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### 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

## ADV---Developing Economies

### 2AC---AT: Democracy Dead

#### Post-pandemic, democracy is at a tipping point---democracy is fragile, but decline isn’t inevitable.

Daly 21, \*Tom Gerald Daly is Deputy Director at Melbourne School of Government, and Director of the project COVID-DEM, which curates and publishes analysis of how the pandemic is affecting democracy worldwide; (May 1st, 2021, “Democracy and the Global Pandemic”, https://verfassungsblog.de/democracy-and-the-global-pandemic/)

Has Covid Accelerated Global Democratic Decay?

On the second question, whether the pandemic has redrawn the democratic atlas, the broad consensus among democracy assessment organisations is that it has [“exacerbated the global decline in freedom”](https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege), although the V-Dem Institute suggests its “direct effects on global levels of liberal democracy were limited in 2020.” Given widespread pre-existing democratic decay, even if the Covid crisis only nudged states further down the wrong path it seems to have produced a global tipping point, epitomised by multiple reports de-listing India as a genuine democracy. Immediate fears for further global decline centre on the continuation of emergency measures beyond the needs of the crisis, or their normalization (the dreaded [‘ratchet’ effect](https://www.tandfonline.com/doi/full/10.1080/20508840.2020.1788232)). The Chinese government’s propaganda campaigns against liberal democracies during the crisis, and [frontal assault](https://www.theguardian.com/world/2020/jul/31/concern-as-hong-kong-postpones-elections-for-one-year-citing-covid-19) on Hong Kong’s freedoms (as well as [reshaping its electoral and political system](https://thediplomat.com/2021/03/china-remakes-hong-kongs-electoral-system/)) have also hardened the line between China and democratic states.

On the positive side, reports from both [Freedom House](https://freedomhouse.org/report/freedom-world/2021/democracy-under-siege) and the [V-Dem Institute](https://www.v-dem.net/files/25/DR%25202021.pdf) suggest that most democracies have shown resilience (although as [International IDEA](https://www.idea.int/sites/default/files/publications/global-democratic-trends-before-and-during-covid-19-pandemic.pdf) suggests, this means non-democratic states became significantly less free). It is important, too, to point out that these frameworks can only capture a slice of reality, even the enormous dataset of V-Dem. [As Kim Scheppele warns](https://onlinelibrary.wiley.com/doi/abs/10.1111/gove.12049), assessment through indicators is always limited. Moreover, assessment frameworks are descriptive but not predictive: they can tell us the picture is bleak right now but cannot tell us what is to come. Whether some states will rebound. Whether emergency measures will be unjustifiably extended. Whether a quiescent populace today might roil with protest tomorrow. Whether today’s troubles will spur a concerted democratic reaction.

More broadly, assessment reports cannot fully capture the good news stories that do not ping loudly enough on our radars – the tales of innovation, resilience, and defiance that are harder to capture through standardized criteria. Here, the qualitative assessments in this Symposium, and the material curated through [the COVID-DEM database](https://mailchi.mp/4d07f74ac625/democratic-decay-resource-dem-dec-first-monthly-newsletter-september-bibliography-update-4893832?e=3cebe79b8c), help us to see the future with hope as well as fear. [Krista Kovács](https://verfassungsblog.de/hungary-and-the-pandemic-a-pretext-for-expanding-power/) points to citizen demands for freedom across Poland, Belarus, Russia, Myanmar. Bolsonaro’s spiteful response, telling the Brazilian people to [“stop whining”](https://www.dw.com/en/coronavirus-digest-brazils-bolsonaro-tells-people-stop-whining/a-56778948), and [countered institutionally](https://verfassungsblog.de/covid-19-in-brazil-a-sick-constitutional-democracy/) by Congress and the courts, may yet prove to be his downfall. Similarly, some believe the unfolding unprecedented crisis “threatens Modi’s grip on India“, while [Thulasi Raj](https://verfassungsblog.de/covid-19-and-the-crisis-in-indian-democracy/) in her country report urges the need to “reclaim” Indian democracy.

## ADV---Resource Cartels

## AT: T---PRIVATE SECTOR =/= EXTRATERRITORIALITY

### 2AC---AT: T---Extraterritoriality (Emory)

#### The private sector is the part of the economy that isn’t state controlled.

investopedia 20, (“Private Sector”, https://www.investopedia.com/terms/p/private-sector.asp)

What is the Private Sector?

The private [sector](https://www.investopedia.com/terms/s/sector.asp) is the part of the economy that is run by individuals and companies for profit and is not state controlled. Therefore, it encompasses all for-profit businesses that are not owned or operated by the government. Companies and corporations that are government run are part of what is known as the public sector, while charities and other [nonprofit organizations](https://www.investopedia.com/terms/n/non-profitorganization.asp) are part of the voluntary sector.

#### Private sector means any private enterprise

Hess et al 17 (Janto S. Hess-Institute for Risk and Disaster Reduction at University College London, Earth System Governance Project. Ilan Kelman-Institute for Risk and Disaster Reduction at University College, Institute for Global Health, University College London, University of Adger. “Tourism Industry Financing of Climate Change Adaptation: Exploring the Potential in Small Island Developing States” <https://discovery.ucl.ac.uk/id/eprint/1567003/1/cddj-vol02-iss2-4.pdf> , Received: 12 November 2016 / Accepted: 17 July 2017 / Published online: 25 July 2017, date accessed 7/19/21)

After the initial pledge to provide USD 100 billion annually by 2020, private sector involvement in adaptation finance was increasingly highlighted (UNEP, 2016; Pauw & Pegels, 2013; Atteridge, 2011). In this article, the term ‘private sector’ is primarily understood as any privately-owned enterprise. The private sector will likely have to adapt, and in many cases already adapts, to climate change through exploiting new business opportunities and managing climate-related risks (Pauw, 2015; Surminski, 2013). Tracking private finance in adaptation is a major challenge due to scarcity of information (Pauw, 2015; Agrawala et al., 2011).

#### 4---Arbitrariness. Collins not exclusive. It doesn’t say THE country’s economy, and US Code was written to be *solely* applicable to that statute.

U.S. Code, 6 Edition. 2 U.S.C. Title 2 - The Congress. Chapter 17A - Congressional Budget and Fiscal Operations. Subchapter II - Fiscal Procedures. Part B - Federal Mandates. Sec. 658 – Definitions. https://www.govinfo.gov/content/pkg/USCODE-2006-title2/html/USCODE-2006-title2-chap17A-subchapII-partB-sec658.htm

§658. Definitions

For purposes of this part:

(1) Agency

The term “agency” has the same meaning as defined in section 551(1) of title 5, but does not include independent regulatory agencies.

(2) Amount

The term “amount”, with respect to an authorization of appropriations for Federal financial assistance, means the amount of budget authority for any Federal grant assistance program or any Federal program providing loan guarantees or direct loans.

(3) Direct costs

The term “direct costs”—

(A)(i) in the case of a Federal intergovernmental mandate, means the aggregate estimated amounts that all State, local, and tribal governments would be required to spend or would be prohibited from raising in revenues in order to comply with the Federal intergovernmental mandate; or

(ii) in the case of a provision referred to in paragraph (5)(A)(ii), means the amount of Federal financial assistance eliminated or reduced;

(B) in the case of a Federal private sector mandate, means the aggregate estimated amounts that the private sector will be required to spend in order to comply with the Federal private sector mandate;

(C) shall be determined on the assumption that—

(i) State, local, and tribal governments, and the private sector will take all reasonable steps necessary to mitigate the costs resulting from the Federal mandate, and will comply with applicable standards of practice and conduct established by recognized professional or trade associations; and

(ii) reasonable steps to mitigate the costs shall not include increases in State, local, or tribal taxes or fees; and

(D) shall not include—

(i) estimated amounts that the State, local, and tribal governments (in the case of a Federal intergovernmental mandate) or the private sector (in the case of a Federal private sector mandate) would spend—

(I) to comply with or carry out all applicable Federal, State, local, and tribal laws and regulations in effect at the time of the adoption of the Federal mandate for the same activity as is affected by that Federal mandate; or

(II) to comply with or carry out State, local, and tribal governmental programs, or private-sector business or other activities in effect at the time of the adoption of the Federal mandate for the same activity as is affected by that mandate; or

(ii) expenditures to the extent that such expenditures will be offset by any direct savings to the State, local, and tribal governments, or by the private sector, as a result of—

(I) compliance with the Federal mandate; or

(II) other changes in Federal law or regulation that are enacted or adopted in the same bill or joint resolution or proposed or final Federal regulation and that govern the same activity as is affected by the Federal mandate.

(4) Direct savings

The term “direct savings”, when used with respect to the result of compliance with the Federal mandate—

(A) in the case of a Federal intergovernmental mandate, means the aggregate estimated reduction in costs to any State, local, or tribal government as a result of compliance with the Federal intergovernmental mandate; and

(B) in the case of a Federal private sector mandate, means the aggregate estimated reduction in costs to the private sector as a result of compliance with the Federal private sector mandate.

(5) Federal intergovernmental mandate

The term “Federal intergovernmental mandate” means—

(A) any provision in legislation, statute, or regulation that—

(i) would impose an enforceable duty upon State, local, or tribal governments, except—

(I) a condition of Federal assistance; or

(II) a duty arising from participation in a voluntary Federal program, except as provided in subparagraph (B)); 1 or

(ii) would reduce or eliminate the amount of authorization of appropriations for—

(I) Federal financial assistance that would be provided to State, local, or tribal governments for the purpose of complying with any such previously imposed duty unless such duty is reduced or eliminated by a corresponding amount; or

(II) the control of borders by the Federal Government; or reimbursement to State, local, or tribal governments for the net cost associated with illegal, deportable, and excludable aliens, including court-mandated expenses related to emergency health care, education or criminal justice; when such a reduction or elimination would result in increased net costs to State, local, or tribal governments in providing education or emergency health care to, or incarceration of, illegal aliens; except that this subclause shall not be in effect with respect to a State, local, or tribal government, to the extent that such government has not fully cooperated in the efforts of the Federal Government to locate, apprehend, and deport illegal aliens;

(B) any provision in legislation, statute, or regulation that relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority, if the provision—

(i)(I) would increase the stringency of conditions of assistance to State, local, or tribal governments under the program; or

(II) would place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding to State, local, or tribal governments under the program; and

(ii) the State, local, or tribal governments that participate in the Federal program lack authority under that program to amend their financial or programmatic responsibilities to continue providing required services that are affected by the legislation, statute, or regulation.

(6) Federal mandate

The term “Federal mandate” means a Federal intergovernmental mandate or a Federal private sector mandate, as defined in paragraphs (5) and (7).

(7) Federal private sector mandate

The term “Federal private sector mandate” means any provision in legislation, statute, or regulation that—

(A) would impose an enforceable duty upon the private sector except—

(i) a condition of Federal assistance; or

(ii) a duty arising from participation in a voluntary Federal program; or

(B) would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with such duty.

(8) Local government

The term “local government” has the same meaning as defined in section 6501(6) of title 31.

(9) Private sector

#### \*\*\*Emory Starts Here\*\*\*

The term “private sector” means all persons or entities in the United States, including individuals, partnerships, associations, corporations, and educational and nonprofit institutions, but shall not include State, local, or tribal governments.

## AT: T---REMEDIES

### 2AC---AT: T---Remedies (Emory)

#### 3---civil fines are prohibitory.

Flyn 8, Prof. of Law, Nova Southeastern University Shepard Broad Law Center (Loyola Consumer Law Review Volume 21 Issue 2 Article 4 2008 This is the End... My Friend: Disgorgement, Dissolution and Sequestration as Remedies under State UDAP Statutes Michael Flyn Follow this and additional works at: http://lawecommons.luc.edu/lclr Part of the Consumer Protection Law Commons Recommended Citation Michael Flyn This is the End... My Friend: Disgorgement, Dissolution and Sequestration as Remedies under State UDAP Statutes, 21 Loy. Consumer L. Rev. 181 (2008). Available at: http://lawecommons.luc.edu/lclr/vol21/iss2/4 This Feature Article is brought to you for free and open access by LAW ecommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW ecommons. For more information, please contact law-library@luc.edu.)

2 o8] DISSOLUTION, DISGORGEMENT, SEQUESTRATION 185 the form of civil penalties and reimbursement of attorney fees and cost is both a strong remedy and a strong deterrent. 5 III. THE HISTORY OF PUBLIC ENFORCEMENT Although court issued injunctions prohibiting specific kinds of unfair and deceptive trade practices are a routine part of most court judgments 36 and consent decrees obtained for violation of UDAP statutes 3 7, almost none of these injunctions prohibit the business entity or its individual principles from conducting business again. In fact, there is no reported case in which the public enforcers have sought and received the dissolution of business entities and the sequestration of assets for distribution to injured consumers and public enforcers as a remedy for a UDAP violation. The powerful remedies of dissolution, disgorgement and sequestration, as recommended and employed by the FTC, remain largely unused and inactive. In 1966, the Federal Trade Commission proposed that state UDAP statutes should at least authorize the state courts "for violation of an injunction issued under the Act to restrain unfair or deceptive practices,... to assess civil penalties in an amount up to $25,ooo;38 and the court additionally is authorized, in its discretion, to order dissolution or suspension or forfeiture of franchise of any corporation which violates such an injunction." 3 9 The Federal Trade Commission went on to comment that the remedy of an injunction and a civil fine or penalty is a prohibitory remedy, while the remedy of dissolution, disgorgement and sequestration is a structural remedy. 4 " Public enforcement agencies have traditionally focused on the prohibitory remedies because such remedies can effectively stop unfair and deceptive trade practices. However, public 11 Id. at 737-38; Haddad v. Gonzalez, 576 N.E.2d 658, 666 (Mass. 1991) (deterrent value of multiple damage awards). 36 NAT'L CONSUMER LAW CTR., supra note 22, at 945. 31 Id. at 95 1-52. 38 Press Release, Fed. Trade Comm'n, FTC Proposes That States Enact Laws to Prevent Consumer Deception and Unfair Competitive Practices, Also to Regulate Hearing Aid Dealers and Correspondence Schools (July 7, 1966) [hereinafter FTC Proposal] (on file with author). 31 Id. at io. 40 Roundtable on Remedies and Sanctions in Abuse of Dominance Cases, available at http://www.ftc.govlbc/international/docs/abuseremediesunited States.pdf (last visited Nov. 13, 2008).

#### Cartel-specific evidence.

Beaton-Wells 16 (CARON BEATON-WELLS -\* BA, LLB (Hons), LLM, PhD (Melb); Professor, Melbourne Law School, The University of Melbourne. ARTICLE: PRIVATE ENFORCEMENT OF COMPETITION LAW IN AUSTRALIA -- INCHING FORWARDS?, 39 Melbourne U. L.R. 681, 711. 2016. Lexis accessed online via KU libraries, date accessed 1/20/22)

The concerns of the ACCC were addressed by the legislature in 2009. 116 However, the approach underpinning the 2009 amendments appears to favour protection of the ACCC Immunity Policy over the encouragement of private actions. The 2009 amendments made to the CCA established a scheme relating to 'protected cartel information' ('PCI'). 117 [[FOOTNOTE 117 BEGINS]] 117 PCI is defined as information that was given to the ACCC in confidence and relates to a breach or possible breach of the cartel offences or the cartel civil penalty prohibitions: CCA ss 157B(7), 157C(7). [[FOOTNOTE 117 ENDS]] The scheme invests substantial discretion in the ACCC to determine whether to grant access to PCI to a court or tribunal, or to a person engaged in or considering court proceedings, based on a finite set of factors, none of which directly refers to the interests of private claimants. 118 Controversially, the scheme displaces the common law doctrine relating to public interest immunity privilege (under which the competing interests of the public enforcement system and private rights to compensation are weighed and balanced) 119 and limits the availability and scope of judicial review of ACCC decisions not to provide disclosure under the scheme. 120

#### Counter-interpretations---prohibit can mean ‘severely hinder’---doesn’t necessitate a ban.

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

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

Our court reached that same conclusion, rejecting a similar argument, in Dejarlais. There the court stated, "nothing in the statute prevents drafting a protection order which allows some contact, for instance, by telephone or through a third party. There is no requirement that all contact be prohibited." State v. Dejarlais, 136 Wn.2d 939, 945, 969 P.2d 90 (1998).

RCW 26.50.110 does not apply only to orders that prohibit all contact. Accordingly, the statute was properly applied to Mr. Kimball's behavior.

#### 2---precision---their card’s distinction is incoherent given that the topic’s ceiling is a prohibition on anticompetitive business practices---that’s all we can topically do.

Jo Seldeslachts et al. ‘7. Professor of Industrial Organization at KU Leuven and a Senior Research Fellow at DIW Berlin, with Joseph A. Clougherty and Pedro Pita Barros. “Remedy for now but prohibit for tomorrow: the deterrence effects of merger policy tools.” https://www.ssoar.info/ssoar/bitstream/handle/document/25862/ssoar-2007-seldeslachts\_et\_al-remedy\_for\_now\_but\_prohibit.pdf;jsessionid=A244005110FDB5816E0347D9F1B75436?sequence=1

Let us now think about the differences between the two antitrust actions of prohibitions and remedies.7 In the case of a prohibition, the penalty for proposing a merger with significant anti-competitive problems involves the full prohibition of the merger: both the pro-competitive and the anti-competitive profits for merging firms are negated by the prohibition. The throwing out of the pro-competitive profits along with the anti-competitive profits is important, as this brings about the punitive measure that Posner (1970) acknowledges as being crucial for deterrence. The big difference between remedies and prohibitions is that remedies attempt to identify and eliminate the anti-competitive elements of a merger. In essence, the merging firms are able to hold on to the pro-competitive elements of the merger—so they keep (ΠPC), but the anti-competitive elements of the merger (ΠAC) are negated by the remedial action. If an antitrust authority imposes remedies, then the disincentive for firms to propose anti-competitive mergers is clearly lower. In short, prohibitions seemingly involve more deterrence than do remedies, as prohibitions represent larger punishments.

## AT: CP---DPA

### 2AC---AT: CP---DPA

#### It’s legitimate---antitrust prohibitions can include exemptions.

Frederick 89 (Donald A. Frederick-Attorney-Adviser. “MANAGING COOPERATIVE ANTITRUST RISK” , United States Department of Agriculture, Agricultural Cooperative Service, Cooperative Information Report 38, <https://www.rd.usda.gov/files/cir38.pdf>, 1989, date accessed 9/5/21)

This exposes farmers to considerable antitrust risk unless their joint marketing activity is conducted in a manner exempt from antitrust prohibitions. As one judge phrased it:

“It is clear that if individual agriculturalists, through the medium of a cooperative, jointly fixed prices, reasonably or otherwise, without statutory authorization, they would be subject to prosecution.” (emphasis added) 14/

#### Prohibit means ‘severely hinder’---not all or nothing.

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

Noting that the statute only applies if the order includes "restraint provisions prohibiting contact," Mr. Kimball alleges that since he is permitted some contact with Kara, the order is not one "prohibiting contact." This contention, of course, would render most no contact orders unenforceable if the former couple had children in common since nearly all orders of this type, as in this case, permit emergency contact or contact for limited purposes.

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

Our court reached that same conclusion, rejecting a similar argument, in Dejarlais. There the court stated, "nothing in the statute prevents drafting a protection order which allows some contact, for instance, by telephone or through a third party. There is no requirement that all contact be prohibited." State v. Dejarlais, 136 Wn.2d 939, 945, 969 P.2d 90 (1998).

RCW 26.50.110 does not apply only to orders that prohibit all contact. Accordingly, the statute was properly applied to Mr. Kimball's behavior.

#### Biden already used the DPA to solve COVID.

Lupkin 3-13-2021 (Sydney, “Defense Production Act Speeds Up Vaccine Production,” https://www.npr.org/sections/health-shots/2021/03/13/976531488/defense-production-act-speeds-up-vaccine-production)

In the run-up to President Biden's promise on March 2 that there would be enough COVID-19 vaccines for every adult in the United States by the end of May, he talked up a Korean War era law called the Defense Production Act.

Biden mentioned it in his first presidential remarks about the pandemic fight from the White House State Dining Room on Jan. 26. He brought it up again during a Feb. 19 trip to a Pfizer vaccine factory in Kalamazoo, Mich., while he stood in front of gleaming stainless steel production equipment. He brought the law up on Feb. 25 after watching a Washington, D.C., resident get vaccinated in front of cameras at the Eisenhower Executive Office Building for an event to celebrate the 50-millionth shot. Less than two hours later, he talked about the law in the National Governors Association's winter meeting.

So perhaps it was no surprise Biden brought up the Defense Production Act yet again in his announcement this month that his administration brokered a deal between two pharmaceutical rivals — Merck and Johnson & Johnson — to increase the vaccine supply and help deliver doses earlier than expected.

"We also invoked the Defense Production Act to equip two Merck facilities to the standards necessary to safely manufacture the J&J vaccine," he said, adding that Johnson & Johnson was getting other government help as well. "In addition, we'll continue to use the Defense Production Act to expedite critical materials in vaccine production, such as equipment, machinery, and supplies."

## AT: CP---CFIUS

### 2AC---AT: CP---CFIUS (Emory)

#### 2---DOJ is key to making competition-specific determinations.

Dogan 08, \*Stacey L. Dogan, Professor of Law, Northeastern University; \*Mark Lemley, William H. Neukom Professor, Stanford Law School; of counsel, Keker & Van Nest LLP; (October 2008, “Antitrust Law and Regulatory Gaming”, https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1873&context=faculty\_scholarship)

Even those agencies whose mission expressly involves consideration of competition issues will not necessarily make it their first among potentially conflicting priorities. The SEC, for example, which as Justice Breyer pointed out is dedicated to improving market information and expressly considers competition among other issues in setting regulation,53 is first and foremost an investor-protection and information-disclosure agency, not an agency that investigates and weeds out cartels or other anticompetitive practices. It is unlikely to devote much in the way of time or resources to such issues, because even if it is tasked to consider such issues they do not reflect the agency’s primary purpose. Similarly, even an agency like the Federal Communications Commission that is directly focused on competitive conditions in a particular market may naturally pay attention primarily to that market, and give less if any attention to the effect its rules might have on competition in adjacent markets or competition from unanticipated new businesses. This arguably explains the FCC’s willingness to largely ignore the effects of its decisions on the Internet, for example: it is telecommunications, not the Internet, that the FCC is tasked to regulate.

Agencies that view competition as secondary, or view it through the lens of a particular industry’s characteristics and interests, are less likely to create and enforce rules that optimally encourage competition.54 At a bare minimum, therefore, the industry-specific expertise of an agency must be balanced against the competition-specific expertise of the specialist antitrust agencies: the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division.

## AT: CP---PROA PIC

### 2AC---AT: CP---PROA PIC (Emory)

#### Only private enforcement maximizes deterrence---enhances the likelihood that a cartel is detected and makes operation cost-prohibitive---it’s superior to public enforcement---that’s 1AC Schmidt and…

Harrington 15, \*Joshua Harrington, Patrick T. Harker Professor, Department of Business Economics & Public Policy, at The Wharton School, University of Pennsylvania; (January 2015, “The Comity-Deterrence Tradeoff and the FTAIA: Motorola Mobility Revisited”, <https://joeharrington5201922.github.io/pdf/cpi15.pdf>)

IV. THE POTENTIAL HARM CREATED BY THE SEVENTH CIRCUIT’S DECISION

Public and private antitrust enforcement can shut down existing cartels and deter future cartels from forming by influencing both the likelihood that a cartel is discovered and convicted and the extent of penalties brought to bear on convicted cartels. The higher is that likelihood, the more likely is the spigot of harm to be shut off. The higher is that likelihood and the more severe are the penalties, the more likely that firms will be deterred from ever turning the spigot on. If we take private damages out of the equation, how much is the disabling and deterring of cartels impacted?

In addressing that question, let us first consider the scenario in which, if there is a cartel, the government were to prosecute it. Presuming that they obtain a conviction, the cartel will be shut down and thus serve the objective of disabling cartels. However, the lack of private suits weakens the objective of deterring cartels as penalties are limited to jail time and government fines and lack potentially sizable private damages. It is well-recognized that current penalties— even with private damages—are very likely to be insufficient to deter. As this point is well-argued in a recent Amicus Curiae Brief16 and the point is not new, I will not dwell on it. Suffice it to say that the Court’s decision to prohibit companies like Motorola to sue will undoubtedly reduce the penalties levied on cartels and, because the full array of penalties are currently inadequate to deter many cartels, will contribute to antitrust enforcement further falling short of what is require to achieve the goal of deterrence.

The preceding analysis was predicated on the critical assumption that the government prosecutes the cartel, but this may not occur for two reasons. First, the government may be unaware of the cartel’s existence. Lacking the right to bring a private case, cartels are less likely to be discovered because those harmed have weaker incentives to monitor for collusion. Nevertheless, they still do have some incentive to monitor and report a suspected cartel to the government in order to disrupt the harm that is being inflicted upon them. It is then unclear whether the loss of antitrust standing will substantively weaken the incentive to monitor to the point that it warrants interfering with comity.

Of greater relevance is the second reason for the lack of public enforcement, which is that the government suspects unlawful collusion but chooses not to litigate. The Antitrust Division of the U.S. Department of Justice (“DOJ”) has limited resources, which means all possible cases cannot be pursued. Furthermore, the presence of a resource constraint impacts the type of cases that are pursued. These days, the DOJ’s caseload is heavily oriented to cases involving the leniency program but not all forms of collusion lend themselves to a firm receiving amnesty. A member of a hard-core cartel engaged in a per se offense can expect to receive leniency if it is the first to come forward but there are many cases of collusion that do not involve behavior that is per se unlawful. Given the lower threshold for a conviction in a civil case, private litigation has been, and will continue to be, essential in prosecuting these less flagrant, but no less harmful, forms of collusion.

While it is difficult to document case selection by the DOJ, there is certainly evidence consistent with it being a substantive factor. In noting that the DOJ obtained convictions in 92 percent of 699 cases filed over 1992 to 2008, Professors Robert Lande and Joshua Davis comment:17

The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases, perhaps at least in part because it lacks the necessary resources. This may well create a need for private litigation as a complement to government enforcement of the antitrust laws.

#### Prefer our evidence---theirs is empirically and statistically unfounded.

Konopasek 21, \*Seth Konopasek, (February 2021, “Treble, Treble Toil and Trouble: The New Per Se Rule as a Protection Against the Curse of the "Supreme Evil" Protection Against the Curse of the "Supreme Evil”, https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1214&context=wmblr)

A common theme of Lande’s work in support of private antitrust actions (and in the work of those that have followed him) is the lambasting of critics who make their arguments against private antitrust actions with no empirical evidence.144 Along with co-author Joshua P. Davis, Lande points out that “[t]hose who point to the perceived flaws of private antitrust enforcement typically offer only anecdotes ... rather than provide reliable and rigorous data to support their arguments.”145 In that same article, Lande and Davis analyze forty cases to conclude that “private antitrust actions complement government enforcement ... . [and] may be every bit as essential as public enforce- ment.”146 In another empirical study, this one covering seventy-one law review pages, Lande and Davis conclude that “the high success rate of government litigation suggests that in the absence of private litigation, many bad actors would get away with violating the antitrust laws.”147 In 2015, Lande revisited his 1993 ques- tion148 and once again found through empirical analysis that “cartel recoveries are mostly less than single damages.”149

#### 2---the plan doesn’t expose American firms to anything---only opens the courts to foreign plaintiffs who sue for foreign defendants---that’s Schmidt… our solvency advocate.

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>)

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

#### 3---no frivolous lawsuits.

Lande 17, \*Robert H. Lande is the Secretary of the American Antitrust Institute’s Board of Directors. He was the AAI’s first Senior Fellow and a co-founding Director of the AAI and has served the AAI on a full-time basis during three different periods. He is the Venable Professor of Law at the University of Baltimore; \*Joshua P. Davis is Professor of Law and Director of the Center for Law and Ethics at the University of San Francisco; (January 1st, 2017, “Restoring the Legitimacy of Private Antitrust Enforcement”, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2017&amp;context=all_fac>)

D. Frivolous Class Action Antitrust Suits are Not a Significant Problem

Fueled by tort reform rhetoric, critics maintain that frivolous antitrust litigation is common, that it often forces businesses to incur expensive and abusive discovery, and that it allows class action lawyers to extort settlements of meritless claims. However, the reality is that while frivolous antitrust claims no doubt are sometimes brought (perhaps by inexperienced or incompetent attorneys, or by competitors for anticompetitive purposes51), there is simply no empirical or theoretical support for the critics’ overblown claims that antitrust class actions are systematically meritless.

The myth of widespread abusive antitrust class actions seems deeply ingrained in the current legal culture. It is reflected, for example, in Twombly, where the Supreme Court raised the bar for pleading an antitrust conspiracy because of the problem of “discovery abuse,” which the Court said “will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings.”52 It is reflected in the work of some leading antitrust scholars.53 And it is reflected in the views of the mainstream antitrust bar.54

The frivolous litigation myth is premised on the idea that plaintiffs will bring weak claims in order to obtain settlements and that defendants will settle such claims in order to avoid the costs of discovery (“nuisance settlements” theory)55 or the small risk of “massive exposure” that may accompany class actions as a result of treble damages, joint and several liability, and fee shifting (“hydraulic pressure” theory).56 Both theories are seriously flawed.

The “nuisance settlements” theory assumes that class action plaintiffs can impose disproportionate litigation costs on defendants,57 but the reverse is more likely.58 Discovery can be expensive for defendants and plaintiffs. As the American Antitrust Institute (AAI) noted in its amicus brief in Twombly:

For all that defendants must identify and produce voluminous documents, plaintiffs must copy, store, and review them. For all that defendants must produce witnesses for depositions in far-flung locations, plaintiffs must pay court reporters and videographers to record those depositions, and lawyers must travel to and take them. Plaintiffs must also hire expert economists to opine on the existence and amount of overcharges . . . . In class actions, counsel must bear the substantial cost of class certification.59

Moreover, defendants can and do raise plaintiffs’ litigation costs with motion practice, including motions to dismiss, Daubert motions, and motions for summary judgment, which judges increasingly are inclined to grant. And frivolous cases subject plaintiffs’ attorneys to sanctions under Rule 11, including payment of defendants’ attorneys’ fees.60 “Meritless filings are not met with payoff money; they are met with motion practice, and sometimes sanctions.”61 And, of course, class action lawyers operating on a contingency basis personally bear the risk of losing, and even when they obtain a recovery, their fees are capped. In contrast, defense counsel, who are ordinarily compensated by the hour, “can make a credible threat to mount a lavish defense that a plaintiff’s attorney cannot credibly counter.”62 In short, rational class action lawyers have little incentive to bring claims they know to be weak, and rational defendants have strong incentives to resist settling frivolous claims, even if it would be cheaper in the short run to settle.63

#### 4---chilling effect now---thumper threshold is low.

Sorkin et al. 21, \*Andrew Ross Sorkin is a columnist and the founder and editor-at-large of DealBook; \*Jason Karaian is the editor of DealBook, based in London; \*Sarah Kessler is a senior staff editor for DealBook and the author of “Gigged,” a book about workers in the gig economy; \*Stephen Gandel is a news editor for DealBook. He was previously a senior reporter for CBS News, and a columnist at Bloomberg; \*Michael de la Merced joined The Times as a reporter in 2006, covering Wall Street and finance; \*Lauren Hirsch joined the New York Times from CNBC in 2020, covering business, policy and mergers and acquisitions; \*Ephrat Livni reports from Washington on the intersection of business and policy for DealBook; (July 27th, 2021, “Biden’s Antitrust Team Talks Its Way to a Win”, https://www.nytimes.com/2021/07/27/business/dealbook/aon-deals-antitrust.html)

Tough talk on antitrust

In the Biden administration’s first major antitrust action, the government scored a victory simply by showing a willingness to fight. Aon called off its proposed $30 billion takeover of the rival insurer Willis Towers Watson yesterday, citing delays stemming from a lawsuit brought just over a month ago by the Justice Department to block the deal, which was first announced in March last year.

“This is a victory for competition and for American businesses,” Attorney General Merrick Garland said in a statement after the deal was scrapped. The [government argued](https://www.justice.gov/opa/press-release/file/1404951/download) that merging two of the three biggest insurance brokers would “likely lead to higher prices and less innovation.” The companies countered that the government didn’t understand their businesses.

“We reached an impasse,” Greg Case, Aon’s C.E.O., said in a statement. Aon had angled for a summer trial while the Justice Department suggested winter next year. The judge set a November date, but warned of delays; Aon decided that instead of digging in, it would pay a $1 billion termination fee to Willis and move on.

Tough talk can make big deals less appealing, former antitrust officials told DealBook. “The risk and time delays of a merger challenge often cause the parties to abandon a deal,” said Doug Melamed, a Stanford law professor and former acting chief of the Justice Department’s antitrust division. President Biden’s pledge to rein in corporate power with [more aggressive antitrust enforcement efforts](https://www.nytimes.com/2021/07/09/business/biden-big-business-executive-order.html), backed by a [team of Big Tech critics](https://www.nytimes.com/2021/07/21/business/dealbook/kanter-justice-antitrust.html), is limited by existing laws. Aon’s move highlights how trustbusters can have their way by other means.

And even if the government doesn’t win every case it brings, the signals it sends about scrutinizing mergers more closely [have been received by deal makers](https://www.bloomberg.com/news/articles/2021-07-26/deal-boom-under-threat-in-washington-after-aon-willis-deal-dies?srnd=deals), who are otherwise having a very busy year. (One of the [busiest on record](https://www.reuters.com/business/media-telecom/global-markets-ma-2021-06-04/), in fact.)

## AT: K---CAP

### 2AC---AT: K---Cap (Emory)

#### A---War---Cap solves nuclear war through interdependence---the alt’s disruption causes a transition war.

Drezner ’16 [Daniel; May 2016; Professor of International Politics at Tufts University, Ph.D. in Political Science and M.A. in Economics in Stanford University, B.A. in Political Economy from Williams College; Brookings Institution, “Five Known Unknowns about the Next Generation Global Political Economy,” <https://www.brookings.edu/wp-content/uploads/2016/07/IOS-Drezner-web.pdf>]

Multiple scholars have observed a secular decline in interstate violence in recent decades.105 The Kantian triad of more democracies, stronger multilateral institutions, and greater levels of cross-border trade is well known. In recent years, international relations theorists have stressed that commercial interdependence is a bigger driver of this phenomenon than previously thought.106 The liberal logic is straightforward. The benefits of cross-border exchange and economic interdependence act as a powerful brake on the utility of violence in international politics. The global supply chain and “just in time” delivery systems have further imbricated national economies into the international system. This creates incentives for governments to preserve an open economy even during times of crisis. The more that a country’s economy was enmeshed in the global supply chain, for example, the less likely it was to raise tariffs after the 2008 financial crisis.107 Similarly, global financiers are strongly interested in minimizing political risk; historically, the financial sector has staunchly opposed initiating the use of force in world politics.108 Even militarily powerful actors must be wary of alienating global capital.

Globalization therefore creates powerful pressures on governments not to close off their economies through protectionism or military aggression. Interdependence can also tamp down conflicts that would otherwise be likely to break out during a great power transition. Of the 15 times a rising power has emerged to challenge a ruling power between 1500 and 2000, war broke out 11 times.109 Despite these odds, China’s recent rise to great power status has elevated tensions without leading to anything approaching war. It could be argued that the Sino-American economic relationship is so deep that it has tamped down the great power conflict that would otherwise have been in full bloom over the past two decades. Instead, both China and the United States have taken pains to talk about the need for a new kind of great power relationship. Interdependence can help to reduce the likelihood of an extreme event—such as a great power war—from taking place.

#### B---Warming---clean energy is rapidly superseding fossil fuels which is sufficient to avoid tipping points.

Wallace-Wells 21, \*David Wallace-Wells is deputy editor of New York magazine, where he also writes frequently about climate change and the near future of science and technology; (January 18th, 2021, “After Alarmism”, https://nymag.com/intelligencer/article/climate-change-after-pandemic.html)

The change is much bigger than the turnover of American leadership. By the time the Biden presidency finds its footing in a vaccinated world, the bounds of climate possibility will have been remade. Just a half-decade ago, it was widely believed that a “business as usual” emissions path would bring the planet four or five degrees of warming — enough to make large parts of Earth effectively uninhabitable. Now, thanks to the rapid death of coal, the revolution in the price of renewable energy, and a global climate politics forged by a generational awakening, the [expectation](https://climateactiontracker.org/global/temperatures/) is for about three degrees. Recent pledges [could bring us closer to two](https://climateactiontracker.org/publications/global-update-paris-agreement-turning-point/). All of these projections sketch a hazardous and unequal future, and all are clouded with uncertainties — about the climate system, about technology, about the dexterity and intensity of human response, about how inequitably the most punishing impacts will be distributed. Yet if each half-degree of warming marks an entirely different level of suffering, we appear to have shaved a few of them off our likeliest end stage in not much time at all.

The next half-degrees will be harder to shave off, and the most crucial increment — getting from two degrees to 1.5 — perhaps impossible, dashing the dream of avoiding what was long described as “catastrophic” change. But for a climate alarmist like me, seeing clearly the state of the planet’s future now requires a conspicuous kind of double vision, in which a guarded optimism seems perhaps as reasonable as panic. Given how long we’ve waited to move, what counts now as a best-case outcome remains grim. It also appears, miraculously, within reach.

In December, a month after Biden was elected promising to return the U.S. to the Paris agreement, the U.N. celebrated five years since the signing of those accords. They were five of the six hottest on record. (The sixth was 2015, the year the agreement was signed.) They were also the years with the highest levels of carbon output in the history of humanity — with emissions equivalent to what was produced by all human and industrial activity from the speciation of Homo sapiens to the start of World War II.

They have also been the five years in which the nations of the world — and cities and regions, individuals and institutions, corporations and central banks — have made the most ambitious pledges of future climate action. Most of them were made in the past 12 months, in the face of the pandemic. Or, perhaps, to some degree, because of it — because the pandemic demanded a full-body jolt to the global political economy, provoking much more aggressive government spending, a much more accommodating perspective on debt, and a much greater openness to large-scale actions and investments of the kind that might plausibly reshape the world. And because decarbonization has come to seem, even to those economists and policy-makers blinded for decades to the moral and humanitarian cases for reform, a rational investment. “When I think about climate change,” Biden is fond of saying, “the word I think of is jobs.”

There are two ways of looking at these seemingly contradictory sets of facts. The first is that the distance between what is being done and what needs to be done is only growing. This is the finding of, among others, the U.N.’s comprehensive [“Emissions Gap” report](https://www.unenvironment.org/emissions-gap-report-2020), issued in December, which found that staying below two degrees of warming would require a tripling of stated ambitions. To bring the planet in reach of the 1.5-degree target — favored by activists, most scientists, and really anyone reading their work with open eyes — would require a quintupling. It is also the perspective of Greta Thunberg, who has spent the pandemic year castigating global leaders for paying mere lip service to far-off decarbonization targets and who called the E.U.’s new net-zero emissions law “surrender.”

The second is that all of the relevant curves are bending — too slowly but nevertheless in the right direction. The International Energy Agency, a notoriously conservative forecaster, recently [called](https://www.carbonbrief.org/solar-is-now-cheapest-electricity-in-history-confirms-iea#:~:text=Source%3A%20IEA%20World%20Energy%20Outlook%202020.&text=Together%2C%20low%2Dcarbon%20sources%20would,up%20from%2019%25%20in%202019.) solar power “the cheapest electricity in history” and projected that India will build 86 percent less new coal power capacity than it thought just one year ago. Today, business as usual no longer means a fivefold increase of coal use this century, as was once expected. It means pretty rapid decarbonization, at least by the standards of history, in which hardly any has ever taken place before.

Both of these perspectives are true. The gap is real, and the world risks tumbling into it, subjecting much of the global South to unconscionable punishments all the way down. But in the months since the pandemic wiped climate strikers off the streets, their concerns have seeped into not just public-opinion surveys but parliaments and presidencies, trade deals and the advertising business, finance and insurance — in short, all the citadels presiding over the ancien régime of fossil capital.

This is not exactly a climate revolution; the strikers and their allies didn’t win in the way they wanted to, at least not yet. But they did win something. Environmental anxieties haven’t toppled neoliberalism. Instead, to an unprecedented degree, they infiltrated it. (Or perhaps they were appropriated by it. It’s an open question.) Climate change isn’t an issue just for die-hards anymore — it’s for normies, sellouts, and anyone with their finger in the wind. It will take time, of course, for voters to see empty rhetoric for what it is, and for consumers to learn to distinguish, say, between the claims of guiltless airline tickets, or between carbon-free foods in the supermarket aisle. Harder still will be sorting through the differences between real corporate commitments like Microsoft’s and more evasive ones, like BP’s. Already, there is considerable consternation among climate activists that the public doesn’t understand the tricky math of “net-zero” on which so many of these commitments have been made—it is not a promise of ending emissions, but of offsetting some amount of them, in the future, with “negative emissions,” sometimes called “carbon dioxide removal,” though no approach of that kind is ready to go at anything like the necessary scale. And while some amount of skepticism about those commitments is surely warranted, it is also the case that, according to [a recent Bloomberg review](https://www.bloomberg.com/graphics/2020-company-emissions-pledges/), of 187 corporate climate pledges made for 2020 in 2015, 138 will be met. (Many of those promises were quite modest, but it is a much better performance than has been managed by the 189 parties to the Paris agreement, of which only two — Morocco and Gambia — are today [judged](https://climateactiontracker.org/countries/) fully “compatible” with the 1.5-degree goal, and only six more with the 2-degree target).

In the political sphere, the uneasy alliance between activists and those in power will be tested, producing new conflicts, or new equilibria, or both. Consider, though, that Varshini Prakash, whose [Sunrise Movement](https://www.sunrisemovement.org/) gave Biden’s primary candidacy an F, later helped write his climate plan along with Alexandria Ocasio-Cortez. Climate expertise has been distributed throughout the incoming administration, as was promised during a campaign that closed, remarkably, with a climate-focused advertising blitz. During the transition, Biden’s pick for director of the National Economic Council, Brian Deese, was targeted by the environmental left for his time with BlackRock, but even this purported stooge had been married by Bill McKibben, one of the godfathers of modern climate activism.

Elsewhere in the world, where 85 percent of global emissions are produced, the great infiltration of climate concerns represents what the British environmental [writer](https://www.businessgreen.com/blog-post/4025199/2020-crisis-crossroads-alternative-histories) James Murray has called “an alternative history to 2020” and what the scientist turned journalist Akshat Rathi [has declared](https://www.bloomberg.com/news/articles/2021-01-05/climate-action-is-embedding-into-how-the-world-works) “a strong sign that climate action is starting to be ‘institutionalized’ — that is, getting deeply embedded into how the world works.” This is not about coronavirus lockdowns producing emissions drops or “nature healing.” It is instead about long-standing trajectories passing obvious tipping points in coal use and political salience; promises and posturing by powerful if compromised institutions; and policy progress almost smuggled into place, all over the world, under cover of pandemic night. In the U.S., in the second coronavirus stimulus, [$35 billion in clean-energy spending](https://nymag.com/intelligencer/2020/12/what-is-in-covid-stimulus-omnibus-climate-pell-grants-medical-billing.html) passed in the Senate 92-6 — an effective down payment, energy researcher Varun Sivaram has estimated, on the innovation spending needed for a full electrification of the country. Did you even notice?

Biden’s climate plan now faces the challenge of a filibuster, a skeptical Supreme Court, and the mood of Senator Joe Manchin of West Virginia, which means American climate action over the next four years is probably more likely to be delivered piecemeal — through appropriations and stimulus, executive action, and regulation — than through a landmark Green New Deal–style piece of legislation. That does limit what can be achieved, but it also means avoiding a protracted battle over climate as a referendum on the identity of the nation. And at least nominally, having been pressured by activists to do so, Biden is promising to multiply the green spending in that recent stimulus by a factor of 60.

The numbers are numbingly large — reminders that in the midst of pandemic turmoil, the rules of state spending have been dramatically revised and perhaps even suspended. Is this global free-spending binge the beginning of a new era or merely a crisis interregnum to be followed by a new new austerity? “We don’t know what the recovery packages of COVID are going to be,” Christiana Figueres, one of the central architects of the Paris accords, told me this summer. “And honestly, the depth of decarbonization is going to largely depend on the characteristics of those recovery packages more than on anything else, because of their scale. We’re already at $12 trillion; we could go up to $20 trillion over the next 18 months. We have never seen — the world has never seen — $20 trillion go into the economy over such a short period of time. That is going to determine the logic, the structures, and certainly the carbon intensity of the global economy at least for a decade, if not more.”

For those dreaming of a climate recovery, the first round of spending was not so encouraging. The E.U. was the gold standard, promising that 30 percent of its stimulus would be earmarked for climate. The U.S. and China each pledged only a fraction of that (and in each case, there was fossil stimulus, too). But in October, a team of researchers including Joeri Rogelj of the Imperial College of London [calculated](https://www.reuters.com/article/climate-change-stimulus/tenth-of-pandemic-stimulus-spend-could-help-world-reach-climate-goals-study-idUSKBN271098) that just one-tenth of the COVID-19 stimulus spending already committed around the world, directed toward decarbonization during each of the next five years, would be sufficient to deliver the goals of the Paris agreement and stop global warming well below two degrees. That analysis may be a touch optimistic, but the level of spending seems, now, doable.

When Donald Trump was elected, trashing Paris, climate hawks were left hoping that the world would hang on for the length of his administration — insisting that, in the long term, the crisis couldn’t be solved without America at the helm. But the past four years of missing leadership have produced astonishing gains.

The price of solar energy has fallen ninefold over the past decade, as has the price of lithium batteries, critical to the growth of electric cars. The costs of utility-scale batteries, which could solve the “intermittency” (i.e., cloudy day) problem of renewables and help power whole cities in relatively short order, have fallen 70 percent since just 2015. Wind power is 40 percent cheaper than it was a decade ago, with offshore wind experiencing an even steeper decline. Overall, renewable energy is less expensive than dirty energy almost everywhere on the planet, and in many places it is simply cheaper to build new renewable capacity than to continue running the old fossil-fuel infrastructure. Oil demand and carbon emissions may both have peaked this year. Eighty percent of coal plants planned in Asia’s developing countries have been shelved.

This summer, I heard the Australian scientist and entrepreneur Saul Griffith talk about what it would take to get the U.S. within range of a 1.5 degree world. He said it would mean that beginning in 2021, this year, every single person buying a new car would have to be buying an electric one. That seems unrealistic, I thought, making a note of it as a useful benchmark illustrating just how far we have to go.

Then, in the fall, the U.K. pledged to ban nonelectrics by 2030—a once-unthinkable law coming both too slow and much more quickly than seemed possible not very long ago. Similar plans are now in place in 16 other countries, plus Massachusetts and California. Canada recently raised its tax on carbon sixfold. Italy cut its power-sector emissions 65 percent between 2012 and 2019, and Denmark is now aiming to reduce its overall emissions 70 percent by 2030. “We set ourselves challenges that on paper looked almost impossible,” the country’s minister for the environment, Dan Jørgensen, told me recently. “And I think experts in many countries said, when looking at Denmark, ‘This is going to be too expensive, this is going to lower their living standards, this is going to hurt their ability to compete.’ But actually I’m proud to say that the opposite has happened. Now, of course, we have set even higher standards.”

In the midst of the pandemic, new net-zero pledges, far more ambitious than those offered at Paris, were independently made by Japan, South Korea, the E.U., and, most significant, China, the world’s biggest emitter, which promised to reach an emissions peak by 2030 and get all the way to zero by 2060. China’s promise is so ambitious it has inspired one wave of debate among experts about whether it is even feasible — given that it would require, for instance, roughly twice as much renewable power to be installed every year for the next decade as Germany has operating nationwide today — and another debate about whether it has revived the possibility of that 1.5-degree target, with economic historian Adam Tooze writing, just after Xi Jinping’s surprise announcement in September, that it single-handedly “redefined the future prospects for humanity.” Together, the new net-zero pledges may have subtracted a full half-degree from ultimate warming. Add Biden’s campaign pledge of net zero by 2050, and you’ve got about two-thirds of global emissions at least nominally committed to firm, aggressive timelines to zero.

These are all just paper promises, of course, and the history of climate action is littered with the receipts of similar ones uncashed. Plot the growth of carbon concentration in the atmosphere against the sequence of climate-action conferences and a distressing pattern emerges: the World Meteorological Conference of 1979, the U.N. framework of 1992, the Kyoto protocol of 1997, the Copenhagen accord of 2009, and the 2015 Paris accords, all tracking an uninterrupted trajectory upward for carbon from a “safe” level under 350 parts per million, past 400, to 414 today, and pointing upward from there. Before the industrial revolution, humans had never known an atmosphere with even 300 parts per million. Inevitably now, within a few years, the concentration will reach levels not seen since 3.3 million years ago, when sea levels were 60 feet higher. For all their momentum, renewables still only make up 10 percent of global electricity production.

But alarmists have to take the good news where they find it. And while mood affiliation is not always the best guide to the state of the world, in 2020, for me, there were three main sources of hope.

The first is the fact that the age of climate denial is over thanks to extreme weather and the march of science and the historic labor of activists — climate strikers, Sunrise, Extinction Rebellion — whose success in raising alarm may have been so sudden that they brought an end to the age of climate Jeremiahs as well. Their voices now echo in some unlikely places. Exxon was booted from the S&P 500 within months of Tesla making Elon Musk the world’s richest man. The cultural cachet of oil companies is quickly approaching that of tobacco companies. Jair Bolsonaro of Brazil aside, practically every leader of every country and every major figure in every corporate and industrial sector now feels obligated — because of protest and social pressure, economic realities, and cultural expectation — to at least make a show of support for climate action. It would be nice not to have to count that as progress, but it is. The questions are: How much does it matter? And what will follow? Disinformation and human disregard are not the only instruments of delay, and the age of climate denial is likely to yield first not to an age of straightforward climate deliverance but to one characterized by climate hypocrisy, greenwashing, and gaslighting. But those things, ugly and maddening and even criminal as they are, have always been with us. It is the other thing that is new.

The second source of good news is the arrival on the global stage of climate self-interest. By this I don’t mean the profiteering logic of BlackRock, which opportunistically announced some half-hearted climate commitments last year, but rather the growing consensus in almost every part of the globe, and at almost every level of society and governance, that the world will be made better through decarbonization. A decade ago, many of the more ruthless capitalists to analyze that project deemed it too expensive to undertake. Today, it suddenly appears almost too good a deal to pass up. (A recent McKinsey [report](https://www.mckinsey.com/business-functions/sustainability/our-insights/how-the-european-union-could-achieve-net-zero-emissions-at-net-zero-cost): “Net-Zero Emissions at Net-Zero Cost.”)

The logic may be clearest in considering the effects of air pollution, which kills an estimated 9 million people per year. In India, where more than 8 percent of GDP is lost to pollution, poor air quality is also responsible for 350,000 miscarriages and stillbirths every year. Globally, coal kills one person for every thousand people it provides power to, and even in the U.S., with its enviably clean air, total decarbonization would be entirely paid for, Duke’s Drew Shindell [recently testified](https://www.vox.com/energy-and-environment/2020/8/12/21361498/climate-change-air-pollution-us-india-china-deaths) before Congress, just through the public-health benefits of cutting out fossil fuels. You don’t even have to calculate any of the other returns — more jobs, cheaper energy, new infrastructure. Of course, countries all around the world are incorporating those considerations too, turning the page on a generation of economic analysis that said decarbonization was too costly and its benefits too small to sell to the public as upside.

A decade ago, capitalists deemed decarbonization too expensive. Suddenly, it appears too good a deal to pass up.

What is perhaps most striking about all the new climate pledges is not just that they were made in the absence of American leadership but that they were made outside the boundaries of the Paris framework. They are not the result of geopolitical strong-arming or “Kumbaya” consensus. They are, instead, plans arrived at internally, in some cases secretly. This has been eye-opening for the many skeptics who worried for decades about climate’s collective-action problem — who warned that because the benefits of decarbonization were distributed globally while the costs were concentrated locally, nations would move only if all of their peers did too. But a [recent paper](https://www.mitpressjournals.org/doi/full/10.1162/glep_a_00578) by Matto Mildenberger and Michaël Alkin suggests this shouldn’t be a surprise. In their retrospective analysis, they found that, despite much consternation about designing climate policy to prevent countries from “cheating,” there was basically no evidence of any country ever pulling back from mitigation efforts to take a free ride on the good-faith efforts of others. There was, in other words, no collective-action problem on climate after all. For a generation, the argument for climate action was made on a moral basis. That case has only grown stronger. And now there are other powerful, more mercenary arguments to offer.

The third cause for optimism is that, while the timelines to tolerably disruptive climate outcomes have already evaporated, the timelines to the next set of benchmarks is much more forgiving. This is why Glen Peters, the research director at the Cicero Center for International Climate Research, often jokes that while keeping warming below two degrees is very hard, perhaps even impossible, keeping it below 2.5 degrees now looks like a walk in the park.

This isn’t to say we’re on a glide path to safety. At current emissions levels, the planet will entirely exhaust the carbon budget for 1.5 degrees in just seven years — stay merely level, in other words, and we’ll burn through the possibility of a relatively comfortable endgame within the decade. We could buy ourselves a little more time by starting to move quickly, but not that much more. To decarbonize fast enough to give the planet a decent chance of hitting that 1.5-degree target without any negative emissions would require getting all the way to net-zero emissions by around 2035. Simply running the cars and furnaces and fossil-fuel infrastructure that already exists to its expected retirement date would push the world past 1.5 degrees—without a single new gasoline SUV hitting the road, or a single new oil-heated home being built, or a single new coal plant opened.

A two-degree target, by contrast, yields a much longer timeline, requiring the world to achieve net-zero by 2070 or 2080 — without even the help of negative emissions. We’d have to cut carbon production in half in about three decades, rather than one. That pathway will almost certainly prove harder than it looks. The good news is that we seem to be beginning, at least, to try.

#### C---Quality of life---competition alleviates poverty and inequality---but the ALT hammers global development---case is a DA.

Piper 21, \*Kelsey Piper, a Staff Writer for Vox's new vertical; (August 3rd, 2021,“Can we save the planet by shrinking the economy?”, https://www.vox.com/future-perfect/22408556/save-planet-shrink-economy-degrowth)

The tension at the heart of degrowth: Can we fix global poverty without economic growth?

One big problem with degrowth is this simple fact: In the coming decades, most carbon emissions won’t be coming from rich countries like the US — they’ll be happening in newly middle-income countries, like India, China, or Indonesia. Already, developing nations account for 63 percent of emissions, and they’re expected to account for even more as they develop further and as the rich world decarbonizes.

Even if emissions in rich countries go to zero very soon, climate change is set to worsen as poorer countries increase their own emissions.

That will, of course, have deeply negative climate impacts. But the alternative is a nonstarter — should the world really prioritize curbing emissions and economic growth if it meant suppressing the growth of those countries?

Degrowthers see no dilemma here. What Hickel envisions is global movement in two directions: Poor countries could develop up to a certain level of prosperity and then stop; rich countries could develop down to that level and then stop. Thus, climate catastrophe could be averted, all while making the world’s poor more prosperous.

“Rich countries urgently need to reduce their excess energy and resource use to sustainable levels so our sisters and brothers in the global South can live well too,” Hickel put it. “We live on an abundant planet and we can all flourish on it together, but to do so we have to share it more fairly, and build economies that are designed around meeting human needs rather than around perpetual growth.”

From a climate change perspective, though, there’s a problem. First, it means that degrowth would do nothing about the bulk of emissions, [which are occurring in developing countries](https://www.cgdev.org/media/developing-countries-are-responsible-63-percent-current-carbon-emissions).

Second, the global economy is more interconnected than Hickel implies. When Covid-19 hit, poor countries were devastated not just by the virus but by the [aftershocks of virus-induced slowdowns in consumption in rich countries](https://documents1.worldbank.org/curated/en/799701589552654684/pdf/Costs-and-Trade-Offs-in-the-Fight-Against-the-COVID-19-Pandemic-A-Developing-Country-Perspective.pdf).

There’s some genuine appeal to the idea of an end to “consumerism,” but the pandemic offered a taste of how a sudden drop in rich-world consumption would actually affect the developing world. Covid-19 [dramatically curtailed Western imports and tourism for a time](https://documents1.worldbank.org/curated/en/799701589552654684/pdf/Costs-and-Trade-Offs-in-the-Fight-Against-the-COVID-19-Pandemic-A-Developing-Country-Perspective.pdf). The consequences in poor countries were devastating. Hunger rose, and child mortality followed.

#### 4---‘Commons’ movements fail---coopted, and can’t sustain traction.

Hollender 16, \*PhD. Specialist in environmental and development policy and planning: sustainable development, climate change, (April 14th, 2014, “A Politics of the Commons or Commoning the Political? Distinct Possibilities for Post-Capitalist Transformation”, https://vtechworks.lib.vt.edu/handle/10919/104832)

Alongside the evolution of new spaces and practices of the Commons, there has been a renewed interest from within the intellectual left to examine the emergence of the actors and practices that have contributed to its expansion. Some of the new integrants include radical voices from indigenous movements, social movements of the Global South, and other anti- and de-colonial struggles while others include representatives of capitalist establishments including the World Bank and private corporations, and state-based institutions from municipal to national levels.[ix] The discovery of right-wing, capitalist, and public institutional actors employing the concept of the Commons to gain support for their political agendas sounded warning bells for leftist theorists.[x] In addition, increasing evidence began to surface about the failure of many Commons initiatives to effect lasting transformation. These observations and others gave way to the emergence of critiques and objections from within the left questioning whether the Commons can be an effective approach for post-capitalist transformation.

Leftist critiques of the Commons range from overarching to detailed; some are calls for reflection and caution, while others argue for rejecting the framework entirely. Since it is not possible to capture every nuance and variation within this paper, attention will focus on those critiques most directly related to the inability of the Commons to impede capitalist expansion and contribute to building alternatives. Although one might approach the classification of these critiques and objections according to historical schisms such as state vs. non-state and reform vs. revolution, doing so would undermine the cross-cutting implications of the critiques themselves and underestimate the possibility of the Commons to transcend these divides. Instead, the objections will be grouped within two categories of concern that have traditionally been shared across the left: the risk of cooptation and failure to engage in sufficient systemic antagonism.

Obstacle 1: Risk and evidence of cooptation

Cooptation of non-capitalist experiments by capitalism is one of the longstanding, unresolved concerns of the left, and has been used to explain the failure of many radical projects over time. For example, the cooptation of organic and fair-exchange movements by capitalist interests has resulted in the for-profit commercialization of organic and fair-exchange products, as well as the assimilation of the symbols and practices of the radical movement into mainstream capitalist norms in order to promote consumeristic behaviors, thus diluting the original radical principles.[xi] The concern with cooptation is echoed by contemporary leftist scholars who argue that Commons initiatives are vulnerable to cooptation by capitalism's pervasive forms, putting at risk its ability to transform and transcend capitalism.[xii]

A number of theorists have put forth concepts to explain the forces and mechanisms by which capitalism coopts non-capitalist sites and practices. Among these are the processes of subsumption and commodification, which respectively incorporate non-wage labor and non-monetarily valued goods, services, spaces, and knowledge into the capitalist market economy.[xiii] [xiv] Another way of understanding the processes of subsumption and commodification is the incorporation by capitalism of new means for creating and accumulating value, thereby allowing for its continued expansion. Subsumption and commodification may overlap with and form part of the process of co-optation, which involves the assimilation of anti-capitalist symbols, practices, and norms into the service of capitalist expansion. The cooptation of anti-capitalist experiments renders impossible or contradictory the continued existence of these projects, as they become vital elements in upholding capitalism. According to traditional leftist theory, subsumption, commodification, and cooptation are driven by primitive accumulation[xv] and its modern day form of accumulation by dispossession[xvi], which are two of the strategies used by capitalism to continue expanding and asserting its control over non-capitalist sites, such as the Commons. Current examples of accumulation by dispossession include the privatization of communal, untitled, and public land, natural resources, and ecological services in the Global South, via land grabbing, Green Economy[xvii] market mechanisms, and the expansion of the extractive development model.[xviii]

The starting point of contemporary efforts to reclaim the Commons is the rejection and reaction to these capitalist processes of enclosure, privatization, and dispossession. In order to reverse these policies and projects that block access of people and communities to the land, spaces, knowledge, and resources that they depend on, the Commons creates processes and structures for allowing decisions related to access, ownership, and management to be made at the most local level possible. Initially, such efforts have proven to result in greater security by communities to their lands and resources, and increased participation and decision-making over shared goods, services, and spaces.[xix] However, the concern by leftist scholars is based on a belief that as long as Commons experiments are carried forth within a prevailing capitalist context, their eventual cooptation is inevitable. Scholars point to a number of contemporary examples of Commons initiatives whose success was short lived, due to their cooptation and rendering to serve capitalist goals (See section III).

Leftist scholars also point out how capitalist institutions have begun to employ partial discourses and practices of the Commons to bolster efforts they claim will fix the social and environmental problems created by capitalism without addressing the systemic roots of these problems. In doing so, they coopt the legal tools, language, and guiding principles of the Commons in order to justify projects that result in subsumption, commodification, and accumulation by dispossession.[xx] A clear example is the growing appropriation of communal lands in a number of eastern African countries, promoted by the World Bank as a way of preserving the Commons for future use.[xxi] Using the language of the Commons in order to legitimize the privatization of traditional land, a legal property form which is made vulnerable through the colonial legacy of blurry and paternalistic land tenure structures, the World Bank is carrying out a new wave of enclosures in the name of conservation. In addition, from 2008-2009 over 56 million hectares of land were either sold or rented in countries of the Global South[xxii], a process that involved legal agreements between states and private actors, in the name of conserving strategic natural resources of the "Global Commons" for the future.[xxiii] As a result, hundreds of communities have been dispossessed from their land and resources and the future availability of strategic resources by Southern countries is uncertain. These pro-capitalist uses of the Commons framework tarnish the reputation of legitimate Commons practices of restoring traditional communal land tenure practices in Africa that go beyond oppressive, pre-colonial models to include access, tenure rights, and decision-making ability for women.[xxiv] [xxv] This grave discrepancy demonstrates the need to distinguish between the two main variants of the Commons.

Obstacle 2: Inward solidarity versus outward antagonism

The second objection put forth by the left that questions the Commons' ability to make an important contribution to post-capitalist transformation points out the limitations of the radical political forms espoused by the Commons, namely open-endedness, pluriversality, and prefigurative politics. The skepticism by the left isn't due to a disagreement with the use of these forms, but a concern that they are not sufficiently accompanied with strategic practices for confronting issues of scale and the pervasive domination of capitalism's structures and norms. In other words, this critique calls into question the potential for Commons movements to sufficiently combine radical democratic practices with an antagonistic confrontation of the dominant structures and relationships that underlie capitalism.

One of the roots of this concern can be traced to longstanding observations by the left of the success with which capitalism erodes and overtakes democracy, posing obstacles to developing political processes that attempt to challenge capitalism. Known as the legitimation crisis, this theory argues that capitalism contains a number of mechanisms that allow it to continually subvert and dominate legitimate democratic processes in order to obtain certain conditions from the public sphere. Habermas[xxvi] offers three examples: (1) the political realm of the state is taken over by economic interests so that the political system cannot fulfill the needs of the public; (2) economic interests are taken over by self-interested politicians; and (3) the state becomes structurally dependent on capital in order to fulfill its public functions and thereby dependent on maintaining the primacy of economic priorities. In all cases, the economy becomes its own political subject whose needs take precedence over the needs and desires of the public, a direct subversion of democracy.

Alongside the erosion of the political sphere, the simultaneous pervasion of liberal and neoliberal economic values into social and cultural behaviors, values, and attitudes degrades the cohesion of citizen responses to the legitimacy crisis, as collective values are replaced by individualizing logics of consumption, prosperity, and debt.[xxvii] This societal permeation of capitalist norms has made it historically challenging for the anti-capitalist left to reach the necessary scale for tipping the balance of capitalist domination that allow alternatives to prosper and expand. A number of theorists have pointed out that unless radical movements can reach critical masses, they risk becoming islands of happiness for a happy few.[xxviii] The inability of movements to increase size and participation has been explained by three main critiques: (1) the potentially alienating aspects of radical theories and practices for populations which are historically embedded into capitalist norms, processes, and structures[xxix], (2) the limits of time, resources, access, prioritization, and desirability of participating in transformational initiatives[xxx], and (3) the failure (often deliberate)[xxxi] of anti-capitalist movements to put forth a clear process and end vision for transformation, which challenges the linear, goal-oriented theories of change that prevail in capitalist societies.

As a first step in attempting to overcome the formidable obstacles of legitimation crisis and societal permeation of capitalist norms, the Commons seeks to build bottom-up political processes that can reestablish and expand democratic decision-making according to collective values. The use of radical democratic principles and practices such as open-endedness, pluriversality, and prefigurative politics by some Commons groups creates political spheres that are hospitable to the coexistence of diverse forms of socioeconomic and political organization, and social normative structures.[xxxii] In other words, Commons political processes strive to embody their end goal, resulting in the co-evolution of means and ends. They also minimize the divide between the means and the ends by which goals are met, reducing the need for exclusionary blueprints or models, and allowing multiple, parallel processes to arise, collaborate, and coexist.

However, the Commons is not the first radical movement to embrace inclusive and horizontal political forms. Despite the strength of the inward looking radical democratic practices of diverse movements from 1960s radical feminists, to the modern-day climate and Occupy movements, these groups struggle(d) with dispersion, dissolution, and debilitating interruptions. When confronted by the dominant legal, economic, socio-normative, and political structures of capitalism, they demonstrated an inability to continuously engage in antagonistic, anti-systemic practices without being eventually engulfed or broken up. These experiences reveal that living by radical democratic principles alone is not enough, a critique which extends to Commons movements as they confront the tricky balance between being inwardly solidaristic and outwardly antagonistic. The concern of the left is that the strategic, anti-capitalist practices of Commons movements will be abandoned, overshadowed, or underdeveloped by an overemphasis open-endedness, pluriversality, and prefigurative politics.

#### 5---No AI impact.

Geist 15, MacArthur Nuclear Security Fellow at Stanford University's Center for International Security and Cooperation (CISAC). Previously a Stanton Nuclear Security Fellow at the RAND Corporation, he received his doctorate in history from the University of North Carolina in 2013. (Edward Moore, 8-9-2015, "Is artificial intelligence really an existential threat to humanity?", *Bulletin of the Atomic Scientists*, https://thebulletin.org/2015/08/is-artificial-intelligence-really-an-existential-threat-to-humanity/)

Convinced that sufficient “intelligence” can overcome almost any obstacle, Bostrom acknowledges few limits on what artificial intelligences might accomplish. Engineering realities rarely enter into Bostrom’s analysis, and those that do contradict the thrust of his argument. He admits that the theoretically optimal intelligence, a “perfect Bayesian agent that makes probabilistically optimal use of available information,” will forever remain “unattainable because it is too computationally demanding to be implemented in any physical computer.” Yet Bostrom’s postulated “superintelligences” seem uncomfortably close to this ideal. The author offers few hints of how machine superintelligences would circumvent the computational barriers that render the perfect Bayesian agent impossible, other than promises that the advantages of artificial components relative to human brains will somehow save the day. But over the course of 60 years of attempts to create thinking machines, AI researchers have come to the realization that there is far more to intelligence than simply deploying a faster mechanical alternative to neurons. In fact, the history of artificial intelligence suggests that Bostrom’s “superintelligence” is a practical impossibility.

## AT: DA---JAPAN

### 2AC---LD---Japan DA

#### No link:

#### 1---the plan only permits jurisdiction in antitrust cases where the plaintiff or defendants home country doesn’t offer at least single damages for outlawed cartel conduct---that’s 1AC Schmidt---meaning it wouldn’t apply to Japan.

Baker McKenzie Tokyo 22, \*a multinational law firm headquartered in Chicago, Illinois (“Antitrust and Competition in Japan”, [https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-japan/),\*original publication date unknown, but article](https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-japan/),*original%20publication%20date%20unknown,%20but%20article) is constantly updated

The Antimonopoly and Fair Trade Maintenance Act 1947 (Antimonopoly Act) governs antitrust and unfair business practices in Japan. Practices covered by the Antimonopoly Act include exclusive dealing, monopolization, price discrimination, predatory pricing, cartels, primary boycotts, tying arrangements, resale price maintenance and unwarranted abuse of bargaining position when dealing with another party.

1.           Overview of competition laws

There is no general provision in the Antimonopoly Act which prohibits anticompetitive practices. The Antimonopoly Act is divided into four parts:

the first part deals with unreasonable restraints of trade (cartels);

the second part distinguishes between “private monopolization” (which results from an intended exclusion or control of competitors);

the third part deals with unfair trade practices; and

the fourth part deals with mergers and acquisitions.

2.           Enforcement and administration

The Antimonopoly Act is administered by the Fair Trade Commission (Commission), which is an independent administrative commission. The Commission’s powers include the power to establish fair competition rules, designate unfair business practices, investigate, adjudicate and dispose of a case and issue cease-and-desist orders and surcharge payment orders to enterprises that violate the Antimonopoly Act. Any person (including individuals) may report a violation of the Antimonopoly Act to the Commission and ask the Commission to take appropriate measures to investigate and make a determination on an alleged violation. After that, the Commission has to initiate a necessary investigation. If the Commission conducts an administrative investigation, the investigator is designated from the staff of the Commission by the Commission. If the investigator of the Commission determines that an enterprise violates the Antimonopoly Act, the Commission issues cease-and-desist orders and/or surcharge payment orders to the enterprise. The enterprise may request the Commission to conduct a hearing proceeding regarding the said order if the enterprise is dissatisfied with the order. In the hearing proceeding, the hearing examiner who is designated from the staff of the Commission by the Commission decides the validity of the hearing request by the enterprise after hearing both the investigator’s opinion and the enterprise’s opinion. If the enterprise is dissatisfied with the decision, it may file a suit to rescind the said decision with the Tokyo High Court. The latest amendment to the Antimonopoly Act, enacted and promulgated in December 2013 (2013 Amendment), will significantly change the above-mentioned regime of appeal against administrative orders issued by the Commission. As the 2013 Amendment becomes effective,[[1]](https://www.globalcompliancenews.com/antitrust-and-competition/antitrust-and-competition-in-japan/" \l "_ftn1) the hearing proceeding will be abolished and replaced by the process of an appeal to a district court. Given that the complex economic issues often raised in antitrust cases require expertise in both law and economics, Tokyo District Court will have exclusive jurisdiction over the first instance of appeals against administrative orders issued by the Commission, in order to ensure consistency among judgments and to accumulate specialized knowledge. Similarly, the Tokyo High Court will have exclusive jurisdiction over the second instance of the said appeals. In addition, the number of judges composing the panel at Tokyo District Court and Tokyo High Court may be increased as compared to general civil/criminal cases, which is aimed at the careful examination of the antitrust cases.

3.           Anti-competitive agreements and other conduct

3.1         Cartel conduct

The phrase “unreasonable restraint on trade” as used in the Antimonopoly Act refers to situations in which: Any enterprise, by contract, agreement or any other concerted action (irrespective of the name) with another enterprise, mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, or to limit production, technology, products, facilities, or customers or suppliers, thereby substantially restraining, contrary to the public interest, competition in any particular field of trade. An “unreasonable restraint on trade” exists if the following elements can be established:

a contract, agreement or other concerted action between two enterprises to mutually restrict or conduct business activities;

to fix, maintain, or increase prices, or to limit production, technology, products, facilities, customers, suppliers or the like;

substantially restrains competition in any particular field of trade; and

contrary to the public interest.

The Antimonopoly Act regulates not only domestic cartels consisting of domestic Japanese enterprises, but also international cartels involving foreign enterprises. The Commission and Courts’ treatment of price-fixing cartels comes close to applying the principle of “per se” illegality. An agreement between competitors that does not affect the prices of products is, however, not per se illegal, and whether or not such agreement is in fact considered to substantially restrain fair competition in the market and amount to an illegal cartel will depend on market conditions.

Unfair Trade Practices

The Antimonopoly Act and the Fair Trade Commission Public Notice titled Designation of Unfair Trade Practices stipulate certain types of unfair trade practices. The main unfair trade practices are as follows:

3.2         Price discrimination

It is unlawful to supply or receive commodities or services at prices which unreasonably discriminate on the basis of region or customer.

3.3         Boycotts

Competitors must not, without justifiable cause, refuse to deal with, or decide jointly to limit dealings with, a specified party. In addition, competitors must not, without justifiable cause, force other parties not to deal with, or to limit their dealings with, a specified party.

3.4         Unjust low price sales

It is unlawful to unjustly supply goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other enterprises. There is no problem in providing goods at a low price that has been achieved through an enterprise’s efficient operations, but if an enterprise tries to acquire customers by offering a low price that totally disregards profitability, it may be unlawful. With regard to unjust low price sales, the Commission has issued the Guidelines concerning Unjust Low Price Sales under the Antimonopoly Act on 18 December 2009, as amended on 23 June 2011.

3.5         Resale price maintenance

It is unlawful, without justifiable cause, to require wholesalers or retailers to maintain wholesale or resale prices at a specified level.

3.6         Tying arrangements

It is unlawful to impose unfairly on a third party a condition that, in order to purchase certain commodities, it must also purchase other designated commodities.

3.7         Exclusive dealing

This is regulated under the unfair business practices provisions of the Antimonopoly Act. It is, for example, prohibited to deal with a party on condition that the party does not conduct business with a competitor, thus reducing the business opportunities for the competitor.

3.8         Trading on restrictive terms

The Fair Trade Commission Public Notice titled Designation of Unfair Trade Practices stipulates that an enterprise shall not trade with another party on conditions which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party. This provision is the general clause which covers unjustifiable restriction against a counterparty other than resale price maintenance and exclusive dealing as discussed above. The criteria for the legality of typical restrictions against a counterparty, such as restrictions on distributors’ handling of competing products, restrictions on distributors’ sales territory, restrictions on distributors’ customers, restrictions on retailers’ sales methods, and the like, is explained in the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act (Distribution Guidelines) issued on 11 July 1991, as amended on 1 November 2005, 1 January 2010 and 23 June 2011.

3.9         Interference with a competitor’s transactions

It is unlawful to unjustly interfere with a transaction between another enterprise who is in a domestic competitive relationship with oneself or with the corporation of which one is a stockholder or an officer, and its transacting party, by preventing the effecting of a contract, or by inducing the breach of a contract, or by any other means whatsoever.

3.10      Abuse of superior bargaining position

Where if one party (Party A) makes a request, etc., that is substantially disadvantageous for the other party (Party B), Party B would be unable to avoid accepting such a request, etc., on the grounds that otherwise Party B would have difficulty in continuing the transaction with Party A and thereby Party B’s business management would be substantially impeded, it is unlawful for Party A to conduct certain designated acts of imposing disadvantageous conditions on Party B in the transaction. In order to clarify the interpretation by the Commission, the Commission has issued the Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act on 30 November 2010.

4.           Abuse of dominant position

Private monopolization

The Antimonopoly Act prohibits such business activity, by which any enterprise excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. Private monopolization includes two types, “control type private monopolization” and “exclusionary type private monopolization,” and the surcharge rate is different between these two types, as discusses below under “Penalties and liabilities”. The “control type” means that an enterprise restrains other enterprises’ decision-making on their business activities and thereby bends them to its will. The “exclusionary type” refers to conduct that would cause difficulty for other enterprises to continue their business activities or for new market entrants to commence their business activities. With regard to “exclusionary type monopolization,” in order to clarify the interpretation by the Commission, the Commission has issued the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act on 28 October 2009.

5.           Mergers and acquisitions

The Antimonopoly Act prohibits mergers and acquisitions, if they would result in a substantial restraint of competition in any particular field of trade. The Commission may review a merger and acquisition, and may prevent the merger from proceeding if it would result in a substantial restraint of competition. If the transaction has already taken place, the Commission also has the power to order the parties to take a range of remedial steps, including divestiture or transfer of a business, in order to restore competition. In order to clarify how the potential effect of a merger on competition is reviewed and evaluated, the Commission has issued the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Guidelines). The Guidelines declare that the Commission will use the Herfindahl-Hirschman Index (HHI) as a safe harbour. Specifically, the Guidelines state that the scrutiny of a business combination will not be required in the following cases:

the HHI, after the transaction, is 1,500 or less.

the HHI, after the transaction, is over 1,500 but does not exceed 2,500, and the HHI increases by 250 or less as a result of the transaction.

the HHI after the transaction is over 2,500, but the HHI does not increase by more than 150 as a result of the transaction.

Although for this substantive analysis, the Commission previously limited the geographic market range to within Japan, the revised Guidelines have made it clear that the Commission will take into consideration the presence of competing overseas suppliers, which can affect the market within Japan.

5.1         Mergers of companies

If two companies (including foreign companies) merge and (i) the group of combined companies to which one of the parties to the transaction belongs has sales in Japan of more than JPY20 billion; and (ii) the group of combined companies to which any other party to the transaction belongs has sales in Japan of more than JPY5 billion, details of the proposed merger must be notified to the Commission at least 30 days prior to the proposed merger.

5.2         Stock acquisitions by a company

In the case of a stock acquisition by a company (including foreign companies), a report on the stock acquisition must be submitted to the Commission at least 30 days prior to the proposed acquisition, where:

the total amount of sales in Japan of the group of combined companies to which the acquirer belongs exceeds JPY20 billion;

the total amount of sales in Japan of the target company and its subsidiary exceeds JPY5 billion; and

as a result of the acquisition, the aggregate percentage shareholding (i.e., voting rights) of the group of combined companies to which the acquirer belongs would move to above 20 percent or to above 50 percent, respectively, of the total issued shares (i.e., voting rights) of the target company.

5.3         Other acquisitions (business acquisitions)

Details of the proposed acquisition must be filed with the Commission as part of a notification 30 days prior to completion of the acquisition, where the acquirer belonging to the group of combined companies whose total amount of sales in Japan exceeds JPY20 billion acquires any of the following:

The entire business from a company with sales in Japan of more than JPY3 billion;

The substantial part of a business, or entire or substantial part of the fixed assets of the business from a company with relevant sales in Japan of more than JPY3 billion.

5.4         Procedures of review of business combination

When a notification is filed with the Commission, the Commission reviews the said business combination to be conducted by the notifying company. As a result of the review, if the Commission ultimately judged that the said business combination is problematic in light of the Antimonopoly Act, a cease-and-desist order is issued by the Commission after the notice prior to the cease-and-desist order (prior notice) given to the notifying company. The concrete procedure of the review is as follows:

after filing a notification, the notifying company is prohibited from implementing the business combination, such as a merger and stock acquisition, until the expiration of the 30-day period from the date of the Commission’s receipt of the said notification. The Commission may shorten the 30-day period if it finds it necessary, when the notifying company requests it.

during the 30-day period (or during a shortened waiting period), the Commission will normally either: (i) judge that the said business combination is not problematic in light of the Antimonopoly Act and give notification to the effect that it will not issue a cease-and-desist order, or (ii) judge that a more detailed review is necessary and request for the submission of the necessary reports, information or materials.

in the case of (ii), the period of the review is extended until 120 days after the date of the receipt of notification or 90 days after the date of the receipt of all reports, etc., whichever is later. During the extended period, the Commission will either (a) judge that the business combination in question is not problematic in light of the Antimonopoly Act and give notification to the effect that it will not issue a cease-and-desist order, or (b) provide prior notice. After providing prior notice to the notifying company, the Commission issues a cease-and-desist order. The Commission may decide not to issue a cease-and-desist order after it gave prior notice if the notifying company has, for instance, offered to take remedy.

A notifying company may consult the Commission prior to filing a notification with regard to method to make the notification and to seek the view of the Commission related to the method (e.g., the view of the scope of the market).

6.           Penalties and liabilities

The Antimonopoly Act provides for surcharges, fines and imprisonment. Where a price-fixing cartel or a control type private monopolization has been formed, the offending parties may be ordered to pay an administrative surcharge computed on the basis of a surcharge rate applied to the total sales related to the cartel or the control type private monopolization during the period the cartel or the control type private monopolization was in place (maximum three years). A surcharge rate of the cartel is determined within the range from 1% to 10% depending on the scale and the category of business of the offending parties and a surcharge rate of a control type private monopolization is determined within the range from 2% to 10% depending on the scale of the offending parties. Recent amendments to the Antimonopoly Act increased the surcharge amount for cartel leaders by 50% and introduced surcharges for the following acts:

exclusionary type private monopolization (surcharge rate: 1% to 6% depending on the category of business)

unjust low price sales if repeated (surcharge rate: 1% to 3% depending on the category of business)

discriminatory pricing if repeated (surcharge rate: 1% to 3% depending on the category of business)

concerted refusal to supply if repeated (surcharge rate: 1% to 3% depending on the category of business)

resale price restriction if repeated (surcharge rate: 1% to 3% depending on the category of business)

abuse of superior bargaining position if continued (surcharge rate: 1%)

With regard to (a) to (f) above, the amount of surcharge is computed on the basis of respective surcharge rates applied to total sales (in case of (f), total transaction amount) related to the violation act during the period the violation act was in place (maximum of three years). Those who have engaged in unreasonable restraints on trade or private monopolization may be sentenced to imprisonment for up to five years or criminally fined up to JPY5 million (Article 89 of the Antimonopoly Act). The maximum fine for a company under the Antimonopoly Act is JPY500 million. The Antimonopoly Act prescribes strict liability for the following conduct:

unreasonable restraints on trade;

private monopolization;

engagement in particular international agreements or contracts and trade associations contravening the Antimonopoly Act.

In the event of a civil suit under the Antimonopoly Act by a plaintiff for damages suffered as a result of such conduct, the plaintiff need not prove the facts of, or any negligence in relation to, the conduct determined to be an unreasonable restraint of trade, private monopolization or unfair trade practice by the Commission. In addition to the remedies under the Antimonopoly Act, the victims of anti-competitive conduct can file a civil damage suit in accordance with the Civil Code of Japan. Furthermore, any person whose interests are seriously infringed by unfair trade practices is entitled to file an application for an injunction.

#### 2---Japan explicitly recognizes the validity of U.S. extraterritorial enforcement broadly, *even when* it targets their own firms---and, they’ve reciprocated extraterritoriality in-kind.

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INTRODUCTION

The international community developed a range of legal frameworks to deal with various transnational or international phenomena. For example, the World Trade Organization was established to handle public restraints to trade. However, no multilateral solution has been adopted to deal with private anticompetitive conduct stretching beyond State borders. In eﬀect, the harm arising from international cartels or transnational mergers often would have been left unaddressed if States did not apply their domestic competition laws extraterritorially.[1](#_bookmark1)

Japan was initially hesitant to apply its competition law extraterritorially. Its approach was restrained, even within the conservative remits set by the well-established principles of international law. Moreover, for a long time Japan did not recognize extraterritoriality in cases involving only foreign conduct. In fact, it actively protested against US extraterritorial assertions in such cases. However, the Japanese position has evolved.

Over time, Japan not only embraced far-reaching jurisdictional assertions but it also moved into the vanguard, pushing the limits of extraterritorial jurisdiction in a manner hitherto unseen. The most recent developments could potentially cause international tension if they withstand legal challenge and become an accepted approach.

This article investigates Japan’s evolving position on the extraterritorial application of domestic competition laws over two decades of signiﬁcant change. This issue requires careful analysis given the importance of Japan’s outward-focused economy and its integration in global supply chains.

The article proceeds by outlining the doctrinal context and the jurisdictional practice of the US and the EU in Part II. Part III presents the Japanese regulatory framework and its initially restrained approach. The evolution of Japan’s position on the US reliance on extraterritoriality is analysed in Part IV. Part V focuses on changes implemented by Japan in the last two decades, showing a gradual but signiﬁcant shift in the way Japan approaches transnational anticompetitive conduct. Japan has clearly demonstrated its willingness and capability to apply domestic competition law extraterritorially and to play an active role in this regard internationally. However, the article argues that most recent extraterritorial assertions are excessive and could create unnecessary international friction if not restrained.

DOCTRINAL CONTEXT AND THE PRACTICE OF THE US AND THE EU

International law recognizes jurisdictional principles which permit a State to regulate conduct beyond its borders—extraterritorially.[2](#_bookmark2) They emerged in response to the problems which would persist if jurisdiction was limited to the two traditional bases (territoriality and nationality).[3](#_bookmark3) The most pertinent for the purposes of competition law is the principle of objective territoriality, formulated by the Permanent Court of International Justice in Lotus in 1927.[4](#_bookmark4) It was held that a State may assert jurisdiction in a case when only part of the oﬀence—one of its constituent elements—has been physically committed within its territory.[5](#_bookmark4) The principle of objective territoriality enables authorities to deal with various types of transnational anticompetitive arrangements. However, it does not support jurisdiction in cases involving purely foreign conduct of foreign entities that lead to harm in the domestic market. Given the growing importance of international business, this inadequacy led to the formulation of the eﬀects doctrine—a principle which allows States to apply laws extraterritorially by recognizing that the economic harm suﬀered in the forum is suﬃcient to provide the necessary nexus.

The eﬀects doctrine was ﬁrst formulated by a US federal court in 1945 in Alcoa, a case concerning an international output-regulating cartel.[6](#_bookmark5) It was held that ‘any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends’.[7](#_bookmark6) Economic harm was recognized as a suﬃciently close connection for jurisdictional purposes, enabling the US authorities to pursue foreign antitrust violators harming US markets.

The doctrine met with a ﬁerce critique internationally because it supported potentially unlimited jurisdiction.[8](#_bookmark6) Foreign governments including Japan[9](#_bookmark6) repeatedly intervened with the US government or directly before US courts to protest against US assertion of the eﬀects doctrine.[10](#_bookmark7) However, over time, foreign States stopped protesting, implicitly and—at times—explicitly recognizing the doctrine’s validity. Meanwhile, two tests encapsulating the eﬀects doctrine have been formulated in the US. The ﬁrst, incorporated in the 1982 Foreign Trade Antitrust Improvements Act (FTAIA), stipulates that in cases not dealing with imports, US antitrust law applies to those arrangements which have a direct, substantial and reasonably foreseeable eﬀect on US commerce.[11](#_bookmark8) The second, formulated by the US Supreme Court in Hartford Fire, provides that US antitrust law applies ‘to foreign conduct that was meant to produce and did in fact produce some substantial eﬀect in the United States [citations omitted]’.[12](#_bookmark9) Both tests qualify the necessary eﬀects, indicating that trivial harm does not meet the threshold.

Various iterations of the doctrine, often carrying various labels, were adopted in diﬀerent jurisdictions.[13](#_bookmark10) Germany[14](#_bookmark11) and China[15](#_bookmark12), for example, introduced statutory provisions explicitly providing for extraterritorial jurisdiction on the basis of domestic harm. Other regimes, for example the EU and ultimately also Japan, embraced the doctrine by interpreting existing provisions.

The EU applied its competition laws extraterritorially almost from its inception. Beginning in the 1960s, the European Commission—the EU’s law enforcer— interpreted the relevant provisions of EU law, which were mute on their scope of application, as being applicable to all arrangements aﬀecting competition in the EU.[16](#_bookmark13) The European Court of Justice (ECJ) endorsed asserting jurisdiction on the basis of the eﬀects doctrine only in 1988, in Woodpulp, a case involving a foreign cartel.[17](#_bookmark14) The Court formulated its own jurisdictional test, noting that a prohibited agreement is composed of two elements: its formation and its implementation, with the location of the latter being the decisive factor (the implementation test).[18](#_bookmark15) It was understood that implementation requires some aﬃrmative act, such as direct sales to an EU purchaser.[19](#_bookmark16) Moreover, in Gencor, a merger case, the Court of First Instance explained that the EU’s rules apply extraterritorially whenever ‘it is foreseeable that a proposed concentration will have an immediate and substantial eﬀect’ in the EU.[20](#_bookmark17) Most recently, in Intel, a case dealing with abuse of a dominant position by a non-EU ﬁrm, the General Court clariﬁed that a direct sale is only one means of implementing an agreement.[21](#_bookmark18)

Overall, the EU’s tests require showing some non-negligible economic harm in order to support an extraterritorial assertion. That is a common requirement among jurisdictions applying their competition laws extraterritorially. Extraterritoriality in competition law is now a well-entrenched feature of the global regulatory framework governing transnational business. What diﬀers among regimes is the degree of clarity relating to the jurisdictional tests, substantive diﬀerences in domestic laws and the scope of actual enforcement.

THE JAPANESE FRAMEWORK AND THE RESTRAINED APPROACH

The Japanese Antimonopoly Act was introduced in 1947[22](#_bookmark19) during the Allied occupation of Japan in an eﬀort to prevent a resurgence of the pre-war structures of industry (so- called zaibatsu).[23](#_bookmark20) The Act was based on US antitrust law and modelled on the US administrative enforcement system, with the Federal Trade Commission, vested with investigatory and quasi-judicial powers, at the apex.

Confusingly, the Antimonopoly Act has two potentially overlapping provisions. Article 3 prohibits ﬁrms from engaging in unreasonable restraints of trade, whereas Article 6 forbids entering into ‘an international agreement or an international contract which contains such matters as fall under unreasonable restraint of trade or unfair trade practices’. The latter provision can be read as preventing ﬁrms from entering into any anticompetitive agreements, even if operationalized and aﬀecting only foreign markets; whereas the former deals with only domestic conduct. Another interpretation suggests that the prohibition of Article 6 would apply prior to the actual implementation of any practice, being aimed at preventing violations of Article

3. Article 6 can be viewed as a legislative error,[24](#_bookmark21) although legislative history suggests a diﬀerent answer.[25](#_bookmark22) Moreover, prior to the 1997 Amendment of the Act ﬁrms were required, under the now abolished Article 6(2), to notify the Japan Fair Trade Commission (JFTC) of any international agreements or contracts they entered into.

The Act does not address the question of its jurisdictional reach. It neither provides an explicit textual basis for extraterritoriality, nor does it set any territorial limits. Older Japanese legislation which was intended to apply to foreign activities typically included explicit provisions to that eﬀect.[26](#_bookmark23) However, in Japanese law there is no general presumption against extraterritoriality. The relevant guiding rule can be found in the Japanese Constitution, which imposes a general requirement to follow the rules of international law.[27](#_bookmark24)

Hence, this is a matter to be determined by the practice of the JFTC, subject to judicial review. So far, the Courts have played a very limited role in the development of the doctrine, mostly due to the fact that the JFTC’s decisions were rarely challenged. Moreover, private enforcement of the Antimonopoly Law was limited.

In the ﬁrst decades following the enactment of the Antimonopoly Act, the prevailing view, also held by the JFTC, was that the Act applied to all entities carrying on business in Japan.[28](#_bookmark25) In 1965, the Japanese Committee of the International Law Association found that ‘only one rule is unanimously accepted; A country does not have regulatory jurisdiction over foreigners acting in a foreign country, even though the act eventually brings economic injury to the former country’.[29](#_bookmark26)

Japan’s ﬁrst transnational case was the 1949 investigation of the conduct of numerous foreign shipping operators, which allegedly ﬁxed cargo rates. Partly due to the protest of the UK government, shortly afterwards the 1949 Marine Transport Act was enacted,[30](#_bookmark26) excluding, under certain conditions, agreements among shippers from the scope of the Antimonopoly Act. Ultimately, the case was resolved in favour of the shipping ﬁrms.[31](#_bookmark27) In 1964 the JFTC brought a similar case against the Japan Homeward Freight Conference, involving Japanese and foreign shipping companies. The foreign defendants challenged the JFTC’s action, arguing that since the agreement was concluded in London and was not implemented in Japan, the JFTC lacked jurisdiction on the matter.[32](#_bookmark28) The agency took the view that the agreement was illegal, ﬁnding that the cartelists engaged in business activities in Japan. The restrictive terms agreed abroad were forced upon the Japanese customers, hence key elements of the conduct were operationalized in Japan. The JFTC did not ﬁnd the overarching London agreement illegal, but only the subsequent contracts with parties in Japan which implemented it. The initial decision was successfully challenged on the grounds of invalidity of service of process, which had been made on the foreign entities’ Japanese agents, who did not have the authority to accept service. After some reconsideration, in 1972 the JFTC issued a new decision addressed to a number of foreign entities who had branch oﬃces in Japan or who were actively conducting business in Japan, thus allowing the JFTC to overcome its inability to serve process abroad.[33](#_bookmark29)

These early shipping conferences cases demonstrate the Japanese adherence to the doctrine of objective territoriality, requiring some conduct in Japan before Japanese law can be applied to foreign entities.[34](#_bookmark30) However, the JFTC’s later approach was even more restrained. The agency went on challenging transnational anticompetitive arrangements, but typically only Japanese participants were addressees of any orders.[35](#_bookmark31) It is unclear to what extent this was a projection of the Japanese view regarding how transnational conduct should be regulated in the fragmented global regulatory system and to what extent it was a result of procedural and practical diﬃculties faced by the JFTC.

For example, in the late 1960s the JFTC investigated an exclusive distributorship agreement between a Japanese distributor, Novo, and a Danish pharmaceutical ﬁrm, Amano. It ordered the elimination of anticompetitive clauses in the agreement, but the only addressee of the decision was the Japanese ﬁrm.[36](#_bookmark32) The Danish ﬁrm attempted to challenge the decision, but the Tokyo High Court found that the ﬁrm lacked standing.[37](#_bookmark33) In eﬀect, although Japanese law was not applied extraterritorially (in the sense that the decision was not addressed to a foreign entity), it negatively aﬀected a foreign ﬁrm’s operations. Hence, the decision was extraterritorial in nature.[38](#_bookmark34)

OPPOSITION TO THE US RELIANCE ON THE EFFECTS DOCTRINE

The gradual change in Japan’s position on extraterritoriality in competition law can be traced through the formal positions communicated by the Japanese government to US authorities. Such communications typically addressed signiﬁcant US policy changes and particular enforcement eﬀorts.

For example, in 1988 the US Department of Justice (DoJ) issued Antitrust Enforcement Guidelines for International Operations.[39](#_bookmark35) The Guidelines clariﬁed that although US antitrust law is considered to apply to all conduct having direct, substantial and reasonably foreseeable eﬀects on US commerce, the US authorities will focus its enforcement eﬀorts only on those arrangements which harm US consumers. But in 1992 the DoJ declared a signiﬁcant change in its policy, announcing that it would also challenge those foreign arrangements which harm US exports, regardless of whether the conduct in question directly harms US consumers.[40](#_bookmark36) This met with criticism from foreign authorities, including Japan. The Japanese government expressed its concerns, observing that such expansive extraterritorial assertions were not permitted under international law.[41](#_bookmark37)

The Japanese government also used amicus curiae briefs to present its views in individual antitrust cases pending before US courts.[42](#_bookmark38) Such submissions of foreign governments are rare.[43](#_bookmark39) Japan submitted amicus briefs in at least seven antitrust cases in the US.[44](#_bookmark40) In ﬁve of these cases Japan opposed US extraterritorial jurisdictional assertions either in general or as sought by the plaintiﬀs.[45](#_bookmark41) These amicus interventions demonstrate how the Japanese position on the issue of extraterritoriality has shifted over time.

In 1985 in Matsushita,[46](#_bookmark42) a case dealing with alleged predatory pricing of Japanese exports to the US, the Japanese government noted that ‘the exercise of a state’s sovereignty involves only control of the activity of its own nationals within its territory with respect to its own export trade, foreign courts should not question or punish such activity’.[47](#_bookmark43) A rather similar position was expressed by Japan in 1996, in Nippon Paper,[48](#_bookmark44) a case involving price-ﬁxing among Japanese producers of fax paper. It was the ﬁrst case in which the US asserted extraterritorial jurisdiction for the purposes of imposing criminal sanctions on foreign defendants. The products in question were sold to unaﬃliated trading houses in Japan on the condition that they charge the inﬂated prices when reselling in the US. In this case the Japanese position was very clear: ‘The Government of Japan, like many other industrialized Nations, holds the view that the extraterritorial application of the Sherman Act to the conduct of those who are not United States citizens or nationals is invalid under international law.’[49](#_bookmark45) Japan considered that the application of US competition laws to the Japanese activities of Japanese ﬁrms was invalid given the absence of a substantial link between the conduct at stake and the forum asserting jurisdiction. The economic eﬀects of the challenged conduct were not considered a suﬃcient link. Hence, both in Matsushita and Nippon Paper Japan opposed extraterritorial assertions made on the basis of the eﬀects doctrine.

In three later cases Japan no longer challenged US reliance on the eﬀects doctrine as such. In particular, in Empagran (a private action brought by US and foreign purchasers of vitamins against a number of foreign vitamins manufacturers, including a Japanese ﬁrm), in its brief before the US Supreme Court, Japan opposed any further expansion of then established extraterritorial reach of US laws.[50](#_bookmark46) On remand, in 2005, Japan submitted another amicus jointly with the governments of Germany, UK, Switzerland and the Netherlands.[51](#_bookmark47) It was asserted that extraterritorial jurisdiction should be limited ‘to those rare situations where the foreign conduct creates a domestic eﬀect that is directly and inextricably bound to the foreign harm. Merely identifying a domestic eﬀect or proclaiming it to be a byproduct of the anticompetitive conduct is not suﬃcient. Otherwise, U.S. court jurisdiction over foreign-based claims would be unlimited (…).’[52](#_bookmark48) In 2007 these representations were brought to the court’s attention in In re Monosodium Glutamate, a case involving another foreign price-ﬁxing cartel involving Japanese ﬁrms, which was unsuccessfully challenged in the US in relation to the harm suﬀered in non-US markets by non-US plaintiﬀs.[53](#_bookmark48)

Finally, in Motorola Mobility,[54](#_bookmark49) the question was again whether a US plaintiﬀ could sue to recover damages with respect to harm suﬀered by its foreign subsidiaries which purchased the cartel-aﬀected products outside the US that were incorporated into ﬁnal products and subsequently sold by the plaintiﬀ in the US. A number of foreign governments intervened in order to oppose Motorola’s claim. In its brief the Japanese Ministry of Economy, Trade and Industry (METI) underlined that the Japanese Government ‘strongly opposes assertion of extraterritorial jurisdiction that would unreasonably interfere with sovereign authority and violate fundamental principles of international law’, directing the court’s attention to the Japanese submissions in Empagran.[55](#_bookmark50) In its second brief, METI explicitly recognized ‘the necessity of the extraterritorial application of competition law of each country to the extent that anti-competitive activities aﬀect their own market’.[56](#_bookmark51) However, it opposed excessive extraterritorial assertions, such as in the case at hand, involving claims arising from foreign purchases of cartel-aﬀected goods by foreign subsidiaries of US ﬁrms.[57](#_bookmark52) Notably, this latter METI view is diﬀerent from the position taken by the JFTC, which at that stage had asserted jurisdiction in a case involving foreign violators in an even more far-reaching manner.[58](#_bookmark52)

The analysis of representations made before US courts in competition cases shows that the Japanese position in relation to extraterritoriality evolved. Initially Japan was actively opposing extraterritorial assertions based on the eﬀects doctrine, considering them illegitimate under international law. However, these protests were not sustained. Later cases show explicit recognition of the validity of extraterritorial assertions, which Japan considered legitimate when the foreign anticompetitive conduct directly causes harm in the forum. This recognition is noteworthy, given that Japan was repeatedly at the receiving end of enforcement—Japanese ﬁrms and individuals were facing sanctions for their anticompetitive conduct harming other markets, principally in the US and in the EU.

THE SHIFT IN THE JAPANESE POSITION

This part of the article analyses legislative and policy-oriented steps taken in Japan, which show a gradual, but signiﬁcant shift in the Japanese approach to extraterritoriality. The majority of these developments occurred in the last two decades. They indicate piecemeal approach to regulatory reform, undertaken to enable the JFTC to deal with transnational competitive harm.

A. The 1990 Study Group Report

Both the practical and symbolic turning point in the Japanese approach to extraterritoriality in competition law dates back to 1990, when a Study Group convened by the JFTC opined in favour of embracing the eﬀects doctrine.[59](#_bookmark53) The Study Group report was inﬂuential and it continues to be referred to by multilateral bodies.[60](#_bookmark54) It concluded that whenever foreign ﬁrms engage in activities such as exporting to Japan and the said activities are suﬃcient to constitute a violation of the Antimonopoly Act, then the Act applies.[61](#_bookmark55) By recognizing exporting to Japan as a suﬃcient jurisdictional link the Group embraced a form of the eﬀects doctrine,[62](#_bookmark56) similar in scope to that by then recognized by the ECJ in the EU.[63](#_bookmark57) At the same time it was acknowledged that, in its actual practice, the JFTC remained faithful to the principle of objective territoriality, which partly explained the procedural diﬃculties of serving notice on entities not based in Japan. The report recommended amending or interpreting the law so as to facilitate service of process in a more ﬂexible manner.

The Group also oﬀered a position on the issue of possible friction between States in relation to extraterritorial enforcement. It took the view that, prior to enforcement, the authorities should consider whether the conduct in question had caused a material eﬀect in the Japanese market. Should the answer be positive, it should still be considered whether enforcement should not be abstained from ‘out of consideration for easing confrontations with the country involved’.[64](#_bookmark58) Hence, while recognizing a possibly broad extraterritorial application of domestic law, the Group recommended restraining enforcement in certain cases as a matter of comity, not on the basis of any legal obligation. Moreover, by underlining the necessity of a material eﬀect in the Japanese market, it proposed an important qualiﬁcation of the eﬀects necessary to validate Japanese jurisdiction, in line with prevailing international practice.

The Nordion case, decided in 1998, is often considered to be the ﬁrst instance of the JFTC’s reliance on the eﬀects doctrine. The Canadian ﬁrm Nordion agreed to supply a particular product (a radioactive isotope used in medical procedures) to Japanese ﬁrms under the condition that they would not purchase it from any other sources. Nordion did not have any presence in Japan, but it sold goods to Japan and the agreement at stake was concluded in Japan. The JFTC ordered Nordion to stop its restrictive practices in the Japanese market.[65](#_bookmark59) The JFTC did not clarify the jurisdictional basis it relied on. It might have indeed embraced the eﬀects doctrine. However, the fact that the underlying agreement was concluded and executed in Japan may be seen as a suﬃcient, albeit not particularly strong, link allowing for reliance on the principle of objective territoriality. Nevertheless, the case demonstrates the new attitude of the JFTC and its willingness to reach beyond Japan’s borders in the enforcement of domestic competition rules.

Reform of Merger Review

From a transnational perspective, some important changes to Japanese merger review came into force in January 1999. Under the old regime review was limited in scope to transactions taking place ‘in Japan’. At least one of the parties to a proposed transaction must have been Japanese in order to trigger the applicability of the Antimonopoly Law. That is why the JFTC was unable to review, for example, the 1997 Boeing–McDonnell Douglas merger, despite a Japanese airline being a major purchaser of passenger planes produced by the parties and even though the Japanese market was to be signiﬁcantly aﬀected.[66](#_bookmark59) The 1998 Amendment removed the territorial nexus, making it possible to review foreign transactions.[67](#_bookmark60) The triggering factor is sales in Japan of a speciﬁed magnitude.

The new rules were applied for the ﬁrst time in 1999 to the proposed merger between Exxon and Mobil, two US entities. Following the review, the JFTC cleared the transaction.[68](#_bookmark61) Similarly, in 2005 the JFTC analysed the proposed acquisition of Guidant by Johnson & Johnson—another transaction involving two US ﬁrms. The JFTC cleared the transaction, satisﬁed with remedies imposed by foreign counterparts.[69](#_bookmark62) Although in both cases the ﬁrms were foreign, they had subsidiaries in Japan. Hence these were not purely oﬀshore transactions.

The ﬁrst case in which the new merger regime was applied in a foreign-to-foreign context was the proposed transaction between BHP Billiton and Rio Tinto, in 2008. Neither of the ﬁrms had any presence in Japan, hence the JFTC must have relied on the eﬀects doctrine when it considered reviewing the proposed deal. The investigation did not culminate in any decision as the deal was abandoned in anticipation of the negative outcome of the review.[70](#_bookmark63) The ﬁrms attempted to merge again in 2010 and again they withdrew their notiﬁcation after the JFTC informed them of its objections.[71](#_bookmark64) The abandoned BHP Billiton/Rio Tinto merger provides a precedent that the Japanese merger review applies to all transactions which meet the prescribed thresholds, regardless of the ﬁrms’ actual presence in Japan.

Changes in the Rules Governing Service of Process

The changes to merger review necessitated adjustment of the rules governing service of process, which did not—at that time—allow for the delivery of documents to persons located overseas. In particular, Article 69(2) of the Antimonopoly Act incorporated, by reference, certain provisions of the Civil Procedure Code dealing with the service of process. However, the provisions dealing with service of process abroad were not included. This shortcoming had already been identiﬁed by the Study Group in 1990.[72](#_bookmark65) However, it remained unaddressed until the 2002 Amendment of the Antimonopoly Law.

This important procedural issue signiﬁcantly limited the JFTC’s enforcement capabilities. The agency was able to investigate conduct of a foreign entity only when the ﬁrm had Japanese agents who were authorized to receive service. That was the case, for example, in Nordion.[73](#_bookmark65) The only other possibility for opening proceedings would have been if a foreign entity voluntarily submitted itself to the JFTC’s jurisdiction. The lack of a duly authorized agent in Japan allowed foreign ﬁrms to avoid the JFTC’s scrutiny, as demonstrated by one of the early shipping conferences cases.[74](#_bookmark66)

The 2002 Amendment successfully rectiﬁed that deﬁciency. It made the provisions of the Code of Civil Procedure, dealing with service abroad, apply mutatis mutandis in the competition law context. Service of process can be now performed by Japanese consular staﬀ abroad. Moreover, the JFTC can make service by publication.[75](#_bookmark67) In the BHP Billiton and Rio Tinto merger review[76](#_bookmark68), service abroad was commissioned to the Japanese consul in Melbourne.[77](#_bookmark69) BHP Billiton refused to accept service and the JFTC made it eﬀective by publication.[78](#_bookmark70)

Pursuing International Cartels

The JFTC began challenging international cartels at the turn of the new millennium. It tried to investigate the Graphite Electrode cartel (in 1999) and Vitamins cartel (in 2001). Both cartels included Japanese ﬁrms and both were successfully investigated in the US and in the EU. However the JFTC failed to pursue its challenge, reportedly for want of evidence.[79](#_bookmark71) In eﬀect, the JFTC only issued ‘warnings’; non-binding administrative guidance to the cartelists.[80](#_bookmark72)

In 2003 the JFTC investigated an international cartel of producers of impact modiﬁers’ (plastic additives used in production of various plastic goods). The investigation was closely coordinated—for the ﬁrst time—with counterparts in the US, the EU and Canada. In this case the JFTC was successful. However, it issued its Recommendation only to two Japanese members of the cartel.[81](#_bookmark73)

In 2008, for the ﬁrst time, the JFTC investigated a cartel involving foreign ﬁrms that did not have any subsidiaries or agents in Japan. The Marine Hose case involved ﬁve ﬁrms, four foreign and one Japanese. Following the investigation, the JFTC issued cease-and-desist orders against several foreign entities. However, foreign ﬁrms which did not supply Japanese customers were not ﬁned. The Antimonopoly Law provides that when calculating ﬁnes the JFTC should use as a benchmark ‘the amount of sales from the relevant goods or services’, without any further guidance.[82](#_bookmark74) The JFTC deﬁned the relevant market as the domestic market. Therefore, ﬁrms which did not generate any local turnover avoided penalties. As a result, only the Japanese Bridgestone Corporation was ﬁned.[83](#_bookmark75)

If there was any remaining doubt as to the Japanese stance on extraterritoriality in competition law, it was resolved by the JFTC’s Cathode Ray Tubes (CRT) decisions.

In 2009 and 2010, the JFTC ﬁned a number of foreign ﬁrms (including foreign subsidiaries of Japanese ﬁrms) involved in a cartel ﬁxing prices of cathode ray tubes.[84](#_bookmark76) Such products are a key input used in the production of televisions. The case involved no cartel conduct in Japan and no direct sales of cartel-aﬀected inputs to Japan. Foreign subsidiaries of Japanese purchased the cartel-aﬀected products from the cartelists outside Japan. These inputs were incorporated into ﬁnal products in Southeast Asian countries by subsidiaries of Japanese ﬁrms. Subsequently, the majority of the ﬁnal products (that is, TVs incorporating the cartel-aﬀected inputs) were sold in various markets outside Japan.[85](#_bookmark77) Cartelists themselves did not sell any ﬁnal products in Japan. In fact, it is unclear—and the JFTC did not reveal—to what extent the ﬁnal products were sold in Japan. The JFTC’s decisions were reaﬃrmed following a request to reconsider.[86](#_bookmark78) It is worth noting that the JFTC served process by publication.[87](#_bookmark79)

The CRT case illustrates not only Japanese reliance on the eﬀects doctrine, but also possibly one of the furthest-reaching extraterritorial assertions the international community has witnessed to date. The cartel-aﬀected inputs were not sold in Japan. Some of the products incorporating the cartel-aﬀected inputs were possibly (this matter is not clear) brought to and sold in Japan by foreign subsidiaries of Japanese ﬁrms. This particular context makes the JFTC’s extraterritorial assertion unique. No other competition authority has decided to take a similar step. The JFTC considered it legitimate to assert jurisdiction when the contracts for the supply of the cartel-aﬀected products to Japanese subsidiaries outside Japan were negotiated directly between the foreign cartelists and Japanese parent companies. Such an approach signiﬁcantly extends the reach of domestic laws. While it can be seen as a possibly inevitable step in the ﬁght against transnational anticompetitive conduct,[88](#_bookmark80) it constitutes a departure from the recognized jurisdictional principles and practice of other States. It may be diﬃcult, if not impossible, to reconcile the position of the JFTC with the representations made by the Japanese METI before a US court in Motorola Mobility. In that case, in a similar context, the Japanese ministry protested against what it called an excessive extraterritorial assertion.[89](#_bookmark81)

In the CRT case the JFTC considered that the foreign subsidiaries of Japanese ﬁrms and their Japanese parent companies constituted single economic entities for the purposes of the application of the Antimonopoly Act. If the parent companies have a decisive inﬂuence over the subsidiaries, such an assertion is justiﬁable. Indeed, in this case the parents negotiated the supply contracts with the foreign cartelists. However, the fact that Japanese ﬁrms suﬀered harm due to anticompetitive conduct does not—in the eyes of international law—automatically grant the JFTC competence to apply domestic laws to the underlying conduct. The eﬀects doctrine allows for jurisdictional assertions only when some non-trivial harm was suﬀered in the domestic market. In CRT the cartel-aﬀected products were not sold in Japan. If the ﬁnal products incorporating them were sold outside Japan, that is, if none of them reached Japan, there is no direct economic harm in the Japanese market to address. The fact that Japanese ﬁrms suﬀered harm, on its own, is of little relevance. What matters is the location of the harm. In a similar manner Japanese tort law would not apply in a case arising from a car accident in Europe and in which a Japanese national suﬀered an injury due to a driver’s negligence.

Moreover, in the CRT case the JFTC for the ﬁrst time imposed ﬁnes on foreign cartelists. When calculating ﬁnes the JFTC did not rely simply on the value of the cartel-aﬀected components incorporated in the ﬁnal products imported to Japan by foreign subsidiaries of Japanese ﬁrms. Instead, the JFTC used as the benchmark all sales of cartel-aﬀected components to foreign subsidiaries of Japanese ﬁrms, regardless of whether the ﬁnal products incorporating them entered the Japanese market. In this regard the JFTC departed from its earlier practice and interpretation of the relevant provisions of the Antimonopoly Act.[90](#_bookmark82) In eﬀect, the JFTC sanctioned the foreign cartelists also for the harm which was not inﬂicted on the Japanese market. Takigawa correctly points out that the inclusion of such sales for the purposes of calculation of ﬁnes was an error.[91](#_bookmark82) While foreign subsidiaries of Japanese ﬁrms might have suﬀered harm due to the foreign price-ﬁxing, any such harm was not suﬀered in Japan. The present global regulatory framework suggests that the JFTC should have abstained from assuming competence to address such overall harm.

The JFTC’s Commissioner Odagiri wrote a supplementary opinion to the JFTC’s decision following the request to reconsider.[92](#_bookmark83) It is particularly noteworthy because the JFTC’s Commissioners rarely issue separate opinions. Although Commissioner Odagiri ultimately supported the majority, his opinion reads like, and should be seen as, a clear dissent. Commissioner Odagiri argued that the Antimonopoly Act should be applied extraterritorially only when purchasers of the cartel-aﬀected products are in Japan, or alternatively—if the Act were to apply in other cases—any ﬁnes imposed should relate to the value of the cartel-aﬀected products incorporated in ﬁnal products sold in Japan. In Commissioner Odagiri’s view, the adopted ﬁning methodology was excessive. He noted that such an approach could lead to conﬂicting outcomes and over-enforcement if more jurisdictions were to follow it. What seems to have convinced Commissioner Odagiri to ultimately side with the majority was the fact that competition authorities in the relevant Southeast Asian jurisdictions (where the Japanese subsidiaries which purchased the cartel-aﬀected products were located) did not take any action against the cartelists. This, however, is not a consideration which legitimatizes far- reaching extraterritorial assertions or validates a ﬁning policy.

The foreign defendants appealed the JFTC decisions. In early 2016 the Tokyo High Court issued three judgments, delivered by diﬀerent judicial panels, upholding the JFTC’s jurisdiction.[93](#_bookmark84) In essence, the Court found that the foreign price-ﬁxing agreement was intended to harm Japanese customers-purchasers, in this context Japanese parent companies.[94](#_bookmark85) The appeal is currently pending before the Supreme Court. In CRT the JFTC sent a clear signal to the international community that it will no longer shy away from enforcing domestic competition law extraterritorially in an expansive manner. However, the approach taken in relation to both jurisdiction and calculation of ﬁnes goes signiﬁcantly beyond the remits established by international practice.[95](#_bookmark86) If followed, the Antimonopoly Act could be applied to any conduct prohibited by the Act whenever it aﬀects Japanese ﬁrms, regardless of whether they operate in Japan or elsewhere. Moreover, ﬁnes can be imposed in relation to sales of the cartel-aﬀected goods even if they took place outside Japan and the products at stake did not reach Japanese consumers, be it directly or through transformed products. Such an approach is likely to generate tensions with other States, asCommissioner Odagiri rightly noted in his opinion.

The new attitude of the JFTC in relation to transnational violations is reﬂected also in organizational developments in the agency. In particular, in 2010 the JFTC created a separate International Cartels Investigation Unit to deal with such cases.[96](#_bookmark87)

CONCLUSION

While initially hesitant about extraterritoriality in competition law enforcement, Japan gradually embraced it and began dealing with transnational anticompetitive conduct. Around the turn of the new millennium Japan recognized the eﬀects doctrine to support jurisdiction in cases involving oﬀshore conduct causing in-bound competitive harm. That step might have been informed by the growing reliance on the doctrine by other jurisdictions and, in general, more active enforcement globally. The evolution of Japan’s stance carried a promise of enabling better safeguarding of competition in the Japanese market and therefore it should be welcomed. A process of regulatory reform followed to facilitate the JFTC taking an active role in the ﬁght against transnational anticompetitive conduct. However, the reform is piecemeal and reactive in nature, not comprehensive. For example, the relevant rules dealing with the service of process were amended three years after the review of oﬀshore mergers was ﬁrst formally enabled. Similarly, around 2000 the JFTC started showing eagerness to pursue international cartels, yet it took it a few years to actually bring a case against foreign cartelists.

The regulatory reform is ongoing. The recent CRT case shows that Japan is only now formulating the jurisdictional standards applicable in cases involving purely foreign conduct, in a learning-by-doing exercise. In this context, it seems that Japan has moved into the vanguard of those pushing the outer limits of extraterritoriality in a manner hitherto unseen. The Antimonopoly Act has been applied to the foreign conduct of foreign ﬁrms when the signiﬁcance and the very presence of the harm in Japanese markets was unclear. The consistency of this approach with international law is questionable. It potentially undermines competition legislation in the aﬀected foreign States. Moreover, in CRT the JFTC also adopted a controversial methodology of calculating ﬁnes for the wrongdoers. The ﬁnes related not only to the sales of the cartel-aﬀected products which entered the Japanese market, but also went well beyond that threshold. Overall, in CRT the JFTC embarked on a collision course with foreign counterparts. The appeal is pending before the Japanese Supreme Court, which hopefully will avail itself of this opportunity to ascertain the limits of the extraterritorial reach of the Antimonopoly Act. If the JFTC’s approach is upheld and followed by other regimes, it is likely to also adversely aﬀect Japanese ﬁrms that operate internationally and are engaged in conduct causing competitive harm in other markets, even if not directly or substantially. It may be that the JFTC sought to demonstrate its commitment to ﬁghting oﬀshore anticompetitive conduct, but it operated within a regulatory framework unprepared for such a refocusing and picked a suboptimal case. An amendment of the ﬁning policy, which is currently being considered,[97](#_bookmark88) may help to align at least the enforcement aspect with internationally prevalent practice.

Japanese competition law and policy cannot be ignored by businesses operating internationally. They would be well advised to increase their awareness of the rules applicable in that jurisdiction given that the Japanese competition watchdog demonstrates determination to deal with transnational violations and apply the Antimonopoly Act in a far-reaching manner.

### 2AC---Thumper---Bases

#### Alt-cause---US-driven Omicron spread.

Gale 1-6-2022 (Alastair, “Japan Criticizes U.S. Response After Omicron Spreads Near American Bases,” *Wall Street Journal*, <https://www.wsj.com/articles/japan-criticizes-u-s-response-after-omicron-spreads-near-american-bases-11641466830>)

A surge in Covid-19 infections around U.S. military bases in Japan is generating tension between Tokyo and Washington after a loophole in entry rules for American soldiers accelerated the spread of the Omicron variant. Foreign Minister Yoshimasa Hayashi on Thursday in Japan asked Secretary of State Antony Blinken for U.S. service members to be restricted to their bases, and regions around bases called for emergency steps to prevent the spread of Covid-19. Prime Minister Fumio Kishida also expressed dissatisfaction with the U.S. response and said he ordered his foreign minister to demand tougher steps at a U.S.-Japan meeting scheduled for Friday. Japan had hoped to keep Omicron at bay with a near-total ban on foreigners entering the country. But the highly infectious variant managed to hitch a ride anyway, including via U.S. troops, who are allowed under a security treaty to travel directly into and out of U.S. bases in Japan on military aircraft. These troops don’t undergo the immigration checks foreigners usually receive on arrival. The troops then interacted with Japanese locals, including workers on the bases. On Thursday, the southern prefecture of Okinawa, where most of the U.S. military in Japan is based, reported 981 cases, the largest caseload in the country. U.S. Forces Japan made masks mandatory for all personnel in public areas on and off base and reported a total of 1,784 current infections among people in military facilities. Around 50,000 U.S. service members are based in Japan, the largest permanent overseas U.S. military deployment. Japan had only a few hundred Covid-19 infection cases each day nationwide from October through late last year, but the total is now climbing rapidly. “A major cause of the spread of the Omicron variant is infections coming from U.S. military bases,” Okinawa Gov. Denny Tamaki said this week. Mr. Tamaki called Thursday for emergency restrictions on businesses such as bars and restaurants, including those around bases, to prevent the spread of the virus. “We may need to take even stronger measures,” he said. Although the U.S. and Japanese militaries work closely together and have stepped up cooperation in the face of a threat from China, tensions involving crime, noise and other base-related issues have long bedeviled the relationship, particularly in Okinawa. Mr. Tamaki has called for a reduction in the U.S. presence and opposes a plan to replace a Marine air station in an urban part of Okinawa with a new base in a more rural part of the island.

### 2AC---Resilience

#### Completely resilient

Green 20, the senior vice president for Asia and Japan chair at the Center for Strategic and International Studies, and director of Asian Studies at the Edmund A. Walsh School of Foreign Service at Georgetown University. Jeffrey W. Hornung is a political scientist at the nonprofit, nonpartisan RAND Corporation. (Michael, “Are U.S.-Japan Relations on the Rocks?,” RAND, <https://www.rand.org/blog/2020/07/are-us-japan-relations-on-the-rocks.html>)

There is not cause for concern about Japan abandoning the alliance with the United States. Abe came back to power promising (PDF) a stronger U.S.-Japan alliance and has given no indication that he is abandoning that promise. Nor are any of the major political figures trying to replace him challenging the alliance relationship. Moreover, the growing threat from China means that Washington and Tokyo need each other more than ever. But the growing points of friction and uncertainty in the relationship carry negative consequences, particularly given that even though polls show that the Japanese public supports the alliance, they also reveal that trust in the United States and President Trump has dropped precipitously. And it sends the wrong message to Tokyo that the next U.S. envoy is cooling his heels waiting for confirmation.

### 2AC---ED

#### E-D by Trump

CDG 1-5-2022 ( “US-Japan ties moving forward on all fronts,” https://global.chinadaily.com.cn/a/202201/05/WS61d4eea5a310cdd39bc7f163.html)

During the four years of the administration of his predecessor, Donald Trump, the relationship was strained. Trump demanded that Japan increase the amount of the host-nation financial support while threatening to withdraw US forces from Japan－he even considered the termination of the US-Japan military alliance.

### 2AC---AT: China Impact

#### China doesn’t undermine the LIO and no impact.

Butts & McKinney 19, Nicholas Butts: LLM @ Peking, MSC @ LSE, MPA @ Harvard. J.M. McKinney: PhD Candidate @ Nanyang (Bringing Balance to the Strategic Discourse on China’s Rise, *Journal on Indo-Pacific Affairs*, Winter 2019, Available Online at: https://www.airuniversity.af.edu/Portals/10/JIPA/journals/Volume-02\_Issue-4/McKinney.pdf)

One of the most repeated ideas in international affairs discourse today is that after World War II the United States created a “free and open international order” and that this order has been responsible for keeping the Indo-Pacific “largely peaceful” for the last 80 years.4 China is then typically said to be promoting a vision “incompatible” with this order—something that should make us worry, as it may herald the return of violent power politics.5

Michael Lind has summarized the perspective:“in my experience, most members of the U.S. foreign policy elite sincerely believe that the alternative to perpetual U.S. world domination is chaos and war.”6 It is indeed true that the years since World War II have been peaceful when compared with most of European history and that violence of all kinds has declined.7 This phenomenon has been dubbed the “New Peace,” and the United States certainly played some role in bringing it about.8

However, there is no consensus among scholars to what extent US actions—or more abstractly, the supposed “order”—contributed to the decline in war and violence. Existing academic explanations stress the role of nuclear weapons restraining states from major war;9 the evolution of territorial norms (as well as regimes and institutions, like the United Nations);10 the development of globalized markets and “trading states”;11 the longer-term spread of reason, sympathy, and feminization alongside the rise of stronger states;12 the settlement of territorial disputes after World War II;13 the spread of democracies;14 the declining utility of war as a rational instrument of statecraft;15 and hegemonic stability, which emphasizes (in its liberal form) how the United States helped create global institutions and shape norms16 and (in its “realist” form) how US power has deterred or compelled rivals to behave.17 This is not the place to judge between the various explanations, but it should be clear that they are diverse and the overall explanation is likely multivariate. Only the realist version of hegemonic stability directly supports the narrative of the free and open international order. Christopher Fettweis has recently sought to test the theory by looking at the changing pattern of global peace/violence relative to US military spending, frequency of intervention, and selection of grand strategy across four presidential administrations (Bush Sr. to Obama). He found no relationship at all. “As it stands,” he concluded, “the only evidence we have regarding the relationship between US power and international stability suggests that the two are unrelated.”18 If US officials and strategic pundits are going to claim that peace is dependent on an abstract order created and maintained by American power, they need to provide serious evidence for their claims. Until then, while we can be thankful that the United States contributed to postwar institutions like the United Nations, helped delegitimize colonialism, and did not abuse its power (as much) as many other states would have, policy makers and scholars should be highly skeptical of more sweeping claims.

Laying aside the question of how the New Peace came about, another oft repeated notion is that China is determined to undermine the contemporary international order, according to Friedberg, by corrupting, subverting, and exploiting it.19 The proof for this claim is generally said to be China’s “militarization” of the South China Sea (SCS) through “salami-slicing” and “grey-zone tactics,”20 and occasionally, a retired Chinese official or Global Times commentator is quoted as representative of China’s official (even if unarticulated) policy and intentions. In the abstract, such claims are alarming—in context, and in balance, rather humdrum. In fact, the evidence of any Chinese intention to destroy, or even merely undermine and exploit, the current order is slight. China is certainly using its growing military power to defend its claims in the SCS and even—on occasion— to coerce its neighbors. It uses protectionist economic policies to boost the prospects of Chinese companies and reduce competition. It employs economic statecraft to serve its interests abroad. And it certainly is opposed to America’s policy of global democracy promotion. However, none of these positions fundamentally challenge the existing order, none of them radically depart from America’s own actions when it was a rising power in the nineteenth century, and none of them obviously surpass America’s own contemporary record of order subversion.

When the United States was a rising power, it took half of Mexico and considered taking the rest, it colonized the Philippines and Hawaii, and it unilaterally seized the maritime choke points of the Caribbean (Puerto Rico and Cuba).21 The United States used tariffs—which by 1857 averaged 20 percent22 and by the end of the nineteenth century were “the highest import duties in the industrial world”23—to protect its industries. It stole intellectual property,24 and it ideologically challenged the governments of the “Old World.” Today, despite no longer being a rising power, the United States has launched two disastrous invasions, tortured prisoners, and dispatches drone strikes at a whim with little international legal authority.25 The point is not that two wrongs make a right; it is that international order is much more resilient than critics seem to realize,26 and it is utopian to expect any rising Great Power to act in a way that uniformly satisfies one’s moral scruples, evolving, in Friedberg’s words, “into a mellow, satisfied, ‘responsible’ status quo power.”27

Friedberg or Harris might object that America’s rise took place in the context of a different order. This is perfectly true, but the more important point is that the long nineteenth century (1815–1914)—the era of America’s rise—was the first iteration of the New Peace.28 The implication is that relative peace can and has coexisted with limited wars, property and territorial thefts, acts of coercion, and aggressive assertions of status. This does not mean any of these are desirable— they are not—but it shows that they need not be fatal to the system. Insofar as there is a lesson from that first period of relative peace, it is that Great Power confrontation is the one thing that is fatal. Accepting this does not mean capitulating in every instance, as implied by some,29 but it does mean rediscovering the rules of Great Power competition30 alongside the art of strategy.31

Focusing only on areas that China’s rise violates the scruples of the established powers, moreover, downplays the extent to which China, has, in fact, conformed to the existing order. As a RAND Corporation report published in 2018 concludes, China has been a supporter—albeit a conditional one—of the international order: “Since China undertook a policy of international engagement in the 1980s . . . the level and quality of its participation in the order rivals that of most other states.”32 The way in which Xi Jinping, following his 2017 Davos speech in defense of globalization, has been heralded as the most prominent champion of international order and defender of globalization underscores the fact that there are different elements of this order, and that China supports many, if not most, of them. Even in places where China is supposedly “altering” the current order, Beijing tends to simultaneously affirm that order. China’s Asian Infrastructure Investment Bank, for instance, actually mirrors existing structures, and China has intentionally copied elements and “best practices” of the World Bank and Asian Development Bank. China is playing the same game, even if it is seeking a bigger role within it.33

# 1AR

### 1AR---AT: PROA CP

#### Parallel enforcement solves through coordination and accountability.

Bornstein 19, Associate Professor of Law, University of Florida Levin College of Law. (Stephanie, “Public-Private Co-Enforcement Litigation”, 104 Minn. L. Rev. 811, pg. 837-838)

More importantly, a co-enforcement approach may avoid the political theory-based criticisms of hybrid systems by improving upon parallel, but redundant enforcement. If critics of redundant enforcement are concerned about a collective action problem or shirking,130 co-enforcement requires internal and automatic accountability. Neither party can shirk without express knowledge by the other, who will then be motivated to hold the shirker responsible.131

If divided enforcement can lead to contradictory approaches or bureaucratic dysfunction,132 for the portion of cases pursued through co-enforcement, both enforcers will have to agree on a unified approach to the case. Any disagreements between coequal co-counsel that will, no doubt, arise, will have to be worked out and overcome within the context of each case.

A co-enforcement approach will also resolve any confusion about preclusion, multiple punishments, and other procedural challenges in parallel redundant litigation.133 Instead of separate cases being pursued simultaneously in a race to the courthouse, both public and private enforcers will coordinate in ways that clearly establish and account for problems raised by possible future preclusion.

#### No impact to overlap.

Bornstein 19, Associate Professor of Law, University of Florida Levin College of Law. (Stephanie, “Public-Private Co-Enforcement Litigation”, 104 Minn. L. Rev. 811, pg. 843-844)

A final counterargument to co-enforcement is that it may be too maximalist. Efficiency and reducing duplication of efforts and multiple punishments may be a laudable goal,164 but, as Zachary Clopton argues, fragmented authority and redundant enforcement may be a feature, rather than a bug, of federal statutory design.165 Redundancy helps ensure proper levels of enforcement, and courts already have procedural mechanisms for resolving problems of overlap.166

#### Maximum deterrence necessitates harmonization.

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.

#### 1---detection.

Lande 17, \*Robert H. Lande is the Secretary of the American Antitrust Institute’s Board of Directors. He was the AAI’s first Senior Fellow and a co-founding Director of the AAI and has served the AAI on a full-time basis during three different periods. He is the Venable Professor of Law at the University of Baltimore; \*Joshua P. Davis is Professor of Law and Director of the Center for Law and Ethics at the University of San Francisco; (January 1st, 2017, “Restoring the Legitimacy of Private Antitrust Enforcement”, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2017&amp;context=all_fac>)

B. Private Cases Compensate Victims

On the Federal level, private cases are virtually the only way for the victims of anticompetitive behavior to be compensated. 14 A recent AAI study documents the benefits of private enforcement by analyzing 60 of the largest recent successful private antitrust cases (defined as those resolved since 1990 that recovered at least $50 million in cash15 for the victims 16 of anticompetitive behavior).17 The study made the following significant findings:

• The 60 cases provided a cumulative cash recovery to consumers and businesses of at least $33 billion;

• 47 of these 60 very large recoveries were class actions.18

• Roughly one third of the total amount recovered came from 25 cases that did not follow federal, state, or EU actions.19

• Nearly half of the cases (27) did not involve traditional “hard-core” per se violations (such as price fixing or bid rigging), and most of those (22) involved conduct governed solely by the rule of reason.20

These findings tend to suggest that private enforcement is helping to do its job: ferreting out antitrust violations that would not otherwise have been exposed, and compensating the victims of antitrust violations.

#### 2---resources.

Lacour 08, \*Justin Lacour, J.D. Candidate, June 2009, St. John's University School of Law; M.F.A., 2004,  
University of Massachusetts; B.A., 2001, University of Houston; (Summer 2008, “Unclear Repugnancy: Antitrust Immunity in Securities Markets After Credit Suisse Securities (USA) LLC v. Billing After Credit Suisse Securities (USA) LLC v. Billing”, <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1084&context=lawreview>)

This loss is of no small significance. The Supreme Court has recognized that Congress created treble damages remedies for antitrust violations to encourage private antitrust suits, since these private suits provide significant supplement to the limited resources available to government agencies for enforcing the antitrust laws. 248 The availability of treble damages encourages private antitrust litigants to act as "'private attorneys general'" by bringing actions against anticompetitive behavior that might otherwise escape the antitrust enforcement efforts of government agencies. 249 The supervision provided by a regulatory agency cannot control all of the activities of a regulated firm, and budgetary constraints may limit its effectiveness. 250 It is unlikely that the "overworked and understaffed" SEC would be able to prevent all antitrust violations within the securities markets. 25 1 In much recent securities law jurisprudence, courts have often chosen to defer to the SEC when possible, thus subjecting cases to "minimal judicial review." 252 Such deference to an agency, however, is only appropriate when the agency has superior resources or experience-otherwise, a court is the better vehicle for adjudication. 253 Furthermore, while a regulatory agency may be able to provide the equivalent of injunctive relief to aggrieved parties, the agency cannot provide private damages, and certainly not treble damages. 254 Thus, the "flexible arsenal of antitrust remedies"-injunction, private damages, and criminal sanctions-would be lost, replaced by cease and desist orders, rules, and fines, which do not benefit the aggrieved party. 255

#### Public enforcement alone fails.

Lande 17, \*Robert H. Lande is the Secretary of the American Antitrust Institute’s Board of Directors. He was the AAI’s first Senior Fellow and a co-founding Director of the AAI and has served the AAI on a full-time basis during three different periods. He is the Venable Professor of Law at the University of Baltimore; \*Joshua P. Davis is Professor of Law and Director of the Center for Law and Ethics at the University of San Francisco; (January 1st, 2017, “Restoring the Legitimacy of Private Antitrust Enforcement”, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2017&amp;context=all_fac>)

As has been observed, “government cannot be expected to do all or even most of the necessary enforcement” for numerous reasons – in addition to budgetary constraints – including “undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by ‘losers’ that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.”7

#### Private suits multiply agency resources

Bornstein 19, Associate Professor of Law, University of Florida Levin College of Law. (Stephanie, “Public-Private Co-Enforcement Litigation”, 104 Minn. L. Rev. 811, pg. 858)

Turning to the other half of hybrid enforcement mechanisms, public enforcement efforts also now face unprecedented challenges and limitations. Of course, federal agencies have always operated with limited resources determined by federal government budgets. Even scholars critical of rent-seeking private class action attorneys acknowledge that a major advantage of allowing private enforcement is its ability to multiply overall enforcement resources.251 Likewise, scholars who argue in favor of predominantly public enforcement regimes or who propose stronger public oversight of private attorneys general recognize that, to do so, requires leveraging the finances of the private bar.252 Without repeating these concerns, this Section adds contemporary context, highlighting that a new level of economic and political pressure toward deregulation, exacerbated by recent Supreme Court jurisprudence, now stands to limit public agency enforcement into the future.253

#### 3---deterrence---the threat of private litigation deters conduct significantly better than criminal enforcement.

Lande 17, \*Robert H. Lande is the Secretary of the American Antitrust Institute’s Board of Directors. He was the AAI’s first Senior Fellow and a co-founding Director of the AAI and has served the AAI on a full-time basis during three different periods. He is the Venable Professor of Law at the University of Baltimore; \*Joshua P. Davis is Professor of Law and Director of the Center for Law and Ethics at the University of San Francisco; (January 1st, 2017, “Restoring the Legitimacy of Private Antitrust Enforcement”, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2017&amp;context=all_fac>)

C. Private Cases Help Deter Anticompetitive Behavior

Private enforcement also deters anticompetitive behavior. There is, moreover, evidence that these deterrence effects are likely to be significant.

Another recent AAI study highlights the deterrence benefits of private enforcement by comparing the likely deterrent effects of private enforcement of the U. S. antitrust laws to the deterrence effects of the most esteemed antitrust program in the world, criminal anti-cartel enforcement by the Antitrust Division of the U.S. Department of Justice.21 The surprising results are that private enforcement probably deters more anticompetitive behavior.

The study does this by noting that from 1990 through 2011, the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled $8.18 billion. Disvaluing a year of prison at $6 million and a year of house arrest at $3 million adds another $3.588 billion in total deterrence from the DOJ’s anti-cartel cases. This totals approximately $11.7 billion. This is an extremely impressive figure, and these sanctions surely have deterred a significant amount of anticompetitive behavior. Nevertheless, this total is significantly less than the more than $33 billion resulting from just sixty analyzed private cases that occurred during the same period. Moreover, the analysis of 60 private cases ignored the costs to defendants of providing products, discounts, or coupons as part of settlements, paying their own attorney’s fees and costs, and suffering a disruption of their business practices. Indeed, given the disparity between the likely deterrent effects of private and DOJ criminal enforcement, even a significantly more conservative approach would yield the same ultimate conclusion.22 The study’s conclusions that the amounts of payouts in private cases are actually staggeringly high-so high that they deter anticompetitive conduct more effectively than the criminal fines and prison sentences resulting from Department of Justice cases-is thus the opposite of the consensus within the antitrust community.

#### Private parties won’t willingly report absent treble damages.

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.