# 1AC

### Plan

#### Plan: The United States federal government should substantially increase prohibitions on private sector conduct that is more restrictive of competition than reasonably necessary to enable creation of information technology standards.

### 1AC---Innovation ADV

#### Advantage 1 is Innovation:

#### Current standard setting organization and FRAND enforcement is failing now

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I. Standard Setting and the Competitive Process

The fundamental economics in the information technology sector, driven by network effects, implies that there is enormous value associated with establishing compatibility standards. Popular standards include the mobile broadband standards used in cell phones, which are established by the 3rd Generation Partnership Project (3GPP), and the Wi-Fi technology for wireless local area networks, which is enabled by the 802.11 standard established by the Institute of Electrical and Electronics Engineers (IEEE).4

There are many SSOs, and their rules and procedures differ considerably. In addition to IEEE, leading SSOs include the International Organization for Standardization (ISO), the International Telecommunication Union (ITU), the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF), and the World Wide Web Consortium (W3C).5 SSOs generally establish standards by holding a series of committee meetings among industry participants. These meetings culminate in a vote on a technical specification that describes what features or attributes a product must have in order to comply with the standard. Most SSOs are open to all industry participants and seek to operate on a consensus basis, applying certain voting rules. SSOs do not normally engage in patent licensing, nor do they specify how patent royalties will be divided up among patent holders. They leave that to their members, which in some cases form patent pools to address these issues.6

SSOs adopt specific policies relating to intellectual property rights (IPRs).7 These IPR policies are generally intended to enable the SEP holders to obtain reasonable royalties for licensing their patents, while prohibiting them from charging excessive royalties after other industry participants have committed to the standard. At that point, firms committed to implementing the standard— which we call “implementers”—would find it very costly to avoid using the patented technology. For this purpose, most SSOs require SEP owners to license their SEPs on FRAND terms.8

FRAND policies are especially necessary because negotiations between SEP holders and implementers generally take place only after the implementers have used and infringed the technologies claimed by the SEPs. Standards involving information and communications technology can involve hundreds or even thousands of SEPs, many with uncertain boundaries for infringement. In addition, a time lag exists between patent application and patent issuance. For these and other reasons, it is impractical for implementers to enter into negotiations for patent licenses with all SEP owners prior to the establishment of a standard and to their implementation of it.9

The fact that patent negotiations generally do not take place until after implementers have used and infringed the technologies has several critical implications. First, at the time of negotiation, implementers are locked into the standard and the technologies claimed by the SEPs—that is, the cost to switch to an alternative technology or standard at that point—ex post—is much greater than it was ex ante, before the patented technology was first included in the standard. Ex post, the patent holder is no longer competing to have its technology included in the standard, nor is it competing to have implementers of the standard use its technology. Instead, because the patent holder owns an asset that is essential to the standard, implementers have no choice but to use the patented technology.

If the standard is commercially successful, implementers are willing to pay a much larger royalty for use of the patented technology than they would have paid ex ante, when the SEP holder faced competition from other technologies. In these circumstances, the SEP holder can be said to have obtained monopoly power in the market in which the patented technology is licensed for use in implementing the standard.10

Second, because of lock-in and the implementer’s ongoing infringement, the potential for litigation looms large in licensing negotiations. In effect, the parties are negotiating about how to settle an infringement suit, and that negotiation is heavily influenced by their predictions as to what the court will do if they cannot agree. This situation is not unique to SEPs; it arises frequently when firms are faced with patent infringement claims for products they have independently developed or technologies they have inadvertently infringed. Patent law addresses such instances by specifying that patent holders are entitled to “reasonable royalties,” defined as the royalties that the parties would have negotiated prior to the infringement and thus prior to lock-in.11 Those hypothetical ex ante royalties reflect the market value of the patent license. Notwithstanding the law’s embrace of this principle, however, as a practical matter, patent holders are generally able to recover more than the ex ante value of the patent when litigation occurs after the implementers are locked in. Further, negotiations in the shadow of litigation after lock-in tend to result in royalties in excess of the ex ante or market value of the patented technology.12

Third, the shadow of litigation is particularly problematic in the communications and technology sector, in which products typically include hundreds or thousands of patented technologies. A court-ordered injunction involving such products would deprive the implementer of not only the value of the technology covered by the patent-in-suit, but also the value of the entire product.13 Implementers that are forced to bear the risk of an injunction are thus induced to agree to royalties greater than those that would be appropriate if only the value of the patented technology were at stake. Those royalties systematically provide SEP holders with excessive compensation in comparison with the benchmark of ex ante royalties.

These implications of lock-in and ex post dealings are well-understood: they represent an example of the general concept of lock-in and opportunism developed by Oliver Williamson.14 The Federal Circuit has also recognized the market distortions caused by the inclusion of patented technologies in public standards and the resulting danger of patent holdup involving SEPs.15

For these and other reasons, the SEP holder has ex post monopoly power that, if left unchecked, would enable it to obtain royalties far in excess of the royalties that it could earn in a competitive market.16 To address this common problem and limit ex post opportunism by SEP holders, SSOs typically require participants that own SEPs to make certain FRAND commitments. In particular, by requiring a commitment to license on “fair and reasonable” terms, the FRAND requirement aims to prevent, or at least reduce, the extent of monopoly pricing by SEP holders. And by requiring a commitment to license on “nondiscriminatory” terms, the FRAND requirement can prevent SEP holders from extracting monopoly premiums by selective licensing or, more important, migrating their monopoly power from the FRAND-regulated market to unregulated standard-implementing product markets by licensing to only one or a few implementers or licensing to selected implementers on discriminatorily favorable terms.

#### Holdup is accentuated by FTC v Qualcomm

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Standards can enhance competition and consumer choice, but they also massively inflate the value of patents deemed essential to the standard, and give their owners the power to sue companies that implement the standard for money damages or injunctions to block them from using their SEPs. When standards cover critical features like wireless connectivity, SEP owners wield a huge amount of “hold-up” power because their patents allow them to effectively block access to the standard altogether. That lets them charge unduly large tolls to anyone who wants to implement the standard.

To minimize that risk, standard-setting organizations typically require companies that want their patented technology incorporated into a standard to promise in advance to license their SEPs to others on fair, reasonable, and non-discriminatory (FRAND) terms. But that promise strikes at a key tension between antitrust and patent law: patent owners have no obligation to let anyone use technology their patent covers, but to get those technologies incorporated into standards, patent owners usually have to promise that they will give permission to anyone who wants to implement the standard as long as they pay a reasonable license fee.

Qualcomm is one of the most important and dominant companies in the history of wireless communication standards. It is a multinational conglomerate that has owned patents on every major wireless communication standard since its first CDMA patent in 1985, and it participates in the standard-setting organizations that define those standards. Qualcomm is somewhat unique in that it not only licenses SEPs, but also supplies the modem chips used by a wide range of devices. These include chips that implement wireless communication standards, which lie at the heart of every mobile computing device.

Although Qualcomm promised to license its SEPs (including patents essential to CDMA, 3G, 4G, and 5G) on FRAND terms, its conduct has to many looked unfair, unreasonable, and highly discriminatory. In particular, Qualcomm has drawn scrutiny for bundling tens of thousands of patents together—including many that are not standard-essential—and offering portfolio-only licenses no matter what licensees actually want or need; refusing to sell modem chips to anyone without a SEP license and threatening to withhold chips from companies trying to negotiate different license terms; refusing to license anyone other than original-equipment manufacturers (OEMs); and insisting on royalties calculated as a percentage of the sale price of a handset sold to end users for hundreds of dollars, despite the minimal contribution of any particular patent to the retail value.

In 2017, the U.S. Federal Trade Commission [sued](https://www.ftc.gov/news-events/press-releases/2017/01/ftc-charges-qualcomm-monopolizing-key-semiconductor-device-used) Qualcomm for violating both sections of the Sherman Antitrust Act by engaging in a number of anticompetitive SEP licensing practices. In May 2019, the U.S. District Court for the Northern District of California agreed with the FTC, identifying numerous instances of Qualcomm’s unlawful, anticompetitive conduct in a comprehensive [233-page opinion](https://www.eff.org/document/ftc-v-qualcomm-district-court-opinion). We were pleased to see the FTC take action and the district court credit the overwhelming evidence that Qualcomm’s conduct is corrosive to market-based competition and threatens to cement Qualcomm’s dominance for years to come.

But this month, a panel of judges from the Court of Appeals for the Ninth Circuit unanimously [overturned](https://www.eff.org/document/ninth-circuit-opinion-ftc-v-qualcomm) the district court’s decision, reasoning that Qualcomm’s conduct was “hypercompetitive” but not “anticompetitive,” and therefore not a violation of antitrust law. To reach that result, the Ninth Circuit made the patent grant more powerful and antitrust law weaker than ever.

According to the Ninth Circuit, patent owners don’t have a duty to let anyone use what their patent covers, and therefore Qualcomm had no duty to license its SEPs to anyone. But that framing requires ignoring the promises Qualcomm made to license its SEPs on reasonable and non-discriminatory terms—promises that courts in this country and around the world have consistently enforced. It also means ignoring antitrust principles like the essential facilities doctrine, which limits the ability of a monopolist with hold-up power over an essential facility (like a port) to shut out rivals. Instead, the Ninth Circuit held rather simplistically that a duty to deal could arise only if the monopolist had provided access, and then reversed its policy.

But even when Qualcomm restricted its licensing policies in critical ways, the Ninth Circuit found reasons to approve those restrictions. For example, Qualcomm stopped licensing its patents to chip manufacturers and started licensing them only to OEMs. This had a major benefit: it let Qualcomm charge a much higher royalty rate based on the high retail price of the end user devices, like smartphones and tablets, that OEMs make and sell. If Qualcomm had continued to license to chip suppliers, its patents would be “exhausted” once the chips were sold to OEMs, extinguishing Qualcomm’s right to assert its patents and control how the chips were used.

Patent exhaustion is a century-old doctrine that protects the rights of consumers to use things they buy without getting the patent owner’s permission again and again. Patent exhaustion is important because it prevents price-gouging, but also because it protects space for innovation by letting people use things they buy freely, including to build innovations of their own. The doctrine thus helps patent law serve its underlying goal—promoting economic growth and innovation. In other words, the doctrine of exhaustion is baked into the patent grant; it is not optional. Nevertheless, the Ninth Circuit wholeheartedly approved of Qualcomm’s efforts to avoid exhaustion—even when that meant cutting off access to previous licensees (chip-makers) in ways that let Qualcomm charge far more in licensing fees than its SEPs could possibly have contributed to the retail value of the final product.

It makes no sense that Qualcomm could contract around a fundamental principle like patent exhaustion, but at the same time did not assume any antitrust duty to deal under these circumstances. Worse, it’s harmful for the economy, innovation, and consumers. Unfortunately, the kind of harm that antitrust law recognizes is limited to harm affecting “competition” or the “competitive process.” Antitrust law, at least as the Ninth Circuit interprets it, doesn’t do nearly enough to address the harm downstream consumers experience when they pay inflated prices for high-tech devices, and miss out on innovation that might have developed from fair, reasonable, and non-discriminatory licensing practices.

We hope the FTC sticks to its guns and asks the Ninth Circuit to go en banc and reconsider this decision. Otherwise, antitrust law will become an even weaker weapon against innovation-stifling conduct in technology markets.

#### Weakened antitrust enforcement emboldens firms to follow Qualcomm’s lead

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While the FRAND process has been highly productive, it is also fragile. Firms are tempted to make commitments at the beginning when the incentive to join is large, but renege on them later when they can profit by doing so. At least in this particular case, private FRAND enforcement had not worked very well. Qualcomm had been able to violate FRAND commitments in order to exclude rivals and obtain higher royalties than FRAND would permit, largely with impunity. Other firms will very likely follow Qualcomm’s lead. If that happens the FRAND system will fall apart, doing irreparable injury to the modern wireless telecommunications network or, at the very least, diminishing the leadership role of the United States in preserving effective network competition.

While governments can be heavily involved in standard set-ting,9 the implementation of technical standards in information technologies is largely the work of private actors. Government involvement is limited mainly to enforcement of contract, intellectual property, or antitrust law. As private actors, those involved in standard setting or compliance are fully subject to the federal antitrust laws.

This Article addresses one question: when is an SSO participant’s violation of a FRAND commitment an antitrust violation, and if it is, of what kind and what are the implications for remedies? It warns against two extremes. One is thinking that any violation of a FRAND commitment is an antitrust violation as well. In the first instance FRAND obligations are contractual, and most breaches of contract do not violate any antitrust law. The other extreme is thinking that, because a FRAND violation is a breach of contract, it cannot also be an antitrust violation. The question of an antitrust violation does not de-pend on whether the conduct breached a particular agreement but rather on whether it caused competitive harm. This can happen because the conduct restrained trade under section 1 of the Sherman Act, was unreasonably exclusionary under section 2 of the Sherman Act, or amounted to an anticompetitive condition or understanding as defined by section 3 of the Clay-ton Act.10 The end goal is to identify practices that harm com-petition, thereby injuring consumers.

The Ninth Circuit’s Qualcomm decision will make antitrust violations in the context of FRAND licensing much more difficult to prove, even in cases where anticompetitive behavior and consumer harm seem clear.11 Indeed, in this case the court itself acknowledged the harm to consumers but appeared to think that they were not entitled to protection.12 If this decision stands, FRAND obligations will to a larger extent have to be settled through private litigation and the federal antitrust enforcement agencies will have a diminished role. Anticompetitive behavior by one firm that is not effectively disciplined will lead others to do the same thing.

#### A trusted and credible system for ICT innovation is critical to rapid tech diffusion and economic growth---absent FRAND, the system will collapse.

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It is easy to take a pessimistic view about whether the system will break. If the current trend continues, the system is likely to break at some point for the simple reason that companies will not trust it anymore. The series of legal disputes witnessed over the past years – sometimes referred to as the “smartphone patent wars” – has been fodder for a pessimistic reading of “the two tales of SEPs”. While it is common in the business world that disputes over patents and licenses are settled in courts, various SEP disputes have revealed problematic aspects of the SEP market that are different from those disputes that follow the normal stream of business and contracts. Often, the SEP disputes are less concerned about the rights and boundaries of patents, and more about antitrust limits to market behavior: they concern market abusive practices and restrictions to competition as much as they are about intellectual property.

If the SEP system actually does break at some point, the consequences would be felt throughout the economy. SEPs have been a critical part of the ICT revolution. SEPs have allowed for the fast rates of innovation diffusion that the world has witnessed over the past quarter of a century. All the computer and Internet related products and services that people are now dependent upon for their private and professional lives are intricate webs of intellectual property. As many as 250,000 patents can be used to claim ownership of some technical specification or design element in a single smartphone (NYT 2012). A laptop, suggests one calculation, implements more than 250 interoperability standards (Biddle et al. 2010), and the number of SEP holders for 3G and 4G standards grew from 2 in 1994 to 130 in 2013 while the number of SEPs rose from fewer than 150 in 1994 to more than 150,000 in 2013 (Galetovic and Gupta 2016). The standardization-body ETSI has registered more than 150,000 declarations of SEPs from companies, and ETSI is just one of many bodies in the world of ICT standardization. For the 3G standard, the same body has about 24,000 patents that have been declared essential. Now, with the economy yet again on the threshold of big technological change, a trusted and credible system for creators and users of technology to standardize proprietary technology would be a boon for innovation, interoperability and – ultimately – the consumers.

And there are reasons for optimism. Although many of the problems in the SEP regimes need to be addressed, the numbers above indicate that the SEP system is in fact attractive to patent holders and SEP implementers. It is easy to see why: neither holders nor implementers are presented with alternative options that on the face of it would be far more profitable for them. In other words, there simply would not be as many patents declared as essential if both creators and users of technology believed the SEP system worked to their disadvantage or was grossly unfair. While the reality for some companies may be that legal disputes and unpredictability prompt them to find other ways than SEPs to get access to key technologies for their products, it remains the case that most stakeholders have strong economic incentives to maintain a balanced SEP system that is trusted.

First, standard essential patents are an asset for creators of technology because, by becoming essential to a standard, their volumes of sales for technologies that users value rise significantly. As many holders want to raise more revenues for their SEPs and – ideally – have the freedom to contract with buyers on their terms, they can expand their customer base when they agree to sell patented technology in accordance with a set of rules that are designed to prevent SEP holders exploiting the weakness of a customer that has grown dependent on having access to their technology.

Second, SEPs are hugely beneficial also to those that buy the licenses – the implementers or users. Through the SEP system, they can access technologies that are interoperable and work with different products and functionalities – and they can do it under conditions that, if history is a guide, in most cases give them stable and predictable terms of contract. As a consequence, both creators and users can focus on their competitive advantages and profit on the economies of scale and specialization. Downstream firms do not need to develop their own upstream technology and upstream firms do not need to package their technologies in end-customer products in order to make their products valuable.

Third, standard-setting organisations (SSOs) also have a big stake in an SEP system that works well – and, like creators and users of technology, they would stand to lose significantly if the SEP system were to collapse.

Lastly, the biggest beneficiaries are individual consumers – those who buy the end products using FRAND-conditioned SEPs. The advent of SEPs and the rules represented by FRAND have enabled a development of fast technology creation and contributed to the rapid diffusion in ICT goods and ICT-based services. The SEP system has also allowed for new competition, both between existing technologies and brands, and from new ones that have stepped into the market with the ambition to disrupt it, again to the benefit of the consumer. It is difficult to imagine that the ICT and digital development would have been as fast as it has been if SEPs had not been a central feature of the market.

The changing fortunes of companies operating in the cellular and smartphone market would not have been possible if there had not been an SEP system that supported competition. Now that the world economy is on the doorstep of new innovations that are dependent on a great number of input technologies – e.g. the Internet-of-Things, transport connectivity and intelligent vehicles – it is crucially important for the consumer that a balanced and functioning SEP system is maintained and that actors in the system converge towards it – which would ultimately meet their economic interests.

#### ICT innovation is key to post-COVID economic recovery and long-term growth.

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Introduction

As the global economy has entered recession in 2020, triggered by the COVID-19 pandemic, the human casualties, and economic damage are perceived to be very large. Even as the health crisis will gradually become manageable, the impact on economic growth can be long-lasting and the recovery path can take several years. In particular, growth drivers such as the pace of job creation, income generation and investment may take several years to get back to pre-crisis trends. Initially the productivity of those growth drivers may be of less concern as the mantra of ‘we’ll do what it takes to avoid worse’ is predominant in this phase of the crisis.

However, once the recovery gets underway the productive use of resources is key to sustained growth. While we do not ignore the short-term challenges of the economic recovery, our primary focus in this paper is on the productivity puzzle from a long-term perspective. Productivity is driven by technological change and innovation which, in turn, depends on investment in human and physical capital as well as in other ‘missing capitals’ often referred to as intangible assets. Indeed, those investments create a positive feedback effect, as the productivity it generates also helps to make more efficient usage of scarce resources in the future. When properly measured and valued, productivity also provides a critical yardstick to realise a fairer distribution of the gains from economic growth to those who bring the resources to bear. It thereby creates the incentives for people to produce and business to invest helping to drive economic growth and raise living standards.

Unfortunately, in the aftermath of the global financial crisis of 2008/2009, many economies around the world, especially advanced economies, have failed to recharge the economy by powering productivity as the key source of growth in the long term. Indeed the latest update of The Conference Board Total Economy Database (July 2020) points at significant weakening in labor productivity growth in Europe up to 2019 (figure 1a–c). While the United States experienced somewhat faster productivity growth from 2017 to 2019 than the Euro Area and the United Kingdom, it still has not recovered to the rates of productivity growth from before the global financial crisis either.

The slowdown in productivity growth over the past 15 years has been well documented. There are multiple causes including an exhaustion of catch-up potential in emerging markets impacting economies along entire global value chains, and the drag from the global financial crisis because of low demand and weak investment, too low interest rates causing misallocations an overreliance on cheap labor, and failing fiscal policies (Bauer et al., 2020; Cette et al., 2016; Crafts, 2018; Dieppe, 2020; Fernald et al., 2017; Syverson, 2016).1 Technical measurement issues regarding inputs and outputs may have played a role as well.

In our earlier work we have stressed the importance of time lags in the adoption of new technologies, and in particular the complexity in generating productivity growth from the latest round of new digital technologies since the early 2010s, including the move toward mobile, ubiquitous access to broadband, the rise of cloud storage and advances in artificial intelligence (AI) and robotics (van Ark, 2016a, 2016b; van Ark and O’Mahony, 2016; van Ark et al., 2016).

While the first priority for economic recovery from the COVID-19 crisis is to restore jobs, it is important that any employment-intensive growth path does go together with a productivity revival. In this paper, we argue that it is possible to avoid another productivity slowdown. Underneath the aggregate figures, there is evidence pointing toward a possible tipping point at which many advanced economies may expect to see more widespread impacts from the adoption and absorption of digital technology on productivity and GDP growth.

In Section 2 we review the latest literature on the productivity impacts of general purpose technologies (GPTs), including the notion of time lapses through which digital technologies result in faster productivity growth. We also look at patterns by which innovation and productivity effects GPTs emerge across industries and disperse across the economy. We explain why the New Digital Economy (NDE) is especially characterised by long lag effects.

In Section 3 we provide an empirical analysis of productivity growth by industry data to observe whether we can detect a distinct pattern across groups of industries pointing to a structural improvement in recent years. We use a taxonomy on digital intensity by industry which was recently developed by the Organisation for Economic Co-operation and Development (OECD) (Calvino et al., 2018), showing that the most digital-intensive industries have experienced a relatively strong performance in terms of labor productivity growth since 2007 and especially since 2013.

In Section 4 of the paper, we discuss the connection between labor and skills in the digital economy, which we believe provides the key to a productivity revival. We developed a new metric on innovation competencies by occupation on the basis of data from the O\*Net database on occupation-specific descriptors in the United States (Hao et al., 2018). When applied to the United Kingdom, we find that innovation competencies point at stronger productivity effects by industry.

In Section 5 we focus on how productivity has been behaving in the short-term during the COVID-19 recession. In particular, we address the potential trade-offs between traditional pro-cyclical recovery effects and scarring effects the recession leaves, especially on the labor market. We argue that increased adoption and usage of digital technologies during the COVID-19 crisis may create a positive productivity effect. In the final section, Section 6, we will review our hypothesis that a productivity revival could be imminent in the light of the recovery from the COVID-19 crisis. In order not to miss this opportunity again, as happened a decade ago, we argue that a coordinated effort from business and policy is needed, and has to be delivered in such a way that the gains from productivity will be more widespread and such that those who provide the resources for growth are incentivised to deliver them in an efficient way.

2. The productivity paradox of the New Digital Economy

It is well known that General Purpose Technologies (GPTs), defined as new methods of producing and inventing new goods and services which are important enough to have a long-term aggregate impact on the economy, can take a significant amount of time to translate to faster productivity growth at the aggregate level of the economy. This is inherent to the three critical characteristics of a GPT as identified by Bresnahan and Trajtenberg (1995).2

1. Pervasiveness –The GPT should spread to most sectors.

2. Improvement –The GPT should get better over time and, hence, should keep lowering the costs of its users.

3. Innovation spawning –The GPT should make it easier to invent and produce new products or processes.

Historical analysis has focussed on productivity trends in previous technology phases (Bakker et al., 2019; Crafts, 2004). Recent literature has shown that the information and communication technology (ICT) revolution of the past 50 years can be characterised as a GPT and doesn’t pale with previous GPTs such as steam technology, electricity and the combustion engine. For example, Hempell (2005) concludes that ‘investment in information and communication technologies (ICT) are closely linked to complementary innovations and are most productive in firms with experience from earlier innovations’. In a more recent analysis of the evolution of the Internet, Simcoe (2015) argues that the modularity of the internet has prevented a fall in return to investments in innovation by ‘facilitating low-cost adaptation of a shared general-purpose technology to the demands of heterogeneous applications’. In a review of the data, Liao et al. (2016) conclude that:

‘...ICT investment does contribute to productivity but not in the usual manner –we find a positive (but lagged) ICT effect on technological progress. We argue that for a positive ICT role on growth to actually take place, a period of negative relationship between productivity and ICT investment together with ICT-using sectors’ capacity to learn from the embodied new technology was crucial. In addition, it took a learning period with appropriate complementary co-inventions for the new ICT-capital to become effective and its gains to be realised. Our findings provide solid, further empirical evidence to support ICT as a general purpose technology’.

#### Growth solves nuclear war.

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What Is To Be Done?

The first marching order is to dodge any kind of perpetual war of the sort that George Orwell outlined in  “1984,” which engulfed the three super states of Eastasia, Eurasia, and Oceania, and made possible the totalitarian Big Brother regime. A long-running Cold War-type confrontation would almost certainly take another form than the one that ran from 1945 until the downfall of the Soviet Union.

What prescriptions can be offered in the face of the escalating competition among the three global powers? First, by staying militarily and economically strong, the United States will have the resources to deter its peers’ hawkish behavior that might otherwise trigger a major conflict. Judging by the history of the Cold War, the coming strategic chess match with Russia and China will prove tense and demanding—since all the countries boast nuclear arms and long-range ballistic missiles. Next, the United States should widen and sustain willing coalitions of partners, something at which America excels, and at which China and Russia fail conspicuously.

There can be little room for error in fraught crises among nuclear-weaponized and hostile powers. Short- and long-term standoffs are likely, as they were during the Cold War. Thus, the playbook, in part, involves a waiting game in which each power looks to its rivals to suffer grievous internal problems which could entail a collapse, as happened to the Soviet Union.

Some Chinese and Russian experts predict grave domestic problems for each other. They also entertain similar thoughts about the United States, which they view as terminally decadent and catastrophically polarized over politics, ethnicity, and the future direction of the country. So, the brewing three-way struggle also involves a systemic contest, which will test the competitors’ economic and political institutions.

At this juncture, the world is entering a standoff among the three great and several not-so-great powers. Averting war, while defending our interests, will prove a challenge, calling for deft policy, political endurance, and economic growth, as well as sufficient military force to keep at bay aggressive states or prevail over them if ever a war breaks out.

#### Holdup threatens the entire IOT economy.

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G. Summary

However, our overall conclusions regarding SEPs are more mixed. Policy and legal changes that have reduced the ability of SEP owners to engage in patent holdup appear to have stalled out, especially as regards reform of the IPR rules at SSOs other than the IEEE. If so, this could have important effects on innovation and efficiency. For example, the “Internet of Things” is a new and growing area where royalty stacking and patent holdup appear to be very real dangers. Devices of all sorts, from thermostats to railroad cars to refrigerators, are being given connectivity using standards developed by SSOs. The price of those chips, and whether the IP contained in them costs $5 or $0.50 or $0.005, will determine the nature of new applications and the rate of adoption.

Failure to prevent patent holdup relating to tomorrow’s information technology and communications standards is likely to cause significant social welfare loss in the years ahead. If new and more effective private solutions relating to standard setting do not emerge to promote innovation and protect consumers, antitrust enforcement is one of the only remaining remedies that seems feasible.

V. Conclusions

Over the past five years, the rewards provided to patent owners in the United States have become more closely matched with the value of the technology they contribute. When rewards and contributions are aligned, economic efficiency is promoted because investments into developing new technologies are commensurate with benefits. These changes have come from legislation, the federal courts, and policy statements and enforcement actions by regulators of various types. However, at this juncture, we see a substantial gap persisting between the ability of some patent owners to monetize their patents and the contributions provided by the technology underlying those patents. With the “Internet of Things” poised to create economic growth, this is a problem worthy of further research and policy attention.

#### Emergence of smart cities depends on IoT applications of 5G interoperability standards---absent FRAND, excessive royalties will undermine sustainable development.

Schwartz 18, \*Matt Schwartz, Privacy Fellowship Coordinator at ACT, App Association; (March 2nd, 2018, “It’s Smart to be FRANDly: How the FRAND Commitment Will Determine the Future of Smart Cities”, https://actonline.org/2018/03/02/its-smart-to-be-frandly-how-the-frand-commitment-will-determine-the-future-of-smart-cities/)

In December, we [outlined](https://actonline.org/2017/12/18/smart-cities-connecting-your-community-through-technology/%5d) the emergence of Smart Cities – cities that harness technological innovations like internet of things (IoT) devices and data analytics to improve essential infrastructure in growing urban centers. The technological foundation of Smart Cities aims to improve public safety, better allocate resources, and meet the needs of citizens more quickly.

A central element to Smart Cities is the comprehensive network of sensors and devices implemented within buildings, roads, traffic signs, and parking meters that allows them to interact with public, and potentially private-owned, infrastructure. These sensors will “speak” to one another, communicating information about energy usage, traffic density, or other elements of city management that have traditionally either been analyzed separately or not tracked at all. The potential of Smart Cities allows data to flow from previously disconnected branches of the city and be processed in real-time, unlocking previously unknown insights.

The powerful interoperability of Smart Cities will rely heavily on standardized technologies developed in organizations like the IEEE, which is responsible for standardizing the wi-fi technology we use every day. Standardized technologies often include standard-essential patents (SEPs), which, like their name suggests, are patents declared essential to an industry standard by a standards-setting organization. In simple terms, one cannot implement the standardized technology without using the patent.

Like regular patents, the users of SEPs must pay royalties or licensing fees to the patent owner before they may use it. For example, if a manufacturing company wants to make an IoT device interoperable with a 5G network, the manufacturer must pay a licensing fee to the owner of the SEP that is essential to the 5G standard. SEPs play a vital role in the new innovations we enjoy and have come to expect, and because of the value of these patents, SEP holders have the ability to demand high license fees from those who wish to implement the standard. To offset this competition issue, many SEP holders voluntarily agree to license their SEPs to any willing licensee under fair, reasonable, and non-discriminatory (FRAND) terms.

While wi-fi and LTE are standards that will be vital to Smart City deployment, countless new standardized technologies are being developed that will be integral to any fully-operational Smart City. With reasonable access to SEPs, assured by the FRAND commitment, innovators can enjoy the legal and business certainty they need to compete. While the meaning of the FRAND commitment continues to be refined – as evidenced by the development of SEP best practices recently launched by the App Association in Europe – its foundations are well-established.

But what happens when SEP holders do not abide by the FRAND licensing commitment, or simply refuse to license at all? Sadly, small and medium-sized companies would be forced to accept untenable licensing terms, but more realistically, they would be priced out of using the standard altogether. As a result, it would impose a barrier to innovation that would result in fewer products offered to consumers or cities eager to implement IoT technologies. For example, many hope the rise of autonomous vehicles will be seamlessly integrated into the Smart City network. But how beneficial would it be if only some autonomous vehicle brands are able to license the technology needed to communicate with traffic lights, simply because of the market power of a chipmaker? The FRAND commitment is an important backstop to that unfortunate possibility.

It is vital for SEP holders to honor FRAND licensing terms, if not for small and medium-sized innovators, then for the sustainability of future Smart Cities. FRAND creates a platform for innovation, providing a floor on which companies can stand, innovate, and compete. If the foundation of the FRAND commitment is reneged, American innovators pay a steep price – not only do they lose a key component of product development and market entry, but they are also left with years of expensive negotiations and litigation if they choose to challenge the licensing practice. What’s more, the confidence developed in the open standards development system is shaken, and Smart Cities have fewer choices in IoT solutions for their future.

To achieve the promise of Smart Cities, a balanced standards ecosystem is essential. We must allow small and medium-sized developers to leverage industry standards for innovation and prevent cost-prohibitive royalty structures and negotiating practices that are detrimental to competition, while also ensuring that SEP owners can protect their intellectual property and be fairly compensated for its use. The FRAND commitment continues to be the best framework to achieve this balance, and adherence to its principles will determine the future and success of Smart Cities.

#### Climate change is anthropogenic and causes extinction---5G-enabled smart cities are critical for mitigation and adaptation.

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Currently, the entire planet is at risk due to continual climate change [1–3]. The recorded increase in average temperature across the world in the past hundred years, and the associated changes attributed to this, are known as global warming. Many scientists are convinced by the published evidence that this change is anthropogenic and resulted from the elevated emission levels of global greenhouse gases (GHGs) [4,5]. Gases such as water vapor, carbon dioxide, methane, nitrous oxide, and ozone are responsible for the absorption and emission of thermal radiation. These changes in the relative quantities of the GHGs induce a proportional change in the amount of preserved solar energy. Presently, the accepted indicator for global warming is the sustained rise in the mean temperature worldwide. This definition is designed to account for the fact that there may be some localized exceptions to this rise. For example, there may be cooling experienced in a region while the global temperature may increase altogether, hence the need for average temperature. A key concern with the GHGs trapping of more heat in the atmosphere is that it affects both climate and short scale weather patterns. Consequently, it results in greater numbers of adverse weather events such as storms, heat waves, cold snaps, droughts, and fires [6]. Climate-related risks to health, livelihoods, food security, water supply, human safety, and economic growth are projected to increase with global warming of 1.5 ◦C [7] and further increase further at 2 ◦C, as shown in Figure 1. In addition, the risks to global aggregated economic growth due to the climate change impacts are projected to be lower at 1.5 ◦C than at 2 ◦C by the end of this century.

Carbon dioxide has the most substantial effect on global warming [8]. Although it was once assumed to have an ~100 year lifespan in the atmosphere, careful studies revealed that the situation is far worse, with three-quarters of the gas expected to remain for a time in the region of up to ~1000 years, with the remainder lasting for an indefinite period of time [9]. It was indicated that the present impacts of humanity on the atmosphere can certainly cause a long term problem [10]. Carbon dioxide is released when oil, coal, and other fossil fuels are burnt for the energy we use to power our homes, cars, and smartphones. By lessening its usage, we can curb our own contribution to climate change while saving money. The first challenge is eliminating the burning of coal, oil, and, eventually, natural gas. Oil is the lubricant of the global economy as it is hidden inside such ubiquitous items as plastic and corn, fundamental to the transportation of both consumers and goods. Coal is the substrate, supplying roughly half of the electricity worldwide, a percentage that is likely to grow according to the International Energy Agency (IEA). In fact, buildings contribute up to 43% of all the greenhouse gas emissions worldwide [11], even though investing in thicker insulation and other cost-effective as well as temperature-regulating strategies can save money in the long run. Investment in new infrastructures, or radical upgradation of the existing highways and transmission lines, may help to reduce greenhouse gas emissions, yielding economic growth in the developing countries.

Nations across the globe have kept very high targets to reducing their GHG discharges [12,13]. In order to meet these goals, considerable reductions in city energy usage is required. At a global scale, urban communities represent over half (55%) of the population, which is predicted to reach 68% by the middle of this century [14]. Urban areas claim ownership of the highest levels of energy use, gas emission, and also the largest local economy. As such, it is crucial for urban areas to reduce their consumption and utilize renewable sources wherever available to reduce their gas discharge levels. Smart cities often utilize digital sensors to measure and transmit data about the levels of GHGs in the city at that moment, as a means of tackling them [15]. The efficacy of such a system is thus reliant on the network used to collate and analyze the data collected as an extant network. The mobile telecommunications networks offer a convenient solution to this desire, as their pre-existence has the clear benefit of reducing costs compared to the design and implementation of a novel system. It is recognized that smart cities will certainly act as the key players meeting these ambitious targets [16,17]. In this study, we focused primarily on the potential applications of 5G network technology to control climate change in Singapore. In addition, a clear overview of the sustainability benefits of introducing 5G technology compatible smart cities, buildings, and farms in all aspects of urbanization is provided. Herein, the main purpose is to tackle the negative outcomes associated with anthropogenic climate change, with a particular focus on the contributions that are best made by the telecoms network operators.

Climate change is one of the most challenging problems that humanity has ever faced. Presently, hundreds of millions of lives, innumerable species, entire ecosystems, health, economy, and the future habitability of this planet are at risk. Fortunately, climate change is solvable, we just need to wisely exploit the existing technologies and sciences. Climate change mitigation is a pressing international need in which many management actions are required. The development of 5G technology has been largely driven by smart mobile devices and advanced communication technologies. It may thus serve as a technical enabler for a whole new range of business opportunities, energy, and facilities management, together with industrial applications. Moreover, it may enable different devices to work together seamlessly. Definitely, the 5G cellular network technology is expected to revolutionize the global industries with profound effects on the savings of energy, waste generation and recycling, and water resources management, thus reducing the climate change impacts.

#### Patent holdup is real and necessitates intervention, even if it can’t be systemically proven.

Contreras 19, \*Jorge Contreras, Professor, University of Utah S.J. Quinney College of Law; (2019, “MUCH ADO ABOUT HOLD-UP”, <https://www.illinoislawreview.org/wp-content/uploads/2019/08/Contreras.pdf>)

B. Protective Measures May Already Be Working to Reduce Hold-Up

Another important factor that should be considered regarding the purported lack of empirical evidence of systemic hold-up is the effect that existing policy measures have already had in reducing hold-up. As noted above, the threat of patent hold-up was a primary motivating factor for many SDOs to adopt policies requiring the disclosure and licensing of SEPs. These policies have been in place for decades. In the United States, the first such policy was adopted in 1959 by the American Standards Association (the predecessor to today’s American National Standards Institute (ANSI).102 Today, every one of the more than 200 ANSI-accredited developers of American National Standards must adhere to ANSI’s essential requirements, including the adoption of such a licensing policy for SEPs. Similar policies have existed in European and international standards organizations since at least the 1980s.103 These policies, which were developed by SDOs in large part to reduce the likelihood of hold-up within standard-setting systems, have had several decades to work, and it is likely that the lack of observed hold-up in some studies can be attributed to the successful operation of these policies.

Similarly, antitrust and competition enforcement agencies in the U.S. and Europe have been aware of the potential for hold-up connected with standardization for many years. Accordingly, they have brought enforcement actions when it has been alleged that hold-up behavior has resulted in a violation of the antitrust laws. High-profile enforcement actions against patent holders such as Rambus, 104 Google 105 and Qualcomm106 send powerful deterrent signals to the market and warn others not to engage in similar behavior lest they, too, become the subject of agency enforcement. Like SDO policies, it is likely that the general market awareness of agency interest in standard-setting and hold-up has, to a degree, limited the amount of hold-up that is actually attempted in the marketplace, thereby limiting the direct evidence of hold-up as a systemic problem.

But do the deterrent effects of SDO and agency efforts to reduce hold-up signify that hold-up is not a problem? Certainly not. To reach such a conclusion would be perverse: akin to claiming that burglary is not a problem in a neighborhood that experiences reduced burglary rates after it has implemented an active neighborhood watch program and enhanced policing.

C. Indicia of Healthy Markets do not Prove the Absence of Anticompetitive Conduct

As noted above, one of the principal arguments advanced by commentators seeking to refute the “hold-up theory” is that markets for telecommunications products, namely smart phones, are robust – evidenced by increasing product functionality, decreasing consumer prices and rapid innovation -- and that this degree of robustness indicates that hold-up cannot be a problem in these markets.107 If hold-up were a problem in these markets, they reason, we would see product stagnation, stable (but high) prices, and a lack of competition – features associated with classic examples of hold-up in markets for products such as natural resources and agricultural goods.108

But this argument relies on a false syllogism: hold-up results in market dysfunction; if a market functions well, then it cannot be subject to hold-up. The weaknesses in this argument are multifold. First, hold-up may exist in individual instances without sufficient weight to affect overall market characteristics, particularly in a large global market such as mobile telecommunications. Thus hold-up may exist, even in a market that outwardly appears to be functioning well. Second, there is no valid counterfactual to use to compare the health and robustness of the market for mobile telecommunications products.109 Other consumer electronics devices, such as televisions and DVD players, do not compare well with mobile telecommunications devices, which have taken on a unique character in the modern networked economy. Thus, observing the strength of the market fails to answer the critical questions “compared to what?” and how much stronger the market might be (through more product diversity, functionality, price reduction) without hold-up?

A simple historical illustration is useful in this context. During the decade leading up to the enactment of the Sherman Antitrust Act of 1890, several major U.S. commodity markets (e.g., steel, salt, petroleum, coal, sugar, lead, and others) came under intense scrutiny for a variety of allegedly anticompetitive industrial arrangements. One might have argued that these markets, had they been subject to the sorts of anticompetitive collusion that the Sherman Act sought to address, should have seen reductions of output and increases in price. Yet, between 1880 and 1890, U.S. output of salt, petroleum, steel, and coal all increased significantly, and prices of steel, sugar and lead all dropped significantly.110 Do these positive market indicia demonstrate that the subject markets were not subject to anticompetitive collusion, and that the Sherman Act was not necessary? Certainly, investigations of these industries revealed significant cartel behavior. I would suggest that few commentators today would argue that the coal, steel, sugar and other major industrial producers of the late nineteenth century were innocent of collusive and anticompetitive conduct, or that the Sherman Act was not a necessary and beneficial measure for the U.S. economy.111 Yet, had we relied solely on the positive characteristics exhibited by these markets as proof that anticompetitive conduct did not exist, then perhaps the Sherman Act never would have been enacted.

By the same token, the fact that global markets for standardized products such as computers and smart phones appear to be thriving does not itself refute the possibility of hold-up nor the existence of anticompetitive conduct in these markets. Nor does it allow regulators and policy makers to drop their guard or cease to monitor these important industries.

#### The plan requires SSO’s to administer reasonable action to prohibit ex post opportunism---that solves

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3. Application of the Basic Legal Principles

The antitrust principle is straightforward: industry-wide collaboration through SSOs to establish procompetitive standards is permitted only if it is no more restrictive of competition than reasonably necessary to enable creation of the standards. When standard setting predictably creates technology monopolies that, if unrestrained, will enable anticompetitive ex post opportunism that would otherwise not occur, an SSO that does not take effective measures to prevent or minimize such ex post opportunism engages in conduct that is more restrictive of competition than necessary. In that case, the SSO and, in appropriate cases, its members, may well violate Section 1 of the Sherman Act.

Under this principle, SSO procedures and FRAND rules should be evaluated based on whether they lead to reasonable SEP royalties, using the competitive ex ante licensing standard discussed above, which has been adopted by the courts in patent law. Put differently, FRAND rules should be evaluated based on their ability to prevent SEP holders from obtaining more than the ex ante value of their technology from implementers.

This limitation would not prevent a SEP holder from proﬁting, perhaps greatly, from participating in the SSO and having its patented technology included in the standard. The SEP holder continues to be rewarded for its technology because the inclusion of its technology in the standard can still greatly increase the volume of licensing opportunities available to the SEP holder.

Whether a particular set of FRAND rules are sufficiently effective in preventing ex post opportunism will depend on the particular circumstances. The procedural unfolding of the case will also depend upon the circumstances. As a general matter, the case would probably be structured as an ordinary Rule of Reason case.82

First, the plaintiff would have to demonstrate harm to competition as a result of the collaboration of the SSO’s members, many of which compete with one another. In this case, the harm to competition would stem from the ability of the SEP holder to exercise monopoly power by obtaining royalties in excess of the competitive, ex ante level. The decision to include patented technologies in the standard would be the allegedly unlawful agreement. Notably, the court need not determine what a FRAND royalty is; it would suffice to determine that market power has been created or exercised, and that existing SSO rules and policies were not adequate to prevent the competitive harm. The defendant, which could be the SSO or perhaps one or more SSO members, would win at this point if the plaintiff failed to show harm to competition. If might fail if the standard faces substantial competition and the court concludes that the SEP holder therefore does not have market power or if the SSO’s rules and policies are found to be effective in preventing ex post opportunism, even if the plaintiff or even the court thinks that other rules and policies would be preferable.

Second, if the plaintiff makes the requisite showing of harm to competition, the defendant(s) would then have to show some procompetitive justiﬁcation— in this case, the beneﬁts of the standard. These two initial steps should be straightforward.

Third, if as is likely the defendant is able to show a procompetitive justiﬁcation, the plaintiff would have to show that the SSO could have used available, reasonable alternatives to realize the efficiency beneﬁts with less or none of the competitive harms. The plaintiff might identify reasonable alternatives that would have led to a different standard, based on including unpatented technology in the standard or perhaps involving fewer SEPs or fewer owners of SEPs, which would be less subject to patent holdup. More likely, the plaintiff could suggest alternative SSO rules that would not change the standard, but would reduce the likelihood or extent of ex post opportunism. For example, the plaintiff might suggest more rigorous FRAND-type rules, such as rules that set forth more precise principles on which FRAND royalties are to be determined and the circumstances under which SEP holders might seek injunctions.

Fourth, the burden would then shift to the defendant(s) to show that the beneﬁts of the standard could not have been realized if the SSO had adopted any of the proffered alternatives or that those alternatives were unrealistic.83 The plaintiff would be entitled to judgment if the court concludes that those beneﬁts could have been realized with less competitive harm if the SSO had adopted the standard with different IPR rules or policies.

Our overall sense, based on experience and the empirical literature, is that the extant FRAND rules are generally useful, but tend to be inadequate because they are imprecise and leave unresolved such critical issues as (a) the meaning of a reasonable royalty, even conceptually; (b) the meaning of “non-discriminatory;” (c) to whom licenses must be offered; and (d) under what circumstances may a SEP holder obtain an injunction.84 These imprecise FRAND commitments are therefore not sufficient to adequately prevent ex post opportunism. The recent revisions to IEEE’s FRAND policy represent a signiﬁcant step in the right direction, but even this advance leaves important questions unanswered.85 If FRAND rules are inadequate in these ways, litigation involving extant FRAND rules would likely be resolved only at the ﬁnal, fourth step. The defendant would be able to demonstrate the beneﬁts created by the standard; the plaintiff would be able to demonstrate the creation of market power and that other reasonable and practical rules or policies would ameliorate the problem. The case would thus turn on whether the defendant is able to demonstrate that signiﬁcant beneﬁts associated with standardization could not have been realized if the SSO had adopted those other rules or policies.

The court would have available a variety of possible remedies if the plaintiff prevails. Implementers that paid supracompetitive royalties or were unlawfully excluded in whole or in part from product markets as a result of the inadequate FRAND policies would be entitled to damages and, in some cases, to treble damages.86 If the unlawful SSO conduct is regarded as the collective action of the SSO and its members, which is likely to be the case in most instances, SSO members would be jointly and severally liable for the damages. Forward-looking injunctive relief aimed at restoring competition would need to be fashioned to the requirements of the individual case. For example, a court could order the SSO to adopt a new rule or policy proposed by the plaintiff. If the court is reluctant to take on that governance role, it might give the SSO a period of time—maybe ninety days—to develop a rule, subject to the court’s ultimate approval, which would adequately ameliorate the competitive problem created by the SSO. Alternatively or in addition, the court might order the parties to attempt to negotiate a rule or policy on which they can agree. And, depending on the circumstances, the court might order SEP holders, including at least those that were defendants in the case, to comply with the new SSO rules and policies.

### 1AC---Cybersecurity ADV

#### Advantage 2 is Cybersecurity:

#### Aggressive patent strategies create structural flaws in 5G standardization that imperils domestic cybersecurity---market competition reduces the incidence of vulnerability and severity of attacks.

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III. COMPETITION AND CYBERSECURITY

In addition to the historical review done so far, another approach to understanding the relationship among patents, competition, and national security is to consider the role of cybersecurity. There is little doubt that computer system vulnerabilities that enable hacking and spread of computer exploits are a threat to the nation’s defenses, so better cybersecurity is a key part of national security strategy.155

Strong competition can thus complement national security by enhancing domestic cybersecurity, and patent assertion that unduly weakens competition detracts from cybersecurity.156 Competition promotes better cybersecurity in at least two ways. First, multiple studies show that competition encourages firms to improve their products on multiple vectors including cybersecurity. Second, competition avoids a situation that security experts call a “monoculture,” which increases vulnerability to severe cyberattacks. As former Secretary of Homeland Security Michael Chertoff wrote recently, “We need competition and multiple providers, not a potentially vulnerable technological monoculture,” to guarantee national security.157 Thus, cybersecurity provides a useful lens for understanding how unfettered patent assertion and licensing can detract from national security.

A. Cybersecurity as Competitive Value-Add

Competition enhances national security by reducing the incidence of technical vulnerabilities. That effect is especially important for security sensitive systems such as mobile telecommunications.

Intuitively, a causal chain from competition to cybersecurity makes logical sense. Computer security is a value-added benefit to consumers, so firms in competitive markets are likely to use security to gain an edge over their competitors.158 In monopolized markets, though, there may be less external impetus to test products for flaws, and the monopolist may choose to focus less on security and more on new product features or increased product quality.

Economic research confirms these hypotheses about competition leading to better cybersecurity. A 2009 empirical study of web browsers considered the impact of market concentration on the amount of time that vendors took to fix security vulnerabilities as they were discovered.159 The study found that the presence of more competitors correlated with faster cybersecurity response—a reduction of 8–10 days in response time per additional market rival.160 Similarly, business researchers in 2005 modeled incentives for firms to engage in sharing of cybersecurity information, and concluded that the “inclination to share information and invest in security technologies increases as the degree of competitiveness in an industry increases.”161 Another study found that, where two software firms are in competition, at least one will be willing to take on some degree of risk and responsibility for cybersecurity, whereas a monopoly software firm will consistently fail to accept such responsibility.162 To be sure, an unpublished study from 2017 found that some market concentration can make firms more responsive to cybersecurity issues, but only to a point: “being in a dominant position reduces the positive effect of having less competitors on the responsiveness of the vendor,” and indeed the “more dominant the firm is, the less rapid it is in releasing security patches.”163 This research confirms that competition is more conducive to cybersecurity.

It is not hard to see how this applies to emerging communication technologies markets. In the absence of competition, the above research suggests that device manufacturers, chip makers, and software developers will lack incentives to respond to vulnerabilities, to share information about cybersecurity practices and issues, and to take responsibility for security matters. Mobile phone chips have had their share of cybersecurity failures already.164 The best way to flush out ongoing and future cybersecurity issues is to maintain competitive pressure at all levels of the supply chain.

B. Vulnerabilities of “Monocultures”

A second reason why monopoly undermines cybersecurity is that monopoly leads to a “monoculture” of single-vendor products, opening the door to massive systemic failure in the case of a cyberattack. Computer researchers developed the theory of software monocultures in the early 2000s, in response to the regular phenomenon of computer viruses and other attacks spreading rapidly by exploiting flaws in the dominant operating system at the time, Microsoft Windows.165 Where a computer system such as Windows has a commanding share of users, a virus that exploits a flaw in that system can quickly spread to infect a whole interconnected ecosystem. An operating system monopoly thus enables fast and easy spread of cyberattacks, and better cybersecurity would be achieved through greater diversity in online systems.166 As one research group posited, “a network architecture that supports a collection of heterogeneous network elements for the same functional capability offers a greater possibility of surviving security attacks as compared to homogeneous networks.”167

There has been considerable study of the theory that computer monocultures are naturally more vulnerable to attacks.168 In one study, computer science researchers reviewed a catalog of 6,340 software vulnerabilities recorded in 2007, to compare whether comparable software would share the same flaws.169 Of the 2,627 vulnerabilities applicable to application software (as opposed to operating systems, web scripts, and other software components), only 29 (1.1%) applied to substitute products from different vendors but providing the same functionality.170 By contrast, different versions of a single software product were found to share vulnerabilities 84.7% of the time.171 Thus, software monocultures share exploitable flaws even when there is some variation in versions across the monoculture; by contrast, diversity in software is almost guaranteed to prevent a single flaw from affecting all users.

In the case of 5G and wireless mobile communications, a monoculture is an especially concerning possibility. To the extent that systems such as smart city sensors or communication networks are widely deployed in a monoculture fashion, a widespread attack could have devastating consequences, potentially blacking out a region and affecting essential services such as 911.172 A monoculture that is vulnerable to so-called “rootkits” or “backdoors”—maliciously installed software that enable bad actors to commandeer systems—could also enable mass surveillance or spying by private hackers or foreign governments.173 The presence of systems from multiple vendors would mitigate these possibilities.

#### Insecure technical standards cause inevitable systemic grid collapse---extinction.

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The infrastructure was essential, ubiquitous and providing basic functionality for everything in daily life from water to heat and transportation. And in an instant it was gone, plunging tens of thousands of residents into a life-threatening crisis. This is, of course, the narrative of the recent debacle in Texas, where a winter storm overwhelmed the state’s electrical grid and brought the state to a near-total blackout. But it should also be interpreted as a preemptive warning of what Americans will face from the next generation of the internet and the new realm of cybersecurity risk it will dramatically amplify.

Both forms of infrastructure—a state-run electrical grid and the 5G and “internet of things” future to which we are rapidly hurtling—share three attributes. First, their construction reflects a lack of imagination about the danger that can quickly coalesce when seemingly remote threat scenarios become real. Second, compounding a lack of analytic imagination is an absence of preparedness. Third, for both the Texas electrical grid and the emerging internet, public policy protections are either meager or completely absent.

In planning for the resilience of its electrical grid, public officials in Texas discounted the potentially devastating disruption that could occur from unpredictable events—whether related to climate change or just a once-a-century anomaly. They also eschewed precautions other states take seriously by allowing for the interconnection of electrical grid supply chains across their borders, ostensibly because of their ideological rejection of federal regulatory oversight governing such arrangements.

As the United States builds out a new national 5G cyber-physical communications network through private service providers, Americans similarly discount the risks—myriad in their diversity and severity—that are orders of magnitude more significant than what Texas confronted recently. More physical things than people are already connected. The super empowered internet of tomorrow, known among some in the field as the “internet of everything,” will exceed by tens of billions of devices the number of connections between individuals simply communicating via social media or digital screens.

This confronts policymakers with an imminent threat: A cyber outage is no longer about losing digital communications but about losing basic societal functioning and even human life. The failure of imagination is to think of the SolarWinds attack on U.S. federal agencies and tech companies as a worst-case scenario. The failure of imagination is to think of cybersecurity through a content-centric lens rather than as possible attacks on the material world. The emergence of internet-connected cardiac devices, digitally dependent cars, and internet-connected agriculture systems portend the stakes of a cyberattack to health care, economic and social functioning, and food security.

The United States should be prepared for, and certainly not be caught by surprise by, such cyberattacks. Yet, the internet of everything is notoriously insecure. Internet-connected physical objects are not necessarily upgradeable. Nor do they come with adequate default security and encryption. The 5G infrastructure that helps connect digital objects has been at the center of debates over Chinese espionage. Industrial cyber-physical systems are based on technical standards that have not been collaboratively vetted for security and interoperability. One of the most infamous cyberattacks—the so-called Mirai botnet that took down major media sites and corporations—hijacked these insecure objects in homes to carry out the assault. The United States is not yet prepared.

Finally, in the race to conceive and deploy effective public policy responses, the U.S. government as a whole is hardly more anticipatory or synthesized in its response to potential calamity than the state of Texas. The focus of U.S. cyber policy remains on information policy issues such as disinformation, manipulation and violent speech rather than securing the digital world that now powers our material day-to-day lives. The Biden administration confronts an enormous challenge in crafting a comprehensive strategy to the cybersecurity risks foreshadowed by the ruinous experience in Texas and its management of vital infrastructure. While the digital world has leapt from two-dimensional to three-dimensional space, cyber policy has not at all jumped from 2D to 3D.

This failure of imagination, preparedness and policy protection must not be America’s cyber future; the stakes are far too high and the costs are far too great. The Texas disaster is a potent illustration of what has always been true: Our digital society and economy are extremely vulnerable and grow more porous and subject to penetration day by day. As digital sensors and cyber control systems become further embedded in physical infrastructure like energy systems, agriculture and transportation, there is no longer a separation between security of the “real” world and security of the online world. They are entangled and increasingly enmeshed—and policy has yet to catch up to either envisioning or mitigating the looming threats the U.S. confronts.

If the energy grid cannot weather a winter storm, how can it be expected to withstand a major cyberattack? What other vital forms of national infrastructure—ranging from water, bridges, highways and roads, and ultimately our day-to-day financial system—are comparably at risk? As Texas dramatizes, it is neither hyperbolic nor exaggerated to assert that our survival could now depend on securing the inevitable cyber-physical future that is accelerating with stunning rapidity.

#### Actors have the means and motivations to strike critical infrastructure.

Wintch 21, \*Timothy M. Wintch, an active-duty Major in the United States Air Force. He is currently a graduate student at the Oettinger School of Science & Technology Intelligence, National Intelligence University, in Bethesda, Maryland. Mr. Wintch has over 11 years of experience in command-and-control operations as an Air Battle Manager. He holds a Bachelor of Arts in Politics from the University of California, Santa Cruz, and a Master of Arts in Military Studies from American Military University. (April 20th, 2021, “PERSPECTIVE: Cyber and Physical Threats to the U.S. Power Grid and Keeping the Lights on”, https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/)

Among critical infrastructure sectors in the U.S., energy is perhaps the most crucial of the 16 sectors defined by the Department of Homeland Security. This sector is so vital because it provides the energy necessary to run every other critical infrastructure sector. However, the U.S. power grid, the backbone of the energy sector, is built upon an aging skeleton that is becoming increasingly vulnerable every day. Whether from terrorists or nation-states like Russia and China, the power grid is susceptible to not just physical attacks, but also to cyber intrusion as well. However, much of this threat can be mitigated if the U.S. takes the appropriate steps to safeguard the power grid and avoid a potential catastrophe in the future.

Since Sept. 11, 2001, terrorism on U.S. soil has been at the forefront of American consciousness. Critical infrastructure provides an appealing target because of the disproportionally large impact even a small attack can have on the sectors. In particular, the power grid represents a particularly lucrative target, both in terms of the ease of access and the large impact it can make. The National Research Council stated that the U.S. power grid is “vulnerable to intelligent multi-site attacks by knowledgeable attackers intent on causing maximum physical damage to key components on a wide geographical scale.”[[1]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn1) Additionally, the physical security of transmission and distribution systems is difficult due to the dispersed nature of these key components, which in turn is advantageous to attackers as it reduces the likelihood of their capture.[[2]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn2) From 2002-2012, approximately 2,500 physical attacks occurred against transmission lines and towers worldwide and approximately 500 attacks against transformer substations.[[3]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn3) Terrorists have the motivation to attack the U.S. power grid but the very nature of the grid makes it highly vulnerable. The power grid is not only at risk from physical attacks, but also nation-state cyberattacks.

One nation that has shown both the capability and intent to use attacks against critical energy infrastructure is Russia, as demonstrated in their 2015 annexation of Crimea from Ukraine. A Russian cyber threat group known as Sandworm, which used its BlackEnergy malware, attacked Ukrainian computer systems that provide remote control of the Ukraine power grid.[[4]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn4) This attack, and another in 2016, each left the capital Kiev without power, prompting cyber experts to raise concern about the same malware already existing in NATO and the U.S. power grids.[[5]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn5) In any conflict between Russia and NATO, not only would similar cyberattacks pose a threat, but so would potential physical attacks severing fuel oil and natural gas lines to Western Europe. Russia has both the capability and intent to attack critical infrastructure, particularly power grids, during future conflicts in their “hybrid warfare” approach.

Another nation that has the capability to attack critical energy infrastructure is China, representing a threat to not just the U.S. energy infrastructure but also that of our allies whose support would be vital in a major conflict. A recent NATO report highlighted this threat from China’s Belt and Road Initiative, stating that “[China’s] foreign direct investment in strategic sectors [such as energy generation and distribution] …raises questions about whether access and control over such infrastructure can be maintained, particularly in crisis when it would be required to support the military.”[[6]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn6) Like Russia, China has been active with cyber intrusions in U.S. energy infrastructure. The Mission Support Center at Idaho National Laboratory characterized these as attacks as “multiple intrusions into US ICS/SCADA [Industrial Control Systems/Supervisory Control and Data Acquisition] and smart grid tools [that] may be aimed more at intellectual property theft and gathering intelligence to bolster their own infrastructure, but it is likely that they are also using these intrusions to develop capabilities to attack the [bulk electric system], as well.”[[7]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn7) China, therefore, has both the capability and intent to conduct cyber intrusions and attacks for myriad reasons.

Another arm of this threat is the reliance the U.S. energy industry has on imports from China, especially transformers. In early 2020, federal officials seized a transformer in the port of Houston that had been imported by the Jiangsu Huapeng Transformer Company before sending it to Sandia National Laboratory in Albuquerque. Sandia is contracted by the U.S. Department of Energy for mitigating national security threats.[[8]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn8) The Wall Street Journal reported that “Mike Howard, chief executive of the Electric Power Research Institute, a utility-funded technical organization, said that the diversion of a huge, expensive transformer is so unusual – in his experience, unprecedented – that it suggests officials had significant security concerns.”[[9]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/" \l "_ftn9) Previously destined for the Washington Area Power Administration’s Ault, Colo., substation, the transformer is believed to have been seized due to “backdoor” exploitable hardware emplaced by the Chinese prior to shipment.[[10]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn10) Shortly after these events, President Trump issued Executive Order 13920, “[Securing the United States Bulk-Power System](https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-securing-united-states-bulk-power-system/),” essentially limiting the import of Chinese-built critical energy infrastructure components due to concerns about cybersecurity.[[11]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn11) Interestingly, Jiangsu Huapeng “boasted that it supported 10 percent of New York City’s electricity load.”[[12]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn12)

Franklin Kramer, the former Assistant Secretary of Defense for International Security Affairs, testified before a U.S. House of Representatives Energy and Commerce subcommittee during an energy and power hearing in 2011 and said that a “highly-coordinated and structured cyber, physical, or blended attack on the bulk power system, however, could result in long-term (irreparable) damage to key system components in multiple simultaneous or near-simultaneous strikes.” He added that “an outage could result with the potential to affect a wide geographic area and cause large population centers to lose power for extended periods.”[[13]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn13) Even the inclusion of features such as smart grids to the overall grid structure poses new vulnerabilities through their connectivity. Kramer stated that “such connectivity means that the distribution system could be a key vector for a national security attack on the grid.”[[14]](https://www.hstoday.us/subject-matter-areas/infrastructure-security/perspective-cyber-and-physical-threats-to-the-u-s-power-grid-and-keeping-the-lights-on/#_ftn14)

#### Those attacks cause accidental nuclear escalation.

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation)

Yet another pathway to escalation could arise from a cascading series of cyberstrikes and counterstrikes against vital national infrastructure rather than on military targets. All major powers, along with Iran and North Korea, have developed and deployed cyberweapons designed to disrupt and destroy major elements of an adversary’s key economic systems, such as power grids, financial systems, and transportation networks. As noted, Russia has infiltrated the U.S. electrical grid, and it is widely believed that the United States has done the same in Russia.[12](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12) The Pentagon has also devised a plan known as “Nitro Zeus,” intended to immobilize the entire Iranian economy and so force it to capitulate to U.S. demands or, if that approach failed, to pave the way for a crippling air and missile attack.[13](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote12)

The danger here is that economic attacks of this sort, if undertaken during a period of tension and crisis, could lead to an escalating series of tit-for-tat attacks against ever more vital elements of an adversary’s critical infrastructure, producing widespread chaos and harm and eventually leading one side to initiate kinetic attacks on critical military targets, risking the slippery slope to nuclear conflict. For example, a Russian cyberattack on the U.S. power grid could trigger U.S. attacks on Russian energy and financial systems, causing widespread disorder in both countries and generating an impulse for even more devastating attacks. At some point, such attacks “could lead to major conflict and possibly nuclear war.”[14](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote14)

These are by no means the only pathways to escalation resulting from the offensive use of cyberweapons. Others include efforts by third parties, such as proxy states or terrorist organizations, to provoke a global nuclear crisis by causing early-warning systems to generate false readings (“spoofing”) of missile launches. Yet, they do provide a clear indication of the severity of the threat. As states’ reliance on cyberspace grows and cyberweapons become more powerful, the dangers of unintended or accidental escalation can only grow more severe.

#### Cyber-compromised NC3 causes nuclear war.

Klare 19, \*Michael T. Klare is a professor emeritus of peace and world security studies at Hampshire College and senior visiting fellow at the Arms Control Association; (November 19th, “Cyber Battles, Nuclear Outcomes? Dangerous New Pathways to Escalation”, <https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation>)

The Nuclear-Cyber Connection

These links exist because the NC3 systems of the United States and other nuclear-armed states are heavily dependent on computers and other digital processors for virtually every aspect of their operation and because those systems are highly vulnerable to cyberattack. Every nuclear force is composed, most basically, of weapons, early-warning radars, launch facilities, and the top officials, usually presidents or prime ministers, empowered to initiate a nuclear exchange. Connecting them all, however, is an extended network of communications and data-processing systems, all reliant on cyberspace. Warning systems, ground- and space-based, must constantly watch for and analyze possible enemy missile launches. Data on actual threats must rapidly be communicated to decision-makers, who must then weigh possible responses and communicate chosen outcomes to launch facilities, which in turn must provide attack vectors to delivery systems. All of this involves operations in cyberspace, and it is in this domain that great power rivals seek vulnerabilities to exploit in a constant struggle for advantage.

The use of cyberspace to gain an advantage over adversaries takes many forms and is not always aimed at nuclear systems. China has been accused of engaging in widespread cyberespionage to steal technical secrets from U.S. firms for economic and military advantages. Russia has been accused, most extensively in the Robert Mueller report, of exploiting cyberspace to interfere in the 2016 U.S. presidential election. Nonstate actors, including terrorist groups such as al Qaeda and the Islamic State group, have used the internet for recruiting combatants and spreading fear. Criminal groups, including some thought to be allied with state actors, such as North Korea, have used cyberspace to extort money from banks, municipalities, and individuals.[4](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote04) Attacks such as these occupy most of the time and attention of civilian and military cybersecurity organizations that attempt to thwart such attacks. Yet for those who worry about strategic stability and the risks of nuclear escalation, it is the threat of cyberattacks on NC3 systems that provokes the greatest concern.

This concern stems from the fact that, despite the immense effort devoted to protecting NC3 systems from cyberattack, no enterprise that relies so extensively on computers and cyberspace can be made 100 percent invulnerable to attack. This is so because such systems employ many devices and operating systems of various origins and vintages, most incorporating numerous software updates and “patches” over time, offering multiple vectors for attack. Electronic components can also be modified by hostile actors during production, transit, or insertion; and the whole system itself is dependent to a considerable degree on the electrical grid, which itself is vulnerable to cyberattack and is far less protected. Experienced “cyberwarriors” of every major power have been working for years to probe for weaknesses in these systems and in many cases have devised cyberweapons, typically, malicious software (malware) and computer viruses, to exploit those weaknesses for military advantage.[5](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote05)

Although activity in cyberspace is much more difficult to detect and track than conventional military operations, enough information has become public to indicate that the major nuclear powers, notably China, Russia, and the United States, along with such secondary powers as Iran and North Korea, have established extensive cyberwarfare capabilities and engage in offensive cyberoperations on a regular basis, often aimed at critical military infrastructure. “Cyberspace is a contested environment where we are in constant contact with adversaries,” General Paul M. Nakasone, commander of the U.S. Cyber Command (Cybercom), told the Senate Armed Services Committee in February 2019. “We see near-peer competitors [China and Russia] conducting sustained campaigns below the level of armed conflict to erode American strength and gain strategic advantage.”

Although eager to speak of adversary threats to U.S. interests, Nakasone was noticeably but not surprisingly reluctant to say much about U.S. offensive operations in cyberspace. He acknowledged, however, that Cybercom took such action to disrupt possible Russian interference in the 2018 midterm elections. “We created a persistent presence in cyberspace to monitor adversary actions and crafted tools and tactics to frustrate their efforts,” he testified in February. According to press accounts, this included a cyberattack aimed at paralyzing the Internet Research Agency, a “troll farm” in St. Petersburg said to have been deeply involved in generating disruptive propaganda during the 2016 presidential elections.[6](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote06)

Other press investigations have disclosed two other offensive operations undertaken by the United States. One called “Olympic Games” was intended to disrupt Iran’s drive to increase its uranium-enrichment capacity by sabotaging the centrifuges used in the process by infecting them with the so-called Stuxnet virus. Another left of launch effort was intended to cause malfunctions in North Korean missile tests.[7](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote07) Although not aimed at either of the U.S. principal nuclear adversaries, those two attacks demonstrated a willingness and capacity to conduct cyberattacks on the nuclear infrastructure of other states.

Efforts by strategic rivals of the United States to infiltrate and eventually degrade U.S. nuclear infrastructure are far less documented but thought to be no less prevalent. Russia, for example, is believed to have planted malware in the U.S. electrical utility grid, possibly with the intent of cutting off the flow of electricity to critical NC3 facilities in the event of a major crisis.[8](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote08) Indeed, every major power, including the United States, is believed to have crafted cyberweapons aimed at critical NC3 components and to have implanted malware in enemy systems for potential use in some future confrontation.

Pathways to Escalation

Knowing that the NC3 systems of the major powers are constantly being probed for weaknesses and probably infested with malware designed to be activated in a crisis, what does this say about the risks of escalation from a nonkinetic battle, that is, one fought without traditional weaponry, to a kinetic one, at first using conventional weapons and then, potentially, nuclear ones? None of this can be predicted in advance, but those analysts who have studied the subject worry about the emergence of dangerous new pathways for escalation. Indeed, several such scenarios have been identified.[9](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote09)

The first and possibly most dangerous path to escalation would arise from the early use of cyberweapons in a great power crisis to ~~paralyze~~ undermine the vital command, control, and communications capabilities of an adversary, many of which serve nuclear and conventional forces. In the “fog of war” that would naturally ensue from such an encounter, the recipient of such an attack might fear more punishing follow-up kinetic attacks, possibly including the use of nuclear weapons, and, fearing the loss of its own arsenal, launch its weapons immediately. This might occur, for example, in a confrontation between NATO and Russian forces in east and central Europe or between U.S. and Chinese forces in the Asia-Pacific region.

Speaking of a possible confrontation in Europe, for example, James N. Miller Jr. and Richard Fontaine wrote that “both sides would have overwhelming incentives to go early with offensive cyber and counter-space capabilities to negate the other side’s military capabilities or advantages.” If these early attacks succeeded, “it could result in huge military and coercive advantage for the attacker.” This might induce the recipient of such attacks to back down, affording its rival a major victory at very low cost. Alternatively, however, the recipient might view the attacks on its critical command, control, and communications infrastructure as the prelude to a full-scale attack aimed at neutralizing its nuclear capabilities and choose to strike first. “It is worth considering,” Miller and Fontaine concluded, “how even a very limited attack or incident could set both sides on a slippery slope to rapid escalation.”[10](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote10)

What makes the insertion of latent malware in an adversary’s NC3 systems so dangerous is that it may not even need to be activated to increase the risk of nuclear escalation. If a nuclear-armed state comes to believe that its critical systems are infested with enemy malware, its leaders might not trust the information provided by its early-warning systems in a crisis and might misconstrue the nature of an enemy attack, leading them to overreact and possibly launch their nuclear weapons out of fear they are at risk of a preemptive strike.

“The uncertainty caused by the unique character of a cyber threat could jeopardize the credibility of the nuclear deterrent and undermine strategic stability in ways that advances in nuclear and conventional weapons do not,” Page O. Stoutland and Samantha Pitts-Kiefer wrote in 2018 paper for the Nuclear Threat Initiative. “[T]he introduction of a flaw or malicious code into nuclear weapons through the supply chain that compromises the effectiveness of those weapons could lead to a lack of confidence in the nuclear deterrent,” undermining strategic stability.[11](https://www.armscontrol.org/act/2019-11/features/cyber-battles-nuclear-outcomes-dangerous-new-pathways-escalation#endnote11) Without confidence in the reliability of its nuclear weapons infrastructure, a nuclear-armed state may misinterpret confusing signals from its early-warning systems and, fearing the worst, launch its own nuclear weapons rather than lose them to an enemy’s first strike. This makes the scenario proffered in the 2018 NPR report, of a nuclear response to an enemy cyberattack, that much more alarming.

# 2AC

## ADV---Innovation

### 2AC---AT: Galetovic

#### Galetovic ignores mitigating factors and contradicts supported theory.

Siebrasse 19, \*Norman Siebrasse is a Professor of Law at the University of New Brunswick. His research focuses on patent law, particularly pharmaceutical patent law, patent remedies, and the intersection of intellectual property law and commercial law; (July 2019, “Holdup, Holdout, and Royalty Stacking: A Review of the Literature”, https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader)

The most important recent study is that of Galetovic et al. ([2015](https://www.cambridge.org/core/product/identifier/9781108594981%23EMT-rl-1/type/BOOK_PART/core-reader#BIBe-r-139)), which examines SEPs in particular. They examine two empirical implications of the SEP holdup hypothesis. First, if holdup in the standards context is slowing the rate of innovation, then products that are highly reliant upon SEPs will experience slower rates of decrease in quality-adjusted prices than similar products that do not. Second, they consider the quasi-natural experiment resulting from the 2006 Supreme Court of the United States decision in eBay Inc. v. MercExchange, LLC,[233](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1395) which made it more difficult for SEP holders to obtain injunctions against infringers than for the holders of non-SEP patents. They find no evidence of SEP holdup on either test. With respect to the comparison between industries, they find:

[P]roducts that are SEP-reliant have experienced faster price declines than any other good in the Consumer Price Index (CPI) over the past 16 years … The prices of SEP-reliant products have fallen at rates that are not only fast relative to a classic holdup industry, they are fast relative to other patent-intensive products that benefit from Moore’s Law but are not SEP-reliant.[234](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1396)

On the second test, they use a difference in differences specification to test whether quality-adjusted prices fall faster in SEP-reliant industries after eBay, while controlling for industry and year effects. Their analysis does not allow them to reject the null hypothesis that eBay did not differentially affect SEP-reliant industries.

These results imply that holdup is not systemically impeding innovation in SEP-reliant industries. There are two caveats to these results that are potentially relevant to remedial issues. First, they do not claim that individual firms never attempt to engage in behavior that can be characterized as holdup.[235](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1397) Courts may wish to respond to individual instances of holdup, even if it is not a systemic problem.

Secondly, they do not take issue with the view that the theoretical conditions for holdup exist in SEP-reliant industries, which suggests that it is some mitigating mechanism that explains their results. One possibility is that systemic holdup has been avoided as a result of structural factors such as the prevalence of ex ante bargaining or repeat play mechanisms. On the other hand, we have seen that it is sometimes suggested that it is legal constraints, such as the FRAND commitment, that mitigate the effect of holdup. That hypothesis is broadly consistent with the result that the prices of SEP-reliant products have fallen at rates that are fast relative to other patent-intensive products that are not SEP-reliant. It is more difficult to reconcile with the result that eBay has had no observable effect on holdup, but it is possible that eBay was effectively anticipated in the context of SEPs. That is, it may be that even before eBay, implementers understood that the FRAND commitment meant what it said and that they would be able to use standards subject to the FRAND commitment without fear of being held up by injunctions or excessive royalties.

From a remedial perspective, it matters what the particular mechanism might be. If structural factors are at play, this would suggest that the courts should be relatively reluctant to withhold injunctive relief to a successful patentee. On the other hand, if it is the FRAND commitment that is avoiding holdup in SEP-reliant industries, the results of Galetovic et al. ([2015](https://www.cambridge.org/core/product/identifier/9781108594981%23EMT-rl-1/type/BOOK_PART/core-reader#BIBe-r-139)) show that the FRAND system is working, but it might suggest that the courts should continue to apply the FRAND principles relatively aggressively in order to ensure that the system keeps working. This might also suggest that the courts should apply a similar reluctance to grant injunctions even in respect of patents that are not FRAND committed, if the potential for holdup is otherwise present. The other side of that coin is that it is also possible that the FRAND commitment has been applied too aggressively, resulting in an inadequate incentive to invent. There appear to be no systemic studies addressing that possibility, though it is likely too soon for incentive effects to have manifested themselves.

3 Royalty Stacking

Galetovic & Gupta ([2017](https://www.cambridge.org/core/product/identifier/9781108594981%23EMT-rl-1/type/BOOK_PART/core-reader#BIBe-r-138)) empirically investigate royalty stacking, and the Cournot complements problem in particular, in the world mobile wireless industry, focusing on third generation (3G) and fourth generation (4G) wireless cellular standards defined by the third generation partnership project (3GPP). Their paper draws on the fact that the number of SEP holders and the number of SEPs have grown dramatically over the life of this technology: “During the last 20 years the number of SEP holders for 3G and 4G standards grew from 2 in 1994 to 130 in 2013 and the number of SEPs rose from fewer than 150 in 1994 to more than 150,000 in 2013.”[236](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1398) Cournot complements theory implies that with the increase in the number of SEP holders, royalty stacking would have gotten worse. In particular, they note that the price of phones should increase or (if quality increases demand) at least stagnate; that margins of SEP holders and downstream manufacturers will fall; and that the number of device manufacturers will decrease and industry concentration will rise. They find none of these effects. On price, for example, they find that “between 1994 and 2013 and controlling for technological generation, the real average selling price of a device fell between −11.4% to −24.8% per year. Moreover, the introductory average selling price of successive generations fell.”[237](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1399) They also find no trend in margins, and that industry concentration fell.[238](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1400) There are many other variables that might also affect the price of phones. Most obviously, the quality of phones has increased, raising willingness to pay, and manufacturing costs have probably decreased, and other factors such as incomes, substitute prices, and downstream intensity of price competition have also changed.[239](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1401) However, in their model, such changes cannot explain the price decrease and other observed effects, because when stacking is severe, the stacked royalty will increase to extract any benefit from cost reductions or increased demand.[240](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1402)

Galetovic & Gupta portray these results as indicating that royalty stacking has not been a systemic problem in the wireless industry, despite the large number of SEP owners. This raises a puzzle: How is this result to be reconciled with Cournot complements theory? The general Cournot complements model developed by Galetovic & Gupta ([2017](https://www.cambridge.org/core/product/identifier/9781108594981%23EMT-rl-1/type/BOOK_PART/core-reader#BIBe-r-138)) shows that “even with a modest number of SEP holders, the effect of royalty stacking on output is severe and eventually, output collapses.”[241](https://www.cambridge.org/core/books/patent-remedies-and-complex-products/holdup-holdout-and-royalty-stacking-a-review-of-the-literature/98A2C16F10DB52E2070E2DA92B197DDC/core-reader#FN-fn-1403) As they observe, the modern wireless industry has a large number of complementary inputs in the form of SEPs, held by independent owners. This implies that the market should “nearly disappear” and yet, as they also observe, the modern wireless industry is very healthy.

Galetovic & Gupta do not attempt to resolve this puzzle. As discussed above, the Cournot complements problem might be mitigated or solved by wide-scale price coordination, perhaps through patent pools, or possibly by specific pricing strategies or practices, but it is not obvious that such factors can explain the apparent lack of royalty stacking in the wireless industry. If Galetovic & Gupta’s basic results are replicated, it is of pressing interest to explain why the wireless industry is so robust, as this might shed entirely new light on the Cournot complements problem. While Galetovic & Gupta present their work as challenging the claim that royalty stacking is a problem in complex product industries such as cellular phones, their work can also be seen as a challenge to Cournot complements theory itself.

### 2AC---AT: Wright

#### Don’t trust authors from GMU’s Mercatus Institute (or Global Antitrust Institute).

McLaughlin 21, Bloomberg, (David, March 12th, 2021, “One Tech-Funded University Helped Shape FTC’s Hands-Off Approach”, <https://www.bloomberg.com/news/articles/2021-03-12/how-george-mason-university-shaped-ftc-s-hands-off-approach-to-tech>)

* Alden Abbott, Jonathan Barnett are both fellows at George Mason University’s Center for Intellectual Property and Innovation Policy (funded by Qualcomm)
* Joshua Wright is a former FTC commissioner who taught at the institute and lobbied for Qualcomm

The [Tech Transparency Project](https://www.techtransparencyproject.org/) (TTP), a watchdog group in Washington, details in a new report an unusually close relationship between the law school at Virginia’s George Mason University and the Federal Trade Commission. By helping shape the workforce of the FTC, the group claims, the school infused it with a laissez-faire philosophy favorable to the school’s tech donors.

[The report](https://www.techtransparencyproject.org/articles/big-techs-backdoor-ftc) throws a harsh light on the FTC’s hands-off approach to tech companies over the past decade. As the agency prepares to argue the lawsuit against [Facebook Inc.](https://www.bloomberg.com/quote/FB:US) that it filed late last year, seeking to break up the social media giant, it must contend with an inconvenient fact: It approved Facebook’s acquisitions of Instagram in 2012 and WhatsApp in 2014—the very mergers it now seeks to undo. The FTC’s consent to those deals is cited by critics as evidence of a permissive attitude that allowed tech companies to grow into leviathans.

One explanation for its lenience, the TTP report charges, is that the industry used a corner of academia to capture the agency. According to the report, which was published on March 12, Silicon Valley donated substantial sums to George Mason’s Antonin Scalia Law School, which built a pipeline of professors and graduates who went to work at the FTC. Dozens of people went from the school to the regulator—commissioners, bureau heads, attorney-advisers, legal interns—during the Obama and Trump administrations.

Under President Trump alone, professors and graduates of Scalia Law, and heads of affiliated programs at George Mason, served as the FTC chair, general counsel, policy planning head, and leaders of its three main divisions: the bureaus of competition, consumer protection, and economics.

Katie Paul, who heads the TTP, says an investigation is needed into “whether George Mason University has effectively become Big Tech’s back door into the FTC, giving the companies an undisclosed way to sway its decision-making and hobble enforcement action.”

Revolving Door

Large tech companies have donated to two programs affiliated with Scalia Law, the Global Antitrust Institute and the Law & Economics Center. From January 2018 to the end of last year, [Google](https://www.bloomberg.com/quote/GOOGL:US) donated $900,000, [Amazon.com Inc.](https://www.bloomberg.com/quote/AMZN:US) contributed $925,000, and Facebook Inc. gave $675,000, according to documents obtained by Bloomberg Businessweek through a public records request. Google, Amazon, and Facebook declined to comment on their donations.

The law school says the ties between its faculty and the FTC aren’t unusual. Alison Price, a senior associate dean, says it’s common for professors to work for federal agencies and then return to their teaching jobs. “Since Scalia Law has special expertise and a relatively large faculty in antitrust, it’s logical that our faculty is called to serve with frequency,” she says. “But faculty don’t set policy; administrations do.”

The Tech Transparency Project is part of a larger watchdog group, [Campaign for Accountability](https://campaignforaccountability.org/). The TTP website cites several philanthropists as donors, including George Soros’s Open Society Foundations. Oracle Corp. had been a donor to a TTP predecessor group that focused mostly on Google, but the TTP says it no longer accepts corporate funding.

Both George Mason programs, which host conferences and offer training for judges and antitrust enforcers, promote the consumer-welfare standard articulated by Robert Bork, the late federal judge and Yale Law School professor. That standard, the guidepost for regulators and courts since the 1980s, looks to price increases as a gauge of competitive harm. It is blamed by some antitrust experts for handcuffing enforcers when it comes to policing tech companies.

The tech companies’ donations are drawing scrutiny. At a hearing on Feb. 25, New York Democratic Representative Mondaire Jones called Abbott “Tad” Lipsky, a former FTC official now at the [Global Antitrust Institute](https://gai.gmu.edu/), “a wolf in sheep’s clothing.” As he testified against proposals to give the antitrust laws more teeth, Lipsky drew Jones’s scorn. Programs such as the GAI “have worked to teach judges and regulators to let their guard down as corporate funders like yours came to dominate our economy,” Jones said. Lipsky responded that his antitrust views predated “any of these digital technology companies.”

A key figure in the law school-to-regulator pipeline is Lipsky’s boss, Joshua Wright, an FTC commissioner from 2013 to 2015. He now teaches antitrust law at George Mason while also running the GAI.

Wright wielded outsize influence at the agency, pushing through a 2015 policy statement in an attempt to rein in the agency’s enforcement power. After he left he improperly lobbied the agency on behalf of Qualcomm Inc., one of the law school’s largest donors, according to a report by the FTC inspector general that was obtained by TTP and verified by Bloomberg Businessweek. His name was redacted in the report, but Wright confirmed it was about him. He says he did nothing wrong.

The New York Times last year [reported that tech companies bankrolled the work of the GAI](https://www.nytimes.com/2020/07/24/technology/global-antitrust-institute-google-amazon-qualcomm.html) and that Wright had worked with corporate donors to fend off critics. The extent of the revolving door between the FTC and the law school, and Wright’s alleged violation of ethics laws, haven’t been previously reported.

Many companies support higher education, and many universities send professors and graduates to Washington. But George Mason is unique in cultivating a specific regulator, says Jeff Hauser, executive director of the [Revolving Door Project](https://therevolvingdoorproject.org/), which tracks government officials’ corporate ties.

“In terms of feeding directly into a government agency, I’m not aware of any equivalent at the SEC or the EPA or anything else,” he says, referring to the Securities and Exchange Commission and the Environmental Protection Agency.

A public university in the northern Virginia suburbs of Washington, George Mason is home to the free-market think tank the [Mercatus Center](https://www.mercatus.org/). It is a leader in the study of applying economic analysis to the law, emphasizing that markets work best when government regulates less. The university became known as a haven for conservatives at the end of the Reagan administration in 1988. Even Bork taught there after stepping down from the bench in 1988.

The George Mason conduit was steady and robust, according to the TTP, which details dozens of examples of people moving between the FTC and the law school over the past decade. One is James Cooper, who directs an economics and privacy program at the Law & Economics Center. He simultaneously taught at the school and served as a deputy director for the FTC’s Bureau of Consumer Protection.

Cooper was among the academics who urged House lawmakers last year to reject proposals to break up tech companies and make merger approvals more difficult. George Mason’s Wright, Lipsky, and John Yun, a professor at the law school who was an economist at the FTC, joined the filing. Cooper didn’t respond to a request for comment, and Yun declined to comment.

But Wright, the former FTC commissioner, perhaps best embodies the ties linking the FTC to the law school and its donors. After leaving the agency in 2015, Wright simultaneously taught at George Mason, ran the GAI, and worked for the Wilson Sonsini Goodrich & Rosati law firm, where he represented Qualcomm.

The FTC sued Qualcomm in January 2017 in a monopoly case that was developed while Wright was an FTC commissioner. Wright tried to broker a settlement about four months after the case was brought. He met Lipsky, then the acting director of the FTC’s competition bureau, for lunch at a steakhouse in Washington and tried to set up an additional meeting with agency officials, according to the inspector general’s report.

In doing so, Wright violated an ethics law that bans officials for life from lobbying on issues they worked on “personally and substantially,” according to the inspector general. Those findings were referred to the Department of Justice’s public integrity section. The Justice Department, which decided not to prosecute, declined to comment.

Lipsky resigned two months after his lunch with Wright, who then hired him at the GAI. Lipsky didn’t respond to a request for comment.

“I never made any appearance at the FTC involving its enforcement action against Qualcomm or discussed the merits of the case with any FTC official,” says Wright, who declined to elaborate on the specifics of the investigation. “I immediately complied when the FTC ethics office informed me that I should not make any appearance based upon a single preliminary vote I had cast years before the case was filed.”

Qualcomm contributed almost $5.8 million to the George Mason law school programs from 2016 through 2020. Less than two months before Wright met with the FTC to try to settle the Qualcomm case, the company gave $525,000 to the GAI. The company didn’t respond to requests for comment.

Tech companies that donate to George Mason collaborate with the school’s professors on projects, according to emails obtained through a public records request.

### 2AC---AT: No Patent Holdup---Empirics

#### Their argument is akin to saying speed limits don’t matter because high ways are safe.

Gilbert 20, \*Richard J. Gilbert is an [American Economist](https://en.wikipedia.org/w/index.php?title=American_Economist&action=edit&redlink=1), professor at [UC Berkeley](https://en.wikipedia.org/wiki/University_of_California,_Berkeley) from 1976 to 2000, and founder of [LECG](https://en.wikipedia.org/wiki/LECG_Corporation) Corp. ([Law and Economics Consulting Group](https://en.wikipedia.org/wiki/LECG_Corporation)). Richard ('Rich') Gilbert served as Deputy Assistant General in the [Antitrust Division](https://en.wikipedia.org/wiki/United_States_Department_of_Justice_Antitrust_Division) of the [U.S. Department of Justice](https://en.wikipedia.org/wiki/United_States_Department_of_Justice) in the White House from 1993 to 1995. He led the development of Joint Department of [Justice and Federal Trade Commission](https://en.wikipedia.org/w/index.php?title=Justice_and_Federal_Trade_Commission&action=edit&redlink=1) [Antitrust](https://en.wikipedia.org/wiki/Competition_law) Guidelines for the Licensing of [Intellectual Property](https://en.wikipedia.org/wiki/Intellectual_property) and is currently [Emeritus Professor](https://en.wikipedia.org/wiki/Emeritus_Professor) of Economics at the [University of California at Berkeley](https://en.wikipedia.org/wiki/University_of_California,_Berkeley); (2020, “Innovation Matters: Competition Policy for the High-Technology Economy”, https://mitpress.mit.edu/books/innovation-matters)

Conduct that enables a patent owner to evade FRAND commitments should not be lawful. High royalties harm consumers and can impede innovation for technologies for which a patent license is necessary. Some have argued that patent holdup is no more than an academic curiosity because innovation and competition for smartphones and other devices have thrived, despite the fact that these devices implement standards covered by hundreds of SEPs.[26](javascript:void(0)) But this argument is flawed. It does not recognize that prices for smartphones and other devices would likely be much higher if the antitrust authorities and the courts stopped policing FRAND licensing obligations.[27](javascript:void(0)) The fact that it is reasonably safe to drive on highways in the US does not mean that speed limits are unnecessary. FRAND limitations are speed limits on the information superhighway.

#### Even if patent holdup isn’t empirically supported, it still reduces social welfare, so efforts must be taken to limit its effects.

Cotter et al. 19, \*Thomas F. Cotter, Briggs and Morgan Professor of Law, University of Minnesota Law School; Innovators Network Foundation Intellectual Property Fellow; \*Erik Hovenkamp, Assistant Professor, USC Gould School of Law; \*Norman Siebrasse, Professor of Law, University of New Brunswick Faculty of Law; (2019, “Demystifying Patent Holdup”, https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4667&context=wlulr)

B. Patent Holdup Is Not a Problem, Because It Is Not Systemic

A second, related argument is that there is no empirical evidence of patent owners engaging in pervasive, systemic patent holdup in the very industries holdup theorists are most concerned with (e.g., telecommunications).139 Indeed, according to the critics, if holdup were pervasive one would expect innovation and growth in the affected industries to “stagnate, wither, or die,”140 whereas if one looks “across human history, it is not clear that the commercialization of complex technologies has ever been faster than it is today in those industries that reform proponents point to as most plagued by the patent holdup ‘problem.’”141

Although we agree that whether, or to what extent, patent holdup occurs in the real world is ultimately an empirical matter, the implication that patent holdup is a problem only if it is “pervasive” or “systemic” is a non sequitur.142 If our analysis above is correct—that the ability to engage in patent holdup depends on path dependence, that settings conducive to patent holdup are not uncommon, and that the three components of a holdup royalty can exist independently of one another—patent holdup does not have to be systemic to be capable of reducing social welfare. Seeing how the empirical critiques of patent holdup do “not claim[ ] that individual firms never attempt to engage in behavior that can be characterized as holdup,”143 the conclusion that holdup is not systemic may well be accurate, for all we know, while still being of any limited relevance for purposes of determining whether injunctive relief should issue on the facts of any one particular case.144 If the choice were between always granting an injunction without tailoring or conditions, and never granting any form of injunctive relief, perhaps the question of whether holdup was systemic, at least in a particular industry, would be central. But the traditional approach to injunctive relief looks to the facts of the particular case.145

Further, rather than the absence of patent holdup serving as a reason for courts to enter injunctions in SEP, PAE, and other cases, it may be that case law imposing limits on the entry of injunctions is itself a leading factor constraining firms from engaging in holdup.146 Again, the question ultimately is an empirical one, but for now we cannot rule out the possibility that legal reforms were necessary to prevent patent holdup from getting worse.

## CP---SSOs

## CP---Patent Law

### 2AC---AT: Patent Law CP---TL

#### The counterplan doesn’t solve:

#### A---consumer-action deficit. Patent infringers have attenuated incentives to cough up high royalties because SSO’s can profit in aggregate by passing costs onto consumers---that’s Melamed and Shapiro. That means widening the plaintiff pool beyond implementers is key---which the counterplan CANNOT do.

Cary et al. 11, \*Messrs. George Cary and Alex Sistla are members of the California and District of Columbia Bars. Mr. Mark Nelson is a member of the New York and District of Columbia Bars. Mr. Steven Kaiser is a member of the New Jersey and District of Columbia Bars; (2011, “THE CASE FOR ANTITRUST LAW TO POLICE THE PATENT HOLDUP PROBLEM INSTANDARD SETTING”, <https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/the-case-for-antitrust-law-to-police-the-patent-holdup-problem-in-the-standard-setting.pdf>)

One final point about patent remedies concerns standing: it is not just the type of harm that matters to antitrust, but whether anyone has a remedy to address it. Antitrust fills the gap left open by patent law by providing a remedy to those “outsiders”—consumers, competitors and others—who lack standing to seek relief under the patent laws. Consider Qualcomm: The use of equitable estoppel there was only available as a defense asserted by the alleged infringer. The elements of the defense discussed above, moreover, require that the infringer either be involved in the SSO process or have a specific basis for claiming that it was affirmatively misled by the patentee. No consumer injured by the wrongful acquisition of monopoly power in this context would meet these criteria, nor would other firms that have been excluded from the market due to the deception at issue. There is no government enforcement agency to protect such plaintiffs, because patent law has no provision for government enforcement intended to protect consumers from harm to competition.

In sum, the limitations of patent law would exclude many of the categories of potential plaintiffs suffering antitrust injury as a result of standard-setting abuse. We conclude that equitable estoppel is unequal to the task of policing monopolization through fraudulent conduct in the standard-setting process.

#### SSO interests do not align with consumers. Patent law is an insufficient proxy for securing competition.

Speegle 12, \*Adam Speegle, J.D., (May 2012, “Antitrust Rulemaking as a Solution to Abuse on the Standard-Setting Process Setting Process”, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1128&context=mlr)

Even assuming that SSO members are willing and able to engage in litigation with a firm attempting patent holdup, consumer welfare takes a backseat to the members' financial considerations.3 8 Because the incentives of the SSO members do not align with those of consumers, enforcement actions by firms in the private sector cannot be relied on to adequately protect consumers. 39 This concept is illustrated by a practice known as injunction threats, in which a patent holder threatens to bring an injunction against a manufacturer for violating its patent unless the manufacturer pays a substantial royalty.4 ° While the patent holder's threat may have questionable legal footing, the manufacturer will often pay the royalty instead of engaging in extended litigation.4 This happens for several reasons. First, the manufacturer has a disincentive to engage a patent holder in litigation because the manufacturer will bear the cost of the litigation, the result of which could benefit competitors. 42 Companies will tend to pay the royalty and wait for another company to challenge the practice. 43 Second, the costs associated with challenging injunction threats may be substantial." On top of ordinary litigation costs, if the manufacturer has already begun making and distributing goods based on the patented technology, a potential preliminary injunction could have a devastating effect on its business.4 5 While engaging a patent holder in litigation may collaterally benefit consumers in that increased royalties are not passed through to the price of the ultimate product, this benefit does not tip the scales in favor of manufacturers pursuing such a path.' Thus, reliance on litigation by SSO members or other third parties will not provide a complete solution to patent holdup, as these parties serve as poor proxies for consumers.

## DA---Innovation

### 2AC---Thumpers

#### FTC Prior Approval ruling thumps the link.

Loughlin and Oliver 10-28-2021, (Chuck Loughlin, Leigh Oliver, “FTC establishes broad policy to require prior approval provisions in all merger divestiture orders,” <https://www.jdsupra.com/legalnews/ftc-establishes-broad-policy-to-require-6917794>)

Analysis

The FTC’s Prior Approval Statement explains that the FTC is hoping that the more liberal use of prior approval provisions will discourage companies from moving ahead with “facially anticompetitive” deals, preserve Commission resources, and flag anticompetitive deals that fall below the Hart-Scott-Rodino (HSR) thresholds and do not trigger federal reporting requirements. Certainly, demanding prior approval provisions—which may extend beyond the relevant markets affected by the merger—will create uncertainty and increase the burden on merging parties. The effect could be that parties take more cases to litigation rather than agree to consent decrees with prior approval provisions that go beyond the scope of the challenged transaction. Moreover, the Commission’s suggestion that it may seek prior approval provisions even when parties abandon a merger would necessarily require the FTC to continue a litigation even after the parties abandoned the deal, using up important Commission resources on expensive litigation that is no longer needed to block the transaction at issue that allegedly has an imminent threat of harming competition. This provision, and others that stretch beyond the transaction at issue, could push more parties to litigate mergers that they would otherwise abandon. After all, if the FTC is going to litigate the issues in the case in order to secure a prior approval provision, then parties may be less willing to abandon the deal in the first place. The Commission appears to hope that these requirements result in less deal activity to begin with, but that is not at all certain.

#### FTC is excessively devoting resources to enforcing patent holdup now.

Morris 9/17/21, \*Angela Morris, Deputy editor at IAM Media; (September 17th, 2021, “The FTC creates a potential new US headache for SEP owners”, https://www.iam-media.com/frandseps/the-ftc-creates-potential-new-us-headache-sep-owners)

SEP owners that may already be wary of potential Biden Administration regulatory changes now have a new threat to keep them up at night.

Over the summer the Federal Trade Commission [announced an expanded view](https://www.jdsupra.com/legalnews/the-ftc-expands-section-5-enforcement-7020931/) of its standalone enforcement authority to curb anti-competitive misconduct; and [now the agency has made it clear](https://www.ftc.gov/news-events/press-releases/2021/09/ftc-streamlines-investigations-in-eight-enforcement-areas) that priority targets include “abuse of intellectual property” and “monopolistic practices”.

The agency’s description of the “anticompetitive and deceptive conduct” it seeks to curtail in the technology sector most likely will encompass alleged misconduct by standards essential patent (SEP) owners and their commitments to licensing on FRAND terms, according to IP and antitrust attorney Tim Syrett.

“The FTC has previously conducted two investigations where it found that SEP holders seeking injunctions against licensees was anti-competitive and presented a threat to innovation,” Syrett, who is a partner in Wilmer Hale in Washington DC, explains via email. “That may be an area where the FTC wants to continue to devote resources and is certainly an area where there can be harm to competition because of the hold-up power of SEPs.”

He adds that investment-backed patent assertion entities and patent aggregation organisations may also have reason to fear ITC investigations.

“Investment-backed patent assertion entities can obscure information about who actually owns or has an interest in patents that can harm both licensing and litigation,” says Syrett. “Further, we have seen a concerning rise of patent assertions where the incentives of investors to obtain outsized returns from patents trump any reasonable valuation of the patents’ worth, which can harm competition in the licensing of patents.”

IP owners in the pharmaceutical, technology and gasoline refining industries should also take note of the development, since the commission indicated that it would investigate potential abuses of IP rights that create anti-competitive and deceptive conduct in those spaces.

Big Tech companies and other large businesses would be advised to pay attention as well, given that another stated FTC aim is to target alleged abuses of their market power that stop entrepreneurs from competing.

The two resolutions were among a group of eight that a divided commission passed this month on a 3-2 vote, as the agency seeks to handle increased workload from high merger filings. Both resolutions, effective for 10 years, direct the agency to use its compulsory processes to obtain documents and testimony through either demands or subpoenas to investigate allegations that would be a violation of Section 5 of the FTC Act.

### 2AC---AT: Innovation DA---TL

#### *Every single* neg innovation claim is false---overdeterrence and “false positives” are wrong, FRAND-ly rates sufficiently motivate innovation, and holdup outweighs.

Leslie 20, \*Christopher R. Leslie, Chancellor’s Professor of Law, University of California Irvine School of Law; (2020,“The DOJ’s Defense of Deception:   
Antitrust Law’s Role in Protecting the Standard-Setting Process”, https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/25382/1\_Leslie\_FNL.pdf?sequence=1&isAllowed=y)

1. Innovation

In his speeches, Delrahim tries to create the specter of antitrust liability destroying innovation incentives if FRAND violations are treated as anticompetitive conduct.152 In particular, Delrahim argues that, even in the presence of FRAND commitments, courts should grant injunctions against alleged infringers in order to “optimize[] the incentive[s] to innovate for the benefit of the public.”153 At times, he asserts that allowing owners of FRAND-encumbered SEPs to enjoin manufacturers from making products is necessary to reward inventors.154 This is counterintuitive. Allowing patentholders to evade their contractual commitments made to SSOs does not “reward[] successful inventors,” as Delrahim argues.155 Rather, it distorts the competitive process through which the standard was initially adopted, which was based on the patentholders’ representations that they would charge FRAND royalties.156 Moreover, there is nothing in patent law that suggests—let alone mandates—that patentholders should be able to maximize their profits by any means they choose.157

Delrahim repeatedly describes FRAND violators as “innovators” and suggests that this characterization alone warrants antitrust immunity, lest liability deter or discourage inventors from inventing.158 But this is a red herring, a distraction. If a patentholder monopolizes a market solely through its innovation, and nothing else, the monopoly is legal. But no one is suggesting that monopolization through innovation should trigger antitrust liability. Rather, it is a patentholder’s deception and/or breach of relied-upon commitments that leads to antitrust scrutiny, because neither of these bad acts represents competition on the merits.159 Delrahim asserts that acquiring market power “as a result of a patent holder’s so-called ‘deception’ about its licensing obligations . . . is not the sort of market-power-enhancing conduct that Section 2 should reach because a cause of action for treble damages would impede the policies underlying the Sherman Act.”160 Delrahim never really explains why monopolization-through-deception is not conduct that violates Section 2. Instead, he expresses concern that patentholders may be liable for treble damages.161 But treble damages are easy to avoid: if the monopolist patentholder does not engage in deception and honors its FRAND commitments, then it will not be on the hook for any damages. In a similar vein, Delrahim notes that “the Supreme Court has cautioned against antitrust standards that would create an unacceptable risk of ‘false positives’ or condemnations of lawful pro-competitive conduct.”162 Invoking that concern, Delrahim asserts that holding innovators liable for their misconduct could deter innovation.163 That is absurd. Liability for misconduct deters misconduct. It does not deter any lawful behavior that is not the basis for liability in the first place. Delrahim offers no explanation for why holding patentees liable for breaking their FRAND commitments after having deceived an SSO into incorporating their patented invention into a standard would be likely to produce “false positives” against patentholders who have not engaged in such behavior.164

Delrahim consistently fails to appreciate how easy it is for an SEP owner to avoid antitrust liability: license the patent on FRAND terms. If there is a dispute about what constitutes a FRAND royalty, the patentholder can go to court and get a ruling on the FRAND rate, instead of suing for an injunction and threatening to drive a manufacturer from the market. Seeking and following judicial guidance on the FRAND rate immunizes the SEP owner against both antitrust liability and a breach of contract lawsuit. Some of Delrahim’s innovation arguments read like a defense of patent holdup writ large. For example, he asserts, “An antitrust duty to license on FRAND terms would also contravene the patent laws’ policy of promoting innovation by offering incentives for holders of valid patents to seek the greatest rewards possible for their inventions.”165 Taken at face value, this approach would eliminate antitrust liability for any patentholders’ anticompetitive conduct (tying, sham litigation, etc.) because such liability would reduce the maximum possible return they could earn on their patent.166 Delrahim’s statement ignores the fact that the patentholder acquired its monopoly power by legally promising not “to seek the greatest rewards possible for [its] invention[].”167

Furthermore, Delrahim is wrong to assert that antitrust liability for willful misconduct weakens incentives for innovation. The patentee is receiving just compensation under the FRAND regime.168 By bargaining to have its patent included in the industry standard, the SEP owner is locking in a steady stream of profits. Delrahim provides no evidence that these FRAND royalties are insufficient to reward and encourage innovation. And, in any event, the patentholder chose to pursue FRAND royalties rather than maintaining its patent outside the standard and retaining the right to set its own royalty rate for its patented technology. To make his innovation-based arguments, Delrahim describes a binary world in which firms are either innovators or implementers, and the “dueling interests of innovators and implementers always are in tension.”169 If this were a tug-of-war match, Delrahim would be loudly rooting for the innovators. Delrahim does not merely champion innovators; he affirmatively disparages implementers and the work of standard-setting organizations, which he accuses of having been “given too little scrutiny when they have acted as a forum to slow down, rather than to facilitate, the adoption of disruptive innovations.”170

The development of advanced technological goods, however, is not a zero-sum game in which one team wins and the other team loses. Delrahim’s description of the relationship between innovators and implementers is deeply flawed because no clear line separates these groups. In response to his first deception-forgiving speech, a group of leaders in the high-tech industry wrote to Delrahim, “We are not mere implementers of standards. Rather, we contribute technologies to standards and drive research, development, investment and innovation throughout the value chain.”171 Signatories to the letter included Apple, Audi, Cisco Systems, Dell, Hewlett Packard, Intel, Microsoft, and Samsung—all major players in the innovation game. In short, Delrahim is wrong to suggest that implementers are not innovators and that recognizing their legal rights would somehow hurt innovation.172

Moreover, Delrahim ignores an entire class of (undisputed) innovators—those inventors who own patented technology that was not included in the adopted standard. Unchosen standards are often rife with innovations. When a patent owner engages in deception to secure a particular standard, the innovators who own patents that would have been SEPs for an alternative standard that was not selected due to another patentee’s deceptive conduct suffer a loss of revenue that could constitute a form of antitrust injury.

Not only is Delrahim’s innovation analysis incorrect, it is counterproductive to its stated goals. The industry letter in response to Delrahim’s first speech explained that the Trump appointee’s approach would “instead threaten US industry and consumer interests, harm US innovation, and interfere with parties’ right to contract.”173 The Department of Justice used to recognize this, noting in its prior joint statement with the PTO that “F/RAND commitments may also contribute to increased follow-on innovation by allowing nondiscriminatory access to networks both to new entrants and to established market participants to introduce new generations of network-operable devices.”174 Patent holdup harms innovation by discouraging firms from participating in SSOs because “[w]here the danger of abuse undermines the collaborative process by threatening to extract supracompetitive prices from competitors, industry members are less likely to participate in SSOs in the future and, as a result, consumers are less likely to benefit from these organizations.”175 Douglas Melamed and Carl Shapiro have explained that “supracompetitive pricing by SEP holders increases the cost of follow-on inventions that build on or improve the technologies claimed by the SEPs. This cost acts as a tax on follow-on innovation, reducing such innovations and impairing the very process of invention that the patent laws are intended to promote.”176 Moreover, because Delrahim looks at the issue only through the eyes of the SEP owner that seeks to evade its FRAND obligation, he overlooks the fact that by delaying the implementation of the standard, the holdout who commits holdup hurts all the other innovators who have SEPs.177 Ultimately, because SSOs facilitate and reward innovation and because patent holdup can chill industry members from participating in the standard-setting process, the failure to deter and remedy patent holdup harms innovation.178 Former FTC Commissioner Terrell McSweeny explained that “[b]y protecting the integrity of the standard-setting process itself, sound antitrust enforcement actually strengthens market opportunities for new technologies, thus improving the incentive for valuable innovation.”179 Thus, while Delrahim is right to praise innovation, he is wrong to argue that permitting deception and FRAND violations is the correct way to encourage innovation.

## K---Capitalism

### 2AC---FW

#### 2---advocacy---the subject-formation of debate should emphasize actualizable alternatives---anything else is an ivory tower position that would facilitate mass violence if materialized.

**Condit 15** – PhD, Distinguished Research Professor of Communication Studies at the University of Georgia---sex edited

(Celeste, “Multi-Layered Trajectories for Academic Contributions to Social Change,” Quarterly Journal of Speech, 101.1)

Thus, **when** Žižek and **others urge us to “Act”** with violence **to destroy the current Reality, without a vision of an alternative, on the grounds that the links between actions and consequences are never certain, we can call** his **[the] appeal** both **a failure of imagination** and a failure of reality. As for reality, **we have dozens of revolutions as models, and the historical record indicates quite clearly that they generally lead not to harmonious cooperation** (what I call “AnarchoNiceness” to gently mock the romanticism of Hardt and Negri) **but instead to the production of totalitarian states** **and**/or **violent factional strife.** A materialist constructivist epistemology accounts for this by predicting that it is not possible for symbol-using animals to exist in a symbolic void. **All symbolic movement has a trajectory, and if you have not imagined a potentially realizable alternative for that trajectory to take, then what people will leap into is biological predispositions**—**the first iteration of which is the rule of the strongest** primate. Indeed, **this is what experience with revolutions has shown to be the most probable outcome of a revolution that is merely against an Evil.** **The failure of imagination** in such rhetorics thereby **reveals itself to be critical**, so it is worth pondering sources of that failure. The rhetoric of “the kill” in social theory in the past half century has repeatedly reduced to the leap into a void because the symbolized alternative that the context of the twentieth century otherwise predispositionally offers is to the binary opposite of capitalism, i.e., communism. That rhetorical option, however, has been foreclosed by the historical discrediting of the readily imagined forms of communism (e.g., Žižek9). **The hard work to invent better alternatives is not as dramatically enticing as the story of the kill: such labor is piecemeal**, **intellectually difficult**, **requires multi-disciplinary understandings, and** perhaps **requires more creativity** **than the typical academic theorist can muster**. **In the absence of a viable alternative**, the **appeals to** Radical **Revolution seem to have been** **sustained by the emotional zing of the kill**, in many cases amped up by the appeal of autonomy and manliness (Žižek uses the former term and deploys the ethos of the latter). But **if one does not provide a viable vision** that **offers a reasonable chance of leaving most people better off than they are now, then Fox News has a better offering** (you'll be free and you'll get rich!). **A revolution posited as a void cannot succeed as a horizon of history**, **other than as constant local scale violent actions**, perhaps connected by shifting networks we call “terrorists.” This analysis of the geo-political situation, of the onto-epistemological character of language, and of the limitations of the dominant horizon of social change indicates that **the focal project** **for progressive Left Academics should** now **include the hard labor** **to produce alternative visions that appear materially feasible.**

### 2AC---Extinction

#### Prioritize existential risk prevention---it encompasses AND outweighs other threats.

Dennis Pamlin & Stuart Armstrong 15, Dennis Pamlin, Executive Project Manager Global Risks, Global Challenges Foundation, and Stuart Armstrong, James Martin Research Fellow, Future of Humanity Institute, Oxford Martin School, University of Oxford, February 2015, “Global Challenges: 12 Risks that threaten human civilization: The case for a new risk category,” Global Challenges Foundation, p.30-93, https://api.globalchallenges.org/static/wp-content/uploads/12-Risks-with-infinite-impact.pdf

2. Risks with infinite impact: A new category of risks “Most risk management is really just advanced contingency planning and disciplining yourself to realise that, given enough time, very low probability events not only can happen, but they absolutely will happen.” Lloyd Blankfein, Goldman Sachs CEO, July 2013 1 Risk = Probability × Impact Impacts where civilisation collapses to a state of great suffering and do not recover, or a situation where all human life end, are defined as infinite as the result is irreversible and lasts forever. A new group of global risks This is a report about a limited number of global risks – that can be identified through a scientific and transparent process – with impacts of a magnitude that pose a threat to human civilisation, or even possibly to all human life. With such a focus it may surprise some readers to find that the report’s essential aim is to inspire action and dialogue as well as an increased use of the methodologies used for risk assessment. The real focus is not on the almost unimaginable impacts of the risks the report outlines. Its fundamental purpose is to encourage global collaboration and to use this new category of risk as a driver for innovation. The idea that we face a number of global challenges threatening the very basis of our civilisation at the beginning of the 21st century is well accepted in the scientific community, and is studied at a number of leading universities.2 But there is still no coordinated approach to address this group of challenges and turn them into opportunities for a new generation of global cooperation and the creation of a global governance system capable of addressing the greatest challenges of our time. This report has, to the best of our knowledge, created the first science-based list of global risks with a potentially infinite impact and has made the first attempt to provide an initial overview of the uncertainties related to these risks as well as rough quantifications for the probabilities of these impacts. What is risk? Risk is the potential of losing something of value, weighed against the potential to gain something of value. Every day we make different kinds of risk assessments, in more or less rational ways, when we weigh different options against each other. The basic idea of risk is that an uncertainty exists regarding the outcome and that we must find a way to take the best possible decision based on our understanding of this uncertainty.3 To calculate risk the probability of an outcome is often multiplied by the impact. The impact is in most cases measured in economic terms, but it can also be measured in anything we want to avoid, such as suffering. At the heart of a risk assessment is a probability distribution, often described by a probability density function4; see figure X for a graphic illustration. The slightly tilted bell curve is a common probability distribution, but the shape differs and in reality is seldom as smooth as the example. The total area under the curve always represents 100 percent, i.e. all the possible outcomes fit under the curve. In this case (A) represents the most probable impact. With a much lower probability it will be a close to zero impact, illustrated by (B). In the same way as in case B there is also a low probability that the situation will be very significant, illustrated by (C). Figure 1: Probability density function [FIGURE 1 OMITTED] The impacts (A), (B) and (C) all belong to the same category, ~~normal~~ [common] impacts: the impacts may be more or less serious, but they can be dealt with within the current system. The impacts in this report are however of a special kind. These are impacts where everything will be lost and the situation will not be reversible, i.e challenges with potentially infinite impact. In insurance and finance this kind of risk is called “risk of ruin”, an impact where all capital is lost.5 This impact is however only infinite for the company that is losing the money. From society’s perspective, that is not a special category of risk. In this report the focus is on the “risk of ruin” on a global scale and on a human level, in the worst case this is when we risk the extinction of our own species. On a probability curve the impacts in this report are usually at the very far right with a relatively low probability compared with other impacts, illustrated by (D) in Figure 2. Often they are so far out on the tail of the curve that they are not even included in studies. For each risk in this report the probability of an infinite impact is very low compared to the most likely outcome. Some studies even indicate that not all risks in this report can result in an infinite impact. But a significant number of peer-reviewed reports indicate that those impacts not only can happen, but that their probability is increasing due to unsustainable trends. The assumption for this report is that by creating a better understanding of our scientific knowledge regarding risks with a potentially infinite impact, we can inspire initiatives that can turn these risks into drivers for innovation. Not only could a better understanding of the unique magnitude of these risks help address the risks we face, it could also help to create a path towards more sustainable development. The group of global risks discussed in this report are so different from most of the challenges we face that they are hard to comprehend. But that is also why they can help us to build the collaboration we need and drive the development of further solutions that benefit both people and the planet. As noted above, none of the risks in this report is likely to result directly in an infinite impact, and some are probably even physically incapable of doing so. But all are so significant that they could reach a threshold impact able to create social and ecological instability that could trigger a process which could lead to an infinite impact. For several reasons the potentially infinite impacts of the risks in this report are not as well known as they should be. One reason is the way that extreme impacts are often masked by most of the theories and models used by governments and business today. For example, the probability of extreme impacts is often below what is included in studies and strategies. The tendency to exclude impacts below a probability of five percent is one reason for the relative “invisibility” of infinite impacts. The almost standard use of a 95% confidence interval is one reason why low-probability high-impact events are often ignored.6 Figure 2: Probability density function with tail highlighted [FIGURE 2 OMITTED] Climate change is a good example, where almost all of the focus is on the most likely scenarios and there are few studies that include the low-probability high-impact scenarios. In most reports about climate impacts, the impacts caused by warming beyond five or six degrees Celsius are even omitted from tables and graphs even though the IPCC’s own research indicates that the probability of these impacts are often between one and five percent, and sometimes even higher.7 Other aspects that contribute to this relative invisibility include the fact that extreme impacts are difficult to translate into monetary terms, they have a global scope, and they often require a time-horizon of a century or more. They cannot be understood simply by linear extrapolation of current trends, and they lack historical precedents. There is also the fact that the measures required to significantly reduce the probability of infinite impacts will be radical compared to a business-as-usual scenario with a focus on incremental changes. The exact probability of a specific impact is difficult or impossible to estimate.8 However, the important thing is to establish the current magnitude of the probabilities and compare them with the probabilities for such impacts we cannot accept. A failure to provide any estimate for these risks often results in strategies and priorities defined as though the probability of a totally unacceptable outcome is zero. An approximate number for a best estimate also makes it easier to understand that a great uncertainty means the actual probability can be both much higher and much lower than the best estimate. It should also be stressed that uncertainty is not a weakness in science; it always exists in scientific work. It is a systematic way of understanding the limitations of the methodology, data, etc.9 Uncertainty is not a reason to wait to take action if the impacts are serious. Increased uncertainty is something that risk experts, e.g. insurance experts and security policy experts, interpret as a signal for action. A contrasting challenge is that our cultural references to the threat of infinite impacts have been dominated throughout history by religious groups seeking to scare society without any scientific backing, often as a way to discipline people and implement unpopular measures. It should not have to be said, but this report is obviously fundamentally different as it focuses on scientific evidence from peer-reviewed sources. Infinite impact The concept infinite impact refers to two aspects in particular; the terminology is not meant to imply a literally infinite impact (with all the mathematical subtleties that would imply) but to serve as a reminder that these risks are of a different nature. Ethical These are impacts that threaten the very survival of humanity and life on Earth – and therefore can be seen as being infinitely negative from an ethical perspective. No positive gain can outweigh even a small probability for an infinite negative impact. Such risks require society to ensure that we eliminate these risks by reducing the impact below an infinite impact as a top priority, or at least do everything we can to reduce the probability of these risks. As some of these risks are impossible to eliminate today it is also important to discuss what probability can right now be accepted for risks with a possible infinite impact. Economic Infinite impacts are beyond what most traditional economic models today are able to cope with. The impacts are irreversible in the most fundamental way, so tools like cost-benefit assessment seldom make sense. To use discounting that makes infinite impacts (which could take place 100 years or more from now and affect all future generations) close to invisible in economic assessments, is another example of a challenge with current tools. So while tools like cost-benefit models and discounting can help us in some areas, they are seldom applicable in the context of infinite impacts. New tools are needed to guide the global economy in an age of potential infinite impacts. See chapter 2.2.2 for a more detailed iscussion. Roulette and Russian roulette When probability and normal risks are discussed the example of a casino and roulette is often used. You bet something, then spin the wheel and with a certain probability you win or lose. You can use different odds to discuss different kinds of risk taking. These kinds of thought experiment can be very useful, but when it comes to infinite risks these gaming analogies become problematic. For infinite impact a more appropriate analogy is probably Russian roulette. But instead of “normal” Russian roulette where you only bet your own life you are now also betting everyone you know and everyone you don’t know. Everyone alive will die if you lose. There will be no second chance for anyone as there will be no future generations; humanity will end with your loss. What probability would you accept for different sums of money if you played this version of Russian roulette? Most people would say that it is stupid and – no matter how low the probability is and no matter how big the potential win is – this kind of game should not be played, as it is unethical. Many would also say that no person should be allowed to make such a judgment, as those who are affected do not have a say. You could add that most of those who will lose from it cannot say anything as they are not born and will never exist if you lose. The difference between ordinary roulette and “allhumanity Russian roulette” is one way of illustrating the difference in nature between a “normal” risk that is reversible, and a risk with an infinite impact. An additional challenge in acknowledging the risks outlined in this report is that many of the traditional risks including wars and violence have decreased, even though it might not always looks that way in media.10 So a significant number of experts today spend a substantial amount of time trying to explain that much of what is discussed as dangerous trends might not be as dangerous as we think. For policy makers listening only to experts in traditional risk areas it is therefore easy to get the impression that global risks are becoming less of a problem. The chain of events that could result in infinite impacts in this report also differ from most of the traditional risks, as most of them are not triggered by wilful acts, but accidents/mistakes. Even the probabilities related to nuclear war in this report are to a large degree related to inadvertent escalation. As many of the tools to analyse and address risks have been developed to protect nations and states from attacks, risks involving accidents tend to get less attention. This report emphasises the need for an open and democratic process in addressing global challenges with potentially infinite impact. Hence, this is a scientifically based invitation to discuss how we as a global community can address what could be considered the greatest challenges of our time. The difficulty for individual scientists to communicate a scientific risk approach should however not be underestimated. Scientists who today talk about low-probability impacts, that are serious but still far from infinite, are often accused of pessimism and scaremongering, even if they do nothing but highlight scientific findings.11 To highlight infinite impacts with even lower probability can therefore be something that a scientist who cares about his/her reputation would want to avoid. In the media it is still common to contrast the most probable climate impact with the probability that nothing, or almost nothing, will happen. The fact that almost nothing could happen is not wrong in most cases, but it is unscientific and dangerous if different levels of probability are presented as equal. The tendency to compare the most probable climate impact with the possibility of a low or no impact also results in a situation where low-probability high-impact outcomes are often totally ignored. An honest and scientific approach is to, whenever possible, present the whole probability distribution and pay special attention to unacceptable outcomes. The fact that we have challenges that with some probability might be infinite and therefore fundamentally irreversible is difficult to comprehend, and physiologically they are something our brains are poorly equipped to respond to, according to evolutionary psychologists.12 It is hard for us as individuals to grasp that humanity for the first time in its history now has the capacity to create such catastrophic outcomes. Professor Marianne Frankenhaeuser, former head of the psychology division, Karolinska Institute, Stockholm, put it this way: “Part of the answer is to be found in psychological defence mechanisms. The nuclear threat is collectively denied, because to face it would force us to face some aspects of the world’s situation which we do not want to recognise.” 13 This psychological denial may be one reason why there is a tendency among some stakeholders to confuse “being optimistic” with denying what science is telling us, and ignoring parts of the probability curve.14 Ignoring the fact that there is strong scientific evidence for serious impacts in different areas, and focusing only on selected sources which suggest that the problem may not be so serious, is not optimistic. It is both unscientific and dangerous.15 A scientific approach requires us to base our decisions on the whole probability distribution. Whether it is possible to address the challenge or not is the area where optimism and pessimism can make people look at the same set of data and come to different conclusions. Two things are important to keep in mind: first, that there is always a probability distribution when it comes to risk; second, that there are two different kinds of impacts that are of interest for this report. The probability distribution can have different shapes but in simplified cases the shape tends to look like a slightly modified clock (remember figure 1). In the media it can sound as though experts argue whether an impact, for example a climate impact or a pandemic, will be dangerous or not. But what serious experts discuss is the probability of different oucomes. They can disagree on the shape of the curve or what curves should be studied, but not that a probability curve exists. With climate change this includes discussions about how sensitive the climate is, how much greenhouse gas will be emitted, and what impacts that different warmings will result in. Just as it is important not to ignore challenges with potentially infinite impacts, it is also important not to use them to scare people. Dramatic images and strong language are best avoided whenever possible, as this group of risks require sophisticated strategies that benefit from rational arguments. Throughout history we have seen too many examples when threats of danger have been damagingly used to undermine important values. The history of infinite impacts: The LA-602 document The understanding of infinite impacts is very recent compared with most of our institutions and laws. It is only 70 years ago that Edward Teller, one of the greatest physicists of his time, with his back-of-the-envelope calculations, produced results that differed drastically from all that had gone before. His calculations indicated that the explosion of a nuclear bomb – a creation of some of the brightest minds on the planet, including Teller himself – could result in a chain reaction so powerful that it would ignite the world’s atmosphere, thereby ending human life on Earth.16 Robert Oppenheimer, who led the Manhattan Project to develop the nuclear bomb, halted the project to see whether Teller’s calculations were correct.17 The resulting document, LA- 602: Ignition of the Atmosphere with Nuclear Bombs, concluded that Teller was wrong, But the sheer complexity drove them to end their assessment by writing that “further work on the subject [is] highly desirable”.18 The LA-602 document can be seen as the first scientific global risk report addressing a category of risks where the worst possible impact in all practical senses is infinite.19 Since the atomic bomb more challenges have emerged with potentially infinite impact. Allmost all of these new challenges are linked to the increased knowledge, economic and technical development that has brought so many benefits. For example, climate change is the result of the industrial revolution and development that was, and still is, based heavily on fossil fuel. The increased potential for global pandemics is the result of an integrated global economy where goods and services move quickly around the world, combined with rapid urbanisation and high population density. In parallel with the increased number of risks with possible infinite impact, our capacity to analyse and solve them has greatly increased too. Science and technology today provides us with knowledge and tools that can radically reduce the risks that historically have been behind major extinctions, such as pandemics and asteroids. Recent challenges like climate change, and emerging challenges like synthetic biology and nanotechnology, can to a large degree be addressed by smart use of new technologies, new lifestyles and institutional structures. It will be hard as it will require collaboration of a kind that we have not seen before. It will also require us to create systems that can deal with the problems before they occur. The fact that the same knowledge and tools can be both a problem and a solution is important to understand in order to avoid polarisation. Within a few decades, or even sooner, many of the tools that can help us solve the global challenges of today will come from fields likely to provide us with the most powerful instruments we have ever had – resulting in their own sets of challenges. Synthetic biology, nanotechnology and artificial intelligence (AI) are all rapidly evolving fields with great potential. They may help solve many of today’s main challenges or, if not guided in a benign direction, may result in catastrophic outcomes. The point of departure of this report is the fact that we now have the knowledge, economic resources and technological ability to reduce most of the greatest risks of our time. Conversely, the infinite impacts we face are almost all unintended results of human ingenuity. The reason we are in this situation is that we have made progress in many areas without addressing unintended low-probability high-impact consequences. Creating innovative and resilient systems rather than simply managing risk would let us focus more on opportunities. But the resilience needed require moving away from legacy systems is likely to be disruptive, so an open and transparent discussion is needed regarding the transformative solutions required. Figure 3: Probability density function with tail and threshold highlighted [FIGURE 3 OMITTED] 2.1 Report structure The first part of the report is an introduction where the global risks with potential infinite impact are introduced and defined. This part also includes the methodology for selecting these risks, and presents the twelve risks that meet this definition. Four goals of the report are also presented, under the headings “acknowledge”, “inspire”, “connect” and “deliver”. The second part is an overview of the twelve global risks and key events that illustrate some of the work around the world to address them. For each challenge five important factors that influence the probability or impact are also listed. The risks are divided into four different categories depending on their characteristics. “Current challenges” is the first category and includes the risks that currently threaten humanity due to our economic and technological development - extreme climate change, for example, which depends on how much greenhouse gas we emit. “Exogenic challenges” includes risks where the basic probability of an event is beyond human control, but where the probability and magnitude of the impact can be influenced - asteroid impacts, for example, where the asteroids’ paths are beyond human control but an impact can be moderated by either changing the direction of the asteroid or preparing for an impact. “Emerging challenges” includes areas where technological development and scientific assessment indicate that they could both be a very important contribution to human welfare and help reduce the risks associated with current challenges, but could also result in new infinite impacts.20 AI, nanotechnology and synthetic biology are examples. “Global policy challenge” is a different kind of risk. It is a probable threat arising from future global governance as it resorts to destructive policies, possibly in response to the other challenges listed above. The third part of the report discusses the relationship between the different risks. Action to reduce one risk can increase another, unless their possible links are understood. Many solutions are also able to address multiple risks, so there are significant benefits from understanding how one relates to others. Investigating these correlations could be a start, but correlation is a linear measure and non-linear techniques may be more helpful for assessing the aggregate risk. The fourth part is an overview, the first ever to our knowledge, of the uncertainties and probabilities of global risks with potentially infinite impacts. The numbers are only rough estimates and are meant to be a first step in a dialogue where methodologies are developed and estimates refined. The fifth part presents some of the most important underlying trends that influence the global challenges, which often build up slowly until they reach a threshold and very rapid changes ensue. The sixth and final part presents an overview of possible ways forward. 2.2 Goals Goal 1: Acknowledge That key stakeholders, influencing global challenges, acknowledge the existence of the category of risks that could result in infinite impact. They should also recognice that the list of risks that belong to this category should be revised as new technologies are developed and our knowledge increases. Regardless of the risks included, the category should be given special attention in all processes and decisions of relevance. The report also seeks to demonstrate to all key stakeholders that we have the capacity to reduce, or even eliminate, most of the risks in this category. Establish a category of risks with potentially infinite impact. Before anything significant can happen regarding global risks with potentially infinite impacts, their existence must be acknowledged. Rapid technological development and economic growth have delivered unprecedented material welfare to billions of people in a veritable tide of utopias.21 But we now face the possibility that even tools created with the best of intentions can have a darker side too, a side that may threaten human civilisation, and conceivably the continuation of human life. This is what all decision-makers need to recognise. Rather than succumbing to terror, we need to acknowledge that we can let the prospect inspire and drive us forward. Goal 2: Inspire That policy makers inspire action by explaining how the probabilities and impacts can be reduced and turned into opportunities. Concrete examples of initiatives should be communicated in different networks in order to create ripple effects, with the long-term goal that all key stakeholders should be inspired to turn these risks into opportunities for positive action. Show concrete action that is taking place today. This report seeks to show that it is not only possible to contribute to reducing these risks, but that it is perhaps the most important thing anyone can spend their time on. It does so by combining information about the risks with information about individuals and groups who has made a significant contribution by turning challenges into opportunities. By highlighting concrete examples the report hopes to inspire a new generation of leaders. Goal 3: Connect That leaders in different sectors connect with each other to encourage collaboration. A specific focus on financial and security policy where significant risks combine to demand action beyond the incremental is required. Support new meetings between interested stakeholders. The nature of these risks spans countries and continents; they require action by governments and politicians, but also by companies, academics, NGOs, and many other groups. The magnitude of the possible impacts requires not only leaders to act but above all new models for global cooperation and decision-making to ensure delivery. The need for political leadership is therefore crucial. Even with those risks where many groups are involved, such as climate change and pandemics, very few today address the possibility of infinite impact aspects. Even fewer groups address the links between the different risks. There is also a need to connect different levels of work, so that local, regional, national and international efforts can support each other when it comes to risks with potentially infinite impacts. Goal 4: Deliver That concrete strategies are developed that allow key stakeholders to identify, quantify and address global challenges as well as gather support for concrete steps towards a wellfunctioning global governance system. This would include tools and initiatives that can help identify, quantify and reduce risks with potentially infinite impacts. Identify and implement strategies and initiatives. Reports can acknowledge, inspire and connect, but only people can deliver actual results. The main focus of the report is to show that actual initiatives need to be taken that deliver actual results. Only when the probability of an infinite impact becomes acceptably low, very close to zero, and/or when the maximum impact is significantly reduced, should we talk about real progress. In order to deliver results it is important to remember that global governance to tackle these risks is the way we organise society in order to address our greatest challenges. It is not a question of establishing a “world government”, it is about the way we organise ourselves on all levels, from the local to the global. The report is a first step and should be seen as an invitation to all responsible parties that can affect the probability and impact of risks with potentially infinite impacts. But its success will ultimately be measured only on how it contributes to concrete results. 2.3 Global challenges and infinite impact This chapter first introduces the concept of infinite impact. It then describes the methodology used to identify challenges with an infinite impact. It then presents risks with potentially infinite impact that the methodology results in. 2.3.1 Definition of infinite impact The specific criterion for including a risk in this report is that well-sourced science shows the challenge can have the following consequences: 22 1. Infinite impact: When civilisation collapses to a state of great suffering and does not recover, or a situation where all human life ends. The existence of such threats is well attested by science.23 2. Infinite impact threshold – an impact that can trigger a chain of events that could result first in a civilisation collapse, and then later result in an infinite impact. Such thresholds are especially important to recognise in a complex and interconnected society where resilience is decreasing.24 A collapse of civilisation is defined as a drastic decrease in human population size and political/economic/social complexity, globally for an extended time.25 The above definition means the list of challenges is not static. When new challenges emerge, or current ones fade away, the list will change. An additional criterion for including risks in this report is “human influence”. Only risks where humans can influence either the probability, the impact, or both, are included. For most risks both impact and probability can be affected, for example with nuclear war, where the number/size of weapons influences the impact and tensions between countries affects the probability. Other risks, such as a supervolcano, are included as it is possible to affect the impact through various mitigation methods, even if we currently cannot affect the probability. Risks that are susceptible to human influence are indirectly linked, because efforts to address one of them may increase or decrease the likelihood of another. 2.3.2 Why use “infinite impact” as a concept? The concept of infinity was chosen as it reflects many of the challenges, especially in economic theory, to addressing these risks as well as the need to question much of our current way of thinking. The concept of a category of risks based on their extreme impact is meant to provide a tool to distinguish one particular kind of risk from others. The benefit of this new concept should be assessed based on two things. First, does the category exist, and second, is the concept helpful in addressing these risks? The report has found ample evidence that there are risks with an impact that can end human civilisation and even all human life. The report further concludes that a new category of risk is not only meaningful but also timely. We live in a society where global risks with potentially infinite impacts increase in both number and probability according to multiple studies. Looking ahead, many emerging technologies which will certainly provide beneficial results, might also result in an increased probability of infinite impacts.26 Over the last few years a greater understanding of low probability or unknown probability events has helped more people to understand the importance of looking beyond the most probable scenarios. Concepts like “black swans” and “perfect storms” are now part of mainstream policy and business language.27 Greater understanding of the technology and science of complex systems has also resulted in a new understanding of potentially disruptive events. Humans now have such an impact on the planet that the term “the anthropocene” is being used, even by mainstream media like The Economist.28 The term was introduced in the 90s by the Nobel Prize winner Paul Crutzen to describe how humans are now the dominant force changing the Earth’s ecosystems.29 The idea to establish a well defined category of risks that focus on risks with a potentially infinite impact that can be used as a practical tool by policy makers is partly inspired by Nick Bostrom’s philosophical work and his introduction of a risk taxonomy that includes an academic category called “existential risks”.30 Introducing a category with risks that have a potentially infinite impact is not meant to be a mathematical definition; infinity is a thorny mathematical concept and nothing in reality can be infinite.31 It is meant to illustrate a singularity, when humanity is threatened, when many of the tools used to approach most challenges today become problematic, meaningless, or even counterproductive. The concept of an infinite impact highlights a unique situation where humanity itself is threatened and the very idea of value and price collapses from a human perspective, as the price of the last humans also can be seen to be infinite. This is not to say that those traditional tools cannot still be useful, but with infinite impacts we need to add an additional set of analytical tools. Life Value The following estimates have been applied to the value of life in the US. The estimates are either for one year of additional life or for the statistical value of a single life. – $50,000 per year of quality life (international standard most private and government-run health insurance plans worldwide use to determine whether to cover a new medical procedure) – $129,000 per year of quality life (based on analysis of kidney dialysis procedures by Stefanos Zenios and colleagues at Stanford Graduate School of Business) – $7.4 million (Environmental Protection Agency) – $7.9 million (Food and Drug Administration) – $6 million (Transportation Department) – $28 million (Richard Posner based on the willingness to pay for avoiding a plane crash) Source: Wikipedia: Value of life http://en.wikipedia.org/wiki/Value\_of\_life US EPA: Frequently Asked Questions on Mortality Risk Valuation http://yosemite.epa.gov/EE%5Cepa%5Ceed.nsf/webpages/MortalityRiskValuation.html Posner, Richard A. Catastrophe: risk and response. Oxford University Press, 2004 Some of the risks, including nuclear war, climate change and pandemics, are often included in current risk overviews, but in many cases their possible infinite impacts are excluded. The impacts which are included are in most cases still very serious, but only the more probable parts of the probability distributions are included, and the last part of the long tail – where the infinite impact is found – is excluded.32 Most risk reports do not differentiate between challenges with a limited impact and those with a potential for infinite impact. This is dangerous, as it can mean resources are spent in ways that increase the probability of an infinite impact. Ethical aspects of infinite impact The basic ethical aspect of infinite impact is this: a very small group alive today can take decisions that will fundamentally affect all future generations. “All future generations” is not a concept that is often discussed, and for good reason. All through human history we have had no tools with a measurable global impact for more than a few generations. Only in the last few decades has our potential impact reached a level where all future generations can be affected, for the simple reason that we now have the technological capacity to end human civilisation. If we count human history from the time when we began to practice settled agriculture, that gives us about 12,000 years.33 If we make a moderate assumption that humanity will live for at least 50 million more years34 our 12,000-year history so far represents 1/4200, or 0.024%, of our potential history. So our generation has the option of risking everything and annulling 99.976% of our potential history. Comparing 0.024% with the days of a person living to 100 years from the day of conception, this would equal less than nine days and is the first stage of human embryogenesis, the germinal stage.35 Two additional arguments to treat potentially infinite impacts as a separate category are: 36 1. An approach to infinite impacts cannot be one of trial-and-error, because there is no opportunity to learn from errors. The reactive approach – see what happens, limit damage, and learn from experience – is unworkable. Instead society must be proactive. This requires foresight to foresee new types of threat and willingness to take decisive preventative action and to bear the costs (moral and economic) of such actions. 2. We cannot necessarily rely on the institutions, morality, social attitudes or national security policies that developed from our experience of other sorts of risk. Infinite impacts are in a different category. Institutions and individuals may find it hard to take these risks seriously simply because they lie outside our experience. Our collective fear-response will probably be ill-calibrated to the magnitude of threat. Economic aspects of infinite impact and discounting In today’s society a monetary value is sometimes ascribed to human life. Some experts use this method to estimate risk by assigning a monetary value to human extinction.37 We have to remember that the monetary values placed on a human life in most cases are not meant to suggest that we have actually assigned a specific value to a life. Assigning a value to a human life is a tool used in a society with a limited supply of resources or infrastructure (ambulances, perhaps) or skills. In such a society it is impossible to save every life, so some trade-off must be made.38 The US Environmental Protection Agency explains its use like this: “The EPA does not place a dollar value on individual lives. Rather, when conducting a benefit-cost analysis of new environmental policies, the Agency uses estimates of how much people are willing to pay for small reductions in their risks of dying from adverse health conditions that may be caused by environmental pollution.” 39 The fact that monetary values for human lives can help to define priorities when it comes to smaller risks does not mean that they are suitable for quite different uses. Applying a monetary value to the whole human race makes little sense to most people, and from an economic perspective it makes no sense. Money helps us to prioritise, but with no humans there would be no economy and no need for priorities. Ignoring, or discounting, future generations is actually the only way to avoid astronomical numbers for impacts that may seriously affect every generation to come. In Catastrophe: Risk and Response, Richard Posner provides a cost estimate, based on the assumption that a human life is worth $50,000, resulting in a $300 tn cost for the whole of humanity, assuming a population of six billion. He then doubles the population number to include the value of all future generations, ending up with $600 tn, while acknowledging that “without discounting, the present value of the benefits of risk-avoidance measures would often approach infinity for the type of catastrophic risk with which this book is concerned.” 40 Discounting for risks that include the possibility of an infinite impact differs from risk discounting for less serious impacts. For example the Stern Review41 prompted a discussion between its chief author, Nicholas Stern, and William Nordhaus,42 each of whom argued for different discount levels using different arguments. But neither discussed a possible infinite climate impact. An overview of the discussion by David Evans of Oxford Brookes University highlighted some of the differing assumptions.43 Two things make infinite impacts special from a discounting perspective. First, there is no way that future generations can compensate for the impact, as they will not exist. Second, the impact is something that is beyond an individual preference, as society will no longer exist. Discounting is undertaken to allocate resources in the most productive way. In cases that do not include infinite impacts, discounting “reflects the fact that there are many high-yield investments that would improve the quality of life for future generations. The discount rate should be set so that our investable funds are devoted to the most productive uses.” 44 When there is a potentially infinite impact, the focus is no longer on what investments have the best rate of return, it is about avoiding the ultimate end. While many economists shy away from infinite impacts, those exploring the potentially extreme impacts of global challenges often assume infinite numbers to make their point. Nordhaus for example writes that “the sum of undiscounted anxieties would be infinite (i.e. equal to 1 + 1 +1 + … = ∞). In this situation, most of us would dissolve in a sea of anxiety about all the things that could go wrong for distant generations from asteroids, wars, out-of-control robots, fat tails, smart dust and other disasters.” 45 It is interesting that Nordhaus himself provides very good graphs that show why the most important factor when determining actions is a possible threshold (see below Figure 4 and 5). Nordhaus was discussing climate change, but the role of thresholds is similar for most infinite impacts. The first figure is based on traditional economic approaches which assume that Nature has no thresholds; the second graph illustrates what happens with the curve when a threshold exists. As Nordhaus also notes, it is hard to establish thresholds, but if they are significant all other assumptions become secondary. The challenge that Nordhaus does not address, and which is important especially with climate change, is that thresholds become invisible in economic calculations if they occur far into the future, even if it is current actions that unbalance the system and eventually push it over the threshold.46 Note that these dramatic illustrations rest on assumptions that the thresholds are still relatively benign, not moving us beyond tipping points which result in an accelerated release of methane that could result in a temperature increase of more than 8 °C, possibly producing infinite impacts.47 Calculating illustrative numbers By including the welfare of future generations, something that is important when their very existence is threatened, economic discounting becomes difficult. In this chapter, some illustrative numbers are provided to indicate the order of magnitude of the values that calculations provide when traditional calculations also include future generations. These illustrative calculations are only illustrative as the timespans that must be used make all traditional assumptions questionable to say the least. Still, as an indicator for why infinite impact might be a good approximation they might help. As a species that can manipulate our environment it could be argued that the time the human race will be around, if we do not kill ourselves, can be estimated to be between 1-10 million years – the typical time period for the biological evolution of a successful species48 – and one billion years, the inhabitable time of Earth.49 [FIGURE 4 OMITTED] [FIGURE 5 OMITTED] If we assume – 50 million years for the future of humanity as our reference, – an average life expectancy of 100 years50, and – a global population of 6 billion people51 – all conservative estimate – , we have half a million generations ahead of us with a total of 3 quadrillion individuals. Assuming a value of $50,000 per life, the cost of losing them would then be $1.5 ×1020, or $150 quintillion. This is a very low estimate, and Posner suggests that maybe the cost of a life should be “written up $28 million” for catastrophic risks52. Posner’s calculations where only one future generation is included result in a cost of $336 quadrillion. If we include all future generations with the same value, $28 million, the result is a total cost of $86 sextillion, or $86 × 1021. This $86 sextillion is obviously a very rough number (using one billion years instead of 50 million would for example require us to multiply the results by 20), but again it is the magnitude that is interesting. As a reference there are about 1011 to 1012 stars in our galaxy, and perhaps something like the same number of galaxies. With this simple calculation you get 1022 to 1024, or 10 to 1,000 sextillion, stars in the universe to put the cost of infinite impacts when including future generations in perspective.53 These numbers can be multiplied many times if a more philosophical and technology-optimistic scenario is assumed for how many lives we should include in future generations. The following quote is from an article by Nick Bostrom in Global Policy Journal: “However, the relevant figure is not how many people could live on Earth but how many descendants we could have in total. One lower bound of the number of biological human life-years in the future accessible universe (based on current cosmological estimates) is 1034 years. Another estimate, which assumes that future minds will be mainly implemented in computational hardware instead of biological neuronal wetware, produces a lower bound of 1054 human-brain-emulation subjective life-years.” 54 Likewise the value of a life, $28 million, a value that is based on an assessment of how individuals chose when it comes to flying, can be seen as much too small. This value is based on how much we value our own lives on the margin, and it is reasonable to assume that the value would be higher than only a multiplication of our own value if we also considered the risk of losing our family, everyone we know, as well as everyone else on the planet. In the same way as the cost increases when a certain product is in short supply, the cost of the last humans could be assumed to be very high, if not infinite. Obviously, the very idea to put a price on the survival of humanity can be questioned for good reasons, but if we still want to use a number, $28 million per life should at least be considered as a significant underestimation. For those that are reluctant or unable to use infinity in calculations and are in need of a number for their formulas, $86 sextillion could be a good initial start for the cost of infinite impacts. But it is important to note that this number might be orders of magnitude smaller than an estimate which actually took into account a more correct estimation of the number of people that should be included in future generations as well as the price that should be assigned to the loss of the last humans. 2.3.3 Infinite impact threshold (IIT) As we address very complex systems, such as human civilisation and global ecosystems, a concept as important as infinite impact in this report is that of infinity impact threshold. This is the impact level that can trigger a chain of events that results in the end of human civilisation. The infinite impact threshold (IIT) concept represents the idea that long before an actual infinite impact is reached there is a tipping point where it (with some probability) is no longer possible to reverse events. So instead of focusing only on the ultimate impact it is important to estimate what level of impact the infinity threshold entails. The IIT is defined as an impact that can trigger a chain of events that could result first in a civilisation collapse, and then later result in an infinite impact. Such thresholds are especially important to recognise in a complex and interconnected society where resilience is decreasing. Social and ecological systems are complex, and in most complex systems there are thresholds where positive feedback loops become self-reinforcing. In a system where resilience is too low, feedback loops can result in a total system collapse. These thresholds are very difficult to estimate and in most cases it is possible only to estimate their order of magnitude. As David Orrell and Patrick McSharry wrote in A Systems Approach to Forecasting: “Complex systems have emergent properties, qualities that cannot be predicted in advance from knowledge of systems components alone”. According to complexity scientist Stephen Wolfram’s principle of computational irreducibility, the only way to predict the evolution of such a system is to run the system itself: “There is no simple set of equations that can look into its future.” 55 Orrell and McSharry also noted that “in orthodox economics, the reductionist approach means that the economy is seen as consisting of individual, independent agents who act to maximise their own utility. It assumes that prices are driven to a state of near-equilibrium by the ‘invisible hand’ of the economy. Deviations from this state are assumed to be random and independent, so the price fluctuations are often modelled using the normal distribution or other distributions with thin tails and finite variance.” The drawbacks of an approach using the normal distribution, or other distributions with thin tails and finite variance, become obvious when the unexpected happens as in the recent credit crunch, when existing models totally failed to capture the true risks of the economy. As an employee of Lehman Brothers put it on August 11, 2007: “Events that models predicted would happen only once in 10,000 years happened every day for three days.” 56 [FIGURE 6 OMITTED] The exact level for an infinite impact threshold should not be the focus, but rather the fact that such thresholds exists and that an order of magnitude should be estimated.57 During the process of writing the report, experts suggested that a relatively quick death of two billion people could be used as a tentative number until more research is available.58 With current trends undermining ecological and social resilience it should be noted that the threshold level is likely to become lower as time progress. 2.3.4 Global F-N curves and ALARP In the context of global risks with potentially infinite impact, the possibility of establishing global F-N curves is worth exploring. One of the most common and flexible frameworks used for risk criteria divides risks into three bands: 59 1. Upper: an unacceptable/ intolerable region, where risks are intolerable except in extraordinary circumstances and risk reduction measures are essential. 2. Middle: an ALARP (“as low as reasonably practicable”) region, where risk reduction measures are desirable but may not be implemented if their cost is disproportionate to the benefit achieved. 3. Lower: a broadly acceptable/ negligible region, where no further risk reduction measures are needed. The bands are expressed by F-N curves. When the frequency of events which cause at least N fatalities is plotted against the number N on log–log scales, the result is called an F-N curve.60 If the frequency scale is replaced by annual probability, then the resultant curve is called an f-N curve. The concept for the middle band when using F-N curves is ALARP. It is a term often used in the area of safety-critical and safety-involved systems.62 The ALARP principle is that the residual risk should be as low as reasonably practicable. The upper band, the unacceptable/ intolerable region, is usually the area above the ALARP area (see figure 8) By using F-N curves it is also possible to establish absolute impact levels that are never acceptable, regardless of probability (Figure 7. Based on an actual F-n Curve showing an absolute impact level that is defined as unacceptable). This has been done in some cases for local projects. The infinite threshold could be used to create an impact limit on global F-N curves used for global challenges in the future. Such an approach would help governments, companies and researchers when they develop new technical solutions and when investing in resilience. Instead of reducing risk, such an approach encourages the building of systems which cannot have negative impacts above a certain level. Pros – Clearly shows relationship between frequency and size of accident – Allows judgement on relative importance of different sizes of accident – Slope steeper than -1 provides explicit consideration of multiple fatality aversion and favours concepts with lower potential for large fatality events – Allows company to manage overall risk exposure from portfolio of all existing and future facilities Cons – Cumulative expression makes it difficult to interpret, especially by non-risk specialists – Can be awkard to derive – May be difficult to use if criterion is exceeded in one area but otherwise is well below – Much debate about criterion lines Figure 7: Example of F-n curve showing different levels of risk 61 Figure 9: Pros and cons of F-N curves 63 46 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 2.3 Global challenges and infinite impact practical guidance that can provide defined group of risks 2.3.5 A name for a clearly 10 100 1000 10000 10 10 10 10 10 10 10 10-2 -3 -4 -5 -6 -7 -8 -9 Number of Fatalities (N) Frequency (F) of Accidents with N or More Fatalities (Per Year) ALARP region Unacceptable Acceptable Today no established methodology exists that provides a constantly updated list of risks that threaten human civilisation, or even all human life. Given that such a category can help society to better understand and act to avoid such risks, and better understand the relation between these risks, it can be argued that a name for this category would be helpful.65 To name something that refers to the end of humanity is in itself a challenge, as the very idea is so far from our usual references and to many the intuitive feeling will be to dismiss any such thing. The concept used in this report is “infinity”. The reson for this is that many of the challenges relate to discussed. In one way the name is not very important so long as people understand the impacts and risks associated with it. Still, a name is symbolic and can either help or make it more difficult to get support to establish the new category. The work to establish a list of risks with infinite impact evolved from “existential risk”, the philosophical concept that inspired much of the work to establish a clearly defined group of risks. The reason for not using the concept “existential risk and impact” for this category, beside the fact that existential impact is also used in academic contexts to refer to a personal impact, is that the infinite category is a smaller subset of “existential risk” and this new category is meant to be used as a tool, not a scientific concept. Not only should the impacts in the category potentially result in the end of all human life, it should be possible to affect the probability and/or impact of that risk. There must also exist an agreed methodology, such as the one suggested in this report, that decides what risks belong and not belong on the list. Another concept that the category relates to is “global catastrophic risk” as it is one of the most used concepts among academics interested in infinite impacts. However it is vague enough to be used to refer to impacts from a few thousand deaths to the end of human civilisation. Already in use but not clearly defined, it includes both the academic concept existential risks and the category of risks with infinite impacts. macroeconomics and its challenges in relation to the kind of impacts that the risks in this report focus on. Further, the name clearly highlights the unique nature without any normative judgements. Still, infinity is an abstract concept and it might not be best communicate the unique group of risks that it covers to all stakeholders. In the same way as it can be hard to use singularity to describe a black hole, it can be difficult to use infinity to describe a certain risk. If people can accept that it is only from a specific perspective that the infinity concept is relevant it could be used beyond the areas of macroeconomics. Two other concepts that also have been considered during the process of writing this report are “xrisks” and “human risk of ruin”. Xrisk has the advantage, and disadvantage, of not really saying anything at all about the risk. The positive aspect is that the name can be associated with the general concept of extinction and the philosophical concept of existential risk as both have the letter x in them. The disadvantage is the x often represents the unknown and can therefore relate to any risk. There is nothing in the name that directly relates to the kind of impacts that the category covers, so it is easy to interpret the term as just unknown risks. Human risk of ruin has the advantage of having a direct link to a concept, risk of ruin, that relates to a very specific state where all is lost. Risk of ruin is a concept in use in gambling, insurance, and finance that can all give very important contributions to the work with this new category of risk. The resemblance to an existing concept that is well established could be both a strength and a liability. Below is an overview of the process when different names were Figure 8: Example of F-n curve showing an absolute impact level that is defined as unacceptable/ infinite. i.e no level of probability is acceptable above a certain level of impact, in this case 1000 dead 64 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 47 2.3 Global challenges and infinite impact 3. 2. 1. 9. Unacceptable risks in different combinations, e.g. unacceptable global risks – This is probably not appropriate for two main reasons. First, it is a normative statement and the category aims to be scientific; whether these risks are unacceptable or not is up to the citizens of the world to decide. Second, the idea of risk is that it is a combination of probability times impact. If a risk is unacceptable is therefore also usually related to how easy it is to avoid. Even if a risk is small, due to relatively low probability and relatively low impact, but is very easy to address, it can be seen as unacceptable, in the same way a large risk can be seen as acceptable if it would require significant resources to reduce. There will not be a perfect concept and the question is what concept can find the best balance between being easy to understand, acceptable where policy decisions needs to be made and also acceptable for all key groups that are relevant for work in these area. During the process to find a name for this category inspiration has been found in the process when new concepts have been introduced; from irrational numbers and genocide to sustainable development and the Human Development Index. So far “infinite risk” can be seen as the least bad concept in some areas and “xrisks” and “human risk of ruin” the least bad in others. The purpose of this report is to establish a methodology to identify a very specific group of risks as well as continue to a process where these risks will be addressed in a systematic and appropriate way. The issue of naming this group of risks will be left to others. The important is that the category gets the attention it deserves. The three concepts are very different. Global catastrophic risk is possibly the most used concept in contexts where infinite impacts are included, but it is without any clear definition. Existential risk is an academic concept used by a much smaller group and with particular focus on future technologies. The category in this report is a tool to help decision makers develop strategies that help reduce the probability that humanity will end when it can be avoided. The relation between the three concepts can be illustrated with three circles. The large circle (1) represents global catastrophic risks, the middle one (2) existential risks and the small circle (3) the list of twelve risks in this report, i.e. risks where there are peer reviewed academic studies that estimate the probability of an infinite impact and where there are known ways to reduce the risk. A list that could be called infinite risks, xrisks, or human risk of ruin. Other concepts that are related to infinite impacts that could potentially be used to describe the same category if the above suggestions are not seen as acceptable concepts are presented below, together with the main reason why these concepts were not chosen for this report. 1. Risk of ruin – is a concept in gambling, insurance and finance relating to the likelihood of losing all one’s capital or affecting one’s bankroll beyond the point of recovery. It is used to describe individual companies rather than systems.66 2. Extinction risk – is used in biology for any species that is threatened. The concept is also used in memory/cognition research. It is a very dramatic term, to be used with care. These factors make it probably unsuitable for use by stakeholders accustomed to traditional risk assessment. 3. Astronomical risk – is seldom used scientifically, but when it is used it is often used for asteroids and is probably best reserved for them.67 4. Apocalyptic risk – could have been suitable, as the original meaning is apocálypsis, from the Greek ἀπό and καλύπτω meaning ‘un-covering’. It is sometime used, but in a more general sense, to mean significant risks.68 But through history and today it is mainly used for a religious end of time scenario. Its strong links to unscientific doom-mongers make it probably unsuitable for a scientific concept. 5. End-of-the-world risk - belongs to the irrational doomsday narratives and so is probably unsuitable for scientific risk assessments. 6. Extreme risk – is vague enough to describe anything beyond the normal, so it is probably unsuitable for risk assessments of this magnitude. 7. Unique risk – is even vaguer, as every risk is unique in some way. Probably best avoided in risk assessments. 8. Collapse risk – is based on Jared Diamond’s thinking.69 There are many different kinds of collapse and only a few result in infinite impact. 48 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 2.3 Global challenges and infinite impact Estimations of impact Only literature where there is some estimation of impact that indicates the possibility of an infinite impact is included. Leading organisations’ priorities In order to increase the probability of covering all relevant risks an overview of leading organisations' work was conducted. This list was then compared with the initial list and subjected to the same filter regarding the possibility to affect the probability or impact. Possibility of addressing the risk Possibility of addressing the risk: From the risks gathered from literature and organisations, only those where the probability or impact can be affected by human actions are included. Expert review Qualitative assessment: Expert review in order to increase the probability of covering all relevant global risks. List of risks Result: List of risks with potentially infinite impacts. Relevant literature Identification of credible sources: search relevant literature in academic literature included in World of Knowledge and Google Scholar. 1 2 3 4 5 6 This chapter presents the methodology used to identify global risks with potentially infinite impact. Methodology overview In order to establish a list of global risks with potentially infinite impact a methodological triangulation was used, consisting of: – A quantitative assessment of relevant literature. – A strategic selection of relevant organisations and their priorities. – A qualitative assessment with the help of expert workshops. 2.4 Methodology 70 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 49 2.4 Methodology The scientific review of literature was led by Seth Baum, Executive Director of the Global Catastrophic Risk Institute72 and research scientist at the Center for Research on Environmental Decisions, Columbia University.73 The methodology for including global risks with a potentially infinite impact is based on a scientific review of key literature, with focus on peer-reviewed academic journals, using keyword search of both World of Knowledge74 and Google Scholar75 combined with existing literature overviews in the area of global challenges. This also included a snowball methodology where references in the leading studies and books were used to identify other scientific studies and books. In order to select words for a literature search to identify infinite impacts, a process was established to identify words in the scientific literature connected to global challenges with potentially infinite impacts. Some words generate a lot of misses, i.e. publications that use the term but are not the focus of this report. For example “existential risk” is used in business; “human extinction” is used in memory/cognition. Some search terms produced relatively few hits. For example “global catastrophic risk” is not used much. Other words are only used by people within a specific research community: few use “existential risk” in our sense unless they are using Nick Bostrom’s work. The term “global catastrophe” was identified as a phrase that referred almost exclusively to extremely negative impacts on humans, by a diversity of researchers, not just people in one research community. A list of 178 relevant books and reports was established based on what other studies have referred to, and/or which are seen as landmark studies by groups interviewed during the process. They were selected for a closer examination regarding the challenges they include.76 The full bibliography, even with its focus on publications of general interest, is still rather long. So it is helpful to have a shorter list focused on the highlights; the most important publications based on how often they are quoted, how wellspread the content (methodology, lists, etc.) is and how often key organisations use them. The publications included must meet at least one of the following criteria: – Historical significance. This includes being the first publication to introduce certain key concepts, or other early discussions of global challenges. Publications of historical significance are important for showing the intellectual history of global challenges. Understanding how the state of the art research got to where it is today can also help us understand where it might go in the future. – Influential in developing the field. This includes publications that are highly cited77 and those that have motivated significant additional research. They are not necessarily the first publications to introduce the concepts they discuss, but for whatever reason they will have proved important in advancing research. – State of the art. This includes publications developing new concepts at the forefront of global challenges research as well as those providing the best discussions of important established concepts. Reading these publications would bring a researcher up to speed with current research on global challenges. So they are important for the quality of their ideas. – Covers multiple global challenges (at least two). Publications that discuss a variety of global challenges are of particular importance because they aid in identifying and comparing the various challenges. This process is essential for research on global risks to identify boundaries and research priorities. In order to identify which global challenges are most commonly discussed, key surveys were identified and coded. First, a list of publications that survey at least three global challenges was compiled, and they were then scanned to find which challenges they discussed. The publications that survey many global challenges were identified from the full bibliography. Publications from both the academic and popular literature were considered. Emphasis was placed on publications of repute or other significance.78 To qualify as a survey of global challenges, the publication had to provide an explicit list of challenges or to be of sufficient length and breadth for it to discuss a variety of challenges. Many of the publications are books or book-length collections of articles published in book form or as special issues of scholarly journals. Some individual articles were also included because they discussed a significant breadth of challenges. A total of 40 global challenge survey publications were identified. For authors with multiple entries (Bostrom with three and WEF with ten) each challenge was counted only once to avoid bias. review of key literature 71 2.4.1 A scientific 50 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 2.4 Methodology 0 5 10 15 20 25 Climate Change Nuclear War Pandemic Biodiversity loss Asteroid / Comet / Meteor Volcano Genetic Engineering High Energy Physics Nanotech Resource Depletion Artificial Intelligence Chemical Pollution Ecological Catastrophe Biogeochem Government Failure Poverty System Failure Astronomic Explosion LULCC Biological Weapons Chemical Weapons Extraterrestrial Reject Procreation Computer Failure EM Pulse New Technology Ozone Depletion Dysgenics Ocean Acidification Interstellar Cloud Atmosphere Aerosols Phase Transition Simulation Unknown 21 18 17 15 14 14 13 13 13 13 11 11 11 8 8 8 8 7 7 5 5 5 5 4 4 4 4 3 3 2 1 1 1 1 In terms of authorship and audience, there are 17 academic publications, 9 popular publications, 1 government report, 3 publications written by academics for popular audiences. In terms of format, there are 15 books, 5 edited collections, 7 articles, 3 of miscellaneous format. Of the 40 publications identified, 22 were available at the time of coding. In addition, 10 Global Risks Reports from the World Economic Forum were coded and then gathered under one heading: “WEF Global Risk Report 2005-2014”. A list of 34 global challenges was developed based on the challenges mentioned in the publications. A spreadsheet containing the challenges and the publications was created to record mentions of specific challenges in each publication to be coded. Then each publication was scanned in its entirety for mentions of global challenges. Scanning by this method was necessary because many of the publications did not contain explicit lists of global challenges, and the ones that did often mentioned additional challenges separately from their lists. So it was not required that a global challenge be mentioned in a list for it to be counted – it only had to be mentioned somewhere in the publication as a challenge. Assessing whether a particular portion of text counts as a global challenge and which category it fits in sometimes requires some interpretation. This is inevitable for most types of textual analysis, or, more generally, for the coding of qualitative data. The need for interpretation in this coding was heightened by the fact that the publications often were not written with the purpose of surveying the breadth of global challenges, and even the publications that were intended as surveys did not use consistent definitions of global challenges. The coding presented here erred on the side of greater inclusivity: if a portion of text was in the vicinity of a global challenge, then it was coded as one. For example, some publications discussed risks associated with nuclear weapons in a general sense without specifically mentioning the possibility of large-scale nuclear war. These discussions were coded as mentions of nuclear war, even though they could also refer to single usages of nuclear weapons that would not rate as a global challenge. This more inclusive approach is warranted because many of the publications were not focused exclusively on global challenges. If they were focused on them, it is likely that they would have included these risks in their global challenge form (e.g., nuclear war), given that they were already discussing something related (e.g., nuclear weapons). Below are the results from the overview of the surveys. Figure 9: Number of times global challenges are included in surveys of global challenges Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 51 2.4 Methodology Climate Change Nuclear War Pandemic Biodiversity loss Asteroid / Comet / Meteor Volcano Genetic Engineering High Energy Physics Nanotech Resource Depletion Artificial Intelligence Chemical Pollution Ecological Catastrophe 21 18 17 15 14 14 13 13 13 13 11 11 11 0 25 20 15 10 5 dung beetle star trek zinc oxalate human extinction 0 200 400 600 800 1000 It should be noted that the literature that includes multiple global challenges with potentially infinite impact is very small, given the fact that it is about the survival of the human race. Experts in the field of global challenges, like Nick Bostrom, have urged policymakers and donors to focus more on the global challenges with infinite impacts and have used dramatic rhetoric to illustrate how little research is being done on them compared with other areas. However, it is important to note that many more studies exist that focus on individual global risks, but often without including low-probability high-impact outcomes.80 How much work actually exists on human extinction infinite impact is therefore difficult to assess. The list of risks found in the scientific literature was checked against a review of what challenges key organisations working on global challenges include in their material and on their webpages. This was done to ensure that no important risk was excluded from the list. The coding of key organisations paralleled the coding of key survey publications. Organisations were identified via the global catastrophic risk organisation directory published by the Global Catastrophic Risk Institute.82 They were selected from the directory if they worked on a variety of global challenges – at least three, and ideally more. The reason for focusing on those that work on multiple challenges is to understand which challenges they consider important and why. In contrast, organisations that focus on only one or two challenges may not Figure 10: The global challenges included ten times or more in surveys of global challenges on global challenges 81 organisations working 2.4.2 A review of Figure 11: Number of academic papers on various topics (listed in Scopus, August 2012) From the paper “Existential Risk Prevention as Global Priority” 79 52 Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 2.4 Methodology Climate Change Nuclear War Pandemic Resource Depletion Biological Weapons Computer Failure Government Failure Nanotech Chemical Weapons Artificial Intelligence Genetic Engineering System Failure Biodiversity loss Ecological Failure Poverty Volcano Asteroid / Comet / Meteor Astronomic Explosion Biogeochem Chemical Pollution Extraterrestrial High Energy Physics New Technology Ozone Depletion Atmospheric Aerosols Dysgenics EM Pulse Interstellar Cloud LULCC Ocean Acidification Phase Transition Reject Procreation Simulation Unknown 13 13 12 9 8 7 7 7 6 5 4 4 2 2 2 2 1 1 1 1 1 1 1 1 1 0 0 0 0 0 0 0 0 0 0 4 8 12 2 6 10 14 be able to adjust their focus according to which challenges they consider the most important. The organisation coding used the same coding scheme developed for coding survey publications. References to specific global challenges were obtained from organisations’ websites. Many have web pages which list the topics they work on. Where possible, references to global challenges were pulled from these pages. Additional references to these challenges were identified by browsing other web pages, including recent publications. While it is possible that some of these organisations have worked on global challenges not mentioned on the web pages that were examined, overall the main challenges that they have worked on have probably been identified and coded. So the results should give a reasonably accurate picture of what global challenges these organisations are working on. Organisations working with global challenges were initially selected on the basis of the literature overview. A snowball sampling was conducted based on the list of organisations identified, according to whether they claimed to work on global challenges and/or their web page contained information about “existential risk”, “global catastrophic risk”,“human extinction” or “greatest global challenges”. Cross-references between organisations and input during the workshops were also used to identify organisations. An initial list of 180 organisations which work with global challenges was established. Based on the production of relevant literature, which other organisations referred to the organisation, and/or are seen as influential by groups interviewed during the process, a short-list of organisations were selected for a closer examination regarding the challenges they work with. Then those working with multiple challenges were selected, resulting in a list of 19 organisations.83 Below is the overview of the results from the overview of key organisations working with multiple global challenges. The organisations working on global challenges vary widely in: 1. What they count as a global challenge 2. How systematically they identify global challenges; and 3. Their emphasis on the most important global challenges For most organisations working with global challenges there are no explanations for the methodology used to select the challenges. Only a few thought leaders, like Tower Watson and their Extreme Risk Report 2013, have a framework for the challenges and estimates of possible impacts. Figure 12: Global challenges that key organisations work with Global Challenges – Twelve risks that threaten human civilisation – The case for a new category of risks 53 2.4 Methodology Climate Change Nuclear War Pandemic Resource Depletion Biological Weapons Computer Failure Government Failure Nanotech Chemical Weapons Artificial Intelligence Genetic Engeneering System Failure Atmospheric Aerosols 13 13 12 9 8 7 7 7 6 5 4 4 0 4 8 12 2 6 10 14 In most cases there is neither a definition of the impact, nor a definition of the probability. The report that focuses on global risk which is probably best known is the WEF Global Risk Report. The WEF’s risk work, with many other groups’, is probably best described as belonging to the category of risk perception rather than risk assessment, where experts are asked to estimate risks, but without any clear definition of probability or impact. The more serious organisations, like the WEF, also clearly define what they do as discussing perception of risk, not a scientific assessment of the actual risk. The WEF describes its perception methodology as follows: “This approach can highlight areas that are of most concern to different stakeholders, and potentially galvanise shared efforts to address them.” 85 The question which people are asked to answer is: “What occurrence causes significant negative impact for several countries and industries?” 86 The respondents are then asked to provide a number on two scales from 1-4, one for impact and another for likelihood (within 10 years).87 It is then up to the respondent to define what 1-4 means, so the major value of the report is to track the changes in perception over the years. Such perception approaches are obviously very interesting and, as the WEF states, can influence actual probability as the readers’ decisions will be influenced by how different challenges are perceived. Still, it is important to remember that the report does not provide an assessment of the actual probability (0-100%) or an assessment of the impact (and not the impact on human suffering, as many respondents likely define risk in monetary terms for their own company or country). An overview of WEF reports from the last ten years indicates that the challenges that likely could happen when applying a five year horizon, like the first signs of climate change, governmental failure and traditional pandemic, are identified. On the other hand, challenges which have very big impacts but lower probability, like extreme climate change, nanotechnology, major volcanoes, AI, and asteroids, tend to get less, or no, attention. An important question to explore is whether a focus on the smaller but still serious impacts of global challenges can result in an increased probability of infinite impacts. For example, there are reasons to believe that a focus on incremental adaptation instead of significant mitigation could be a problem for climate change as it could result in high-carbon lock-in.88 Other research indicates that focus on commercially relevant smaller pandemics could result in actions that make a major pandemic more likely. It is argued that this could happen, for example, by encouraging increased trade of goods while investing in equipment that scans for the type of pandemics that are known. Such a system can reduce the probability for known pandemics while at the same time resulting in an increased probability for new and more serious pandemics.89 Figure 13: The top 12 global challenges that key organisations work with 2.4.3 Workshops global risks 2.5 The list of Two workshops were arranged where the selection of challenges was discussed, one with risk experts in Oxford at the Future of Humanity Institute and the other in London with experts from the financial sector. See Appendix 2 for agenda and participants. In both workshops the list of global challenges was discussed to see if any additional challenges should be included, or if there were reasons to exclude some from the list. No challenge was excluded at the workshops, but one was added. Although little research exists yet that is able to verify the potential impacts, the participants agreed to include Global System Collapse as a risk with possible infinite impact. There was agreement that further research is needed to clarify exactly what parts of the economic and political system could collapse and result in a potentially infinite outcome. The conclusion was that enough research exists to include such a collapse on the list. Based on the risks identified in the literature review and in the review of organisations and applying the criteria for potentially infinite impact, these risks were identified: 1. Extreme Climate Change 2. Nuclear War 3. Global Pandemic 4. Ecological Catastrophe 5. Global System Collapse 6. Major Asteroid Impact 7. Supervolcano 8. Synthetic Biology 9. Nanotechnology 10. Artificial Intelligence (AI) 11. Unknown Consequences 12. Future Bad Global Governance This is an initial list. Additional risks will be added as new scientific studies become available, and some will be removed if steps are taken to reduce their probability90 and/or impact so that they no longer meet the criteria. Four categories of global challenges The challenges included in this report belong to four categories. The first, current challenges, includes those where decisions today can result directly in infinite impacts. They are included even if the time between action and impact might be decades, as with climate change. The second category is exogenous challenges, those where decisions do not – currently – influence probability, but can influence impact. The third category is emerging challenges, those where technology and science are not advanced enough to pose a severe threat today, but where the challenges will probably soon be able to have an infinite impact. The technologies included in emerging challenges, including synthetic biology, nanotechnology and artificial intelligence (AI), will be critical to finding solutions to infinite impacts. Including these technologies should not be seen as an attempt to arrest them. If anything, the development of sustainable solutions should be accelerated. But it is equally important to create guidelines and frameworks to avoid their misuse, whether intentional or accidental. The fourth category, future global policy challenges, is of a different kind. It includes challenges related to the consequences of an inferior or destructive global governance system. This is especially important as well-intended actions to reduce global challenges could lead to future global governance systems with destructive impact. The first category, current challenges, includes: 1. Extreme Climate Change 2. Nuclear War 3. Global Pandemic 4. Ecological Catastrophe 5. Global System Collapse The second category, exogenous challenges, covers: 6. Major Asteroid Impact 7. Supervolcano Those in the third category, emerging challenges, are: 8. Synthetic Biology 9. Nanotechnology 10. Artificial Intelligence (AI) 11. Unknown Consequences The fourth category, global policy challenges, is: 12. Future Bad Global Governance not included 2.5.1 Risks Many risks could severely damage humanity but have not been included in this report. They were excluded for one or more of three reasons: 1. Limited impact. Many challenges can have significant local negative effects, without approaching the “2 billion negatively affected” criterion - tsunamis, for example, and chemical pollution. 2. No effective countermeasures. The report focuses on promoting effective interventions and so ignores challenges where nothing useful can be done to prevent or mitigate the impact, as with nearby gamma-ray bursts. 3. Included in other challenges. Many challenges are already covered by others, or have a damage profile so similar that there seemed no need to have a separate category. Population growth, for one, is an underlying driver significant for climate change and eco-system catastrophe, but without direct large-scale impacts. The challenges mentioned in the reviewed literature and organisations which are not included in this report often refer to economic damage such as “fiscal crises” or “unemployment”. While such impacts could have far-reaching consequences they are obviously of another magnitude than those included here. Some of the risks that were suggested and/or which exist in books and reports about global risks were rejected according to the criteria above. They include: 91 1. Astronomical explosion/nearby gamma-ray burst or supernova.92 These seem to be events of extremely low probability and which are unlikely to be survivable. Milder versions of them (where the source is sufficiently far away) may be considered in a subsequent report. ͢ Not included due to: No effective countermeasures 2. False vacuum collapse. If our universe is in a false vacuum and it collapses at any point, the collapse would expand at the speed of light destroying all organised structures in the universe.93 This would not be survivable. ͢ Not included due to: No effective countermeasures 3. Chemical pollution. Increasingly, there is particular concern about three types of chemicals: those that persist in the environment and accumulate in the bodies of wildlife and people, endocrine disruptors that can interfere with hormones, and chemicals that cause cancer or damage DNA. ͢ Not included due to: Limited impact 4. Dangerous physics experiments creating black holes/strangelets including high energy physics. These risks are of low probability94 and have been subsumed under “Uncertain Risks”. ͢ Not included due to: Included in other challenges 5. Destructive solar flares. Though solar flares or coronal mass ejections could cause great economic damage to our technological civilisation,95 they would not lead directly to mass casualties unless the system lacks basic resilience. They have been subsumed in the Global System Collapse category. ͢ Not included due to: Limited impact/included in other challenges 6. Moral collapse of humanity. Humanity may develop along a path that we would currently find morally repellent. The consequences of this are not clear-cut, and depend on value judgements that would be contentious and unshared.96 Some of these risks (such as global totalitarianism or enduring poverty) were included in the Governance Disasters category. ͢ Not included due to: included in other challenges 7. Resource depletion/LULCC/ Biodiversity loss. It has often been argued that declining resources will cause increased conflict.97 Nevertheless such conflicts would not be sufficient in themselves to threaten humanity on a large scale, without a “ System Collapse” or “Governance Disasters”. ͢ Not included due to: included in other challenge

### 2AC---Permutation

#### 3---this is the paragraph after their alternative card ends, which 100% votes for the permutation.

Wigger 18 [Kansas] [Angela, Assoc Prof in Global Political Economy at Radboud Univ, “From dissent to resistance: Locating patterns of horizontalist self-management crisis responses in Spain,” *Comparative European Politics* 16.1, p.35, JCR]

The concepts ‘prefiguration’ and ‘propaganda by the deed’, mostly developed and deployed in anarchist literatures to capture a broad range of subversive tactics and activities (Day, 2005), are well suited to understand transformative agency beyond expressions of dissent and protest that is not merely reactive or defensive but that involves an actual material reorganization of social relations in everyday life. Prefiguration implies that the way in which on-going transformative praxis is organized already entails a presentiment of the envisaged future society, while propaganda by the deed refers to exemplary political actions and interventions in the prevailing system that provide a positive example and stimulate solidarity activities and imitation. As a philosophy of praxis, prefiguration entails moreover that the means, strategies and tactics ought to be commensurable with the envisaged future. Social imaginaries or utopian visions are hence a prerequisite for prefiguration. At the same time, such imaginaries should never be understood as definite blueprints for how the future should look. Prefigurative politics often contains only an incomplete glance of the anticipated future because present tense experiments are always unfinished and imperfect, and thus in process (see also Maeckelbergh, 2013). Prefiguration is thus both a lived radical praxis and a goal for the future. The alternative organization of the social relations of (re-)production can therefore be understood as a prefigurative politics of resistance that operates at the same time as propaganda by the deed. Locations of prefiguration can become ‘infrastructures of dissent’ that enable collective capacities for memory (reflection on past struggles), analysis (theoretical discussion and debate), communication, knowledge transfer and shared learning and can thereby foster sustained mobilization by creating networks of mutual support and spread alternative practices (Sears, 2014: 6; see also Dauvergne and LeBaron, 2014).

[Gonzaga’s card ends]

The solidarity economy encompasses a broad range of activities and is often considered the third sector alongside the public/state economy and the private capitalist economy (Chavez and Monzo´n, 2012). In 2002, the European Standing Conference on Co-operatives, Mutual Societies, Associations and Foundations defined its key characteristics in terms of giving primacy to individual and social objectives over profit maximization; the voluntary and open membership; democratic control by members (with the exception of foundations); the combination of interests of members/users and/or the general interest; the defence and application of the principle of solidarity and responsibility; the autonomous management and independence from public authorities; and the use of the surpluses to pursue sustainable development objectives, service of interest to members or of general interest. Far from being homogenous, organizational and legal frameworks, the relation with the state and the integration into the conventional capitalist economy can vary greatly. Activities can be more or less radical in challenging and resisting prevailing capitalist forms of production of goods and services, depending also on whether production takes place primarily for the purpose of creating use value or exchange value and commercial gain, and whether economic activities are removed from the sphere of competitive capitalism and brought into the orbit of cooperation and mutual aid (as the antidote of capitalist competition). As isolated and fragmented initiatives are too easily defeated by capitalist logics, the transformative capacity of the solidarity economy depends on the density of alliances among different local, regional and global activities and their embedding into a wider transformative political project.

### 2AC---AT Foster

#### Both advantages impact turn the K---they’re robust defenses of innovation, which the alt can’t solve.

Kornai 13, \*János Kornai is a Hungarian economist and the Allie S. Freed Professor of Economics Emeritus at Harvard and Professor Emeritus at Corvinus University of Budapest; (János, November 6th, 2013, “Dynamism, Rivalry, and the Surplus Economy”, DOI:10.1093/acprof:oso/9780199334766.001.0001, Google Books)

C. There is no competition between producers and sellers. Production is strongly concentrated. Many companies enjoy monopolist positions, or at least a (regional) monopoly in producing an entire group of products. The chronic shortage of products creates monopolistic behavior even when many producers operate in parallel. The shortage economy, one of the strongest system-specific properties of socialism, ~~paralyzes~~ impedes the forceful engine of innovation, the incentive to fight for the favors of the customer ( Kornai 1971 ; 1980; 1992, chapters 11 – 12 ). The producer/seller is not compelled to attract the buyer by offering him a new and better product, since the latter is happy to get anything in the shop, even an obsolete and poor-quality product.

There are examples of inventive activities motivated by chronic shortages: ingeniously created substitutes for missing materials or machinery parts (Laki 1984 –1985). These results of the inventors’ creative mind, however, do not become widespread, commercially successful innovations in the Schumpeterian sense. 25 Table 2.1 features only one revolutionary innovation that did not appear first in a capitalist country but, rather, in the Soviet Union: synthetic rubber. Its inventor had been doing research on the subject for decades; the employment of it in industry was rendered necessary by the shortage of natural rubber.

D. The tight limits of experimenting. Capitalism allows for hundreds or thousands of barren or barely fruitful attempts, so that, afterward, one out of the hundreds or thousands would succeed and bring immense success. In the socialist planned economy, actors are inclined to avoid risks. As a result, the application of revolutionarily significant innovations are more or less excluded, since those always mean a leap into the dark, as success is necessarily unpredictable. As far as followers are concerned, some economies follow up quickly, others slowly. The socialist economies belong to the group characterized by the slowest pace. They prefer to maintain the already known, old production procedures, and produce the old well-tried products; new technologies and new products have too many uncertain characteristics making the planning of the directives difficult.

E. There is no capital waiting to be utilized; investment allocation is rigid. Central planning is not miserly with the resources devoted to capital formation. The share of investment carved out from the total output is typically higher than in the capitalist economies. However, this enormous volume is appropriated ahead of time to the last penny. Moreover, most of the time over-allocation takes place; in other words, the ensemble of all project plans prescribes the requisition of more resources than the required amount to execute the plan. It never happens that unallocated capital is waiting for someone with a good idea. The allocators do not search for an entrepreneur waiting to step forward with a proposal for innovation. Flexible capital markets are unknown. Instead, the rigid and bureaucratic regulation of project activities takes place, and to devote capital resources to activities with possibly uncertain outcomes is unconceivable. No foolish minister of industry or factory manager could be found who would demand money for ventures admitting in advance that the money may be wasted and the innovation may not succeed. 26

# 1AR

## Adv 1

### AT: Hold Up

#### Patent investments and potential royalty pricing are better statistics to determine if hold up is happening- it is

Shapiro & Lemley 20, \*Carl Shapiro is the Transamerica Professor of Business Strategy Emeritus at the Haas School of Business, University of California at Berkeley; \*Lemley is the William H. Neukom Professor at Stanford Law School and a partner at Durie Tangri LLP; (2020, “THE ROLE OF ANTITRUST IN PREVENTING PATENT HOLDUP”, https://faculty.haas.berkeley.edu/shapiro/patentholdup.pdf)

E. Actual Holdups Are Very Difficult to Measure

As just noted, the extensive empirical support for the general theory of holdup consists primarily of studies showing that firms structure their relationships to avoid or minimize the adverse effects of holdup. Critically, the evidence does not involve quantifying the magnitude of actual ex post holdups.36 Indeed, the empirical literature on holdup has relatively few documented examples of large-scale actual holdups.37 This will be important below when we turn to evaluating the empirical evidence regarding patent holdup in particular.

Anticipating the arguments being made by those who deny that the patent holdup problem is real and significant, it is instructive to ask why the empirical literature on the general holdup problem has not proceeded by measuring the frequency or magnitude of actual holdups.

In part this is for a very good conceptual reason: the theory predicts that market participants will structure their affairs to avoid or mitigate actual holdups. As stressed above, the social costs caused by the holdup problem can be large even if large-scale holdups are very infrequent. The validity of the general theory of holdup, and the importance of the holdup problem, do not hinge on the frequency or magnitude of actual holdups.

But practical considerations also play a big role in explaining why the very large empirical literature on the holdup problem includes few documented instances of actual holdups. Even in situations where such holdups take place, they are exceedingly difficult for researchers to reliably detect and quantify. To see why, denote the holdup (ex post monopoly) price by 𝑃𝐻 and the ex ante competitive price by 𝑃 ∗ . The (perunit) magnitude of the actual ex post holdup is equal to (𝑃𝐻 − 𝑃 ∗ ). Measuring either component of this difference can pose quite a challenge for researchers. Actual transaction prices in complex business-to-business transactions are rarely observable by researchers. Plus, even when a measure of price is available, it typically is confounded by other terms and conditions, making 𝑃𝐻 very hard to observe. Coming up with a good measure of the competitive benchmark price 𝑃 ∗ is even harder, since it reflects a counterfactual and since the transactions at issue are by nature idiosyncratic. Practical considerations also explain why the empirical literature on the holdup problem includes few documented instances in which the prospect of holdup has discouraged investment. The resulting reduction in investment typically will not normally be observable to researchers, much less attributable to holdup.

For all of these reasons, scholars studying the holdup problem widely agree that the general theory of holdup is very well supported empirically without expecting, much less demanding, a body of empirical work measuring actual holdups. This same sensible approach should be applied to patent holdup.

When we turn to look at patent holdup below, we will examine the two types of evidence used in the more general empirical literature on holdup. First, we look for evidence identifying situations in which the patent holdup problem is significant. **The telltale marker that the patent holdup problem is significant in a given setting is the presence of substantial investments specific to a given patent or patent portfolio. Second, we look for evidence that the mechanisms used to manage the patent holdup problem are costly or imperfect**. There is clear evidence that the mechanisms used by SSOs to manage SEP holdup are costly and imperfect.

#### More ev

Hovenkamp 20, \*Herbert J. Hovenkamp is James G. Dinan University Professor at the University of Pennsylvania Law School and the Wharton School of the University of Pennsylvania; (2020, “FRAND and Antitrust”, <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3095&context=faculty_scholarship>)

CONCLUSION

Oversight of FRAND obligations is one area where it is critical for the courts to keep an eye on longer run concerns for innovation. FRAND has evolved into a highly successful but nevertheless vulnerable mechanism for facilitating joint innovation and product development. Indeed, for networked technologies such as cellular phones it is difficult to see how coordinated development by numerous competitive firms could be achieved without the significant coordination and technology sharing that FRAND enables. That system will be undermined, however, if one firm is able to renege on its voluntarily entered obligations, because others will then do the same. The regime of collaborative innovation that FRAND contemplates would very likely fall apart, and at great harm to competition and economic welfare. The Ninth Circuit’s 2020 Qualcomm decision indicates that this fear is more than fanciful. Unless corrected, Congress may have to intervene in order to protect a system that has been an important driver of innovation and economic growth.

## Inno DA

### 1AR- Thumper

#### Impacts all markets.

Litvack and Vooris 10-26-2021, (Douglas E Litvack is co-chair of the firm’s Antitrust and Competition Law Practice. He represents both plaintiffs and defendants in complex antitrust litigation and appeals, Lee K Van Vooris is co-chair of the firm’s Antitrust and Competition Law Practice and a member of the Corporate and Private Equity Practices, “Client Alert: FTC Reverses Quarter-Century of Enforcement Policy,” https://www.jdsupra.com/legalnews/client-alert-ftc-reverses-quarter-8487547)

In a move widely expected after the Federal Trade Commission’s Democratic majority rescinded a 1995 policy in July, the FTC issued a policy statement yesterday requiring prior approval provisions for settlements in future transactions affecting any relevant market for which they alleged a violation. The 1995 policy was not to require prior approval provisions as part of a consent decree, settlement, or enforcement order absent extraordinary circumstances (typically where one of the parties to the decree had a history of doing anticompetitive transactions below the HSR threshold). Now, the FTC will require a prior approval provision for all merging parties that resolve antitrust issues subject to a Commission Order. The FTC also appears likely to pursue a prior approval order even when the parties abandon a transaction after substantially complying with a Second Request. Under a prior approval provision, the party must obtain the FTC’s permission before consummating any transaction subject to the provision. As the statement suggests, the FTC could simply reject the transaction without having to provide a court with sufficient evidence to show the transaction violates the law. Styled as a measure to “preserve Commission resources,” the overall effect of the policy on transactions may not be that clear. However, this new policy will certainly add additional risk to any transaction that could be resolved with a divestiture because the parties will need to give the FTC veto power over future deals in that relevant market – and perhaps even beyond that market, as the FTC bragged about in a consent decree also released yesterday. The new Commission policy states that in certain cases where “stronger relief is needed,” the prior approval order may include geographic and product markets beyond those in the instant transaction. Because of the veto power and the threat of an expansive prior approval provision, parties may be more likely to litigate a transaction’s legality rather than settle with the FTC and accept a provision that will hamstring their ability to do future deals. It therefore appears that this policy may inadvertently incentivize more costly merger litigation for both the FTC and defendants, opening the question of whether the policy change might actually cost more in Commission resources than the former policy, which did not penalize companies in this way for settling antitrust disputes with the FTC.