# 1NC

**T Per Se**

TOPICALITY:

**‘Prohibiting’ a practice requires per se illegality.**

Lee **Mendelsohn 6**, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The **first step** in any **competition law** analysis is to **define** the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The **prohibition** on the fixing of a purchase or selling price or any other trading condition is one of the so-called **"per se"** prohibitions which are included in our Competition Act. The prohibition is **automatic** and **absolute** and the fixing of prices or other trading condition **cannot be justified** on the basis of any technological, efficiency or other procompetitive **gains** that could **outweigh** the potential **anticompetitive effect** of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

**Limits---many standards, requiring distinct answers, make the topic unmanageable.**

**Ground---fringe standards dodge links and allow bidirectional permissiveness.**

### Transparency CP

#### Text: The United States federal government should:

#### ---maintain the exemption of export cartels in its core antitrust laws

#### ---mandate a business review clearance for export cartels

#### ---make the results of the review available to foreign countries which promise increased market access in exchange

#### CP solves the aff---it uses the antitrust exemptions of cartels to conduct a business review clearance and hands over that information to foreign jurisdictions---that solves via foreign antitrust actions against the US-based cartels

Sokol 8 (D. Daniell, Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law, WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION? Journal of Competition Law & Economics, 4(4), 967–982, y2k)

c. A New Approach

Battling export cartels requires a new approach from either existing hard-law or soft-law solutions. This article advocates mandatory notification and transparency of export cartels by the WTO. Countries would require legitimate export joint ventures (even those with only an implicit exemption) to undertake a robust business review clearance from their home jurisdiction that would provide immunity for a set period of time based on the proposed business plan. Business review clearance would be publicly available. To have the immunity renewed past the initial period, companies involved in the joint venture would be required to provide evidence that the venture is not participating in anticompetitive activities abroad. This proposal is not the same as the developing world essentially buying the developed world agencies’ enforcement of export cartels.62 My proposal is more modest in that it would require fewer market access trade-offs because the only function of the developed world antitrust agency is to create transparency and a paper record on export cartels. It would be up to the antitrust agency of the importing country to take steps against any potential anticompetitive behavior by export cartels. This proposal therefore reduces the cost of information for detection of export cartels.

This process would put the onus of enforcement on developed world countries—those countries that are more likely to have explicit or implicit export cartel exemptions. These countries are better able to absorb the cost of enforcement and have the knowledge and agency capacity to undertake review rather than developing world countries that are more likely to lack both evidence and effective enforcement tools. When a developed world country has an export cartel immunity, this raises the cost of domestic enforcement among younger antitrust agencies to a point in which the developing world agency cannot act to prevent overcharges by the cartel in its market. Because of the cost of information, it is much easier for developed world countries that have export cartel exemptions to keep track of companies that apply for such immunities. Antitrust agencies undertake enforcement actions ex-ante in a number of other situations, such as business review letters or premerger notification.

### T Increase

#### Increase is to make greater or stronger

Dictionary.com, no date

[“increase”, <http://www.dictionary.com/browse/increase>, accessed 9/8/16, GNL]

verb (used with object), increased, increasing.

1.

to make greater, as in number, size, strength, or quality; augment; add to:

to increase taxes.

verb (used without object), increased, increasing.

2.

to become greater, as in number, size, strength, or quality:

Sales of automobiles increased last year.

3.

to multiply by propagation.

4.

to wax, as the moon.

#### Violation – the aff does not “increase” prohibitions if other countries say no

#### Vote neg for limits and ground – a durable increase constrains possible affs while guaranteeing neg ground based on a departure from the status quo

### Mergers CP

#### The United States federal government should prohibit merger practices not authorized by an internationally-agreed framework of cooperation regarding competition law.

#### Aff can’t solve without changing Vertical agreements, Dominant firm conduct, and Mergers—their evidence also concludes that mergers can be a good first step for any competition policy

David J. 1AC Gerber 12, Distinguished Professor of Law at Chicago-Kent College of Law, B.A. from Trinity College, M.A. from Yale University, and J.D. from the University of Chicago, Awarded the Degree of Honorary Doctor of Laws by the University of Zurich, Former Visiting Professor at the Law Schools of the University of Pennsylvania, Northwestern University, and Washington University, Global Competition: Law, Markets, and Globalization, p. 307-312

a. *Criteria for goals*

The most obvious criteria for goals is that they must be sufficiently attractive to induce and maintain commitment from all necessary participants in the process. As we have seen, however, there is a broad range of goals in existing systems, which means that the goals of the project will have to be relatively general and flexible, becoming more specifically defined through experience along the pathway. A project which assumes that a single conception of competition law favored by one or two participants at a particular point in time will be accepted and implemented by all participants is unlikely to attract widespread commitment. Goals must also be ‘graspable’ or ‘interpretable.’ The language must identify the range of possible interpretations. If it does not, it cannot represent a common goal, and it cannot maintain support. In negotiating international agreements, it is common for parties intentionally to choose language that is too vague to guide actual decision making. That may be appropriate for other types of agreement, but it would be inconsistent with the long-term orientation of a commitment strategy.

The project’s goals must also be ‘shared’ or ‘shareable’. Where goals are shared, each participant has an interest in the effective pursuit of the goals by other participants. For example, the goal of increasing consumer welfare (as understood in neoclassical economics) is shareable, because any increase in consumer welfare on a global market benefits consumers across the market, regardless of state boundaries. In contrast, the goal of protecting a set of producers in one country would presumably not be shareable, as it relates only to those specific producers and those who benefit from their success.¹²

Finally, the agreed goals will have to be perceived as ‘fair’ by all types of participants. Goals that are likely to give significant advantages and gains to some participants (such as highly-industrialized countries) and to cause net harm to others (eg developing countries) cannot attract widespread support. At a minimum, therefore, fairness is likely to require that all participants have a reasonable prospect of benefit. Given the non-linear nature of economic development, however, it cannot require that all benefit equally.

b. Goal structure

Goals will have to be related to each other in ways that guide the development of national systems. As an example of such a structure, we use three goals which, if applied together, might form the basis of a global competition law strategy. Th ere may be others, but my purpose here is merely to illustrate how such a goal structure might look.

The basic concept is that participants would eventually all have approximately the same goals for competition law, at least insofar as it is applied to global markets. In order to achieve that result, national competition law goals would be expected to fi t within a range of goals that narrows over time. Given that national goals often vary considerably, this process will take time and affect some countries more than others. The basic goals would be set out at the time of agreement, but the pathway concept would allow variation over time on the basis of input from the participants.

The most basic goal of all competition laws is to deter anti-competitive conduct. Definitions of ‘anticompetitive’ vary, however, and the concept is notoriously difficult to operationalize in legal decision making. By itself, therefore, this goal is too broad. A second goal could give further guidance—protecting the process of competition from private restraints. The idea is contained in some form in all competition law systems, and thus it provides another shared basis for a pathway strategy. Although there can be uncertainty about the edges of the concept, it makes clear that the competitive process itself is the focus of the project, thus further limiting the set of acceptable national goals. Th e goal of providing durable benefits to consumers could further limit the acceptable range of goals. Again, virtually all competition law systems seek to protect the consumer, so it can also provide a basis for commitment. Together, a package of goals such as this might provide a viable basic goal framework.

c. Potential problem areas

The history of competition law development points to three potential problem areas in developing an acceptable goal structure. One is whether non-economic goals should be part of such a project. Competition laws have often pursued political and social goals in addition to their economic goals. In post-war Europe and in Japan, for example, competition law was often explicitly or implicitly intended to support democratic development. Experience with competition law has, however, revealed the difficulties of using competition law for non-economic goals, and the general trend has been to eliminate them. Given that a multinational project for competition law creates obligations for not one state, but many, such goals are likely to be incompatible with its objectives.

A second potentially difficult issue involves the goal of consumer welfare (in the sense of neoclassical economics). US officials and scholars (as well as many European competition officials) now generally assume that consumer welfare should provide the only goal of competition law, but many outside the US do not accept this view. Given that US support is likely to be necessary for the success of any global competition law project, this creates a potentially serious basis for conflict. Th ere may, however, be ways to minimize this conflict. For example, the consumer welfare standard is based on the application of price theory to a unified market. It does not take into account the existence of political borders. Th is at least calls into question whether it can be effective as the sole goal in a competition law strategy in which national boundaries play a central role. Moreover, the consumer welfare standard is most effectively used for short-run analysis, but a pathway project depends on maintaining political commitment over time. Those who favor consumer welfare as the sole goal of competition law may, therefore, be willing to broaden their range of acceptable goals, at least over the near term, in order to obtain the benefits of the project.

Another potential obstacle involves the goal of economic development. As we have seen, many countries have used competition law as a tool for development. Moreover, developing countries have often argued that economic development should be a goal of competition law, because economic development can be expected to create additional competitors as well as broader markets and thus enhance competition in the long run.¹³ Many kinds of policies may, however, be seen as supporting economic development, and thus identifying it as a goal for a pathway project gives little guidance. In addition, such a goal could easily be used to justify policies that are inconsistent with competition goals. In a pathway strategy, however, there may be no need for developing countries to insist on development as a goal, because the strategy provides flexibility in the timing of obligations and allows obligations regarding norms to be phased in over time. It is thus itself development-oriented. Most, perhaps all, of the arguments supporting development as a goal can be satisfied through the long-term orientation of the pathway concept.

In a pathway context, goals must guide the construction of the process and provide incentives to support it. Accordingly, in formulating goals that can perform this function effectively, the objective should be to articulate a set of goals that is specific enough to achieve commitment from states that prefer a narrow conception of goals, but broad enough to attract commitment from those who have a broader vision of goals. Each will have to accommodate the other. This can be justified if it supports a process that gives both groups most of what they want or is at least superior to its alternatives.

4. Commitment in norm-setting

Th e pathway concept requires that participants eventually restrict the norms that they apply to global markets. Th is narrowing of acceptable norms would have to be phased in over time, depending on factors in a country’s economy and political system as well as on the capacity and experience of its institutions. Some norms may be required early in the process, whereas others may be phased in as the project’s benefits are demonstrated and working relationships are created.

a. Potential obstacles

Two issues are likely to be prominent in reaching agreement on substantive norms. One is the role of economics. Recall that economics plays two basic roles in competition law: one is to interpret data, the other is to provide norms or standards of conduct. Our concern here is with its normative role. In the US, that role is central. There are few ‘rules’ that are based solely on the characteristics of the conduct itself. Legal decisions usually focus on economic analysis of the actual or probable effects of the conduct under the circumstances of a specific case. Economics here plays a normative role. It determines the lawfulness of the conduct. As we have seen, the European Commission has recently moved toward this view, at least in most areas of competition law.

Th is normative role for economics is, however, rare in other competition law systems. It creates a degree of legal uncertainty that few countries have accepted. In these systems, conduct is typically deemed unlawful where the conduct itself has specified characteristics or relatively specific effects, without requiring full analysis of its economic consequences in each specific case. A full effects-based economic analysis is expensive, and many countries do not have the resources to perform such an analysis. In the near term, therefore, it probably cannot be required as part of a global competition law strategy.

Divergence in views about the role of economics is thus likely to present challenges for any global competition law agreement, but one value of a pathway strategy is that it may be able to develop uses of economics that can bridge the gap. For example, officials and experts from participating countries could together develop common scenarios in which anti-competitive effects can be presumed or excluded.¹⁴ National competition officials and courts would be free to apply their laws according to their own procedures, but the scenarios would serve as guidelines for their decisions. Moreover, the group may eventually even include an obligation that national decision makers give reasons for reaching conclusions that are inconsistent with these scenarios. This may be a way of reducing concerns in the US and Europe about inadequate economic analysis and also meeting the demands of other systems for greater legal security.

The issue of whether norms should apply equally to all participants may also be an obstacle to agreement. It has created significant difficulties in previous discussions of global competition law, and it continues to be a major part of discussions in the area. Developing countries often argue that for historical and other reasons fi rms located in their countries have had limited opportunity to grow and to become competitive on global markets. As a result, if they are subjected to competition from larger foreign fi rms, they will have little chance of success, and global markets will forever be dominated by firms from a few countries. This, they claim, justifies what is often called ‘special and differential treatment’ for them. Other states have generally been unwilling to accept such treatment in the context of competition law.¹⁵

This issue is likely to be critical to competition law development, but the pathway concept may be uniquely positioned to accommodate it, because that strategy allows norms to be phased in over time, depending on factors such as the economic conditions in the participant state. A developing country’s obligations could thus automatically be tailored to its level of economic development, and differential treatment would gradually be eliminated over time.

b. Specific types of norms—cartels

A brief review of the main categories of norms illustrates some of these issues. The treatment of cartels could serve as a starting point and foundation for a pathway strategy. There is widespread agreement that cartels are generally harmful, and most, if not all, competition laws either prohibit them or contain norms intended to deter them. The economic harms from cartels are usually obvious, and even relatively low-cost deployment of economic analysis can identify them. This means that there may be little difficulty in requiring competition law systems to prohibit cartels. This would allow states to develop experience with the project and to develop trust, knowledge pathways, and feedback loops—all of which can provide momentum for further commitment. Above all, enforcement in the area can be expected to generate benefits that would further support the project.

[KENTUCKY’S CARD ENDS]

exemptions could be allowed, provided that they meet specifi ed criteria and that the range of exemptions narrows over time.

c. Vertical agreements

Vertical agreements such as distributorships create more complex issues, and there is far more diversity of views about how competition law should treat them. Th is is an area where competition laws have actually diverged in recent decades, as the US and then the EU have moved away from a form-based analysis and toward a more eff ects-based analysis. Th e main impetus for the move was a growing awareness that the economic eff ects of such agreements depend on the context in which they are applied and that detailed economic analysis can identify these eff ects with some precision. Most other countries have continued to rely primarily on more form-based analysis, and they have been less concerned about precision in assessing economic eff ects. In part this is because these systems are often less well-fi nanced than competition law systems in Europe and in the US, but it also results from concepts of justice that call for greater predictability in applying the law.

A pathway project could, however, accommodate and perhaps eventually reduce diff erences on this issue. It could provide, for example, that participants include provisions for deterring vertical restraints on competition, but it could add an obligation that when applying such provisions decision makers must consider proof off ered to them that the conduct at issue was not, in fact, harmful to competition. Over time, institutions may be increasingly willing to take these kinds of issues into consideration. Th is would accommodate, at least to some extent, US and EU preferences for increased use of economics in this area without imposing signifi cant costs on other participant countries.

d. Dominant firm conduct

A third major category of norms in competition law systems involves unilateral conduct by dominant fi rms. Here the focus is not on specifi c transactions, but on identifying particular kinds of conduct by dominant fi rms that can harm the competitive process. Examples include refusals to deal and predatory pricing. Th e most prominent competitive harms result from the capacity of the fi rm to use its economic power to exclude competitors or to limit their range of action, so-called ‘exclusionary abuse.’ In many countries (including Europe, but not the US) unilateral conduct provisions also include so-called ‘exploitative abuses’ in which a dominant fi rm exercises it market power to raise prices or impose other conditions on purchasers or suppliers. In both cases, distinguishing pro-competitive from anti-competitive conduct can be fraught with uncertainty.

Th ere has been signifi cantly less experience worldwide with this category of conduct, but it can be an important component of a competition law regime. Applying competition law to dominant fi rms often captures public attention. It can demonstrate the potential value of competition law and thereby attract political support for both domestic and transnational competition law eff orts.

There are, however, significant differences among competition law systems regarding unilateral conduct. Even between the US and Europe the differences remain formidable. Moreover, there is a high degree of wariness and uncertainty about this category in many countries. Such provisions pose signifi cant risks of political interference, precisely because drawing lines between competitive and anti-competitive behavior is uncertain and because political leaders may be tempted to use such provisions to attract popular support. These risks are further compounded on global markets, because the effects of conduct cross borders, creating incentives for officials in one country to seek domestic political support by attacking foreign dominant fi rms. Developing countries tend to favor provisions on unilateral conduct as a tool of protection against potentially harmful conduct of dominant foreign firms. Th e home countries of these fi rms (primarily the US, Europe, and Japan) typically oppose inclusion of such provisions in developing countries, because they fear that the provisions may be used against their fi rms on a discriminatory basis and without justifi cation.

Under these circumstances, there is no basis at present for including in a pathway agreement an obligation to combat abuse of power by dominant fi rms. Such a project could, however, include a provision that participant states apply them only where there is evidence of signifi cant economic harm to the state’s interests. Th is at least creates a mechanism that a state can use to protest the use of unilateral conduct provisions by other states for political or other non-economic purposes.

e. Mergers

Competition laws that prohibit mergers present similar challenges. Historically, such provisions have often been the last component to be included in a competition law system. In Germany, merger control provisions were included some fifteen years after other provisions, and the EU merger provisions were in the process of negotiation for almost two decades before being finally agreed in the early 1990s. In the US, merger provisions were not made effective until decades after other provisions. This suggests caution in including merger obligations in a pathway agreement.

Two factors help to explain these delays. One is that merger controls are often politically sensitive. Th ey allow a competition authority to block a major economic transaction in which at least one of the parties is likely to be large and/or politically influential and thus in a position to put significant political pressure on competition law institutions. Moreover, these cases are often well-publicized, creating further incentives for political involvement. A second factor is that effective analysis of the likely economic effects of a merger is expensive. It calls for predictions about the future eff ects of major economic transactions and is thus likely to require significant and expensive economic analysis. Merger control provisions are, therefore, a high-risk and high-cost endeavor. As a result, there is little incentive to include them in a pathway agreement, although they may be phased in later.

This review of norms that might be included in a pathway strategy reveals areas of general agreement (eg cartels) and other areas of significant differences (eg unilateral conduct). This highlights the potential value of a pathway strategy, which would allow those norms that are widely accepted to be included soon and for most participants, whereas others could be identified for inclusion later in the process and by increasing numbers of participants. Experience gained with the first set of norms could provide a basis for further development by generating confidence in the project and revealing its potential value.

#### Developing economy growth high now

WorldBank 10/5/21 (10/5/21 Strong Rebound in 2021 Boosts Economies in Emerging Europe and Central Asia, https://www.worldbank.org/en/news/press-release/2021/10/05/strong-rebound-in-2021-boosts-economies-in-emerging-europe-and-central-asia-slowdown-ahead-in-2022)

WASHINGTON, October 5, 2021 – A surprisingly strong rebound in the first half of this year boosted economic activity in emerging and developing countries in the Europe and Central Asia region, with the regional economy now projected to expand by a better-than-expected 5.5 percent in 2021, says the latest edition of the World Bank’s Economic Update for the region, released today.

The rebound was largely driven by a strong recovery in exports during the first half of this year, as activity in the Euro area bounced back and commodity prices rose sharply, as well as strengthening domestic demand due to vaccinations and support packages. The boost to exports, however, may be fading due to the ongoing global and regional spread of more contagious COVID-19 variants, which has also dampened the recovery in regional domestic demand.

#### Plan trades off with developing market entrance

Peerapat **Chokesuwattanasku** **2018**. University of Cambridge, DPhil Dissertation. "Export cartels and economic development" <https://www.repository.cam.ac.uk/bitstream/handle/1810/273865/Chokesuwattanaskul-2018-PhD.pdf?sequence=1&isAllowed=y>

Potential enhancement of welfare Export cartels have been accused of raising the price level and hence depleting welfare ceteris paribus in the recent literature. However, there are two reasons why a reduction in welfare by export cartels may not occur. Firstly, export cartels may promote global competition by introducing additional players into the market which reduces the overall price level or provides more variety of products for consumers (Evenett et al., 2001; Immenga, 1995). By definition, export cartels are single-country oriented and formed exclusively for exporting activities20 (Sweeney, 2007; Waller, 1992). As a consequence, export cartels from developing countries are partial cartels from the global perspective (i.e., not formed by all firms in the global market) and have no market power (Dick, 1992; Jensen-Eriksen, 2013). Some export cartels were even formed to reduce prices in order to be competitive and be able to penetrate the global market (Sweeney, 2007). The empirical evidence in different countries such as Germany and Japan also shows that export cartel formation was related to price reduction (Audretsch, 1989; Dick, 1992; Levenstein and Suslow, 2006). Therefore, the argument that consumer surplus will be depleted by the existence of export cartels is rather vague when it comes to export cartels from developing countries. Export cartels from developing countries in the global market could be seen as an analogy of cartels formed by SMEs in the domestic market, which is generally acceptable due to their potential to preserve the long-term competition21 (Bhattacharjea, 2004; Bridgman et al., 2015). Therefore, domestic cartels were often allowed to be formed among SMEs in some countries such as Germany in the mid-twentieth century (Khun, 1997a). The same analogy can be made in terms of firms from developing countries surviving the competitive force against the larger firms from developed countries or the multinational enterprises in the global market. Therefore, the inefficiency might not even be created under the dynamic setting. SMEs in Germany were particularly allowed or even encouraged to form cartels in the mid-20th century to buffer against overwhelming competition from both domestic and foreign firms. For example, in 1904, two smaller German banks, the Dresdner Bank and the Schaaffhausen Bankverein, agree to form, under our definition, a territory and profit-sharing cartel (Liefmann (1932) considered it as the interest-group which is a type of concern). The purpose of the cartel was "to strengthen the capital power and influence of each of the banks by means of common action in big business deals" and, more importantly, to help stimulate their "competitive power against their two big rivals the Deutsche Bank and the Diskontogesellschaft."

#### Causes global governance collapse and state failure

Brown et al 20. Frances Z. Brown is a senior fellow and co-director of Carnegie’s Democracy, Conflict, and Governance Program, who previously worked at the White House, USAID, and in nongovernmental organizations, Saskia Brechenmacher is a PhD candidate at the University of Cambridge and a fellow in Carnegie’s Democracy, Conflict, and Governance Program, Thomas Carothers is interim president of the Carnegie Endowment for International Peace. "How Will the Coronavirus Reshape Democracy and Governance Globally?" <https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-globally-pub-81470>

BROADER GOVERNANCE IMPLICATIONS Beyond the pandemic’s effects on democracy, a range of governance ramifications may emerge in the months ahead. BASIC GOVERNANCE VIABILITY AND REGIME STABILITY The pandemic will exert enormous pressures on governance institutions in heavily affected countries—especially on health systems, but also on many other essential government functions, from education and food supply chains to law enforcement and border control. Even in comparatively wealthy states, like Italy, Spain, and the United States, health systems in the worst-affected areas have already cracked under the weight of the pandemic. **Crisis responses will inevitably require triage** well beyond the health sector, **diverting** **government** attention and **resources from other vital functions and challenges**. This problem will be exacerbated as more and more politicians, government leaders, and civil servants test positive for the virus, rendering governments less able to operate just when they need to be working overtime. The specter of the pandemic has also forced legislatures and government agencies to curtail operations or work remotely, resulting in inevitable losses of efficiency. As the virus spreads more widely in weak states, these governance challenges will be even more pronounced. **The acute public health emergency** **will be on a collision course with an abject lack** **of government capacity,** frail institutions, limited government reach, and low citizen trust in leaders (and corresponding reluctance to heed public health directives). Social distancing will be difficult to observe in crowded settlements, especially if residents are reliant on informal work to survive. At the same time, **governments in many developing countries will struggle to mobilize adequate resources to ease** the effects of an **economic recession.** Robust international assistance efforts will be essential, but insufficient implementation capacity may hinder their effectiveness. In countries already suffering from protracted conflict or instability, the pressures of the pandemic and **resultant cascade of governance failures could lead to at least partial state collapse.** PRESSURE ON SOCIOPOLITICAL COHESION The pandemic will strain basic sociopolitical cohesion in many states. The differential effects of the health crisis along key axes—rich vs. poor, urban vs. rural, region vs. region, and citizen vs. migrant—may sharpen existing sociopolitical divides. The pandemic may compound those strains by exacerbating political polarization where it already exists. From India and Bolivia to Poland and the United States, many democracies are already suffering from rising animosity and tensions between contending political camps. As the crisis worsens, opposing sides may disagree about the gravity of the pandemic or about appropriate government responses—a dynamic that could be intensified by people’s greater reliance on online communication while they remain mostly isolated in their homes, and by governments using the crisis to advance partisan agendas. In the United States, for example, partisanship has heavily shaped perceptions of the severity of the crisis and individuals’ trust in the government’s response. In Brazil, President Jair Bolsonaro’s dismissal of the seriousness of the crisis has inflamed an already fierce political divide. At the same time, the “wartime” imperative to combat the pandemic could invoke feelings of shared sacrifice and collective mission that heal rather than aggravate societal and political divisions. But such a rallying effect likely requires political leaders to rise to the challenge and take a unifying approach, which goes against the populist playbook in use in many countries. Tracking leadership styles and messages will be key to understanding the longer-term effects of the pandemic on sociopolitical cohesion. HEIGHTENED CORRUPTION Government responses to the pandemic are likely to exacerbate graft and corruption in many countries. Crises involving urgent medical needs and scarce supplies inevitably present opportunities for smuggling, graft, price-gouging, and fraud. Corruption undermines the effectiveness of public health responses, particularly if valuable resources are diverted from high-need areas or citizens are denied treatment if they refuse to pay bribes. Both domestic actors and international partners assisting with public health responses should anticipate these risks and avoid the tendency to adopt an “anything goes in an emergency” attitude. In the medium term, the perception and reality of heightened corruption may increase popular discontent with governments. However, the crisis could also end up spurring new anticorruption measures. If corruption spikes rapidly when governments implement crisis measures, widespread public outrage may catalyze reforms that improve health governance and public accountability. More immediately, the prospect of high-stakes corruption may also mobilize civil society, governments, and international actors to take preventive steps, especially in places that are still less affected by the pandemic. In the United States, for example, legislators heeded calls for increased oversight in the new economic stimulus package. Civil society groups in Nigeria are urging government authorities to institute corruption safeguards as the country braces for the coronavirus. Possible additional measures may include concerted diplomatic pressure for greater oversight over aid flows or increased adoption of recommendations already developed by advocacy groups. LOCAL-NATIONAL DISCONNECT The virus may reshape dynamics between national and regional or local government actors. Local officials are on the front lines of the crisis response, sometimes reinforcing and sometimes competing with messages from national leaders. In Afghanistan, where the central government’s presence in the periphery is limited, some provincial governors have been shoring up its policies and bolstering its response efforts. The governor of Nangarhar Province quickly set up an emergency aid fund and publicly dispelled myths about curing the virus, while other governors have supplied basic food packages to encourage infected men to stay home from work. Elsewhere, the virus response has exacerbated friction between local and national officials. In Hungary, where the opposition party controls several major cities, the central government unveiled a measure that would dilute mayors’ decisionmaking authority during an emergency. Local leaders quickly attacked the plan as one that would undermine the coronavirus response, and the government eventually walked it back. In Turkey, the pandemic has renewed long-standing tensions between President Recep Tayyip Erdoğan and the opposition-party mayor of Istanbul. Contrary to Erdoğan’s directives, the mayor has advocated a lockdown of Istanbul and launched his own fundraising campaign to galvanize the response, prompting national leaders to block the effort. In the United States, the pandemic response has intensified frictions between Trump and several Democratic state governors critical of his administration’s response. These trends could change internal power relations in various places, whether by enhancing local-level leaders’ legitimacy at the expense of national officials or worsening governance fragmentation. Where friction between national governments and opposition-party local leadership tracks ideological, regional, and rural-urban lines, it may exacerbate preexisting political polarization. ENHANCED ROLES OF NONSTATE ACTORS The virus may also reshape relationships between nonstate actors and governments, with important implications for government legitimacy and claims to sovereignty. Where governments enjoy low levels of citizen trust, cooperating with nonstate systems of governance may be essential to ensuring an effective crisis response. In Sierra Leone, for example, local chiefs were highly influential in containing the spread of Ebola. The Taliban in Afghanistan are already committing themselves to cooperating with health officials from international organizations like the World Health Organization that typically collaborate with sovereign governments. Arab governments are mobilizing official Islamic institutions and authorities to help them manage the crisis, which may help them compensate for low levels of public trust in official communications and directives—while potentially also reinforcing government control over the religious domain. However, nonstate actors’ enhanced role in implementing crisis responses may also strengthen their legitimacy and authority in the eyes of local communities, thereby entrenching their political influence. In Rio de Janeiro, for example, drug trafficking gangs have imposed a coronavirus curfew in the city’s favelas and handed out soap to local residents, while condemning the Brazilian government’s lack of action. In Lebanon, the paramilitary organization Hezbollah has reportedly mobilized a remarkable 25,000 people, including medics, to combat the virus, in addition to organizing new testing centers and ambulances and repurposing an entire hospital for the crisis. Although the group insists that its efforts are meant to “complement the government apparatus”—Hezbollah is part of the government coalition—the response stands in notable contrast to the struggles of the official Lebanese administration. In Afghanistan, the Taliban have launched a coronavirus awareness campaign in areas of the country under their sway; whereas the Kurdish-led region of northeast Syria, which maintains autonomy from the regime of President Bashar al-Assad, has initiated curfews, coordinated aid delivery, and stood up isolation wards to combat the virus. As in many situations of acute crisis, rapid and effective efforts by nonstate actors to enforce order or deliver services can foster or reinforce alternative systems of governance, particularly if the government is seen as absent, ineffective, or divisive. On the other hand, different regimes may try to use the crisis to shore up their control over nonstate entities. It will be important to monitor these: in fragile or low-income states, nonstate actors’ heightened roles in crisis response—or, alternatively, their efforts to impede effective responses—will likely reshape citizens’ perceptions of state legitimacy and their expectations of the state. TIME TO PREPARE Looking ahead, all domestic and transnational actors concerned with democracy’s future must closely monitor the wide-ranging, fast-moving political effects of the pandemic, rapidly devise responses to lessen potential harm, and seize any positive opportunities the crisis may present. **Coming soon is a second**, **perhaps even bigger wave of political disruption that will be caused by the unfolding global economic crisis**. Potentially devastating increases in economic inequality, unemployment, debt, and poverty, as well as pressures on the stability of financial institutions, will put enormous strains on governance systems of all types. After the global financial crisis that erupted in 2008, few foresaw the very long tail of negative political consequences. Yet that crisis ultimately ushered in the rise and spread of illiberal populism, fragmentation of party systems, and consolidation of several authoritarian regimes—long after economic recovery was under way. **Amid a new crisis even more daunting in scale,** there is a natural tendency for governments and individuals alike to be consumed by the urgency of near-term domestic fallout from the pandemic. But just as the virus’s contagion respects no borders, its political effects will inevitably sweep across boundaries and continue to echo long after the health emergency has eased. Now is the time to get ready.

**Agenda ptx**

#### The two-part package consisting of social spending and infrastructure will pass now---PC is key

Foran 10-28 (Clare Foran, House Democrats again delay infrastructure vote amid party divisions, <https://www.kake.com/story/45072366/house-democrats-to-again-delay-infrastructure-vote-amid-party-divisions>, y2k)

The decision to delay the vote came just hours after Biden appealed directly to House Democrats in a closed-door meeting on Capitol Hill, pitching them on a framework for a separate, larger climate and economic package.

The problem for party leaders is that progressives made clear they would not vote for the infrastructure bill unless the larger bill moves in tandem and said a framework was not enough to win their votes. That bill has not yet been finalized or publicly signed off on by all Senate Democrats.

Delaying the infrastructure vote is a significant setback for Democrats with Biden making clear privately for more than a week he wanted an agreement and passage of the bipartisan measure before he arrives at a UN Climate Conference on November 1. Biden departed for his foreign trip later in the day on Thursday.

Speaker Nancy Pelosi had told House Democrats earlier Thursday not to "embarrass" Biden by voting down the infrastructure bill during Biden's trip overseas.

This is the second time in two months that House leadership has had to delay the infrastructure vote after a similar scenario played out at the end of September. For now, it's unclear how long the vote on the bipartisan infrastructure bill will be delayed.

Amid resistance from progressives over moving ahead with the infrastructure bill, the House instead voted Thursday night to approve a short-term extension of highway funding.

The transportation bill vote was needed to avoid a lapse in funding for transportation projects starting Monday. The Senate agreed by unanimous consent that once the House passed the extension, it would be deemed passed by the Senate as well.

House Majority Leader Steny Hoyer's office sent a notice that the transportation extension vote would be the last of the week.

Hoyer later told reporters that "yes" he is disappointed they weren't able to vote on the infrastructure package.

Asked if it would take until December 3 to pass it, which is when highway funding would lapse after the stopgap was passed, Hoyer said, "no, I don't think," it will take that long.

On when they will finally vote on the infrastructure bill, he said, "I hope soon."

Some moderates expressed frustration over yet another delay, arguing that the bipartisan infrastructure bill should be passed now. That's especially a concern for some vulnerable incumbents looking for a tangible win as they head into the midterm elections.

"Unfortunately, a small number of Members within our own party denied the President -- and the American people -- a historic win," Democratic Rep. Stephanie Murphy of Florida, the co-chair of the Blue Dog Coalition, said in a statement. "We are extremely frustrated that legislative obstruction of the BIF continues—not based on the bill's merits, but because of a misguided strategy to use the bill as leverage on separate legislation."

Reps. Tom Malinowski of New Jersey and Dean Phillips of Minnesota both expressed deep frustration with their party's handling of the infrastructure vote -- and voted in protest against the short-term extension of transportation funding.

"I'm concerned about Virginia, I'm concerned about the message. I'm concerned about the message it sends to the world right now that is looking at our system of governance with increasing concern about its viability," Phillips said, alluding to Tuesday's gubernatorial election in Virginia, where Democrats had been hoping a legislative win for Biden would help boost Democratic nominee Terry McAuliffe.

Malinowski, whose district is targeted by Republicans, said of delaying the vote: "It is frustrating to a lot of us that we are now in a game of 'who goes first' when all sides seem to be in agreement on the substance. The country has been begging for this, my constituents have been begging for this."

Biden pitches Democrats but falls short

During the closed-door meeting with House Democrats, Biden laid out in person long-awaited details of his $1.75 trillion economic and climate package, trying to convince progressives who are skeptical of anything short of a fully written bill and commitments from all 50 members of the Senate Democratic caucus to back his framework.

But he came up short, with progressives still demanding that both bills move in tandem.

Phillips was critical of Biden because he did not explicitly say the infrastructure vote should occur on Thursday in the meeting; Pelosi is the one who pushed for the vote.

"I'm not afraid to say I wish he was more explicit. ... This is the commander in chief of the United States. When you spend political equity in front of a caucus two times in a month, I think it's got to be awfully explicit -- and be more forthright."

Phillips added: "If the President had led us down that hallway onto and on the House floor, I think it would have been close. .... I think with Republican votes, it would have passed."

The personal pitch to House Democrats marked a concerted effort by the President to wrest control of an unwieldy process that has led to significant revisions to Democratic goals in the effort to appease Sens. Joe Manchin Manchin and Kyrsten Sinema. While Biden's proposal isn't finalized in its entirety, days of negotiations have brought it to a place where the key elements are all locked in.

Not all Democrats have signed off on the framework that Biden announced Thursday morning, two people familiar with the plan cautioned, but the President believes it's a consensus all Democrats should be able to support.

Neither Manchin nor Sinema explicitly committed to backing the plan Thursday, though they both said they were continuing to negotiate after Biden's meeting with House Democrats.

Sinema reacted to the framework by saying in a statement, "We have made significant progress" and "I look forward to getting this done."

Manchin was noncommittal when asked by reporters whether he will support the framework agreement. Later on Thursday, he said, "We haven't seen the text yet. Everyone has to see it. I don't think anybody could say they could support it until they see the text."

Notably, however, Manchin signaled support for a $1.75 trillion top line for the package.

Asked by CNN if that price was too high, he said, "No," adding, "That was negotiated."

This is the first public indication that Manchin will accept a price tag higher than $1.5 trillion, which he had previously said was the figure he was willing to settle on.

And despite the scrapped infrastructure vote, the White House expressed optimism that both bills would eventually pass. "Legislative text is starting to become public, and the road to passing both critical parts of the President's plan to make our economy deliver for middle class families—not just the wealthy—is clearer than ever," White House press secretary Jen Psaki said in a statement Thursday evening.

'We are going to pass both bills'

As she left the final House vote of the night, Rep. Pramila Jayapal -- the chair of the Congressional Progressive Caucus, who has said that just having a framework on the larger spending plan is not enough -- told reporters, "We are going to pass both bills."

"The President said he believes he's got 50 votes in the Senate and I think it's a lot for him to say that," the Washington state Democrat said. She has made clear, though, that progressives want a vote on both bills in the House at the same time.

Earlier in the day, after a separate meeting with House progressives, she had said, "Everyone in the room enthusiastically endorsed a resolution that approves in principle the framework the President laid out today."

"We intend to vote for both bills when the Build Back Better Act is ready," she said, referring to the larger climate and economic package. But, she added, "we do need the vote on both bills in the House at the same time."

"We have 96, 98% of the caucus on the same page," Democratic Rep. Alexandria Ocasio-Cortez of New York said. "We just need to figure out what these two folks are willing to commit to and once we get real clarity on that, on what is a yes, then I think we'll be able to move forward," she said of Manchin and Sinema.

Senate Democrats cannot afford to lose a single vote to pass the bill under a process they plan to use known as budget reconciliation.

#### Antitrust trades-off with Biden’s priorities

Carstensen 21 (Peter C. Carstensen, Fred W. & Vi Miller Chair in Law Emeritus, University of Wisconsin Law School, THE “OUGHT” AND “IS LIKELY” OF BIDEN ANTITRUST, <https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en>, y2k)

Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Infrastructure solves the grid – it’s vulnerable now and requires investment

Gozdziewski 3/22 - Charles J. Gozdziewski is the American Council of Engineering Companies' (ACEC) Board Chair. He is also the Chairman Emeritus of Hardesty & Hanover in New York where he oversees transportation planning, construction inspection and support services for highways; all types of movable, fixed and railroad bridges; as well as special structures. 2021 (“Our nation's critical infrastructure is dangerously vulnerable”, available online at <https://thehill.com/changing-america/opinion/544330-our-nations-critical-infrastructure-is-dangerously-vulnerable?amp>, Changing America is a subsidiary of the Hill)

The recent historic snowfall in Texas and the ensuing failure of the state's power grid have laid bare what we in the engineering industry have known for a long time - our nation's critical infrastructure is dangerously vulnerable to a wide range of threats. We must act quickly and comprehensively to make our infrastructure more resilient because those threats will only become more severe in the future.

While the focus right now is justifiably on the energy sector and the power grid, all of our nation's infrastructure systems - transportation, water, and power - are at risk from extreme weather. Climate change lies at the heart of this challenge, and to mitigate its effects, we must have robust investment to fund the design and construction of the resilient infrastructure our country needs.

As engineers, infrastructure is who we are. It is critically entwined in everything we do - from embracing smart cities, to establishing safe protocols in buildings for a post-COVID world, to preparing for the much needed Fourth Industrial Revolution. The need for resilience, sustainability, reliability, and flexibility will become even more vital as we move into the future.

As leaders in the engineering and design industry, we have both a stake in and a valuable perspective on the policy discussion on infrastructure. Moreover, we are a critical partner in the implementation of that policy and the repair and upgrading of all aspects of our physical infrastructure - including roads, bridges, freight rail, ports, electrical grids, and Internet provision. Each of these components is critical to the health of our physical and built environment.

Yet our expertise is worth nothing if the public sector clients we serve lack certainty from the federal government that there will be consistent, predictive funding in place to finance the infrastructure improvements we need. No designs will be drawn up and no dirt will be moved. It is imperative that our federal lawmakers act on a transformative infrastructure plan before the current law expires in September.

Investing now in a long-term infrastructure bill will pay dividends, not only to mitigate the effects of a changing climate, but to help our nation recover from the COVID-19 pandemic. Engineers play a substantial role in the health of the national economy. According to the ACEC Research Institute's Industry Impact Series of reports, the Engineering and Design Services sector currently employs 1.5 million Americans directly. Those employees and their companies collectively support another 3 million jobs in the various contracting and other firms with which they work. The Institute's latest study found that each new job created in the Engineering and Design Services industry indirectly creates two additional jobs in related sectors across the economy.

The data shows that investments in infrastructure that support engineering jobs pave the way for economic opportunity. What's more, the designs our industry creates help improve the built environment, making it more resilient to climate change. This is a win-win for society, creating a more equitable, environmentally sound, and prosperous built environment resulting in job creation and economic mobility. We look forward to working with policyholders, members of Congress, and the Biden-Harris Administration to develop sustainable solutions that benefit the country as a whole in the weeks ahead.

#### Loss of critical infrastructure causes extinction

Friedemann 16 (Alice Friedemann, transportation expert, founder of EnergySkeptic.com and author of “When Trucks Stop Running, Energy and the Future of Transportation,” worked at American Presidential Lines for 22 years, where she developed computer systems to coordinate the transit of cargo between ships, rail, trucks, and consumers, citing Dr. Peter Vincent Pry. Pry is executive director of the Task Force on National and Homeland Security, a Congressional advisory board dedicated to achieving protection of the United States from electromagnetic pulse and other threats. Dr. Pry is also the director of the United States Nuclear Strategy Forum, an advisory body to Congress on policies to counter weapons of mass destruction. Dr. Pry has served on the staffs of the Congressional Commission on the Strategic Posture of the United States, the Commission to Assess the Threat to the U.S. from an EMP Attack, the House Armed Services Committee, as an intelligence officer with the CIA, and as a verification analyst at the U.S. Arms Control and Disarmament Agency. 1-24-16, accessed 1/1/19 “Electromagnetic pulse threat to infrastructure (U.S. House hearings)” <http://energyskeptic.com/2016/the-scariest-u-s-house-session-ever-electromagnetic-pulse-and-the-fall-of-civilization/>)

Modern civilization cannot exist for a protracted period without electricity. Within days of a blackout across the U.S., a blackout that could encompass the entire planet, emergency generators would run out of fuel, telecommunications would cease as would transportation due to gridlock, and eventually no fuel. Cities would have no running water and soon, within a few days, exhaust their food supplies. Police, Fire, Emergency Services and hospitals cannot long operate in a blackout. Government and Industry also need electricity in order to operate. The EMP Commission warns that a natural or nuclear EMP event, given current unpreparedness, would likely result in societal collapse. Terrorists, criminals, and even lone individuals can build a non-nuclear EMP weapon without great trouble or expense, working from Unclassified designs publicly available on the internet, and using parts available at any electronics store. In 2000, the Terrorism Panel of the House Armed Services Committee sponsored an experiment, recruiting a small team of amateur electronics enthusiasts to attempt constructing a radiofrequency weapon, relying only on unclassified design information and parts purchased from Radio Shack. The team, in 1 year, built two radiofrequency weapons of radically different designs. One was designed to fit inside the shipping crate for a Xerox machine, so it could be delivered to the Pentagon mail room where (in those more unguarded days before 9/11) it could slowly fry the Pentagon’s computers. The other radiofrequency weapon was designed to fit inside a small Volkswagon bus, so it could be driven down Wall Street and disrupt computers— and perhaps the National economy. Both designs were demonstrated and tested successfully during a special Congressional hearing for this purpose at the U.S. Army’s Aberdeen Proving Ground. Radiofrequency weapons are not merely a hypothetical threat. Terrorists, criminals, and disgruntled individuals have used home-made radiofrequency weapons. The U.S. military and foreign militaries have a wide variety of such weaponry. Moreover, non-nuclear EMP devices that could be used as radiofrequency weapons are publicly marketed for sale to anyone, usually advertised as ‘‘EMP simulators.’’ For example, one such simulator is advertised for public sale as an ‘‘EMP Suitcase.’’ This EMP simulator is designed to look like a suitcase, can be carried and operated by one person, and is purpose-built with a high energy radiofrequency output to destroy electronics. However, it has only a short radius of effect. Nonetheless, a terrorist or deranged individual who knows what he is doing, who has studied the electric grid for a major metropolitan area, could—armed with the ‘‘EMP Suitcase’’— black out a major city. A CLEAR AND PRESENT DANGER. An EMP weapon can be used by state actors who wish to level the battlefield by neutralizing the great technological advantage enjoyed by U.S. military forces. EMP is also the ideal means, the only means, whereby rogue states or terrorists could use a single nuclear weapon to destroy the United States and prevail in the War on Terrorism or some other conflict with a single blow. The EMP Commission also warned that states or terrorists could exploit U.S. vulnerability to EMP attack for coercion or blackmail: ‘‘Therefore, terrorists or state actors that possess relatively unsophisticated missiles armed with nuclear weapons may well calculate that, instead of destroying a city or military base, they may obtain the greatest political-military utility from one or a few such weapons by using them—or threatening their use—in an EMP attack.’’ The EMP Commission found that states such as Russia, China, North Korea, and Iran have incorporated EMP attack into their military doctrines, and openly describe making EMP attacks against the United States. Indeed, the EMP Commission was established by Congress partly in response to a Russian nuclear EMP threat made to an official Congressional Delegation on May 2, 1999, in the midst of the Balkans crisis. Vladimir Lukin, head of the Russian delegation and a former Ambassador to the United States, warned: ‘‘Hypothetically, if Russia really wanted to hurt the United States in retaliation for NATO’s bombing of Yugoslavia, Russia could fire an SLBM and detonate a single nuclear warhead at high altitude over the United States. The resulting EMP would massively disrupt U.S. communications and computer systems, shutting down everything.’’ China’s military doctrine also openly describes EMP attack as the ultimate asymmetric weapon, as it strikes at the very technology that is the basis of U.S. power. Where EMP is concerned, ‘‘The United States is more vulnerable to attacks than any other country in the world’’: ‘‘Some people might think that things similar to the ‘Pearl Harbor Incident’ are unlikely to take place during the information age. Yet it could be regarded as the ‘Pearl Harbor Incident’ of the 21st Century if a surprise attack is conducted against the enemy’s crucial information systems of command, control, and communications by such means as… electromagnetic pulse weapons… Even a superpower like the United States, which possesses nuclear missiles and powerful armed forces, cannot guarantee its immunity…In their own words, a highly computerized open society like the United States is extremely vulnerable to electronic attacks from all sides. This is because the U.S. economy, from banks to telephone systems and from power plants to iron and steel works, relies entirely on computer networks… When a country grows increasingly powerful economically and technologically…it will become increasingly dependent on modern information systems… The United States is more vulnerable to attacks than any other country in the world.’’ Iran—the world’s leading sponsor of international terrorism—in military writings openly describes EMP as a terrorist weapon, and as the ultimate weapon for prevailing over the West: ‘‘If the world’s industrial countries fail to devise effective ways to defend themselves against dangerous electronic assaults, then they will disintegrate within a few years… American soldiers would not be able to find food to eat nor would they be able to fire a single shot.’’ The threats are not merely words. The EMP Commission assesses that Russia has, as it openly declares in military writings, probably developed what Russia describes as a ‘‘Super-EMP’’ nuclear weapon—specifically designed to generate extraordinarily high EMP fields in order to paralyze even the best protected U.S. strategic and military forces. China probably also has Super-EMP weapons. North Korea too may possess or be developing a Super-EMP nuclear weapon, as alleged by credible Russian sources to the EMP Commission, and by open-source reporting from South Korean military intelligence. But any nuclear weapon, even a low-yield first generation device, could suffice to make a catastrophic EMP attack on the United States. Iran, although it is assessed as not yet having the bomb, is actively testing missile delivery systems and has practiced launches of its best missile, the Shahab–III, fuzing for high- altitude detonations, in exercises that look suspiciously like training for making EMP attacks. As noted earlier, Iran has also practiced launching from a ship a Scud, the world’s most common missile—possessed by over 60 nations, terrorist groups, and private collectors. A Scud might be the ideal choice for a ship-launched EMP attack against the United States intended to be executed anonymously, to escape any last-gasp U.S. retaliation. Unlike a nuclear weapon detonated in a city, a high-altitude EMP attack leaves no bomb debris for forensic analysis, no perpetrator ‘‘fingerprints.’’ Under present levels of preparedness, communications would be severely limited, restricted mainly to those few military communications networks that are hardened against EMP. Today’s microelectronics are the foundation of our modern civilization, but are over 1 million times more vulnerable to EMP than the far more primitive and robust electronics of the 1960s, that proved vulnerable during nuclear EMP tests of that era. Tests conducted by the EMP Commission confirmed empirically the theory that, as modern microelectronics become ever smaller and more efficient, and operate ever faster on lower voltages, they also become ever more vulnerable, and can be destroyed or disrupted by much lower EMP field strengths. Microelectronics and electronic systems are everywhere, and run virtually everything in the modern world. All of the civilian critical infrastructures that sustain the economy of the United States, and the lives of 310 million Americans, depend, directly or indirectly, upon electricity and electronic systems. Of special concern is the vulnerability to EMP of the Extra-High-Voltage (EHV) transformers, that are indispensable to the operation of the electric grid. EHV transformers drive electric current over long distances, from the point of generation to consumers (from the Niagara Falls hydroelectric facility to New York City, for example). The electric grid cannot operate without EHV transformers—which could be destroyed by an EMP event. The United States no longer manufactures EHV transformers. They must be manufactured and imported from overseas, from Germany or South Korea, the only two nations in the world that manufacture such transformers for export. Each EHV transformer must be custom-made for its unique role in the grid. A single EHV transformer typically requires 18 months to manufacture. The loss of large numbers of EHV transformers to an EMP event would plunge the United States into a protracted blackout lasting years, with perhaps no hope of eventual recovery, as the society and population probably could not survive for even 1 year without electricity. Another key vulnerability to EMP are Supervisory Control And Data Acquisition systems (SCADAs). SCADAs essentially are small computers, numbering in the millions and ubiquitous everywhere in the critical infrastructures, that perform jobs previously performed by hundreds of thousands of human technicians during the 1960s and before, in the era prior to the microelectronics revolution. SCADAs do things like regulating the flow of electricity into a transformer, controlling the flow of gas through a pipeline, or running traffic control lights. SCADAs enable a few dozen people to run the critical infrastructures for an entire city, whereas previously hundreds or even thousands of technicians were necessary. Unfortunately, SCADAs are especially vulnerable to EMP. EHV transformers and SCADAs are the most important vulnerabilities to EMP, but are by no means the only vulnerabilities. Each of the critical infrastructures has their own unique vulnerabilities to EMP: The National electric grid, with its transformers and generators and electronic controls and thousands of miles of power lines, is a vast electronic machine—more vulnerable to EMP than any other critical infrastructure. Yet the electric grid is the most important of all critical infrastructures, and is in fact the keystone supporting modern civilization, as it powers all the other critical infrastructures. As of now it is our technological Achilles Heel. The EMP Commission found that, if the electric grid collapses, so too will collapse all the other critical infrastructures. But, if the electric grid can be protected and recovered, so too all the other critical infrastructures can also be restored. Transportation is a critical infrastructure because modern civilization cannot exist without the goods and services moved by road, rail, ship, and air. Cars, trucks, locomotives, ships, and aircraft all have electronic components, motors, and controls that are potentially vulnerable to EMP. Gas stations, fuel pipelines, and refineries that make petroleum products depend upon electronic components and cannot operate without electricity. Given our current state of unpreparedness, in the aftermath of a natural or nuclear EMP event, transportation systems would be paralyzed. Traffic control systems that avert traffic jams and collisions for road, rail, and air depend upon electronic systems, that the EMP Commission discovered are especially vulnerable to EMP. Communications is a critical infrastructure because modern economies and the cohesion and operation of modern societies depend to a degree unprecedented in history on the rapid movement of information—accomplished today mostly by electronic means. Telephones, cell phones, personal computers, television, and radio are all directly vulnerable to EMP, and cannot operate without electricity. Satellites that operate at Low-Earth-Orbit (LEO) for communications, weather, scientific, and military purposes are vulnerable to EMP and to collateral effects from an EMP attack. Within weeks of an EMP event, the LEO satellites, which comprise most satellites, would probably be inoperable. Banking and finance are the critical infrastructure that sustain modern economies. Whether it is the stock market, the financial records of a multinational corporation, or the ATM card of an individual—financial transactions and record keeping all depend now at the macro- and micro-level upon computers and electronic automated systems. Many of these are directly vulnerable to EMP, and none can operate without electricity. The EMP Commission found that an EMP event could transform the modern electronic economy into a feudal economy based on barter. Food has always been vital to every person and every civilization. The critical infrastructure for producing, delivering, and storing food depends upon a complex web of technology, including machines for planting and harvesting and packaging, refrigerated vehicles for long-haul transportation, and temperature-controlled warehouses. Modern technology enables over 98 percent of the U.S. National population to be fed by less than 2 percent of the population. Huge regional warehouses that resupply supermarkets constitute the National food reserves, enough food to feed the Nation for 30–60 days at normal consumption rates, the warehoused food preserved by refrigeration and temperature control systems that typically have enough emergency electrical power (diesel or gas generators) to last only about an average of 3 days. Experience with storm-induced blackouts proves that when these big regional food warehouses lose electrical power, most of the food supply will rapidly spoil. Farmers, less than 2 percent of the population as noted above, cannot feed 310 million Americans if deprived of the means that currently makes possible this technological miracle. Water too has always been a basic necessity to every person and civilization, even more crucial than food. The critical infrastructure for purifying and delivering potable water, and for disposing of and treating waste water, is a vast networked machine powered by electricity that uses electrical pumps, screens, filters, paddles, and sprayers to purify and deliver drinkable water, and to remove and treat waste water. Much of the machinery in the water infrastructure is directly vulnerable to EMP. The system cannot operate without vast amounts of electricity supplied by the power grid. A natural or nuclear EMP event would immediately deprive most of the U.S. National population of running water. Many natural sources of water—lakes, streams, and rivers—would be dangerously polluted by toxic wastes from sewage, industry, and hospitals that would backflow from or bypass wastewater treatment plants, that could no longer intake and treat pollutants without electric power. Many natural water sources that would normally be safe to drink, after an EMP event, would be polluted with human wastes including feces, industrial wastes including arsenic and heavy metals, and hospital wastes including pathogens. Emergency services such as police, fire, and hospitals are the critical infrastructure that upholds the most basic functions of government and society—preserving law and order, protecting property and life. Experience from protracted storm-induced blackouts has shown, for example in the aftermath of Hurricanes Andrew and Katrina, that when the lights go out and communications systems fail and there is no gas for squad cars, fire trucks, and ambulances, the worst elements of society and the worst human instincts rapidly takeover. The EMP Commission found that, given our current state of unpreparedness, a natural or nuclear EMP event could create anarchic conditions that would profoundly challenge the existence of social order.

**FTC**

#### The Federal Trade Commission ought to renounce enforcement policy related to “dark pattern” enforcement and “the Safeguards Rule”

**COVID-related enforcement is key to effective recovery---it’s a key priority**

**OECD 20** (The Role of Competition Policy in Promoting Economic Recovery – Note by the United States, 12-2, <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/economic_recovery_us.pdf>, y2k)

1. The Antitrust Division of the **D**epartment **o**f **J**ustice (DOJ) and the U.S. **F**ederal **T**rade **C**ommission (FTC) (collectively the Agencies) offer this joint submission in response to the Competition Committee’s review of the **role** of **competition policy** in promoting **economic recovery**. In this paper, we highlight some **key steps** that the Agencies have taken to respond to the present **COVID-19 crisis** in the United States and to help promote **a rapid** and **sustained economic recovery.**

2. The U.S. antitrust agencies have undertaken initiatives in several categories to help spur recovery from the COVID-19 crisis, including stepped-up criminal enforcement, policy guidance to health and emergency-related government agencies, and expedited review of private sector cooperative efforts. The Agencies strongly believe that **competition policy** has an important role to play in the **COVID-19 recovery** process and intend to continue to engage in partnership with domestic and international counterparts to ensure the protection of competition and consumers.

2. Deterrence of Cartel Activity, Price Gouging, and Other Harmful Activity

3. Deterrence of **unlawful commercial activities** has long been **a key mission** of the Agencies, rendered even more **critical** by the **social** and **economic disruptions** caused by the COVID-19 crisis.1 While most Americans have acted to help their neighbors and communities during the past year, **crisis-related disruption** increases the risk that some individuals will make **unlawful windfall profits** at the expense of **public safety** and **the health** and **welfare** of their fellow citizens.2

4. While hoarding and exploitation are not themselves antitrust violations, such behaviors are often accompanied by criminal antitrust collusion, price fixing, and bid rigging, and other attempts to take advantage of the public. As with other natural disasters, the COVID-19 crisis increases the risk that individuals and organizations will engage in these unlawful commercial activities, necessitating increased vigilance by the Agencies.

2.1. COVID-19 Hoarding and Price Gouging Task Force

5. To coordinate enforcement efforts, the Attorney General in March 2020 announced the creation of the COVID-19 Hoarding and Price Gouging Task Force.3 The Task Force is charged with developing effective enforcement measures and best practices, and coordinating nationwide investigation and prosecution of illicit activities. Because **health care products** and **markets** are central in **responding to the health care crisis** and eventually to **economic resilience** and **recovery**, the Task Force focuses on **protecting** the availability of those **products** designated **essential** by the Department of Health and Human Services (HHS) under Section 102 of the Defense Production Act. The DOJ consults with HHS during this process, including advising on the antitrust implications of COVID-19 for affected markets and products.

6. The Task Force is currently being led by a coordinating U.S. Attorney, with assistance as needed from the Antitrust Division’s Criminal Program. Each United States Attorney’s Office, as well as other relevant Department components, is directed to designate an experienced attorney to serve as a member of the Task Force. The Antitrust Division’s role in the Task Force involves investigating allegations of criminal antitrust harms, such as price fixing and bid rigging, and responding to citizen complaints about collusive or anticompetitive disaster-related behavior.

2.2. Procurement Collusion Strike Force

7. The DOJ is also stepping up efforts to combat crisis-related disruption through the newly-created Procurement Collusion Strike Force (PCSF). COVID-19 recovery will require **substantial** **investment** by national, state, and local authorities, with $3.48 trillion appropriated to date.4 The size and pace of such efforts unfortunately create opportunities for **fraud** and **collusion** affecting government **procurement** and **grant-making**. Through the creation of the PCSF, DOJ is dedicating significant resources to help identify and prevent these unlawful activities.5

8. The PCSF is an interagency partnership dedicated to protecting taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Under the umbrella of the PCSF, prosecutors from the Antitrust Division’s five criminal offices and 13 U.S. Attorneys’ Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process.

9. Since its creation in 2019, over 50 federal, state, and local government agencies have already sought training and assistance from the PCSF, as well as opportunities to work with the PCSF on investigations. So far, the PCSF has led over a dozen interactive virtual training programs for approximately 2,000 criminal investigators, data scientists, and procurement officials.6 Over a third of the Antitrust Division’s current investigations relate to public procurement, and the PCSF marks an important effort to marshal enforcement resources to tackle these cases. Several grand jury investigations already have been opened as a direct result of the work of the PCSF. In addition to playing a meaningful role in COVID-19 economic recovery, the PCSF will continue to be an important resource for detecting fraud and collusion in government procurement for years to come.

2.3. Protecting Competition in Labor Markets

10. The DOJ and FTC are working to protect competition in labor markets, which have been subject to significant dislocation due to the economic impact of COVID-19. In April 2020, the Agencies issued a statement warning that antitrust enforcers are closely monitoring improper employer coordination that may disadvantage workers.7 The statement affirmed that antitrust laws with respect to hiring and employment remain fully in effect despite the crisis, and stated that “COVID-19 does not provide a reason to tolerate anticompetitive conduct that harms workers, including doctors, nurses, first responders, and those who work in grocery stores, pharmacies, and warehouses, among other essential service providers on the front lines of addressing the crisis.”8

11. Given the special **impact** of COVID-19 on **medical staffing** and **employment**, the Agencies are focused on preventing **employers**, including health care staffing companies and recruiters, from engaging in **collusion** or other **anticompetitive** conduct in **labor markets**, such as agreements to lower wages or to reduce salaries or hours worked. This announced focus continues the Agencies’ policy of devoting resources to preventing labor malpractice in critical industries, especially health care. As one example, the DOJ in April 2020 reached a significant resolution in the criminal investigation of Florida Cancer Specialists (FCS) for entering into a market allocation agreement that gave FCS a monopoly for services in a densely populated part of southwest Florida. As part of the deferred prosecution agreement reached in that case, the Division obtained a $100 million fine – the statutory maximum – and FCS agreed to waive certain non-compete provisions for current and former employees, including physicians and other healthcare professionals.9 In another important matter, early this year, the FTC investigated, and the parties abandoned a proposed tie-up between two providers of nursing staff. The proposed merger had likely anticompetitive effects in multiple localities across the country on markets both for nursing services and for private duty nursing care.10

2.4. Consumer Protection

12. The FTC has worked aggressively to address consumer protection issues arising from the COVID-19 pandemic. Since late March, as the coronavirus emerged, the FTC has received nearly 225,000 consumer complaints relating to COVID-19, including concerns about fraud related to the government’s economic impact payments.11 In addition, the FTC has been monitoring the marketplace for unsubstantiated health claims, illegal robocalls, privacy and data security concerns, online shopping fraud, and a variety of other scams related to the economic fallout from the COVID-19 pandemic.

13. Acting on this market information, the FTC has pursued a rigorous warning letter program and filed law enforcement actions for injunctive and other relief in federal courts.12 In the health claims area, for example, the FTC and the Food and Drug Administration (FDA) have, to date, issued over 90 joint warning letters to marketers regarding claims that their products will treat, cure, or prevent COVID-19.13 The FTC on its own has issued more than 225 additional warning letters to marketers.14 The letters warn recipients that their conduct is likely to be unlawful, that they could face serious legal consequences if they do not immediately stop, and require a response to the FTC within 48 hours. In nearly every instance, companies that have received FTC warning letters have taken quick steps to correct or eliminate their problematic claims. The FTC also has issued warning letters, in conjunction with the Small Business Administration, to companies making potentially misleading claims about federal loans or other temporary small business relief.15

14. The FTC has also filed court actions involving COVID-19 health claims, distribution claims, and government stimulus check claims.16 For example, the FTC filed four lawsuits in federal district courts against online merchandisers for failing to deliver on promises that they could quickly ship products like face masks, sanitizer, and other personal protective equipment (PPE) related to the coronavirus pandemic.17

15. Finally, the FTC has launched numerous consumer education campaigns, including a website on COVID-19 scams and a resource page that contains brochures, graphics, and videos in multiple languages.18

3. Guidance and Cooperation to Peer Agencies as Part of a Coordinated, GovernmentWide Response Effort

16. The FTC and DOJ also have **shared** their **competition expertise** with other international and federal agencies in order to facilitate **COVID-19 response** and **recovery** while preserving competitive markets. Among other efforts, the Agencies have been working closely with the Federal Emergency Management Agency (FEMA) to develop a Voluntary Agreement governing cooperation among industry participants seeking to respond to the pandemic.19 The purpose of the Agreement is to **maximize** the effectiveness of the **manufacture** and **distribution** of critical healthcare resources **nationwide** to respond to the pandemic. Organized under the authority granted by the Defense Production Act, participants to the Agreement receive antitrust immunity for actions taken to carry out the Agreement. Before the Agreement can become effective, however, the Attorney General must find that the purposes of the Agreement may not be achieved through a voluntary agreement having less anticompetitive effects. These efforts also have helped inform the Agencies’ responses to business review letters seeking approval for cooperation in the production of critical health care products, as discussed below.

3.1. International Advocacy

17. U.S. enforcers also have been leveraging our existing bilateral relationships and ties to multilateral organizations, such as the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD), to increase communication and cooperation.

18. In the immediate aftermath of the declaration of a state of national emergency in the United States, the Agencies played a key role in facilitating communication and cooperation among international enforcers by collecting and sharing on a regular basis rapidly developing information on how COVID-19 has impacted competition law enforcement efforts around the world. After DOJ successfully developed a regular internal process for collecting and disseminating this information, the ICN integrated this project into its ongoing work streams. In early April, as the economic impact of COVID-19 and possible enforcement challenges began to emerge, the ICN Steering Group issued a statement on key considerations related to competition law enforcement during and after the COVID-19 pandemic.20 The Agencies contributed with the FTC serving as a lead drafter of the statement recognizing the importance of competition to economies in crisis and urging agencies to remain vigilant regarding anti-competitive conduct. The statement also calls for transparency of operational and policy changes during the crisis and advocates for competition as a guiding principle for economic recovery efforts in the aftermath of the pandemic.

19. Since spring 2020, the Agencies have participated in several virtual events hosted by the ICN, the OECD, and the United Nations Conference on Trade and Development on international cooperation, investigations and competition law policy in the wake of COVID-19.21 In September 2020, the U.S. Agencies hosted the ICN 2020 Virtual Conference, which brought together enforcers from around the world to discuss antitrust developments, including how to address enforcement and policy challenges raised by COVID-19.

3.2. Doctrinal Responses

20. While procedural aspects of the Agencies’ work have changed as a result of COVID-19, the Agencies’ view of key U.S. antitrust standards has not changed. The Agencies have reiterated that the antitrust laws are flexible enough to account for changing market conditions, even during uncertain times.22

21. In particular, the Agencies continue to take the view that the failing firm defense is “narrow in scope,” and should be invoked selectively.23 The Agencies have continued to reiterate in speeches and publications that they will not relax the stringent conditions that define a genuinely “failing” firm and continue to apply the test set out in the U.S. Horizontal Merger Guidelines24 and reflected in our long-standing practice, and that they will require the same level of substantiation as was required before the COVID pandemic.25 As such, while it is possible that more firms may fail as a result of an economic crisis such as COVID-19, the view of the United States is that economic dislocation, on its own, does not provide a compelling reason why the assets of failing firms should be purchased by close competitors.

3.3. Competition Advocacy

22. The Agencies are continuing to advocate for changes to regulations that may impede competition, which may cause even greater harm in the context of the COVID-19 crisis. For example, the Agencies have submitted multiple letters to state legislatures in recent years expressing their concerns over “certificate of need” laws26 and other restrictions on the availability of health care resources.27 Given the extraordinary disruptions created by COVID-19, the United States views protecting the free functioning of health care markets as even more urgent, and the Agencies plan to continue our advocacy to remove regulatory impediments to competition in the health care sector.

23. Directly relating to the COVID-19 public health emergency, FTC staff submitted a comment to the Centers for Medicare & Medicaid Services (CMS) on its Interim Final Rule with Comment Period (IFC).28 The FTC comment supported the IFC’s provisions that reduce or eliminate restrictive Medicare payment requirements for telehealth and other communication technology-based services during the public health emergency. FTC staff noted that if telehealth practitioners’ entry is limited or reimbursement requirements are overly restrictive, consumers’ access to care and choice of practitioner might be unnecessarily restricted, especially in areas where there is a shortage of healthcare professionals. The IFC’s rule would reduce restrictions on Medicare reimbursement for telehealth services. This is especially important, not only to enhance the use of telehealth to care for Medicare beneficiaries, but also to encourage private payers to expand the use of telehealth. Reducing or eliminating restrictions on reimbursement of telehealth services could potentially enhance competition, improve access and quality, and decrease health care costs in both the public and private sectors. By connecting widely separated providers and patients, telehealth can alleviate primary care and specialty shortages.

24. The FTC continues to advocate against states issuing certificates of public advantage (COPA). For example, in September 2020 FTC staff submitted a public comment opposing issuance of a COPA to the Texas Health and Human Services Commission. FTC staff expressed concern that the proposed merger at issue would lead to significantly less competition for healthcare services in Midwest Texas.29

25. The FTC and its staff have also analyzed potential competitive concerns associated with professional regulations in the health care sector, including licensure and scope of practice.30 For example, FTC staff sent advocacy letters to the Texas Attorney General and the Texas Medical Board relating to regulations that could harm competition by impeding access to surgical and other health care services provided by certified registered nurse anesthetists.31 FTC staff recommended that Texas maintain only CRNA supervision requirements that advance patient protection and avoid adopting regulations that impede CRNA practice.

26. DOJ hosted a virtual joint workshop with the USPTO in July 2020 that included debate on the role of innovation and public-private collaboration in responding to the COVID-19 pandemic.32 The workshop, entitled “Promoting Innovation in the Life Science Sector and Supporting Pro-Competitive Collaborations: The Role of Intellectual Property,” comprised 10 sessions over two days. Panelists included leading figures from industry, government agencies, prominent research labs, the non-profit sector, academia, and the broader legal and economic community. Members of the public were also able to submit questions throughout the event.

4. Facilitation of Cooperative Public and Private-Sector Efforts to Resolve the Crisis

27. The Agencies are working together to bolster the recovery by providing guidance relating to recovery-related collaborations on an expedited basis.33 In a joint statement in April, the Agencies emphasized the potential importance of pro-competitive collaborations between private firms to bring essential goods and services to communities in need. In addition to providing high-level collaboration guidelines consistent with previous DOJ and FTC policies, the statement contained guidance specific to COVID-related business activities, including reaffirming that the Agencies will account for exigent circumstances in evaluating collaborative efforts to address the spread of COVID-19, and that medical providers’ development of suggested practice parameters to assist in clinical decisionmaking will not be challenged, absent extraordinary circumstances.34

28. The Agencies also announced an expedited business review letter program, under which all COVID-19-related requests will receive responses within seven calendar days of the Agencies receiving all necessary information. This expedited process for COVIDrelated business review letters is an outgrowth of the Agencies’ role in advising other executive branch agencies on facilitating COVID-related cooperation within the antitrust laws, and each of the letters issued through the expedited process in 2020 addresses proposed conduct that is critical to COVID-19 response. Since March 2020, DOJ has issued the following four expedited business review letters:

1. A letter approving a collaboration by McKesson Corporation, Owens & Minor Inc., Cardinal Health Inc., Medline Industries Inc., and Henry Schein Inc to expedite and increase manufacturing for the distribution of personal protective equipment (PPE) and coronavirus-treatment-related medication in a way unlikely to lessen competition;35

2. A letter approving a collaboration by AmerisourceBergen with FEMA, HHS, and other government entities to “identify global supply opportunities, ensure product, quality, and facilitate product distribution of medications and other healthcare supplies to treat COVID-19 patients;”36

3. A letter approving a collaboration by Eli Lilly and Company, AbCellera Biologics, Amgen, AstraZeneca, Genentech, and GSK to “exchange limited information about the manufacture of monoclonal antibodies that may be developed to treat COVID19” in order to optimize COVID-19 vaccine production as part of Operation Warp Speed;37 and

4. A letter approving a collaboration by the National Pork Producers Council (NPPC) and the U.S. Department of Agriculture (USDA) “to address certain hardships facing hog farmers as a result of the COVID-19 pandemic.”38 29. The Agencies also pledged to expedite the processing of filings under the National Cooperative Research and Production Act, which provides flexible treatment of certain standards development organizations and joint ventures under the antitrust laws.

5. Revised Rules Regarding Merger Enforcement

30. The Agencies have adapted to changing work conditions and reallocated resources to maintain continuity of core operations and enforcement efforts. COVID-19 initially necessitated temporary changes to ensure the continuation of expeditious and thorough merger review.39 Changes made by both Agencies include (1) extending standard timing agreement provisions so that the post-compliance period runs for sixty to ninety days (instead of thirty days) for pending or proposed transactions that may be subject to a Second Request, (2) requiring all merger filings with the FTC and DOJ to be submitted via the FTC’s electronic filing system, and (3) committing to conducting all meetings and depositions by phone or video conference when possible, absent extenuating circumstances.40 For the initial period of only two weeks at the start of the COVID crisis, the Agencies also suspended the granting of early termination, which can shorten the waiting period for non-problematic mergers. The option of early termination was resumed in March, and timing of grants of early termination has returned to pre-pandemic levels.41

31. Notably, COVID-19 did not sideline other important efforts to improve the Agencies’ enforcement programs. Among other efforts, in June 2020, the Agencies for the first time issued joint Vertical Merger Guidelines.42 In September, the Division also issued a modernized Merger Remedies Manual. As an update to the 2004 edition, the new manual provides “greater transparency and predictability regarding the Division’s approach to remedying a proposed merger’s competitive harm,” including an emphasis on structural remedies and a renewed focus on enforcing consent decree obligations. The Division also has continued to follow through on its September 2018 commitment to modernize banking merger review, with the goal of expedited and efficient resolution for uncomplicated merger matters.43 Economic downturns, as often occur in the wake of disasters such as the COVID-19 crisis, may impact **merger activity**, which is why continuing to improve the Agencies’ approach to **reviewing** and **remedying** potentially anticompetitive mergers **remains a priority.**

**Plan causes a trade-off and devastates antitrust agency effectiveness**

**Sacher & Yun 19** (Seth B. Sacher, Economist, & John M. Yun, Antonin Scalia Law School, George Mason University, TWELVE FALLACIES OF THE "NEO-ANTITRUST" MOVEMENT, 26 Geo. Mason L. Rev. 1491, y2k)

VII. Fallacy Seven: Not Recognizing That Their Proposals Will **Strain** Competition Agency **Resources**, Increase Uncertainty, and Make These Agencies More Political and Subject to Capture

Most of those that have worked within, or before, the antitrust agencies, despite their inevitable disagreement with certain actions or policies, are generally very impressed with the high degree of skill, professionalism, and dedication exhibited by the career staff. 131As will be discussed more fully in the [\*1515] context of Fallacy XI below, many proponents of neo-antitrust do not accept the proposition that the antitrust agencies and their staffs function relatively well, in spite of the views of many (on all sides of the political spectrum) who have had experience working within or before the antitrust agencies. Regardless of how **neo-antitrust proponents** view the agencies, many of their proposals run a serious risk of **adversely** affecting competition agency **performance**.

There are a number of objective reasons to expect antitrust agencies to function relatively well. First, antitrust agencies tend to be small relative to many other regulatory agencies and bureaucracies in general. 132Second, their staffs tend to be highly trained professionals, consisting primarily of lawyers and Ph.D. economists. 133Third, they have a well-defined objective (i.e., the consumer welfare standard or some similar standard based on economic reasoning, such as the total welfare standard). 134Finally, although antitrust is considered a form of regulation, it is distinct from other forms of regulation in that it does not involve a continuing relationship between the regulated firms and the regulator. As a goal, antitrust seeks to enable markets to more nearly achieve certain social objectives on their own. 135

First, advocates of neo-antitrust would like to see the **responsibilities** of the antitrust agencies **expanded** in a number of ways. This includes more **aggressively** enforcing existing antitrust laws, as well as the consideration of issues **beyond those currently within that purview**. 136Further, many of their proposals, such as requiring data sharing, monitoring markets to prevent tipping, or approving platforms' algorithm changes, 137 will require **significantly** more active **market supervision** than is **currently the case**. While many [\*1516] proponents of modern antitrust would agree that the antitrust agencies are underfunded, 138 there is certainly a point at which **expanding** the antitrust agencies will have "**bureaucratic" diseconomies** of scale. Fully following the recommendations of **neo-antitrust** advocates could very well require many antitrust agencies to **expand** beyond some **critical point**, which will inevitably lead to significantly **larger bureaucracies** and **associated inefficiencies**.

Second, many of the above proposals would require not only **more staff**, but also staff with differing **expertise** from that held by most agency lawyers and economists. For example, monitoring data sharing is far from straightforward, as it is frequently unclear where data begins and technology ends. Similarly, considerations of income inequality or environmental questions may involve tradeoffs beyond the expertise of mere law or economics, such as technology, ethics, or even psychology. While staff of the antitrust agencies will frequently contact market participants and other experts with specialized knowledge on an as-needed basis, it is unknown how well such expertise would function within the long-term framing of antitrust, which has been a legal and economic domain since its inception.

**Failed COVID recovery triggers multiple hotspots**

**Wright 20** (Robin Wright, a contributing writer and columnist @ The New Yorker, The Coronavirus Pandemic Is Now a Threat to National Security, 10-7, https://www.newyorker.com/news/our-columnists/america-the-infected-and-vulnerable, y2k)

The broader danger is the world’s **perception** now of America as **inept** and vulnerable, Doug Lute, a retired lieutenant general who was the director of operations for the Joint Chiefs and a deputy national-security adviser to Presidents George W. Bush and Barack Obama, told me. “There are two things that would drive our competitors—the general sense of incompetence by the executive branch and a reading that we are totally self-absorbed internally,” he said. “There’s an overlapping of the pandemic, the protests, and now the election that amplifies that image. In broad terms, those conditions internally will be viewed by external competitors as **opportunities**.” America faces **threats** from a spectrum of **overseas adversaries**, the retired Marine General John Allen, who is now the president of the Brookings Institution, told me. “I’m deeply concerned that there will be **foreign actors**, all the way from **jihadists** to **state actors,** that try to **take advantage** of a level of duress that we haven’t seen for a long time. It has not been lost on our adversaries, or those who would seek to gain ground, that the United States has consciously chosen to withdraw.” The sense of “**sheer confusion**” surrounding American politics in 2020 compounds the **temptation** of foreign actors to make **moves**, either for their own gains or to diminish America, Allen said. The most obvious perils are from the **big powers**, which may calculate that the White House will **not** counter their moves elsewhere in the world during such **domestic turbulence**, especially on the eve of an election, former military and Pentagon officials told me. From Russia, President Vladimir **Putin** could dig **deeper** into Ukraine, meddle in unstable **Belarus**, or **test** the strength of the **Baltic states** to resist. From China, President **Xi** Jinping could further threaten **Taiwan**, exert its claim to islands in the **S**outh **C**hina **S**ea by deploying equipment or personnel, or take more draconian actions in **H**ong **K**ong. Both countries have moved steadily to deepen their **presence** and **influence** across Asia and deep into the **Mid**dle **East**—with its access to the **Mediterranean** and the West. For Moscow and Beijing, overt challenges would be a big bet, especially with an erratic and sometimes reckless President (currently on steroids) in the White House. Yet both countries will also understand that the American public has little appetite for more trauma, the military and security officials said. “I’m sure that **foreign adversaries’** intelligence services have their collection systems turned up **high** so that they understand exactly how **disruptive** this pandemic is on our **national-security structure**,” the former C.I.A. director John Brennan said on CNN this week. **No**rth **Ko**rea and **Iran** may also try to **exploit** the moment, although both have fewer capabilities than Russia or China. Tehran is still smarting from the U.S. assassination, in January, of General Qassem Suleimani, the head of its élite Quds Force, a wing of the Revolutionary Guards, which supports several militias that have attacked U.S. troops in Iraq and Lebanon. “I suspect Iran is not done seeking revenge for the killing of Suleimani,” Lute told me. Tehran’s strength is in the proxy forces it arms, aids, and often directs across the Middle East, particularly Lebanon, Iraq, and Yemen. Since Suleimani’s death, attacks by the Popular Mobilization Forces on U.S. troops and the American Embassy in Iraq have steadily escalated; the P.M.F., backed and sometimes directed by Iran, is the umbrella for some sixty predominantly Shiite militias that operate in separate brigades. Last month, the campaign sparked a diplomatic crisis when Secretary of State Mike Pompeo warned the Iraqi government that the United States would close its Embassy in Baghdad—one of the largest American diplomatic facilities in the world—if the government did not prevent the militias from firing on the U.S. compound and American troops based elsewhere in Iraq. “Our global deterrence at the high end—nuclear and conventional deterrence in Europe, Asia, and the Gulf—will not be tested,” Lute said. “But there may be challenges at **lower levels** through **cyber** or by **proxies**.”

### K

#### There is no external reality—mind/world dualism causes extinction--The alternative is a new science rooted in consciousness.

Chopra et al. 12 (Deepak Chopra, MD, FACP, Menas Kafatos, Ph.D., Fletcher Jones Endowed Professor in Computational Physics, Chapman University, and Rudolph E. Tanzi, Ph.D., Joseph P. and Rose F. Kennedy Professor of Neurology at Harvard University, and Director of the Genetics and Aging Research Unit at Massachusetts General Hospital (MGH) September 30, 2012, “A Consciousness Based Science,” http://www.sfgate.com/opinion/chopra/article/A-Consciousness-Based-Science-3850763.php)

The greatest mystery of existence is existence itself. There is the existence of the universe and there is the existence of the awareness of existence of the universe. Were it not for this awareness, even if the universe existed as an external reality, we would not be aware of its existence, so it would for all practical purpose not exist. Traditional science assumes, for the most part, that an objective observer independent reality exists; the universe, stars, galaxies, sun, moon and earth would still be there if no one was looking. However, modern quantum theory, the most successful of all scientific creations of the human mind, disagrees. The properties of a particle, quantum theory tells us, do not even exist until an observation takes place. Quantum theory disagrees with traditional, Newtonian physics. Most scientists, although respecting quantum theory, do not follow its implications. The result is a kind of schizophrenia between what scientists believe and what they practice. When we examine this hypothesis of traditional science, we find it more a metaphysical assumption than a scientific assertion.

How can we assert that an observer-independent reality exists if the assertion itself is dependent on the existence of a conscious observer? This raises the additional dilemma of who or what is the observer and where is this observer located? When scientists in general describe empirical facts and formulate scientific theories, they forget that neither facts nor theories are an insight into the true nature of fundamental reality apart from any observer. What we consider to be empirical facts are entirely dependent on observation, in agreement with quantum theory. The scientific observer in this case is an activity of the universe called Homo sapiens usually with a Ph.D. in physics, biology, neuroscience or other branches of science. However, many scientists have never really asked the question "Who am I"?

Most neuroscientists who still don't believe that quantum theory has anything to do with the brain, would assert that "I", the conscious observer, is solely an epiphenomenon of the brain; that consciousness is produced by the brain, just as gastric juices are produced by the stomach and bile is produced by the gall bladder. The problem with this of course, is that any neuroscientist worth his/her tenure will tell you that there is no satisfactory theory in neuroscience that explains how neurochemistry translates into conscious experience. How do electrochemical phenomena in the brain create the appreciation of the beauty of a red rose, the taste of garlic, the smell of onions, the feeling of love, compassion, joy, insight, intuition, imagination, creativity, free will, or awareness of existence of self and the universe? There is no physicalist theory based on classical physics to explain these subjective experiences. Nor, is there any obvious means for coming up with one.

When traditional science finds itself in such an impasse it might be time to question some of the basic assumptions about so called independently-existing reality. We must revisit the idea that science is a methodology and not an ontology. Current science however is based on a physicalist ontology. This is the basic belief that reality is physical and mind is an epiphenomenon of matter (the nervous system). Nonetheless we are baffled when asked to explain how matter becomes mind. We suggest here a fundamental revision in our most cherished scientific assumptions. We boldly suggest that matter, force fields, particles, waves, even the fabric of space and time are not denizens of fundamental reality but that they are perceptual and cognitive experiences in consciousness. Actually what we propose, would be in agreement with what most of the great physicists who founded quantum theory almost a hundred years ago would hold. But we are also going beyond, taking the statements of quantum theory to the next level: All of physical reality is a perceptual experience in consciousness alone. The experience may turn out to be different for different species.

What is physical reality to a bat, a honey bee, a nematode, a whale, a dolphin, an eagle, an insect with numerous eyes? There is no fixed physical reality, no single perception of the world, just numerous ways of interpreting world views as dictated by one's nervous system and the specific environment of our planetary existence. We propose that the worldview of current science as its is being practiced, which operates from the assumption that human perception and particularly facts emanating from observations made with human scientific methods are the only fundamental truth, is clearly flawed. Furthermore the subject / object split that is the basic premise of the current scientific methods has led to the creation of arguably detrimental technologies including mechanized death, petroleum products in our food, genetically modified foods, global warming, extinction of species, and even the possible extinction of the human species. Building on the quantum view of the cosmos, which accepts a non-local, entangled reality that includes observers as fundamental, we suggest the next natural step, a new science rooted in consciousness, one that strives to interpret the entire universe, with all its observers, all modes of observation, and all objects observed as nothing other than consciousness and it's manifestations!

## Trade

#### There’s absolutely no internal link to protectionism---export cartels can theoretically cause trade barriers, but no empirical evidence exists

Martyniszyn 12 (Dr. Marek, Senior Lecturer in Law at Queen’s University Belfast, PhD, University College Dublin, Export Cartels: Is it Legal to Target Your Neighbour?, Journal of International Economic Law, 3-29, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>, y2k)

It is acknowledged in the literature that empirical data on export cartels is lacking.16 This state of affairs seriously handicaps attempts to analyze this issue. It may well be that the greatest significance of export cartels, as seen through the lens of free trade, is symbolic. The principles underlying trade liberalization have been the antithesis of mercantilism, which is characterized by beggar-thy-neighbour policies. The fact of tolerance or even encouragement of export cartels may be seen, as Sweeney puts it, as a form of neo-mercantilism17 and thus contrary to the efforts of trade liberalisation. At the same time, Sokol rightly cautions that due to the lack of empirical data solutions to the issue of export cartels may be too reliant on theory with all the risks connected with the acceptance of various assumptions, which may be misguided.

#### Their author agrees---concerns about the cartels have existed since the 50s---it’s massively denied and there’s no actual uniqueness

Dr. Brian Ikejiaku 21, Senior Lecturer in Law at Coventry University, PhD from the Research Institute of Law, Politics, & Justice (RILPJ) at Keele University, and Cornelia Dayao, LL.M in International Business Law, “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US”, Utrecht Journal of International and European Law, Volume 36, Issue 1, http://doi.org/10.5334/ujiel.513

It is suggested that concerns regarding the link between competition policy and trade policy have been around since the pre-GATT period. There have also been attempts to integrate the competition policy with the WTO framework. Nonetheless, studies linking competition law and protectionism remained scant. While the protectionist tendencies of EU merger regulation enforcement have been explored empirically, little or nothing has been found in the US context. Furthermore, studies that relate export cartels to protectionism are mainly based on theoretical assumptions given the lack of empirical data to establish the economic effects of export cartels.

#### Their “shooting war” evidence is about the US applying our law overseas causing trade war, not export cartels!

Sean A. Pager 20, Professor at the Michigan State University College of Law, LLM from the European University Institute, JD from the University of California-Berkeley, AB from Harvard University, and Eric Priest, Associate Professor at the University of Oregon School of Law, LLM from Harvard Law School, JD from the Chicago-Kent Illinois Institute of Technology, BA from the University of Minnesota, “Redeeming Globalization Through Unfair Competition Law”, Cardozo Law Review, Volume 41, Number 3, 41 Cardozo L. Rev. 2435, July 2020, Lexis

As Part III explains, locating such objective criteria in the supply chain context is not hard. As noted, the egregious misconduct described in this Article—labor abuses, human rights violations, environmental destruction—already violates existing law. Therefore, liability imposed based on such transgressions would hardly arise out of the blue. Indeed, the notion that unlawful acts can be deemed per se “unfair” has considerable support in unfair competition law.141

Yet, even so, it would be unreasonable for every minor violation of a local ordinance overseas to give rise to an unfair competition action in America. Committing to such collateral enforcement of foreign law in such an unqualified manner would be problematic on several levels. Doing so would open the floodgates to transnational claims, clogging the dockets of U.S. courts and agencies.142 It could encourage harassment of foreign competitors, burdening them with the costs and distractions of defending unfair competition claims lodged in a distant U.S. court. And it could also encourage litigation tourism, inviting foreign plaintiffs to forum shop. Finally, use of unfair competition law could be abused for protectionist purposes. Such perceived unilateral aggression could trigger retaliation that risks sparking a larger trade war.

[End of their card]

G. Extraterritoriality Concerns

Such concerns over transnational liability implicate a broader set of issues related to extraterritorial jurisdiction. Expansive assertion of U.S. law over conduct taking place overseas is problematic on many levels. Courts are generally reluctant to meddle in the turf of foreign sovereigns and worry that such interventions could roil international relations in ways that raise separation of power concerns.143 Such concerns are

## Harmonization

#### Harmonization is impossible---no will for reciprocal agreements

Stephan 3 (Paul B., Professor @ UVA, an expert on international business, international dispute resolution and comparative law, Competitive Competition Law? An Essay Against International Cooperation (Spring 2003). Univ. of Virginia Law & Econ Research Paper No. 03-3, https://ssrn.com/abstract=405542 or <http://dx.doi.org/10.2139/ssrn.405542>, y2k)

B. International Coordination of Regulatory Jurisdiction

Recognizing the many obstacles to substantive harmonization of competition law, some governments and commentators have considered coordination of jurisdiction as an alternative way of addressing the overlapping jurisdiction problem. 71 The ideal is universal acceptance of jurisdictional criteria that would submit transactions to one, and only one, regulatory authority. The search for jurisdictional stability underlay the forty-year struggle between the United States and its trading partners over the “effects” test for antitrust jurisdiction as well as justifying the various agreements between the Justice Department and other states on antitrust enforcement.

1. Allocations of Regulatory Jurisdiction

In a simpler world of mechanical and formalistic jurisdictional tests, overlapping regulatory authority did not pose a problem. Only the sovereign on whose territory a transaction occurred would impose its rules.72 But with the rise of multijurisdictional transactions, territoriality came under pressure. U.S. courts initially relaxed the traditional test by requiring that only some part of the transaction in question occur in U.S. territory.73 By the end of World War II, the lower courts cast aside even that constraint, instead applying U.S. antitrust law to any action that had direct and intended effects in the United States.74 Europe and the Commonwealth countries resisted this approach, but by the end of the 1980s the EC had incorporated the effects test into its own competition law.75 Almost as soon as the effects test emerged as the U.S. standard for international antitrust, some courts and commentators proposed to limit it. It is unclear whether the critics saw the potential costs of multiple regulation or simply disliked the foreign criticism that the test generated. For whatever reason, their efforts dominated most discussion of international antitrust during the 1970s and 1980s. The leading treatise on international antitrust proposed that courts use a “rule of reason,” base on multiple criteria, to limit U.S. jurisdiction in cases that satisfied the effects test. The Ninth Circuit embraced this standard, and the Third Restatement of the Foreign Relations Law of the United States proclaimed it the general rule.76 The campaign to limit antitrust jurisdiction suffered a setback in 1993, when, in Hartford Fire Insurance Co. v. California,77 a narrow majority of the Supreme Court both endorsed the effects test and rejected the rule-of-reason limitation. But poor argumentation in that majority’s opinion has enabled litigants to keep alive the prospect of the rule of reason’s reemergence.78

As this account illustrates, disputes over jurisdictional scope typically take place in the judicial arena. Legislators typically fail to address the issue of extraterritorial regulation, and courts conventionally craft choice-of-law rules to fill in statutory lacunae. In the case of antitrust, however, some intergovernmental agreements also seek to distribute regulatory jurisdiction. The U.S. Justice Department has negotiated compacts with Australia, Canada, the EC, Japan and Mexico, among others.79

Superficially, these agreements appear to address the problems of overlapping regulation. A review of their terms, however, reveals that they do not even create soft law. Rather, the bilateral agreements express only a desire to consult and cooperate, and do not limit the discretion of regulatory authorities in any jurisdiction. None of these instruments has terms that a U.S. court could enforce, and the EC agreement entails judicial enforcement only in the sense that it provides the EC Commission with an additional grounds for making demands of national regulators.80 Each purports to embrace the rule of reason as the basic concept for allocating regulatory jurisdiction, but all use a long list of unweighted criteria that have the effect of removing almost all exercises of regulator review from attack. Moreover, the agreements do not seek to coordinate merger approval, the area that has caused the greatest recent tension. If anything, the bilateral agreements illustrate the conflicting interests that jurisdictions have in imposing their competition law on international transactions, and the difficulties of surrendering regulatory discretion in spite of the potential costs caused by overlapping constraints on private transactors.

Finally, one should note the Hague Convention on International Jurisdiction and Foreign Judgments in Civil and Commercial Matters.81 This multilateral instrument, if adopted, might limit the power of a signatory state to exercise some regulatory jurisdiction over extraterritorial transactions, and would make civil judgments produced by proceedings that conform to the convention subject to execution by all parties to the Convention. But no one who follows these negotiations seriously believes that the United States will sign the Convention or that Congress would accede to it. Rather, even this modest attempt to reach an international consensus on the allocation of regulatory jurisdiction seems an entirely academic exercise.

To summarize, the courts have supplied three different strategies for allocating regulatory jurisdiction. The territorial approach would severely limit the scope of competition law in cases where production took place offshore. The effects test maximizes a state’s regulatory power. The rule of reason muddles these two approaches. In theory states might agree to concrete and specific allocations of authority, but nothing achieved to date meets this description. To the contrary, the agreements we have suggest the difficulty of imposing significant constraints on national regulatory power.

2. Critique

The use of rules that allocate regulatory jurisdiction as a substitute for unification of substantive law is most closely associated with U.S. corporate law. During the last decade Roberta Romano has produced an influential reappraisal of this subject.82 Her work has developed a conceptual apparatus hat translates into other substantive areas and, in due course, has led to a rich and lively scholarly debate about regulatory competition generally.83

As Romano observes, the challenge is choosing jurisdictional criteria that will not promote a flight by transactions to a jurisdiction that permits significant externalization of the transactions’ costs. The traditional critique of the U.S. choice-of-law rule for corporate law (place of incorporation) asserts that managers incorporate in jurisdictions that maximize their opportunities to enrich themselves at the expense of investors. The “race to the bottom” metaphor arose in this context.84

Romano’s contribution involved a demonstration that managers often will have to internalize the costs associated with rules that enabled them to exploit investors, and thus should have a preference for rules that maximize firm value. She found in corporate law a virtuous race to the top, where her predecessors had seen only a regrettable regulatory collapse. Stephen Choi and Andrew Guzman extended her argument to the international arena, advocating a regime that would allow the issuers of securities to choose which jurisdiction would regulate their transactions.85

A consensus does not exist regarding the validity of Romano’s empirical claims about U.S. corporate law, much less Choi and Guzman’s extension. The debate focuses mostly on the supply rather than the demand side, involving arguments over the willingness of states to compete for corporate charters.86 Most scholars, however, agree with the analytics underlying Romano’s claim: The degree to which transactors should have the freedom to choose which rules will govern their transaction depends primarily on externalities. To the extent that the ratio of externalized costs to benefits matches that of those internalized, the transactors, at least if they meet minimum standards of competence, should have the freedom to choose their regulatory environment. Under these conditions, a race to the top can occur.

Using Romano’s framework, the argument that competition regulation is susceptible to a race to the bottom, and therefore should not be subject to transactor choice, is straightforward. At its heart competition law involves producer conduct, either unilateral or in concert, that may have harmful effects on consumers. Allowing producers to choose which regime will regulate the harm they impose on consumers would make sense only if consumers could boycott producers that choose consumerunfriendly regimes. But competition law, at least in theory, focuses on exactly the kinds of producer actions that reduce consumer choice. In most instances, producer choices about competition law should have no significance.87

Straightforward analysis also demonstrates that none of the three rules used by the courts for allocating state regulatory jurisdiction will produce optimal outcomes. First, a universal commitment to territoriality would prevent a state from regulating offshore producers intending inefficiently to limit competition in the state’s market. Barring all such desirable regulation can be justified only if one can demonstrate that on balance extraterritorial regulation would decrease welfare. Some instances of extraterritorial regulation probably are inefficient. States can use competition law as a form of protection for local producers or as a means of attacking changes in foreign producers’ organizational structure that greatly reduces production costs at the price of some reduced consumer welfare. But some states might limit competition rules to cases that both maximize efficiency and increase consumer welfare. Moreover, in industries where production is moveable, and firms thus can induce states to compete for their activities, producers probably would exploit a territoriality regime to increase opportunities for monopoly rents.

Symmetrical arguments expose the flaws in the effects test. That approach multiplies the number of states with jurisdiction over transactions and thus increases the likelihood that private organizational decisions will confront governmental resistance. As with the territorial rule, whether governmental intervention will increase welfare constitutes an empirical consideration. There is no categorical reason to believe that the benefits from desirable competition rules permitted by the effects test necessarily will be greater that the costs generated by inefficient regulation.88 The most one can claim for the effects test is that is maximizes sovereignty by allowing states to choose the scope of their regulation free of international constraints. But maximization of sovereign choice is not necessarily a good thing. Arguments for expanding individual choice do not translate to the level of the state.89

The one approach that seems unambiguously flawed is the rule of reason. William Dodge misstates the case when he characterizes this approach as producing the same outcome as the territorial method.90 Rather, the rule of reason only increases the likelihood that one state, presumably the place of production, will impose its competition rules. But unlike either the territoriality rule or the effects test, the rule of reason contains a high degree of instability and unpredictability. It allows courts to balance unweighted factors on an ex post basis, making reliable guesses about regulatory jurisdiction difficult if not impossible. It creates legal risk without necessarily eliminating the costs of either under-regulation or over-regulation.

If the judicially crafted formulas for allocating jurisdiction produce suboptimal outcomes, should governments enter into agreements to allocate regulatory jurisdiction? The extant agreements suggest that we already have reached the limits of state-to-state bargains. No state seems will to submit to serious and enforceable constraints on its regulatory jurisdiction. Two reasons for this reluctance suggest themselves. First, states will not surrender jurisdiction to regulate without some clear and reliable expectation of what substantive rules other states will apply. Second, and following from the first, states recognize that the jurisdiction issue simply recasts the question of preferences for substantive competition rules.

This last point also suggests why a global bargain to allocate competition policy jurisdiction may be undesirable as well as unattainable. On reflection, the jurisdictional question presents exactly the same issues and problems as does substantive harmonization. There is no neutral template for allocation that transcends the interests engaged by competition law, and no reason to believe that those interests would not affect the structure of any international bargain. In particular, giving an international agency responsibility for supervising how states exercise their jurisdiction would give rise to exactly the same agency problems discussed in the previous section.

#### Contradictory goals---these are existential to harmonization

Crane 9 (Daniel A. Crane, Visiting Professor, University of Chicago Law School; Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University, Substance, Procedure, and Institutions in the International Harmonization of Competition Policy, 10 CHI. J. INT'l L. 143 (2009), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785688>, y2k)

Second, harmonizing jurisdictions must agree on a common answer to antitrust's great existential questions: why do we have antitrust laws and for whose benefit do we enforce them? It will do no good to agree on modes of antitrust analysis (that is, rule of reason, premerger notification, HirfindahlHirschman Index) without agreeing on why and for whose benefit the relevant technocrats are undertaking the endeavor. Answering these existential questions is difficult enough within a mature antitrust jurisdiction like the US.29 It is far more difficult to achieve a consensus on these questions across multiple jurisdictions that have very different understandings about why antitrust law exists. Consider, for example, the contrast between the ostensible goals of antitrust law in the US and the EU. The essential purpose of the antitrust provisions in the Treaty of Rome is the creation of a European common market, whereas the essential purpose of the Sherman Act (at least in its modern iteration) is to enhance economic efficiency and consumer welfare.30 Whereas common markets often do enhance efficiency, the EU's distributive concerns sometimes lead to results that would be anathema in the US.3 ' To be sure, transatiantic differences sometimes reflect disagreement over means rather than ends, 32 but sometimes results look different simply because the two antitrust regimes are pursuing different goals. Harmonizing goals is no easy task because goals are highly historically contingent. The Sherman Act and the Treaty of Rome grew out of two very different historical circumstances. The Treaty of Rome was framed against a backdrop of two disastrous world wars that wreaked havoc on the European continent. Hence, the Treaty's primary goal was political--to prevent another world war.33 The Treaty used economics as an instrument to achieve the political end-binding the European nations together economically, so that their fates and fortunes were intertwined. Historically, the US also needed to use economics instrumentally to bind together its obstreperous states, but it did not choose an antitrust policy to do so. For example, nothing bound the Union together so much as the creation of Alexander Hamilton's national bank, which issued debt to so many constituencies that the failure of the bank would have meant the impoverishment of a wide swath of American society. The framing of the Sherman Act did share one similarity with the Treaty of Rome, however-it occurred within a generation of a disastrous war (the US Civil War that ended twenty-five years before the framing of the Sherman Act).34 But even prior to the Civil War, the US already possessed the legal tools necessary to achieve a common market-particularly the power of Congress over interstate commerce and the dormant commerce clause, which prohibited states from discriminating against interstate commerce. Unlike the Treaty of Rome, the Sherman Act was not a political antidote to war, but a statute with genuinely economic goals. We may add to this short account of Europe and the US that many emerging antitrust jurisdictions have their own historical circumstances that shape their own competition policy goals. Russia has moved forward cautiously with competition policy, "liberalizing" its economy through a mixture of underenforced competition laws and a price-regulatory "natural monopolies" law.3 " China relies on economic growth to maintain its holy grail of political stability and sees antitrust law as a driver of economic growth.36 In this calculus, producer surplus may count far more than consumer surplus. India's new competition act lists the "economic development of the country" as a goal of the law, which may result in permitting anticompetitive activities that ostensibly contribute to "development" goals.37

## OAS

#### Multilat fails and is unsustainable.

Young et al ‘13 (Kevin Young, Assistant Professor in the Department of Political Science at the University of Massachusetts Amherst, David Held is Master of University College, and Professor of Politics and International Relations, at the University of Durham. He is also Director of Polity Press and General Editor of Global Policy, Thomas Hale is a Postdoctoral Research Fellow at the Blavatnik School of Government, Oxford University, Open Democracy, "Gridlock: the growing breakdown of global cooperation", <http://www.opendemocracy.net/thomas-hale-david-held-kevin-young/gridlock-growing-breakdown-of-global-cooperation>, May 24, 2013)

The Doha round of trade negotiations is **deadlocked**, despite eight successful multilateral trade rounds before it. Climate negotiators have met **for two decades without** finding **a way to stem** global **emissions. The UN is ~~paralyzed~~** in the face of growing insecurities across the world, the latest dramatic example being Syria. Each of these phenomena could be treated as if it was independent, and an explanation sought for the peculiarities of its causes. Yet, such a perspective would fail to show what they, along with numerous other instances of breakdown in international negotiations, have in common. **Global coop**eration **is gridlocked** across a range of issue areas. The reasons for this are **not the result of any single** underlying causal **structure**, but rather of **several** underlying **dynamics** that work together. Global cooperation today is failing not simply because it is very difficult to solve many global problems – indeed it is – but because previous phases of global cooperation have been incredibly successful, producing unintended consequences that **have overwhelmed** the **problem-solving capacities** of the very institutions that created them. It is hard to see how this situation can be unravelled, given failures of contemporary global leadership, the weaknesses of NGOs in converting popular campaigns into institutional change and reform, and the domestic political landscapes of the most powerful countries. A golden era of governed globalization In order to understand why gridlock has come about it is important to understand how it was that the post-Second World War era facilitated, in many respects, a successful form of ‘governed globalization’ that contributed to relative peace and prosperity across the world over several decades. This period was marked by peace between the great powers, although there were many proxy wars fought out in the global South. This relative stability created the conditions for what now can be regarded as an unprecedented period of prosperity that characterized the 1950s onward. Although it is by no means the sole cause, the UN is central to this story, helping to create conditions under which decolonization and successive waves of democratization could take root, profoundly altering world politics. While the economic record of the postwar years varies by country, many experienced significant economic growth and living standards rose rapidly across significant parts of the world. By the late 1980s a variety of East Asian countries were beginning to grow at an unprecedented speed, and by the late 1990s countries such as China, India and Brazil had gained significant economic momentum, a process that continues to this day. Meanwhile, the institutionalization of international cooperation proceeded at an equally impressive pace. In 1909, 37 intergovernmental organizations existed; in 2011, the number of institutions and their various off-shoots had grown to 7608 (Union of International Associations 2011). There was substantial growth in the number of international treaties in force, as well as the number of international regimes, formal and informal. At the same time, new kinds of institutional arrangements have emerged alongside formal intergovernmental bodies, including a variety of types of transnational governance arrangements such as networks of government officials, public-private partnerships, as well as exclusively private/corporate bodies. Postwar institutions created the conditions under which a multitude of actors could benefit from forming multinational companies, investing abroad, developing global production chains, and engaging with a plethora of other social and economic processes associated with globalization. These conditions, combined with the expansionary logic of capitalism and basic technological innovation, changed the nature of the world economy, radically increasing dependence on people and countries from every corner of the world. This interdependence, in turn, created demand for further institutionalization, which states seeking the benefits of cooperation provided, beginning the cycle anew. This is not to say that international institutions were the only cause of the dynamic form of globalization experienced over the last few decades. Changes in the nature of global capitalism, including breakthroughs in transportation and information technology, are obviously critical drivers of interdependence. However, all of these changes were allowed to thrive and develop because they took place in a relatively open, peaceful, liberal, institutionalized world order. By preventing World War Three and another Great Depression, the multilateral order arguably did just as much for interdependence as microprocessors or email (see Mueller 1990; O’Neal and Russett 1997). Beyond the special privileges of the great powers Self-reinforcing interdependence has now progressed to the point where it has altered our ability to engage in further global cooperation. That is, economic and political shifts in large part attributable to the successes of the post-war multilateral order are now amongst the factors grinding that system into gridlock. Because of the remarkable success of global cooperation in the postwar order, human interconnectedness weighs much more heavily on politics than it did in 1945. The need for international cooperation has never been higher. Yet **the “supply”** side of the equation, institutionalized multilateral cooperation, **has stalled.** In areas such as nuclear proliferation, the explosion of small arms sales, terrorism, failed states, global economic imbalances, financial market instability, global poverty and inequality, biodiversity losses, water deficits and climate change, **multilateral** and transnational **coop**eration **is** now increasingly **ineffective** or threadbare. Gridlock is not unique to one issue domain, but appears to be becoming a general feature of global governance: cooperation seems to be increasingly difficult and deficient at precisely the time when it is needed most. It is possible to identify **four reasons** for this blockage, four pathways to gridlock: rising **multipolarity, institutional inertia, harder problems, and institutional fragmentation**. Each pathway can be thought of as a growing trend that embodies a specific mix of causal mechanisms. Each of these are explained briefly below. **Growing multipolarity**. The absolute number of states has **increased by 300 percent** in the last 70 years, meaning that the most basic transaction costs of global governance have grown. More importantly, the number of states that “matter” on a given issue—that is, the states without whose cooperation a global problem cannot be adequately addressed—has expanded by similar proportions. At Bretton Woods in 1945, the rules of the world economy could essentially be written by the United States with some consultation with the UK and other European allies. In the aftermath of the 2008-2009 crisis, the G-20 has become the principal forum for global economic management, not because the established powers desired to be more inclusive, but because they could not solve the problem on their own. However, a consequence of this progress is now that many **more countries, represent**ing a **diverse** range of **interests, must agree** in order for global cooperation to occur. **Institutional inertia**. The postwar order succeeded, in part, because it incentivized great power involvement in key institutions. From the UN Security Council, to the Bretton Woods institutions, to the Non-Proliferation Treaty, key pillars of the global order explicitly grant special privileges to the countries that were wealthy and powerful at the time of their creation. This hierarchy was necessary to secure the participation of the most important countries in global governance. Today, the gain from this trade-off has shrunk while the costs have grown. As power shifts from West to East, North to South, a broader range of participation is needed on nearly all global issues if they are to be dealt with effectively. At the same time, following decolonization, the end of the Cold War and economic development, the idea that some countries should hold more rights and privileges than others is increasingly (and rightly) regarded as morally bankrupt. And **yet, the architects of the postwar order did not**, in most cases, **design institutions that would** organically **adjust to fluctuations in** national **power**. **Harder problems**. As independence has deepened, the types and scope of problems around which countries must cooperate has evolved. **Problems are both now more extensive**, implicating a broader range of countries and individuals within countries, **and intensive**, penetrating deep into the domestic policy space and daily life. Consider the example of trade. For much of the postwar era, trade negotiations focused on reducing tariff levels on manufactured products traded between industrialized countries. Now, however, negotiating a trade agreement requires also discussing a host of social, environmental, and cultural subjects - GMOs, intellectual property, health and environmental standards, biodiversity, labour standards—about which countries often disagree sharply. In the area of environmental change a similar set of considerations applies. To clean up industrial smog or address ozone depletion required fairly discrete actions from a small number of top polluters. By contrast, the threat of climate change and the efforts to mitigate it involve nearly all countries of the globe. Yet, **the divergence of** voice and **interest** within both the developed and developing worlds, along with the sheer complexity of the incentives needed to achieve a low carbon economy, have **made a global deal**, thus far, **impossible** (Falkner et al. 2011; Victor 2011). **Fragmentation**. The institution-builders of the 1940s began with, essentially, a blank slate. But efforts to cooperate internationally today occur in a dense institutional ecosystem shaped by path dependency. The exponential **rise in** both multilateral and transnational **organizations** has **creat**ed a more **complex** multilevel and multi-actor system of **global governance.** Within this dense web of institutions mandates can conflict, interventions are frequently uncoordinated, and all too typically scarce resources are subject to intense competition. In this context, the proliferation of institutions tends to lead to dysfunctional fragmentation, reducing the ability of multilateral institutions to provide public goods. When funding and political will are scarce, countries need focal points to guide policy (Keohane and Martin 1995), which can help define the nature and form of cooperation. Yet, when international regimes overlap, these positive effects are weakened. **Fragmented institutions**, in turn, **disaggregate resources and political will, while increasing transaction costs.** In stressing four pathways to gridlock we emphasize the manner in which contemporary global governance problems build up on each other, although different pathways can carry more significance in some domains than in others. The challenges now faced by the multilateral order are substantially different from those faced by the 1945 victors in the postwar settlement. They are second-order cooperation problems arising from previous phases of success in global coordination. Together, they now block and inhibit problem solving and reform at the global level.

#### No impact to Latin American instability – no nukes

**Cardenas, Brookings Latin America Initiative senior fellow, 2011**

(Mauricio, “Think Again Latin America”, 3-17, <http://www.foreignpolicy.com/articles/2011/03/17/think_again_latin_america?page=full>, ldg)

"Latin America is violent and dangerous." Yes, but not unstable. Latin American countries have among the world's highest rates of crime, murder, and kidnapping. Pockets of abnormal levels of violence have emerged in countries such as Colombia -- and more recently, in Mexico, Central America, and some large cities such as Caracas. With 140,000 homicides in 2010, it is understandable how Latin America got this reputation. Each of the countries in Central America's "Northern Triangle" (Guatemala, Honduras, and El Salvador) had more murders in 2010 than the entire European Union combined. Violence in Latin America is strongly related to poverty and inequality. When combined with the insatiable international appetite for the illegal drugs produced in the region, it's a noxious brew. As strongly argued by a number of prominent regional leaders -- including Brazil's former president, Fernando H. Cardoso, and Colombia's former president, Cesar Gaviria -- a strategy based on demand reduction, rather than supply, is the only way to reduce crime in Latin America. Although some fear the Mexican drug violence could spill over into the southern United States, Latin America poses little to no threat to international peace or stability. The major global security concerns today are the proliferation of nuclear weapons and terrorism. No country in the region is in possession of nuclear weapons -- nor has expressed an interest in having them. Latin American countries, on the whole, do not have much history of engaging in cross-border wars. Despite the recent tensions on the Venezuela-Colombia border, it should be pointed out that Venezuela has never taken part in an international armed conflict. Ethnic and religious conflicts are very uncommon in Latin America. Although the region has not been immune to radical jihadist attacks -- the 1994 attack on a Jewish Community Center in Buenos Aires, for instance -- they have been rare. Terrorist attacks on the civilian population have been limited to a large extent to the FARC organization in Colombia, a tactic which contributed in large part to the organization's loss of popular support.

# 2NC

## Transparency CP

#### CP solves cartels---allows the importing countries to easily prosecute conduct as a result of an influx of new information, which literally ceases cartels---here’s an example of how this works

Sokol 8 (D. Daniell, Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law, WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION? Journal of Competition Law & Economics, 4(4), 967–982, y2k)

Mandatory transparency would allow importing jurisdictions a further check on the activities of joint exporting firms that may be causing an anticompetitive effect. This would particularly assist developing world agencies in obtaining information as to the potential anticompetitive effects of export cartels in their jurisdictions. Though not a developing world antitrust agency, the Irish Competition Authority (“ICA”) has shown how transparency can yield results against export cartels.63 The Webb Pomerene Act requires registration with the FTC, which posts the filings on the FTC webpage. This posting made it very easy from the perspective of the ICA to get a list of all associations registered. The ICA then sent letters to all the associations and asked the associations which of their members may be engaged in cartel activities that had an effect in Ireland. Export cartel activity in Ireland stopped as a result. The Irish experience suggests a low-cost way in which the potential negative impact of joint exporting firms could be addressed by an importing country with minimal cost to the exporting country. In countries where the capacity of antitrust agencies is high, such as in North America, parts of Asia, or EU members, countries can use the type of approach that the ICA has used against U.S. export cartels. That there seem to be few such cases suggests that export cartels may not be significant in these jurisdictions.64

#### Follow-on---builds support for the aff

Sokol 8 (D. Daniell, Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law, WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION? Journal of Competition Law & Economics, 4(4), 967–982, y2k)

Compliance costs for reporting might have the secondary effect of creating support for increased competition advocacy to limit immunities in the first place. After all, if there is no anticompetitive effect, why have the exemption in the first place? One response may be that small companies may be riskaverse and may not have the ability to afford sophisticated antitrust counsel about joint export situations.65 Such a claim may or may not be true. The impact of export cartels is on the foreign country but foreign antitrust agencies lack the capacity to make the determination for themselves if there is an anticompetitive harm as a result of the export cartel. The WTO prohibition would provide a policy lever to push for increased domestic policy change in export cartels and provide arguments for competition advocacy to limit any negative effects of such cartels. Competition advocacy would expose the true cost of such policies and make repeal more likely. It might also create shaming penalties. Suppose a well-known company like Proctor & Gamble was engaged in such an export cartel. The foreign antitrust agency could publicize that the export cartel members, including Proctor & Gamble, overcharge the poor.66 Though shaming might work if export cartel members are large corporations, shaming might have a more limited effect with smaller companies. A commitment to transparency is within the traditional WTO rubric and is possible to enforce. For example, GATT Article III and TRIPS Article 63 require mandatory transparency and notification of provisions. Increased transparency will allow the possibility for national enforcers to take proactive steps to combat export cartels to the extent that such cartels threaten their country with anticompetitive conduct. The export cartel transparency provision, like other transparency provisions in the WTO, would be subject to dispute settlement for nonenforcement. This would be different from the traditional cartel registration “solution” offered for most of the first half of the twentieth century antitrust debate because of the now existing global norm to combat hard-core cartels

#### Shaming tactics independently solve

Sokol 8 (D. Daniell, Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law, WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION? Journal of Competition Law & Economics, 4(4), 967–982, y2k)

Compliance costs for reporting might have the secondary effect of creating support for increased competition advocacy to limit immunities in the first place. After all, if there is no anticompetitive effect, why have the exemption in the first place? One response may be that small companies may be riskaverse and may not have the ability to afford sophisticated antitrust counsel about joint export situations.65 Such a claim may or may not be true. The impact of export cartels is on the foreign country but foreign antitrust agencies lack the capacity to make the determination for themselves if there is an anticompetitive harm as a result of the export cartel. The WTO prohibition would provide a policy lever to push for increased domestic policy change in export cartels and provide arguments for competition advocacy to limit any negative effects of such cartels. Competition advocacy would expose the true cost of such policies and make repeal more likely. It might also create shaming penalties. Suppose a well-known company like Proctor & Gamble was engaged in such an export cartel. The foreign antitrust agency could publicize that the export cartel members, including Proctor & Gamble, overcharge the poor.66 Though shaming might work if export cartel members are large corporations, shaming might have a more limited effect with smaller companies. A commitment to transparency is within the traditional WTO rubric and is possible to enforce. For example, GATT Article III and TRIPS Article 63 require mandatory transparency and notification of provisions. Increased transparency will allow the possibility for national enforcers to take proactive steps to combat export cartels to the extent that such cartels threaten their country with anticompetitive conduct. The export cartel transparency provision, like other transparency provisions in the WTO, would be subject to dispute settlement for nonenforcement. This would be different from the traditional cartel registration “solution” offered for most of the first half of the twentieth century antitrust debate because of the now existing global norm to combat hard-core cartels

#### Harmonizing export cartel law strengthens economic integration throughout the OAS

Frederic Desmarais 9, LLB from McGill University, B.Sc. in International Studies from the University of Montreal, “Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?”, Manitoba Law Journal, 33 Man. L.J. 41, Lexis

C. The Advantages of the Harmonization Process

In its report of 1974, the CERBP of the OECD concluded that a notification procedure is desirable. 230 It recommended its member states to consider incorporating such a procedure in their national competition laws by stating that:

A notification procedure should cover details about membership, fields of action, the type of restriction involved, and the basic facts of the business done or planned. Obligatory notification of export cartels would enable the national authorities to obtain a much more clearer picture of the advantages and disadvantages of export cartels in their countries, and eventually, modify their legislation accordingly. [Emphasis added.] 231

In so doing, the CERBP shed light on the primary advantage of an explicit exemption system with a notification requirement: the ability to gather information regarding the activities of export cartels to assess the pros and cons of such associations. As a result, the IAJC should adhere to the conclusion of the CERBP.

The second advantage of this harmonization process is that it will facilitate the prosecution of anticompetitive export cartels instituted by developing American countries. As illustrated by section 2(C), developing countries are often powerless to prosecute export cartels adversely affecting their national market because they lack extra-territorial enforcement capacity, technical expertise, and access to evidence in other countries that typically don't have exemption systems with notification requirements. Some bilateral agreements provide for facilitation of [\*84] extra-territorial prosecutions but only between major American countries. 232 An informal harmonization process geared towards the explicit exemption system that comes with a notification requirement remedies, or at least diminishes, these enforcement and evidence problems.

As a final point, this harmonization process could lead to a fostering of an inter-American awareness of competition law and economic integration issues. The Canadian Department of Foreign Affairs and International Trade concluded that discussions concerning export cartels could serve to:

[D]raw isolationist elements in the U.S. Department of Justice into a process of rethinking the role of competition policy harmonization and cooperation in an integrating continental market [...].

[B]uild an understanding as to how competition policy could contribute towards deepening NAFTA and indeed multilateral market integration. [Emphasis added.] 233

Regardless, the World Bank and the OECD foresee positive developments from such action: "In any case, increased cooperation between competition authorities and pressures to harmonize competition policy worldwide are likely to result in the elimination of export cartel exemptions or at least make them impractical." 234

VII. CONCLUSION

Export cartels rest on a retrograde conception of the international system. The rationale of national enrichment to the detriment of other countries appears, from a solely national perspective, to make sense. However, the thorough analysis of the [\*85] various effects of export cartels in part II illustrates that they may be at best a zero-sum game. They not only distort international trade, but they may generate adverse and anticompetitive effects on domestic markets and on developing countries, which are the majority in the American hemisphere. Their anticompetitive effects may nullify their "potential benefits" which are, as evidenced by the United States experience, empirically unpersuasive for justifying their perpetuation. As Eleanor Fox argues: "It is in everyone's interest to be free of export cartels in an integrated world". [Emphasis added.] 235

The study conducted by the IAJC concerning cartels in the Americas takes its origins from GA's Resolution 1772 which underscored the importance of legal issues in economic integration and requested the IAJC to circumscribe its activities in that matter to competition law and protectionism in the American hemisphere. 236 Although the rapporteurs Rodas and Fried did not explicitly recommend a harmonization process in their final report, they did not disregard this alternative which is in accordance with section 99 of the OAS Charter. In the document entitled Competition and Cartels in the Americas: Suggested Conclusions to Document CJI/doc.118/03, 237 the rapporteurs pointed out, as their second conclusion that American states are politically willing to incorporate competition law and cartels issues in an international convention, namely the FTAA, which they actually did in its three drafts. But the FTAA is currently an ineffectual organization and, even in the long-term; one can doubt that American states will advance further in this integration process.

Furthermore, the United States, as evidenced by its position within the WTO framework, acts as the standard bearer of export cartel exemptions. Thus the best alternative to achieve international regulation of export cartels is establishing of an informal harmonization based on the explicit exemption system with notification, since this mechanism currently functions in American law. This would only require redirecting the political willingness of OAS member states that was underscored by the rapporteurs towards an informal harmonization process. This process has three advantages. First, it would allow access to information on the activities of export cartels so that states could assess the pros and the cons of their eventual perpetuation or ban. Second, it would facilitate legal proceedings by developing countries against harmful export cartels, thereby complying with one request of the IAJC formulated in its resolution Cartels in the Scope of the Competition Law in the Americas urging member states:

[\*86] [T]o pay special attention to the challenges faced by smaller, and less developed, member states, so that they can develop the capacity required to maintain effective administration, application, and international cooperation in this area. [Emphasis added.] 238

Third, it could foster an inter-American awareness on competition law and economic integration issues.

The United States Supreme Court reminds us that: "[T]he antitrust laws [...] were enacted for the protection of competition, not competitors". [Emphasis added.] 239 This statement is undeniably accepted among the majority of the countries of the world. For instance, the OECD recognizes that all its member states consider that this statement is accurate. 240 Export cartel exemptions are problematic precisely because they were not enacted for the protection of competition itself, but rather for the protection of competitors whose foreign activities might even generate anticompetitive effects on domestic markets. Uniformity is not an absolute good in legal matters, but in the case of export trade law it is fundamental to the welfare of consumers around the globe.

#### Say yes---this is especially true if the thesis of the aff is correct!

Gifford 8 (Robins, Kaplan, Miller & Cirisi Professor of Law, University of Minnesota, Trade and Competition Policy in the Developing World: Is There a Role for the WTO? ., Trade and Competition Policy in the Developing World: Is There a Role for the WTO? (August 13, 2008). Minnesota Legal Studies Research Paper No. 08-27, <http://dx.doi.org/10.2139/ssrn.1223737>, y2k)

In addition to a concern about export cartels, developing countries have expressed special concern about cartel prices on products primarily or exclusively sold in their markets and the problem of bid rigging on special orders or projects. Cooperation from the developed countries, in which the perpetrators reside or about whose activities competition agencies have good information, would greatly assist the local efforts of the countries suffering such harms.124 And, as noted earlier, the higher income countries may value lower income countries’ cooperation in tracking global cartels. This contribution is likely supplementary rather than essential, however. The International Competition Network (ICN) and individual developed country competition agencies now extend some assistance to nascent agencies in lower income countries. It is almost inevitable that cooperation on specific matters of interest to particular poor countries will get a fuller and more sympathetic hearing from officials of agencies that are themselves cooperating on matters of mutual concern – such as global cartels. Moreover, rich states have every incentive to support key investigations abroad with both funding and personnel. So growing bilateral as well as multilateral cooperation on cartel issues between rich and poor countries appears likely. Moreover, the precise value of any single act of cooperation cannot be accurately assessed a priori by either side, which is probably the most propitious situation for building stronger policy links within an “epistemic community” of competition policy professionals in a broad range of countries.

#### Any action by the FTC under the CP involve minor assistance---they don’t link because the US wouldn’t be the one implementing antitrust suits

Michaels 16 (Ralf Michaels, Arthur Larson Professor of Law, Duke University School of Law, Supplanting Foreign Antitrust, 79 LAW & CONTEMP. Probs. 223 (2016), y2k)

A. Assistance, Positive Comity, And Supplanting

While actual supplanting antitrust as such appears like a novel idea,24 the use of developed country antitrust expertise and actors for developing countries is not unusual. Developed countries offer their regimes as models, and many antitrust regimes in developed countries around the world are the results of such modeling.25 They provide technical assistance in the form of expertise and 26 manpower.26 They provide investigative assistance to concrete antitrust inquiries. 27 And they provide enforcement assistance by enforcing decisions, especially court decisions, made in developing countries. Recently, Michal Gal has made a proposal that goes further.2 8 She suggests that small and developing countries could save on antitrust enforcement costs by recognizing decisions made in developed countries with regard to the same cartel.29 In her proposal, after a decision has been made in a developed country, a local plaintiff in the developing country need not prove existence of the cartel but only the local elements of the offense, as well as some procedural requirements concerning the recognized decision.3 0 All these assistance mechanisms differ from supplanting in a crucial way: they leave implementation to the developing country. This is different from another form of assistance that is more akin to supplanting, namely positive comity.3 1 The OECD defines this as an instrument "whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of that request."3 2 Positive comity is regulated in several international agreements.33 It is a version of supplanting in the sense that one country regulates the market of another. Here, the decision that enforcement should take place is still taken by the affected country (through a request), but an actual enforcement is left to the other country.

#### It’s a lower-cost solution than the aff

Sokol 8 (D. Daniell, Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law, WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION? Journal of Competition Law & Economics, 4(4), 967–982, y2k)

IV. CONCLUSION

There is much that remains unknown about the frequency of and actual harm that export cartels cause. To create a more effective policy to combat this potential problem requires a solution that reduces the information costs associated with understanding export cartels. In a departure from previous approaches, such an approach should focus on increasing transparency on export cartels. A transparency regime is a lower-cost solution than that proposed by Becker and has greater potential benefits than a solution based merely on increased coordination.

#### Evaluate the link in a sliding scale---each marginal resource that the aff take away hampers their ability to effectively prosecute COVID harms

## Merger cp

#### Small companies AND countries

Niklas Jensen-Eriksen 2013. Casimir Ehrnrooth Professor of Business History, and a member of the multidisciplinary Helsinki Institute of Sustainability Science (HELSUS) at the University of Helsinki. "A Potentially Crucial Advantage" https://www.cairn.info/revue-economique-2013-6-page-1085.htm

Although export cartels can be useful tools for small or undeveloped countries, it would not be in general interest to categorically exempt cartels from these countries from strict competition laws, and ban those that originate from in - dustrialized countries. This division would not tell us anything about the role of these cartels in the markets, because companies from small or undeveloped countries can set up alliances that have a monopoly position and therefore have traditional negative effects on customers and on economic development. nei - ther should we stop small companies from large industrialized countries from setting up efficiency-enhancing institutions, if they continue to face strong competition from non-members. These institutions should be banned if they achieve a dominant position in the markets. it might, however, be difficult for individual governments to find out whether nominally independent foreign suppliers have formed export cartels that have such a strong position. Requiring the registration of export cartels in all coun - tries, combined with the sharing of information among governments, could help competition authorities better understand the state of competition in individual markets.91

#### Promotes econ and tech development

Niklas Jensen-Eriksen 2013. Casimir Ehrnrooth Professor of Business History, and a member of the multidisciplinary Helsinki Institute of Sustainability Science (HELSUS) at the University of Helsinki. "A Potentially Crucial Advantage" https://www.cairn.info/revue-economique-2013-6-page-1085.htm

This article argues that cartels can in certain circumstances be a source of power for the small and weak nations, and that this aspect has often been overlooked in current public discussions about cartels, which tend to emphasize their negative effects. In particular, we will look at export cartels, which, in most countries, are exempted from the scope of tough competition laws, but which have since the end of the 1980s received an increasing amount of criticism. Yet, as several writers have noted, the available empirical evidence on the actual effects and activities of export cartels is very limited. This article expands our knowledge by analyzing one country, Finland, where these institutions played an exceptionally important role. The Finnish export associations helped the country’s small and insignificant producers become significant players in world markets, and promoted economic and technical development in their home country. Yet, the Finnish cartels also promoted the cartelization of international trade.

#### Lit review

Peerapat **Chokesuwattanasku** **2018**. University of Cambridge, DPhil Dissertation. "Export cartels and economic development" <https://www.repository.cam.ac.uk/bitstream/handle/1810/273865/Chokesuwattanaskul-2018-PhD.pdf?sequence=1&isAllowed=y>

The assessment of the academic understanding is far from being clear-cut either. The conventional view on export cartels promotes a strict prohibition of export cartels, believing that export cartels are purely beggar-thy-neighbour and detrimental for the exporting firms themselves. However, some scholars have recently proposed that export cartels are more likely to be beneficial when they originate in developing countries than those from developed countries (Bhattacharjea, 2004; Dick, 1990; Jensen-Eriksen, 2013). It seems that the effects of export cartels on economic development are not as detrimental as claimed by scholars and policymakers (Buccirossi and Spagnolo, 2006; Kühn, 2001; Schultz, 2002; Victor, 1991).

#### Merger regulation is a more significant alt cause

Dr. Brian Ikejiaku 21, Senior Lecturer in Law at Coventry University, PhD from the Research Institute of Law, Politics, & Justice (RILPJ) at Keele University, and Cornelia Dayao, LL.M in International Business Law, “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US”, Utrecht Journal of International and European Law, Volume 36, Issue 1, http://doi.org/10.5334/ujiel.513

(iii) Merger regulation and protectionism

One area of competition law that has always been suspected as an instrument of protectionism is merger regulation; the failed merger of Siemens-Alstom is a good case in point. Merger regulation is one of the pillars of competition policy aimed at preserving market competition in the event of business combinations and takeovers.126 However, preservation of competition is not the only rationale for the enforcement of merger regulations; national security, businesses perceived to be of national strategic importance, technological capabilities, jobs and export also influence merger control enforcement.127 Thus, the protectionism hypothesis posits that merger regulation is used as a tool to protect domestic firms from competition.128 In addition to protection of domestic firms, which is often associated with the infant industry argument, States are also suspected of using merger regulations to promote its national champions on the premise of strategic trade theory. In the context of merger control, the notion of a national champion generally means that the government encourages or does not prevent a merger between two domestic firms to create a more powerful entity, or it opposes the acquisition of one of the domestic firms by a foreign company.129

A study has found that, while merger regulation has deterred anticompetitive mergers, it has also protected rival producers from increased competition due to efficient mergers.130 In the context of EU merger policy, an empirical analysis to prove the protectionist hypothesis concluded a direct correlation between the likelihood of opposition to the merger by the competition authority when the bidder is a foreign national and the expected adverse effect of the reviewed merger on domestic competitors.131 After reforms on the EU Merger Regulation were introduced in 2004, the hypothesis was re-examined and change in protectionist tendencies were discovered.132 The result was more consistent with a recent empirical study that showed the Commission has not intervened more frequently or extensively in transactions involving a non-EU- or US-based firm’s acquisition of a European target.133 Nonetheless, there has been no conclusive findings on the absence of protectionism. At most, empirical analyses have shifted the burden of proof to those advancing the view.

Despite these empirical results disproving the use of merger regulation for protectionist purposes, persistent allegations abound. The political model of antitrust established that merger decisions are influenced by political contributions of lobby groups representing special interests, political pressures and social welfare considerations.134 For instance, Bu argues that the decision of Chinese competition authority to block the merger between Coca Cola and Huiyuan illustrates the influence of non-competition considerations such as protectionism on merger regulation enforcement.135 The lack of sufficient analysis as well as broad conclusions reached on the decision left no other conclusion but that China was trying to protect its home-grown, local company from potential brand dilution once absorbed by Coca Cola.136 Another example is the opposition of the US to the potential merger between Broadcom, a Singapore-based company, and Qualcomm, an American telecommunication chip manufacturer, on the grounds of national security.137 In the EU, its opposition to the Boeing/McDonnell Douglas merger was suspected to arise from protectionist sentiment because of the merger’s adverse impact on the rival EU firm Airbus.138

## Harmonzation

#### Harmonization would be super gradual---allows a host of anticompetitive conducts to go unpunished in the interim which triggers the aff

Sokol 9 (D. Daniel Sokol, Assistant Professor, University of Florida Levin College of Law, Limiting Anticompetitive Government Interventions That Benefit Special Interests, 17 GEO. Mason L. REV. 119 (2009), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1121&context=facultypub>, y2k)

The proposed WTO solution is not an exclusive solution. In conjunction with soft law institutions, it should build domestic capacity to limit or remove public restraints. Hard law solutions are infrequent whereas soft law fosters day-to-day interaction between agencies. Thus, soft law institutions play a critical role in shaping antitrust norms. They can help to identify public restraints, develop better practices to reduce them, and serve to educate regulators and the public at large as to the anticompetitive aspects of public restraints. A soft law solution on its own would be very gradual, and in the near-to-medium term allow a significant amount of anticompetitive conduct to go unchallenged, because of the reluctance to take on significant public restraints due to public choice concerns. The increased use of the WTO would help solve what soft law harmonization and domestic approaches cannot do as effectively in the near-to-medium term--overcome the domestic political process. It is the domestic political process which has created antitrust immunities and anticompetitive public restraints. Thus, revitalizing antitrust regulation and taking action against such restraints may require an international solution.

#### Even if there’s a broad opt-in, variations in enforcement deck harmonization

Hollman 11 (Hugh M. Hollman is Attorney Advisor to Commissioner Kovacic at the Federal Trade Commission, and a member of the ICN’s Agency Effectiveness Working Group, The International Competition Network: Its Past, Current and Future Role (2011), Minnesota Journal of International Law. 265, <https://scholarship.law.umn.edu/mjil/265>, y2k)

It is useful to consider how much the ICN’s convergence related initiatives, as well as the contributions of other multinational networks, will reduce conflicts among jurisdictions with respect to the treatment of specific matters. We would expect broad, voluntary opting in to substantive and procedural standards to decrease conflicts. Widespread adoption of similar analytical methods and procedures should serve in many instances to guide competition agencies in matters to the same result. At the same time, it is hard to imagine that convergence inspired by the ICN or other multinational networks will suffice to eliminate transnational conflicts. Jurisdictions with similar competition regimes, shared analytical methods, and consistent procedures sometimes will reach different outcomes owing to variations in application.

#### Enforcement bias is inevitable

Shen 20 (Shen, Weimin, LL.M, J.S.D., Washington University School of Law, The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy (August 2, 2020). Journal of Transnational Law & Policy, Vol. 30, 2020-2021, y2k)

Professor Andrew Guzman argued States attempt to “externalize the costs and internalize the benefits of the exercise of market power across borders” to maximize their national interest.150 States have the incentive to either under-enforce or over-enforce their antitrust laws depending on trade flows.151 That is, if a State is a net importer, it has a motivation to employ stricter antitrust standards than what would be globally optimal as it fails to internalize costs generated by foreign producers; if a state is a net exporter, it has a motivation to adopt relatively permissive antitrust laws rather than in a closed economy, externalizing costs to foreign consumers.152 As Professor Guzman concluded, each country adjusts its antitrust laws strategically, based upon its trade flows. Therefore, domestic antitrust regimes are characterized by a statutory bias that manifests itself in the form of export cartels and industry exemptions, and enforcement bias toward domestic corporations through selective enforcement.153

#### Paradox---if laws are different, then how can you harmonize?

#### Their evidence says states veto the aff

Dr. Brian 1AC Ikejiaku 21, Senior Lecturer in Law at Coventry University, PhD from the Research Institute of Law, Politics, & Justice (RILPJ) at Keele University, and Cornelia Dayao, LL.M in International Business Law, “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US”, Utrecht Journal of International and European Law, Volume 36, Issue 1, http://doi.org/10.5334/ujiel.513

Section 1: Introduction

Today, there is a growing fear of rising protectionism, from the United States (US) under the Trump administration’s imposition of tariffs and a trade war with China, to the United Kingdom’s Brexit, to the less known trade-restricting measures adopted by other countries all over the world.1

The neoclassical economic model suggests the desirability of free trade over protectionism because free trade lowers prices, allows a flow of goods with little restrictions and improves the quality of products, resulting in overall welfare gain.2 On the other hand, protectionism results in welfare losses, increased prices and a decline in innovation, thus harming consumers and economic efficiency.3

The natural inclination of states to engage in protectionism is as old as time and, until today, has never been diminished.4 The General Agreement on Trade & Tariff (GATT),5 superseded by World Trade Organisation (WTO) since 1995, rendered the classical forms of protectionism such as tariffs obsolete. However, it did not defeat protectionism; instead, protectionism has evolved through its protean capacity to adapt into new and often undetectable forms,6 now labelled as ‘murky’ protectionism.7

Competition law enforcement is suspected as one of the forms of this murky protectionism. There are two ways (among others) considered in this article in which States can utilise competition law to impair free trade and restrict access of foreign firms to domestic market. First is the exemption under national competition law such as export cartel exemptions; second is the strategic application of domestic competition law, e.g. alleged discriminatory and selective enforcement of merger regulation.8

It appears that States use their competition law as invincible trade barriers to further their protectionist bids such as national security and environmental protection.9 In recent years, States have been accused of using their competition law to pursue protectionism. For instance, the US has criticised the EU’s merger regulation as protecting competitors and not competition, particularly in the technology industry in mergers involving non-EU firms – even when those same acquisitions are approved by other competition authorities. A good example is the Commission’s 2001 decision to block the $42 billion acquisition of Honeywell by General Electric.10 Similarly, the US is being encouraged to change their stance on leniency towards export cartels due to its beggar-thy-neighbour effect.11 Investigating the controversy around the use of competition law for protectionist ends is particularly relevant today to protect and uphold free trade and liberalisation. There is a gap between competition and trade policies which national competition law fails to address and the WTO rules fail to regulate. Merger regulation and export cartel exemptions appear to be used as tools for protectionist ends to exploit the gap. This article, therefore, examines whether States use their competition law to pursue protectionist policy in the EU and the US. In this context, the article specifically focuses on analysing how merger regulation and treatment of export cartel further protectionism.12

In terms of method and approach, the article uses the international political economy (IPE) perspective underpinned by (legal/political) realism and interdisciplinary, theoretical-analytical perspectives within the framework of international competition law. It employs (comparative) qualitative empirical evidence from the EU and US for comparative analysis. The international political economic perspective is used to analyse how the presence of political elements and influences on decision-making reflect the enforcing jurisdiction’s national environment, culture, priorities and goals by presenting an opportunity for the use of competition law for protectionist bids. Meanwhile, the interdisciplinary and theoretical-analytical perspective is used to employ literature in the legal, economics, international relations and international politics areas.13 This is empirically analysed within the framework of (international) competition law. The (comparative) qualitative empirical evidence is employed by gathering relevant material from the European Union and the United States of America for an in-depth analysis.

The article adopts legal/political realism theory in the analysis section to demonstrate that the regulation of competition law by regulators/competition authorities in the EU (mainly, the EU Commission)14 and in the USA (the US Department of Justice and the Federal Trade Commission)15 is highly influenced by the public policy of the nation. In simple parlance, legal realism is a theory that all law derives from prevailing social interests and public policy. According to legal realist theory, judges consider not only abstract rules, but also social interest and public policy, when deciding a case.16 Legal realism is a diverse school of thought and any attempt to homogenise it will distort more than simplify,17 since its influence goes beyond being a mere theory of adjudication.18 Judges more often than not promote social ends; just as Cardozo admitted, a judge may be tempted to substitute their view for that of the community.19 From this perspective, the legal realist is attached to social reform and they want law to serve as an instrument for social action. To achieve this, realist thought, policy objectives and interrelationship between legal rules had to become more intimate.20

Political realism is a theory that attempts to explain, model, and prescribe political relations. It proposes that power is (or ought to be) the primary end of political action, whether in the domestic realm or international arena. In the domestic realm, the theory contends that politicians do, or should, strive to maximise their power, whilst in the international arena, nation States are the primary agents that maximise, or ought to maximise, their power. In the context of nation States, the proposition is that a nation can only advance its interests against the interests of other nations; this implies that the international environment is inherently unstable.21 Realism emphasizes power and the national interest and directs more attention to political security than to economic issues.22 Realism is equated to, if not related to, mercantilism, also known as protectionism.23 To obtain political security, realists enrich their power and wealth at the expense of their neighbouring States, often through an increase in exports and decrease in imports.24 IPE is concerned with the interaction of economics and politics in the international sphere.25 Politics is represented by the State as a sovereign political unit and economics is represented by the market as a system of production and consumption at a price determined by supply and demand.26

Based on the political and economic dimensions involved in the interplay of competition law and trade policy, particularly protectionism, it is the position of this article that realist theory, along with an IPE perspective, is relevant in understanding why nation States use competition law as a protectionist bid in their trade policy.

The article is structured into five broad sections; this section, Section 1 is the general introduction and set out the method, including the theoretical approach used in the article. Section 2 provides a brief conceptual understanding of the relevant concepts in the article which have divergent conceptual interpretations within academic literature. Section 3 discusses the relationship between competition law and other issues areas such as trade policy, protectionism and others. Section 4 analyses competition law and protectionism in the two case studies, EU and US, by using specific competition law instruments: (i) merger regulation and (ii) treatment of export cartels to investigate and analyse how they are used for protectionism, including a brief comparative analysis. Finally, Section 5 summarises and concludes the article.

Section 2: A Conceptual understanding of relevant concepts

Looking at academic literature, scholars have provided divergent conceptual views or interpretations of relevant competition law concepts that appear in the article.

(i) Competition

Competition, in its broad economic sense, is the process whereby firms struggle to win against each other. Competition law, also known as antitrust in the United States, refers to the legal rules and standards which aim to protect the process of competition by dealing with market imperfections and restoring desirable competitive conditions in the market.27 Competition policy, on the other hand, is broader than competition law and covers the full range of government measures that could promote competitive market structures and behaviour, including trade liberalisation measures.28 Views on the necessity of the enactment of competition law to implement competition policy remain divided.29 The neo-classical economics case for competition argues competition provides various benefits such as lower prices, efficiency, and innovation.30 There is no consensus on the goals of competition law. Some scholars suggest that competition law is akin to a sponge or that it is a fluid concept influenced by varying objectives, policies, culture; hence, the goals vary based on each enacting jurisdiction.31 On the other hand, one of the prominent scholars of the Chicago school of competition analysis suggests that the ultimate goal of competition law is economic efficiency, which is equated to consumer welfare maximisation.32 Nonetheless, the most commonly declared goal of competition law is to protect and encourage competition to achieve the optimal resource allocation and maximise consumer welfare.33

As a result of these diverging goals and enforcement policies of competition law, several scholars proposed for the internalisation, or at least harmonisation, of competition law.34 Some scholars such as Fox and Manne and Weinberger, recognising the restrictive effect on trade by anticompetitive practices, called for the alignment of competition law within the WTO Framework. However, this failed to materialise as a result of the diverging views of the member States.35

(ii) Merger

Under a business or firm perspective, mergers36 are motivated by efficiency goals as explained by efficiency theory, strategy to increase market power as explained by market power hypothesis, or simply the managers’ greed or overconfidence as explained by the hubris hypothesis.37 Efficiency theory suggests that firms will merge if there is a potential to generate sufficient realisable synergies beneficial to all the merging parties.38 Synergies comprise of collusive, operational and financial synergy.39 Operational synergies are manifested in resulting economies of scale and economies of scope as they mainly relate to production and/or administrative efficiencies; financial synergy refers to cost savings, and collusive synergy refers to expansion of market power as supported by the market power hypothesis.40 Alternatively, hubris hypothesis argues that decisions to merge are the result of managements’ overestimation of the resulting benefits to the business due to the managers’ overconfidence in decision-making.41 Nonetheless, each merger transaction is unique; hence, there is no single theory that encapsulates the motivations for pursuing these transactions.42

Under the legal perspective, however, a merger simply refers to a combination of two or more corporations into a single entity, regardless of business reason or mode of acquisition.43 For competition authorities, mergers pose a concern because of the merging firms’ potential to accumulate or expand market power, which can distort competition through monopoly or abuse of dominance.44

However, empirical analyses negate the protectionism hypothesis, at least with the perspective of the EU competition law. Initial studies found a positive correlation between the likelihood of opposition to mergers involving foreigners and the foreseen negative impact of the merger on domestic competitors.45 Yet, after the 2004 reforms introduced EU merger regulation, a re-examination of the protectionist hypothesis showed a shift in the protectionist tendencies of the enforcement authority.46 Recent research affirmed the results of this re-examination and found that the EU Commission committed no discrimination in its enforcement of merger regulation, whether in frequency or intensity, in mergers involving foreign firms.47 These empirical analyses, at least in the EU context, show that competition authorities did not use their merger control power to intervene on mergers involving non-EU or US acquirers. Nevertheless, they fail to conclusively prove that protectionism with merger regulation does not exist. Conversely, qualitative analyses examining merger decisions and the text of the merger regulations claim that merger regulation is used, or at least could potentially be used, for protectionist purposes such as promotion of national champions.48

(iii) Export cartels

A cartel is an association of rivals agreeing to fix prices above the competitive level, limit output below the competitive level or allocate markets between or amongst themselves in order to maximise their profits.49 Cartels, generally, have been labelled as the ‘supreme evil of antitrust’50 and the ‘primary evil of global trade’.51 On the other hand, export cartels are cartels that only operate in foreign markets and do not directly affect the markets in the jurisdiction where the cartel members are located.52 While there is a consensus among the world’s competition authorities to prohibit hard-core cartels,53 there is lack of clarity and transparency surrounding the treatment of export cartels. It is argued that export cartels receive considerable political support,54 not only because of its benefits to the exporting country, but also because **it is argued that export cartels are not necessarily pure evil like hard-core cartels**.55 Export cartels may have the same goals as hard-core cartels – to fix prices or allocate markets – but they may also have strictly efficiency-enhancing goals such as sharing marketing and transportation costs.56

According to economic theory, export cartels raise domestic producer welfare without diminishing domestic consumer welfare.57 **Additional export revenues and increases in national welfare incentivises exporting States to tolerate, if not promote, export cartels**.58 Furthermore, since the adverse effects of export cartels are externalised or felt exclusively by importing States, exporting States possessing the territorial jurisdiction over the cartel **have very little interest in disciplining the conduct.**59 On the other hand, importing States which have the motivation to prevent the conduct due to its anticompetitive effect and corresponding reduction in their consumer welfare do not have the territorial jurisdiction and must rather apply their competition laws extra-territorially to sanction the cartel.60 However, since exporting **States** are not motivated to sanction the cartel, or even induced to promote or tolerate the cartel because of its positive domestic effect, they **may block any extraterritorial enforcemen**t **by the importing States through exemptions or non-cooperation**.61 This conflicting interest presents a competition law enforcement dilemma on export cartels.

Fox similarly observed the insufficiency of national competition enforcement to regulate export cartels because it lacks legitimacy or capacity to reach competitive restraints on foreign soil; nonetheless, it mainly affects the domestic home market.62 Export cartels are often not covered by national competition laws when they do not affect the domestic market, neither directly or indirectly. Scholars argue that export cartels, to the extent that they are tolerated – if not encouraged – by the exporting States, are an effort of exporting States to boost domestic welfare at the expense of global welfare. More specifically, it is at the cost of the consumers’ welfare in the target market – a clear manifestation of a beggar-thy-neighbour conduct.63 On the contrary, there is a belief that the scarcity of empirical data on export cartels handicaps the attempts to analyse the issue on export cartels.64 The lack of data creates difficulties to determine the gravity of the anticompetitive harm that export cartels create; thus, **the very assumptions on which the theory of the nexus of export cartel and anticompetitive conduct rely may be misguided.65**

(iv) Trade policies

Like competition law, trade policy also contains both political and economic dimensions. It refers to the system of incentives put in place by a State with regard to production and consumption, including importation, exportation and trade of goods and services as aligned with the imposing state’s growth and development objectives.66 Trade policy involves various actions and tools such as the imposition of tariffs, quotas or restrictions, granting of subsidies to domestic industries and other measures often classified into two broad types: tariffs and non-tariff measures.67

The tariff is the classic instrument of trade policy.68 Tariffs are imposed to generate revenue but also, more importantly, to protect the domestic industry of the imposing country.69 However, with increasing trade liberalisation, most states covertly seek to protect domestic sectors through other instruments of trade policy such as non-tariff measures.70 Non-tariff measures include quotas, licences, technical barriers to trade, sanitary and phytosanitary measures, export restrictions, custom surcharges, financial measures and anti-dumping measures.71 Whilst non-tariff measures may intrinsically be protectionist, they seem useful in addressing failures in the market such as externalities and the asymmetry of information between producers and consumers.72

Trade policy is historically determined on the basis of the macro and micro view.73 The micro view provides that the State adopts its trade policy in accordance with the preferences of its industrial constituents.74 Hence, under the micro view, trade policy refers to the ‘aggregate outcome of industry battles over protection.’75 The macro view, on the other hand, suggests that the trade policy of the State cannot simply be traced back to the preferences of its industrial constituents.76 Under the macro view, the trade policy of the State reflects the collective interest of the State and the State acts as an independent agent furthering the national State objectives. Trade policy in all countries consists of varying dimensions or levels. For example, the EU trade policy, in addition to its ‘unilateral’ liberalization, i.e. voluntarily providing preferential market access or zero tariffs for specific types of countries, also adopts bilateral, plurilateral and multilateral agreements as well as commercial instruments such as anti-dumping laws and other safeguards.77 The objectives pursued at each level of trade policy constantly changes.78 Different States negotiate in order to determine their international trade policies.79 Hence, bilateral, plurilateral or multilateral trade agreements are born, usually involving preferential tariff rates, agreements on investments, technology-sharing or single market objectives.80 In the context of protectionism, the ability of States to resolve trade disputes amongst themselves significantly influences protectionist positions.81 However, it is argued that protectionist trade policy is more than just a means of adjudicating trade disputes; rather, protectionism is pursued by certain States in order to further their national economic and political policies.82

Part II

Protectionism

Protectionism is a kind of trade policy aimed at impeding foreign trade access to the domestic market and preserving, if not improving, the position of domestic producers in contrast to foreign producers.83 With the decline of classic protectionism, i.e. the imposition of tariffs and other visible barriers to trade, comes the rise of ‘murky’ protectionism, also known as new protectionism, which is characterised by seemingly innocuous and subtle measures designed to distort free trade without constituting as violations of the WTO rules or trade agreements.84 More aptly, murky protectionism has been defined as ‘abuses of legitimate discretion which are used to discriminate against foreign goods, companies, workers and investors’.85 Examples of murky protectionism are the imposition of regulatory and licensing requirements, tightening of product standards, limitation of ports of entry, introduction of bailout packages and initiation of disguised ‘green’ protectionism.86

Academic literature provides conflicting arguments regarding protectionism. Economic theory under the classic utility model establishes that any benefit that may result from protectionism is outweighed by its costs in terms of losses to consumer welfare and decline of economic growth.87 Another argument against protectionism is the moral argument which provides that protectionism is akin to stealing, i.e. producers and rent-seeking individuals induce the government to pursue their interests and benefit at the expense of consumers, in effect taking away what is due.88 On the other hand, the most notable arguments in favour of protectionism are national defence, infant industry and strategic trade theory.89

The national defence argument authorises the protection of industries with a vital role in national security such as weapon manufacturing to ensure the States’ readiness in times of war or adversity.90 It is suggested that agricultural protectionism is subsumed under the national defence argument because food security and food availability are part of the States’ legitimate national interests.91 It has been noted that the EU’s agricultural protectionism resulted in growth of production, achievement of self-sufficiency in food security and stability in the common market for agricultural products.92

The infant industry argument provides that a State, in order to grow, must first strengthen its newly established industries which do not enjoy the cost and production efficiencies yet compared to its competitors; this is at least until it establishes its comparative advantage and the playing field has been levelled.93 Proponents for the protection of the infant industry assert that protection must only be temporary and the benefits provided by the protected industry must exceed the costs of protection, also known as the Mill-Bastable Test.94

The strategic trade theory, introduced by James Brander and Barbara Spencer, has also been used to support protectionism.95 According to the strategic trade theory, firms are inclined to take ‘strategic’ moves exhibiting aggressive behaviour; the State’s support of such national firms will further give more credence to such behaviour, in effect deterring potential rivals such as foreign firms.96 Hence, strategic trade theory suggests the States can raise their national income at the expense of other States by supporting or promoting national firms in international competition.97

Section 3: The relationship between competition law and other issue areas

(i) Competition and Trade Policies

Competition and trade policies are both national policies used as tools for economic development, albeit with different objectives, principles, and scope. No consensus on the overall relationship between the two has yet been reached. It is suggested that the two policies could be mutually reinforcing, complementary, contradictory, or substitutes depending on how they are applied.98 Based on their basic objectives, efficiency and consumer welfare, competition and trade policies are perceived as mutually reinforcing.99 On the other hand, by dealing with private, anticompetitive conduct to ensure effective market access, competition policy is viewed as complementary with trade policy which is concerned with the removal of governmental actions. This facilitates the anti-competitive behaviour by private entities. Restrictive trade measures limit competition by curtailing the entry of foreign suppliers in the market as well as aiding anti-competitive practices by domestic firms; meanwhile, exclusions and exemptions from competition law, as well as lack of enforcement thereof, negatively impact trade.100

A contradictory relationship between competition and trade policy is also suggested as a result of their divergent aims and effects. Competition policy is concerned with consumer welfare, while trade policy is focused on the welfare of producers and is more easily influenced by special interest groups.101 Trade policy also has objectives which conflict with competition policy aims such as raising revenue, promoting self-sufficiency and supporting exports.102 Finally, competition policy and trade policy are also viewed as substitutes in some respects. For instance, the WTO found that competition law provisions relating to price discrimination serve as a substitute for anti-dumping measures in some circumstances.103

The impact of anti-competitive business practices on international trade is the most important concern in trade policy.104 Experts105 recognise that anti-competitive practices of firms, in addition to trade barriers, hamper international trade. Hence, the necessity to integrate or at least align competition and trade policies has been formally recognised as early as the proposal for the establishment of the International Trade Organisation (Havana Charter). The Havana Charter contained provisions which encourage member States to prohibit business practices that affect international trade which restrain competition, limit access to markets, or foster monopolistic control whenever such practices are harmful to trade.106 Nonetheless, the Havana Charter was not ratified and was instead succeeded by the GATT of 1947, which salvaged some of the provisions from the Havana Charter. Thus, the negotiating parties that created the GATT of 1947 had shown a public awareness that arrangements designed to foster trade could be undermined when commercial enterprises engaged in cartels or other restrictive business practices, and these negotiating parties had proposed treaty provisions to ensure that competition policy would reinforce government measures for international trade.107 Subsequently, the World Trade Organisation was established in 1995 to succeed the GATT of 1947. Efforts to include competition policy within the trade policy framework in the WTO have proved particularly challenging due to lack of agreement among member States on competition policy.108 Support for international discipline regarding competition law was originally stimulated by US perceptions that international cartels and the absence or lack of enforcement of national competition law obstructed the ability of US firms to contest markets.109 The US supported the inclusion of a chapter dealing with restrictive business practices, reflecting its views against German cartels and Japanese zaibatsu who are the main opposition to including competition law in the WTO.110 In recent times, the EU has been in the lead, arguing that all WTO members must adopt and enforce competition laws. Developing countries have not been at the center of the debate on trade and competition in the WTO.111 However, competition policy has an important role in developing countries, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive policy stance. However, the issue is that many do not have competition laws; those that do often have limited implementation ability.112 The bottom line of the debate is that any agreement on international competition policy that goes beyond general procedural cooperation and introduction of transparency mechanisms likely must be plurilateral, at least initially.

The lack of consensus on the nexus of competition and trade policy creates a gap which is exploited in order to pursue various motives such as promoting industrial policy, protectionism or nationalism.

(ii) Competition law and protectionism

In the United States, some scholars claim that antitrust law is rooted in protectionist institutions.113 Evidence reveals that the political impetus for antitrust law originated from lobbying farmers of several agricultural states;114 however, the majority views of scholars differs on this.115 Inefficient businesses misused antitrust laws by suing their efficient competitors for lower prices, increase in output and product or process innovation116 Today, the use of antitrust law for protectionism is no longer limited to the protection of an industry from another within the domestic sphere; it extends to the international level and transcends international trade. Similarly, in the European Union, remnants of industrial policy abound in the EC competition law.117 The European Commission has been attacked on the ground of ‘disguised protectionism’, protecting EU-based competitors and furthering the single market objective rather than seeking to uphold competition in strict terms.118 This is clearly demonstrated in the proposed Siemens-Alstom merger. In prohibiting the proposed consolidation of Siemens and Alstom, the European Commission unleashed a turmoil of political discontent; arguably, this is more the manifestation of longstanding frustration with certain underlying asymmetries within merger regulation which impede the ascendancy of the European industry on the world stage than an issue with the Commission’s decision itself.119

Competition law, as a political creation, is inherently susceptible to ‘instrumentalisation’ for protectionist ends. Competition law is at risk of being misused to advance industrial policies, political agendas and protectionist policies in the guise of competition enforcement, thus bypassing the scrutiny of international trade agreements.120 The existing legislative framework of competition law enhances this risk, as it provides for greater discretion in decision making and political involvement in the enforcement of competition law.121 While open-ended discretionary standards are laudable because economic analysis cannot be put into rigid standards as each competition case is unique, it also creates opportunities for abuse. Discretion may be abused to allow regulators to pursue their own private interests, shirk unpleasant duties, augment their regulatory authority in hopes of increasing monopoly rents which they can trade to interest groups in return for personal benefits, and act in other ways that are contrary to the public good.122 In the context of merger law, for instance, discretion may incentivise regulators to pursue protectionism – in particular, new protectionism. Trade agreements and institutions such as the WTO have made traditional protectionism through open trade discrimination challenging. Yet, the underlying political dynamic driving protectionism has not gone away. Hence, while jurisdictions do not forbid certain mergers, they can still discriminate against them. For instance, regulators can require more onerous ‘fixes’ for mergers that threaten local producers such as requiring the merging parties to divest assets in a way that benefits the domestic competitor.123

Indeed, the argument that competition law may be a tool to pursue a protectionist end is commonly premised upon the possibility that competition law – especially through selective, discriminatory enforcement – might actually be abused as a trade barrier.124 National protectionism is often demanded by certain industries or interest groups.125 However, a competition regime that favours domestic firms such as local producers hurt not only the producers and consumers of other countries, but also the domestic consumers.

(iii) Merger regulation and protectionism

One area of competition law that has always been suspected as an instrument of protectionism is merger regulation; the failed merger of Siemens-Alstom is a good case in point. Merger regulation is one of the pillars of competition policy aimed at preserving market competition in the event of business combinations and takeovers.126 However, preservation of competition is not the only rationale for the enforcement of merger regulations; national security, businesses perceived to be of national strategic importance, technological capabilities, jobs and export also influence merger control enforcement.127 Thus, the protectionism hypothesis posits that merger regulation is used as a tool to protect domestic firms from competition.128 In addition to protection of domestic firms, which is often associated with the infant industry argument, States are also suspected of using merger regulations to promote its national champions on the premise of strategic trade theory. In the context of merger control, the notion of a national champion generally means that the government encourages or does not prevent a merger between two domestic firms to create a more powerful entity, or it opposes the acquisition of one of the domestic firms by a foreign company.129

A study has found that, while merger regulation has deterred anticompetitive mergers, it has also protected rival producers from increased competition due to efficient mergers.130 In the context of EU merger policy, an empirical analysis to prove the protectionist hypothesis concluded a direct correlation between the likelihood of opposition to the merger by the competition authority when the bidder is a foreign national and the expected adverse effect of the reviewed merger on domestic competitors.131 After reforms on the EU Merger Regulation were introduced in 2004, the hypothesis was re-examined and change in protectionist tendencies were discovered.132 The result was more consistent with a recent empirical study that showed the Commission has not intervened more frequently or extensively in transactions involving a non-EU- or US-based firm’s acquisition of a European target.133 Nonetheless, there has been no conclusive findings on the absence of protectionism. At most, empirical analyses have shifted the burden of proof to those advancing the view.

Despite these empirical results disproving the use of merger regulation for protectionist purposes, persistent allegations abound. The political model of antitrust established that merger decisions are influenced by political contributions of lobby groups representing special interests, political pressures and social welfare considerations.134 For instance, Bu argues that the decision of Chinese competition authority to block the merger between Coca Cola and Huiyuan illustrates the influence of non-competition considerations such as protectionism on merger regulation enforcement.135 The lack of sufficient analysis as well as broad conclusions reached on the decision left no other conclusion but that China was trying to protect its home-grown, local company from potential brand dilution once absorbed by Coca Cola.136 Another example is the opposition of the US to the potential merger between Broadcom, a Singapore-based company, and Qualcomm, an American telecommunication chip manufacturer, on the grounds of national security.137 In the EU, its opposition to the Boeing/McDonnell Douglas merger was suspected to arise from protectionist sentiment because of the merger’s adverse impact on the rival EU firm Airbus.138

(iv) Export cartels exemption and protectionism

Export cartel exemptions are instruments of competition policy for trade policy ends.139 By tolerating, if not supporting, anticompetitive conduct just because it does not affect the domestic market, exporting states in effect assist or condone the harm caused to the importing states.140 Hence, export cartel exemptions are perceived as tools for protectionism in this context of the beggar-thy-neighbour approach.

In the context of trade policy, export cartel exemptions produce the same economic effect as export subsidies or aids.141 While both harm competition at the expense of foreign markets and foreign competitors, only export subsidies are regulated under the WTO rules.142 However, State-run export cartel are challengeable under WTO rules with different outcomes depending on the State.143 Hence, the difficulty in prosecuting export cartels that have anti-competitive effects is considered a trade dilemma. In Argentina, based on Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,144 the WTO Panel noted that the WTO rules do not obligate its members ‘to assume a full “due diligence” burden to investigate and prevent cartels from functioning as private export restrictions’.145

The United States, through the Webb-Pomerene Act of 1918,146 explicitly exempted export cartels and export association from the Sherman Act147 and from Section 7 of the Clayton Act,148 which has been reinforced by the Export Trading Company Act of 1982149 and the Foreign Trade Antitrust Improvements Act150 which regulated export cartels by granting them certificates. The EU, on the other hand, while it does not explicitly exempt export cartels, Articles 101 and 102 of the TFEU151 provide for the limited application of the EU competition law to conduct that produces anticompetitive effects (objective or subjective) within the internal market and to the trade between Member States. Hence, the EU competition law implicitly allows export cartels if they do not influence the EU internal market.

#### Say no is devastating---there’s no will to overturn export cartel exemptions---even bringing it up will get you canceled

Sokol 8 (D. Daniell, Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law, WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION? Journal of Competition Law & Economics, 4(4), 967–982, y2k)

Could soft law assist in export cartel efforts across agencies? To use soft law to identify and implement domestic business clearance for export joint ventures would require a significant change for the 51 jurisdictions that have either explicit or implicit export cartel immunities. At present, there may not be the political will necessary to undertake such a change. This particularly affects the ability of soft-law institutions to implement an export cartel solution. Presently, the most influential soft-law international institutions (ICN and OECD) do not have export cartels on their agenda.60 To the extent that export cartels cause consumer welfare loss because of their exemptions from domestic competition laws, these spillover effects go unpunished. Export cartels being off the agenda of the soft-law international antitrust institutions is in part a function of the power dynamics of the countries

\*\*MARKED\*\*

that maintain them. Not surprisingly, the jurisdictions with the most to lose with limits on export cartels (U.S. and EU) set the agenda (or at least have veto power over the agenda) of both of these organizations. Because the United States and nearly all EU member states maintain such cartels explicitly or implicitly, this limits the likelihood that these countries, the leaders in international antitrust, will focus on removing such exemptions any time soon.61

[Footnote 61]

Mere mention of a discussion of export cartels at the Antitrust Modernization Commission

received such negative comments by industry groups that benefit from these practices that the Commission dropped export cartels from its agenda even though other difficult issues that

did not affect specialized interest groups remained in the agenda.

[Footnote ends]

This problem illustrates the limits of soft law in creating norms against export cartels. However, these soft-law organizations could address export cartel issues through their analysis and implementation of cartel norms generally by distinguishing between those cartels that are hard-core cartels and those cartels in which the restraint is merely ancillary to doing business.

#### EU backlash kills

Sokol 9 (D. Daniel Sokol, Assistant Professor, University of Florida Levin College of Law, Limiting Anticompetitive Government Interventions That Benefit Special Interests, 17 GEO. Mason L. REV. 119 (2009), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1121&context=facultypub>, y2k)

The weakness of the ICN specific to addressing antitrust public restraints is that it may not have United States and EU support. There has been no discussion at the ICN of immunities (such as export cartels), international trade/market access issues, or antidumping. No ICN work discusses how to overcome immunities directly. Moreover, most public restraints come about as a result of legislative failure. Agencies may not be so effective as to be able to police against existing public restraints, though they may be able to better affect the imposition of new public restraints. Thus, recommended practices can only go so far when it is not a market malfunction or a problem of coordination that causes the problem of public restraints. Rather, it seems to be the ability of governments to limit legislation that is both existing and proposed. Agencies can make progress in this area. However, this progress may be slow.

#### China prevents harmonization even in the opt-in system

Kendall 19 (Brent Kendall is a legal affairs reporter in the Washington bureau of The Wall Street Journal, where he covers the Justice Department, the Federal Trade Commission and the federal courts, including the Supreme Court, Global Antitrust Agencies Issue New Rules on Enforcement, 4-5, <https://www.wsj.com/articles/global-antitrust-agencies-issue-new-rules-on-enforcement-11554496427>, y2k)

The International Competition Network’s new protocols, announced Friday, are aimed at streamlining the enforcement process while also preventing countries from using local antitrust laws to favor domestic companies over competitors from other jurisdictions.

Individual nations will have to opt in to be bound by the framework, and its effectiveness could be limited by how Chinese authorities respond, analysts said.

“It basically means you can’t reverse-engineer an outcome to favor privileged competitors,” said University of Florida antitrust-law professor Daniel Sokol. “This could put pressure on a number of countries.”

Much of the private sector’s call for greater clarity and stronger protections has come amid the rise of antitrust enforcement as a hot topic in the U.S. and abroad, with public frustration mounting over increased corporate concentration and the size and reach tech behemoths, among other companies.

The U.S. Justice Department had been pushing for the rules to be adopted. The number of countries seeking to exercise antitrust authority has grown substantially in recent years; as a result, multinational mergers need the approval not only of the U.S. and European Union but of a range of smaller countries as well.

“The proliferation of competition authorities around the world underscores the importance of agreeing on a core set of procedural norms,” the Justice Department’s antitrust chief, Makan Delrahim, said last year in an address to the Council on Foreign Relations. But the new protocols don’t attempt to reconcile the range of laws used to address mergers and anticompetitive conduct, which vary greatly by country.

The ICN protocol was approved by agencies from a core group of countries, including the U.S., Brazil, France, Japan, Mexico and South Korea.

China isn’t a member of the ICN, though it would still have the option to agree to the rules if other countries could persuade it to do so. U.S. officials have discussed the issue with their Chinese counterparts, according to a person familiar with those talks.

George Paul, an antitrust lawyer at White & Case LLP, said it would take time to determine whether the new rules would lead to meaningful improvements in emerging jurisdictions.

“My sense is that China will do what it wants—whether it joins or not,” Mr. Paul said. “Ultimately, the ability to get harmonization is limited because the Chinese economy and legal system operates very differently than our capitalism-based economy and legal system does.”

## OAS

#### Populism a/c

Dr. Ryan C. Berg 10-6, Ph.D. and an M.Phil. in Political Science and an M.Sc. in Global Governance and Diplomacy from the University of Oxford, Senior Fellow in the Americas Program and Head of the Future of Venezuela Initiative at the Center for Strategic and International Studies, and Dr. Lauri Tähtinen, Ph.D. in History from the University of Cambridge, Master of Theological Studies at Harvard University, B.Sc. in International Relations from the London School of Economics, Nonresident Fellow at the Finnish Institute of International Affairs and Co-Founder of Geostreams, “Latin America’s Democratic Recession: How Washington Can Help Turn Things Around”, Foreign Affairs, 10/6/2021, https://www.foreignaffairs.com/articles/central-america-caribbean/2021-10-06/latin-americas-democratic-recession

**The results have been disastrous. It was under the OAS’s watch,** for instance, that Nicaragua and Venezuela **both decayed through various forms of semi-authoritarianism before eventually arriving at brutal dictatorships**. The fallout from these political cataclysms has spread throughout the region: nearly six million Venezuelans have fled the country as the economy has imploded in the worst nonwartime economic collapse in modern history. Both countries have effectively descended into lawlessness and have become sanctuaries for transnational criminal organizations and designated terrorist groups. And both countries have spun webs of corruption and illegal activity to buttress their authoritarian regimes.

Elsewhere in the hemisphere, democratic countries have regressed to a more familiar undemocratic norm in the caudillo, or the strongman leader with autocratic tendencies, as other relatively healthy democracies have twiddled their thumbs. Throughout the first decade of the twenty-first century—a period known as the “pink tide” due to the perceived turn toward left-wing populism throughout Latin America—countries including Bolivia and Ecuador fed China’s insatiable appetite for commodities and used the resulting cash influx to spend lavishly on popular social programs while simultaneously eroding political institutions, manipulating elections, and stifling civil society. Much of the region remained silent in the face of these antidemocratic maneuvers under the specious idea that solidarity with pueblos hermanos, or sibling republics, means not only barring interference but also moderating criticism. Argentina and Mexico, for instance, recently abstained from an OAS resolution condemning Ortega’s crackdown on the political opposition in Nicaragua out of this misguided sense of solidarity.

And it is not just leftists who are eroding democratic norms and practices: the emergence of several leaders on the populist right poses a grave threat to democratic governance in the region. El Salvadorian President Nayib Bukele has semi-jokingly cast himself as [“the coolest dictator in the world”](https://www.theguardian.com/world/2021/sep/26/naybib-bukele-el-salvador-president-coolest-dictator) and has marched members of the armed forces into the legislative assembly to coerce lawmakers into following his agenda. Brazilian President Jair Bolsonaro has likewise openly challenged the authority of the country’s judicial branch over his administration and has threatened to reject the result of next year’s general election if he loses. Both Bukele and Bolsonaro, among others, have welcomed deeper engagement with illiberal foreign governments such as China, particularly in exchange for COVID-19 vaccines.

#### Decks coop – polarization key

Dr. Ryan C. Berg 10-6, Ph.D. and an M.Phil. in Political Science and an M.Sc. in Global Governance and Diplomacy from the University of Oxford, Senior Fellow in the Americas Program and Head of the Future of Venezuela Initiative at the Center for Strategic and International Studies, and Dr. Lauri Tähtinen, Ph.D. in History from the University of Cambridge, Master of Theological Studies at Harvard University, B.Sc. in International Relations from the London School of Economics, Nonresident Fellow at the Finnish Institute of International Affairs and Co-Founder of Geostreams, “Latin America’s Democratic Recession: How Washington Can Help Turn Things Around”, Foreign Affairs, 10/6/2021, https://www.foreignaffairs.com/articles/central-america-caribbean/2021-10-06/latin-americas-democratic-recession

The United States will also have to supplant the dictator’s playbook with strategies and support for democratic leaders. To that end, it should fund efforts to reduce the polarization, conflict, and violence that have tilted the playing field toward authoritarians. It should also help the region install alarm bells within the inter-American system that can sound powerful warnings before it is too late to rebuild unraveling democratic norms and institutions—for instance, by monitoring the rapidly evolving social media landscape for political red flags; tomorrow’s antidemocratic agenda is circulating as disinformation on Facebook and WhatsApp today. Another priority must be to deepen inter-American cooperation on all fronts and to collaborate to address dysfunction within the OAS. The United States will have an opportunity to spearhead such an effort when it hosts the next Summit of the Americas in 2022. It should openly acknowledge that the region is slipping toward the rule of the few and, at the same time, drive collective efforts to buttress the rule of the many. These are the building blocks of a new hemispheric strategy that repurposes the rubble of the 9/11 terrorist attacks to erect a fortress of democracy—not just in the United States but throughout the Americas.

**Stability increasing- state reforms, strengthening institutions and open economy prove**

**Freedom Lab 18,** 11-9-2018, “A brighter future for Latin America?” http://freedomlab.org/wp-content/uploads/2018/11/Macroscope-NO-171-A-brighter-future-for-Latin-America.pdf

Disappointing economic performance, corruption scandals, rising crime and populism dominate global headlines about Latin America. However, if we look beyond recent events, longer term trends brewing underneath the radar point to a brighter future for the region. **State reform in Latin America is pushing ahead** slowly. While the 1980’s and 1990’s were characterized by an emphasis on (failed) economic policies, more recently much-needed institutional reform has appeared on the political agenda. It is useful to recall that Latin America has been known for widespread corruption for decades. All of this went unnoticed or untouched. But that is changing. In these young democracies, growing middle classes that are exceptionally frequent users of digital technology are driving reform. Indeed, the elections of populists reflect disgruntled middle classes. While AMLO and Bolsonaro may not lead to institutionalized solutions for corruption, they’re certainly products of anticorruption sentiment. Furthermore, high profile cases such as Lava Jato and the ousting of corrupt leaders in Brazil, Peru and Guatemala indeed reflect **strengthening institutions**. These developments are hopeful ones. They will strengthen civil society, representative democracy, and the rule of law, which will create stronger institutions and the foundation for economic progress. As state reform pushes ahead, **the countries of Latin America are also growing closer together**. The region has always been divided in several regions (i.e. Atlantic, Pacific, landlocked) that stand on equal footing (a geographic destiny the Spanish and Portuguese also ran into). As such, no clear regional power has emerged. Moreover, the colonial legacy

of the region fragmented the continent further (and also created weak political institutions). Contrarily, in pre-colonial times, the political order was more cohesive (e.g. the Inca Empire in the area of the Pacific Alliance: Peru, Chile). Now, through modern political institutions, technology and connectivity, region-wide integration is gaining momentum again (e.g. intracontinental infrastructure, trade agreements). First, the ‘Asian bloc’ of Latin America (the countries facing Asia and the Pacific) is integrating through the Pacific Alliance and the countries facing the Atlantic are integrating through Mercosur. Second, Mercosur and the Pacific Alliance are negotiating a Latin American free trade bloc. Besides growing closer together, Latin American countries are increasingly connecting to the rest of the world. As in colonial times, **the region is emerging at the center of globalization.** In the 16th century, Mexicans believed to be at the center of the world, as Latin America was the place where Asia, Europe and the Americas met. However, the region’s colonial legacy fueled isolation, and the Pink Tide, a continental turn to leftwing governments at the start of this century, strayed away from openness to global markets. But as the Pink Tide has ended, Latin America is turning to more market-friendly policies. As a result, China, Europe, and the U.S. have all gained renewed interest in the region, which will only increase in the coming years. Through state reform, internal integration, and connectivity to the rest of the world, Latin America will build on its traditions of progressivism, natural resource abundance (in a world of scarcity), and its **future on the western hemisphere as the most stable region of the world,** to become a dynamic region similar to the current rise of South East Asia.

# 1NR

## 1NR

**Outweighs on scope---US-led COVID response controls responses to every existential risk.**

Stergios **Skaperdas 20**, Department of Economics and Center for Global Peace and Conflict Studies, University of California, Irvine, “The Decline of US Power and the Future of Conflict Management after Covid,” Peace Economics, Peace Science and Public Policy, vol. 1, no. ahead-of-print, De Gruyter, 08/04/2020, www.degruyter.com, doi:10.1515/peps-2020-0029

I don’t confront the debate on “unipolarity” here. However, with the rapid economic **growth of China** and the **emergence of Russia** as a **military and diplomatic competitor** to the US in Eurasia, the **US**’s **dominance** in Eurasia **cannot be taken for granted**. If anything, as I will argue, the trends over the past two decades have been more negative for the US than is commonly recognized. With Eurasia having nearly 70 percent of the world’s population and about the same in total GDP (at PPP, IMF 2020), it will be no longer possible for a non-Eurasian power to dominate the world’s economics and geopolitics by itself.

1 Trends before the Pandemic

I will discuss recent trends relating China to the US in terms of three dimensions that are often used to assess great power status: the economy, military capabilities, and technology.

1.1 Economy

China has been quickly catching up with the US in its economy. In fact, by the beginning of 2020, China’s GDP at PPP was 37 percent higher than that of the US (IMF 2020). While GDP at nominal exchange rates might be better in projecting economic power, GDP at PPP is better in gauging the actual productive capacity of an economy.

The trend, however, that has been in favor of the US lately, has been the enhanced status of the US dollar as a reserve currency, paradoxically since 2008. The currency swaps between the Fed and other Central Banks – to help primarily the banks of US allied countries – appears to have been the major factor in this trend (Tooze 2018). This financial power has been increasingly used in sanctions against adversaries but even Allies.

1.2 Military

China has been rapidly modernizing and expanding its conventional forces but is very far away from becoming a peer to the US militarily.

The US has maintained its extraordinary predominance to move military resources by sea, land, and air throughout the world. However, the actual ability for the US to force its will on others has been shown to be limited recently. It can barely hold onto its troops in Afghanistan and Iraq and has had limited influence in Syria and in Libya. The fact that, after the assassination of Iranian General Suleimani, Iran was allowed to hit the US Al-Asad military base in Iraq (with apparently pretty accurate missiles) without any reaction shows the limits of US power projection. I suspect this is the first time that the US had one of its bases hit by another sovereign state without retaliating against them. While Iraq could be occupied, Iran is unlikely to be so – it is three times as big and populous as Iraq and its invasion would involve many additional complications .

Moreover, US aircraft carriers and bases are vulnerable to increasingly accurate missiles not just from Russia and China but from Iran as well. Hypersonic missiles are even deadlier, with Russia and China being reportedly ahead of the US in their development. With such vulnerabilities the US’s ability to project military power in Eurasia becomes much more limited. It would be no exaggeration to say that it is “game over” for the US’s projecting military power in Eurasia without the expectation of a challenge.

Finally, the relatively small wars that US have already entered have been extremely costly. The cost of the Iraq and Afghanistan wars to US alone was estimated 10 years ago by Stiglitz and Bilmes (2012) to be between $4-6 trillion, a quarter to 40% of US GDP at the time.

1.3 Technology

While the US was far ahead of China in technology and basic research barely a few years ago, China has been rapidly catching up. For example, one respectable index of current high-quality research is the Nature Index (natureindex.com) which includes articles only in the top natural science journals. In 2012 China’s scientific productivity was at 24% of the US but by 2019 it was 67% of the US’s level. This is likely a much better level than the Soviet Union ever achieved relative to the US. In technological disciplines such as computer science and AI China is likely in even better place.

Furthermore, China has been demonstrating the ability to rapidly learn how to adapt foreign technologies and implement them in production at large scale. High-speed rail, for instance, expanded from nothing to a 30,000 km network within a decade, while pushing the technology to new limits. The US by contrast seems to have largely divested itself of the necessity of maintaining primacy in engineering and manufacturing. The US’s emphasis on expensive high-tech weaponry is largely driven by military-industrial complex rent-seeking and is, at best, a gamble that would have highly uncertain returns in a hypothetical conventional battlefield.

Overall, China, while still markedly militarily inferior, has become at least an equal to the US economically and has been catching up rapidly in technology, while Russia has been counter-balancing the US militarily and diplomatically in Eurasia.

2 Effects of the Pandemic

The **pandemic** has brought about Depression levels of unemployment in the US in record time and almost all countries are facing **severe contraction**.1 Employment is unlikely to reach its pre-pandemic level for a long time and, because this is happening simultaneously around the world, there is no single large country or region that could help lift the rest of the world with its demand.

However, in **relative terms** **China** and East **Asia** have been **less affected** thus far and will **continue to do so** as long as they maintain a **better health policy response** to the pandemic.2 China will likely have to **restructure** its economy to be less dependent on existing supply chains, rapidly expand the Belt-and-Road initiative, and expand its social welfare so as to rely more on internal demand for continued growth. Nevertheless, although all predictions now can be expected to have high variance, **China** is likely to **come out** in the end economically **better off** relative to the **US**.

Other widely discussed probable effects include the strengthening of the nation-state and a retreat of globalization in production, trade, and capital movements. We can envision scenarios from a mild **retreat of globalization** with **shorter supply chains** to a **full blown new Cold War** with two or more **separate** economic **blocks**.

Regardless of what the medium and long run will look like, the pandemic appears to have **accelerated** pre-existing trends of **US declining power** to the extent that we cannot say that there is **one superpower** **dictating** the international politics and economics of Eurasia. China and, secondarily, Russia will have much to say about how the global political economy evolves. Under such conditions opportunities for conflict increase and institutions of conflict management become ever more important.

3 The Alarming Future of Conflict Management

US policy until recently was as if the liberal trade hypothesis were true and there was no chance of an adversarial relation with China in the future. That is consistent with a neoclassical economic perspective according to which more trade is always better. However, trade policy cannot be separated from security considerations when there is the possibility of insecurity (Garfinkel et al. 2015; Skaperdas and Syropoulos 2001). Now US policy seems to have been reversed with China being treated, not as trade partner, but effectively as an enemy.

In such a case international institutions of conflict management would be important for reducing the chance of conflict, reducing the costs of arming, and allowing for smoother trade relations; most of all, for minimizing the chance of nuclear war. Those **institutions**, however, have gradually **atrophied** or have been intentionally **boycotted** during the time of US dominance. Over the past two decades, for example, and contrary to previous practices the US entered a number of wars without UN Security Council resolutions (including those that it could have obtained agreement such as the Afghanistan war). The recent withdrawal from the WHO, and the series of withdrawals from arms-control agreements (ABM, INF, Open Skies, and perhaps START) are other examples of the weakening of international institutions. Perhaps this is to be expected of a world hegemon, but the unilateralism appears to have increased while US power has been decreasing and the need for future restraint on all has become more visible. The conditions appear to be leading to a “bad” equilibrium without investments in conflict management and high probability of conflict as opposed to a “good” equilibrium with investments in conflict management and low probability of conflict (Genicot and Skaperdas 2002).

The times we are now have **similarities** with the **pre-WWI period** which combined a high degree of **globalization** with the **absence of institutions of conflict management** (instead of their atrophy that we now have). At the time, there **was** a wide-spread belief that economic **interdependence**, and the break of that interdependence and other costs that war brings about, would **by themselves** guarantee peace (see, e.g., Angell 1913). Yet war **came unexpectedly** and with a vengeance.

With the dismantling of previous arms control agreements, without good prospects for their replacement in the future, and the weakening of the UN and other international organizations, the **risks and challenges** facing the world include the following:

–**Multiple-pronged arms races** that go **beyond hypersonic weapons** to **cyber**weapons, **a**utonomous **w**eapon **s**ystems, other **AI** technology-enabled systems, and deployments in outer **space**. The costs and, most important, the multiple **uncertainties** that such arms races can generate are of **immense risk**. Highly risk averse **leaders**, perhaps as a result of a **mistake** or **misunderstanding** but not only so, could **launch wars** from which there might be no going back (Mearsheimer 2001; Wong et al. 2020).

–In the absence of nuclear weapons treaties, the only restraint on nuclear war is Mutual Assured Destruction (**MAD**). With new platforms, such as hypersonic missiles, that make possible delivery of nuclear weapons faster than it ever has been, could there be a **greater temptation** for a **first strike** (thinking that retaliation would never come)? Many examples of preconceptions, mishaps, and near-accidents from the 1950s and 60s that were not previously known (reported in Ellsberg 2017) show how the world we are now entering is likely more dangerous than the Cold War ever was.

–A scramble for **trading partners** and **Allies** across the world that could go **beyond** just the offering of **carrots**. The undermining of governments that are perceived to be unfriendly by one side and their shoring up by the other side often leads to less autonomy, externally-induced political conflicts, increased authoritarianism, and not infrequently to outright civil war. The danger of many countries in Eurasia, Africa, and Latin America becoming **battlegrounds** for continual **proxy conflicts** between the **superpowers** is increasing.

Since we **avoided** a **nuclear catastrophe** during the Cold War we can at least begin by mimicking some of the conflict-management practices that developed during that time and also draw some lessons about great power behavior. First, increase adherence to the letter of the UN Charter and of other **international organizations and agreements**. That’s the **only “rule of law”** that we have for international relations among sovereign states. It is meager but it is better than what existed in 1914 and it can be gradually improved. Adhering to it would preclude adventures such the US invasion of Iraq.

**COVID enforcement is ticking up---latest cases prove**

**Fair 10-28** (Lesley, **FTC and DOJ use new law to challenge COVID claims** for nasal spray, <https://www.ftc.gov/news-events/blogs/business-blog/2021/10/ftc-doj-use-new-law-challenge-covid-claims-nasal-spray>, y2k)

If businesses make coronavirus prevention or treatment claims for their products, it’s time to get up to speed on the COVID-19 **C**onsumer **P**rotection **A**ct. The **D**epartment **o**f **J**ustice and the **FTC** just filed their **latest action** under the law, seeking **civil penalties** from the marketers of Xlear, a nasal spray the complaint alleges has been deceptively advertised to offer “up to four hours” of protection from COVID-19 and as “part of a layered defense to prevent getting COVID-19.” What’s more, this isn’t the first time that Utah-based Xlear, Inc., and company president Nathan Jones have heard from the FTC about their allegedly misleading COVID representations.

Xlear Complaint Exhibit DUnder the Xlear Sinus Care brand, the defendants sell saline nasal sprays that also contain grapefruit seed extract and the sweetener xylitol. The defendants have promoted Xlear sprays on Facebook, Instagram, YouTube, podcasts, and sponsored TV appearances. They also sell them through national and online retailers. According to the complaint, beginning in March 2020, the defendants shifted their marketing focus to promote Xlear as “a simple, safe, and cheap option that could be an effective solution to the pandemic.” The company cited studies at the University of North Carolina and the University of Tennessee that purported to support their advertising claims.

The lawsuit alleges the defendants don’t have proper support to back up their promises that Xlear will prevent COVID-19 infection and reduce its severity or duration. What about the defendants’ representations that scientific studies at universities substantiate what they say? The FTC and DOJ allege those claims are false.

In the two-count complaint, the FTC and DOJ are asking for – among other things – refunds for consumers, civil penalties, and a permanent injunction to prevent future law violations. The **filing** of the case sends two **important messages** to **other companies**.

When challenging unsubstantiated advertising claims, the FTC will seek the remedies authorized by the COVID-19 **C**onsumer **P**rotection **A**ct. **Deceptive COVID-related claims** put consumers’ health at **risk** and cause **substantial financial injury**. For the **duration** of the public health crisis, the law allows the FTC to seek **financial penalties** from companies and individuals that engage in **deceptive practices** associated with “the treatment, cure, prevention, mitigation, or diagnosis of COVID-19.”

**Normal means definitely don’t include new funding---fiscal constraints mean that agencies would have to make trade-off decisions**

**Moran 13** (Jerry Moran, Senator, HEARINGS BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON APPROPRIATIONS UNITED STATES SENATE ONE HUNDRED TWELFTH CONGRESS, <https://www.govinfo.gov/content/pkg/CHRG-112shrg72314/pdf/CHRG-112shrg72314.pdf>, y2k)

However, at a time when our national debt stands at more than $15 trillion, we cannot afford to ignore our country’s fiscal reality by failing to make difficult decisions to address our debt and deficit problem. We cannot continue to address our problems by instituting new taxes, increasing spending, and increasing our already record debt. As Members of Congress, and particularly as members of the Senate Appropriations Committee, we have a responsibility to work to get our fiscal house in order. This requires us to balance important needs and priorities across the Government— from investing in critical medical research that not only saves lives but also helps create thousands of jobs and drives economic growth—to protecting investors, who turn to markets to help secure their retirements, pay for homes, and send their children to college. In accordance with the **Budget Control Act** signed into law last year, these priorities must be considered in the context of **statutory caps** on discretionary spending. In this environment, **all** Federal agencies must **redouble efforts** to achieve cost **savings**, work more efficiently, and make **careful** and **prudent decisions** based on demonstrated need as to how to **best** allocate **scarce** resources. Staffing must be managed to prevent growth to unsustainable levels. Agencies must make decisions on resource allocations based on CFTC’s mission responsibilities, but also grounded in budget reality. **Simply increasing funding** does not ensure that an agency can **successfully** achieve its mission and frankly is **not a realistic** option **given current fiscal constraints**

**The plan drains finite FTC resources EVEN with new resources---it still sucks up time and attention**

Tara L. **Reinhart, et al. 21**. \*\*Head of Skadden, Arps, Slate, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*Steven C. Sunshine, Co-head of Skadden, Arps, Slat, Meagher & Flom LLP’s Antitrust/Competition Group. \*\*David P. Whales, antitrust lawyer with over 25 years of experience in both private and public sectors. \*\*Julia Y. York, partner at Skadden, Arps, Slat, Meagher & Flom LLP. \*\*Bre Jordan, associate at Skadden, Arps, Slat, Meagher & Flom LLP focusing on antitrust law. “Lina Khan’s Appointment as FTC Chair Reflects Biden Administration’s Aggressive Stance on Antitrust Enforcement.” 6/18/21. https://www.skadden.com/insights/publications/2021/06/lina-khans-appointment-as-ftc-chair

Second, like all antitrust enforcers, Ms. Khan and the FTC will face resource constraints. Bringing **antitrust litigation is an expensive and laborious process**, often requiring millions of dollars for expert fees and a large army of FTC staff attorneys and taking many months or even years to accomplish. Typically, the FTC can only litigate a **handful of antitrust matters** at a time. It seems likely that Congress will provide more funding to the FTC in the current environment, but **even with these extra resources**, the **FTC will still have to pick its cases carefully** and cannot challenge every deal or every instance of alleged unlawful conduct.

#### Policing anti-competitive COVID practices is key to recovery

Baer 20 (Bill Baer served as Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice from 2013 to 2016, and as Director of the Bureau of Competition at the Federal Trade Commission from 1995 to 1999, Why we need antitrust enforcement during the COVID-19 pandemic, 4-22, <https://www.brookings.edu/blog/techtank/2020/04/22/why-we-need-antitrust-enforcement-during-the-covid-19-pandemic/>, y2k)

Antitrust enforcers need to be vigilant in these uncertain and troubling times. Think about the effect on consumers from price gouging, price fixing, mergers in concentrated markets and the unilateral exercise of monopoly power. We rely on vigorous rivalry between firms—in good times and bad—to deliver us quality goods and services at competitive prices. The American consumer remains entitled to the benefits of competition, especially during a major health and economic crisis. It is up to federal and state enforcers to serve as the economic cops on the beat as we begin the long road to recovery.

What needs to be done? In the short term, the Department of Justice and the Federal Trade Commission need to facilitate legitimate cooperation among manufacturers, distributors, and retailers to ensure critical goods and services—think masks and respirators—get to market in a timely fashion. To their credit, the two agencies are trying to do just that. In late March the two agencies jointly announced an expedited process for reviewing and green lighting collaborations of businesses working to protect the health and safety of Americans during the COVID-19 pandemic. And true to their word, 10 days later DOJ formally advised certain medical supplies distributors that it would not stand in the way of a joint effort to work with FEMA and expedite sourcing, production and delivery of personal protective equipment.

But getting out of the way at the right time is just one priority. Antitrust enforcers must be vigilant in attacking efforts by firms to limit competition in a time of crisis. And the temptation will be there. Those of us involved over the years in investigating and prosecuting price fixing and bid rigging know well that the urge to cartelize markets is strongest in the face of falling prices triggered by reduced demand. Although it is often rationalized during tough economic times as “not raising prices, just stabilizing them,” or “just protecting our margins, not increasing them,” agreements between companies that restrict competition are per se unlawful and subject the companies and their executives to criminal prosecution. Consumers deserve the benefit of market competition regardless of where we are in the economic cycle.

The temptation to cheat is not limited to traditional brick and mortar commerce. While at DOJ in the Obama Administration we uncovered a scheme involving two online sellers of poster art on Amazon Marketplace. After experiencing shrinking margins due to price competition, executives of the two companies got together and wrote an algorithm that priced their online offerings identically when consumers searched for poster art. The result was corporate and individual criminal charges.

Antitrust enforcers will need to vigilantly police mergers and acquisitions as the economy struggles to regain its footing. Our sudden but necessary shutdown has put business of all sizes at risk of permanent closure. Economists see small businesses as particularly vulnerable, and the CARES Act only begins to address the problem. Policy makers must continue to provide financial support and other incentives to keep small and medium-sized businesses afloat. But realistically, not all businesses are going to be able to get up and running again. That means many markets are going to become more concentrated. We will see it in all sectors, from agriculture and retail to manufacturing and travel. Fewer competitors means less competition, more market power for some sellers and some buyers, and more risk of tacit price coordination. At the end of the day consumers will pay more.

**Antitrust regulation over industry collaboration is key to recovery**

**Schaeffer 20** (Fiona Schaeffer, Partner @ Milbank, Antitrust in the Time of COVID-19: Antitrust Agencies Receptive to “Unprecedented Collaboration” but Will Continue to Prosecute Anticompetitive Conduct, 3-27, <https://www.milbank.com/images/content/1/2/v2/128953/Antitrust-in-the-Time-of-COVID-19-3.27.20-final.pdf>, y2k)

**Businesses** and **industry associations** are navigating critical **production**, **procurement**, **logistics**, and **workplace** challenges in responding to **COVID-19.** Coordinated industry responses and business collaborations may be **necessary** to address these challenges, **but** it is important that these efforts **comply with the antitrust laws**. In the last several days, antitrust authorities in the **US** and Europe have issued important **guidance** on interfirm collaborations that are intended to address the effects of the crisis, such as **product scarcity**, **medical needs**, **r**esearch **and** **d**evelopment activities, **joint purchasing**, **distribution**, and **logistics**, and **standards-setting activities**. The US and EU antitrust authorities have made clear that they will continue to **vigorously** enforce the **antitrust laws** in the current environment, but they also will take account of the challenges caused by COVID-19 when assessing the potential competitive effects of collaborations. They are also ready to provide expedited guidance on the legality of proposed joint activities in response to COVID-19. While some businesses may find it helpful to consult with the authorities on their proposed collaborations, in most cases experienced antitrust counsel can vet proposals and help to develop compliant arrangements without the need to involve the antitrust authorities. US and EU antitrust law provides considerable flexibility to engage in a range of collaborative activities to address industry challenges in **the current environment**. This alert provides a briefing on antitrust developments in response to COVID19 and provides practical guidance for businesses and associations that are considering industry responses and collaborations at this time.

**The IAD just advises other FTC enforcers about what to do with the international cases---that means there’s STILL incrase enforcement by the FTC itself**

**Tritell 5** (The Federal Trade Commission’s International Antitrust Program Randolph W. Tritell and Elizabeth F. Kraus\* Submitted for the program of the International Antitrust and Foreign Competition Law Committee ABA Section of Antitrust Law Spring Meeting Washington, D.C., April 1, 2005 ,<https://www.ftc.gov/system/files/attachments/key-speeches-presentations/tritellkraus_ftcintantiprogram.pdf>, y2k)

II. **Resource within FTC**

International issues arise in many FTC investigations. The International Antitrust Division is **an internal resource**, along with our General Counsel’s office, to assist with these issues. For example, the Division **advises staff** on when it is necessary to notify foreign governments or **agencies of FTC enforcement** activities pursuant to an international agreement. We also consult with staff on issues involving personal and subject matter jurisdiction, service of process, and obtaining evidence abroad as these issues arise in connection investigations and in administrative litigation. When we work with foreign agencies, Division personnel assist our investigative staff in understanding foreign laws and procedures and how they intersect with FTC and US laws and procedures.

#### 11 People run the entirety of the FTC’s international program – not just exports but all foreign mergers

FTC, 19 - Randolph Tritell is the Director, and Elizabeth Kraus the Deputy Director for International Antitrust, of the Federal Trade Commission’s Office of International Affairs (“The Federal Trade Commission’s International Antitrust Program”, October 2019, ftc.gov)

Federal Trade Commission plays a lead role in fostering international cooperation and convergence toward sound antitrust policy and procedure. The **FTC** has long **placed a high priority on its international antitrust program** to ensure the fulfillment of the Commission’s competition mission in a global economy. The Commission’s international antitrust program: (i) serves as an expert resource to support the FTC’s competition enforcement program by assisting with international aspects of investigations and litigation and guiding broader U.S. policy and engagement on international antitrust issues; (ii) builds cooperative relations with foreign competition agencies; and (iii) promotes convergence of international antitrust policies toward best practice. This paper presents the background and organization of the FTC’s **international antitrust program** and describes our main activities to further the program’s goals internally, through bilateral relations, and in multilateral fora.1 I. Organization of the Office of International Affairs (OIA) **The Office is headed by a Director**, Randolph W. Tritell (202-326-3051; rtritell@ftc.gov), **and a Deputy Director** for International Antitrust, Elizabeth Kraus (202- 326-2649; ekraus@ftc.gov), who oversees the Office’s antitrust work. **The Office has nine other antitrust attorneys**, with the indicated primary portfolios: Molly Askin 202-326-3663 maskin@ftc.gov International Discovery, Africa Maria Coppola 202-326-2482 mcoppola@ftc.gov European Union Russell Damtoft, Associate Director 202-326-2893 rdamtoft@ftc.gov The Americas, Russia, UNCTAD Andrew Heimert 202-326-2474 aheimert@ftc.gov East Asia, IP, Unilateral conduct policy Timothy Hughes 202-326-3503 thughes@ftc.gov Technical assistance, SE Asia, Eastern Europe Krisztian Katona 202-326-2517 kkatona@ftc.gov OECD, Brazil, EU Member States Cynthia Lagdameo 212-607-2828 clagdameo@ftc.gov ICN, Australia, New Zealand, Israel

#### Here's an example of what they would have to do

FTC, 19 - Randolph Tritell is the Director, and Elizabeth Kraus the Deputy Director for International Antitrust, of the Federal Trade Commission’s Office of International Affairs (“The Federal Trade Commission’s International Antitrust Program”, October 2019, ftc.gov)

**Parties to merger and conduct investigations** routinely **waive confidentiality** protections to facilitate cooperation. Waivers are particularly valuable to the agencies, and can benefit parties by reducing information production burdens and avoiding incompatible remedies.8 In 2013, the FTC and the Department of Justice’s Antitrust Division issued a joint model waiver of confidentiality for use in merger and civil non-merger matters **involving concurrent review by the US and non-U.S. competition authorities**.9 The model waiver is designed to streamline the waiver process to reduce the burden on individuals and companies, as well as to reduce the agencies’ time and resources involved in negotiating waivers. The International Antitrust Guidelines include a chapter dedicated to international cooperation that elaborates on the agencies’ investigative tools, confidentiality safeguards, waivers of confidentiality, the types of information exchanged, and the legal basis for cooperation, among other things.10 The FTC’s review of the proposed Praxair/Linde merger illustrates the global reach of our cooperation. FTC staff worked with antitrust agencies of Argentina, Brazil, Canada, Chile, China, Colombia, the European Union, India, Korea, and Mexico to ensure consistent analyses, outcomes and remedies. 11 While most of our enforcement cooperation is in merger investigations, we cooperate on a significant number of non-merger enforcement matters, often aided by waivers provided by parties and third parties. In addition to cooperating on specific matters, the FTC works with other agencies to promote policy convergence. In the past year, we engaged on policy issues of common interest through bilateral high-level meetings with the competition agencies of Australia, Brazil, Canada, Chile, China, Colombia, the European Union, France, Germany, India, Israel, Japan, Korea, Mexico, New Zealand, Nigeria, Taiwan, and the United Kingdom. We participated in annual informal workshops with the Canadian Competition Bureau and Mexico’s COFECE to share merger enforcement techniques and experience, and in working groups with other agencies. Prior working groups with the European Commission resulted in the issuance of Revised Best Practices for Coordinating Merger Reviews, 12 which provide a framework for US-EC cooperation when our agencies review the same merger. Similarly, the FTC, Department of Justice, and Competition Bureau Canada issued a set of “best practices” to make more transparent how they cooperate and coordinate merger reviews.13 The U.S. agencies also have participated in working groups with the competition agencies of Canada, Japan, Korea, and Mexico on issues including intellectual property and conduct by dominant firms. The FTC has placed a high priority on working with the Chinese and Indian competition agencies. We share experience and learning with officials who are involved in developing the law, regulations, and enforcement institutions and practices, with the aim of encouraging legal frameworks and practices based on sound competition principles and international good practice.14 In 2019, the FTC engaged with counterparts in China on procedural fairness, enforcement of monopolization laws, and the antitrust treatment of the exercise of intellectual property rights. We also work through the United States government’s interagency processes to ensure that competition-related issues that arise in connection with China’s Anti-Monopoly Law that implicate broader U.S. policy interests are addressed in a coordinated and effective manner.15

**New priorities undermine overall FTC mandate---things are not compartmentalized within the agency**

**Stancil 15** (Will Stancil, Staff Attorney at the Institute of Metropolitan Opportunity, University of Minnesota; JD/MPP 2013, University of Minnesota; MA 2008, Queens University Belfast; BA 2007, Wake Forest University, A BETTER WAY TO CANCEL YOUR GYM MEMBERSHIP (AND AVOID OTHER HAZARDS OF AUTOPAYMENT), 2015 U. Ill. J.L. Tech. & Pol'y 103, y2k)

The **resource problem** is exacerbated by the **breadth** of the FTC's mandate. Rather than focusing on a **single industry**, **region**, **market**, or **subject matter**, the agency **broadly** targets virtually **all sectors** of and participants in the US economy. It is essentially empowered to regulate the **entire commercial existence** of any US firm - **advertising** and **marketing**, **retail** and commercial buying and selling, and **antitrust problems**. As a result, even significant industries might be surveyed by **small teams** - such as when, in 2012, a government watchdog discovered that the Mobile Technology Unit, which oversees the massive cellular communications field, contained all of six employees. 158

**Empirics---the expanded enforcement agenda in the 60s collapsed due to ambitious agenda---agencies will fumble in response to fiating new priorities**

**Jones 20** (Alison Jones is Professor of Law at King’s and a solicitor at Freshfields Bruckhaus Deringer LLP, Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy, The Antitrust Bulletin. 2020;65(2):227-255, y2k)

III. Obstacles to **Effective** Implementation

The proponents of change have set out a breathtaking agenda for reform. The various papers and reports are powerfully reasoned and argued but devote relatively little attention to the question of how their proposals can be achieved successfully. Rather many of them seem to be predicated on the assumption that any legislative changes required can be introduced rapidly and that the new, more aspiring, program can be driven home straightforwardly by agencies led by courageous leaders and supported by a larger staff that shares the vision for fundamental change.

The discussion below, and history, seems to indicate, however, that more courage and **more people** will not necessarily overcome the **implementation obstacles** that stand in the way of a program that requires **the rapid prosecution** of a large number of **complex cases** against **well-resourced** and **powerful** companies. Indeed, the criticisms levied at the current system, the proposals for more effective enforcement and reform, and the scale of the action being demanded bear some resemblance to those that led to a more re-invigorated and aggressive antitrust enforcement policy in the **1960s** and early 1970s. For example, at that time complaints that the FTC was in decay, was obsessed with trivial cases and failing to address matters of economic importance, anticompetitive conduct, and rising concentration,77 led the FTC to embark on a new, bold, and astoundingly **broad** enforcement program.78 In an effort to meet criticisms of it as a shambolic and failing institution, the FTC sought to upgrade its processes for policy planning, made concerted efforts to improve its human capital in management and case handling, and sought to improve substantive processes and the quality of its competition and consumer protection analysis.

In the end, FTC’s efforts to improve capability proved **insufficient** to support the **expanded enforcement agenda**, partly because the Commission failed to formulate an adequate plan to overcome the full range of **implementation obstacles.** The FTC seriously **overreached** because it did not **grasp**, or **devise strategies** to deal with, **the scale** and **intricacies** of its **expanded program of cases** and **trade regulation rules**, the **ferocious opposition** that big cases with **huge** remedial **stakes** would provoke from **large defendants** seeking to avoid divestitures, compulsory licensing, or other measures striking at the heart of their business, and **the resources** required to **deliver** good results. The Commission lacked the capacity to run **novel** shared monopoly **cases** that sought the break-up of the country’s eight leading petroleum refiners and four leading breakfast cereal manufacturers79 and **simultaneously** pursue an abundance of other **high stake**, **difficult matters** involving monopolization, distribution practices, and horizontal collaboration. The FTC also overlooked swelling political opposition, stoked by the vigorous lobbying of Congress, that its aggressive litigation program provoked.80

New legislation envisaged by reform advocates could ease the path for current government agencies seeking to reduce excessive levels of industrial concentration by arresting anticompetitive behavior of dominant enterprises (through interim and permanent relief) and by blocking mergers that pose incipient threats to competition. It seems clear, however, that such dramatic legislative proposals are likely to be fiercely contested through the legislative process and so will take time, and be difficult, to enact. Further, **even if** armed with a more powerful mandate, **the DOJ** and the **FTC** will still have to bring what are likely to be **challenging cases** applying the new laws (see Section F). The **adoption**, **setting up**, and **bedding** in of new legislation or regulatory structures and bodies is therefore unlikely to happen very **quickly** and is, consequently, unlikely to meet the demands of those seeking **urgent and immediate action now**.

These difficulties suggest that for the near future, at least, the agencies will have to achieve successful **extensions** of policy mainly through launching themselves into a number of **lengthy**, **complex investigations** and **litigation** based on the current regime. This means establishing violations under existing judicial interpretations of the antitrust laws and making a convincing case for the imposition of effective remedies, including structural relief.