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## 1AC

### 1AC---Developing Economies

#### Advantage 1 is Developing Economies:

#### 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.

#### Where foreign entities are unwilling or unable to prosecute cartels, the presumption against extraterritoriality leaves developing economies defenseless to anticompetitive predation and widens gaps in international cartel enforcement.

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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 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 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 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: 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 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.17 Even if developing countries 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 developed antitrust regimes---that form of patchwork enforcement creates impunity for a host of 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 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 economies, but which is still offered in developing countries). 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.

#### 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)

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 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 enables democratic backsliding and organized crime.

Merke et al. 21, \*Federico Merke is an associate professor of international relations at the Universidad de San Andrés, Argentina. He is also a researcher for the National Council for Scientific Research; \*Oliver Stuenkel is an associate professor at the School of International Relations at Fundação Getulio Vargas (FGV) in São Paulo, Brazil. He is also a nonresident scholar affiliated with the Democracy, Conflict, and Governance Program at the Carnegie Endowment for International Peace. \*Andreas E. Feldmann is an associate professor in the departments of Latin American and Latino Studies and Political Science at the University of Illinois at Chicago; (June 24th, 2021, “Reimagining Regional Governance in Latin America”, https://carnegieendowment.org/2021/06/24/reimagining-regional-governance-in-latin-america-pub-84813)

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 enables 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.

#### Democracy solves extinction.

Twining 21, PhD, president of the International Republican Institute, former director of the Asia Program at the German Marshall Fund. (Daniel, 10-10-2021, "America must double down on democracy", *The Hill*, <https://thehill.com/opinion/campaign/575693-america-must-double-down-on-democracy>) \*language edited

The hard truth is that a world that is less free is one that is less secure, stable and prosperous. The greatest dangers to the American way of life emanate from hostile autocracies. There are no quick fixes, but the best antidotes to the challenges of great-power conflict, terrorism and mass migration of desperate refugees lie in the building of inclusive democratic institutions — and working with allied democracies to sustain the free and open order that China, in particular, wishes to replace with a world that’s safe for autocracy. The conventional wisdom that authoritarianism has popular momentum is wrong. No one anywhere is taking to the street to demand more corrupt governance, the adoption of one-man rule, a stronger surveillance state, or greater intervention by malign foreign powers. Democratic freedoms are unquestionably under assault in many nations. Autocrats are aggressive precisely because of the growing demands for change in their more modern, connected societies — and the rising risk that middle classes in nations such as China and Russia will not be willing forever to forfeit political rights for prosperity. American retrenchment and isolationism compound the danger. It would be nice to live in a world where failed states and dictatorships were a problem for someone else to worry about. But rather than producing stability, Western retreat only emboldens autocrats in ways that amplify dangers to American national security. We know that violent extremism flourishes under state failure and dictatorship. Broken states become breeding grounds for extremist groups because they leave vacuums that terrorists are only too happy to fill. In nations without democratic accountability, citizens become drawn to the only forms of expression available to them, which are often violent and extreme. The good news is that we have billions of allies around the world: citizens on every continent chafing for greater freedom and dignity. They do not want U.S. military-led nation-building. They want peaceful support for their independent efforts to create democratic space in systems distorted by overweening government control, dangerous governance gaps and foreign malign influence. The free world cannot be neutral in the face of autocracy’s resurgence. Rather, it should play to its strengths. The appeal of democratic opportunity is a strategic asset for the United States — despite our own shortcomings — because people around the world similarly aspire to live in societies that guarantee justice, rights and dignity. America’s closest allies are democracies. Democracies don’t fight each other, export violent extremism, or produce the conflicts that drive mass migration. Democracies are better partners in fighting terrorism, human trafficking and poverty, as well as establishing reliable trading relationships. Open societies incubate the technologies that will help solve the world’s most pressing problems, including climate change. Citizens can hold leaders accountable when they fall short, and democratic institutions are stronger than any [individual] ~~man~~ — as America itself witnessed after the assault on the U.S. Capitol on Jan. 6.

#### Organized crime causes extinction.

Luna 21 \*David Luna, Founder and Executive Director of ICAIE, former U.S. diplomat and national security official with over 20 years of federal service; (2021, “Why We Must Confront the Growing Threat to National Security Posed by Illicit Economies and Cesspools of Corruption and Organized Crime,” https://www.linkedin.com/pulse/why-we-must-confront-growing-threat-national-security-david-m-?trk=public\_post\_promoted-post)

Illicit economies are not harmless and can have tremendous human, economic, societal and security costs and consequences.

Illicit economies come with vulnerabilities to peace and security — including corruption, violence, chaos, organized crime, terrorist financing and instability. Illicit economies are the lifeblood of today’s bad actors, enabling kleptocrats to loot their countries, criminal organizations to co-opt states and export violence and terrorist groups to finance their attacks against our societies.

Illicit economies are pervasive threats that undermine democracy, corrode the rule of law, fuel impunity, imperil effective implementation of national sustainability and economic development strategies, contribute to human rights abuses and enflame violent conflicts.

Across today’s global threat environment, criminals and bad actors exploit natural disasters, human misery and market shocks for illicit enrichment.

The lucrative criminal activities enabling and fueling the multitrillion-dollar illicit economies include the smuggling and trafficking of narcotics, opioids, weapons, humans, counterfeit and pirated goods; illegal tobacco and alcohol products; illegally harvested timber, wildlife and fish; pillaged oil, diamonds, gold, natural resources and precious minerals; and other contraband commodities. Such contraband and illicit goods are sold on our main streets, on social media, in online marketplaces and on the dark web every minute of every day. The United Nations has estimated that the dirty money laundered annually from such criminal activities constitutes up to 5 percent of global gross domestic product, or $4 trillion.

The International Coalition Against Illicit Economies recognizes that illicit economies and crime convergence are threat multipliers that ripple across borders and imperil supply chain security, market integrity, democratic freedoms and institutions and systems of open, free and just societies.

In Mexico and Central America, for example, organized crime infiltrated the government at every level, and has diversified into other sectors such as agriculture, mining and transportation. Criminals also control strategic and critical infrastructure such as the country’s major ports. In recent years, the Jalisco New Generation Cartel has killed judges, police officers, politicians and thousands of civilians. Gangs like MS-13 and the Mexican cartels also remain a significant threat across the United States.

The significant market penetration of the Latin cartels has resulted in illicit economies that have corrupted and destabilized Mexico’s justice system and rule of law, and threaten regional stability. Their reach is now global, expanding to other regions of the world like Africa, Europe, and the Asia-Pacific.

China’s involvement in the expansion of illicit economies — including the booming trade in fraudulent consumer goods, money laundering/trade-based money laundering and the corruptive and malign influence of the Chinese Communist Party — continues to harm American national interests, our economy and competitiveness and the health and safety of our citizens.

In Africa, authoritarian governments, ungoverned spaces and conflicts have created the perfect storm for criminals and terrorist groups to expand their illicit trafficking and smuggling operations. The lucrative business of illicit trade has also been militarized in some areas, bribing complicit government officials to shield illicit enterprises from scrutiny and coercing soldiers to protect the illicit markets.

In other parts of the world – from Southeast Asia to the Caucasus – ruthless corrupt leaders and malign actors are similarly engaging in criminality and undermining global security, financing criminalized markets and creating illicit economies.

### 1AC---Resource Cartels

#### Advantage 2 is Resource Cartels:

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

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)

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.

#### The risk is increasing---cartels undermine the stability of CRM supplies.

Umbach 20, \*Frank Umbach, \*S. RAJARATNAM SCHOOL OF INTERNATIONAL STUDIES SINGAPORE; (April 27th, 2020, “The new "rare metal age" : new challenges and implications of critical raw materials supply security in the 21st century”, <https://dr.ntu.edu.sg/bitstream/10356/143617/2/WP329_V2.pdf>)

* CRM = critical raw materials

The risks pertaining to the security of supply are not just confined to CRMs but also to the import of semi-manufactured and refined goods as well as finished products. Market imperfections in the form of manipulated prices, restricted supplies and attempts at cartelisation of CRM markets by powerful state-owned and private companies are threatening the stability of the future supply of many precious CRMs. And, trading houses, major producers and financial institutions are adding to the insecurity. With ever more complex global supply chains and blurred boundaries between physical and financial markets, these players have been able to exploit opaque pricing mechanisms and weakly governed market platforms to manipulate prices.44

#### That caps 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

#### 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)

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 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.

#### States have a common interest in coordinating antitrust---they prefer to cooperate, rather than resist, extraterritorial enforcement.

Lim 17, \*Daniel Lim, Corporate Associate at Ropes & Gray LLP. Ropes & Gray LLP; (2017, “State Interest as the Main Impetus for U.S. Antitrust Extraterritorial Jurisdiction: Restraint Through Prescriptive Comity”, https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1180&context=eilr)

II. FROM RESENTMENT TO COOPERATION

Following the Alcoa decision, none of the nearly 250 foreign antitrust actions brought by the DOJ had been dismissed under the intended effects test.108 As a result, foreign states began adopting “blocking” statutes. Some of these frustrated U.S. application of antitrust laws by preventing discovery, requiring foreign courts to refuse recognition of treble-damages awards, and permitting defendants to receive “clawback” judgments, 109 which allow defendants to retrieve the damages award they paid in their home courts. 110 However, members of the international community began changing their approach; instead of resisting, they began to formulate their own antitrust laws. Bilateral and multilateral agreements gave rise to cooperative regimes to harmonize and enforce antitrust laws. However, the effects of these regimes were limited to common interests between states.

A. Foreign Counteractions against U.S. Antitrust Laws

After the Seventh Circuit Court asserted jurisdiction over Australia, Canada, Great Britain, and South Africa in a uranium price-fixing case, the Westinghouse litigation, the foreign states passed blocking statutes. 111 The British Parliament passed the Shipping Contracts and Commercial Documents Act, which “authorized a Minister of the British Government to order British citizens not to comply with certain discovery requests from foreign States.” 112 The Canadian government also adopted a similar blocking statute by adopting a Uranium Information Security Regulation, which “prohibit[ed] a person from releasing any written matter or documentation relating to any phase of uranium mining, refining or marketing . . . unless required to do so by Canadian law, or by the Minister of Energy, Mines and Resources.” 113 The Australian government passed the Australian Foreign Antitrust Judgments Act providing that a judgment of a foreign court under antitrust law should not be satisfied if the Attorney General determined that it was inconsistent with international law or comity, or was not in the national interest.114

B. Development of Stricter Antitrust Laws in Foreign States

While the United States was initially the most aggressive in expanding the reach of its antitrust laws, other nations began to reciprocate U.S. antitrust extraterritorial jurisdiction. 115 This change in attitude came with the increasingly global nature of business activity and the realization that international comity principles posed no significant obstacle to extraterritorial application of antitrust laws. 116 The continuing liberalization of trade also encouraged the increasing number of competition statutes among various states.117

In particular, the EU began not only tolerating but also increasingly applying extraterritorial jurisdiction.118 Among other factors, the EU’s growing role as an economic actor contributed to its boldness in applying its antitrust extraterritorial jurisdiction.119 Today, the EU is considered to be engaging in “unilateral regulatory globalization” known as “The Brussels Effect.”120

Although the European Court of Justice (ECJ) never explicitly affirmed the effects doctrine, it developed doctrines that emulated the tests formulated by U.S. courts. 121 The Economic Entity Doctrine was used to assert jurisdiction over non-EU parent undertakings by attributing liability to them for the illegal price-fixing by their subsidiaries in the EU.122 The ECJ looked at the extent to which a non-EU parent undertaking controls its subsidiaries located in the EU to determine if a single economic entity was formed. 123 Because the court regarded the non-EU parent and its EU subsidiaries as a single economic entity, the non-EU undertaking fell within the scope of the EU competition law.124 The EU also developed the Implementation Doctrine, which is based on the territoriality principle.125 Under this doctrine, agreements and practices fall within the purview of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)126 if they are implemented within the EU and they affect trade between member states, regardless of their geographic origin.127

Other states, such as Australia and South Korea, adopted similar approaches to extraterritorial application of antitrust laws. In Australia, although the government enacted the Trade Practices Act, which rejected the U.S. and Canadian models, it eventually adopted antitrust legislation modeled after U.S. antitrust legislation. 128 South Korea enacted the Monopoly Regulation and Fair Trade Act (MRFTA), which was also modeled after U.S. antitrust laws.129 Today, the five most aggressive antitrust enforcement regimes are found in the EU, Brazil, Japan, South Korea, and the United States. 130 The EU is the leading entity in aggressive investigation of cartel activity. In 2014, it led the way in cartel fines, collecting over $2 billion. 131 In 2002, the Korean Fair Trade Commission (KFTC) made its first decision to apply extraterritorial jurisdiction in a case concerning international cartels. 132 In January 2015, the KFTC made a record fine of $123 million for bid-rigging.133 For the first time, it also imposed prison terms on individuals for cartel offenses in 2014. 134 In other states, such as Brazil, the jail sentence for anticompetitive behavior has been increasing, with sentences sometimes exceeding ten years.135

C. International Cooperative Regimes for Antitrust Enforcement

Along with an increasing application of extraterritorial jurisdiction of anti- competition laws, various states began cooperating and building global antitrust regimes. This movement began after World War II, when states attempted to achieve harmonization through multilateral agreements and international organizations.

In 1947, the Havana Charter and the International Trade Organization began contemplating adding provisions for the regulation of business practices. 136 In the early 1950s, the United Nations (U.N.) Economic and Social Council continued discussions on formulating an international agreement on business practices as well. However, these international endeavors were rejected by the United States. 137 Although the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” was adopt ed in 1980 with the efforts of developing countries, it did not have much meaningful effect due to the voluntary nature of the code.138

The formation of the World Trade Organization (WTO) in the 1990s reignited efforts to harmonize antitrust laws and enforcement. 139 This time, leaders of the European Commission tried to incorporate competition law into the WTO regime, but failed due to opposition from both developing countries and the United States. 140 Following years of failed negotiations, the WTO decided not to hold discussions on competition law.141

However, the stalemate for international cooperation was broken with the strong support of U.S. interest s through a different strategy. 142 In 1997, U.S. Attorney General Janet Reno and Assistant Attorney General for Antitrust Joel Klein formed the International Competition Policy Advisory Committee (ICPAC).143 This committee was commissioned to address worldwide antitrust problems and issued a report advising the creation of a “Global Competition Initiative” to realize a greater convergence of competition law, analysis, and common culture. 144 At the anniversary of the European Council Merge Control Regulation in 2000, Mario Monti, then-European Commissioner for Competition, and Joel Klein expressed their support for the initiative. 145 Finally, in 2001, top officials from Australia, Canada, the EU, France, Germany, Israel, Japan, Korea, Mexico, South Africa, the United Kingdom, the United States, and Zambia launched the International Competition Network (ICN).146

One of the main features of the ICN is that participation is voluntary. 147 Although almost all of the competition authorities in the world are represented in the ICN, 148 ICN initiatives and cooperation will only be effective when the case involves jurisdictions without contradictory interests. The voluntary nature of the ICN and the bilateral agreements discussed below are all efforts initiated by states with power to coordinate a more effective competition law enforcement regime according to the standards of each respective state.

The United States continued to build an international community that would help support its competition law initiatives by entering into bilateral and regional agreements with other nations, rather than using international organizations as a forum for discussion. Initially, the United States was not receptive to cooperation with other states, 149 as evidenced by its rejection of the recommendation of the Organisation for Economic Co-operation and Development (OECD) in 1967 to limit state enforcement actions in light of legitimate foreign interests. 150 Today, the United States has entered into anticompetitive bilateral agreements with Australia, Brazil, Canada, the European Union, Germany, Israel, Japan, Mexico, and Russia. 151 Mutual legal assistance treaties (MLATs) are other important tools of cooperation. 152 MLATs are bilateral agreements, which provide that each party will use its own criminal investigative resources to obtain information for an investigation being conducted by the other party. 153 To date, the United States has entered into an MLAT agreement with twenty-six different states, including Australia, Canada, Japan, South Korea, and the UK. 154 There have also been cooperative efforts on a regional level. Some of the most notable multilateral agreements are the Asia-Pacific Economic Cooperation (APEC), where the United States is a key participant, and the North American Free Trade Agreement (NAFTA).155 These agreements have gone beyond written form into action. Some of these coordinated efforts include cooperative dawn raids and the execution of search warrants in multiple jurisdictions.156

Nonetheless, these agreements did not play a major role in harmonizing antitrust policies, but instead acted mostly as non-binding agreements. 157 And even those agreements that were binding only had some rudimentary coverage of competition policy matters. 158 Most importantly, these international agreements were not effective in restraining extraterritorial jurisdiction, but they did support cooperative efforts that were aimed towards reinforcing each state’s interest by sharing information, coordinating dawn raids, and executing multi-jurisdictional search warrants. 159 The nature of these agreements shows that international cooperation in antitrust laws is not motivated by a desire of restraint, but by a desire to effectively enforce each state’s own antitrust laws. In other words, international anti-competitive cooperation is realized by the gathering of various states that have common interests in preventing similar “anti-competitive” actions.

#### 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

# 2AC

## Solvency

### 2AC---AT: Foreign Countries Resist

#### 2---empirics.

First and Bush 19, \*Harry First, Charles L. Denison Professor of Law, New York University School of Law, and \*Darren Bush, Leonard B. Rosenberg Professor of Law, University of Houston Law Center; (2019, “Antitrust Analysis of NOPEC Legislation”, https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2044&context=lclr)

In the past, foreign countries have not always been happy about the United States applying its antitrust laws to cartels formed or operated in their countries. Early efforts to resist that enforcement, however, have largely given way to foreign countries embracing competition, engaging in law enforcement against international cartels, and even accepting the imprisonment of their nationals in U.S. jails. While asymmetric retaliation from foreign countries outside the competition law system is certainly possible, there is no history of such retaliation against U.S. antitrust enforcement, even in the context of the private litigation brought directly against OPEC and state-owned oil companies. Consequently, concerns with retaliation as a result of antitrust action by the United States are misplaced.

### 2AC---AT: Blocking Statutes

#### Blocking statutes are all posturing with no impact---foreign states don’t enforce them, and U.S. courts don’t care.

Hoda 18, \*M.J. Hoda, J.D. 2017, University of California, Berkeley, School of Law; (2018, “The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It”, http://www.californialawreview.org/wp-content/uploads/2018/02/6Hoda-34.pdf)

My most notable finding was that, in at least twenty-one instances, U.S. courts have held that foreign states’ failure to enforce their blocking statutes (a) showed that no serious foreign state interest would be undermined by ordering violations of those statutes, or (b) undermined litigants’ claims that compelling violation would constitute a hardship.103 In other words, when foreign entities have raised the blocking-statute excuse, U.S. courts have often looked to the enforcement histories of the statutes, and, where the relevant statute had not been actively enforced, the courts held that the lack of enforcement weighed in favor of ordering their violation. These holdings have created what I call the ‘Aérospatiale Dilemma.’ If foreign states are to protect their citizens and companies from U.S. discovery using blocking statutes, they must first use those statutes to prosecute and punish those very same entities.

Until now, no academic work has quantified the rise of the Aérospatiale Dilemma. As part of my effort to provide strategic advice to foreign states, I set out to measure the effect of the Aérospatiale Dilemma using the fifty-six opinions collected in Geoffrey Sant’s “Court-Ordered Law Breaking.” I began by narrowing the fifty-six cases compiled in Sant’s article to match my inquiry. Because I wanted to investigate only those cases where U.S. federal judges considered whether to order violations of foreign blocking statutes, I excluded all state-court cases, and all cases where courts considered whether to violate foreign injunctions or court orders rather than foreign statutes. I then excluded cases where courts considered litigants’ arguments that a discovery order would violate foreign law, but did not proceed with a full Aérospatiale analysis because they found that there was no actual conflict of laws.

Many of the remaining cases involved multiple foreign defendants or statutes, and courts often considered whether to order violations of multiple foreign laws in a single opinion. I thus further divided opinions in Sant’s dataset to reflect the number of individual blocking-statutes violations that U.S. courts considered. I found that the federal courts have considered whether to order at least forty-two individual violations of foreign blocking statutes since Aérospatiale.i An analysis of those forty-two contemplated orders follows.

Courts compelled foreign parties to produce discovery in violation of foreign law in thirty-seven of those forty-two contemplated orders, and refused to order violations of foreign law in only five. ii Thus, when faced with conflict between motions to compel and foreign blocking statutes, U.S. federal courts ordered violations of foreign law 88 percent of the time.

Of the forty-two instances where federal courts considered the blocking- statute excuse, twenty-six explicitly considered the enforcement histories of the foreign laws at issue.104 In twenty-three of those twenty-six instances, courts found either (a) that there was evidence that the blocking statute had not been enforced in similar situations, or (b) that the objecting entity had offered no evidence as to the statute’s enforcement history. iii In all twenty-three of those instances, the courts went on to order production in violation of foreign law.105 In contrast, of those twenty-six instances where courts considered the enforcement histories of foreign laws, those courts found evidence that the relevant statute had been actively enforced in only three.iv In all three of those instances, the courts ultimately refused to order production.106

These data provide three important insights. First, when courts have faced conflicts between motions to compel and blocking statutes, they have explicitly considered blocking statutes’ enforcement histories in 63 percent of all instances. Second, in those instances where courts have considered blocking statutes’ enforcement histories, the presence or absence of active enforcement has always been a bellwether for the ultimate disposition. When courts have explicitly found that a relevant blocking statute has not been enforced in similar cases, they have always ordered production. But in the very few cases where courts found that a relevant blocking statute had been enforced in cases like the one at bar, they have always refused to order production. The lesson is that, while courts have not considered enforcement history in every case, it has been an unfailing indicator of the ultimate outcome in cases where they have.

Before moving to consider the strategic import of these findings, it is useful to breathe some life into the numbers with an illustrative case. The case discussed in this Note’s Introduction—Motorola Corp. v. Uzan —brings the enforcement-history inquiry into focus.107 As discussed above, blocking-statute conflicts arose in Uzan after Motorola filed ex parte discovery requests against banks in France, Jordan, the United Arab Emirates, and Switzerland.108 Each bank raised its home-country blocking statute as an excuse to not produce the requested discovery.109 In considering whether to order violations of the four blocking statutes, the court wrote:

[S]everal of the nations whose laws are here involved have enacted legislation prohibiting the release of . . . the information here sought, sometimes on pain of criminal prosecution, thereby suggesting a strong competing interest. But is this for real? If a given country truly values its national policy of, say, criminalizing compliance with a U.S. court subpoena, it will prosecute its citizens for so complying. . . . [T]he extent to which the relevant country has actually enforced the prohibition is a strong indicator of the strength of the state interest.110

#### Empirically---countries tear down blocking statutes in response to U.S. pressure.

Zhang 21, \*Angela Huyue Zhang is an associate professor at the Faculty of Law at the University of Hong Kong; (February 1st, 2021, “The dangerous legal war posing a new threat to China-US relations”, https://asia.nikkei.com/Opinion/The-dangerous-legal-war-posing-a-new-threat-to-China-US-relations)

The United States and China are now locked in a dangerous legal war.

On Jan. 9, China's Ministry of Commerce issued [new rules](https://asia.nikkei.com/Economy/Trade-war/China-takes-aim-at-foreign-companies-swayed-by-US-sanctions) to block its companies and citizens from having to comply with "unjustified" foreign laws and measures in an attempt to counter increasingly aggressive U.S. sanctions against Chinese businesses and individuals.

The purpose of this blocking statute, similar to other countermeasures such as the "unreliable entity list" that China implemented last year, is more bark than bite.

It is hardly a surprise that China has adopted such a law. A long list of countries have implemented measures designed to block the applications of U.S. sanctions within their jurisdictions, including some of America's closest allies such as Canada and the United Kingdom. What is more surprising, however, is that it has taken China so long to react.

There has been a similar delay regarding the unreliable entity list. The Ministry of Commerce first announced its intention to publicize a list of unreliable foreign entities and individuals that have imposed bans on supplying Chinese companies in May 2019, but so far no foreign entity has been explicitly named. What is holding China back?

For one thing, these types of countermeasures have severe limitations. Take the example of the blocking statute. China can only invalidate the effects of U.S. law within its domestic jurisdiction. And although businesses are promised protection in China, they are still subject to penalties for noncompliance with U.S. sanctions in other overseas jurisdictions.

More importantly, the penalty for violating U.S. sanctions not only includes hefty fines and restricted access to the U.S. market, but also potential criminal liability for business executives. Thus, for many global companies, succumbing to U.S. pressure -- no matter how difficult -- is probably the only rational choice of action.

This was what happened to European businesses when the European Union amended its blocking statute in response to the U.S. reimposing sanctions on Iran in 2019. Having no choice but to quietly concede, many European companies complied with the U.S. sanctions law by winding down operations in Iran without explicit reference to the U.S. sanctions. This will likely be the approach that foreign multinationals with a significant presence in China will adopt in trying to fulfill demands under both U.S. and Chinese.

## ADV---Developing Economies

## ADV---Resource Cartels

## AT: T---Private Sector

### 2AC---AT: T

#### Counter-interpretation---the private sector includes an industry.

The Law Dictionary N.D., (The Law Dictionary: Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. “Private Sector” , <https://thelawdictionary.org/private-sector/> , date accessed 9/11/21)

What is PRIVATE SECTOR?

An industry that is composed of private companies. The corporate sector and the personal sector are encompassed in the private sector and they are responsible for the allocation of the majority of resources within the economy.

#### The private sector includes subsets---refers to many different actors.

Waler and Hofstetter 16 (Katharina Walker is Advisor for vocational skills development and Helvetas’ youth focal person. Sonja Hofstetter joined Swisscontact in Cambodia in July 2016. She is the Quality Assurance Manager and Deputy Team Leader of the Skills Development Programme. “ Study on Agricultural Technical and Vocational Education and Training (ATVET) in Developing Countries” Federal Department of Foreign Affairs FDFA, Swiss Agency for Development and Cooperation SDC, Global Programme Food Security, 25.1.2016, <https://www.shareweb.ch/site/Agriculture-and-Food-Security/focusareas/Documents/ras_capex_ATVET_Study_2016.pdf> , date accessed 7/19/21)

In many developing countries, the private sector1 [[BEGIN FOOTNOTE 1]] 1 The private sector is not perceived as a homogenous mass even though the terminology might suggest this to be the case. In this study, the term “private sector” is used to circumscribe the various actors such as small and medium sized companies, large companies, sectorial associations, business associations, chambers of commerce, etc.[[END FOOTNOTE 1]] faces challenges in finding adequately skilled employees. This also holds true for sectors linked to agriculture, e.g. processing, distribution, marketing, etc. The development of ATVET from a purely productivity-oriented approach to provide broader and more specialised skills sets along agricultural value chains is likely to raise the interest of private sector actors. This incentive can result in a stronger and more sustainable financial and conceptual engagement of employers in ATVET.

#### ‘By’ only requires anticompetitive practices resulting from private sector action.

Michigan Court of Appeals 10 (SAWYER, J. Opinion in DEQ. v. Worth Twp., 808 N.W.2d 260, 289 Mich. App. 414 (Ct. App. 2010). Google scholar caselaw. Date accessed 7/23/21).

Second, we look to the meaning of the phrase "by the municipality." This phrase is key because it answers plaintiffs' contention that MCL 324.3109(2) imposes responsibility for a discharge on a municipality without regard to the source of the discharge. That is, plaintiffs argue that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge. We disagree. The word "by" has many meanings. For its meaning as a nonlegal term, we look to a layman's dictionary rather than a legal one. Horace v. City of Pontiac, 456 Mich. 744, 756, 575 N.W.2d 762 (1998). We find these definitions from the Random House Webster's College Dictionary (1997) to be particularly helpful: "10. through the agency of" and "12. as a result or on the basis of[.]" Thus, MCL 324.3109(2) imposes responsibility on the municipality not when the violation merely occurs within the boundaries 264\*264 of the municipality, but when the violation occurs "through the agency of" the municipality or "as a result" of the municipality, that is to say, when it is the actions of the municipality that lead to the discharge.

## AT: CP---Devolution

### 2AC---AT: Devolution CP

#### No spillover between antitrust and the net benefit.

Robinson 15, J.D. from Harvard University, B.A. from the University of Virginia, Professor of Law at the University of Richmond School of Law; Washington University Law Review, (Kimberly, 2015, “Disrupting Education Federalism,” Rev. 959)

In offering a theory for how education federalism should be restructured to strengthen the federal role over education, and thus reduce reliance on states to ensure equal access to an excellent education, I build upon Yale Law Professor Heather Gerken's argument that federalism theory should eschew advancing a single theory for all occasions because "[b]oth in theory and practice .. . there are many federalisms, not one."39 She astutely contends that scholars developing and critiquing federalism theory should consider the appropriate balance of institutional arrangements for a specific context. 40 Therefore, my theory for how education federalism should be restructured does not attempt to propose a federalism theory for other policymaking arenas such as environmental law or healthcare policy. Instead, it solely proposes a shift in the balance of federal, state, and local authority in order to strengthen the federal role in ensuring equal access to an excellent education while preserving the aspects of state and local autonomy over education that do not undermine equal access to an excellent education.

## AT: 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.

#### 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

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#### a lack of treble damages demotivates private suits by making the investigation and filing of a claim cost-prohibitive---leaving anticompetitive conduct untouched.

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

In litigation involving FRAND violations, the core of the plaintiff’s case is the same under either a contract law approach or an antitrust law approach. The same conduct—charging a supra-FRAND royalty—is the foundation of both a breach of contract and an antitrust violation. Besides the fact that Section 2 liability requires proof of a defendant’s monopoly power, the two most important differences are the remedies and the universe of potential plaintiffs. With respect to remedies, under contract law, if the patentee charges a royalty that is not FRAND, the contract plaintiff can recover the difference between the FRAND amount and the royalty actually paid. In contrast, successful antitrust plaintiffs are entitled to treble damages on the overcharge as well as reasonable attorneys’ fees and costs.200 These differences in available remedies have important implications for both compensation and deterrence. Although called compensatory damages, the single damages associated with contract law do not actually fully compensate victims of breach for their injuries. Although contract damages are supposed to make the nonbreaching party whole, they do not for several reasons. First, contract law does not generally provide attorneys’ fees for successful plaintiffs.201 Second, contract remedies do not compensate the nonbreaching party for the time and effort of investigating their contract claims.202 As a result, even when a plaintiff wins her contract law case, she is not fully compensated for her injuries. She remains worse off than if the contract had been properly performed.

Congress provided for the automatic trebling of antitrust damages in order to deter firms from engaging in anticompetitive conduct in the first place.203 Antitrust law’s treble damages are also intended to compensate victims of antitrust violations for the time it takes to investigate and pursue potential antitrust violations.204 Congress recognized that consumers would be less likely to spend the necessary resources to detect and challenge antitrust violations if they were not compensated for their investment in time. Although contract law alone does not deter patentholder deception and holdup,205 Delrahim praises contract remedies specifically because contract law does not provide for treble damages.206 He raises the threat of overdeterrence if antitrust law were in play. But there should be no meaningful risk of overdeterrence because the owner of a SEP can eliminate the prospect of antitrust litigation by adjudicating FRAND royalty rates ahead of time.

#### 2---deterrence---international cartels will forgo all U.S. profits if it means they can maintain operations elsewhere---harmonization is key because it multiplies expected penalties by the number of nations nominally committed to enforcement---that’s and…

Desautels-Stein 08, \*Justin Desautels-Stein, Associate Professor of Law, University of Colorado: LL.M., Harvard Law School (2006); J.D., UNC- Chapel Hill School of Law (2005); M.A.L.D., The Fletcher School, Tufts University (2004); (2008, “Extraterritoriality, Antitrust, and the Pragmatist Style”, https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1280&context=articles)

At the same time, of course, policy arguments are marshaled in favor of extraterritorial exercise as well, including the notion that a narrow effects-test 270 interpretation of the FTAIA could lead to under-regulation. Borrowing from the Supreme Court's Pfizer decision, Ralf Michaels, Hannah Buxbaum, and Horatia Muir Watt recall:

If foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home. If, on the other hand, potential antitrust violators must take into account the full costs of their conduct, American consumers are benefited by the maximum deterrent effect of treble damages upon all potential violators. 27 1

This argument has more or less currency as a matter of how many jurisdictions are able to claim and sustain comparable antitrust regimes. Because many developing countries have enforcement regimes that take different views on the topic of market regulation, U.S. notions of market regulation would be jeopardized. 27 2 Michaels, Buxbaum, and Watt do not go on to conclude, however, that the prospects of under-regulation necessitate U.S. extraterritoriality. Rather, the way forward first demands a consideration of judicial restraint in the face of reasonableness and comity, thus bringing the 273 analysis full circle.

## AT: CP---Reciprocity

### 2AC---AT: CP---Reciprocity

#### They’ve butchered the counterplan---it’s advocating for mandatory reporting by the WTO---but doesn’t say anything close to advocating actual enforcement.

Sokol 8—(Assistant Professor of Law, University of Florida, Fredric G. Levin College of Law). D. Daniel Sokol. June 12, 2008. “What Do We Really Know About Export Cartels And What Is The Appropriate Solution?” Journal of Competition Law & Economics, Volume 4. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144003>.

c. A New Approach

Battling export cartels requires a new approach from either existing hard-law or soft-law solutions. This article advocates mandatory notification and transparency of export cartels by the WTO. Countries would require legitimate export joint ventures (even those with only an implicit exemption) to undertake a robust business review clearance from their home jurisdiction that would provide immunity for a set period of time based on the proposed business plan. Business review clearance would be publicly available. To have the immunity renewed past the initial period, companies involved in the joint venture would be required to provide evidence that the venture is not participating in anticompetitive activities abroad. This proposal is not the same as the developing world essentially buying the developed world agencies’ enforcement of export cartels.62 My proposal is more modest in that it would require fewer market access trade-offs because the only function of the developed world antitrust agency is to create transparency and a paper record on export cartels. It would be up to the antitrust agency of the importing country to take steps against any potential anticompetitive behavior by export cartels. This proposal therefore reduces the cost of information for detection of export cartels.

This process would put the onus of enforcement on developed world countries—those countries that are more likely to have explicit or implicit export cartel exemptions. These countries are better able to absorb the cost of enforcement and have the knowledge and agency capacity to undertake review rather than developing world countries that are more likely to lack both evidence and effective enforcement tools. When a developed world country has an export cartel immunity, this raises the cost of domestic enforcement among younger antitrust agencies to a point in which the developing world agency cannot act to prevent overcharges by the cartel in its market. Because of the cost of information, it is much easier for developed world countries that have export cartel exemptions to keep track of companies that apply for such immunities. Antitrust agencies undertake enforcement actions ex-ante in a number of other situations, such as business review letters or premerger notification.

## AT: DA---DOJ Tradeoff

### 2AC---AT: DA---DOJ Tradeoff

#### The plan Congressionally authorizes the DOJ to annually categorize classes of *Empagran-*type cases that can be heard by U.S. courts---that effort isn’t resource intensive, and relies on civil, not criminal enforcement---that’s 1AC Schmidt and…

Simmons 18, \*Jay Simmons, Executive Senior Editor, Southern California Law Review, Volume 92; J.D. Candidate 2019, University of Southern California Gould School of Law; B.S., summa cum laude, Political Science and Economics 2016, Bradley University; (2018, “What’s in a Claim? Challenging Criminal Prosecutions Under the FTAIA’s Domestic Effects Exception – Note by Jay Kemper Simmons,” [https://southerncalifornialawreview.com/2018/11/02/whats-in-a-claim-challenging-criminal-prosecutions-under-the-ftaias-domestic-effects-exception-note-by-jay-kemper-simmons/](about:blank))

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators’ conception of the Sherman Act and its penalties, violations “may be prosecuted as civil or criminal offenses,” and punishments for civil and criminal offenses vary.[153] For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may “obtain injunctive and treble damage relief for violations of the Sherman Act.”[154] Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the “sole responsibility for the criminal enforcement” of criminal offenses and “criminally prosecutes traditional per se offenses of the law.”[155] In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations.[156]

#### DOJ resources are limited now.

Goolsbee 20 \*Austan Goolsbee, Professor of economics at the University of Chicago’s Booth School of Business, has been a Department of Justice antitrust consultant, and was an adviser to President Barack Obama; (September 30th, “Big Companies Are Starting to Swallow the World,” <https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html>)

First, the enforcement budget for antitrust actions was already stretched way too thin even before the current crisis began. That budget has been falling for years and is lower now than it was two decades ago. The entire antitrust division of the Justice Department and the F.T.C. are being forced to operate on less than a single company like Facebook brings in over a few days. In the last 10 years, the number of merger filings (which notify the authorities of an intended merger) has almost doubled, but the number of enforcement actions taken by the government has actually fallen.

#### DOJ litigation wave high now

Radford 1-18-2022 (Kent, “Antitrust in the Biden administration: 3 key steps to take to prep for the rise in investigations,” *ABA Journal*, <https://www.abajournal.com/columns/article/antitrust-in-the-biden-administration-three-key-steps-to-take-to-prep-for-the-rise-in-investigations>)

From technology behemoths buying up dynamic startups to market-leading utility companies joining forces, there is a clear trend of market consolidation in the U.S. In the quest to curb the monopolization of industries, President Joe Biden signed an executive order in July promoting competition in the economy—which signals an upcoming increase in antitrust investigations for the legal industry.

The executive order lays out 72 initiatives to tackle the most pertinent issues, with a “whole-of-government” antitrust policy committing the federal government to aggressive enforcement of the antitrust laws. This includes a call for the leading antitrust agencies, the U.S. Department of Justice and the Federal Trade Commission, “to enforce the antitrust laws vigorously” and importantly, recognize that the “law allows them to challenge prior bad mergers that past administrations did not previously challenge.”

In particular, the executive order directs these organizations to focus their enforcement efforts on particular industries: labor, agriculture, health care and technology (although these are far from the only industries under fire). And with the news that the DOJ is suing to stop the American Airlines/JetBlue alliance, followed by 32 state attorney generals urging the DOJ to take further action, it looks like the litigation wave is already starting.

#### Specific areas:

#### --M and A’s

Feiner 1-18-2022 (Lauren, “FTC, DOJ seek to rewrite merger guidelines, signaling a tougher look at large deals,” <https://www.cnbc.com/2022/01/18/ftc-doj-seek-to-rewrite-merger-guidelines.html>)

The Federal Trade Commission and Department of Justice Antitrust Division kicked off a process to rewrite merger guidelines for businesses on Tuesday, signaling a tougher stance toward large deals. The nation’s two federal antitrust enforcers announced they are seeking public comment on how to “modernize enforcement of the antitrust laws regarding mergers.” Their questions to the public shed light on where they may seek to strengthen the guidelines and in what areas they could take a more forceful approach to antitrust enforcement. That focus could suggest additional scrutiny for large deals in the future, especially big tech deals, which have already been the target of increased scrutiny over the past few years. Microsoft’s $68.7 billion deal to buy video game-maker Activision, announced earlier Tuesday, could be just one example of the type of transaction that will gain a closer look given its scope and industry. The agencies said they are “particularly interested” in learning about where the earlier guidelines “may underemphasize or neglect” important aspects of competition. They list labor market effects and elements of competition that aren’t tied to prices, like innovation and quality, as examples of such aspects. The request for comment contains an entire section of questions devoted to digital markets, asking whether the guidelines should differ in for such markets, how they should take into account the ways data can help firms amass power and how enforcers should assess two-sided markets, like when platforms serve both advertisers and consumers. During a press conference Tuesday, John Kwoka, chief economist to the FTC chair, said that several of the issues associated with digital markets like data aggregation were not “fully addressed” in the agency’s horizontal merger guidelines issued in 2010. A growing contingent of antitrust scholars, including progressive FTC Chair Lina Khan, have argued that enforcing antitrust laws in digital markets requires a different lens than what’s traditionally applied to deals and competitive conduct. That’s in part, they argue, because such businesses may be able to use data and network effects to concentrate their power and bar competition, even if prices for consumers appear low or even free in return. Enforcers have already been quick to review large tech deals by internet giants. The DOJ reportedly continued probing Google’s acquisition of Fitbit even after it closed last year, according to Reuters, and the agency also requested extra information about Salesforce’s deal for Slack before it closed in 2021. The FTC’s ongoing lawsuit against Facebook includes claims that it acquired Instagram and WhatsApp to illegally maintain its dominance in the personal social networking space, a claim Facebook-owner Meta has denied. Tuesday’s announcement follows the FTC’s vote last year to withdraw the joint agency vertical merger guidelines instated during the Trump administration. At the time, DOJ’s antitrust chief Jonathan Kanter had not yet been confirmed and the acting head of the division said the guidelines would remain in place, though the division would continue to collaborate with the FTC to assess their effectiveness. The two Republican FTC commissioners who voted against rescinding the guidelines lamented the uncertainty that pulling the guidelines could add to businesses seeking to merge. Now, with both Kanter and Khan in place, the agencies are embarking on a potential overhaul of existing guidelines for businesses seeking to close deals. It comes amid a surge in mergers that has overwhelmed the under-resourced agencies and led the FTC to take unusual steps, like warning some businesses that it will continue to look into their deals after the period of time the parties are required to wait to close. Kanter made clear that the two agencies are aligned in their approach.

#### ---Ag

MFN 1-4-2022 (Michigan Farm News, “USDA, DOJ launch joint effort to enforce ag antitrust laws,” <https://www.michiganfarmnews.com/usda-doj-launch-joint-effort-to-enforce-ag-antitrust-laws>)

USDA and the Department of Justice (DOJ) are outlining their joint commitment to enforcing federal antitrust laws that protect farmers, including the Packers and Stockyards Act. The update came during a White House meeting Monday, where President Biden outlined $1 billion in new federal spending to increase production capacity for independent meat processors — a move aimed at chipping away at the large companies that dominate the American meat market. Four large meat packing companies control 85% of the beef market, while in poultry the top four processing firms control 54% of the market and the top four pork processors control about 70%. Ag Secretary Tom Vilsack and U.S. Attorney General Merrick Garland said their departments are already working together to support enforcement of federal competition laws pertaining to agriculture and released a list of shared commitments between USDA and DOJ. The agencies will jointly develop a centralized process for farmers to submit complaints about potential violations of antitrust laws and the Packers and Stockyards Act. USDA and DOJ say the confidentiality of the complainants will be protected “to the fullest extent possible under the law” and commit to supporting relevant whistleblower protections. USDA and DOJ say they will work together on information sharing to create a process to efficiently address a complaint and USDA will refer potential violations of the Packers and Stockyards Act to DOJ. The agencies say they will also work together to identify areas where Congress can help modernize that process. “Antitrust and market regulatory enforcement is essential to enabling the competition necessary to transform our concentrated supply chains in favor of diversified, resilient food systems,” Vilsack said. “These are complex, difficult areas of law, and our authorities are 100 years old or more, but I'm heartened by reaffirming our shared commitment to tackle these challenges together.”

### 2AC---AT: Labor Monopsony

#### Market concentration can’t explain inequality or wage stagnation, and antitrust won’t solve.

Bivens et al. 18, \*PhD, director of research at the Economic Policy Institute; \*\*PhD, MA, distinguished fellow at EPI; \*\*\*PhD, MSc, EPI’s vice president. (Josh, Lawrence Mishel, and John Schmitt, 4-25-2018, "It’s not just monopoly and monopsony: How market power has affected American wages", *Economic Policy Institute*, https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/)

This paper highlights some empirical findings from the new literature on the effect of labor and product market concentration on wages. We address three questions about market concentration that have not always been placed front and center in this literature. The first question is, “Does concentration adversely affect wages at a point in time?” The second question is, “Has concentration grown over time?” The third question is, “Can growing concentration by itself explain a significant portion of the change in wage trends in recent decades?” We find there is evidence to answer “yes” to the first and second questions but not the third. To be clear, the failure to answer affirmatively to the third question is not a criticism of these studies. The studies are not claiming that rising concentration alone can explain wage stagnation or inequality. Yet too many readers have taken these studies’ findings to this conclusion.

Finally, this paper makes two broader points about market power. First, market concentration is not the only source of power—particularly employer power—in markets. Second, even unchanged employer power (like that conferred by market concentration) can play a role in growing wage suppression and inequality if it is accompanied by a collapse of workers’ market power. The new literature on market concentration tells us a lot about employer power, but further exploration of what has happened to workers’ market power remains a key research agenda.

This paper highlights the need to tackle sluggish wage growth and rising inequality with a broad menu of policy interventions that go beyond those provided by competitive models to focus on employer and worker power, and even beyond the antitrust agenda suggested by focusing exclusively on market concentration.

Following are our key conclusions:

Labor market concentration is negatively correlated with wages, but the scope of its downward pressure on wages is limited.

New research shows that labor market concentration is negatively correlated with wages. However, the effect of labor market concentration is comparatively modest when scaled against what we consider the most significant wage trend in recent decades: the growing gap between typical (median) workers’ pay and productivity.

The new literature on market concentration has not yet provided concrete empirical estimates of a key labor market trend of recent decades—rising compensation inequality. This should be a priority for this research agenda in the future.

The new concentration literature does allow us to estimate the effect of market concentration on the share of overall income claimed by labor compensation. These estimates suggest that concentration has not risen enough, nor is its effect on labor’s share of income strong enough, to account by itself for an economically important share of the divergence between economywide productivity and the typical worker’s pay in recent decades.

The new research on labor market concentration implies that this concentration reduced wage growth by roughly 0.03 percent annually between 1979 and 2014, a decline that would explain about 3.5 percent of the total divergence between the median worker’s pay and economywide productivity over the same period.

One important study shows that the “average” labor market is “highly concentrated.” But differences between measures of concentration of the average labor market and the labor market experienced by the average worker have important implications for how to assess the impact of labor market concentration on long-term wage trends. In other words, many labor markets suffer from high degrees of concentration, but most people work in labor markets with only low-to-moderate degrees of concentration.

Nonetheless, labor market concentration is a particular challenge for rural areas and small cities and towns. This is an important finding for those looking to provide economic help to residents of those areas.

## AT: DA---Court Clog

### 2AC---AT: DA---Floodgates (Minnesota)

#### 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.

#### Denying jurisdiction if claims are better heard before a foreign court creates a clear bright line for which cases could be heard---turning plaintiffs back preserves judicial economy---that’s 1AC Schmidt and…

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>)

Yet even if amnesty programs were properly designed and harmonized to account for international cartels, exercising U.S. jurisdiction over Empagran-type claims could still reduce the deterrence of international cartels. Jurisdiction over such claims could undermine the effective antitrust policies of other countries and unnecessarily burden U.S. courts with litigation. At the same time, closing U.S. courts to all Empagran-type cases will almost certainly reduce deterrence. Many nations-particularly developing nations, but also some developed nations--do not effectively enforce their antitrust laws against international cartels, 211 or they provide protection to domestic export cartels. 2 12 Thus the United States requires a remedy that distinguishes between those situations in which litigation is more appropriately brought in another jurisdiction and those situations where no other jurisdiction will provide the plaintiffs with the possibility of adequate relief.

Fashioning such a remedy implicates two other foreign policy interests of the United States. First, America has an interest in seeing that its antitrust laws are applied consistently and predictably in order to reduce the uncertainty regarding the cost of trading in U.S. commerce. Potential defendants-whether domestic or foreign multinational corporations-cannot predict their potential liability.2 13 Uncertainty also encourages foreign plaintiffs to try to bring lawsuits in the U.S. courts instead of other venues because a successful suit in U.S. court can bring much greater damage awards.21 4 Second, the United States has an interest in not becoming the world's antitrust court. Antitrust cases are large and require a significant amount of court resources. The United States has an interest in seeing that other countries take on the burden of antitrust enforcement, particularly if those countries do so in a manner that is harmonious with America's antitrust policies.

#### 2---differentiated case management.

Fentress 16, \*Keith Fentress is the founder and president of Fentress Incorporated. He has an extensive history of consulting to real property organizations; (October 13th, 2016, “Caseload Management Can Lead to Better Courtroom Utilization”, https://blog.fentress.com/blog/better-courtroom-utilization)

A sustained increase in court caseload often means that [more judges](https://blog.fentress.com/blog/share-courtrooms/) are needed to hear the cases, which results in a need for more courtrooms. For courts that are already fully-staffed, the only solution is an expansion to the current building or a brand new courthouse – options that don’t relieve the short-term space need and that are often difficult or impossible in jurisdictions with tight budgets.

Instead of tolerating a burdensome caseload and overloading judges and staff, many courts find ways to increase their operational efficiencies. One of these strategies is the use of differentiated case management, which can be a very effective tool to increase courtroom utilization.

What is DCM?

If you are a judge or a clerk of court, you probably know all about differentiated case management. But for many architects and other facility professionals, it is quite likely an unfamiliar term. Differentiated case management – DCM – is a technique that courts use to create an efficient, tight-fitting assignment of cases for judges based on the specific characteristics of each case, much like putting a jigsaw puzzle together. By balancing complex cases that involve more time and resources with simpler cases that require less time and resources, a court manager can better utilize his or her judges and courtrooms.

Working with DCM

When I was a graduate student, I worked in the case assignment section of the county court clerk’s office. The court actively used a DCM program, which improved operational efficiencies throughout the courthouse and positively impacted the courtroom space requirements. A balanced caseload meant an optimal level of courtroom utilization; all of the courtrooms were being utilized as fully and as often as possible and fewer were sitting empty while upcoming dockets piled up.

Here’s how it worked. When a case was filed, the initiating party completed a form that described the case in terms of time needed to complete each stage of the case (such as the time required for the discovery phase). Depending on the complexity of the case, the court clerk’s office assigned it to one of four tracks, from the least to most complex. A less complex case that required only minimal discovery was assigned to the expedited track. Cases in this track had limited pretrial deadlines and trials were set within 90 days of filing. By contrast, the most complex cases were assigned to an extended track, where the trial date was set at over a year away. There were also two other intermediate tracks between the expedited and extended tracks, with varying trial date schedules.

Positive Results

In my job, I witnessed firsthand the efficiencies gained through the court’s use of DCM. The less complex cases were disposed of faster on the expedited track, with many resolved prior to the trial, some dismissed entirely, and others settled through mediation. Resolving these cases quickly was beneficial to everyone involved – the litigants received quick dispositions and the judges who had fewer cases going to trial were able to reserve their time for the cases that most needed their attention. In addition, the clerk’s office had less paperwork and fewer documents to process.

The use of DCM was beneficial for everyone, but the benefits didn’t stop there. The program also improved the court’s image among the public and the legal community. The litigants involved in less complex cases no longer had to wait years to have their cases resolved, while on the criminal side, DCM often reduced the amount of time a defendant spent in pretrial detention because simpler cases were heard and resolved more quickly.

#### 3---special masters.

BakerHostetler 20, BakerHostetler is a leading law firm that helps clients around the world address their most complex and critical business and regulatory issues. (Baker, 3/5/20, The Need for Special Masters in Complex Antitrust Cases, <https://www.antitrustadvocate.com/2020/03/05/the-need-for-special-masters-in-complex-antitrust-cases/>)

The ABA resolution advises the bench and bar that utilization of special masters has evolved over the last 50 years from the rare exception to a commonplace tool to manage complex litigation, including antitrust cases. In 2019, the American Bar Association issued a resolution “urging” state and federal courts “to make greater and more systematic use of special masters to assist in civil litigation” “to aid in the just, speedy and inexpensive determination” of cases, as mandated by the federal rules of civil procedure. The ABA resolution advises the bench and bar that utilization of special masters has evolved over the last 50 years from the rare exception to a commonplace tool to manage complex litigation, including antitrust cases. Still, courts and parties are occasionally reticent to use masters, perhaps due to inexperience with the concept, misconceptions about the benefits or unfounded concerns about the costs. This article intends to discuss the law governing special masters, detail the various ways special masters can benefit the courts and litigants, and provide some best practices concerning their engagement. What Rules Govern Special Masters Engagements? In 1957, the U.S. Supreme Court in La Buy v. Howes Leather, an antitrust case, held that the appointment of a special master by a district judge was not justified by docket congestion, issue complexity and the substantial time commitment demanded by the case; rather, “exceptional circumstances” were necessary. By 2003, however, the law had shifted as Federal Rule of Civil Procedure 53 was amended due to swelling federal dockets to expressly authorize appointment of special masters where pretrial or post-trial matters “cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” The advisory committee notes recognize: “The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation.” Recognizing this shifting legal landscape, the U.S. Court of Appeals for the Third Circuit in Glover v. Wells Fargo Home Mortgage, a 2015 consumer protection case involving mortgage foreclosures, affirmed the appointment of a special master, over the objection of the plaintiff, to assist the district judge and the assigned magistrate judge with escalating discovery disputes. Judge Patty Shwartz of the U.S. Court of Appeals for the Third Circuit, writing for the court, explained: “While the 1957 La Buy court viewed docket congestion, issue complexity, and the time-consuming nature of a case as not justifying the appointment of a special master, the 2003 version of Rule 53 reflects the changing practices in using special masters. As the advisory committee specifically recognized, the appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades to aid district courts in managing complex litigation.” How Do Courts Benefit From Special Masters? Court-appointed special masters are especially useful in antitrust and other complex litigation due to the myriad of issues presented and multiple parties frequently involved. In In re Generic Pharmaceuticals Pricing Antitrust Litigation, for example, U.S. District Judge Cynthia Rufe of the Eastern District of Pennsylvania appointed several special masters to monitor the discovery process in a multidistrict antitrust case involving pricing of generic pharmaceuticals. Similarly, in Santana Products v. Bobrick Washroom Equipment, former U.S. District Judge Thomas Vanaskie of the Middle District of Pennsylvania used a special master’s services extensively and praised his work in that multidimensional antitrust case involving massive and contentious discovery: “The court is most grateful for the work performed by Mr. Reihner in superintending the sometimes contentious discovery problems that are often encountered in litigation of this complexity.” In Santana Products, the author suggested the appointment of a special master in the initial case management plan. The special master vastly benefited the administration of the case by attending depositions, ruling on problematic discovery objections, holding hearings on spoliation issues, and overall streamlining the discovery process, as the court acknowledged. Other recent examples of special master appointments in complex cases include: Behrens v. Arconic, where U.S. District Judge Michael Baylson of the Eastern District of Pennsylvania appointed a special master with expertise on French law to assist with potentially thorny international discovery issues, Jordan v. Mirra, where U.S. District Judge Gerald McHugh of the Eastern District of Pennsylvania appointed a special master to assist with discovery due to his temporary role as a visiting judge in the U.S. District Court for the District of Delaware, in addition to his Eastern District of Pennsylvania responsibilities, and In re K-Dur Antitrust Litigation, where erstwhile Chief District Judge Anthony Greenaway of the District of New Jersey appointed a special master to, among other things, issue a report and recommendation on motions for class certification and dispositive motions for summary judgment. Relying on special masters can be a critical safety valve when district courts experience understaffing due to judicial vacancies or heavy caseloads. For example, the U.S. District Court for the District of New Jersey currently has six judicial vacancies that have been designated judicial emergencies by the Judicial Conference. Weighted filings per judgeship in the district tally 903 cases. Similarly, the U.S. District Court for the District of Delaware recently witnessed a snappy uptick in filings as a result of the Supreme Court’s TC Heartland decision, which drove patent cases into a district that coincidentally saw several judicial retirements. These courts have successfully employed special masters to help manage unusually heavy dockets. Special masters can wear many hats, particularly if litigants consent to their appointment. Examples drawn from actual appointments in the Third Circuit include: Monitoring discovery and resolving motions to compel and for protective orders. Assessing privilege logs and reviewing in camera withheld documents. Supervising public and private consent decrees that require retention of jurisdiction. Overseeing distribution of settlement proceeds to qualified applications. Mediating complex settlement negotiations that cannot be resolved in a single conference. Solving e-discovery disputes concerning search terms and custodians. Monitoring compliance with and designations under confidentiality agreements. Conducting accountings to compute damages or disgorgement.. Holding hearings concerning sanctionable conduct, such as spoliation. Reviewing petitions for attorney fees and costs. Drafting reports on motions for class certification and summary judgment. How Do Parties Benefit From Special Masters? How can litigants benefit from special masters? After all, they are responsible for paying the special master’s fees, usually split evenly between the parties, though awardable to the prevailing party in motion practice if permitted by the appointment. Even considering this added expenditure, special masters are worth the cost in complex antitrust cases for three reasons. First, the cost is usually a drop in the bucket compared to the cost of complex litigation, not to mention the potential liability. Second, utilized properly, special masters can proactively monitor proceedings and therefore anticipate and circumvent avoidable disputes, saving litigants the substantial cost of formal motion practice and occasionally delayed rulings. They can also steer clear of internecine fights that cause litigation costs to spiral and can result in court sanctions. Third, if courts choose a special master with expertise in the relevant subject matter, as they should, the parties will save the cost of teaching generalist courts about esoteric economic and other challenging concepts inherent in the practice of antitrust law. Moreover, special masters can significantly shorten the duration of litigation and can avoid the judicial limbo that often results from an antitrust case’s demand on judicial resources. Illustrative of judicial resources needed to shepherd an antitrust case to verdict, the U.S. Judicial Conference assigns antitrust cases a “complexity weight” of 3.42, representing the average amount of time needed to resolve them, compared to 1.41 for insurance contract cases, .75 for prisoner civil rights cases, and .90 and .61 for personal injury and products liability cases, respectively. Masters can alleviate this demand on judicial resources, break logjams and accelerate the timeline for a verdict or summary judgment.

## AT: DA---Extraterritoriality

### 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---Thumpers

#### A litany of extraterritorial laws aside from antitrust offend other countries.

Briggs et al. 15, John DeQ Briggs is Co-chair of the Antitrust & Competition practice at Axinn Veltrop & Harkrider LLP, Managing Partner of the firm’s Washington, DC, office, and a former Chair of the Section of Antitrust Law of the American Bar Association; Daniel S. Bitton is a partner in the Antitrust & Competition practice at Axinn Veltrop & Harkrider LLP. His practice is focused on counseling and representing clients in high-stakes international antitrust matters, including global merger clearance, government non-merger investigations, and litigation; (2015, “Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity”, https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf)

It is not just foreign governments who react angrily to what some call American Judicial Imperialism. Consider the reaction outside of the United States to a statute that took effect on July 1 of last year—the Foreign Account Tax Compliance Act (FATCA). It is not well known that the United States is virtually alone in the world in exercising jurisdiction over its citizens no matter where they might be. FATCA is intended to detect and deter tax evasion by U.S. citizens through the use of accounts held abroad. But the extraterritorial feature is that FATCA places the reporting burden primarily on financial institutions, wealth managers, and national tax authorities, rather than individuals. These are foreign entities. For example in the UK, information on U.S. citizens’ accounts holding more than $50,000 must be reported to HM Revenue & Customs, who will then pass details to the U.S. Internal Revenue Service (this latter step is the subject of a bilateral agreement between the U.S. and the UK).

Placing responsibility for compliance with the U.S. statute on foreign banks or other such institutions amounts to extraterritoriality writ large. The U.S. was and is able to engage in this kind of regulatory hegemony because it controls the world’s finance system, at least for now. Americans, who are mostly unconnected with the international community, probably neither know nor care much about this. But outside the U.S., and in the business and financial community especially, FATCA (and other American regulatory provisos) are controversial. As Felix Salmon put it in the Financial Times last year:

America is using its banking laws not to make its financial system safer, nor to protect its own citizens from predatory financial behaviour, but rather to advance foreign policy and national security objectives. Only in America, for instance, would citizens have to apply to the finance ministry in order to get a visa to visit Cuba.

Leadership is important, and most countries would be fine with following America’s lead for some things—cross-border rules governing stability, liquidity, and leverage, for instance. But even then the US has a tendency to ignore everybody else once the rules have been written, and decide to implement a set of entirely separate rules instead. The hegemon does whatever it wants, for its own, often inscrutable reasons, and it does not enjoy being questioned about its decisions.

No other country can get away with this: what we are seeing is unapologetic American exceptionalism, manifesting as extraterritorial powermongering. Using financial regulation as a vehicle for international power politics is extremely effective. It is also very cheap, compared with, say, declaring war.

US officials never apologise for the fact that their own domestic law always trumps everybody else’s; rather, they positively revel in it. The consequence is entirely predictable: a very high degree of resentment at the way in which the U.S. throws its weight around.35

The U.S. indictments, plea agreements and extradition requests in the Fédération Internationale de Football Association (FIFA) fraud scandal are triggering similar signs of international skepticism. The first criticism actually came from Russia,36 which does not have much credibility in complaining about extraterritorial assertion of power, much less in complaining about the FIFA investigations (since it allegedly benefitted from the bribes that are being investigated). But that does not necessarily detract from the merits of the Russian criticism. Indeed, The Economist noted that Russia was onto something, observing that “American prosecutors . . . do indeed reach much farther than their peers elsewhere—sometimes too far” and that while the crack down on FIFA is welcome “when it comes to bribery, America has sometimes been too audacious.”37 DOJ’s reliance on the RICO Act and Travel Act (rather than anti-bribery statutes) to establish jurisdiction to prosecute what essentially are bribery allegations does not help its cause.38

The extraterritorial adventures of U.S. courts in antitrust proceedings have not yet produced quite this much heat, but they are producing in their own way a great deal of heat, and one senses that the temperature is rising.

### 2AC---LD---Offends Sovereigns (Long)

#### Turn---the plan permits foreign plaintiffs to sue *only if* their or the defendant’s host countries lack robust anti-cartel laws---both developed *and* developing support the AFF because it restrains jurisdiction when cases are better heard elsewhere---that’s 1AC Schmidt and…

Huffman 07, \*Max Huffman, Visiting Assistant Professor, University of Cincinnati College of Law (2005-2007); (2007, “A Standing Framework for Private Extraterritorial Antitrust Enforcement”, https://scholar.smu.edu/cgi/viewcontent.cgi?article=1438&context=smulr)

a. New Emphasis on Comity Concerns

The Empagran Court admonished that litigation must not go forward if foreign comity concerns militated sufficiently strongly against it.251 The rule following Empagran is that some safeguard must be in place. As in the domestic enforcement sphere, with regard to extraterritorial enforcement, courts cannot rely on private plaintiffs to self-select and not bring suit because of diplomatic concerns. 252 A modified prudential standing analysis permits courts to decline to hear cases that, based on their developed common-law experience, should not be cognizable. This flexible analysis of comity concerns can take account of changing circumstances horizontally-with regard to which foreign sovereign is in question, and vertically-over time.

The Empagran litigation is a prime example of the benefits of malleability in the invocation of foreign comity concerns. Consider first horizontal variation. At issue in Empagran were foreign sovereigns with which the United States has diplomatic ties. The comity analysis for other foreign sovereigns might differ.253

The degree to which comity concerns are implicated by extraterritorial enforcement also depends on the nature of that sovereign's economic regulation. Empagran raised comity concerns with regard to four foreign sovereigns-Australia, Ecuador, Panama, and the Ukraine-whose antitrust regulation, or lack of regulation, was threatened with preemption if the foreign plaintiffs' claims were permitted to go forward in U.S. court under U.S. law.254 Scholars analyzing Empagran have ignored the fact that those countries did not appear in the litigation raising comity concerns. 255 The concerns came, instead, from others such as Britain, Canada, Germany, and Japan-major U.S. trading partners with robust antitrust regulation. 256 The U.S. government, the parties, and other amici also advanced comity arguments, primarily in the contexts of U.S. allies with sophisticated antitrust laws.257 Neither scholarly nor judicial analysis has considered the extent to which the comity concerns that were advanced were relevant to the particular sovereign nations whose antitrust regulation-or lack thereof, in the case of Ecuador258 - supposedly were threatened with being undermined.259

In Hartford Fire, the Court observed that some types of extraterritorial jurisdiction of U.S. economic regulation do not undermine foreign sovereigns' efforts to regulate their own domestic commerce. 260 The Court asked only whether U.S. regulation actually conflicted with regulation by foreign sovereigns. Because it did not, extraterritorial jurisdiction was found. 261 There may be a good explanation why foreign amici in Empagran were limited to those nations with sophisticated antitrust regulation. Sovereign nations without such regulation-but suffering perhaps substantial harm from cartel conduct in their economies 262 -may be illinclined to oppose assistance by U.S. courts in maintaining competitive conditions in their own domestic commerce. 263 At a minimum, a court should explore this question in an individual case before assuming the Empagran approach applies to a particular foreign sovereign. 264

The "vertical" (temporal) analysis of comity considerations is not constant either. For any one foreign sovereign, U.S. diplomatic policy toward that country is not unchanging. Legal rules developed based on the comity analysis on day zero might not be relevant on day one.265 The same applies with regard to changing economic regulations worldwide. The advent of antitrust regulations in foreign countries in recent decades has been a much remarked phenomenon.266 Justification for extraterritorial application of U.S. antitrust laws will decrease as that development continues and other sovereigns' regulations become more sophisticated. Conversely, should there be a slowing or setback in that development, the need for extraterritorial enforcement of U.S. antitrust laws might increase. Few issues demand the flexibility of common law analysis so much as does the comity question.2 67

#### That means the AFF *avoids* conflict with developed countries….

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>)

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

[FOOTNOTE 279]

279. Such a policy could also advance the United States's foreign policy interests by avoiding conflict with other developed countries with which it collaborates in antitrust enforcement.

[END FOOTNOTE 279]

# 1AR

### 1AR---AT: Solvency

#### Seriously---blocking statutes are paper tigers.

Hoda 18, \*M.J. Hoda, J.D. 2017, University of California, Berkeley, School of Law; (2018, “The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It”, http://www.californialawreview.org/wp-content/uploads/2018/02/6Hoda-34.pdf)

That changed when the U.S. Supreme Court decided Société Nationale Industrielle Aérospatiale v. U.S. District Court .66 There, American plaintiffs brought suit against two French corporations following an airplane crash in the United States.67 When the plaintiffs sought discovery, the defendants claimed that the French Blocking Statute forbid them from complying with the plaintiffs’ request and moved for a protective order.68 Both the trial and appellate courts ordered the defendants to violate the French Blocking Statute and produce the requested documents.69 In a 5-4 decision, the Supreme Court affirmed that U.S. litigants may initiate “any discovery pursuant to . . . the Federal Rules of Civil Procedure” against foreign counterparts, and that “[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute.”70

The Aérospatiale majority expressly refused to “articulate specific rules to guide [the] delicate task of adjudicat[ing]” the conflict between motions to compel and applicable blocking statutes.71 Instead, it instructed lower courts to adjudicate conflicts based on “[their] knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke.”72 In response, the dissent lamented the majority’s “failure to provide lower courts with any meaningful guidance” about how to resolve blocking-statute conflicts.73 And indeed, in Aérospatiale’s wake, commentators have largely agreed that the majority’s opaque decision was “regrettable.”74 Despite its vague guidance, Aérospatiale did mark one clear advance in the law. Today, if a case is properly before a U.S. court, the judge can order discovery in spite of a clearly applicable blocking statute.

Scholarly opprobrium notwithstanding, U.S. courts have applied Aérospatiale to the best of their ability. Part II, below, discusses the various ‘Aérospatiale tests’ that the lower courts have developed. But before considering those tests, it is useful to take a global view of blocking statutes’ fates in the U.S. courts thus far. Since Aérospatiale was decided in 1987, blocking statutes have ceased posing any serious obstacle to otherwise-justified U.S. discovery.75 Geoffrey Sant proved that claim quantitatively in his article Court-Ordered Law Breaking .76 In his study, Sant identified fifty-six opinions that referenced Aérospatiale in considering whether to order violations of foreign law.77 He found “overwhelming evidence of pro-forum bias” in the lower courts’ applications of Aérospatiale.78

Sant’s study confirmed that foreign states’ blocking-statute gambit has largely failed. In all but a small minority of cases, U.S. courts have rejected the foreign litigants’ blocking-statute defense—thereby rendering blocking statutes “paper tigers” in all but a few instances.79 What is less clear, however, is the future of blocking statutes, and, by extension, the extraterritorial-discovery conflict more broadly. Are blocking statutes destined to gather dust?

#### foreign compulsion is too hard to prove to be meaningful.

Martyniszyn 12, \*Dr. Marek Martyniszyn is a Senior Lecturer in Law at Queen’s University Belfast (UK). Previously he was a Senior Research Fellow in the Institute for Consumer Antitrust Studies at Loyola University Chicago. He holds a PhD from University College Dublin (completed on a prestigious Ad Astra Scholarship), an LLM (with specializations in EU Economic and World Trade Law) from the Saarland University’s European Institute, and Master degrees from the Warsaw School of Economics; (Martyniszyn, M. (2012). A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation. Competition Law Review, 8(2), 143-167. http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1986032)

Foreign state compulsion is one such state-related defence, or to better reflect their common effect: avoidance techniques.3 It is a valid defence in antitrust cases, potentially fully removing liability from the party invoking it. Although widely recognised,4 it is a rule of domestic law, not a principle of international law. Foreign state compulsion is usually treated as a sui generis defence, peculiar either to the international context or even to the antitrust area.5 The rationale behind it is at least twofold and includes comity and fairness considerations.6 Comity among nations calls for a domestic court to give due deference to the governmental (de jure imperii) acts of a foreign sovereign. Fairness requires not holding an entity liable for a conduct which it did not undertake of its own free will. Unfortunately that is where clarity ends. Despite the reasonably straightforward logic behind it, the foreign state compulsion doctrine remains a rather poorly defined legal tool, offering little predictability in terms of possible outcomes in both leading competition law regimes: the US and the EU. This is unsatisfactory especially as strong industrial policies and state regulation in economic affairs are not reminiscences of the past, but still a feature of important economies, for example in the BRIC states.7

This paper offers a new contribution to the extensive literature on the international aspects of competition laws. It aims to partly fill the existing gap by providing a comparative perspective on the issue of foreign state compulsion as a defence in antitrust cases in the US and in the EU. It also attempts to indicate the present contours of the defence, in light of the most recent and still emerging US case law, underlining the aspects of the doctrine requiring further consideration. This paper argues that at present the standard required to prove compulsion is set too high to make it a workable and reliable legal tool, serving its purpose.

### 1AR---AT: Floodgates DA

#### 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.”

#### AND special masters solve.

BakerHostetler 20, BakerHostetler is a leading law firm that helps clients around the world address their most complex and critical business and regulatory issues. (Baker, 3/5/20, The Need for Special Masters in Complex Antitrust Cases, <https://www.antitrustadvocate.com/2020/03/05/the-need-for-special-masters-in-complex-antitrust-cases/>)

The ABA resolution advises the bench and bar that utilization of special masters has evolved over the last 50 years from the rare exception to a commonplace tool to manage complex litigation, including antitrust cases. In 2019, the American Bar Association issued a resolution “urging” state and federal courts “to make greater and more systematic use of special masters to assist in civil litigation” “to aid in the just, speedy and inexpensive determination” of cases, as mandated by the federal rules of civil procedure. The ABA resolution advises the bench and bar that utilization of special masters has evolved over the last 50 years from the rare exception to a commonplace tool to manage complex litigation, including antitrust cases. Still, courts and parties are occasionally reticent to use masters, perhaps due to inexperience with the concept, misconceptions about the benefits or unfounded concerns about the costs. This article intends to discuss the law governing special masters, detail the various ways special masters can benefit the courts and litigants, and provide some best practices concerning their engagement. What Rules Govern Special Masters Engagements? In 1957, the U.S. Supreme Court in La Buy v. Howes Leather, an antitrust case, held that the appointment of a special master by a district judge was not justified by docket congestion, issue complexity and the substantial time commitment demanded by the case; rather, “exceptional circumstances” were necessary. By 2003, however, the law had shifted as Federal Rule of Civil Procedure 53 was amended due to swelling federal dockets to expressly authorize appointment of special masters where pretrial or post-trial matters “cannot be effectively and timely addressed by an available district judge or magistrate judge of the district.” The advisory committee notes recognize: “The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation.” Recognizing this shifting legal landscape, the U.S. Court of Appeals for the Third Circuit in Glover v. Wells Fargo Home Mortgage, a 2015 consumer protection case involving mortgage foreclosures, affirmed the appointment of a special master, over the objection of the plaintiff, to assist the district judge and the assigned magistrate judge with escalating discovery disputes. Judge Patty Shwartz of the U.S. Court of Appeals for the Third Circuit, writing for the court, explained: “While the 1957 La Buy court viewed docket congestion, issue complexity, and the time-consuming nature of a case as not justifying the appointment of a special master, the 2003 version of Rule 53 reflects the changing practices in using special masters. As the advisory committee specifically recognized, the appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades to aid district courts in managing complex litigation.” How Do Courts Benefit From Special Masters? Court-appointed special masters are especially useful in antitrust and other complex litigation due to the myriad of issues presented and multiple parties frequently involved. In In re Generic Pharmaceuticals Pricing Antitrust Litigation, for example, U.S. District Judge Cynthia Rufe of the Eastern District of Pennsylvania appointed several special masters to monitor the discovery process in a multidistrict antitrust case involving pricing of generic pharmaceuticals. Similarly, in Santana Products v. Bobrick Washroom Equipment, former U.S. District Judge Thomas Vanaskie of the Middle District of Pennsylvania used a special master’s services extensively and praised his work in that multidimensional antitrust case involving massive and contentious discovery: “The court is most grateful for the work performed by Mr. Reihner in superintending the sometimes contentious discovery problems that are often encountered in litigation of this complexity.” In Santana Products, the author suggested the appointment of a special master in the initial case management plan. The special master vastly benefited the administration of the case by attending depositions, ruling on problematic discovery objections, holding hearings on spoliation issues, and overall streamlining the discovery process, as the court acknowledged. Other recent examples of special master appointments in complex cases include: Behrens v. Arconic, where U.S. District Judge Michael Baylson of the Eastern District of Pennsylvania appointed a special master with expertise on French law to assist with potentially thorny international discovery issues, Jordan v. Mirra, where U.S. District Judge Gerald McHugh of the Eastern District of Pennsylvania appointed a special master to assist with discovery due to his temporary role as a visiting judge in the U.S. District Court for the District of Delaware, in addition to his Eastern District of Pennsylvania responsibilities, and In re K-Dur Antitrust Litigation, where erstwhile Chief District Judge Anthony Greenaway of the District of New Jersey appointed a special master to, among other things, issue a report and recommendation on motions for class certification and dispositive motions for summary judgment. Relying on special masters can be a critical safety valve when district courts experience understaffing due to judicial vacancies or heavy caseloads. For example, the U.S. District Court for the District of New Jersey currently has six judicial vacancies that have been designated judicial emergencies by the Judicial Conference. Weighted filings per judgeship in the district tally 903 cases. Similarly, the U.S. District Court for the District of Delaware recently witnessed a snappy uptick in filings as a result of the Supreme Court’s TC Heartland decision, which drove patent cases into a district that coincidentally saw several judicial retirements. These courts have successfully employed special masters to help manage unusually heavy dockets. Special masters can wear many hats, particularly if litigants consent to their appointment. Examples drawn from actual appointments in the Third Circuit include: Monitoring discovery and resolving motions to compel and for protective orders. Assessing privilege logs and reviewing in camera withheld documents. Supervising public and private consent decrees that require retention of jurisdiction. Overseeing distribution of settlement proceeds to qualified applications. Mediating complex settlement negotiations that cannot be resolved in a single conference. Solving e-discovery disputes concerning search terms and custodians. Monitoring compliance with and designations under confidentiality agreements. Conducting accountings to compute damages or disgorgement.. Holding hearings concerning sanctionable conduct, such as spoliation. Reviewing petitions for attorney fees and costs. Drafting reports on motions for class certification and summary judgment. How Do Parties Benefit From Special Masters? How can litigants benefit from special masters? After all, they are responsible for paying the special master’s fees, usually split evenly between the parties, though awardable to the prevailing party in motion practice if permitted by the appointment. Even considering this added expenditure, special masters are worth the cost in complex antitrust cases for three reasons. First, the cost is usually a drop in the bucket compared to the cost of complex litigation, not to mention the potential liability. Second, utilized properly, special masters can proactively monitor proceedings and therefore anticipate and circumvent avoidable disputes, saving litigants the substantial cost of formal motion practice and occasionally delayed rulings. They can also steer clear of internecine fights that cause litigation costs to spiral and can result in court sanctions. Third, if courts choose a special master with expertise in the relevant subject matter, as they should, the parties will save the cost of teaching generalist courts about esoteric economic and other challenging concepts inherent in the practice of antitrust law. Moreover, special masters can significantly shorten the duration of litigation and can avoid the judicial limbo that often results from an antitrust case’s demand on judicial resources. Illustrative of judicial resources needed to shepherd an antitrust case to verdict, the U.S. Judicial Conference assigns antitrust cases a “complexity weight” of 3.42, representing the average amount of time needed to resolve them, compared to 1.41 for insurance contract cases, .75 for prisoner civil rights cases, and .90 and .61 for personal injury and products liability cases, respectively. Masters can alleviate this demand on judicial resources, break logjams and accelerate the timeline for a verdict or summary judgment.