# 1AC --- Foreign Compulsion --- JCCC

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

### 1AC --- Adv --- China

#### Contention 1 is CHINA:

#### The supreme court decision in Vitamin C greatly expanded the scope of antitrust by limiting deference to foreign nations BUT didn’t go far enough because it didn’t clarify transparency requirements

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

The Supreme Court’s decision **clarifies** that the Sherman Act can be used to address anticompetitive behaviours that were supposedly compelled by foreign law.54 Vitamin C makes it clear that federal courts have significant discretion in assigning weight to the selective materials.55 It was held that a ‘federal court should accord respectful consideration to a foreign government’s submission, but is **not bound** to accord conclusive effect to the **foreign government’s statement**.’56 The Court vacated the Second Circuit’s opinion and remanded for revaluating its holding pursuant to its substantial-but not-conclusive deference standard.57 Under the new respectful consideration standard, the Supreme Court’s opinion **identifies** five ‘[r]elevant considerations’ to guide future analyses of a foreign government’s interpretation of its domestic law: (i) the statement’s ‘clarity, thoroughness and support’; (ii) the statement’s ‘context and purpose’; (iii) **the ‘transparency of** the foreign **legal system’**; (iv) the ‘role and authority of the entity or official offering the statements’; **and**. (v) the statement’s consistency with the foreign government’s **past positions.**58 The above criteria would similarly be considered ‘any relevant material or source’ under FRCP Rule 44.1. Despite the lack of a bright line, there is prima facie potential for them to be conducive to predictable, and efficient decision-making.59

This Vitamin C case marks the first time in history that the Chinese government has appeared before the US Supreme Court.60 It raises delicate political, economic, and legal issues about how US courts should treat foreign companies that argue their conduct was mandated by a foreign government. It is notable that the Supreme Court, for the first time, articulated a test that district courts must use in the application of Rule 44.1 to deal with choice of foreign law. Despite the qualitative analysis of the extent to which a federal court should defer to a foreign sovereign’s interpretation, the Supreme Court has not clarified what exactly international comity **abstention entails**.61 It opened the door for US courts to consider a long list of non-exhaustive relevant considerations. The appropriate weight in each case will depend on the circumstances,62 of which each case may dictate how a court will weigh a foreign sovereign’s interpretation of its own law.63

IV. Equitable analysis Given substantial state intervention in the ‘unlevel playing field,’ a one-sided emphasis on comity principles may not efficiently address global anticompetitive behaviours. A foreign sovereign could abuse a position of absolute deference, leaving plaintiffs unable to secure relief in US courts. A conclusive-deference approach would encourage foreign sovereigns to manipulate outcomes by filing legal briefs that support local interests. The Supreme Court’s ruling in Vitamin C defines the role foreign governments can play in US litigation and guide courts on how to deal with foreign governments that attempt to shield ‘their’ companies from US litigation.64 As such, a court need to consider the countervailing interests and policies.65

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 shield domestic firms from treble damages.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 position was 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 self evidently 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

#### Specifically, the lack of a transparency requirement led the 2nd circuit to exempt Chinese cartels based on post-hoc statements

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

#### The post-hoc nature of the defense opens the door for inconsistency in international trade and antitrust law

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

#### Those inconsistencies create incentives for China to game the system

Fox and Janow, 12 (Eleanor Fox and Merit Janow, Walter J. Derenberg Professor of Trade Regulation at New York University School of Law, l Professor, Columbia University, 2012, accessed on 2-8-2022, Its.law.nyu, "China, the WTO, and Statesponsored export cartels: Where trade and competition ought to meet ", https://its.law.nyu.edu/faculty/profiles/representiveFiles/fox%20-%20China\_%20the%20WTO\_%20and%20Statesponsored%20export%20cartels\_FED2F0A6-A495-4641-11BC016851056F31.pdf)//Babcii

Has China lit its candle at both ends? We consider the hypothetical case of China sponsored hard core export restraints, which could in theory be carried out either by the state or by firms under the control of the state. We examine their legitimacy, both under WTO treaty obligations and under antitrust law. In so doing, we are struck by the opportunities for nations to **play** one **system** (trade) **against the other** (competition). At the end of this essay, we suggest a modality for bringing the systems and their fact-finding into greater coherence or at least awareness. We concentrate principally on one particular ongoing litigation, the US antitrust case against four Chinese firms for fixing prices of vitamin C into the United States (the firms admit the price-fixing and attribute it to China),1 as compared with a hypothetical proceeding in the World Trade Organization against China for sponsoring the export cartel. In the pending US antitrust case, Vitamin C, the Chinese firms defend that their cartel was lawful; that it was in fact China’s cartel; and they argue that the price-fixers are shielded from liability by the foreign sovereign compulsion defense. In the Vitamin C case, China’s Ministry of Commerce has, exceptionally, filed an amicus brief taking ownership of the cartel.2 Some years earlier, in the process of joining the WTO, **China undertook** extensive market-opening accession commitments. These  commitments included China’s undertaking to **allow the market to set prices** “in every sector” **except in areas specified**.3 Vitamins were not among the reserved items. China’s commitments reinforce a number of WTO provisions. For example, Article XI of the GATT speaks to the elimination of quantitative restrictions on imports and exports,4 Article 7.2 of China’s Protocol states its commitment not to “introduce, reintroduce or apply non-tariff measures;”5 Article 11 of the Safeguards Agreement prohibits voluntary export restraints, orderly marketing arrangements and other similar export measures... 6 What if China were exonerated in notional **WTO proceedings** against it for ordering a **vitamin C cartel** on grounds that the evidence was too ambiguous to conclude that the government itself ordered the output and price restrictions (a measure that would be reachable under some facts under China’s protocol and GATT Article XI7 ), **and** if the Chinese vitamins firms were **exonerated in the US court proceedings** on grounds that China did order the restrictions? We pose this possibility to examine two larger questions. 1) What is the appropriate perspective on the right of the state to take measures that impose costs on the trading system, and what is the appropriate perspective on the right of firms to invoke state action in defense of their export cartel? 2) What modalities can minimize the gaming and can nudge the systems towards coherence, both on fact-finding (what did Chinese officials say to whom?) and on the narrative: Did China adopt a governmental measure ordering the cartel within the meaning of its WTO undertakings; did it order the cartel within the meaning of the antitrust foreign sovereign compulsion defense? Did it order the cartel and also the terms of it, and does that matter?8 Should “order” mean the same thing in WTO language and in antitrust language? What are the consequences if the default perspectives for trade and for competition are not aligned? What are the consequences if WTO obligations are construed to give more policy space to China, and if the antitrust defense is construed to disfavor exceptions from the antitrust rule against cartels (as it is)? The appropriate perspective? We have a view: Trade and competition are two sides of the same coin. Trade and competition rules sympathetic to markets are important in today’s world of deep economic globalization. The financial crisis and its aftermath has increased tendencies of nations to draw inwards and to be attracted to more narrowly self-interested measures in the hope that nationalism might solve their problems. Often, the opposite is true. A perspective of openness and regard for the larger community is likely to enhance economic welfare, in general to produce more harmony, and to take an edge off conflicts in the world. We therefore prefer an approach in which commitments are interpreted strictly when construing undertakings by nations to forsake export restraints or export cartels. The counterpart to a state commitment to play by rules of free trade (not to restrain exports) is the private firm commitment to play by the rules of competition (not to cartelize). The anticartel rule is strong and stronger than it ever has been in the history of the world. Why? Because more and more nations appreciate the value of markets; they are in search of growth, and they are committed to building environments in which their producers can flourish and in which consumers can get fair deals. All antitrust nations of the world recognize that hard core cartels are heinous; cartels rob the people; they degrade competition, chilling the incentives that lead firms to invent and produce, create jobs and create wealth. There is no international law of competition, but there is one principle of antitrust law that can be found in all national antitrust regimes: No hard core cartels.9 Why, then, does the law of the US and other nations allow a foreign sovereign compulsion defense to a hard core cartel? There are two reasons: 1) Deference to sovereignty. If the state has a right to take certain measures (restrain exports), then should it not be allowed to use its firms as the means to do so? 2) Fairness to the commanded firms. Should a firm be punished merely for following the command of its state? If indeed China undertook not to order export cartels, then there would be no need for a foreign sovereign compulsion defense in order to respect the sovereignty space of China, for China would have forsaken just such policy space in return for the greater benefits of the world trading system.10 If, further, the defendant vitamin C firms had the choice not to price fix into the United States as far as China was concerned, either because China did not issue an order or the order was objectively invalid as contrary to China’s obligations, it would not be unfair to the firms to hold them to account. Indeed, even if the firms perceived that they were following the policy of their country, one could make a rather convincing argument that it is more unfair to the overcharged consumers for a court to refuse to apply the anti-cartel law than it is unfair to the profiteering cartelists to apply the US law.11 And if China (MOFOM) ordered the firms to collaborate on production to avoid dumping lawsuits and the firms proceeded to agree to an elevated price far above what any objective avoidance would require (plaintiffs allege that price rose almost 200%, from $2.50 to $7.00 per kilogram), again, fairness may not lie on the side of the firms.12 Thus, depending on the facts, neither the privilege of the sovereign nor equity to firms may require an antitrust defense, let alone a wide one. But still, our hypothetical may **come to pass**. The reach of international trade rules over state sponsored export cartels is **not well established**, we are just beginning to see cases litigating the scope of applicable rules. Moreover, both **China’s** governmental measures and the WTO obligations are not without ambiguity. The WTO could uphold the state as fulfilling its WTO commitments and the US federal court could uphold the firms’ submission that their conduct was compelled.13 Or conversely, there could be state liability at the WTO and private liability in antitrust. What might be done to avert such possibilities, or at least to avert **gaming by the litigants**?

#### Antitrust and certainty are key to preventing corporate adventurism

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 Light of 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 **become**s **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.

#### China’s attempts to “game” the system undermine the transnational legal process (TLP)

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 **Ministry of Commerce** (“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 rol**e 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.**

#### It's the core test for overall legitimacy of the process --- Success spills over to other domains

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

Nevertheless, the influence of **T**ransnational **L**egal **P**rocess is still very much **at work**, even as the world is experiencing its worst “slowbalisation.” 299 What is at stake is that the success experienced in the international trade regime **did not replicate itself in other international law domains**. In particular, when this theory comes to human rights, the government would block them out. As such, having secured the legal certainty and economic benefits of most-favored-nation treatment through WTO accession, the failed internalization parts embarked on a mission to ensure that the economic transformation would not upend its political control. V. CONCLUSION This article seeks to explore the roles of Transnational Legal Process in the realm of trade and competition systems. It is mainly focused on how US courts and the executive branch in a synergistic relationship enforce WTO obedience and **competition policy** convergence as part of **Transnational Legal Process**. I have given concrete examples of Transnational Legal Process actively working and reforming China’s industry to comply with rules of free trade and competition. Transnational Legal Process is a wise strategy to negotiate with China through a combination of self-interest and legal process, which could contribute to long-term national obedience with international law. **A spirit of openness** and regard for the broader community is likely to promote **economic welfare** as a whole, create **more harmony**, and take an edge off the world’s **conflicts**. Time will tell whether Transnational Legal **Process can meet this challenge**. What is certain, though, is that the unique nature of the Chinese economy creates new tensions for interpreting **WTO law and the roles of Transnational Legal Process**. In the future, Transnational Legal Process may need 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 may need to learn how to leverage **trade** cooperation to internalize **other domains of laws** and regulations **in the process** of Transnational Legal Process. In any event, the U.S. is not the only proponent of Transnational Legal Process. All allies should support the system of global governance and address the real problems of the world.

#### That’s key to an effective strategy to combat transnational threats

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

From this perspective, I have already argued that **transnational actors** (in this Article, U.S. courts and the USTR) **preserved international law** by participating in **Transnational Legal Process** by **working together** and **encouraging** each other through a complex **norm internalization**. They were not only spurred by self-interest; more importantly, these transnational actors also promoted WTO law compliance and competition policy convergence. In the next section, I propose transnational actors’ suggestions that together would constitute positive next steps for this critical economic relationship. The core is to avoid fostering a relationship shaped only by competition and identifying where mutually beneficial outcomes are possible. As the U.S. Department of Defense has pointed out, while China is a critical long-term strategic competitor, “competition does not mean conflict is inevitable, or preclude cooperation with China on areas of mutual interest.”276 B. What’s at Stake: Transnational Legal Process, Free Trade, and Competition The **cooperation of the 21st century was dominated by international organizations** created by formally negotiated and legally binding treaties.277 To maintain this structure of global cooperation, **the U**nited **S**tates supported the creation of an elaborate **legal framework to constrain illiberal actions** and encourage the notion of using global collaboration to solve global problems, such as **war** crimes, **trade** imbalances, **climate change**, immigration, and refugees. As the primary pioneer of liberal internationalism, this approach adopted by the United States was simple: **more diplomacy, more human rights, more democracy, and more legal process**.278 For example, the Paris Deal about climate change was negotiated under the auspices of the United Nations Framework Convention on Climate Change (“UNFCCC”), a treaty with 196 state parties to which the U.S. Senate gave its consent in 1992. Indeed, the evolution of the Paris Deal “graphically illustrated the engage-translate-leverage framework.”279 This deal also allows the U.S. to engage with countries around the world, such as G-20 members, members of the Major Economies Forum (“MEF”), and members of BASIC (Brazil, South Africa, India, and China) to frame the global deal. As Professor Koh commented: Instead of treating **climate change** as an area without law, the United States translated from **norms** inchoate in the rigid, legally binding, top-down Kyoto architecture, which specified internationally negotiated emissions targets that applied only to developed countries, to a much more informal, politically binding, bottom-up Copenhagen blueprint infused with stronger norms and with greater symmetry between the duties of developed and developing nations. 280 Likewise, the theory of Transnational Legal Process is significant in trade domains as well.281 The world is in a system of international commercial transactions that operates mostly with the hope of more and more market opening and less governmental intervention. The WTO is the only multilateral set of agreed-upon rules and norms of behavior to evaluate the Chinese economic structure’s impact on the international level. Seeing the WTO in this way **grants the U.S. authority** to confirm where China fails to comply with **existing commitments** and indicate where WTO laws are unable to discipline China on unfair trade practices and where bilateral or unilateral action may be necessary.

#### Transnational threats result in extinction

Nagan ’14 [Winston; April 20; Professor of Law at the University of Florida, LL.M. from Duke University, J.D. from Yale University, M.A. from Oxford University; Cadmus, “The Crisis of the Existing Global Paradigm of Governance and Political Economy,” vol. 2]

Abstract This article seeks to underline the central challenges to world order that are outcomes of our current system of global, social, power and constitutional processes. The article outlines these major problems which it is suggested represent a crisis for the future trajectory of human survival and well-being. The paper then uses the problem of the emergence of transnational criminal activity in order to underline the limits of the current global paradigm of governance. In effect, in the criminal law context the jurisdiction of sovereign states to attack the problem of transnational crime is hedged with severe limitations. The most important of these limitations is the fact that the jurisdiction over crimes by sovereigns is limited by the territorial character of the definition of sovereignty. Thus a sovereign has a limited capacity to control and police criminal activity whose main locus of operation is generated outside of the territorial reach of the sovereign state. This essentially means that the element of global governance generates a juridical vacuum which permits organized crime to flourish outside of the boundaries of the state but at the same time, having the capacity to penetrate and corrupt the social, political and juridical processes of the sovereign state. The article explores the effort of the UN to provide some form of response to this crisis in the form of an international agreement. The most important global expectation about global governance is reflected in the Preamble of the UN Charter and it is authorized by “we, the people” of the earth/space community. That expectation includes the high priority humanity gives to international peace and security; the reaffirmation of faith and fundamental human rights, in the dignity and worth of the human person, and equal rights for men and women and nations of whatever size. It also underscores the importance of the global rule of law as well as the promotion of social progress, better standards of life, and expanding freedoms. That is the promise. However, at the practical level the institutions of global governance have been to a large extent a captive of their own history. That history emerged with scholars in the late 1500s and early 1600s (Bodin and Hobbes) and later was given a juridical imperator in the Treaty of Westphalia (1648). In the early 19th century Bodin, Hobbes, and Westphalia were given a powerful juridical imprimatur when John Austin published his influential book The Province of Jurisprudence Determined. In effect, from Bodin to Austin we have the developments from scholarship, to political agreement to creation of a jurisprudential foundation for the notion of the territorially organized sovereign state. The sovereign state became the currency of international relations, diplomacy, international law, as well as a powerful limitation on the force and efficacy of both international law and constitutional law. In the 20th century the sovereignty idea contained no obvious constraints that could limit a drift into a global war (WWI). Moreover, the creation of the League of Nations system and the Covenant of the League was itself limited in a context of facilitating international peace and security by state claims to sovereign absolutism. At the end of WWII the victorious powers adopted the Charter of the United Nations. The Charter reflected ambiguity of its authority resting in “we, the people” and the residual strength and ambition of sovereign state powers, claiming frequently the competence to trump activities challenging their ambitions and interests. The current paradigm is thus responsible for generating problems that now seem to challenge the survivability of humanity, as well as undermine the prospect of global policy and practice that moves in a trajectory that secures humanity's wellbeing for the future. We list several of the most obvious scenarios where the state/sovereign-centered paradigm is limited in its capacity to respond effectively to the crisis of humanity’s future survivability and wellbeing. These are listed as follows: 1. The crisis of the global war system. States no longer have an effective monopoly on war making. States have been involved in privatizing the functions of the military with unforeseeable consequences. There continues to be the emergence of mercenary-like forces for hire in the global environment. The proliferation of the flow of arms and armaments in the global arms market remains significantly unregulated. The existence of weapons of mass destruction (nuclear, chemical and biological) still represents a major crisis regarding the acquisition of the technologies and assets of these weapons systems falling into the hands of terrorists groups or organized crime cartels.1 2. The growth of civil society deviance may threaten world order when it develops into forms of apocalyptic terrorism, state terrorism, organized crime, human trafficking, global drug production and distribution, and trading in small arms and/or components of mass destruction. 3. Global political economy of radical inequality. Conventional economic theory seems to lead a global race to the bottom. More wealth is produced than ever before and greater inequality is produced as well. Greater wealth concentrations often result in plutocracy which favors the wealthy and greater alienation for the impoverished. What is needed is an economic paradigm that is not confined to a single state or sovereign but a paradigm that functions within the context of a global, social and political process and responds to the problems that emerge from this process from a global inclusive perspective. 4. The depreciation of a human right to development, a depreciation that undermines the value potentials of human capital for the improvement of the human prospect. Clearly, the right to development is a human right of global dimensions and requires a global solution to effectively respond to it. The solution here is beyond the parochialism of national sovereignty. 5. The importance of a viable ecosystem for the survival of humanity requires policy making that is beyond the nation states’ competence. In short, global warming and climate change are matters of inclusive global concern. All must participate because all have a stake in preserving a viable ecosystem for all. 6. Human demographics and human survivability. The radical population increases raise the question of whether food security and accessibility to clean healthy water may be put at risk when earth’s population exponentially increases. Demographic growth may well challenge eco-social and economic capacity of the earth to indefinitely sustain such increases without important radical innovations in birth control, food production, and water conservation. These issues transcend any particular nation state. 7. The global capacity to respond to natural catastrophes (tsunamis, earthquakes, hurricanes, asteroid collisions). It’s now well accepted that such catastrophes require global action because the capacity of any particular sovereign is limited in this regard. 8. The global health crisis (AIDS, malaria, TB, Ebola, etc). It is clear today that any emergent global pandemic will be beyond the capacity of any single sovereign state. Such health threats are really beyond the current paradigm.

#### The plan is key to global trade --- Otherwise perceived Chinese illiberalism will rip it apart

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**”

#### Covid is a warning, the problem is structural --- Chinese mercantilism undermines resilience of free trade

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.

#### 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.



#### Protectionist fragmentation causes secondary risks --- Extinction

Dr. Suzanne Fry 21, Director of the Strategic Futures Group at the National Intelligence Council (NIC), Ph.D. in Politics from New York University, B.A. in Government and International Studies from the University of Notre Dame, Member of the Council on Foreign Relations, et al., “Global Trends 2040: A More Contested World”, A Publication of the National Intelligence Council, March 2021, https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

In 2040, the world is fragmented into several economic and security blocs of varying size and strength, centered on the United States, China, the European Union (EU), Russia, and a few regional powers, and focused on self-sufficiency, resiliency, and defense. Information flows within separate cyber-sovereign enclaves, supply chains are reoriented, and international trade is disrupted. Vulnerable developing **countries** are caught in the middle with some on the verge of becoming failed states. Global **problems**, notably climate change, are spottily addressed, if at all. HOW WE GOT THERE By the early 2030s, cascading global challenges from decades of job losses in some countries in part because of globalization, heated trade disputes, and health and terrorist threats crossing borders prompted states to raise barriers and impose trade restrictions to conserve resources, protect citizens, and preserve domestic industries. Many economists thought that economic decoupling or separation could not really happen because of the extensive interdependence of supply chains, economies, and technology, but security concerns and governance disputes helped drive countries to do the unthinkable, despite the extraordinary costs. Countries with large domestic markets or sizeable neighbors successfully redirected their economies, but many developing economies with limited resources and market access were hit hard as both import and export markets dried up. Economic stagnation fostered widespread insecurity across Africa, the Middle East, and South Asia, fueling a retreat to subnational ethnic and religious identities, **strained societies, fragmented states**, and spreading instability. New waves of migrants headed to the developed world hoping to escape poverty, poor governance, and increasingly harsh environmental conditions. Their hopes were dashed when political pushback prompted destination countries to block most migration. As physical barriers went up, dependence on digital commerce and communications **soared**, but a combination of information management **challenges** and repeated data security breaches led those states with strong cyber controls, like China and Iran, to reinforce their **cyber barricades**. Then states that once advocated for an open Internet set up new closed, protected networks to **limit threats** and screen out unwanted ideas. By 2040, only the United States and a few of its closest allies maintained the semblance of an **open Internet** while most of the world operated behind strong firewalls. With the trade and financial connections that defined the prior era of **globalization disrupted**, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but **prices** for consumer goods rose dramatically. States unable to join a bloc were **left behind and cut off**. Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to develop **nuclear weapons**, as the ultimate guarantor of their security. Small **conflicts occur**red at the edges of these new **blocs**, particularly over scarce resources or emerging opportunities, like the **Arctic** and **space**. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, **conflicts became endemic**, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address climate changes, little was done to slow **greenhouse gas emissions**, and some states experimented with geoengineering with disastrous consequences.

#### Lack of cartel deterrence enables weaponized interdependence

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>

\*Edited for ableist language

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 (asinine)** ~~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.

#### Weaponized interdependence elicits quick modernization and nuclear escalation

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."

#### It also undermines the liberal coop

Brands, 20 (Hal Brands, Hal Brands is a senior fellow at the American Enterprise Institute, where he studies US foreign policy and defense strategy. Concurrently, Dr. Brands is the Henry A. Kissinger Distinguished Professor of Global Affairs at the Johns Hopkins School of Advanced International Studies (SAIS). Dr. Brands graduated from Yale University with a PhD, MA, and MPhil in history. He also received a BA in history and political science from Stanford University., 10-30-2020, accessed on 3-25-2022, American Enterprise Institute - AEI, "To compete with China, we need the liberal international order | American Enterprise Institute - AEI", <https://www.aei.org/op-eds/to-compete-with-china-we-need-the-liberal-international-order/)//Babcii>

In May, 2020, Senator Josh Hawley (R-Mo.) introduced a joint resolution to pull the United States out of the World Trade Organization. For a quarter-century, the **WTO** has represented the **apotheosis** of progress toward a more integrated, cooperative global economy. Yet Hawley, who has been positioning himself for leadership of the post-Trump Republican Party, argued that the organization had merely empowered America’s most dangerous challenger. China had exploited the market access its WTO membership provided to pursue a predatory trade policy at Washington’s expense, he [wrote](https://www.hawley.senate.gov/senator-hawley-introduces-joint-resolution-withdraw-wto): “International organizations like the WTO have enabled the rise of China and benefited elites around the globe while hollowing out American industry.” Withdrawing from the WTO, and rediscovering the virtues of economic self-reliance, were prerequisites to defending American interests in an age of rivalry. Hawley’s proposal parallels the Trump administration’s [assault](https://www.politico.com/story/2019/07/26/trump-world-trade-organization-1623192) on the WTO over the past four years, an attack meant to make the organization irrelevant by preventing it from performing its crucial dispute resolution function. Hawley’s argument also reflects the key intellectual themes of Trump-era foreign policy. The administration and its supporters have advanced a two-fold argument: first, that the United States must shift toward competition with China; and second, that doing so requires moving away from the “liberal international order” that Washington has cultivated for decades. Like many ideas underpinning Trump’s statecraft, the argument is narrowly correct, in the sense that calling a halt to progressively deeper engagement with China was an overdue prerequisite to confronting the challenge it poses to U.S. interests. Yet the argument also misses a larger strategic truth, which is that America cannot compete effectively with China if it abandons the **liberal order** that **China’s behavior threatens.** The “liberal international order” is shorthand for the strategic [project](https://press.princeton.edu/books/paperback/9780691156170/liberal-leviathan) that America undertook after World War II and has pursued in various forms for 75 years. That project was embodied, economically, in institutions and agreements that promoted **free commerce** and discouraged mutually immiserating trade wars. It reflected an emphasis, albeit an imperfect one, on human rights and democratic values. It featured unprecedented, if inconsistent, multilateral cooperation through institutions such as the World Bank, International Monetary Fund, and World Health Organization. The **entire order was anchored by American power** and a network of U.S.-led alliances and strategic partnerships that circled the globe. The liberal order is now caricatured by critics as a manifestation of a strategic idealism. Yet it was rooted in the [sad realism](https://www.amazon.com/Lessons-Tragedy-Statecraft-World-Order/dp/030023824X) that emerged from Great Depression and World War II—the realization that the world would surely descend into anarchy or worse absent enlightened leadership by its most powerful nation, and that America could secure its narrow national interests only through the creation of a larger international society that was itself healthy, stable, and prosperous. Over the subsequent decades, the American-led order proved remarkably [effective](https://www.amazon.com/Jungle-Grows-Back-America-Imperiled/dp/0525521658) in suspending the normal rhythms of power politics within the non-Communist world, and thereby forging a geopolitical community whose successes exerted excruciating strategic and ideological pressure on the Communist world. After the Cold War, America’s strategic horizons expanded: Washington would exploit the collapse of the Soviet Union and its ideological challenge to enlarge and entrench the liberal system. NATO expanded into Eastern Europe to hedge against a resurgence of Russian power and encourage the consolidation of political and economic reforms. The United States promoted the freer flow of goods, capital, and information on an increasingly global scale. Washington also aimed to bring potential spoilers, notably China, into the expanding order, through economic integration that would, in theory, ultimately exert a geopolitically pacifying and politically liberalizing effect on Beijing. It is undeniable that certain aspects of this program went [awry](https://www.tandfonline.com/doi/full/10.1080/00396338.2018.1470755). American officials underestimated the determination of China’s rulers to hang onto power amid a global wave of democratization, as well as their resourcefulness in doing so. Washington probably overestimated the extent to which a party that was rooted in Leninist principles could be induced to accept a positive-sum vision of international affairs. The **engagement policy** of the 1990s and 2000s ended up hastening the rise of a competitor that became more, not less, truculent and authoritarian. It also created, as COVID underscored, **dependencies** on an autocratic **rival** for key goods ranging from **munitions** components to **pharmaceuticals**. The single most important strategic insight of the Trump administration has thus been that ending the engagement paradigm, and limiting American integration with China, are vital to containing the influence of a country that is using its centrality in the global economy as a source of strategic leverage. Regardless of whether Trump or Joe Biden wins the presidency, America must build greater **resilience** against China’s **coercive power**, which implies reducing—preferably in a targeted, selective fashion—the dependence of democratic societies on **Chinese** money, **markets, and strategically important goods**. Unfortunately, the administration and its supporters have turned this insight into a broader hostility towards the liberal order. Trump, of course, has distinguished himself with his [antipathy](https://www.amazon.com/American-Grand-Strategy-Age-Trump/dp/0815732783) to alliances, trade agreements, and international institutions; he theatrically withdrew from the WHO rather than compete vigorously for influence there. The president’s National Security Strategy put an intellectual spin on this antipathy by [condemning](https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf) post-Cold War foreign policy as an exercise in geopolitical naiveté. It paired an unvarnished description of the Chinese challenge with a striking lack of emphasis on the relatively peaceful and cooperative order that Beijing is challenging. Former officials and leading intellectuals have [argued](https://muse.jhu.edu/chapter/2696579) that America can win “Cold War II” only by [breaking](https://www.foreignaffairs.com/articles/americas/2020-08-11/end-american-illusion) with the liberal international order that helped it win Cold War I. This is where the argument **jumps the tracks**, for three reasons. First, this approach risks turning the U.S.-China competition into a struggle over power alone. The reason that the United States has traditionally found it comparatively easy to rally allies is that it has been committed to a broader concept of international order that benefits so many countries. The contrast with Beijing, which has tended to consume global publics goods—freedom of the seas, for example—provided by others while aggressively pursuing its own economic and territorial interests, ought to be obvious. But if the United States rejects the liberal order, then its competition with China is really just an effort to defend its own primacy. It isn’t clear why countries around the world—except those most tangibly menaced by Chinese military might—would join America in that effort. If America becomes less committed to the international order it created, expect many of its friends, particularly other democracies, to become less committed to supporting American leadership. Second, for smaller countries that lack the power to **slug it out with Beijing**, economically or militarily, the liberal order is a **critical** means of self-protection. It provides international norms, standards, and processes that [lesser powers](https://www.foreignaffairs.com/articles/asia/2020-06-04/lee-hsien-loong-endangered-asian-century) can use to hold greater powers to account. The **WTO** is undoubtedly flawed, but it nonetheless offers a forum in which a Singapore or a Malaysia can **lodge complaints** against mercantilistic Chinese trade practices. If that **organization** becomes a **dead letter**, or if America becomes an agent of destruction vis-à-vis international law and institutions, we will enter a **might-makes-right world** that will seem quite congenial to Beijing. Finally, the only way to compensate for selective decoupling from rivals is through deeper integration with friends. It is all well and good to say that America and other democracies should not rely on China for pharmaceuticals or components of precision-guided munitions. But autarky isn’t a feasible solution, even for the United States, and Washington can’t surrender the benefits of specialization and comparative advantage while still hoping to [compete](https://www.brookings.edu/research/preparing-the-united-states-for-the-superpower-marathon-with-china/) with a technologically sophisticated nation of 1.4 billion people. It will require [more](https://www.bloomberg.com/opinion/articles/2020-03-26/coronavirus-and-the-g-20-globalization-is-the-best-medicine?sref=nmVx3tQ5), not less, economic cooperation with like-minded nations to succeed in competition with China, which requires strengthening the order that binds America to its allies and partners. The problem with Trumpism is not that it is devoid of good ideas, but that it often blends them with dangerously self-destructive ones. When Trump’s presidency ends, whether in a few months or a few years, the challenge will be to appropriate the former while jettisoning the latter. The paradigm of strategic competition with China should, and likely will, persist. But prevailing in that rivalry will require reinvesting in, rather than undermining, **the liberal order** Trump has scorned.

#### That causes numerous existential risks

Yuval Noah Harari 18, Professor of History at Hebrew University of Jerusalem, 9/26/18, “We need a post-liberal order now,” The Economist, <https://www.economist.com/open-future/2018/09/26/we-need-a-post-liberal-order-now>

The second thing to note about this vision of friendly fortresses is that it has been tried—and it failed spectacularly. All attempts to divide the world into clear-cut nations have so far resulted in war and genocide. When the heirs of Garibaldi, Mazzini and Mickiewicz managed to overthrow the multi-ethnic Habsburg Empire, it proved impossible to find a clear line dividing Italians from Slovenes or Poles from Ukrainians. This had set the stage for the second world war. The key problem with the network of fortresses is that each national fortress wants a bit more land, security and prosperity for itself at the expense of the neighbors, and without the help of universal values and global organisations, rival fortresses cannot agree on any common rules. Walled fortresses are seldom friendly. But if you happen to live inside a particularly strong fortress, such as America or Russia, why should you care? Some nationalists indeed adopt a more extreme isolationist position. They don’t believe in either a global empire or in a global network of fortresses. Instead, they deny the necessity of any global order whatsoever. “Our fortress should just raise the drawbridges,” they say, “and the rest of the world can go to hell. We should refuse entry to foreign people, foreign ideas and foreign goods, and as long as our walls are stout and the guards are loyal, who cares what happens to the foreigners?” Such extreme isolationism, however, is completely divorced from economic realities. Without a global trade network, all existing national economies will collapse—including that of North Korea. Many countries will not be able even to feed themselves without imports, and prices of almost all products will skyrocket. The made-in-China shirt I am wearing cost me about $5. If it had been produced by Israeli workers from Israeli-grown cotton using Israeli-made machines powered by non-existing Israeli oil, it may well have cost ten times as much. Nationalist leaders from Donald Trump to Vladimir Putin may therefore heap abuse on the global trade network, but none thinks seriously of taking their country completely out of that network. And we cannot have a global trade network without some global order that sets the rules of the game. Even more importantly, whether people like it or not, humankind today faces three common problems that make a mockery of all national borders, and that can only be solved through global cooperation. These are nuclear war, climate change and technological disruption. You cannot build a wall against nuclear winter or against global warming, and no nation can regulate artificial intelligence (**AI) or bio**engineering single-handedly. It won’t be enough if only the European Union forbids producing killer robots or only America bans genetically-engineering human babies. Due to the immense potential of such disruptive technologies, if even one country decides to pursue these high-risk high-gain paths, other countries will be forced to follow its dangerous lead for fear of being left behind. An AI arms race or a biotechnological arms race almost guarantees the worst outcome. Whoever wins the arms race, the loser will likely be humanity itself. For in an arms race, all regulations will collapse. Consider, for example, conducting genetic-engineering experiments on human babies. Every country will say: “We don’t want to conduct such experiments—we are the good guys. But how do we know our rivals are not doing it? We cannot afford to remain behind. So we must do it before them.” Similarly, consider developing autonomous-weapon systems, that can decide for themselves whether to shoot and kill people. Again, every country will say: “This is a very dangerous technology, and it should be regulated carefully. But we don’t trust our rivals to regulate it, so we must develop it first”. The only thing that can prevent such destructive arms races is greater trust between countries. This is not an impossible mission. If today the Germans promise the French: “Trust us, we aren’t developing killer robots in a secret laboratory under the Bavarian Alps,” the French are likely to believe the Germans, despite the terrible history of these two countries. We need to build such trust globally. We need to reach a point when Americans and Chinese can trust one another like the French and Germans. Similarly, we need to create a global safety-net to protect humans against the economic shocks that AI is likely to cause. Automation will create immense new wealth in high-tech hubs such as Silicon Valley, while the worst effects will be felt in developing countries whose economies depend on cheap manual labor. There will be more jobs to software engineers in California, but fewer jobs to Mexican factory workers and truck drivers. We now have a global economy, but politics is still very national. Unless we find solutions on a global level to the disruptions caused by AI, **entire countries might collapse**, and the resulting chaos, violence and waves of immigration will destabilise the entire world. This is the proper perspective to look at recent developments such as Brexit. In itself, Brexit isn’t necessarily a bad idea. But is this what Britain and the EU should be dealing with right now? How does Brexit help prevent nuclear war? How does Brexit help prevent climate change? How does Brexit help regulate artificial intelligence and bioengineering? Instead of helping, Brexit makes it harder to solve all of these problems. Every minute that Britain and the EU spend on Brexit is one less minute they spend on preventing climate change and on regulating AI. In order to survive and flourish in the 21st century, humankind needs effective global cooperation, and so far the only viable blueprint for such cooperation is offered by liberalism. Nevertheless, **governments** all over the world are undermining the **foundations** of the liberal order, and the world is turning into a network of fortresses. The first to feel the impact are the weakest members of humanity, who find themselves without any fortress willing to protect them: refugees, illegal migrants, persecuted minorities. But if the walls keep rising, eventually the whole of humankind will feel the squeeze.

### 1AC --- Plan

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

### 1AC --- Solvency

#### Contention 2 is SOLVENCY:

#### The plan institutes a transparency requirement that smokes out gaming attempts while retaining fairness

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.

#### That solves by ensuring an effective strategy to ensure political responsibility under international trade law

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 most comprehensive studies prove the plan successfully deters cartels and induces compliance

Putnam 16 – Tonya L. Putnam is a Research Scholar at the Arnold A. Salzman Institute of War and Peace Studies at Columbia University. From 2007 to 2020 she was a member of the Political Science at Columbia University. Tonya’s work engages a variety of topics related to international relations and international law with emphasis on issues related to jurisdiction and jurisdictional overlaps in international regulatory and security matters. “Extraterritoriality in the Absence of Agreement: International Antitrust.” Chapter. In Courts without Borders: Law, Politics, and US Extraterritoriality, 101–51. Cambridge: Cambridge University Press, 2016. doi:10.1017/CBO9781316480304.004.

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.

#### Lenient and uncertain applications of antitrust hamstring deterrence --- Only the plans clear and certain hardline solves

Wu, 18 (Bangyu Wu, Independent author for SSRN.com, practices law at [Guangdong Guangyue Law Firm](http://credit.gdla.org.cn/front/indexFront/orgDetail?orgId=102080), 4-18-2018, accessed on 3-2-2022, Papers.ssrn, "The 'Foreign Compulsion' Defense in U.S. Anti-Trust Law---A Possible Rectified Unification of its Current Divergence", https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3165165)//Babcii

C. Criticism To the Lax Approach The Lax Approach in Vitamin C might be the most **outlandish** approach an U.S. **court** could take. Under this approach, the “True conflict” test satisfied the minimum compulsion that a country could perform. In terms of the “priority problem” by introducing the “balancing test” in Timberlane, the essence of the “balancing test” is to compare which country has greater interests to decide whether the court should abstain or not, therefore it is a complete test. The problem of this approach, however, is that it is **over lenient** and **unpredictable**. It basically **leaves United States interests at the mercy of a foreign government**, and attempts to reach a neutral ruling that beyond a domestic court’s capacity. 1. The Overstated Comity Concern The dominating rationale for the Second Circuit’s judgment is comity, or to be more specifically, the prescriptive comity. Mr. Doge in his paper International Comity in American Law made a clear distinction of comity as a principle that plays different roles in U.S. legal system, among them, the “prescriptive comity” is employed by U.S. courts as the ground for restraining extraterritorial judicial power60, i.e., “to avoid unreasonable interference with the sovereign authority of other nations.”61 In Hartford Fire, the Supreme Court realized that it is possible for the court to abstain from exercising jurisdiction “under the principle of international comity”62. However, the importance of comity should not be overstated in Anti-trust law FSC situation, there are at least two reasons for this: First, the extraterritorial application of Anti-trust law itself has weaken the importance of comity concern. One of the most important approaches for prescriptive comity to restrain United States judicial power is to apply the almost unconditional presumption against extraterritorial application of U.S. law63, but under the Anti-trust law, this presumption has already been overcome, therefore one can naturally reach a assumption that the legislators/interpreters of Anti-trust law would foresee the possibility of the conflict between U.S. law and foreign law, yet they still chose to apply the Anti-trust law extraterritorially, which indicates the comity issue is not the primary concern, otherwise the Anti-trust statute would not overcome the presumption in the first place. Congress has long recognized the extraterritorial application of Anti-trust law, but has rarely chosen to limit such an application by courts64, which can also justify such an inclination. Second, realizing international comity should not sacrifice the reasonable interests of United States. Prescriptive comity refuses unreasonable exercise of jurisdiction to promote a state’s interests65. But with the development of global consensus over the harm of anti-competition action, three major anti-trust extraterritorial regions-United States, China, and EU have adopted their own version of extraterritorial application of domestic anti-trust law, and all of those regions’ statutes adopted “effect test” that derived from the United States Anti-trust law66. The importance of competition for a country’s market economic cannot be overstated, moreover, it is well-established that a country has the right of regulating the economic affairs within its own border67, therefore, applying the anti-trust law to a foreign corporation that intend to and indeed has substantial effect to U.S. economic should be deemed as protecting United States reasonable interests, this should also be the foreign corporation’s expectation when they are doing business in United States. Once we understand United States shares the equally reasonable interests of protecting its economy from harmful anti-competition action, a fair question would be: Could the comity be stated to the extent of sacrificing United States legitimate interests? The author believes not. Comity itself has never been interpreted as an absolute obligation for a court to fulfill, especially when facing a situation where the reasonable domestic interests would be hurt by such a comity doctrine, as the Court in Laker Airways dictated: “The central authority quoted, Hilton v. Guyot, recognizes that comity never obligates a national forum to ignore ‘the rights of its own citizens or of other persons who are under the protection of its laws.’” 68 Moreover, the Restatement (Third) of Foreign Relations Law § 403 expressed the idea that when two states are both reasonable to exercise conflicting jurisdiction over a person or activity, the state with “clearly” greater interests would prevail69. In an Anti-trust law FSC situation, both states have reasonable interests of regulating its domestic economic, it is **hard to say** whose interest is “clearly” **greater than the other**. Indeed, it is technically necessary to examine this on a case-by-case ground, for example, if a country’s revenue is overwhelmingly based on its exportation of certain product, without certain price-fixing policy the people in that country would starving, then one can tell that state’s interests is “clearly” greater because survival is almost always the priority concern, but an empirical and reasonable conclusion would be, such a situation is too rare to justify comity’s superiority as a general rule under Anti-trust law. Therefore, the comity concern should not be the general dominating factor in FSC defense under Anti-trust Law. 2. Misplayed Role of US Court Another criticism to the **Lax Approach** is also related to the **comity** issue. The Second Circuit in Vitamin C tried to employ the **“balancing test”** to compare which country’s interest is greater over the Anti-trust issue, but such an attempt demands an U.S. court to **play a neutral role that** not only too demanding, but also **results in uncertainty** The “balancing test” requires the court to consider which country has greater interests over the contesting issue to decide whether to abstain or not. However, such an inquiry is dubious from its beginning. The United States court is not an international dispute resolving forum like WTO panel, no matter how developed the country’s law is, it is still a domestic court, its law’s primary purpose is, of course, protecting its own interests. The judge sitting on the bench is immersed in the faith to its own country, paid by its own people, take an oath to its own Constitution, as the Court in LakerAirways pointed out: The courts of most developed countries follow international law only to the extent it is not overridden by national law. Link to the text of the note Thus, courts inherently find it difficult neutrally to balance competing foreign interests to the text of the note. When there is any doubt, national interests will tend to be favored over foreign interests.70 The “balancing test” that requires the court to consider “relative importance of the alleged violation of conduct here compared to that abroad”71, but how should a court siting in its own country, designed to enforce its own law to give up its own position to favor the contradicting foreign law? In what way could the court get rid of its “prejudice” to consider the importance of the issue to the foreign country? Is there any universal standard to decide what is “important”? Even if there is somehow, is such an approach desirable for a domestic court? Those questions almost answered themselves. In fact, in **Timberlane** and Mannington **Mills**, courts only identified the interests need to be considered, but left the question of “**which state** has greater interests” **unsolved**, later courts’ attempt in balancing test were not satisfying, neither72. Scholars’ criticism echoed this criticism after the creation of the “balancing test” 73. The most conspicuous flaw in Second Circuit’s ruling also demonstrates this criticism, in Vitamin C, the Second Circuit identified Chinese government’s interest in vitamin C regulation is “assist China in its transition from a state-run command economy to a market-driven economy, and the resulting price-fixing was intended to ensure China remained a competitive participant in the global vitamin C market and to prevent harm to China's trade relations” 74 . After this, the Court draw a conclusion: “Recognizing China's strong interest in its protectionist economic policies and given the direct conflict between Chinese policy and our antitrust laws, we conclude that China's ‘interests outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law.’” 75 The United States interests in maintaining a competitive market is missing, and there is **no way to know with what standard the court reached its conclusion**. The Court’s silent in the process of comparison is not surprising, simply because **it is impossible** to **weigh things** with a **scale** that has **no marks**. Moreover, the Lax Approach makes the balancing test **dominates** FSC **analysis** while almost abandoning the compulsion concern will **bring more uncertainty**. Since there is a **significant lack of** the specific and practicable **standard** in courts’ **practice**, if comity is to be the dominating concern in FSC defense, the **defendant cannot adjust its future behavior** accordingly because the anti-trust law **might be set aside** almost **randomly** by the discretion of the court. In author’s view, such an **unpredictability should be avoided**, as it is almost as terrible as the conflicting laws defendant is facing.

#### Antitrust is the only solution to induce liberal reform

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

V. THE IMPLICATIONS OF TRANSNATIONAL LEGAL PROCESS FOR TRADE AND COMPETITION There are potential implications of Transnational Legal Process for WTO compliance. Suppose a WTO member country moves in a legally noncompliant direction. In that case, other member countries can legally challenge that country in a WTO dispute and generate an interaction that yields a settlement (interpretation) that the government defendant must then obey as a matter of domestic law (internalization).252 I already discussed how US **courts** and both **governmental** and non-governmental **actors** were part of the Transnational Legal Process. In this Chapter, I examine important normative questions **via Transnational Legal Process**. I argue that Transnational Legal Process has laid the groundwork for China’s **economic transition**. What is at stake is that the international trade regime’s success did not replicate itself in other international law domains. The appropriate solution, in my view, remains Transnational Legal Process. I then apply Transnational Legal Process to current international trade, focusing particularly on the trade war rages between the US and China. As we shall see, Transnational Legal Process remains alive and significant opportunities exist for US transnational actors if they remain active **participants**. A. The Fruits of Transnational Legal Process There are at least three practical reasons that Transnational Legal Process can be robust, even in a place where judicial institutions are weak and governmental openness limited.253 First, the heart of effective internalization depends on the degree to which particular rules are or are not internalized into the domestic legal structure, instead of the particular domestic legal system in question.254 Second, Transnational Legal Process is a constructivist process by which it serves to reorder not just national interests but even national identity. 255 Third, Transnational Legal Process actually could help to explain why nations obey and why nations do not obey. 256 The United States has encouraged the Chinese agencies to enforce the Anti-monopoly Law (“AML”) to work with Chinese regulatory agencies with sectoral responsibilities to **emphasize** the importance of trade associations refraining from engaging in **conduct that would violate antitrust** law.257 On 30 August 2007, **China promulgated** the **AML**, shortly after antitrust class actions brought against Chinese defendants.258 The AML delineates the legal framework for the prohibition of cartels. Article 11, for example, stated that “[t]rade associations shall tighten their selfdiscipline, give guidance to the undertakings in their respective trades in lawful competition, and maintain the market order in competition.”259 Article 16 makes explicit that trade associations may not make arrangements for undertakings within their respective trades to engage in monopolistic practices.260 Article 46 increases the maximum fines imposable on trade associations from 500,000 yuan to 5 million yuan.261 The same article also stated that if the circumstances are serious, the administrative department for the registration of public organizations may cancel the registration of the trade association per the law.262 Since the initial implementation of the AML in 2008, several price-related investigations involving trade associations were conducted by the country’s antitrust agencies, including fields of papermaking, sea sand, gold jewelry, construction equipment, insurance, brick manufacturing, tourism and so on.263 Action accompanied the commitment that China will implement its DSB rulings and recommendations on May 2, 2015.264 According to State Councilor Wang Yong: “The separation of industry associations and chambers of commerce from the government represents a major reform measure that China is currently carrying out.”265 On July 8, 2015, the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council released the “Overall Plan for the Decoupling of Chambers of Commerce of Industry Associations and Administrative Organs” to promote the decoupling of industry associations from administrative agencies. 266 The plan is considered to be a first step for the Chinese government to formally clarify the functional boundaries between administrative agencies and industry association chambers of commerce. 267 It includes 1) cancellation of the sponsorship, supervisory, and affiliation relationship between the administrative organ (including subordinate units) and the industry associations and the chamber of commerce; 2) clarification of the functions of the industry associations and the chamber of commerce, including removing the existing administrative functions of the industry associations and the chamber of commerce, except as otherwise provided by laws and regulations; 3) separation of assets and finance, and standardization of property relations; and 4) separation the personnel management of these industry associations and the chamber of commerce from the government, and define their relationship regarding personnel; and 5) separation Communist Party of China affairs and international exchanges of these organizations from the government and define their relationship regarding administration.268 By the end of 2018, 422 national-based industry associations had been decoupled from administrative agencies, which exceeded 50% of the total number.269 On June 14, 2019, the Central Office announced the decoupling of the remaining 373 national-based industry associations.27 All the above changes show that the government delineated a robust enforcement system against protectionist and other abusive government restraints. In fact, the fruits of Transnational Legal Process are visible on the streets of any major Chinese metropolis. With the WTO accession and **Transnational Legal Process** application, **thousands of Chinese laws and regulations were rewritten**. 271 Chinese legal scholars, international lawyers, law students, and government officers acquired knowledge about the rules necessary for their country to **reengage with the global trade regime**. They, in turn, widely disseminated this knowledge internally.272 Yet it would be **incorrect to assume that Transnational Legal Process is always perfect**. As many scholars argued, the enforcement powers of the AML are so **weak** as to nearly undermine the effort.273 **Nevertheless**, it is essential to step back and be clear that China is currently the United States’ largest merchandise trading partner, its third-largest export market, and its most significant source of imports. The economic costs of the bilateral economic relationship are genuine. Meanwhile, the **WTO** is the only international body dealing with trade rules between the U.S. and China that reflect core U.S. values. It “**form[s]** a baseline . . . to build **global support** to **critique** and **push back** against **Chinese** economic **practices**.” 274 In the context of comprehensively addressing China’s challenges, **the WTO is** still a **central** system, and subject to the strong leadership of the U.S. Viewed through the optic of a Transnational Legal Process, legal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, judicial interpretation, legislative action, or some combination of the three.275 That is, the U.S. should take a comprehensive approach to the negotiations based on market-oriented solutions, **strengthening the global trading system and the rule of law.** Progressing on China’s **WTO commitments** will be most **effective** where the U.S. is also complying with its WTO commitments.

#### No DA’s --- Even a full rejection of deference to China would be within the world welfare

\* 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

#### BUT they are also thumped --- The Supreme court’s previous expansion of antitrust smashed deference AND ensures infinite uncertainty

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

## 2AC --- Adv --- China

### 2AC --- AT --- Heg Bad

#### 1. Heg is sustainable --- It not even close

Hal Brands & Charles N. Edel 19. \*\*Hal Brands, Henry A. Kissinger Distinguished Professor of Global Affairs at the Johns Hopkins University School of Advanced International Studies; Resident Scholar at the American Enterprise Institute. \*\*Charles Edel, Assistant Professor of strategy and policy at the U.S. Naval War College; CFR International Affairs Fellow. *The Lessons of Tragedy: Statecraft and World Order*. 2019.

It is easy to lose sight of this fact amid all the upheaval both in America and overseas. Yet the basic picture remains unambiguous. **The United States is no fallen hegemon.** America still accounted for **22 percent of global GDP** in 2016—not far off the historical average since the 1970s—and it **spent as much on defense as the next eight nations combined.** When U.S. treaty allies are factored in, America’s geopolitical coalition possessed nearly **60 percent of global GDP and military spending**, an amount that still vastly exceeds the economic and military power of all U.S. rivals put together, and that seems unimpressive only in comparison to the utterly peerless primacy of the 1990s. Washington remains at the **center of a global network made up of over thirty treaty allie**s, another thirty or so quasi-allies, and still more security and diplomatic partners, **giving it geopolitical leverage and relationships** that no competitor can approach. And **even in the age of Trump, no rival boasts anything close to America’s experience and expertise in coordinating complex military and diplomatic endeavors.** This is not to say that all is well. America’s competitors have closed the gap in some key areas; that narrowing margin is **encouraging the geopolitical tests Washington confronts today.** There are questions regarding whether the United States still has enough military might to uphold key regional balances around the world, which are inseparable from questions about how wisely the country will address its long-term fiscal dilemmas. There are even graver questions as to whether Americans and their leaders still want to use the nation’s power in the service of the postwar order. But the primary limiting factors here are political and psychological rather than material. They relate to historical amnesia, and to a reluctance to make hard choices and face hard facts, rather than any catastrophic collapse of American power. The United States still **possesses advantages that most previous leading powers can only envy; its capabilities are surely sufficient**—particularly when combined with the strengths of its allies—to mount a credible defense of the international system it has constructed. To say the U.S.-led order is endangered is a counsel of realism, but to say the situation is irretrievable is a counsel of unwarranted despair.

#### 3. China heg fails---there’s no alternative to U.S. leadership

Lyon, 19 - senior fellow at ASPI; Rod Lyon, “Can ‘revisionists’ rule the world?," *Strategist*, 3-14-2019, https://www.aspistrategist.org.au/can-revisionists-rule-the-world/

That takes us to the separate but larger question: could Russia and China cooperate to shape a new global order in Asia, Europe and the Middle East? That’s only a portion of the globe, but an important portion. Well, Russia’s a European-centred state with a revanchist agenda focused on reversing its post–Cold War losses. That’s a big ask, though. The Soviet Union’s gone and it isn’t coming back. China, by comparison, is a rising power—and one that believes it’s entitled to a Sino-centric order in Asia, as a sort of latter-day compensation for the century of humiliation. It has both economic and growing military heft. Still, it remains an incomplete power, demonstrated most clearly by its relentless, state-organised theft of technology and intellectual property, and its large internal challenges. It’s not obvious that Russia and China could build and sustain a new global order. Yes, they’re both permanent members of the UN Security Council. But neither attracts genuine ‘followers’ in the international community. They agree on what they don’t want—US hegemony—rather than on what they do. They’re not driven by any shared ideology or common vision of what the world should look like under their leadership. Some suggest that they want to reverse the central tenet of the liberal order and make the world safe for authoritarianism, but that’s a negative, self-centred vision of the future rather than a positive ideational one. Nationalism is a rising force in both countries, but that’s as likely to repel as attract. Geopolitically, will the rising power cooperate with the declining one—except to secure its own backyard? Conversely, will Moscow see Beijing as its true strategic partner—as the Belt and Road Initiative extends Chinese influence across Russia’s soft Eurasian underbelly? Where does that leave us? Frankly, a world order that turns upon close cooperation between Russia and China seems unlikely. Each is better placed to exert regional influence than global clout. And both are better placed to play the easy role of spoilers than the difficult role of architects. A world disordered by the joint efforts of Russia and China to diminish US power and influence—accelerated by some of the US’s own actions—seems the near-term reality we’ll be living through.

## 2AC --- OFF

### 2AC --- T --- Expand

#### Expand includes clarification, not amendment.

Washington Court of Appeals 4 (HOUGHTON, J. Opinion in State v. Cannon, 84 P. 3d 283 - Wash: Court of Appeals, 2nd Div. 2004. Google scholar caselaw. Date accessed 7/12/21).

In 2002, the House and Senate introduced two identical bills, House Bill 1512 and Senate Bill 6346, to alter the definition of "photograph." The Final Bill Report on House Bill 1512 states, "The term `photograph' in the child pornography statutes is expanded to include digital images and both tangible and intangible items." H.B. REP. on HB 1512, 57th Leg., Reg. Sess. (Wash.2002). Cannon argues that by using the word "expand," the Legislature indicates that it amended rather than clarified the statute. We disagree.

### 2AC --- Exec deference CP/DA --- F/L

#### 4. The plan solves the NB by actualizing exec deference in the area of the plan

Angela Huyue Zhang, Associate Professor of Law, University of Hong Kong, ’19, "Strategic Comity," Yale Journal of International Law 44, no. 2

4. In its brief, the U.S. government relied heavily on Federal Rule of Civil Procedure 44.1, which was adopted in 1966 to assist courts in determining issues concerning foreign law.16 4 The government highlighted two aspects of Rule 44.1. First, the determination of foreign law is a "question of law" for the courts rather than a question of fact.165 Second, the Court may consider any relevant material or sources in determining foreign law.166 This affords federal courts great flexibility.167 In addition, the U.S. government argued that federal courts should not treat foreign governments' characterizations as conclusive in all circumstances.168 The executive branch enumerated a list of factors that courts should consider when weighing a foreign government's statements, including "the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence."' 69 The **brief** then **noted that the Second Circuit disregarded** other relevant materials, including **China's representation to the W.T.O**. that it had given up export administration of vitamin C. 17 0 Further**, the brief disagreed with the Second Circuit's interpretation of the previous case law**, arguing that not "every submission by a foreign government is entitled to the same weight."' 7 ' Last but not least, the brief disputed the Second Circuit's concerns about reciprocity, stating that the United States has never argued before foreign courts that they are bound to accept its characterizations of U.S. law. 172

#### 5. BUT avoids downsides of directly linking them

Dodge ’15 [William S; Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law; *Columbia Law Review,* “INTERNATIONAL COMITY IN AMERICAN LAW,” <https://columbialawreview.org/content/international-comity-in-american-law/>; KS]

Much more problematic is judicial deference to the Executive with re­spect to the outcomes of particular cases. Some international comity doc­trines have been interpreted to permit case-by-case discretion by the ex­ec­utive branch. The Second Circuit has held that the Executive may waive the act of state doctrine in a particular case under the so-called Bernstein exception.381 With respect to foreign official immunity, the executive branch has claimed authority to make binding determinations since the Supreme Court’s 2010 decision in Samantar.382 For status-based immunities, this au­thority derives from the President’s recognition power and is uncontro­versial, but there is no “equivalent constitutional basis” for determina­tions of status-based immunity.383 Nevertheless, the Fourth Circuit gives State Department determinations of conduct-based immunity “substantial weight,”384 while the Second Circuit considers them absolutely binding.385 As for foreign state immunity, the FSIA was passed in 1976 with the express purpose of shifting immunity determinations from the executive branch to the courts.386 In Republic of Austria v. Altmann, the Supreme Court refused to give any “special deference” to the Executive’s views about how the FSIA should be interpreted but suggested that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”387 This suggestion drew a sharp dissent from Justice Kennedy, who noted that “judicial independence . . . is compromised by case-by-case, se­lective determinations of jurisdiction by the Executive.”388 Finally, in the context of litigation under the Alien Tort Statute, the Supreme Court has raised the possibility of “case-specific deference to the political branches,” stating that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”389 Lower courts have tended to cabin this sug­gestion within the existing framework of the political question doctrine.390 But the Ninth Circuit in Mujica, applying its newly minted doctrine of in­ter­national comity abstention,391 gave substantial weight to a U.S. state­ment of interest suggesting “that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States.”392 Posner and Sunstein do not discuss any of these examples in de­tail,393 but they come down firmly on the side of case-specific deference to the executive branch. Even outside the Chevron context, they argue, courts should defer “if the executive branch argues that the court should dismiss the case rather than reach the merits.”394 “[T]he argument for deference to the executive is that it has more expertise than the courts in foreign relations and that the executive’s accountability for foreign rela­tions is more important than the courts’ independence from political pres­sure.”395 But Posner and Sunstein elide some key distinctions be­tween Chevron deference and case-specific deference and fail to respond to the two main normative arguments against a case-specific role for the execu­tive branch in administering the doctrines of international comity. First, as Justice Kennedy pointed out in his Altmann dissent, “judicial independence” is compromised when the Executive has the power to make “case-by-case, selective determinations” that dictate the outcome of cases.396 Justice Douglas once made the point more colorfully in an act-of-state case, writing that such discretion makes the court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.”397 Testifying before Congress in favor of the proposed FSIA, State Department Legal Adviser Monroe Leigh said that the State Department’s “consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see es­tablished.”398 Deferring to an agency’s interpretation of the geographic scope of a statute under Chevron respects the established roles of Congress, the executive branch, and the courts.399 Allowing the Executive to tell courts which cases to dismiss does not. Thus, the Supreme Court properly re­jected the U.S. government’s argument in Kirkpatrick that the act of state doctrine should bar adjudication whenever the Executive determined that a case would cause too much embarrassment to a foreign government.400 “The short of the matter is this: Courts in the United States have the pow­er, and ordinarily the obligation, to decide cases and controversies pro­perly presented to them.”401 Second, the Executive’s ability to make case-by-case comity determi­nations may harm, rather than advance, the foreign relations of the United States. In Sabbatino, Justice Harlan observed that “[o]ften the State Department will wish to refrain from taking an official position, par­ticularly at a mo­ment that would be dictated by the development of pri­vate litigation but might be inopportune diplomatically.”402 Ironically, international comity doctrines that promise deference to the Executive put the Executive in the uncomfortable position of having to make deci­sions that may disap­point foreign governments.403 This was the U.S. experience with respect to foreign state immunity from the 1940s, when the Supreme Court adopted a rule of deferring to determinations of immunity by the State Department,404 until Congress passed the FSIA in 1976.405 As State Department Acting Legal Adviser Charles Brower testified, “We at the Department of State are now per­suaded . . . that the foreign relations interests of the United States . . . would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.”406 The problem was that “some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations” and that these states were “inclined to regard a de­cision by the State Department refusing to suggest immunity as a polit­ical decision unfavorable to them rather than a legal decision.”407 In their let­ter of transmittal to Congress, the Department of Justice and the Department of State explained: The transfer of this function to the courts will also free the [State] Department from pressures by foreign states to suggest immun­ity and from any adverse consequences resulting from the un­willingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.408 Both the House and Senate Reports accompanying the FSIA empha­sized that “[a] principal purpose of this bill is to transfer the determina­tion of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity de­terminations” and freeing the State Department “from pressures from for­eign governments to recognize their immunity from suit and from any ad­verse consequences resulting from an unwillingness of the Department to support that immunity.”409 Over the past four decades, the “FSIA (with lit­tle or no deference to the executive branch) has not generated major for­eign policy problems.”410 As former State Department Legal Adviser John Bellinger has noted, the same dynamic is likely to play itself out in the context of foreign offi­cial immunity, where the State Department currently claims unreviewable discretion to make case-by-case immunity determinations: I wonder whether, in a few years time, the Legal Adviser’s Office will be in that same situation again, seeking another kind of FOIA—a “Foreign Officials Immunities Act”—just as 40 years ago it sought the FSIA to relieve the burden and political pres­sure of having to file statements of sovereign immunity in every case.411 Other international comity doctrines that allow the Executive to dic­tate the outcome in specific cases—the Bernstein exception to the act of state doctrine, Altmann’s possibility of deference to statements of interest under the FSIA, and Sosa’s suggestion of case-specific deference in ATS cases—present the same dangers. Each opportunity for deference invites pressure from foreign governments and creates the possibility of diplo­matic backlash if the Executive decides not to support their positions. Giving the executive branch authority to make case-by-case determi­nations under doctrines of international comity is a bad idea. It turns le­gal decisions into political ones, undermining not only the rule of law but also the foreign policy interests of the United States. The desirability of executive discretion over questions of international comity is not just a myth, it is a dangerous myth.

#### 6. It fails --- The executive will bow out/no link

Briggs & Bitton ‘15 [John; Daniel; 2015; Antitrust and litigation counsel of choice for dozens of major companies in the United States, Asia, Europe and Scandinavia. Client demand for his work has focused on antitrust, M&A and complex civil litigation; An attorney who represents clients in the San Francisco, California area; "Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity." https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf]

Institutionally, DOJ is much better placed than private plaintiffs and their counsel to consider international comity in deciding what cases and targets to prosecute and what sentences to seek. As part of the Executive Branch, the impact of its enforcement efforts on international relations should matter in its exercise of prosecutorial discretion. Indeed, DOJ has long had in place Antitrust Enforcement Guidelines for International Operations, in which it explains that it considers international comity when enforcing the U.S. antitrust laws extraterritorially, among others, by determining whether enforcement objectives can be achieved by deferring to foreign governments instead.86 And there is, for example, an agreement between the U.S. and European Communities87 under which they basically have agreed that the DOJ and European Commission (EC) will normally defer or suspend their own enforcement efforts in favor of the other’s where the anticompetitive conduct may have an impact in its own territory but is primarily taking place in and directed at the other’s territory.88

In actual practice, however, there is little visible evidence that international comity is a significant consideration for DOJ. As the nation’s federal prosecutor, the DOJ—and especially its prosecuting staff—usually seems singularly focused on securing guilty pleas, convictions, and large fines, including in a great many cases from foreign corporations and citizens. Its aggressive enforcement against overseas conduct and its advocacy efforts before courts in favor of an expansive view of the extraterritorial reach of U.S. laws89 suggest that considerations of international comity typically take a backseat to enforcement and deterrence, if those considerations get a seat at all.

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

#### 2. Perm do the CP --- Either it expands antitrust or it’s overridden

Wang 12 - (Dingding Tina Wang, J.D. Candidate 2012, Columbia Law School; published June 2012, Columbia Law Review, Vol. 112, No, 5, "When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China Wto Disputes In Deciding Antitrust Cases Involving Chinese Exports," 9-2-2021) url: https://www.jstor.org/stable/23238449

1. Nonbinding Nature of International Tribunal Decisions. — It is settled law that rulings by international bodies are not binding precedent on U.S. courts.148 In 1804, Chief Justice Marshall expounded the Charming Betsy doctrine: If a U.S. law is unambiguous, then it may be interpreted by U.S. courts to trump U.S. international obligations, and if a U.S. law is ambiguous, then it should not be interpreted to conflict with U.S. international obligations.149 U.S. courts, particularly the Federal Circuit and a lower court, the U.S. Court of International Trade, have universally emphasized that WTO decisions are not binding on U.S. courts.150 Drawing upon the Charming Betsy doctrine, the Federal Circuit stated in its 2005 Corns Staal BV v. Department of Commerce decision: Congress . . . has authorized the [USTR], an arm of the Executive branch, ... to determine whether or not to implement WTO reports and determinations .... We therefore accord no deference to the cited WTO cases.151

In other words, since WTO rulings are not self-enforcing, U.S. courts will not construe a U.S. trade law differently just because WTO rulings contradict the U.S. law, and it is up to the political and executive branches to change law or policy in order to comply with WTO decisions. This judicial approach is based on Congress's explicit instructions that "no provision of any [WTO agreement] . . . that is inconsistent with any law of the United States shall have effect."152

#### a. It’d appear to give in to Europe---that’s a deal breaker

Anu Bradford 7, LL.M. from the University of Helsinki, S.J.D. from Harvard Law School, Henry L. Moses Professor of Law and International Organization at Columbia Law School, Former Professor at the University of Chicago Law School, “International Antitrust Negotiations and the False Hope of the WTO”, Harvard International Law Journal, 48 Harv. Int'l L.J. 383, Summer 2007, Lexis

The most powerful explanation for the United States's hesitation (and the EU's converse enthusiasm) to international antitrust rules, however, appears to be the prospect that any international antitrust agreement negotiated today would be likely to resemble the EU-model of antitrust regulation (yielding the United States the payoff [pi][us] - d[us]). Both the United States and the EU have been actively exporting their antitrust regimes to developing countries and transition economies in an attempt to expand their respective "spheres of influence." 106 While several countries have adopted U.S.-style antitrust laws, the EU seems to be winning the race for the supremacy of antitrust laws. 107 Thus, an international antitrust agreement would be likely to shift several states away from the "U.S. model" and toward the "EU model," compromising U.S. influence in an important area of economic policy. For the same reason, it is not surprising that the EU is willing to seize the opportunity to "lock in" its preferred regulatory approach worldwide.

Without bright-line rules, the current reform efforts will be in vain.

**b. Courts are extremely conservative on extraterritoriality**

**Hall et al 18** “US courts retreat from applying major federal statutes to extraterritorial activity” Thomas J. Hall - Co-Head of Dispute Resolution and Litigation at Norton Rose Fulbright, New York, Seth M. Kruglak - Partner at Norton Rose Fulbright, Thomas J. McCormack - Co-Head of Commercial Litigation, United States at Norton Rose Fulbright, December 2018, https://www.nortonrosefulbright.com/en-ca/knowledge/publications/ae5cfa02/us-courts-retreat-from-applying-major-federal-statutes-to-extraterritorial-activity

Multinational businesses frequently engage in activities that may, however circumscribed, touch the US One concern of non-US parties is whether conduct that touches the US in a de minimis manner is enough for a US court to apply its law to those actions. Recent US Supreme Court cases have marked a **reversal from** the historic trend of **expanding** the **scope of US law**. Indeed, the **Court** has recently stated that “**U**nited **S**tates law governs domestically but **does not rule the world**.” To that end, the Court now presumes that a statute does not apply **extraterritorially** unless the text clearly shows the US Congress intended such a result. With President Trump solidifying a **conservative** block in the Supreme Court’s **majority** for the foreseeable future, this trend will likely **continue unabated**. Commercial disputes practitioners should be familiar with this **significant trend in US law**.

#### 4. Captured by regulators.

Edward M. Graham 3, Senior Fellow at the Peterson Institute and an Adjunct Professor at Columbia University in New York, 2003, “‘Internationalizing’ Competition Policy: An Assessment of the Two Main Alternatives,” Antitrust Bulletin, Vol. 48, pp. 947-968, https://journals.sagepub.com/doi/pdf/10.1177/0003603X0304800404

But this does not address the issue of "capture" by the competition enforcement agencies themselves. How great is the risk that such capture will occur and will lead to public welfare reduction? The main danger in this regard is that competition enforcement agencies, when seeking to cooperate with one another, are likely to "think inside the box" (to use currently fashionable language). That is, these agencies are likely to seek, as much as possible, simply to embody the status quo into agreed upon modes of international cooperation and to change as little as possible. This is fine if the status quo is, also, stateof-the-art. As has already been suggested, however, the basic thinking underlying competition policy and its application has changed over the past two decades or so, such that what was the status quo in, say, 1979, might be seen as quite obsolete (and welfare-damaging) today.

That "capture by the regulators" (as opposed to regulatory capture) thus could pose some problems in terms of desirability of outcome is a real problem. This would be especially so to the extent that international cooperation that is of, by, and for the regulators themselves were to lock in the status quo and, simultaneously, the status quo were to diverge from the latest and best practice.

This having been said, however, it is again questionable whether a multilateral negotiation would necessarily produce a better outcome, even if the problems of feasibility discussed in the previous section were to disappear. Such a negotiation would doubtlessly take place largely among specialists, who likely would come from the competition enforcement agencies. In the context of a multilateral negotiation, where multiple and sometimes competing interests are at stake, these specialists might find themselves under pressure to make compromises that they would not make were they simply to work with other specialists to create a framework for cooperation. Thus, the outcome of a multilateral negotiation might be quite different than that of pure cooperation among enforcement agencies. Even so, there is no guarantee of course that the former outcome would be any better in terms of maximization of public welfare than the latter; indeed, because of pressures for compromise, coupled with tradeoffs among competing interests, the multilateral process could very well lead to an outcome that is more "contaminated" than a cooperative process.

The overall conclusion that would follow is then that a cooperative process might very well indeed suffer from some "contamination" from either regulatory capture or capture by regulator, where "contamination" means that the outcome is less than public welfaremaximizing. But it is not clear that any such contamination would be greater than that which would result from a full-blown multilateral negotiation. "Capture" (however defined) thus would not seem to be a fatal flaw in a cooperative approach to internationalization of competition policy, or at least not in the sense that the amount of capture would be such as to render this approach inferior to a multilateral negotiation in terms of likely impact on public welfare.

Even so, capture by competition enforcement agencies could lead to issues of legitimacy, and these issues could prove to be fatal. This is explored in the next section.

#### 5. International agreements are impossible.

Gerber 18 [David J Gerber is the University Distinguished Professor, at the Illinois Institute of Technology, Chicago-Kent College of Law, “Competitive harm in global supply chains: assessing current responses and identifying potential future responses”, Journal of Antitrust Enforcement, Volume 6, Issue 1, April 2018, Pages 5–24, https://doi.org/10.1093/jaenfo/jnx015]

Other jurisdictions: divergent interests

**Other countries** **could** also **reduce** the potential **harms** associated with GSCs, but here the interests of individual countries diverge. **Destination countries** may have **much to gain** by pursuing **more effective competition law** responses to GSC harms, but source countries may have much to lose. Destination countries could increase public enforcement, but, as noted above, this is likely to have limited effect. They could also increase private enforcement by enabling it where it is not currently available or providing incentives for plaintiffs to use private enforcement tools where they do exist. As we have seen, however, experience with private enforcement outside the United States is limited and developing very slowly.

**Source countries**, on the other hand, have quite different incentives that often clash sharply **with** the incentives of **destination states**. They may benefit, for example, from cartel agreements **among domestic firms**, because **these agreements** tend to **yield higher profits** for such firms as well as **more jobs** for inhabitants. This **results in benefits for the state** itself (eg, through **higher tax revenues** and **increased employment**, etc.) and its officials. As a result, such countries have few, if any, incentives to apply their own competition laws, if any, **to GSCs** or to **aid enforcement** by destination countries.

The divergence in interests is rooted in the structure of the global economy. **Large discrepancies** in **labour** and other **production costs** between **high-income** countries and **low-income** countries **mean** that **resources** for the production of goods and services tend to **flow** from the **former** to the **latter**. The lower the obstacles to the movement of capital, persons and goods, the more rapid and extensive this flow is likely to be. These **contrasting** and conflicting interests meet and interact to **forge global supply chains**, and law, perhaps especially competition law, necessarily influences the shape of those interactions.

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

#### 4. Federal courts strike the CP --- If they fiat around this than it requires the aff

\* Winning an ITC case against cartels requires “antitrust injury” which Vitamin C immunized

Kieff 18 [F. Scott Kieff is the Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, “Private Antitrust at the U.S. International Trade Commission”, 2018, https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2597&context=faculty\_publications] IanM

Nevertheless, at least one recent high-profile dispute shows there is at least one significant barrier that may **stand** as a practical obstacle to a **private litigant** **bringing** an **antitrust claim** under the **Section 337** portion of the ITC’s docket: the **doctrine** that federal courts developed called “antitrust injury,”10 During the **initial** **phases** of such a case recently brought against Chinese importers of steel by the domestic US steel industry, with support from both companies and unions, the ALJ dismissed the antitrust complaint for **lack of antitrust injury** in an initial determination that was then reviewed by the Commission. 11 This paper explores some reasons why the **antitrust** injury doctrine from federal court may **not** be a **good fit for investigations** brought under Section 337 at the ITC.

#### 5. Deterrence --- ECD case proves ITC is insufficient to stop Chinese cartels

McMickle, 17 (John McMickle, a founding principal of North South Government Strategies. From 1995-2001, John served as Counsel to the Senate Judiciary Committee where he advised Chairman Grassley (R-IA) on an array of policy matters under the committee's jurisdiction, including the last comprehensive re-write of the nation's bankruptcy laws. After leaving the Hill, Mr. McMickle served for a decade as a partner in the government affairs department of a major international law firm and then as President of a boutique public strategies consulting firm. Mr. McMickle received a B.A. from the University of Tennessee in 1989 and a J.D. from American University, Washington College of Law in 1994., 7-26-2017, accessed on 5-22-2021, TheHill, "Beef up antitrust law to fight Chinese price-fixing schemes", https://thehill.com/blogs/pundits-blog/economy-budget/343878-beef-up-antitrust-law-to-fight-chinese-price-fixing-schemes?rl=1) //Babcii

Chinese companies, in connection with the Chinese government, have successfully used federal courts to hide possible evidence of an illegal price fixing conspiracy that has resulted in serious harm to American manufacturers. In a [court case denied review in the Supreme Court earlier this year](http://www.scotusblog.com/case-files/cases/energy-conversion-devices-liquidation-trust-v-trina-solar-limited/), China escaped punishment under American antitrust laws and, incredibly, hid behind so-called protective orders and federal court rules to seal damning evidence of misconduct. Access to these sealed documents are in the national public interest and should be reviewed by Congress and the public to determine the full extent of any possible illegality and to inform federal policies aimed at ensuring a fair playing field for United States manufacturers. A bit of background is in order. **In 2012**, the **I**nternational **T**rade **C**ommission found that Chinese solar panel manufacturers were “**dumping**” solar panels in the United States by selling below cost. As a result, the ITC imposed duties in order to level the playing field for American businesses. **Unfortunately, the ITC decision does not provide a remedy for American businesses already harmed by the anticompetitive conduct**. Subsequent evidence seemed to reveal that Chinese solar panel manufacturers colluded with each other and the Chinese government in order to drive American companies out of the solar panel manufacturing business. The fate of Energy Conversion Devices (ECD), the Michigan company that sought review in the Supreme Court, is a case in point. Once the world’s largest maker of flexible solar panels, ECD [was forced into bankruptcy](https://www.greentechmedia.com/articles/read/The-End-Arrives-For-ECD-Solar-) as a result of this illegal price-fixing scheme. ECD, in an attempt to recoup some of its losses, created a trust and filed suit in federal court to force Chinese manufacturers to pay damages resulting from an alleged price-fixing conspiracy. In other words, the litigants in the recent Supreme Court case **tried to use American antitrust laws to compensate** a U.S. manufacturer for harm suffered as a result of conduct that had already been deemed illegal by the federal government. **Lower courts dismissed the ECD case and that dismissal is now final**.

#### 6. The CP fails to induce compliance and collapses trade

Corey and Atkinson, 20 (Nigel Corey and Robert Atkinson, Nigel Cory is an associate director covering trade policy at the Information Technology and Innovation Foundation. Cory holds a master’s degree in public policy from Georgetown University and a bachelor’s degree in international business and commerce from Griffith University in Brisbane, Australia., Atkinson holds a Ph.D. in city and regional planning from the University of North Carolina, Chapel Hill, where he was awarded the prestigious Joseph E. Pogue Fellowship. He earned his master’s degree in urban and regional planning from the University of Oregon, which named him a distinguished alumnus in 2014., 1-13-2020, accessed on 6-13-2021, Itif, "Why and How to Mount a Strong, Trilateral Response to China’s Innovation Mercantilism", https://itif.org/publications/2020/01/13/why-and-how-mount-strong-trilateral-response-chinas-innovation-mercantilism)//Babcii

The Need to Differentiate Between **Protectionism and Prosecution**

**Trade enforcement** and other tools should be used to fight protectionism in China, and **not be a** tool to reduce competitive pressures on firms in the United States, Japan, and the European Union. The goal of the three parties should not be to withdraw from the global trading system **and emulate the mercantilists**, thereby defending their companies from uncomfortable foreign competition. In other words, **enforcement** should be used to contest Chinese protectionism that is damaging the global trade system, not simply as a tool to make any or all of the three parties more competitive—or to provide shelter to certain sectors from the rigors and turmoil of global competition. This may sound like a semantic difference, and indeed, most in the Washington trade establishment refuse to accept the difference—seeing both as “protectionism”—but there is in fact a **difference**, and it’s a **critical** one.

The goal here is not permanent “protectionist” policies against China, but rather an array of policies to be used as tools to pressure China into at least significantly **reducing its use of mercantilist policies**. Should China do that, the three parties should remain open to China’s enterprises, and trade and investment between them and China. Indeed, the three parties should pursue a “selective” prosecution whereby China should be rewarded when it plays by the rules and progress is clearly visible, but be met with resolute action when it does not play by the rules. Blanket, punitive **trade taxes** against China will likely not prove productive in getting China to change; a trilateral strategy in response to China’s mercantilism will have to be more **nuanced**.

### 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.

### 2AC --- Court Ptx --- F/L

#### 1. Court PTX is dead --- Roberts lost control --- Barrett and Kavanaugh could care less about legitimacy

\* Answers Roe and EPA cause both are from red states

Lithwick, 12/10 (Dahlia Lithwick, Dahlia Lithwick is a Canadian-American lawyer, writer and journalist. Lithwick is currently a contributing editor at Newsweek and senior editor at Slate. She primarily writes about law and politics in the United States., 12-10-21, accessed on 1-3-2022, Slate, "John **Roberts has lost control**", <https://slate.com/news-and-politics/2021/12/texas-abortion-john-roberts-lost-control-supreme-court.html)//Babcii>

Perhaps now is as good a time as any to put to rest the soothing notion, floated last spring, of a [**3–3–3** court](https://www.economist.com/united-states/2021/06/24/americas-supreme-court-is-less-one-sided-than-liberals-feared), with a temperate and amiable Brett Kavanaugh as the median justice and a youthful Amy Coney Barrett inclined to pump the brakes on the most radical elements of the Federalist Society’s pet projects. Neither Barrett nor Kavanaugh appears to be swayed by the chief justice’s concerns for **institutional legitimacy** or even, in fact, **institutional supremacy**. If red states want to go ahead and **choke off fed**erally protected rights, they have been given the comprehensive road map. We will certainly see red states do precisely **this**.

The **mistake** we’ve been making for over a year lay in believing that John Roberts’ worries with respect to the **reputation, independence, and legitimacy** of the court were both an end in themselves and **shared** by the imaginary centrists Barrett and Kavanaugh. We have for too long confused Roberts’ concern for the appearance of temperate independence (the [“lie better next time” instruction to litigants](https://slate.com/news-and-politics/2019/06/john-roberts-supreme-court-census-case-well-played.html)) with a concern for actual temperate independence. Faced with public outcry about the way in which S.B. 8 was handled on its emergency docket in September (in the dark of night, without explanation), the court scheduled real-life arguments and real-life briefings, then waited yet another month, and then somehow produced a decision with substantially the same outcome. This time it came with an elaborate warning to abortion providers that they can go ahead with their lawsuit but they will likely fail again in the future—while the majority still congratulated itself on having treated the plaintiffs with “extraordinary solicitude at every turn.”

I have used up my quota of the word [gaslighting](https://slate.com/news-and-politics/2021/12/scotus-will-gaslight-us-until-the-end.html) for 2021, but to be clear, abortions after six weeks are still unlawful in Texas. Real people are suffering the real consequences, as Justice Sonia Sotomayor opens in her own partial dissent: “For nearly three months, the Texas Legislature has substantially suspended a constitutional guarantee: a pregnant woman’s right to control her own body.”  Five conservative justices think this is just fine. Clever, even. The stratagems by which Texas’ abortion ban was diabolically effectuated have been blessed yet again by five justices on the Supreme Court, who tell you once again that this enforcement mechanism was just too brilliantly innovative to be enjoined and possibly even too brilliant to be successfully challenged in the future. And only the chief justice seems to be willing to say that this constitutes “nullification” of a fundamental constitutional freedom, and should perhaps be addressed accordingly.

The problem at the heart of the perception of John Roberts’ moderating influence on the court was that it was always about public perception. When he was still theoretically in charge of the conservative supermajority, his approach was in fact that it could do anything, so long as it didn’t look too radical. Some of us came to **confuse** that **with moderation**. But public perception is malleable and can be measured on a sliding scale. Five justices want you to call a narrow loss a “win” for abortion rights, and they want you to think of state nullification as “novel.” They will keep saying that **over and over** until one concedes that it’s true, and **when Dobbs comes down** this summer, **they will tell you there is nothing radical** in doing away with the right to choose. They will assume that if you accepted nullification in September, you’ll be open to overt bans come spring.

#### 2. Won’t be inter-issue spillover

Redish 91 MARTIN H., Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University. ELIZABETH J., Law Clerk to Chief Judge William Bauer, United States Court of Appeals, Seventh Circuit. “CONSTITUTIONAL PERSPECTIVES: ARTICLE: "IF ANGELS WERE TO GOVERN": THE NEED FOR PRAGMATIC FORMALISM IN SEPARATION OF POWERS THEORY.”Duke Law Journal, 41 Duke L.J. 449, Lexis

Choper's assumption that the judiciary's institutional capital is transferable from structural cases to individual rights cases is no more credible. Common sense should tell us that the public's reaction to controversial individual rights cases -- for example, cases concerning abortion, n240 school prayer, n241 busing, n242 or criminal defendants' rights n243 -- will be based largely, if not exclusively, on the basis of its feelings concerning those particular issues. It is unreasonable to assume that the public's acceptance or rejection of these individual rights rulings would somehow be affected by anything the Court says about wholly unrelated structural issues.

#### 3. Tons of thumpers

Gorod 9-9 [Brianne Gorod is chief counsel for the Constitutional Accountability Center. 9-9-2021https://newrepublic.com/article/163519/roe-wade-supreme-court-fall-term]

The new Supreme Court term is about to begin, and it promises to be a blockbuster. With cases involving abortion and guns already on the docket, and the possibility that an affirmative action case may be added as well, this term will present the court’s new six-member conservative supermajority with the opportunity to usher in major shifts in the law. What the justices do with those opportunities will be a test of their commitment to precedent and, for many of them, their self-professed commitment to originalism.

Perhaps the biggest issue on the court’s docket this term will be abortion. A little over a year ago, in a case called June Medical Services LLC v. Russo, the Supreme Court gave abortion rights advocates a win when it held unconstitutional a Louisiana law that required physicians who perform abortions to have admitting privileges at a nearby hospital. In his opinion concurring in the ruling, with which he joined the court’s (then) four liberal members, Chief Justice John Roberts extolled the importance of precedent, observing that “for precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly.” Because the Louisiana law was identical to a Texas law the court had previously struck down, the chief justice voted to strike down the Louisiana law.

But with the replacement of Justice Ruth Bader Ginsburg by Justice Amy Coney Barrett, the chief justice’s vote will not be dispositive when the court hears Dobbs v. Jackson Women’s Health Organization this term. In Dobbs, the court will be considering a challenge to the constitutionality of a Mississippi law that, with limited exceptions, bans abortions after the fifteenth week of pregnancy. The lower courts rightly concluded that this pre-viability ban on abortion was unconstitutional under the Supreme Court’s precedents, and Mississippi now asks the court to overrule those precedents.

According to Monica Simpson, executive director of SisterSong, a Southern-based, national reproductive justice organization that works to improve policies that affect the reproductive lives of women of color, “If the Supreme Court decides to overturn ... precedent under Roe v. Wade, the consequences will be devastating for communities like mine in Georgia, where we are currently fighting against a six-week abortion ban in court.” As she further explained, “The right to access abortion care is a crucial aspect of bodily autonomy, which is too often denied to Black people and others from marginalized backgrounds.”

This case is a huge test for the court and its newest justices, all three of whom—Barrett, Brett Kavanaugh, and Neil Gorsuch—professed a commitment to precedent at their confirmation hearings. Repeatedly, the Supreme Court has been asked to overrule Roe, and repeatedly it has reaffirmed that decision. But in an ominous sign, the court, over the dissents of Chief Justice John Roberts and Justices Breyer, Sotomayor, and Kagan, recently refused an emergency request to block Texas’s six-week abortion ban from going into effect, thus functionally gutting Roe. In doing so, the court not only undermined the right to abortion, but also its own legitimacy. If the new conservative supermajority does, in fact, vote in Dobbs to fully jettison Roe and the other long-standing precedents that recognize a constitutional right to access abortion simply because they were not, in the views of those justices, “decided correctly,” it will deliver an even more significant blow not only to the right to abortion, but also to the legitimacy of the court.

It should also deliver a blow to the claims by many members of the court that they follow the text and history of the Constitution, wherever it leads. When the Reconstruction framers drafted the Fourteenth Amendment, they chose sweeping language to protect the full panoply of fundamental rights for all, and they viewed both personal liberty and control over one’s body as among those fundamental rights. The Fourteenth Amendment thus guarantees the right to access abortion, and the court’s originalists should recognize that.

Dobbs is not the only blockbuster case on the court’s docket. In New York State Rifle & Pistol Association Inc. v. Bruen, the court will be considering whether New York’s denial of two individuals’ applications for concealed-carry licenses for self-defense violates the Second Amendment. In 2008, in a case called District of Columbia v. Heller, the Supreme Court held that the Second Amendment protects an individual right to own guns for self-defense, but also made clear that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.”

In the years since Heller, it has fallen to the lower courts to determine what gun regulations are constitutional, with very little guidance from the Supreme Court. The Second Circuit Court of Appeals concluded that the New York law was constitutional, explaining that because “our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, ... [the law] passes constitutional muster if it is substantially related to the achievement of an important governmental interest.” The circuit court went on to conclude that “New York has substantial, indeed compelling, governmental interests in public safety and crime prevention,” and the law is “substantially related” to those interests. When the Supreme Court decides Bruen, how it rules may ultimately be as important as what it rules, because the guidance it provides about how courts should decide the constitutionality of gun regulations could have ramifications that extend far beyond the New York law at issue in the case.

As if these two huge cases were not enough, the court may add another big issue to the docket before the term ends: affirmative action. And as in the abortion case, the court is being asked to overrule a long-standing precedent: Grutter v. Bollinger, the 2003 case that held that universities may consider race as a factor in admissions. In Students for Fair Admissions Inc. v. President & Fellows of Harvard College, an organization called Students for Fair Admissions sued Harvard under a federal law that prohibits entities that accept federal funds from discriminating on the basis of, among other factors, race. The lower courts rejected the challenge, concluding that Harvard’s “limited use of race in its admissions process in order to achieve diversity ... is consistent with the requirements of Supreme Court precedent.” The group challenging Harvard’s admissions policy has asked the court to hear the case, and the court has called for the views of the solicitor general.

Here, as in Dobbs, both constitutional text and history, as well as the court’s own precedent, require the same result—upholding the lower court decision. After all, at the same time the framers of the Fourteenth Amendment drafted that amendment, they also enacted a long list of race-conscious legislation designed to guarantee equality of opportunity for all persons regardless of race. The Supreme Court’s repeated rulings upholding universities’ use of race as one factor in admissions decisions are entirely consistent with that history. In other words, if the court ultimately decides to take up this case, it—no less than Dobbs—will be a real test of the justices’ commitment to the text and history of the Constitution, as well as to the court’s own precedent.

While those three cases are likely to dominate headlines about the court this term, they’re hardly the only important ones on the docket. The court will also be deciding, among many other matters, whether individuals can challenge conduct that has a disparate impact on the basis of disability, whether an important federal civil rights law allows plaintiffs to recover damages for emotional distress, and whether it is constitutional for a state to provide students with funding for private schools but prohibit them from attending schools that provide religious instruction.

#### 4. Antitrust under the radar

Baum and Devins 10 – Lawrence Baum is a professor emeritus in the Department of Political Science at Ohio State University; his primary research focus is judges’ behavior in decision making. Neal Devins is Sandra Day O’Connor Professor of Law and Professor of Government at William and Mary Law School.

Lawrence Baum and Neal Devins, “Why the Supreme Court Cares About Elites, Not the American People,” *The Georgetown Law Journal*, vol. 98, 2010, pp. 1549-1550, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2149&context=facpubs.

It is worth underlining the point that a great deal of the

Court’s work is essentially invisible to the public. Decisions in fields such as antitrust and patent law may be highly consequential, but it seems unlikely that there are strong public feelings about those decisions. Even if Justices seek to maintain the Court’s legitimacy, they have no reason to worry that public outrage in decisions in those fields will damage this legitimacy.170 More telling, the Rehnquist Court’s federalism revival was unnoticed by most of the mass public. During the period from 1992 to 2006, the Court invalidated eleven federal statutes on federalism grounds,171 thereby shifting the balance between the federal government and the states substantially. Nevertheless, these decisions (although prompting significant law review commentary) appeared to have low political salience.172 Of 229 Gallup Poll questions that explicitly referenced the Supreme Court during this period, there was not a single question concerning these decisions or any other Supreme Court invalidations of federal statutes.173

#### 5. Ruling irrelevant for EPA capabilities

Smith 11-7 [Lexi Smith is a third-year student at Yale Law School. She studied environmental science and public policy as an undergraduate at Harvard, and she worked as an advisor to the Mayor of Boston on climate policy before enrolling in law school. 11-7-2021 https://yaleclimateconnections.org/2021/11/supreme-court-to-weigh-epa-authority-to-regulate-greenhouse-pollutants/]

In American Electric Power v. Connecticut, the Court heard a public nuisance challenge to greenhouse gas pollution. Public nuisances are acts, conditions, or conduct that interfere with the rights of the public generally. Connecticut’s nuisance claim rested on federal common law, a form of judge-made law. Judge-made law can be displaced by laws passed by Congress. The Court decided that because Congress had already granted EPA authority to regulate greenhouse gases under the Clean Air Act, Congress had displaced judge-made law in this area. If the Court were to overturn Massachusetts v. EPA completely, public nuisance challenges could be brought against fossil fuel companies again, an outcome conservative Justices are likely to want to avoid.

Finally, even if EPA – and therefore the executive branch agencies as a whole – were to lose authority to regulate greenhouse gases directly under the Clean Air Act, it could still indirectly reduce greenhouse gas emissions by targeting co-pollutants that fall more squarely under Clean Air Act authority. For instance, greenhouse gas emissions are often accompanied by particulate matter, nitrogen oxides, sulfur oxides, volatile organic compounds, and air toxics. By regulating those co-pollutants, EPA can bring down greenhouse gas emissions without exercising any direct regulatory authority over them. Of course, if the Court fully embraces the nondelegation doctrine, EPA’s authority to regulate those other pollutants could also be jeopardized. But, as mentioned above, some Justices may stop short of such a decision in light of concerns about the Court’s legacy and risks of a backlash.

In short, while the Supreme Court’s decision to hear West Virginia v. EPA creates plenty of anxiety for climate advocates, there are also reasons to think that the Court will not fully overturn Massachusetts v. EPA. And even if the Court takes away EPA’s authority to regulate greenhouse gases, the agency may still have other avenues available for bringing down emissions. A broader embrace of the nondelegation doctrine would pose more sweeping problems for environmental regulation, but the Court’s recent cautious approach to hot-button issues suggests it is more likely to make only incremental changes to that doctrine.

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## Case

#### Modernization turns offensive WHEN China has nuclear security --- Chinese nuclear confidence causes escalation

Eli Jacobs 11. Research intern for the Project on Nuclear Issues at the Center for Strategic and International Studies. “China’s Underground “Great Wall”: A Success for Nuclear Primacy.” CSIS. 10-25-2011. http://csis.org/blog/chinas-underground-great-wall-success-nuclear-primacy

Given their greater resources, superior nuclear forces will serve China’s national interests regardless of U.S defense policy. Fortunately, U.S. nuclear primacy helps to change the valence of that build-up, orienting it towards a defensive stance by making it too expensive to develop useful but non-essential offensive nuclear capabilities. The grave threat of U.S. nuclear first strike is, thus, a contributor to China’s current defensive nuclear posture. Ceasing the pursuit of primacy would serve as a de facto acknowledgement of mutual vulnerability; it would free up resources for China to make progress on other, more offensive components of its arsenal. These measures, pursued in the absence of a U.S. nuclear first strike option, would give China the means to prepare for nuclear first-use contingencies. This would not only make them more confident about last-ditch escalation to nuclear war in a failing conventional conflict, but also give them less pause about initiating conflicts, given their expectation of greater freedom of action. In short, forcing China to plan to defend itself against U.S. first strike orients their strategic culture around defensive as opposed to offensive posturing and reduces their means to invest in offensive nuclear capabilities. Thus, while China’s tunnel network reduces the likelihood that the United States possesses nuclear primacy, it is a form of strategic tunnel vision to argue that we should, as a result, accept a reality of mutual vulnerability. Continuing to introduce meaningful doubt into China’s understanding of the security of their deterrent forces them to spend to protect it, rather than spending to threaten or compete with the United States.