# 1AC --- Vitamin C --- JCCC

## 1AC --- Compulsion --- v1

### 1AC --- Adv --- Pharmaceuticals

#### Advantage one is Pharmaceuticals:

#### The 2nd circuit on remand in Vitamin C recently granted a sovereign compulsion defense that is far too lenient to Chinese defendants

\*Vitamin C refers to Animal Science Products, Inc, v. Hebei Welcome Pharmaceutical Co. LTD.  
\*Participation in the Cartel was not mandated AND China only set a price floor, so actions above the floor were not mandated

Wesley, 21 (Richard C. Wesley is a Judge of the United States Court of Appeals for the Second Circuit. At the time of his appointment in 2003, he was a Judge of the New York Court of Appeals. Judge Wesley received his B.A. degree summa cum laude from the State University of New York at Albany in 1971, and his J.D. degree from Cornell Law School in 1974., 8-10-2021, accessed on 11-29-2021, Cases.justia, "Animal Sci. Prods. v. Hebei Welcome Pharma. Co. Ltd. 2021 Dissenting Opinion", <https://cases.justia.com/federal/appellate-courts/ca2/13-4791/13-4791-2021-08-10.pdf?ts=1628605810)//Babcii>

Did “Chinese law require[] the Chinese sellers’ conduct[?]” Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1875 (2018). **The majority never** really **answers. Instead, it improperly applies** the doctrine of **international comity to avoid a finding it cannot contest: that Chinese law did not require the defendants to fix prices** above the minimum of $3.35/kg, which is what Hebei and NCPG (the “defendants”) did. Because it was not impossible for the defendants to comply with both Chinese and U.S. law, this case should not be dismissed on international comity grounds. See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 799 (1993). Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several [s]tates, or with foreign nations.” 15 U.S.C. § 1. “[P]rice-fixing agreements are unlawful **per se** under the Sherman Act.” Arizona v. Maricopa Cty. Med. Soc., 457 U.S. 332, 345 (1982). It is well established that § 1 proscribes only concerted, not unilateral, action. See Fisher v. City of Berkeley, Cal., 475 U.S. 260, 266 (1986). “Even where a single firm’s restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement [with another, separate entity].” Id. As a threshold matter, the plain text of the regulations and agency charter demonstrates Chinese law did not require the defendants to coordinate vitamin C prices and quantities at all. The 2002 Notice establishing the Price Verification and Chop (“PVC”) system stated “the relevant chambers must . . . submit to [Customs] information on industry-wide negotiated prices.” Sp. App’x 302. The 2003 Announcement explained “the Chambers shall . . . affix the . . . chop . . . to the export contracts at the blocks where the prices and quantities are specified” and “verify the submissions by the exporters based on the industry agreements.” Id. at 310. The Vitamin C Subcommittee, “a self-disciplinary trade organization jointly established on [a] voluntary basis” to, inter alia, “coordinate and guide vitamin C import and export business,” expressly gave members “[f]reedom to withdraw from the Subcommittee” in its amended 2002 Charter. Id. at 325–26. The 2003 Announcement acknowledged **membership was optional**, instructing the Chambers to “give [non-member exporters] the same treatment as to member exporters.” Id. at 311. In other words, under the PVC regime, the defendants were not legally required to engage in any concerted action. They could have complied with Chinese law without violating the Sherman Act by resigning from the Subcommittee and thereby independently setting their prices at or above the industry-coordinated minimum price, abstaining from any “meeting of the minds” to agree on price.1 See Fisher, 475 U.S. at 267. The Ministry and defendants do not dispute this conclusion. The Ministry explicitly agreed that “[u]nder the [Vitamin C Subcommittee’s] 2002 Charter . . . [Subcommittee] membership was no longer necessary to export vitamin C.” Ministry’s Letter Br. at 5. Its argument that “through the PVC system . . . the Chamber . . . ensured that each manufacturer complied with the industry’s price and volume restrictions,” id., does not amount to a violation of the Sherman Act. See Fisher, 475 U.S. at 267 (holding that “the mere fact that all competing property owners must comply with the same provisions of the [city’s rent control] [o]rdinance is not enough to establish a conspiracy among landlords”). The defendants concede members were able to freely resign, but contend they could not because they were members of the executive “Council” elected to four-year terms. See Appellants’ Letter Br. at 3. However, there is no indication their status impeded their legal right to resign. Their argument they could not as “a practical matter,” id., is inapposite; we are concerned only with what Chinese law required. Despite recognizing that members could resign from the Subcommittee, the Ministry avers that the PVC regime required the defendants to violate the Sherman Act. I do not think the Ministry’s submissions merit deference under the Supreme Court’s five-factor test. See Animal Sci. Prods., 138 S. Ct. at 1873. They lack sufficient “clarity, thoroughness, and support,” id., as they conflate China’s 2002 PVC regime with its 1997 regime and fail to address salient issues such as the “suspension provision” of the 2002 Notice permitting “the customs and chambers [to] suspend export price review,” Sp. App’x 302, and the right under the 2002 Charter to freely resign from the Vitamin C Subcommittee. The “context and purpose” factor, Animal Sci. Prods., 138 S. Ct. at 1873, cuts strongly against the Ministry; I do not see how this being the Chinese government’s first official appearance in a U.S. court mitigates the fact that the Ministry has only taken this ––as the majority recognizes––**self-serving position** for the first time in the context of this litigation. See Maj. Op. at 47–48. Its view conflicts with China’s public representation to the World Trade Organization (“**WTO**”) in 2002 **that it “gave up export administration of . . . vitamin C**,” noted under the heading “any restrictions on exports through non-automatic licensing or other means . . . .” World Trade Organization, Transitional Review under Art. 18 of the Protocol of Accession of the People's Republic of China, G/C/W/438, at 2–3 (2002) (some emphasis omitted). Upon careful and respectful consideration, these deficiencies prevent me from finding the submissions worthy of deference. Moreover, the record makes clear that Chinese law did not require the defendants to agree on prices above the minimum of $3.35/kg, which is what the defendants did. In a 2003 Notice informing “member enterprises” of the “industry[-]agreed export prices,” the Chamber asserted “[t]he agreed prices are the minimum prices. We put the limit on the floor prices but not the ceiling prices.” App’x 1934 (emphases added). Wang Qi, an executive of one of the original defendants that settled before trial, testified: Question: And when the minimum price for verification and chop was $3.35, the Chamber of Commerce did not care if your company sold Vitamin C at a price higher than $3.35; isn’t that right? Answer (Qi): Correct. That is like a minimum price. Question: You were free to decide about prices above $3.35 when that was the minimum price? Answer (Qi): Yes, when it’s over they don’t care. . . . Question: And no one ordered you outside of your company to charge prices higher than $3.35 when that was the minimum price? . . . [(Qi asks to clarify question)] Answer (Qi): No. Id. at 1709–10 (emphases added). Qi’s testimony is consistent with the Ministry’s and defendants’ accounts. The Ministry described the PVC regime as “the minimum export price rule,” explaining that “Chinese law imposed minimum price thresholds via PVC,” Ministry’s Letter Br. at 2, 4 (emphasis added), and “[i]f the price was at or above the minimum acceptable price set by coordination through the Chamber, the Chamber affixed a . . . ‘chop,’ on the contract,” App’x 164 (emphasis added). This accords with the Ministry’s consistent contention that China adopted the PVC system to “avoid anti-dumping sanctions imposed by foreign countries on China’s exports,” id., also identified as a goal in the 2002 Notice. See also Appellants’ Letter Br. at 4 (“The prices agreed on were up to the companies so long as they exceeded anti-dumping minima.”). As a result, even if Chinese law required vitamin C exporters to coordinate in setting a price, it was only a minimum price; to collude on prices above that was the defendants’ choice, not their legal obligation. The majority acknowledges that “the [Subcommittee] members were able to exercise some discretion in determining actual market prices by consensus,” Maj. Op. at 36, and that “the PVC regime’s enforcement scheme appears to have required only the [minimum price of $3.35/kg],” id. at 47 n.33. Yet it surmises that “the additional price and volume coordination” above the minimum was “still clearly mandated by the Chinese government,” without any support.2 Id. Neither the defendants nor the majority proffer any evidence suggesting vitamin C exporters needed to agree on every price rather than just the minimum price. Instead, the defendants argue that “the price level established does not matter” because the Sherman Act prohibits price fixing per se. Appellants’ Letter Br. at 6. However, international comity does not work that way. International comity is a careful balancing act.3 It requires “tak[ing] into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.” In re Maxwell Commc'n Corp., 93 F.3d 1036, 1048 (2d Cir. 1996). Accordingly, “[w]hen there is a conflict, a court should seek a reasonable accommodation that reconciles the central concerns of both sets of laws.” Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring). China’s purpose in enacting the PVC regime, as characterized by the Ministry, was to “transition from a Statecontrolled economy” as it entered the WTO and to avoid anti-dumping sanctions. Ministry’s Letter Br. at 3. Even accepting for argument’s sake that Chinese law required the defendants to coordinate on a minimum price to achieve its concern about anti-dumping claims, applying comity for agreements **above the minimum** goes above and beyond **accommodating the central interests of the foreign state**. Nothing in the international comity precedents implies a true conflict exists where only part of the defendants’ conduct was required under foreign law. As the Supreme Court held in Hartford Fire, there is no true conflict if foreign law did not “require[] [defendants] to act in some fashion prohibited by the law of the United States” or if the defendants’ “compliance with the laws of both countries” was possible. 509 U.S. at 799. The phrase “act in some fashion” does not direct courts to ignore whether there exists a true conflict as to the defendants’ actual conduct at issue. Indeed, as the majority recites repeatedly, the comity analysis looks to the “degree of conflict with foreign law,” not simply whether there is any conflict period. See Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 614 (9th Cir. 1976) (emphasis added).4 Accordingly, even if the PVC regime required the defendants to agree on a minimum price and the defendants could not have complied with the Sherman Act because it prohibits price fixing per se, comity does not demand that we set aside examining if their actual price-fixing conduct was required under Chinese law. The defendants could have complied with Chinese law and the Sherman Act by: (1) exercising their legal right to resign from the Subcommittee and not participating in any conspiracy to set prices, or (2) not colluding on prices above the minimum, the only price needed to receive a chop. Given the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them,” Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976), this is not the “rare” case presenting “extraordinary circumstances” that warrants dismissal on the basis of comity, see Brief for U.S. Gov’t as Amicus Curiae, Animal Sci. Prods., 138 S. Ct. 1865 (No. 16-1220), at 19. I would affirm the judgment of the district court.5

#### That will open the floodgates to the formation of future cartels and anti-competitive price fixing

Scissors, 17 (Derek Scissors, Derek Scissors is a resident scholar at the American Enterprise Institute (AEI), where he focuses on the Chinese and Indian economies and on US economic relations with Asia. He is concurrently serving on the US-China Economic and Security Review Commission. Dr. Scissors was a senior research fellow in the Asian Studies Center at the Heritage Foundation and an adjunct professor of economics at George Washington University. He has worked for London-based Intelligence Research Ltd., taught economics at Lingnan University in Hong Kong, and served as an action officer in international economics and energy for the US Department of Defense. Dr. Scissors has a bachelor’s degree from the University of Michigan, a master’s degree from the University of Chicago, and a doctorate from Stanford University., 11-2-2017, accessed on 5-23-2021, American Enterprise Institute - AEI, "How China Cheats | AEI", https://www.aei.org/articles/how-china-cheats/)//Babcii

The US response to Beijing’s strategy can be fairly characterized as **pathetic**. Cheap Chinese imports can benefit Americans, but there is **only loss when** American **exports are not allowed to compete** against Chinese SOEs. No President to date has made the simple point that China can either change on this score **or expect the same kind of treatment** it doles out, with its sales here limited accordingly.

The US stance on cyber and technology theft might be worse. Despite evidence of tens, or even hundreds, of billions of dollars in Chinese theft of intellectual property (IP), the only American retaliation has been threatening to arrest people residing safely inside China. The Trump administration is now considering a serious response on IP. It should have been done a decade ago.

With regard to imports, the US has tools to fight Beijing’s subsidies. But it struggles with transshipment — goods produced in China and then shipped here through third countries. Further, Chinese companies are now global investors. When tariffs affect goods made in China, these companies can produce more in other countries even while they still receive subsidies at home.

Chinese firms thus have the capacity to control American and global markets for a variety of goods, using regulations to ensure control of their own large market, the state-sponsored technology theft, and third parties to circumvent American trade actions. A current example is solar, where the last two US-based panel-makers are asking for a remedy for China-directed imports.

In this case as in others, there is another side to the argument: cheap imports mean more affordability here. This is usually true, but it may not be true when China is involved. Chinese **vitamin C-makers have admitted** that they raised prices after **taking over** the US market, eliminating the original benefit for Americans.

This led to a much bigger problem: last year, an American court knowingly let the vitamin-makers off the hook. It ruled the firms could not be punished because “China’s interests outweigh whatever antitrust enforcement interests the United States may have.” Obeying the Chinese government “trumps” American law and a government that subsidizes, steals and bars competition in China is **now allowed to order higher prices** in the US.

When President Trump returns from Asia, he and the Congress will face difficult trade decisions. If the US again **does nothing** to try to force Beijing to shift policies, there are going to be more subsidies, more cyber-theft, **more unbalanced market access**, and fewer jobs here. Americans may get cheaper goods out of it, or China may decide that’s no longer on the table, either.

#### That facilitates the playbook to overtake the pharmaceutical sector

Bauman, 19 (Valerie Bauman, Senior Investigative Reporter at Bloomberg Industry Group. BA in journalism from Western Washington University, 9-9-2019, accessed on 5-23-2021, bloomberg law, "Chinese Vitamin C Price-Fixing Case Could Alter U.S. Drug Market", https://news.bloomberglaw.com/health-law-and-business/chinese-vitamin-c-price-fixing-case-could-alter-u-s-drug-market)//Babcii

China’s “**grand strategy**” is to **dominate global markets** first through ramping up domestic production, Atkinson said. They then leverage that success by undercutting prices to gain international market share, drive out competitors, and finally control prices. “If this case goes the right way, it’s one more tool we have in the arsenal to go after China’s innovation mercantilist practices” of maximizing exports and minimizing imports, he said. The vitamin C case is being decided against the backdrop of a major trade war between the U.S. and China and as China moves forward with “Made in China 2025,” a strategy to **increase** the country’s **global dominance** in pharmaceuticals. The case also comes as federal officials are growing increasingly concerned about the extent to which APIs from China have entered the U.S. drug supply and the potential national security and public health threats. “The **vitamin C** case lays out China’s **playbook for how it will gain control** over the supply of our medicine through **price fixing** and controlling supply to the United States—and this is why we’re having to import all the active pharmaceutical ingredients and raw materials from China,” said Rosemary Gibson, a senior health care adviser at The Hastings Center, a bioethics think tank. “The same **playbook** will be used for our **generic medicines,** which are 90% of the drugs we take,” said Gibson, who is also the author of “China RX: Exposing the Risks of America’s Dependence on China for Medicine.” “When we lose control over supply, we lose control over price,” she added. “China will be the price setter and we will be the price taker.” The problem has gotten the attention of the federal government. “The **national security risks** of increased Chinese dominance of the global API market **cannot be overstated**,” said Christopher Priest, a senior official at the Defense Health Agency, which oversees medical services for the armed forces, at a July 31 hearing before the U.S.-China Economic and Security Review Commission. “There is no required registry for API sources, making it extremely difficult to gauge the extent of the risk,” Priest testified. “Based on reports of China’s increasing control of APIs, there is risk that existing regulations, programs, and funding are insufficient to guarantee U.S. independence from unreliable foreign suppliers.” The pending decision by **the Second Circuit** will be critical, as its original opinion **“legitimized cartel behavior for all** medicinal **products**,” Gibson said. If the U.S. companies lose, it will make it easier for China to “**drive the U.S. out of production,**” she added. “It means we are losing our capacity to make our own medicines. When the supply chain and manufacturing is centralized largely in a single country, those supply chains create risks of drug shortages.” Notably, China has previously cut off the international supply of a product during a foreign disagreement. In 2010, China briefly stopped the flow of rare earth minerals to Japan during a territorial dispute. Japan ultimately found rare earth deposits within its own territory, but that action signals a willingness by China to weaponize its dominance in international supply chains.

#### And it will succeed --- Producers can’t match the cartels rampant abuse without antitrust

Gibson, 19 (Rosemary Gibson, senior advisor at The Hastings Center, led national health care quality and and safety initiatives at the Robert Wood Johnson Foundation, chief architect of the foundation’s decade-long strategy that successfully established palliative care in more than 1,600 hospitals in the United States, master’s degree from the London School of Economics, Oct-30-2019, accessed on 11-19-2021, Energycommerce.house, "Testimony of Rosemary Gibson Before the Committee on Energy and Commerce Subcommittee on Health, "Safeguarding Pharmaceutical Supply Chains in a Global Economy"", https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony-Gibson-API\_103019.pdf)//Babcii

2. China’s Cartels Subsidized by the Chinese Government -– Not Simply Lower Labor Costs and Weak Environmental Regulations – Are a Main Reason for the Collapse of the U.S. Industrial Base for Manufacturing of Pharmaceutical Raw Material and Other Ingredients. A common view is that because China has lower labor costs and weaker regulations governing worker safety and environmental protection, China is a cheaper place to outsource. There’s more to the story. **China’s cartels fueled by government subsidies are undercutting U.S. and other competitors and driving them out of business**. **U.S. and other** generic drug companies and ingredient makers are competing against the Chinese government, a **battle they will not win** unless and until the U.S. government develops in concert with industry a smart strategy and executes it successfully on behalf of the American people. 2 3. China’s Vitamin C Cartel Exposes the Chinese Government’s **Playbook to Overtake the U.S. Medicine Supply.** China’s **intentions are clearly expressed** in the Vitamin C anti-trust case pending in U.S. federal court. The Chinese Ministry of Commerce filed its own court brief in support of Chinese firms that formed a cartel and drove out U.S. and other global producers, similar to the penicillin cartel. The Chinese government wrote in the brief that it requires its domestic companies as a matter of Chinese law to fix prices Americans pay and control the supply and amount of product they send to the U.S. Further, the Chinese government asserted that its domestic companies should be immune from U.S. antitrust laws, thereby **undermining the entire U.S. competitive economic system**. This stance is **unequivocal evidence of China’s strategy: to use the U.S. federal court system to allow Chinese cartels to operate** freely in the United States; to **disrupt, dominate, and displace U.S. and virtually all other competitors**; to undermine America’s free market system; and to **create perpetual dependence** on China for medicines and everything else it sells to the U.S. When it comes to medicines, this is China’s approach to achieving its stated goal to become the **pharmacy to the world**. A decision by the federal appeals court in Manhattan is pending. 4. All Roads Lead to China: India is at the Mercy of China for Raw Materials and Chemical Intermediates to Make Active Pharmaceutical Ingredients (APIs) for Generic Drugs for the U.S. and the Rest of the World. The Association of Accessible Medicines reports that India is the source of 24.5 percent of generic drugs sold in the U.S. This appears to suggest that we don’t need to worry about generics coming from China. In fact, India is dramatically dependent on China for raw materials and chemical intermediates that are used to make active pharmaceutical ingredients. A quick Google search will reveal the extent of India’s dependence on China. The dependence is recognized by senior Indian government officials as a national security threat to that nation, its military, and its large generic drug industry which would shut down within weeks without Chinese components. Senior government officials in India have not hesitated to talk publicly in the media about the national security risks to their country if China withheld supplies. Even countries such as Italy and Spain are buying raw materials from China. The Economic Times in India published a story about the risks to national security, and the opening line was, “Imagine a situation where a(n Indian) soldier’s medical kit is running out of essential drugs on a battle front.” This is what prompted me while writing China Rx to ask whether the U.S. military is similarly dependent on China—which it is for many medicines whose components are made in China. So, India, a global powerhouse in generic manufacturing, is at the mercy of China. A deterioration in India’s relationship with China could trigger China to withhold supplies of vital components in essential medicines. China can use its economic leverage to extract concessions from India on a host of political, economic, and military matters. The same is true for how China can use its leverage to compel the U.S. government to act in China’s interest. 5. America’s Seniors, Working Families, Veterans, and Taxpayers are Sending an Estimated $6 Billion to China for Generic Drugs Annually Which Causes Two Public Health Problems: Loss of U.S. Self-Sufficiency for Medicine-Making and the Risk of Increased Illegal Opioids from China in Communities Suffering from Unemployment Due to Shuttered Manufacturing Facilities. 3 The Association for Accessible Medicines reports that 8.5% of generic drugs sold in the U.S. are made in China. China’s first generic drug, made in China by a Chinese company, was approved for use in the U.S. in 2007. So, in about 10 years, Chinese companies gained an 8.5% market share. With an 8.5% market share of generic drug spending going to China, a rough back-of-the-envelope calculation prepared quickly for this testimony suggests that America’s seniors, veterans, working families, and taxpayers are sending an estimated $6 billion of our hard earned money to China to grow its generic industry as the U.S. is littered with shuttered, abandoned factories, families unable to make ends meet, and communities ravaged by illegal opioids made in China.1 Two public health crises are created: dependence on a foreign country for life-saving medicines and a deepening crisis of opioid-related deaths. Let’s take a closer look at the 8.5% of generic drugs made in China. Here are a few of the generic drugs made by Chinese domestic companies and sold here: anti-depressants, HIV/AIDS medicine, birth control pills, chemotherapy for cancer treatment for children and adults, medicines for Alzheimer’s, diabetes, epilepsy, Parkinson’s, and much more. The Financial Times reported that China is gaining steam in the US generic drug market. If past performance is indicative of future performance, ten years from now China will make 20 percent of our generic drugs, and 10 years later 30 percent. And by the 100th anniversary of the 1949 founding of the People’s Republic of China, Chinese companies will be the dominant supplier of generic drugs to the United States. In China Rx, I predict that China will overtake India as the largest global generic drug producer because of China’s pattern of cartels, subsidies to its domestic companies, and other predatory trade practices that drive out market competition. This reality should give pause to the prevailing notion in the U.S. that “generic competition lowers prices.” This approach is merely shifting production to China whose government will subsidize production until such time that China has a full chokehold on the U.S. generic supply and can raise prices at will. The U.S. will have no alternative but to pay China’s monopoly or near-monopoly price. 6. Members of Congress, Presidents, the Military, Veterans, Seniors, and Hospital Intensive Care Units Will Soon Have No Alternative but to Use Generic Drugs Made in China by Its Domestic Companies. China is ramping up production of generic drugs made in China by domestic companies and selling them in the United States. In the **near future,** Americans will likely have no alternative but to buy generic drugs made in China by Chinese domestic companies. **Chinese companies will undercut U.S. and other western generic manufacturers** on price **and drive them out of business**, just as China’s cartel drove out all U.S., European, and Indian penicillin raw material manufacturers.

#### Takeover throttles innovation --- It crowds out innovative foreign firms --- US key

Atkinson, 20 (Robert Atkinson, President of the Information Technology and Innovation Foundation, named one of the “three most important thinkers about innovation,” President Clinton appointed Atkinson to the Commission on Workers, Communities, and Economic Change in the New Economy; the Bush administration appointed him chair of the congressionally created National Surface Transportation Infrastructure Financing Commission; the Obama administration appointed him to the National Innovation and Competitiveness Strategy Advisory Board; and the Trump administration appointed him to the G7 Global Partnership on Artificial Intelligence, Sep-8-2020, accessed on 11-19-2021, Itif, "The Impact of China’s Policies on Global Biopharmaceutical Industry Innovation", <https://itif.org/publications/2020/09/08/impact-chinas-policies-global-biopharmaceutical-industry-innovation>)//Babcii

However, if China continues to employ unfair, **mercantilist practices**, the results are likely to be **harmful along all aspects**. Because **Chinese firms would gain global market share**, foreign biopharma firms and their workers would be hurt because they would lose market share to Chinese firms through unfair competition. If China is able to produce drugs more cheaply than other countries—for example, through government subsidies to its producers—foreign consumers could be better off. However, foreign consumers would be **hurt** because Chinese mercantilist **policies** would **reduce the pace of global drug innovation**. This is akin to drug price controls in domestic markets: Consumers are better off from lower drug prices but worse off from less biopharma innovation and fewer new and more-effective drugs.165 Innovation mercantilist policies would likely be detrimental to global innovation in large part because **foreign firms are more innovative**. For example, Chinese industrial espionage harms global innovation because it reduces the rate of return from R&D to non-Chinese companies, thus resulting in companies investing less in R&D. It also harms leading firms more than laggards, as practitioners of industrial espionage such as China generally don’t spy on generics companies, but rather on companies at the leading edge. Likewise, Chinese drug price controls designed to favor Chinese generics **firms** reduce overall global industry sales and R&D, **leading to a slower rate of innovation**. Chinese government-backed venture investments can harm global innovation when their **investments crowd out more innovative start-ups**. For example, these firms may invest in foreign biopharma companies with more-generous terms than foreign venture firms would do (higher levels of investment, at an earlier stage and with less ownership stake in the company). If the goal is to ensure technology and expertise are gained by China, the result is a weakening of the superior foreign—especially U.S.—innovation ecosystems, leading to less innovation. To be sure, these kinds of firm-specific government intervention are very different from a broader form of support for the industry that does not distort individual deals (or discriminate as to whether the beneficiary is a domestic or foreign enterprise), such as an R&D tax credit start-ups and established firms can both use or support for early-stage research through entities such as NIH. COMPARATIVE INNOVATION PERFORMANCE Overall, Chinese biopharma firms are significantly less innovative than the leading firms around the world. One measure is scientific publications. From 2011 to 2015, China ranked second in the world **behind the United States** in international biomedical publications.166 And it quadrupled its global share of biomedical articles between 2006 (2.4 percent) and 2015 (10.8 percent).167 In 2016, it was responsible for almost as many biotechnology and applied microbiology publications as the United States.168 **However**, **it also has a population 4.4 times larger than the United States**, so on a per capita basis, China lags significantly behind the United States. In addition, its share of documents in the top **1 percent** of citations is **lower** than its overall share of articles.169 Moreover, while the number of China’s biology and medical-sciences articles relative to U.S. articles grew 161 percent and 147 percent, respectively, China still lags relatively far behind, publishing only 19 percent as many **biology-sciences** articles as the United States, **and** only 11 percent as many **medical-sciences** articles.170 On a per capita basis, this is **just 4.3 percent and 2.2 percent of U.S. levels**, respectively. Moreover, there is evidence that at least some of the **papers published by Chinese scholars are fraudulent and produced by “paper mills.”**171

#### US innovation and leadership are essential

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Over the last year, the world has witnessed the importance of **strong innovation policies** as intellectual property protection and market access policies **facilitated** the research, development and distribution of COVID-19 diagnostics, treatments **and** vaccines. **Innovative medicines** are now making their way to patients around the world, demonstrating remarkable progress and collaboration at a scale that was unimaginable at the start of the pandemic, including more than 200 manufacturing and other partnerships to date. **Underscoring the critical need for and value of American innovation**, the Office of the United States Trade Representative (USTR) released last week the 2021 Special 301 Report. The report showcases how effective intellectual property protection and enforcement and related **market access** issues are essential to tackling current and **future global health challenges**. The report reaffirms the U.S. government’s continued commitment to promoting **fair market access around the world** for American inventions, **including biopharmaceuticals**. Promoting an **equitable trading environment helps to deliver innovation worldwide** and drives economic growth and job creation. In the United States alone, biopharmaceutical innovators contribute more than $1.1 trillion annually to the U.S. economy and create more than 4 million jobs across all 50 states. The 2021 Special 301 Report identifies how key U.S. trading partners can further increase the economic and **innovation** potential of open markets and implement effective intellectual property protection and enforcement regimes, including by addressing discriminatory, nontransparent and **trade-restrictive measures** and unreasonable regulatory approval and reimbursement delays. The progress made over the last year is nothing short of incredible. Intellectual property protection has been essential not only to speed the research and development of new treatments and vaccines, but also to facilitate the sharing of technologies and information across borders to scale up vaccine manufacturing to meet global needs. Working together, we can **continue to bring the benefits of biopharmaceutical innovation to patients around the world.**

#### Pharmaceutical innovation solves disease, bioterrorism, and ABR

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As key actors in the healthcare innovation landscape, pharmaceutical and life sciences companies have been called on to develop medicines, vaccines and diagnostics for pressing public health challenges. The COVID-19 crisis is one such challenge, but there are many others. For example, MERS, SARS, Ebola, Zika and avian and swine flu are also infectious diseases that represent public health threats. Infectious agents such as anthrax, smallpox and tularemia could present threats in a **bioterrorism context**. The general threat to public health that is posed by antimicrobial resistance is also well-recognised as an area in need of pharmaceutical innovation. Innovating in response to these challenges does not always align well with pharmaceutical industry commercial models, shareholder expectations and competition within the industry. However, the expertise, networks and infrastructure that industry has within its reach, as well as public expectations and the moral imperative, make pharmaceutical companies and the wider life sciences sector an indispensable partner in the search for solutions that save lives. This perspective argues for the need to establish more sustainable and scalable ways of incentivising pharmaceutical innovation in response to infectious disease threats to public health. It considers both past and current examples of efforts to mobilise pharmaceutical innovation in high commercial risk areas, including in the context of current efforts to respond to the COVID-19 pandemic. In global pandemic crises like COVID-19, the urgency and scale of the crisis – as well as the spotlight placed on pharmaceutical companies – mean that contributing to the search for effective medicines, vaccines or diagnostics is essential for socially responsible companies in the sector. It is therefore unsurprising that we are seeing industry-wide efforts unfold at unprecedented scale and pace. Whereas there is always scope for more activity, industry is currently contributing in a variety of ways. Examples include pharmaceutical companies donating existing compounds to assess their utility in the fight against COVID19; screening existing compound libraries in-house or with partners to see if they can be repurposed; accelerating trials for potentially effective medicine or vaccine candidates; and in some cases rapidly accelerating in-house research and development to discover new treatments or vaccine agents and develop diagnostics tests. Pharmaceutical companies are collaborating with each other in some of these efforts and participating in global R&D partnerships (such as the Innovative Medicines Initiative effort to accelerate the development of potential therapies for COVID-19) and supporting national efforts to expand diagnosis and testing capacity and ensure affordable and ready access to potential solutions. The primary purpose of such innovation is to benefit patients and wider population health. Although there are also reputational benefits from involvement that can be realised across the industry, there are likely to be relatively few companies that are ‘commercial’ winners. Those who might gain substantial revenues will be under pressure not to be seen as profiting from the pandemic. In the United Kingdom for example, GSK has stated that it does not expect to profit from its COVID-19 related activities and that any gains will be invested in supporting research and long-term pandemic preparedness, as well as in developing products that would be affordable in the world’s poorest countries. Similarly, in the United States AbbVie has waived intellectual property rights for an existing combination product that is being tested for therapeutic potential against COVID-19, which would support affordability and allow for a supply of generics. Johnson & Johnson has stated that its potential vaccine – which is expected to begin trials – will be available on a not-for-profit basis during the pandemic. Pharma is mobilising substantial efforts to rise to the COVID-19 challenge at hand. However, we need to consider how pharmaceutical innovation for responding to emerging infectious diseases can best be enabled beyond the current crisis. Many public health threats (including those associated with other infectious **diseases, bioterrorism agents and** antimicrobial ressistance) are urgently in need of pharmaceutical innovation, even if their impacts are not as visible to society as COVID-19 is in the immediate term. The pharmaceutical industry has responded to previous **public health emergencies** associated with infectious disease in recent times – for example those associated with Ebola and Zika outbreaks. However, it has done so to a lesser scale than for COVID-19 and with contributions from fewer companies. Similarly, levels of activity in response to the threat of antimicrobial resistance are still low. There are important policy questions as to whether – and how – industry could engage with such public health threats to an even greater extent under improved innovation conditions.

#### Covid is uniqueness --- Best studies prove pandemics are increasing in both severity and frequency --- Innovation is essential to prevent invisible thresholds for extinction

Penn 21 (Michael Penn, Director of Communications, Marketing and Alumni Relations, Duke Global Health Initiative, citing William Pan, Ph.D., associate professor of global environmental health at Duke, Marco Marani, adjunct professor at Duke department of Global Health, where he previously was a professor of civil and environmental engineering and Anthony Parolari, Ph.D., of Marquette University, is a former Duke postdoctoral researcher, Gabriel Katul, Ph.D., the Theodore S. Coile Distinguished Professor of Hydrology and Micrometeorology at Duke, “Statistics Say Large Pandemics Are More Likely Than We Thought” Duke Global Health Institute, <https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought>)

The COVID-19 pandemic may be the deadliest viral outbreak the world has seen in more than a century. But statistically, such extreme events aren’t as rare as we may think, asserts a new analysis of novel disease outbreaks over the past 400 years. The study, appearing in the Proceedings of the National Academy of Sciences the week of Aug. 23, used a newly assembled record of past outbreaks to estimate the intensity of those events and the yearly probability of them recurring. It found the probability of a pandemic with similar impact to COVID-19 is about 2% in any year, meaning that someone born in the year 2000 would have about a 38% chance of experiencing one by now. And that probability is only growing, which the authors say highlights the need to adjust perceptions of pandemic risks and expectations for preparedness. “The most important takeaway is that large pandemics like COVID-19 and the Spanish flu are relatively likely,” said William Pan, Ph.D., associate professor of global environmental health at Duke and one of the paper’s co-authors. Understanding that pandemics aren’t so rare should raise the priority of efforts to prevent and control them in the future, he said. The study, led by Marco Marani, Ph.D., of the University of Padua in Italy, used new statistical methods to measure the scale and frequency of disease outbreaks for which there was no immediate medical intervention over the past four centuries. Their analysis, which covered a murderer’s row of pathogens including plague, smallpox, cholera, typhus and novel influenza viruses, found considerable variability in the rate at which pandemics have occurred in the past. But they also identified patterns that allowed them to describe the probabilities of similar-scale events happening again. In the case of the deadliest pandemic in modern history – the Spanish flu, which killed more than 30 million people between 1918 and 1920 -- the probability of a pandemic of similar magnitude occurring ranged from 0.3% to 1.9% per year over the time period studied. Taken another way, those figures mean it is statistically likely that a pandemic of such extreme scale would occur within the next 400 years. “ The most important takeaway is that large pandemics like COVID-19 and the Spanish flu are relatively likely. WILLIAM PAN — ASSOCIATE PROFESSOR OF GLOBAL ENVIRONMENTAL HEALTH In the case of the deadliest pandemic in modern history – the Spanish flu, which killed more than 30 million people between 1918 and 1920 -- the probability of a pandemic of similar magnitude occurring ranged from 0.3% to 1.9% per year over the time period studied. Taken another way, those figures mean it is statistically likely that a pandemic of such extreme scale would occur within the next 400 years. But the data also show the risk of intense outbreaks is growing rapidly. Based on the increasing rate at which novel pathogens such as SARS-CoV-2 have broken loose in human populations in the past 50 years, the study estimates that the probability of novel disease outbreaks will likely grow three-fold in the next few decades. Using this increased risk factor, the researchers estimate that a pandemic similar in scale to COVID-19 is likely within a span of 59 years, a result they write is “much lower than intuitively expected.” Although not included in the PNAS paper, they also calculated the probability of a pandemic capable of eliminating all human life, finding it statistically likely within the next 12,000 years. That is not to say we can count on a 59-year reprieve from a COVID-like pandemic, nor that we’re off the hook for a calamity on the scale of the Spanish flu for another 300 years. Such events are equally probable in any year during the span, said Gabriel Katul, Ph.D., the Theodore S. Coile Distinguished Professor of Hydrology and Micrometeorology at Duke and another of the paper’s authors. “When a 100-year flood occurs today, one may erroneously presume that one can afford to wait another 100 years before experiencing another such event,” Katul says. “This impression is false. One can get another 100-year flood the next year.” As an environmental health scientist, Pan can speculate on the reasons outbreaks are becoming more frequent, noting that population growth, changes in food systems, environmental degradation and more frequent contact between humans and disease-harboring animals all may be significant factors. He emphasizes the statistical analysis sought only to characterize the risks, not to explain what is driving them. But at the same time, he hopes the study will spark deeper exploration of the factors that may be making devastating pandemics more likely – and how to counteract them. “This points to the importance of early response to disease outbreaks and building capacity for pandemic surveillance at the local and global scales, as well as for setting a research agenda for understanding why large outbreaks are becoming more common,” Pan said.

#### Defense doesn’t assume secondary risks

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

#### Genetic engineering means bioterrorism causes extinction --- It will be easily accessible

Myhrvold, 13 Nathan, PhD in theoretical and mathematical physics from Princeton + founded Intellectual Ventures after retiring as chief strategist and chief technology officer of Microsoft Corporation, July 2013, "Strategic Terrorism: A Call to Action," The Lawfare Research Paper Series No.2, (<http://www.lawfareblog.com/wp-content/uploads/2013/07/Strategic-Terrorism-Myhrvold-7-3-2013.pdf>)//Babcii

A virus genetically engineered to infect its host quickly, to generate symptoms slowly—say, only after weeks or months—and to spread easily through the air or by casual contact would be vastly more devastating than HIV. It could silently penetrate the population to unleash its deadly effects suddenly. This type of epidemic would be **almost impossible to combat** because most of the infections would occur before the epidemic became obvious. A technologically sophisticated terrorist group **could develop such a virus** and kill a large part of humanity with it. Indeed, terrorists may not have to develop it themselves: some **scientist may do so first and publish the details**. Given the rate at which biologists are making discoveries about viruses and the immune system, at some point in the near future, someone may create artificial pathogens that could drive the human race to extinction. Indeed, a detailed species-elimination plan of this nature was openly proposed in a scientific journal. The ostensible purpose of that particular research was to suggest a way to extirpate the malaria mosquito, but similar techniques could be directed toward humans.16 When I’ve talked to molecular biologists about this method, they are quick to point out that it is slow and easily detectable and **could be fought with biotech remedies**. If you challenge them to come up with improvements to the suggested attack plan, however, they have plenty of ideas. Modern biotechnology will soon be capable, if it is not already, **of bringing about the demise of the human race**— or at least of killing a sufficient number of people to end high-tech civilization and set humanity back 1,000 years or more. That terrorist groups could achieve this level of technological sophistication may seem far-fetched, but keep in mind that **it takes only a handful of individuals** to accomplish these tasks. Never has lethal power of this potency been accessible to so few, so easily. Even more dramatically than nuclear proliferation, modern biological science has frighteningly undermined the correlation between the lethality of a weapon and its cost, a fundamentally stabilizing mechanism throughout history. Access to extremely lethal agents—lethal enough to exterminate Homo sapiens—**will be available to anybody with a solid background in biology**, terrorists included. The 9/11 attacks involved at least four pilots, each of whom had sufficient education to enroll in flight schools and complete several years of training. Bin laden had a degree in civil engineering. Mohammed Atta attended a German university, where he earned a master’s degree in urban planning—not a field he likely chose for its relevance to terrorism. A future set of terrorists could just as **easily be students of molecular biology** who enter their studies innocently enough but later put their skills to homicidal use. Hundreds of universities in Europe and Asia have curricula sufficient to train people in the skills necessary to make a sophisticated biological weapon, and hundreds more in the United States accept students from all over the world. Thus it seems likely that sometime in the near future a small band of terrorists, or even a single misanthropic individual, will **overcome our best defenses** and do something truly terrible, such as fashion a bioweapon that could kill millions or even billions of people. Indeed, the creation of such weapons within the next 20 years **seems to be a virtual certainty**. The repercussions of their use are hard to estimate. One approach is to look at how the scale of destruction they may cause compares with that of other calamities that the human race has faced.

#### Lack of retal and upward pressures means bioterror causes quick nuclear escalation

Pifer et al 10, Steven Pifer, Richard C. Bush, Vanda Felbab-Brown, Martin S. Indyk, Michael O’Hanlon, Kenneth M. Pollack, May 2010, Date Accessed: 11-20-2017, “U.S. Nuclear and Extended Deterrence: Considerations and Challenges” Brookings Foreign Policy, Arms Control Series, Paper 3, https://www.brookings.edu/wp-content/uploads/2016/06/06\_nuclear\_deterrence.pdf

The United States has at times recognized this reality. It publicly committed not to use nuclear weapons against non-nuclear weapon states, unless the latter are allied with nuclear powers in wartime operations (and now has aligned its NSAs to non-nuclear weapon states in compliance with the NPT). Yet American policy had not been consistent. Even while making such NSA commitments at various points, the United States has also sought to retain nuclear weapons as an explicit deterrent against other, **nonnuclear forms of weapons** of mass destruction, as a matter of targeting policy and nuclear weapons doctrine.106 There was an element of hypocrisy in this previous American pledge not to use nuclear weapons against non-nuclear weapon states when combined with a willingness to consider using nuclear weapons in response to **a biological** (or even chemical) **attack**. Others noted this contradiction and chastised the United States for it. One thoughtful and well-argued study in the 1990s asserted that nuclear weapons should never be used against biological (or chemical) threats or in retaliation for such attacks. In considering the possibility of an extremely destructive biological agent that killed as many as nuclear weapons might, the authors wrote that “… it would be technically and operationally difficult to achieve such high numbers of casualties with biological weapons, and no nation is known to possess weapons so effective.”107 It is a good reason that, as a normal matter of policy, the United States should not plan on any nuclear response to attacks by lesser types of weapons of mass destruction, especially the types of attacks that might be anticipated today or that have been witnessed in the recent past (for example, the chemical attacks during the Iran-Iraq war of the 1980s).108 From this standpoint, the Nuclear Posture Review reached a sound conclusion on responding to a BW or CW attack. But this argument is perhaps more persuasive for the technologies of the present rather than a hypothetical situation in the future; things could change over time. That is the crux of the challenge for future policy and doctrine regarding whether nuclear weapons should have a future purpose of helping deter advanced biological attack. **Biological weapons could become much more potent in coming decades**. Biological knowledge certainly is advancing rapidly. To take one metric, the number of genetic sequences on file, a measure of knowledge of genetic codes for various organisms, grew from well under five million in the early 1990s to 80 million by 2006.109 The number of countries involved in biological research is growing rapidly as well. What about 25 to 50 years from now, a day that current policymakers must contemplate when considering lasting changes to doctrine as well as the pursuit of a nuclear-weapons-free world? As of 2008, more than 160 states had ratified and acceded to the Biological and Toxin Weapons Convention, but one of its weaknesses is the lack of verification measures. One can naturally hope that better monitoring and verification concepts will be developed in the biological field—just as they must clearly be improved in the nuclear realm if abolition is ever to be feasible even on its own more narrow terms.110 But these techniques will be very hard to devise, and probably rather imperfect in their ability to provide timely warning. One can try various forms of direct as well as indirect monitoring—the latter including looking for mismatches between the numbers of trained scientists and professional positions available to them in a given country, or a mismatch between the numbers of relevant scientists and associated publications.111 Big disparities could suggest hidden programs. One can also build up disease surveillance systems and create rapid-response BW investigation teams to look into any suspected development of illicit pathogens or any outbreak of associated disease.112 But the United States will still need a good deal of luck to discover many hypothetical biological weapons programs. Any countries bent on cheating will have a good chance of success in hiding their associated research and production facilities. For Americans, who long led the way in biology, it is sobering and important to remember that even today, at least half of all important biological research is already done abroad. It often takes place in small facilities that are very hard if not impossible to identify from remote sensing.113 For such reasons, it is eminently possible that an advanced “bug”—perhaps an influenza-born derivative of smallpox resilient against currently available treatments, for example—**could be developed by a future aggressor state**. Such a bug could combine the contagious qualities of the flu with the lethality of very severe diseases.114 This could dramatically alter the calculations of BW use. It is such a prospect that led University of Maryland scholar John Steinbruner to note “One can imagine killing more people with an advanced pathogen than with the current nuclear weapons arsenals.”115 The **state** developing this BW agent **might simultaneously develop a vaccine** against the new disease and use that vaccine to inoculate its own people. It might then use the biological pathogen as a weapon, or a threat, against another country. That could be a country it was interested in conquering; it could also threaten use against the United States and broader international community, to deter other countries from coming to the rescue of another state being attacked directly by the aggressor (analogous to how Saddam Hussein would have liked to deter the U.S.-led coalition from coming to Kuwait’s aid in 1990-1991). If the **U**nited **S**tates **faced** the prospect of millions of its own citizens, or hundreds of thousands of its own troops, becoming sick as it considered a response to aggression, and its only recourse was conventional retaliation, **its range of options could be limited**. Indeed, the very troops called on to carry out the retaliation might **become vulnerable** to the disease, jeopardizing their physical capacity to execute the conventional operation. Perhaps they could be wellprotected on the battlefield, once suited up, but they could be vulnerable before deployment, along with the rest of the American population. A potential adversary, seeing these possibilities, might find the concept of such an advanced pathogen very appealing. Would there be a clear and definitive policy or moral argument against the use of a nuclear weapon in retaliation for a BW attack that killed hundreds of thousands—or even millions—of Americans? If the origin of the attack could be identified, as it might well be under numerous scenarios like the one sketched above, and if huge numbers of American civilians had been targeted, **the case for restraint would be hard to make**. At the least, it might be no stronger than the case for absorbing a nuclear weapons strike and choosing not to retaliate. What if the United States thought a biological attack by an aggressor imminent? Or what if it had already suffered one attack and others seemed possible? In such circumstances, there could be potential value in a nuclear retaliatory threat against the belligerent state, warning that any future use of biological attacks against the American people or U.S. allies might produce a nuclear response.116 In his classic book on just and unjust war, Michael Walzer asserted that “Nuclear war is and will remain morally unacceptable, and there is no case for its rehabilitation.” He also argues “Nuclear weapons explode the theory of just war. They are the first of mankind’s technological innovations that are simply not encompassable within the familiar moral world.” This would seem to argue (since biological weapons of certain types predated nuclear technologies) that in fact nuclear deterrent threats could never be justifiable against a biological attack. However, the logic of Walzer’s overall case against nuclear weapons is based explicitly on their indiscriminate and extreme effects—characteristics that advanced biological pathogens, which did not exist when he wrote the above words, would share. It is hard to argue that nuclear deterrence of an adversary’s possible use of an advanced pathogen that could kill a million or even ten million is less justifiable than the use of nuclear deterrence against an adversary’s nuclear arms.117 Indeed, it is possible that a nuclear response to such a biological attack might be conducted in a more humane way than the BW attack. Nuclear responses might target military bases and command headquarters, for example. To be sure, civilians would also be at risk in such a nuclear attack, but in proportionate terms a nuclear retaliatory blow could well cause a smaller fraction of casualties among innocent civilian populations than would a biological pathogen.118 U.S. policymakers had to bear in mind what is possible, at least theoretically, with advanced engineered pathogens. As Steinbruner notes, in discussing the contagiousness of certain flu-borne ailments, “One strain infected an estimated 80 percent of the world’s population in a sixmonth period. Normally the incidence of disease among those infected is relatively low, as is the mortality rate of those who contract the disease. However, aviary strains of the virus have killed virtually all of the birds infected, which suggests the possibility of highly lethal human strains as well.”119 It was these kinds of considerations that led the Nuclear Posture Review to incorporate a hedge with regard to biological weapons. While U.S. policy now is not to respond with nuclear weapons for a CW or BW attack by a non-nuclear weapons state, the U.S. government retained the option to reconsider nuclear retaliation with regard to BW if there were major advances in biotechnology that were put to use for BW purposes. But the other side of the argument is not inconsequential, either. Advanced biological pathogens may never be developed; nuclear weapons already have been not only developed but mass-produced and used. Retaining the threat of nuclear retaliation based on hypothetical concerns about possible future developments with biological agents that are far from inevitable may be unnecessary and unjustified. Surely it would be seen as cynical in the eyes of some, as a barely veiled attempt to find an excuse to maintain dependence on nuclear arms, and could undercut the value of the policy change in reducing the relevance of nuclear weapons. Moreover, if a biological weapon with mass casualty features ever were developed and utilized to devastating effect, the United States would not be constrained in its retaliatory options in any event. If a million Americans, Germans, Italians or Japanese were killed by a superbug, it would be hard to imagine a particularly strong international criticism if Washington reversed its previous pledges and **responded with nuclear arms**. If necessary, this point could be conveyed privately through diplomatic channels to U.S. allies in advance, as a way of shoring up the credibility of the American extended deterrent even as the formal role of nuclear weapons was publicly constrained by announcement of a new doctrine. This could offer a way to avoid allowing the unlikely and extreme scenario of horrific biological attack to stand in the way of the more immediate agenda of reducing the role of nuclear weapons in U.S. security policy

### 1AC --- Adv --- Cohesion

#### Advantage two is Cohesion:

#### Vitamin C creates inconsistency in WTO and Antitrust cohesion by immunizing Chinese cartels under both

\* This is also an answer to circumvention --- If China mandates anticompetitive behavior, they will be subject to WTO laws

Wang, 12 (Dingding Tina Wang, J.D. Candidate 2012, Columbia Law Vol. 112, No.5 , June 2012, Accessed 11-12-21, “WHEN ANTITRUST MET WTO: WHY U.S. COURTS SHOULD CONSIDER U.S.-CHINA WTO DISPUTES IN DECIDING ANTITRUST CASES INVOLVING CHINESE EXPORTS” https://www.jstor.org/stable/23238449) //Babcii

2. Interplay of Antitrust Law and WTO Law. — **WTO law and antitrust law share the common goal of ensuring competition**, whether between domestic and foreign producers or among producers in general.79 But the WTO did not standardize an international form of antitrust law, and antitrust law remains cleaved along national lines.80 A **member country** generally cannot sue another member country in the WTO for anticompetitive **conduct by private actors**.81 Some scholars have argued that there is little incentive for a country to sign onto an international antitrust agreement because the advantage of export cartels for the exporting country is that losses typically fall to foreign consumers and gains accrue to domestic producers.82 National governments have an incentive to set up, encourage, or tolerate export cartels as a way to prop up domestic producers and externalize the costs of doing so to foreign markets,83 though at the risk of provoking trade tensions.84 Overall, WTO law continues to **focus on state conduct while antitrust** law mostly **targets private anticompetitive conduct**. But national antitrust law and WTO law interact and are **likely to conflict** when private anticompetitive conduct is mixed with state conduct. As a prime example, the recent U.S.-China WTO dispute over China's export restraints on certain raw materials closely tracks the pending antitrust cases in U.S. courts, but the U.S. government and U.S. plaintiffs made contradicting claims: The U.S. government argued in the WTO that the Chinese government directed the export restraints, while the U.S. private parties argued in U.S. courts that the Chinese government did not direct the export restraints.85 If China's price restraints are public in nature, the producers may be **immune from U.S. antitrust** li ability, due to available common-law foreign-sovereignty-related defenses, but the country should be vulnerable to WTO liability. If the price restraints are private in nature, **China should avoid WTO liability** but the private antitrust cases should proceed on the merits, because the foreign sovereignty-related defenses would fail.86 **There is** the risk of **theoretical inconsistency**, in which both the foreign country and its private producers are held liable, and the resulting "double whammy" for the foreign country of both treble damages from U.S. antitrust liability and trade sanctions from WTO liability.87 As one antitrust treatise notes, WTO and national antitrust cases "when taken together raise fascinating possibilities for the interaction between competition policy and international trade law."88 The DOJ and FTC also observe, "There has always been a close relationship between the international application of the antitrust laws and the policies and rules governing the international trade of the United States. II. Chinese Exports: A Tale of Three Judicial Approaches to the U.S.-China WTO Dispute This Part explores the interaction between three domestic antitrust actions and the parallel WTO dispute. Part II.A describes the unprecedented Chinese government participation in the vitamin C case in the Eastern District of New York and describes the court's treatment of the Chinese government's representations to the court. Part II.B shows how the U.S.-China WTO dispute interacts with the vitamin C case, particularly through the U.S. government's extensive use, in its WTO filings, of the Chinese government's statements in the vitamin C case. Part II.C compares the approaches that the three district courts have taken in re sponse to the existence of the U.S.-China WTO dispute. Part II.C.l de scribes the Western District of Pennsylvania's constitutional and prag matic rationales for issuing a stay of its case pending resolution of the WTO dispute. Part II.C.2 explores the District of New Jersey's use of the U.S. executive branch's position in the WTO dispute to help it make fac tual and legal findings. Part II.D.l provides the broader context of U.S. courts' treatment of decisions by international tribunals, and, in particu lar, the Federal Circuit's refusal to accord legal deference to WTO rul ings in its interpretation of U.S. trade law. The section notes that the precedent leaves room for ways that WTO cases can factually inform courts' application of other areas of U.S. law, such as antitrust. Part II.D.2 describes a line of trade-remedy cases in which courts still acknowledge that WTO decisions can be informative or persuasive and argues that this approach can be extended to domestic antitrust cases. A. Vitamin C Case: The Chinese Government Speaks In the vitamin C case discussed in Part I.B, the Chinese government, apparently for the first time ever, filed an amicus brief in U.S. court.90 China's Ministry of Commerce, a government body under the direction of the State Council (China's equivalent of the U.S. Cabinet) that regulates China's foreign trade, sought to bolster the Chinese vitamin C producers' **defenses of act of state, foreign sovereign compulsion, and international comity**. The Ministry first submitted a brief to the district court in 2006 explaining that, under China's export regulatory regime, the Chinese government, through an affiliated trade chamber, **directed** defendants to coordinate export **price** floors **among themselve**s.91 To counter the plaintiffs' argument that the defendants' trade association, CCCMHPIE, was a private organization, the Ministry stated that the chamber "is an entity under the Ministry's direct and active supervision"92 and that it authorized the creation of the chamber's vitamin C subcommittee to which the Chinese defendants belonged. **The Ministry did not directly set prices** but ordered the subcommittee members to attend price discussion meetings, vote on price floors, and comply with those price floors, under penalty of having their export allowances reduced or their export licenses revoked.93 In response, the plaintiffs pointed to the Chinese government s past public statements extolling the independence of trade chambers to support the plaintiffs' position that the chamber is a private actor. The Ministry of Commerce then filed a statement with the court in 2008 emphasizing that its 2006 amicus brief, rather than the past public statements, represented the Ministry's official position.94 The Ministry stressed that China's chambers of commerce do not fit the U.S. conception of a chamber of commerce: "[P] lain tiffs trivialize China's organs of regulation where those organs differ in structure or function from ones more familiar to the plaintiffs."95 Finally, the Ministry appealed to respect for sovereignty and reliance on diplomacy: [T]he Chinese government respectfully submits that, to the extent the plaintiffs take issue with the Chinese government's sovereign actions over the conduct solely of its own citizens, that issue should not be addressed in the courts of the United States but rather through bilateral trade negotiations conducted by the executive branches of the respective sovereign nations . . . .96 This argument echoed the judicial reasoning behind the act of state doctrine, with its concern for preserving the role of the executive branch in conducting foreign policy. Nonetheless, the district court allowed the action to proceed past the motion to dismiss stage, stating it was still **unclear whether the Chinese vitamin C producers' actions were compelled or voluntary**.97 While professing deference to the Ministry's arguments, the court em phasized that the trade association's own documents, including its public website, portrayed the exporters as reaching a "self-regulated agreement" in which they would "voluntarily control" the price and quantity of ex ports and take "self-restraint measures."98 But it also noted the Ministry's argument that terms such as exporters' "voluntary self-restraint" and "self-discipline" used in the chamber's documents should not be taken at "face value" or for their literal translations but should be placed in the context of China's regulatory system.99 In support of the defendants' mo tion for summary judgment, the Ministry submitted a statement to the court in 2009 in response: This [self-discipline] system has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government.100 These Ministry statements in U.S. court would come in handy when the United States sued China under the WTO, as discussed in the next sec tion. Nevertheless, the district court (this time under a different judge) eventually ruled against the Chinese defendants' summary judgment mo tion, finding that as a matter of law the Chinese government did not compel defendants to fix export prices.101 The court found that there was no evidence, on the face of the government directives and the trade as sociation's documents, that the Ministry of Commerce required, rather than merely encouraged, the exporters' price and output agreements.102 It found that even if some compulsion existed, the Chinese government only compelled exporters to avoid below-cost pricing and foreign anti dumping charges, not to set specific price levels that were above those necessary to achieve the government's goals.103 The court settled on ac cepting the so-called "plain language" of government regulations and trade association documents that emphasized the exporters' system of "self-discipline" and "voluntary" cooperation, and rejected the Chinese defendants' and Chinese government's insistence that such language be placed in the context of China's regulatory culture.104 It also found that the Ministry of Commerce's amicus brief and statements105 to the court reflected a "carefully crafted and phrased litigation position" that was a "post-hoc" attempt to shield the exporters from liability.106

#### That undermines deterrence and creates a moral hazard for cartelization

Brunell and Stutz, 18 (Richard Brunell and Randy Stutz, Richard Brunell previously served as the General Counsel of the American Antitrust Institute. In 2012-13, he served as Senior Advisor for Competition Matters in the chairman’s office at the Federal Trade Commission. graduate of Swarthmore College and the Harvard Law School, Randy M. Stutz is Vice President of Legal Advocacy at the American Antitrust Institute. Stutz is a graduate of Washington University in St. Louis and the Catholic University Columbus School of Law., 3-5-2018, accessed on 11-18-2021, Antitrust institute, "BRIEF FOR THEAMERICAN ANTITRUST INSTITUTEAS AMICUS CURIAE INSUPPORT OF PETITIONERS", <https://www.antitrustinstitute.org/wp-content/uploads/2018/09/16-1220-tsac-AmericanAntitrustInst.pdf)//Babcii>

C. The Lack of Transparency of a Foreign Government’s Law is Grounds for Less, Not More, Deference The Second Circuit thought the fact that “‘Chinese law is not as transparent as that of the United States’” made it particularly important to defer to the Ministry’s interpretation. Pet. App. 29a (quoting district court). But the opposite is true. A lack of transparency should be grounds to call into question a **post hoc statement** that price fixing of exports has been compelled. To facilitate its entry into the WTO, China made representations to the world trading body **that it “gave up export administration” of vitamin C** and many other products. JA 319; see also 2001 WTO Report ¶¶ 50, 56, 62, at 10-12 (China represented that it had sharply reduced the number of products subject to government price control—identifying those products in an annex—and that “price controls would not be used for purposes of affording protection to domestic industries”). **Then, in this case, MOFCOM claimed to have directed its exporters to fix prices** and restrict the supply of vitamin C. The district court concluded that China’s **representations to the WTO “appear to contradict** the Ministry’s position in the instant litigation,” which was a further reason not to defer to the Ministry’s position. Pet. App. 120a-121a. More generally, the very fact that China’s minimum export price system is “largely opaque” and “highly non-transparent,” according to the U.S. Trade Representative,9 is itself grounds for affording less deference. Cf. Int’l Guidelines § 4.2.2 n.124 (ambiguous statements regarding compulsion not given dispositive weight). As in the state-action context, it is important that foreign sovereigns that mandate anticompetitive export restraints “**accept political responsibility** for actions they intend to undertake” **in the worldwide trading arena**. Fed. Trade Comm’n v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992). A foreign government should “make clear that [it] is responsible for the price fixing it has sanctioned and undertaken to control.” Id. at 633. Its failure to do so militates against affording conclusive deference to its post hoc statements. D. Weakening Deterrence Is Unwise in an Era of Rampant International Cartels International cartels are a scourge of the global economy. Known international cartels have been estimated to cost consumers around the globe more than $1.5 trillion since 1990, with North American consumers paying more than $400 billion.10 The Justice Department has prosecuted dozens of international cartels, obtaining fines of over $12 billion, and jail time for over 88 foreign nationals.11 See generally Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 860 (7th Cir. 2012) (“Foreign cartels . . . have often been the target of either governmental or private litigation.”). But despite stepped up U.S. and foreign anti-cartel enforcement, international cartels continue to proliferate. See Connor at 22-23 (75 discovered per year); Scott D. Hammond, Deputy Ass’t Attorney General, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 1, 3 (Feb. 25, 2010) (50 DOJ investigations open at a time). Deterrence remains insufficient. See John M. Connor & Robert H. Lande, Cartels as Rational Business Strategy: Crime Pays, 34 Cardozo L. Rev. 427, 429 (2012). Conclusive deference, by making it easier to prove a foreign sovereign compulsion or “true conflict” defense, will only **undercut deterrence**, making cartels that harm U.S. consumers **more likely. “The host country** for the cartel will often **have no incentive to prosecute it”** and “would logically be pleased to reap the economic rents from other countries . . . [that] their exporters collect.” Minn-Chem, 683 F.3d at 860. The same **incentive may lead foreign governments to lend their support to export cartels** when challenged in U.S. courts. And even if such support is not forthcoming, deterrence is lessened if foreign **firms believe that they can immunize their** export **cartels** under U.S. law by obtaining a statement from their government that their conduct was compelled.

#### The moral hazard is in every industry --- Only reversing the decision solves

Scissors, 16 (Derek Scissors, Derek Scissors is a resident scholar at the American Enterprise Institute (AEI), where he focuses on the Chinese and Indian economies and on US economic relations with Asia. He is concurrently serving on the US-China Economic and Security Review Commission. Dr. Scissors was a senior research fellow in the Asian Studies Center at the Heritage Foundation and an adjunct professor of economics at George Washington University. He has worked for London-based Intelligence Research Ltd., taught economics at Lingnan University in Hong Kong, and served as an action officer in international economics and energy for the US Department of Defense. Dr. Scissors has a bachelor’s degree from the University of Michigan, a master’s degree from the University of Chicago, and a doctorate from Stanford University., 9-21-2016, accessed on 5-23-2021, American Enterprise Institute - AEI, "An American court prioritizes China | American Enterprise Institute - AEI", <https://www.aei.org/foreign-and-defense-policy/asia/an-american-court-prioritizes-china/)//Babcii>

A US federal **court decision** to [throw out a price-fixing judgment](http://www.wsj.com/articles/u-s-court-throws-out-price-fixing-judgment-against-chinese-vitamin-c-manufacturers-1474391092) against Chinese vitamin C makers may be sound on highly technical legal grounds. But it definitely **puts the US on weak**er economic **grounds**. If the US legal system will not act, American policymakers must. Chinese firms breaking US law should not be allowedto participate in the American market. The court’s argument is effectively that the **companies involved cannot be held liable** **because they were required** by the Chinese government to violate US law. The violations took the form of predatory pricing – undercutting competitors to drive them out of the market in order to then be able to charge monopoly prices and harm consumers. While vitamin C hardly seems to warrant a strong policy response, it’s the tip of a very large iceberg. Elements of the Chinese government have over time directed firms in many industries to take economically (if perhaps not legally) similar steps as the **vitamin C** makers, examples ranging from [**rare earth elements**](http://peakoil.com/generalideas/underpriced-rare-earth-metals-from-china-have-created-a-supply-crisis) in 2009 **to** [**low-end steel**](http://www.reuters.com/article/us-china-steel-idUSKCN0WX0X9) in 2016. These **actions** do not always help China, but they typically **harm trade** partners. More important, they are a natural outgrowth of a [long-term development model](https://www.foreignaffairs.com/articles/china/2009-05-01/deng-undone-0) that guarantees widespread [overproduction within China](http://www.bbc.com/news/business-37415202). The domestic oversupply makes predatory pricing in foreign markets appealing. Chinese **firms** in industries ranging from **auto parts to zinc** smelting are candidates for directives from Beijing that would **undermine competition in the US**. They also undermine competition in other markets, harming US firms seeking to do business overseas. The court just insisted antitrust laws that protect American consumers may not be used in response. The **message** to Chinese companies is that ostensibly **unlawful attempts** to win monopoly status in the US are **no-risk** endeavors. It’s thus almost certain **more will try**, if not otherwise prevented. And, unless it is **discouraged**, the Chinese government will become **more active in enabling** them. If firms are guilty of violating US antitrust law and cannot be subject to legal remedy, they and their subsidiaries should be banned as a matter of policy. Heading them off is simple in principle. Chinese companies exist only at the sufferance of the Communist Party and cannot resist state edicts. The Party itself is not interested in law, American or Chinese. The US, however, should be under no obligation to permit such state-directed companies to do business here, whether shipping underpriced goods or investing to establish operations to then seek monopoly. If firms are guilty of violating US antitrust law and cannot be subject to legal remedy, they and their subsidiaries should be banned as a matter of policy. There are important practical questions to be faced: what documentation of anti-competitive behavior is sufficient, what agencies will be responsible, what punishments are suitable for specific, state-directed and anti-competitive actions? It is **crucial to do all of** this well **in order to** simultaneously **reassure** law-abiding **foreign** firms, since their **trade and investment activities** are beneficial. But the idea that the Chinese Communist Party can order American markets be undermined and American consumers harmed, even if tenable in US court, is nothing short of insane as US policy. While it would be reassuring if the World Trade Organization could help prevent this, the US must not wait for or rely on any **external body**. Congress and the President should begin immediately to create the necessary tools to deter and, if necessary, punish this behavior.

#### AND it’s global --- Immunization will encourage gaming by every nation

Martyniszyn, 12 (Marek Martyniszyn, PhD Candidate, Ad Astra Scholar, University College Dublin School of Law, 2012, accessed on 1-3-2022, Queens University, "Export Cartels: Is it Legal to Target your Neighbour? Analysis in Lightof Recent Case Law", https://pureadmin.qub.ac.uk/ws/portalfiles/portal/13701517/SSRN\_id2012838\_1.pdf)//Babcii

VI. Conclusion The **creativity of the corporate world seems unlimited**. There is no reason to believe that businesses around the world would refrain from taking advantage of the present **regulatory system allowing for export cartels**. The absence of empirical data should not lead to the conclusion that the issue is nonexistent. The unique treatment accorded to export cartels at the moment, as compared to other types of cartels, by their tolerance or encouragement, and the immunity from domestic antitrust laws, is not a beneficial policy in the long-run. The recent case law illustrates the deficiencies of the present regulatory framework. The lack of an international mechanism addressing export cartels forces targeted states to rely on extraterritorial application of national competition laws. In general this unilateral route, from a practical perspective, requires expertise and resources, which are scarce in many jurisdictions. As the Indian ANSAC case shows, the lack of an explicit legal basis in national legislation providing for extraterritoriality may hinder such actions. It also underlines that when binding international mechanisms in competition law are lacking, the matter will be addressed through trade policy when important economic interests are at stake. It suggests that it is in the best interest of the less powerful states who are interested in legal resolution of controversies arising from transnational anticompetitive conduct and who lack trade muscle, to work towards international consensus in this area. At the same time, the South African case shows that when competition law is free to take its course unobstructed, extraterritoriality may lead to positive outcomes and may be a useful tool in the fight with export cartels. It is noteworthy that both cases concerned the same officially registered and publicly known export cartel, which was earlier challenged in a developed competition law regime. This seems to be the only case of this nature. **The Chinese**/US **cases**, in general, point out that export **cartels** may come also **from the global South**. If this development becomes **a large**r **phenomenon**, it could, in principle, reframe the discussion on export cartels in terms of possible tradeoffs. Some economists suggested tying a general prohibition of export cartels in developed countries227 with market access concessions on behalf of and transfers from developing world as a form of reciprocation.228 Were export cartels to become more widespread in the global South, any such ‘package deal’ would require reconsideration. Moreover, the Chinese export cartel cases show that government’s **involvement** in transnational anticompetitive conduct, like export cartels, **poses a challenge to antitrust regimes**. If the bulwark of sovereignty proves to provide a **shelter** in such scenarios, then there is a risk that state-protected **export cartels become more prevalent, undermining** not only the competition laws, but also the **rules of international trade**, by according entities engaged in such anticompetitive conduct a comparative advantage. This perspective may in fact incentivize international community to look for a solution to the issue of both private and public, state(s)-driven, export cartels. While it is unlikely to reach a compromise prohibiting public export cartels dealing with natural resources,229 this as such should not restrain us from placing them on the international agenda as well, looking for a mutually beneficial solution with an intention to tighten up the gaps in the current regulatory framework.

#### It will rip trade apart at the seams through increasing populism and the spread of mercantilism

Petit, 16 (Nicolas Petit, Nicolas Petit is Joint Chair in Competition Law at the Department of Law and at the Robert Schuman Centre for Advanced Studies. He is also invited Professor at the College of Europe in Bruges. Prof at and phd from University of Liege, 6-21-2016, accessed on 7-8-2021, Papers.ssrn, "Chinese State Capitalism and Western Antitrust Policy", https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2798162)//Babcii

II. MORAL IMPERATIVE The moral case for an antitrust reaction is easier to lay out. In recent years, public confidence in open markets that bring in foreign competition has been **fraying at the seams**. The growing opposition to ongoing trade partnership negotiations in the West is **a visible symptom** of this. The increasing political **clout** of anti-establishment and populist parties with anti-free trade agendas is another indicator of the public’s diminishing confidence in open markets. Chinese competition in Western markets has likely **meant distortions** in the level playing field, engineered by systemic subsidization, currency manipulation and extractive labor market relations.50 This has **eroded the political capital of the West’s “open door” trade policies**. A widespread realization that doing business with China means opening the door to a syndicate of firms, coordinated backstage by the CCP, could be **the final nail in the coffin for our current free trade system**. The collateral damage of doing business with the Chinese supertrust could indeed fuel further demands for a blanket abandonment of free and competitive **trade across the board**, including with nations which, unlike China, do have effective market governance institutions. This would in practice deny Western citizens the benefits of legitimate competitive imports. The risk of a backlash reinforces the pressing **need for antitrust** attention to the CCP-led supertrust, and may help forestall the emergence of an even **greater anti-free trade** platform than we presently observe. After all, the core raison d'être of antitrust regimes is reflective of Western societies’ moral commitment to promote competition in all of its forms. The **objection that this is a trade issue is** in our view **irrelevant**. As George Stigler wrote in a paper titled “The Economists and the problem of monopoly”: “**Free trade is** a sort of international **antimonopoly program in itself**”

#### Only the signal of antitrust is sufficient to play gap filler to WTO law --- Otherwise countries will attempt to game the system

Shen, 20 (Weimin Shen, L.L.M, J.S.D., Washington University School of Law, 8-2-2020, accessed on 11-24-2021, Papers.ssrn, "The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy", https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3785688)//Babcii

“Export cartel” refers to a collusive behavior between exporting firms “to charge a specified export price or to divide export markets among themselves.”1 The purpose is often to enhance domestic firms’ welfare at the expense of foreign consumers. 2 **Antitrust and** the World Trade Organization (“**WTO**”) are mutually exclusive remedies when dealing with an **export cartel**. The difference is that a successful antitrust proceeding depends on showing the **absence of government involvement**. In contrast, a WTO proceeding’s success depends on showing **the State’s participation** in export restraints. Lately, **the lines have blurred when certain export cartels wind their way through U.S. courts.** In such cases, the extent to which U.S. courts should enforce antitrust laws against foreign export cartels has been controversial, as defendants often invoke foreign-sovereignty-related defenses. This issue has become more prominent than ever with involved litigants who are at times unable to apply their antitrust laws extraterritorially to international cartels because of the difficulty of obtaining evidence that is located outside of their jurisdiction. Similarly, litigants at the WTO complained about the government’s role in the administrative and judicial system, including the use of verbal demands and informal notices on export cartels. This intervention undermines the ability to show that a WTO-inconsistent measure exists. Several recent U.S. antitrust litigations involving Chinese export cartels highlight this challenge. In **In re Vitamin C** Antitrust Litigation (“Vitamin C”),3 the Chinese defendants moved to dismiss the complaint of price-fixing on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, **shielding them from liability under U.S. antitrust law.** The defendants invoked comity, sovereign compulsion, and the act of state doctrines.4 The Chinese **M**inistry **of Com**merce (“Ministry”) took the unprecedented step of intervening as amicus curiae in the proceeding. The Ministry explained that the China Chamber of Commerce of Medicines & Health Products Importers & Exporters (“CCCMHPIE”) is a “Ministry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels.”5 Thus, the Chinese defendants were compelled under Chinese law to collectively set a price for vitamin C exports.6 Two similar antitrust cases were brought in the U.S. courts against Chinese export cartels. In Resco Products, Inc. v. Bosai Minerals Group,7 private litigants alleged price-fixing and other anti-competitive behavior by certain Chinese exporters of bauxite. As the members of the China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters (“CCCMC”), the Chinese defendants relied on the amicus brief filed by the Ministry in Vitamin C and argued that CCCMC was a government entity that directed them to coordinate their price.8 Similarly, in Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp,9 private litigants alleged price-fixing and other anti-competitive behavior by certain Chinese exporters of magnesite in a separate U.S. court proceeding. The defendants asserted that their trade chamber, CCCMC, was an instrument of the Chinese government to regulate export trade.10 On June 23, 2009, with the blessings of the Obama Administration, the U.S. government requested WTO consultations with China regarding China’s export restraints on several raw materials.11 In its first written submission, the U.S. government cited the above three cases, arguing that based upon representations already made by the Chinese Ministry, “the European understands that the CCCMC’s export-price related functions and responsibilities . . . are attributable to China.”12 On December 21, 2009, the Dispute Settlement Body (“DSB”) established a single panel to examine the complaints.13 The above **case**s fostered a **perception that** antitrust and WTO meet when private anticompetitive conduct is mixed with state conduct. Emblematic of this viewpoint is Professor Eleanor M. Fox and Professor Merit E. Janow’s argument that “[t]rade and competition rules sympathetic to markets are important in today’s world of deep economic globalization.”14 Both of the scholars were astonished by the **opportunities for nations to play one system** (trade) **against the other** (competition). They also cautioned that U.S. **courts** involved with foreign export cartels need to flexibly interact with the international regime to form a coherent approach to legal challenges over foreign regulatory systems.15 What academics and other commentators have missed is that the involved U.S. courts and the executive branch’s stance in the above litigations perfectly illustrates a pervasive Transnational Legal Process. The U.S. not only **represents all antitrust nations’ interests** when it is anti-cartel. The transnational actors generated interactions that led to WTO law and competition policy interpretations that become internalized, thereby binding under domestic law (in this Article, China law). This Article assesses the roles of Transnational Legal Process by examining transnational actors engaged in antitrust litigation and evaluating their relationship to transnational actors participating in the WTO litigation. My central thesis is that essential **synergies exist** between trade and competition, in which Transnational Legal Process will largely prove a positive role in constraining state-sponsored export cartels and international cartels. To avert gaming by the litigants due to ambiguous factual evidence in cartel cases, U.S. courts and the executive branch should become active transnational actors. They therefore stimulate each other to participate in a dynamic process of Transnational Legal Process. Under the condition that cartel action is attributable to State in the antitrust proceeding, as defendants invoke foreign-sovereignty-related defenses, transnational actors in the competition system promote WTO obedience by sending a strong signal to the executive branch. Under the condition that cartel action is attributable to private parties in the WTO proceeding, transnational actors in **the competition system** should perform a gap-filling role that the WTO system precludes. 16 The resulting tendency is to suggest **a synergistic relationship** between transnational actors to play by rules of free trade (not to restrain exports) and competition (not to cartelize). Having described the most basic features of Transnational Legal Process, my Article partly confirms that Transnational Legal Process **could** somewhat fix the potentially worrying issue of nations’ opportunities to play one system (trade) against the other (competition). This Article is organized as follows: Part II explores the treatment of cartels and important synergies that exist between WTO law and competition law. Part III details the theory of Transnational Legal Process and explores its potential role where the antitrust system and the WTO system meet. Part IV examines the role of Transnational Legal Process in enforcing WTO law and competition policy in the Chinese context.17 I examine the chief factors behind China’s economic transition that have shaped its current antitrust economic conditions. I then discuss the relationship between trade associations and the government under the hybrid nature of China’s regulatory environment. Part V explores relevant cases, focusing on U.S. transnational actor involvement. These cases support the basic premises that U.S. courts as part of Transnational Legal Process have successfully stimulated other participants (in this Article, the United States Trade Representative (“USTR”)). The key point is that Transnational Legal Process is active and significantly affected China’s WTO internalization and competition policy convergence.18 The last Chapter stresses the future of Transnational Legal Process, free trade, and competition. I suggest that the WTO plays a central role in framing the issues at play in the U.S.-China **trade dispute**. Meanwhile, I argue Transnational Legal Process needs to discern the means to champion transformation in other facets, such as human rights, before internalizing international trade laws. Or, given the high stakes, it needs to learn how to leverage trade cooperation to internalize other domains of laws and regulations as a part of Transnational Legal Process. On the surface, it may appear that faith in Transnational Legal Process has collapsed in the domain of international trade. Critics argued that the world is experiencing a new situation where there is no international law to apply, or the existing WTO law may not precisely cover this new situation. I contend, however, that the influence of Transnational Legal Process is still at work, even **as the world experiences its longest-ever trade tensions**. Transnational Legal Process remains standing in good faith among the opportunities **for the U**nited **S**tates to strengthen free trade and competition—by translating the spirit and **intent of existing law to govern it.**

#### Now is key --- Covid means only restraining Chinese mercantilism can prevent a full collapse

Sally, 20 (Razeen Sally, Visiting Associate Professor, Lee Kuan Yew School of Public Policy, National University of Singapore. Sally taught at the London School of Economics, where he received his PhD., Sep-24-2020, accessed on 11-19-2021, Hinrich Foundation, "Deglobalization and the new mercantilism | Hinrich Foundation", <https://www.hinrichfoundation.com/research/article/us-china/deglobalization-new-mercantilism/)//Babcii>

Three eras of international trade preceded the present pandemic. The first – the quarter-century until the GFC – was an era of unprecedented liberalisation and globalisation. The second – the near-decade after the GFC – saw globalisation stall, though not reverse, and trade growth stagnate alongside [“creeping” protectionism](https://www.ft.com/content/4ee2d69a-6aa3-11e4-bfb4-00144feabdc0). The third, [starting in early 2017](https://www.china-briefing.com/news/the-us-china-trade-war-a-timeline/), was triggered by President Trump, partly to retaliate against increasing Chinese protectionism. It centred on a US-China trade war but rippled out into copycatting protectionism by other countries. Protectionism went from creeping to galloping. This **pandemic has triggered the worst deglobalisation since 1945**. International trade may shrink by up to a third, foreign direct investment by up to 40 per cent, and international remittances by 20 per cent, this year. The trade outlook is worse than it was during the GFC in two ways. Now economic contraction is synchronised around the world; during and after the GFC, fast growth in emerging markets, [**led by China**](https://www.bbc.com/news/business-45493147)**,** cushioned the fall in trade and enabled a recovery. Now services trade is suffering even more than goods trade; travel and tourism have collapsed. The GFC, in contrast, hit goods trade hard but services trade was more resilient, especially fast-growing travel and tourism. Now there are signs of a protectionist upsurge, starting with export bans on medical equipment, with new restrictions on foreign ownership in the pipeline. What is the medium-term – post-vaccine – trade outlook? First, protectionism is likely to increase as a spillover of domestic state – particularly industrial-policy – interventions that last beyond the present crisis. Crisis-induced subsidies will be difficult to reverse wholesale and will **have trade-discriminating effects**. New screening requirements might have a chilling effect on foreign investment. These and other **interventions to protect domestic sectors** and national champions have a home-production bias. **The list of “strategic” sectors to protect** on “national security” grounds **against foreign competition will likely expand**. There will probably be more restrictions on migration and the cross-border movement of workers. Two precedents are relevant: the “new protectionism” of the 1970s and ‘80s, which partly resulted from bigger, more interventionist government in domestic markets; and, more perniciously, the expansion of government after the first world war, which empowered interest groups to lobby effectively for restricted imports, foreign investment and immigration. Second, national unilateralism – this time “illiberal unilateralism” – will likely expand and make effective regional and global policy cooperation more difficult. It bodes ill for the WTO, APEC and the G20, also for regional organisations such as ASEAN, and will cramp the liberalising effects of stronger preferential trade agreements. This only increases the prospect of tit-for-tat retaliation, starting with the Big Three (the US, EU and China), and **copycatting protectionism that will spread around the world.** Third, the reorientation of global value chains will accelerate. Western multinationals will relocate parts of their **production from China** to other countries on cost grounds, as they have been doing, but increasingly **on political-risk and security grounds** as well. There will be a combination of onshoring, near-shoring and regionalisation of value chains, which will vary widely by sector. But the **overall effect will be to raise costs for producers and consumers.** Fourth, international trade will be hit harder by a more fractured and conflictual geopolitical environment, especially US-China rivalry, but not helped either by an inward-looking and divided EU. It will be squeezed between more unstable geopolitics and the recalibration of states and markets – more “state” and less “market” – domestically. All the above points to a new mercantilist trade order that might be more malign than benign, echoing the “new protectionism” of the 1970s and early ‘80s, or, even more worryingly, the 1920s and ‘30s. My ideal world is a classical-liberal one: limited government, free markets and free trade, underpinned by appropriate domestic and international rules. I would add political liberalism and legally protected individual freedoms. The post-1945 global order was some distance from this classical-liberal ideal, but it was liberal enough to deliver unprecedented freedom and prosperity. From this vantage point, the new mercantilist order, with emerging malign characteristics, is alarming – bad economics, politics and international relations; bad for individual freedoms and global prosperity. As a realist, however, I must take the world “as it is” rather than indulge in wishful thinking. To improve the world, principled liberalism must be combined with practical realism. I believe **the two biggest threats to global order are rising illiberal populism in the West**, endangering the West’s adherence to its own liberal values, **and the increasingly aggressive illiberalism of the Chinese party-state**. Both have mercantilist features that spill over the border into protectionism and restricted globalisation. Both feed off each other in a global negative-sum game. Hence both must be resisted: naivety and complacency should apply to neither. China under Xi Jinping, with its mix of authoritarianism, a state-directed market economy and external assertiveness, is **becoming a classic mercantilist power**, like Germany and Japan in the late nineteenth century and early twentieth century. Its external power projection, especially in the last decade, looks quite different to that of the US in the Pax Americana. Of course, at times, here and there, the US threw its weight about unilaterally and arbitrarily. But the essence of US leadership was to provide public goods for a stable, **open and prosperous world order**. It did so by organising concerts of international and regional cooperation. **In international trade,** that took the form of the GATT, later the WTO, and the multilateral rules it administers. **China**, in contrast, prioritises a combination of unilateral and bilateral **action to expand and entrench its power**. That subsumes the expansion of the PLA Navy in the East China Sea, South China Sea and Indian Ocean; and tight, asymmetric bilateral relations with smaller, weaker states in a twenty-first century recreation of the ancient tributary system. The Belt and Road Initiative should be seen in this frame: a network of hub-and-spoke bilateral relationships in which China wields power over dependent states. This is classic mercantilism. It privileges discretionary power, exercised unilaterally and bilaterally, over plurilateral and multilateral rules that constrain such power. **China** – meaning the Chinese Communist party state – **presents a pressing challenge to the liberal world order**. Dealing with this challenge will require some trade, technological and investment restrictions, and **limited supply-chain decoupling**. But that could easily descend into an all-round mercantilist and deglobalisation spiral. Hence China must be engaged at the same time, not least to preserve existing links that are mutually beneficial. Engagement and strategic decoupling need not be mutually exclusive. Still, this will prove an incredibly difficult, perhaps elusive, balancing act.

#### Trade decline triggers shooting wars, World War III, environmental destruction, runaway prolif threats that cause extinction

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Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

#### Specifically, Breakdown causes civil and proxy conflicts that draw in Iran, Russia, and North Korea---nuclear war.

Kampf ’20 [David; June 16; PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University; World Politics Review, “How COVID-19 Could Increase the Risk of War,” https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war]

But that overlooked the ways in which the risk of interstate war was already rising before COVID-19 began to spread. Civil wars were becoming more numerous, lasting longer and attracting more outside involvement, with dangerous consequences for stability in many regions of the world. And the global dynamics most commonly cited to explain the falling incidence of interstate war—democracy, economic prosperity, international cooperation and others—were being upended. If the spread of democracy kept the peace, then its global decline is unnerving. If globalization and economic interdependence kept the peace, then a looming global depression and the rise of nationalism and protectionism are disconcerting. If regional and global institutions kept the peace, then their degradation is unsettling. If the balance of nuclear weapons kept the peace, then growing risks of proliferation are disquieting. And if America’s preeminent power kept the peace, then its relative decline is troubling. Now, the pandemic, or more specifically the world’s reaction to it, is revealing the extent to which the factors holding major wars in check are withering. The idea that war between nations is a relic of the past no longer seems so convincing. The Pessimists Strike Back More than any other individual, it was cognitive scientist Steven Pinker who popularized the idea that we are living in the most peaceful moment in human history. Starting with his 2011 bestseller, “The Better Angels of Our Nature: Why Violence Has Declined,” Pinker argued that the frequency, duration and lethality of wars between great powers have all decreased. In his 2019 book, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress,” he wrote that war “between the uniformed armies of two nation-states appears to be obsolescent. There have been no more than three in any year since 1945, none in most years since 1989, and none since the American-led invasion of Iraq in 2003.” Optimists like Pinker held that, rather than the world falling apart, as a quick glance at headline news might suggest, the opposite was true: Humanity was flourishing. More regions are characterized by peace; fewer mass killings are occurring; governance and the rule of law are improving; and people are richer, healthier, better educated and happier than ever before. In their book, “Clear and Present Safety: The World Has Never Been Better and Why That Matters to Americans,” Michael A. Cohen and Micah Zenko argued that the evidence is so overwhelming that it is difficult to argue against the idea that wars between great powers, and all other interstate wars, are becoming vanishingly rare. Even when wars do break out, they tend to be shorter and less deadly than they were in the past. John Mueller, a senior fellow at the Cato Institute, also reasoned that the idea of war, like slavery and dueling before it, was in terminal decline, while Joshua Goldstein, an international relations researcher at American University, credited the United Nations and the rise of peacekeeping operations for helping win the “war on war.” But in recent years, a range of critics have begun to poke holes in these arguments. Tanisha M. Fazal, an international relations professor at the University of Minnesota, contends that the decline in war is overstated. Major advances in medicine, speedier evacuations of wounded soldiers from the field of battle and better armor have made war less fatal—but not necessarily less frequent. Fazal and Paul Poast, who is at the University of Chicago, further assert that the notion of war between great powers as a thing of the past is based on the assumption that all such conflicts resemble World War I and II—both are historical anomalies—and overlooks the actual wars fought between great powers since 1945, from the Korean War and the Vietnam War to proxy wars from Afghanistan to Ukraine. Meanwhile, Bear F. Braumoeller, an Ohio State political science professor, analyzed the same historical data on conflicts used by Pinker, Mueller and Goldstein, and found no general downward trend in either the initiation or deadliness of warfare over the past two centuries. What’s more, Braumoeller contends that the so-called “long peace”—the 75 years that have passed without systemic war since World War II—is far from invulnerable, and that wars are just as likely to escalate now as they used to be. Just because a major interstate war hasn’t happened for a long time, doesn’t mean it never will again. In all probability, it will. And by focusing solely on interstate wars, the optimists miss half the story, at least. Wars between states have declined, but civil wars never disappeared—and these internal conflicts could easily escalate into regional or global wars. The number of conflicts in the world reached its highest point since World War II in 2016, with 53 state-based armed conflicts in 37 countries. All but two of these conflicts were considered civil wars. To make matters worse, new studies have shown that civil wars are becoming longer, deadlier and harder to conclusively end, and that these internal conflicts are not really internal. Civil wars harm the economies and stability of neighboring countries, since armed groups, refugees, illicit goods and diseases all spill over borders. Some 10 million refugees have fled to other countries since 2012. The countries that now host them are more likely to experience war, which means states with huge refugee populations like Lebanon, Jordan and Turkey face legitimate security challenges. Even after the threat of violence has diminished in refugees’ countries of origin, return migration can reignite conflicts, repeating the brutal cycle. A Yugoslav Federal Army tank. Perhaps most importantly, recent research indicates that civil wars increase the risk of interstate war, in large part because they are attracting more and more outside involvement. In a 2008 paper, researchers Kristian Skrede Gleditsch, Idean Salehyan and Kenneth Schultz explained that, in addition to the spillover effects, two other factors in civil wars increase international tensions and could possibly provoke wider interstate wars: external interventions in support of rebel groups and regime attacks on insurgents across international borders. Immediately after the Cold War, none of the ongoing civil wars around the world were internationalized. According to the Uppsala Conflict Data Program, there were 12 full-fledged civil wars in 1991—in Afghanistan, Iraq, Peru, Sri Lanka, Sudan, and elsewhere—and foreign militaries were not active on the ground in any of them. Last year, by contrast, every single full-fledged civil war involved external military participants. This is due, in part, to the huge growth in U.S. military interventions abroad into civil conflicts, but it’s not only the Americans. All of today’s major wars are in essence proxy wars, pitting external rivals against one another. Conflicts in Syria, Yemen and Libya are best understood not as civil wars, but as international warzones, attracting meddlers including the United States, Russia, Saudi Arabia, Turkey, Iran, France and many others, which often intervene not to build peace, but to resolve conflicts in a way that is favorable to their own interests. These internationalized wars are more lethal, harder to resolve and possibly more likely to recur than civil wars that remain localized. It is not that difficult to imagine how these conflicts could spark wider international conflagrations. Wars, after all, can quickly spiral out of control. As Risks Increase, Deterrents Decline To make matters worse, most of the global trends that explained why interstate war had decreased in recent decades are now reversing. The theories that democracy, prosperity, cooperation and other factors kept the peace have been much debated—but if there was any truth to them, their reversals are likely to increase the chance of war, irrespective of how long the coronavirus pandemic lasts. Democracy is often considered a prophylactic for war. Fully democratic countries are less likely to experience civil war and rarely, if ever, go to war with other democracies—though, of course, they do still go to war against non-democracies. While this would be great news if democracy and pluralism were spreading, there have now been 14 consecutive years of global democratic decline, and there have been signs of additional authoritarian power grabs in countries like Hungary and Serbia during the pandemic. If democracy backslides far enough, internal conflicts and foreign aggression will become more likely. Other theories posit that economic bonds between countries have limited wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to preserve ties when there are high expectations for future trade, but war becomes increasingly possible when trade is predicted to fall. If globalization brought peace, the recent wave of far-right nationalism and populism around the world may increase the chances of war, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike. The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade. This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945. Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world. It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right. Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis. The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent. In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors. If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war. If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good. The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return

#### Recent, robust studies prove our impact

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Why does protectionism lead to conflict and why does free trade help prevent it? Learn about the connection between peace and free trade.

Frédéric Bastiat famously claimed that “if goods don’t cross borders, soldiers will.”

Bastiat argued that free trade between countries could reduce international conflict because trade forges connections between nations and gives each country an incentive to avoid war with its trading partners. If every nation were an economic island, the lack of positive interaction created by trade could leave more room for conflict. Two hundred years after Bastiat, libertarians take this idea as gospel. Unfortunately, not everyone does. But as recent research shows, the historical evidence confirms Bastiat’s famous claim.

To trade or to raid

In “Peace through Trade or Free Trade?” professor Patrick J. McDonald, from the University of Texas at Austin, empirically tested whether greater levels of protectionism in a country (tariffs, quotas, etc.) would increase the probability of international conflict in that nation. He used a tool called dyads to analyze every country’s international relations from 1960 until 2000. A dyad is the interaction between one country and another country: German and French relations would be one dyad, German and Russian relations would be a second, French and Australian relations would be a third. He further broke this down into dyad-years; the relations between Germany and France in 1965 would be one dyad-year, the relations between France and Australia in 1973 would be a second, and so on.

Using these dyad-years, McDonald analyzed the behavior of every country in the world for the past 40 years. His analysis showed a negative correlation between free trade and conflict: The more freely a country trades, the fewer wars it engages in. Countries that engage in free trade are less likely to invade and less likely to be invaded.

Trading partners

The causal arrow

Of course, this finding might be a matter of confusing correlation for causation. Maybe countries engaging in free trade fight less often for some other reason, like the fact that they tend also to be more democratic. Democratic countries make war less often than empires do. But McDonald controls for these variables. Controlling for a state’s political structure is important, because democracies and republics tend to fight less than authoritarian regimes.

McDonald also controlled for a country’s economic growth, because countries in a recession are more likely to go to war than those in a boom, often in order to distract their people from their economic woes. McDonald even controlled for factors like geographic proximity: It’s easier for Germany and France to fight each other than it is for the United States and China, because troops in the former group only have to cross a shared border.

The takeaway from McDonald’s analysis is that protectionism can actually lead to conflict. McDonald found that a country in the bottom 10 percent for protectionism (meaning it is less protectionist than 90 percent of other countries) is 70 percent less likely to engage in a new conflict (either as invader or as target) than one in the top 10 percent for protectionism.



### 1AC --- Plan

#### The United States federal government should increase its prohibitions on anticompetitive business practices by the private sector by expanding the scope of its core antitrust laws to restrict exemptions under foreign sovereign compulsion and international comity where the private party and foreign sovereign did not affirmatively disclose their intent to act in an anti-competitive nature

### 1AC --- Solvency

#### Solvency:

#### That sufficiently deters cartels BUT doesn’t undermine relations by retaining legitimate deference

\*The plan says if China and the Cartel disclose before hand they are coordinating to price fix that is legal, but doing it afterwards is not

Fox and Healey, 14 (Eleanor Fox and Deborah Healey, Eleanor Fox is Walter J. Derenberg Professor of Trade Regulation at New York University School of Law, Deborah Healey is Associate Professor on the Faculty of Law at the University of New South Wales, Austra, 2014, accessed on 11-15-2021, ABA - Antitrust Law Journal, Vol. 79, No. 3, "WHEN THE STATE HARMS COMPETITION—THE ROLE FOR COMPETITION LAW on JSTOR", https://www.jstor.org/stable/43486966)//Babcii

In terms of the defense, which if allowed would validate the state action, we might frame the principal choice in broad terms: **Should private parties**, acting anticompetitively, **be accorded a broad or a narrow state action defense**? Under a broad defense, private parties could defend their anticompetitive behavior if a state policy **merely encouraged it. Under a narrow defense** private parties would be responsible for their behavior **unless the state specifically ordered it** or the state clearly expressed a policy that depended upon the anticompetitive behavior and closely supervised the private anticompetitive acts. (The latter conditions are akin to those required by U.S. law.) The European Union has a very narrow defense: the private **party must have had no autonomy to act competitively.** A yet narrower defense could in theory **require** one more condition - **transparency**. Let us suppose that the offense was price fixing. Contemporaneously with its agreeing to fix prices the implicated firm could be **required to make a public disclosure: "I have just agreed to fix the price of x. The state required me to do it**." This condition would not only provide transparency but would **smoke out latter-day contrived contentions**: "The state made me do it." A narrow defense favors more **market**, less state. A broad defense favors more state, less market. A broad defense has significant costs. It errs on the side of vested interests. It would give private firms generous leeway to act anticompetitively for their private benefit, which may be **far beyond** what the state contemplated and not remotely needed by the state for its public objectives, as the uranium firms attempted to do in carrying out their cartel in the late 1970s.153 But what costs might a narrow defense impose upon state autonomy? Might it chill the adoption of programs that are (according to the state) good for the people and that the state cannot effectively execute by itself? China made such a claim in an international context in litigation in a U.S. court charging Chinese **vitamin C** makers with price fixing of vitamin C for sale into the United States. China argued that the pharmaceutical trade associations - which became the forum for the private price fixing - were infused with a governmental character, and that China ordered the price fixing of vitamin C in order to shield its firms from dumping claims and to ease them into a market economy.154 **We prefer a narrow defense**. The state can almost always carry out its desired state policy efficiently without enlisting private firms in otherwise **illegal conduct**, and the gains from a broad defense are almost always private. We now turn to fairness. If a defendant firm followed the policy of its state and could not have known that it was doing wrong, there would be a fairness concern. That situation will be rare. If unfairness would occur - e.g., treble damages liability for following an apparent command of the state - **it could normally be addressed in the remedy**. The court could issue an injunction against future price fixing, and perhaps (if allowed by law) could limit damages to the amount of the price fixers' windfall profits. The needs of the state, not the fairness claims of defendants, would lead the search for a wise rule.

#### The plan restores world welfare --- No risk of trade or econ DA

\* No Econ DA --- The defense was a massive risk that companies assumed they would lose  
\* No Trade DA --- It’s not a jurisdictional question, controversy isn’t derived from the “direct” question in the FTAIA

Fox, 19 (Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. , 2019, accessed on 11-12-2021, Awards.concurrences, "ANTITRUST: UPDATING EXTRATERRITORIALITY", https://awards.concurrences.com/IMG/pdf/4.\_updating\_extraterritoriality.pdf55787/361912bf66b468d8848477187d73628b861dbf86)//Babcii

4. CHINESE VITAMIN C EXPORT CARTEL: CAN A FOREIGN SOVEREIGN IMMUNIZE ITS COMPANIES FROM THE IMPORTING NATION’S ANTI-PRICEFIXING LAW? A limited foreign sovereign compulsiondefense is available under US **antitrust law**. Defendants can defend that they did the violative act solely on their own soil, they had to do it because their government ordered them to do it, and the penalties they faced from violating the order were so great that they could not afford to violate the order. 29 There is also the possibility of dismissal of a private action on comity grounds. It is unclear and much debated as to whether this ground is available in antitrust cases where the anticompetitive effects in the U.S. are direct, substantial and foreseeable, and indeed the intended and the only harm is local.30 Comity is a domestic law concept and, if available, is intended to be applied where foreign interests outbalance US interests and assertion of the US interests will interfere with the foreign relations of the United States.31 The Chinese vitamin C makers fixed the export price of vitamin C to the United States. They admitted it. The price fixing took place within the Chinese trade association, the Association of Importers and Exporters of Medicines and Health Products. Trade associations in China were infused with the presence of government officials, who typically guided the firms in the interests of China.32 US direct buyers sued. The defendants pled foreign sovereign compulsion and comity. The Chinese Ministry of Commerce (MOFCOM) told the federal district court that it ordered the firms to fix their export prices. MOFCOM explained: The firms needed to adjust to a market economy, and MOFCOM wanted them to avoid a US antidumping action. Did MOFCOM really order the firms to fix prices? The jury found that it had not; a Chinese notice invited industry self-regulation, and the notice did not appear to be an order. The jury returned a large award to the overcharged buyers. The Court of Appeals for the Second Circuit reversed. It held that comity required the court to accept China’s word (China’s interpretation of its notice) and that the Chinese interests outweighed the US interests, and it dismissed the case. The Supreme Court vacated the decision and remanded the case because the appellate court improperly treated as conclusive China’s declaration to the court that it ordered the cartel.33 The Vitamin C case—also called Animal Science—**is not about extraterritorial jurisdiction**. There was clearly jurisdiction. The case is about an **alleged** clash of sovereigns. The analysis applicable to the cases of extraterritoriality is equally applicable to resolve the clash. 1. Were the effects of the price-fixing direct, substantial and reasonably foreseeable? The answer is, yes, without question. 2. Was the US enforcement proportionate to the interests of the United States? Again, yes, without question.34**\*\*\*FOOTNOTE BEGINS\*\*\*** 34 Moreover, enforcing the price-fixing **law would create no business uncertainty**. The Chinese firms would surely have known of the strict US law and the uncertainty of a foreign sovereign compulsion defense, and must have taken the risk. If they did not want to take the risk, **they could have** refrained or (if really compelled) **asked for a business review letter rather than keeping their conduct secret**. In a credible case for China’s overriding interest, a favorable business review letter should issue; transparency would facilitate the process of clarifying the law. **\*\*\*FOOTNOTE ENDS\*\*\*** 3. Where did the world welfare interests lie? **This was a naked export cartel**—to the US and the other countries as well. **World welfare lay with the enforcement**. 4. How should the conflict of sovereigns be resolved? China wanted to shield its firms from the US antitrust system. But so did Saskatchewan and maybe Canada (in the potash situation), and so did Korea and Taiwan (in LCD panels); they just did not claim that they said to their firms: “I order you to cartelize.” Why should a country’s order to its firms (let alone its claim that it ordered its firms) to violate the regulating country’s law be enough to differentiate the Potash case (where the US harming conduct was not even as direct) and to immunize the price-fixers? What gives China a greater interest in shielding its firms from the US anti-price-fixing law than the US interest in enforcing its world-standard law against pricefixing?35 If China did order its firms to fix prices in violation of US law and in violation of **the principles of all antitrust jurisdictions including its own internal market rules**, this was a frontal assault on US law and **world norms**. China’s own domestic law not only prohibits pricefixing but even prohibits government officials from ordering firms to price-fix.36 Even if there was a clash of sovereigns in Vitamin C, **the US and world interests easily outweigh China’s**, in the view of this author37 (albeit not in the view of the Court of Appeals of the Second Circuit, which is now reconsidering the case on remand from the Supreme Court).38

#### Numerous studies prove the plans expansion of antitrust successfully deters cartels

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In maintaining a legal and institutional capacity to apply U.S. law **extraterritorially** on the basis of U.S. effects, U.S. courts have prompted a broad spectrum of private entities – American and foreign – **to give U.S. rules substantial weight** in their transnational operations. Of course, foreign governments can block their own domestic institutions from enforcing unwelcome U.S. court judgments, which restricts the efficacy of U.S. courts to situations where the United States has independent enforcement power. Foreign governments also retain the option to engineer legal grounds for defendants in U.S. litigation to claim “**sovereign compulsion**” by enacting laws expressly requiring private entities inside their territories to take actions that violate U.S. law. In many instances, however, taking such steps would narrow options for private actors in foreign jurisdictions in ways that would have large commercial and economic downsides (as, for example, if the Swiss government had changed its laws to require, rather than merely to permit, domestic watchmakers to restrict the production and sale of watch parts). In sum, the ability and **willingness** of U.S. courts to apply U.S. antitrust laws extraterritorially has shaped not only the **incentives** of private entities but also the menu of domestic legal options available to foreign governments whose citizens have U.S. ties. In contrast, the legal and administrative tools for effects-based extraterritoriality have existed in German, British, and EEC law since the 1950s and have been used at a modest but growing rate since the late 1960s. Over this period, European competition rules and practices, particularly with respect to anti-cartel policies, have increasingly come to resemble those of the United States.200 Economic integration achieved through the EEC, and now the EU, correspondingly, has given European regulators and courts an enforcement capacity analogous to that of the United States. However, this equality of capacity has not yet translated into extraterritorial regulatory claim-making on a scale approaching that of the United States. A key reason why is that the power to initiate competition enforcement in Europe remains, in many practical respects, under the near-exclusive control of EU and member state regulators. The hypothesis that U.S. **extraterritoriality** influences private strategic behavior in the antitrust realm is further confirmed by other **empirical work** that focuses on firm behavior. One study, by Julian Clarke and Simon Evenett (2003), examines the effects of international anti-cartel enforcement on the decisions of private entities about whether and on what level to engage in legally prohibited activities in particular settings. Their approach uses a gravity trade model and **data from the World Trade Analyzer database** to measure actual trade flows for a specific commodity (**vitamins**) for nine countries on three continents. They then compare those results with estimated benchmarks in the absence of a cartel constructed from OECD budget and enforcement records. Overall Clarke and Evenett **find that robust enforcement of antitrust rules has deterrent effects on international cartel activity**. Another study by John M. Connor (2007) compares the effectiveness of U.S., Canadian, and EU anti-cartel enforcement in the period between 1990 and 2008 along two dimensions. The first is the likelihood of detecting illegal behavior. The second concerns the harshness of penalties. Connor finds the U.S. system both more likely to **detect** **wrongdoing** and more likely to produce a **swift and harsh response** when wrongdoing is identified, for example, by imposing large corporate fines or individual criminal penalties. Among the observable ways in which this affects private strategic behavior is in the selection of locations for cartel meetings. Connor finds that conspirators generally avoid U.S. territory, preferring instead to meet “in Switzerland, Mexico, Japan, Hong Kong, and several EU cities that were regarded as less risky.” 201 Still more to the point, he finds that, although the U.S. and EU economies have become roughly equal in terms of GDP, 62 percent of the enterprises that were the target of criminal antitrust enforcement during his study were headquartered in Europe, and only 16 percent were headquartered in the United States. This implies a high degree of awareness among U.S. enterprises about the outer limits of U.S. antitrust rules and a healthy respect for U.S. enforcement power. To summarize, U.S. government regulators and many key private constituencies inside the United States stand to gain little from a more internationally centralized approach to antitrust enforcement. As Europeans have edged ever closer to U.S.-style antitrust rules and practices, EU regulators and those in Europe’s larger states have learned to wield the effects doctrine to their advantage. At the same time, the integration of European markets has given those regulators increasing leverage to use it effectively. European extraterritorial enforcement, however, has been, with few exceptions, limited in comparison to U.S. practice. If this were to change substantially in the future with the growth of private enforcement in Europe, the result could be an increase in clashes over the authority and appropriateness of extraterritorial regulation and the erosion of the long-standing U.S. preference for unilateralism in international antitrust enforcement.

#### DAs are fake news --- The supreme courts “respectful consideration” doctrine ensures infinite uncertainty

\* To be clear --- In first case the 2nd circuit ruled they were “bound to defer” to China, Supreme court later rejected that and remanded the case, in 2021 the 2nd circuit reaffirmed. Plan overturns the most recent 2nd circuit case BUT the supreme court case should have thumped

Bu, 20 (Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, 4-30-2020, accessed on 11-30-2021, Oxford University Press, "Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment", https://academic.oup.com/jeclap/article-abstract/11/5-6/274/5827020)//Babcii

VI. Conclusion

The US Supreme Court’s **Vitamin C** ruling clarifies that international **comity does not require a court to give binding deference** to a foreign sovereign’s interpretations of its own laws **has far-reaching and significant consequences**. The Supreme Court certified only a narrow question, and offered several (non-exhaustive) criteria the courts should consider. The standard of **respectful consideration** leaves open the possibility that federal courts may reach decisions that completely or partially **reject positions of foreign governments, and that they may do so on inconsistent grounds.** The ruling is focused more on qualitative analysis, there is no much difference in procedures though. Such a multipronged balancing approach **casts more uncertainty for litigants**. Although it addresses the long-standing split in the deference level, this ruling will not change the federal court’s practice dramatically. In this vein, the ruling does not constitute a significant departure from the current approaches by the federal court. It is not a revolution, but a milestone of the evolution of the deference standard.

# 2AC

## Adv---Pharmaceuticals

### SOE’s

#### The private sector includes the Chinese private sector --- AND it’s increasing in the squo

Chandrasekhar 17 – C. P. Chandrasekhar is currently Professor at the Centre for Economic Studies and Planning, Jawaharlal Nehru University, New Delhi. He has published widely in academic journals. August 2017, “How Large is China’s Private Sector?” https://www.networkideas.org/wp-content/uploads/2017/08/China\_Private\_Sector.pdf

It is a truism that economic reform in China has meant a substantial expansion in the role of private initiative in economic activity. The dismantling of communes and collectives, the encouragement of foreign investment, the recognition of the private sector initially as a “supplement to the state-owned economy” and subsequently as an “important component of the socialist market economy”, the closure, restructuring and disinvestment of shares of enterprises in the state-owned sector, the opening of Communist Party of China (CPC) membership to entrepreneurs and businesspersons, the sale of equity in leading state-owned banks and most recently the decision to make all state-held shares in the1,300 listed companies publicly traded, have all contributed to a substantial expansion in the role of the private sector, and continue to do so.

#### Chinese SOEs are counterintuitively part of the Chinese private sector – and to the extent that there is an artificial difference there is no ground loss because ownership has no relation to function in the Chinese economy

Emmerich 17 – Brandon Emmerich is a Data Analyst at Suvretta Capital Management. Brandon writes for Financial Times, Seeking Alpha, and Global Finance about Chinese business practices, 2-17-2017, "Parsing State Ownership In China More private companies compete with China’s state-owned enterprises, but government influence continues to run deep," Global Finance Magazine, <https://www.gfmag.com/topics/blogs/identifying-soes>

\*graphs omitted\*

How does China define company registration? For the government, the identity of the controlling shareholder—that is, the legal entity with the power to appoint and remove board members—sufficiently designates a company as either state or private sector. In the case of private sector companies, the controlling shareholder is a person, or often a family. SOEs, on the other hand, are controlled by either a cabinet-level ministry or a state holding company responsible for preserving and managing state-owned assets, called a SASAC. Although the official taxonomy is quite straightforward, there are two reasons why this first-order approximation needs significant refinement if we are to truly understand the reach of the state. In fact, not only is the state more involved in the economy than China’s company registration statistics imply, the state vs private sector distinction poorly describes the relationship of any given company to the state. Mixed ownership, in particular, muddies China’s company registration taxonomy. Of the 1,600 private sector listed companies in China, 23% count either Huijin or the CSF as one of their top shareholders. Note, Huijin is owned by China Investment Corporation, which is owned by the ministry of Finance, which reports to the State Council. The CSF is owned collectively by China’s stock, commodities and futures exchanges, which are all regulated by the CSRC, which is a cabinet-level ministry directly under, you guessed it, the State Council. Whew. In other words, minority owners of nearly a quarter of Chinese private sector listed companies report at least indirectly to the State Council—that is, President Xi. Mixed ownership permeates the state sector as well. In fact, nearly 60% of China’s 980 listed SOEs count an individual as one of their top 10 shareholders. Additionally, while ownership presents a convenient methodology for classifying companies into either the state or private sector, it has very little to do with the functional definition of state control. In a paper on Chinese state capitalism, Beyond Ownership, Curtis Milhaupt of the Columbia Law School and Wentong Zheng of the University of Florida explain: Functionally, SOEs and large POEs in China share many similarities in the areas commonly thought to distinguish state-owned firms from privately owned firms: market access, receipt of state subsidies, proximity to state power, and execution of the government’s policy objectives. Which is to say, the ownership of state-owned or private sector companies fails to define sufficiently the scope of state involvement. To understand the blurred lines between China’s state and private sectors, let’s consider three dimensions of state intervention: management control, financial control and extra-legal control.

## Adv---Cohesion

## OFF

### 2AC --- T --- Exemptions

#### Expand the scope just means to increase claims

Epstein, New York University School of Law, 19 [Richard A., Laurence A. Tisch Professor of Law, The New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, the University of Chicago. This Article was presented at a conference sponsored by the Classical Liberal Institute and the Nebraska Law Review, Understanding the Visible: The Undisputed Facts and Disputed Law of Platform Antitrust, held on February 22 & 23, 2019 at the NYU Law School. For the record, I have advised Qualcomm on various antitrust matters over the years, including its current litigation with the FTC. My thanks to William Dawley and Joseph Scopelitis, NYU Law School Class of 2020 for their excellent research assistance., Nebraska Law Review, “SYMPOSIUM: Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Theory”, 98 Neb. L. Rev. 241 \*

The question then arose whether the violation of the Telecommunications Act counted as a violation of the antitrust laws as well. The statutory framework contained two key provisions. The Telecommunications Act was not allowed to preempt the operation of the antitrust laws: "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 64 By the same token, the status quo was preserved because the Telecommunications Act also did nothing to expand the scope of the antitrust laws. It did not create new claims going beyond existing antitrust standards. The creation of any additional antitrust standards would be equally inconsistent with the saving clause's mandate that nothing in the Telecommunications Act would "modify, impair, or supersede the applicability" of existing law.

#### Courts can expand the scope

Wallace 92 – Wallace, Goodwin, and Poole, circuit judges. [Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co., 981 F.2d 429 (9th Cir. 1992)]

3 The Act's definition of “antitrust laws” “includes the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the Wilson Tariff Act, and the Act of June 19, 1936, chapter 592.” 16 U.S.C. § 2602(1) (citations omitted). The definition's use of the word “includes” suggests that the phrase “antitrust laws” may encompass more than just these statutes. See Highway & City Freight Drivers v. Gordon Transps., Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002, 99 S.Ct. 612, 58 L.Ed.2d 678 (1978); American Fed'n of Television & Radio Artists v. NLRB, 462 F.2d 887, 889–90 (D.C.Cir.1972); United States v. Gertz, 249 F.2d 662, 666 (9th Cir.1957). In interpreting another statute, the Supreme Court has held that the term “laws” encompasses both statutes and court decisions. See Illinois v. City of Milwaukee, 406 U.S. 91, 99–100, 92 S.Ct. 1385, 1390–91, 31 L.Ed.2d 712 (1972). We conclude that the phrase “antitrust laws” embraces not only the text of the Sherman Antitrust Act and the other listed statutes, but also the courts' interpretations of them. The state action doctrine is an interpretation of the Sherman Antitrust Act, see Parker, 317 U.S. at 350–51, 63 S.Ct. at 313–14, of which Congress was aware, see Director, Office of Workers' Compensation Programs v. Perini North River Assocs., 459 U.S. 297, 319–20, 103 S.Ct. 634, 648–49, 74 L.Ed.2d 465 (1983), when it chose the phrase “antitrust laws.” The plain meaning of section 2603(1) thus establishes that the Act is to have no effect on the applicability of the state action doctrine to gas and electric utilities like PG & E.

#### They certainly expand

Donald F. **Turner 90**. Professor of Law, Georgetown University Law Center. "The Virtues and Problems of Antitrust Law," Antitrust Bulletin 35, no. 2 (Summer 1990): 297-310.

However, unsound interpretations of antitrust laws have adverse economic effects. **Court-formulated rules have varied** from time to time over the years **since antitrust statutes were passed, and the scope of antitrust prohibitions were either enlarged or reduced**. While there are extensive disputes as to what the precedents' defects have been and are, it is generally recognized that **antitrust law** has had and still **has** some undesirable **features that the courts or Congress should correct.**

#### Courts prohibit business practices

**Scott, 6** (Thane Scott, Thane D. Scott is a partner and co-chairman ofthe antitrust practice group at Boston’s Edwards Angell Palmer & Dodge., 06, accessed on 8-21-2021, Morganlewis, "Is a second golden age of antitrust here?", https://www.morganlewis.com/-/media/files/docs/archive/ts-is-a-second-golden-age-of-antitrust-here\_2271pdf.pdf)//Babcii

It was not until Standard Oil that the Supreme Court struck a considered balance between fostering economic risk-taking and innovation through the protection of reasonable contracts, and curbing predatory conduct that stifled competition and small businesses’ freedom to trade. By holding that the Sherman Act prohibited only unreasonable restraints of trade and monopolies, the Standard Oil **court prohibited anticompetitive use of market power** while encouraging contracts and mergers that fostered healthy economic growth and development.

### 2AC --- CIL CP --- F/L

#### 4. No precedent or solvency---rollback.

Michelle M. Kundmueller 02, Ph.D. candidate, Department of Political Science, University of Notre Dame, former attorney at Wildman, Harrold, Allen & Dixon, specializing in constitutional law, Ph.D., M.A. Political Science, University of Notre Dame, J.D. University of Notre Dame Law School, B.A. Politics and Law, Flagler College, "The Application of Customary International Law in US Courts: Custom, Convention, or Pseudolegislation?" The Journal of Legislation, Vol. 28, pg. 369-372, 2002, Hein Online.

The argument against direct incorporation of customary international law focuses on several perceived evils, with the primary focus resting on lack of constitutional justification and incompatibility with constitutional principles such as separation of powers and democratic rule. In a Note that focuses specifically on the question of whether customary international law supersedes federal statutes, Garland A. Kelley takes a moderate position, claiming that customary international law should not supercede federal law, but that "American courts must attempt to reconcile U.S. federal statutory law with conflicting international norms and standards, whenever possible.",42 In the course of explaining why federal law ought not be superseded by customary international law, based on constitutional interpretation, Kelley makes an argument for how customary international law has the potential to threaten some of the most basic premises of American constitutional government.

Kelley challenges the claim that the last-in-time doctrine applies to customary international law, pointing out that the Supremacy Clause leaves ambiguous "how conflicts between separate classes of supreme laws are to be resolved., 43 While conflicts between different types of federal law would normally be resolved through the last-in-time doctrine, Kelley notes that with customary international law this does not result in a comfortable outcome." The precise date of a doctrine of customary international law becoming effective, because of the nature of customary international law, is impossible to determine; hence, any date chosen is entirely arbitrary. Unless one is willing to accept the premise that customary law is constantly in the process of being renewed-and, thus, that customary international law always trumps legislative federal law-this issue presents a serious practical obstacle to the application of the last-in-time rule.

In a discussion of jus cogens, a specific form of customary international law, Kelley discusses two more fundamental problems of incorporation. Not only is the literature on jus cogens conflicting as to the substance of jus cogens, but the issue of who, in the arena of domestic law, will determine both the substance and applicability of jus cogens does not have an obvious answer.45 The issue of where to lodge the power of applying customary international law creates a dilemma, but this is not the most daunting problem. Kelley claims that "the most serious objection" is "that ceding peremptory power to jus cogens norms is fundamentally at odds with basic American constitutional values."46 Modern customary international law conflicts with domestic legal issues, issues concerning the self-governance of Americans. Kelley explains that the heart of the problem lies in the potential for customary international law, over which Americans have no direct control, to undermine democracy and the consent of the governed.

If our form of constitutional government stands for anything, it is the belief that no law is law without the consent of the governed, as expressed through our elected representatives. Preempting domestic statutory law with norms of customary international law, particularly customary international law based not on the practice of nations, but on declarations that are purposeful and hopeful, is to apply law that has been generated by non-United States law-making procedure.47

Kelley contends that the loss of a truly consent-based government would not be the only casualty of customary international law's dominance over federal legislation: such implementation would necessarily come at "considerable cost, upsetting the safeguards inherent in at least three basic U.S. constitutional values and assumptions ....",48 Because directly incorporating customary international law as dominant over federal law would necessitate using the courts as the applying and interpreting body, such incorporation by definition gives previously unknown power to the courts. This power, as Kelley points out, comes at a price. The judicial branch's gain would come at the expense of the President, Congress, and state governments. According to Kelley, such costs are "excessive and illegitimate."49

In an article on the authoritative sources of customary international law in the United States, Harold G. Maier argues that both the

governmental structure of the United States and the functional nature of international law itself compel the conclusion that the authoritative source of public international law in the United States is the will of the United States body politic as reflected in federal law ... not the will of the world community of nations. 50

Maier bases much of his argument on the role of territorial sovereignty. Territorial sovereignty and nationhood both require "possession of the internal authority to decide whether to violate international obligations."51 Not only is the authority to choose whether to follow international norms vested in the body politic of each nation, but, as a practical matter, this is the only method through which international law can be translated to the domestic front. In the words of Maier, "[i]t is this functional reality, as much as any language of the courts or of the Constitution, that supports the proposition that United States decision makers are not bound by the Constitution to apply rules of customary international law in domestic fora."52

In practice, this theory demands "active affirmative participation" of a nation's "authoritative decision-makers" for customary international law to have "applicability within a nation's legal system."53 Maier explains what this means within the framework of the U.S. legal system, stating that the "principles of international law are accessible to the federal courts when they decide cases by the common law method. 5 4 While available to courts, "those principles are given domestic legal effect by the authority of the court applying them in its traditional common law process, not by some metaphysical omnipresence of the international legal regime."5 The courts exercise their discretion in applying and interpreting customary international law.

Customary international law is further checked and, ultimately in the scheme of U.S. law, balanced by the legislative branch. As the will of the people of the United States-as determined through our own law-making process-dominates the common law findings of the judiciary, so the legislative findings of Congress, when they contravene a court's holding concerning customary international law, reverse the holding of the court system. In the words of Maier, when there is "conflict between the will of the people, reflected by the act of their government institutions, and the will of the international community reflected in customary international law, the municipal will must necessarily control .... 56 Maier believes that, within pal will must necessarily control .... ."" Maier believes that, within the U.S. political and legal systems, customary international law can and rightfully does have a guiding role to play; ultimately, however, the decision-making authority is still retained by the people and government, none of whom are "subject to the limitations created by an international legal regime."57

#### 5. Can’t solve --- irregular processes undermine deterrence

Baker 11 (Donald I., Senior Partner, Baker & Miller PLLC, Washington DC  Why Is the United States So Different from the Rest of the World in Imposing Serious Criminal Sanctions on Individual Cartel Participants?, 12 Sedona Conf. J. 301, 305–06 (2011))

The accepted wisdom in the US is that we impose jail sentences against those who commit antitrust violations as a painful remedy for them and to deter similar conduct by others.18 As an apparent consequence, we do not tend to see serial violators (those individuals who repeat the same offence after having been caught once). Rather, we see some different individuals and enterprises violating the law because they think they can get away with it, while projecting some significant economic advantage to themselves and or their employers in trying to do so. Any system that is based on deterrence--and fairness--must have clear rules. Ordinary business actors must be able to understand the difference between right and wrong, and their lawyers must be able to give unequivocal legal advice. The basic anticartel rules against price-fixing and bid-rigging (and even market allocations) meet this required standard of clarity and predictability. Effective deterrence also requires that those who might be tempted to take illegal action believe that there is some reasonable probability of their being caught and that, if so, the consequences are likely to be grave. Risk of conviction and imprisonment also provides a powerful inducement for one coconspirator to inform on her other coconspirators. Moreover, the US has provided a fairly high level of funding for antitrust criminal enforcement by the DOJ and a uniquely advantageous prosecutorial system of grand jury investigations. Having more DOJ staff armed with a secretive process favoring the prosecutors clearly increases the government's chance of catching covert conspirators and thereby raises the stakes for those rationally contemplating price-fixing or other cartel activities. Consistency and comprehensiveness in enforcement are very important. For criminal laws against individual cartel participants to really matter, enforcement must be frequent and highly visible. It has taken almost a century in the US for incarceration to become routine for cartel participants who are caught. By contrast, having a criminal law against a profitable activity is unlikely to be effective as a deterrent if the normal prosecutions are so infrequent as to appear more like random lightning strikes or prosecutorial vendettas.

#### Clear and certain application is key to prevent circumvention

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

A. Neutrality, accuracy, and consistence

A foreign sovereign would unlikely be wholly impartial and could be liable to make false or inconsistent representations to federal courts.66 One of the possible risks is that it may not be neutral, which results from a strong incentive to shield its domestic entities from antitrust liability abroad.67 In Vitamin C, MOFCOM may have been motivated to shielddomesticfirms fromtrebledamages.68 As Sweeney observed, the gains from the uncompetitive behaviour would accrue to their home state,while the victims are foreign purchasers.69 This is reflected in the Chinese government’s allegedly inconsistent position regarding its regulation of Vitamin C exports in front of the World Trade Organisation (WTO).70 China’s submission directly contradicted previous statements it had made about its competition law to theWTO.71 It is inferred that MOFCOM’s positionwas a post hoc attempt to shield the Chinese defendants’ conduct from antitrust scrutiny.72 Being inconsistent and self-serving, MOFCOM’s statement is due limited deference.73 The **lack of consistency** with earlier positions is not dispositive; however, it **can compromise** the **reliability** of the litigants’ position. As Godi said: ‘In fact, when a foreign government wishes to intervene as a third party to a dispute, its objective is rather clear: self-interest.’74 **Opening the door to this kind of manipulation** of American lawsuits would be selfevidently unwise.75 **The Court should assess** the extent to which the foreign sovereign’s litigation position is **consistent with the positions it has taken in earlier briefs.**76

#### 7. No impact or impact uniqueness – AND state legislatures will block it

Eric A. Posner 17, Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School. Thanks to Adam Chilton (10/10 Torts Prof) “Liberal Internationalism and the Populist Backlash,” 49 ARIZ. St. L.J. 795 (2017). UChicago Law Libraries.

We can summarize this backward movement by noting that international security-as embodied in the UN charter's prohibitions on use of force-and human rights are the two most significant pillars of international law since the end of the Cold War. And both are in shambles. The United States and Russia have repeatedly violated the use of force prohibition. And human rights have worsened over the last decade.6 Meanwhile, tribunals and other international institutions are contributing little to international order, and there have been no major efforts to advance international legalization for more than a decade.∂ Meanwhile, international economic cooperation is also in decline. Here, we should point out something that most debates about international law leave out: the persistent unhappiness of major developing countries with what they regard as their coercive and unfair treatment under the major international economic institutions-including the austerity policies of the IMF, and the trade policies of the WTO.68∂ Combine these events with the populist backlashes within countries and the overall impression is one of significant backsliding and retrenchment something that international law scholars have not, as far as I am aware of, predicted or even discussed as realistic possibilities. What went wrong? The simple answer is that the benefits of globalization-greater wealth and freedom-failed to materialize as promised, with most of the gains going to a small fragment of the global elite, or to vast populations of workers in places like China, with cheaper consumer goods in the West failing to compensate people in their minds for the economic dislocation they experienced.6 9 Human freedom has not advanced since 2000, and has very likely declined. Meanwhile, the costs of globalization turned out to be highly visible. These costs included the spread of international terrorism, disease (such as the SARS epidemic in 2002-2003), and economic instability, represented above all by the financial crisis of 2007-2008, whose causes and effects were global in nature. As in the 1930s, the natural reaction has been to abandon global commitments in favor of familiar tribal and national loyalties. But modern international law, born out of that era, was supposed to prevent a return to it by binding nations ever more closely together. Why did that not happen?∂ III. WHAT ACCOUNTS FOR THE BACKLASH?∂ The answer to this question is speculative but clues lie about, and they can be put together into a suggestive theory. The overwhelming impetus to backlash lay in popular opinion across countries. Many ordinary people, left behind by globalization, have united in their opposition to further international legalization. They have lost faith in international institutions (as illustrated best by Europe) and in the national leaders who supported them. They now seek new national leaders who will advance the national interest rather than global ideals.∂ The backlash should not come as a complete surprise. As we saw, worries about the democratic deficit in Europe are as old as European integration. While most scholars supported European integration, either because they believed that the democratic deficit was mythical, or that the benefits of integration exceeded any costs to democracy," the dissenting view persisted if only because it was impossible to ignore the evidence."' Public opinion surveys showed that many Europeans distrusted European institutions. European politicians successfully ran on anti-Europe campaign promises. Voters in some European countries rejected the European constitution and the Lisbon Treaty. And pro-integration mainstream leaders took the democratic deficit seriously enough to try to address it by strengthening the European Parliament. Brexit only ratified a longstanding worry.∂ In the United States, the debate took place in a lower key. The United States is not bound by any international institutions whose strength and authority is comparable to that of the European institutions. Indeed, the United States has disproportionate influence over most major international institutions, and nearly always can protect itself with veto rights. However, from time to time, a relatively minor question of international law erupted into public consciousness. The possibility that the International Criminal Court could have jurisdiction over American soldiers provoked Congress to pass a law in 2002 that appeared to authorize a military invasion of the Netherlands if an American was ever held for trial. 2 Roper and related cases caused a public outcry, leading some state legislatures to pass statutes that blocked courts from relying on "foreign law."" 3 The American political system is suspicious of human rights treaties, and the Senate has become increasingly reluctant to give its consent to any treaty at all-although this is partly an artifact of a 2/3 majority rule and the disproportionate influence of rural populations in that body.

### 2AC --- DOJ DA --- F/L

#### 1. They don’t have the money for antitrust priorities

Leah Nylen 12/23/21, covers antitrust and investigations for POLITICO, 12/23/21, Potential DOJ suits against Apple and Google delayed amid budget woes, https://www.politico.com/news/2021/12/23/apple-google-doj-delay-526072

The Justice Department is still months away from deciding whether to sue Apple or file a new suit against Google over antitrust concerns, two people familiar with the discussions said — a question facing new financial complications after the collapse of President Joe Biden's social spending bill. DOJ antitrust prosecutors had earlier aimed to wrap up their probes of the two tech giants by Dec. 31, culminating years of scrutiny by the department into Apple's App Store and Google's command of the online ad market. But now the decision on going to court is likely to come in March or later because of continued discussions about where to file and who will make the call, the two people told POLITICO. They spoke anonymously to discuss internal DOJ deliberations. Another major concern for the department is the likely expense of a court battle with the two companies, each of which has a market value exceeding $1 trillion. That issue became more fraught this week when Sen. Joe Manchin (D-W.Va.) torpedoed Democrats' Build Back Better package, which would have given DOJ a $500 million boost for antitrust enforcement. Senate Democrats vow to hold a vote on the $1.7 trillion bill anyway in January. The department could also get extra cash in other upcoming legislative packages, such as a Senate-passed bill to aid U.S. competition with China. For now, however, DOJ is weighing what antitrust cases can move forward with its current funding, though the people emphasized that decisions will be based on the legal merits. Arlen Morales, a Justice Department spokesperson, declined to comment. Google and Apple didn't immediately respond to a request for comment. Google and Apple probes: The department has been investigating Google’s advertising technology business and Apple’s lucrative App Store since 2019, probes that continued even after DOJ sued Google in October 2020 over its online search business. During the past year, the department's team has drafted an antitrust complaint focused on Google’s dominance of the technology used to buy and sell the online display ads that fund many websites. The complaint is similar to one that attorneys general in Texas and other states filed last year, though the Justice Department’s version has some differences. Separately, antitrust prosecutors have been examining Apple and its tight control over the ecosystem for iPhone and iPad apps. DOJ attorneys virtually attended the May trial between Apple and Fortnite-maker Epic Games to glean any additional witnesses or evidence they might want for their probe. They also have scrutinized a September ruling from U.S. District Judge Yvonne Gonzalez Rogers, who found that Apple wasn't violating federal antitrust law but declared its limits on developers' communications with customers a violation of California state law. Who will decide, and when: Top DOJ decisions could make their final decisions on suing Google or Apple in the spring of 2022, the two people told POLITICO. Who will make that call also remains up in the air. DOJ ethics officials haven’t yet determined whether Assistant Attorney General for Antitrust Jonathan Kanter must recuse himself from those cases because of his previous work for critics of the two companies, they said. Either case would be expensive. Texas alone will require $43 million to pursue its piece of the multistate antitrust suit against Google, state Attorney General Ken Paxton has told legislators. Speaking of money: Congress’ fiscal 2022 funding bill for the Justice Department proposed giving antitrust prosecutors an extra $16 million. That money would help ease some of the DOJ’s budget crunch. But it could also get swallowed up by cases already in litigation, including the Google search suit and lawsuits aiming to block a major sugar merger and a proposed union between Penguin Random House and Simon & Schuster.

#### 2. Morale’s at an all-time low---the AFF saves it---that’s key to effective enforcement.

John Newman 21, associate professor with the University of Miami School of Law, “Morale At the DOJ’s Antitrust Division Has Plummeted. Here’s How to Fix It,” ProMarket, 3/17/21, https://promarket.org/2021/03/17/doj-antitrust-division-morale-biden-pay-funding/

The US Department of Justice Antitrust Division faces one of the most critical junctures in its long and storied history. A landmark case against Google, high concentration levels across a variety of industries, a projected wave of merger-driven consolidation, and an increasing likelihood of legislative reforms—amidst all of these, a healthy and robust Antitrust Division has never been more necessary. So it’s been especially troubling to see the drastic decline in Division morale over the past four years. In 2010, when I was a summer intern there, the Antitrust Division prided itself on being one of the best places to work in the entire federal government. That year, the Division ranked 22nd out of over 400 federal agency components included in the Office of Personal Management’s (OPM) annual Federal Employee Viewpoint Survey. But per the OPM’s latest results, morale at the Antitrust Division has plummeted, dragging the Division all the way down to 404th place out of the 420 agency components surveyed. Let that sink in: morale at the Antitrust Division dropped from a consistent top 10 percent ranking to a bottom 10 percent ranking in less than a decade. This can’t be explained away by an overall drop in morale at the Justice Department. It is specific to the Antitrust Division. The blue line below represents the Division; the gray line DOJ more broadly. After a temporary drop during 2011–12 (likely due to an internal restructuring effort), a marked divergence began in 2017. Over that time period, as highlighted by the New York Times, the Division was among the ten agencies experiencing the worst declines in employee morale. At the same time, antitrust law itself has skyrocketed in visibility. A well-functioning Antitrust Division is always important—these days, it’s crucial. What’s to Be Done? The Biden administration faces both challenges and opportunity. Citing interagency dysfunction between the Division and the FTC over the past four years, a number of observers have proposed stripping antitrust jurisdiction from one of the agencies. But why not fix existing structures instead of simply tossing them aside? Practicing with the Antitrust Division should be a positive, fulfilling experience. And, just as importantly, a re-energized Division will translate into more effective, innovative enforcement efforts.

#### 3. Winners win—the plan saves the FTC by making them appear successful.

Lopez-Galdos 21. Marianela 7-28-21. Global Competition Counsel at the Computer& Communications Industry Association, previously served as Director of Competition & Regulatory Policy, and is a professor at George Washington University Competition Law Center and at the University of Melbourne Law School. “Policy Decisions of Antitrust Institutions Series: The Future of the FTC and Its Perils”. Disruptive Competition Project. <https://www.project-disco.org/competition/072821-policy-decisions-of-antitrust-institutions-series-the-future-of-the-ftc-and-its-perils/>

One of the most challenging matters to tackle when it comes to leadership of antitrust authorities, or administrative agency for that matter, is legacy and the impact for the future of the agency. To put it simply, while antitrust leaders leave agencies, the side effects of leadership’s successes and failures condition the future of the agencies. Their leadership has consequences and sets precedent which will bind the agency well into the future. Under the current political context, it would not be surprising if the current Neo-Brandeisian FTC enjoyed political support and success with its decision to bring big cases, especially against leading tech companies. In the short term, if the FTC makes headlines for opening cases against “Big Tech”, policymakers pushing for antitrust reforms will surely applaud the new changes as they would reflect a commitment to enhanced enforcement outcomes notwithstanding the strength of the cases. However, in the mid-and long-term, if the FTC loses the big cases, the commitment to policy outcomes won’t be met. And then, it is unlikely that the question would be whether the antitrust norms are fit for today’s economy, but rather if the agency is capable of executing its mandate effectively. The recent decision in the FTC v. Facebook case is a good example of this paradigm, where the Judge expressed that the FTC had not carried out a sufficiently robust analysis supported by evidence, and therefore dismissed the case.

#### 7. Funding rides the plan --- Or passes inevitably

Dylan Byers 21, senior media reporter for NBC News; internally citing George Washington University professor and former FTC chair William Kovacic; “Is Facebook untouchable? It's complicated,” NBC News, 7-1-2021, https://www.nbcnews.com/tech/tech-news/facebook-untouchable-complicated-rcna1323

The House Judiciary Committee recently advanced six bills that would bolster the government's ability to regulate Big Tech. They range from simple budgeting measures — one would give more funding to the FTC and the Department of Justice for their antitrust enforcement efforts — to profound reforms — one that would stop platform companies from preferencing their products over those of their competitors and another that would make it illegal for companies to eliminate competitors through acquisitions.

This legislative package faces an arduous road ahead. House Majority Leader Steny Hoyer, who sets the House floor schedule, has said none of the six bills are ready for a vote, which suggests they don't have broad bipartisan support. If and when they do make it through the House, they face an even harder battle in the Senate.

"It's hard to imagine that the larger legislative package is accomplished this year," Kovacic said, though he predicted a few of the less-threatening bills — budgeting, for example — are likely to pass on their own.

"The funding for the FTC and DOJ antitrust divisions, it's nearly 100 percent likely that Congress will pass that law," he said. He said another bill, which would block the tech firms from moving court hearings to more favorable states, was also likely to pass.

#### 8. There’s no risk of a challenge

Gregg Easterbrook, MA, 15, a contributing editor to The Atlantic, NY Times, March 9, 215, “Our Navy Is Big Enough”, http://www.nytimes.com/2015/03/09/opinion/our-navy-is-big-enough.html?\_r=0

At General Dynamics Bath Iron Works in Maine, workers are completing a warship unlike any the world has seen. The $3.3 billion Zumwalt destroyer uses all-electric propulsion, employs stealth features, carries a huge arsenal of guided missiles, and mounts advanced cannons that can hit targets 63 miles away. Most likely it will never be tested in battle, because no other nation is even attempting to build a warship like the Zumwalt, which symbolizes the gigantic advantage the United States Navy enjoys. The Pentagon’s new budget request asks that the Navy receive a large increase: $161 billion for the 2016 fiscal year, versus $149 billion in the current fiscal year. Last month, Navy Secretary Ray Mabus told the House Appropriations Committee that the Navy must get bigger — increasing to a total of at least 300 ships, versus the current 275. Both houses of Congress are now under Republican control, with the Senate Armed Services Committee headed by John McCain, a Navy veteran. Desire for a larger, more expensive Navy has been a Republican political theme since the Reagan presidency. The Republican presidential aspirant Jeb Bush, who favors higher military spending, has called Navy budget restrictions “really severe.” Another potential Republican White House candidate, Gov. Bobby Jindal of Louisiana, told the American Enterprise Institute in October that if cuts were made to the defense budget, “America will not have a global Navy anymore.” Yet no naval expansion is needed. The Navy has 10 nuclear-powered supercarriers — 10 more than the rest of the world. No other nation is even contemplating anything like the advanced nuclear supercarriers that the United States has under construction. China possesses one outdated, conventionally powered carrier, and is believed to be building two other carriers, neither of which is a nuclear supercarrier capable of contesting the “blue water,” or deep open oceans, where the United States Navy dominates. In aircraft carriers, nuclear submarines, naval aviation, surface firepower, assault ships, missiles and logistics, the United States Navy is more powerful than all other navies of the world combined. Some commentators engage in fearmongering regarding China’s carriers, new submarines and its anti-ship ballistic missile. But the carriers are modest compared with America’s, the submarines far less capable than ours. And there’s no evidence that its anti-ship missile has had a realistic test. China’s neighbors are unhappy that the growing Chinese Navy may back Beijing’s claims regarding the South China Sea. But Chinese naval expansion does not pose any direct threat to the national security of the United States, or to its dominance of the oceans. For the United States to think there is something sinister in China’s projecting power in its own nearby waters would be like China’s asserting there were something sinister in the fact that the United States Fourth Fleet operates in the Caribbean. South China Sea jurisdictional disputes are an issue to be resolved by negotiation. Making the United States Navy even more powerful won’t matter to such clashes. For many centuries, naval rivalry was a central aspect of great-power relations. Yet for more than half a century there has been no great-power naval rivalry — because the United States Navy rules. The last major sea battle was at Okinawa, in 1945. Piracy still occurs, but in the main, global trade has flowered because sea lanes are open and commercial vessels ply the oceans unthreatened by warships. Free commerce upon the oceans brings nearly all nations, including developing nations, higher living standards and less poverty. Since Navy operations take place far from home, Americans may be unaware of their country’s nautical strength and of the progressive role the Navy plays in world affairs. Many Americans have never seen an active-duty United States warship; ships can’t march in Fourth of July parades or fly over football games. But arguably, naval hegemony is among the greatest American achievements, and one that makes all nations better off. That hegemony is secured by such a dramatic margin that no naval buildup is needed. A few years ago, I gave a lecture at the United States Naval War College, in Newport, R.I. Officers from 129 nations have graduated from the Naval War College; flags of their countries ring the grounds. I was reminded that one lesson that officers of other navies learn at the Naval War College is that there is zero chance they will ever defeat the United States in battle — so why even try? This situation is a tremendously positive development for the world, but it also means there is no reason to increase the Navy’s budget, nor for Congress to fret about how many ships we have.

#### 9. No impact either

Rhodes, Poli Sci PhD, 5 – Dr. Edward Rhodes is dean for the Social and Behavioral Sciences at Rutgers University. A former International Affairs Fellow of the Council on Foreign Relations, he has served in the Strategy and Concepts Branch of the Navy Staff, “. . . From the Sea” and Back Again Naval Power in the Second American Century, Naval War College Review, Spring 1999, Vol. 52, No. 2, http://www.usnwc.edu/Publications/Naval-War-College-Press/Newport-Papers/Documents/24-pdf.aspx, p. 172-6, CMR

The lack of evidence in support of a proposition is, of course, not evidence against that proposition; it is simply an absence of evidence. A priori, however, there is substantial reason to doubt the efficacy of littoral projection of naval power in shaping the peacetime environment. What is known, principally from studies of crises (about which more will be said below), regarding decisions to engage in aggression and states’ ability to understand or focus on power projected “from the sea” suggests a real danger that states will ignore or underestimate the capabilities inherent in American naval power. Moreover, even if it were shown to be the case that applying naval power “from the sea” has a significant positive impact on the peacetime environment, it would still remain to be demonstrated that it is a cost-effective means of creating that impact – that naval power is less expensive than alternative military means, such as subsidizing regional proxies, or than nonmilitary means, such as fostering trade and development or developing a specialized capacity for humanitarian relief. In crisis, the forward-deployed capacity to project power “from the sea” is touted as having an immediate deterrent effect – that is, dissuading an adversary who is tentatively considering going to war from following through on that idea. Here we do have some evidence; at very best, however, it must be regarded as offering mixed support for the Navy’s advocacy of a littoral approach. A variety of studies of conventional deterrence have been undertaken.60 While the research questions, underlying theoretical assumptions, and research methods have varied, several general findings emerge. The principal one is that immediate extended deterrence with conventional means – that is, using threats of conventional response to deter an adversary who is considering aggression against a third party – regularly fails, even in cases where commitments are “clearly defined, repeatedly publicized and defensible, and the committed [gives] every indication of its intentions to defend them by force if necessary.”61 Unlike nuclear deterrence, conventional deterrence does not appear to result in a robust, stable stalemate but in a fluid and competitive strategic interaction that, at best, buys time during which underlying disputes or antagonisms can be resolved. The possession of decisive conventional military superiority and the visible demonstration of a resolve will not necessarily permit the United States to deter attacks on friends and interests. There are three reasons why immediate extended conventional deterrence is so problematic. First, potential aggressors are sometimes so strongly motivated to challenge the status quo that they are willing to run a high risk, or even the certainty, of paying the less-than-total costs of losing a war. Second, potential aggressors frequently conclude, correctly or incorrectly, that they have developed a military option that has politically or militarily “designed around” the deterrent threat. Third, there is considerable evidence that, particularly when they are under severe domestic stress, potential aggressors are unable to understand or respond rationally to deterrent threats. “Wishful thinking” by leaders who find themselves caught in a difficult situation appears to be an all-too common pathology. Further, and more germane to the issue of naval forward presence as a crisis deterrent tool, there is some evidence that because of the general insensitivity of potential aggressors to information, efforts to “signal” resolve through measures such as reinforcing or redeploying forces have limited effectiveness. If force movements are large enough to foreclose particular military options, they may forestall aggression. But as a means of indicating resolve and convincing an aggressor of the credibility of deterrent commitments, they do not generally appear to have an impact. All of this would seem to provide a reasonable argument against bothering to invest too heavily in forward military forces – or at least against believing that they offer much assurance of guaranteeing regional crisis stability. Ultimately, the key to preventing conflicts seems to be resolution of the underlying issues. At best, conventional deterrent efforts buy time. On the other hand, there is also some evidence that in some circumstances it is in fact possible to buy time. In particular, having forces in place that can deny potential aggressors a quick victory seems to tend to reinforce deterrence. The historical record suggests that the prospect of quick victory may be an important element in at least some aggressors’ calculations: the potential aggressor’s belief that he can either score a quick knockout or achieve a limited fait accompli appears to make aggression significantly more attractive. This offers some grounds for supporting forward naval presence. On the other hand, it also suggests the possibility that the Army is right and that if forward presence is to matter it needs to be on the ground, that an offshore presence of a potent but limited force, with only the implicit threat of surged ground forces, is less likely to have an impact, at least if the potential aggressor has limited goals. It also suggests the possibility that the symbolism of naval forward presence, serving as a reminder of the full weight and power the United States could ultimately bring to bear, may not be that important. In war, the argument that forward naval forces operating with a littoral strategy can have an important impact in the initial phases of the conflict, thereby preparing the ground for later U.S. successes, is doubtless true. While true, however, it may well be relevant in only a limited range of cases. Most potential conflicts or contingencies involve adversaries who are too small for this effect to matter much. Short of a major regional conflict (MRC), the superiority of U.S. military forces is sufficiently overwhelming that initial setbacks are not likely to be critically important. At the other extreme, in the case of a regional near-peer competitor – a Russia or a China – it is hard to imagine a littoral strategy having much of an impact: the amount of (nonnuclear) power that can be projected from the sea is trivial compared to the size of the adversary’s society or military establishment. What is left is a handful of admittedly very important cases: MRCs against such rogue states as Iran, Iraq, and North Korea. What is interesting about these cases, however, is that there are not very many of them; their identity is known; and plans can be made in advance to move large amounts of land power and land-based air power to the theater at relatively short notice. The unique flexibility of naval power is, in these cases, relatively less valuable. Critics of the littoral strategy are, then, likely to argue that it is difficult to find cases in which a major investment in the capacity to project power from the sea makes sense. A small investment would be sufficient for most Third World contingencies, particularly if the United States does not demand real-time response. Even a large investment would be insufficient to deal with the great powers. And in the case of the mediumsized conflicts, the MRCs, paying for the extra flexibility of naval power may not be cost-effective. If there is reason for some cautious skepticism about the wisdom of building a navy for its capacity to project power from the sea, then perhaps it is worth thinking about some of the other things that the U.S. Navy does. In particular, it may be worthwhile to rethink the old Mahanian notion of sea power – not because Mahan was some sort of prophet and his ideas have eternal validity but because in the particular circumstances of the early twenty-first century his observations about the importance of the international commons per se may be relevant. The globalization of energy and food markets, as well as cross-industry trade in industrial goods, makes the sea remarkably important for national well-being, not simply for the well-being of the American nation but for that of most nations. By the middle of the next century, even China will be critically dependent on its access to the ocean. Global naval hegemony – that is, the capacity to exercise control over the world’s high seas – thus offers a powerful reason to invest in naval power. At best, control of the world’s oceanic highways may convey the power to shape the general evolution of international society. At minimum, it is likely to provide a veto power over many changes in international norms and regimes that the United States dislikes. Obviously, global naval hegemony does not convey an ability to dictate national policies or to control the social and political development or activities of other states. It is unlikely to offer much useful leverage if the Chinese choose to repeat Tienanmen Square, if there is a coup in Russia, or if Hutus and Tutsis resume killing each other. But then again, no approach to naval power is likely to offer much useful leverage in these cases. The point is that there are realistic limits to what naval power is likely to provide to a twenty-first-century America, and these may be well short of the goals encompassed within a liberal-internationalist vision of national security. These limits do not mean the United States should cease investing in naval power. They do, however, suggest that U. S. leaders and the U.S. Navy should not mislead themselves into believing that investing in the capacity for littoral warfare will necessarily yield an ability to control social and political developments around the world. Liberal internationalism can generate a dangerous hubris. A naval strategy that panders to the hubris is unlikely in the long run to serve the interests of either the nation or the Navy.

### 2AC --- China DA --- F/L

#### 1. It’s thumped --- The Supreme court’s rejection of conclusive deference was a slap in the face to China AND opened the floodgates for future litigation to any foreign action --- That’s Bu --- Here is more of the article

**Bu 20** “Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Qingxiu Bu - University of Sussex, Journal of European Competition Law & Practice, Volume 11, Issue 5-6, May-June 2020, Pages 274–286, April 30, 2020, https://academic.oup.com/jeclap/article-abstract/11/5-6/274/5827020

V. Reshaping he landscape of deference practice? US courts should show appropriate respect to foreign governments, but how much deference will depend on the circumstances. A foreign sovereign’s interpretation of its laws is **not automatic**ally entitled to conclusive deference, but still carry signifcant weight.105 The Supreme Court’s ruling does not provide an absolute rule of udicial obligation, but immense discretion for a federal court to determine foreign law.106 Due to the ill-defned con cept of respectful consideration, it remains uncertain as to how the newly established standard will be applied. Adoption of the less deferential approach would create greater uncertainty as to whether the views expressed by a foreign government will be accepted by US courts.107 Furthermore, in discerning the meaning and credibility of a foreign law, the transparency of the foreign legal system is one relevant consideration in evaluating the foreign sovereign’s interpretation.108 This inevitably creates a de facto hierarchy between foreign legal regimes. 109 **The Supreme Court’s ruling** could **heighten the current tensions,** which could also facilitate more sophisticated laws to mitigate future litigation risks.110 A. Potential reciprocal concern in the context of trade war It is reciprocity that makes comity work. As Weinberg said: ‘if comity is reciprocal, both states are better of than they would have been if each simply applied its own law.’ 111 The US Supreme Court is less ulnerable to the politics of foreign relations than the other US government branches.112 Its decision in Vitamin C is a reassertion of US judicial sovereignty to afrm that a fed eral court reserves the right to disregard foreign regimes’ characterisation of their law as it sees fit. 113 **The ruling itself raised considerable controversy** in declining to defer to MOFCOM’s interpretation. The decision may have implications of reciprocity for the USA when appearing before a foreign court. It may impact international liti gation as well as US foreign relations **for many years to come.** 114 In addition, the Supreme Court leaves open an inquiry of whether foreign courts’ interpretation of their nations’ laws will be diferentiated from those interpreted by their governmental agencies. 1. A variable of foreign relations The Vitamin C ruling has broader ramifications, since the Supreme Court provided less than full deference to China’s interpretations of its own laws. The application of the standard of respectful consideration may be detrimental to the US foreign relations,115 which could have serious consequences.116 Foreign law could compel the very conduct that US law prohibits, and udicial inter ference may infringe on the executive function to handle international relations. 117 Inevitably, there is an impact on foreign diplomacy and trade relations.118 As Eichensehr observed: ‘it would be a mistake for the Court to iew the brief as a representation that disagreement with the foreign sovereign’s iew of international law would provoke serious foreign policy consequences for the United States.’119

#### 2. Protectionism now.

Anne O **Krueger 21**. “US should re-engage as a constructive world leader” The Business Times. 09-28-21. https://www.businesstimes.com.sg/opinion/us-should-re-engage-as-a-constructive-world-leader

DESPITE the cantankerous, polarised atmosphere in Washington, DC, there seems to be **bipartisan agreement** on one thing at least: that China is a problem, and that the United States must respond to the competitive challenge it poses. With military and economic strength as its main components, the Sino-American rivalry has come to be seen as a contest to determine who will lead the regional and global order. Economic dynamism is a necessary condition for establishing military strength. For the US to maintain and strengthen its leadership role in the world economy, it must have both allies and a vibrant domestic economy. Why, then, is US President Joe Biden's administration sponsoring policies that will help China reduce America's own economic advantage? Instead of asking how the US can improve its economic performance, the administration is imitating China by letting the government pick winners and losers among technologies and industries. In doing so, it is **abandoning traditional US support for the open multilateral trading system**, the rule of law, and private enterprise within an appropriate governance framework. In any competition, there are always two basic strategies from which to choose. The more resources and attention that are directed towards one option, the less will be available for the other. The first strategy is offensive and consists of strengthening one's own capabilities; the second is defensive and consists of trying to weaken the competitor. With respect to China, the US has already tried a defensive strategy without success. This was the approach taken by former president Donald Trump, who **launched a "trade war" by imposing tariffs and sanctions on China.** Despite those actions, China averaged over 6 per cent annual GDP growth in 2017-19, dwarfing the US economy's 2.5 per cent average annual growth during that period. In 2020, the year of the Covid-19 shock, the Chinese economy grew 2.3 per cent, while US GDP fell by more than 3.5 per cent. In the International Monetary Fund's most recent forecast for 2021, China is expected to grow by 8.1 per cent, compared to around 7 per cent for the US. PERPETUATING FAILURE Though Mr Trump's protectionist strategy clearly failed, the Biden administration is nonetheless **perpetuating it by leaving the previous administration's tariffs in place and adopting "buy American" policies of its own**. By acting unilaterally, Mr Trump weakened the open multilateral system and harmed the US economy, along with those of its allies. Yet even if the US under Mr Biden secures the backing of most of its allies, it is not large or strong enough to do more than slow China's rise moderately. Since the end of World War II, no country has erected high protectionist walls and achieved satisfactory economic growth over any significant length of time. For decades, the US led much of the world down a better path. But instead of adopting an offensive strategy based on strengthening this role and leading by example, the US is now **pursuing the kind of policies that have long failed in many other countries.**

#### 6. Independently --- Expansive cartels create escalating trade deficits that encourage aggressive Chinese mil-mod that escalates to nuclear war

Collins, 16 (Michael Collins, Michael P. Collins is President of MPC Management, was Vice President and General Manager of two divisions of Columbia Machine in Vancouver, Washington. He has more than 35 years of experience in Manufacturing., 6-13-2016, accessed on 6-9-2021, Industry Week, "It is Time to Stand Up to China", <https://www.industryweek.com/the-economy/trade/article/21974236/it-is-time-to-stand-up-to-china)//Babcii>

The U.S. has been an **enabler** to China’s approach. **China continually** challenges the U.S. by **ignoring** free-market **rules** and doing whatever it takes to **capture market share.** Meanwhile, the U.S. **looks the other way** when China breaks the rules, thus encouraging them to do it again. The most recent example is the steel industry. According to The American Steel and Iron Institute, American steel mills have had to layoff 13,500 employees because China has been dumping steel in the U.S. The Chinese steel companies can sell steel at below-market prices because they are state-owned and, by definition, are subsidized by the government. [[The U.S. in May affirmed that China had been dumping cold-rolled steel;](http://www.industryweek.com/competitiveness/us-affirms-266-dumping-margin-cold-rolled-steel-imports-china) the International Trade Commission will make public its ruling on the case on June 30.] Further, a recent lawsuit by [United States Steel Corp. (IW500/91)](http://www.industryweek.com/resources/us500/2016/United-States-Steel) charges China with price fixing, stealing the company’s trade secrets, and shipping steel to the U.S. through other countries so buyers won’t know the country of origin. China is not a market economy, much less a free-market economy. Still, the U.S. continues to treat China as a free-market economy, with the hope that it will somehow encourage them to **begin playing by the** same **rules** governing the rest of the world. But, alas, it's not happening. Here is a short list of some of China's strategies. Currency Manipulation – China manipulates its currency to keep the U.S. dollar value high, so that Chinese companies have a 30% to 40% cost advantage. This undervaluation is illegal and should be considered to be a direct export subsidy, yet the Commerce Department has refused to treat currency undervaluation as actionable under the law. State-Owned Enterprises (SOE) – China owns and subsidizes many companies, as in the steel industry example, above. Through the subsidized companies, China can target a market with low-cost products, capture market share and drive competitors out of business. Technology Theft – China knows that technology and innovation is what can make them the No. 1 manufacturer in the world, and they are prepared to get it any way they can. They have been accused of using espionage, counterfeiting and buying American technology companies as standard strategies. According to the [US-China Economic Panel Security Commission](https://www.industryweek.com/the-economy/trade/article/21974236/US-China%20Economic%20Panel%20Security%20Commission)’s [2015 report to Congress,](http://www.uscc.gov/Annual_Reports/2015-annual-report-congress) “China’s government conducts and sponsors a massive cyber espionage operation aimed at stealing trade secrets and intelligence from U.S. corporations and the government.” This includes blocking U.S. company websites, revoking business licenses and censoring the internet. Technology Transfer - As a condition of accessing the Chinese markets, China requires U.S. companies that build plants in China to create joint ventures with local companies—and share with them their latest technologies. [Testimony to Congress by Patrick A. Mulloy](https://books.google.com/books?id=rkbfsgEACAAJ&dq=%22Across+the+Pond+U.s.+Opportunities+and+challenges+in+the+Asia+Pacific&hl=en&sa=X&ved=0ahUKEwi-lL_ui9jMAhVN4GMKHX5fCAAQ6AEIHDAA) asserts that we are slowly losing the Advanced Technology Products industries to China. Advanced technology products includes the more advanced elements of the computer and electronics industry as well as life sciences, biotechnology, aerospace and nuclear technology, all of which are central to U.S.'s own innovation strategy. In 2014, the U.S. trade deficit with China in advanced technology products was $123 billion. Research & Development Facilities - China requires foreign companies with plants in China set up R&D facilities in China. As a result, foreign companies have built more than 1,000 R&D labs in China. The Results of China's Unfair Trade Practices & U.S.'s Weak Response So what are the results of China's unfair trade practices? First, by now, everyone knows that trade agreements do not benefit all citizens; there are winners and losers. The **winners are** the multinational corporations who have plants in **China**. The losers are American small businesses and workers. The initial promotion of China trade promised that consumers would be better off because of the cheap imported products. However, China trade created a $**3.6 trillion deficit**, which eliminated **jobs** and stagnated **wages**. It is part of the reason the rich have gotten richer and the poor poorer. Second, the **economic strength** built upon these practices has helped China **grow** its **military might**. According to the U.S.-China Commission, China continues to modernize its forces "... creating additional challenges for the United States and its allies. Most notably, China conducted its first test of a new **hypersonic** missile vehicle, which could enable China to conduct kinetic strikes anywhere in the world within minutes to hours, and performed its second flight test of a new **road-mobile intercontinental missil**e that will be able to strike the entire continental United States and could carry up to 10 independently maneuverable warheads. “China is making big investments in modern **submarines, ships** and combat **aircraft**. For the first time, its Navy began combat patrols in the Indian Ocean. Its first aircraft carrier has conducted a long-distance deployment. China is exerting force to control its claims in the **East and South China Seas**. "Perhaps of most concern is Beijing's apparent **willingness to provoke incidents** at sea and in the air that could lead to a **major conflict** as China's maritime and air forces expand their operations beyond China's immediate periphery."

# 1AR

### 1AR --- W/M

#### The ABA AGREES that exemptions are both statutory and non-statutorily CONSTRUCTED JUST requires congressional BASIS

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

D. Top 3 Accomplishments Since Last Long Range Plan in 2015

(1) Publications. In addition to our Annual ALD Updates, we are set to publish an update to the Noerr-Pennington Handbook, which should be out in 2019. We also published a new version of the State Action Handbook in 2016. The Handbook on the Scope of the Antitrust Laws was published in 2015.

(2) Commentary on Legislative and Regulatory Proposals. The Committee has been very active in supporting Section commentary on proposed legislation, regulations, and other policy issues.

For instance, in March 2018, the E&I Committee assisted former E&I Chair John Roberti in composing his article, “The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law”, presented to the DOJ Antitrust Division Roundtable on behalf of the ABA Antitrust Section.

In January 2018, in response to a request from the Section Chair, we submitted Section comments along with the Legislative and State AG Committees, addressing the proposed Restoring Board Immunity Act legislation that would impact the post-NC Dental exemptions and immunity climate. Previously, we commented on the Professional Responsibility Act.

(3) Spring Meeting Programs. We have sponsored or co-sponsored a program at every Spring Meeting since our last long range plan. In 2019 we will chair Sham Litigation after FTC v. AbbVie The FTC v. AbbVie decision – calling for the disgorgement of $448 million on the basis of sham patent litigation. In addition, we will co-sponsor in 2019 with the Trade, Sports & Professional Associations Committee, a program on “Antitrust Law's Anomalous Treatment of Sports,” addressing how US courts have shown broad deference to the "rules of the game," including near-immunity status for concepts such as "amateurism."

II. Major Competition/Consumer Protection Policy or Substantive Issues Within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Issue #1: Will Certain Exemptions Be Eliminated or Expanded?

A goal of the current DOJ Antitrust Division is to streamline antitrust laws, and in particular, take a hard look at exemptions and immunities. This is in the wheelhouse of our Committee’s fundamental policy issue: How much of the economy has opted out of our antitrust system? Is that a problem or are ad hoc exemptions acceptable ways to fine tune the application of the antitrust laws?

We anticipate, therefore, that efforts to enact or to repeal existing statutory exemptions and immunities will continue. In recent years, there have been efforts to repeal the exemptions for railroads and (at least in part) the McCarran-Ferguson insurance exemption. The Section and the Committee has generally supported efforts to repeal statutory exemptions. Given that repeal issues are very political it is unlikely that we will see many exemptions actually repealed.

On the other hand, proposals for new exemptions and immunities will continue to be introduced in Congress. The Committee will improve on a template for use in assisting the Section in drafting comments to Congress on newly proposed exemptions and immunities.

One development that may continue in the health care area are issues over a "COPA" or "Certificate of Public Advantage" at the state level. A COPA is a state statutory mechanism that provides certain collaborations in the health care community with immunity from private or government actions under the antitrust laws by invoking the state action doctrine. The FTC has generally opposed such efforts at the state level, but several states have used them to immunize health care mergers. This is a major development that should be monitored.

Through programs, newsletters, and Connect entries, the Committee intends to educate its members about Congressional and other efforts to repeal, or introduce new, exemptions and immunities, as well as the application of existing statutory exemptions and immunities in the courts. The Committee’s Handbook on the Scope of Antitrust Law, published in 2015, addresses developments in the statutory immunities area. It built on the prior publication, Federal Statutory Exemptions from Antitrust Law Handbook in 2007. Our Scope book will need to be updated within the next three years.

B. Issue #2: Will There Be Legislative Solutions to State Action Issues at State and Federal Levels?

The FTC’s case against the North Carolina Board of Dental Examiners put the "active supervision" prong of the state action test front and center. North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). The Court agreed with the FTC’s position that state occupational licensing boards comprised of market participants must satisfy the active supervision requirement. This spurred additional suits against other types of state boards involving regulated professionals. Moreover, every State had to reassess its boards to determine if there is "active supervision." Courts and state legislatures are addressing those issues. We also expect the proper framing of the clear articulation prong of the state action doctrine will be addressed. The Supreme Court spoke to the clear articulation test in FTC v. Phoebe Putney Health System, Inc., 133 S.Ct. 1003 (2013), narrowing the foreseeability test to cover only situations in which the anticompetitive conduct is the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.” How this test has played out in the lower courts will be of particular interest to the Committee and its membership. The COPA issues, at the state level, as previously mentioned, will impact this area.

The Committee expects to address these issues through updates to Connect, newsletters, Spring Meeting programs, committee programs, its contributions to the Annual Review of Antitrust Law Developments. The State Action Practice Manual addresses these issues, as well as the Committee’s Handbook on the Scope of Antitrust Law.

C. Issue #3: Will Noerr Be Restricted or Expanded?

The Noerr-Pennington doctrine is an exemption issue that is frequently litigated. In particular, the most likely area of further development is in the pharma industry. Alleged misrepresentations to government agencies has caught the attention of some courts. In addition, there may be more development on the pattern exception, which raises the issue of whether each act of petitioning in a pattern must satisfy the objectively and subjectively baseless requirements for sham petitioning. The Committee’s new Handbook on Noerr (forthcoming) and its earlier Handbook on the Scope of Antitrust Law addresses developments in the Noerr law.

III. Specific Long Term Plans to Strengthen Committee

The Committee provides important services to the membership of the Section through publications, drafting ABA Antitrust Section comments to proposed regulation and international competition proposed immunities, and programming. The goals of the Committee include: (1) to provide policy comments on key questions about the scope of the antitrust laws for legislation and policy-making; (2) produce a mix of publications and programming that provides relevant and useful information to our members; (3) to ensure that the Committee remains valuable to our members’ practices; and (4) to make the most productive use of electronic communications to deliver the Committee’s work product.

A. Potential Modifications to Charter: What is the Role of this Committee?

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### It certainly meets that --- It is codified in the FTAIA! --- Their evidence agrees!

Christopher L. Sagers 15, James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator at the Cleveland-Marshall College of Law, Cleveland State University, “Table of Contents,” Handbook on the Scope of Antitrust, American Bar Association, Section of Antitrust Law, 2015, <https://www.americanbar.org/content/dam/aba-cms-dotorg/products/ecd/ebk/140535931/5030623-TOC.pdf>

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