoning of the district court here were accepted, there is no reason why a foreign country that imports U.S. raisins could not impose antitrust penalties on U.S. raisin producers on the theory that, if the producers wished, they could all just refuse to cooperate with the government. But the U.S. would expect foreign nations to recognize that the public-private interaction surrounding its raisin policies does not create an "optional" regulatory regime or "private" cartel in any meaningful sense. Other nations should be entitled to equal deference.

The district court's judgment disrespects China's sovereignty in a way that will inevitably harm U.S. interests, for it establishes that foreign citizens can be held liable for participating in their home nations' regulatory programs if a U.S. judge deems the programs insufficiently compulsory. These considerations further support reversal of the judgment below.

#### The aff’s ruling opens up the litigation floodgate, which monopolizes court attention and focus

Masingill ’18 - Senior Staff Member, American University Law Review, Volume 68; J.D. Candidate, May 2019, American University Washington College of Law

Megan Masingill, “EXTRATERRITORIALITY OF ANTITRUST LAW: APPLYING THE SUPREME COURT’S ANALYSIS IN RJR NABISCO TO FOREIGN COMPONENT CARTELS” American University Law Review: Vol. 68 : Iss. 2 , Article 5., https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2083&context=aulr

Lastly, policy considerations support the narrow scope of U.S. antitrust laws as suggested by the Supreme Court and the Seventh Circuit. Foreign nations have raised valuable concerns that allowing foreign plaintiffs to recover under U.S. law allows them to bypass the laws of the country under which they are incorporated. For those who feel a globalized society calls for the extension of such reach, it is important to bear in mind that the United States cannot and should not police the world. It is simply the price of doing business: if a company choses to conduct its business in foreign countries or with foreign enterprises, it must seek redress under such laws. To allow claims like Motorola’s would open the floodgates to domestic companies bringing private claims on behalf of the thousands of foreign subsidiaries owned by U.S. companies.