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#### “The scope” requires removing an existing exemption

ABA 15 – (American Bar Association, Handbook on the Scope of Antitrust Law, ABA Section of Antitrust Law, Chicago: ABA Publishing, 2015, p. 9-12) ISBN: 978-1-63425-054-2

Next, the language of the federal antitrust laws imposes several scope limits. Each of the major antitrust statutes applies only to "trade or commerce,"39 and that phrase has been held to exclude gratuitous or charitable conduct and other conduct not involving the exchange of goods or services for consideration.40 The Sherman Act likewise applies only to "persons," and while that term is construed broadly under the Sherman Act, it has some exceptions, notably for the federal government and its instrumentalities.41 Stricter limits appear in the Clayton, Robinson-Patman, and Federal Trade Commission Acts (FTC Act), and these limits are quite complex. The Robinson-Patman Act and two of the Clayton Act's substantive provisions, the limit on tying and exclusive dealing arrangements in section 3 and the limit on interlockin§ directorates in section 8, apply only to persons "engaged in comrnerce.',4 The Federal Trade Commission Act is subject to a few special peculiar Scope limits of its own Finally, in several distinct ways the language of other federal statutes can limit the scope of the federal antitrust laws. First, approximately three dozen statutes explicitly limit antitrust as it would otherwise apply in particular contexts. Statutory exemptions tend to concern either ( 1) industries that are already regulated by some agency, like insurers excepted by the McCarran-Ferguson Act, by virtue of their being regulated by state insurance commissioners,44 or ocean shipping firms regulated by the Federal Maritime Com.mission,45 or (2) specific kinds of conduct that Congress has chosen from time to time to favor with special freedom to collaborate, like technological research and development, 46 the graduate medical resident program,47 or production joint ventures among competing newspapers.48

#### Those must be expressly Congressional

Krattenmaker 4, US Federal Trade Commissioner, (Antitrust Enforcement in Regulated Sectors Working Group , International Competition Network, https://centrocedec.files.wordpress.com/2015/07/limits-and-constraints-intervening-in-regulated-sectors-2004.pdf)

A. Congress’s will prevails. – The national antitrust laws and the national regulatory statutes are creatures of Congress. They mean whatever Congress wants them to mean and conflicts between them must be ironed out according to the will of Congress, as best as that intent can be ascertained. So, if Congress has spoken clearly to the issue, its resolution governs. For example, in United States v. Philadelphia National Bank, 374 U.S. 321 (1963), the Supreme Court was confronted with an antitrust challenge to a bank merger. The banks argued that a recent statute, the Bank Merger Act of 1960 repealed by implication the application of antitrust law to block bank mergers. The Court found that Congress had not intended such a result. But what if Congress has not clearly spoken? Then other principles come into play. B. Full compliance is the norm. – Generally speaking, one must comply with both the dictates of the antitrust laws and the requirements of the regulatory regime. Thus, for example, mergers between telecommunications firms are subject to review under both federal antitrust law and the provisions of the Federal Communications Act. Telecommunications firms, then, may not merge unless they have cleared both antitrust and Federal Communications Commission review. Permission from one does not entail permission from the other. Denial by one is therefore sufficient, but legally does not constitute denial by the other. Of course, if there is a clear conflict – so that one federal statute commands an act that another one forbids and that conflict cannot be resolved by statutory interpretation – then the later expression of Congressional will governs. (See, for example, the case of Gordon v. New York Stock Exchange, discussed below, in which fear of conflict led the Court to imply an antitrust immunity.)

Exemptions from the antitrust laws are not lightly inferred. – Sometimes, compliance with antitrust may be possible, but difficult or arguably not consistent with the policies underlying the regulatory scheme. Firms may argue that the regulatory scheme should be understood to act as granting an implied exemption from antitrust. Federal courts rarely accept this argument. The general rule is that, to obtain an exemption from antitrust, one must get it directly and explicitly from the legislature, not from courts. The Philadelphia National Bank case, discussed above, is an example of the Court’s general refusal to find antitrust exemptions without express direction from Congress. Similarly, in an important case establishing the per se rule against price fixing, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940), the Court gave short shrift to the defendants’ claim that their conduct was “consistent with the general objectives and ends sought to be obtained under the National Industrial Recovery Act,” which was in place when the conduct began. This was because the conduct, illegal under the antitrust laws, “lack[ed] Congressional sanction.” Even though the Federal Energy Regulatory Commission has extensive powers over interconnection and interconnection prices, the Court refused to imply an antitrust immunity in a challenge to a refusal to interconnect and provide electricity in Otter Tail Power Co. v. United States, 410 U.S. 366 (1973). On very rare occasions, the Supreme Court will find an implied immunity. In Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) the plaintiffs challenged agreements by which New York Stock Exchange brokers fixed commission charges. These agreements were allowed under New York Stock Exchange rules, but the U.S. Securities and Exchange Commission had statutory authority to alter the rules and in fact exercised supervisory authority over them. On these facts, the Court found an immunity necessary to prevent conflicts between instructions from the Commission and from antitrust courts to the Exchange.44

#### The Aff just intensifies the application of antitrust to already covered activities---it does NOT curtail a Congressionally outlined exemption or immunity. The 2nd circuit ruling is limited, not enforced in other districts

Cardenas 21 (Natalie, “Had Enough Vitamin C? Second Circuit Dismisses Antitrust Claims Against Chinese Vitamin C Manufacturers Yet Again,” JD Supra, <https://www.jdsupra.com/legalnews/had-enough-vitamin-c-second-circuit-2307332/>)

The Second Circuit’s decision strengthens the international comity defense in a narrow set of cases where a foreign government participates in U.S. proceedings by submitting interpretations that make clear its laws conflict with U.S. laws. While these interpretations are not given complete deference, they may be given considerable weight when supported by additional documents and materials. Certainly the Second Circuit’s decision in this case may provide foreign defendants who meet these unique characteristics with a potential shield against antitrust liability. The decision should not be read, however, to completely preclude U.S. enforcement, and it remains to be seen whether other circuits presented with the same question will reach a similar conclusion. Moreover, as the Second Circuit noted, the U.S. may still invoke its interest through alternative means, such as trade negotiations between the executive branches of each nation, or dispute resolution in an outside forum. Executive Branch guidance on whether proceedings would have an adverse effect on foreign relations may also tip the balance against dismissal, allowing U.S. courts to invoke jurisdiction and hear the case.

#### Vote NEG---eliminating Congressionally enshrined exemptions and immunities provides a limited AND predictable basis for prep, and focuses debates on the balance between antitrust and regulation, ensuring conceptual unity.

### 1NC — DA

#### Phase 1 and 2 of the US-China trade treaty are steady now---both preserve interdependence. BUT, respect for sovereignty is key

Ezrati 20, MSS in Mathematical Economics, affiliate of the Center for the Study of Human Capital and Economic Growth at the University at Buffalo (SUNY) (Milton, “A Phase Two China Deal: Tough But Not Impossible,” <https://www.forbes.com/sites/miltonezrati/2020/02/17/a-phase-two-china-deal-tough-but-not-impossible/?sh=a342cfdd08f1>)

Even as the Coronavirus dominates the news from Asia, China and the United States have turned to the next, more difficult part of their trade negotiations. This next phase should make the first look easy. Indeed, the only reason the two countries could sign phase one is because they agreed to postpone the hard stuff. Progress from now on is far from certain, even after the virus issue has receded. Still, if the White House can keep its nerve, China’s clear need for trade with the United States may still lead to some agreement. This White House’s objectives were never new. Every president going back at least to Bill Clinton had pressed China for the four major issues on Trump’s agenda: 1. China bought too little from the United States. 2. Beijing insisted that U.S. firms in that economy have a Chinese partner with whom they must share their technology. 3. China had closed its financial markets to U.S. banks and other financial firms. 4. China violated U.S. patents and otherwise stole U.S. technology. With past presidents, China had reassured each that it would alter its behavior, most famously to President Barack Obama late in his second term. But because in every case Beijing reneged on its promises, American negotiators this time have insisted on something more substantive from Beijing. In some cases, they wanted to see changes in Chinese law, which Beijing resisted, calling it an infringement on its sovereignty. Phase one of these negotiations secures a good part of the White House agenda. China has promised to buy some $200 billion more from the United States over the next two years. Beijing has promised to open Chinese financial markets to U.S banking, investment, and insurance. China’s leadership has also promised to stop insisting that U.S. firms operating in China must have a Chinese partner to which the American firm must transfer its technology. The agreement remains mute on the issue of cyber theft, but it does make provisions for Chinese firms to notify Americans when introducing products that might infringe on the American firm’s patent. It further allows aggrieved American firms to approach Beijing through the U.S. Trade Representative. In the past, U.S. firms had to go to the Beijing government themselves, where they risked retaliation just for complaining. In response to China’s concessions, the United States has agreed to ease some of the tariffs it had put in place over the last couple of years. The White House has cancelled the so-called “penalty tariffs” it had scheduled to place on $156 billion of Chinese goods and cut from 15 percent to 7.5 percent the tariffs imposed last September on $120 billion in Chinese goods. The United States retains the 25 percent tariffs it had imposed earlier on another $250 billion of Chinese imports. Since the tariffs were only ever meant to pressure Beijing to make the changes now in prospect these reductions hardly constitute much of a U.S. concession. Phase two will take up the question of cyber theft and the changes in Chinese law that China has resisted so vociferously over the last couple of years. Any further tariff reductions will depend on satisfactory Chinese assurances on this matter. Future tariff reductions will also depend on how well Beijing complies with its pledges in the phase one agreement. On the first of these questions, the next round of negotiations can hardly be expected to go smoothly. Beijing remains sensitive on sovereignty issues, perhaps especially so now that it has already bowed to several American demands. If the sides can ever reach agreement, it will depend on extremely sensitive language to give sufficient assurances to the Americans while allowing Beijing to assert that it has not changed domestic law in response to U.S. dictates. It does, however, seem likely that Beijing, despite its history of deceit, will live up to its phase one promises. Even before the agreement, China had begun the process of changing its regulations to allow U.S. insurance subsidiaries and wholly owned U.S. banks onto the mainland. Nor should China have trouble increasing purchases of U.S. goods. Since China has lost half its hog herd to African swine fever, it certainly has reason to increase imports of American pork. China has already made significant increases in its purchases of American soybeans and further has begun to change its “safety” rules to allow imports of genetically modified food from the United States. If it were also simply to shift its energy purchases in the direction of this country’s huge natural gas surplus, it could easily comply with its commitment to buy $200 billion more from the United States over two years.

#### The plan is perceived by China as a direct affront to sovereignty. Triggers escalating disputes.

Cabranes 21, second circuit judge, this is text from the controlling opinion of the relevant case (Vitamin C, or ASP vs Hebei Welcome) (No. 13-4791-cvANIMAL SCIENCE PRODUCTS,INC.,THE RANIS COMPANY, INC., Plaintiffs -Appellees,v. HEBEI WELCOME PHARMACEUTICAL CO.LTD.,NORTH CHINA PHARMACEUTICAL GROUP CORPORATION, Defendants-Appellants. Appeal from the United States District Court for the Southern District of New York., <https://law.justia.com/cases/federal/appellate-courts/ca2/13-4791/13-4791-2021-08-10.html>)

Possible Effect upon Foreign Relations

The Ministry emphasizes that China “has attached great importance to” this case. App’x 650. In a brief filed in the Supreme Court, the Ministry stated The Ministry has been actively involved in this litigation since 2005. It first presented the Chinese government’s authoritative interpretation of Chinese law in 2006, when it filed an amicusbrief in the district court. It reaffirmed its position in supplemental submissions to the district court in 2008 and 2009, and in an amicusbrief in the court of appeals in 2014. As both courts [] observed, this was ‘historic.’ Brief of Amicus Curiae Ministry of Commerce of the People’s Republic of China in Support of Respondents, No. 16-1220 (U.S.) at 1. It appears that China perceives this case as threatening its rights as a sovereign to enact and enforce regulations 61 governing Chinese companies conducting business within China’s borders.42 We discern that China has already taken umbrage at the district court’s treatment of its representations about the meaning and operation of its law. In our judgment, the enforcement of a sizeable damages award and permanent injunction against defendants is likely to prove a considerable further “irritant.” App’x 175 (quoting O.N.E. Shipping, 830 F.2d at 454). On such matters, we generally assign considerable significance to the views of the U.S. Department of State, for the Constitution primarily entrusts foreign relations to the Executive Branch, and we are ill-equipped to assess the numerous, cross-cutting bilateral and multilateral issues properly informing such decisions. As the Department of State has not weighed in or otherwise signaled a view one way or another on this case, we are left somewhat in the dark.43 Nonetheless, we remain cognizant of the Supreme Court’s general observation—raised in the context of the presumption against extraterritoriality—that the Judiciary is understandably cautious not to “erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.” Kiobel v. Royal DutchPetroleum Co., 569 U.S. 108, 116 (2013). This presumption “serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries.” RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2100 (2016). After all, “[t]he Judiciary does not have the institutional capacity to consider all factors relevant to creating a cause of action that will inherently affect foreign policy.” Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021).Consequently, to the extent the record reflects protestations of the Chinese government at the application of U.S. antitrust law to Chinese companies implementing export policy in China, and no contrary view of the Executive Branch is expressed, this factor tips in favor of dismissal for reasons of international comity. International Comity Principles Favor Dismissal44Balancing these factors, we decline to construe U.S. antitrust law as reaching defendants’ conduct in the circumstances presented here, and we conclude that principles of international comity warrant dismissal. The existence of a true conflict between Chinese and U.S. antitrust law, Chinese nationality of all of the defendants, extraterritorial nature of the anticompetitive conduct, and potential impact upon foreign relations together strongly favor dismissal.45While the efficacy of enforcing a judgment is unclear, we acknowledge that enforcement could be salutary for the international Vitamin C market, especially given that economic harm to American consumers was foreseeable. The United Statesundoubtedly has a substantial interest in the uniform enforcement of its antitrust laws, including the deterrence value of treble damages against foreign companies whose anticompetitive conduct causes substantial and foreseeable economic injury to American consumers. Yet the U.S. Department of Justice has not brought criminal antitrust enforcement actions against these defendants, and the Department of State has not weighed in as an amicus curiaeon either side of the issue.46 There are also alternate means for the United States to vindicate those interests, such as through bilateral diplomatic efforts, multilateral discussions, trade proceedings in the WTO, or dispute resolution in another international forum. While the stakes are high for both countries, we conclude that the United States’ concern with extraterritorial enforcement of a private civil judgment under its antitrust laws is substantially diminished in these circumstances. In light of these considerations of international comity, we do not construe the Sherman and Clayton Acts to reach the present controversy.IV.CONCLUSIONWe therefore REVERSE the judgment of the district court, and REMAND with instructions to DISMISS the complaint with prejudice.

#### Those disputes go nuclear

Rovner 17 – Professor of Political Science, SMU (Joshua, “Two kinds of catastrophe: nuclear escalation and protracted war in Asia,” Journal of Strategic Studies, [http://www.tandfonline.com/doi/abs/10.1080/01402390.2017.1293532?journalCode=fjss20](about:blank))

This clash of great power interests has led to concerns that a US–China war may be over the horizon. Such a war is not inevitable, of course, and both sides have obvious reasons to avoid any military conflict. But neither has shown much willingness to back down from the political issues at stake, some of which are infused with nationalism. As long as these issues remain unresolved, and as long as the United States remains committed to the allies who are at loggerheads with Beijing, then conflict will remain a possibility. The fact that both sides possess nuclear weapons raises the danger of a nuclear exchange, even over crises that begin over what to be relatively minor disputes.1 In the event of a war, both China and the United States would seek a quick decisive victory. Any war is likely to exact high costs in blood and treasure. Their high level of trade and financial interdependence, and the centrality of the United States and China to the global economy, means that a prolonged war would be an economic calamity. Chinese military doctrine increasingly stresses the importance of winning quickly, and it puts a premium on seizing the initiative and controlling the pace of combat under what it calls “informatized conditions.” The examples of the US wars in Iraq, Kosovo, and Afghanistan convinced Chinese thinkers that high-intensity conventional combat is no longer a question of relative industrial power. Instead, it is a competition for control of communications. In future conflicts, long-range attacks coupled with aggressive information operations will sew confusion and allow China to dictate the crucial opening stages. The 2001 edition of the Science of Military Strategy (SMS) states that China envisions precision strikes in order to “paralyze the enemy in one stroke.” 2 Organizational changes in the years that followed gave the People’s Liberation Army Air Force (PLAAF) more autonomy and responsibility for long-range strike. In addition, the 2013 edition of SMS called for the PLAAF to develop information operations capable of “effective suppression and destruction” of enemy’s information systems alongside an “information protection capability.” 3 Chinese leaders have committed to the PLA’s military space and counter-space capabilities, investing in more missions, more launches, and more satellites. Finally, the PLA has deliberately merged electronic warfare with psychological operations, based on the idea that confusing the enemy by undermining its communications will force it into operational sclerosis and have a profound psychological effect. The goal is to win fast. The PLA must “seize and control the battlefield initiative, paralyze and destroy the enemy’s operational system of systems, and shock the enemy’s will for war.” 4 This approach closely resembles the US model, which relies on prompt attacks on communications and intelligence networks, which will make it safe for follow-on forces to surge into theater and dictate the scope and pace of combat. American officers have become accustomed to short conventional clashes since the first Gulf War, and their basic operational concept remains largely unchanged. Doctrine continues to emphasize the importance of seizing the initiative, confusing the enemy, and establishing control. The standing joint publication on operations provides a neat summary of the US approach: As operations commence, the (joint force commander) needs to exploit friendly advantages and capabilities to shock, demoralize, and disrupt the enemy immediately. The JFC seeks decisive advantage through the use of all available elements of combat power to seize and maintain the initiative, deny the enemy the opportunity to achieve its objectives, and generate in the enemy a sense of inevitable failure and defeat.5 Rapid attacks cause physical destruction and psychological damage, turning dangerous adversaries into helpless, disorganized, and vulnerable targets. Under these conditions, enemies have neither the ability nor the desire to fight on, and the United States can consolidate its initial gains with additional forces who face little or no resistance. In sum, China and the United States are preparing for a kind of highintensity warfare that requires executing rapid and complex operations while simultaneously disrupting the enemy’s command and control. Both sides believe this operational concept can lead to victory at a reasonably low cost, and are tailoring military doctrine to achieve specific political objectives without risking national disaster. What if both sides are wrong? Great powers often exaggerate their capabilities and minimize the importance of contingency and chance in war. Sometimes they launch campaigns with the false belief that war will be brief and painless, only to learn the opposite. Combat against a thinking adversary reveals the limits of existing capabilities in ways that are impossible to know before the fact. Strategic interaction during war plays havoc with prewar expectations, because the combatants do their utmost to undermine the other. Ambiguous information may not allow either side to judge whether it is succeeding, or, indeed, whether its forces are actually carrying out operations as intended. Great power wars rarely go according to plan. Good strategies thus contain a reasonable margin of error, and good strategists learn to think about what might go wrong. Contingency planning is especially important in cases where nuclear weapons may come into play This article discusses the relationship between conventional and nuclear weapons in a hypothetical war between the United States and China. Both countries have spent lavishly on new conventional military capabilities. Beijing is developing “anti-access” systems to make operations dangerous for US forces in the region, and Washington has responded by refining its operational approach. In the nuclear realm, China is undergoing a modernization of its arsenal and has revised its posture, while the United States has invested in increasingly accurate missiles, lethal warheads, and remote sensing technologies that enable rapid precision strikes. These trends may have important and troubling effects on the dynamics of a potential conventional military confrontation. While optimists imagine a quick and decisive victory, the presence of nuclear weapons opens the possibility of unexpected scenarios that neither side can fully control. The following discussion describes two such scenarios. The first section discusses the prospects for nuclear use. The second section discusses the opposite scenario by looking at the prospects for a protracted conventional war. While escalation concerns have attracted a great deal of scrutiny, scholars have paid much less attention to the possibility of a drawn-out fight. The third section evaluates which scenario is more likely in a US–China conflict. The conclusion discusses the political and military trade-offs leaders will face in a future crisis. Efforts to win quickly will increase the risk of nuclear use. Efforts to reduce the risk of escalation, on the other hand, will increase the risk of a prolonged war. Escalation What would cause leaders to cross the nuclear threshold? In some cases, the choice may be a conscious decision to marry conventional and nuclear doctrine and incorporate escalatory moves in prewar plans. This would be the case if they believe they can execute a preemptive first strike and disable or destroy the adversary’s arsenal. Preemptive attacks are particularly appealing against states with incautious or irrational leaders, especially if they possess small and vulnerable forces. Deliberate escalation is also possible if leaders believe that they must signal resolve by indicating their control at all levels of violence. Preparations for conventional war would transparently include plans for nuclear use in the case of certain contingencies. According to this logic, a clear signal of “escalation dominance” is necessary to convince the enemy that the risks are overwhelming and the prospects of victory are slim. If demonstrations of dominance fail, however, then the stronger state can simply execute its plan in order to defeat the enemy. US leaders in the Cold War invested in capabilities to enable attacks on enemy nuclear weapons and associated systems.6 If this was the case in the Cold War, when the United States faced a superpower adversary with a sprawling nuclear weapons complex, then leaders today probably remain interested in counterforce. Open-source analyses of US technology, along with some telling statements from US leaders, reveal an ongoing program for building and deploying weapons to preempt enemy escalation during a conventional conflict.7 They are also concerned with adversary innovations that complicate counterforce strikes.8 But suppose that leaders have no intention of using nuclear weapons. It is one thing to develop impressive technologies, but quite another to use them, and policymakers may blanch at the real prospect of authorizing first use. Even in these cases, there are several theoretical pathways to escalation. The first is psychological. Cognitive biases may cause leaders to misperceive rival intentions, mistaking signals of restraint for signs of danger. Prewar expectations strongly influence how individuals interpret new information, and they will ignore or reframe dissonant information so it fits into their existing beliefs. Misperceptions intensify after the shooting starts, when information is ambiguous and incomplete. Carl von Clausewitz dwelt on the problem in the aftermath of the Napoleonic Wars, noting that intelligence reports were often contradictory and unreliable “in the thick of fighting.” Despite advances in intelligence and communications, the fog of war remains an enduring problem. Organized violence is an iterative process, and each side has incentives to hide its actions and deceive its adversary. Violence also unleashes intense emotions that obscure the material effects of battle. Commanders may not understand whether they are winning or losing, and in lieu of reliable intelligence they are likely to let passion overtake good judgment. “In short,” Clausewitz concluded, “most intelligence is false, and the effect of fear is to multiply lies and inaccuracies.” 9 Wartime leaders are prone to attribution bias, or the belief that their counterparts are inherently evil. Leaders in conflict are likely to assume the worst about their rivals or else they would not have picked a fight in the first place. Attribution bias causes them disregard the notion that their enemies have limited goals and are willing to accept partial victories. They are also prone to reject peace overtures as meaningless gestures at best, or as efforts to lull them into passivity before escalating the conflict.10 Finally, prospect theory tells us that individuals will fight harder to avoid losing a possession than they will to gain something new. If leaders equate settling with losing, then they will be tempted to risk escalation. All of these psychological pressures are exacerbated under stress and tight time constraints.11 Domestic pressures might lead to escalation if one or both governments fear that regime change will be the political penalty for battlefield failure. Escalation is also possible if the issues at stake are wrapped up in nationalism or ideologies that inflate the value of the object. Leaders will be hard pressed to accept defeat in such cases, especially if military outcome is particularly lopsided and humiliating. Leaders who depend on particularly hawkish constituencies to remain in power are especially likely to take new risks even against long odds. Rather than negotiating an end to the war, they might gamble for resurrection by escalating to the nuclear level.12 Such a move would not necessarily be irrational. Instead, resurrection succeeds by shifting the war towards the balance of interests rather than the balance of capabilities. A retreating combatant, battered in the early stages of a conflict, may still affect the enemy’s calculation by taking extraordinary risks. Escalation signals a willingness to fight to the finish and a reminder that it has powerful interests at stake. Such a strategy is admittedly risky, but it may be effective, especially if the escalating state is fighting to defend its own territory against a distant rival. Transforming a conflict into a test of resolve makes sense when a state is failing the test of arms.13 Finally, inadvertent escalation may occur when conventional attacks put the adversary’s nuclear force at risk. Under these conditions, the target state might reasonably worry that the attack is only the first phase of a larger war. There may be no way to offer credible reassurances that it is not. Fearing the destruction or incapacitation of its nuclear deterrent, the target state might face a “use it or lose it” dilemma. Inadvertent escalation is especially likely if key command and control nodes are vulnerable or if conventional and nuclear target sets are indistinguishable. The danger also increases if military organizations indulge organizational preferences for offensive action. This encourages planners to err on the side of attacking all available targets. While it might sense to allow the adversary to retain some capabilities in order to reduce the incentives for escalation, planners may bridle at the thought of consciously allowing the enemy to retain the capacity for attack.14 In recent years, China has invested heavily in capabilities that will complicate US maritime operations and threaten US bases in Japan and Guam. Equipped with a range of anti-access capabilities, China may be able to deter the United States from intervening in the case of a regional war. If it does intervene, China may attempt to damage or destroy US assets or force carrier groups to operate at prohibitively long distances from the mainland.

#### Independently---China will backtrack on treaty commitments in response to comity degradation

Kava 19, JD/MBA Candidate @ JU (Samuel, “The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization,” 15 J. Bus. & Tech. L. 135, Lexis)

Justice Scalia, in his dissenting opinion in Hartford Fire Insurance Co., highlighted many of these factors and determined that international comity barred the Sherman Anti-Trust Act’s extraterritorial application in that case.168 However, the majority decided to narrow the comity analysis by only considering if “the non-U.S. law must require the action being challenged so that ‘compliance with the laws of both countries is…impossible.’”169 This narrow comity analysis has led to the broadening of the Sherman Anti-Trust Acts extraterritorial application, which jeopardizes the economic well-being of the global economy. While some courts have disregarded the Supreme Court’s narrow comity analysis, by claiming that the Supreme Court “left unclear whether it was saying that the only relevant comity factor in that case was conflict with foreign law…or whether the Court was more broadly rejecting balancing of comity interests in any case where there is no true conflict,” Congress should expressly provide federal courts with a broad range of factors it should consider to ensure the United States respects the laws of other nations.170 Specifically, Congress should amend the FTAIA by explicitly providing that the Sherman Anti-Trust Act only applies extraterritorially in cases where it does not offend the sovereignty of a foreign nation. In essence, to ensure the economic prosperity of the global economy, the United States Congress should be proactive in amending the FTAIA. Specifically, Congress should prescribe a broad international comity test for courts to consider when deciding if the Sherman Anti-Trust Act should apply extraterritorially. If international comity is taken seriously, unlike its most recent application by the Supreme Court in Hartford Fire Insurance Co., there will be a greater degree of compliance by the international community and more certainty will be provided to consumers and producers. Moreover, federal courts should not wait until Congress amends the FTAIA. In fact, federal courts should, on its own accord, extensively apply an international comity analysis to every case where a foreign entity is involved. As was previously mentioned, some courts continue to apply a robust international comity analysis. Specifically, the Ninth Circuit Court of Appeals in Mujica v. Airscan Inc. considered: [T]he location of the conduct in question, the nationality of the parties, the character of the conduct in question, the foreign policy interests of the United States, any public policy interests, the strength of the foreign governments’ interests, and the adequacy of the alternative forum.171 Thus, until the United States Congress takes the necessary step to amend the FTAIA, federal courts should consider applying an international comity analysis to all cases that involve an international entity. By adopting a broad international comity analysis: (1) foreign nations would be less likely to adopt burdensome blocking statutes, (2) consumers and producers would have more certainty through unified laws, (3) the global economy will continue to prosper because of the certainty and predictability of the law, and (4) foreign nations may become more amenable to enter into bilateral treaties with the United States.

#### US-China arms control co-op strong now- that solves nuclear war BUT managing the relationship is key

Williams, 12-15 – King's College Defence Studies senior lecturer

[Heather Williams, Harvard Kennedy School Project on Managing the Atom visiting fellow, "Crisis stability as a priority in US-China relations," The Interpreter, 12-15-2021, https://www.lowyinstitute.org/the-interpreter/crisis-stability-priority-us-china-relations, accessed 1-6-2022]

Yet in November, National Security Advisor Jake Sullivan announced that the United States and China would begin “discussions on strategic stability”. Additionally, the United States and China have been cooperating within the “P5 process” on transparency of doctrines and nuclear risk reduction in the lead-up to the Nuclear Non-Proliferation Treaty Review Conference in January 2022.

So what might US-China arms control look like, and what should Joe Biden and Xi Jinping discuss when these dialogues take place?

Managing rising tensions with a peer competitor and assuring allies is an enduring challenge for the United States. In many ways, it is a familiar one from the Cold War era; but one of the biggest differences today is the speed of conflict. Strategic stability, a concept that shaped much of the Cold War whereby neither party as incentives to use nuclear weapons first, becomes more complex with new technologies, such as cyber, and new actors, including China.

Arms control as a tool for strengthening strategic stability, therefore, must adapt to these new strategic realities. Above all, it must become more agile to deal with rapid developments in technology and geopolitics. I suggest a vision for the future of US-China arms control that is agile, tailored, with a focus on crisis management and strengthening alliances in the region. These and other challenges for managing allies and crisis escalation are the focus of a forthcoming book, Alliances, Nuclear Weapons, and Escalation.

Arms control can play an important role in preventing nuclear war in at least two ways. First, it can promote arms race stability by reducing incentives to achieve strategic superiority or gain a first-strike advantage. Given the rapid rate of technological change, the United States and China are already locked in competition, which is often driven by private actors rather than the state. Arms control for arms race stability, therefore, might focus on limiting specific applications or operations of a technology that would be particularly risky, such as the use of automation in nuclear decision-making or cyberattacks on nuclear command and control.

But second, and perhaps more importantly, arms control can prevent crisis escalation.

As China builds its strategic arsenal while also becoming increasingly aggressive in the region, the risks of miscalculation and crisis seemingly increase. Princeton scholar David Logan, for example, suggests various inadvertent escalation pathways with regards to China ­– heightened vulnerability, target ambiguity, and warhead ambiguity – exacerbated by misperceptions and missed signals between various actors in the region. Logan goes on to argue that:

Strategic singling and perception management will be key to controlling escalation risks stemming form nuclear-conventional entanglement in China.

### 1NC — CP

#### The United States federal government ought to rule that increased prohibitions on anticompetitive business practices by the private sector where the private party and foreign sovereign did not affirmatively disclose their intent to act in an anti-competitive nature are mandated by Customary International Law.

#### The counterplan establishes CIL’s precedence over domestic law.

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To date, international antitrust cases have only been brought before domestic courts. Those courts, of course, have to apply domestic law. International law is applicable only to the extent that domestic law so provides. Also, when a domestic court has to decide an individual case, it need not determine whether a certain rule is part of domestic law or of international law as long as it is satisfied that the rule exists. Before a domestic court, proof of the existence of a rule of unwritten law is brought by citing as many domestic precedents as possible. Again, it seems to be immaterial whether those precedents reflect customary international law or only domestic rules of conflict of laws. Thus, there seem to be good reasons to subscribe to Lowenfeld's preference for some blend of public law, public international law and private international law.34 In international antitrust practice, however, there are cases where it does matter whether an assumed rule is one of international law or of conflict of laws. Domestic law may attribute a different rank to the two sets of rules. In Germany, for instance, rules of general international law prevail over any statutory law.35 Similarly, within European Community law, secondary legislation enacted by organs of the Communities is void if it violates general international law.36 And, on the level of relations between sovereign states, domestic rules of conflict of laws cannot, of course, be relied upon at all. The two legal systems interact in the process of forming new rules of unwritten law. Rules of conflict of laws may be part of state practice and thereby contribute to the formation of customary international law, and rules of customary internationalaw may be referred to when ascertaining or interpreting principles of conflict of laws. But, in contrast to reciprocal influences on the contents of new rules, their actual creation follows entirely different lines. First, the emphasis in the creation of conflict-of-laws rules is on judge-made law. Domestic courts are easily accessible and may give regular guidance on the development of the law, whereas international adjudication is the exception rather than the rule. Customary international law is mainly formed by theit is hoped, parallel, but usually divergent-practice of some 160 independent states, acting through their legislative, executive and/or judicial branches. Second, the role of legal publicists in the creation of new rules is different as well. In conflict of laws, theoretical approaches may be conceived specifically for adoption into judge-made law. The function of scholars of international law offers less opportunity for creative thinking: they may compile and analyze state practice, but they cannot replace it with their own concepts. Finally, the perspective for analysis is different, too. The- perspective of conflict of laws lies within a state. It is directed to domestic interests, both public and private. Foreign interests are relevant only insofar as they form part of the state's foreign policy, for instance, if they reflect considerations of reciprocity. The perspective of international law stands above the sovereign states. It demands neutrality vis-a-vis the interests of particular states and it implies that, in general, the interests of the individual have to be articulated by sovereign states. These three differences should be kept in mind when state practice is surveyed and analyzed in the next two sections of this paper. They all derive from the same plain truth: domestic rules of conflict of laws make up part of one lawmaking system organized by one constitution and usually based on a broad consensus of values and interests. The decentralized making of international law does not enjoy any of those benefits and is therefore bound to offer a more modest yield of legal rules. But, as should also be remembered, modest answers of international law may often be supplemented by richer ones of conflict of laws.

#### CIL incorporation is key to US leadership in the international legal order---outweighs and turns every impact.

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Every generation gets the Constitution that it deserves. As the central preoccupations of an era make their way into the legal system, the Supreme Court eventually weighs in, and nine lawyers in robes become oracles of our national identity. The 1930s had the Great Depression and the Supreme Court’s “switch in time” from mandating a laissez-faire economy to allowing New Deal regulation. The 1950s had the rise of the civil rights movement and Brown v. Board of Education. The 1970s had the struggle for personal autonomy and Roe v. Wade. Over the last two centuries, the court’s decisions, ranging from the dreadful to the inspiring, have always reflected and shaped who “we the people” think we are. During the boom years of the 1990s, globalization emerged as the most significant development in our national life. With Nafta and the Internet and big-box stores selling cheap goods from China, the line between national and international began to blur. In the seven years since 9/11, the question of how we relate to the world beyond our borders — and how we should — has become inescapable. The Supreme Court, as ever, is beginning to offer its own answers. As the United States tries to balance the benefits of multilateral alliances with the demands of unilateral self-protection, the court has started to address the legal counterparts of such existential matters. It is becoming increasingly clear that the defining constitutional problem for the present generation will be the nature of the relationship of the United States to what is somewhat optimistically called the international order. This problem has many dimensions. It includes mundane practical questions, like what force the United States should give to the law of the sea. It includes more symbolic questions, like whether high-ranking American officials can be held accountable for crimes against international law. And it includes questions of momentous consequence, like whether international law should be treated as law in the United States; what rights, if any, noncitizens have to come before American courts or tribunals; whether the protections of the Geneva Conventions apply to people that the U.S. government accuses of being terrorists; and whether the U.S. Supreme Court should consider the decisions of foreign or international tribunals when it interprets the Constitution. In recent years, two prominent schools of thought have emerged to answer these questions. One view, closely associated with the Bush administration, begins with the observation that law, in the age of modern liberal democracy, derives its legitimacy from being enacted by elected representatives of the people. From this standpoint, the Constitution is seen as facing inward, toward the Americans who made it, toward their rights and their security. For the most part, that is, the rights the Constitution provides are for citizens and provided only within the borders of the country. By these lights, any interpretation of the Constitution that restricts the nation’s security or sovereignty — for example, by extending constitutional rights to noncitizens encountered on battlefields overseas — is misguided and even dangerous. In the words of the conservative legal scholars Eric Posner and Jack Goldsmith (who is himself a former member of the Bush administration), the Constitution “was designed to create a more perfect domestic order, and its foreign relations mechanisms were crafted to enhance U.S. welfare.” A competing view, championed mostly by liberals, defines the rule of law differently: law is conceived not as a quintessentially national phenomenon but rather as a global ideal. The liberal position readily concedes that the Constitution specifies the law for the United States but stresses that a fuller, more complete conception of law demands that American law be pictured alongside international law and other (legitimate) national constitutions. The U.S. Constitution, on this cosmopolitan view, faces outward. It is a paradigm of the rule of law: rights similar to those it confers on Americans should protect all people everywhere, so that no one falls outside the reach of some legitimate legal order. What is most important about our Constitution, liberals stress, is not that it provides rights for us but that its vision of freedom ought to apply universally. The Supreme Court, whose new term begins Oct. 6, has become a battleground for these two worldviews. In the last term, which ended in June, the justices gave expression to both visions. In two cases in particular — one high-profile, the other largely overlooked — the justices divided into roughly two blocs, representing the “inward” and “outward” looking conceptions of the Constitution, with Justice Anthony Kennedy voting with liberals in one case and conservatives in the other. The Supreme Court is on the verge of several retirements; how the justices will address critical issues of American foreign policy in the future hangs very much in the balance. This may seem like an odd way of thinking about international affairs. In the coming presidential election, every voter understands that there is a choice to be made between the foreign-policy visions of John McCain and Barack Obama. What is less obvious, but no less important, is that Supreme Court appointments have become a de facto part of American foreign policy. The court, like the State Department and the Pentagon, now makes decisions in cases that directly change and shape our relationship with the world. And as the justices decide these cases, they are doing as much as anyone to shape America’s fortunes in an age of global terror and economic turmoil. What Conservatives Understand About International Law The debate between inward-looking conservatives and outward-looking liberals has recently taken a turn toward the shrill. Liberal lawyers do not simply accuse their conservative counterparts of denigrating the rule of law; they accuse them of violating it themselves. Calling last spring for the firing of the tenured Berkeley professor John Yoo, an architect of the Bush administration’s legal strategy in the war on terror, Marjorie Cohn, the president of the National Lawyers’ Guild, declared that “Yoo’s complicity in establishing the policy that led to the torture of prisoners constitutes a war crime under the U.S. War Crimes Act.” The conservatives’ arguments are no less heated: not only, they contend, do liberals paint a naïvely romantic picture of the world — one in which the United Nations and its agencies and courts would make law for Americans — but liberals are also endangering American lives. Dissenting this past June from the Supreme Court decision giving those held at Guantánamo Bay a right to challenge their detention, Justice Antonin Scalia wrote that the majority’s ruling “will almost certainly cause more Americans to be killed.” These sorts of accusations are overstated and unhelpful. Neither the liberal nor the conservative view corresponds to the stereotype assigned to it by its opponents. Notwithstanding their limitations, both views express values that are deeply grounded in the American constitutional tradition and in the rule of law. Each is necessary to help us make sense of the Constitution’s role in an increasingly complex global world. Consider first the conservative vision, which is sometimes called “sovereigntist” because it emphasizes the power and prerogative of the United States to act as if it is responsible to no one but itself. The Bush administration, through its characteristic combination of boldness, historical ambition and operational incompetence, has given sovereignty a bad name, much as it has for unilateralism. But the constitutional principle here is actually one that most liberals also fully embrace: namely, the principle of democracy. International law, as even its staunchest defenders must acknowledge, often fails to accord with democratic principle. Such law is not passed by a democratically elected Congress and signed by a democratically elected president. It is true that the U.S. Constitution says that international treaties signed by the president and approved by the Senate shall be the supreme law of the land, thereby conferring some democratic legitimacy on treaties. But a great deal of international law derives not from treaties signed by consenting nations but rather from the vague category of international custom, which over time can harden into binding law. For hundreds of years, until more formal treaties were adopted, custom was the main way international law was created, giving rise to the laws of war, for instance, and condemning terrorism and torture. Even today, the existence of a treaty among only a select group of nations can be invoked in international forums as evidence of an established custom — and nonparticipating countries can come to be bound by treaties that they themselves never signed. To conservatives, such international “law” is anathema. Even in cases in which explicit treaties among nations do exist, conservatives worry. Such treaties, after all, are increasingly interpreted by nondemocratic institutions like tribunals of the World Trade Organization or the United Nations’ International Court of Justice. Two hundred years ago, treaties tended to be simple agreements between two parties, with each reserving the right to interpret (and, if necessary, enforce) the treaty’s terms for itself. Today, though, many of the most important treaties — those governing trade, the environment and other crucial matters — involve a large number of nations that agree as a condition of the treaty to be bound by the decisions of an international body. To sign on to such a treaty, conservatives point out, confers future lawmaking authority on some unelected and thus undemocratic body. According to the sovereigntists, the United States, faced with such undemocratic regimes, should feel free to reject any undesirable verdict of a body like the International Court of Justice and embrace a policy more in line with U.S. interests — much in the way that Israel responded to the I.C.J.’s condemnation of the path of its security barrier on the West Bank. In a world where Libya can lead an international human rights commission, no international institution is free from the distortions that arise when all countries are treated as equals. Even within the distinguished higher echelons of the United Nations or European Union, there is a risk that bureaucrats may pursue policies that reflect the values and priorities of their own technocratic classes. The worst-case scenario, from the perspective of the conservatives, is one in which enemies of the United States engage in “lawfare,” opportunistically charging the country with violations of international law to impede it from rightfully ensuring its safety. Another key sovereigntist principle is the right of the United States, when acting abroad, to protect itself, whether fighting wars or preventing terrorist attacks. Historically, the court has given the president, as commander in chief, great latitude to act abroad as he sees fit. In situations in which Congress has explicitly authorized the president’s action, the court has recognized the prerogative as almost absolute. For instance, when the United States acquired Puerto Rico, Guam and the Philippines in the Spanish-American War, the Supreme Court allowed Congress and the president to govern those territories without extending constitutional rights to the residents. Similarly, after World War II, when Germans held by the United States in occupied Germany pending war-crimes charges petitioned for judicial review, the Supreme Court turned them away. Conservatives argue, not implausibly, that these historic decisions did not undermine the rule of law: they embodied it. The Supreme Court’s judgments derived, after all, from the Constitution itself and its own democratic pedigree. One central reason that the people of the United States formed the Constitution was in order to provide for the common defense. The Constitution does protect rights, according to this view — but they are the rights of citizens, not the rights of mankind in general or of foreigners who have never even set foot in the United States. What Liberals Understand About International Law From the liberal perspective, the vision espoused by the conservatives is crabbed and parochial. Of course the Constitution demands democracy and gives rights to American citizens. But, say the progressives, that does not explain why over the last two centuries the Constitution has become the very model of what a system of government under law looks like. The key to the Constitution’s global appeal, according to the liberal view, is that the document stands for the universal principle that state power over individuals may only ever be exercised through law — no matter what government is acting, and no matter where on earth. This outward-looking, “internationalist” conception of the Constitution respects the sovereignty of the United States and that of other countries — provided they deliver a just legal order to their citizens. But liberals point out that even a constitutional state that guarantees rights for its own citizens will not protect people in many places and times, often when rights are most sorely needed. In wartime, for instance, almost no nation will have an interest in protecting the rights of foreign enemies that it encounters. On the open seas, no domestic law applies. And for reasons of sheer practicality, no country’s laws regulate all its potential relations with all other states. To cover situations like these, where domestic law runs out of rope, is the task of international law. Such law seeks to ensure rights for all, not by replacing the domestic law of independent nations but by holding it to standards of universal justice and by supplementing it where it is incomplete or inadequate. From this perspective, international law is necessary to ensure that the rule of law will actually obtain in situations where individual states do not provide it. This is why, for liberals, it is essential that the United States comply with its international obligations. The framers of the Constitution were certainly eager to demonstrate such compliance. When they made treaties the law of the land, they were saying — according to an interpretation of Chief Justice John Marshall’s that dates back to 1829 — that the moment the Senate ratifies a treaty, it automatically becomes the supreme law of the land, binding in every court in the nation. Deepening their historical argument, the liberals also point out that from the earliest days of the United States, the nation’s courts applied customary international law, regularly deciding who owned ships captured on the high seas according to immemorial practice that was not found in any treaty. What is more, the framers’ reliance on international law and custom went to the very heart of their constitutional endeavor: what, otherwise, did the framers mean when they spoke in the Constitution about the declaration of war, or about letters of marque and reprisal, or about judicial authority over ambassadors? In practice, the internationalist camp argues for the prudent use of international legal materials in constitutional decision-making — not only for purposes of rhetoric and persuasion but also to provide rules and principles to help actually decide cases. For example, liberals argue that if the United States adopts laws designed to comply with the Geneva Conventions, the government is obligated to follow the treaty to the letter should the government invoke the authority to detain prisoners that the treaty confers. Likewise, when the United States has undertaken to comply with the decisions of international tribunals, those tribunals’ rulings must be treated as law, just as the treaties themselves are. Liberals concede that the framers showed respect for international law, in part, because their country was new and revolutionary, and they sought legitimacy in the community of nations. But the liberal view stresses that the tradition of respect continued even once the nation was well established, and that it was kept alive by successive generations for different but always compelling reasons. The United States helped found the United Nations after World War II, for instance, at what was then the nation’s moment of greatest global power. Franklin Delano Roosevelt’s idea, shared by liberals then and now, was that the international rule of law was good not just in principle but also in practice. As a country governed by law, we were asserting the superiority of our system to others governed by dictatorship. Moreover, since the United States was a permanent member of the Security Council, any compromises to our national sovereignty were more than outweighed by the tremendous benefits of having a legitimate international legal order through which, as a superpower, it could assert its will. As liberals see it, being a leading exponent of the rule of law internationally strengthens America’s ability to pressure or bully other countries to respect the rights of their own citizens. In this way, oddly enough, the liberal view is consonant with certain aspirations of the Bush administration. In Afghanistan, Iraq and beyond, President Bush has tried to export liberal constitutionalism, including both elections and basic rights. His “freedom agenda” is, in fact, a direct descendant of liberal internationalism, a policy associated with Woodrow Wilson and his plans to make the world safe for democracy through the work of international institutions. The Bush administration, of course, distrusts international organizations that continue in the tradition of the League of Nations, which Wilson helped to found (though he could not persuade his own country to join it). But Bush’s notion that America’s democratic Constitution should be an inspiration for the world is identifiably Wilsonian — as is the zeal to spread the good word, voluntarily when possible but by force if necessary. If the greatest tragedy of the Bush presidency is the enormous human cost of America’s ham-handed efforts to accomplish this worthy goal, a second, related tragedy is that the spreading of constitutional democracy is rarely talked about anymore as a liberal goal at all. The Court’s Liberal Victory Each constitutional worldview — the one conservative and inward-looking, the other liberal and outward-focused — has found exponents on the current Supreme Court. This past spring, in two cases before the court, each side won an important victory. The larger battle, however, was widely overlooked. The liberal victory was widely publicized, but its full implications were not often noted. As for the conservative win, its very existence went almost entirely unnoticed. The liberal victory, in the case of Boumediene v. Bush, took place against the backdrop of the detentions of suspected terrorists at Guantánamo Bay, Cuba. The detainees were being held there because the Bush administration’s lawyers were confident that, under the Supreme Court’s precedent, the detainees would not enjoy constitutional rights. Like the Germans denied review after World War II, the detainees were noncitizens who were neither arrested nor held in the United States. Guantánamo was leased from Cuba under a 1903 treaty, so it was not in the United States, and yet there was no tradition of applying Cuban law there. In light of these circumstances, the Bush administration seemed to believe it could treat Guantánamo as a law-free zone. Unlike Iraq, which the administration conceded was a war zone in which the Geneva Conventions applied, Guantánamo was initially considered legally off the grid. It is often said by liberal critics that Bush’s anti-terror policies ignored the Constitution and international law. But this is a misleading oversimplification. What the choice of Guantánamo demonstrates, rather, is the profoundly legalistic way in which those policies were designed. Using the law itself, the lawyers in the Bush administration set out to make Guantánamo into a legal vacuum. The court’s decision in Boumediene repudiated that attempt. The majority, led by Justice Kennedy, announced that for constitutional purposes, Guantánamo Bay was part of the United States: the detainees there enjoyed the same rights as if they had been held in Washington. The Boumediene decision was chiefly the accomplishment of Justice John Paul Stevens, who has made overturning the Bush detention policies into the legacy-defining task of his distinguished career. In key opinions issued in 2004 and 2006, Stevens chipped away at the special status asserted for Guantánamo, each time referring the matter of judicial review for the detainees back to Congress. But Congress repeatedly approved the administration’s proposals to deny access to the courts. To win the fight even against Congress, Stevens needed Kennedy to provide the fifth vote and hold that denying the Guantánamo detainees their day in court actually violated the Constitution. The opinion that Kennedy wrote for the court’s majority in Boumediene announced squarely that the Constitution applied to the detainees being held in Guantánamo. Kennedy insisted that he was not overruling the precedent of the German detainees who were denied review. Unlike the situation with the Germans after World War II, he argued, the Guantánamo detainees had not received a hearing; the Guantánamo naval base was entirely under U.S. control; and granting hearings was not so impractical that it would fundamentally disrupt the operation of the prison. In effect, however, Kennedy’s opinion rejected what the Bush administration claimed to be the rule that noncitizens held outside the United States were not entitled to constitutional protection. Having refused to overturn Roe v. Wade in the 1990s and having championed gay rights in recent years, Kennedy may now be depicted as an unlikely liberal hero — the latest in a line of Republican appointees (one of whom is John Paul Stevens) who gradually evolved into staunch exponents of liberal rights. The key to Kennedy’s reasoning in the Guantánamo case was his expansive conception of the rule of law. In the central paragraph of the decision, Kennedy explained his underlying logic: if Congress and the president had the power to take control of a territory and then determine that U.S. law does not apply there, “it would be possible for the political branches to govern without legal constraint,” he wrote. Government without courts, Kennedy suggested, was not constitutional government at all. “Our basic charter,” he went on, “cannot be contracted away like this.” What seemed to most offend Kennedy about Guantánamo, then, was precisely the effort by the executive branch, with the approval of Congress, to make Guantánamo into a place beyond the reach of any law. By insisting on its own authority, the court was striking a blow for law itself. In this way, the court embraced the ideal of the outward-looking Constitution: a document that protects the rights not only of citizens within the United States but also of noncitizens outside its formal borders. This Constitution, by extension, stands for the ideal of legal justice being made available to all persons — no matter where they might be. Holding that the Constitution did indeed follow the flag to Guantánamo was an act with tremendous international resonance. It can even be read as an attempt to hold the Bush administration to its own rhetoric about democracy. The rule of law, after all, is not solely an American ideal but one that is broadly shared globally. To insist that some law covers all people wherever they may be found underscores the universality that law aims to create. The Court’s Conservative Victory From the conservative point of view, of course, Kennedy’s decision did not follow from the basic principle of the rule of law. According to the four conservative dissenting justices, whose views closely tracked those of the Bush administration, the Constitution unquestionably binds the government. But according to their view, the Constitution also allows the president and Congress, acting together, to lease or even acquire territory and govern it without allowing recourse to the courts. Indeed, this view was precisely the one adopted by the Supreme Court after the Spanish-American War, when the United States was a rising imperial power. The dissenters in Boumediene actually agree with the liberals that law does apply to Guantánamo; they just maintain that the courts are not part of it. The conservative cause may have lost in Boumediene. It prevailed, however, in a case decided last March that garnered little public attention— but that was, in its own way, just as important to defining our constitutional era. The case, Medellín v. Texas, grew from a conflict between the Supreme Court and the International Court of Justice over death-row inmates in the United States who were apparently never told they had the right to speak to the embassies of their home countries, a right guaranteed by a treaty called the Vienna Convention on Consular Relations. The international court declared that the violation tainted the inmates’ convictions and insisted that they have their day in court to try to get them overturned. The Supreme Court disagreed. In his initial trial and appeal, José Medellín, the man who brought the Supreme Court case, did not raise his right to speak to his embassy — presumably because, having never been informed of the right, he had no idea that it existed. Under the arcane rules for postconviction judicial review, a defendant ordinarily cannot ask the courts to consider legal arguments that were not raised when he was tried in the first place. And in its decision, the court upheld those rules: the violation of the treaty, it held, did not demand any special exception to the usual rules governing review. The fact that the United States had violated its international-treaty obligation was of no use on death row. Medellín was executed by the State of Texas on Aug. 5. What made this conflict between the Supreme Court and the International Court of Justice particularly stark was that the Bush administration had for once taken the side of international law. Before the Supreme Court issued its opinion, President Bush issued a memorandum advising state courts to follow the judgment of the International Court of Justice. With the ruling of the Supreme Court on one side, and that of the international court — endorsed by the president — on the other, just what did the Constitution require the state courts to do? The United States signed three separate treaties stating that it undertook to obey the judgments of the International Court of Justice. But the Supreme Court bridled at the thought that the international court’s decision might trump its own. This was not just instinctive turf-protection, though that concern no doubt played a part. Never before had an international body replaced the Supreme Court in telling lower courts in the United States that their own procedural rules were unacceptable. The natural order of things seemed to be turned on its head. The Supreme Court held that the treaties obligating us to listen to the International Court of Justice were not binding law. Chief Justice John Roberts wrote that a careful reading of the text of the treaties revealed no intention to subject the United States to the judgments of the international court — not, that is, unless Congress passed a separate statute demanding such obedience. This opinion upended the rules for applying treaties in the U.S. courts. In dissent, Justice Breyer painted a grim picture of the consequences. If treaties were not automatically binding law unless they said so, he wrote, the applicability of some 70 treaties involving economic cooperation, consular relations and navigation was now thrown into doubt. The rest of the world, he intimated, would be left wondering whether the United States intended to obey its treaty obligations or not — which is not a trivial concern when the world also suspects the United States of ignoring its obligations of humane treatment under the Geneva Conventions. To Breyer, the decision was a reversal of nearly 180 years of precedent and a message to the world that the United States was prepared to play fast and loose with its international commitments. When the justices rejected the death-row appeal, they were acting on the basis of familiar conservative concerns. The judges of the International Court of Justice were not appointed according to any constitutional procedure. To let the international body decide matters of law that would be binding for state courts seemed fundamentally undemocratic — an unjust usurpation of the judicial function. It would be absurd for the Constitution, as the core document of our democracy, to require such a result. The old precedent regarding treaties was thus, according to the conservatives, truly obsolete. It made no sense to apply it in a globalized world where treaties are not just straightforward agreements between sovereign states; now, they often create irresponsible international tribunals to adjudicate their meaning. If the judgments of an international court were to be obligatory, a democratically legitimate body should say so explicitly — either the Senate that approved the treaty promising compliance or the whole Congress in a separate legal enactment. By its own lights, the Supreme Court in the Medellín case was reading the Constitution to guarantee us control over our own destiny. That meant turning away from international law in a systematic and profound sense. The cost to the United States might be real, but the court considered it justified by the preservation of our democratic sovereignty. Which Side Is Right? The Boumediene decision saw the Constitution as facing outward, expanding and promoting the rule of law throughout the world. The Medellín decision, by contrast, saw the Constitution as a domestic blueprint designed to preserve and protect the United States from foreign encroachment, even at some cost to the international rule of law. Underscoring the tension between the two cases is the fact that nearly all the justices of the Supreme Court voted consistently across both of them. The four conservatives — Justices Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito — dissented from the extension of habeas corpus rights to Guantánamo Bay in Boumediene and joined the majority opinion in Medellín that made it harder for treaties to become law. Meanwhile the court’s liberals — Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer — joined the majority in the Guantánamo case, and all but Stevens dissented in Medellín. (Though Stevens voted with the majority in that case, he did so seemingly only for tactical reasons; he wrote a separate, concurring opinion that did not embrace the logic of Roberts’s majority opinion.) The key vote in both cases was that of Kennedy. In both cases, he acted to uphold the prerogatives of the Supreme Court — against the president and Congress in the Guantánamo case, and against the international court in the Medellín decision. And Kennedy does argue that such judicial supremacy is crucial to the rule of law. But the other justices did not see the cases in those terms. To them, the cases were not primarily about the perennial issue of the division of powers between the different branches of government. To these eight justices, the cases were about what sort of Constitution we have: either outward-facing or inward-looking. Who is right? It is tempting to conclude that the Constitution must look inward and outward simultaneously. But embracing contradiction is not the answer, either. Instead what we need to resolve the present difficulty is a subtle shift in perspective. There is an important way in which neither of the predominant approaches to the Constitution and the international order can provide a fully satisfactory answer to the problem. Although they differ deeply about what the Constitution teaches, the two sides share a common image of what the Constitution is. Both imagine it to be a blueprint offering a coherent worldview that will allow us to reach the best results most of the time. According to this shared assumption, the way to find the real or the true Constitution is to identify the core values that the document and the precedents stand for, and to use these as principles to interpret the Constitution correctly. There is nothing wrong with this picture of constitutional interpretation when it is applied to the vast majority of constitutional decisions, from the right to bear arms to the meaning of equal protection of the laws. Deciding what deep principles emerge from our history can help resolve even problems unimagined by the framers, like those presented by abortion or claims to gay rights. Most of the time, constitutional interpretation proceeds in precisely this way — and so it should. But when we are talking about the basic direction the country needs to face in order to achieve its goals in the modern world, deriving principles from history is often inadequate to dictate outcomes. The national and global situations in which we find ourselves are ever-changing. The ship of state must navigate in waters that correspond to no existing chart. The complexity of the world, coupled with the profound changes in the role the United States plays in it, is a very different thing from, say, our progressive recognition that African-Americans, women, gays and lesbians deserve the same equality and respect as everybody else. For this reason, when the world has changed drastically, the Constitution has always had the flexibility to change along with it. The industrial economy, for example, was so much bigger and more complex than the economy of 1787 that the old constitutional order no longer worked. The New Deal ushered in systematic regulation and administrative agencies that had no real place in the three-branch system — but that we now accept as constitutional today. The original federal system limiting the power of the central government relative to the states also had to be reconfigured when the economy became truly national. The changed nature of the president’s war powers offers yet another pragmatic example of flexibility and change. Modern wars demand rapid decision-making and overwhelming concentrations of force; in the light of these needs, we have largely abandoned the framers’ model for war powers, which gave Congress much more authority than it is able to exercise today. On each occasion that the Supreme Court has had to confront such drastically changed circumstances, it has adopted the approach of seeing constitutional government as an ongoing experiment. Justice Oliver Wendell Holmes Jr. wrote that our system of government is an experiment, “as all life is an experiment.” Justice Robert Jackson, confronting the separation of powers — about which the Constitution is cryptic at best — admitted frankly that nothing in the document, the case law or the scholars’ writings got him any closer to an answer. Then he tried to come up with his own rules, designed to reflect political reality and the changed nature of the presidency. Looking at today’s problem through the lens of our great constitutional experiment, it emerges that there is no single, enduring answer to which way the Constitution should be oriented, inward or outward. The truth is that we have had an inward- and outward-looking Constitution by turns, depending on the needs of the country and of the world. Neither the text of the Constitution, nor the history of its interpretation, nor the deep values embedded in it justify one answer rather than the other. In the face of such ambiguity, the right question is not simply in what direction does our Constitution look, but where do we need the Constitution to look right now? Answering this requires the Supreme Court to think in terms not only of principle but also of policy: to weigh national and international interests; and to exercise fine judgment about how our Constitution functions and is perceived at home and abroad. The conservative and liberal approaches to legitimacy and the rule of law need to be supplemented with a healthy dose of real-world pragmatism. In effect, the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own. On the surface, it seems as if such inevitably political judgments are not the proper province of the court. If assessments of the state of the world are called for, shouldn’t the court defer to the decisions of the elected president and Congress? Aren’t judgments about the direction of our country the exclusive preserve of the political branches? Indeed, the Supreme Court does need to be limited to its proper role. But when it comes to our engagement with the world, that role involves taking a stand, not stepping aside. The reason for this is straightforward: the court is in charge of interpreting the Constitution, and the Constitution plays a major role in shaping our engagement with the rest of the world. The court therefore has no choice about whether to involve itself in the question of which direction the Constitution will face; it is now unavoidably involved. Even choosing to defer to the other branches of government amounts to a substantive stand on the question. That said, when the court exercises its own independent political judgment, it still does so in a distinctively legal way. For one thing, the court can act only through deciding the cases that happen to come before it, and the court is limited to using the facts and circumstances of those cases to shape a broader constitutional vision. The court also speaks in the idiom of law — which is to say, of regular rules that apply to everyone across the board. It cannot declare, for instance, that only this or that detainee has rights. It must hold that the same rights extend to every detainee who is similarly situated. This, too, is an effective constraint on the way the court exercises its policy judgment. Indeed, it is this very regularity that gives its decisions legitimacy as the product of judicial logic and reasoning. Why We Need More Law, More Than Ever So what do we need the Constitution to do for us now? The answer, I think, is that the Constitution must be read to help us remember that while the war on terror continues, we are also still in the midst of a period of rapid globalization. An enduring lesson of the Bush years is the extreme difficulty and cost of doing things by ourselves. We need to build and rebuild alliances — and law has historically been one of our best tools for doing so. In our present precarious situation, it would be a terrible mistake to abandon our historic position of leadership in the global spread of the rule of law. Our leadership matters for reasons both universal and national. Seen from the perspective of the world, the fragmentation of power after the cold war creates new dangers of disorder that need to be mitigated by the sense of regularity and predictability that only the rule of law can provide. Terrorists need to be deterred. Failed states need to be brought under the umbrella of international organizations so they can govern themselves. And economic interdependence demands coordination, so that the collapse of one does not become the collapse of all. From a national perspective, our interest is less in the inherent value of advancing individual rights than in claiming that our allies are obligated to help us by virtue of legal commitments they have made. The Bush administration’s lawyers often insisted that law was a tool of the weak, and that therefore as a strong nation we had no need to engage it. But this notion of “lawfare” as a threat to the United States is based on a misunderstanding of the very essence of how law operates. Law comes into being and is sustained not because the weak demand it but because it is a tool of the powerful — as it has been for the United States since World War II at least. The reason those with power prefer law to brute force is that it regularizes and legitimates the exercise of authority. It is easier and cheaper to get the compliance of weaker people or states by promising them rules and a fair hearing than by threatening them constantly with force. After all, if those wielding power really objected to the rule of law, they could abolish it, the way dictators and juntas have often done the world over. On those occasions when the weak, using the machinery of courts, are able to vindicate their legal rights, the reason their demands are honored is generally that those who have the most influence in the system recognize it is in their own long-term interest to make the concession. Those who consider law a tool of the weak mistake these rare trade-offs for defeat, when — from the perspective of power — they are simply part of the cost of doing business. This is why, for example, the police and prosecutors embrace the Miranda warnings: they require that defendants be read their rights. But once the formality is satisfied, it is almost guaranteed that the defendants’ statements will be admissible into evidence. Applying the lesson that the world and the United States need law more than ever at this particular moment yields some specific conclusions. The executive branch certainly should be accorded considerable leeway in defending the nation from attacks by stateless groups like Al Qaeda. But it was an error of constitutional dimensions to choose Guantánamo as a global symbol of those efforts precisely because of the way it seemed to be outside the reach of our domestic Constitution, the law of any other country or international law itself. The Supreme Court therefore was right to reinsert Guantánamo in the legal grid — but not because this was definitively the best reading of the constitutional materials, which were contradictory and indeterminate. What justifies the decision is the practical necessity and importance of reassuring the citizens of the United States and the world at large that the United States had not given up the role it assumed after World War II as the chief proponent of the rule of law worldwide. Not every Supreme Court decision has this monumental symbolic effect — but the Boumediene case was guaranteed to be seen as either a victory or a defeat for the very idea of law itself. In an ideal world, the Supreme Court would not have had to send this message, and it could have avoided the substantial expansion of its own power to which it was driven by the foolishness of the Bush administration. The Medellín case is trickier. On one hand, globalization inevitably inserts us into an ever-widening array of treaty regimes, each with its own mechanism of adjudication. There is no turning back the clock to the simpler world of the framers. Joining the World Trade Organization, as we have, or the Kyoto Protocol, as we ultimately have not, does detract from the democratic legitimacy of the laws that govern us. This lesson can be easily learned from a glance at the European Union, where countries increasingly cede sovereign authority to the bureaucrats in Brussels. Under these circumstances, there is much to be said for requiring either the treaty ceding this authority to speak explicitly, or else for Congress to make this concession expressly, in full view of the public who elects it. On the other hand, there is the problem of timing. Had the United States not invaded Iraq under a claim of international law that many other countries rejected, or had the Guantánamo disaster been avoided by the exercise of wiser judgment, it would be relatively easy to conclude that the Supreme Court was right to pull us back from too rapid an entrance into an international order that undercuts our sovereignty. But the treaty decision came at just the moment when the United States was trying to reassert its commitment to the rule of law internationally. The conservatives who carried the day did not care. For them, upholding international judgments that differ from our own courts’ is inconsistent with our core constitutional values. The message sent, then, in the world and at home, is precisely the wrong one for this historical juncture, when the United States needs — at least for the moment — to convince the world that the project of international legality is one in which we believe. What the Election May Bring There are going to be many more opportunities in the coming years for the court to take a position on the Constitution and the international order. Should John McCain become president, there is good reason to believe he would be more committed than President Bush to the international rule of law. Influenced by his experience of being tortured in Vietnam, McCain has sponsored legislation requiring that U.S. government personnel comply with the Geneva requirement of humane treatment of prisoners. Yet McCain has also snubbed Justice Kennedy, promising to nominate justices like Roberts and Alito in their ideological orientation; justices of this persuasion are likely to see the Constitution in largely inward-looking terms. Meanwhile, Barack Obama, with his globalized upbringing and insistence on multilateralism, could be expected, as president, to nominate justices more sympathetic to an outward-looking Constitution. But if, as seems likely, the first retirees from the court are liberals, the best Obama could hope for would be to maintain the status quo — not to institutionalize a liberal majority for the future. Whichever candidate is elected, once the Bush administration is out of office, the war on terror will almost certainly be waged differently, and the constitutional issues that arise will not be exactly the same as before. Guantánamo Bay will probably be closed, and the legal team that planned it will be long gone. But most of its detainees will still have to be tried, and their appeals will reach the Supreme Court once again. Of course we will still want to catch terrorists — especially before they act — and we will have to figure out what to do with them when we do. No matter who is president, the United States will still find itself deeply enmeshed in the affairs of Afghanistan, even if in the next few years there are substantial troop withdrawals from Iraq. At the same time, the processes of globalization have not been turned back by the war on terror. The growing global financial crisis calls for more international regulation, not less. Conflicts between U.S. courts and international tribunals about the meaning of our international obligations are going to become more and more common, just as they have become for members of the European Union. Next time, the Supreme Court may not be able to avoid conflict by asserting that the courts are not obligated to listen to the international body. When that happens, new doctrines and solutions are going to have to be developed. In these all-important processes, as always in the history of the court, people are everything. Justices vary widely in temperament, ideology, intelligence and preparedness. The best justices can be really very impressive; the worst ones truly disastrous. Charged with interpreting the Constitution and therefore shaping its contemporary orientation, the Supreme Court needs to be extraordinarily sensitive to the demands of history. When the court gets it wrong, the consequences can be serious. The Constitution we get will still be the one we deserve, but our deserts need not be good ones. The Constitution, let us not forget, gave us slavery and segregation. It gave us dysfunctional limitations on progressive legislation that was desperately needed in the years before the Great Depression. We like to think the Constitution is always leading us toward a more perfect union. But this has not always been the case, and as with any experiment, there is no guarantee that it will be in the future.

### 1NC — DA

#### The DOJ has just committed to focusing enforcement on shipping cartels now and they’re key to compliance

Consadine 9/8/21, Attorneys in Maritime and Transportation Group for Seward & Kissell LLC. ( Shipping Companies Beware: Antitrust Challenges Ahead as DOJ Focuses On Industry, <https://www.sewkis.com/publications/shipping-companies-beware-antitrust-challenges-ahead-as-doj-focuses-on-industry/>

In response to U.S. President Joseph Biden’s July 9, 2021 Executive Order to enhance competition and antitrust enforcement, the U.S. Federal Maritime Commission (“FMC”) entered into a Memorandum of Understanding (“MOU”) with the Antitrust Division of the U.S. Department of Justice (“DOJ”) to facilitate criminal investigations of violations of U.S. laws. Given that shipping companies and their employees may be separately charged by DOJ regardless of their physical location and face draconian penalties upon conviction, it is incumbent for all shipping companies – foreign and domestic – to monitor these recent developments and take steps to minimize the likelihood of harmful consequences, including by establishing or enhancing existing compliance programs. Overview of the MOU On July 12, 2021, the FMC and DOJ signed its first interagency MOU to foster cooperation in the enforcement of antitrust and other laws related to the maritime industry. Key provisions of the MOU provide that the agencies will: i) share information and materials relevant to the competitive conditions in the U.S.-international ocean liner shipping industry, including terminal services provided to ocean liners, and ii) confer, at least annually, to discuss and review enforcement and regulatory matters. Unlike the FMC, DOJ has the authority to bring criminal charges against alleged offenders of antitrust laws. In the past, DOJ has made its presence known by issuing statements regarding certain alliance agreements (vessel-sharing agreements); this MOU raises the stakes as it suggests more intense scrutiny by DOJ. FMC Activity, Audit Program and Recent Litigation On July 19, 2021, within days of the Executive Order and the signing of the MOU, the FMC also disclosed the Vessel-Operating Common Carrier Audit Program to review carrier compliance with FMC’s detention and demurrage rule. As part of this new audit program, the FMC will audit the top nine carriers by market share ― i.e., Maersk, MSC, CMA CGM, COSCO Group, Hapag-Lloyd, ONE, Evergreen, HMM and Yang Ming. Initially, the FMC will request information from the carriers to create a database of quarterly reports on detention and demurrage practices, and will follow with individual carrier interviews. The audit may also focus on other aspects of these companies’ practices and operations, such as billing, appeals procedures, penalties assessed by the lines, and any other restrictive practices. Significantly, the FMC has already been auditing carriers to address issues concerning intermodal congestion related to COVID-19 and to identify operational solutions to cargo delivery system challenges. The FMC is apparently poised to investigate eight carriers ― CMA CGM, Hapag-Lloyd, HMM, Matson, MSC, OOCL, SM Line and Zim ― that were identified as having implemented congestion-related surcharges. In August, the FMC requested information about these surcharges from these carriers. The FMC’s inquiry may focus on whether surcharges were implemented following proper notice, if their purpose was clearly defined, and whether there were clear events or conditions that triggered or terminated the surcharges. The FMC suggested enforcement action may occur if tariffs are improperly established. Shipping customers are also imploring the FMC to investigate shipping practices. On July 28, 2021, MCS Industries, a Pennsylvania-based home furnishings manufacturer, filed an administrative proceeding against COSCO and MSC, alleging that the carriers had violated provisions of the Shipping Act and refused to honor their service contracts, calling for the FMC to conduct an investigation of these companies’ shipping practices. COSCO and MSC have denied the allegations and noted, among other things, that MCS’s complaint should be heard in the fora specified in its respective service contracts with the carriers. An administrative law judge was appointed to hear the matter, the outcome of which should be closely watched by industry participants. DOJ Antitrust Landscape DOJ’s coordinated efforts with the FMC have implications for the shipping industry as DOJ antitrust prosecutions have been both expansive and punitive. DOJ’s jurisdiction includes foreign business activities that have a “substantial and intended effect in the U.S.” That broad reach has impacted numerous companies throughout the world in various industries ranging from auto parts to air cargo. Companies in such industries have paid millions of dollars in penalties and many of their employees have been imprisoned. The shipping industry has not been spared. In a long-running investigation, a Norwegian shipping company and its executives were indicted for their participation in an antitrust conspiracy focused on the allocation of customers and routes, rigging bids, and fixing prices for the sale of international ocean shipments of roll-on, roll-off cargo to and from the United States. The company pled guilty and was sentenced to pay a $21 million fine; four individuals have already been sentenced to serve prison terms. Four other companies also pled guilty for their roles in the conspiracy, leading to the assessment of more than $255 million in criminal fines. Importance of Compliance Programs Given these developments, it is important for all shipping companies to establish effective compliance programs. Since 2019, DOJ has resolved certain criminal investigations without charges where DOJ concluded that the companies under investigation have implemented adequate and effective compliance programs. This leniency policy was implemented to incentivize companies to prioritize antitrust compliance and to be proactive in detecting and reporting anticompetitive behavior. Under this policy, DOJ will not automatically grant leniency to companies that merely maintain a compliance program. Rather, DOJ will determine whether the compliance plan is adequate. If deemed adequate, even where unlawful conduct has occurred, more lenient treatment is potentially available. In determining the adequacy of compliance plans, DOJ’s Guidance on Corporate Compliance Programs is instructive. That Guidance details the components of an effective compliance program, including whether the company at issue has devoted sufficient antitrust compliance resources, conducted training, created effective reporting systems, and tailored the compliance program to the company’s business and industry. Conclusion For those companies operating under DOJ jurisdiction, the existence of an effective compliance program minimizes the likelihood of an investigation and decreases the resulting penalties where violations occur. With the FMC and DOJ now committing to collaborating in investigating the shipping industry, it is crucial to follow developments arising from this collaboration and to implement a substantial compliance program to curtail the occurrence of improper conduct and to minimize penalties should misconduct occur.

#### Antitrust is zero sum — new priorities trades off with existing ones

Rosenberg 20, Chuck Rosenberg is a former U.S. attorney, senior FBI official and chief of the Drug Enforcement Administration. (Chuck, “Why the Attorney General's Meddling on Antitrust Issues Matters,” <https://www.lawfareblog.com/why-attorney-generals-meddling-antitrust-issues-matters>)

Third, by focusing on frivolous cases, meritorious cases wither. Remember, the Antitrust Division has limited resources to assess more than 2,000 proposed mergers each year. They can look closely at only a small fraction of that number. But, as Elias noted, [a]t one point, cannabis investigations accounted for five of the eight active merger investigations in the office that is responsible for the transportation, energy, and agriculture sectors of the American economy. The investigations were so numerous that staff from other offices were pulled in to assist, including from the telecommunications, technology, and media offices. There is a zero-sum game aspect to that arrangement. You cannot simply add more capacity to do all the important things that need to be done. If you are directed to do something frivolous, then something meritorious may be overlooked.

#### The DOJ has sole authority for the plan

DOJ 17 [U.S. Department of Justice and Federal Trade Commission, “Antitrust Guidelines For International Enforcement and Cooperation: Issued By the U.S. Department of Justice and the Federal Trade Commission,” 01/13/17, https://www.ftc.gov/system/files/documents/public\_statements/1049863/international\_guidelines\_2017.pdf, EA}

The Sherman Antitrust Act (“Sherman Act”) sets forth general antitrust prohibitions.11 Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies that unreasonably restrain “trade or commerce among the several States, or with foreign nations.”12 Section 2 outlaws monopolization, attempts to monopolize, and conspiracies to monopolize “any part of the trade or commerce among the several States, or with foreign nations.”13 Section 6a, added by the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), clarifies the Sherman Act’s application to conduct involving only non-import foreign commerce.14

Violations of the Sherman Act may be prosecuted as civil or criminal offenses. The Department has sole responsibility for the criminal enforcement of the Sherman Act and criminally prosecutes traditional per se offenses of the law, which typically involve price fixing, customer allocation, bid rigging, or other cartel activities that would also be violations of the law in many countries. Criminal violations of the Act are punishable by fines and imprisonment. The Sherman Act provides that corporate defendants may be fined up to $100 million and individual defendants may be fined up to $1 million and sentenced to up to 10 years imprisonment.15

#### Shipping cartels are crushing U.S. maritime industry

O’Shea 17, an attorney who works on transportation and infrastructure issues, (Sean, October 3, 2017, Congress Must Stop Foreign Ocean Carriers From Harming U.S. Economy, https://morningconsult.com/opinions/congress-must-stop-foreign-ocean-carriers-from-harming-u-s-economy/)

But America’s maritime industry will not be able to continue to attract private investors and lenders to build infrastructure to meet this future economic demand unless Congress takes action now to end price-fixing and other anticompetitive practices by foreign ocean carriers that stifle industry profits, put jobs at risk and stifle private investment in much-needed port infrastructure upgrades. In particular, carriers immunized from antitrust regulation are also ordering enormous, new 22,000-container ships that will require new cranes and shore facilities, but they will not provide long-term volume guarantees necessary for ports to finance these capital improvements through regular commercial markets. Aside from this obvious legislative restoration of reasonable balance to enable private industry to meet demands, the two equally unacceptable outcomes are to do without the infrastructure and pay the economic penalty when bottlenecks occur, or look to taxpayer-funded solutions.

#### Maritime industry key to naval readiness

Clark et al 20, Senior Fellow at the Center for Strategic and Budgetary Assessments. (Bryan, with Timothy A. Walton Research Fellow at the Center for Strategic and Budgetary Assessments, and Adam Lemon a former Research Assistant at the Center for Strategic and Budgetary Assessments, STRENGTHENING THE U.S. DEFENSE MARITIME INDUSTRIAL BASE A PLAN TO IMPROVE MARITIME INDUSTRY’S CONTRIBUTION TO NATIONAL SECURITY, <https://csbaonline.org/uploads/documents/CSBA8199_Maritime_Industrial_FINAL.pdf>)

The U.S. maritime industry is essential to American prosperity and security. Since their nation’s founding, Americans have gone to sea for trade, to harvest resources from the oceans, and to advance the country’s interests. By building and repairing ships, training mariners, operating shipping networks, and sustaining ports and waterways, the U.S. maritime industry makes possible the economic benefits of access to the sea. In an era of great power competition, a robust maritime industry, and the policies that support it, are increasingly important to U.S. national security. Private shipyards build and repair U.S. warships, sometimes alongside civilian vessels. U.S. shipping companies and their civilian mariners transport military personnel, equipment, and supplies overseas. And private dredging, salvage, towing, intermodal transport, and harbor services companies ensure the operation of America’s military and commercial ports and waterways.

#### Naval power independently solves every impact

Eaglen & McGrath 11 – (Mackenzie Eaglen is Research Fellow for National Security in the Douglas and Sarah Allison Center for Foreign Policy Studies, a division of the Kathryn and Shelby Cullom Davis Institute for International Studies, at The Heritage Foundation; Bryan McGrath is a retired naval officer and the Director of Delex Consulting, Studies and Analysis in Vienna, Virginia. On active duty, he commanded the destroyer USS Bulkeley (DDG 84) and served as the primary author of the current maritime strategy; “Thinking About a Day Without Sea Power: Implications for U.S. Defense Policy”; The Heritage Foundation; D.A. February 12th 2020, [Published May 16th 2011]; <https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy>)

Global Implications. Under a scenario of dramatically reduced naval power, the United States would cease to be active in any international alliances. While it is reasonable to assume that land and air forces would be similarly reduced in this scenario, the lack of credible maritime capability to move their bulk and establish forward bases would render these forces irrelevant, even if the Army and Air Force were retained at today’s levels. In Iraq and Afghanistan today, 90 percent of material arrives by sea, although material bound for Afghanistan must then make a laborious journey by land into theater. China’s claims on the South China Sea, previously disputed by virtually all nations in the region and routinely contested by U.S. and partner naval forces, are accepted as a fait accompli, effectively turning the region into a “Chinese lake.” China establishes expansive oil and gas exploration with new deepwater drilling technology and secures its local sea lanes from intervention. Korea, unified in 2017 after the implosion of the North, signs a mutual defense treaty with China and solidifies their relationship. Japan is increasingly isolated and in 2020–2025 executes long-rumored plans to create an indigenous nuclear weapons capability.[[11]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn11) By 2025, Japan has 25 mobile nuclear-armed missiles ostensibly targeting China, toward which Japan’s historical animus remains strong. China’s entente with Russia leaves the Eurasian landmass dominated by Russia looking west and China looking east and south. Each cedes a sphere of dominance to the other and remains largely unconcerned with the events in the other’s sphere. Worldwide, trade in foodstuffs collapses. Expanding populations in the Middle East increase pressure on their governments, which are already stressed as the breakdown in world trade disproportionately affects food importers. Piracy increases worldwide, driving food transportation costs even higher. In the Arctic, Russia aggressively asserts its dominance and effectively shoulders out other nations with legitimate claims to seabed resources. No naval power exists to counter Russia’s claims. India, recognizing that its previous role as a balancer to China has lost relevance with the retrenchment of the Americans, agrees to supplement Chinese naval power in the Indian Ocean and Persian Gulf to protect the flow of oil to Southeast Asia. In exchange, China agrees to exercise increased influence on its client state Pakistan. The great typhoon of 2023 strikes Bangladesh, killing 23,000 people initially, and 200,000 more die in the subsequent weeks and months as the international community provides little humanitarian relief. Cholera and malaria are epidemic. Iran dominates the Persian Gulf and is a nuclear power. Its navy aggressively patrols the Gulf while the Revolutionary Guard Navy harasses shipping and oil infrastructure to force Gulf Cooperation Council (GCC) countries into Tehran’s orbit. Russia supplies Iran with a steady flow of military technology and nuclear industry expertise. Lacking a regional threat, the Iranians happily control the flow of oil from the Gulf and benefit economically from the “protection” provided to other GCC nations. In Egypt, the decade-long experiment in participatory democracy ends with the ascendance of the Muslim Brotherhood in a violent seizure of power. The United States is identified closely with the previous coalition government, and riots break out at the U.S. embassy. Americans in Egypt are left to their own devices because the U.S. has no forces in the Mediterranean capable of performing a noncombatant evacuation when the government closes major airports. Led by Iran, a coalition of Egypt, Syria, Jordan, and Iraq attacks Israel. Over 300,000 die in six months of fighting that includes a limited nuclear exchange between Iran and Israel. Israel is defeated, and the State of Palestine is declared in its place. Massive “refugee” camps are created to house the internally displaced Israelis, but a humanitarian nightmare ensues from the inability of conquering forces to support them. The NATO alliance is shattered. The security of European nations depends increasingly on the lack of external threats and the nuclear capability of France, Britain, and Germany, which overcame its reticence to military capability in light of America’s retrenchment. Europe depends for its energy security on Russia and Iran, which control the main supply lines and sources of oil and gas to Europe. Major European nations stand down their militaries and instead make limited contributions to a new EU military constabulary force. No European nation maintains the ability to conduct significant out-of-area operations, and Europe as a whole maintains little airlift capacity. Implications for America’s Economy. If the United States slashed its Navy and ended its mission as a guarantor of the free flow of transoceanic goods and trade, globalized world trade would decrease substantially. As early as 1890, noted U.S. naval officer and historian Alfred Thayer Mahan described the world’s oceans as a “great highway…a wide common,” underscoring the long-running importance of the seas to trade.[[12]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn12) Geographically organized trading blocs develop as the maritime highways suffer from insecurity and rising fuel prices. Asia prospers thanks to internal trade and Middle Eastern oil, Europe muddles along on the largesse of Russia and Iran, and the Western Hemisphere declines to a “new normal” with the exception of energy-independent Brazil. For America, Venezuelan oil grows in importance as other supplies decline. Mexico runs out of oil—as predicted—when it fails to take advantage of Western oil technology and investment. Nigerian output, which for five years had been secured through a partnership of the U.S. Navy and Nigerian maritime forces, is decimated by the bloody civil war of 2021. Canadian exports, which a decade earlier had been strong as a result of the oil shale industry, decline as a result of environmental concerns in Canada and elsewhere about the “fracking” (hydraulic fracturing) process used to free oil from shale. State and non-state actors increase the hazards to seaborne shipping, which are compounded by the necessity of traversing key chokepoints that are easily targeted by those who wish to restrict trade. These chokepoints include the Strait of Hormuz, which Iran could quickly close to trade if it wishes. More than half of the world’s oil is transported by sea. “From 1970 to 2006, the amount of goods transported via the oceans of the world…increased from 2.6 billion tons to 7.4 billion tons, an increase of over 284%.”[[13]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn13) In 2010, “$40 billion dollars [sic] worth of oil passes through the world’s geographic ‘chokepoints’ on a daily basis…not to mention $3.2 trillion…annually in commerce that moves underwater on transoceanic cables.”[[14]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn14) These quantities of goods simply cannot be moved by any other means. Thus, a reduction of sea trade reduces overall international trade. U.S. consumers face a greatly diminished selection of goods because domestic production largely disappeared in the decades before the global depression. As countries increasingly focus on regional rather than global trade, costs rise and Americans are forced to accept a much lower standard of living. Some domestic manufacturing improves, but at significant cost. In addition, shippers avoid U.S. ports due to the onerous container inspection regime implemented after investigators discover that the second dirty bomb was smuggled into the U.S. in a shipping container on an innocuous Panamanian-flagged freighter. As a result, American consumers bear higher shipping costs. The market also constrains the variety of goods available to the U.S. consumer and increases their cost. A Congressional Budget Office (CBO) report makes this abundantly clear. A one-week shutdown of the Los Angeles and Long Beach ports would lead to production losses of $65 million to $150 million (in 2006 dollars) per day. A three-year closure would cost $45 billion to $70 billion per year ($125 million to $200 million per day). Perhaps even more shocking, the simulation estimated that employment would shrink by approximately 1 million jobs.[[15]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn15) These estimates demonstrate the effects of closing only the Los Angeles and Long Beach ports. On a national scale, such a shutdown would be catastrophic. The Government Accountability Office notes that: [O]ver 95 percent of U.S. international trade is transported by water[;] thus, the safety and economic security of the United States depends in large part on the secure use of the world’s seaports and waterways. A successful attack on a major seaport could potentially result in a dramatic slowdown in the international supply chain with impacts in the billions of dollars.[[16]](https://www.heritage.org/defense/report/thinking-about-day-without-sea-power-implications-us-defense-policy" \l "_ftn16)

## 1NC — Pharma Adv

### 1NC — SoE

#### The plan doesn’t solve the SoE defense. It is written to only apply to the private sector.

Scarborough 19, JD, antitrust attorney (Michael, “Between a Rock and a Hard Place: Vitamin C and the Future of U.S. Antitrust Enforcement Against Chinese Companies,” <https://www.sheppardmullin.com/media/publication/1786_Legal%20500%20PDF.pdf>)

This doubt went effectively unchallenged until the so-called Vitamin C case–which has been pending for 14 years and is still working its way through U.S. courts. There, Chinese Vitamin C makers argue they are immune from U.S. antitrust liability because they are state-owned enterprises and their conduct was required by the Chinese government, arguments that the Chinese government has confirmed in its own court filings. Through many twists and turns, the case has now come to focus on the question of whether the U.S. court should accept the Chinese government’s declaration of what its own laws] require. Most recently, the U.S. Supreme Court issued a unanimous decision that U.S. courts are not required to accept the Chinese government’s statements regarding Chinese law, and must make their own determinations of what Chinese law actually requires in a particular case. The Court remanded the case back to a lower appellate court with instructions to make that determination as to the Vitamin C defendants. Because the lower court in Vitamin C has already acknowledged some skepticism about the Chinese government’s statements, there is a real possibility that it will reject the Vitamin C defendants’ immunity arguments. Regardless of the ultimate resolution of the Vitamin C case, the new legal landscape—where U.S. courts have discretion to reject the Chinese government’s statements regarding its own laws—could open the floodgate to U.S. antitrust litigation against Chinese defendants. These cases will not be decided in a vacuum, but in the midst of an escalating trade war between China and the United States, at a time when elements of the U.S. government are openly hostile to various Chinese businesses and their products. It is probably unavoidable that political realities will inform the filing and resolution of future cases and the ongoing development of U.S. law in this area.

#### They’ll make their businesses into State Owned Enterprises that are immunized from US law

Kantner 13—(Partner in the international law firm of Jones Day, specializes in trade secret and other intellectual property litigation and counseling). Robert Kantner. “Protecting Trade Secrets Internationally Through A Comprehensive Trade Secret Policy.” The Practical Lawyer. February 2013. <http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/TPL1302_Kantner_thumb.pdf>.

Foreign Defendants May Claim Foreign

Sovereign Immunity

Even if a plaintiff successfully exerts jurisdiction over a foreign entity, if the defendant is a state-owned entity, it may be able to claim that it is immune from suit under the Foreign Sovereign Immunities Act. Because economic espionage is being conducted more frequently by state-owned entities, particularly in China, many foreign defendants will likely seek immunity under this Act. While there are exceptions to the Act’s provision of immunity, briefing and arguing the matter will certainly extend the resolution of the case overall and possibly involve significant expense.

#### China blocks enforcement- *this is from the majority VitC decision*

Nardini and Cabranes, 21 -- United States Court of Appeals for the Second Circuit judges

[William, and José A., Animal Sci. Prods. v. Hebei Welcome Pharma. Co. Ltd., majority decision, United States Court of Appeals for the Second Circuit, decided 8-10-21, No. 13-4791-cv, https://cases.justia.com/federal/appellate-courts/ca2/13-4791/13-4791-2021-08-10.pdf?ts=1628605810, accessed 1-5-22, footnote 40 inserted]

2. Effectiveness of Enforcement and Alternative Remedies

The judgment entered below would require collection from foreign defendants and enforcement of a permanent injunction abroad, which China may not tolerate.40 [FN 40] 40 Notably, Article 276 of the Civil Procedure Law of the People's Republic of China (2017) provides that "[i]f any matter in which a foreign court requests assistance would harm the sovereignty, security or public interest of the People's Republic of China, the [Chinese] court shall refuse to comply with the request." Similarly, Article 282 forbids Chinese courts from executing any foreign judgment which "contradicts the basic principles of the law of the People's Republic of China or violates State sovereignty, security or the public interest." [FN 40 ENDS] If enforced, the trebled damage award and threat of future sanctions from violating a permanent injunction would be likely to deter defendants from future anticompetitive behavior. Yet it also seems likely that China will continue to set minimum prices. The consequences of enforcing the judgment are therefore uncertain.

### 1NC — COVID Thumps

#### COVID thumps — proves healthcare is resilient AND innovation has only improved

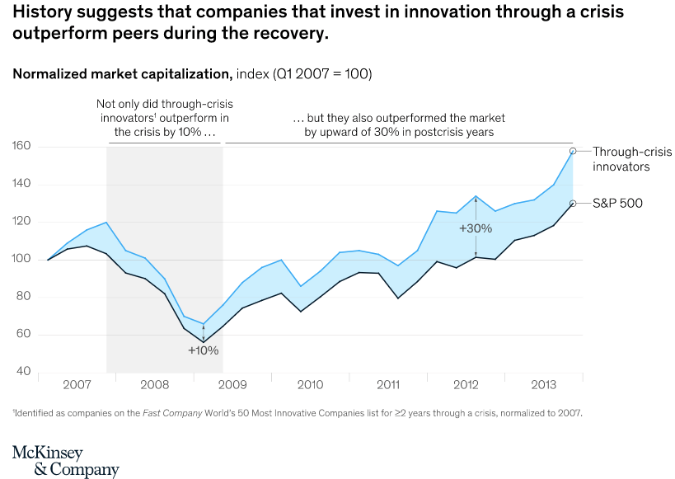
Jansen et al ’20 — Leigh Jansen (Associate Partner, McKinsey & Company); “Industry innovation: How has COVID-19 changed global healthcare?;” World Economic Forum; November 25th, 2020; <https://www.weforum.org/agenda/2020/11/healthcare-innovation-covid-coronavirus-pandemic-response-health>

[TITLE]: Industry Innovation: How has COVID-19 changed global healthcare?

While the COVID-19 pandemic has placed unparalleled demands on modern healthcare systems, the industry’s response has vividly demonstrated its resilience and ability to bring innovations to market quickly.

The effects of the pandemic on the industry continue to be profound. The shifts in consumer behavior, an [acceleration of established trends](https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-great-acceleration), and the likely deep and lasting economic impact will potentially affect healthcare companies no less—and quite possibly more—than those in other sectors. Around the world, more than [90 percent of executives](https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/innovation-in-a-crisis-why-it-is-more-critical-than-ever) we polled believe COVID-19 will fundamentally change their businesses, and 85 percent predict lasting changes in customers’ preferences. Among healthcare leaders, two-thirds expect this period to be the most challenging in their careers.1

To meet both the humanitarian challenge and the obligation to their stakeholders, leaders of healthcare organizations need to meet the innovation imperative. History tells us that organizations that invest in innovation during a crisis [outperform their peers in the recovery](https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-great-acceleration) (exhibit). What’s more, a crisis can create an urgency that rallies collaborative effort, breaks through organizational silos, and overcomes institutional inertia.



During the course of this year, the healthcare industry has produced inspiring examples of innovation in products, services, processes, and business and delivery models, often in partnership with other sectors. For example, Sheba Medical Center in Israel is working with TytoCare to keep COVID-19 patients in their homes by supplying them with special stethoscopes that both listen to their hearts and transmit images of their lungs to a care team that can intervene as appropriate.2 In the United States, Zipline, which specializes in delivering medical supplies to remote areas, quickly formed a partnership with Novant Health in North Carolina to distribute supplies to hospitals via drones.3 The adoption of telehealth has exploded, from 11 percent of consumers using it in 2019 to [46 percent in April 2020](https://www.mckinsey.com/industries/healthcare-systems-and-services/our-insights/telehealth-a-quarter-trillion-dollar-post-covid-19-reality), and well more than half of healthcare providers polled indicate higher comfort with this care-delivery method than before.

### 1NC — ! Defense

#### COVID thumps any lethality warrant — the worst, global pandemic in a century had an extremely low lethality rate — natural pandemics cannot cause extinction

#### AND burnout means that even if they do exist, they cannot cause extinction

Owen Cotton-Barratt 17, et al, PhD in Pure Mathematics, Oxford, Lecturer in Mathematics at Oxford, Research Associate at the Future of Humanity Institute, 2/3/2017, Existential Risk: Diplomacy and Governance, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic.

One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

### 1NC — AT: Class Action

#### Turn, making antitrust class actions easier leads to more anticompetitive behavior as they build costs in

Choi & Spier 20, Professors of Law at University of Michigan and Harvard. (Albert and Katherine, 2020 CLASS ACTIONS AND PRIVATE ANTITRUST LITIGATION, http://www.law.harvard.edu/programs/olin\_center/papers/pdf/Spier\_1021\_revision.pdf)

This paper analyzes the private and social desirability of class action lawsuits in the context of private antitrust litigation.6 We focus on possible price fixing by firm-defendants in a market, and the class action is modeled as a mechanism that allows consumer-plaintiffs and their attorneys to lower their cost of bringing lawsuits against the firm-defendants. Our analysis produces several results. Importantly, the analysis shows that class action lawsuits may or may not be socially desirable. In some circumstances, the threat of class actions may force the firms to lower their prices to avoid lawsuits. But if the class action mechanism makes lawsuits sufficiently cheap and easy to bring, firms may simply accept litigation as a necessary cost of business and engage in even more egregious anti-competitive conduct. We show that, depending on the circumstances, the firms’ private incentive to block class action lawsuits may be socially excessive or socially insufficient.

## 1NC — Cohesion Adv

### 1NC — AT: WTO

#### The WTO’s inability to get a Covid waiver crushes all WTO credibility—No one will follow it anymore

Meyer 21, Senior Writer at Fortune Magazine. (David, 6/18/21, The WTO’s survival hinges on the COVID-19 vaccine patent debate, waiver advocates warn, <https://fortune.com/2021/06/18/wto-covid-vaccines-patents-waiver-south-africa-trips/>)

The World Trade Organization knows all about crises. Former U.S. President Donald Trump threw a wrench into its core function of resolving trade disputes—a blocker that President Joe Biden has not yet removed—and there is widespread dissatisfaction over the fairness of the global trade rulebook. The 164-country organization, under the fresh leadership of Nigeria's Ngozi Okonjo-Iweala, has a lot to fix. However, one crisis is more pressing than the others: the battle over COVID-19 vaccines, and whether the protection of their patents and other intellectual property should be temporarily lifted to boost production and end the pandemic sooner rather than later. According to some of those pushing for the waiver—which was originally proposed last year by India and South Africa—the WTO's future rests on what happens next.

#### China won’t accept WTO punishment if it fundamentally alters their economy

Tesik 21, senior associate in the international trade practice of Wiley Rein, LLP. He holds a J.D. from American University Washington College of Law in Washington, DC, and an LLM in Chinese law from Peking University in Beijing (Adam, “Is the WTO the Worst of Both Worlds for U.S.-China Tech Competition?,” Lawfare Blog, <https://www.lawfareblog.com/wto-worst-both-worlds-us-china-tech-competition>)

Legal outcomes, however, are not always consistent with common sense. The United States, the European Union and Japan, for example, have taken the position that the Appellate Body’s definition of “public bodies,” a legal element in a subsidies claim, is too narrow to discipline the actions of quasi-state entities like guidance funds. They argue that new definitions are needed. In the WTO’s consensus-based system, however, it could be impossible to convince countries like China to agree to new rules that explicitly target their own development strategies. Even if the United States were to prevail in a subsidies case, compliance would be challenging. China has long questioned the legitimacy of the rules-based order that the WTO once exemplified. The opening exchange between U.S. and Chinese officials during their recent meeting in Anchorage suggests that China may be unwilling to accept any efforts by the Biden administration to revive the “rules-based order” in managing U.S.-China tensions. When even like-minded allies seem incapable of resolving sensitive disputes through the WTO, pessimism regarding the institution’s ability to play economic peacemaker between the United States and China seems justified.

#### The WTO is toothless against China

Ezell 21, ITIF Vice President, Global Innovation Policy Stephen J. Ezell focuses on science, technology, and innovation policy as well as international competitiveness and trade policy issues. He is the coauthor of Innovating in a Service Driven Economy: Insights Application, and Practice (Palgrave McMillan, 2015) and Innovation Economics: The Race for Global Advantage (Yale 2012). (Stephen, “False Promises II: The Continuing Gap Between China’s WTO Commitments and Its Practices,” https://itif.org/publications/2021/07/26/false-promises-ii-continuing-gap-between-chinas-wto-commitments-and-its)

China has taken full advantage of its WTO rights. It has also largely ignored the responsibilities and commitments through its embrace of state-directed capitalism predicated upon an aggressive innovation mercantilism. This mercantilism denies foreign enterprises access to Chinese markets on reciprocal terms; distorts global markets, including for advanced-technology goods; and deprives nations of the benefits they believed they would receive when granting China accession into the community of trading nations.

In this report, China’s accession to the WTO is recounted along with the trade rules with which it fails to comply. The report also describes the economic benefits China has accrued in part by not complying with its WTO commitments. Lastly, it offers policy recommendations for policymakers from the United States and like-minded nations to address the continuing China trade challenge.

Our initial 2015 Information Technology and Innovation Foundation (ITIF) report on this topic, on which this report is based, is premised on China’s false promises to the WTO. Even with a full-scale Section 301 investigation initiated by the Trump administration, China has made little progress in fulfilling a wide range of its WTO commitments over the past two decades.2

As such, the report’s policy recommendations reflect China’s failings and present a path forward to rectify the false promises. These recommendations include the following measures:

Develop a comprehensive “Bill of Particulars” against China

Revoke China’s Permanent Normal Trade Relations (PNTR) and renegotiate WTO market access schedules for Chinese goods and services

Pursue a nonviolation nullification and impairment case against China at the WTO

Insist that China extend to other nations provisions from the U.S.-China Phase One agreement

Strengthen subsidies disciplines at the WTO

Create a Democracies’ Alliance Treaty Organization (DATO) for trade

Form a Global Strategic Supply Chain Alliance (GSSCA)

The United States should join the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and pursue free trade agreements (FTAs) with like-minded nations

The United States Trade Representative’s Office (USTR) should self-initiate more cases against China before the WTO.

Elevate the focus on technology, innovation, and intellectual property (IP) in U.S. trade policymaking

HIGH EXPECTATIONS

Negotiations toward China’s accession to the General Agreement on Tariffs and Trade (GATT) and its successor organization, the WTO, began in 1986 and took 15 years to complete. China ultimately entered the WTO on December 11, 2001, with the WTO’s then-142 members voting in favor.3 Policymakers believed that giving China a stake in global institutions such as the WTO would bind it into the rules-based system set up after World War II. As the Economist wrote, they hoped “that economic integration would encourage China to evolve into a market economy and that, as they grew wealthier, its people would come to yearn for democratic freedoms, rights and the rule of law.”4

At the time, pundits hailed China’s accession as a pivotal moment that heralded the country’s shift toward a market-based economy that would adhere to the rules of international trade. WTO Director General Dr. Supachai Panitchpakdi, who led the organization from 2002 to 2005, and Mark Clifford, then a regional editor for BusinessWeek, heralded the move in their book China and the WTO: Changing China, Changing World Trade. “It is virtually impossible to overstate the importance of bringing the world’s most populous nation into a system that establishes internationally accepted rules for economic behavior,” they wrote.5 Furthermore, “The WTO will set out the rules for a market-based economy … The agreement signals China’s willingness to play by international trade rules and to bring its often opaque and cumbersome governmental apparatus into harmony with a world order that demands clarity and fairness.”6

Now, nearly 20 years on, a serious evaluation of China’s time in the WTO shows that on balance the country has not moved significantly toward the WTO trading order, and by and large has not lived up to its commitments.

Panitchpakdi and Clifford were not alone. Then-WTO Director General Mike Moore gushed in 2001 about China’s decision to join the WTO, describing it as “momentous,” and asserting that “China’s opaque and arbitrary trade and investment rules will become transparent, stable, and more predictable.”7 Moore assuaged those concerned China might not live up to its commitments, intoning, “If it doesn’t, the U.S. or any other WTO member government can use the organization’s dispute-settlement procedures to ensure it does.”8

The WTO itself stated, “China has agreed to undertake a series of important commitments to open and liberalize its regime in order to better integrate into the world economy and offer a more predictable environment for trade and foreign investment in accordance with WTO rules.”9

Pascal Lamy, the European Union (EU) trade commissioner who negotiated Chinese WTO entry on behalf of the EU and later became WTO director-general, deemed China’s accession a “win-win agreement” that would “serve to boost the rule of law in China” while giving countries (including China itself) “predictable, rules-based access to other markets.”10

Global major powers rejoiced. “China’s accession can only lock in and deepen market reforms, empowering those in leadership who support further and faster moves toward economic freedom,” wrote the European Commission.

President Clinton called China’s accession “a hundred-to-nothing deal for America when it comes to the economic consequences,” and one that would “have a profound impact on human rights and liberty” in China.11 Then-president George W. Bush promised that granting permanent normal trade relations to the Middle Kingdom would “narrow our trade deficit with China.”12

If China had been a “normal” country, such expectations might very well have been warranted. But it was not. Its massive economic size and growth rates impeded foreign business from a “capital strike” to punish China for its mercantilist behavior. China could and does punish any company that has the temerity to encourage countries to bring a case to the WTO.

Consider the case of one high-level official of a U.S. Fortune 100 company. He met with the head of a major Chinese Ministry to complain about an egregious violation of WTO rules that was hurting his business to the benefit of a Chinese competitor, and threatened a WTO case. The response: If the company advocated for a WTO case to be brought forward, they would be foreclosed in the future from selling in China.13 Needless to say, the company did nothing, as it was better to have a shrinking share of the market than nothing at all.

In essence, many companies have no choice but to tolerate China’s actions because they must have access either to the market or the low-priced labor, whose low price was subsidized even more by currency manipulation.

In addition, the WTO has lacked tools to discipline many of China’s most-effective mercantilist practices, including currency manipulation, IP theft, and the forced technology transfer carried out by administrative guidance rather than formal rules. Neither the WTO itself nor its member countries have ever had the political courage to take on China’s misdeeds in a serious and sustained way.

As a result, many early supporters of China’s WTO accession soon realized a problem was brewing. In 2010, former U.S. trade representative Charlene Barshefsky, who led China’s WTO accession negotiations for the United States, observed that China’s embrace of trade-distorting industrial policies, “raises a significant and profound—almost theological—question about the rules as they exist.”14

In 2018, two former Obama administration officials—Kurt M. Campbell, who now leads the Biden administration’s Asia policy team at the National Security Council, and Ely Ratner (now at the Office of the Secretary of Defense)—admitted that both Democratic and Republican administrations “had been guilty of fundamental policy missteps on China.”15 That same year, even the Economist magazine wrote that the West’s gamble on China had failed and “the illusion has been shattered” that China will integrate into the liberal international order.16

China may have evinced some degree of economic liberalization and market opening in the first decade after WTO accession, particularly in initially shrinking its large state-owned enterprise (SOE) sector. However, since President Xi Jinping’s ascent to leadership in 2013, these reforms have reversed and reformers who were sympathetic to a more market-driven model shunted to the sidelines.

As Nicholas Lardy of the Peterson Institute of International Economics explained, “Xi came into office endorsing wide-ranging market-oriented economic reform but quickly abandoned this design in favor of a more-statist approach.” Lardy continued that, since 2012, market-driven growth has made way for “a resurgence of the role of the state in resource allocation and a shrinking role for the market and private firms.”17

Nearly 20 years on, a serious evaluation of China’s time in the WTO shows that the country has not moved significantly toward the WTO trading order. By and large, China has not lived up to its commitments. Nor has it led to a reduced trade deficit for the United States (or for many other nations). The WTO’s dispute settlement system also fails to constrain China’s actions.

Whereas the United States had the wherewithal to “sue” China for not living up to many of the commitments and standards it should have already been adhering to as a WTO member, most nations don’t have that ability, and so continue to suffer from China’s refusal to play by WTO rules.

In short, China knew what it had to promise to gain access to the WTO. It made these promises. Its subsequent actions, however, have demonstrated its lack of intention to keep them. Getting into the WTO enabled China to gain largely carte blanche protection against trade enforcement measures that other nations might take. Accession was not about driving internal reform and moving toward a market-based economy.18 China ramped up its innovation mercantilist policies and practices after joining the WTO. Its actions also revealed WTO enforcement against informal and subtle, yet effective, mercantilist practices to be no more than a paper tiger.

#### If they are right the WTO would shut down China’s state-owned enterprises, then China would just leave the WTO entirely which decks solvency in every instance

#### The plan won’t broadly allow mercantilism globally

Donovan 21, JD, Partner @ Wintson (Molly, “Chinese Vitamin Defendants Prevail Again, Showing Limits of U.S. Antitrust Law’s Extraterritorial Reach,” Winston, <https://www.winston.com/en/competition-corner/chinese-vitamin-defendants-prevail-again-showing-limits-of-us-antitrust-laws-extraterritorial-reach.html>)

Last week, the United States Court of Appeals for the Second Circuit reversed—for the second time—the decision of the United States District Court for the Southern District of New York that awarded treble damages to the plaintiffs in a class action suit alleging that four Chinese exporters of Vitamin C violated U.S. antitrust laws. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd., No. 13-4791-cv, Dkt. No. 324-1 (2d Cir. Aug. 10, 2021). The decision shows us that, while U.S. antitrust law has a long reach, there are limits. In this case, the limitation was international comity—an exception that is applicable only in the rarest of cases.

BACKGROUND In 2013, a jury found a number of China-based companies liable for coordinating the supply and prices of Vitamin C exported to the United States. The district court entered a trebled damages award of nearly $150 million. On appeal, the Second Circuit reversed, dismissing the case and holding that the district court was bound to defer to the explanation of Chinese law that was submitted in the lawsuit by the Ministry of Commerce of the People’s Republic of China, which said that Chinese law compelled the defendants to engage in the alleged conduct. Later, the Supreme Court reversed the Second Circuit, concluding that it had afforded too much deference to the Chinese government. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018). The Supreme Court remanded the case to the Second Circuit, instructing it to consider, but not to defer conclusively to, the Ministry’s statement. RECENT SECOND CIRCUIT DECISION Now the Second Circuit has reversed and dismissed the action yet again. The court found again that Chinese law did require the defendants to engage in the conduct at issue. But this time, the court looked beyond the statement that the Ministry submitted in the lawsuit, and considered the evolution of the regulations in the Vitamin C industry in China, including the formation of a Vitamin C Coordination Group, whose members were the exclusive exporters of Vitamin C. The members were obligated to comply with all regulations from the Ministry, including voluntarily adjusting their production outputs and coordinating on export prices, which were set by the Chamber of Commerce of Medicines & Health Products Importers & Exporters (the Chamber). The court found that additional Chinese records substantiated that finding, including administrative materials detailing the Chamber’s price coordination role in the Vitamin C industry, as well as contemporaneous industry records and notes from the Vitamin C Coordination Group meetings, which all corroborated the finding that Chinese law required coordination on supply and prices. Finally, the court examined (again) the submissions that the Ministry had made during the case and concluded that they confirmed its finding that Chinese law required the defendants to coordinate and fix prices. All of this resulted in the court’s conclusion that it was impossible for the defendants to comply with U.S. antitrust law and Chinese law, and, therefore, a “true conflict” existed—requiring deference to Chinese law under principles of international comity. Additionally, the court looked at the: Nationality of the parties and site of anticompetitive conduct—all in China. Effectiveness of enforcement and alternative remedies—the consequences of enforcing the judgment were uncertain and did not impact the court’s decision. Foreseeable harms to American commerce—the only factor that weighed against dismissal because the harm to American commerce was foreseeable. Reciprocity—“the U.S. government would undoubtedly expect the Chinese court to recognize a valid defense that U.S. law required the American exporter’s conduct.” Possible effect upon foreign relations—China was greatly concerned about the case, while the U.S. State Department had not participated or even signaled its view. TAKEAWAYS

While the defendants in the Vitamin C situation are on the winning side of this latest decision, they had to engage in years of expensive and burdensome litigation to get there, with the help of a very narrow and rarely applicable defense, and yet another appeal to the Supreme Court still remains possible.

It is advisable for companies operating abroad who import products to the U.S., or whose products otherwise may make their way into the U.S., to seek guidance of U.S. and home-based counsel before engaging in conduct that is such an obvious violation of U.S. antitrust laws: price-fixing, market allocation, customer allocation, and/or bid-rigging. With appropriate guidance, it may be possible for companies positioned like those in the Vitamin C case to avoid years of litigation trauma and expense by proactively addressing these and similar issues on the front end.

# 2NC

## T — Exemptions

#### I’m inserting the list here.

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

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#### There’s DA uniqueness

McGinnis 14 (Anne, “Ridding the Law of Outdated Statutory Exemptions to Antitrust Law: A Proposal for Reform,” University of Michigan Journal of Law Reform, 47.2)

Most of the statutory exemptions enacted over the last one hundred years are still in place today, despite widespread changes in economic theory, market structures, and antitrust law in general. When initially enacted, many statutory exemptions were seen as special-interest legislation harmful to competition, competitors, and society. While others were beneficial when first put into law, even many of those have grown irrelevant over time. Some have even become as harmful as those enacted with the intent of benefitting special interests.

#### To defend against scope, a defendant invokes jurisdictional questions, arguing that they are categorically immune OR their conduct is categorically exempt. To defend against application, a defendant invokes antitrust defenses to justify conduct on the merits. That ensures links to DAs

Keith Hylton & Fei Deng 6, Hylton is Professor of Law, Boston University; Deng is with NERA Economic Consulting, “Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects,” Antitrust Law Journal, December 2006, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1849&context=faculty\_scholarship

The Scope Index which we have presented measures the number of ways in which a firm could get into trouble under the nation’s competition law, or, informally, the size of the competition law net. However, the Scope Index score says nothing about the number of defenses that are available to a firm. In other words, the Scope Index measures the size of the net without saying anything about the number of holes in it.

**Exemptions are ONLY Congress**

**ARENA 11** --- AMEDEO ARENA, Associate Professor of European Union Law at the School of Law of the University of Naples, “Institute for International Law and Justice Emerging Scholars Papers”, IILJ Emerging Scholars Paper 19 (2011) (A Sub series of IILJ Working Papers) Finalized 01/18/2011, https://iilj.org/wp-content/uploads/2016/08/Arena-The-Relationship-Between-Antitrust-and-Regulation-in-the-US-and-in-the-EU-2011.pdf

According to a recent survey, approximately **20 percent** of the US economic activities are to some degree **exempted from antitrust law.**22 Federal statutory antitrust exemptions can be divided into **proper “exemptions**”, which entail immunity from antitrust rules, and “**pseudo-exemptions”,** which merely imply a differential application of antitrust law. The “exemptions” category’ can be split up into two sub-categories: “**full exemptions**”, which exempt a given activity from all antitrust rules, and “**partial exemptions**”, which grant exemption only from certain antitrust rules.

Full exemptions are, for the most part, a creature of their time, a period ranging from the 1907 Bankers’ Panic to the mid-1940s. Indeed, only five of them are still in force.2’ In view of the broad scope of those immunities, in all five instances the legislature provided for oversight of the exempted sectors through a regulatory scheme enforced by a governmental agency, commission, or board.24 In some cases, however, the scope of regulation turned out to be narrower than that of antitrust immunity. For example, the Secretary of Commerce is supposed to police fishermen’s agreements against excessive pricing, yet apparendy it has never engaged in any real regulatory oversight.23

Turning to the **nineteen partial exemptions currently in force**,26 the discrepancy between the scope of the exemption and that of regulator}\* oversight is even greater, possibly because those exemptions authorize only specific conducts otherwise prohibited by antitrust law, thus mitigating the need for comprehensive regulatory oversight. The typical regulator}- scheme set out in those statutes consists in an obligation to submit the agreements eligible for exemption to a regulatory authority. The intensity of the assessment carried out by the relevant authority, however, varies considerably. As per the Need-Based Educational Aid Act, coordination on need-based financial aid programs, for instance, is not subject to regulator}- review at all.2 Under the Defense Production Act, the allocation of markets for military materials in time of national emergency is subject to approval by the Secretary of Defense, which must withdraw the immunity if it establishes that the “action was taken for the purpose of violating antitrust law”.28 Between those extremes, the ICC Termination Act provides for that the Surface Transportation Board must approve price-fixing agreements concerning the rates of household moves under a “public interest” standard;29 in addition, the Board can require compliance with “reasonable conditions” to ensure that the agreement furthers transportation policy.30

Unlike **full and partial exemptions**, the eight **pseudo-exemptions** in force **do not** bring economic activities **outside the scope of antitrust provisions** to subject them to sector-specific regulation, but rather modify the substantive standards, the remedies, or the forum of “general” antitrust law, thus creating “special” antitrust rules.3’ While pseudo-exemptions are generally not accompanied by regulatory schemes, in some cases the “special” antitrust rules themselves can be regarded as regulatory lato sensu.

ii) Judge-made Implied Antitrust Immunities and Regulation-Related Defenses

**Scope is when the law applies**

**Dernbach 21** --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute **applies**. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action **is not addressed in the statute, the statute is not applicable**. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

**Expanding requires a reversal of legislative intent**

**Garubo 84** --- Angelo G. Garubo, Senior Vice President and Corporate Secretary, Commercial Credit Group, Juris Doctor, magna cum laude, from California Western School of Law, “Severing the Legislativ ering the Legislative Veto Provision: The Aftermath of Chada vision: The Aftermath of Chada”, California Western law Review, Vol 21 No 1, 1984, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1559&context=cwlr

Since a veto provision can qualify as a proviso, the rule in Davis v. Wallace 147 and Frost v. Corporation Commission 148 can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In Davis and Frost, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute. 149 The Court reasoned that severing such a provision would result in an extension of the scope of the statute.' 50 Such an extension would be contrary to the legislative intent of a statute by **including subject matter** which the **legislature expressly chose to exclude**.151 The Davis and Frost analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso 152 and (2) severing a veto provision will **expand the scope** of the statute **contrary to legislative intent**. 5 3 By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation **would constitute a defacto contradiction of legislative intent** by **altering the purview of the statute**.' 54 A veto provision is a control mechanism.' 55 Its mere presence in a statute indicates the legislature's desire to restrict the scope of that statute. 5 6 **By removing it, the court would affect a fundamental change in the** nature of the **statute**, which was not accounted for when the legislature enacted the law. 157 Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

#### Overlimiting is structurally impossible---the field of antitrust law is enormous

Spencer Weber Waller 20, John Paul Stevens Chair in Competition Law, Professor, and Director of Institute for Consumer Antitrust Studies at the Loyola University Chicago School of Law, and Jacob E. Morse, J.D. Candidate at the Loyola University Chicago School of Law, “The Political Face of Antitrust”, Brooklyn Journal of Corporate, Financial, and Commercial Law, Volume 15, July 2020, https://awards.concurrences.com/IMG/pdf/\_11\_weber\_waller\_v21\_formatted\_1\_.pdf?68864/b1fc17637de92baef13f2a93eb750f872a721091

IV. Antitrust in Civil Society

Competition issues are also part of the general civic discourse separate from the campaign rhetoric and legislative proposals offered by politicians. This is also a significant sign that antitrust has begun to be an important source of small “p” politics that engages substantial segments of the public at large.

One example is the increased number of non-technical books intended for a lay audience that deal with the role of antitrust in a healthy economy and democracy. Recent and forthcoming books dealing with these themes include Tim Wu’s “The Curse of Bigness,”109 Matt Stoller’s “Goliath,”110 Maurice Stucke and Ariel Ezrachi’s “Competition Overdose,”111 Zephyr Teachout’s “Break ‘em Up,”112 and David Dayan’s “Monopolized.”113 On the academic side, there are a plethora of government and NGO studies of competition policy on digital competition114 and new works are flourishing which explore the broader ramifications of antitrust and competition in society.115

Long form and more mass-market journalism have also taken up the mantle of exploring the role of antitrust and competition policy. Such diverse magazines as The Atlantic,116 Time,117 New Republic,118 American Prospect,119 Rolling Stone,120 New York Times magazine,121 Variety,122 National Review,123 Foreign Policy,124 and other policy and opinion magazines have all run recent stories or profiles of individuals involved in antitrust issues. Before the COVID-19 pandemic effectively monopolized press coverage in the United States, there were thirty-three antitrust related stories on the front page of the New York Times or the front page of its business section over a three-month period in late 2019.125 A majority of the stories focused on tech giants such as Apple, Microsoft, Google, Amazon, and Facebook.126 In addition, the New York Times also covered stories about mergers, merger policy, local issues such as the Chicago taxi market, and various smaller industries.127 This is separate from coverage during the same period of campaign issues and candidate statements relating to the field.

A similar increase in coverage during this same period can be observed anecdotally in more business-oriented publications like Forbes, Barron’s, Wired, and the Wall Street Journal; general newspapers like USA Today, Washington Post, and Huffington Post; more local newspapers; as well as radio and television.128 Web pages and social media accounts on these issues have similarly proliferated on all ideological perspectives.129

Lobbying and public policy groups are growing in number and influence. Beyond the traditional trade associations and general think tanks there are now a number of active groups with antitrust as a large part of their focus. These include the Open Markets Institute,130 American Antitrust Institute,131 Anti-Monopoly Fund,132 Institute for Self-Reliance,133 Public Citizen,134 Public Knowledge,135 Demos,136 and the International Center for Law and Economics.137

At the more technical legal end of the debate, antitrust is similarly flourishing as a field. One sees increased law school hiring in the field for the first time in decades. Academic institutes and centers abound with a wide variety of perspectives ranging from libertarian to enforcement oriented.138 Most major antitrust cases now feature multiple amicus briefs from legal and economic experts on both sides of an issue both in the Supreme Court or the Courts of Appeals.139

Conclusion

Antitrust has always been political in nature. Antitrust law provides broad legal commands dealing with how governments and private individuals can challenge different types of market behavior. In this way, antitrust has not changed.

Antitrust will never take the place of sports, the Dow Jones index, or the weather for conversation at the breakfast table, but it has become a meaningful part of the political and policy debate for candidates, the legislature, and important segments of civil society. What has changed, however, is the degree that antitrust has reentered the political arena. Once mostly the domain of technocrats, antitrust issues have been proposed and debated by Presidential candidates, political parties, legislators, pundits, journalists, lobby groups, and voters alike. There are also a flurry of serious proposals and investigations that would make significant changes to the current system if adopted.

## CP — CIL

#### 1. Terrorism---goes nuclear---extinction.

Dr. Peter J. Hayes 18. Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University. “Non-State Terrorism and Inadvertent Nuclear War.” NAPSNet Special Reports. 1/18/2018. https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/.

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16] Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders. The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions: Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended. At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational. Accordingly, the effect of nuclear terrorism involving a nuclear detonationor major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack). It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

#### 2. Failed states---great power war.

Jakub Grygiel 9. Associate Professor of International Relations, Paul H. Nitze School of Advanced International Studies, Johns Hopkins University, PhD, MPA Princeton University, BSFS Georgetown University. “Vacuum Wars.” The American Interest, 4(6), 7/1/2009. https://www.the-american-interest.com/2009/07/01/vacuum-wars/.

Failed states cause more than just humanitarian problems and terrorism; they’re potential flashpoints for great power wars as well. Mention “failed states” in an academic seminar or a policy meeting and you will hear a laundry list of tragic problems: poverty, disease, famine, refugees flowing across borders and more. If it is a really gloomy day, you will hear that failed states are associated with terrorism, ethnic cleansing and genocide. This is the conventional wisdom that has developed over the past two decades, and rightly so given the scale of the human tragedies in Bosnia, Somalia and Rwanda, just to mention the most egregious cases of the 1990s. This prevailing view of failed states, however, though true, is also incomplete. Failed states are not only a source of domestic calamities; they are also potentially a source of great power competition that in the past has often led to confrontation, crisis and war. The failure of a state creates a vacuum that, especially in strategically important regions, draws in competitive great-power intervention. This more traditional view of state failure is less prevalent these days, for only recently has the prospect of great power competition over failed “vacuum” states returned. But, clearly, recent events in Georgia—as well as possible future scenarios in Iraq, Afghanistan and Pakistan, as well as southeastern Europe, Asia and parts of Africa—suggest that it might be a good time to adjust, really to expand, the way we think about “failed states” and the kinds of problems they can cause. The difference between the prevailing and the traditional view on state failure is not merely one of accent or nuance; it has important policy implications. Intense great power conflict over the spoils of a failed state will demand a fundamentally different set of strategies and skills from the United States. Whereas the response to the humanitarian disasters following state failure tends to consist of peacekeeping and state-building missions, large-scale military operations and swift unilateral action are the most likely strategies great powers will adopt when competing over a power vacuum. On the political level, multilateral cooperation, often within the setting of international institutions, is feasible as well as desirable in case of humanitarian disasters. But it is considerably more difficult, perhaps impossible, when a failed state becomes an arena of great power competition. The prevailing view of failed states is an obvious product of the past two decades—a period in which an entirely new generation of scholars and policymakers has entered their respective professions. A combination of events—the end of the Cold War, the collapse of the Soviet Union and the prostration of states such as Somalia, Rwanda, Haiti and Bosnia, and most importantly the terrorist attacks of September 11—created two interlocked impressions concerning the sources of state failure that are today largely accepted uncritically. The first of these is that weak states have unraveled because of the great powers’ disinterest in them, which has allowed serious domestic problems, ranging from poverty to ethnic and social strife, to degenerate into chaos and systemic governance failure.1 The basic idea here is that the Cold War had a stabilizing effect in several strategic regions where either the United States or the Soviet Union supported recently fashioned states with little domestic legitimacy and cohesion for fear that, if they did not, the rival superpower might gain advantage. Some fortunate Third World neutrals even managed a kind of foreign aid arbitrage, attracting help from both sides. When support from the superpowers ended, many of these states, such as Somalia and Yugoslavia, were torn apart by internal factionalism. The state lacked the money to bribe compliance or to generate a larger economic pie, degenerating rapidly into corruption and violence. The key conclusion: The most egregious and tragic examples of failed states in the 1990s occurred because of great power neglect rather than meddling. The related second impression that post-Cold War events have created is that the main threat posed by failed states starts from within them and subsequently spills over to others. Failed states export threats ranging from crime to drugs to refugees to, most dramatically, global terrorism.2 The lawlessness and violence of such states often spills across borders in the form of waves of refugees, the creation of asylums for criminals and more besides. As the number and severity of failed state cases rose, Western powers reacted much of the time by hoping that the problems arising from the failure of states, even those geographically close to the United States or Europe like Haiti and Bosnia, would remain essentially limited so that internal chaos could simply be waited out. Interventions such as in Somalia, Bosnia or Haiti were driven by a Western public shocked by vivid images of suffering and slaughter rather than by a sense that these collapsed states directly threatened U.S. national security. The 9/11 terrorist attacks against the United States changed the perception that failed states could be safely ignored. The Hobbesian world of a failed state could be distant, but it was also a breeding ground for terrorist networks that could train their foot soldiers, establish logistical bases and plan attacks against distant countries. Failed states suddenly were not only humanitarian disasters but security threats. As Francis Fukuyama observed in 2004, “radical Islamist terrorism combined with the availability of weapons of mass destruction added a major security dimension to the burden of problems created by weak governance.”3 However, 9/11 did not alter the conviction that the main threat posed by failed states stems from endogenous problems and not from a great power competition to fill the vacuum created by their demise. At least in the immediate aftermath of the terrorist attacks, there was a naive feeling that the Islamist threat festering in failed or weak states such as Afghanistan was a menace to the international community writ large, and certainly to great powers like Russia and China, as well as the United States. It was therefore assumed that the great powers would cooperate to combat terrorism and not compete with each other for control over failing or failed states. As Stephen David pointed out in these pages, “Instead of living in a world of international anarchy and domestic order, we have international order and domestic anarchy.”4 The solution stemming from such a view of failed states falls under the broad category of “nation-building.” If the main challenge of failed states is internally generated and caused by a collapse of domestic order, then the solution must be to rebuild state institutions and restore authority and order, preferably under some sort of multilateral arrangement that would enhance the legitimacy of what is necessarily an intrusive endeavor. Great powers are expected to cooperate, not compete, to fix failed states. U.S. foreign policy continues to reflect this prevailing view. Then-Director of the Policy Planning staff, Stephen Krasner, and Carlos Pascual, then-Coordinator for Reconstruction and Stabilization at the State Department, wrote in 2005 that, “when chaos prevails, terrorism, narcotics trade, weapons proliferation, and other forms of organized crime can flourish.” Moreover, “modern conflicts are far more likely to be internal, civil matters than to be clashes between opposing countries.”5 The prevailing view of failed states is, to repeat, not wrong, just incomplete—for it ignores the competitive nature of great power interactions. The traditional understanding of power vacuums is still very relevant. Sudan, Central Asia, Indonesia, parts of Latin America and many other areas are characterized by weak and often collapsing states that are increasingly arenas for great power competition. The interest of these great powers is not to rebuild the state or to engage in “nation-building” for humanitarian purposes but to establish a foothold in the region, to obtain favorable economic deals, especially in the energy sector, and to weaken the presence of other great powers. Let’s look at just three possible future scenarios. In the first, imagine that parts of Indonesia become increasingly difficult to govern and are wracked by riots. Chinese minorities are attacked, while pirates prowl sealanes in ever greater numbers. Bejing, pressured by domestic opinion to help the Chinese diaspora, as well as by fears that its seaborne commerce will be interrupted, intervenes in the region. China’s action is then perceived as a threat by Japan, which projects its own power into the region. The United States, India and others then intervene to protect their interests, as well. In the second scenario, imagine that Uzbekistan collapses after years of chronic mismanagement and continued Islamist agitation. Uzbekistan’s natural resources and its strategic value as a route to the Caspian or Middle East are suddenly up for grabs, and Russia and China begin to compete for control over it, possibly followed by other states like Iran and Turkey. In a third scenario, imagine that the repressive government of Sudan loses the ability to maintain control over the state, and that chaos spreads from Darfur outward to Chad and other neighbors. Powers distant and nearby decide to extend their control over the threatened oil fields. China, though still at least a decade away from having serious power projection capabilities, already has men on the ground in Sudan protecting some of the fields and uses them to control the country’s natural resources. These scenarios are not at all outlandish, as recent events have shown. Kosovo, which formally declared independence on February 17, 2008, continues to strain relationships between the United States and Europe, on the one hand, and Serbia and Russia, on the other. The resulting tension may degenerate into violence as Serbian nationalists and perhaps even the Serbian army intervene in Kosovo. It is conceivable then that Russia would support Belgrade, leading to a serious confrontation with the European Union and the United States. A similar conflict, pitting Russia against NATO or the United States alone, or some other alliance of European states, could develop in several post-Soviet regions, from Georgia to the Baltics. Last summer’s war in Georgia, for instance, showed incipient signs of a great power confrontation between Russia and the United States over the fate of a weak state, further destabilized by a rash local leadership and aggressive meddling by Moscow. The future of Ukraine may follow a parallel pattern: Russian citizens (or, to be precise, ethnic Russians who are given passports by Moscow) may claim to be harassed by Ukrainian authorities, who are weak and divided. A refugee problem could then arise, giving Moscow a ready justification to intervene militarily. The question would then be whether NATO, or the United States, or some alliance of Poland and other states would feel the need and have the ability to prevent Ukraine from falling under Russian control. Another example could arise in Iraq. If the United States fails to stabilize the situation and withdraws, or even merely scales down its military presence too quickly, one outcome could be the collapse of the central government in Baghdad. The resulting vacuum would be filled by militias and other groups, who would engage in violent conflict for oil, political control and sectarian revenge. This tragic situation would be compounded if Iran and Saudi Arabia, the two regional powers with the most direct interests in the outcome, entered the fray more directly than they have so far. In sum, there are many more plausible scenarios in which a failed state could become a playground of both regional and great power rivalry, which is why we urgently need to dust off the traditional view of failed states and consider its main features as well as its array of consequences. The traditional view starts from a widely shared assumption that, as nature abhors vacuums, so does the international system. As Richard Nixon once said to Mao Zedong, “In international relations there are no good choices. One thing is sure—we can leave no vacuums, because they can be filled.”6 The power vacuums created by failed states attract the interests of great powers because they are an easy way to expand their spheres of influence while weakening their opponents or forestalling their intervention. A state that decides not to fill a power vacuum is effectively inviting other states to do so, thereby potentially decreasing its own relative power. This simple, inescapable logic is based on the view that international relations are essentially a zero-sum game: My gain is your loss. A failed state creates a dramatic opportunity to gain something, whether natural resources, territory or a strategically pivotal location. The power that controls it first necessarily increases its own standing relative to other states. As Walter Lippmann wrote in 1915, the anarchy of the world is due to the backwardness of weak states; . . . the modern nations have lived in armed peace and collapsed into hideous warfare because in Asia, Africa, the Balkans, Central and South America there are rich territories in which weakness invites exploitation, in which inefficiency and corruption invite imperial expansion, in which the prizes are so great that the competition for them is to the knife.7 The threat posed by failed states, therefore, need not emanate mainly from within. After all, by definition a failed state is no longer an actor capable of conducting a foreign policy. It is a politically inert geographic area whose fate is dependent on the actions of others. The main menace to international security stems from competition between these “others.” As Arnold Wolfers put it in 1951, because of the competitive nature of international relations, “expansion would be sure to take place wherever a power vacuum existed.”8 The challenge is that the incentive to extend control over a vacuum or a failed state is similar for many states. In fact, even if one state has a stronger desire to control a power vacuum because of its geographic proximity, natural resources or strategic location, this very interest spurs other states to seek command over the same territory simply because doing so weakens that state. The ability to deprive a state of something that will give it a substantial advantage is itself a source of power. Hence a failed state suddenly becomes a strategic prize, because it either adds to one’s own power or subtracts from another’s. The prevailing and traditional views of failed states reflect two separate realities. Therefore, we should not restrict ourselves to one view or the other when studying our options. The difference is not just academic; it has very practical consequences. First and foremost, if we take the traditional view, failed states may pose an even greater danger to international security than policymakers and academics currently predict. Humanitarian disasters are certainly tragedies that deserve serious attention; yet they do not pose the worst threats to U.S. security or world stability. That honor still belongs to the possibility of a great power confrontation. While the past decade or so has allowed us to ignore great power rivalries as the main feature of international relations, there is no guarantee that this happy circumstance will continue long into the future. Second, there is no one-size-fits-all policy option for a given failed state. Humanitarian disasters carry a set of policy prescriptions that are liable to be counterproductive in an arena of great power conflict. It is almost a truism that failed states require multilateral cooperation, given their global impact. But the traditional view of failed states leads us not to seek multilateral settings but to act preemptively and often unilaterally. Indeed, it is often safer to seek to extend one’s control over failed states quickly in order to limit the possibility of intervention by other great powers. Third, the role of armed forces engaged in failed states needs to be re-evaluated in light of the traditional view. If failed states require only “nation-building”, the military forces of the intervening powers will have to develop skills that are more like those of a police force: comfortable with a limited use of force, adept at distinguishing peaceful civilians from criminals, able to enforce law and order, good at managing interactions within the societies and many other tasks as well. However, the traditional view suggests that one must be prepared to apply the full spectrum of military force in case of a direct confrontation with another great power. Sending a weakly armed peacekeeping force into a situation in which such a confrontation is possible could easily prove disastrous. Thus the United States should not focus only or overly much on preparing for low-intensity conflicts and counterinsurgency operations to the detriment of preparing for a major war involving another state. Rather, it should maintain and improve its ability to deny other powers access to regions at stake and increase its readiness for a direct confrontation. Finally, on the political level, nation-building under the aegis of the United Nations or even NATO may not be the solution to failed states. If they are problems not just of foreign aid and law enforcement, but also of great power conflict and bilateral diplomacy, we should expect a reversion to an atavistic set of state actions that were supposed to have been made obsolete by the triumph of liberal internationalism. As to the outcomes of vacuum wars, finally, history suggests four basic possibilities: non-intervention by all powers; partition; unilateral preventive intervention; and war. If a failed state was too distant and ultimately strategically irrelevant, great powers simply ignored it, sensing that an intervention would not increase their own power. In many ways the irrelevance of a failed state leads to the most stable situation, one in which the prevailing view is most applicable. But there are ever fewer areas of the world that fall into this category. Interconnectedness combined with the growing power-projection capability of powers such as China creates incentives to intervene in even the most remote areas. The possible scenarios of Indonesia or Sudan are good examples of this. So we are left with the other three options. Great powers have employed partition or division into spheres of influence to avoid a massive confrontation. The partitions of Poland at the end of the 18th century are a classic example. The next option is unilateral preventive intervention. Basically, this involves a rapid intervention by one power to establish its dominance over the area in question, preventing the other interested parties from projecting their power there. In brief, one power arrives first at the carcass of the failed or failing state and preempts conflict by making it too costly for others. The last option, which is not mutually exclusive of the others, is war. The inability to reach an agreement to divide or unilaterally control a failed state can lead to a violent clash. The exact features of such a war may range from battles between mass armies to attempts at subversion and insurgency. But the underlying characteristic is the direct involvement of two or more powers. The 1982 war between Israel and Syria in Lebanon, and the subsequent vying for influence over that politically collapsed state, is one example. The cases of Georgia and the 1999 standoff at the Pristina airport in Kosovo between NATO and Russian forces, fall somewhere in between, characterized by neither a negotiated settlement nor a direct war between the interested powers—near misses, perhaps. I am not predicting an eruption of another world war over Sudan or Kosovo. But the current concentration on issues of humanitarianism and terrorism within a failed state, and the accompanying fascination with nation-building, seems shortsighted in the light of history. Failed states are as old as the establishment of the first polity, and great power confrontations over them are a recurring problem. One need only look to 18th-century Poland, or even Corcyra during the Peloponnesian War, to see that the problem will never go away. Both were sources of great power confrontations no less significant than Yugoslavia in the late 20th century—and no less than Georgia or Ukraine continue to have the potential to be in the 21st. This will demand a greater appreciation for the complexity of failed states and an awareness of the possibility that humanitarian tragedies may have a tendency to turn into larger wars.

#### 1. The plan preserves an anchor in domestic law that creates mixed grounds---only the counterplan alone provides signaling and precedent via the evaluation of CIL as superior to domestic law.

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V. Conclusion This Note has attempted to demonstrate some of the difficulties of applying customary international law in U.S. courts. At every level, there are unanswered questions. Many of these issues, like how "general" a practice or its acceptance must be in order to constitute customary international law, can only be given imprecise answers. Not only are these general problems inherent in all legal questions involving line-drawing in the defining of customary international law, but there is a virtual war being waged over where that line should be drawn and by whom. This issue, in turn, raises questions of constitutional importance, the gravity of which it is almost impossible to overstate. Practical concerns about the balance of powers, no less than theoretical misgivings over undermining our government's consent-based authority and legitimacy, demand our attention as the possibility of directly incorporating customary international law, perhaps even when in direct contravention of federal statute, comes closer to becoming a reality. Current cases do not present any of these possibilities as realities. They do, however, contain the beginnings of what could become fundamental structural changes in customary--and hence, United States--law should the judicial system prove dominant in determining customary international law. Current cases show U.S. courts, on a fairly modest level, defining, determining, and apply-ing customary international law. The cases have yet to produce a real showdown between domestic, either constitutional or congressional, and customary law. To date, congressional and executive actions and statements have been taken as one type of evidence in determining the content of customary international law, but they have not served as dispositive or controlling in the face of over-whelming evidence that customary international law as a whole dictates a contrary outcome. This, of course, is the real issue. What happens when the will of the people or a dictate of the Constitution conflicts directly with customary international law? No doubt, our courts will do their best to interpret creatively so as to avoid such a conflict, but, eventually, the conflict will come, and a decision will be made. The conflict is inevitable due to the nature of modern customary international law. No longer delegated to issues traditionally understood as exterior, modern customary international law is beginning to define relationships between governments and their citizens and amongst citizens. [\*378] The conclusions of this Note are three. First, there is an impending constitutional crisis, with the potential to alter the fundamental structure of our laws and the legal authority (if not the power) of the American people. Second, in this eminent struggle, Congress ought to take the lead, controlling through legislation the authority of customary international law in domestic matters and thus circumventing the potential conflict between international and domestic law by upholding the supremacy of U.S. law in domestic matters. The courts will by necessity play a crucial role, for they must concur that this role belongs to the legislature and that federal law is supreme. Third, U.S. courts must, in their role as interpreters of customary international law, hold ever present in their determinations the recognized definition of customary law, which encompasses both a custom and a convention element: the practice of nations ought not be ignored. By this means, they will be surer of applying customary international law as it exists, rather than as courts and commentators wish it to be.

#### 2. Even if the perm solves in the short-term---the plan’s existence means courts will interpret the counterplan as consistent with domestic supremacy to water-down precedent

Gordon A. **Christenson 95**. University Professor of Law, University of Cincinnati College of Law. “Customary International Human Rights Law in Domestic Court Decisions.” Ga. J. Int’l & Comp. L., 25(225). 1995/96, p.253-254. http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1394&context=gjicl

V. CONCLUSION At each point in international human rights litigation before domestic courts, however briefly it may be consciously considered, a forum court should make a functional analysis with as much intuitive sense as suggested in conflict of laws theory for each stage. It should begin its analysis with the interests and purposes for each rule shaped or decision undertaken, balanced among governmental and international interests in harmonious interstate relations, stability, predictability and effectiveness in achieving universally recognized international human rights norms, subject to statutory and constitutional limitations. Consciousness in domestic court decision-making at each phase of the case should eliminate a problem which human rights advocates sometimes place before American courts, in effect forcing judges to base their decisions on the choice between authorities promulgating rules. In facing a hierarchy of loyalties between these systems of authority, U.S. federal courts do not seem willing to subordinate their constitutional loyalty to national political authority to that of an emerging consensus of the international community of states, unless first given the green light by the national political branches. The false choice between loyalty to the national political community, allegiance to the international community of states or a new allegiance to a cosmopolitan world community not yet here is an escape from making hard substantive choices balancing a number of interests and values in shaping rules of decision for each transnational human rights case. If these alternatives of choice among authority systems are the only ones realistically seen by federal courts, international human rights law will continue to be but the symptom of vast political upheaval which the federal courts will shun entering.

#### 3. Mootness. Establishing prohibitions via antitrust statute removes controversy.

Stephen **Wermiel 19**. Fellow in Law and Government at American University Washington College of Law. 8/29/19. “SCOTUS for law students: Battling over mootness.” <https://www.scotusblog.com/2019/08/scotus-for-law-students-battling-over-mootness/>.

What is mootness and when does it apply? As a general matter, a case becomes moot when the parties no longer have an interest that can be resolved by the court’s decision. The rule is derived from Article III of the U.S. Constitution, which defines “the judicial power” as extending to “cases” and “controversies.” The Supreme Court has long interpreted this language to mean that federal courts have jurisdiction to decide only those cases in which the parties have concrete interests that will be resolved by a judicial decision. Those tangible interests must be present at every stage of the lawsuit, the court has said, from initial filing to final decision. A principal theory behind the case and controversy requirement – and behind the mootness doctrine, as well – is that courts will reach the best decisions when the cases they decide are litigated in a process that is truly adversarial on behalf of parties who have a real stake in the outcome. When tangible interests are no longer present for the parties in a dispute, a case may become moot. The theory, again, is that parties to a case may not make the best arguments and engage in zealous advocacy if they no longer have genuine, tangible interests in the outcome. Typically, a dispute will become moot because no issues remain that will have a real effect on the litigants. In one well-known example, DeFunis v. Odegaard, the Supreme Court ruled that the claim of a white law student that he was denied admission to law school because of his race and the operation of an affirmative action plan was moot because the student had been allowed to attend law school while the case was pending and was close to graduating. A determination by the Supreme Court that the student was or was not denied admission because of his race would not have affected that individual student’s status or interests, the justices said.

#### a. The “core antitrust laws” means Sherman, Clayton, and FTC.

**FTC ND**. “The Antitrust Laws.” 2013. Federal Trade Commission. June 11, 2013. https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

**b. “Its” means the plan must expand the scope of the US’ antitrust laws.**

**Supreme Court of Oklahoma 34**

(Swindall v. State Election Board, 168 Okla. 97, Lexis)//BB

However, I view another phase of the act which is not considered in the majority opinion. It is my opinion that the expression, "its nominees," should have been construed by this court. Had this court so construed those words, it would have assisted the State Election Board in the furtherance of its ministerial duties, and would have set to rest the immediate question. It is my theory that the correct interpretation to place upon those words, "its nominees," is to the effect that those words do not mean all the nominees of any particular party. The word "its" is the possessive case, or the possessive adjective of "it", meaning of or belonging to it. Webster's International Dictionary. In other words, the expression, "its nominees," as applied to the Republican party, means nominees of it (the Republican party). The words, "nominees" of the "Republican party," do not and necessarily cannot mean all the nominees of the Republican party. Those words, however, do mean more than one nominee. It seems reasonable to conclude, in the absence of an expression like "all of its nominees," or words of similar import, that it was not the intent of the Legislature to make those words, "its nominees," all inclusive. It seems to me that a fair and reasonable interpretation would be that those words support and embrace the thought expressed by the New York statute, to wit, that it is the intention of the candidate to support generally at the next general election the nominees of the party from which he seeks his nomination, or that it is his intention to support a majority of the candidates of that party.

#### CIL is not US law.

**LII ND**. Legal Information Institute. Cornell Law School. “Customary International Law.” https://www.law.cornell.edu/wex/customary\_international\_law

Customary international law is one component of [international law](https://www.law.cornell.edu/wex/international_law). Customary international law refers to international obligations arising from established international practices, as opposed to obligations arising from formal [written conventions](https://www.law.cornell.edu/wex/international_conventions) and treaties. Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation. Two examples of customary international laws are the doctrine of [non-refoulement](https://www.merriam-webster.com/dictionary/non-refoulement) and the granting of immunity for visiting heads of state. International Jurisdiction The [International Court of Justice](https://www.law.cornell.edu/wex/international_court_of_justice) (ICJ) is the main judicial body of the [United Nations](https://www.law.cornell.edu/wex/united_nations), and it settles disagreements between member states of the United Nations. Under Chapter II, Article 38 of the Statute of the International Court of Justice, international customs and general practices of nations shall be one of the court's sources of customary international law is one of the [sources of international law](https://www.law.cornell.edu/wex/sources_of_international_law). Customary international law can be established by showing (1) state practice and (2) [opinio juris](https://www.law.cornell.edu/wex/opinio_juris_%28international_law%29).

#### The clarity of the legal source of prohibitions is irrelevant---OR links to the AFF because antitrust statutes are also extremely vague.

Prachi **Juneja ND**. Financial analyst at numerous firms, including IBM. “The Problem with Antitrust Laws.” https://www.managementstudyguide.com/problem-with-antitrust-laws.htm

Antitrust laws are extremely vague. Bureaucrats can make them look like whatever they want to. For instance, if a company is charging a high price for its product, they can make it look like monopoly overcharging. On the other hand, if they charge the same price as their competitors, bureaucrats can make it appear like a case of collusion amongst competitors. Similarly, if the company charges prices which are lower than the competition, they can be accused of predatory pricing. The laws fail to clearly define what constitutes an antitrust violation. Instead, the onus is left on the bureaucrat who could be using the government given authority to fleece these organizations.

## Adv — Pharma

#### Xi will do it

McGregor 19 Richard McGregor reporter for The Guardian, How the state runs business in China, <https://www.theguardian.com/world/2019/jul/25/china-business-xi-jinping-communist-party-state-private-enterprise-huawei>

When Xi Jinping took power in 2012, he extolled the importance of the state economy at every turn, while all around him watched as China’s high-speed economy was driven by private entrepreneurs. Since then, Xi has engineered an unmistakable shift in policy. At the time he took office, private firms were responsible for about 50% of all investment in China and about 75% of economic output. But as Nicholas Lardy, a US economist who has long studied the Chinese economy, concluded in a recent study, “Since 2012, private, market-driven growth has given way to a resurgence of the role of the state.”

#### China wants to nationalize everything

Gatuzade 19 Amir Guluzade Chief Operating Officer, Private Wealth Institute, Ahmadoff & Co, 07 May 2019, <https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play/>

Despite the above-mentioned factors, the Chinese government is still keen on supporting SOEs and is committed to making them bigger, stronger and more efficient. This is particularly relevant to certain strategic sectors where government oversight is essential - specifically in defense, energy, telecom, aviation and railway systems. Conversely the state is encouraged to divest from other industries by decreasing its ownership. The State-owned Asset Supervision and Administration Commission (SASAC) is making great strides in implementing the government’s ‘zhuada fangxiao’ (grasp the big, release the small) policy, which has greatly reduced the number of SOEs through privatisation, asset sales, and mergers and acquisitions. The Commission, which was established in 2003, is currently concentrating on restructuring the remaining SOEs into modern profit-oriented corporations. Practically all of the entities overseen by SASAC are structured as corporations and are legally separate from the government with their own boards of directors, effectively delegating more authority to the executives. There is also substantial work being done to improve SOEs through reorganisation, restructuring and enhancing their internal governance standards. The government went as far as introducing mixed ownership in telecoms company China Unicom, by selling shares worth around $11 billion to 14 private investors. This was done as a step towards making China Unicom more accountable and more focused on generating returns on equity, while retaining state control. These efforts to make SOEs competitive while holding absolute control over their final decision-making reasserts the Chinese government’s commitment to consolidating state control while simultaneously allowing the market to be the ultimate resource allocator. In other words, the government wants to keep a close eye on market forces while reserving the ‘intervention option’ in critical situations. China’s legal and regulatory systems are going through crucial transformations with regards to investment and intellectual property - but they are not yet prepared to regulate giant, strategically significant corporations, which is why the government has chosen to retain the option of direct control over its SOEs. Besides, once the property rights framework is brought to a certain level, the government could profit far more by privatising competitive enterprises rather than selling off distressed assets in the current legal environment.

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## DA — China

#### Turns advantage two---Global trade---tit-for-tat escalation makes the trade war global

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Overall, the impact would be a significant negative shock for both economies (with flow-on effects for the global economy). Though not likely to be recession-inducing, the costs would be large, needless, and could easily escalate further, including with mounting risks of a more globalised trade war. There is still some scope to make a deal before all this comes to pass (perhaps a face-saving or time-buying deal). But the space to manoeuvre is rapidly shrinking. As my colleague John Edwards has pointed out (US–China trade: joke’s over), it is not clear what the Trump administration wants that China would realistically give. China might be willing to sweeten the deal it offered earlier, by agreeing to further increase the forced purchase of US goods, and maybe by moving faster on certain liberalising measures. But Trump’s maximum pressure tactics look more likely to prove highly counterproductive. Xi Jinping presents himself as a strong leader and cannot be seen to be giving in to such blatant foreign bullying (especially given China’s historical sensitivities). Nor will China budge on core US demands to dismantle its industrial policies. In fact, there is instead real concern Trump’s bullying tactics are only strengthening the hand of those in China who want greater national self-reliance and believe in a more statist approach – to the detriment of those pro-market reformers the US should instead be trying to bolster.

#### Independently, the plan’s application to non-China countries violates their sovereignty---nuclear war.

Walt 20, professor of international relations at Harvard University (Stephen, “Countries Should Mind Their Own Business,” *Foreign Policy*, <https://foreignpolicy.com/2020/07/17/sovereignty-exceptionalism-countries-should-mind-their-own-business/>)

What we are seeing, in short, is a reassertion of sovereign independence on the part of great and small powers alike. The Westphalian model of sovereignty has never been absolute or uncontested, but the idea that individual nations should be (mostly) free to chart their own course at home remains deeply embedded in the present world order. The territorial state remains the basic building block of world politics, and, with some exceptions, states today are doing more to reinforce that idea than to dilute it. Although there are clearly areas where our future depends on states agreeing to limit their own freedom of action and conform to global norms and institutions, greater respect for sovereignty and national autonomy has some obvious benefits. First, states that interfere in foreign countries rarely understand what they are doing, and even well-intentioned efforts often fail due to ignorance, unintended consequences, or local resentment and resistance. A stronger norm of noninterference could make some protracted conflicts less likely or prolonged. Second, trying to impose a single model on other countries inevitably raises threat perceptions and increases the risk of serious great-power conflict. The Westphalian idea of sovereignty was created in part to address this problem: Instead of continuing to fight over which version of Christianity would hold sway in different countries (one of the key drivers of the wars that preceded the Westphalian peace), European states agreed to let each ruler determine the religious orientation of their realm. Similarly, a powerful state’s efforts to shape the domestic arrangements of another country will inevitably be seen as threatening by the target: Just look at how Americans now react to the possibility of Russian interference in our political system. Third, creating a more stable international economic order while preserving most of the benefits of trade and comparative advantage will require fashioning trade and economic arrangements that permit great national autonomy, even at the price of slightly lower global growth rates. Not only might this reduce the risk of global financial panics, but allowing individual states greater freedom to set the terms of their international economic engagement could also reduce the anti-free trade backlash that is currently fueling costly trade wars. Finally, a world in which a single political and economic model prevails is probably impossible anyway, at least for the foreseeable future. To believe that one size could fit all ignores the enormous diversity that still exists in the world and the powerful tendency for ideas and institutions to morph and evolve as they travel from their point of origins. Take pop music: Elvis Presley creates a new amalgam of rhythm and blues, gospel, and rockabilly (with a jolt of testosterone), his influence arrives in England and helps inspire the Beatles, who lead the “British invasion” of America in the 1960s, which then combines with Bob Dylan and the folk music movement to create the sound of groups like The Byrds. Or look at how Lin-Manuel Miranda combined hip-hop with his deep appreciation of traditional Broadway styles to create something new like Hamilton. These examples just scratch the surface of how music changes when different cultural streams begin to interact; I could just as easily have cited examples from Africa, Latin America, the Middle East, or the Silk Road. Because humans are boundlessly creative social beings who resist conformity, and because no social or political arrangements are ever perfect, dissidents will always arise and contending visions will emerge no matter how fiercely they are repressed. Institutions created in one place may travel to other locations, but they will mutate and evolve in the process and exhibit different forms wherever they take root. And that’s why I’ll raise two cheers for the (partly) sovereign state. A world made up of contending nationalisms is hardly a utopia, with the ever-present possibility of conflict and war and many obstacles to mutual cooperation. But trying to fit a diverse humanity into a uniform box is doomed to fail—and no small source of trouble as well. Even if we hold certain values to be sacred and are tempted to act when other states violate them, continued respect for boundaries and sovereignty is also a norm that can keep simmering rivalries in check. Libya would not have multiple powers interfering in it today had Britain, France, and the United States not decided to meddle there back in 2011. As A.J.P. Taylor once archly observed, leaders in the 19th century “fought ‘necessary’ wars and killed thousands; the idealists of the 20th century fought ‘just’ wars and killed millions.” Looking ahead, greater respect for national sovereignty and fewer efforts to force the whole world into one way of living will help emerging rivalries stay within bounds and help countries with very different values cooperate on those critical issues where their interests overlap.

#### The plan causes a flood of litigation that will be politicized to escalate the trade war

Scarborough 19, JD, antitrust attorney (Michael, “Between a Rock and a Hard Place: Vitamin C and the Future of U.S. Antitrust Enforcement Against Chinese Companies,” <https://www.sheppardmullin.com/media/publication/1786_Legal%20500%20PDF.pdf>)

This doubt went effectively unchallenged until the so-called Vitamin C case–which has been pending for 14 years and is still working its way through U.S. courts. There, Chinese Vitamin C makers argue they are immune from U.S. antitrust liability because they are state-owned enterprises and their conduct was required by the Chinese government, arguments that the Chinese government has confirmed in its own court filings. Through many twists and turns, the case has now come to focus on the question of whether the U.S. court should accept the Chinese government’s declaration of what its own laws require. Most recently, the U.S. Supreme Court issued a unanimous decision that U.S. courts are not required to accept the Chinese government’s statements regarding Chinese law, and must make their own determinations of what Chinese law actually requires in a particular case. The Court remanded the case back to a lower appellate court with instructions to make that determination as to the Vitamin C defendants. Because the lower court in Vitamin C has already acknowledged some skepticism about the Chinese government’s statements, there is a real possibility that it will reject the Vitamin C defendants’ immunity arguments. Regardless of the ultimate resolution of the Vitamin C case, the new legal landscape—where U.S. courts have discretion to reject the Chinese government’s statements regarding its own laws—could open the floodgate to U.S. antitrust litigation against Chinese defendants. These cases will not be decided in a vacuum, but in the midst of an escalating trade war between China and the United States, at a time when elements of the U.S. government are openly hostile to various Chinese businesses and their products. It is probably unavoidable that political realities will inform the filing and resolution of future cases and the ongoing development of U.S. law in this area.

#### New enforcement leads to prison time and treble damages for Chinese elites. And, puts the US in direct control over application of Chinese law. That wrecks relations

Scarborough 19, JD, antitrust attorney (Michael, “Between a Rock and a Hard Place: Vitamin C and the Future of U.S. Antitrust Enforcement Against Chinese Companies,” <https://www.sheppardmullin.com/media/publication/1786_Legal%20500%20PDF.pdf>)

The Vitamin C decision is but one of a growing collection of obstacles for Chinese companies to navigate when doing business in the US. Recent developments include the ongoing US-China trade war, the rollout of the China Initiative, the passage of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), and the unprecedented extradition of the Chinese citizen CFO of Huawei Technologies, China’s largest smartphone and communications equipment maker. Vitamin C creates additional uncertainty for Chinese companies potentially facing conflicting demands from Chinese and US authorities. The stakes can be particularly high when it comes to antitrust enforcement in the U.S., where prison time, treble damages and class actions are very real possibilities. The standard articulated by the Supreme Court leaves open the possibility that district courts and courts of appeal may reach decisions that completely or partially reject positions of foreign governments on the interpretation or application of their own laws. Future decisions like this may further raise tensions with China or give rise to even more issues that Chinese companies need to consider. Indeed, in its amicus brief to the Supreme Court, MOFCOM argued that “[r]ejecting a foreign sovereign’s explanation of its own law can imply only two things: that a U.S. court knows a country’s laws better than its own government, or that the foreign government is not being candid.” Either of these implications, MOFCOM warned, were “profoundly disrespectful” and risked an “international incident” and “international discord as a result.” And MOFCOM protested in its most recent amicus brief to the Second Circuit that “[i]t would make no sense for a sovereign [to] appear in U.S. court for the first time to offer untrue statements that could be used against its own interests by other nations, all to support a handful of domestic companies facing litigation abroad” unless it was offering a bona fide interpretation of its own regulations.

#### That hypocritical interference spikes Chinese nationalism

Hormats 19 - Atlantic Council board member, vice chairman of Kissinger Associates Inc., and a former US undersecretary of state for economic, energy and environmental affairs. (Robert, and Former US Undersecretary, June 27th, “The Trump-Xi summit and beyond,” *Atlantic Council*, <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-trump-xi-summit-and-beyond/>)

Then there is the question of how this agreement is embodied and implemented in Chinese law, regulations, and policy statements. The Chinese vividly recall a period that included much of the 19th century and the first half of the 20th century, in which their country was weak and internally divided. Foreign powers took advantage of this situation and imposed what were known as “unequal treaties” on China. If recent press reports are accurate, the notion that the United States would have a role in determining what is written in Chinese law to ensure implementation of these negotiations goes right to the core of these raw memories. Hence China’s lead trade negotiator Liu He has emphasized that any deal must be “premised on equality and dignity.” Again assuming press reports are accurate, the United States has sought to retain some of the current tariffs for a time after a deal has been reached to ensure Chinese compliance, and further wants to have the right to reimpose tariffs unilaterally if Washington finds that Beijing is not complying, with China agreeing not to retaliate. As senior Chinese leaders came to understand and digest these US pressures, there were serious concerns as to how they would be received by public opinion and especially by opinion within the Communist Party. Even influential Chinese who are enthusiastically reform-minded may have found these types of concessions objectionable. And if such concessions trigger nationalistic feelings that China’s leaders cannot ignore, a deal will be difficult if not impossible to conclude.

#### Xi is forced to compensate with escalatory tactics

Torigian 19 – PhD, Assistant Professor @ American U (Joseph, “Elite politics and foreign policy in China from Mao to Xi,” *Brookings*, <https://www.brookings.edu/articles/elite-politics-and-foreign-policy-in-china-from-mao-to-xi/>)

Another possibility is that Xi might be tempted to take big foreign policy risks to please the PLA, point to victories in his column, summon popular support, or rally the elite in a time of crisis. Perhaps, but that would risk catastrophe and might not be necessary in the first place. Unless pressures and failures mount higher and higher, Xi has reason to believe he has enough cushion to act prudently.

#### “Respectful consideration” but not “binding deference” is an acceptable middle-ground. It’s what the US expects in international proceedings, and is consistent with I-Law

Francisco 18, Solicitor General (Noel, In the Supreme Court of the United States ANIMAL SCIENCE PRODUCTS, INC., ET AL., PETITIONERS v. HEBEI WELCOME PHARMACEUTICAL CO. LTD., ET AL. ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, <https://www.justice.gov/atr/case-document/file/1041216/download>)

When the United States litigates questions of U.S. law in foreign tribunals, it expects that the views submitted on its behalf will be afforded substantial weight, and that its characterizations of U.S. law will be accepted because they are accurate and well-supported. But the United States historically has not argued that foreign courts are bound to accept its characterizations or precluded from considering other relevant material.6 And although other nations’ approaches to determining foreign law vary, we are not aware of any foreign-court decision holding that representations by the United States are entitled to such conclusive weight The understanding that a government’s expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Those treaties specify that “[t]he information given in reply shall not bind the judicial authority from which the request emanated.” European Convention on Information on Foreign Law art. 8, June 7, 1968, 720 U.N.T.S. 147, 154; see Organization of American States, Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, O.A.S.T.S. No. 53, 1439 U.N.T.S. 107, 111 (similar). Although the United States is not a party to those treaties, they reflect an international practice that is inconsistent with the court of appeals’ approach, and they confirm that the court’s rule of binding deference is not supported by considerations of international comity.

#### It borders on ridiculous to assume that China will just complacently accept the US ripping apart the Chinese economy. They’ll respond with their own acts of aggression. They’ve already said they will use tit-for-tat responses.

Baruzzi, 21 is an Editorial Research Assistant with Dezan Shira & Associates, an AmCham China Corporate Partner Program member. (Sofia Baruzzi “China Promulgates New Extraterritorial Jurisdiction Measures” accessed online 9/17/2021 <https://www.china-briefing.com/news/china-promulgates-new-extraterritorial-jurisdiction-measures/>)

On January 9, 2021, the Ministry of Commerce (“MOFCOM”) released the Measures for Blocking Improper Extraterritorial Application of Foreign Laws and Measures (“Measures”), with immediate effect. The Measures state that Chinese citizens, legal entities, and organizations (hereafter collectively referred to as “PRC persons”) must report to the competent authority in China, any inappropriate application of foreign measures or laws that are designed to bar economic, trade, and related activities between China and other countries. The competent authority has the power to issue an injunction allowing the reporter not to recognize, implement, or comply with the said foreign norms, as well as to file a lawsuit in China claiming for losses’ compensation. What is the reason behind the adoption of the Measures? As further explained below, the Measures provide a retaliation clause remarking that China is ready to take the necessary countermeasures against any improper extraterritorial application of foreign laws and measures. In this way, China is sending a message to the entire world, warning foreign countries to stop unjustly prohibiting or restricting Chinese people or companies from doing business. With the decision to promulgate such type of measures, China reasserts that, if Chinese businesses are not treated equally and allowed to carry out their business in a lawful and regular manner, then the Chinese government is ready to intervene. It is worth noting that while the Measures do not mention any specific foreign country, they will likely serve as countermeasures to the US restrictions and bans – for instance, the ban against Tik Tok and WeChat, the measures adopted against Huawei’s chips, or the exclusion of China Unicom, China Telecom, and China Mobile from the stock exchange – that heavily impact doing business with Chinese companies and individuals. Considering the recent change in US administration, China’s move might be interpreted as an attempt to change the direction of US-China relations, in the hope that such Measures will deter President Joe Biden’s administration from maintaining (or exacerbating) the regulations implemented during Trump’s administration. Hence, how China will relate itself with the US – and consequently how global companies will be impacted by the Measures – really depends on the Biden administration’s approach. (In a recent interview, Biden said that his administration would be ready for “extreme competition” with China but based within the scope of international rules.) The same type of logic shall apply to any other foreign country, in other words, if it wants to maintain a good and smooth relationship with China – it will have to evaluate whether to modify (or remove) the policies and regulations that prevent or restrict PRC persons from performing economic, trade, and related activities.

#### Interdependence is sufficiently high

Bremmer 9-14-2021, American political scientist and author with a focus on global political risk. He is the president and founder of Eurasia Group, a political risk research and consulting firm with principal offices in New York City. He is also a founder of the digital media firm GZERO Media (Ian, “China and US economic interdependence hasn't lessened,” G Zero Media, <https://www.gzeromedia.com/in-60-seconds/world/china-us-economic-interdependence-hasnt-lessened>)

China owns more than $1 trillion US debt, but how much leverage do they actually have? I mean, the leverage is mutual and it comes from the enormous interdependence in the economic relationship of the United States and China. And it's about debt. And it's about trade. It's about tourism. It's about sort of mutual investment. Now. There is some decoupling happening in terms of labor, increasingly moving domestic in terms of the China five-year plan, dual circulation focusing more on domestic economy, and in terms of data systems breaking up, the internet of things, being Chinese or American, but not both. And indebtedness is part of that. But I don't see that unwinding anytime soon. And certainly, the Chinese knows if they're going to get rid of a whole bunch of American debt, they wouldn't be as diversified in global portfolio. Not as great, it's much riskier. And also, the price of those holdings, as they start selling them down would go down. So, I don't think there's a lot of leverage there, frankly. I think the leverage is interdependent.

#### They have to win that the plan economically prevents China from modernizing. But, they don’t solve any of the reasons China has the upper hand. [KU is yellow]

2AC Collins, 16 (Michael Collins, Michael P. Collins is President of MPC Management, was Vice President and General Manager of two divisions of Columbia Machine in Vancouver, Washington. He has more than 35 years of experience in Manufacturing., 6-13-2016, accessed on 6-9-2021, Industry Week, "It is Time to Stand Up to China", <https://www.industryweek.com/the-economy/trade/article/21974236/it-is-time-to-stand-up-to-china)//Babcii>

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

#### The US will just choose not to file WTO suits against China [KU is yellow]

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Mulloy](https://books.google.com/books?id=rkbfsgEACAAJ&dq=%22Across+the+Pond+U.s.+Opportunities+and+challenges+in+the+Asia+Pacific&hl=en&sa=X&ved=0ahUKEwi-lL_ui9jMAhVN4GMKHX5fCAAQ6AEIHDAA) asserts that we are slowly losing the Advanced Technology Products industries to China. Advanced technology products includes the more advanced elements of the computer and electronics industry as well as life sciences, biotechnology, aerospace and nuclear technology, all of which are central to U.S.'s own innovation strategy. In 2014, the U.S. trade deficit with China in advanced technology products was $123 billion. Research & Development Facilities - China requires foreign companies with plants in China set up R&D facilities in China. As a result, foreign companies have built more than 1,000 R&D labs in China. The Results of China's Unfair Trade Practices & U.S.'s Weak Response So what are the results of China's unfair trade practices? 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#### China won’t follow even the strongest WTO rules

2AC Collins, 16 (Michael Collins, Michael P. Collins is President of MPC Management, was Vice President and General Manager of two divisions of Columbia Machine in Vancouver, Washington. He has more than 35 years of experience in Manufacturing., 6-13-2016, accessed on 6-9-2021, Industry Week, "It is Time to Stand Up to China", <https://www.industryweek.com/the-economy/trade/article/21974236/it-is-time-to-stand-up-to-china)//Babcii>

Do you remember when China was accepted into the World Trade Organization in 2001? Presidents Clinton and Bush, as well as many other public policy leaders, predicted that it would improve the U.S.-China trade balance and would encourage China to abandon communism for free-market capitalism,

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both of which would benefit America. I don’t know how they got it so wrong. After 15 years, we can say from experience that none of those predictions have come true. The U.S. deficit with China has ballooned from $83 billion in 2000 to $366 billion in 2015. This is a total of $3.6 trillion in deficits with China. During this same period, the U.S. lost 5 million manufacturing jobs. China is still a communist dictatorship, though it has adopted a few aspects of capitalism in order to participate in global trade. Unlike America’s free-trade approach, communist capitalism operates on the strategy of mercantilism and plays the game by its own rules.