## 1

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.**

## 2

**CP: The United States federal government should**

* **maintain the scope of antitrust laws at status quo levels;**
* **cease and/or settle current antitrust lawsuits;**
* **issue a memorandum to the fifty state attorney generals to enter deferred prosecution and settlement agreements on current antitrust lawsuits.**

**Market is bucking declinist trends—March was the lowest it’ll go**

**Reuters 3/30** (“Analysis: U.S. stock rally defies economic unease’, https://www.reuters.com/business/mystifying-us-stock-rally-defies-economic-unease-2022-03-30/)

NEW YORK, March 30 (Reuters) - As **a stunning rebound in U.S. stocks charges on**, investors are questioning how long the surge can continue in the face of a hawkish Federal Reserve, warnings of recession from the bond market and geopolitical uncertainty.

The S&P 500 is up 11% since March 8, its biggest 15-day percentage gain since June 2020, led by many of the high-growth stocks that have been pummeled for much of the year. The benchmark index has cut its year-to-date losses to 2.8%, after it earlier swooned by as much as 12.5%.

The move has come **despite a broad range of concerns** that rocked equities earlier this quarter, among them the war in Ukraine, surging inflation and a sharp rise in Treasury yields fueled by tightening monetary policy from the Fed. read more

Stocks shrugged off the latest ominous sign from the bond market on Tuesday. The S&P 500 closed up 1.2% even as the widely tracked U.S. 2-year/10-year Treasury yield curve inverted for the first time since September 2019, a phenomenon that has reliably predicted past recessions. read more

"It's been mystifying," said Jack Ablin, chief investment officer at Cresset Capital Management. "I think that the bond market is sober and the equity market is quixotic."

Investors are pointing to a number of factors that could be driving the bounce in equities.

Many have taken heart from Fed Chairman Jerome Powell's assessment of the U.S. economy as strong enough to handle an aggressive pace of rate increases and may be cheering a Fed that now appears to be tackling sky-high inflation head on, analysts said.

The S&P 500 has gained over 6% since the Fed's March 16 monetary policy meeting, at which it raised interest rates by 25 basis points and penciled in 150 basis points of tightening for the rest of the year. read more

"While stock investors love low interest rates, they don't love an inflationary environment that gets out of control," said J. Bryant Evans, investment advisor and portfolio manager at Cozad Asset Management.

Recent weeks have also seen institutional investors driving up prices as they unwind so-called "short" bets against equities, analysts at Goldman Sachs said in a recent report.

At the same time, individual investors have been using the weakness in stocks as an opportunity to buy, the bank said.

According to Goldman, $93 billion of capital has flowed into U.S. equity funds since the start of the year, "suggesting that households have continued to buy after the record year for U.S. equity inflows in 2021."

Indeed, many of the stock rally's biggest gainers have come in high-growth, retail investor favorites that had been hammered as bond yields shot higher earlier this year. Those include so-called meme stock darlings GameStop (GME.N) and AMC Entertainment Holdings (AMC.N), whose prices have more than doubled from their 2022 lows, and Cathie Wood's ARK Innovation fund (ARKK.P) ETF, which is up 36.5% from its recent low.

Strategist Ed Yardeni of Yardeni Research said **March 8 may have marked a bottom for the stock market this year**, believing stocks are gaining support from investors **using equities as a hedge against inflation**, which stands at its highest level in nearly four decades.

"The fog of war had masked the outlook, but the long-term bull market, punctuated by panic attacks, remains intact," he wrote on Tuesday.

The corporate earnings outlook also remains solid, even as higher energy and other prices threaten to erode profit margins. Estimates for S&P 500 profits have risen since the start of the year with companies overall expected to increase earnings by 8.8% in 2022, according to Refinitiv IBES.

"Stocks were knocked down, but **earnings** estimates **just kept going up**," said Matthew Miskin, co-chief investment strategist at John Hancock Investment Management. "Investors are hesitant to really unload on stocks here as the earnings and economic picture looks still very favorable."

Another factor may be investors adjusting their portfolios as the quarter winds down, strategists at JPMorgan said. Investor rebalancing of portfolios "likely played a major role over the past two weeks, hurting bonds and supporting equities," they wrote.

**Securities have implied immunity now, the plan broadly overturns engaging a floodwave of litigation**

**Tyler 21** (Eleanor Tyler Legal Analyst With assistance from Peter Rasmussen, Legal Analyst, Bloomberg Law. “ANALYSIS: Securities Markets Face Scrutiny Under Antitrust Bill”, https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-securities-markets-face-scrutiny-under-antitrust-bill)

But also tucked into CALERA are sections that would all but end a fairly obscure judicial doctrine called “implied immunity.” The doctrine currently disallows antitrust complaints about conduct that is regulated under another complex federal statutory framework. In other words, where Congress is silent on the issue of antitrust law overlapping with another statute, courts have occasionally stepped in to close off areas from antitrust scrutiny.

The defense of “implied immunity” doesn’t come up that often, and it is mostly successful in securities markets. Defendants have long argued that applying antitrust law to conduct that is legal under the securities laws infringes on the regulatory authority of the Securities and Exchange Commission and harms financial markets. Core functions of the securities market, like participating in exchanges and listing and selling stocks and options, should only be subject to one set of rules, they argue.

Right now, if the securities acts apply to conduct related to core securities market functions—and the SEC doesn’t explicitly forbid that conduct—**then that conduct can be immune from antitrust claims**. CALERA would greatly narrow that rule: Instead, implied immunity could only attach to conduct that other laws “explicitly require or authorize.” In short, conduct within the vast gray areas of the securities law wouldn’t qualify for implied immunity under CALERA; only conduct that the securities laws “explicitly require or authorize” would.

Furthermore, CALERA says that the antitrust laws “shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments.” That language counters a Supreme Court statement in Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP that a regulatory framework designed to deter anticompetitive harm probably doesn’t warrant the addition of antitrust scrutiny, even if Congress explicitly preserved the application of the antitrust laws to that regulatory framework.

Together, these provisions mean that courts can’t second-guess whether the antitrust laws should apply to conduct in regulated markets, or water down the antitrust laws when applying them to that conduct. Unless the regulator explicitly permits or requires the conduct, market participants can challenge it under the Sherman Act.

What Conduct Is at Risk?

In practice, few antitrust defendants have successfully pleaded implied immunity from the federal antitrust laws in court. Nevertheless, **a wide variety of defendants have argued that their conduct should be immune from the antitrust laws.**

Cases in which the defense was raised have included not only antitrust claims against financial market conduct, but also complaints about anticompetitive conduct in, **patent infringement**, horse racing, **merging hospitals**, and seeking **FDA approval** for a generic drug.

Most successful cases have been in the securities or commodities context. The current test for implied immunity comes from Credit Suisse Securities (USA) LLC v. Billing, a 2007 Supreme Court decision that dismissed claims that underwriters colluded to drive up prices for initial public offerings (IPOs). Specifically, the plaintiffs complained about underwriting contracts that required them to buy shares at prearranged escalating prices in the aftermarket in order to get access to an IPO, a practice called “laddering.” Laddering isn’t currently permitted under Regulation M (and was at best disfavored in 2007 when the Court decided Credit Suisse); however, the Supreme Court held that it can only be addressed by the SEC and not by those harmed by inflated share prices under the Sherman Act.

Other financial markets practices shielded under the doctrine have included underwriting contractual provisions prohibiting “flipping” (immediately reselling) of IPO shares, restricting trade in stock options, charging fixed commission rates for stock trades, and restricting trade in mutual funds on the secondary market.

In short, if the myriad kinds of restrictive conduct that are **explicitly intended to boost prices for stocks and derivatives** become subject to the antitrust laws, **many practices, at all levels of the financial system, are likely to come under scrutiny**. That scrutiny could include enforcement actions by federal or state regulators or private actions for treble damages under the Sherman Act.

Narrow Wedge, Big Shift

For decades, the markets around the offering and listing of stocks have been largely a walled garden, protected from pruning by the Sherman Act. There is likely a lot that would interest plaintiffs in that overgrowth. That’s an issue that investment bankers, brokers, compliance professionals, and lawyers may need to assess.

All of that depends, of course, on whether CALERA looks likely to be enacted. The key issue, therefore, is which parts of Klobuchar’s proposals have enough bipartisan support to get through the Senate.

More fundamentally, however, the implied immunity provision of CALERA expresses a belief that the antitrust laws should be at least on equal footing with other federal statutes. Aside from shining a light on financial markets, therefore, ending implied immunity would remove a tool that Klobuchar believes judges have used to de-fang the Sherman and Clayton Acts. If that sentiment survives in CALERA’s text, **it could signal a new phase of antitrust enforcement.**

**Bull market exuberance is tenuous—the plan causes a crash and recession**

**Roberts 11/7/21** (Lance, Seeking Alpha, “Did The Fed Just Set The Stock Market Up For A Crash?”, https://seekingalpha.com/article/4466775-did-the-fed-just-set-the-stock-market-up-for-a-crash)

Market Back To Extreme Overbought As noted last week, the more significant concern remains the underlying technical condition of the market. While the rally has been impressive, rising to all-time highs, the market is now back to more extreme overbought levels. Furthermore, our "money flow buy signal" **is near a peak** and **slightly triggered a "sell signal**." However, with the MACD still positive, **the signal suggests a consolidation** rather than correction. However, a confirming MACD often aligns with short-term corrections at a minimum. Therefore, we will watch that signal closely. Also, this entire rally from the recent lows has been on very weak volume, which suggests a lack of commitment. **Currently, the bulls control the market** as we are in the middle of a "buying stampede." Historically, buying stampedes last on average between 7 and 12 days. Logically, buying stampedes always get followed by selling stampedes of similar lengths. However, there are times these stampedes can last much longer than expected. We are currently in one of those longer-term periods. As shown below, the S&P 500 has only been down in 2 of the last 18 days. How unusual is that? In the previous 20 years of the S&P 500, the number of times the market accomplished such a feat was precisely ZERO. Of course, **that stampede gets driven by exuberance**. Irrational Exuberance In our daily market commentary, we quoted a piece of analysis from Chartr.com. To wit: "Every week it feels like we get a new headline about financial markets doing something unusual. Just this week we've had:" A "squid game" crypto token falling 99.99% in a few minutes. Tesla adding hundreds of billions of dollars in value over a deal with Hertz that hasn't even been signed. US stock markets hitting fresh all-time highs. "All of which begs the question: are we in a bubble?" So where are we now? The latest CAPE ratio for the S&P 500 Index is 38x. That's pretty close to **the all-time record**, which was 44x back in 2000. For those with a short memory, that was just before the dotcom bubble burst and stock markets (particularly tech) **crashed hard**." As we have noted previously, valuations, by themselves, are a terrible timing metric. However, they tell us a great deal about expected future returns and current market psychology. When it comes to "irrational exuberance," there are other indicators better at revealing speculation in the markets that have **preceded a stock market crash**. The CNN Fear/Greed index is now at extreme greed territory. Furthermore, the demand for protection against a stock market crash (put options) fell to new lows. Historically, such periods of "speculative" activity led to a minimum of short-term stock market corrections, but **a crash is not beyond the realm of possibilities**. As noted above, with **the market extremely overbought, speculative activity surging**, and conviction weak, taking some actions to rebalance and manage risk is warranted. **However, for now, investors have "no fear"** as they believe the Fed will continue to remain accommodative. The Fed's Third Mandate Takes Priority My co-portfolio manager, Michael Lebowitz, made an important observation on Thursday. "Jerome Powell made it clear the Fed is in no hurry to raise interest rates. 'We don't think it's time yet to raise interest rates. There is still ground to cover to reach maximum employment, both in terms of employment and in terms of participation.' The Fed's reason is the employment picture is not back to pre-pandemic levels. In our mind, there is plenty of evidence such as the outsize quits rate, rising wages, and the record number of job openings that scream the labor market is very healthy. Does Mr. Powell disagree with our assessment, or is there more to the Fed's policy stance? We believe he answered the question at Wednesday's press conference. Per Jerome Powell: 'The Fed's policy actions have been guided by our mandate to promote maximum employment and stable prices for the American people along with our responsibilities to promote the stability of the financial system.'" The last sentence is the most important. According to the Federal Reserve's Congressional authorization, the Fed has only TWO mandates: price stability (inflation) and full employment. The third mandate is a self-imposed mandate from Ben Bernanke, who was the Fed Chairman in 2010: "This approach eased financial conditions in the past and, so far, looks to be effective again. Stock prices rose, and long-term interest rates fell when investors began to anticipate the most recent action. Easier financial conditions will promote economic growth. For example, lower mortgage rates will make housing more affordable and allow more homeowners to refinance. Lower corporate bond rates will encourage investment. And higher stock prices will boost consumer wealth and help increase confidence, which can also spur spending." Fed Opts To Keep Markets Elevated Jerome Powell ignored surging inflationary pressures and a robust job market **in favor of supporting asset prices**. With valuations surging, speculative activity rising, and investors heavily leveraged, the Fed faces a difficult choice. There is already a decoupling of markets from consumer confidence. A stock market **crash would further devastate confidence pushing the economy into recession**. That is the risk the Fed cannot afford.

**Nuke war**

Jomo Kwame **Sundaram &** Vladimir **Popov 19**. Former economics professor, was United Nations Assistant Secretary-General for Economic Development, and received the Wassily Leontief Prize for Advancing the Frontiers of Economic Thought in 2007. Former senior economics researcher in the Soviet Union, Russia and the United Nations Secretariat, is now Research Director at the Dialogue of Civilizations Research Institute in Berlin “Economic Crisis Can Trigger World War.” <http://www.ipsnews.net/2019/02/economic-crisis-can-trigger-world-war/>.

Economic recovery efforts since the 2008-2009 global financial crisis have mainly depended on unconventional monetary policies. As fears rise of yet another international financial crisis, **there are growing concerns about the increased possibility of large-scale military conflict**.

More worryingly, in the current political landscape, prolonged economic crisis, combined with rising economic inequality, chauvinistic ethno-populism as well as aggressive jingoist rhetoric, including threats, **could easily spin out of control and ‘morph’ into military conflict, and worse, world war.**

Crisis responses limited

The 2008-2009 global financial crisis almost ‘bankrupted’ governments and caused systemic collapse. Policymakers managed to pull the world economy from the brink, but soon switched from counter-cyclical fiscal efforts to unconventional monetary measures, primarily ‘quantitative easing’ and very low, if not negative real interest rates.

But while these monetary interventions averted realization of the worst fears at the time by turning the US economy around, they did little to address underlying economic weaknesses, largely due to the ascendance of finance in recent decades at the expense of the real economy. Since then, despite promising to do so, policymakers have not seriously pursued, let alone achieved, such needed reforms.

Instead, ostensible structural reformers have taken advantage of the crisis to pursue largely irrelevant efforts to further ‘casualize’ labour markets. This lack of structural reform has meant that the unprecedented liquidity central banks injected into economies has not been well allocated to stimulate resurgence of the real economy.

From bust to bubble

Instead, easy credit raised asset prices to levels even higher than those prevailing before 2008. US house prices are now 8% more than at the peak of the property bubble in 2006, while its price-to-earnings ratio in late 2018 was even higher than in 2008 and in 1929, when the Wall Street Crash precipitated the Great Depression.

As monetary tightening checks asset price bubbles, another economic crisis — possibly more severe than the last, as the economy has become less responsive to such blunt monetary interventions — is considered **likely**. A decade of such unconventional monetary policies, with very low interest rates, has greatly depleted their ability to revive the economy.

The implications beyond the economy of such developments and policy responses are already being seen. Prolonged economic distress has worsened public antipathy towards the culturally alien — not only abroad, but also within. Thus, another round of economic stress is deemed likely to **foment unrest, conflict, even war** as it is blamed on the foreign.

International trade shrank by two-thirds within half a decade after the US passed the Smoot-Hawley Tariff Act in 1930, at the start of the Great Depression, ostensibly to protect American workers and farmers from foreign competition!

Liberalization’s discontents

**Rising economic insecurity**, inequalities and deprivation are expected to strengthen ethno-populist and jingoistic nationalist sentiments, and **increase social tensions and turmoil, especially among the growing precariat and others who feel vulnerable or threatened.**

Thus, **ethno-populist inspired chauvinistic nationalism may exacerbate tensions**, leading to conflicts and tensions among countries, as in the 1930s. Opportunistic leaders have been blaming such misfortunes on outsiders and may seek to reverse policies associated with the perceived causes, such as ‘globalist’ economic liberalization.

Policies which successfully check such problems may reduce social tensions, as well as the likelihood of social turmoil and conflict, including among countries. However, these may also inadvertently exacerbate problems. The recent spread of anti-globalization sentiment appears correlated to slow, if not negative per capita income growth and increased economic inequality.

To be sure, globalization and liberalization are statistically associated with growing economic inequality and rising ethno-populism. Declining real incomes and growing economic insecurity have apparently strengthened ethno-populism and nationalistic chauvinism, threatening economic liberalization itself, both within and among countries.

Insecurity, populism, conflict

Thomas Piketty has argued that a sudden increase in income inequality is often followed by a great crisis. Although causality is difficult to prove, with wealth and income inequality now at historical highs, this should give cause for concern.

Of course, other factors also contribute to or exacerbate civil and international tensions, with some due to policies intended for other purposes. Nevertheless, even if unintended, such developments could inadvertently catalyse future crises and conflicts.

Publics often have good reason to be restless, if not angry, but the emotional appeals of ethno-populism and jingoistic nationalism are leading to chauvinistic policy measures which only make things worse.

At the international level, despite the world’s unprecedented and still growing interconnectedness, multilateralism is increasingly being eschewed as the US increasingly resorts to unilateral, sovereigntist policies without bothering to even build coalitions with its usual allies.

Avoiding Thucydides’ iceberg

Thus, **protracted economic distress, economic conflicts or another financial crisis could lead to military confrontation by the protagonists, even if unintended.** Less than a decade after the Great Depression started, the Second World War had begun as the Axis powers challenged the earlier entrenched colonial powers.

They patently ignored Thucydides’ warning, in chronicling the Peloponnesian wars over two millennia before, when the rise of Athens threatened the established dominance of Sparta!

Anticipating and addressing such possibilities may well serve to help avoid otherwise imminent disasters by undertaking pre-emptive collective action, as difficult as that may be.

## 3

#### The United States federal government should

#### substantially reduce its current SEC blockchain enforcement

#### substantially reduce its high-frequency trading enforcement

#### shift its blockchain enforcement towards procompetitive vision for blockchain-based platforms under existing agency authority

#### substantially increase cooperation with the European Union, at least including cooperation over trade and emerging tech

#### Shifting the nature of *existing* regulations solves

Weinstein 19 (Samuel, “FINANCIAL REGULATION IN THE (RECEDING) SHADOW OF ANTITRUST”, Temple Law Review, VOL. 91 NO. 3 SPRING 2019)

There are many reasons to conclude that antitrust enforcement more effectively protects and promotes competition than sector-regulator competition enforcement. But can the same be said of the comparison to structural regulation of the types discussed above? The difficulty of prevailing on the sorts of antitrust claims that arise in markets involving competitive bottlenecks suggests that structural regulation indeed may do a better job safeguarding competition than antitrust enforcers or private plaintiffs suing under the antitrust laws can do under current law. One proposed approach to the bottleneck problems clearinghouses and exchanges pose is to address them through antitrust’s essential facilities doctrine.420 Some courts have found that firms controlling a facility to which access is required to compete in a relevant market cannot unreasonably deny such access to downstream rivals.421 An oft-cited articulation of the elements of this type of claim is found in the Seventh Circuit’s decision in MCI Communications Corp. v. AT&T. 422 That court identified in the case law four elements that plaintiffs must show to prevail on an essential facilities claim: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.”423 The problem with relying on the essential facilities doctrine is that it is highly disfavored among courts and commentators.424 Professor Phillip Areeda famously asserted that essential facilities is “less a doctrine than an epithet, indicating some exception to the right to keep one’s creations to oneself, but not telling us what those exceptions are.”425 Critics have argued that the doctrine can dampen dynamic efficiency by undermining incentives for firms to create competing facilities or for monopolists to improve their own facility.426 Certain of these objections apply squarely in the case of clearinghouses. If potential members believe they will be forced ultimately to offer open access to their clearinghouse, they may be unwilling to make the significant capital investments starting and maintaining a clearinghouse would require.427 Further, even when courts are willing to consider liability under the essential facilities doctrine, the four-part test is difficult for plaintiffs to satisfy.428 Essential facilities allegations are closely related to refusal-to-deal claims,429 which also are challenging for plaintiffs. Unilateral refusals to deal are rarely actionable.430 Claims asserting unlawful concerted refusals to deal are sometimes successful but still can be difficult for plaintiffs to win.431 One suggestion for addressing this problem is to apply the theory of parallel exclusion to exclusionary conduct by clearinghouse members.432 Professors C. Scott Hemphill and Tim Wu, who developed this theory, have described parallel exclusion as “self-entrenching conduct, engaged in by multiple firms, that harms competition by limiting the competitive prospects of an existing or potential rival to the excluding firms.”433 In situations where members of a clearinghouse’s risk committee “arrive independently at policies” that exclude competitors, under current antitrust case law, courts may have little recourse to prevent the conduct.434 If the decisions indeed are made independently, section 1 of the Sherman Act would not apply.435 Courts might be able to solve this problem by using Hemphill and Wu’s theory to find a section 2 “shared monopoly” violation where clearinghouse members exclude rivals in a manner that unreasonably harms competition. In the absence of such a solution, there is a risk that big banks can harm competition in the derivatives markets free from the threat of antitrust liability.436 Structural regulation of derivatives clearinghouses and exchanges avoids the problems antitrust enforcement faces in these markets. The risk that exclusionary conduct by clearinghouse members working through risk committees or otherwise might fall into gaps in the antitrust laws is much less worrisome if the big banks cannot control risk committees or other levers of power in derivatives clearinghouses and exchanges. Absent that control, the big banks will find it difficult to exclude rivals. The structural solution would not require relying on uncertain ex post regulatory enforcement to ensure competition is protected. Sufficiently strict ownership caps, governance restrictions, or other forms of structural regulation address the problem without active agency involvement. One potentially serious drawback to this structural approach was suggested in the big banks’ responses to the CFTC’s and SEC’s proposed conflicts-of-interest rules.437 It may prove difficult to convince big banks to contribute sufficient capital to clearinghouses over which they do not have ultimate control.438 Without big-bank contributions, clearinghouses may face a liquidity shortage and may not be able to serve their systemic risk function.439 It is unclear, however, how much of a problem this will pose in practice. Under the agencies’ proposed rules, for example, big banks still can own significant stakes in clearinghouses and exchanges.440 And as a group, big banks can own up to 40% or even 100% of a clearinghouse or exchange.441 True, the rules’ governance restrictions limit the big banks’ control,442 but even under the strictest of the proposed limits, they still could have a significant presence on most committees and the board of directors. There will be some profit to be made by owning part of a clearinghouse or exchange and there are other advantages to membership.443 In sum, the competition-related benefits of structural regulation are strong and the drawbacks speculative. There is another potentially compelling reason to prefer structural regulation to antitrust in this context: increased competition in derivatives trading may not always be beneficial. Contemporary antitrust enforcement typically has one goal: eliminating unlawful barriers to competition to increase output of goods and services—thereby lowering prices—and spur innovation.444 In many markets, this goal may be in harmony with, or at least not inconsistent with, other public policy objectives. Markets for toxic products are an exception. Professor Daniel Crane has studied this issue with regard to the tobacco business.445 He observed that “[o]utput maximization remains the dominant goal of antitrust enforcement in the tobacco industry” and that “[i]n general, the antitrust establishment simply ignores the harmful nature of tobacco” when considering enforcement in that sector.446 To address this problem in antitrust law, Crane identified what he termed “net-harm markets,” which he described as markets where “(1) [t]he consumption of the good at any level of output produces greater total internal and external costs than internal and external benefits; or (2) [a]t the output level determined by a competitive market, consumption of the good produces greater total costs than total benefits.”447 Crane conceded that it may be difficult to identify net-harm markets but suggested that one way to do so is to look to whether public policy, expressed through government statements and actions, evinces a consensus that output of a product is harmful.448 This is the case for tobacco products, and in Crane’s view it means that tobacco is a net-harm market, which “should be eligible for extraordinary antitrust treatment.”449 Crane advised that in “net-harm markets, the antitrust agencies and courts should apply the antitrust laws to pursue a goal of harm-reduction rather than one of output maximization” and that in cases where a public policy consensus exists to reduce consumption of a product, “the antitrust laws should not be used to increase that product’s consumption.”450 Are derivatives a net-harm market? As Crane noted, it is difficult to determine quantitatively if a market produces greater costs than benefits.451 There is persuasive evidence that the derivatives markets were responsible for a significant portion of the damage the 2008 financial crisis caused.452 That damage was enormous. The Government Accountability Office stated in 2013 that studies have shown the crisis caused between a “few trillion” and over $10 trillion in lost output and led to “large declines in employment, household wealth, and other economic indicators.”453 The derivatives markets also provide important economic benefits, however, allowing companies to hedge risks, thereby expanding the amount of available credit in the economy.454 Whether those benefits outweigh the harms derivatives already have caused and may cause in the future likely is impossible to say with mathematical certainty. To the extent Dodd-Frank represents a public policy consensus on the treatment of derivatives, it is that to reduce systemic risk the vast majority of derivatives should be traded on transparent exchanges and centrally cleared.455 Dodd-Frank accordingly is biased toward standardized swaps that can be exchange-traded and away from exotic swaps that might not qualify for exchange trading. Arguably, the Act also at least implicitly aims to reduce output of derivatives contracts. By pushing most derivatives trades to regulated exchanges and central clearinghouses, Dodd-Frank increases the chances that certain trades will not be consummated, either because regulators having seen them will bar them or because clearinghouses will reject either the derivatives trader or a specific trade.456 That being said, there is no explicit mandate in Dodd-Frank to reduce the overall output of derivatives trades similar to government pronouncements in the tobacco markets. Nonetheless, because certain derivatives may threaten systemic safety, derivatives markets potentially are net-harm markets for which antitrust, with its goal of increasing output and innovation, is an awkward fit. While tobacco products generally are considered uniformly harmful, derivatives contracts can be beneficial in many circumstances.457 The challenge is to discourage swaps that unduly increase systemic risk, while permitting or encouraging benign and beneficial swaps. Antitrust enforcers are not attuned to these distinctions and, indeed, are not concerned with them.458 Antitrust’s role is to increase output and innovation, not to pick and choose between financial products.459 Financial regulators are much better positioned to distinguish helpful and harmful swaps.460 Under Crane’s model, antitrust enforcers and courts would give the derivatives markets different antitrust treatment than non-net-harm markets.461 At least under current antitrust law and agency policy that approach seems unlikely to be implemented. The problem is avoided altogether, however, if competition issues in the derivatives markets are addressed by structural regulation with sector-regulator oversight, rather than antitrust enforcement.462 In this scheme, the structural regulations “perform[] the antitrust function” that sector regulators are unequipped for, freeing them to concentrate on their core competency—ensuring that the derivatives markets do not unduly increase systemic risk.463 In doing so, the sector regulators can judge how much competition and innovation is healthy in these markets and they can decide which swaps to promote (with the goal of increasing output and lowering price) and which to discourage. While many regulated markets likely do not raise similar concerns about toxic products, the advantages of structural regulation we see in the derivatives sector nonetheless may be broadly relevant to other regulated markets where antitrust immunity or displacement of antitrust on regulatory grounds is a risk. In the potential absence of antitrust enforcement in markets where the sector regulators are unprepared or unwilling to perform the antitrust function, structural regulation can fill the gap. Some sector regulators may be willing and competent guardians of competition; when that is the case, there is less need to consider the structural alternative. But, particularly in the financial markets, structural regulation should be considered a primary option when it is clear that the shadow of antitrust is receding.

## 4

#### Trinko & Credit Suisse are the ultimate preservation of Chevron deference—overturning greenlights a flood of suits that strip agency interpretation authority. CP Avoids it

Srago 3/16/21 (Josh Srago, EFF Legal Fellow, Why Can’t You Sue Your Broadband Monopoly? EFF (2021) https://www.eff.org/document/why-you-cant-sue-your-broadband-monopoly)

Where does this leave us in regards to the FCC, its oversight authority, and antitrust claims? Under the Chevron framework, unless Congress expressly spoke to a given issue in a statute discussing a regulated industry, it will be left for the agency granted oversight authority to interpret the statute. So long as they do so reasonably, the courts will defer to the agency’s interpretation and judgment. The 1996 Act provides for specific rules for telecommunications service providers. Under Trinko, and its expansion in Credit Suisse, we find that “the Supreme Court's decision prevents . . . courts from engaging in [an antitrust] inquiry at all for claims that push the boundaries of antitrust in the context of a regulated industry.”47 Telecommunications service providers must work with the FCC in order to offer the services in compliance with the 1996 Act and any other rules or regulations laid down by the FCC. As a result of telecommunications being a regulated market with agency oversight, including the ability to monitor for anticompetitive behavior and enforce penalties for such behavior, the courts will defer to the FCC’s conclusions. Howard Shelanski, former Director of the Federal Trade Commission’s (FTC’s) Bureau of Economics put it most succinctly:

By broadening the conditions under which regulation blocks antitrust enforcement, those cases redrew the boundary between antitrust and regulation and would likely have prevented the government from bringing, in previous decades, a number of important antitrust cases in regulated industries. Most notably, Trinko and Credit Suisse would likely have blocked the suit by the U.S. Department of Justice ("DOJ") that in 1984 broke up AT&T's monopoly over telephone service, considered among the most important antitrust enforcement actions in history.48

The Court’s creation of antitrust immunity for regulated industries extends the premise that if an antitrust claim were to include conduct that has been approved by the regulating agency, any such enforcement of antitrust laws could be contrary to the enforced regulatory regime. The FTC drew upon this comparison in its amicus filing in Credit Suisse where it stated “the complaint’s allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct.”49 And further that, “the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambiguous allegations that focus on immune conduct.”50 The Court agreed, stating that in order for the antitrust suit to be allowed, there must be, “a plain repugnancy between . . . antitrust claims and the federal . . . law.”51 Therefore, if the FCC establishes regulations that dictate that 1996 Act’s competition policies are no longer applicable under its regulatory structure, the Court will be required to dismiss an antitrust claim as being implicitly precluded under the telecommunications laws, as to do otherwise would violate the authorized regulatory regime.

#### Nuke war

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

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

Intellectual Property in “Interesting Times”

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

The Changes In Intellectual Property Law

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

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

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

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

Patents

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

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

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

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

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

Copyrights

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

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

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

Trademarks

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

Trade Secrets

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

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

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

Privacy Rights

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

America’s Need For Strong Intellectual Property Protection

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

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

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

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

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

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

Conclusion

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

## 5

**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**.”

## First adv

### 1NC – Turn

#### Sole SEC regulatory authority solves digital assets laundering

Todd Phillips 21 J.D., Director, Financial Regulation and Corporate Governance @ American Progress, The SEC’s Regulatory Role in the Digital Asset Markets, https://www.americanprogress.org/article/secs-regulatory-role-digital-asset-markets/

Preventing money laundering, tax evasion, and criminal activities It has been said that the primary uses for digital assets are to evade financial sanctions and collect ransoms.67 Bitcoin’s notoriety initially came from its ability to be used to buy illicit goods and services anonymously on the dark web,68 with the FBI estimating that the most infamous platform, Silk Road, facilitated $1.2 billion in sales via bitcoin from 2011 to 2013.69 Today, the North Korean regime uses digital assets to avoid U.S. and international sanctions, hacking exchanges and stealing assets that it then uses to buy goods and services.70 Additionally, the ease and anonymity with which digital assets are bought and sold has facilitated a 66 percent annual rise in ransomware attacks, in which hackers will threaten to disable a company’s online services or delete its data unless it pays a significant ransom. As the Colonial Pipeline hack demonstrated, this can have significant real-world consequences.71 According to Chainalysis, the total amount paid by ransomware victims in 2020 reached nearly $350 million in digital assets.72 These blatant violations of the law are possible because individuals can trade digital assets with pseudonymity; although all transactions are registered on a blockchain, it is possible for people to set up and use digital asset wallets without verifying their identities.73 This same flaw also facilitates tax evasion. Although digital asset owners are required to pay capital gains taxes on proceeds from the sales of their assets, the congressional Joint Committee on Taxation estimates that nearly $30 billion will be lost to the U.S. Treasury over the next decade as a result of U.S. taxpayers not reporting these profits.74 While it is against the law to launder money, finance terrorists, or not pay taxes owed, the nation’s laws do not merely expect compliance; the government requires companies that make up the plumbing of financial markets to prevent such violations from occurring in the first place. Securities brokers and asset managers are required to know their customers’ identities,75 so that they can halt transactions to or from individuals on the Treasury Department’s Specially Designated Nationals and Blocked Persons List and report suspicious activities.76 They are also required to record and report customers’ transactions, sending 1099-B forms to both clients and the IRS that contain clients’ capital gains information in order to ensure that the tax authorities have full information about what investors owe.77 If individuals use U.S. companies to attempt illegal activities, the companies are legally required to put a stop to it. Although some digital asset brokers and exchanges state that they “don’t have access to the information required for information reporting,”78 platforms can be designed so that they do.79 By regulating digital asset securities, the SEC and FINRA would be able to require U.S.-based brokers trading in these assets, or those assisting U.S. clients, to comply with the various anti-money laundering and tax reporting laws. If these new brokers refuse, the SEC and FINRA would be able to revoke their licenses, putting them out of business. Conclusion The markets for digital assets are a growing area of interest to investors and a growing area of concern for legislators and regulators; without market oversight and the transparency that regulation brings, not only will investors not understand the risks to their investments and be liable to be significantly harmed, but the purported benefits of digital assets will also certainly fail to come to fruition. Fortunately, although new legislation may be necessary in the future, regulators already have at least some legal authority—through enforcing the rules already in place and drafting new regulations—to address any issues that digital assets raise. This report has discussed the authority of the SEC to regulate digital asset securities, as well as the brokers, dealers, and exchanges that facilitate their transactions, and has encouraged it to do so in ways that improve the climate footprint of the assets, protect consumers, and prevent money laundering and tax evasion.

#### That funds North Korean nuclear development

Richard Llyod Parry 2-22, British foreign correspondent, Kim Jong-un steals crypto to make a bomb, <https://www.thetimes.co.uk/article/kim-steals-crypto-to-make-a-bomb-hhjxmjvrx>

North Korea is using increasingly sophisticated hacking and money-laundering techniques to steal cryptocurrencies in its latest effort to evade sanctions and fund its nuclear weapons programmes. Kim Jong-un’s government is earning hundreds of millions of dollars at a time in hacking raids on cryptocurrency exchanges, where currencies such as bitcoin are traded digitally, studies indicate. The regime is evading efforts to clamp down on its activities with the use of the latest technologies that help it to transfer and sell digital currencies without detection.

#### Unchecked development causes nuclear use

Markus Garlauskas 21 is a nonresident senior fellow with the Atlantic Council’s Scowcroft Center for Strategy and Security, affiliated with its Asia Security Initiative and Forward Defense programs. Proactively Countering North Korea’s Advancing Nuclear Threats, https://www.atlanticcouncil.org/wp-content/uploads/2021/12/COUNTERING-NORTH-KOREA-4.pdf

North Korea’s nuclear and missile capabilities—once viewed with derision by outside observers—have been advancing rapidly in recent years despite international diplomatic efforts and United Nations (UN) economic sanctions designed to end these weapons programs. If these programs continue along the path North Korean leader Kim Jong Un has outlined to his country’s ruling body, then North Korea’s nuclear capabilities will provide a flexible tactical nuclear force, robust regional nuclear strike options, and the capability to credibly threaten the US homeland with nuclear retaliation with a robust second-strike capability.2 Taken together, these capabilities increase the odds that Pyongyang would aggressively leverage its nuclear weapons for coercion and would even risk escalating to limited nuclear use in the event of war.3 The continued improvement and expansion of North Korean nuclear and missile capabilities, if unchecked, would therefore drive a dramatic increase in the risk of two serious scenarios coming to pass in the years ahead. First, a North Korea emboldened by its enhanced capabilities could make a grave miscalculation that would lead to spiraling escalation, eventually leading to a nuclear war that results in millions of deaths—many of them Americans. Alternately, North Korean nuclear-backed coercion could lead to Seoul’s acquiescence to Pyongyang’s demands, effectively ending the US-South Korea alliance as Washington distances itself to avoid the risk of nuclear retaliation.

### 1NC – SDG’s

#### SDG’s are bogus

Desai 16 “Sustainable Development Will Be Impossible Without Radically Transforming How People Move Around the World” Kavita Desai on November 03, 2016, <https://www.undispatch.com/sustainable-development-will-impossible-without-radically-transforming-people-move-around-world/>

Globally, the transportation sector carries a huge human and environmental impact. Transport accounts for a total of 23% of energy-related greenhouse gas emissions, and road congestion comes at an economic cost, accounting for 0.7% loss of GPD in the USA, and 10% of GDP in cities like Beijing, São Paulo and Lima. Pollution from transport also contributes to an estimated 3.5 million premature deaths annually.

If the transportation sector is not reformed, global goals to eradicate extreme poverty and promote sustainable development may never be achieved. But now, the international community is awaking to the fact that there is a profound need to harness transportation as a tool for sustainable development. Just last week, a UN panel issued a set of recommendations around “Mobilizing Sustainable Transport for Development” and later this month, leaders will gather for a first-ever Global Sustainable Transport Conference. This issue is finally getting the global attention it deserves.

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### 1NC – Supply Chains

#### Squo disproves supply chains – they can’t solve fast enough to resolve the covid crunch

#### SC resilient now and no impact

Drezner 21 (Dan, Daniel W. Drezner is a professor of international politics at the Fletcher School of Law and Diplomacy at Tufts University and a regular contributor to PostEverything., “Global supply chains will be fine”, https://www.washingtonpost.com/outlook/2021/05/05/global-supply-chains-will-be-fine/)

Remember six weeks ago, when that container ship blocked the Suez Canal and everyone interpreted it as a sign of excessive globalization? Turns out everything sorted itself out. It worked out so well that I bet you cannot even remember the name of the ship that got stuck. As I noted at the time, “This is not an all-or-nothing crisis, but rather one in which prices react to real-world shocks and private-sector actors will respond to shifting incentives.”

I bring this up because those concerns about excessive globalization have again gravitated toward global supply chains, particularly in semiconductor chips. This has been a running theme of the past year of pandemic. Throughout 2020, consultants and business publications were banging on about the need to think about supply chain integrity in response to shocks like covid-19.

This concern has increased in recent weeks. Manufacturing output growth in the United States slowed last month because automakers face semiconductor chip shortages. “60 Minutes” did a big story this past weekend on the problem, with Lesley Stahl asserting in her voiceover, “Covid showed that the global supply chain of chips is fragile and unable to react quickly to changes in demand.” Stahl’s report also raises the specter of geopolitical risks posed by Taiwan’s dominance of the semiconductor industry.

This is a cudgel that CNN and other outlets have also wielded. The thing is, Stahl’s own reporting undercuts her hyperbole about fragile global supply chains. As Kevin Drum noted:

Why is there a shortage of chips? Is it because we’ve outsourced everything to the wily Chinese folks on Taiwan? You’d think so after inhaling Lesley Stahl’s inane reporting, except for the fact that she inadvertently allowed the chairman of Taiwanese chipmaker TSMC a brief moment to give the game away: “In March 2020, as COVID paralyzed the U.S., car sales tumbled, leading automakers to cancel their chip orders. So TSMC stopped making them.”

Oh. So it has nothing to do with Taiwanese fabs vs. American fabs or global supply constraints or any of that. Nor is it related to a possible invasion of Taiwan or the fact that Intel may or may not have made good decisions about its future business. It’s because American car companies canceled their chip orders and never bothered to reinstate them. Then in December, when car sales “unexpectedly” began to rebound, they panicked and realized what they had done. You’d think these guys had never done an economic forecast or used an MRP system before in their lives.

Fortunately, contra to Drum’s fears, it would seem that the car manufacturers might have been the outlier. According to one recent survey of supply chain decision-makers, 91 percent of respondents expressed confidence in their own supply chain. Eighty percent said they were investing in inventory capacity in 2021 to improve resiliency.

That last point is important. While “just in time” management cut costs for final producers, it redistributed some of those costs to intermediate producers, who wound up either holding extra stock or finding other ways to cope with demand-side fluctuations. The Financial Times’ David Keohane, Claire Bushey and Joe Miller report that the latest surge in demand for chips has triggered a debate about whether suppliers or final producers will shoulder the costs of carrying inventory:

Jean-Marc Chéry, chief executive of STMicroelectronics, said that his customers, whether carmakers or car part suppliers, will need to hold more inventory or agree to more non-cancellable contracts to make supply more predictable and reduce the risk of shortages.

That would mark a shift from the current system where chipmakers hold excess inventory to accommodate the sector’s just-in-time supply chain.

“If they expect the semiconductor [suppliers] to be the bank, to keep having a big working capital to support them, they can forget it,” said Chéry.

Fortunately, the Wall Street Journal’s Sean McLain reports that auto manufacturers are coming around to a similar view, deciding it is worth stockpiling some inventory:

Executives say they don’t want to replace just in time entirely, because the savings are too great. But they are moving to undo it to some degree, focusing on areas of greatest vulnerability. They are seeking to stockpile more critical parts, especially if they are light and relatively inexpensive yet irreplaceable like semiconductors.

Ford’s chief executive, Jim Farley, said he was looking at keeping more inventory. “Most other industries use safety stock for critical components like chips,” he said at an event hosted by Automotive News. “And many of these companies pay for chips upfront, years and years ahead of the capacity requirements.”

Three decades in the car business hadn’t prepared Mr. Farley for this year. “It’s shocking to me how much I’ve learned about the supply base,” he said.

Much like the complaints about the Ever Given blocking the Suez Canal, this is a “bad news caused by good news” kind of story. The FT story confirms the “60 Minutes” point: “The chip shortage was caused by an unexpected rebound in demand for cars that coincided with a booming consumer electronics market.” Demand surged in the last quarter of 2020 and the first quarter of 2021. As vaccines spread across the developed world, demand will likely spike even further. Still, much like the recent Suez crisis, firms are responding to shifts in prices. In other words, this is a problem that is sorting itself out.

It is worth noting the dogs that are not barking in any of the detailed reporting on global supply chains. There are no issues with importing goods from the Pacific Rim. There are no reports of concerns about disruption due to geopolitical risks. Indeed, despite all the hyperbole surveys of firms do not show geopolitical risk anywhere near the top of the concern queue.

To repeat a theme: global supply chains are not fragile and the geopolitical risks to them have been exaggerated. The current shortages are caused by producers underestimating demand and lacking the immediate inventory to respond. One lasting effect of covid-19 will likely be the increase of buffer stocks by final producers to ensure this problem does not recur.

The hard-working staff here at Spoiler Alerts is well aware of the problems associated with weaponized interdependence. That does not mean that every supply chain hiccup is reason for hyperventilation. This problem is sorting itself out.

### 1NC – Warming

#### CSR can’t solve warming – their internal link card is about ESG portoflios not actually taking meaningful steps to reduce warming

#### Also, no reason the SEC would STOP that – there’s a disconnect between

#### Warming doesn’t cause extinction.

**Farquhar et al. 17** Sebastian Farquhar, DPhil student at Oxford specializing in Cyber Security and AI. John Halstead, doctorate in political philosophy. Owen Cotton-Barratt, DPhil in pure mathematics. Stefan Schubert, Oxford's department of experimental psychology. Haydn Belfield, degree in Philosophy, Politics and Economics from Oriel College. Andrew Snyder-Beattie, Director of Research at the Future of Humanity Institute, University of Oxford, MS in biomathematics. [Existential Risk: Diplomacy and Governance, Global Priorities Project 2017]//BPS

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

## Second

### 1NC – No Harmonization

#### Too many alt causes – CWS, treatment of tech companies, etc. are all differences in antitrust enforcement

#### 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

### 1NC – No EU leadership

#### Alt causes to EU leadership.

Tony **Barber 19**, Europe editor at the Financial Times, 11-4-2019, "New EU leadership team must up its game on foreign policy," https://www.ft.com/content/e08b101e-fa48-11e9-a354-36acbbb0d9b6  
  
The new EU leadership team taking office in Brussels knows that, if the bloc’s common foreign policy is to command respect, the first place where it must achieve success is in Europe’s neighbourhood. It needs to be well-planned, as united as possible, efficiently executed and imbued with a larger sense of long-term strategy. In all these regards, two recent episodes — one concerning the Balkans, and the other Syria — have been little short of a debacle.

Each incident points to the EU’s inability to translate its undoubted weight as a commercial and regulatory bloc into hard power on the world stage. It is not just a matter of lack of military muscle, important though that is. The real problem is that, whenever two or more of the EU’s biggest countries are in disagreement, a common European foreign policy is either ~~paralysed~~ [stagnated] or becomes a question of finding the lowest common denominator among 28 states. An often overlooked point is that these disagreements tend to arise out of domestic political tensions in individual countries — over, for example, irregular migration or attitudes to Islam or Russia. Such tensions hobble the attempts of governments to find common ground with their EU partners.

In any case, France, Germany and other EU countries usually prefer to keep their freedom of manoeuvre when it suits them. The Syrian episode centres on Annegret Kramp-Karrenbauer, who is Angela Merkel’s preferred candidate to succeed her as German chancellor. Ms Kramp-Karrenbauer was named defence minister in July in an apparent attempt to raise her profile with German voters. But the proposal for a multinational security zone in northern Syria that she came up with this month was startling for its naivety and lack of preparation. Before unveiling her plan, Ms Kramp-Karrenbauer, who replaced Ms Merkel as the Christian Democratic party’s leader in December ahead of elections due in 2021, consulted neither her Social Democratic coalition partners nor Germany’s Nato and EU allies. Her proposal skipped over crucial questions such as whether the UN Security Council would endorse it, whether the US would take part and whether Germany’s under-resourced armed forces would send soldiers to Syria. To each question it rapidly became clear that the answer was almost certain to be no. Indeed, it was hard to tell who was more dismissive of the initiative — Russia and Turkey, which control events on the ground in Syria, or Heiko Maas, Germany’s foreign minister, who is of course a colleague of Ms Kramp-Karrenbauer. In this way, the plan served no purpose other than to illustrate the incoherence of the German coalition’s foreign policy, not to mention the EU’s near-irrelevance in Syria.

This is a sobering thought in view of the fact that the 2015 arrival of large numbers of war refugees from Syria and other conflict zones, plus other migrants, precipitated one of the EU’s worst crises since the 1957 Treaty of Rome that set up the bloc.

The EU’s mis-steps in the Balkans are no less painful to watch, but in this case the main culprit is France, not Germany. By blocking Albania and North Macedonia from opening EU membership talks, President Emmanuel Macron shocked and undermined a region whose stability is integral to the stability of the European continent. In North Macedonia’s case, Mr Macron’s move made the EU reek of hypocrisy. For the EU had long promised to start entry talks, provided that the Macedonians compromise with Greece over their country’s disputed name — a condition fulfilled in the Prespa agreement, which came into force last February.

In fairness to Mr Macron, he is not alone in having doubts about enlarging the EU into south-eastern Europe. Denmark and the Netherlands joined France in opposing Albania’s entry talks. Moreover, when the European parliament adopted a resolution last week in favour of starting accession talks with the two Balkan states, some 136 MEPs — or almost a quarter of those who voted — backed Mr Macron’s position. Furthermore, Mr Macron has a point when he suggests that the EU should focus on internal reforms before absorbing new members. The EU’s most important project, the 19-nation eurozone, remains a half-built house. Effective EU-wide action is woefully lacking in areas such as migration and asylum policy. However, Mr Macron would sound more persuasive, but for the persistent rumours that France’s true objective is to close the EU door forever to western Balkan countries. Instead they would be fobbed off with membership of the European Economic Area, which would keep them out of the EU’s political institutions and make them permanent second-class Europeans. The Syrian and Balkan embarrassments are symptoms of an EU unsure of its place in the world and suffering from ineffective Franco-German co-operation. But if the EU cannot get things right on its own doorstep, where can it?

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**Europe rels in tank no matter what – we have opposing policy goals**

Henry **Olsen 19,** Washington Post columnist and a senior fellow at the Ethics and Public Policy Center., 2-18-2019, "U.S.-European Relations Are On The Rocks. They Won’T Get Better Anytime Soon.," Washington Post, https://www.washingtonpost.com/opinions/2019/02/18/us-european-relations-are-rocks-they-wont-get-better-anytime-soon/?utm\_term=.a69de0ef106b

Democrats frequently decry President Trump for purportedly weakening our ties with our European allies. But a recent security conference in Germany shows that tensions between the United States and Europe would likely recur under any Republican president — **and perhaps under Democratic leadership as well**. The fact is that Republican orthodoxy is at odds with many commonly shared European viewpoints. Take climate change. Europeans of all political stripes share a commitment to the Paris Agreement and are willing to pursue tax and regulatory policies to reduce greenhouse-gas emissions. German Chancellor Angela Merkel, for example, recently announced that Germany would phase out all coal-fired electricity plants by 2038, forcing utilities to find new sources for about half of Germany’s electricity output. **No Republican president would come even close to matching that, yet European pressure to move policies in their direction will only intensify.** Vice President Pence’s presentation at the 2019 Munich Security Conference shows how starkly the European and Republican worldviews collide. He staunchly defended the Trump administration’s withdrawal from the Paris Agreement. He criticized Britain, France and Germany for staying in the Iranian nuclear deal, from which Trump has withdrawn the United States. He called on the European Union to recognize Juan Guaidó as Venezuela’s rightful president. He defended the administration’s tariffs on China and its insistence that all NATO members spend at least 2 percent of gross domestic product on defense and 20 percent of that spending on equipment procurement. And **in each case, he was in stark opposition to the desires of a significant number of our allies.** Most, if not all, of these policies would be pursued by any conceivable Republican president. Sen. Marco Rubio (R-Fla.), for example, has been a leader in pushing for the recognition of Guaidó as president and the removal of the Maduro regime from power. Rubio is also one of the Senate’s leading China hawks, calling repeatedly for an aggressive federal policy to combat unfair Chinese trade practices and prevent China from overtaking U.S. leadership in military technology. Sen. Ted Cruz (Tex.), one of Trump’s final Republican opponents in 2016, was as staunchly opposed to the Iranian deal and Paris Agreement as Trump. Europeans might wish for a return to the kinder, gentler days of George H.W. Bush-led Republicanism, but that is simply not where today’s GOP stands. Former vice president Joe Biden’s speech was, in contrast, music to European ears. He praised efforts to fight climate change and expressed support for multilateral action. He also called U.S. border policy “an embarrassment” and told the assembled leaders that the United States “will be back,” with “back” clearly serving as code for “more in tune with your views.” **But even Democratic leadership might rest uneasily with European desires**. It is painfully clear that the phrase “American leadership” means something different on both sides of the Atlantic. For many Europeans, it seems to mean the United States following Europe’s lead on relations with the Middle East and less developed regions of the world while Europe allows the United States to defend it against Russia. The contrast in burden-sharing was difficult to manage even under the Obama administration, which failed to persuade Germany, Italy and other European countries to increase their defense spending even while making concessions in areas of European priority. **It will be increasingly hard to manage under any Democratic administration that seeks to shift shrinking U.S. military resources to combat China’s rise in the Pacific.** Democratic desires to significantly raise domestic spending will also place pressures on the European alliance. The United States has always spent more on defense than its European allies, even during the Cold War. That differential helped us to take primary responsibility for European defense while maintaining a global presence. **If the United States becomes more like Europe in terms of domestic spending, however, it will likely have to reduce its military to pay for that**. **That will leave European allies even more exposed to any Russian threat, forcing them to deal with the identical unpleasant choices Trump is pushing them to make.** Trump’s particular concerns with NATO and the trade imbalance with Germany have surely contributed to the current malaise in the U.S.-European alliance. **But our interests have been diverging for decades, and the difference in worldviews between Republican voters and continental Europeans is especially hard to reconcile. Our marriage with Europe is on the rocks no matter who leads us. Without serious and difficult communication and compromise from both sides, further estrangement is likelier than renewed devotion.**

**AT: China**

**China doesn’t hurt US tech leadership---most recent studies.**

**Economist 18**, 5-3-2018, “Fears that China has hurt innovation in the West are overblown,” https://www.economist.com/finance-and-economics/2018/05/03/fears-that-china-has-hurt-innovation-in-the-west-are-overblown

POPULAR concern about free trade with China has focused on the loss of manufacturing jobs in America and Europe. Policymakers have an additional worry: that China’s rise is hurting innovation in the West. This fear is among the small set of issues that unites American Democrats and Republicans. In 2016 Barack Obama’s commerce secretary said that China’s state-driven economy would weaken the world’s innovation ecosystem. Donald Trump’s advisers allege that China makes it harder for foreign firms to invest in innovation by squeezing their returns. Mr Trump’s trade team was expected to raise this complaint, among others, with Chinese officials during talks in Beijing on May 3rd and 4th, as The Economist went to press. **There is one problem. Data suggest that competition with China has coincided with more innovation in America, not less.** The relationship between competition and innovation is complex, even before considering trade with China. Economists agree that the right competitive landscape fosters innovation. But they disagree about what exactly that landscape looks like. More competition might prod companies to try harder to develop new products in the hope of gaining market share. Alternatively, if competition is cut-throat, profits might evaporate to the point that companies have little incentive to take risks. The fear is that China generates the wrong kind of competition and stunts the good kind. Businesspeople elsewhere worry that when the Chinese government decides to fund this or that industry, investment soars and margins collapse. Overcapacity in steel was caused in part by Chinese investment in steel processing; semiconductor firms think their industry might be next. At the same time, argues Robert Lighthizer, the US Trade Representative, foreign companies that beat their Chinese competitors are not adequately rewarded because China presses them to transfer their intellectual property. The two main academic papers on this question looked at the years around China’s accession to the World Trade Organisation in 2001. Far from settling the matter, they were contradictory. Economists studying European companies found that competition from Chinese imports both caused firms to improve their technology and led to a shift in jobs to the most advanced firms. They concluded that 15% of the upgrading of technology in Europe between 2000 and 2007 could be attributed to the increase in imports from China. But economists examining the impact on America argued that, on the contrary, Chinese competition had led companies to spend less on research as profits fell. They calculated that imports from China explained 40% of a slowdown in American patenting between 1999 and 2007, compared with the preceding decade. **The IMF has now weighed in with more recent figures**. Its conclusion is rather more cheerful, at least for those who think a trade war with China is a rotten idea. In a report published in April the fund showed that, following an extended period of decline, high-quality patents granted to American companies **had risen sharply between 2010 and 2014**. It also pointed to a big increase in American spending on research and development during the same years—even as America’s trade deficit with China rocketed (see chart). The growth in patents was more sluggish in Europe and Japan. But both patents and research spending soared in South Korea, the country most directly exposed to manufacturing competition from China. A separate IMF working paper late last year unpicked some of what is happening in America. Competition from Chinese imports has caused research spending to be reallocated within certain industries, **away from also-rans and towards the most productive and profitable firms**. At the same time, many researchers left manufacturing industries and moved into service sectors such as data-processing and finance. Both results are consistent with an American economy that is playing to its strengths. **The IMF’s analysts concluded that Chinese imports were not a threat to innovation in America, after all, and that policymakers could take a deep breath**. No loud inhaling sounds have yet been reported from the White House.

**AT: FDI Solves War**

**FDI does not solve war**

Kelan **Lu**. 11-7-**18**. Professor of Political Science at the University of South Carolina“ The Spillover Effect of the Trade War between Adversarial Dyads: Evidence from the Sino-US Investment Relationship,” Journal of Chinese Political Science/Association of Chinese Political Studies 2018https://link.springer.com/article/10.1007%2Fs11366-018-9577-0

According to my theory, **national government and local governments tend to have different agendas when it comes to adversarial FDI** with national government caring **more about national security**, macro-economic wellbeing at national level and the **national leaders’ political survival** and local governments **care more about local economic wellbeing** and local officials’ political survival. Compared to foreign trade, FDI are more **local-oriented** and **less national-oriented as fixed assets are more involved locally** with local governments and local communities. This makes FDI more likely to serve as a shared constituency between the host and home countries of FDI. In the US-China case, the Chinese **FDI have received quite different treatments** between **the national government and local governments**, particularly during the trade war period. First, at the national level, the Trump administration has **strengthened its scrutiny on Chinese FDI** via the Committee on Foreign Investment in US (CFIUS). With the trade war escalating, however, **the Chinese investment in the US has been decreasing**. China’s direct investment in the U.S. dropped “more than 90 percent from the same period in 2017 and the lowest level in seven years”.9 This dramatic drop is not only caused by the China’s crackdown on outward investment for reducing its domestic financial risks, but also caused by America’s “increasing scrutiny on Chinese acquisitions through the Committee on Foreign Investment in US (CFIUS).10” CFIUS is an interagency body of the executive and legislative branch that advises the president on national security issues related to foreign investments. CFIUS has the power to block foreign acquisitions of domestic businesses and technology if it found that those acquisitions would threaten US security. CFIUS has rejected several Chinese acquisitions of U.S. firms (or foreign firms with assets in the U.S.) in sensitive areas since 2016 (Pi 2018). According to Biglaiser et al. [39], the blocked acquisitions included electronics firm Phillips (2016), semiconductor manufacturer Aixtron (2016), Global Communications Semiconductor (2016), Lattice Semiconductor (2017), and MoneyGram (2018), a money transfer business (Jackson 2018). According to Rhodium group’s estimation, “deals worth more than $8 billion were abandoned in 2017 due to “unresolvable CFIUS concerns (Jilani and Cheng 2018).” According to Jilani and Cheng [40], the US congress is **expected to be further pressured by the defense department** to strengthen the power of CFIUS and **restrict the inflows of Chinese FDI** for the purpose of national security.

#### Does not solve slow growth

**Readiness D---1NC**

**No readiness impact**

John **Mueller 16**, Woody Hayes Senior Research Scientist, Mershon Center for International Security Studies; Adjunct Professor, Department of Political Science, Ohio State University, 6/5/16, “Embracing Threatlessness: US Military Spending, Newt Gingrich, and the Costa Rica Option,” <http://politicalscience.osu.edu/faculty/jmueller/CNArestraintCato16.pdf>

The **U**nited **S**tates seems to be substantially **free from threats that require a great deal of military preparedness**.

To begin with, it really seems time to consider the consequences of the fact that a conflict like World War II is extremely unlikely to recur. Spending a lot of money for an eventuality—or fantasy—of ever-receding likelihood is highly questionable. Some envision threat in China’s rapidly-increasing prosperity. But, although its oft-stated desire to incorporate (or re-incorporate) Taiwan into its territory should be watched, armed conflict would be extremely—even overwhelmingly—costly to the country. And **Chinese leaders**, already rattled by internal difficulties, seem to **realize this**. Russia’s recent assertiveness bears watching, but it does not suggest that the game has been crucially changed. It might make sense to maintain a containment and deterrent capacity against rogue states in formal or informal coalition with other concerned countries. However, **the military requirements for the task are limited**. Humanitarian intervention with military force is unlikely due to a low tolerance for casualties in such ventures, an increasing aversion to the costs of nation-building, and the lack of political gain from successful ventures. Concern about nuclear proliferation is overwrought: long experience suggests that when countries obtain the weapons, they “use” them only to stoke their national ego and to deter real or imagined threats. Europe seems to face no notable threats of a military nature, the Taiwan/China issue remains a fairly remote concern, and Israel’s primary problems derive from the actions of sub-state groups. The military relevance of the terrorism “threat” has been substantially exaggerated, and it mainly calls for policing and intelligence work and perhaps for occasional focused strikes by small units.