# 1AC

## 1AC---Extraterritoriality

### 1AC---Economic Development

#### Advantage 1 is Economic Development\*:

\*we have modified some of the rhetoric in these cards to strikethrough and/or replace the terms “developed countries” and “developing countries.”

#### The Supreme Court’s ruling in *Empagran* denied standing to foreign plaintiffs seeking remedy for antitrust injury sustained abroad.

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In F. Hoffman LaRoche Ltd. v. Empagran S.A., 542 US 155 (2004), the Supreme Court limited access to American courts by foreign plaintiffs suing under the Sherman Act based on foreign transactions. Jurisdiction over foreign antitrust claims is governed by the Foreign Trade Antitrust Improvements Act (“FTAIA”). However, rather than parsing this opaque and poorly drafted statute, the Court drew on the doctrine of prescriptive comity and held that where a statute is vague, it should be construed narrowly so as not to interfere with the prerogatives of co-sovereigns. Alternatively, the Court concluded that if the conduct in question would have been beyond the reach of the Sherman Act prior to the enactment of FTAIA, it would not be cognizable under the FTAA because that statute was designed to limit—not expand—jurisdiction over foreign claims. The Court found that there were no pre-FTAIA cases to support jurisdiction.

On remand, the D.C. Circuit ruled that even if foreign plaintiffs could show that “but for” participation of U.S. firms in the conspiracy, they would not have been injured, their claims would still be barred. The FTAIA contemplates that (1) the illegal foreign have a “direct, substantial and reasonably foreseeable effect” on U.S. commerce; and (2) such adverse effect on foreign commerce gives rise to claims by foreign plaintiffs. Incidental or “but for” linkage does not suffice; proximate cause is the standard.

Moreover, foreign claims based on foreign transactions are also barred under the doctrines of standing and antitrust injury. Antitrust courts have traditionally denied standing to firms that were neither competitors nor consumers in the U.S. market. Similarly, the doctrine of antitrust injury limits the universe of antitrust plaintiffs to those who have suffered injury of the kind that the antitrust laws are met to protect against and that flows from that which makes the conduct unlawful. The U.S. antitrust laws were not meant to protect plaintiffs who were not participants in the U.S. market. Empagran may not eliminate antitrust actions by foreign purchasers, but the decision is a major hurdle to their successful prosecution.

IN EMPAGRAN, 1 THE SUPREME COURT construed the Foreign Trade Antitrust Improvements Act 2 (FTAIA) to severely limit the extraterritorial reach of the Sherman Act. In the wake of Empagran and the D.C. Circuit’s subsequent ruling on remand in that case, 3 foreign plaintiffs asserting claims under U.S. antitrust laws for injuries based on transactions consummated abroad have been largely shut out of federal courts. Foreign plaintiffs, however, have not abandoned their efforts to obtain relief in American courts for anticompetitive acts committed in the international arena. Rather, they have turned to claims under various state laws, including state antitrust laws, state unfair trade practice laws, and common law relief under theories of unjust enrichment and restitution.

This article analyzes the viability of these state law claims and concludes that state law remedies are likely to be unavailable for injuries based on transactions consummated abroad, for the same reasons the FTAIA bars antitrust claims under federal law. Additionally, these state law claims are barred by the Supremacy Clause of the U.S. Constitution, the Foreign Commerce Clause, the Due Process Clause, and the doctrine of prescriptive comity.

Background

Historically, U.S. courts have been hesitant to apply American antitrust laws to conduct occurring outside of the country. In American Banana Co. v. United Fruit Co., the Supreme Court ruled that the Sherman Act must be “confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”4 As American traders became increasingly involved in the international arena, courts began to relax the hard-line view of American Banana. In Alcoa, the Second Circuit held that the Sherman Act does proscribe extraterritorial acts that are “intended to affect imports [into the United States] and did affect them.”5 At the same time, Alcoa made clear that “[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.”6 Still, the court made no attempt to identify the point at which foreign acts were qualitatively and quantitatively sufficient to affect domestic commerce to confer jurisdiction on U.S. courts.

Congress enacted the FTAIA in 1982 to clarify the reach of the Sherman Act in matters involving foreign commerce. The statute, however, was inartfully drafted and led to more confusion than clarity among courts and litigants. The Supreme Court in Empagran granted certiorari to resolve a dispute among the circuits on construction of the FTAIA. 7 The D.C. Circuit had concluded that the FTAIA allowed subject matter jurisdiction over claims by plaintiffs located in the Ukraine, Australia, Ecuador, and Panama, each of whom alleged that they had suffered injuries from a global price-fixing cartel when they bought vitamins for delivery outside of the United States. The Supreme Court vacated, holding that the FTAIA bars the exercise of subject matter jurisdiction over Sherman Act claims by foreign plaintiffs claiming illegal conduct that “significantly and adversely affects both customers outside the United States and customers within the United States” if “the adverse foreign effect is independent of any adverse domestic effect,” that is, if “the conduct’s domestic effects did not help to bring about that foreign injury.”8

The Court articulated a two-pronged rationale for its interpretation of the FTAIA. First, under principles of prescriptive comity, ambiguous statutes—and the FTAIA is, at the very least, ambiguous—should generally be interpreted so as to “avoid unreasonable interference with the sovereign authority of other nations.”9 The Court concluded that the Sherman Act may not supersede a foreign nation’s determination of how best to protect its citizens in cases where foreign conduct causes foreign injury independent of domestic injury and that foreign injury alone gives rise to foreign plaintiffs’ claims. 10 The Court further observed, citing amici filings by foreign governments, that allowing foreign plaintiffs to proceed with treble damage claims under these circumstances “would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody.”11

Second, the Court found plaintiffs’ argument for expansive construction of the FTAIA unpersuasive. As a threshold matter, the FTAIA was meant to limit—not to expand—the reach of the Sherman Act in matters involving foreign commerce. Moreover, the Court found no case decided prior to the enactment of the FTAIA that would have upheld the exercise of jurisdiction over similar foreign claims. 12 Although the Court acknowledged that plaintiffs’ argument favoring jurisdiction presented “the more natural reading of the statutory language,” considerations of comity and history made clear that plaintiffs’ reading “is not consistent with the FTAIA’s basic intent.”13 Instead, the Court adopted the narrower reading championed by defendants because “[t]hat reading furthers the statute’s basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.”14 The Court emphasized that its holding “assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct’s domestic effects did not help to bring about that foreign injury.”15

On remand, the plaintiffs argued that their injury was not unrelated to the anticompetitive effects of the cartel on U.S. commerce, urging that but for defendants’ price-fixing activities in the United States, the international cartel would have collapsed. The plaintiffs maintained that, given the fact that vitamins are fungible and readily transportable, without U.S. participation in the conspiracy, foreign purchasers would have bought vitamins in the United States at competitive prices, instead of dealing with the cartel at supracompetitive prices. By incorporating the U.S market, the cartel cut off that avenue of arbitrage. Accordingly, the plaintiffs argued that the domestic effect of the cartel caused the plaintiffs’ foreign injury.

The D.C. Circuit disagreed. The court did acknowledge that the plaintiffs had painted a plausible scenario that but for supracompetitive prices in the United States resulting from cartel activities in the United States, they would not have been injured. 16 Nevertheless, the court held that “ ‘but-for’ causation between the domestic effects and the foreign injury claim is simply not sufficient to bring anticompetitive conduct within the FTAIA exception.”17 Rather, the statutory formulation calls for “a direct causal relationship, that is, proximate causation,” between domestic effects and foreign injury, a standard that is not satisfied by establishing a mere “but-for ‘nexus.’”18 The proximate cause standard under the FTAIA has proven to be a formidable barrier to foreign plaintiffs who seek to bring antitrust suits under U.S. law in American courts.

#### Gaps in enforcement and the presumption against extraterritoriality leave much of the Global South vulnerable to anticompetitive predation.

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Why should American law supplant, for example, Canada’s or Great Britain’s or Japan’s own determination about how best to protect Canadian or British or Japanese customers from anti-competitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?1

Thus asked Justice Breyer in his 2004 opinion in F. Hoffman-La Roche, Ltd. v. Empagran, SA,2 a case brought in U.S. federal court as a class action on behalf of purchasers of certain vitamin products on foreign (non-U.S.) markets against members of a cartel. The question was, of course, rhetorical. There seems to be, at least prima facie, no good reason to impose U.S. antitrust law on other highly developed countries with their own functioning antitrust regimes, especially without or even against these countries’ will.3

But the question was also strangely misplaced. Although Canada, Great Britain, and Japan—the countries Breyer named—had urged the Court to dismiss the claims by foreign plaintiffs,4 the countries from which the named plaintiffs stemmed—Ecuador, Panama, and Ukraine—had remained silent.5 These last three countries are representatives of less developed countries, many of which do not have very effective antitrust regimes.6 With this in mind, Breyer’s question would better have read something like this: Why should American law supplant, for example, Ecuador, Panama, or Ukraine’s antitrust regimes, insofar as these countries are unable to protect their customers from anti-competitive conduct engaged in significant part by foreign companies?

This question is harder to dismiss. Arguably, supplanting these countries’ ineffective competition regimes would serve a purpose. The question would not be one of superseding foreign regimes when there are none. The question would be one of filling regulatory gaps. Vis-à-vis countries with functioning antitrust regimes, the question is which of several countries should regulate the cartel. Vis- à-vis countries without functioning antitrust regimes, the question is whether the cartel is regulated at all. If the developed country does not regulate, no other country does. Hence, the issue is not whether to defer to a foreign antitrust agency. Instead, the question is whether to defer to the cartel’s impunity. This policy decision would require quite a different justification.

~~Developing countries~~ [the Global South] would likely do better if they had effective antitrust regimes, and other articles in this issue discuss what is required for success. But we also need solutions for situations in which ~~developing countries do~~ [the Global South does] not (yet) have such regimes, or in which they are for other reasons incapable of dealing with an international cartel. This is the situation this article addresses. It develops an argument for when and why a developed country’s antitrust regime should supplant the regime of a developing country. The question is, essentially, when and why the developed country should take over, in part, regulation of the developing country’s market.

Some limitations should be mentioned. First, the article focuses on the regulation of cartels. Although supplanting antitrust law might well work also for other issues—for example, merger control or abuse of a dominant position— these issues would require different considerations, which the article does not address. Second, for purposes of the article, a developed country is defined as a country with, and a developing country as a country without, a functioning antitrust regime. The analysis is therefore not directly applicable to developing countries that have effective regimes. By contrast, some of the arguments may be applicable to small developed countries with limited resources.7

Part II begins by laying out the tension between the need for antitrust in developing countries and the obstacles these countries face in building their own regimes. It then argues for the possibility of one country’s antitrust institutions regulating another country’s market, as long as a jurisdictional basis exists. Part III discusses this idea of supplanting antitrust, its legal background, and the factors relevant for its justifiability. Part IV applies the idea of supplanting antitrust in three constellations: multinational cartels that affect markets in both developed and developing countries; transnational cartels in which cartels from developed countries target markets in developing countries; and domestic cartels that remain confined within the boundaries of the developing country. Part V discusses a number of possible objections.

II DEVELOPING COUNTRIES AND ANTITRUST REGULATION

A. Challenges

Once, establishing antitrust regimes was thought not to benefit developing countries.8 That view is no longer prevalent. Today, more than half of the ~~developing~~ [Global South] countries in the world have antitrust regimes.9

Having laws on the books represents, however, only a first step. A greater problem for many developing countries lies in building institutions 10 and enforcing existing antitrust laws. Here, the data are somewhat unclear. Levenstein and Suslow found in 2004 that actual enforcement of existing antitrust law was widely lacking.11 Waked, by contrast, suggests that developing countries do allocate resources to the enforcement of antitrust laws, though the degree depends on, amongst others, general macroeconomic development, openness to trade and imports, and level of corruption.12 Büthe and Aydin identify several factors that constrain ~~developing~~ countries [in the Global South]: limits in financial resources and expertise, unsupportive or hostile political–legal environments, limitations to legal culture, a lack of competition culture, and underdeveloped markets 13

The enforcement problem is exacerbated for transboundary cartels with actors from outside the ~~developing countries~~ [Global South] targeting the country’s markets.14 Often, less developed countries do not even appear to recognize the impact these cartels have on their economies.15 If cartel members act outside the country, agencies have difficulties detecting and scrutinizing the cartel.16 Where they do, the global market power of firms is often badly matched by the antitrust regimes of ~~developing countries~~ [Global South].17 Even if ~~developing countries~~ [Global South] have the resources and expertise to regulate small and midsize local cartels, they may well be unable to regulate bigger and transnational or multinational cartels.18 It may often be preferable for them to allocate scarce resources to the regulation of domestic cartels.

#### Instead, foreign plaintiffs were encouraged to rely on trickle-down enforcement from more developed antitrust regimes, which creates impunity for transboundary and multinational cartels.

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III. PART III: SHORTCOMINGS OF THE STATUS QUO

The current regulatory patchwork works relatively well for the key ~~developed~~ countries. The established competition agencies could overcome the hurdles of transnational cases if they so choose.[48](javascript:;) They have the necessary financial and human resources and expertise. This state of affairs may explain why the developed world stopped investing efforts in finding a multilateral solution to the problem of transnational anticompetitive conduct such as international cartels.

Even when foreign violators do not have assets in the ~~developed~~ states, they are unlikely to react to unfavourable enforcement outcomes by exiting the market because such markets are too important. The economic weight of a market helps to realize the potential of extraterritoriality. Economies that are less important from the violators’ perspective face a particularly uphill and unequal battle when challenging anticompetitive conduct.

In this regulatory context, the smaller and less developed countries are advised to focus their enforcement on domestic violations.[49](javascript:;) When it comes to transnational violations, such as international cartels, they are often recommended to rely on the enforcement efforts of [more] developed regimes.[50](javascript:;) That is, they are to depend on what can be called ‘trickle-down enforcement’. The implicit argument is: should an international cartel be investigated and sanctioned by one or more developed agencies, it will be disbanded and cause no further competitive harm. In other words, enforcement by more developed agencies can generate positive externalities, or spill-over effects for other regimes. Hence, there is an opportunity for enforcement free-riding. While this certainly happens, this proposition assumes that transnational violations affect developed and developing countries in a similar manner. This may be true when it comes to violations affecting virtually all world markets; in such casesprosecution effectively deals with the totality of the underlying anticompetitive conduct. For example, in the case of the Southeast Asian cartel of LCD screen manufacturers, enforcement by a number of agencies led to the restoration of competition.[51](javascript:;) Similarly, the operation of the vitamins cartel was global and attracted significant attention of enforcers in several jurisdictions.[52](javascript:;) However, not all transnational violations are omnipresent with sufficient impact on key economies to provoke vigorous enforcement and a complete discontinuation of the harmful practice. For example, the American Soda Ash Export Cartel (ANSAC), a U.S.-based export cartel, was found in breach of EU competition law in 1990.[53](javascript:;) However, this decision did not lead to its abandonment. ANSAC reorganized its activities in relation to the EU and continued operating in a business-as-usual manner in other markets. In 1996 it was challenged in India. The case failed due to the lack of an explicit textual basis in Indian law allowing for extraterritoriality. The judgment was rendered under severe pressure exerted by the United States. In 1999 the same cartel was challenged in South Africa, where—after nearly ten years of litigation—ANSAC settled.

Enforcement in the EU, India and South Africa did not lead to the break-up of ANSAC, which continues operating in various markets. This case underlines the gaps in the current regulatory framework. It shows that enforcement free-riding will not necessarily work. There may be no trickle down benefit to countries that forego domestic enforcement.

Moreover, reliance on enforcement activities of developed countries by other states is not always an option. While some transnational violations are truly global, many types of anticompetitive conduct are more limited in scope, depending on the nature and characteristic of the goods or services involved. There may be regional arrangements (for example, a regional cement cartel) or arrangements that affect only a specific group of countries (for example, a cartel concerning a good which is no longer sold in the ~~developed~~ [Global North] economies, but which is still offered in ~~developing countries~~ [the Global South]). In such cases there would be no enforcement by developed agencies to piggy-back on and therefore no trickle-down benefit, given that markets in developed economies would not be affected.

Due to the existing gaps in the regulatory framework, the recommendation to focus on domestic violations has had perhaps unintended, and somewhat perverse, consequences. Domestic infringements—which typically do not lead to transfer of wealth abroad—are pursued while transnational violations escape scrutiny, despite generally causing much greater harm [54](javascript:;) and often leading to outflow of wealth from the domestic economy. Even in cases of successful reliance on enforcement by agencies of other states (for example, in cases of truly global cartels) the transfer of wealth is not remedied. The rents extracted through supra-competitive prices are not even partially remedied by fines imposed on the violators, given that no sanctions are imposed in relation to the harm to the domestic market. Rather, the benefit is the prevention of future harm. This is only a partial success, but even this is not present in cases in which the foreign enforcement is either not robust enough to lead to discontinuation of the anticompetitive conduct in question or when such enforcement is simply missing. Hence, passive reliance on trickle-down enforcement is unsatisfactory.

Furthermore, even if free-riding on enforcement by other states can prevent future harm, this setup provides no deterrence, which is considered crucial in modern competition law. Transnational violators can feel safe and act with impunity. Any sanctions they may face will relate only to harm caused in the enforcing jurisdictions. Hence, there is no reason for them not to continue with existing—and not to create new—anticompetitive arrangements that extract wealth from markets in states that do not challenge transnational violations.[55](javascript:;) The situation is particularly grim in the case of anticompetitive practices that do not affect any major jurisdiction enforcing competition law robustly, since there will be no agency to piggy-back on and no possibility of a trickle-down benefit. The violation may remain completely off the radar should domestic agencies focus solely on domestic conduct. Moreover, even if the viability of a particular anticompetitive arrangement requires it to be global in scope, prospective violators may still find it profitable, even after taking into account any sanctions they may face in the key jurisdictions that actively challenge such transnational violations. Profits extracted from the non-enforcing jurisdictions may offset ‘related’ costs, that is sanctions imposed in the relatively few jurisdictions which do pursue such cases. This argument was made before the US Supreme Court in Empagran.[56](javascript:;) Such sanctions—especially if only financial in nature—can be seen as no more than just a selectively imposed tax on transnational anticompetitive activities. The availability of individual criminal sanctions in the form of imprisonment in some countries changes that dynamic, but does not fundamentally resolve the problem.

#### Cartels undermine good-faith market competition---that’s a precondition for recurrent economic development.

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Introduction

Microeconomic theory defines the market as perfect competition when firms provide goods at a price that equals their marginal cost. Some common characteristics of a perfectly competitive market include homogenous products, all buyers and sellers as price takers, there is complete information, and no entry and exit barriers. Under the assumption of prices equal marginal costs, firms would have no or little incentive to innovate.

It is reasonable to expect that most industries are characterized by some degree of heterogeneity and product differentiation. In this situation, the competition encourages profit-maximizing firms to innovate to achieve abnormal returns.

Rooted in management literature known as the resource-based view of the firm, Barney (1991) argues that sustainable competitive advantage derives from the resources and capabilities a firm controls that are valuable, rare, imperfectly imitable, and not substitutable. It is arguable that the firm's sustainable competitive advantage should be connected with the environment where the firm operates. Good faith competition incentivizes firms to build sustainable competitive advantages through R&D investments, product differentiation, advertising, and capital- and cost-efficiencies. Firms need to invest in tangible and intangible resources to create competitive advantages and generate abnormal returns (returns on equity higher than the cost of equity). Firms also need to continue investing in maintaining those advantages over time to create long-term value.

Kline and Rosenberg (2010) define the process of innovation as a series of changes that affect not only hardware but also production, markets, and organizations. In fair competition markets, a firm's search for creating competitive advantages provides a continuous investment process and stimulates innovation, providing economic growth, employment, and welfare enhancement (Baumol and Strom 2007, OECD 2007, Daniels 1996).

Sustainable economic growth has important implications for society. In the long run, economic growth is mainly explained by technological progress. Sustained economic growth has an amplified effect on per capita income, and it is an effective mechanism to reduce poverty rates (Barro and Sala-i-Martin 2004, Sala-i-Martin 2006, Dollar et al. 2013). United Nations' 2030 Agenda for Sustainable Development1 includes eradicating poverty as an indispensable requirement for sustainable development. In fair markets, firms competing for competitive advantages take a crucial role, bringing the power of innovation that generates economic growth, resulting in an improved standard of living for the wider society. However, some firms may have incentives to collude to obtain extra-profits, harming consumers and, at the same time, negatively affecting the power of innovation. Regulators have to ensure the fair functioning of markets.

II. Advantages of good faith competition

The positive effect on society of firms' rivalry is based on three central ideas. The first one is that firms pursue a profit maximization strategy and expect to achieve abnormal returns. The second one is that industries have some degree of heterogeneity and product differentiation. Lastly, firms compete in fair markets. In this scenario, firms pursuing abnormal returns will make investments in order to develop competitive advantages. Investment in R&D is one of the most important activities driving competitive advantage, and firms in competitive industries enter into innovation races to differentiate their products. Innovation affects long-term economic growth through technological progress. The European Central Bank supports innovation as an essential driver of economic progress that benefits consumers, businesses, and the economy as a whole.

Fair market competition is one of the pillars for obtaining positive effects from rivalry. National and supranational organizations acknowledge the benefits of good faith competition. The Autorité de la concurrence, the competition regulator in France, argues that competition forces companies to be innovative and to stimulate growth and jobs. The European Union states that having firms competing fairly in the market benefits society. Consumers receive higher quality products at better prices, and competition incentivizes firms to innovate to differentiate their products and make firms more competitive in global markets.

In fair markets, the search for competitive advantages stimulates innovation and strengthens long-term economic growth. The Presidency Report to the Council of the EU (September 20th, 2019) on developing long-term strategies of sustainable growth identifies Research and Innovation (R&I) as a critical driver in response to the main challenges of the European economic growth model. Economic growth does not need to be explosive but recurrent over the long term. An example of the positive effects of long-term economic growth on income per capita is the U.S. economy. The US GPD per capita grew at a yearly rate of 1.8% between 1870 and 2000, resulting in an increase of 10 times, from $3,340 to $33,330 measured in 1996 dollars. However, reducing the yearly growth rate to 0.8%, the per capita rent in 2000 would have been $9,450, only 2.8 times the value of 1870, and the U.S. would be ranked in 45th position instead of 2nd out of 150 countries (Barro and Sala i Martin 2004). Arguably, designing good faith competition markets is a natural mechanism to promote sustainable economic growth.

Fair competition stimulates innovation, which is the main contributor to sustainable economic well-being.

III. Market failures and the need for regulation to avoid firms' misconduct

Collusion is a market failure that occurs when firms in a market coordinate, restricting competition and negatively affecting prices, outputs, and innovation. Public institutions are making a great effort in detecting firms' collusion practices that harm competition. Research on cartel overcharge shows a significant increase in price attributable to collusion (Connor 2010; Smuda 2014; Boyer and Kotchoni 2015). Among other adverse effects, collusion may provoke an extraction of consumers' welfare in favor of the cartel firms, reducing firms' incentives to invest in innovation. It is important to contextualize the relevance of collusion agreements. Private International Cartels (PIC) database, developed by Professor John M. Connor, contains detailed information for price-fixing cartels detected between 1990 and 2017. Relative to the GDP, cartels operating in Europe are triple those operating in North America, while the affected sales' size is equal between both markets, with affected sales' totaling about $900 billion, of which global cartels account for 37%.

One clear example of market manipulation is the truck cartel. In July 2016, the European Commission ("E.C.") imposed a record fine of €3 billion to MAN, Volvo/Renault, Daimler, Iveco, and DAF for continuing collusion in the medium and heavy truck market. Over 14 years, the firms colluded on pricing, the introduction of new emission technologies, and passing on compliance costs with stricter emission rules. Scania was part of the cartel practices but did not accept the fine and initiated a separate legal proceeding to defend itself from the accusations. Scania was eventually declared guilty by the E.C. and received a fine of €880m2.

One essential piece to improving good faith competition is an efficient competition law that avoids firms' misconduct. Antitrust is considered as one of the most important public policies that has aimed at protecting a public good as well as protecting consumers from predatory business practices: good faith competition. There are substitute arguments on the necessity of governments' intervention. The theory of "public interest" is based on the assumption that government can solve inefficiencies caused by monopolistic conduct and externalities through intervention. The second stream of thought states that competition and private enforcement mitigate market failures within strong legal systems and well functioning courts (Coase 1960). Shleifer (2005) highlights that the enforcement environment determines the optimal intervention system (public regulation or court-based system).

In antitrust cases, victims can initiate an action from scratch (stand-alone) or after the competition body adopts an infringement decision (follow-on). Claimants initiating a standalone action have to prove the infringement, while in follow-on actions, the claimants benefit from the antitrust resolutions. Stand-alone damage actions have high barriers for victims due to the difficulties obtaining evidence of the infringement conduct. These actions are highly costly and risky. Therefore, it may not achieve the deterrence function for colluding firms.

Private enforcement is the necessary complement for public enforcement to have efficient competition law. However, a study commissioned by the EU in 2004 identified actions for damages against antitrust infringement were totally undeveloped. In 2014, the EU adopted antitrust actions for damages to eliminate obstacles to compensation for antitrust victims and better define the relationship between public and private enforcement. The Directive 2014/104/EU facilitates private enforcement through follow-on actions for damages on European Commission or national competition bodies' resolutions.

Among other changes, the Directive establishes that the competition regulators' final decision is binding before courts. It also states that there is a presumption that cartels cause harm3 , and cartel victims have to prove in national courts the amount of loss they suffered from an infringement. The Directive establishes a time-barred period of five years to bring cases to courts since the infringement has ceased, so victims will have had sufficient time to bring an action. Before the Directive enaction, limitation periods differed considerably among member states, and the starting period cannot be precisely identified.

While this new regulation facilitates victims' actions and incentivizes private enforcement, it is still complex in time and cost. The main difficulties that claimants face are related to proving and quantifying this misconduct's effects on their specific situation. The quantification of the economic effects usually requires a large sample of data and a high level of expertise to deal with it properly. It is difficult to prove the economic effects of the misconduct with single-case data.

The limitations associated with single enforcements have generated an opportunity for funds who are willing to invest in damage claims. Currently, litigation funds provide complete financing for the process under a profit-sharing structure, and even some investors are directly acquiring such claims4 .

In December 2020, the European Union adopted the Directive 2020/1828 on representative actions to protect consumers' collective interests. It is one additional step in the regulation process to protect consumers' interests against infringement actions.

The new regulation, jointly with the interest of funds to support these claims, enhances private enforcement in Europe, and it is an important element in promoting the good faith competition disincentivizing firms to collude.

IV. Conclusion

Within perfect competition, profits are zero at the maximum, and firms have little or no incentives to innovate because they cannot create sustainable competitive advantages. However, most industries have some degree of heterogeneity and differentiation. In product-differentiation markets and under good faith competition, profit-maximization firms have incentives to obtain abnormal returns through value-creating strategies that competitors cannot replicate. This search for competitive advantage creates a virtuous cycle of innovation, which is the pillar for economic growth, employment, and welfare enhancement.

Poverty reduction is one of the main goals of governments and multilateral organizations. Sustained economic growth is a powerful mechanism to reduce poverty providing new employment opportunities and making education more accessible to the wider population. It also incentivizes entrepreneurship. All these factors improve competitiveness, which results in more economic growth.

Markets have to operate in good faith to achieve the advantages of innovation. Governments have to ensure the fair-functioning of the markets. However, firms may try to extract consumers' welfare through anti-competitive agreements. Cartels are situations in which firms decide to cooperate and not compete, thereby injuring customers by rising prices, restricting production, or reducing their investments in R&D. These anti-competitive agreements reduce innovation and negatively affect economic growth.

Competition law plays an essential role in disincentivizing firms to collude. The interaction of antitrust regulation and private enforcement is a powerful instrument in deterring future antitrust violations and supporting good faith competition.

Sustainable growth is one dimension of sustainable development. The evaluation of sustainable development requires the inclusion of other relevant factors in the equation, such as reducing carbon emissions and global warming, reducing « with-in » countries' inequality, and ensuring equal opportunities for all.

There is an open discussion on the correct balance between the three dimensions of sustainable development- economic, environmental, and social. One example of the adequacy of the sustainability indicators is the recent research developed by Einsenmenger et al. (2020) that criticizes the overweight of economic growth versus ecological integrity in the SDGs of the U.N.'s 2030 Agenda for Sustainable Development. Some economic models offer a new approach for including sustainability factors in the equation. The so-called Doughnut Economy (Raworth 2017) includes planetary and social as upper and lower boundaries for economic growth. The planetary boundaries assure that economic growth does not put too much pressure on the planet's health and includes, among other concepts, climate change, ocean acidification, and the loss of biological diversity. The social boundaries include life's essentials, from food to healthcare and education. Lastly, there is a sweet spot area for economic growth within those two boundaries, environmentally friendly and socially.

In sum, there are multiple potential trade-offs between economic growth and social and environmental impacts, and each generation will have to decide what is the right balance. But whatever the chosen balance is, we argue that good faith competition is still a minimum requirement to promote long-term sustainable growth that helps reduce poverty and improve people's standard of living and well-being around the world.

#### The upside of market competition outweighs and solves alt causes to economic development.

Khameni 7, \*R. Shyam, Advisor, Competition Policy, in the Financial and Private Sector Development Vice-Presidency of the World Bank Group, Washington D.C., 2007, (“Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries,” (<https://documents1.worldbank.org/curated/en/397801468174885108/pdf/413340FIAS1Competition1Policy01PUBLIC1.pdf>)

A persistent challenge that faces the governments of least-developed countries as well as policy advisors at the Bretton Woods Institutions, the United Nations, and aid agencies is: how to foster sustainable broad-based economic growth, development, and poverty reduction. During the past two decades or more, various policy approaches have been explored. In the “first-generation reforms,” the World Bank Group and the International Monetary Fund (IMF), among others, focused on promoting the macroeconomic stability and trade integration of countries. Second-generation reforms moved from the broad policy environment to encourage more microeconomic changes, namely, improvements in the administrative, legal, and regulatory functions of the State. Of late, particular emphasis has been placed on the role of the public sector in establishing an “investment climate” conducive to promoting private sector-led investment, growth, and poverty alleviation.

The quality of a country’s investment climate determines the risks and transaction costs of investing in and operating a business. These risks and costs are in turn determined by the legal and regulatory framework, barriers to entry-exit, and conditions prevailing in markets for labor, finance, infrastructure services, and other productive inputs. Essentially, the quality of the investment climate will determine the mobility and speed with which resources can be redeployed from lower to higher productive uses. For this to occur effectively, the nature and degree of competition in markets plays a pivotal role. In this regard, there is significant economic evidence suggesting that private investment has grown faster in countries with better investment climates. Also, economies with competitive domestic markets tend to attract more domestic and foreign direct investment, have higher levels and rates of growth in per capita gross domestic product (GDP), and lower rates of poverty.1

Promoting effective competition is often argued on grounds that it spurs firms to focus on efficiency and improve consumer welfare by offering greater choice of higher-quality products and services at lower prices. However, it also promotes greater accountability and transparency in government-business relations and decision making, and contributes to reducing corruption, lobbying, and rent-seeking behavior. Additionally, by lowering barriers to entry, it provides opportunities for broad-based participation in the economy and for sharing in the benefits of economic growth. Without effective competition, firms are more likely to possess considerable market power, which enables them to earn excess profits and wield political influence to tilt public policy in their favor. There are also likely to be distorted price and profit signals and increased risk of misguided investment and output decisions, which can lead to economy-wide repercussions.

The merits and benefits of fostering open and competitive markets have been recognized in many countries that have adopted various macro- and microeconomic reforms. However, there is wide variation in the economic growth and development of nations. Casual observations indicate that there is also a wide variation in the nature and extent of competition prevailing within and across countries. Moreover, notwithstanding the merits and benefits of competition, there is no consensus or widespread support for promoting competition within and across countries—especially developing nations. This stems in part from the lack of understanding or appreciation of what effective competition can tangibly contribute to the betterment of the lives of ordinary citizens, and in part from ideological differences and the influence wielded by vested interest groups in both government and the economy at large. Although the differences in the economic growth and development of nations cannot purport to be explained by the differences in the prevailing degrees of competition, this paper argues that it is one of the important, if not critical explanatory factors. It is well established that least-developed economies are encumbered by limitations of human and physical capital, governance and institutional structures, and other resource constraints. But they are also prevented from achieving their potential by various types of public policy-based and private sector anticompetitive business practices. The primary message of this paper is that these countries need to take concrete, consistent, and coherent measures to integrate and promote effective competition policy as part of their overall government economic and regulatory framework. An effective competition policy should be viewed as the “fourth cornerstone” of this framework— along with sound monetary, fiscal, and commercial (international trade) policies.

#### Sustainable development defuses a confluence of threats to global security---extinction.

UNSC 17, \*United Nations Security Council, (December 20th, 2017, “Prevention, Development Must Be at Centre of All Efforts Tackling Emerging Complex Threats to International Peace, Secretary-General Tells Security Council”, https://www.un.org/press/en/2017/sc13131.doc.htm)

Prevention, Development Must Be at Centre of All Efforts Tackling Emerging Complex Threats to International Peace, Secretary-General Tells Security Council

Prevention and development must be at the centre of all efforts to address both the quantitative and qualitative changes that were emerging in threats around the world, the Secretary‑General of the United Nations told the Security Council today, as some 60 Member States participated in an all‑day debate tackling complex contemporary challenges to international peace and security.

António Guterres said the perils of nuclear weapons were once again front and centre, with tensions higher than those during the Cold War.  Climate change was a threat multiplier and technology advances had made it easier for extremists to communicate.  Conflicts were longer, with some lasting 20 years on average, and were more complex, with armed and extremist groups linked with each other and with the worldwide threat of terrorism.  Transnational drug smugglers and human traffickers were perpetuating the chaos and preying on refugees and migrants.

The changing nature of conflict meant rethinking approaches that included integrated action, he said, stressing that prevention must be at the centre of all efforts.  Development was one of the best instruments of prevention. The 2030 Agenda for Sustainable Development would help build peaceful societies. Respect for human rights was also essential and there was a need to invest in social cohesion so that all felt they had a stake in society.

He also emphasized that women’s participation was crucial to success, from conflict prevention to peacemaking and sustaining peace.  Where women were in power, societies flourished, he pointed out.  Sexual violence against women, therefore, must be addressed and justice pursued for perpetrators.

Prevention also included preventive diplomacy, he said, noting that the newly established High-level Advisory Board on Mediation had met for the first time.  The concept of human security was a useful frame of reference for that work, as it was people‑centred and holistic and emphasized the need to act early and prioritize the most vulnerable.

“Let us work together to enhance the Council’s focus on emerging situations, expand the toolbox, increase resources for prevention, and be more systematic in avoiding conflict and sustaining peace,” he said, emphasizing the need for Council unity.  Without it, he said, the parties to conflict might take more inflexible and intransigent positions, and the drivers of conflict might push situations to the point of no return.

Japan’s representative, Council President for December, spoke in his national capacity, noting that in the 25 years since the end of the Cold War, there had been a rise in complex contemporary challenges to international peace and security.  That included the proliferation of weapons of mass destruction, the expansion of terrorism, and non‑traditional challenges such as non‑State actors and inter‑State criminal organizations.

While the Council had been tackling those challenges, in most cases through a country or region‑specific context, he stressed that a human security approach was highly relevant when addressing complex contemporary challenges to international peace and security.  Such an approach placed the individual at the centre, based on a cross‑sectoral understanding of insecurities.  It also entailed a broadened understanding of threats and challenges.

In the ensuing debate, speakers emphasized the need to adjust to the changing challenges to international peace and security and welcomed the Secretary General’s reform of the Organization’s security pillar and other initiatives.  Many stressed the need to address root causes of instability and conflict, including climate change, non‑State armed groups, extremism and terrorism, as well as poverty and underdevelopment.

#### Independently, development deflates wars globally.

Cortright 16, \*David Cortright, Director of the Global Policy Initiative; Special Advisor for Policy Studies; Professor Emeritus of the Practice, Kroc Institute for International Peace Studies; (May 18th, 2016, “Linking Development and Peace: The Empirical Evidence”, https://peacepolicy.nd.edu/2016/05/18/linking-development-and-peace-the-empirical-evidence/)

The connections between development and peace are firmly supported by social science research. All the standard indicators of economic development, including per capita income, economic growth rates, levels of trade and investment, and degree of market openness, are significantly correlated with peace. Virtually every study on the causes of war finds a strong connection between low income and the likelihood of armed conflict. Economist Edward Miguel describes this link as “one of the most robust empirical relationships in the economic literature.” Irrespective of all other variables and indicators, poverty as measured by low income bears a strong and statistically significant relationship to increased risk of civil conflict.

No one has made this point more convincingly over the years than Paul Collier. He and his colleagues have shown that civil conflict is heavily concentrated in the poorest countries. The risk of civil war is strongly associated with joblessness, poverty and a general lack of development. They famously [conclude](https://openknowledge.worldbank.org/handle/10986/13938), “The key root cause of conflict is the failure of economic development.” They also make the reverse point. Raising economic growth rates and levels of per capita income may be “the single most important step that can be taken” to reduce the likelihood of armed conflict.

War is reverse development. It undermines economic well-being and reduces income levels. War may bring profit for the few, those ‘masters of war’ as Bob Dylan called them, but it creates economic misery for many. Once started, war becomes a self-sustaining system, an “economy of war” Mary Kaldor calls it in New and Old Wars, a feeding trough for profiteers, warlords and mobsters that becomes exceedingly difficult to stop.

War reduces life expectancy and destroys education and public health systems. It tears apart the social fabric. The [World Development Report 2011](http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf) calculates the cost of a major civil war as equivalent to more than 30 years of typical growth for a medium-size developing country. Trade levels take 20 years to recover. The negative economic impact of conflict helps to explain why countries at war are often caught in a deadly conflict trap, why the chief legacy of a civil war is another war.

#### Specifically, the Middle East---sluggish growth perpetuates proxy conflicts.

Eaton et al. 19, \*Tim Eaton, Senior Research Fellow, Middle East and North Africa Programme; \*Dr Renad Mansour, Senior Research Fellow, Middle East and North Africa Programme; Project Director, Iraq Initiative; \*[Dr Lina Khatib,](https://www.chathamhouse.org/about-us/our-people/lina-khatib) Director, Middle East and North Africa Programme; \*Dr Christine Cheng, Lecturer in War Studies, King's College London; \*Jihad Yazigi, Journalist and Analyst; (February 2019, “Conflict Economies in the Middle East and North Africa”, <https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/1-introduction>)

1. Introduction

The conflicts in Iraq, Libya, Syria and Yemen have killed hundreds of thousands of people and displaced millions. In Iraq, the defeat of Islamic State of Iraq and Syria (ISIS) is unlikely to lead to lasting stability because it does not address fundamental conditions on the ground which allow violent extremist groups to resurge every few years. In Libya’s fragmented political and security environment, a wide range of largely local actors continue to compete violently for influence, as evidenced by the latest major outbreak of fighting around Tripoli. In Syria, ISIS fighters have been forced out of their last enclave in Baghouz, while President Bashar al-Assad consolidates his control over territory in the rest of the country. In Yemen, a precarious ceasefire on the Red Sea coast has led to an intensification of battles between the Houthis and their rivals on other front lines.

Other states within the Middle East and North Africa (MENA) region, along with Western states, have often been active proxy participants in these conflicts, supporting certain groups over others in pursuit of national interests. The impacts have also been felt far beyond MENA borders, as refugees fleeing conflict areas have travelled to Europe and other Western countries, sparking outcry over a supposed ‘migration crisis’ which has in fact been instrumentalized by political actors.

Identity-based discourses

To explain the violence that has struck the region, many scholars, policymakers, journalists and pundits have focused their analysis on ideological and identity-based factors. Developments in Iraq, Syria and Yemen have been viewed predominantly through the lens of ethno-sectarian politics.[10](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-037) In Libya, significant attention has been paid to the development of Islamist and Salafi-jihadi movements since 2011, particularly in policy circles.[11](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-036) In Iraq, the conflict since 2003 has been explained as a sectarian battle between Shia and Sunni Arabs, with the assumption that these identities are easily carved out along ethno-sectarian lines.

Exclusively identity-centric explanations of conflict at times miss important realities on the ground

Such exclusively identity-centric explanations of conflict at times miss important realities on the ground. As the knowledge base around MENA political dynamics has expanded, so too has our common understanding of how ethnic and religious divisions in the region have intersected with other critical factors. This has enabled more accurate and layered analyses.[12](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-035) Chatham House research has sought to broaden policy analysis through its focus on the political economy of the conflicts in question.[13](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-034)

Exploring the political economy of war

Against this backdrop, this report seeks to expand the discourse by analysing economic drivers of conflict in Iraq, Libya, Syria and Yemen. Factors such as rent-seeking, economic coping strategies and local political expediency are key to understanding the civil wars in these countries, yet they tend to be under-emphasized. As the conflicts have progressed, the national and local economies in which they are embedded have likewise evolved.

Over the past several decades, research on the political economy of war has sought to explain the initiation,[14](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-033) duration [15](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-032) and character of war.[16](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-031) Initially, as with the MENA wars of today, the dominant discourse in studies of the 1990s civil wars was identity-centred.[17](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-030) Following ethnic cleansing in the former Yugoslavia, the Rwandan genocide, the end of apartheid in South Africa, and the violence of clan conflicts in Somalia, civil war was viewed largely as a product of group identity.[18](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-029) In contrast, the quantitative study of war economies that subsequently developed in the late 1990s and early 2000s contended that economic motivations – especially in resource-rich areas – rather than group identities provided greater explanatory power for the onset of armed conflict. On the qualitative side, case study research focusing largely on sub-Saharan Africa (and, to a lesser extent, on Latin America and Asia) showed that profit-based incentives are co-mingled with narratives of grievance and embedded in a larger global political economy.[19](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-028) The heart of that debate was about identifying economic self-interest as the main motivation for rebels joining and fighting civil wars.[20](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-027)

More recent work on horizontal inequality has added nuance to these discussions. It has moved beyond a binary ‘greed versus grievance’ distinction to illustrating how group grievances are constructed. Such research seeks to demonstrate empirically how an unequal distribution of power and resources between groups generates conditions for violent mobilization.[21](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-026) More generally, the incorporation of economic motives into analysis of civil war has revealed that members of rebel organizations, militias and paramilitaries have joined[22](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-025) and stayed in such groups[23](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-024) for a variety of reasons, and that the relative weighting of these imperatives can change over time. Individuals may join (or be forced to join) an armed group for one set of reasons, and stay for an entirely different set of reasons.

To date, the ‘political economy of war’ approach has had limited application in analysis of the MENA region.[24](https://www.chathamhouse.org/2019/06/conflict-economies-middle-east-and-north-africa-0/CHHJ6854-War-Economies-190620-1.xhtml#footnote-023) Yet we find that the insights of the literature associated with this approach resonate in each of our four case studies. We show how economic motivations at the individual and group level can offer an alternative or complementary explanation for armed group membership and armed group violence. While some people will fight to promote or defend a particular identity, others fight for economic survival or enrichment. For many more, these motivations are tied together, and separating out ‘greed’ and ‘grievance’ is a difficult, if not impossible, task. By focusing on conflict economies in a localized way, we aim to rebalance how the wars in Iraq, Libya, Syria and Yemen are portrayed and analysed. Even if economic motivations did not spark these wars initially, it is now clear that such motivations play a critical role in the persistence of open fighting, localized violence and coercion.

#### Middle East conflicts escalate to World War III.

Tonhnor 18, \*Author at Proutist Universal; (March 27th, 2018, “A Ticking Time Bomb: Proxy Wars and the Tragedy of the Kurds”, https://prout.info/blog/2018/03/27/a-ticking-time-bomb-proxy-wars-and-the-tragedy-of-the-kurds/)

Since the Arab Spring, the armed conflicts in the Middle East have escalated to a point where they pose the greatest risk to world peace in our times.

While the media is focusing on the threat posed by North Korea due to its nuclear weapons, the chances for an all-out escalation are small, for the reasons I outlined in a previous article. If we accept the premise that Kim Jong-un is a shrewd, calculating politician (and all signs indicates that he is) it does not matter if he is ruthless, cruel, and self-serving. Whatever nuclear arsenal he has, it is just a fraction of one percent of the size of the arsenal of the United States. Hence, he knows that he cannot possibly win a nuclear war with the United States.

By developing proven nuclear capabilities his negotiating power has vastly increased, and insures that nobody can take North Korea lightly. The timing of his recent diplomatic overtures towards South Korea has buttressed this point. He waited until he had proven that he had intercontinental missiles capable of striking the United States. He then turned down his aggressive rhetoric and instead turned up his charm. This is not the act of a madman. It is a clever political game.

Middle East Tinder Box

The situation in the Middle East is not so simple. We are not dealing with one regime in complete control over its armed forces, but rather a host of unstable states and armed groups of a number of persuasions and interests. In addition to this, the two most powerful countries in the world are actively involved in the war on one side or the other. While Russia has combat troops on the ground in Syria, the United States is actively supporting groups that are directly fighting Russian and Syrian government troops.

If we add the powerful regional powers, such as Iran, Israel, Turkey and Saudi Arabia, who all have their own strategic reasons to fight, we have a truly explosive mix. At present there is seemingly no way all parties can be satisfied. The region has become a battle ground for political influence and power.

Even though the conflict started out as a proxy fight, today the main protagonists are directly involved in the war. The United States has since decades had troops in Iraq and Afghanistan, and Russia now has a strong military presence in Syria. Depending on how the situation develops, the United States may increase its number of troops in Iraq, and may even decide to put troops on the ground in Syria to protect its strategic interests.

Most recently Turkey has launched a full scale offensive into Syria, attacking the Kurdish guerrilla fighters which are supported by the United States. This creates an unprecedented situation where two NATO allies are coming in direct military conflict with each other. The long term consequences of this is hard to foresee, but it could potentially destabilize an institution that has been the main military force in Europe since the Second World War.

Why is Turkey so keen on attacking the Kurds? To understand this, we need to take a look back in history.

A Brief History of the Kurds

Like the Rohingya, the Kurds are a people without a country. They emerged as a group in Iran during the Medieval Period, and are presently constituting a sizeable minority in Turkey, Iran, Iraq, and Syria. They have a distinct language that has strong similarities with Persian and Baluchi, suggesting a common ancestry. The first recorded military clash involved Arab Commander Utba ibn Farqad, who in 641 AD conquered a number of Kurdish forts. Since then the Kurds have throughout the centuries participated in many revolts, but although they managed to establish a number of Kurdish Principalities, mainly in the mountains, they never managed to get a state of their own.

Apart from wars, they have also been subjected to massacres, including the Massacre of Ganja in 1606, when all men, women and children of the Sunni Kurdish tribe of Jekirlu were killed.

Kurdish nationalism emerged at the end of the 19thcentury, and since then they have been striving for nationhood. The problem is that the Kurds are not in majority in any country, and to form a nation they would have to carve out a territory from Syria, Iraq, Turkey, Iran, and other nations, and none of these nations would allow something like that to happen. Hence, the Kurds have few friends in the region. Yet the Kurds are a sizeable minority, and so they cannot be ignored either. A minority group of 1% can be marginalized and even exterminated, but with a minority population close to 20% in Iraq, Syria and Turkey, this is not possible to achieve with the Kurds. For example, 19% of the population in Turkey is Kurdish, some 5 million people.

In the past 50 years, the Kurds have been fighting for autonomy and independence. While they managed to create an autonomous region in Northern Iraq, and recently had substantial military success in Syria and managed to carve out a sizeable territory there, they have had little success in Turkey. The Kurdish Workers’ Party, PKK, has for a long time been fighting for autonomy in Turkey, and from 1984 to 1999, and again from 2004 to 2012, the Turkish military engaged in open war with the PKK.

Fearing that the Kurds will use their newly gained territories in Northern Syria as a spring board to launch fresh guerrilla attacks across the border, Turkey has now decided to invade the Kurdish controlled areas of Iraq to create a buffer zone to prevent the PKK to operate from Iraq. This is a serious escalation in the conflict, as it is the first time in recent history a country in the Middle East is directly invading a neighbor state. This is naturally seen as a threat by the Syrian regime, so while fighting the Kurdish forces in other places, they have tacitly allowed the Kurdish YPG (“People’s Protection Unit”) to pass through government controlled areas to resupply the areas attacked by Turkey. It seems everyone is fighting everyone and nobody really knows who is an enemy and who is a friend.

Western Support for the Kurds

While the vast majority of Kurds are Sunni Muslims, there are also Shiites, Christians and even Jews among them. They are one of the few cultural groups in the Middle East which practice religious tolerance. For example, the Kurdish Regional Government in Northern Iraq rejected Islamic teachers from Bagdad, and declared that their schools should be religiously neutral. The bonds that keep the Kurdish nation together is cultural, and not religious. The Kurds have all the hallmarks of a distinct Samaj.

Kurdish women have generally a better standing in society than that of other women in the Middle East. They have actively taken part in both political and military struggles. ISIS fear the female Peshmerga and the YPJ (“Women’s Protection Force”) forces more than any other enemy, since being killed by a woman would send their souls to hell!

These characteristics have made them the ‘ideal’ partner for the Unites States. The civil war in Syria, has enabled the Kurds to capture much territory, and their clear intention is to hold on to it and create a Kurdish nation.

Unfortunately for the Kurds, the support from the West is purely tactical, and probably none of the Western powers would be happy to see the emergence of a Kurdish nation. A Kurdish nation would be fiercely opposed by all countries in the Middle East that have Kurdish minorities, and the West could politically not afford to back such a scenario.

The Endgame

While we can hope that the conflict is localized to the Middle East, there is no guarantee that it will not escalate to a worldwide conflict. But even in a best case scenario, the suffering in the region is far from over and millions more will die or be made refugees before it will get any better.

#### The plan solves---reinvigorating antitrust enforcement in the Middle East unlocks sweeping economic improvements.

World Bank 19, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (October 2019, “Reaching New Heights: Promoting Fair Competition in the Middle East and North Africa”, https://thedocs.worldbank.org/en/doc/660811570642119982-0280022019/original/ENMEMReachingNewHeightsOCT19.pdf)

1A. Making MENA Markets Competitive10

Economies in the Middle East and North Africa (MENA) have two faces. One is the concentrated and sclerotic formal sector, often dominated by state-owned enterprises (SOEs) and politically connected private companies. That economy keeps out competitors, misallocates resources, and generates excessive profits for participants. The official economy coexists with an informal economy in which most of the population toils in relatively small operations at low wages and with few social protections.11

A powerful way to invigorate MENA economies would be to inject more competition. That would create a more efficient official economy and reduce informality.

Economists suggest that competition is a powerful tool for ensuring that resources are used in the best way that is technologically feasible—minimizing costs (and therefore prices) and helping ensure that goods and services are provided in the amount and variety consumers desire. As firms compete against each other to make a profit, they have an incentive to invest in research and development to improve the production of existing goods and services and to introduce new ones12. More competition also leads to higher growth in output per worker (productivity) and therefore is a key ingredient in long-run sustainable development13.

Market entry by new firms and the exit of inefficient companies are potent sources of competition. But in the MENA region there are often sizeable barriers that prevent new firms from entering existing markets and protections for inefficient ones. Ease of entry and exit is what determines contestability, and it is the result of the interplay between the available production technology and the regulatory framework in place.

Moreover, when state-owned enterprises (SOEs) are present, it is fundamental that they do not benefit from any type of advantage over their private competitors—whether by obtaining specific inputs (physical or financial) or by receiving easier market access. In brief, the institutional framework must be geared towards the principle of competitive neutrality—that all enterprises face the same set of rules whether they are public or private and that government involvement or ownership of a firm confers no special advantage.

Competition and contestability are essential to creating economic opportunity, which allows workers to help shape their destiny through personal initiative. Competition also increases the purchasing power of incomes, because firms find it harder to set prices above cost. Moreover, these effects are reinforced through cost-reducing technological progress and firm turnover, which allows the most productive firms to survive14. The overall effect is that competition can be an antidote to inequality15. As Eleanor Fox put it: “Markets empower people to help themselves. Markets and access to markets stand side by side with food, health, shelter, education, environment, infrastructure, and institutions as critical tools to combat the world’s greatest economic deprivations”16. But, as the father of modern economics, Adam Smith, recognized in The Wealth of Nations, a well-functioning competitive process cannot be taken for granted17.

That means countries must undertake policies that foster competition. Those policies include an effective antitrust law that keeps in check restrictive practices of the private sector and of government interventions to preserve a level playing field—which means that any regulation that distorts markets in pursuit of the general interest18 should not create any unnecessary barriers. But it also means that when state owned enterprises (SOEs) are present or subsidy programs are involved, competitive neutrality should be ensured for all market participants (see Figure II.1).

In 1890, the United States recognized that legislation was needed to preserve and nurture competitive forces by passing the Sherman Act. The law was a reaction to the dangerous concentration of economic and political power in large companies and trusts that characterized the so-called Gilded Age19. Since then, almost every country has adopted some form of competition law, with a substantial acceleration during the past few decades20.

In the MENA region, four countries lack antitrust legislation—Iran, Lebanon, Libya and West Bank and Gaza–while Bahrain and Iraq have no competition authority to enforce their law (see Table II.1).

Extensive information exists about the competition frameworks of seven MENA countries—Algeria, Egypt, Jordan, Kuwait, Morocco, Oman, and Tunisia21. The evidence shows that they lack key elements of effective regimes, placing substantial costs on their economies. In addition, weak enforcement is a major problem. Its importance is demonstrated by the increase in the value of the divested assets that followed successes in breaking up market concentration.

The breakup of Standard Oil in the United States is a vivid example. When the U.S. government sued Standard Oil in 1906, the company controlled more than 90 percent of U.S. oil refining. After the courts broke Standard Oil into 34 entities in 1911, their combined stock value increased so rapidly that a few years later it was five times higher22. Such an experience is relevant for the MENA countries, where many economic sectors are dominated by few companies even though there are no technological reasons for such a level of market concentration. A striking example is exclusive import licensing for goods for which countries are not self-sufficient (see Box II.1).

Moreover, strong antitrust action can unleash substantial technological advancement, as suggested by two landmark U.S. cases—against IBM and Microsoft 23. The IBM case effectively opened the software industry by forcing IBM to stop selling computers and software as a package.24 The Microsoft case in 2001 likely kept the Seattle-based giant from trying to monopolize the nascent new economy by preemptively crushing companies such as Amazon, Facebook and Google (as it did to the competing web-browser Netscape, which sparked the antitrust action).

Lack of contestability in MENA is arguably a main culprit in the slow pace of technology adoption that has historically characterized the region, which significantly hurt its growth performance. Without substantial reforms to encourage competition, MENA countries risk missing the opportunities offered by digitization and the so-called Fourth Industrial Revolution (See Box II.2).

#### Lax cartel enforcement devastates Latin American development---supplanting competition law solves.

World Bank 21, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (2021, “FIXING MARKETS, NOT PRICES”, <https://openknowledge.worldbank.org/bitstream/handle/10986/35985/Fixing-Markets-Not-Prices-Policy-Options-to-Tackle-Economic-Cartels-in-Latin-America-and-the-Caribbean.pdf?sequence=1&isAllowed=y>) //rhetoric modified

Cartels in LAC have affected hundreds of markets and the large majority went undetected22

Over the last 4 decades, more than 300 economic cartels have been revealed - mostly in markets that provide key inputs to firms or essential goods to families. Between 1980 and 2020, in over 300 incidences, firms supplying markets as critical as milk, sugar, poultry, transport, energy and medicines chose to jointly fix higher prices, restrict total production, divide or share markets, rig bids, or obstruct the entry of new competitors – that is, to create economic cartels. Instead of vying for consumers with better deals and higher quality, more than 2,500 firms and 153 trade associations engaged in these agreements in 19 different sectors.

Cartels affect important markets with large market players. Previous evidence of international cartels from 1990 to 2007 suggests that between USD 150 and 200 billion worth of sales in LAC were affected by discovered cartels, and consumers in this region paid overcharges of at least USD 35 billion from 1990 to 2007 (Ivaldi, Julien, Rey, Seabright, & Tirole, 2003).23 Based on newly available information, 89 of the firms that formed cartels in LAC had total revenues of USD 81 billion in 2019, equivalent to what would constitute the 8th largest GDP in LAC.24

The cartel activity revealed so far affects a significant share of the economy. Evidence based on a selected number of cartels in developing economies between 1995 and 2013 shows that affected sales of cartel members related to GDP at a given point in time reaches up to 6.4 percent. As much as 3.4-8.4 percent of imports in ~~developing~~ [Global South] countries may be affected by cartel agreements (Levenstein, Suslow, & Oswald, 2003). New evidence for LAC now reveals that the Competition Watchdog in El Salvador, even with limited cartel enforcement trajectory, has detected 7 cartels that affected sales in the amount to 0.4 to 0.8 percent of GDP between 2006 and 2011. This does not even take into account that some of the cartel agreements occurred at the upstream level and may have also affected the downstream industries (such as in the case of wheat and bread).

The true pervasiveness of economic cartel activity is at least tenfold. While over 300 cartels have been detected and dismantled by respective authorities in LAC, studies from advanced economies show that even mature competition authorities only detect between 10 and 20 percent of cartel activity (See Box 1). Given the incipient status or even entire lack of cartel enforcement in most parts of LAC, the extent to which consumers and businesses are affected is likely manifold. For example, of at least 84 large global cartels that were shown to fix prices in LAC at some point between 1990 and 2007, only four were investigated by authorities in this region (Connor, 2008).

Detection rates of cartel activity in LAC may be particularly low in some sectors, such as the financial sector. In the European Union (EU), 28 percent of cases against anti-competitive practices between 2013 and 2017 targeted the financial sector and revealed several high-profile price-fixing agreements in markets such as financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR), Japanese Yen LIBOR, Swiss Franc IRDs and future Swiss Franc LIBOR. However, only one of seven mature competition authorities in LAC have opened antitrust investigations in the banking sector, and only one of them related to cartel activity: Mexico detected and fined agreements to manipulate sovereign bond prices (WBG, 2020). In Colombia, 2 banking associations, 14 banks and 2 payment systems network providers entered into commitments with the competition authority to end an investigation regarding an agreement among banks to fix interchange fees.2

Cartels hurt the poor, stifle growth and limit policy effectiveness

Cartels are particularly harmful for economic development objectives: By eliminating competition among firms, they lose incentives to innovate, and charge higher prices. These consequences disproportionately and directly affect the poorest households. Cartels limit growth by affecting productivity and competitiveness. Finally, cartels undermine effectiveness of public policies. Benefits of trade liberalization do not materialize when firms collude across borders or agree to block imports. Governments can procure fewer public goods and services (medicine, public works, school supplies, etc.) when procurement processes are rigged. The following section will briefly discuss the existing evidence and new insights from the novel data on LAC.

Economic cartels affect the poor. Cartels disproportionally affect poor households because they are common in markets affecting products in the basic consumption basket. At least 21 percent of the cartels detected involved basic consumption products such as sugar, toilet paper, wheat, poultry, milk, and medicines.26 Global estimates suggest consumers pay on average 49 percent more when buying from cartels, and 80 percent more when cartels are stronger.27 In LAC, in 65 percent of cartels detected over the last decades with information available on prices charged, consumers experienced overcharges ranging between 5-25 percent and in at least 4 percent of the cases, consumers had to pay as much as twice for the products and services. A simple comparison of public expenditure efficiency from South Africa suggests that public resources spent on cartel enforcement would be 38 times more effective in tackling poverty than cash transfers, when considering that part of the cash transferred to eligible household is spent on overcharges for basic food items (Purfield, et al., 2016).

Collusive agreements lower economic growth prospects by depressing productivity growth and reducing competitiveness. First, agreements among competitors to limit competition affect productivity. The introduction of anti-cartel policy is related to higher labor productivity growth in industries affected by collusive behavior, which otherwise record a 20 to 30 p.p. lower labor productivity growth (than industries without cartels) (OECD, 2014). Evidence from a 40-year long cartel in the United States suggests that quantity-productivity declined by 22 percent (Bridgman, Qi, & Schmitz Jr, 2009). Systematically allowing for cartel activity can further curb total productivity growth across the economy (Petit, Kemp, & Van Sinderen, 2015). Second, cartels distort important markets in LAC’s value chains. 34 percent of collusive agreements detected occurred in the manufacturing sector (Figure 1). Another 15 percent of cartels affected wholesale and retail trade activities transportation activities, respectively.28 Within the manufacturing sector, cartels across LAC region are particularly frequent in the meat processing activity in Brazil, Chile, and Panama, and in the manufacturing of basic chemicals in Argentina, Brazil, Colombia, Panama, and Peru.29 Within the wholesale and retail trade sector, trade of pharmaceutical goods are also found in Brazil, Chile, Honduras and El Salvador. In the transport sector, Chile fined six shipping lines with USD 95 million for colluding in multiple tender processes for providing maritime transport services to manufacturers and consignees of various car brands imported to Chile beginning in 2000. Mexico sanctioned seven shipping lines for engaging in nine collusive agreements and segmenting the car transport market into different routes between 2009 and 2012. Some of the sanctioned firms were also investigated in Chile and Peru (WBG-USAID, 2018) .

Cartel agreements undermine the benefits of trade opening and liberalization. In the Pacific Alliance30 – the group of countries with the lowest trade barriers in the region – at least 67 cartels were detected in sectors generally considered tradable, and a third of those operated in the market for more than 5 years. Even though Colombia is an open market economy, sugar traders from the region were able to sell in Colombian markets only after a decade-long cartel agreement by domestic sugar mills was broken up in 2015: 12 mills had been explicitly coordinating to obstruct sugar imports.31 Import competition does not preclude the formation of cartels in tradable goods. Such agreements can operate at the regional or even global level: In Chile, Peru, and Colombia, three international firms jointly raised prices for toilet paper by up to 30 percent for over 10 years (Dinamo, 2015). In smaller LAC economies, where connectivity issues are central to economic growth, such as those of the Caribbean Community (CARICOM), cartels have also been uncovered, for example in shipping services.32

When cartels raise prices, the state can provide fewer public goods and services and cartels can even distort the market of government bonds. At least one in four cartels formed among firms participating in government procurement process. In such cases, taxpayers bear the burden of the overcharges. In Peru, between 2010 and 2012, 31 providers of hemodialysis services rigged the bids by abstaining from participating in public tenders called by one of the Peruvian public healthcare administrators with the objective of increasing reference prices in subsequent tenders. This led to overcharges in each tender of approximately over USD 10 million.33 Similarly in 2014, Peru sanctioned an engineer’s cartel that affected public-construction contracts worth USD50 million which had been designated for the expansion of the public highway network34 (Martinez Licetti & Goodwin, 2015). In Mexico, seven banks entered into at least 142 agreements to manipulate the price of the Mexican sovereign bond market between 2010 and 2013 by limiting sales and acquisitions of bonds with losses to the market of over USD 1.443 million.35 In Colombia, the government and ultimately the taxpayers incurred in losses of at least USD 11 million for the overcharges paid in the construction of a major highway (Ruta del Sol II), due to an anticompetitive agreement that favored a particular group of firms in the concession process.36

Recent developments in LAC also suggest that economic cartels undermine public trust in market economies. In 2016, 73 percent of the population in Chile considered collusion to be a reproachable conduct, even more reproachable than violations of labor laws.37 This sentiment was preceded by several years of successful breakups of cartels, and a historic confirmation by the Supreme Court of the decision to fine a group of poultry producers for having agreed to limit output. The protests in 2019 were partly motivated by discontent with the private sector (Freire, 2020) . As part of the government’s response in form of an “anti-abuse agenda”, the executive submitted four bills to Congress in March 2020 aiming at increased enforcement of the laws against white collar crimes, including cartels.

On the upside, consumers and businesses benefit from effective anti-cartel enforcement. For example, so-called leniency programs – which offer firms the possibility to come clean about their involvement in cartel conduct in exchange for immunity or reduction of financial penalties - (and as we will see later) render any agreement less stable, because any member of the cartel has incentives to break out and report the cartel. Thus, these programs shorten the duration of harmful cartels and can even reduce the level of anti-competitive overcharges by cartels.38 Miller (2009) finds empirical support for these effects: the leniency program in the United States increased the rate of cartel detection by 62 percent and reduced the rate of cartel formation by 59 percent. Yusupova (2013) also finds that the 2009 revision of the Russian leniency program was effective in reducing the size and duration of cartels. Choi & Hahn (2014) show that the leniency program in Korea shortened cartel duration. Leniency programs can also speed up the process of breaking up cartels. Brener (2009) demonstrates how leniency reduces the average sanctioning process by 1.5 years on average. In Europe, nearly 60 percent of detected cartels are discovered through leniency (Jaspers, 2020). Overall, leniency programs can have significant effects on competition intensity. Klein (2011) revises data from 23 OECD countries and finds that leniency policies were associated with a decrease in the industry-level price-cost margin of 3 to 5 percent.

However, many LAC countries do not have any tools to deter and prevent economic cartels. 28 percent of countries in the region do not have an operational competition legal framework. In only 5 out of 15 countries where the legal framework is in place, there are effective anti-cartel enforcement tools.

#### LAC economic volatility causes democratic erosion and backsliding.

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Introduction

Latin America is experiencing one of the most difficult moments in its recent history as it confronts three overlapping crises: the coronavirus pandemic, a steep economic contraction, and high levels of political polarization and democratic erosion. No region has been more impacted by COVID-19, the disease caused by the coronavirus, than Latin America, both in human and economic terms.1 As of April 30, 2021, Latin America had a total of 28 million confirmed cases (out of a world total of 150 million) and just over 900,000 deaths (out of a world total of just over 3 million). With around 8 percent of the world’s population, the region has almost 19 percent of confirmed cases and 28 percent of total deaths. Also, as of April 30, Latin America had administered only 8 percent of the total vaccines.2

The economic impact has been equally devastating. The World Bank estimates that in 2020, 53 million Latin Americans saw their income fall below the region’s poverty line of $5.50 per day, pushing up the percentage of those living in poverty to an estimated 37.7 percent—a level not seen since 2006.3 According to the United Nations (UN) Economic Commission for Latin America and the Caribbean, Latin America is suffering its worst economic crisis in 120 years, with gross domestic product (GDP) having declined by a staggering 9.1 percent in 2020, eliminating most of the progress made during the commodity boom years (2003–2013). As might be expected, governments across the region are grappling with serious fiscal limitations and seem hard pressed to offer even basic responses to their population’s significant needs.4 All the while, a toxic mix of insecurity and pervasive social turmoil is undermining ~~[crippling]~~ most countries. As if this were not enough, the region faces what is arguably the most acute migration crisis of its history, with the exodus in recent years of more than 5 million Venezuelans.5

Several reasons explain why the region was hit so hard by the pandemic. First, even before the pandemic began, Latin America was economically vulnerable. Between 2014 and 2019, the region’s GDP per capita shrank 4 percent, largely as a result of significant declines in commodity prices.6 As part of these economic difficulties, chronic underinvestment in public health limited most countries’ capacity to treat COVID-19 patients, especially during the most acute periods of the disease. In addition, fiscal constraints limited governments’ ability to provide emergency cash-transfer payments to the poorest in their societies. Labor productivity and the job market were also hit hard by lockdown orders and workplace closures: only about 20 percent of existing jobs in Latin America could be performed remotely, compared to 40 percent in advanced economies and 26 percent in the rest of the emerging world.7

Second, the region entered the pandemic in a politically vulnerable condition. Throughout 2019, large-scale protests rocked Bolivia, Chile, Colombia, Ecuador, Haiti, and Venezuela, creating one of the most politically volatile years in memory.8 In most cases, social turmoil stemmed from popular frustration with low-quality public services, socioeconomic inequality, and detached political elites. Many people who joined Latin America’s new middle class during the commodity boom of the 2000s slid back into poverty during the 2010s, and faced the realization that both they and their children are unlikely to escape poverty for many years to come. Popular demands for economic justice and support became more intense and difficult for governments to satisfy, creating openings for radical antiestablishment figures to come to power, like President Jair Bolsonaro in Brazil or President Nayib Bukele in El Salvador.

Finally, the region is beset by severe political polarization and democratic backsliding.9 In Mexico, President Andrés Manuel López Obrador is undermining democracy by seeking to concentrate power in an already strong executive.10 In Nicaragua, the increasingly authoritarian administration of President Daniel Ortega has pushed through new laws to name “traitors” and to pressure media and human rights groups opposing his grip on power. At the time of writing, there have been twelve opponents detained since June 2.11 In El Salvador, Bukele has enacted a series of controversial policies that many observers believe represent a serious threat to democracy. Neighboring Honduras is not faring much better, as an inflammable mix of corruption, violence, and authoritarianism under President Orlando Hernández is generating massive outmigration. Ecuador recently has seen widespread discontent, while Peru witnessed massive protests and instability following the legislature’s ousting of caretaker President Martín Vizcarra in 2020.

Another regional trend, present in both Ecuador and Peru as well as in other countries, has been the acute fragmentation of political parties, which has made governance exceedingly difficult.12 Colombia is in the midst of a serious crisis with widespread protests and a resurgence of politically driven violence, with one social leader killed every forty-one hours.13 Argentina’s economy has hit rock bottom as its government aims to reach a deal with the International Monetary Fund while tackling high inflation rates. Following former U.S. president Donald Trump’s playbook, Brazil’s right-wing Bolsonaro continuously glorifies dictatorship and tests the resilience of Brazil’s democratic institutions. In May 2020, for instance, Bolsonaro, while facing allegations that he tried to meddle with law enforcement for personal reasons, had to be convinced by generals to not ask soldiers to close the Supreme Court.14 Chile, once regarded as one of the region’s few bright spots due to its economic growth and political stability, also has witnessed massive demonstrations and violent riots against the establishment. It now has the daunting task of attempting to design a new constitution even as it struggles to respond to the pandemic and undertake a rapid vaccination program to protect its citizens.

Given this complex set of interlinked social, economic, and political crises, Latin American governments and nongovernmental actors urgently need to work together to address collective challenges. The events of recent decades have shown that unless better regional mechanisms can be found, transnational and even domestic problems—from organized crime and environmental degradation to migration and lackluster economic growth—will become even more difficult to address, with potentially devastating long-term consequences. Yet traditional regional governance mechanisms seem paralyzed, lacking even the capacity to discuss the current untenable situation, let alone address it. The popular narrative is that regional cooperation across Latin America is practically nonexistent because its heads of states have insurmountable ideological differences and because the region’s dominant diplomatic institutions have failed to fulfill their purpose. In addition, domestic turmoil is fueling rising isolationism and “antiglobalism,” most prominently in Brazil. Such a pessimistic view, however, stifles any capacity to reimagine regional cooperation. The dramatic crisis in Latin America requires more creative thinking, not less, about ways to promote renewed channels for regional cooperation.15

#### Regional democratic backsliding enable Russia and China to spread authoritarianism globally.

Brands 19, \*Hal Brands, Henry Kissinger Distinguished Professor at Johns Hopkins University’s School of Advanced International Studies, and a scholar at the American Enterprise Institute; (February 10th, 2019, “South America Is a Battlefield in the New Cold War”, https://www.bloomberg.com/opinion/articles/2019-02-10/venezuela-crisis-south-america-is-a-battlefield-in-the-new-cold)

By the early 2000s, however, the climate was shifting. First came a new generation of leaders who viewed neoliberal economics as the source of the region’s persistent poverty and inequality. Governments led by the likes of Chávez in Venezuela, Evo Morales in Bolivia and Rafael Correa in Ecuador coupled populist political appeals and economic programs with a penchant for illiberalism and, in some cases, outright authoritarianism. They challenged the U.S. diplomatically and rhetorically, while establishing close ties with Cuba. This created a bloc of regional actors that opposed American power — just as outside actors were beginning to assert, or reassert, their own influence in the region.

China's Big Business in America's Backyard

As China’s economy has boomed over the last two decades, its presence in Latin America has grown as well. Chinese trade and investment has surged nearly everywhere, not just countries run by radical populists. Chinese commerce and loans have provided a lifeline to illiberal rulers such as Chávez and now Maduro by reducing their vulnerability to U.S. and Western pressure. Chinese military engagement followed, creating fears that Beijing may be trying to establish a strategic foothold in the Western Hemisphere. Although aspects of China’s relationship with Latin American countries remain controversial — some Chinese infrastructure projects have been criticized because they often employ Chinese rather than Latin American workers, for instance — Beijing has undoubtedly become a player in the Western Hemisphere.

Russia has provided economic and diplomatic support to Chavez, Maduro and other autocratic rulers such as Nicaragua’s Daniel Ortega. It has sold jets, tanks and other weapons to populist governments, and resumed providing military technology and oil to Cuba. Much to the concern of the U.S. government, the Kremlin has also been working to establish a significant intelligence presence in Nicaragua. As the Carnegie Endowment for International Peace observes, “Moscow’s approach to Latin America today echoes Soviet outreach in the 1960s through 1980s.”

Russian and Chinese relations with Latin American countries are often described as simply transactional, and it is true that both Moscow and Beijing can drive hard bargains for their support. One price of Russia’s continued backing of the Maduro regime has been a significant ownership stake in the Venezuelan oil industry. China, too, has seen Venezuela as an energy source, and its economic growth would have driven enhanced involvement in Latin America even in the absence of any geopolitical design.

But for both countries, that involvement also has a deeply competitive logic. Reaching into Latin America is a way of keeping the U.S. off-balance by exerting influence in Washington’s “near abroad.” It helps augment Beijing’s and Moscow’s global influence and stature at a time of intensifying rivalry with Washington. Finally, supporting autocratic regimes such as those in Caracas and Managua — whether quietly, as in China’s case, or more vocally, as in Russia’s — is a way of making sure that the world remains ideologically safe for authoritarianism in Beijing and Moscow, as well.

All this constitutes the backdrop to the Venezuelan crisis. The growth of Russian and Chinese influence in Latin America broadly, and Venezuela specifically, is a key reason the Trump administration has so uncharacteristically taken up the banner of human rights and democracy. By imposing harsh economic sanctions, calling for the military to desert Maduro, and backing the political opposition led by the Juan Guiadó, the Trump administration is seeking to deprive Moscow, Beijing and Havana of a critical partner in Latin America. And while Russia and China have responded very differently to this crisis, both are working, in their own ways, to protect that partner.

#### Democratic failure cascades and causes nuclear war.

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The most obvious response to the ill winds blowing from the world’s autocracies is to help the winds of freedom blowing in the other direction. The democracies of the West cannot save themselves if they do not stand with democrats around the world. This is truer now than ever, for several reasons. We live in a globalized world, one in which models, trends, and ideas cascade across borders. Any wind of change may gather quickly and blow with gale force. People everywhere form ideas about how to govern—or simply about which forms of government and sources of power may be irresistible—based on what they see happening elsewhere. We are now immersed in a fierce global contest of ideas, information, and norms. In the digital age, that contest is moving at lightning speed, shaping how people think about their political systems and the way the world runs. As doubts about and threats to democracy are mounting in the West, this is not a contest that the democracies can afford to lose. Globalization, with its flows of trade and information, raises the stakes for us in another way. Authoritarian and badly governed regimes increasingly pose a direct threat to popular sovereignty and the rule of law in our own democracies. Covert flows of money and influence are subverting and corrupting our democratic processes and institutions. They will not stop just because Americans and others pretend that we have no stake in the future of freedom in the world. If we want to defend the core principles of self-government, transparency, and accountability in our own democracies, we have no choice but to promote them globally. It is not enough to say that dictatorship is bad and that democracy, however flawed, is still better. Popular enthusiasm for a lesser evil cannot be sustained indefinitely. People need the inspiration of a positive vision. Democracy must demonstrate that it is a just and fair political system that advances humane values and the common good. To make our republics more perfect, established democracies must not only adopt reforms to more fully include and empower their own citizens. They must also support people, groups, and institutions struggling to achieve democratic values elsewhere. The best way to counter Russian rage and Chinese ambition is to show that Moscow and Beijing are on the wrong side of history; that people everywhere yearn to be free; and that they can make freedom work to achieve a more just, sustainable, and prosperous society. In our networked age, both idealism and the harder imperatives of global power and security argue for more democracy, not less. For one thing, if we do not worry about the quality of governance in lower-income countries, we will face more and more troubled and failing states. Famine and genocide are the curse of authoritarian states, not democratic ones. Outright state collapse is the ultimate, bitter fruit of tyranny. When countries like Syria, Libya, and Afghanistan descend into civil war; when poor states in Africa cannot generate jobs and improve their citizens’ lives due to rule by corrupt and callous strongmen; when Central American societies are held hostage by brutal gangs and kleptocratic rulers, people flee—and wash up on the shores of the democracies. Europe and the United States cannot withstand the rising pressures of immigration unless they work to support better, more stable and accountable government in troubled countries. The world has simply grown too small, too flat, and too fast to wall off rotten states and pretend they are on some other planet. Hard security interests are at stake. As even the Trump administration’s 2017 National Security Strategy makes clear, the main threats to U.S. national security all stem from authoritarianism, whether in the form of tyrannies from Russia and China to Iran and North Korea or in the guise of antidemocratic terrorist movements such as ISIS.1 By supporting the development of democracy around the world, we can deny these authoritarian adversaries the geopolitical running room they seek. Just as Russia, China, and Iran are trying to undermine democracies to bend other countries to their will, so too can we contain these autocrats’ ambitions by helping other countries build effective, resilient democracies that can withstand the dictators’ malevolence. Of course, democratically elected governments with open societies will not support the American line on every issue. But no free society wants to mortgage its future to another country. The American national interest would best be secured by a pluralistic world of free countries—one in which autocrats can no longer use corruption and coercion to gobble up resources, alliances, and territory. If you look back over our history to see who has posed a threat to the United States and our allies, it has always been authoritarian regimes and empires. As political scientists have long noted, no two democracies have ever gone to war with each other—ever. It is not the democracies of the world that are supporting international terrorism, proliferating weapons of mass destruction, or threatening the territory of their neighbors.

### 1AC---Resource Cartels

#### Advantage 2 is Resource Cartels:

#### International cartels devastate competition in metals and minerals markets.

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Private companies’ attempts to manipulate prices and supply nevertheless remain a significant threat to metals markets, even if they tend to take more subtle forms than in the past. There were at least 15 cases where anti-trust authorities uncovered and punished attempts to form clandestine international private cartels in mining and primary metals between 2000 and 2010.33 Given that such ‘private international hardcore cartels’ present the most extreme form of anti-competitive practices – and that cartel members will make considerable efforts to conceal them – they could be the tip of the iceberg of manipulative practices in the sector.

#### That undermines efficiency innovations necessary to relieve stress on the environment and global resource production.

Kooroshy et al. 14, \*Jaakko Kooroshy was a Research Fellow in the Energy, Environment and Resources Department; \*Felix Preston is a Senior Research Fellow in the Energy, Environment and Resources Department; \*Siân Bradley is a Research Associate in the Energy, Environment and Resources Department; (December 2014, “Cartels and Competition in Minerals Markets: Challenges for Global Governance”, https://www.chathamhouse.org/sites/default/files/field/field\_document/20141219CartelsCompetitionMineralsMarketsKooroshyPrestonBradleyFinal.pdf)

Introduction

Global prosperity and security depend upon more efficient, sustainable and equitable consumption of key resources. The current outlook is one of volatility and continued pressure on global resource production systems, mounting environmental stress and potential political clashes over resource access. Looking to make the most of their natural endowments, many producer countries have also intervened more actively into markets, spurring debates about rising resource nationalism and a ‘new mercantilism’.7

International commerce is becoming a front line for such tensions over resources – at a time when the global economy is more dependent than ever on global markets and integrated supply chains. New actors, such as sovereign wealth funds and state-owned enterprises, and tightening links between physical and complex financial markets, further complicate the picture.

Policy debates on natural resources have often focused on energy, food and water, but metals and minerals are also vital for economic competitiveness and development. Large volumes are needed by emerging economies such as China and India for infrastructure, construction and industrial development. Equally, manufacturing sectors in advanced economies such as Germany and Japan depend on access to metals and mineral markets. Detailed data for Germany show that raw materials and components account for 30–60% of manufacturers’ production costs, while energy costs are typically below 10%.8

Metals and minerals have perhaps received less attention than other types of resources because price swings or supply disruptions have little immediate or obvious impact on individual consumers. But attempts to manipulate prices, restrict supplies or carve up international markets for metals and minerals can cause direct and indirect welfare losses for consuming industries. In many cases, these are ultimately passed down the supply chain to consumers around the world.

Such distortions can be considerable, as recent examples demonstrate. Companies that consume aluminium have calculated that artificial constraints on warehousing deliveries on the LME cost them at least $3bn a year.9 The moratoria on iron ore exports imposed by two Indian states to combat illegal mining in 2010 may have added as much as $40 per tonne, or more than 25%, to the price of iron ore in global markets.10 For European and Japanese steelmakers respectively, this could equate to a $5bn difference in the costs of raw material imports per year. For China, the impact could have been as large as $30bn per year.11

It is not only heavy industries or construction that depend on secure supplies; many of the technologies needed to unlock a resource efficiency revolution, advance low-carbon energy and boost food security also depend on the availability and affordability of minerals.12 Potash-based fertilizers could make an important contribution to closing yield gaps in many developing countries, but are often not affordable for low-income farmers. In the second half of 2013, potash prices dropped by over 20% when one of the two export cartels that control global supplies broke down. Speciality metals and minerals such as lithium, flake graphite and rare earths play a growing role for resource-efficient and low-carbon technologies.13 Price spikes and supply security concerns for these raw materials, some of which relate to export restrictions or other anti-competitive practices, can slow the diffusion of best-available technology, e.g. for electric vehicles or wind turbines.14

Allegations over anti-competitive activities in metals markets also have the potential to spill over into broader trade and diplomatic tensions between consumer and producer countries. International coordination mechanisms that exist for other types of resources (e.g. the International Energy Agency (IEA) for energy and Agricultural Market Information System (AMIS) for food) and that could help to defuse such tensions are largely absent for metals and minerals. For example, forming export cartels is still not illegal in most parts of the world, including the US, the EU, China and Japan, and the WTO framework lacks effective mechanisms to deal with cartel-like structures.15

Meanwhile, national authorities face the challenge of regulating supply chains that stretch across continents, where unclear jurisdiction, lack of coordination among regulators and poor data availability often give potential offenders the advantage.

The purpose of this research paper is to identify and analyse the key policy challenges associated with anti-competitive practices in international metals and minerals markets. Such anti-competitive practices include producer-country cartels in the traditional sense, like the Organization of the Petroleum Exporting Countries (OPEC) but also other major sources of market distortions, including clandestine private cartels, unilateral export restrictions and more sophisticated forms of manipulation of physical and associated financial markets, e.g. through warehousing practices. In particular, the paper will address the following questions:

#### Climate-driven resource shocks cause extinction.

Klare 13, \*Michael T. Klare, The Nation’s defense correspondent, is professor emeritus of peace and world-security studies at Hampshire College and senior visiting fellow at the Arms Control Association in Washington, D.C.; (April 22nd, 2013, “How Resource Scarcity and Climate Change Could Produce a Global Explosion”, https://www.thenation.com/article/archive/how-resource-scarcity-and-climate-change-could-produce-global-explosion/)

It is safe to assume that climate change, especially when combined with growing supply shortages, will result in a significant reduction in the planet’s vital resources, augmenting the kinds of pressures that have historically led to conflict, even under better circumstances. In this way, according to the Chatham House report, climate change is best understood as a “threat multiplier…a key factor exacerbating existing resource vulnerability” in states already prone to such disorders.

Like [other experts](http://www.guardian.co.uk/global-development/2013/apr/13/climate-change-millions-starvation-scientists) on the subject, Chatham House’s analysts claim, for example, that climate change will reduce crop output in many areas, sending global food prices soaring and triggering unrest among those already pushed to the limit under existing conditions. “Increased frequency and severity of extreme weather events, such as droughts, heat waves and floods, will also result in much larger and frequent local harvest shocks around the world….These shocks will affect global food prices whenever key centers of agricultural production area are hit—further amplifying global food price volatility.” This, in turn, will increase the likelihood of civil unrest.

When, for instance, a [brutal heat wave](http://www.bbc.co.uk/news/business-10977955) decimated Russia’s wheat crop during the summer of 2010, the global price of wheat (and so of that staple of life, [bread](http://www.tomdispatch.com/archive/175419)) began an inexorable upward climb, reaching particularly high levels in North Africa and the Middle East. With local governments unwilling or unable to help desperate populations, anger over impossible-to-afford food merged with resentment toward autocratic regimes to trigger the massive popular outburst we know as the Arab Spring.

Many such explosions are likely in the future, Chatham House suggests, if current trends continue as climate change and resource scarcity meld into a single reality in our world. A single provocative question from that group should haunt us all: “Are we on the cusp of a new world order dominated by struggles over access to affordable resources?”

For the US intelligence community, which appears to have been influenced by the report, the response was blunt. In March, for the first time, Director of National Intelligence James R. Clapper [listed](http://www.upi.com/Top_News/US/2013/03/13/Official-US-faces-diverse-threats/UPI-15151363156505/) “competition and scarcity involving natural resources” as a national security threat on a par with global terrorism, cyberwar and nuclear proliferation.

“Many countries important to the United States are vulnerable to natural resource shocks that degrade economic development, frustrate attempts to democratize, raise the risk of regime-threatening instability, and aggravate regional tensions,” he wrote in his [prepared statement](http://www.dni.gov/index.php/newsroom/testimonies) for the Senate Select Committee on Intelligence. “Extreme weather events (floods, droughts, heat waves) will increasingly disrupt food and energy markets, exacerbating state weakness, forcing human migrations, and triggering riots, civil disobedience, and vandalism.”

There was a new phrase embedded in his comments: “resource shocks.” It catches something of the world we’re barreling toward, and the language is striking for an intelligence community that, like the government it serves, has largely played down or ignored the dangers of climate change. For the first time, senior government analysts may be coming to appreciate what energy experts, resource analysts and scientists have long been warning about: the unbridled consumption of the world’s natural resources, combined with the advent of extreme climate change, could produce a global explosion of human chaos and conflict. We are now heading directly into a resource-shock world.

#### And, international ag cartels dominate the industrial food chain, hammering global food security.

ETC 13, \*ETC, Action Group on Erosion, Technology and Concentration, staff and board members come from a variety of backgrounds, including community and regional planning, ecology and evolutionary biology, and political science; (September 2013, “Putting the Cartel before the Horse ...and Farm, Seeds, Soil, Peasants, etc.”, https://www.etcgroup.org/sites/www.etcgroup.org/files/CartelBeforeHorse11Sep2013.pdf)

Introduction: 3 Messages

ETC Group has been monitoring the power and global reach of agro-industrial corporations for several decades – including the increasingly consolidated control of agricultural inputs for the industrial food chain: proprietary seeds and livestock genetics, chemical pesticides and fertilizers and animal pharmaceuticals. Collectively, these inputs are the chemical and biological engines that drive industrial agriculture.

This update documents the continuing concentration (surprise, surprise), but it also brings us to three conclusions important to both peasant producers and policymakers…

1. Cartels are commonplace. Regulators have lost sight of the well-accepted economic principle that the market is neither free nor healthy whenever 4 companies control more than 50% of sales in any commercial sector. In this report, we show that the 4 firms / 50% line in the sand has been substantially surpassed by all but the complex fertilizer sector. Four firms control 58.2% of seeds; 61.9% of agrochemicals; 24.3% of fertilizers; 53.4% of animal pharmaceuticals; and, in livestock genetics, 97% of poultry and two-thirds of swine and cattle research. More disturbingly, the oligopoly paradigm has moved beyond individual sectors to the entire food system: the same six multinationals control 75% of all private sector plant breeding research; 60% of the commercial seed market and 76% of global agrochemical sales.1 Some also have links to animal pharmaceuticals. This creates a vulnerability in the world food system that we have not seen since the founding of the UN Food and Agriculture Organization. It’s time to dust off national competition / anti-combines policies and to consider international measures to defend global food security.

2. The “invisible hold” of the market is growing. For all the talk of the invisible hand of the free market, the market is evermore opaque and far from “free.” As the concentration grows, companies are more guarded with their information. Further, the investment companies that analyze markets have also become more concentrated and more proprietary (and their information is more expensive). As the “invisible hold” tightens, it is harder and harder for governments – and more so, peasants – to understand the level of food system control exercised by a handful of multinational enterprises. As a result, ETC’s data – in order to be accurate – is dependent upon 2011 figures. Be assured that corporate concentration in these sectors is not receding. Agribusiness must be legally obliged to provide full and timely data on sales and market share.

3. Climate research shows that we don’t know (that) we don’t know our food system: One positive outcome since our last update is that society in general – and governments in particular – are more aware of the threat posed by climate change to global food security. There is now a popular mantra (but not much movement) emphasizing the central importance of smallholder producers in meeting global food requirements in the decades ahead. We couldn’t agree more. To help policymakers move from mantra to marching orders, this Communiqué is accompanied by a poster contrasting the capacity of the Industrial Food Chain and the Peasant Food Web to address climate chaos. The poster raises 20 genuine questions. It is a work-in-progress. There may be more than one answer to the questions, but the data provides a basis for a fundamental change of mind and shift in policy direction. For some of the reasons cited already, the data policymakers need to make decisions are not always available (or accurate). As the United Nations Framework Convention on Climate Change prepares to receive the fifth assessment report of the Intergovernmental Panel on Climate Change over the coming months, we hope this report and accompanying poster will encourage a much needed constructive debate and complementary research on all of the issues we are raising.

Over the past half-century, the corporations that dominate the industrial food system have wrested control of the agricultural R&D agenda while concentrating power and influencing trade, aid and agricultural policies to fuel their own growth. There was cautious hope in the United States that a new era was dawning when, in 2009 – the first year of President Obama’s first term – the US Department of Agriculture and the Antitrust Division of the Department of Justice (DOJ) announced a joint investigation into anticompetitive practices in agriculture. The news that Monsanto specifically had been required to turn over internal documents related to seed prices raised the level of optimism. But when the DOJ dropped the Monsanto investigation almost 3 years later without explanation, it was clear that antitrust fervour had fizzled, despite the breathless claims2 (which happen to be true) that anticompetitive practices in agriculture pose a threat to public health and security.

#### Food wars go nuclear.

Cribb 19, \*Julian Cribb, Principal of Julian Cribb & Associates, Fellow of the Australian Academy of Technological Sciences and Engineering, former Director of National Awareness at the Commonwealth Scientific and Industrial Research Organisation; (August 23rd, 2019, “FOOD AS AN EXISTENTIAL RISK”, <https://www.cambridge.org/core/books/abs/food-or-war/food-as-an-existential-risk/8C45279588CD572FE805B7E240DE7368>) //rhetoric modified

Although actual numbers of warheads have continued to fall from its peak of 70,000 weapons in the mid 1980s, scientists argue the danger of nuclear conflict in fact increased in the first two decades of the twentyfirst century. This was due to the modernisation of existing stockpiles, the adoption of dangerous new technologies such as robot delivery systems, hypersonic missiles, artificial intelligence and electronic warfare, and the continuing leakage of nuclear materials and knowhow to non- nuclear nations and potential terrorist organisations.

In early 2018 the hands of the ‘Doomsday Clock’, maintained by the Bulletin of the Atomic Scientists, were re-set at two minutes to midnight, the highest risk to humanity that it has ever shown since the clock was introduced in 1953. This was due not only to the state of the world’s nuclear arsenal, but also to irresponsible language by world leaders, the growing use of social media to destabilise rival regimes, and to the rising threat of uncontrolled climate change (see below).12

In an historic moment on 17 July 2017, 122 nations voted in the UN for the first time ever in favour of a treaty banning all nuclear weapons. This called for comprehensive prohibition of “a full range of nuclear-weapon-related activities, such as under- taking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons.”13 However, 71 other countries – including all the nuclear states – either opposed the ban, abstained or declined to vote. The Treaty vote was nonetheless interpreted by some as a promising first step towards abolishing the nuclear nightmare that hangs over the entire human species.

In contrast, 192 countries had signed up to the Chemical Weapons Convention to ban the use of chemical weapons, and 180 to the Biological Weapons Convention. As of 2018, 96 per cent of previous world stocks of chemical weapons had been destroyed – but their continued use in the Syrian conflict and in alleged assassination attempts by Russia indicated the world remains at risk.14

As things stand, the only entities that can afford to own nuclear weapons are nations – and if humanity is to be wiped out, it will most likely be as a result of an atomic conflict between nations. It follows from this that, if the world is to be made safe from such a fate it will need to get rid of nations as a structure of human self-organisation and replace them with wiser, less aggressive forms of self-governance. After all, the nation state really only began in the early nineteenth century and is by no means a permanent feature of self-governance, any more than monarchies, feudal systems or priest states. Although many people still tend to assume it is. Between them, nations have butchered more than 200 million people in the past 150 years and it is increasingly clear the world would be a far safer, more peaceable place without either nations or national- ism. The question is what to replace them with.

Although there may at first glance appear to be no close linkage between weapons of mass destruction and food, in the twentyfirst century with world resources of food, land and water under growing stress, nothing can be ruled out. Indeed, chemical weapons have frequently been deployed in the Syrian civil war, which had drought, agricultural failure and hunger among its early drivers. And nuclear conflict remains a distinct possibility in South Asia and the Middle East, especially, as these regions are already stressed in terms of food, land and water, and their nuclear firepower or access to nuclear materials is multiplying.

It remains an open question whether panicking regimes in Russia, the USA or even France would be ruthless enough to deploy atomic weapons in an attempt to quell ~~invasion~~ [entry] by tens of millions of desperate refugees, fleeing famine and climate chaos in their own homelands – but the possibility ought not to be ignored.

That nuclear war is at least a possible outcome of food and climate crises was first flagged in the report The Age of Consequences by Kurt Campbell and the US-based Centre for Strategic and International Studies, which stated ‘it is clear that even nuclear war cannot be excluded as a political consequence of global warming’.15 Food insecurity is therefore a driver in the preconditions for the use of nuclear weapons, whether limited or unlimited.

### 1AC---Solvency

#### Finally, solvency:

#### Plan: The United States federal government should substantially increase prohibitions on anticompetitive private cartel practices in cases where foreign plaintiffs cannot secure adequate relief in alternative fora.

#### The plan permits jurisdiction over *Empagran*-type cases only in instances where foreign plaintiffs don’t have an alternative forum for recovering damages---that maximizes cartel deterrence through harmonization of antitrust laws and preserves judicial economy.

Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>)

5. A New Approach to the Empagran Problem: Legislative Authorization to the Executive Branch To Limit Jurisdiction Based on the Principles of Foreign Non Conveniens

A better approach would systematize the executive branch's review of other countries' antitrust regimes, apply that executive determination categorically over a class of cases, and remove judicial discretion with respect to complying with that executive determination. Accordingly, I recommend that the DOJ 2 7 6 should annually review other countries' antitrust regimes to determine whether they provide private parties an adequate forum to recover damages from cartel activities. Congress should amend 277 section 12 of the Clayton Act to bar jurisdiction in cases involving international cartels in which (1) neither the plaintiff nor the defendant is a national of the United States, and (2) the plaintiff or defendant is a national of a country that the DOJ currently lists as one that provides plaintiffs with an adequate private remedy in the antitrust claim, except (3) when that country permits United States jurisdiction for reasons of judicial economy. Such a law would promote international judicial economy in a transparent and predictable manner that prevents forum shopping without greatly reducing the deterrent effect of United States law.

The principles underlying this proposed law are those of the doctrine of forum non conveniens as articulated in Piper. Thus, if plaintiffs can secure relief in their domestic courts for antitrust violations that involve foreign harms, they should not be able to sue a foreign defendant in U.S. courts simply because the damages available there may be more favorable. However, when a foreign plaintiff cannot secure relief in her domestic courts--either because the courts do not permit jurisdiction over the claims or because the statutory relief is not actually available-she should first turn to the court system in which the foreign defendant is located. Again, this result would accord with a concern for convenience and judicial economy. Only if the plaintiff cannot receive adequate relief in her home forum or the defendant's home forum should U.S. courts exercise jurisdiction, assuming the requisite showing of a link to domestic effect is made. Such an exercise of jurisdiction would not be an act of charity toward the plaintiff; it would recognize that affording such plaintiffs an opportunity for relief somewhere is necessary to deter the international cartels that harm American consumers and businesses.

Such a restriction of jurisdiction would not affect the ability of American plaintiffs to bring antitrust claims against anyone in the world, nor would it prevent U.S. courts from exercising jurisdiction over cases involving American defendants. Instead, this restriction on jurisdiction would apply only when neither the plaintiff nor the defendant was an American. In such situations, the United States retains an interest in ensuring that plaintiffs can receive adequate compensation because of its deterrent effect on international cartels that affect the United States. However, if such claims could be better heard before a foreign court, the United States should decline jurisdiction because of convenience and judicial economy.279

The DOJ's annual review of other countries' private antitrust remedies should be more than a broad "thumbs-up, thumbs-down" review; it should distinguish the types of claims for which a country's relief is adequate from those for which it is inadequate. For example, although Canada has a strong anti-cartel regime, it also protects its domestic export cartels.280 Such protectionist policies-of which the FTAIA is one-do not enhance worldwide deterrence,28' and when implemented by foreign governments, they specifically do not deter conduct harming American consumers. Therefore, the DOJ would list Canada as a country that provides an adequate forum except in cases involving Canadian export cartels. Similarly, other countries may not permit foreign plaintiffs to sue their domestic firms for participating in an international cartel, though domestic plaintiffs can bring such actions. In these situations, the DOJ would list those countries as providing an adequate forum for domestic plaintiffs, but U.S. jurisdiction would be permitted if the plaintiffs were foreigners who also lacked an adequate forum in their home country.

The definition of "adequate" relief is an important component of this proposal. Consistent with the principles of forum non conveniens articulated in Piper, the United States should not require that countries provide treble damages. The United States should decline jurisdiction in anti-cartel actions so long as plaintiffs can recover at least compensatory damages. America's mandatory treble damages regime is based on a policy choice in the United States regarding the proper mix of public and private enforcement. The fact that other governments do not provide treble damages may reflect other aspects of their systems, such as greater public fines, the availability of punitive damages, or the cost to plaintiffs of bringing actions for damages. The United States should not require treble damages as the sole mechanism of deterrence.

Refusing jurisdiction in international antitrust suits may sacrifice some global judicial economy. The nature of international cartel activities increases the possibility that the same defendants will simultaneously face multiple lawsuits in many countries. By splitting the plaintiffs' actions, these multiple lawsuits could complicate the suits, delay them, and make them more 282 expensive. For this reason, the U.S. courts could exercise jurisdiction if the nations implicated in the case ask it to do so. Admittedly, this is only a partial solution to the issue of global judicial economy. A more comprehensive solution will require additional political solutions, such as an international agreement permitting some form of transnational transfer or consolidation of cases. Such agreement is foreseeable, as informal collaboration already occurs with respect to public lawsuits against international cartel members.

This proposal would help achieve America's three goals with respect to international antitrust. First, the U.S. government would have a national policy with respect to jurisdiction in international cartel cases that distinguishes between those foreign antitrust regimes that are effective and those that are not. Second, such a policy would be consistent and predictable, facilitating international trade. Plaintiffs and defendants would know whether jurisdiction could be exercised before bringing a case. Plaintiffs from countries that the United States deems to have an effective antitrust regime would have no reason to bring a case in U.S. courts, and they would therefore need to turn to their home jurisdiction. In this manner, the policy would encourage other jurisdictions to enact policies that would be in harmony with those of the United States. For example, with respect to Canada, the exercise of U.S. jurisdiction with respect to a Canadian export cartel may cause Canadian lawmakers to tear down their measures protecting such cartels, especially if they wish to protect Canadian defendants from America's treble damages regime.283

[FOOTNOTE 283]

283. Indeed, America's treble damages regime would provide an incentive for foreign companies to lobby their countries to enact antitrust policies sufficiently strong to remove them from U.S. jurisdiction in Empagran-type suits.

[END FOOTNOTE 283]

Upon such action, the DOJ would determine that U.S. jurisdiction should no longer be granted in such cases. Thus, this proposal, like my suggested reforms of national amnesty programs, seeks to harmonize international antitrust policies and to do so in a manner that most effectively deters international cartels.

#### Only international, private antitrust enforcement maximizes deterrence---it enhances the cartel’s likelihood of being detected and makes operation in multiple countries cost-prohibitive.

Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>)

II. BACKGROUND

A core aspect of America's antitrust regime is its encouragement of private litigation as an enforcement device. Private litigation is thought to be particularly effective against cartels, as the consumers in a cartel market may often be among the first entities to detect the cartel's damaging collusive behavior, and awarding damages-particularly a multiple of the cartel's profits-may make the illegal conduct cost-prohibitive. Thus, private litigation is viewed as an important mechanism for achieving one of the fundamental goals of the antitrust acts: the maximum deterrence of cartels.26

Initially, the application of America's antitrust regime was contained within its borders. But as commerce became increasingly international after World War II, U.S. courts applied the antitrust laws extraterritorially. America's extraterritorial application of its antitrust laws created tension with its trading partners, who disagreed with the American approach of relying on private litigation and treble damages as an enforcement device. They viewed the extraterritorial application of U.S. law as an anticompetitive maneuver aimed at furthering U.S. trade objectives. In the late 1970s and early 1980s, many of these countries passed legislation to frustrate the extraterritorial application of America's antitrust laws. The U.S. Congress responded by passing the FTAIA. This law barred foreigners from using America's laws against American companies when American consumers were not harmed. The Empagran decision-and the governments' amici briefs-must be understood within this context of antitrust policy as trade policy.

A. The Sherman and Clayton Acts

The Sherman and Clayton Acts are the statutory foundation for private antitrust litigation in the United States. The Sherman Antitrust Act outlaws "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations., 27 Violations are felonies, with corporations and individuals facing civil and criminal penalties, including imprisonment.29

To expand the enforcement of the antitrust laws and to facilitate the compensation of the victims of antitrust harms, Congress adopted the Clayton Act. Section 4 of the Clayton Act creates a private cause of action for individuals and companies harmed by antitrust violations, 30 and section 12 grants jurisdiction over these lawsuits to any district in which the defendant does business.3' Plaintiffs in such lawsuits act as "private attorneys general, 32 who help alert authorities to violations of the antitrust laws while also punishing those violations. The Clayton Act allows private litigants to sue for treble damages. Treble damages enhance deterrence in two ways-they encourage private suits, which raise the probability the cartel will be detected,33 and they increase the penalty imposed on defendants found guilty of violating the acts.34 The Clayton Act has succeeded in encouraging such suits. 35

B. Cartels-An Introduction

Cartels are "unambiguously bad' 36 and "the most egregious violations of competition law."3 7 The collusion they engage in the "supreme evil of antitrust. ' '3s A cartel is a group of firms in an industry that should be competitors but have instead agreed to coordinate their activities so that they can raise prices and earn profits above competitive market levels. Cartels utilize a number of mechanisms to coordinate their activities, including horizontal price fixing,39 bid rigging, territorial division,40 non-territorial customer division, and market-share agreements. In addition to harming the consumers of their products by charging supra-competitive prices, cartels also reduce economic efficiency by causing consumers to purchase less of a product than they otherwise would buy and by reducing the competitive pressures that member firms face to control costs and to innovate.41

A cartel must overcome four challenges to operate successfully. First, the cartel's members must reach agreement to restrict the supply of a product and increase its price. A cartel restricts supply so that the loss from the lower quantity of sales is more than offset by the increase in the price of each remaining sale. The optimal cartel quantity and price is that of a monopoly producer, but cartels rarely achieve that optimal level because cheating by members and market entry by new producers increases market supply. Thus, a second challenge for a cartel is to ensure that its members follow the agreed course of action. Each cartel member has an incentive-to sell more than the agreed quantity of the product-at the cartel price or one slightly below it-to gain even more profit.42 Because cheating threatens the cartel's viability, cartels must monitor their members and punish cheating.4 3 But monitoring is difficult because of the third challenge inherent to cartels: their illegal actions force them to operate in secrecy to avoid detection.44 Yet even if, while operating in secret, cartels are able to monitor and punish cheaters, they still must prevent entry by other firms into the market. Entrants will be enticed by the opportunity to earn profits due to the extra-competitive cartel prices, and their entry will drive down the cartel's profits. To maintain its hold on the market, the cartel must prevent new entry, again without making the cartel visible. The complexity of addressing these four challenges leads many economists to conclude that cartels are "inherently unstable."43

Certain market characteristics are conducive to collusive activity. Cartels often operate in concentrated markets with few firms, permitting easier coordination and more reliable confidentiality.46 Markets with high initial investment costs are also conducive to cartel activity. These costs deter other firms from quickly entering the market to take advantage of the cartel's artificially high prices.47 Products that are homogenous and fungible also facilitate cartel activity. a Such products are usually uniformly priced, making it easier for cartels to monitor member prices. Finally, market structures, such as public disclosure laws regarding prices and quantities, can help cartels monitor their members' activities.

Market characteristics alone cannot sustain a cartel; cartel members must adopt a variety of practices to avoid detection and to enforce compliance. Cartels avoid detection by holding secret meetings, using code names, and creating legitimate-appearing trade associations to share information.49 Generally, cartel members meet periodically to review public and private sales and price figures from prior periods. They also force members who exceed their quotas to compensate the other members.50 Thus, cartels overcome their inherent instability by successfully providing supra-competitive profits to their members while maintaining the secrecy of their collusion and punishing any deviations. Indeed, based on the fact that twenty-four of the forty international cartels prosecuted in the 1990s had operated for at least four years, one study concluded, "market forces alone may be unable to quickly undermine attempts to fix prices, rig bids, allocate quotas, and market shares; perhaps implying a potential role for national anti-cartel enforcement." 51

C. International Cartels

Certain characteristics of the global marketplace increase the ability of international cartels to monitor their members and maintain secrecy. The publication of official import and export data facilitates the cartel's monitoring of its members. National differences in accounting, reporting requirements, and other legal mandates help cartels to hide their activities and profits. 53 National borders mask agreements to divide a product market among competitors,54 and they can facilitate the punishment of cheaters.55 Cartel members also frustrate the efforts of effective policing authorities by meeting and retaining records outside their jurisdictions.56

Almost invariably, any international cartel harms consumers in all of the countries in which its product is sold. If an international cartel does not raise prices everywhere, a product sold at a cheaper price in one country can be resold in another country where the price is higher. This arbitrage threat exists as long as transaction costs, including transportation costs, are low and the product is undifferentiated across the various countries. If the cartel's product is sold in the United States, the cartel must raise its price in the United States sufficiently so that it is not profitable to buy the product in the United States, ship it to another market, and sell it at or below the cartel price. Thus, because cartels must address the arbitrage threat by raising prices in all of the markets in which they operate, the harms caused by the cartels in those markets are interconnected.

To effectively deter cartels, the total expected penalty must at least equal the supra-competitive profits from participating in the cartel.57 Because an international cartel enjoys supra-competitive profits from its sales in other countries, "[tihe relevant expected penalty depends on the sum of the expected penalties in each nation., 58 According to the OECD, sanctions against cartels "are, on the whole, still inadequate" 59 in most countries. Therefore, cartels will raise their prices in the United States even though doing so increases the likelihood of the cartel's detection due to the United States's more rigorous antitrust regime. The international cartel will still harm American consumers because it can offset its expected American losses with its supra-competitive profits from countries where it has little fear of penalty. As a result, "the deterrent required to prevent a global cartel from including the United States is generally larger than the deterrent required to prevent a purely domestic cartel from forming." 60

#### Only the AFF’s bottom-up harmonization fills enforcement gaps---that must precede any effort to develop an international antitrust regime.

Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>)

My proposal is also consistent with the desire by many economists and legal scholars to see some form of global antitrust authority established. Eleanor Fox notes, "international antitrust has been a gleam in the eye of the world at least since the proposal of the Havana Charter in the 1940s.,,29' Yet while there are "seeds"2 for some sort of international antitrust charter, there is disagreement as to whether the international community should adopt a common international antitrust code,294 establish an oversight body along the lines of the World Trade Organization to ensure compliance with such a code, or create a world antitrust court to adjudicate important private international disputes.295 Indeed, the United States and the European Union-arguably the two jurisdictions that present the most agreement on the substantive aspects of international antitrust-occupy diametrically opposed positions with respect to the form international antitrust enforcement should take. The European Union favors binding dispute resolution in the WTO; the United States favors a more voluntary approach that focuses on technical assistance and the issuance of voluntary standards. Although there has been convergence in substantive antitrust policies, there, too, disagreement exists. The substantive disagreements led Judge Diane Wood, after proposing a baseline general international antitrust code, to note that in actually negotiating such a code, "the details would indeed be devilish" and to "wonder whether the effort it would take to achieve international consensus on all [of the areas of antitrust] would be worth it." 296 As an international antitrust regime is still such a distant possibility, I prefer to propose an improvement to the status quo rather than waiting for the intellectually best solution.

Absent an international agreement establishing some form of global antitrust regime, the international community needs to work to further harmonize their practices to fill the enforcement gaps that allow corporate criminals like cartels to thrive.297 I believe my proposal is the best mechanism-absent an international agreement-to encourage harmonization of antitrust policies with respect to international cartels. By exercising jurisdiction over claims by plaintiffs located in countries where the laws do not provide adequate relief, the United States implicitly encourages those countries to implement and enforce laws that provide such relief. Although other nations might respond negatively to America's judgment of their antitrust regimes, their objections should be mollified by the fact that such judgments are undertaken to limit, rather than extend, American power 298 through an exercise of jurisdictional restraint.

Still, international antitrust disagreements will persist, but such disagreements are not created by the United States. Instead, they reflect real policy differences between the United States and its trading allies regarding the degree to which all cartels, especially domestic export cartels, should be deterred, the viability of private antitrust suits as a means of policing cartel activities, and the ability of the United States to protect its consumers, even at the expense of foreign corporations. Empagran has not generated conflict; it has only revealed it. Accordingly, I reject the view that the absence of conflict, such as would result by closing our courts to Empagran-type suits, is equivalent to harmony. Instead, the closing of our courts to all Empagran-type suits would represent a surrender of America's interest in protecting its consumers from the harms of international cartels. At the least, such a capitulation of America's vital economic interests should not be achieved by judicial fiat.

# 2AC---R2

## T---Per Se

### 2AC---Re-Highlight

#### It’s a non-starter---card says one particular prohibition was per se. [KU=yellow]

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

### 2AC---AT: T---Prohibit = Per Se---TL

#### We meet---Cartels are ‘per se’ illegal.

GLI 21, \*Global Legal Insights, provides essential insights into the current legal issues, providing readers with expert analysis of legal, economic and policy developments through the eyes of the world's leading lawyers; (2021, “Cartel Laws and Regulations”, https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/usa)

In the United States, there are two major federal antitrust laws relating to cartels:

• Section 1 of the Sherman Antitrust Act (1 5 U.S.C. S 1), which prohibits "[e] very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"; and

• Section 5(a) of the Federal Trade Commission Act ("FTC Act") (1 5 U.S.C. SS 41-58), which prohibits "unfair methods of competition" and "unfair or deceptive acts or practices".

The Sherman Act can be enforced criminally or civilly by the Antitrust Division ("Division") of the U.S. Department of Justice ("DOJ"). Criminal antitrust enforcement is reserved for "hard core" violations of Section 1: price-fixing; bid-rigging; and market allocation schemes among horizontal competitors. The DOJ can also pursue less egregious cases civilly. Section 4 of the Clayton Act provides for a private right of action to enforce Section 1 of the Sherman Act. Private plaintiffs may recover treble damages and litigation costs and may also seek injunctive relief.

While Section 1 of the Sherman Act on its face prohibits all restraints of trade, the Supreme Court has interpreted it to prohibit only "unreasonable" restraints. See Standard Oil Co. v. United States, 221 U.S. 1, 60—68 (1 911). Naked horizontal agreements with competitors to fix prices (or any component of pricing), restrict output, rig bids, or allocate customers or geographic markets, i.e., the hard-core violations discussed above, are considered "per sé illegal regardless of the economic rationale or the consequences because these practices always or almost always restrict competition.

#### Counter-interpretation---rule of reason is a prohibition.

Light 19, Sarah E. Light Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania., The Law of the Corporation as Environmental Law, 71 Stan. L. Rev. 137, 2019, Lexis/Nexis

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive. As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition. The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199 Associations of firms have adopted numerous mechanisms of private environmental governance to address the management of common pool resources like fisheries, forests, and the global climate. 200 Examples include the Sustainable Apparel Coalition's Higg Index 201 and the American Chemistry Council's Responsible Care program. 202 But private industry standards raise special antitrust concerns. An agreement among competitors with respect to product or process specifications may exclude competitors who fail to meet such standards, raising the specter that such industry collaborations really constitute output limitations or efforts to limit competition. 203 While the U.S. Supreme Court has scrutinized private standard-setting associations carefully, 204 it has noted that if associations "promulgate … standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition … , those private standards can have significant procompetitive advantages." 205 In the absence of price fixing or a boycott, a rule of reason analysis generally applies to product standard setting by private associations. 206 The uncertain outcome [\*179] inherent in the application of antitrust law in this context could therefore serve as a potential disincentive to the adoption of private industry standards. 207 The challenge of course is that some form of explicit sanctions on noncompliant industry members may be necessary for private industry standards to be effective. In the context of private reputational mechanisms like the New York Diamond Dealers Club, 208 Barak Richman has pointed out that the Club's use of reputational sanctions and voluntary refusals to deal with actors who flout industry norms, while welfare enhancing, could nonetheless amount to violations of antitrust law. 209 This echoes the concern raised by Andrew King and Michael Lenox in their extensive empirical analysis of the Responsible Care program created by the Chemical Manufacturers Association (now the American Chemistry Council). 210 King and Lenox concluded that the absence of explicit sanctions on members who failed to meet the standards set by the program left the program vulnerable to "opportunism." 211 While they suggested that industry associations could look to third parties to enforce the rules, 212 an alternative way to facilitate the long-term environmental benefits of stronger sanctions would be to interpret antitrust law in conformity with the environmental priority principle presented below. 213 [\*180] In some instances, the conflict between the values of promoting competition and conserving environmental resources can be stark. 214 Jonathan Adler, for example, has identified this conflict in the context of fisheries - a tragedy of the commons situation in which some form of collective action is required to avoid overfishing. 215 He cites as an example Manaka v. Monterey Sardine Industries, Inc., in which a fisherman was excluded from a local fishing cooperative. 216 The fisherman sued the cooperative under the Sherman Act, and the court found an antitrust violation in his exclusion. 217 While the fishing cooperative's policies were no doubt exclusionary, Adler contends that they also promoted conservation by restricting catch. 218 The fishery collapsed by the 1950s, a collapse Adler hypothesizes might have been "inevitable" but that perhaps might not have occurred in the absence of the antitrust suit. 219 While a court performing a rule of reason analysis must consider whether a restraint on trade suppresses or destroys competition, Adler points out that courts may also "consider offsetting efficiencies from otherwise anticompetitive arrangements." 220 It is not clear, however, that the courts have consistently taken these factors into account. 221 Among other potential remedies, Adler argues that to resolve this tension between antitrust law, on the one hand, and private collective action to conserve environmental resources, on the other, courts should more actively consider the "ancillary conservation benefits of otherwise anticompetitive conduct." 222 Recognizing the long-term health of a fishery would be consistent with antitrust law's purpose of ensuring viable markets exist in the future, and consistent with the environmental priority principle introduced below. 223

#### Prohibit can mean ‘severely hinder’---doesn’t necessitate a ban.

Washington Court of Appeals 19 (KORSMO-judge. Opinion in State v. Kimball, No. 35441-5-III (Wash. Ct. App. Apr. 2, 2019). Google scholar caselaw. Date accessed 7/13/21).

His argument runs counter to the meaning of the word "prohibit." It means "1. To forbid by law. 2. To prevent, preclude, or severely hinder." BLACK'S LAW DICTIONARY 1405 (10th ed. 2014). As "severely hinder" suggests, a "prohibition" need not be an all or nothing proposition.

## CP---ITC

### 2AC---AT: CP---ITC

#### Permutation: do the counterplan---to prove a Section 337 violation, complainants must prove antitrust injury beneath the Sherman Act. Either the counterplan “expands scope”, or it fails.

1NC Pupkin 20, \*Barry Pupkin, practices primarily before the Federal Trade Commission and the US Department of Justice, as well as other regulatory and legislative bodies including the Merger Task Force of the European Commission, US Congress and the Committee on Foreign Investment in the United States; (April 13th, 2020, “Beyond IP Rights: Pursuing Antitrust Claims Under Section 337 of the Tariff Act”, https://www.natlawreview.com/article/beyond-ip-rights-pursuing-antitrust-claims-under-section-337-tariff-act)

Where does this leave a company interested in pursuing an antitrust-related Section 337 matter going forward?

In the Carbon and Alloy Steel case, U.S. Steel based its Section 337 claim on a violation of the Sherman Act. That Act prohibits contracts, combinations and conspiracies in restraint of trade, including price fixing and market division. The Sherman Act also prohibits monopolization and attempts to monopolize. Specifically, with regard to the U.S. Steel claims that Chinese steel producers conspired to fix prices at below-market levels and control output and export volumes, the ITC determined that U.S. Steel needed to allege that the Chinese respondents had agreed to set prices below a certain level of their cost and that the Chinese respondents had a dangerous probability of recouping their investment (i.e., their predatory below-cost prices). A private plaintiff bringing a Section 337 case, then, would need to plead and prove the same antitrust injury that courts require of private plaintiffs bringing cases under US antitrust laws.

For predatory pricing claims, antitrust injury is shown by pleading and providing evidence of below-cost pricing and recoupment. These two claims are difficult to prove given the logistical hurdles of conducting discovery and obtaining relevant cost and recoupment information in China from Chinese companies. It might have been possible, though, to plead injury based on the anticompetitive conspiracy among Chinese companies to effect price at a level that would not allow U.S. Steel to invest in new technology or to continue to provide quality service to its customers. Section 337 does not limit antitrust inquiries to predatory pricing claims alone.

#### 1NC ev says it makes proving injury easier, which logically implies more litigation. [KU=yellow]

Barry 1NC Pupkin 20, practices primarily before the Federal Trade Commission and the US Department of Justice, as well as other regulatory and legislative bodies including the Merger Task Force of the European Commission, US Congress and the Committee on Foreign Investment in the United States, “Beyond IP Rights: Pursuing Antitrust Claims Under Section 337 of the Tariff Act,” Global IP &amp; Technology Law Blog, 4-13-2020, https://www.iptechblog.com/2020/04/beyond-ip-rights-pursuing-antitrust-claims-under-section-337-of-the-tariff-act/

Although investigations under Section 337 of the Tariff Act of 1930 have focused on intellectual property rights involving patents, unregistered trademarks or trade secret claims, the language of Section 337 is much broader.

The provision applies to any “unfair methods of competition and unfair acts in the importation of articles.” That language is similar to the Federal Trade Commission Act, which prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”

In June 2016, decades after the last Section 337 claim based on an antitrust violation had been filed, U.S. Steel alleged, in part, a conspiracy to “fix prices and control output volumes” in order to “restrain or monopolize trade and commerce in the United States” in violation of Section 337, in Certain Carbon and Alloy Steel Products. The International Trade Commission (ITC or the Commission) dismissed the U.S. Steel complaint because the Commission said that U.S. Steel had not pleaded the requisite “antitrust injury” to proceed. In fact, the Commission stated that U.S. Steel, “if given the opportunity to amend the complaint, [] will not be able to plead or demonstrate antitrust injury.” One commissioner, Meredith M. Broadbent, dissented from the ITC decision, arguing that Section 337 confers broad unfair competition jurisdiction on the ITC, and that the Commission should not be constrained by standing requirements under US antitrust laws. She said that Section 337 was intended “to capture within its scope any nefarious practices that distort domestic competition,” and as such, the U.S. Steel petition would have been sufficient and should not have been dismissed. That said, it soon became clear that the Commission decision against U.S. Steel was not meant to foreclose future Section 337 claims based on antitrust violations. In fact, soon after the Certain Carbon and Alloy Steel decision, the ITC initiated an antitrust investigation in Certain Programmable Logic Controllers pursuant to Section 337.

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In fact, in January 2018, Radwell International filed a Section 337 complaint with the ITC requesting that it institute an investigation into certain alleged unfair methods of competition and unfair acts by Rockwell Automation. In its complaint, Radwell alleged several different antitrust-based claims, which it said would “destroy or substantially injure a domestic industry in the United States” and/or “restrain or monopolize trade and commerce in the United States.” These claims included a conspiracy to fix resale prices; a conspiracy to boycott resellers; and monopolization. Just as these claims are substantially broader than the claims made by U.S. Steel, the ability to demonstrate antitrust injury for each of these claims was correspondingly broadened. On March 23, 2018, the ITC issued a notice of institution of investigation into the antitrust-based Section 337 claims brought by Radwell.[1]

What does this mean for a Section 337 litigant going forward?

It means that antitrust lawyers and trade lawyers need to work closely with one another to figure out the best, most credible claims, as well as the arguments, under both antitrust and trade law that will likely be sustained by the ITC. Given the dearth of precedent in this area, it seems that in pursuing antitrust-related Section 337 actions, it is probably best to plead as broad and as comprehensive a set of antitrust claims as possible. Counsel should assess any and all possible antitrust offenses that might be relevant to the facts, and allege, as well as gather evidence of, antitrust injury for each such offense. Alternatively, because the language of the Tariff Act is so broad, prohibiting unfair methods or acts that may “restrain or monopolize trade or commerce in the United States,” a petitioner might avoid the necessity of showing antitrust injury by grounding its complaint only on the language of Section 337.

We believe that Section 337 can become an even stronger tool to exclude certain imports from sale in the US if antitrust claims become a more routine allegation in future Section 337 actions. If this happens, and more precedent is developed, petitioners will be in a much better position to frame their competitive injury arguments going forward.

#### In the event it was miraculously approved, the ITC’s remedies are procedurally limited to bans on U.S. imports, which is way too modest relative to private antitrust law’s treble damages.

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

A second key difference between these two statutory regimes relates to the different mechanisms the statutes use to accomplish their goals. The remedy provisions of the Clayton Act benefit much more than just the private plaintiff. They are designed to benefit the public, echoing the view that the private plaintiff is serving, indirectly, as a proxy for the market as a whole. For example, the enhanced damages provisions of the Clayton Act, including treble damages and attorney fees, provide general deterrence against anticompetitive conduct. In addition, the broad equitable power of the injunction has allowed courts and agencies to deploy myriad structural remedies to provide future protection against such conduct. In a sense, this mix of remedies is designed to reward the prospecting risks of a private plaintiff incurring the costs to act as a private attorney general, but under the private antitrust injury doctrine, such remedies must then be reined in to ensure they are not used to unjustly enrich that particular plaintiff with remuneration beyond the particular antitrust harm it actually suffered or to deter pro-competitive conduct of defendants in general. By contrast, the provisions in Section 337(a)(1)(A)(i) and (iii), however, are much more direct in that they protect against injury to the industry28 or to trade and commerce more broadly. Harm to the particular complainant is essentially only relevant in so far as it shows harm to the industry or to trade and commerce more broadly. In turn, the remedies the ITC’s statute provides are more modest and direct in stopping any such broader harm that is determined to exist through a complete investigation. The remedies available under the ITC’s statute are limited to an exclusion order and a cease and desist order.29 The directness of the Commission’s statute decreases the risk of the errors associated with the indirectness of a proxy approach. Furthermore, the more limited scope of the remedies available under Section 337 decreases the harm from any such errors that do occur.30

### 2AC---AT: DA---Court Clog

#### Courts are clogged now.

Land et al. 21, \*Greg Land covers topics including verdicts and settlements and insurance-related litigation for the Daily Report in Atlanta; \*Amanda Bronstad is the ALM staff reporter covering class actions and mass torts nationwide. She writes the email dispatch Law.com Class Actions: Critical Mass; (July 30th, 2021, “Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle”, https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/?slreturn=20211014154916)

As judges around the country gingerly reopen their courtrooms and invite lawyers, litigants and jurors back for business—sometimes as usual, but often still far from the normal routines of years past—they’re being confronted by an array of pitfalls, real and potential. Will a surge of COVID-19 cases among the unvaccinated and forceful advance of the delta variant force renewed shutdowns? Will jurors and staffers be willing to risk a return? Are mask mandates and vaccine passports in the offing? But one very real dilemma is already on their minds: Backlogs of criminal, civil and domestic cases that have piled up, exacerbating already crowded dockets where litigants and lawyers jostle to get motions filed, rulings issued and, toughest of all, cases tried. Richard Clifton, a senior judge on the U.S. Court of Appeals for the Ninth Circuit, who serves as president of the Federal Judges Association, said that court backlogs are a big topic for judges, although not all are as impacted as others. “At least one judge in a very busy district didn’t think the backlog had turned out as high as it turned out to be,” he said. “Other judges have commented, unspecifically, they’re just piling up.” He said the most frequent comment is that the civil calendar “is just sitting there” because judges are spending all their time dealing with criminal caseloads. He hasn’t heard about judges suggesting settlement as an option to those with civil cases but, he said, “I would be shocked if it weren’t happening.” “The reality is that most cases get settled, we all know that—it’s not a good or a bad thing, it’s just a fact,” he said. And, while judges don’t actively get involved in settlements, their goal is to resolve cases. “And if it’s realistic to say to parties, ‘look, you won’t get a trial date anytime soon,’ I’m sure that’s something judges are saying to parties in those cases.” That’s exactly what happened to Ryan Baker, of [Waymaker](https://www.waymakerlaw.com/) in Los Angeles. “It absolutely is the case that, especially in the federal courts, civil trials are at the end of the line,” he said. Baker represents the defendant in a trademark case filed in 2017. “I know there’s been a lot of debate among the judges on how to handle this situation,” he said. “There are very different views, as there are with any group of people, on what is appropriate and what measures need to be taken.” In Baker’s case, U.S. District Judge Cormac Carney of the Central District of California minced no words in telling the parties in April that he could not guarantee a trial date in 2021, or even the first half of 2022. “The court strongly believes that this case should settle,” he wrote in a minute order. “To hold a trial in this civil case would mean asking citizens to report for jury duty or to testify as witnesses when many of them have been out of work for months and fear they will not be able to pay their rent, mortgage, or other bills, or put food on the table for their families. “And it would also ask the court to find time in its congested calendar for such an endeavor after more than a year of closure due to the coronavirus,” Carney wrote. Baker said the case went through two mediations and three court-ordered settlement conferences before settling July 23. “And these conferences, the last couple have been ordered because the court is concerned that this case is not going to be set for trial, not this year, not even next year, because of the backlog of criminal matters that will necessarily precede all the civil trials,” he said. California’s Central District, which includes Los Angeles, has six judicial vacancies. But Baker said a lot depends on how much is at stake in the case and the specific judge’s calendar. He has another case in the district in which Judge Consuelo Marshall has set a trial date for February 2022. But there has been a strong push for settlement. “The backlog factor weighs heavily in favor of courts really advocating for private resolution because the reality is litigants are having to bear the cost of extended and protracted litigation,” Baker said. In a 2015 patent infringement lawsuit in the Southern District of New York, Judge Gregory Woods canceled a Nov. 29 trial, citing a criminal trial now scheduled for that date. After his June 15 order, U.S. Magistrate Judge Sarah Netburn asked the parties for settlement dates. Another judge in New Mexico cited the court’s backlog as a reason to grant final approval of a nearly $4.2 million settlement involving a class of truck drivers seeking unpaid overtime wages. Settling the 2019 class action would avoid “significant delay,” U.S. Magistrate Judge Gregory Fouratt said in an April 9 order. “The court further observes that litigation of this case would have moved exceptionally slowly in the current pandemic environment in which jury trials are logistically difficult and almost entirely devoted for the next 12-18 months to resolving an unprecedented backlog in criminal cases,” he wrote.

## CP---WTO

### 2AC---WTO CP

#### Thumpers.

1NC Anderson et al 20 (Robert D. Anderson, William E. Kovacic, Anna Caroline Muller, Antonella Salgueiro, and Nadezhda Sporysheva, “Competition Policy and the Global Economy: Current Developments and Issues for Reflection”, George Washington Law Review, Vol. 88, No. 6) DB

Second, in many cases, cross-cutting problems in global competition policy stem from differences in policy goals and industrial policies and are truly global in nature, thus resistant to lower-level policy intervention.300 High-level decisions that go to the core of economic policy making are required to resolve them.301 Third, the ICN has focused on issuing nonbinding recommendations.302 While such recommendations are an important achievement, perhaps further progress could be achieved through establishing binding, treaty-based obligations. The ICN’s role in facilitating convergence among competition law systems would thus be an essential platform in such an evolution from soft to hard law. According to Hollman and Kovacic: The concept that soft law evolves into hard law has logical appeal. Global problems would seem to require global solutions. An agreement could reduce the risk of jurisdictional conflict and resolve conflicts that arise. In addition, without an agreement, states’ interests will not align sufficiently to resolve conflicts that arise.303 As we have discussed, some of the issues most in need of intergovernmental discussion include the need for the safeguarding the impartiality of competition law, wider issues surrounding state monopolies, and the interface between IP and competition. In that regard, some commentators argue that many of the interfaces described in this article find their “natural home” for policy dialogue in the WTO—at least to the extent they have specific trade policy dimensions—and that “flanking principles in the WTO,” such as nondiscrimination, transparency, and procedural fairness, are relevant.304 This is in light of the WTO’s existing functions and objectives, its historical mandate for and past work on competition policy, and WTO Members’ general interest in advancing competition policy matters.305 C. Possible Contributions of Renewed Discussion in the WTO306 This Article has explored the competition policy dimension of current policy issues in the global economy, including issues concerning IP, anticompetitive practices in digital markets, and the role of state-owned enterprises. The WTO’s work would aim to complement and reinforce the work of the ICN and other relevant organizations, rather than duplicating it. In this context, and subject to further deliberations and input by WTO Members and those of other relevant international bodies, the WTO could contribute to greater policy coherence and to a stronger framework for the promotion of competition by addressing the following issues.307 • The application of the WTO’s founding principles of nondiscrimination, transparency, and procedural fairness, in relation to competition law enforcement.308 As we have seen, the relevance of these principles—an important focus of the original work of the WTO Working Group on Trade and Competition Policy—has since been validated and amplified by the work of the ICN and related developments including the U.S.-led Multilateral Framework on Procedures in Competition Law Investigation and Enforcement.309 • Further codification of generally agreed norms such as general commitments by WTO Members to counter hardcore cartels and support international cooperation.310 Again, this element is common to both the original WTO Working Group and subsequent developments in RTAs and the ICN. Codification of norms would also acknowledge the priority given to competition agencies themselves to implement these standards. • Support for common action or commitments in relation to cross-border anticompetitive practices, including in digital markets. The difficulty of detecting such practices, however, calls for cooperative action and information sharing.311 In this regard, existing provisions of the TRIPS Agreement, notably Articles 8.2, 31(k), and 40 could play a role.312 While significant efforts against these practices are reflected in the framework of the ICN and RTAs, high-level international discussions may be needed in order to find effective solutions. • Potentially, jurisdictional issues which arise in the application of competition law to export cartels. This issue draws interest from both developing countries and some elements of the business community.313 Fox suggests that “[t]he cartel externality problem has a natural home in the WTO.”314 An even broader array of issues is evident with respect to the interaction of trade and competition policy. These would include, at a minimum, measures addressing the following:315 • The concept of competitive neutrality, especially with respect to the treatment of SOEs. The role of SOEs was an important consideration in the early work of the WTO Working Group and has since been amplified in subsequent norm-setting RTAs316 and the work of the OECD and other international organizations.317 As we have seen, there is also a clear link to elements of the existing WTO Agreements.318 • The role of competition policy in relation to global value chains. As noted, these, by definition, involve significant issues concerning vertical linkages.319 Consequently, competition policy should be viewed as one of the international community’s tools for appropriate regulation of global value chains. • The relationship between competition policy and industrial policy. As Fox has suggested, the WTO might be in a position to “narrow the bounds” of permissible trade remedies laws and subsidies in light of their distortionary effect on international trade and particular harm to developing countries.320 Certainly, industrial subsidies and SOE support are core elements of current discussions surrounding proposed WTO reforms,321 and are central to any prospect of progress towards resolution of current issues in China-U.S. trade.322 • Addressing the significance of competition policy for “governmental barriers to participation in public procurement markets.”323 Government procurement is already a dynamic and vital area of concern for the WTO.324 This issue represents an important confluence between export-oriented business interests (seeking access to foreign procurement markets) and competition authorities’ interests (understanding that closed markets intrinsically limit competition and facilitate bid rigging).325 • The potential application of competition-related disciplines including those discussed in the WTO Reference Paper on Basic Telecommunications (“Reference Paper”) in terms of other infrastructure sectors as well as issues concerning trade in services more generally.326 The Reference Paper arguably goes the furthest amongst the existing WTO Agreements in establishing commitments against anticompetitive practices.327 Other infrastructure sectors, including electrical energy, however, might face similar structural problems.328 • The interface between competition policy and IP. As we have noted, the TRIPS Agreement specifically invokes concerns about anticompetitive licensing practices and foresees the application of competition rules in this area.329 The relevant provisions, however, offer only limited guidance with respect to related issues.330 There is a need for further international deliberation on these issues, building on related work in the OECD, ICN, the World Intellectual Property Organization (WIPO), and other fora.331 Meaningful work on these issues at the multilateral environment will be possible only when the political environment allows this and would require an affirmative decision or decisions on the part of national authorities. The following reflects on possible organizational paths for such discussions, in this light. D. Possible Organizational Paths for Discussions at the Multilateral Level332 As noted earlier, the original WTO Working Group still exists as a vehicle for possible work, although it is currently designated as inactive. The WTO General Council’s 2004 decision concerning the status of the Working Group reads as follows: [T]he Council agrees that [work on the Interaction between Trade and Competition Policy, together with the related issues of the Relationship between Trade and Investment and Transparency in Government Procurement] will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.333 This formulation clearly leaves an opening for work on these issues to resume following the conclusion of the Doha Round. This language also does not rule out resumption of exploratory work on these issues, so long as such work is not directed “towards negotiations.”334 Certainly, the WTO Working Group, which earned solid credit for a similar exploratory work program in its early stages,335 would be a logical body for furthering such discussion. It also leaves open the possibility of the Working Group undertaking a wide variety of projects including gathering updated information and practical experience from global competition authorities, including how they have handled trade policy and trade law questions, and developing an updated information platform to use for both a capacity building role and a structure for continuing policy discussion. These alone are desirable outcomes, and they do not need to create expectations of negotiations as an inevitable further step. In any further WTO work program on trade and competition policy, other organizations active in the competition policy field should be solicited for broad input. These would include, first and foremost, the ICN, but also UNCTAD, the OECD, and civil society organizations such as CUTS. Such organizations should be given specific, dedicated roles in the development of relevant standards. Such external delegation of tasks is not unprecedented in the negotiation of WTO agreements. For instance, the negotiation of the WTO Agreement on Government Procurement (“GPA”) drew importantly upon preparatory work done in the OECD.336 The WTO’s work on trade-related IPRs has been extensively cross-fertilized by the WIPO’s past work.337 Moreover, the TRIPS Agreement builds upon and integrates elements of a number of pre-existing international treaties, including the Paris Convention for the Protection of Industrial Property338 and the Berne Convention for the Protection of Literary and Artistic Works.339 A similarly consultative approach regarding trade and competition policy, permitting input from organizations with more specialized expertise in competition policy per se, could greatly enhance both the usefulness and the political and institutional acceptability of renewing work in the WTO framework on trade and competition policy. The WTO GPA may be relevant to international work on competition policy in another way. Specifically, the GPA is an opt-in agreement which is binding only on a subset of WTO members that have acceded to it.340 Conceivably, this could work as a model for a possible WTO agreement embodying international prohibitions of hardcore cartels.341 CONCLUSION This Article has reviewed and reflected upon a wide array of issues concerning competition law enforcement which impact international trade and the global economy. In contrast to the situation prevailing 20 years ago, competition policy is no longer viewed primarily as a domestic matter merely of interest to developed economies. Rather, it has become an essential element of the global economy’s legal and institutional framework. As just one example of how competition policy has become increasingly prominent on the global stage, when the WTO Working Group on the Interaction between Trade and Competition Policy was first convened in 1997,342 70 economies had national competition legislation.343 Currently, more than 130 countries have national competition laws.344 These include all of the BRICS economies and many other developing economies.345 Efforts to establish a general agreement on competition policy within the international trading system have to date been unsuccessful. The importance of competition policy for global trade is nonetheless evident in the discussions carried out and notifications made on competition policy in the WTO accession process346 as well as in notified RTAs, which systematically reference the role of national competition policies in developed and developing jurisdictions.347 These provisions and activities indicate that the framers of those agreements and initiatives viewed competition policy as both directly relevant and complementary to the international trading system. Additionally, an extensive set of RTAs have incorporated competition policy chapters since 2004, linking economies around the globe.348 These provisions signal, at a minimum, significant convergence on the framing of competition policy disciplines within international trade agreements. As such, they are a clear reference point for stock-taking at the multilateral level and may even provide a template for related action. Concurrently, particular issues of competition law enforcement and competition policy are gaining increased attention in international circles including: • The international dimension of competition law cases, particularly their resulting spillover effects and the potential for jurisdictional conflicts; • The broadening application of competition policy vis- `avis IPRs in the global economy; • Issues within digital markets, particularly the potential for monopolization and the maintenance of competition; • Issues relating to SOEs as well as the place of industrial policy, subsidies, and the maintenance of competitive neutrality in emerging economies; and • A growing concern in global business circles to ensure that competition law is enforced in a nondiscriminatory, transparent, and procedurally fair manner. Moreover, each of the above issues and developments naturally implicates the interests of multiple jurisdictions and international markets. As such, if and when WTO Members are ready to proceed, they are prima facie legitimate subjects for discussion and stock-taking within the multilateral trading system. Indeed, as also discussed in this Article, the work carried out by the WTO Working Group on the Interaction between Trade and Competition Policy, as well as complementary and ongoing work in the ICN, the OECD, UNCTAD and other organizations, arguably establishes a solid basis for examining these issues. Furthermore, although no consensus was reached on the need for a more general agreement on competition policy in the WTO, and while the WTO Working Group is currently designated as inactive, it remains a potential resource and avenue for advancement if and when WTO Members find the time has come. To be clear, these issues and developments are complex, and any related initiatives will doubtlessly require careful reflection. In any relevant international arrangements, great care should be taken to preserve or strengthen the operational imperatives and independence of competition law enforcement.349 Perhaps, the best approach is simply to encourage continuing dialogue on relevant issues in international fora that are or have been active in this area. A valuable, objective, and fairly uncontroversial contribution by the WTO to this dialogue would consist of systematically collected updated information on legal and policy settings across the WTO’s Membership, the sharing of practical experience focused on the interplay between trade and competition, and cooperation on empirically based capacity building. This Article has shown though that these issues are important ones with significant implications for trade, prosperity, and development at both the national and global levels. There is, moreover, a risk of coordination failures, if not outright policy conflicts, in this area if action is not taken. And, with the experience gained and progress made in the international competition community in the past 20 years, there is a solid basis for meaningful discussions among a broad cross-section of developed and emerging economies if and when they are prepared to take the issues up.

### 2AC---Multilat Deficits

#### Unilateral, extraterritorial cartel enforcement greases the wheels for international mechanisms---acting without the proper domestic regulatory framework first fails.

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IV. PART IV: NARROWING THE GAPS

A realignment of the current system of enforcement relating to transnational anticompetitive conduct could help address its weaknesses. These proposals explicitly focus on international hardcore cartels, which constitute the most flagrant example of anticompetitive conduct. They do not extend to other areas of competition law, in which significant differences among jurisdictions persist (and, in effect, a broad consensus is missing as to what conduct should be prohibited). Most of the recommendations can be implemented without significant inherent costs and require no international negotiations. Hence, they can be of relevance to competition systems which particularly suffer from resource constraints.[57](javascript:;) While not eliminating the existing enforcement gaps, such realignments should significantly narrow them for the ultimate benefit of consumers.

First, domestic competition laws need to explicitly provide for extraterritorial jurisdiction.[58](javascript:;) Preferably, a clear textual basis for extraterritoriality should be adopted, drawing from the experience of the key jurisdictions. Moreover, the relevant rules pertaining to investigation, adjudication, and sanctioning have to be considered in a holistic manner. It is vital to recognize that, while dealing with separate issues, these different elements form a chain of enforcement. If necessary, they need to be adjusted to enable proper handling of transnational cases. For example, rules on service of process need to permit service by publication if foreign entities are themselves not present and do not have any authorized agents in the country. Development of the Japanese competition regime serves as a good illustration. While the Japanese competition agency has been willing to bring cases against foreign violators since the late 1990s, domestic rules originally did not allow for service of process. In 2002 they were changed, enabling service of process abroad either by diplomatic staff or by publication.[59](javascript:;) Similarly, provisions dealing with sanctions should not allow violators with no in-forum assets or turnover to avoid punishment. For example, a cartelist participating in a market-sharing agreement under which it agrees not to enter a particular market should not avoid sanctions simply because it has no in-forum turnover in the very market harmed by the agreement.[60](javascript:;)

The preparation of a domestic regulatory framework is an essential first step, signalling eagerness to challenge transnational violators. It should be followed by a change in regulatory approach, informed by the deficiencies of reliance on trickle-down enforcement. In particular, agencies should not shy away from bringing transnational cases and they should publicly signal that attitude. They should accept the related risks and use these opportunities to develop their capacity and to identify further regulatory improvement needs. There are no shortcuts when it comes to learning-by-doing.

The fact that transnational cartels often affect more than one jurisdiction means that there may be, potentially, more expert pairs of eyes searching for them. Therefore, it is important for competition agencies to establish and nourish relationships with counterparts in neighbouring countries and closely follow their enforcement efforts. Simultaneously, agencies should publish, preferably also in English, information about their own enforcement actions to enable others to learn from them. In the current fragmented regulatory patchwork, the gaps in communication between enforcers allow violators to avoid liability. These gaps persist despite the overall growth in interactions between agencies, suggesting that not all agencies participate in these processes to the same extent. The existing international cooperation platforms, such as ICN, OECD, and UNCTAD, continue to play an important role. However, there still seems to be a need for information clearing houses, which could collect and distribute information about cartel enforcement activities among interested agencies, for example, by drawing from the experience of dissemination of information within the European Competition Network. A major information clearing house would streamline the process, narrow the information gap, and offer significant time-savings for all involved. UNCTAD is particularly well-placed to assume such a role, given its all-embracing membership (including both developed and developing states), permanent staff, and experience in working with agencies at different stages of their life-cycle.

When it comes to enforcement, currently, the existence of an international cartel affecting markets in numerous countries needs to be proven in each and every state that attempts to sanction it. This applies equally to relatively small cross-border arrangements and to truly global cartels. It is one of the most striking features of the present regulatory patchwork. It causes significant waste of resources due to multiplicative costs. It importantly contributes to under-enforcement against transnational cartels because many of the affected states may not have the capacity or be able to prove the allegations. In fact, the LIBOR cartel, the most broadly investigated global cartel, faced scrutiny in just over ten jurisdictions.[61](javascript:;) In addition, sanctions in the effectively enforcing jurisdictions reflect only domestic harm.[62](javascript:;) Hence, from a global perspective, they have proved ineffective as a deterrent.

This patchwork approach should be abandoned. Instead, agencies should be permitted to rely on judgments, decisions and settlements in competition cases of other jurisdictions and use them as prima facie evidence of the existence of the cartel in question. There is no reason why the fact of an existence of a cartel, established in proceedings in one state, should not be introduced and recognized in a follow-on case in another jurisdiction by means of judicial notice.[63](javascript:;) In fact, a similar solution has been introduced in the EU to facilitate private follow-on actions.[64](javascript:;) Agencies should be obliged to show only the domestic link—to assert that the harm was likely to have been caused on the domestic market by the cartel. This procedural step would then shift the burden of proof, requiring the alleged violators to prove that their activities did not, in fact, harm the local economy. Such a possibility has been discussed at the OECD forum, which recognized its potential to both reduce overall enforcement costs and increase the level of deterrence against international cartels.[65](javascript:;) It was also presented in the UNCTAD’s framework.[66](javascript:;) The United States considered it promising, noting its own experience of sharing guilty pleas in criminal cartel cases with foreign counterparts to facilitate prosecutions elsewhere.[67](javascript:;) There already are instances of reliance on this approach. For example, in South America’s first transnational conduct case—Mexico’s investigation of the international lysine cartel—the materials from the US provided circumstantial evidence of damage to the Mexican market.[68](javascript:;) Similarly, Brazil’s first transnational conduct case—the investigation of the international vitamins cartel—relied on the EU decision and guilty pleas from the United States to prove the cartel’s existence, allowing investigators to focus on the cartel’s effects in Brazil.[69](javascript:;)

This change in approach can be introduced unilaterally (that is, without any need of intergovernmental negotiations). For example, domestic legislation could list jurisdictions whose judgments, decisions, and settlements in competition law can be relied on. The violators would still have their day in court (or its equivalent as provided for under domestic rules). They would be able to present their defence as to the existence of harm on the domestic market. Hence, no special due process concerns would be raised.[70](javascript:;) This systemic realignment would help to overcome one of the key problems of transnational cases—the difficulty of accessing foreign-based evidence. This mechanism should apply in cases of both public and private enforcement, if the latter mode of enforcement is provided for in domestic law. There is no reason why private parties harmed by transnational cartels should be disadvantaged and prevented from seeking appropriate damages.

In this context, the leading competition agencies which investigate transnational violations, and the courts that hear cases in these states, have a special and important role to play. They can facilitate this positive externality by exploring the extent of any investigated transnational cartels’ operations and by recording their findings in a clear and unambiguous manner in judgments, decisions, or settlements. While this can be a great service to competition agencies elsewhere, the economy of the enforcing state would also benefit without incurring extra costs. Facilitating enhanced international enforcement acts as a deterrent within their own system. The enforcing state sends a strong message: ‘If you harm this market, we will challenge you domestically and we will also help our counterparts hold you liable elsewhere.’

Furthermore, international cartelists should face more severe sanctions for their violations. Despite the increasing interest in criminalization and individual liability more broadly, the most common sanctions for cartel conduct are corporate fines. The prevalent fining methodology is to impose fines that are benchmarked to the relevant in-country turnover of the culprits.[71](javascript:;) Given the nature of the present regulatory regime, this practice is friendly to cartelists. Assuming, for the sake of argument, that corporate fines and fine-setting methodology are both sufficient and just, an international cartel would face appropriate sanctions only if it were to be held responsible in each and every affected jurisdiction. That is virtually impossible. Moreover, the common practice is to introduce maximum limits on fines. Quite often fines cannot exceed either a specific monetary amount, provided for in the relevant domestic rules, or a fixed percentage of the violator’s last year-relevant in-forum turnover, typically ten per cent.[72](javascript:;) There is no theory or empirical evidence supporting such thresholds. Even if there were, in practice such thresholds are never met. The imposed fines are set at astonishingly low levels compared to illegal profits, even within the sanctioning jurisdictions.[73](javascript:;) Given the practical impossibility of effective enforcement in every harmed state, those jurisdictions which have the capacity to bring transnational cases should increase the severity of their sanctions to increase deterrence. They should do so by, at least, both increasing permissible fine limits and by utilizing the full available spectrum of punitive measures. In this context, the transnational nature of a violation, leading to a transfer of wealth abroad, should be taken into account.

From the deterrence perspective it would be advisable to relate fines to overall, not just in-forum turnover. This would undoubtedly lead to the defendants’ bar raising the double jeopardy argument, conflating the question of which harm is being addressed and which legal interest is being protected with the issue of appropriate sanctions. In the current regulatory framework, each jurisdiction addresses the harm caused on its own market. Therefore, double jeopardy is not and would not become an issue. To avoid this misleading double jeopardy argument, it may be worth considering replacing turnover as a sanctioning benchmark with the overall value of the violator’s assets. In general, the type and severity of sanctions is a sovereign matter. For example, the US provides for imprisonment of up to ten years for individuals involved in a cartel,[74](javascript:;) although in many other countries around the world such conduct is not subject to any criminal sanctions, or even to any individual sanctions. Since this is a sovereign choice and there are no binding universal norms to the contrary, it cannot be contested. That said, there is no reason why agencies and courts should not continue with the good practice, which has already emerged, of taking into account sanctions already imposed by other jurisdictions. This practice should continue as a matter of comity, especially in cases involving non-financial sanctions.

Moreover, fines levied on foreign violators could be left, at least partially, in domestic competition agencies’ budgets to facilitate future enforcement and advocacy activities. Sceptics may argue that this would skew the incentives, making the agencies more likely to bring such cases. That is, in fact, the very objective of this proposal. As explained above transnational cases are generally more complicated, presenting higher risks for enforcers. The system should reflect that and incentivize the taking of such risks. More fundamentally, given that transnational violations tend to cause greater harm and lead to outflow of wealth, they warrant agencies’ enhanced attention.

Finally, execution of any sanctions imposed on foreign violators may be difficult, or even seem impossible in the short to medium term. Such possible challenges should not, however, inform inaction and passive acceptance as it would create perverse incentives for firms to engage in more, not less anticompetitive conduct from abroad. Even if seemingly unenforceable, imposed sanctions fulfil their function of deterrence, signalling to potential foreign violators that the jurisdiction in question is closed for anticompetitive business. In the context of the international vitamins cartels it was empirically found that a strong enforcement regime may not only discourage cartel formation, but actually leads to lower overcharges even if the cartel is never actually investigated.[75](javascript:;)

V. CONCLUSIONS

This article engaged with the persistent problem of transnational anticompetitive conduct, which causes very significant harm to consumers. It showed that the current regulatory regime consists of a variety of rules and instruments that often leave cross-border cartels untouched. This patchwork is composed of predominantly domestic laws and various agreements, typically bilateral, that provide for different forms of cooperation between competition agencies. There are no binding multilateral instruments that can be availed of in cases involving transnational anticompetitive conduct, and all efforts to develop them, so far, have failed.

States focus on the harm to their own domestic markets. Virtually all jurisdictions do not prohibit conduct causing outbound competitive harm, that is, conduct harming only foreign markets. In effect, the states whose markets are harmed by such inbound competitive harm are left to act on their own, by applying their domestic competition laws extraterritorially. This is so even in the case of hardcore cartels, which are virtually universally prohibited.

Transnational cases are particularly challenging. Access to evidence remains one of the key difficulties. Moreover, less developed and smaller jurisdictions may simply either not have enough resources to bring such cases, or their markets may not be large enough to secure foreign violators’ compliance with outcomes of such investigations. While optimists may argue that the significant growth in cooperation and intensity of interactions between competition agencies, on formal and informal platforms, make these cases easier to prosecute, so far they have not overcome the key obstacles. In effect, smaller and less established jurisdictions continue to face a particularly steep and unequal battle when it comes to fighting transnational violations. This regulatory patchwork offers little recourse to them.

This article argues that the current regulatory patchwork requires a realignment to address gaps that effectively protect transnational hardcore cartels. The proposed changes are pragmatic and can be introduced unilaterally. If implemented by a sufficient number of states, these proposals would importantly realign the currently sub-optimal system of enforcement worldwide. They carry a promise of significantly strengthening deterrence and addressing some of the main gaps in the present regulatory framework governing transnational anticompetitive conduct.

#### Building from the ground-up is key to true multilateral solutions.

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At the same time, however, this presumption in favor of extraterritorial jurisdiction would be offset by another apple of the experimentalist eye: the emphasis on local production and planning.3 5 7 While judging in the shadow of a highly interdependent international order would be of certain importance, it would also be true for the experimentalist that working out particular antitrust and jurisdictional questions is a project best undertaken by specific localities, and not some international architecture. 5 8 The reasoning here is that, as it is impossible to simply construct an optimal system by way of rational deduction-either on the score of global antitrust cartel issues or multi- jurisdictional problems-the best practices of particular nations and sub- national entities will have the highest likelihood of actually finding improvised solutions. 359 With this set of considerations in hand, the experimentalist would move on to the substantive question of who is actually doing what.

#### The WTO jurisdictionally cannot touch nor deter *private* cartel behavior---only public.

Sokol 07, \*Daniel Sokol, William H. Hastie Fellow, University of Wisconsin Law School; (2007, “Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age”, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1115&context=facultypub)

iii. Norm-creator for Mergers and Cartels

One role that the WTO could play is facilitator of antitrust norms. Such a role returns to the vision of the 2003 WTO, when it ended the discussions of the Working Group on the interaction of trade and competition. The WTO discussions on "core principles" attempted to apply WTO principles of transparency and nondiscrimination to the development of antitrust norms. 258 A global norm-diffusion function for the WTO presupposes antitrust agencies' interest in embracing it as yet another forum in which to discuss best practices. Given the limited time and financial resources of antitrust agencies, particularly those of the developing world, it is not clear that the WTO offers a forum uniquely suited to create antitrust norms for which agencies should spend their limited time and resources in meetings and negotiations. Use of the WTO to create antitrust norms seems inappropriate given the institutional weakness of the WTO in antitrust, especially in light of the relative strength of other international institutions such as the ICN (discussed infra). Other international institutions have already established success in disseminating antitrust norms, in some cases norms implicating private conduct such as mergers and cartels, and have tackled mixed private-government restraints in studies on sector regulation. The WTO addresses only government limitations on trade and antitrust. WTO agreements do not reach purely private behavior, even when there are international effects of this behavior. These limitations on WTO agreements limit its ability to create norms in antitrust for private anticompetitive behavior.

With respect to cartels, the WTO simply lacks the capacity to police purely private behavior. Many international cartels operate without any government restraints upon them. The WTO can only be effective in those cases in which the government is somehow facilitating a private cartel though regulation or purposeful nonenforcement of anticartel laws. The WTO's possible remedies also limit its effectiveness in combating international cartels. The WTO remedy is simply an order "to cease and desist." Lack of damages declaws much of WTO remedies' deterrent value. 2 59 As the discussion on cartel remedies in Part IlI.A illustrates, even treble civil damages may not deter cartels. There is little reason to believe that a system without a multiplier effect would create an 260 incentive for companies to cease in their cartel activities.

## CP---States

### 2AC---AT: CP---State Antitrust

#### The presumption against extraterritorial antitrust denies states the ability to remand foreign conduct.

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B. The Presumption Against Extraterritorial Application of State Law in International Conflicts

The application of state law in international cases creates the potential for conflict between that law and the law of a foreign nation. In two critical respects, such cases present the same problems as the application of federal law in international cases. First, they create the possibility of international discord. Second, due to foreign affairs concerns, they create a potential problem regarding the allocation of power within the U.S. political system (although, as we will see, of a slightly different nature than in the federal context). Many courts applying a presumption against the application of state law in international cases acknowledge the difference between interpretation of federal and state legislation, but recognize these similarities.30 In addressing the need to avoid friction with foreign sovereigns, for instance, courts invoke international comity as a reason for the presumption. In an age discrimination claim brought under Pennsylvania human rights law, for example, a federal district court stated:

[F]ederal courts will only attribute to Congress an intent to apply federal law outside the United States when Congress has very explicitly expressed such an intention. The rationale for this reluctance—respect for the sovereignty of other nations within their territories—should make courts even more reluctant to apply state law outside the boundaries of the United States.31

With respect to the allocation of authority to address matters of foreign relations, where the federal cases focus on separation of powers between the political branches and the judiciary, the state cases focus on the division of power between state and federal lawmakers. The Supreme Court has held that, as a general matter, the sovereign authority of U.S. states to regulate extraterritorially is analogous to that of the federal government.32 However, several constitutional doctrines limit the role of the states in matters of foreign affairs. Courts often invoke these limitations in justifying a presumption against the extraterritorial application of state law in international cases. In one representative case, the Fourth Circuit Court of Appeals considered the application of state tort law in an international case.33 It noted that the classic presumption against extraterritoriality applies only to federal legislation, and reasoned that “given that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law, the presumption against extraterritorial application is even stronger in the context of state tort law.”34 Other cases have similarly invoked the limited role of states in matters of foreign affairs.35

For similar reasons, courts addressing the applicability of state regulatory law in international cases often decide that the geographic scope of those laws is coterminous with the geographic scope of their federal counterparts. In one case, a court considered the geographic scope of the Donnelly Act, New York’s antitrust statute.36 The court concluded:

It is not necessary to know precisely the extent of the Donnelly Act’s extraterritorial reach to understand that it cannot reach foreign conduct deliberately placed by Congress beyond the Sherman Act’s jurisdiction. The federal limitation upon the reach of the Sherman Act, predicated upon and an expression of the essentially federal power to regulate foreign commerce, would be undone if states remained free to authorize “little Sherman Act” claims that went beyond it. The established presumption is, of course, against the extraterritorial operation of New York law, and we do not see how it could be overcome in a situation where the analogue federal claim would be barred by congressional enactment.37

#### The FTAIA limits overreach---state action will be preempted.

O’Rourke 10, \*Ken O’Rourke Senior Partner, O'Melveny & Myers LLP, an international law firm specializing in antitrust; (March 3rd, 2010, “United States: The FTAIA In State Court: A Defense Perspective,” https://www.mondaq.com/unitedstates/trade-regulation-practices/95030/the-ftaia-in-state-court-a-defense-perspective?utm\_source=pocket\_mylist)

As federal courts tighten the reins on private antitrust actions, some antitrust plaintiffs are focusing their attention on litigating in state court. And they are being creative about how to avoid removal to federal court.1 Yet, as antitrust plaintiffs turn to state court and state law, they are likely to face some of the same federal doctrines they would prefer to avoid.

One federal doctrine sure to arise in state court antitrust actions when there are allegations or damages based on cross-border conduct is the Foreign Trade Antitrust Improvements Act ("FTAIA").2 The FTAIA defines the limits on the reach of the Sherman Act in cases involving foreign trade and commerce.

The FTAIA's parameters continue to evolve as litigants and the courts wrestle with new variations of the basic allegation that international price-fixing or overseas monopolistic conduct "caused" domestic injury on which a Sherman Act claim is based.

Congress enacted the FTAIA in 1982, some 92 years after the enactment of the Sherman Act. The FTAIA operates by "removing" anticompetitive conduct in foreign trade or commerce (other than import trade or import commerce) "from the Sherman Act's reach," unless that same conduct also causes direct, foreseeable and substantial injury to domestic trade or commerce within the United States, U.S. import commerce, or exporting activities of American exporters.3

A threshold question is whether these limitations similarly restrict the extraterritorial application of state antitrust laws. Defendants will argue that the state antitrust laws cannot permissibly extend to reach conduct or give rise to damages that Congress has placed beyond the reach of federal antitrust law under the FTAIA.

The defendants' argument goes like this. First, under the Supremacy Clause of the U.S. Constitution,4 federal law preempts state law even in the absence of an express preemption provision when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."5

Second, the FTAIA's legislative history establishes that Congress had multiple objectives when enacting the statute. One objective was to ensure that the risk of Sherman Act liability did not prevent American exporters and other firms doing business abroad from entering into advantageous "business arrangements (such as joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."6

Another objective was to eliminate "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."7

Congress sought to adopt a "clear benchmark ... for businessmen, attorneys and judges as well as [U.S.] trading partners"8 with the "ultimate purpose" of "promot[ing] certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions."9

A third objective was to promote international comity by acknowledging and respecting the prerogatives of other nations to establish and apply their own standards for regulating and remediating alleged restraints of trade in their own markets.10

Congress believed that respecting such foreign sovereign regulatory prerogatives would ultimately best serve U.S. interests by "encourage[ing] our trading partners to take more effective steps to protect competition in their markets."11

Applying state antitrust laws to regulate foreign trade or commerce excluded from federal antitrust jurisdiction by the FTAIA arguably would frustrate every one of these objectives.

American exporters and other businesses engaged in foreign trade or commerce could have no confidence that restraints exempted from federal antitrust attack would not be subject to alternative antitrust attack under the laws of one or more U.S. states. Businesses, therefore, would be deterred from entering into arrangements that Congress intended to enable.

Likewise, ambiguity in the "standard to be employed" for assessing the extraterritorial application of "American antitrust law" would not only persist, but would be multiplied fifty times.

And the imposition of as many as 50 states' antitrust laws on foreign trade or commerce clearly would negate the federal objectives of international comity and respect for foreign regulation of foreign markets.

#### Foreign defendants can remove cases to the federal level.

Crowell and Moring 08, \*Crowell and Moring LLP provide legal services across the world and specialize in antitrust, (2008, “THE ABCs OF CROSS-BORDER LITIGATION IN THE UNITED STATES”, https://www.crowell.com/files/ABC-Guide-to-Cross-Border-Litigation\_Crowell-Moring.pdf)

FEDERAL COURT JURISDICTION

Jurisdiction in the U.S. federal courts is somewhat more restrictive. The federal courts are called courts of “limited jurisdiction” because they are available only for certain limited types of disputes, including cases involving the U.S. or foreign governments, questions relating to international treaties or agreements, cases arising under federal laws or regulations, and cases between residents of different states.

Still, the jurisdiction of federal courts remains broad, especially for disputes between U.S. and non-U.S. parties. The procedural rules governing the federal courts expressly grant subject matter jurisdiction over claims between U.S. and non-U.S. citizens. While the text appears simple, this rule in practice can present many complexities. For example, what is the citizenship of an entity that is incorporated in Hungary but has its primary place of business in the U.S.? What about a corporation that is separately incorporated in the U.S. and in the E.U.? There are a range of legal strategies that may be available to a non-U.S. company in this regard. It is important to discuss these options with U.S. counsel to be able to make an informed judgment regarding how to proceed in the U.S. litigation.

It is important to bear in mind that some federal statutes may apply to conduct abroad of both foreign and U.S. corporations. For example, certain federal antitrust laws may apply where the conduct was meant to produce and in fact did produce a substantial effect in the United States. Other examples of laws that may be applied extraterritorially include certain federal securities and international banking laws, the Alien Tort Claims Act, suits against foreign states, various federal civil rights acts, and claims related to international arbitration agreements.

REMOVAL FROM STATE COURT TO FEDERAL COURT

“Removal” permits defendants sued in state court to “remove” the case from state court, in certain circumstances, so that it may be adjudicated by a federal court. A party sued in state court may favor proceeding in federal court for many reasons: federal courts may be more predictable, consistent, and experienced in certain matters than state courts; however, federal court litigation also may be more expensive and time-consuming than litigation in the state courts. As usual, with each rule there are exceptions. For example, federal courts in the Eastern District of Virginia are known for moving extremely quickly while some judges in other jurisdictions can take months or even years to resolve threshold questions in a case.

## DA---China Bill

### 2AC---China Bill

#### That immediately sparks invasion of Taiwan and US China War

Calhoun 21 (George, Quantitative Finance Program Director, at Stevens Inst. of Technology, “War With China? The Economic Factor That Could Trigger It” 9/12/21 https://www.forbes.com/sites/georgecalhoun/2021/09/12/war-with-china-the-economic-factor-that-could-trigger-it/?sh=5386ced95d26)

The Pentagon undoubtedly draws up various scenarios for how conflict between China and the U.S. might develop. Most of them would involve a Chinese move against Taiwan. But Taiwan and China have co-existed in intense but bloodless antagonism for seven decades without tipping into real war. The crucial question is: What would trigger an actual Chinese military adventure? I can answer that question. To step back – If there is to be a war, an open war, with China – and we may stipulate that this scenario is at the far end of the spectrum of possibilities, and yet not an impossibility – if there is to be a war, it will not arise from Western outrage at human rights violations in Xinjiang, or Chinese outrage at Western outrage, or cyber-crime, or technology theft, or currency manipulation, or security crackdowns in Hong Kong, or indignities visited upon the Filipinos or the Vietnamese or the Australians. It will arise from acute economic pain, inflicted on China by actions of the United States to deprive them of the most essential physical resource of the 21st century: semiconductors. “China’s aspiration to become a true technological rival to the U.S. faces a foundational challenge: The country doesn’t control the semiconductors that are the building blocks for everything from smartphones to automated cars…. ‘For our country,’ Vice Premier Liu He told the country’s top scientists in May, ‘this technology is not just for growth. It’s a matter of survival.’” – Bloomberg “American leadership in semiconductors is vital to the technological superiority of the U.S. military.” – The National Research Council (NRC) of the United States National Academies of Sciences, Engineering, and Medicine “Modern wars are fought with semiconductors.” - a U.S. Senator The semiconductor problem, and the increasing vulnerability of China’s economy – and its military – to supply constraints, is what will lead China to consider, finally, outright military action against Taiwan. In fact, there is a strong historical parallel: China in 2021 finds itself in a situation very much like the situation of Japan in 1941. The Japanese Precedent It’s pretty clear that Japanese military aggression in 1941 was driven by the need to secure the country’s oil supply. “A recently discovered diary from one of Emperor Hirohito’s aides makes clear how the Japanese viewed oil’s importance in the Pacific war. It quotes the late emperor as saying, after the war, that Japan went to war with the United States because of oil — and lost the war because of oil.” “The Japanese military was obsessed with oil. The Japanese military machine was almost entirely dependent upon imported oil — and that meant the United States, which supplied about 80 percent of Japan’s consumption in those days. ‘If there were no supply of oil,’ one admiral said, ‘battleships would be nothing more than scarecrows.’” Japan sought to address its vulnerability by investing in new technology. But it was unsuccessful, as detailed in a peer-reviewed article entitled “Synthetic fuel production in prewar and World War II Japan: A case study in technological failure,” published in 1993 in the journal Annals of Science. “To achieve independence in petroleum, the Japanese [sought to] establish a synthetic fuel industry for the conversion of coal to oil. Actually, the Japanese had begun research on synthetic fuel in the 1920s, only a few years after other countries, such as Germany and Britain, that lacked sources of natural petroleum. They did excellent laboratory research on the coal hydrogenation and Fischer-Tropsch conversion processes, but in their haste to construct large synthetic fuel plants they bypassed the intermediated pilot-plant stage and failed to make a successful transition from small- to large-scale production.” Japan’s only other “solution” involved military expansionism. After the Fall of France in 1940, Japan moved to occupy French Indochina, as a steppingstone to oil producing regions in Malaysia and the Dutch East Indies.

#### Goes nuclear

Littlefield and Lowther 2015 — Alex Littlefield, Assistant Professor in the Department of International Trade at Feng Chia University (Taiwan), holds a Ph.D. In International Politics from National Chung Hsing University (Taiwan), and Adam Lowther, Research Professor at the Air Force Research Institute at Maxwell Air Force Base, Director of the School of Advanced Nuclear Deterrence Studies at the Air Force Global Strike Command, former Assistant Professor of Political Science at Arkansas Tech University and Columbus State University, holds a Ph.D. In International Relations from the University of Alabama, 2015 (“Taiwan and the Prospects for War Between China and America,” *The Diplomat*, August 11th, Available Online at http://thediplomat.com/2015/08/taiwan-and-the-prospects-for-war-between-china-and-america/, Accessed 06-25-2016)

Possible Scenario

While there are several scenarios where conflict between the United States and China is possible, some analysts believe that a conflict over Taiwan remains the most likely place where the PRC and the U.S. would come to blows. Beijing is aware that any coercive action on its part to force Taiwan to accept its political domination could incur the wrath of the United States. To prevent the U.S. from intervening in the region, China will certainly turn to its anti-access/area-denial (A2/AD) strategy, beginning with non-lethal means and non-lethal threats to discourage the American public from supporting the use of force in support of Taiwan. If thwarted in its initial efforts to stop Chinese aggression against Taiwan, the United States may be tempted to resort to stronger measures and attack mainland China. A kinetic response to a cyber-attack, for example, although an option, would very likely lead to escalation on the part of the Chinese. Given the regime’s relative weakness and the probability that American attacks (cyber and conventional) on China will include strikes against PLA command and control (C2) nodes, which mingle conventional and nuclear C2, the Chinese may escalate to the use of a nuclear weapon (against a U.S. carrier in China’s self-declared waters for example) as a means of forcing de-escalation. In the view of China, such a strike would not be a violation of its no-first-use policy because the strike would occur in sovereign Chinese waters, thus making the use of nuclear weapons a defensive act. Since Taiwan is a domestic matter, any U.S. intervention would be viewed as an act of aggression. This, in the minds of the Chinese, makes the United States an outside aggressor, not China. It is also important to remember that nuclear weapons are an asymmetric response to American conventional superiority. Given that China is incapable of executing and sustaining a conventional military campaign against the continental United States, China would clearly have an asymmetry of interest and capability with the United States – far more is at stake for China than it is for the United States. In essence, the only effective option in retaliation for a successful U.S. conventional campaign on Chinese soil is the nuclear one. Without making too crude a point, the nuclear option provides more bang for the buck, or yuan. Given that mutually assured destruction (MAD) is not part of China’s strategic thinking – in fact it is explicitly rejected – the PRC will see the situation very differently than the United States. China likely has no desire to become a nuclear peer of the United States. It does not need to be in order to achieve its geopolitical objectives. However, China does have specific goals that are a part of its stated core security interests, including reunification with Taiwan. Reunification is necessary for China to reach its unstated goal of becoming a regional hegemon. As long as Taiwan maintains its de facto independence of China it acts as a literal and symbolic barrier to China’s power projection beyond the East China Sea. Without Taiwan, China cannot gain military hegemony in its own neighborhood. China’s maritime land reclamation strategy for Southeast Asia pales in scope and significance with the historical and political value of Taiwan. With Taiwan returned to its rightful place, the relevance to China of the U.S. military presence in Japan and South Korea is greatly diminished. China’s relationship with the Philippines, which lies just to the south of Taiwan, would also change dramatically. Although China criticizes the United States for playing the role of global hegemon, it is actively seeking to supplant the United States in Asia so that it can play a similar role in the region. While Beijing may take a longer view toward geopolitical issues than Washington does, Chinese political leaders must still be responsive to a domestic audience that demands ever higher levels of prosperity. Central to China’s ability to guarantee that prosperity is the return of Taiwan, and control of the sea lines of commerce and communication upon which it relies. Unfortunately, too many Americans underestimate the importance of these core interests to China and the lengths to which China will ultimately go in order to guarantee them – even the use of nuclear weapons. Should China succeed it pushing the United States back, the PRC can deal with regional territorial disputes bilaterally and without U.S. involvement. After all, Washington invariably takes the non-Chinese side. China sees the U.S. as a direct competitor and obstacle to its geopolitical ambitions. As such it is preparing for the next step in a crisis that it will likely instigate, control, and conclude in the Taiwan Straits. China will likely use the election or statement of a pro-independence high-ranking official as the impetus for action. This is the same method it used when it fired missiles in the Straits in response to remarks by then-President Lee Teng-hui, ushering in the 1996 Taiwan Straits Crisis. The U.S. brought an end to the mainland’s antics when the U.S.S Nimitz and six additional ships sailed into the Straits. Despite the pro-China presidency of Ma Ying-jeou, China continues to expand its missile force targeting Taiwan and undertakes annual war games that simulate an attack on Taiwan. China has not forgotten the humiliation it faced in 1996 and will be certain no U.S. carrier groups have access to the Strait during the next crisis. The Second Artillery Corps’ nuclear capabilities exist to help secure the results China seeks when the U.S. is caught off-guard, overwhelmed, and forced to either escalate a crisis or capitulate.

### !D---Heg

#### No deterrence impact.

**Fettweis 20**, Associate Professor of Political Science at Tulane University. (Christopher J., 6-3-2020, "Delusions of Danger: Geopolitical Fear and Indispensability in U.S. Foreign Policy", *A Dangerous World? Threat Perception and U.S. National Security*, <https://www.cato.org/publications/publications/delusions-danger-geopolitical-fear-indispensability-us-foreign-policy>)

Like many believers, proponents of hegemonic stability theory base their view on **faith alone**.41 There is **precious little evidence** to suggest that the United States is responsible for the pacific trends that have swept across the system. In fact, the world remained **equally peaceful**, relatively speaking, while the United States cut its forces throughout the 1990s, as well as while it **doubled** its military spending in the first decade of the new century.42 **Complex statistical methods** should not be needed to demonstrate that levels of U.S. military spending have been essentially **unrelated** to global stability.

Hegemonic stability theory’s flaws go way beyond the absence of simple correlations to support them, however. The theory’s supporters have **never been able to explain adequately** how precisely **5 percent** of the world’s population could **force** peace on the other **95 percent**, unless, of course, the rest of the world was simply not intent on fighting. Most states are quite free to go to war without U.S. involvement but **choose not to**. The United States can be counted on, especially after Iraq, to **steer well clear** of most civil wars and ethnic conflicts. It took years, hundreds of thousands of casualties, and the use of chemical weapons to spur even limited interest in the events in Syria, for example; surely internal violence in, say, most of Africa would be unlikely to attract serious attention of the world’s policeman, much less **intervention**. The continent is, **nevertheless**, **more peaceful today** than at **any other time** in its history, something for which U.S. hegemony **cannot take credit**.43 Stability exists today in **many such places** to which U.S. hegemony **simply does not extend**.

## DA---Trade

### 1NC---Thumper---Trade

#### COVID wrecked interdependence.

Kampf 20, senior PhD fellow at the Center for Strategic Studies at The Fletcher School. (David, 6/16/20, “How COVID-19 Could Increase the Risk of War”, *World Politics Review*, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war)

The coronavirus pandemic immediately elicited further calls to reduce dependence on other countries, with Trump using the opportunity to pressure U.S. companies to reconfigure their supply chains away from China. For its part, China made sure that it had the homemade supplies it needed to fight the virus before exporting extras, while countries like France and Germany barred the export of face masks, even to friendly nations. And widening economic inequalities, a consequence of the pandemic, are not likely to enhance support for free trade.

This assault on open trade and globalization is just one aspect of a decaying liberal international order, which, its proponents argue, has largely helped to preserve peace between nations since World War II. But that old order is almost gone, and in all likelihood isn’t coming back. The U.N. Security Council appears increasingly fragmented and dysfunctional. Even before Trump, the world’s most powerful country ratified fewer treaties per year under the Obama administration than at any time since 1945.

Trump’s presidency only harms multilateral cooperation further. He has backed out of the Paris Agreement on climate change, reneged on the Iran nuclear deal, picked fights with allies, questioned the value of NATO and defunded the World Health Organization in the middle of a global health crisis. Hyper-nationalism, rather than international collaboration, was the default response to the coronavirus outbreak in the U.S. and many other countries around the world.

### 2AC---U---Protectionism

#### Free trade is dead.

Alden 21, \*Edward Alden is an American journalist, author, and the Bernard L. Schwartz senior fellow at the Council on Foreign Relations; (July 20th, 2021, “Free Trade Is Dead. Risky Managed Trade Is Here”, https://foreignpolicy.com/2021/07/20/free-trade-dead-managed-carbon-border-tax-climate-tariffs-trade-war-protectionism-esg-biden-trump-eu-china/)

But the nondiscrimination principle is now under the most sustained assault it has ever faced. On issues from national security to labor rights to the environment, the world’s largest economies are deciding that nondiscrimination—the bedrock principle of free trade and globalization—must take a back seat to more pressing concerns. The most dramatic abandonment is about to hit: Last week, the European Union unveiled its “[Fit for 55](https://www.forbes.com/sites/siladityaray/2021/07/14/fit-for-55-heres-what-to-expect-as-the-eu-unveils-its-ambitious-new-climate-legislation/?sh=453215bb5ad6)” plan to reduce carbon emissions by 55 percent from 1990 levels by the end of this decade and to reach carbon neutrality by 2050—which will require the most sustained economic upheaval since the Industrial Revolution. Central to the EU’s plan is a carbon border tax, under which Europe plans to charge higher tariffs on imports of products made in ways that generate higher emissions than European producers will be permitted to generate for the same goods. The scheme will start by targeting carbon-intensive sectors such as concrete, steel, aluminum, and fertilizer. The U.S. Congress is developing a similar plan to [tax carbon-intensive imports](https://www.nytimes.com/2021/07/14/climate/border-carbon-tax-united-states.html) as part of the coming budget reconciliation package—although the details are still murky. Other new trade restrictions being imposed or considered on both sides of the Atlantic Ocean are based on compliance with labor protections, human rights, and other criteria. For many traded goods, nondiscrimination will become a quaint relic.

Most of these measures are eminently defensible, perhaps even critically necessary, but together, they are leading to an increasingly balkanized global economy—one divided by ideology, social values, and environmental commitments. It will be a less efficient world, one in which companies will need to tailor both investments and production decisions to the values of the countries they wish to sell to. And it will cause more economic conflict. The more these exceptions to the principle of nondiscrimination become entrenched, the easier it becomes to expand those exceptions in the future. As the world moves down this road to closely managed trade, it will need to step cautiously to avoid going too far—and slide back into damaging protectionism.

The dilemma is the line between legitimate humanitarianism or environmentalism and selfish protectionism can be vanishingly thin.

Nondiscrimination has been the foundation of global trade since the 1947 creation of the General Agreement on Tariffs and Trade (GATT), the forerunner of the World Trade Organization (WTO). [Article 1.1 of the GATT agreement](https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm)—the founding constitution for modern trade—directs that “any advantage, favour, privilege or immunity” given to the products of any GATT member “shall be accorded immediately and unconditionally” to the same products from any other member. In those years, of course, much of the world remained outside the system, in particular the Soviet bloc of communist countries; China withdrew in 1950. But for GATT members, which, by the mid-1990s, included most of the world, there were very few exceptions to nondiscrimination. Having learned from the wreckage of the 1930s, when high tariff walls killed off much of the world’s trade and deepened the global depression, the founders of the GATT wanted nondiscrimination to be a largely inviolate principle, a bulwark against the descent back into senseless trade wars.

Unfortunately, the exceptions were still large enough to erode that bedrock commitment. Decades of preferential trade agreements and regional trade zones, from the original European Community to the North American Free Trade Agreement (NAFTA) and beyond, offered favorable treatment for countries inside those arrangements at the expense of nonmembers. Some of these arrangements gave preferences to certain outside countries but not others—for decades, the European Community gave special privileges to France’s former colonies. Mexico’s proximity to the large U.S. consumer market and its special access under NAFTA turned it into a manufacturing powerhouse. The GATT system also permits countries to slap tariffs on goods deemed “unfairly traded” due to government subsidies or predatory pricing. Many global steelmakers especially have faced such duties for decades. Critics argue “unfair” and “predatory” can be squishy criteria, subjectively applied to ward off competition.

Recently, these exceptions have mushroomed. Former U.S. President Donald Trump cited national security—[a narrow but permitted GATT exception](https://www.cato.org/policy-analysis/closing-pandoras-box-growing-abuse-national-security-rationale-restricting-trade)—to raise taxes on imports of steel and aluminum from some countries. U.S. President Joe Biden is making similar arguments when he insists goods like semiconductors, advanced electric batteries, pharmaceuticals, and critical minerals [be produced primarily in the United States](https://foreignpolicy.com/2021/06/18/biden-bidenomics-economy-america-first-trump-trade-supply-chains-industrial-policy-china-reshoring-protectionism/). Washington has threatened to block goods deemed environmentally damaging and is currently pursuing a case against Vietnam over its exports of furniture and other wood products made from timber alleged to have been [illegally harvested](https://crsreports.congress.gov/product/pdf/IF/IF11683). The European Union, the United States, Britain, and Canada recently imposed trade sanctions targeted at imports from China’s Xinjiang region to protest Beijing’s treatment of the region’s Uyghur Muslims.

Each exception to the nondiscrimination principle has many defenders. No country, quite reasonably, would let its desire for open global trade threaten its national security. Defenders of U.S. trade restrictions on China argue China’s admission to the WTO and the explosion in trade and investment that followed allowed Beijing to grow richer and advance technologically to the point that it poses a significant security threat. A correction was long overdue. Countries, quite understandably, want their economic policies to reflect their values—who would now argue that trade policies should be blind to deforestation in the Amazon or the exploitation of workers? And climate change is now an existential threat to the planet.

The dilemma with each of these measures is the line between legitimate humanitarianism or environmentalism and selfish protectionism can be vanishingly thin. The goals of the EU carbon tax are twofold. First, to encourage other countries to make similarly ambitious climate commitments by threatening the loss of European market access while also equalizing competitive conditions for the EU producers who will pay higher costs for switching to clean energy. The latter goal is dauntingly complex. The EU fears what it calls “carbon leakage,” in which companies would increasingly abandon the EU and shift production abroad to take advantage of looser rules in other countries. The new border tax is intended to “[equalise the price of carbon](https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3661) between domestic products and imports.”

The EU has worked hard to try to ensure the new mechanism does not violate WTO rules, but implementation will be messy at best. The means for assessing the carbon content of imports remain unclear, and EU firms are certain to lobby for the highest possible tariffs to protect their competitive edge. In the United States, which has not set a domestic price for carbon, the danger of protectionist discrimination through import tariffs may be even higher. It’s easy to imagine the next step: Targeted countries and companies will complain they’re being treated unfairly, retaliatory tariffs will ensue, and a trade conflict will start that will be difficult to control given the intensity of the societal and political convictions involved.

The same dynamics are in play on other measures, such as labor rights. For decades, U.S. administrations have pushed for tougher labor standards in trade agreements, partly motivated by the desire to see working conditions improve abroad but mostly in response to domestic labor unions that fear being undercut by cheaper foreign workers. The debate over whether lower wages are an integral part of the competitive advantage of developing economies or a pernicious feature of a global race to the bottom remains unresolved. But the advanced economies have become more aggressive in blocking imports over labor rights. The new United States-Mexico-Canada Agreement, for example, allows for [import tariffs to be targeted](https://crsreports.congress.gov/product/pdf/IF/IF11308) at a single company’s products if that company is deemed to be wrongly impeding union organizing.

There is much to support in all of this. For too long, trade has been blind to most values other than maximizing wealth and corporate profits. However important the pursuit of profit has been in lifting hundreds of millions of people out of misery and destitution in the developing world, there are other values that matter as much, not least the survival of the planet in the face of climate change.

As the world enters a new era of closely managed trade, countries must ensure enlightened discrimination does not become a cover for ruinous protectionism.

But as they abandon the old trade order in pursuit of these laudable goals, the EU and the United States, in particular, would be wise to remind themselves repeatedly of another standard enshrined in the WTO: the “less trade-restrictive” principle. Trade negotiators have grappled for decades with the trade implications of national regulations designed to protect human health and safety, from car crash testing standards to drug and food quality regulations. Such regulations are the proper sovereign authority of nations—but they’re also easily abused to keep out foreign competition or applied for political reasons alone, such as Europe’s fears of certain U.S. food exports.

The compromise has been that while countries must be free to take regulatory measures to protect their people, those measures “[shall not be more trade-restrictive](https://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm) than necessary to fulfill the legitimate objective.” A series of WTO dispute cases in the 1990s on issues like U.S. air quality standards for gasoline and the U.S. requirement that the fishing industry protect sea turtles provided sensible standards. The panels in those cases found that although such environmental measures were legitimate under trade rules, they must be implemented in an even-handed way that does not disproportionately harm foreign countries, and those countries must be given time to adapt to the new rules. The panels called for negotiated compromises to resolve disagreements wherever possible.

Although weaker, to be sure, a commitment to less trade-restrictive responses and compromises would provide some needed guardrails against sliding down the proverbial slippery slope. As the world enters a new era of closely managed trade, countries must ensure enlightened discrimination does not become a cover for ruinous protectionism.

### 2AC---Antitrust Now

#### Antitrust is increasing across the board

Scarborough 2-4-2022, \*Michael W., partner in the firm's San Francisco office and the U.S. Chair of the firm’s Antitrust and Competition Group. \*\*Skyler Hicks, an associate in the Business Trial Practice Group in the firm's San Francisco office. ("Looking Ahead to Tougher Merger Guidelines and Enforcement", *National Law Review*, <https://www.natlawreview.com/article/looking-ahead-to-tougher-merger-guidelines-and-enforcement>)

Although the number of corporate mergers surged during President Biden’s first year in office, all signs point to a tougher regulatory environment for deals going forward.

In 2021, $5.8 trillion changed hands as a result of corporate mergers across the globe.[1] This 64 percent increase over 2020 far surpassed the previous annual record,[2] and now the Biden Administration appears to be taking steps toward fulfilling the President’s goal of ramping up antitrust enforcement.[3] One such measure includes taking a more critical approach when evaluating proposed mergers, and federal agencies have already filed several high-profile investigations.[4]

On January 18, the Federal Trade Commission and the U.S. Department of Justice’s Antitrust Division jointly announced plans to “modernize federal merger guidelines to better detect and prevent illegal, anti-competitive deals.”[5] These are expected to overhaul both the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines, presumably in a unified set of new guidelines.[6]

The FTC and DOJ joint press release noted that “many industries across the economy are becoming more concentrated and less competitive” and this new rulemaking effort seeks to modernize current guidelines to better reflect evolving markets.[7] Instead of relying solely on traditional antitrust metrics such as consumer prices, the new guidelines appear poised to adopt additional assessment criteria that take into account factors such as a merger’s impact on privacy or how even low-priced marketplaces can exercise monopoly power.[8]

FTC Chair Lina Khan has been a vocal critic of big-tech and is expected to push new guidelines that would make it harder for large tech companies to consolidate. However, Khan has commented that she intends for the new rules to apply to all industries in light of the market consolidation taking place across the board in industries ranging from retail to healthcare.[9] While Jonathan Kanter, the newly-installed head of the DOJ’s Antitrust Division, appears aligned with many of Khan’s concerns, it remains to be seen whether he will push as aggressively as Khan when it comes to the updated guidelines, including as to potential reforms to the traditional economic analyses undergirding prior iterations of the guidelines.[10]

### 2AC---Healthcare Thumper

#### Healthcare thumps.

DOJ 2-24-2022, Department of Justice, Office of Public Affairs. ("Justice Department Sues to Block UnitedHealth Group’s Acquisition of Change Healthcare", <https://www.justice.gov/opa/pr/justice-department-sues-block-unitedhealth-group-s-acquisition-change-healthcare>)

The Department of Justice, together with Attorneys General in Minnesota and New York, filed a civil lawsuit today to stop UnitedHealth Group Incorporated (United) from acquiring Change Healthcare Inc. (Change). The complaint, filed in the U.S. District Court for the District of Columbia, alleges that the proposed $13 billion transaction would harm competition in commercial health insurance markets, as well as in the market for a vital technology used by health insurers to process health insurance claims and reduce health care costs.

“Quality health insurance should be accessible to all Americans,” said Attorney General Merrick B. Garland. “If America’s largest health insurer is permitted to acquire a major rival for critical health care claims technologies, it will undermine competition for health insurance and stifle innovation in the employer health insurance markets. The Justice Department is committed to challenging anticompetitive mergers, particularly those at the intersection of health care and data.”

# 1AR

## AT: CP---ITC

### 1AR---AT: Become SOEs

#### **SOE liability would be a consequence, but not a mandate, of the plan.**

Gaukrodger 10 (David, Senior Legal Consultant, Investment Division of the OECD Directorate of Financial and Enterprise Affairs, “FOREIGN STATE IMMUNITY AND FOREIGN GOVERNMENT CONTROLLED INVESTORS,” 2010, <https://www.oecd.org/corporate/mne/WP-2010_2.pdf>, DOA: 2-20-2022) //Snowball

The FSIA excludes punitive damages against foreign states, but not against state instrumentalities (including state-owned companies).116 Treble damages awarded in private antitrust suits go beyond compensation and could thus be considered to be punitive damages or penalties. Fines on SOEs would thus seem possible under U.S. law, but as noted above, the antitrust authorities generally do not have the power to impose civil fines in Sherman Act cases.

The Antitrust Enforcement Guidelines for International Operations, issued by the DOJ and FTC in 1995, briefly address state immunity. They state (§ 3.31) that “[a]s a practical matter, most activities of foreign government-owned corporations operating in the commercial marketplace will be subject to U.S. antitrust laws to the same extent as the activities of foreign privately-owned firms”. A number of civil cases have applied the antitrust laws to SOEs or foreign trading organisations by finding that the activity at issue was commercial.117

### 1AR---U---Court Clog

#### Courts clogged now---judicial vacancies, backlogs, and pandemic delays.

Davis '21 [Kristina; 2/25/21; writer for the San Diego Tribune; "Overwhelmed federal courts ask Congress for more judges," https://www.sandiegouniontribune.com/news/courts/story/2021-02-25/federal-courts-congress-relief/]

“For 20 years-plus we’ve been in a judicial emergency,” Chief District Judge Kimberly Mueller of the Eastern District of California testified to the Subcommittee on Courts, Intellectual Property, and the Internet.

The Judicial Conference of the United States — the policymaking body of the federal courts — has proposed that Congress create 65 new permanent judgeships across certain district courts to provide relief to 663 existing positions, as well as convert eight temporary seats to permanent. California should get 23, the conference said, including four in the Southern District of California, which encompasses San Diego and Imperial counties.

The proposal, backed by progressive legal organizations, is not as controversial as the idea of expanding the U.S. Supreme Court and appears to have some bipartisan support — including from subcommittee member Rep. Darrell Issa, R-Vista, who sponsored a similar bill in 2018 that would have added 52 new judgeships.

However, he and other Republicans stressed that backing such a measure would likely come with a compromise that would perhaps spread the appointments over current and future presidential election cycles so as not to flood the courts with President Joe Biden appointees.

The last major boost to the federal bench came with legislation in 1990. Since then, the number of case filings has swelled while the number of district judges assigned to hear them has remained relatively stagnant.

The situation is no different in San Diego, which has authorization for 13 active judges, bolstered by 14 magistrate judges, nine senior judges and the occasional visiting judge.

Since 2003, the last time Congress added judgeships locally, case filings have risen by 17 percent, testified District Judge Larry Burns, who recently stepped down as chief to assume senior status in the district.

When considering weighted caseloads — an assessment that determines the amount of time each case type takes to complete — the Southern District in 2019 handled well above the national average, 634 cases per judge versus 535. The goal is around 430.

The crushing caseloads have been exacerbated by vacancies on the bench — Biden currently has five to fill locally — and a considerable backlog of civil cases stalled by the COVID-19 pandemic.

“Our criminal caseload is absolutely staggering here,” Burns explained to the subcommittee, noting the district’s nexus to the U.S.-Mexico border. From 2017 to 2019, criminal filings rose 30 percent, much of it stemming from the Trump administration’s push to prosecute misdemeanor illegal entries into the U.S.

“The effects of the increase in our caseload have been profound and have inexorably led to delay in the handling of cases — particularly civil cases,” Burns said.

#### Especially true for civil cases.

Land '21 [Greg; 7/30/21; staff reporter at Law.com; "Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle," <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/>]

As judges around the country gingerly reopen their courtrooms and invite lawyers, litigants and jurors back for business—sometimes as usual, but often still far from the normal routines of years past—they’re being confronted by an array of pitfalls, real and potential.

Will a surge of COVID-19 cases among the unvaccinated and forceful advance of the delta variant force renewed shutdowns? Will jurors and staffers be willing to risk a return? Are mask mandates and vaccine passports in the offing?

But one very real dilemma is already on their minds: Backlogs of criminal, civil and domestic cases that have piled up, exacerbating already crowded dockets where litigants and lawyers jostle to get motions filed, rulings issued and, toughest of all, cases tried.

Richard Clifton, a senior judge on the U.S. Court of Appeals for the Ninth Circuit, who serves as president of the Federal Judges Association, said that court backlogs are a big topic for judges, although not all are as impacted as others.

“At least one judge in a very busy district didn’t think the backlog had turned out as high as it turned out to be,” he said. “Other judges have commented, unspecifically, they’re just piling up.”

He said the most frequent comment is that the civil calendar “is just sitting there” because judges are spending all their time dealing with criminal caseloads.

He hasn’t heard about judges suggesting settlement as an option to those with civil cases but, he said, “I would be shocked if it weren’t happening.”

“The reality is that most cases get settled, we all know that—it’s not a good or a bad thing, it’s just a fact,” he said. And, while judges don’t actively get involved in settlements, their goal is to resolve cases. “And if it’s realistic to say to parties, ‘look, you won’t get a trial date anytime soon,’ I’m sure that’s something judges are saying to parties in those cases.”

That’s exactly what happened to Ryan Baker, of Waymaker in Los Angeles.

“It absolutely is the case that, especially in the federal courts, civil trials are at the end of the line,” he said. Baker represents the defendant in a trademark case filed in 2017.

#### Clog now and local alt cause.

Moran ’21 [Lyle; August 31; Lyle Moran, a legal affairs writer, joined the ABA Journal staff in 2020; ABA Journal, “Court backlogs have increased by an average of one-third during the pandemic, new report finds,” https://www.abajournal.com/news/article/many-state-and-local-courts-have-seen-case-backlogs-rise-during-the-pandemic-new-report-finds]

The average case backlog for state and local courts across the United States increased by about one-third amid the COVID-19 pandemic, according to a report released this month from Thomson Reuters.

The company’s survey of more than 238 judges and other court professionals found that the average backlog in U.S. courts before the COVID-19 pandemic was 958 cases. The average backlog increased to 1,274 in the last year, according to report, titled The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021.

Overall, about one-third of U.S. courts saw their case backlogs increase by more than 5% in the last year, and another 23% saw their backlogs increase by 1% to 5%, the report found. Altered operations and delayed proceedings because of court closures as a result of the pandemic contributed to the increase in backlogs, according to the report.

“Even in the best of times, the nation’s courts consistently battle case backlogs for a variety of reasons,” the report said. “When you add a public health crisis into that equation, it is easy to see why the backlog situation may become much more difficult to manage.”

### 1AR---Antitrust Now

#### Banking, ag, healthcare, tech, transportation, and more!

Arends 2-24-2025, JD, partner @ Husch-Blackwell partner, Co-Chair, Distribution and Franchising Committee, American Bar Association, Section of Antitrust Law. (Wendy, Julia Banegas, Mark Tobey, "Biden Antitrust Enforcers Take Aim at Mergers and Acquisitions", *JD Supra*, <https://www.jdsupra.com/legalnews/biden-antitrust-enforcers-take-aim-at-8223350/>)

A broader view of harm to competition

DOJ and FTC have signaled they are open to a variety of theories regarding a transaction’s harm to competition and are not tied to the consumer welfare standard established over decades of economic analysis and judicial precedent. Chair Khan declared that the FTC will investigate a transaction’s potential effects on employees and small business, not just consumers. DOJ’s Kanter questioned the necessity of defining the market in a given case, and both agencies have signaled ramped-up enforcement of transactions in banking and finance, food and agriculture, healthcare, technology, and transportation, among other industries.

The agencies are also taking a closer look at transactions that may not present traditional horizontal overlap issues, but instead raise vertical concerns, such as the denial of access to a key supplier or purchaser or harm to a rival. Examples of current transactions that were or are being investigated for vertical issues include:

Microsoft/Activision. It is reported that the FTC is investigating Microsoft’s proposed $69 billion acquisition of Activision

(creator of Call of Duty and Candy Crush) and is likely to scrutinize how the acquisition could harm rivals by limiting their access to content, among other issues.

NVIDIA/Arm. In December 2021, the FTC filed suit to block U.S. semiconductor chip supplier Nvidia Corp.’s $40 billion acquisition of UK-based semiconductor design firm Arm Ltd. The FTC alleged that the transaction would harm competition in markets for computer chips used in datacenters and in automotive advanced driver assistance systems. Arm is a critical technology supplier to most of NVIDIA's competitors. It is reported that the parties are abandoning the transaction.

Lockheed Martin/Aerojet. The FTC is suing to block Lockheed Martin’s $4.4 billion acquisition of Aerojet Rocketdyne. Aerojet supplies critical components for the missiles made by Lockheed and other defense prime contractors. The FTC’s complaint alleges that if the deal is allowed to proceed, Lockheed will use its control of Aerojet to harm rival defense contractors and further consolidate multiple markets critical to national security and defense.

Amazon/MGM. It is reported that the FTC continues to investigate Amazon’s proposed $8.45 billion acquisition of MGM.

Penguin Random House/Simon & Schuster. DOJ filed a complaint in November 2021 to block the proposed acquisition by Penguin Random House of Simon & Schuster, two of the “Big Five” U.S. publishers. The complaint alleges not only elimination of head-to-head competition between the two, but also potential harm to best-selling authors by lessening incentives to give competitive pre-publication advances.

## DA---China Bill

### 1AR---XT

#### Chinese revisionism is driven by status denial --- accommodating China’s status demands induces it to work within the existing order

Ward 17- Assistant Professor of Government at Cornell University (Steven, Status and the Challenge of Rising Powers, p. 181-182

Both rejectionists and integrationists err by ignoring the ways in which status ambitions may matter for China’s trajectory. Rejectionists go too far in arguing that a Chinese challenge to the status quo is inevitable. They base this claim on the records of the behavior of rising great powers from history, but my analysis in Chapters 3, 4, and 5 has shown that shifts toward radical revisionism were not structurally determined. In none of these cases was there a consensus about the wisdom of challenging the status quo order, and in each case the ultimate domination of the hardline perspective was to some degree a function of the nature of beliefs about the prospects of the rising power’s status ambitions, which were in turn influenced by at least partially contingent factors like decisions made by domestic elites, the behavior of foreign actors, and the consequences of exogenous crises.

The integrationists, on the other hand, place too much faith in the idea that integration within the liberal order is in China’s material self-interest. As a result they understate the difficulty of keeping China satisfied with the status quo. It is true that China profits from the open economic order that the United States underwrites, that it benefits by free-riding on the other public goods that American hegemony provides, and that its leaders understand how costly a war with the United States might be. Moderate leaders in Wilhelmine Germany, Imperial Japan, and Weimar Germany also appreciated the material benefits of not challenging the status quo orders within which their respective states rose to power. The material benefits of patience and integration were outweighed, in these cases, by a set of forces that have mostly been left out of analyses of China’s trajectory: the social psychological and political consequences of beliefs about the compatibility of its status ambitions and the liberal order.

The purpose of this chapter is to demonstrate that these same forces are critical for understanding the future of Chinese foreign policy, and thus the future fate of the international order. China – like other rising states – has outstanding status ambitions. As is always the case when status is involved, these ambitions can only be satisfied if they are recognized. And this means that there is a possibility that influential Chinese observers may come to the conclusion that China’s status ambitions have been unjustly obstructed and are incompatible with the US-backed order. Obstructed status ambitions might in turn lead to demands for policies that aim to protest, delegitimate, or overthrow elements of the status quo order, and these – if they are resonant and widespread enough – could influence Chinese foreign policy as they did in the German and Japanese cases from the first half of the twentieth century. In short, Western accommodation failure could produce forces that push China toward policies that reject and challenge the norms, rules, and institutions of the liberal international order.2