## 1AC---Extraterritoriality

### 1AC---Economic Development

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

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

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

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

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

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

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

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

Background

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II DEVELOPING COUNTRIES AND ANTITRUST REGULATION

A. Challenges

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

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

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

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

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III. PART III: SHORTCOMINGS OF THE STATUS QUO

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

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

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

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

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

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

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

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

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Introduction

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

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

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

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

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

II. Advantages of good faith competition

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Independently, development deflates wars globally.

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

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

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

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

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

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

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

1. Introduction

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

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

Identity-based discourses

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

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

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

Exploring the political economy of war

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

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

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

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

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

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

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

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

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

Middle East Tinder Box

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

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

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

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

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

A Brief History of the Kurds

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

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

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

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

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

Western Support for the Kurds

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

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

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

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

The Endgame

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

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

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

1A. Making MENA Markets Competitive10

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cartels hurt the poor, stifle growth and limit policy effectiveness

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

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

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

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

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

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

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

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

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

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Introduction

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

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

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

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

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

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

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

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

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

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

China's Big Business in America's Backyard

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

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

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

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

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

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

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

### 1AC---Resource Cartels

#### Advantage 2 is Resource Cartels:

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Introduction: 3 Messages

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

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

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

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

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

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

#### Food wars go nuclear.

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

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

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

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

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

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

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

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

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

### 1AC---Solvency

#### Finally, solvency:

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

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

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

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

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

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

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

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

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

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

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

[FOOTNOTE 283]

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

[END FOOTNOTE 283]

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

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

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

II. BACKGROUND

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

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

A. The Sherman and Clayton Acts

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

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

B. Cartels-An Introduction

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

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

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

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

C. International Cartels

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

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

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

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

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

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

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

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

# 2AC---Template

## ADVANTAGE---DEVELOPMENT

### 2AC---Deficit---Deterrence

#### Deterrence deficit---international cartels will forgo all U.S. profits if it means they can maintain operations elsewhere---harmonization is key because it multiplies expected penalties by the number of nations committed to enforcement.

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.

### 2AC---AT: Become SOEs

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

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

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

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

## T---Scope

### 2AC---AT: T---Expand Scope

#### We meet:

#### The plan expands the territorial scope of the Sherman Act.

Popofsky 08, \*Mark S. Popofsky, Kaye Scholer LLP; (2008, “Extraterritoriality in U.S. Jurisprudence”, in 3 ISSUES IN COMPETITION LAW AND POLICY 2417 (ABA Section of Antitrust Law 2008)

For a century, courts, Congress, and enforcement agencies have struggled to define the Sherman Act’s applicability to conduct outside the United States. The Sherman Act’s evolving territorial scope reflects an uneasy tension between two opposing impulses: protecting American consumers from international cartels requires giving the Sherman Act some “extraterritorial” scope. However, condemning overseas conduct under American laws often draws the charge that American antitrust policy reflects “legal imperialism” and risks retaliation from other jurisdictions upon whose antitrust enforcement efforts American consumers too depend.

#### *Empagran* limited the territorial scope of the Sherman Act through narrow interpretations of the FTAIA.

Popofsky 08, \*Mark S. Popofsky, Kaye Scholer LLP; (2008, “Extraterritoriality in U.S. Jurisprudence”, in 3 ISSUES IN COMPETITION LAW AND POLICY 2417 (ABA Section of Antitrust Law 2008)

In F. Hoffman-La Roche, Ltd. v. Empagran,135 the Supreme Court adopted the narrower reading of Subsection 2 but largely left open what type of nexus between in- U.S. detrimental effects and plaintiffs’ injury is required. Empagran involved class actions seeking recovery for a worldwide conspiracy to fix the price of vitamins. One class involved foreign purchasers: those who bought price-fixed vitamins for delivery in Ecuador, Ukraine, Australia, and Panama. The defendants argued that FTAIA Subsection 2 barred these claims, because, having purchased abroad, the in-U.S. anticompetitive effects of the scheme did not “give rise” to plaintiffs’ injuries.136 The plaintiffs, by contrast, advanced the broader reading of Subsection 2 and argued, inter alia, that the FTAIA imposed no such nexus requirement.137

The Supreme Court agreed with defendants that the FTAIA imposes a nexus requirement. The Court decided the case on the assumption that “the adverse foreign effect [the plaintiffs alleged] is independent of any adverse domestic effect.”138 In other words, the only link alleged between the in-U.S. effects that meet FTAIA Subsection 1 and the plaintiffs’ injury was that both flowed from the same conduct. The FTAIA, the Court held, could not be construed to extend the Sherman Act to redress such foreign injuries for two reasons.

First, permitting such treble damages actions defied international norms on the reasonable scope of the objective territorial principle.139 Finding Subsection 2 of the FTAIA ambiguous, the Court invoked the principle that the Sherman Act not be construed to violate customary principles of international law.140 The Court explained that, although applying the Sherman Act to condemn foreign conduct is “consistent with principles of prescriptive comity,” permitting treble damages actions to proceed where the only link between the foreign harm asserted and the requisite in-U.S. harm is that both flow from the same conduct is not.141 Such private enforcement in U.S. courts would “interfer[e] with a foreign nation’s ability independently to regulate its own commercial affairs.”142 The Court agreed with commentators observing that reading the FTAIA to impose no nexus requirement would effectively “provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provision for private antitrust enforcement.”143 “Congress,” the Court explained, cannot lightly be assumed to have engaged “in an act of legal imperialism.”144

The Court rejected the plaintiffs’ arguments that international comity concerns were better addressed on a case-by-case basis and that a contrary rule would threaten to undermine the Sherman Act’s goals of compensation and deterrence. The Court accepted the arguments of amici—the United States, the business community, and foreign enforcers—that permitting private damages actions for foreign injuries could “undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty.”145

Second, the Court concluded that applying “the Sherman Act to redress foreign injuries” that are independent of in-U.S. effects would be unprecedented.146 This doomed the plaintiffs’ reading of the FTAIA because, according to the court, the FTAIA was designed to limit, not expand, the Sherman Act’s scope.147

#### Expanding the scope of the Sherman Act includes expanding the categories of cases it is intended to apply to.

Popofsky 08, \*Mark S. Popofsky, Kaye Scholer LLP; (2008, “Extraterritoriality in U.S. Jurisprudence”, in 3 ISSUES IN COMPETITION LAW AND POLICY 2417 (ABA Section of Antitrust Law 2008)

3.1. Which jurisdictional principles apply?

A threshold issue in any matter involving foreign commerce is which of the many tests that govern the Sherman Act’s reach applies. With the FTAIA’s passage, there are three possible “jurisdictional”91 standards:

* the test that applies to domestic commerce,
* the Alcoa substantial intended effects standard, and
* the FTAIA.

[FOOTNOTE 91]

As the Supreme Court has observed, “jurisdiction is a word of many, too many, meanings.” Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 90 (1998) (citation omitted). The territorial reach of the Sherman Act, as explained, presents at least a question of “prescriptive” jurisdiction; that is, whether Congress has extended the Sherman Act to particular conduct. Some courts have held that the scope of the Sherman Act also delimits the subject matter jurisdiction of the federal courts in cases arising under the Sherman Act. See United Phosphorous, Ltd. v. Angus Chem. Co., 322 F.3d 942, 951-52 (7th Cir. 2002) (en banc).

[END FOOTNOTE 91]

#### Counter-interp---expand includes clarification, not amendment.

Washington Court of Appeals 4 (HOUGHTON, J. Opinion in State v. Cannon, 84 P. 3d 283 - Wash: Court of Appeals, 2nd Div. 2004. Google scholar caselaw. Date accessed 7/12/21).

In 2002, the House and Senate introduced two identical bills, House Bill 1512 and Senate Bill 6346, to alter the definition of "photograph." The Final Bill Report on House Bill 1512 states, "The term `photograph' in the child pornography statutes is expanded to include digital images and both tangible and intangible items." H.B. REP. on HB 1512, 57th Leg., Reg. Sess. (Wash.2002). Cannon argues that by using the word "expand," the Legislature indicates that it amended rather than clarified the statute. We disagree.

## CP---RoR

### 2AC---ASEAN Turn

#### Antitrust ensures ASEAN’s economic development and general influence.

Khoirul 16—(Faculty of Law, Hang Tuah University). Mokhamad Khoirul Huda, Ninis Nugraheni, & Kamarudin. 2016. “Harmonizing Competition Law In The Asean Economic Community”. International Journal of Business, Economics and Law, Vol. 9, Issue 4. <https://dspace.hangtuah.ac.id/xmlui/bitstream/handle/123456789/200/K9_210-1.pdf?sequence=2&isAllowed=y>. Accessed 12/30/21.

Introduction

The geopolitics and geo-economics of Southeast Asia have strategic values. The condition brings the region into the competition arena of influences as in the era of the cold war between the West Block and the East Block. One proof of the rivalry between the superpowers and great powers at that time was the Vietnam War between the North Vietnamese backed by communist forces and South Vietnamese supported by the US-led Western.

In addition, there is a competition of ideology between the Western and East powers, as well as the military conflict in Southeast Asia involving three countries, namely Laos, Cambodia, and Vietnam, as well as bilateral conflicts such as Indonesia and Malaysia, Cambodia and Vietnam. This situation encourages the leaders of countries in Southeast Asia to establish a partnership that can reduce mutual suspicion and to encourage joint development efforts in the region.1

On August 8, 1967, held in Bangkok Thailand, five representatives of governments from Southeast Asia, the Indonesian Foreign Minister-Adam Malik, Deputy of Prime Minister of Malaysia-Abdul Razak, Minister of Foreign Affairs for the PhilippinesNarciso Ramos, Minister of Foreign Affairs for Singapore-S. Rajaratnam, and the Foreign Minister of Thailand-Thamat Khoman met and signed the ASEAN Declaration called The ASEAN Declaration or Bangkok Declaration.2 The founding countries were subsequently Brunei Darussalam (1984), Vietnam (1995), Laos (1997), Myanmar (1997), and Cambodia (1999).3 The cooperation initially focused on issues of peace and security in Southeast Asia.

Along with dynamic time and change of regional strategic environment, the ASEAN also focused on economic issues which carried the spirit of economic and social stability in Southeast Asia through the acceleration of economic, social and cultural progress by promoting equality and partnership. The shifting more increasingly appeared when the economic crisis occurred in 1997 in Thailand as the impact of globalization and financial integration of the world. The economic crisis then spread to the member countries of the ASEAN such as Indonesia, Malaysia and Singapore. Hence, the ASEAN as a regional organization was also actively responded to the spirit of cooperation known as a regional self-help.

The leaders of the ASEAN countries issued a statement of "the ASEAN Vision 2020". The vision is to strengthen a unity and economic integration and to increase economic cooperation among others by implementing the ASEAN Free Trade Area and accelerating trade liberalization. Strengthening this vision was made in 9th Nusa Dua Bali Summit on October 7-8, 2003.4

In three years later the ASEAN meeting was held in Cebu Philippines and declared “Cebu Declaration on the Acceleration of the Establishment of an ASEAN by 2015” on January 13, 2007. The Cebu Declaration states: first, the ASEAN's strong commitment towards accelerating the establishment of an ASEAN Community by 2015 along the lines of the ASEAN Vision 2020 and the Declaration of ASEAN Concord II, in the three pillars of the ASEAN Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community; second ASEAN's strong determination to Accelerate the full implementation of the ASEAN Community's program areas, measures and principles, with Appropriate flexibility; third ASEAN's determination to create a stronger, more united and cohesive ASEAN that can better manage the challenges posed by the evolving regional architecture and economic climate; and fourth, that ASEAN remains committed to further expanding our engagement with our Dialogue Partners and other parties, and Believes that such interaction will assist ASEAN in its integration Efforts to Achieve the ASEAN Community by 2015.5

At the end of December 2015 the AEC will be enforced effectively. The AEC is a form of economic integration of ASEAN in terms of a system of free trade between ASEAN countries. This will transform the regions into free and integrated region with the global economy of the world.6

One of the goals listed in the AEC blueprint is to create a competitive economic region in which one element is the importance of competition policy. It means that the role of competition law and competition policy is crucial in ensuring the fair competition in the ASEAN region. Currently, there are only six ASEAN member countries that have competition law, namely Indonesia, Thailand, Singapore, Malaysia, Vietnam and the Philippines. The Philippines is the most recent state that enacts competition law on July 21, 2015, namely the Philippines Competition Act. Meanwhile, four other ASEAN member states, Brunei, Cambodia, Laos and Myanmar are still in the process of making competition law respectively.7

The prohibition of unfair business competition in Indonesia is regulated in Act Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. Monopolistic practices constitute a centralized economic activity by one or several businessmen, so that the goods and/or services producing and/or marketing are under his/her or their control. The activity makes a business competition unfair and can harm the public interests. Meanwhile, unfair business competition constitutes a competition occurring among businessmen in producing and/or marketing the goods and/or services dishonestly or unlawfully.

Competition law regulates the prohibition of which businessmen conduct agreements with business competitors horizontally to stipulate the prices, to set the amount of production, to divide the marketing area, to rig tender, to make agreements vertically, to prohibit the abuse of dominant position and the mergers and acquisitions that are able to appear unfair competition on the relevant market.8

The AEC has the risk of unfair competition e.g. through the merging companies abroad, mergers, acquisitions, monopolies on certain sectors and international new cartels (cross border cartel) which have negative impact on economics of the ASEAN. The economy can be affected by monopoly or cartel on particular sectors, that is, easily increasing the prices by way of coordinating the companies that are included in the holding companies for example in the field of CPO cartel that can be done by CPO companies in Indonesia, Malaysia and Thailand.9

Based on the issue background stated above, this paper aims to discussing the implementation of the competition law in ASEAN countries since the ASEAN Economic Community has been implemented.

Research Design

The research is a legal research relating to academic activities. Black's Law Dictionary defines legal research as:

a. The finding and assembling of arthritic's that bear on a question of law and;

b. The field of study concerned with the effective marshaling of authorities that bear on the question of law. 10

Jurisprudence has a distinctive character by which the nature is normative.11 In this case, the jurisprudence has distinctive properties (sui generis) characterized by:

a. Empirical analysis that expose and analyze the content and structure of the law;

b. Systematizing symptoms of law;

c. Doing interpretation of the substance of the applicable law; and

d. That practical sense of law is closely related to its normative dimension.

The legal research is conducted by method according to the character and typical of the jurisprudence which differs from the social sciences and natural science. The research method includes the approach the determination of legal materials and critical analysis of the material contained therein legal process to think that is explorative, inquiry and interpretation. The research method uses normative research that is a research referring to the legal norms contained in competition/antitrust law. The problem approach used in the research is an approach of legislation (statute approach). 12

Furthermore, sources of law in the research consist of primary source of law, secondary source of law and tertiary source of law. The primary source of law is competition law. Secondary source of law covers literature, scholarly writings such as textbooks, journals, papers, dictionaries, and articles contained in the print and electronic media. According to Black's Law Dictionary, the definition of source law is: "something such as constitution, treaty, statute, or custom that provides authorities for legislation and judicial decisions; a point of origin of law or analysis." Explained further sources of law include: "In the context of legal research, the term" sources of law "can refer three roommates rent concept should be distinguished. One, sources of law can refer to the origin of legal concepts and ideas ...; two, sources of law can refer to governmental institutions that formulate legal rules ...; three, sources of law can to the published manifestations of the law. The books, computer databases, forms, optical disks, other media that contain legal information are all of law. "13

The sources of law are collected by: reading, learning, quoting, comparing and connecting source of law from statutory law and literature, so that they become a unity so that the process is easy. The sources of law are processed by many steps:

a. Editing, that the data are carefully checked to avoid errors of collected data;

b. Classifying, that the collected data are then classified based on their respective subjects, this process is done to avoid errors in

grouping data; and;

c. Organizing, that the collected data are then sorted according to the grouping, to avoid mistakes in the sense according to the

systematization of materials. 14

The sources of law are finally analyzed in several steps in accordance with the classification of problems. The analysis is carried out and poured in the form of descriptive analysis that contains activities of explaining, studying, systematizing, interpreting and evaluating. The next step is a theoretical analysis of the ingredients of the law to find, understand and explain in depth the competition law.

Harmonizing Competition/Antitrust Law

The ASEAN Summit on December15, 1997 in Kuala Lumpur Malaysia achieved understanding of the ASEAN leaders to ratify the ASEAN Vision 2020 with the goal of creating stable, prosperous and highly competitive economic zones of the ASEAN marked with free flow of goods, services and investment, freer flow of capitals, easy to move or free movement of workers and equitable economic development and reducing poverty and socio-economic un-justice.

On the 6th ASEAN Summit, December 16, 1998 in Hanoi, Vietnam, the ASEAN leaders made the Hanoi Action Plan that is the first step to realize the goal of the ASEAN Vision 2020. This action plan has a time limit of six years from 1999 till 2004. On the 7th ASEAN Summit, November 5, 2001 in Bandar Seri Begawan Brunei Darussalam the Roadmap for Integration of ASEAN was approved to map important milestones to be achieved and specific steps of the achievement schedule.

A commitment to create the ASEAN community as declared in the vision was confirmed by the ASEAN Concord II on October 2003 in Bali, known as the Bali Concord II on which the ASEAN leaders declared the establishment of the ASEAN Economic Community with the goal of regional economic integration in 2020. 15 On the 10th ASEAN Summit in Vientiane, Laos in 2004, the concept of the ASEAN Community reached the progress that the Vientiane Action Program (VAP) which was a strategy and work program to realize the ASEAN Vision was approved.

The ASEAN Community achievement is stronger since the "Cebu Declaration on the Acceleration of the Establishment of the ASEAN Community by 2015 had been signed by the ASEAN leaders on the 12th ASEAN Summit in Cebu, Philippines on January 13, 2007. The leaders also agreed to accelerate the establishment of the ASEAN Economic Community in 2015.

For the purpose of accelerating the economic integration, the ASEAN leaders prepare ASEAN Charter as an "umbrella law" which becomes the principle to promote and encourage cooperation among the ASEAN member countries. The charter contains principles that must be obeyed by all ASEAN member countries; the principles have been proclaimed on the 10th Summit until the 13th Summit in Singapore, November 20, 2007.

Simultaneously, by signing the ASEAN Charter, the ASEAN leaders also signed the ASEAN Economic Community Blueprint which is a master plan for the ASEAN to establish the ASEAN Economic Community in 2015. Furthermore, the ASEAN leaders declared the ASEAN Economic Community Blueprint (AEC Blueprint) as follows:

“... The AEC Blueprint which each ASEAN Member Country shall abide by and implement the AEC by 2015. The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy ... ”1

The Blueprint identifies steps of economic integration that will be pursued through the implementation of detail various

commitments with clear goals and target of time. The target of time is divided into four (4) phases: 2008-2009, 2010-2011, 2012-

2013 and 2014-2015. The ASEAN Economic Community Blueprint has four (4) main characteristics, namely to realize the

ASEAN as:

a. The single market and production base with five (5) main elements, namely: (i) the free flow of goods, (ii) the free flow of services, (iii) the free flow of investments, (iv) the free flow of skilled labor, and (iv ) more freely capital flows. In addition, the single market and production base also include two (2) other essential components, namely the Priority Integration Sectors (PIS) and cooperation in the field of foods, agriculture, and forestry.

b. Highly competitive economic zone with 6 (six) main elements, namely: (i) competition policy, (ii) consumer protection, (iii) intellectual property rights (IPR), (iv) infrastructure development, (v ) taxation, and (vi) e-commerce.

c. Equitable economic development zone with two (2) main elements, namely: (i) the development of small and medium enterprises (SMEs) and (ii) initiative for the ASEAN Integration.

d. The integrated zone into the global economy with two (2) main elements, namely: (i) an integrated approach to the economy outside the region, and (ii) increased participation in global supply networks.

The four characteristics above are closely related to each other. For the purpose of realizing the ASEAN as a single market and production base, the ASEAN should have a high economic competitiveness, either individually or regionally among member countries. To create a region which has high competitiveness, the development gap among member countries should be minimized so that each ASEAN member countries have an equivalent level of economic development. Achievement of the three things above is needed to make the ASEAN as ready region to fully integrate into the global economy.

The legal basis of the ASEAN single market is stated in Article 1 number 5 of the ASEAN Charter. Article 1 number 5 states that to create a single market based which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is a free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labor; and free flow of capital. The provision of Article 1 number 5 does not only establish a single market but also sets the culture of competition within the ASEAN. This can be seen from the words "... highly competitive and economically integrated with ... ". It means that all business actors in doing their business may not effect trade between ASEAN member countries. To ensure a fair competition between ASEAN member countries, business actors need a competition law. With the ASEAN Free Trade Area the business actors are free to supply the product from one member country to the other ASEAN member countries. Every business actor can trade among ASEAN member countries. This will lead to competition between the business actors among ASEAN member countries in ASEAN single market. It means that the culture of competition is already exists within every business actor.17

There are at least three factors that encourage the effort to achieve the AEC, namely: first, the process that leads to a market economy because of the deeper integration of the ASEAN economies with the global economy and the turmoil in the country; second, the consequences that are resulted by members of the ASEAN countries in multilateral organizations, especially the World Trade Organization and Asia Pacific Economic Cooperation; and third, growing number of Multi-National Companies that engage in productivity and provide goods and services in the ASEAN countries.18

Lawan Thanadsillapakul states that the ASEAN needs competition law because:19 first, since the ASEAN aims to strengthen economic integration in the region, it needs laws and institutions to support the implementation and elaboration of trade and investment within the ASEAN market liberalization; and second, in an emerging ASEAN free market economy, monopolies and restrictive business practices are viewed as undesirable, since they are likely to distort prices and inhibit the efficient allocation

of resources.

Hence, it can be properly inferred that the common competition law and policy framework in ASEAN are the main prerequisite towards the attaining objectives & mentioned above. The actual goal of the ASEAN Competition Policy is to ensure a level playing field and to nurture fair business competition culture in the regional economic performances of ASEAN in the long run. Most development and many developing jurisdictions have competition laws. At its most basic, competition law "consists of rules that are intended to protect the process of competition in order to maximize consumer welfare." The theory behind competition law is that market competition within a jurisdiction leads to efficiency in the delivery of goods or services which benefits consumers, a decreases output and economic growth. Competition is at its best when all market participants operate from a level playing field and compete to supply goods and services to others.20

The competition law in the ASEAN regions is divided into 3 groups. First, there are four member countries that have national competition policy and competition agency. Moreover, in several ASEAN Countries namely Indonesia, Singapore, Thailand and Vietnam, the initial competition laws have temporarily been implemented with Indonesia's Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law Number 5 of 1999 on Competition Law), Thailand's Price Control and Anti-Monopoly Act 1979 lastly Amended by Trade Competition Act of 1999, Vietnam's Competition Law in 2004 and Singapore's Competition Act, 2004. The second group is filled by Malaysian ratify competition law in 2012 and Philippine ratify competition law on July 21, 2015 called Philippine Competition Act. The third group is the other ASEAN member countries, namely Laos, Myanmar, Brunei, and Cambodia which are in the process of preparing or planning to introduce competition law. 21 The condition of 4 countries that do not have a competition law is recently as follows:

Brunei does not have laws that specifically regulate business competition. However, the economy is open for market-oriented and seeks to improve competition in accordance with the domestic situation and the provisions of the WTO. These efforts include the deregulation and privatization of the corporation as well. Brunei reviews the framework of regulations that govern the industrial sector continuously for the purpose of enhancing the economic competitiveness as a whole. Nowadays, Brunei is developing a competition law by considering comprehensive regulatory bodies in accordance with the country's economic structure and by planning for implementing the rules of competition correctly.

Cambodia does not have a complete competition law. However, the Royal Government of Cambodia promotes fair competition policy. For example, the law on trade mark and unfair competition action contains a section which prohibits unfair competition. Article 56 of the Constitution of Cambodia, adopted in 1993, stipulates that Cambodia shall adopt the market economy system, and the preparation and process of this economic system shall be determined by the law.

Laos is elaborating and developing the competition law and policy. The government is preparing a decision on antitrust law and competition policy. However, competition law and policy are a complex problem, because Laos faces the fundamental problem that is the lack of experience and no culture of competition.

Myanmar also has no competition law and policy. However, Myanmar government is looking for solutions that will balance the interests of competition with the existing economic structure. Like the other countries in the region, Myanmar does not have a culture of competition; for three decades the policy in the form of a closed system of socialism has been applied.

The ASEAN Regional Guidelines on Competition Policy (Regional Guideline) as a guide of assessment do not directly affect the behavior of businesses and industry and market structures. The ASEAN Regional Guideline only assists member countries to improve the awareness of the importance of competition, not to preserve competition among ASEAN member countries. With the integration of the ASEAN market, the competition agencies in each country not only supervise and ensure competition in each country, but also indirectly supervise competition in the regional markets of ASEAN.22

The future challenge is that there are still no competition law and institutions that control the implementation of business activities among the ASEAN member countries. Differences of legal systems among the ASEAN member countries of ASEAN, differences in implementing competition laws in several countries, the nature of nationalism and protectionism, sector egoism, and no harmonization of one competition law with another still become obstacles of the regional integrated market by regulating the ban of horizontal and vertical agreements, dominant position and abuse of dominant positions and regulating mergers and acquisitions.

For example in the case of mergers, Indonesia controls the mergers and acquisitions with post notification, coupled with voluntary pre-notification by setting the threshold of asset values, Rp. 2.5 trillion or sale values, Rp. 5 trillion and Rp. 20 billion for the Bank, while Singapore conducts voluntary self-assessment in both pre and post-notification with the threshold of market share more than 40%, or between 20-40% of market share and at post-merger the market share 70% or more. Thailand and Vietnam shall be notified. 23

Due to the enactment of the AEC at the end of 2015, it will invite companies in the ASEAN region to merger and do acquisition for the purpose of enhancing competitive capability. Competition between businessmen becomes more intense after the enforcement of the EAC. Example, the extraterritorial doctrine has been applied by the Commission for Supervising Business Competition to Temasek Holding Company and its subsidiaries outside the territory of the Republic of Indonesia. The Commission provides financial penalty to Temasek Holding Company and subsidiaries and they obey it. The question is that weather the same action will also be obeyed by businessmen in one of the ASEAN member countries but resulting unfair competition in other countries, if the institution for controlling business competition issues the verdict. Thus, cooperation between the institutions for controlling business competition among the ASEAN member countries should be enhanced to enforce competition law in the ASEAN region in the era of the EAC. It is also necessary to establish the institution for controlling business competition and to enact competition law of the ASEAN in order to easily harmonize competition laws among the ASEAN member countries. 24

Thus, for the long term we can see that the competition law in the ASEAN will not become an obstacle to run and merge the regional economy; however, it gives an assurance of business certainty to effectively enforce the ASEAN economic community after 2015.25

Conclusions

There are still several countries of the ASEAN members not to have the competition law. Differences of legal systems in the ASEAN countries and of the implementation of the competition law in some ASEAN countries, nationalism, protectionism, and egoism mostly constitute the limiting factors in harmonizing the competition law in the ASEAN countries.

Harmonizing the competition law in the ASEAN countries should be soon implemented to ensure that the business competition can run fairly, and to defend the principle of public openness in the ASEAN region. Therefore, the most important thing to do is to substantively harmonize the competition law in each ASEAN country as well as to regionally implement the competition law in the ASEAN region.

#### Independently—strong ASEAN solves US-China rivalry—extinction.

Ghee 22 - (\*Lim Teck Ghee, Director of the Centre for Policy Initiatives in Malaysia. Visiting fellow or professor at the following universities: the Australian National University, the Max Planck Institute, Griffith University, Yale University, Cornell University, Columbia University and the University of California, Berkeley. Received a number of academic awards including the Harry J. Benda Prize in Southeast Asian Studies; the Fulbright Fellowship Award; Rockefeller Foundation “Reflections on Development” Fellowship Award; East West Center Visiting Fellowship; Australian National University Visiting Fellowship; Jackson Memorial Fellowship, Griffith University; University of Toronto Visiting Chair in ASEAN Studies; and Kyoto University Asian Public Intellectual Senior Fellowship award ; 1-20-2022, Khmer Times - Insight into Cambodia, "Can Asean bring U.S and China together?" doa: 1-29-2022) url: <https://www.khmertimeskh.com/501010149/can-asean-bring-u-s-and-china-together/>

The US strategy in targeting China as an enemy can only bring about adverse consequences in the form of an intensified arms and militarisation race.

The most pessimistic outcome could be a nuclear holocaust which will affect all humanity.

Although put on the defensive by the US identification as a rival to be brought down, it is in China’s interest to refrain from retaliation and to work towards a peaceful and amicable outcome in the contestation that has emerged between them.

Meanwhile, concerns are growing that the US and China could be moving to the brink of a nuclear war as the contest for primacy grows more intense.

The biggest danger seems centred on the South China Sea, which China claims as its own, using logic not much different from the Monroe Doctrine that the US has employed in the Caribbean and Latin American world since 1823 to claim that any intervention in the politics of the Americas by foreign powers is a potentially hostile act against the United States.

In January, to underscore the nuclear and other perils, the Bulletin of the Atomic Scientists moved the Doomsday Clock from two minutes to 100 seconds to midnight. This is closer to humanity’s doomsday hour than at any time since its creation in 1947.

According to the Arms Control Association, there are 13,500 nuclear warheads in the world.

Ninety per cent are held by Russia and the US with a total payload of 6,600 megatons, enough to destroy the world many times over.

Some 3,500 warheads are in military service: 700 deliverable warheads are in China.

Is the world moving closer to Herman Kahn’s theory of “Thinking the Unthinkable” (1960) i.e., of states using thermonuclear weapons to win unwinnable wars?

Will China or its North Korea ally nuke Japan for its current and past anti-China and anti-Korea policy and its support of US military dominance?

Is Washington thinking the unthinkable against China that is unlikely to flinch in the face of threats from the US?

Instead of the US overreacting to China’s growing military, economic and cultural power or China taking advantage of declining US influence to pursue a more aggressive foreign policy, both superpowers need to bury the hatchet and minimise their geopolitical differences to foster peace and stability in the world.

They ought to mobilise their resources to overcome their own domestic shortcomings and just as, if not more importantly, turn their attention to the defining crisis of our time: Covid-19 and climate change.

Can this idealistic scenario play out on the global geopolitical stage and what can make it happen?

UNSC’s glimmer of hope

On Jan 3, a rare joint statement by the Five Permanent members of the United Nations Security (UNSC) consisting China, France, Russia, UK and US affirmed:

A nuclear war is the last thing the world needs. A nuclear war cannot be won and must never be fought;

Nuclear weapons – for as long as they exist – should serve defensive purposes, deter aggression and prevent war;

The importance of preserving and complying with bilateral and multilateral non-proliferation, disarmament, and arms control agreements and commitments to avert a nuclear holocaust; and,

The intention to continue seeking bilateral and multilateral diplomatic approaches to avoid military confrontations, strengthen stability and predictability, increase mutual understanding and confidence, and prevent an arms race that would benefit none and endanger all.

Besides reaffirmation of the grouping’s agreement on the nuclear issue, the statement is significant in that the five signatories point to their desire to work with “all states” and their resolution “to pursue constructive dialogue with mutual respect and acknowledgment of each other’s security interests and concerns”.

This is a clear recognition of the multipolar global system and a repudiation of the uni- or bipolar world posited by advocates of US and Western dominance and hegemony.

Opening for Asean to leave a mark

The Association of Southeast Asian Nations (Asean) should follow up on this important opening provided by the UNSC to advance further its opposition to Aukus and to reiterate the anti-nuclear position of the member countries.

This step is necessary to ensure that Southeast Asian nations do not become embroiled or compromised in the US led campaign against China.

A more difficult option for Asean to pursue, but one potentially more beneficial to the cause of peace and security, is for the Association to play a role as a referee or as an honest broker in the conflict between the two superpowers rather than taking the side of either power.

If Asean member states can become an honest broker to mitigate the rivalry between the two, they would do the region and humanity a great service.

To the best of our knowledge, Asean has yet to offer either power its willingness to act as a mediator. This perhaps may be due to the fact that Asean has yet to get its house in order.

Nevertheless, it is a challenge that we urge Asean to consider in the next round of its engagement with the two superpowers.

The scenario of the “Thucydides Trap” situation describes the tendency towards war when an emerging power threatens to displace an existing great power as is clearly happening now.

In addition to the Thucydides Trap, there is also the danger of the two superpowers falling into what is known as the “Churchill Trap”.

This term refers to the long-term confrontation that took place between the US and the former USSR, which also drew in small and medium-sized countries and inflicted enormous damage to all participant nations, together with the two contesting powers.

Possibilities also exist for the pursuit by Asean member states of an enlarged and stronger concept of non-alignment that can go beyond the traditional policy of non-participation in the military affairs in a bipolar world.

It may sound a tall order for small states in Asean to help moderate the US-Sino rivalry and to turn attention to the challenges to humanity identified by the Doomsday Clock scientists and other experts. Nevertheless, it is one worthy of consideration.

Pandemic, environmental and climate change challenges

How to insert and operationalise a comprehensive concept of non-alignment into global relations so that small and medium-sized nations that comprise the Non-Aligned Movement and Asean can exert a moderating influence in our multipolar world is a subject that we hope can feature prominently in think tank circles and Asean’s future planning.

Looking further beyond the field of global politics, Asean should use its influence to lobby China and the US to work more closely to address the many urgent challenges outside the political arena.

These socio-economic and environmental challenges threaten regional and global peace and security just as much or even more than the arms race and militarisation.

### 2AC---Deficits

#### 2---Per se enforcement against international cartels is bad! Civil RoR is better.

Benton-Wells 11, Deputy Dean at the Melbourne Business School and a Professorial Fellow at the Melbourne Law School. She is the former Director of the University's Competition Law & Economics Network and co-Director of the Global Competition and Consumer Law Program. She is also a lay Member of the Australian Competition Tribunal. (Caron, “Criminalising Cartels: Critical Studies of an International Regulatory Movement,” Research Gate)

On a broader stage, criminalisation of cartel conduct is telling of the high priority assigned by governments across the world to competition policy. In tandem with the expansion of free market capitalism and liberal democracy, competition policy has achieved a ‘constitutional’ status in many jurisdictions across the globe.87 There is, of course, a paradox in the way in which the premium increasingly placed on free enterprise (as expressed through trends of privatisation, liberalisation and deregulation) has seen a corresponding increase in government intervention through intensive and, in the present context, penal regulation.88 It is this paradox that has facilitated thinking about phenomena such as the ‘regulatory state’ and ‘regulatory capitalism.’89 Cartel criminalisation is relevant to this regulatory discourse. There are significant unanswered questions about how companies will respond over the long-term to the increasingly hostile and aggressive regulatory environment governing contacts and collaborations between competitors. One scenario, as suggested in several contributions in this book, is that it may see collusive behaviour become even more clandestine and hence more difficult to detect. Another scenario is that companies will seek to formalise their relations through joint ventures and mergers to a greater extent,90 and thereby force competition authorities to apply complex and resource intensive effects-assessments avoided under the per se rules that feature in anti-cartel laws and enforcement. It will be important to monitor and attempt to map these trends given that the result may be increased concentration and market power and correspondingly diminished competition — the antithesis of the objectives to which criminalisation is directed.

## DA---South Korea

### 2AC---Thumpers

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

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

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

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

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

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

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

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

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

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

## DA---Clog

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

#### Courts are clogged now.

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

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

#### Thumpers:

#### ---antitrust.

Rivero 21, \*Nicolas Rivero, Nico covers tech for Quartz. He graduated from Northwestern University and has written for The Miami New Times, Mental Floss, and El Cronista; (September 29th, 2021, “A cheat sheet to all of the antitrust cases against Big Tech in 2021”, https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021/)

Anti-monopoly enforcement is in vogue once again around the world. After two decades of virtually unchecked growth from the world’s biggest tech companies—particularly, Google, Amazon, Facebook, and Apple—regulators and politicians are rediscovering their zeal for reining in corporate power. In the last four years, the EU has issued [a series of multi-billion-dollar rulings](https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html) against big tech companies, and the bloc’s crusading competition commissioner Margrethe Vestager has announced [new investigations at a steady clip](https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies). Antitrust regulators in [South Korea](https://www.cnbc.com/2021/09/14/south-korea-antitrust-regulator-fines-google-177-million.html), [India](https://www.reuters.com/technology/india-antitrust-probe-finds-google-abused-android-dominance-report-shows-2021-09-18/), [Australia](https://www.reuters.com/business/media-telecom/google-dominance-australia-online-advertising-harms-businesses-regulator-2021-09-28/), and the [post-Brexit UK](https://qz.com/1989645/uk-regulators-accuse-facebook-of-monopolizing-the-worlds-gifs/) have started to launch investigations and levy fines in an effort to shift tech companies’ business practices. Now the US is joining the fray. The US steps up antitrust enforcement Spurred by a rapid shift in US public opinion, politicians on the left and right—from progressive Democratic senators like Elizabeth Warren to Trump-allied Republican representatives like Jim Jordan—have made taking on Big Tech a core piece of their political identities. Congress has begun the process of [updating the nation’s antitrust laws](https://qz.com/2020152/congresss-antitrust-bills-empower-regulators-to-take-on-big-tech/) for the first time in seven decades. President Joe Biden named Lina Khan, [a firebrand antitrust scholar once at the fringe of US legal thought](https://qz.com/2021305/lina-khan-will-bring-the-lefts-anti-monopoly-stance-to-the-ftc/), as the head of the country’s top competition regulator; she has vowed to ramp up lawsuits against tech firms and dust off her agency’s long-neglected power to set competition rules. Federal prosecutors have joined forces with coalitions of state attorneys general to bring sweeping suits against the likes of [Facebook](https://techcrunch.com/2020/12/09/facebook-antitrust-state-attorneys-general/) and [Google](https://abcnews.go.com/Technology/google-hit-antitrust-lawsuit-38-state-attorneys-general/story?id=74780182). Some of these cases explicitly [call for tech giants to be broken up](https://www.cbsnews.com/news/facebook-antitrust-case-wall-street/)—a legal feat that would [only be possible in US courts](https://qz.com/1946058/europes-digital-markets-act-wont-topple-big-tech/), which have jurisdiction over the biggest [tech](https://qz.com/re/tech/) companies. All these efforts could, with time, reconfigure the landscape of corporate giants that control how the world shops, finds information, and accesses the internet. But, historically, the pace of antitrust proceedings has been glacially slow. US prosecutors’ landmark lawsuit against Microsoft, for instance, [didn’t fully wind down](https://www.seattletimes.com/business/microsoft/long-antitrust-saga-ends-for-microsoft/) until a decade after it began in 2001. Today, any investigation, lawsuit, or enforcement action could take years to reach a resolution, as legions of high-paid economists and lawyers well-versed in stalling tactics debate the minutia of arcane market models and legal precedents. We’ve taken a snapshot of the wide world of antitrust in an attempt to put into perspective the slow-moving, global project of reining in big tech. This chart lists every major antitrust case against Google, Amazon, Facebook, and Apple that is still pending today.

#### ---capitol riot.

Gerstein 21, \*Josh Gerstein is POLITICO’s Senior Legal Affairs Reporter; \*Kyle Cheney is a Congress reporter for POLITICO; (March 10th, 2021, “Capitol riot cases strain court system”, https://www.politico.com/news/2021/03/10/capitol-riot-court-cases-475081)

The transcontinental hearing — with the prosecutor in Alaska, the defendant in Michigan and other participants in the D.C. area — underscored the extraordinary lengths to which the Justice Department and courts are going to prosecute and process hundreds of people accused of storming the Capitol on Jan. 6. With the D.C.-based team of federal prosecutors stretched thin, the Justice Department has called in a cavalry of far-flung reinforcements. A POLITICO review of the more than 250 (and climbing) cases related to the Capitol breach shows that federal prosecutors from Fort Lauderdale to Wichita to San Francisco have heeded that call. So far, over 30 cases are assigned to attorneys who appear to be outside the staff of the U.S. Attorney’s Office in Washington as it tackles what may be the most sprawling prosecution in U.S. history related to a single event. For context: the office’s 2021 criminal caseload includes fewer than 20 federal prosecutions that aren’t connected to the Capitol assault. The ever-expanding probe, which President Joe Biden’s incoming attorney general Merrick Garland has called his top immediate priority, has increasingly strained the justice system and required extraordinary measures to churn through a growing roster of cases. Dozens are simple trespassing cases, but others allege brutal assaults on Capitol police officers while a mob loyal to former President Donald Trump overran Congress and forced a delay in the formal counting of electoral votes. Hundreds more cases are expected to land on the docket in the next few weeks and months. The number of cases assigned to prosecutors outside the ranks of the D.C. U.S. Attorney’s office is modest but is growing steadily as more and more suspects are identified — typically from a combination of videos taken from social media, surveillance cameras or body-worn cameras and tips from the public.

### 2AC---AT: IL---Patents

#### Years-long patent backlogs now and inevitable---COVID.

Lloyd 21, \*Richard Lloyd, Editor, IAM magazine; (March 25th, 2021, “Expect more ITC cases as district courts work through covid backlog, says leading US litigator”, https://www.iam-media.com/law-policy/expect-more-itc-cases-district-courts-work-through-covid-backlog-says-leading-us-litigator)

Desmarais LLP has recently launched a Washington DC office focused on disputes before the International Trade Commission and, according to the firm’s founder, an already popular venue with some rights owners might be about to see an uptick in activity

The International Trade Commission looks set to hear an even greater volume of IP cases as patent trials in district courts in the US continue to face long delays because of the covid-19 pandemic and spend years working through the backlog of lawsuits.

That’s the message from [John Desmarais](https://www.desmaraisllp.com/john-desmarais), one of the US’s leading patent litigators who was speaking to IAM after a period of significant expansion for his firm, Desmarais LLP, including a new DC office focused on ITC work.

“There was a trend even before covid of increasing work going to the ITC because it was getting harder and harder to get injunctions out of the district courts,” Desmarais said. “So, we were already seeing that trend pre-covid but then over the last year the district courts have really become backlogged because they’ve had to put off so many trials.”

Cases are still moving forward, he added, but getting to trial in many districts has become a distant prospect. “I think you’re going to see that trend at the ITC really increase for the next several years as plaintiffs start going there instead of district court,” Desmarais commented.

According to Lex Machina’s [annual litigation report](https://lexmachina.com/media/press/lex-machina-releases-2021-patent-litigation-report/) for 2020 the median time to trial for district court cases that terminated in 2019 was 135 days shorter than cases which terminated in 2020. That underlines the extent to which covid has added to already lengthy litigation timetables in the US. Courtrooms in many districts remain closed because of covid and while popular venues such as the Western and Eastern Districts of Texas that have reputations for moving relatively quickly, have started hearing trials again, they still have been slowed down in working through their particularly large dockets.

Desmarais’s remarks came after his firm [announced](https://www.desmaraisllp.com/3-Partners-Arrive-Desmarais-Launch-Washington-DC-Office) the hire of a trio of ITC specialists from Troutman Pepper and the launch of a new office in Washington DC. [Justin Wilcox](https://www.desmaraisllp.com/justin-wilcox), previously based in the firm’s New York HQ, has also moved to the US capital.

As Desmarais pointed out, beyond the prospect of winning an injunction, another attraction of the ITC is that it is statutorily obligated to keep cases on a fast timeline and, unlike in district court, the trials at the Commission are bench trials. “They’re easy to do even now because you don’t have worries about how you’re going impanel a jury,” he said.

If the patent litigator’s comments are anything to go by then the gumming up of district courts might be a problem for some time to come yet. “It’s taking a long time even to get to the very first conference,” he remarked of his firm’s current caseload.

With the build-up in disputes one of the questions will be to what extent that will impact litigation strategies for rights owners and defendants alike. For instance, might the increase in time to trial prompt more settlements?

“For the cases where the plaintiff is really just looking for a payment, case that are not strategic disputes between competitors, I suspect you’ll see a lot of parties just desperate to get a payment rather than waiting three years for a trial,” Desmarais predicted.

And as the renowned patent litigator added, that’s not including another 18 months for any appeal. That adds to what is already a tough litigation climate in the US.

## DA---Bedoya

### 2AC---Bedoya

#### 2---Republican opposition is completely irrelevant to the confirmation---it’s a party-line vote now, which can confirm him.

Kelly 1/10/22, is a policy reporter for The Verge . (Makena, The FCC’s still in a stalemate a year into Biden’s presidency

And pressure is mounting to get nominations confirmed, https://www.theverge.com/22876628/fcc-biden-ftc-gigi-sohn-alvaro-bedoya-rosenworcel-net-neutrality Biden renominated Sohn and Bedoya on January 4th, setting the nominations up for further consideration by the Senate Commerce Committee. According to Politico on Monday, the committee plans to vote on nominees on January 24th, and the markup may include Sohn and Bedoya, but the final agenda has not been released as of publication. “THERE’S NO TIME TO WASTE” “There’s no time to waste and so much to get done at the FCC: ensuring the billions being invested in broadband actually reach those who need it most, restoring Net Neutrality and Title II, reckoning with media regulators’ history on race and repairing the damage of the Trump years,” Craig Aaron, Free Press Action co-CEO, said in a Monday statement. As FCC and FTC nominations saw some movement in the Senate last year, Republicans like Sen. Lindsey Graham and The Wall Street Journal editorial board argued that Sohn was a telecom policy extremist. “Gigi Sohn is a complete political ideologue who has disdain for conservatives. She would be a complete nightmare for the country when it comes to regulating the public airwaves,” Graham said in a tweet thread last November. “I will do everything in my power to convince colleagues on both sides of the aisle to reject this extreme nominee.” So long as every Senate Democrat, including Sen. Joe Manchin (D-WV), votes in favor of both Sohn and Bedoya, no Republican support would be necessary to confirm them.

### 2AC---UQ

#### Bedoya won’t be confirmed---partisanship.

Hendel 1-3 (John, POLITICO tech reporter chasing the telecom debates dominating Capitol Hill, “2022 kicks off with tech nomination do-overs,” 1-3-22, <https://www.politico.com/newsletters/morning-tech/2022/01/03/2022-kicks-off-with-tech-nomination-do-overs-799632>, DOA: 3-5-2022) //Snowball

Bedoya for FTC: Bedoya, a longtime privacy advocate who, like Sohn, faces GOP complaints over past partisan tweets, faces bigger procedural hurdles than Davidson and is unlikely to win the same amount of bipartisan support.

The committee deadlocked along partisan lines when it voted on him in December, with every Republican siding against. He could still advance to the floor with unified Democratic support, but Democrats would need to find the time for three roll call votes. (In addition to cloture and confirmation votes, Bedoya would need one simply to discharge him from the Senate Commerce Committee — and that adds up to a lot of floor time.)

### 2AC---USDA

#### There is no internal link to agriculture enforcement—That is an area where Garland and the USDA are already committed and already enforcing—Bedoya is not key to ag enforcement

Schweller 1/4/22, Assistant News Editor for Whistleblower Network News., (Geoff 1/4/21, and USDA Commit to Protecting Agricultural Antitrust Whistleblowers, <https://whistleblowersblog.org/government-whistleblowers/doj-and-usda-commit-to-protecting-agricultural-antitrust-whistleblowers/>)

On January 3, Attorney General Merrick B. Garland and Secretary of Agriculture Tom Vilsack spoke at a White House event focused on competition in agriculture. Garland and Vilsack expressed the shared commitment of the Department of Justice (DOJ) and Department of Agriculture (USDA) in “effectively enforcing federal competition laws that protect farmers, ranchers, and other agricultural producers and growers from unfair and anticompetitive practices,” according to a DOJ press release. Furthermore, Garland and Vilsack voiced support for strong whistleblower protections as a key element in policing unfair and anticompetitive practices in agriculture. In connection with the event, the DOJ and USDA released a statement of principles and commitments. One of the principles highlights the agencies’ shared commitment to protecting whistleblowers. It reads: “The agencies will jointly develop within 30 days a centralized, accessible process for farmers, ranchers, and other producers and growers to submit complaints about potential violations of the antitrust laws and the Packers and Stockyards Act. The agencies will protect the confidentiality of the complainants, if they so request, to the fullest extent possible under the law and also commit to supporting the strongest possible whistleblower protections.”

#### FTC is irrelevant—It is the USDA that is key to ag enforcement

Farm News Media 1/4/21, (USDA, DOJ launch joint effort to enforce ag antitrust laws, <https://www.michiganfarmnews.com/usda-doj-launch-joint-effort-to-enforce-ag-antitrust-laws>)

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

### 2AC---Link

#### There is no link—The Khan nomination proves there is a strong bipartisan consensus for increasing antitrust enforcement

Stoler 21, Research Director for the American Economic Liberties Project. (Matt, 6/16/21. Research Director for the American Economic Liberties Project, https://mattstoller.substack.com/p/the-antitrust-revolution-has-found)

The earth-shattering news in the antitrust world is that yesterday, Lina Khan became the Chair of the Federal Trade Commission, one of the two agencies that enforces antitrust law. In this issue, I’m going to explain who she is, why she got both Republican and Democratic votes for her confirmation in the Senate, and how her selection to this position indicates a potential revolutionary shift in politics. The TLDR version is that something just happened to make Wall Street analysts on CNBC very nervous. From Journalist to Lawyer to Leader On Monday, the Senate voted overwhelmingly to put progressive antitrust scholar Lina Khan on the Federal Trade Commission. A few hours after her final vote yesterday, Senator Amy Klobuchar leaked the news that the White House would designate her as Chair. Khan is something rare in progressive politics, someone with academic credentials and mastery over a dense technical subject, but also connected with a broad-based populist social movement that crosses partisan lines. I can’t tell you how many people I’ve spoken to in business, Republicans as well as Democrats, who talk in reverential tones about Khan. It’s not just that she is an important thinker, it’s that she \*understands\* what they are going through, the coercive power they are up against. And that’s because she got her start understanding the economy not in a classroom or at a law firm, but as a business journalist, listening to business people and workers facing monopolists. As such, Khan covered all sorts of industries. In 2013, for instance, she wrote a Halloween-themed story in Time Magazine titled “Why So Little Candy Variety? Blame the Chocolate Oligopoly.” In that piece, she traced consolidation in the candy market, showing the industry is controlled by just three firms, Hershey’s, Mars, and Nestle. These firms offer kickbacks to retailers known as ‘slotting fees,’ which block the ability of independent candy makers to sell their wares. To write the story, Khan talked to small candy makers, like Dave Wagers of the Idaho Candy Company, who told her what it is like to try to get a product on shelves. Such a story is common, and Khan examined concentrated power across the economy, writing about airlines, banks and commodity trading, meatpackers, seeds and chemicals, and business formation in general. Then she went to law school. While a student, Khan used her experience as a journalist to help craft a legal argument on the roots of Amazon’s power, which she traced to the transformation of antitrust enforcement. Her analysis, titled Amazon’s Antitrust Paradox, put her at the center of a worldwide debate over concentration and monopoly power. Khan then went the FTC as an advisor to Commissioner Rohit Chopra, before going to work for the Antitrust Subcommittee last year. She served as the lead researcher of big tech in the subcommittee’s groundbreaking investigation which reoriented tech policy globally. In other words, Khan has shown herself a capable storyteller, a creative lawyer, and a practical and hard-nosed policymaker, and one who doesn’t orient her thinking around traditional partisan political calculations. That said, Joe Biden took a risk in appointing her to the FTC, because neither monopolists nor the antitrust establishment are happy to see their main intellectual foil placed in a position of authority. And during her nomination hearing, Khan didn’t play any political games. She didn’t try to hide anything or moderate her views. When asked, she noted “potential criminal activity” by big tech firms, in an allusion to possible price-fixing by Google and Facebook in ad markets. And yet, Biden’s gamble paid off. The right-wing took the choice of Khan in good faith, and at a moment of deep partisan bitterness over virtually every issue under the sun, 22 Republicans chose to oppose big tech, cross the aisle and vote to confirm her to run the agency tasked with enforcing fair trade rules in America. To call this appointment remarkable understates the point. That Khan is on the commission, with Republican votes, is surprising enough, but for her to be Chair is downright shocking. It’s too soon to know what Khan is going to do in her new role, but her appointment is already sending shock waves in the enforcement community globally. Antitrust policy is run by a small yet international community of lawyers and economists who know each other. In every country, some of them are cheering this move, while others are horrified. But they all know it matters, because as goes the U.S. on antitrust, so goes Europe. And Khan, if she is able, will take competition policy in a very different direction. There are hurdles, as the FTC does require a 3-2 vote for most major actions, so it’s not like Khan can bring cases on her own authority. Still, this is a big deal. And it wasn’t just antitrust enforcers and monopolists who realized the import of this pick. Wall Street and the Crisis of Legitimacy Over the past two days, Khan’s nomination has been discussed several times on CNBC, with analysts looking at which stocks to buy or sell due to her appointment. While the general sentiment among analysts is alarm, CNBC star Jim Cramer, in a later segment, argued not to worry. Breaking up big tech, he said, would help boost investor returns because big tech firms are worth far more in pieces. While it’s true that researchers are finding that stronger antitrust laws are good for stock prices (which is something I noted in 2019), the far more important point is that Wall Street is having this debate about the Federal Trade Commission at all. It’s been a generation since the FTC was taken seriously as a meaningful player in the organization of our economy and markets. Every so often some official will make noise about a tougher stance on competition, citing Senator John Sherman or Teddy Roosevelt in a fancy speech, only to back down. Getting sanctioned by enforcers is increasingly a joke. As Commissioner Rohit Chopra noted, “it's become a right of passage for Silicon Valley companies to get an FTC consent decree." This crisis of legitimacy is longstanding, but it became evident antitrust enforcement was irrelevant in 2013, when the FTC, even though it had good evidence of monopolization by Google, dropped its antitrust claims against the search giant, and then kept secret how much evidence it had. The flaccid nature of these enforcement choices was further emphasized when Facebook was fined $5 billion by the FTC over its Cambridge Analytica scandal. It sounds like a lot of money, but upon the announcement of the fine, the firm’s stock price jumped up by tens of billions of dollars. As if a regulator couldn’t get any more deferential to power, the FTC didn’t even make the announcement of the fine. Facebook did, on an earning’s call no less. In other words, Khan is stepping into a leadership role at a demoralized and insular institution, with a culture of timidity. That can’t last for much longer. Khan’s reputation is such that many are looking to Biden’s appointment of her, and her confirmation with Republican votes, as a signal that politicians want to end the era of concentrated economic power. Either Khan fixes the FTC, or in ten years the FTC will probably not exist in its current form. The FTC’s New Deal Resurrection This moment isn’t the first time the FTC has been nearly left for dead as a handmaiden of monopoly, and then resurrected. In fact, a similar scenario occurred at another moment of extreme monopolization, a few decades after the FTC’s birth. The origins of the FTC go back to the birth of corporate America, at the turn of the century, when J.P. Morgan had engineered a merger wave to create many of the giants we know, like General Electric and U.S. Steel. In response, Teddy Roosevelt created the Bureau of Corporations in the early 1900s to help lead investigations into these firms. Woodrow Wilson turned this agency into a full commission with regulatory authority in 1914, with the goal of breaking up corporate giants and regulating the resulting competitive markets. But the FTC, though it had some successes, didn’t quite work. World War One got in the way, and then the FTC was neutered by courts and captured by monopolists in the 1920s. By the early 1930s, populists, most of whom had been aligned with Wilson, had had enough. Many came to despise the FTC, because far from a commission to address monopolization and create fair trade practices, it had turned into a vehicle for legalizing monopolies. When I was researching my book, I found an amazing letter in the archives from anti-monopolist Congressman Wright Patman, who later was a strong supporter of the FTC, illustrating the depth of this anger. Patman, in writing to a fellow Texas anti-monopolist, proudly noted that he “succeeded in eliminating $300,000 from” the FTC budget, and expressed hope that soon “we will finally abolish that useless Commission altogether.” New Dealer populists like Patman didn’t end up eliminating the FTC. Instead, they resurrected it with new leadership and funding, until it became the guardian of small business in America. From the 1930s until the 1960s, the FTC brought suits against chain stores to stop the kind of predatory pricing and discriminatory behavior that Amazon-style chains like A&P had routinely used to destroy independent retailers. The populist economic strategy worked. After an initial collapse of independent retailers in the early 1930s, their numbers recovered and America became a mix of chain and independent stores, as well as small, medium, and large manufacturers, a high-wage high-growth economy. That period lasted until the 1970s, when naive consumer advocates trained by Ralph Nader took over the FTC. Reared in a period when politicians had been wholly friendly to consumer rights, these activists largely saw the FTC as a consumer-only focused commission. In doing so, they unwittingly killed the political support base of the agency, which had been rural and southern small businesses. In the 1980s, Reagan, pointing to these failures, restructured the agency. His FTC Chairman James Miller began getting rid of populist lawyers, and stocked it instead with neoliberal economists. Clinton, Bush, and Obama continued down the path Reagan laid out, even as Walmart and other chain stores gobbled up the economy. By the time the FTC gave up on the Google monopolization case in 2013, the failure, though dramatic and far-reaching, was more a ratification of the collapse of anti-monopoly rules than anything else. So the failure is great, and the monopoly crisis is now urgent. The question, therefore, is what Khan’s appointment means, not just for antitrust or competition policy, but politics more broadly. Where Is King Manchin of the Senate? If you talk to most progressives or Democrats who watch MSNBC or CNN, the most significant domestic policy storyline is whether Senator Joe Manchin of West Virginia will validate their legislation on voting rights, spending, or the filibuster. They perceive a narrow partisan path for wielding power, and failing that, despair. What is fascinating about the nomination and confirmation of Khan is that it suggests a different political roadmap, not just for Democrats but for Republicans as well. Both parties are confused and trying to figure out what they think, with scuffles within parties as much as between them, mirroring the disputes within the commercial world. Political operatives, pollsters, politicians, and lawyers in both parties are not comfortable with this new populist language and policy and how to wield it. On the right, libertarians and corporatist lawyers are the only ones with the substantive chops to operate in this dense and complex area. On the left, there’s a cultural dislike of commerce. Some Democratic activists often imagine, wrongly, that business questions are wonky, niche, and not relevant to ordinary people. Thinking about monopoly power isn’t really even politics to them, or if it is, using terms like ‘markets,’ and ‘competition’ signifies conservative political beliefs. Nonetheless, it’s evident there is interest on the right and left in addressing concentrated private power through revamped competition policy enforcement. What is increasingly clear is that there is consensus that something must be done, and that there is opportunity here to steal this issue from the other party. Both the Democrats and Republicans are trying to outflank each other on who is stronger on antitrust. In many ways, competition policy is very similar to trade, where Donald Trump stole the traditional Democratic issue and made it his own, accurately pointing out that Democrats like Bill Clinton and Barack Obama pursued policies incentivizing offshoring to China instead of protecting American jobs. Rather than oppose Trump on trade, populist Democrats quietly worked with Trump to reorient American policy. Trump’s trade chief, Robert Lighthizer, was the only cabinet member respected by Democrats, and was able to bring nearly every Democrat on board for a rewrite of NAFTA. Biden is trying to steal this issue back; Katherine Tai, who is Biden’s pick for trade, has continued Lighthizer’s agenda, with some modifications (like challenging pharma’s vaccine monopoly). Unlike many social questions, in other words, antitrust and related issues like trade cross party lines and are areas of consensus. That doesn’t make them unimportant, even though they aren’t often reported on CNN. Competition policy is a massively consequential area, and not just in the tech platform area, which is the centerpiece of current debates. Pretty much every part of the economy is full of concentrated power, whether pharmacy benefits managers, search engines, meatpackers, or candy monopolists.

# 1AR

## DA---Clog

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Especially true for civil cases.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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