# Shirley---Round 1---vs. Georgia MW

## 1AC

### 1AC---Trade ADV

#### Advantage One is TRADE

#### Antitrust rules are rapidly proliferating globally, but are overlapping and disjointed---the lack of international harmonization increases their cost and complexity AND creates an opening for politicized use of rules as a mechanism to unfairly promote domestic industrial policy under the guise of competition

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I. Global developments suggest increased need for legal certainty in rulemaking and enforcement

Companies today operate in an increasingly globalised world, interconnected via digital platforms and ecosystems. The technological revolution is accelerating at an ever-increasing speed. It promises to fundamentally alter both the competitive landscape and the tools by which competition is regulated. Against this backdrop, the world is facing substantial environmental challenges with mounting pressure on businesses to change the way they operate, including an increasing need for firms to collaborate to achieve social goals and increased efficiency that no one firm could achieve independently.

While some progress has been made towards a unified view of competition law, companies are also facing rising geopolitical tensions that have led to protectionist measures and the pursuit of industrial policy objectives under the guise of competition law enforcement. Concepts including national security, full employment, and ‘fair’ or ‘level’ pricing frequently introduce domestic protection concerns into traditional economic tests. With the proliferation of competition regimes, now well over 100, the potential for regulatory drag on the global markets increases exponentially. Having spent the last two decades as competition counsel, I can say with certainty that the complexity of the legal landscape and uncertainty and unpredictability as to compliance with competition law regulations have increased dramatically in recent years both at a global and EU level. Companies are struggling to achieve legal competition law compliance despite consistent efforts including scaling up their compliance departments.

As our markets continue to evolve in the face of technology and sustainability and other social goals, it is now more important than ever for the European Commission (‘the Commission’) to ensure legal certainty, both in rulemaking and in enforcement. The costs associated with uncertainty should not be underestimated, particularly as the Commission considers new enforcement tools designed to address competition structures and practices that may fall outside of traditional economic analyses. Not only is transparency and predictability vital for the proper functioning of the European Economic Area, but it would also send a much-needed signal to the rest of the world. Conversely, if, in any new enforcement system transparency and predictability do not prevail, the Commission’s efforts would likely serve to indirectly legitimise non-transparent and unpredictable protectionis[m]t in other countries, not founded on the rule of law and due process.

Even if one of the key roles of the Commission is to enforce competition law, it is important to keep in mind that competition policy and enforcement are tools of economic policy. Implemented well, competition policy can stimulate economic growth and competitiveness but, if not, it can be a significant regulatory brake on investment, economic development, and sustainability advances.

II.Why should we worry about uncertainty costs?

When considering the potential costs of new regulation, decision-makers often emphasise the legal spend, i.e., the cost of in-house lawyers, external advisers, document preservation systems, etc. But what is often overlooked is the far more expensive costs related to uncertainty in the process of risk-weighting potential investments. A simple example:

Company A seeks to enter into a transaction with Company B to achieve carbon output reduction. Company A’s executive management team, in conjunction with financial advisors, calculates a value for the transaction, which is typically a range of acceptable prices to achieve the desired goal. Company A’s CEO then engages her legal department to assess the potential for regulatory risk flowing from the venture. Given the potential for fines, divestitures, restrictions, or outright prohibitions on the project from a myriad of governmental authorities, the application of competition regulation has the potential to result in billions of dollars in business losses. On receiving legal advice on the probability of such losses, Company A’s CEO applies risk weighting to the value of the transaction, adjusting the value downward to account for the regulatory risk.

In some ways, legal ‘weight’ on a transaction, collaboration, or other business initiative is (socially and economically) desirable—if for example, a company employee proposed to engage in a price-fixing cartel, the legal department’s assessment of extreme risk serves a valuable societal goal. But in far too many cases, it is the mere lack of transparency and certainty in global competition regimes that lead to a determinative ‘risk weighting’ outcome in a deal. Competition counsel must conservatively advise of the uncertainty surrounding deal execution, and responsible CEOs must protect shareholders against business losses flowing frompossible regulatory intervention including the reputational risk following compliance breaches. As in our example, regulatory uncertainty alone may prevent a pro-competitive, socially desirable transaction that has been devalued by the risk of regulatory intervention.

When designing business practices, engaging in collaboration with other companies, and in considering merger activities, legal certainty, transparency, and predictability routinely drive willingness to invest.

III. Legal uncertainty has increased significantly in recent years

The trend that we see is that the complexity of the legal landscape and uncertainty as to compliance with and enforcement of antitrust regulations have increased dramatically in recent years, both globally and in the EU. There are several reasons for this development.

Firstly, more and more jurisdictions have competition laws in place and an increasing number of countries are actively enforcing their rules. For global companies that can mean familiarisation with up to 100 different competition law regulations. This is not particular to competition law, but it highlights the need for clear and transparent rules as well as predictability.

Secondly, the substantive competition rules are becoming increasingly unclear due to the application of domestic protection concerns, non-economic factors, and novel competition theories, such as proposed new competition enforcement tool (‘New Competition Tool’) currently under review in Europe1. The conduct at issue in these kinds of cases is rarely ‘black or white’ or may simply be a consequence of the (changing) market dynamics (also where changes are unrelated to the conduct of the company) and will typically pursue legitimate purposes, making it extremely difficult for companies to draw the boundaries needed to avoid government intervention.

Thirdly, companies increasingly operate in a vast number of countries, and their business practices may implicate several jurisdiction’s rules at the same time. Companies are often faced with substantially different rules despite apparently similar concepts. Also, we see new confidence by emerging countries to apply the common antitrust concepts according to their own interpretation and possibly to serve their own political ends. Lack of international convergence on substantive rules including sector-specific regulations thus in practice differs immensely across jurisdictions despite ICN and OECD efforts to harmonise rules.

#### This will dry up cross-border commerce and investment---foreign companies won’t participate if there’s the prospect of discrimination

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After setting our theoretical priors, we empirically test our two hypotheses on sector-level data covering 53 U.S. industries over the 2002–2017 period. Our panel-data empirical results indicate that merger policy investigative activities disproportionately deter foreign acquirers in local M&A markets. Specifically, increases in merger policy risk and merger policy uncertainty lead to reduced foreign acquirer presence in the U.S. markets for corporate control. The empirical evidence then suggests that merger policy enforcement is protectionist in effect, as foreign investment activities are more adversely affected by the application of merger policy as compared to domestic investment activities. These results yield salient implications for the international business literature on hostcountry characteristics and foreign investment activities.

In order to comprehensively examine the relationship between merger policy enforcement and foreign acquirer presence in local M&A markets, we structure the remainder of this paper as follows. We present a theoretical framework that focuses on the salience of policy risk and policy uncertainty in generating two hypotheses regarding the relationship between the enforcement of merger policy and the participation of foreign acquirers in domestic M&A markets. After setting out our theoretical priors, we describe our sector-level data on U.S. merger control and acquisition activities, formulate our estimation strategy, present our empirical results, and discuss robustness testing. The last section concludes.

HYPOTHESES DEVELOPMENT

A considerable amount of IB literature has examined the impact of country-level political risk and uncertainty on inward FDI activities – see the literature reviews by Kobrin (1979), Fitzpatrick (1983) and Liesch, Welch, and Buckley (2011). The basis behind this literature is that political risks and uncertainties can ‘‘arise from the actions of national governments which interfere with or prevent business transactions’’ (Weston & Sorge, 1972: 60). Firms generally react to such political hurdles by reducing their willingness to make investments as the option value of delaying investment becomes higher under such risks and uncertainties (Bloom, 2014; Brouthers, Brouthers, & Werner, 2008). While political hurdles and hazards can negatively influence the investment activities of all firms, foreign firms are generally considered to be more sensitive to such shocks. For one, foreign firms might be more frequently targeted when burdensome laws, regulations and policies are implemented by national governments; e.g., Eden (1994) observes that national policies practiced in a parochial manner represent fundamental threats to multinationals. Furthermore, foreign firms often lack the local information, legitimacy and contacts which might help them properly assess and mitigate political constraints. As Werner, Brouthers, and Brouthers (1996: 572) underscore, ‘‘firms commonly find international business opportunities to be inherently more risky than domestic ones’’ due to the stark differences in political environments and the inherent legal uncertainties characteristic of foreign investment endeavors. It is no surprise then that a great deal of empirical literature (e.g., Delios & Henisz, 2000, 2003b; Henisz & Delios, 2001) indicates that uncertainty in the political environment substantially deters foreign investment activities. Indeed, Kobrin (1979) highlights how the response to political risk and uncertainty is frequently avoidance, as multinationals simply do not get involved in countries perceived as risky.

While macro-level studies regarding the relationship between political risk and FDI tend to dominate the literature (Vadlamannati, 2012), there have been efforts to follow the prescriptions of Kobrin (1979) to consider the industry-, firm-, and project-specific factors relating to political risk and uncertainty. For one, Miller (1993) breaks down the salient host-country environmental uncertainties into six different dimensions – where uncertainties with respect to specific government policies represent the first dimension. Werner et al. (1996) follow in this line of research by considering the national laws which affect foreign firms; and Grosse (1985) and Bonaime, Gulen, and Ion (2018), respectively, consider the impact of regulatory policies and uncertainties on FDI and M&A activities. The conduct of national merger policy represents a particular regulatory policy that involves a direct threat to the participation of foreign firms in local M&A markets. Specifically, the presence of a national merger policy can negatively impact foreign acquirers by slowing down the consummation of their cross-border acquisitions via antitrust investigations, curtailing the profitability of these cross-border acquisitions by requiring structural remedies, and by even outright prohibiting them. Thus, merger control is a specific and salient government barrier that foreign acquirers must successfully navigate in order to gain access to local M&A markets (Brouthers et al., 2008; Clougherty, 2005).

While the IB literature lacks empirical scholarship concerning this topic, many IB scholars (e.g., Brewer, 1993; Buckley & Casson, 1996; Hymer, 1970; Spar, 2001) have posited that the national enforcement of merger policy potentially restrains the level of inward FDI. It is with these concerns in mind that many policy advisors recommend that countries do not prioritize competition policy, as it could discourage inward FDI via the creation of additional regulatory barriers and uncertainties for foreign investors (Oliveira et al., 2001). Moreover, the conduct of national merger policy lends itself well to analyzing the deterrence effects with respect to acquisition activities in a manner that is consistent with the pre-existing literature on political risk and uncertainty. First, merger policy is conducted at the industry level and exhibits cross-sector variation in antitrust scrutiny (Clougherty & Seldeslachts, 2013); thus, it represents an industryspecific policy context worth analyzing for policy risk factors in line with Kobrin’s (1979) prescriptions. Second, merger policy involves both policy risk and policy uncertainty – both of which may disproportionately deter foreign acquirers as compared to domestic acquirers. We turn now to a discussion of these concepts and to the formulation of our theoretical priors.

Merger Policy Risk

The concept of risk goes back to Knight’s (1921) fundamental insights, where he considered risk to be a known probability distribution over a set of events; for example, flipping a coin involves risk, but with known odds. In moving from the concept of risk to its application in IB political risk, Kobrin (1979) observes that risk is at play when managers have knowledge regarding the possibility and probability of different political outcomes via either calculations or past experience statistics. While the relevant information is available with political risk, and observers generally agree with respect to the probabilities of different outcomes, foreign investors are often considered to be at a disadvantage as compared to domestic investors due in part to inherent information asymmetries (Gehrig, 1993; Gordon & Bovenberg, 1996; Liesch et al., 2011). As Gehrig (1993: 98) makes clear, ‘‘information may have to be interpreted in the light of the legal conventions and business culture of a particular community, which may be difficult for foreigners to assess’’. Thus, domestic investors are better informed and better able to interpret the relevant probabilities as compared to foreign investors, and, as a result, foreign managers tend to overestimate the risks and underestimate the benefits involved with host-country investment activities (Liesch et al., 2011). Simply put, the lack of information, knowledge, and experience with respect to the intricacies of host-country activities accentuates the perceptions of risk when considering foreign investments. A great deal of the political risk literature accordingly focuses on the probabilistic estimates of different policy outcomes and how increased risk leads to decreased foreign investment activities. With the above as a backdrop, we consider how the policy risk involved with merger control might disproportionately affect foreign investors considering participating in the local markets for corporate control.

#### Specifically---export cartels are legalized protectionism designed to bypass WTO subsidy controls---that creates increasing disputes that put trade on the brink, especially after Trump and Brexit

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Section 1: Introduction

Today, there is a growing fear of rising protectionism, from the United States (US) under the Trump administration’s imposition of tariffs and a trade war with China, to the United Kingdom’s Brexit, to the less known trade-restricting measures adopted by other countries all over the world.1

The neoclassical economic model suggests the desirability of free trade over protectionism because free trade lowers prices, allows a flow of goods with little restrictions and improves the quality of products, resulting in overall welfare gain.2 On the other hand, protectionism results in welfare losses, increased prices and a decline in innovation, thus harming consumers and economic efficiency.3

The natural inclination of states to engage in protectionism is as old as time and, until today, has never been diminished.4 The General Agreement on Trade & Tariff (GATT),5 superseded by World Trade Organisation (WTO) since 1995, rendered the classical forms of protectionism such as tariffs obsolete. However, it did not defeat protectionism; instead, protectionism has evolved through its protean capacity to adapt into new and often undetectable forms,6 now labelled as ‘murky’ protectionism.7

Competition law enforcement is suspected as one of the forms of this murky protectionism. There are two ways (among others) considered in this article in which States can utilise competition law to impair free trade and restrict access of foreign firms to domestic market. First is the exemption under national competition law such as export cartel exemptions; second is the strategic application of domestic competition law, e.g. alleged discriminatory and selective enforcement of merger regulation.8

It appears that States use their competition law as invincible trade barriers to further their protectionist bids such as national security and environmental protection.9 In recent years, States have been accused of using their competition law to pursue protectionism. For instance, the US has criticised the EU’s merger regulation as protecting competitors and not competition, particularly in the technology industry in mergers involving non-EU firms – even when those same acquisitions are approved by other competition authorities. A good example is the Commission’s 2001 decision to block the $42 billion acquisition of Honeywell by General Electric.10 Similarly, the US is being encouraged to change their stance on leniency towards export cartels due to its beggar-thy-neighbour effect.11 Investigating the controversy around the use of competition law for protectionist ends is particularly relevant today to protect and uphold free trade and liberalisation. There is a gap between competition and trade policies which national competition law fails to address and the WTO rules fail to regulate. Merger regulation and export cartel exemptions appear to be used as tools for protectionist ends to exploit the gap. This article, therefore, examines whether States use their competition law to pursue protectionist policy in the EU and the US. In this context, the article specifically focuses on analysing how merger regulation and treatment of export cartel further protectionism.12

In terms of method and approach, the article uses the international political economy (IPE) perspective underpinned by (legal/political) realism and interdisciplinary, theoretical-analytical perspectives within the framework of international competition law. It employs (comparative) qualitative empirical evidence from the EU and US for comparative analysis. The international political economic perspective is used to analyse how the presence of political elements and influences on decision-making reflect the enforcing jurisdiction’s national environment, culture, priorities and goals by presenting an opportunity for the use of competition law for protectionist bids. Meanwhile, the interdisciplinary and theoretical-analytical perspective is used to employ literature in the legal, economics, international relations and international politics areas.13 This is empirically analysed within the framework of (international) competition law. The (comparative) qualitative empirical evidence is employed by gathering relevant material from the European Union and the United States of America for an in-depth analysis.

The article adopts legal/political realism theory in the analysis section to demonstrate that the regulation of competition law by regulators/competition authorities in the EU (mainly, the EU Commission)14 and in the USA (the US Department of Justice and the Federal Trade Commission)15 is highly influenced by the public policy of the nation. In simple parlance, legal realism is a theory that all law derives from prevailing social interests and public policy. According to legal realist theory, judges consider not only abstract rules, but also social interest and public policy, when deciding a case.16 Legal realism is a diverse school of thought and any attempt to homogenise it will distort more than simplify,17 since its influence goes beyond being a mere theory of adjudication.18 Judges more often than not promote social ends; just as Cardozo admitted, a judge may be tempted to substitute their view for that of the community.19 From this perspective, the legal realist is attached to social reform and they want law to serve as an instrument for social action. To achieve this, realist thought, policy objectives and interrelationship between legal rules had to become more intimate.20

Political realism is a theory that attempts to explain, model, and prescribe political relations. It proposes that power is (or ought to be) the primary end of political action, whether in the domestic realm or international arena. In the domestic realm, the theory contends that politicians do, or should, strive to maximise their power, whilst in the international arena, nation States are the primary agents that maximise, or ought to maximise, their power. In the context of nation States, the proposition is that a nation can only advance its interests against the interests of other nations; this implies that the international environment is inherently unstable.21 Realism emphasizes power and the national interest and directs more attention to political security than to economic issues.22 Realism is equated to, if not related to, mercantilism, also known as protectionism.23 To obtain political security, realists enrich their power and wealth at the expense of their neighbouring States, often through an increase in exports and decrease in imports.24 IPE is concerned with the interaction of economics and politics in the international sphere.25 Politics is represented by the State as a sovereign political unit and economics is represented by the market as a system of production and consumption at a price determined by supply and demand.26

Based on the political and economic dimensions involved in the interplay of competition law and trade policy, particularly protectionism, it is the position of this article that realist theory, along with an IPE perspective, is relevant in understanding why nation States use competition law as a protectionist bid in their trade policy.

The article is structured into five broad sections; this section, Section 1 is the general introduction and set out the method, including the theoretical approach used in the article. Section 2 provides a brief conceptual understanding of the relevant concepts in the article which have divergent conceptual interpretations within academic literature. Section 3 discusses the relationship between competition law and other issues areas such as trade policy, protectionism and others. Section 4 analyses competition law and protectionism in the two case studies, EU and US, by using specific competition law instruments: (i) merger regulation and (ii) treatment of export cartels to investigate and analyse how they are used for protectionism, including a brief comparative analysis. Finally, Section 5 summarises and concludes the article.

Section 2: A Conceptual understanding of relevant concepts

Looking at academic literature, scholars have provided divergent conceptual views or interpretations of relevant competition law concepts that appear in the article.

(i) Competition

Competition, in its broad economic sense, is the process whereby firms struggle to win against each other. Competition law, also known as antitrust in the United States, refers to the legal rules and standards which aim to protect the process of competition by dealing with market imperfections and restoring desirable competitive conditions in the market.27 Competition policy, on the other hand, is broader than competition law and covers the full range of government measures that could promote competitive market structures and behaviour, including trade liberalisation measures.28 Views on the necessity of the enactment of competition law to implement competition policy remain divided.29 The neo-classical economics case for competition argues competition provides various benefits such as lower prices, efficiency, and innovation.30 There is no consensus on the goals of competition law. Some scholars suggest that competition law is akin to a sponge or that it is a fluid concept influenced by varying objectives, policies, culture; hence, the goals vary based on each enacting jurisdiction.31 On the other hand, one of the prominent scholars of the Chicago school of competition analysis suggests that the ultimate goal of competition law is economic efficiency, which is equated to consumer welfare maximisation.32 Nonetheless, the most commonly declared goal of competition law is to protect and encourage competition to achieve the optimal resource allocation and maximise consumer welfare.33

As a result of these diverging goals and enforcement policies of competition law, several scholars proposed for the internalisation, or at least harmonisation, of competition law.34 Some scholars such as Fox and Manne and Weinberger, recognising the restrictive effect on trade by anticompetitive practices, called for the alignment of competition law within the WTO Framework. However, this failed to materialise as a result of the diverging views of the member States.35

(ii) Merger

Under a business or firm perspective, mergers36 are motivated by efficiency goals as explained by efficiency theory, strategy to increase market power as explained by market power hypothesis, or simply the managers’ greed or overconfidence as explained by the hubris hypothesis.37 Efficiency theory suggests that firms will merge if there is a potential to generate sufficient realisable synergies beneficial to all the merging parties.38 Synergies comprise of collusive, operational and financial synergy.39 Operational synergies are manifested in resulting economies of scale and economies of scope as they mainly relate to production and/or administrative efficiencies; financial synergy refers to cost savings, and collusive synergy refers to expansion of market power as supported by the market power hypothesis.40 Alternatively, hubris hypothesis argues that decisions to merge are the result of managements’ overestimation of the resulting benefits to the business due to the managers’ overconfidence in decision-making.41 Nonetheless, each merger transaction is unique; hence, there is no single theory that encapsulates the motivations for pursuing these transactions.42

Under the legal perspective, however, a merger simply refers to a combination of two or more corporations into a single entity, regardless of business reason or mode of acquisition.43 For competition authorities, mergers pose a concern because of the merging firms’ potential to accumulate or expand market power, which can distort competition through monopoly or abuse of dominance.44

However, empirical analyses negate the protectionism hypothesis, at least with the perspective of the EU competition law. Initial studies found a positive correlation between the likelihood of opposition to mergers involving foreigners and the foreseen negative impact of the merger on domestic competitors.45 Yet, after the 2004 reforms introduced EU merger regulation, a re-examination of the protectionist hypothesis showed a shift in the protectionist tendencies of the enforcement authority.46 Recent research affirmed the results of this re-examination and found that the EU Commission committed no discrimination in its enforcement of merger regulation, whether in frequency or intensity, in mergers involving foreign firms.47 These empirical analyses, at least in the EU context, show that competition authorities did not use their merger control power to intervene on mergers involving non-EU or US acquirers. Nevertheless, they fail to conclusively prove that protectionism with merger regulation does not exist. Conversely, qualitative analyses examining merger decisions and the text of the merger regulations claim that merger regulation is used, or at least could potentially be used, for protectionist purposes such as promotion of national champions.48

(iii) Export cartels

A cartel is an association of rivals agreeing to fix prices above the competitive level, limit output below the competitive level or allocate markets between or amongst themselves in order to maximise their profits.49 Cartels, generally, have been labelled as the ‘supreme evil of antitrust’50 and the ‘primary evil of global trade’.51 On the other hand, export cartels are cartels that only operate in foreign markets and do not directly affect the markets in the jurisdiction where the cartel members are located.52 While there is a consensus among the world’s competition authorities to prohibit hard-core cartels,53 there is lack of clarity and transparency surrounding the treatment of export cartels. It is argued that export cartels receive considerable political support,54 not only because of its benefits to the exporting country, but also because it is argued that export cartels are not necessarily pure evil like hard-core cartels.55 Export cartels may have the same goals as hard-core cartels – to fix prices or allocate markets – but they may also have strictly efficiency-enhancing goals such as sharing marketing and transportation costs.56

According to economic theory, export cartels raise domestic producer welfare without diminishing domestic consumer welfare.57 Additional export revenues and increases in national welfare incentivises exporting States to tolerate, if not promote, export cartels.58 Furthermore, since the adverse effects of export cartels are externalised or felt exclusively by importing States, exporting States possessing the territorial jurisdiction over the cartel have very little interest in disciplining the conduct.59 On the other hand, importing States which have the motivation to prevent the conduct due to its anticompetitive effect and corresponding reduction in their consumer welfare do not have the territorial jurisdiction and must rather apply their competition laws extra-territorially to sanction the cartel.60 However, since exporting States are not motivated to sanction the cartel, or even induced to promote or tolerate the cartel because of its positive domestic effect, they may block any extraterritorial enforcement by the importing States through exemptions or non-cooperation.61 This conflicting interest presents a competition law enforcement dilemma on export cartels.

Fox similarly observed the insufficiency of national competition enforcement to regulate export cartels because it lacks legitimacy or capacity to reach competitive restraints on foreign soil; nonetheless, it mainly affects the domestic home market.62 Export cartels are often not covered by national competition laws when they do not affect the domestic market, neither directly or indirectly. Scholars argue that export cartels, to the extent that they are tolerated – if not encouraged – by the exporting States, are an effort of exporting States to boost domestic welfare at the expense of global welfare. More specifically, it is at the cost of the consumers’ welfare in the target market – a clear manifestation of a beggar-thy-neighbour conduct.63 On the contrary, there is a belief that the scarcity of empirical data on export cartels handicaps the attempts to analyse the issue on export cartels.64 The lack of data creates difficulties to determine the gravity of the anticompetitive harm that export cartels create; thus, the very assumptions on which the theory of the nexus of export cartel and anticompetitive conduct rely may be misguided.65

(iv) Trade policies

Like competition law, trade policy also contains both political and economic dimensions. It refers to the system of incentives put in place by a State with regard to production and consumption, including importation, exportation and trade of goods and services as aligned with the imposing state’s growth and development objectives.66 Trade policy involves various actions and tools such as the imposition of tariffs, quotas or restrictions, granting of subsidies to domestic industries and other measures often classified into two broad types: tariffs and non-tariff measures.67

The tariff is the classic instrument of trade policy.68 Tariffs are imposed to generate revenue but also, more importantly, to protect the domestic industry of the imposing country.69 However, with increasing trade liberalisation, most states covertly seek to protect domestic sectors through other instruments of trade policy such as non-tariff measures.70 Non-tariff measures include quotas, licences, technical barriers to trade, sanitary and phytosanitary measures, export restrictions, custom surcharges, financial measures and anti-dumping measures.71 Whilst non-tariff measures may intrinsically be protectionist, they seem useful in addressing failures in the market such as externalities and the asymmetry of information between producers and consumers.72

Trade policy is historically determined on the basis of the macro and micro view.73 The micro view provides that the State adopts its trade policy in accordance with the preferences of its industrial constituents.74 Hence, under the micro view, trade policy refers to the ‘aggregate outcome of industry battles over protection.’75 The macro view, on the other hand, suggests that the trade policy of the State cannot simply be traced back to the preferences of its industrial constituents.76 Under the macro view, the trade policy of the State reflects the collective interest of the State and the State acts as an independent agent furthering the national State objectives. Trade policy in all countries consists of varying dimensions or levels. For example, the EU trade policy, in addition to its ‘unilateral’ liberalization, i.e. voluntarily providing preferential market access or zero tariffs for specific types of countries, also adopts bilateral, plurilateral and multilateral agreements as well as commercial instruments such as anti-dumping laws and other safeguards.77 The objectives pursued at each level of trade policy constantly changes.78 Different States negotiate in order to determine their international trade policies.79 Hence, bilateral, plurilateral or multilateral trade agreements are born, usually involving preferential tariff rates, agreements on investments, technology-sharing or single market objectives.80 In the context of protectionism, the ability of States to resolve trade disputes amongst themselves significantly influences protectionist positions.81 However, it is argued that protectionist trade policy is more than just a means of adjudicating trade disputes; rather, protectionism is pursued by certain States in order to further their national economic and political policies.82

Part II

Protectionism

Protectionism is a kind of trade policy aimed at impeding foreign trade access to the domestic market and preserving, if not improving, the position of domestic producers in contrast to foreign producers.83 With the decline of classic protectionism, i.e. the imposition of tariffs and other visible barriers to trade, comes the rise of ‘murky’ protectionism, also known as new protectionism, which is characterised by seemingly innocuous and subtle measures designed to distort free trade without constituting as violations of the WTO rules or trade agreements.84 More aptly, murky protectionism has been defined as ‘abuses of legitimate discretion which are used to discriminate against foreign goods, companies, workers and investors’.85 Examples of murky protectionism are the imposition of regulatory and licensing requirements, tightening of product standards, limitation of ports of entry, introduction of bailout packages and initiation of disguised ‘green’ protectionism.86

Academic literature provides conflicting arguments regarding protectionism. Economic theory under the classic utility model establishes that any benefit that may result from protectionism is outweighed by its costs in terms of losses to consumer welfare and decline of economic growth.87 Another argument against protectionism is the moral argument which provides that protectionism is akin to stealing, i.e. producers and rent-seeking individuals induce the government to pursue their interests and benefit at the expense of consumers, in effect taking away what is due.88 On the other hand, the most notable arguments in favour of protectionism are national defence, infant industry and strategic trade theory.89

The national defence argument authorises the protection of industries with a vital role in national security such as weapon manufacturing to ensure the States’ readiness in times of war or adversity.90 It is suggested that agricultural protectionism is subsumed under the national defence argument because food security and food availability are part of the States’ legitimate national interests.91 It has been noted that the EU’s agricultural protectionism resulted in growth of production, achievement of self-sufficiency in food security and stability in the common market for agricultural products.92

The infant industry argument provides that a State, in order to grow, must first strengthen its newly established industries which do not enjoy the cost and production efficiencies yet compared to its competitors; this is at least until it establishes its comparative advantage and the playing field has been levelled.93 Proponents for the protection of the infant industry assert that protection must only be temporary and the benefits provided by the protected industry must exceed the costs of protection, also known as the Mill-Bastable Test.94

The strategic trade theory, introduced by James Brander and Barbara Spencer, has also been used to support protectionism.95 According to the strategic trade theory, firms are inclined to take ‘strategic’ moves exhibiting aggressive behaviour; the State’s support of such national firms will further give more credence to such behaviour, in effect deterring potential rivals such as foreign firms.96 Hence, strategic trade theory suggests the States can raise their national income at the expense of other States by supporting or promoting national firms in international competition.97

Section 3: The relationship between competition law and other issue areas

(i) Competition and Trade Policies

Competition and trade policies are both national policies used as tools for economic development, albeit with different objectives, principles, and scope. No consensus on the overall relationship between the two has yet been reached. It is suggested that the two policies could be mutually reinforcing, complementary, contradictory, or substitutes depending on how they are applied.98 Based on their basic objectives, efficiency and consumer welfare, competition and trade policies are perceived as mutually reinforcing.99 On the other hand, by dealing with private, anticompetitive conduct to ensure effective market access, competition policy is viewed as complementary with trade policy which is concerned with the removal of governmental actions. This facilitates the anti-competitive behaviour by private entities. Restrictive trade measures limit competition by curtailing the entry of foreign suppliers in the market as well as aiding anti-competitive practices by domestic firms; meanwhile, exclusions and exemptions from competition law, as well as lack of enforcement thereof, negatively impact trade.100

A contradictory relationship between competition and trade policy is also suggested as a result of their divergent aims and effects. Competition policy is concerned with consumer welfare, while trade policy is focused on the welfare of producers and is more easily influenced by special interest groups.101 Trade policy also has objectives which conflict with competition policy aims such as raising revenue, promoting self-sufficiency and supporting exports.102 Finally, competition policy and trade policy are also viewed as substitutes in some respects. For instance, the WTO found that competition law provisions relating to price discrimination serve as a substitute for anti-dumping measures in some circumstances.103

The impact of anti-competitive business practices on international trade is the most important concern in trade policy.104 Experts105 recognise that anti-competitive practices of firms, in addition to trade barriers, hamper international trade. Hence, the necessity to integrate or at least align competition and trade policies has been formally recognised as early as the proposal for the establishment of the International Trade Organisation (Havana Charter). The Havana Charter contained provisions which encourage member States to prohibit business practices that affect international trade which restrain competition, limit access to markets, or foster monopolistic control whenever such practices are harmful to trade.106 Nonetheless, the Havana Charter was not ratified and was instead succeeded by the GATT of 1947, which salvaged some of the provisions from the Havana Charter. Thus, the negotiating parties that created the GATT of 1947 had shown a public awareness that arrangements designed to foster trade could be undermined when commercial enterprises engaged in cartels or other restrictive business practices, and these negotiating parties had proposed treaty provisions to ensure that competition policy would reinforce government measures for international trade.107 Subsequently, the World Trade Organisation was established in 1995 to succeed the GATT of 1947. Efforts to include competition policy within the trade policy framework in the WTO have proved particularly challenging due to lack of agreement among member States on competition policy.108 Support for international discipline regarding competition law was originally stimulated by US perceptions that international cartels and the absence or lack of enforcement of national competition law obstructed the ability of US firms to contest markets.109 The US supported the inclusion of a chapter dealing with restrictive business practices, reflecting its views against German cartels and Japanese zaibatsu who are the main opposition to including competition law in the WTO.110 In recent times, the EU has been in the lead, arguing that all WTO members must adopt and enforce competition laws. Developing countries have not been at the center of the debate on trade and competition in the WTO.111 However, competition policy has an important role in developing countries, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive policy stance. However, the issue is that many do not have competition laws; those that do often have limited implementation ability.112 The bottom line of the debate is that any agreement on international competition policy that goes beyond general procedural cooperation and introduction of transparency mechanisms likely must be plurilateral, at least initially.

The lack of consensus on the nexus of competition and trade policy creates a gap which is exploited in order to pursue various motives such as promoting industrial policy, protectionism or nationalism.

(ii) Competition law and protectionism

In the United States, some scholars claim that antitrust law is rooted in protectionist institutions.113 Evidence reveals that the political impetus for antitrust law originated from lobbying farmers of several agricultural states;114 however, the majority views of scholars differs on this.115 Inefficient businesses misused antitrust laws by suing their efficient competitors for lower prices, increase in output and product or process innovation116 Today, the use of antitrust law for protectionism is no longer limited to the protection of an industry from another within the domestic sphere; it extends to the international level and transcends international trade. Similarly, in the European Union, remnants of industrial policy abound in the EC competition law.117 The European Commission has been attacked on the ground of ‘disguised protectionism’, protecting EU-based competitors and furthering the single market objective rather than seeking to uphold competition in strict terms.118 This is clearly demonstrated in the proposed Siemens-Alstom merger. In prohibiting the proposed consolidation of Siemens and Alstom, the European Commission unleashed a turmoil of political discontent; arguably, this is more the manifestation of longstanding frustration with certain underlying asymmetries within merger regulation which impede the ascendancy of the European industry on the world stage than an issue with the Commission’s decision itself.119

Competition law, as a political creation, is inherently susceptible to ‘instrumentalisation’ for protectionist ends. Competition law is at risk of being misused to advance industrial policies, political agendas and protectionist policies in the guise of competition enforcement, thus bypassing the scrutiny of international trade agreements.120 The existing legislative framework of competition law enhances this risk, as it provides for greater discretion in decision making and political involvement in the enforcement of competition law.121 While open-ended discretionary standards are laudable because economic analysis cannot be put into rigid standards as each competition case is unique, it also creates opportunities for abuse. Discretion may be abused to allow regulators to pursue their own private interests, shirk unpleasant duties, augment their regulatory authority in hopes of increasing monopoly rents which they can trade to interest groups in return for personal benefits, and act in other ways that are contrary to the public good.122 In the context of merger law, for instance, discretion may incentivise regulators to pursue protectionism – in particular, new protectionism. Trade agreements and institutions such as the WTO have made traditional protectionism through open trade discrimination challenging. Yet, the underlying political dynamic driving protectionism has not gone away. Hence, while jurisdictions do not forbid certain mergers, they can still discriminate against them. For instance, regulators can require more onerous ‘fixes’ for mergers that threaten local producers such as requiring the merging parties to divest assets in a way that benefits the domestic competitor.123

Indeed, the argument that competition law may be a tool to pursue a protectionist end is commonly premised upon the possibility that competition law – especially through selective, discriminatory enforcement – might actually be abused as a trade barrier.124 National protectionism is often demanded by certain industries or interest groups.125 However, a competition regime that favours domestic firms such as local producers hurt not only the producers and consumers of other countries, but also the domestic consumers.

(iii) Merger regulation and protectionism

One area of competition law that has always been suspected as an instrument of protectionism is merger regulation; the failed merger of Siemens-Alstom is a good case in point. Merger regulation is one of the pillars of competition policy aimed at preserving market competition in the event of business combinations and takeovers.126 However, preservation of competition is not the only rationale for the enforcement of merger regulations; national security, businesses perceived to be of national strategic importance, technological capabilities, jobs and export also influence merger control enforcement.127 Thus, the protectionism hypothesis posits that merger regulation is used as a tool to protect domestic firms from competition.128 In addition to protection of domestic firms, which is often associated with the infant industry argument, States are also suspected of using merger regulations to promote its national champions on the premise of strategic trade theory. In the context of merger control, the notion of a national champion generally means that the government encourages or does not prevent a merger between two domestic firms to create a more powerful entity, or it opposes the acquisition of one of the domestic firms by a foreign company.129

A study has found that, while merger regulation has deterred anticompetitive mergers, it has also protected rival producers from increased competition due to efficient mergers.130 In the context of EU merger policy, an empirical analysis to prove the protectionist hypothesis concluded a direct correlation between the likelihood of opposition to the merger by the competition authority when the bidder is a foreign national and the expected adverse effect of the reviewed merger on domestic competitors.131 After reforms on the EU Merger Regulation were introduced in 2004, the hypothesis was re-examined and change in protectionist tendencies were discovered.132 The result was more consistent with a recent empirical study that showed the Commission has not intervened more frequently or extensively in transactions involving a non-EU- or US-based firm’s acquisition of a European target.133 Nonetheless, there has been no conclusive findings on the absence of protectionism. At most, empirical analyses have shifted the burden of proof to those advancing the view.

Despite these empirical results disproving the use of merger regulation for protectionist purposes, persistent allegations abound. The political model of antitrust established that merger decisions are influenced by political contributions of lobby groups representing special interests, political pressures and social welfare considerations.134 For instance, Bu argues that the decision of Chinese competition authority to block the merger between Coca Cola and Huiyuan illustrates the influence of non-competition considerations such as protectionism on merger regulation enforcement.135 The lack of sufficient analysis as well as broad conclusions reached on the decision left no other conclusion but that China was trying to protect its home-grown, local company from potential brand dilution once absorbed by Coca Cola.136 Another example is the opposition of the US to the potential merger between Broadcom, a Singapore-based company, and Qualcomm, an American telecommunication chip manufacturer, on the grounds of national security.137 In the EU, its opposition to the Boeing/McDonnell Douglas merger was suspected to arise from protectionist sentiment because of the merger’s adverse impact on the rival EU firm Airbus.138

(iv) Export cartels exemption and protectionism

Export cartel exemptions are instruments of competition policy for trade policy ends.139 By tolerating, if not supporting, anticompetitive conduct just because it does not affect the domestic market, exporting states in effect assist or condone the harm caused to the importing states.140 Hence, export cartel exemptions are perceived as tools for protectionism in this context of the beggar-thy-neighbour approach.

In the context of trade policy, export cartel exemptions produce the same economic effect as export subsidies or aids.141 While both harm competition at the expense of foreign markets and foreign competitors, only export subsidies are regulated under the WTO rules.142 However, State-run export cartel are challengeable under WTO rules with different outcomes depending on the State.143 Hence, the difficulty in prosecuting export cartels that have anti-competitive effects is considered a trade dilemma. In Argentina, based on Measures Affecting the Export of Bovine Hides and the Import of Finished Leather,144 the WTO Panel noted that the WTO rules do not obligate its members ‘to assume a full “due diligence” burden to investigate and prevent cartels from functioning as private export restrictions’.145

The United States, through the Webb-Pomerene Act of 1918,146 explicitly exempted export cartels and export association from the Sherman Act147 and from Section 7 of the Clayton Act,148 which has been reinforced by the Export Trading Company Act of 1982149 and the Foreign Trade Antitrust Improvements Act150 which regulated export cartels by granting them certificates. The EU, on the other hand, while it does not explicitly exempt export cartels, Articles 101 and 102 of the TFEU151 provide for the limited application of the EU competition law to conduct that produces anticompetitive effects (objective or subjective) within the internal market and to the trade between Member States. Hence, the EU competition law implicitly allows export cartels if they do not influence the EU internal market.

#### The perception of protectionism-by-antitrust sends shockwaves that end the last semblance of global trade---subtle vehicles like competition law are a unique threat because open protectionism is controlled by international agreements

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INTRODUCTION

Trump. Le Pen. Brexit. Protectionist rhetoric has consumed the international political stage. Western countries and their leaders were once the drivers of economic globalization, relying on free-market speeches and the prospect of removing trade barriers to appeal to their constituents. 1They pointed fingers at other countries engaging in or encouraging protectionist behavior and challenged them in the court of public opinion and elsewhere to stop their antics. The "our country first, world trade after" mentality was widely politicized and vilified. Now, it seems that Western national leaders are championing the very protectionism that they once criticized. 2

Although a system of truly free world trade has never been perfected, past world leaders have eliminated most of the protectionist trade mechanisms that once ran rampant in the international economy. They did so by implementing multilateral and bilateral trade agreements. These webs of agreements have bolstered decades of support for free trade, or at least some version of it. By and large, tariff policies and other forms of protectionism were either eliminated or dramatically reduced. [\*118] Now, as we have seen in the media, when a government imposes a tariff, it becomes a rather extreme political statement which sends a shockwave of significant global consequences.

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders' best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law. 3So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

Notwithstanding the recent uptick in tariff threats, it is unlikely that all Western leaders will revamp or terminate the trade agreements set forth by their predecessors and bring back the kinds of tariff policies that once existed in their place. Although in the United States ("U.S."), President Trump recently imposed tariffs on steel imports, it appears that his intent is to limit this behavior to a specific industry rather than institute a widespread policy favoring the use of tariffs generally. 4To remedy bad behavior in a specialized set of industries is not to instigate a global paradigm shift. This purpose is underscored by his use of the national security exemption, which is largely interpreted as being used for individual situations rather than general policy schemes. 5 Many still hope that his course of action will be retracted and is merely a strong negotiation tactic. However, there is no doubt that Trump is far more comfortable than past leaders with subverting the status quo on trade relations.

Trump is not the only high-profile leader flirting with staunch protectionism. Western leaders in the E.U. appear to be growing more comfortable than their predecessors with considering similar policies. However, Western lawmakers themselves do not seem as persuaded by the statements of their leadership. The general sentiment among international policymakers is that there has been too much political wherewithal spent on loosening international trade barriers to take actions [\*119] that could counteract that progress. 6Presidential actions taken because of dissatisfaction with current global trade relations aside, a complete overhaul of trade agreements may be too daunting and difficult a task, especially absent ample political support in legislative bodies.

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization ("WTO"), "once formal trade barriers come down, other issues become more important." 7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

#### The result will be full-on trade wars

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Yet, even so, it would be unreasonable for every minor violation of a local ordinance overseas to give rise to an unfair competition action in America. Committing to such collateral enforcement of foreign law in such an unqualified manner would be problematic on several levels. Doing so would open the floodgates to transnational claims, clogging the dockets of U.S. courts and agencies. 142It could encourage harassment of foreign competitors, burdening them with the costs and distractions of defending unfair competition claims lodged in a distant U.S. court. And it could also encourage litigation tourism, inviting foreign plaintiffs to forum shop. Finally, use of unfair competition law could be abused for protectionist purposes. Such perceived unilateral aggression could trigger retaliation that risks sparking a larger trade war.

#### Trade wars cause shooting wars that trigger World War III and collapse containment of environmental, disease, and tech threats that cause extinction

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Four structural forces will shape the future of International Relations: globalization (but without liberal rules, institutions, and leadership)1; multipolarity (the end of American hegemony and wider distribution of power among states and non-states2); the strengthening of distinctive, national and subnational identities, as persistent cultural differences are accentuated by the disruptive effects of Western style globalization (what Samuel Huntington called the “non-westernization of IR”3); and secular economic stagnation, a product of longer term global decline in birth rates combined with aging populations.4 These structural forces do not determine everything. Environmental events, global health challenges, internal political developments, policy mistakes, technology breakthroughs or failures, will intersect with structure to define our future. But these four structural forces will impact the way states behave, in the capacity of great powers to manage their differences, and to act collectively to settle, rather than exploit, the inevitable shocks of the next decade.

Some of these structural forces could be managed to promote prosperity and avoid war. Multipolarity (inherently more prone to conflict than other configurations of power, given coordination problems)5 plus globalization can work in a world of prosperity, convergent values, and effective conflict management. The Congress of Vienna system achieved relative peace in Europe over a hundred-year period through informal cooperation among multiple states sharing a fear of populist revolution. It ended decisively in 1914. Contemporary neoliberal institutionalists, such as John Ikenberry, accept multipolarity as our likely future, but are confident that globalization with liberal characteristics can be sustained without American hegemony, arguing that liberal values and practices have been fully accepted by states, global institutions, and private actors as imperative for growth and political legitimacy.6 Divergent values plus multipolarity can work, though at significantly lower levels of economic growth-in an autarchic world of isolated units, a world envisioned by the advocates of decoupling, including the current American president. 7 Divergent values plus globalization can be managed by hegemonic power, exemplified by the decade of the 1990s, when the Washington Consensus, imposed by American leverage exerted through the IMF and other U.S. dominated institutions, overrode national differences, but with real costs to those states undergoing “structural adjustment programs,”8 and ultimately at the cost of global growth, as states—especially in Asia—increased their savings to self insure against future financial crises.9

But all four forces operating simultaneously will produce a future of increasing internal polarization and cross border conflict, diminished economic growth and poverty alleviation, weakened global institutions and norms of behavior, and reduced collective capacity to confront emerging challenges of global warming, accelerating technology change, nuclear weapons innovation and proliferation. As in any effective scenario, this future is clearly visible to any keen observer. We have only to abolish wishful thinking and believe our own eyes.10

Secular Stagnation

This unbrave new world has been emerging for some time, as US power has declined relative to other states, especially China, global liberalism has failed to deliver on its promises, and totalitarian capitalism has proven effective in leveraging globalization for economic growth and political legitimacy while exploiting technology and the state’s coercive powers to maintain internal political control. But this new era was jumpstarted by the world financial crisis of 2007, which revealed the bankruptcy of unregulated market capitalism, weakened faith in US leadership, exacerbated economic deprivation and inequality around the world, ignited growing populism, and undermined international liberal institutions. The skewed distribution of wealth experienced in most developed countries, politically tolerated in periods of growth, became intolerable as growth rates declined. A combination of aging populations, accelerating technology, and global populism/nationalism promises to make this growth decline very difficult to reverse. What Larry Summers and other international political economists have come to call “secular stagnation” increases the likelihood that illiberal globalization, multipolarity, and rising nationalism will define our future. Summers11 has argued that the world is entering a long period of diminishing economic growth. He suggests that secular stagnation “may be the defining macroeconomic challenge of our times.” Julius Probst, in his recent assessment of Summers’ ideas, explains:

…rich countries are ageing as birth rates decline and people live longer. This has pushed down real interest rates because investors think these trends will mean they will make lower returns from investing in future, making them more willing to accept a lower return on government debt as a result.

Other factors that make investors similarly pessimistic include rising global inequality and the slowdown in productivity growth…

This decline in real interest rates matters because economists believe that to overcome an economic downturn, a central bank must drive down the real interest rate to a certain level to encourage more spending and investment… Because real interest rates are so low, Summers and his supporters believe that the rate required to reach full employment is so far into negative territory that it is effectively impossible.

…in the long run, more immigration might be a vital part of curing secular stagnation. Summers also heavily prescribes increased government spending, arguing that it might actually be more prudent than cutting back – especially if the money is spent on infrastructure, education and research and development.

Of course, governments in Europe and the US are instead trying to shut their doors to migrants. And austerity policies have taken their toll on infrastructure and public research. This looks set to ensure that the next recession will be particularly nasty when it comes… Unless governments change course radically, we could be in for a sobering period ahead.12

The rise of nationalism/populism is both cause and effect of this economic outlook. Lower growth will make every aspect of the liberal order more difficult to resuscitate post-Trump. Domestic politics will become more polarized and dysfunctional, as competition for diminishing resources intensifies. International collaboration, ad hoc or through institutions, will become politically toxic. Protectionism, in its multiple forms, will make economic recovery from “secular stagnation” a heavy lift, and the liberal hegemonic leadership and strong institutions that limited the damage of previous downturns, will be unavailable. A clear demonstration of this negative feedback loop is the economic damage being inflicted on the world by Trump’s trade war with China, which— despite the so-called phase one agreement—has predictably escalated from negotiating tactic to imbedded reality, with no end in sight. In a world already suffering from inadequate investment, the uncertainties generated by this confrontation will further curb the investments essential for future growth. Another demonstration of the intersection of structural forces is how populist-motivated controls on immigration (always a weakness in the hyper-globalization narrative) deprives developed countries of Summers’ recommended policy response to secular stagnation, which in a more open world would be a win-win for rich and poor countries alike, increasing wage rates and remittance revenues for the developing countries, replenishing the labor supply for rich countries experiencing low birth rates.

Illiberal Globalization

Economic weakness and rising nationalism (along with multipolarity) will not end globalization, but will profoundly alter its character and greatly reduce its economic and political benefits. Liberal global institutions, under American hegemony, have served multiple purposes, enabling states to improve the quality of international relations and more fully satisfy the needs of their citizens, and provide companies with the legal and institutional stability necessary to manage the inherent risks of global investment. But under present and future conditions these institutions will become the battlegrounds—and the victims—of geopolitical competition. The Trump Administration’s frontal attack on multilateralism is but the final nail in the coffin of the Bretton Woods system in trade and finance, which has been in slow but accelerating decline since the end of the Cold War. Future American leadership may embrace renewed collaboration in global trade and finance, macroeconomic management, environmental sustainability and the like, but repairing the damage requires the heroic assumption that America’s own identity has not been fundamentally altered by the Trump era (four years or eight matters here), and by the internal and global forces that enabled his rise. The fact will remain that a sizeable portion of the American electorate, and a monolithically pro- Trump Republican Party, is committed to an illiberal future. And even if the effects are transitory, the causes of weakening global collaboration are structural, not subject to the efforts of some hypothetical future US liberal leadership. It is clear that the US has lost respect among its rivals, and trust among its allies. While its economic and military capacity is still greatly superior to all others, its political dysfunction has diminished its ability to convert this wealth into effective power.13 It will furthermore operate in a future system of diffusing material power, diverging economic and political governance approaches, and rising nationalism. Trump has promoted these forces, but did not invent them, and future US Administrations will struggle to cope with them.

What will illiberal globalization look like? Consider recent events. The instruments of globalization have been weaponized by strong states in pursuit of their geopolitical objectives. This has turned the liberal argument on behalf of globalization on its head. Instead of interdependence as an unstoppable force pushing states toward collaboration and convergence around market-friendly domestic policies, states are exploiting interdependence to inflict harm on their adversaries, and even on their allies. The increasing interaction across national boundaries that globalization entails, now produces not harmonization and cooperation, but friction and escalating trade and investment disputes.14 The Trump Administration is in the lead here, but it is not alone. Trade and investment friction with China is the most obvious and damaging example, precipitated by China’s long failure to conform to the World Trade Organization (WTO) principles, now escalated by President Trump into a trade and currency war disturbingly reminiscent of the 1930s that Bretton Woods was designed to prevent. Financial sanctions against Iran, in violation of US obligations in the Joint Comprehensive Plan Of Action (JCPOA), is another example of the rule of law succumbing to geopolitical competition. Though more mercantilist in intent than geopolitical, US tariffs on steel and aluminum, and their threatened use in automotives, aimed at the EU, Canada, and Japan,15 are equally destructive of the liberal system and of future economic growth, imposed as they are by the author of that system, and will spread to others. And indeed, Japan has used export controls in its escalating conflict with South Korea16 (as did China in imposing controls on rare earth,17 and as the US has done as part of its trade war with China). Inward foreign direct investment restrictions are spreading. The vitality of the WTO is being sapped by its inability to complete the Doha Round, by the proliferation of bilateral and regional agreements, and now by the Trump Administration’s hold on appointments to WTO judicial panels. It should not surprise anyone if, during a second term, Trump formally withdrew the US from the WTO. At a minimum it will become a “dead letter regime.”18

As such measures gain traction, it will become clear to states—and to companies—that a global trading system more responsive to raw power than to law entails escalating risk and diminishing benefits. This will be the end of economic globalization, and its many benefits, as we know it. It represents nothing less than the subordination of economic globalization, a system which many thought obeyed its own logic, to an international politics of zero-sum power competition among multiple actors with divergent interests and values. The costs will be significant: Bloomberg Economics estimates that the cost in lost US GDP in 2019- dollar terms from the trade war with China has reached $134 billion to date and will rise to a total of $316 billion by the end of 2020.19 Economically, the just-in-time, maximally efficient world of global supply chains, driving down costs, incentivizing innovation, spreading investment, integrating new countries and populations into the global system, is being Balkanized. Bilateral and regional deals are proliferating, while global, nondiscriminatory trade agreements are at an end.

Economies of scale will shrink, incentivizing less investment, increasing costs and prices, compromising growth, marginalizing countries whose growth and poverty reduction depended on participation in global supply chains. A world already suffering from excess savings (in the corporate sector, among mostly Asian countries) will respond to heightened risk and uncertainty with further retrenchment. The problem is perfectly captured by Tim Boyle, CEO of Columbia Sportswear, whose supply chain runs through China, reacting to yet another ratcheting up of US tariffs on Chinese imports, most recently on consumer goods:

We move stuff around to take advantage of inexpensive labor. That’s why we’re in Bangladesh. That’s why we’re looking at Africa. We’re putting investment capital to work, to get a return for our shareholders. So, when we make a wager on investment, this is not Vegas. We have to have a reasonable expectation we can get a return. That’s predicated on the rule of law: where can we expect the laws to be enforced, and for the foreseeable future, the rules will be in place? That’s what America used to be.20

The international political effects will be equally damaging. The four structural forces act on each other to produce the more dangerous, less prosperous world projected here. Illiberal globalization represents geopolitical conflict by (at first) physically non-kinetic means. It arises from intensifying competition among powerful states with divergent interests and identities, but in its effects drives down growth and fuels increased nationalism/populism, which further contributes to conflict. Twenty-first-century protectionism represents bottom-up forces arising from economic disruption. But it is also a top-down phenomenon, representing a strategic effort by political leadership to reduce the constraints of interdependence on freedom of geopolitical action, in effect a precursor and enabler of war. This is the disturbing hypothesis of Daniel Drezner, argued in an important May 2019 piece in Reason, titled “Will Today’s Global Trade Wars Lead to World War Three,”21 which examines the pre- World War I period of heightened trade conflict, its contribution to the disaster that followed, and its parallels to the present:

Before the First World War started, powers great and small took a variety of steps to thwart the globalization of the 19th century. Each of these steps made it easier for the key combatants to conceive of a general war. We are beginning to see a similar approach to the globalization of the 21st century. One by one, the economic constraints on military aggression are eroding. And too many have forgotten—or never knew—how this played out a century ago.

…In many ways, 19th century globalization was a victim of its own success. Reduced tariffs and transport costs flooded Europe with inexpensive grains from Russia and the United States. The incomes of landowners in these countries suffered a serious hit, and the Long Depression that ran from 1873 until 1896 generated pressure on European governments to protect against cheap imports.

…The primary lesson to draw from the years before 1914 is not that economic interdependence was a weak constraint on military conflict. It is that, even in a globalized economy, governments can take protectionist actions to reduce their interdependence in anticipation of future wars. In retrospect, the 30 years of tariff hikes, trade wars, and currency conflicts that preceded 1914 were harbingers of the devastation to come. European governments did not necessarily want to ignite a war among the great powers. By reducing their interdependence, however, they made that option conceivable.

…the backlash to globalization that preceded the Great War seems to be reprised in the current moment. Indeed, there are ways in which the current moment is scarier than the pre-1914 era. Back then, the world’s hegemon, the United Kingdom, acted as a brake on economic closure. In 2019, the United States is the protectionist with its foot on the accelerator. The constraints of Sino-American interdependence—what economist Larry Summers once called “the financial balance of terror”—no longer look so binding. And there are far too many hot spots—the Korean peninsula, the South China Sea, Taiwan—where the kindling seems awfully dry.

#### Proxy conflicts will escalate globally---nuclear war

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But that overlooked the ways in which the risk of interstate war was already rising before COVID-19 began to spread. Civil wars were becoming more numerous, lasting longer and attracting more outside involvement, with dangerous consequences for stability in many regions of the world. And the global dynamics most commonly cited to explain the falling incidence of interstate war—democracy, economic prosperity, international cooperation and others—were being upended.

If the spread of democracy kept the peace, then its global decline is unnerving. If globalization and economic interdependence kept the peace, then a looming global depression and the rise of nationalism and protectionism are disconcerting. If regional and global institutions kept the peace, then their degradation is unsettling. If the balance of nuclear weapons kept the peace, then growing risks of proliferation are disquieting. And if America’s preeminent power kept the peace, then its relative decline is troubling.

Now, the pandemic, or more specifically the world’s reaction to it, is revealing the extent to which the factors holding major wars in check are withering. The idea that war between nations is a relic of the past no longer seems so convincing.

The Pessimists Strike Back

More than any other individual, it was cognitive scientist Steven Pinker who popularized the idea that we are living in the most peaceful moment in human history. Starting with his 2011 bestseller, “The Better Angels of Our Nature: Why Violence Has Declined,” Pinker argued that the frequency, duration and lethality of wars between great powers have all decreased. In his 2019 book, “Enlightenment Now: The Case for Reason, Science, Humanism, and Progress,” he wrote that war “between the uniformed armies of two nation-states appears to be obsolescent. There have been no more than three in any year since 1945, none in most years since 1989, and none since the American-led invasion of Iraq in 2003.”

Optimists like Pinker held that, rather than the world falling apart, as a quick glance at headline news might suggest, the opposite was true: Humanity was flourishing. More regions are characterized by peace; fewer mass killings are occurring; governance and the rule of law are improving; and people are richer, healthier, better educated and happier than ever before.

In their book, “Clear and Present Safety: The World Has Never Been Better and Why That Matters to Americans,” Michael A. Cohen and Micah Zenko argued that the evidence is so overwhelming that it is difficult to argue against the idea that wars between great powers, and all other interstate wars, are becoming vanishingly rare. Even when wars do break out, they tend to be shorter and less deadly than they were in the past. John Mueller, a senior fellow at the Cato Institute, also reasoned that the idea of war, like slavery and dueling before it, was in terminal decline, while Joshua Goldstein, an international relations researcher at American University, credited the United Nations and the rise of peacekeeping operations for helping win the “war on war.”

But in recent years, a range of critics have begun to poke holes in these arguments. Tanisha M. Fazal, an international relations professor at the University of Minnesota, contends that the decline in war is overstated. Major advances in medicine, speedier evacuations of wounded soldiers from the field of battle and better armor have made war less fatal—but not necessarily less frequent. Fazal and Paul Poast, who is at the University of Chicago, further assert that the notion of war between great powers as a thing of the past is based on the assumption that all such conflicts resemble World War I and II—both are historical anomalies—and overlooks the actual wars fought between great powers since 1945, from the Korean War and the Vietnam War to proxy wars from Afghanistan to Ukraine. Meanwhile, Bear F. Braumoeller, an Ohio State political science professor, analyzed the same historical data on conflicts used by Pinker, Mueller and Goldstein, and found no general downward trend in either the initiation or deadliness of warfare over the past two centuries. What’s more, Braumoeller contends that the so-called “long peace”—the 75 years that have passed without systemic war since World War II—is far from invulnerable, and that wars are just as likely to escalate now as they used to be. Just because a major interstate war hasn’t happened for a long time, doesn’t mean it never will again. In all probability, it will.

And by focusing solely on interstate wars, the optimists miss half the story, at least. Wars between states have declined, but civil wars never disappeared—and these internal conflicts could easily escalate into regional or global wars.

The number of conflicts in the world reached its highest point since World War II in 2016, with 53 state-based armed conflicts in 37 countries. All but two of these conflicts were considered civil wars. To make matters worse, new studies have shown that civil wars are becoming longer, deadlier and harder to conclusively end, and that these internal conflicts are not really internal. Civil wars harm the economies and stability of neighboring countries, since armed groups, refugees, illicit goods and diseases all spill over borders. Some 10 million refugees have fled to other countries since 2012. The countries that now host them are more likely to experience war, which means states with huge refugee populations like Lebanon, Jordan and Turkey face legitimate security challenges. Even after the threat of violence has diminished in refugees’ countries of origin, return migration can reignite conflicts, repeating the brutal cycle.

A Yugoslav Federal Army tank.

Perhaps most importantly, recent research indicates that civil wars increase the risk of interstate war, in large part because they are attracting more and more outside involvement. In a 2008 paper, researchers Kristian Skrede Gleditsch, Idean Salehyan and Kenneth Schultz explained that, in addition to the spillover effects, two other factors in civil wars increase international tensions and could possibly provoke wider interstate wars: external interventions in support of rebel groups and regime attacks on insurgents across international borders.

Immediately after the Cold War, none of the ongoing civil wars around the world were internationalized. According to the Uppsala Conflict Data Program, there were 12 full-fledged civil wars in 1991—in Afghanistan, Iraq, Peru, Sri Lanka, Sudan, and elsewhere—and foreign militaries were not active on the ground in any of them. Last year, by contrast, every single full-fledged civil war involved external military participants. This is due, in part, to the huge growth in U.S. military interventions abroad into civil conflicts, but it’s not only the Americans. All of today’s major wars are in essence proxy wars, pitting external rivals against one another. Conflicts in Syria, Yemen and Libya are best understood not as civil wars, but as international warzones, attracting meddlers including the United States, Russia, Saudi Arabia, Turkey, Iran, France and many others, which often intervene not to build peace, but to resolve conflicts in a way that is favorable to their own interests. These internationalized wars are more lethal, harder to resolve and possibly more likely to recur than civil wars that remain localized. It is not that difficult to imagine how these conflicts could spark wider international conflagrations. Wars, after all, can quickly spiral out of control.

As Risks Increase, Deterrents Decline

To make matters worse, most of the global trends that explained why interstate war had decreased in recent decades are now reversing. The theories that democracy, prosperity, cooperation and other factors kept the peace have been much debated—but if there was any truth to them, their reversals are likely to increase the chance of war, irrespective of how long the coronavirus pandemic lasts.

Democracy is often considered a prophylactic for war. Fully democratic countries are less likely to experience civil war and rarely, if ever, go to war with other democracies—though, of course, they do still go to war against non-democracies. While this would be great news if democracy and pluralism were spreading, there have now been 14 consecutive years of global democratic decline, and there have been signs of additional authoritarian power grabs in countries like Hungary and Serbia during the pandemic. If democracy backslides far enough, internal conflicts and foreign aggression will become more likely.

Other theories posit that economic bonds between countries have limited wars in recent decades. Dale Copeland, a professor of international relations at the University of Virginia, has argued that countries work to preserve ties when there are high expectations for future trade, but war becomes increasingly possible when trade is predicted to fall. If globalization brought peace, the recent wave of far-right nationalism and populism around the world may increase the chances of war, as tariffs and other trade barriers go up—mostly from the United States under President Donald Trump, who has launched trade wars with allies and adversaries alike.

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

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

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

It’s hard to see the U.S. reluctance to lead as anything other than a sign of its inevitable, if slow, decline. The country’s institutionalized inequalities and systemic racism have been laid bare in recent months, and it no longer looks like a beacon for others to follow. The global balance of power is changing. China is both keen to assert a greater leadership role within traditionally Western-led institutions and to challenge the existing regional order in Asia. Between a rising China, revanchist Russia and new global actors, including non-state groups, we may be heading toward an increasingly multipolar or nonpolar world, which could prove destabilizing in its own right.

Finally, the pacifying effect of nuclear weapons could be waning. While vast nuclear arsenals once compelled the United States and the Soviet Union to reach arms control agreements, old treaties are expiring and new talks are breaking down. Mistrust is growing, and the chance of an unwanted U.S.-Russia nuclear confrontation is arguably as high as it has been since the Cuban missile crisis.

The theory of nuclear peace may no longer hold if more countries are tempted to obtain their own nuclear deterrent. Trump’s decision to abandon the Iran nuclear deal, for one thing, has only increased the chance that Tehran will acquire nuclear weapons. It’s almost easy to forget that, just a few short months ago, the United States and Iran were one miscalculation or dumb mistake away from waging all-out war. And despite Trump’s efforts to negotiate nuclear disarmament with Kim Jong Un’s regime in Pyongyang, it is wishful thinking to believe North Korea will give up its nuclear weapons. At this point, negotiators can only realistically try to ensure that North Korea’s nuclear menace doesn’t get even more potent.

In other words, by turning inward, the United States is choosing to leave other countries to fend for themselves. The end result may be a less stable world with more nuclear actors.

If leaders are smart, they will take seriously the warning signs exposed by this global emergency and work to reverse the drift toward war.

If only one of these theories for peace were worsening, concerns would be easier to dismiss. But together, they are unsettling. While the world is not yet on the brink of World War III and no two countries are destined for war, the odds of avoiding future conflicts don’t look good.

The pandemic is already degrading democracies, harming economies and curtailing international cooperation, and it also seems to be fostering internal instability within states. Rachel Brown, Heather Hurlburt and Alexandra Stark argue that the coronavirus could in fact sow more civil conflict. If this proves accurate, the increase in civil wars is likely to lead to more external meddling, and these next proxy wars could soon precipitate all-out international conflicts if outsiders aren’t careful. With the usual deterrents to conflict declining around the world, major wars could soon return.

#### Recent, robust studies prove our impact

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Why does protectionism lead to conflict and why does free trade help prevent it? Learn about the connection between peace and free trade.

Frédéric Bastiat famously claimed that “if goods don’t cross borders, soldiers will.”

Bastiat argued that free trade between countries could reduce international conflict because trade forges connections between nations and gives each country an incentive to avoid war with its trading partners. If every nation were an economic island, the lack of positive interaction created by trade could leave more room for conflict. Two hundred years after Bastiat, libertarians take this idea as gospel. Unfortunately, not everyone does. But as recent research shows, the historical evidence confirms Bastiat’s famous claim.

To trade or to raid

In “Peace through Trade or Free Trade?” professor Patrick J. McDonald, from the University of Texas at Austin, empirically tested whether greater levels of protectionism in a country (tariffs, quotas, etc.) would increase the probability of international conflict in that nation. He used a tool called dyads to analyze every country’s international relations from 1960 until 2000. A dyad is the interaction between one country and another country: German and French relations would be one dyad, German and Russian relations would be a second, French and Australian relations would be a third. He further broke this down into dyad-years; the relations between Germany and France in 1965 would be one dyad-year, the relations between France and Australia in 1973 would be a second, and so on.

Using these dyad-years, McDonald analyzed the behavior of every country in the world for the past 40 years. His analysis showed a negative correlation between free trade and conflict: The more freely a country trades, the fewer wars it engages in. Countries that engage in free trade are less likely to invade and less likely to be invaded.

Trading partners

The causal arrow

Of course, this finding might be a matter of confusing correlation for causation. Maybe countries engaging in free trade fight less often for some other reason, like the fact that they tend also to be more democratic. Democratic countries make war less often than empires do. But McDonald controls for these variables. Controlling for a state’s political structure is important, because democracies and republics tend to fight less than authoritarian regimes.

McDonald also controlled for a country’s economic growth, because countries in a recession are more likely to go to war than those in a boom, often in order to distract their people from their economic woes. McDonald even controlled for factors like geographic proximity: It’s easier for Germany and France to fight each other than it is for the United States and China, because troops in the former group only have to cross a shared border.

The takeaway from McDonald’s analysis is that protectionism can actually lead to conflict. McDonald found that a country in the bottom 10 percent for protectionism (meaning it is less protectionist than 90 percent of other countries) is 70 percent less likely to engage in a new conflict (either as invader or as target) than one in the top 10 percent for protectionism.



#### Protectionist fragmentation causes catastrophic geoengineering

Dr. Suzanne Fry 21, Director of the Strategic Futures Group at the National Intelligence Council (NIC), Ph.D. in Politics from New York University, B.A. in Government and International Studies from the University of Notre Dame, Member of the Council on Foreign Relations, et al., “Global Trends 2040: A More Contested World”, A Publication of the National Intelligence Council, March 2021, https://www.dni.gov/files/ODNI/documents/assessments/GlobalTrends\_2040.pdf

In 2040, the world is fragmented into several economic and security blocs of varying size and strength, centered on the United States, China, the European Union (EU), Russia, and a few regional powers, and focused on self-sufficiency, resiliency, and defense. Information flows within separate cyber-sovereign enclaves, supply chains are reoriented, and international trade is disrupted. Vulnerable developing countries are caught in the middle with some on the verge of becoming failed states. Global problems, notably climate change, are spottily addressed, if at all.

HOW WE GOT THERE

By the early 2030s, cascading global challenges from decades of job losses in some countries in part because of globalization, heated trade disputes, and health and terrorist threats crossing borders prompted states to raise barriers and impose trade restrictions to conserve resources, protect citizens, and preserve domestic industries. Many economists thought that economic decoupling or separation could not really happen because of the extensive interdependence of supply chains, economies, and technology, but security concerns and governance disputes helped drive countries to do the unthinkable, despite the extraordinary costs.

Countries with large domestic markets or sizeable neighbors successfully redirected their economies, but many developing economies with limited resources and market access were hit hard as both import and export markets dried up. Economic stagnation fostered widespread insecurity across Africa, the Middle East, and South Asia, fueling a retreat to subnational ethnic and religious identities, strained societies, fragmented states, and spreading instability. New waves of migrants headed to the developed world hoping to escape poverty, poor governance, and increasingly harsh environmental conditions. Their hopes were dashed when political pushback prompted destination countries to block most migration.

As physical barriers went up, dependence on digital commerce and communications soared, but a combination of information management challenges and repeated data security breaches led those states with strong cyber controls, like China and Iran, to reinforce their cyber barricades. Then states that once advocated for an open Internet set up new closed, protected networks to limit threats and screen out unwanted ideas. By 2040, only the United States and a few of its closest allies maintained the semblance of an open Internet while most of the world operated behind strong firewalls. With the trade and financial connections that defined the prior era of globalization disrupted, economic and security blocs formed around the United States, China, the EU, Russia, and India. Smaller powers and other states joined these blocs for protection, to pool resources, and to maintain at least some economic efficiencies. Advances in AI, energy technologies, and additive manufacturing helped some states adapt and make the blocs economically viable, but prices for consumer goods rose dramatically. States unable to join a bloc were left behind and cut off.

Security links did not disappear completely. States threatened by powerful neighbors sought out security links with other powers for their own protection or accelerated their own programs to develop nuclear weapons, as the ultimate guarantor of their security. Small conflicts occurred at the edges of these new blocs, particularly over scarce resources or emerging opportunities, like the Arctic and space. Poorer countries became increasingly unstable, and with no interest by major powers or the United Nations in intervening to help restore order, conflicts became endemic, exacerbating other problems. Lacking coordinated, multilateral efforts to mitigate emissions and address climate changes, little was done to slow greenhouse gas emissions, and some states experimented with geoengineering with disastrous consequences.

#### Extinction

Dr. Catherine E. Richards 21, Professor in the Department of Engineering at the University of Cambridge, Dr. Rick C. Lupton, Lecturer in Mechanical Engineering at the University of Bath, PhD from the University of Cambridge, and Dr. Julian M. Allwood, Professor of Engineering and the Environment at the University of Cambridge, “Re-Framing the Threat of Global Warming: An Empirical Causal Loop Diagram of Climate Change, Food Insecurity and Societal Collapse”, Climatic Change, Volume 149, Springer

Comprehensive surveys of X-risks reveal mechanisms that could cause the collapse of contemporary society. Bostrom and Ćirković (2008), Rees (2018) and Ord (2020) provide eminent scholarly treatment of the field, drawing from the academic literature. WEF (2020) and GCF (2020) produce global risk reports drawing from decision-makers and experts across intergovernmental and non-governmental organisations. These surveys establish that many historically observed mechanisms of societal collapse, including natural climate change, remain applicable as X-risks today. However, the state of existence of contemporary society has led to a different landscape in which these mechanisms apply, and to a number of unprecedented mechanisms, including anthropogenic climate change. Ehrlich and Ehrlich (2013) and Häggström (2016) note that although increased complexity, such as globalisation and technological advancement, can increase a society’s resilience and adaptability, it can also increase vulnerability. For example, globalisation increases resilience to local agricultural production shocks through access to global markets; however, it also increases vulnerability through exposure to sudden reversal in connectivity, such as trade restrictions (Rivington et al. 2015). Some geoengineering technologies, for example, may enable society to mitigate and adapt to climate change; however, they may also increase vulnerability to termination shocks, where failure of the technology exposes society to sudden temperature increases (Morton 2016). In this highly interconnected landscape, ‘synchronous’ (Homer-Dixon et al. 2015) and ‘cascading’ (Buldyrev et al. 2010) failures create the potential for mechanisms and outcomes of societal collapse, once contained to a single localised civilization, to rapidly spread across multiple nations and impact humanity on a global scale.

#### It also causes nuclear war

Dr. Duncan McLaren 21, Professor in Practice at the Lancaster Environment Centre, PhD from Lancaster University, MBA from the University of Cambridge, MSc in Rural Resources and Environmental Policy from the University of London, and Dr. Olaf Corry, Professor of Global Security Challenges at the University of Leeds, PhD in International Relations at the University of Copenhagen, MPhil in Politics and Sociology from the University of Cambridge, “Clash of Geofutures and the Remaking of Planetary Order: Faultlines Underlying Conflicts Over Geoengineering Governance”, Global Policy, Volume 12, Issue S1, April 2021, Wiley

Interestingly, most modellers’ expectations of *real-world deployment* of geoengineering echo the situated narrative more than idealised modelling. For one, the speed of SRM makes it likely to be considered as climate impacts intensify, but winning intergovernmental agreement would likely require ‘tying it up in ongoing diplomacy – trade, military cooperation etc.’ (MB:6). Others noted that ‘unilateral efforts would likely be suppressed, by trade sanctions or military threats’ (MC:2), or ‘would risk political crisis in a world of increasing nationalist division’ (MG:2), yet still expect ‘incremental, unilateral, ungoverned geoengineering’ driven by local impacts (ME:4) or even ‘as a tool of political diplomacy … countries might deploy SRM as a way to extract justice from the international community, even deliberately aiming to negatively affect perceived climate villains’ (MA:7).

Thus, in the situated geofuture ‘geoengineering’ is not simply a set of devices but an integrated part of a world-historical system, best understood, not just through climate modelling and economic theory but through disciplines of history, political economy and even religion. The notion of ‘governance’ envisaged by situated future practices is more comprehensive, going beyond state level agreements to depend effectively on a transformational process of reducing power imbalances and addressing justice beyond only impact attribution and cost distribution.

The pragmatist geofuture

If the idealised geofuture foregrounds truth-making and the situated prioritises world-making, the *pragmatist* focuses on action-making, moving issues of uncertainty and precaution centre-stage in a multi-level world of complexity and uncertainty, where truth is subject to interpretation and negotiation. Those exhibiting this position (including many negotiators) take a precautionary stance regarding both the material and political side-effects of geoengineering, and treat models as merely one means of inquiry about the future. They recognise the value of more situated assessment, not just the idealised view of the IPCC, and apply a pragmatic view of governance as potentially either constraining or enabling for technologies. Questions of fairness are part of their assessments, albeit most strongly in relation to procedural questions.

Where the other geofutures consider climate science somehow capable of precision (either in tailoring geoengineering or controlling it for vested interests) the pragmatist understands science as itself also a source of risk. Those countries supportive of a UNEA assessment of geoengineering highlighted uncertainties about side-effects, and the risks of geoengineering undermining mitigation. Geoengineering technology:

must be treated with precaution regarding potential negative impacts on the environment or other peoples. If it’s possible to use safely … and without undermining emissions reduction, then it would be OK. But it shouldn’t be used as a substitute. (NF:3)

For another state delegate SRM is ‘deeply concerning’ but the uncertainties about the stability of the climate system mean that … ‘[still] we are not ready to reject it entirely’ (NE:1).

A key pragmatist aim at UNEA was to build on (or not undermine) existing precautionary governance. One Southern delegate highlighted a choice between upholding precaution, and relaxing control, arguing in favour of ‘governance to strengthen the precautionary principle, to confirm the CBD decisions’ (ND:1). Another delegate carefully separated their own opinion from their official, more neutral, line: ‘Personally, I see geoengineering (especially SRM/Stratospheric Aerosol Injection (SAI) as “very scary” and it should be governed on a precautionary basis’ (NC:1).

This emphasis on uncertainty and risk emanating from the scientific knowledge-production means that action-making matters. Research might be usefully conducted, but is not inevitably separate from the risks of potential deployment. Supporters of the resolution called for ‘norms and regulations, not just voluntary projects … It’s like the human rights regime. The declaration [the Universal Declaration on Human Rights (UDHR)] isn’t enough, it needs regulation to implement it’ (NB:1). Governance is needed ‘because of the likelihood of transboundary impacts, and worries about geoengineering as a security issue’. This applies to CDR at scale as well as SRM: ‘It’s also of international significance if a country tries to substitute CDR for emissions reductions’ (NB:2).

In the pragmatist geofuture the multiplicity of the international is neither assumed away nor reduced to ‘Northern domination’. Rather, it demands inclusion of diverse actors in action-making: ‘With a magic wand, I’d … emphasise governance in a UNEA report. The process should also involve civil society. We share the same planet, and should work together for the benefits of the environment’ (NF:4). Discriminating governance of geoengineering (and research into it) is understood pragmatically as needed both: ‘to constrain geoengineering in the face of side effects or irreversible effects … [or to] constrain unilateral use by a large power, which could trigger wider conflicts between nuclear-armed states’ (NE:2), and ‘alternatively to enable it in the face of imminent climate crisis’ (NE:3) or to avoid the risk that, like essential drugs, without global governance ‘techniques like SRM will get into private hands, and thus be less accessible in case of need’ (NE:4). For other delegates, while CDR was seen to merit a precautionary approach, other geoengineering approaches might be ‘ruled out following assessment’ (NB:3).

### 1AC---Plan

#### Plan

#### The United States federal government should prohibit anticompetitive private cartel practices not authorized by an internationally-agreed framework of cooperation regarding competition law.

### 1AC---Harmonization ADV

#### Advantage Two is HARMONIZATION

#### The plan multilateralizes antitrust---formalizing law under international frameworks for contingent cooperation creates an opt-in system of explicit reciprocity that creates agreement AND spills over to deep economic integration

Dr. Daniel Francis 21, Climenko Fellow and Lecturer on Law at Harvard Law School, Doctorate of Laws Degree from the NYU School of Law, Master of Laws Degree from Harvard University, JD from Trinity College at Cambridge University, Former Deputy Director of the Federal Trade Commission, “Choices and Consequences: Internationalizing Competition Policy after TPP”, in Megaregulation Contested: The Global Economic Order After TPP, Ed. Kingsbury, Revised 8/26/2021, p. 40-48

B. Between Contracts and Networks: Frameworks

Another dichotomy that dominates the integration of competition policy pertains to the forms of internationalization, which in the competition policy space have generally been dominated by contract-style treaties on the one hand and by open networks on the other.166 Between these two models lies what seems to be an under-utilized alternative, which I call a “framework for contingent cooperation.”

[FOOTNOTE] 166 This binary view dominates the literature. See, e.g., Edward M. Graham, “Internationalizing” Competition Policy: An Assessment of the Two Main Alternatives, 48 Antitrust Bull. 947, 949 (2003) (“[M]echanisms [for antitrust internationalization] range from bilateral treaties creating arrangements for cooperation between or among national competition law enforcement agencies to informal working arrangements among agencies.”); Eleanor M. Fox, International Antitrust and the Doha Dome, 43 Va. J. Int’l L. 911, 912 (2003) (contrasting “horizontalism” with “globalism”); Anu Piilola, Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation, 39 Stan. J. Int'l L. 207, 247 (2003) (“Rather than drafting overarching multilateral agreements on antitrust laws, cooperation efforts in the immediate future are more likely to succeed in managing existing diversity and promoting voluntary convergence based on approximation of domestically applied standards. Networks of antitrust authorities are well-suited to facilitate this process of cooperation and voluntary convergence.”). [END FOOTNOTE]

A “framework” in the sense that I am using that term is a facilitative arrangement that does not constitute a treaty under international law,167 and which does not carry the charge of international legal obligation, but which involves an exchange of specific and reciprocally contingent commitments by participant jurisdictions to engage in mutually beneficial conduct. Specifically, each party states that it will extend certain benefits to each other party so long as each other does likewise; the parties may also create supplementary mechanisms to monitor and/or adjudicate compliance with these commitments.168

A framework of this kind is not a treaty: it is what Kal Raustiala calls a “pledge,”169 and what Charles Lipson calls an “informal” agreement,170 involving no legal obligation, and it involves no commitment of the parties’ reputation for law-abiding behavior.171 On the other hand, it differs from an open, information-sharing network because it precisely specifies behavioral commitments, and because each of the parties shares an understanding that concrete consequences will promptly follow—exclusion from the benefits provided by others—if its behavior materially deviates from the terms of the commitment.172 A framework is therefore essentially a specific declaration of intention to engage in conduct that benefits others, contingent upon parallel behavior by other participating states, without obligatory status under international law.

This is, in some sense, the direct opposite of the approach typically taken in competition policy chapters in trade agreements. The provisions of competition policy chapters partake of the substance of treaty law, but are generally framed in broad terms rather than specifics, and generally do not reflect a shared understanding that specific consequences will attend breach. By contrast, frameworks do not bind in international law, are framed in specific terms than aspirational generalities, and reflect an understanding that the benefits of cooperation will be withdrawn in the event of violation.

Contingent cooperation thus depends for its effectiveness primarily upon three important dynamics. The first and most important of these is the rationality of strategic cooperation. A familiar mainstream view holds that to a significant extent states behave in international society in ways that rationally serve their interests.173 And when cooperation over a series of interactions is overall in the interests of each member of a group, but when each member faces a rational incentive to defect from the terms of cooperation in individual cases, familiar economic theory teaches that a strategic cooperative equilibrium can be maintained among the parties.174 In contingent cooperation, each party understands that if it defects materially from the terms of the framework, the other participants will withdraw the excludable benefits of cooperation, and this provides the incentive to comply.175

Contingent cooperation can be made more stable by the introduction of certain structures designed to monitor compliance (just as with a cartel among private companies).176 This might among other things involve the creation of a central “facilitator” that is responsible, in a general sense, for obtaining, collecting, and processing information necessary to sustain a cooperative equilibrium.177 Depending on the purpose and scope of the cooperation project, this could include (for example): reviewing the text of laws, regulations, and policy documents for consistency with the terms of the framework; conducting peer-review-style evaluations and certifications; hosting voluntary dispute resolution processes, including mediation and/or arbitration, to determine whether and when the framework has been violated; or even receiving and handling complaints of violations ombudsman-fashion (i.e., receiving the complaint, giving the subject of the complaint an opportunity to respond, and publishing findings and conclusions). A central facilitator could also go beyond a policing function and offer a common forum for certain forms of cooperation and information sharing. The nature of such broader functions, and the extent to which they would be useful or desirable, would depend on the nature and purpose of the cooperation.

The second dynamic that powers contingent cooperation is the normative appeal of the project itself. The point here is not unlike what Gráinne de Búrca calls “mission legitimacy”: the normative force of the underlying purpose of a cooperative project, and specifically the power of that normativity to secure the acceptance and cooperation of those who participate.178 Parties joining projects of contingent cooperation can be expected to be in some sense self-selecting: they join such endeavors because, in part, they are genuinely committed to promoting and achieving the ends that the project represents, and they embrace the project of cooperation as worthwhile.179 It may sound a little naïve to suggest that a project of cooperation may be more likely to “stick” if it has some normative appeal to the participating polities, but legal scholarship has long recognized that states do what they undertake to do more often than strictly rational analysis would predict.180 And I think the proposition that genuine commitment to a goal can contribute to compliance is in truth somewhat less naïve than the converse idea that compliance is just as likely without it.

The third source of a framework’s effectiveness is to be found in the acculturative and socializing effects of interaction in an environment in which values and practices are shared and reinforced as normative, and in which attention is paid to the existence and nature of violations. There is a rich and complex literature on the ways in which states, state actors, and the individuals within them may be “socialized” or “acculturated” by repeated engagement with others through common institutions and shared environments of normativity, eventually contributing to the emergence of obligations with genuine normative force.181 Jutta Brunnée and Stephen Toope have pointed out ways in which the force of legal obligation itself arises from shared communities of practice grounded in social reality and shared understandings, not formal commitments.182 As they put it, “[s]tability may be aided by explicit articulation of a norm in a text, but it is ultimately dependent upon [an] underlying shared understanding and a continuous practice of legality.”183

Participation in an endeavor of contingent cooperation may help to engender the development of such understandings and practices, and these may contribute to the effectiveness of the framework. In the longer term, this may even result in the creation of a legal instrument. But this progression is not necessary for acculturation to exert a reinforcing effect: for, as Anu Bradford accurately notes, there is no reason to think that “the pathway from nonbinding to binding rules” is an inevitable or even a natural one.184

The distinctive value of a framework is that it provides a low-cost way for jurisdictions to explore and participate in possible arrangements of mutual benefit that depend upon shared concrete understandings regarding future behavior, but without bearing the burden of an obligation under international law, without running the reputational risk of having to break a treaty, and without facing the domestic hurdles (or political scrutiny) that a treaty would necessitate.185 Use of such a framework may help to reduce the concerns grounded in political morality that might otherwise attend inter-jurisdictional action in sensitive areas:186 to use a term I have coined elsewhere, as contingent practices from which states could withdraw at any time, frameworks would benefit from considerable resources of “exit legitimacy.”187

Frameworks are not suited to every application. They seem particularly apt for types of international cooperation that generate excludable benefits for other participants and can be reasonably well monitored: in the sphere of competition policy, for example, this would include commitments to provide nondiscriminatory access to procurement markets as well as many forms of antitrust cooperation (including cooperation with one another’s investigations, coordination of enforcement activity, the operation of joint filing systems for merger review and cartel leniency programs, and so on). Certain guarantees of nondiscriminatory treatment by SOEs could also be extended on a selective basis. On the other hand, contingent cooperation is much less suitable for projects that require strong and highly credible guarantees of commitment from the participants (in which case a traditional treaty-contract would seem more appropriate188) or groups of parties still lacking the prerequisite agreement on the terms and ambit of desirable cooperation. Nor is it suitable in the absence of sufficient confidence in the ability or incentive of other parties to deliver on their commitments: in these cases, open dialogue and information exchange through a network would seem preferable. Nor, obviously, is it a good fit for projects in which the benefits of cooperation are non-excludable.189 To pick an obvious example, contingent cooperation would not recommend itself as a natural choice for an international project to introduce SOE discipline: the benefits are non-excludable (there is no obvious way to withdraw them selectively in the event of defection) and compliance is very difficult to monitor, so the use of a framework is unlikely to make much of a contribution.190

#### Starting by prohibiting cartels generates experience and feedback loops that spill over to broader harmonization

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a. *Criteria for goals*

The most obvious criteria for goals is that they must be sufficiently attractive to induce and maintain commitment from all necessary participants in the process. As we have seen, however, there is a broad range of goals in existing systems, which means that the goals of the project will have to be relatively general and flexible, becoming more specifically defined through experience along the pathway. A project which assumes that a single conception of competition law favored by one or two participants at a particular point in time will be accepted and implemented by all participants is unlikely to attract widespread commitment. Goals must also be ‘graspable’ or ‘interpretable.’ The language must identify the range of possible interpretations. If it does not, it cannot represent a common goal, and it cannot maintain support. In negotiating international agreements, it is common for parties intentionally to choose language that is too vague to guide actual decision making. That may be appropriate for other types of agreement, but it would be inconsistent with the long-term orientation of a commitment strategy.

The project’s goals must also be ‘shared’ or ‘shareable’. Where goals are shared, each participant has an interest in the effective pursuit of the goals by other participants. For example, the goal of increasing consumer welfare (as understood in neoclassical economics) is shareable, because any increase in consumer welfare on a global market benefits consumers across the market, regardless of state boundaries. In contrast, the goal of protecting a set of producers in one country would presumably not be shareable, as it relates only to those specific producers and those who benefit from their success.¹²

Finally, the agreed goals will have to be perceived as ‘fair’ by all types of participants. Goals that are likely to give significant advantages and gains to some participants (such as highly-industrialized countries) and to cause net harm to others (eg developing countries) cannot attract widespread support. At a minimum, therefore, fairness is likely to require that all participants have a reasonable prospect of benefit. Given the non-linear nature of economic development, however, it cannot require that all benefit equally.

b. Goal structure

Goals will have to be related to each other in ways that guide the development of national systems. As an example of such a structure, we use three goals which, if applied together, might form the basis of a global competition law strategy. Th ere may be others, but my purpose here is merely to illustrate how such a goal structure might look.

The basic concept is that participants would eventually all have approximately the same goals for competition law, at least insofar as it is applied to global markets. In order to achieve that result, national competition law goals would be expected to fi t within a range of goals that narrows over time. Given that national goals often vary considerably, this process will take time and affect some countries more than others. The basic goals would be set out at the time of agreement, but the pathway concept would allow variation over time on the basis of input from the participants.

The most basic goal of all competition laws is to deter anti-competitive conduct. Definitions of ‘anticompetitive’ vary, however, and the concept is notoriously difficult to operationalize in legal decision making. By itself, therefore, this goal is too broad. A second goal could give further guidance—protecting the process of competition from private restraints. The idea is contained in some form in all competition law systems, and thus it provides another shared basis for a pathway strategy. Although there can be uncertainty about the edges of the concept, it makes clear that the competitive process itself is the focus of the project, thus further limiting the set of acceptable national goals. Th e goal of providing durable benefits to consumers could further limit the acceptable range of goals. Again, virtually all competition law systems seek to protect the consumer, so it can also provide a basis for commitment. Together, a package of goals such as this might provide a viable basic goal framework.

c. Potential problem areas

The history of competition law development points to three potential problem areas in developing an acceptable goal structure. One is whether non-economic goals should be part of such a project. Competition laws have often pursued political and social goals in addition to their economic goals. In post-war Europe and in Japan, for example, competition law was often explicitly or implicitly intended to support democratic development. Experience with competition law has, however, revealed the difficulties of using competition law for non-economic goals, and the general trend has been to eliminate them. Given that a multinational project for competition law creates obligations for not one state, but many, such goals are likely to be incompatible with its objectives.

A second potentially difficult issue involves the goal of consumer welfare (in the sense of neoclassical economics). US officials and scholars (as well as many European competition officials) now generally assume that consumer welfare should provide the only goal of competition law, but many outside the US do not accept this view. Given that US support is likely to be necessary for the success of any global competition law project, this creates a potentially serious basis for conflict. Th ere may, however, be ways to minimize this conflict. For example, the consumer welfare standard is based on the application of price theory to a unified market. It does not take into account the existence of political borders. Th is at least calls into question whether it can be effective as the sole goal in a competition law strategy in which national boundaries play a central role. Moreover, the consumer welfare standard is most effectively used for short-run analysis, but a pathway project depends on maintaining political commitment over time. Those who favor consumer welfare as the sole goal of competition law may, therefore, be willing to broaden their range of acceptable goals, at least over the near term, in order to obtain the benefits of the project.

Another potential obstacle involves the goal of economic development. As we have seen, many countries have used competition law as a tool for development. Moreover, developing countries have often argued that economic development should be a goal of competition law, because economic development can be expected to create additional competitors as well as broader markets and thus enhance competition in the long run.¹³ Many kinds of policies may, however, be seen as supporting economic development, and thus identifying it as a goal for a pathway project gives little guidance. In addition, such a goal could easily be used to justify policies that are inconsistent with competition goals. In a pathway strategy, however, there may be no need for developing countries to insist on development as a goal, because the strategy provides flexibility in the timing of obligations and allows obligations regarding norms to be phased in over time. It is thus itself development-oriented. Most, perhaps all, of the arguments supporting development as a goal can be satisfied through the long-term orientation of the pathway concept.

In a pathway context, goals must guide the construction of the process and provide incentives to support it. Accordingly, in formulating goals that can perform this function effectively, the objective should be to articulate a set of goals that is specific enough to achieve commitment from states that prefer a narrow conception of goals, but broad enough to attract commitment from those who have a broader vision of goals. Each will have to accommodate the other. This can be justified if it supports a process that gives both groups most of what they want or is at least superior to its alternatives.

4. Commitment in norm-setting

Th e pathway concept requires that participants eventually restrict the norms that they apply to global markets. Th is narrowing of acceptable norms would have to be phased in over time, depending on factors in a country’s economy and political system as well as on the capacity and experience of its institutions. Some norms may be required early in the process, whereas others may be phased in as the project’s benefits are demonstrated and working relationships are created.

a. Potential obstacles

Two issues are likely to be prominent in reaching agreement on substantive norms. One is the role of economics. Recall that economics plays two basic roles in competition law: one is to interpret data, the other is to provide norms or standards of conduct. Our concern here is with its normative role. In the US, that role is central. There are few ‘rules’ that are based solely on the characteristics of the conduct itself. Legal decisions usually focus on economic analysis of the actual or probable effects of the conduct under the circumstances of a specific case. Economics here plays a normative role. It determines the lawfulness of the conduct. As we have seen, the European Commission has recently moved toward this view, at least in most areas of competition law.

Th is normative role for economics is, however, rare in other competition law systems. It creates a degree of legal uncertainty that few countries have accepted. In these systems, conduct is typically deemed unlawful where the conduct itself has specified characteristics or relatively specific effects, without requiring full analysis of its economic consequences in each specific case. A full effects-based economic analysis is expensive, and many countries do not have the resources to perform such an analysis. In the near term, therefore, it probably cannot be required as part of a global competition law strategy.

Divergence in views about the role of economics is thus likely to present challenges for any global competition law agreement, but one value of a pathway strategy is that it may be able to develop uses of economics that can bridge the gap. For example, officials and experts from participating countries could together develop common scenarios in which anti-competitive effects can be presumed or excluded.¹⁴ National competition officials and courts would be free to apply their laws according to their own procedures, but the scenarios would serve as guidelines for their decisions. Moreover, the group may eventually even include an obligation that national decision makers give reasons for reaching conclusions that are inconsistent with these scenarios. This may be a way of reducing concerns in the US and Europe about inadequate economic analysis and also meeting the demands of other systems for greater legal security.

The issue of whether norms should apply equally to all participants may also be an obstacle to agreement. It has created significant difficulties in previous discussions of global competition law, and it continues to be a major part of discussions in the area. Developing countries often argue that for historical and other reasons fi rms located in their countries have had limited opportunity to grow and to become competitive on global markets. As a result, if they are subjected to competition from larger foreign fi rms, they will have little chance of success, and global markets will forever be dominated by firms from a few countries. Th is, they claim, justifies what is often called ‘special and differential treatment’ for them. Other states have generally been unwilling to accept such treatment in the context of competition law.¹⁵

This issue is likely to be critical to competition law development, but the pathway concept may be uniquely positioned to accommodate it, because that strategy allows norms to be phased in over time, depending on factors such as the economic conditions in the participant state. A developing country’s obligations could thus automatically be tailored to its level of economic development, and differential treatment would gradually be eliminated over time.

b. Specific types of norms—cartels

A brief review of the main categories of norms illustrates some of these issues. The treatment of cartels could serve as a starting point and foundation for a pathway strategy. There is widespread agreement that cartels are generally harmful, and most, if not all, competition laws either prohibit them or contain norms intended to deter them. The economic harms from cartels are usually obvious, and even relatively low-cost deployment of economic analysis can identify them. This means that there may be little difficulty in requiring competition law systems to prohibit cartels. This would allow states to develop experience with the project and to develop trust, knowledge pathways, and feedback loops—all of which can provide momentum for further commitment. Above all, enforcement in the area can be expected to generate benefits that would further support the project.

#### Normative convergence through antitrust harmonization prevents extinction from resource depletion, human rights abuse, and war

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A. The international political environment

At the root of international political theory is the fundamental maxim that relations between sovereign nations in the absence of mitigating factors is characterized by intense competition, mutual distrust, the inability to make credible commitments, and war.20

[FOOTNOTE] 20 Political scientists characterize the international system as “anarchic.” In the absence of world government (or other mitigating force), competition between states is largely unregulated by external laws or enforcement. The world is characterized by mistrust, the inability to contract, and the ultimate reliance on a state’s own devices. See THOMAS HOBBES, LEVIATHAN 80 (Edwin Curley ed., 1994) (in the state of nature “the condition of man . . . is a condition of war of everyone against everyone”). In fuller terms:

There is no authoritative allocator of resources: we cannot talk about a ‘world society’ making decisions about economic outcomes. No consistent and enforceable set of comprehensive rules exists. If actors are to improve their welfare through coordinating their policies, they must do so through bargaining rather than by invoking central direction. In world politics, uncertainty is rife, making agreements is difficult, and no secure barriers prevent military and security questions from impinging on economic affairs.

ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 18 (1984). Efficiency-enhancing gains from trade are difficult to appropriate because trade itself (and any other form of exchange or agreement between nations) is characterized by the absence of credible commitments to future behavior. And underlying the problem is the ever-present threat of the use of force. See, e.g., Kenneth N. Waltz, Anarchic Orders and Balances of Power, in NEOREALISM AND ITS CRITICS 98, 98 (Robert O. Keohane ed. 1986) (“The state among states . . . conducts its affairs in the brooding shadow of violence . . . . Among states, the state of nature is a state of war.”). Although this dire characterization of the international environment is, of course, a stylized approximation of the real world—there are always overlying constraints on sovereign behavior in the form of norms, reputational effects, and customary international law, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977)—it is a useful and widely accepted heuristic for crafting a theory of international politics. [END FOOTNOTE]

As one commentator notes, “Nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests.”21 And states are “unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination.”22 As a result, states operating on the international stage are unable to judge the sincerity of each others’ stated intentions when those intentions are contrary to this manifest interest. Because of self-help rules, states are forced in the main to assess their own security environment by assessing the capabilities of competitors, downplaying their motives. Given that the nature of the competition can implicate the fundamental survival of one (or more) of the actors, actions taken by one state to improve its own security must necessarily decrease the security of its competitor; in the absence of mitigation, security is a zero-sum game.23 In a world where cooperation is exceedingly difficult (because there is no authority to enforce agreements, nor any basis for assessing the reliability of another state’s commitments), international relations are characterized by a continuous race to the bottom, a mindless arms race rather than the opportunity to realize gains from cooperation.

It is obvious that not all relations between states are characterized by the security dilemma, however. Canada, for example, shares an unprotected border with the most powerful nation in the world without degenerating into a destructive and costly arms race. By some mechanism, then, Canada must be able reliably to judge U.S. intentions, even absent the apparent ability by the United States credibly to bind itself to a nonaggressive policy toward Canada. The key to mitigating the pressures of the security dilemma is the ability to distinguish a state with aggressive and expansionist tendencies from a benign one.24 States can be distinguished by their fundamental type. They can be classified as “revisionist,” that is, they seek to subvert the dominant order, or they can be classified as “status quo,” that is, they seek to support it.25 But, as noted, a state’s ability to judge another’s intentions (as opposed simply to counting its armaments) is extremely tenuous and comes at great cost. In fact, political science offers few well-understood mechanisms for judging a state’s propensity for aggression.

At the same time, hegemonic states have an abiding interest in spreading and maintaining their dominant worldview.26 Not only is it imperative that dominant states receive credible signals about other states’ intentions, but it is also important that dominant states attempt to inculcate their norms within other states that, over time, might mount credible challenges to the dominant states’ security.27 The spread of hegemony through internalization of norms occurs for three reasons. First, states with similar institutions and sympathetic domestic norms are simply better and more reliable trading partners, and it is in the hegemon’s economic interest to instill its norms.28 Second, states with defensive military postures and that adhere to the status quo present significantly less security risk to dominant states.29 And finally, the hegemon has a normative interest in the spread of its culture, its worldview, and its norms.30 This conception of the playing field upon which states interact leads to the conclusion that, entirely apart from the immediate and substantial economic benefits to a state from well-ordered interactions with other states, hegemonic states also have a national security and a normative interest in the information to be gleaned from the fact that these interactions are, in fact, well ordered.

In the absence of centralized enforcement, privately held and nonverifiable information as to a state’s fundamental type is the critical problem in assessing motives.31

[FOOTNOTE] 31 See KEOHANE, supra note 20, at 31 (“Order in world politics is typically created by a single dominant power [or hegemon].”). States are consequently classified as one of two types, “revisionist” or “status quo,” based on their acceptance and adherence to the political norms, institutions, and rules created by the hegemon. Status quo states are those that try to improve their condition from within the framework of the accepted world order. Revisionist states, by contrast, seek to gain position both by working outside that order and by working to subvert the hegemonic order itself. For instance, the existing world order is generally accepted to be that created by the United States after World War II. It comprises a liberal international economic order, the use of multilateral institutions (such as the United Nations and the WTO), negotiation for dispute resolution rather than the threat of violence, and the promotion of liberal democratic moral norms. See, e.g., Schweller, supra note 24, at 85; HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 32 (1948). Trade disputes between status quo states (like tariff disputes between the United States and Europe) are resolved through peaceful negotiation rather than the threat of war. Although status quo states do not entirely eschew the use of violence, they typically seek international authorization and legitimization before employing military force, as in the multilateral operations in Iraq, Kosovo, and Afghanistan. Revisionist states, on the other hand, such as North Korea, Iran, and China, will more readily use military force as a bargaining tool and are more reluctant fully to participate in transparent military, economic, and political negotiations. [END FOOTNOTE]

States wishing to escape the pressures of the security dilemma and engage in cooperative behavior need a means of conveying their preferences to others in a credible manner. There are, in general, two means by which such information can be transmitted: states can either bind themselves in such a way that they are unable to deviate from a stated behavior (known as “hands tying” in Schelling),32 or they can signal their intention to engage in a specified course of action by incurring costs sufficiently large that they discourage the misrepresentation of preference.33

International institutions can play a crucial role in facilitating the transmission of this information.34 In particular, international agreements over the terms of trade, even without binding supranational enforcement authority, provide a means for states to bind themselves to a desirable course of behavior in the short run and, more importantly, to signal their acquiescence to the ruling world order in the long run. Because compliance with treaty obligations often requires signatories to alter their domestic laws to reflect the terms of the treaty, the costs of compliance can be substantial. In the short run, to the extent that states enforce their domestic laws they can bind themselves to a certain course of behavior. In the long run, a state’s willingness to incur the substantial costs of changing its laws, both the transaction costs inherent in changing domestic laws and the even more substantial costs in domestic political capital, signals a willingness to engage other states on the terms set by the reigning international power. Moreover, there may be unintended effects, as changes in domestic laws result in a new set of domestic incentives to which actors respond, and new windows of opportunity may open up through which policy entrepreneurs can push for the internalization of new norms.35 Competition laws in particular are susceptible to this mode of analysis.

Most nations have adopted competition laws as a way to actualize (as well as to symbolize) a degree of commitment to the competitive process and to the prevention of abusive business practices . . . . The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.36

The surest way to remove the threat of war, increase wealth, conserve resources, and protect human rights is through fundamental agreement between all states (or at least effective agreement between verifiably status quo states) under a normative umbrella that promotes all of those values. This normative convergence can be effected through the stepwise internalization of the sorts of economic and democratic values inherent in international economic liberalization, perhaps most notably through the adoption of principled international antitrust standards.37

#### Resource depletion causes extinction

Dr. Timothy Gorringe 20, Professor in the Department of Religion and Theology at the University of Exeter, “Confession and Hope: Ekklesia’s Task in the Global Emergency”, Religions, Volume 11, Number 2, https://www.mdpi.com/2077-1444/11/2/97/htm

1. The Four Horsemen

Doubtless every generation has its own version of the four horsemen of Revelation 6, and they have been grim enough over the centuries, but never as genuinely apocalyptic, in the popular sense, as today. Today’s four horsemen—overpopulation, resource depletion, loss of biodiversity and climate change—could each separately mean civilisational collapse and put together they could mean the end of human life on earth.1

The first issue is population, which has more than doubled since 1961 to getting on for 8 billion. The UN predicts it will plateau at 11 billion at the end of the century but this cannot be guaranteed. The assumption is that women’s education, and the availability of contraception, will stabilize numbers but, as Stephen Emmot points out, both of these have been available in Niger for years, and the average birth rate is still seven children per woman. In China and Hungary larger families are officially promoted. If the current rate of global reproduction continues, there will not be eleven billion, but twenty eight billion human beings by the end of the century (Emmott 2013). While one sixth of the present world population still live in absolute poverty it remains the case that, as the Baltimore economist Herman Daly has been arguing for half a century, huge numbers mean huge impacts. Emmott argues that the pressures this size of population will generate can only end in complete collapse, in which the earth will become uninhabitable.

Population impacts are intensified by the dominant economic model, neo-liberalism, which looks for more and more growth, ignoring the warnings of the ‘Limits to Growth’ report of fifty years ago. The mission of the World Bank is to put an end to poverty, which is admirable, but the subtext is that the whole world should live like the United States—which would require five planets, and indeed more if absolute numbers keep growing. One of the results of this version of ‘economy’ (actually, an anti-economy as Wendell Berry in particular has argued) is a soaring gap between rich and poor all over the world. Today inequality is driven not primarily by inherited wealth but by salary differentials.2 Some CEOs earn more than a thousand times what their lowest paid employees earn. The French economist Thomas Piketty suggests that if it got to a stage where the top decile appropriated 90% of each year’s output, revolution would likely occur unless some peculiarly effective repressive apparatus exists to keep it from happening.3 Even in terms of the system as it is, an inegalitarian spiral cannot continue indefinitely: Ultimately there will be no place to invest the savings, and the global return on capital will fall, until an equilibrium distribution emerges.4

The second of our four horsemen is resource depletion, which includes uranium, copper, phosphorus, rare earths which are vital for renewable energy, top soil, but above all water. Sixty per cent of fresh water is found in just nine countries.5 It is estimated that within twenty years almost half the world’s population will experience water scarcity. Global consumption of water is doubling every twenty years, more than twice the rate of human population growth. Agriculture accounts for sixty five per cent (one ton of wheat requires one thousand tons of water), domestic use ten percent, and industry accounts for the rest. Even now ‘the water table in major grain producing areas in China is falling at the rate of five feet per year. Of China’s 617 cities 300 already face water shortages. 80% of their rivers no longer support fish life.’ (Kunstler 2006).

Some analysts have been predicting peak oil for many years and if this were really the case it would have huge implications for farming and therefore for the capacity to feed seven or eleven billion. However, as Emmott notes, new reserves of oil and gas are constantly being found, and shale oil and gas is coming on stream. The problem, as he puts it, is not that there are not enough fossil fuels, but, to the contrary, that we will seek to use every last drop.6

#### Human rights failure causes nuclear war

Gregory Treverton 17, Chair of the National Intelligence Council, Office of the Director of National Intelligence, National Intelligence Council Unclassified Strategic Assessment Of Global Trends, Authored by ODNI Personnel Including the Chairman of the NIC, “The Near Future: Tensions Are Rising”, 2017, <https://www.dni.gov/index.php/global-trends/near-future>

These global trends, challenging governance and changing the nature of power, will drive major consequences over the next five years. They will raise tensions across all regions and types of governments, both within and between countries. These near-term conditions will contribute to the expanding threat from terrorism and leave the future of international order in the balance.

Within countries, tensions are rising because citizens are raising basic questions about what they can expect from their governments in a constantly changing world. Publics are pushing governments to provide peace and prosperity more broadly and reliably at home when what happens abroad is increasingly shaping those conditions.

In turn, these dynamics are increasing tensions between countries—heightening the risk of interstate conflict during the next five years. A hobbled Europe, uncertainty about America’s role in the world, and weakened norms for conflict-prevention and human rights create openings for China and Russia. The combination will also embolden regional and nonstate aggressors—breathing new life into regional rivalries, such as between Riyadh and Tehran, Islamabad and New Delhi, and on the Korean Peninsula. Governance shortfalls also will drive threat perceptions and insecurity in countries such as Pakistan and North Korea.

* Economic interdependence among major powers remains a check on aggressive behavior but might be insufficient in itself to prevent a future conflict. Major and middle powers alike will search for ways to reduce the types of interdependence that leaves them vulnerable to economic coercion and financial sanctions, potentially providing them more freedom of action to aggressively pursue their interests.

Meanwhile, the threat from terrorism is likely to expand as the ability of states, groups, and individuals to impose harm diversifies. The net effect of rising tensions within and between countries—and the growing threat from terrorism—will be greater global disorder and considerable questions about the rules, institutions, and distribution of power in the international system.

Europe. Europe’s sharpening tensions and doubts about its future cohesion stem from institutions mismatched to its economic and security challenges. EU institutions set monetary policy for Eurozone states, but state capitals retain fiscal and security responsibilities—leaving poorer members saddled with debt and diminished growth prospects and each state determining its own approach to security. Public frustration with immigration, slow growth, and unemployment will fuel nativism and a preference for national solutions to continental problems.

* Outlook: Europe is likely to face additional shocks—banks remain unevenly capitalized and regulated, migration within and into Europe will continue, and Brexit will encourage regional and separatist movements in other European countries. Europe’s aging population will undermine economic output, shift consumption toward services—like health care—and away from goods and investment. A shortage of younger workers will reduce tax revenues, fueling debates over immigration to bolster the workforce. The EU’s future will hinge on its ability to reform its institutions, create jobs and growth, restore trust in elites, and address public concerns that immigration will radically alter national cultures.

United States. The next five years will test US resilience. As in Europe, tough economic times have brought out societal and class divisions. Stagnant wages and rising income inequality are fueling doubts about global economic integration and the “American Dream” of upward mobility. The share of American men age 25- 54 not seeking work is at the highest level since the Great Depression. Median incomes rose by 5 percent in 2015, however, and there are signs of renewal in some communities where real estate is affordable, returns on foreign and domestic investment are high, leveraging of immigrant talent is the norm, and expectations of federal assistance are low, according to contemporary observers.

* Outlook: Despite signs of economic improvement, challenges will be significant, with public trust in leaders and institutions sagging, politics highly polarized, and government revenue constrained by modest growth and rising entitlement outlays. Moreover, advances in robotics and artificial intelligence are likely to further disrupt labor markets. Meanwhile, uncertainty is high around the world regarding Washington’s global leadership role. The United States has rebounded from troubled times before, however, such as when the period of angst in the 1970s was followed by a stronger economic recovery and global role in the world. Innovation at the state and local level, flexible financial markets, tolerance for risk-taking, and a demographic profile more balanced than most large countries offer upside potential. Finally, America is distinct because it was founded on an inclusive ideal—the pursuit of life, liberty, and happiness for all, however imperfectly realized—rather than a race or ethnicity. This legacy remains a critical advantage for managing divisions.

Central and South America. Although state weakness and drug trafficking have and will continue to beset Central America, South America has been more stable than most regions of the world and has had many democratic advances—including recovery from populist waves from the right and the left. However, government efforts to provide greater economic and social stability are running up against budget and debt constraints. Weakened international demand for commodities has slowed growth. The expectations associated with new entrants to the middle class will strain public coffers, fuel political discontent, and possibly jeopardize the region’s significant progress against poverty and inequality Activist civil society organizations are likely to fuel social tensions by increasing awareness of elite corruption, inadequate infrastructure, and mismanagement. Some incumbents facing possible rejection by their publics are seeking to protect their power, which could lead to a period of intense political competition and democratic backsliding in some countries. Violence is particularly rampant in northern Central America, as gangs and organized criminal groups have undermined basic governance by regimes that lack capacity to provide many basic public goods and services.

* Outlook: Central and South America are likely to see more frequent changes in governments that are mismanaging the economy and beleaguered by widespread corruption. Leftist administrations already have lost power in places like Argentina, Guatemala, and Peru and are on the defensive in Venezuela, although new leaders will not have much time to show they can improve conditions. The success or failure of Mexico’s high-profile reforms might affect the willingness of other countries in the region to take similar political risks. The OECD accession process may be an opportunity—and incentive— for some countries to improve economic policies in a region with fairly balanced age demographics, significant energy resources, and well-established economic links to Asia, Europe, and the United States.

An Inward West? Among the industrial democracies of North America, Europe, Japan, South Korea, and Australia, leaders will search for ways to restore a sense of middle class wellbeing while some attempt to temper populist and nativist impulses. The result could be a more inwardly focused West than we have experienced in decades, which will seek to avoid costly foreign adventures while experimenting with domestic schemes to address fiscal limits, demographic problems, and wealth concentrations. This inward view will be far more pronounced in the European Union, which is absorbed by questions of EU governance and domestic challenges, than elsewhere.

* The European Union’s internal divisions, demographic woes, and moribund economic performance threaten its own status as a global player. For the coming five years at least, the need to restructure European relations in light of the UK’s decision to leave the EU will undermine the region’s international clout and could weaken transatlantic cooperation, while anti-immigration sentiments among the region’s populations will undermine domestic political support for Europe’s political leaders.
* Questions about the United States’ role in the world center on what the country can afford and what its public will support in backing allies, managing conflict, and overcoming its own divisions. Foreign publics and governments will be watching Washington for signs of compromise and cooperation, focusing especially on global trade, tax reform, workforce preparedness for advanced technologies, race relations, and its openness to experimentation at the state and local levels. Lack of domestic progress would signal a shift toward retrenchment, a weaker middle class, and potentially further global drift into disorder and regional spheres of influence. Yet, America’s capital, both human and security, is immense. Much of the world’s best talent seeks to live and work in the United States, and domestic and global hope for a competent and constructive foreign policy remain high.

China. China faces a daunting test—with its political stability in the balance. After three decades of historic economic growth and social change, Beijing, amid slower growth and the aftereffects of a debt binge, is transitioning from an investment-driven, export-based economy to one fueled by domestic consumption. Satisfying the demands of its new middle classes for clean air, affordable houses, improved services, and continued opportunities will be essential for the government to maintain legitimacy and political order. President Xi’s consolidation of power could threaten an established system of stable succession, while Chinese nationalism—a force Beijing occasionally encourages for support when facing foreign friction—may prove hard to control.

* Outlook: Beijing probably has ample resources to prop up growth while efforts to spur private consumption take hold. Nonetheless, the more it “doubles down” on state owned enterprises (SOEs) in the economy, the more it will be at greater risk of financial shocks that cast doubt on its ability to manage the economy. Automation and competition from lowcost producers elsewhere in Asia and even Africa will put pressure on wages for unskilled workers. The country’s rapidly shrinking working-age population will act as a strong headwind to growth.

Russia. Russia’s aspires to restore its great power status through nationalism, military modernization, nuclear saber rattling, and foreign engagements abroad. Yet, at home, it faces increasing constraints as its stagnant economy heads into a third consecutive year of recession. Moscow prizes stability and order, offering Russians security at the expense of personal freedoms and pluralism. Moscow’s ability to retain a role on the global stage—even through disruption—has also become a source of regime power and popularity at home. Russian nationalism features strongly in this story, with A Chinese man rides a bike among luxurious cars. China’s dramatic economic growth has highlighted greater gaps between rich and poor.

President Putin praising Russian culture as the last bulwark of conservative Christian values against the decadence of Europe and the tide of multiculturalism. Putin is personally popular, but approval ratings of 35 percent for the ruling party reflect public impatience with deteriorating quality of life conditions and abuse of power.

* Outlook: If the Kremlin’s tactics falter, Russia will become vulnerable to domestic instability driven by dissatisfied elites— even as a decline in status suggests more aggressive international action. Russia’s demographic picture has improved somewhat since the 1990s but remains bleak. Life expectancy among males is the lowest of the industrial world, and its population will continue to decline. The longer Moscow delays diversifying its economy, the more the government will stoke nationalism and sacrifice personal freedoms and pluralism to maintain control.

An Increasingly Assertive China and Russia. Beijing and Moscow will seek to lock in temporary competitive advantages and to right what they charge are historical wrongs before economic and demographic headwinds further slow their material progress and the West regains its footing. Both China and Russia maintain worldviews in which they are rightfully dominant in their regions and able to shape regional politics and economics to suit their security and material interests. Both have moved aggressively in recent years to exert greater influence in their regions, to contest the US geopolitically, and to force Washington to accept exclusionary regional spheres of influence—a situation that the United States has historically opposed. For example, China views the continuing presence of the US Navy in the Western Pacific, the centrality of US alliances in the region, and US protection of Taiwan as outdated and representative of the continuation of China’s “100 years of humiliation.”

* Recent Sino-Russian cooperation has been tactical, however, and is likely to return to competition if Beijing jeopardizes Russian interests in Central Asia and as Beijing enjoys more options for cheap energy supply beyond Russia. Moreover, it is not clear whether there is a mutually acceptable border between what China and Russia consider their natural spheres of influence. Meanwhile, India’s growing economic power and profile in the region will further complicate these calculations, as New Delhi navigates relations with Beijing, Moscow, and Washington to protect its own expanding interests. A Chinese development firm—with links to the Chinese Government and People’s Liberation Army— today announced that it recently purchased the uninhabited Cobia Island from the Government of Fiji for $850 million. Western security analysts assess that China plans to use the island to build a permanent military base in the South Pacific, 3,150 miles southwest of Hawaii.

Russian assertiveness will harden anti-Russian views in the Baltics and other parts of Europe, escalating the risk of conflict. Russia will seek, and sometimes feign, international cooperation, while openly challenging norms and rules it perceives as counter to its interests and providing support for leaders of fellow “managed democracies” that encourage resistance to American policies and preferences. Moscow has little stake in the rules of the global economy and can be counted on to take actions that weaken US and European institutional advantages. Moscow will test NATO and European resolve, seeking to undermine Western credibility; it will try to exploit splits between Europe’s north and south and east and west, and to drive a wedge between the United States and the EU.

* Similarly, Moscow will become more active in the Middle East and those parts of the world in which it believes it can check US influence. Finally, Russia will remain committed to nuclear weapons as a deterrent and as a counter to stronger conventional military forces, as well as its ticket to superpower status. Russian military doctrine purportedly includes the limited use of nuclear weapons in a situation where Russia’s vital interests are at stake to “deescalate” a conflict by demonstrating that continued conventional conflict risks escalating the crisis to a large scale nuclear exchange.

In Northeast Asia, growing tensions around the Korean Peninsula are likely, with the possibility of serious confrontation in the coming years. Kim Jong Un is consolidating his grip on power through a combination of patronage and terror and is doubling down on his nuclear and missile programs, developing long-range missiles that may soon threaten the continental United States. Beijing, Seoul, Tokyo, and Washington have a common incentive to manage security risks in Northeast Asia, but a history of warfare and occupation along with current mutual distrust makes cooperation difficult. Continued North Korean provocations, including additional nuclear and missile tests, might worsen stability in the region and prompt neighboring countries to take actions, sometimes unilaterally, to protect their security interests.

Competing Views on Instability

China and Russia portray global disorder as resulting from a Western plot to push what they see as self-serving American concepts and values of freedom to every corner of the planet. Western governments see instability as an underlying condition worsened by the end of the Cold War and incomplete political and economic development. Concerns over weak and fragile states rose more than a generation ago because of beliefs about the externalities they produce— whether disease, refugees, or terrorists in some instances. The growing interconnectedness of the planet, however, makes isolation from the global periphery an illusion, and the rise of human rights norms makes state violence against a governed population an unacceptable option.

#### Economic fragmentation alone causes nuclear war

Espen Barth Eide 16, Higher Degree in Political Science, University of Oslo, Former Senior Researcher and Research Director, Norwegian Institute of International Affairs, Head of Geopolitical Affairs at the World Economic Forum, “Are We Sleepwalking Into Geopolitical Turmoil?”, World Economic Forum, 1/14/2016, https://www.weforum.org/agenda/2016/01/how-can-we-prevent-the-world-sleepwalking-into-geopolitical-turmoil/

Without a concerted effort to properly address current trends, the world is at risk of [heading] ~~sleepwalking~~ into a future of widening chaos with growing danger of interstate conflict. This is the conclusion of a year-long review of global risks, The Global Risks Report 2016, being presented today in London. Geopolitical risk is among the top concerns, but it is the convergence of drivers at different levels – national, regional and global – that threatens to overwhelm existing institutions, and should push us to engage a wider range of stakeholders.

Economic and technological change is happening at a pace that leaves most political and regulatory systems unable to cope. This spurs dissatisfaction with leaders and increasing polarization in society, already weakened by a steep fall in social cohesion and trust. Trust is a fundamental element of social capital, and when it wanes, it negatively affects all aspects of society. Loss of trust results in part from a steady increase in inequality, undermining the feeling essential to the fabric of society of citizens being “in the same boat”.

Downbeat perception of future economic opportunity aggravates grievances, now also in many of the economies that only recently were labelled as “emerging”. Polarization and growing populism forces leaders to take rather ill-advised, short term measures that may give the appearance of “doing something” without really tackling protracted crises at their roots.

Individuals increasingly feel disengaged from traditional structures of power, but strongly engaged through new forms of participation and voice, but in ways that do not necessarily foster shared understanding in society.

The conflicts in Syria and Iraq show how today’s wars are not confined to the battlefront itself. They are “glocal” in the sense that while most of the fighting takes place in a specific region, accompanying terrorist attacks can happen anywhere. Sophisticated recruitment campaigns and social media based information warfare has become genuinely global, with fighters from over 100 countries involved in Syria and Iraq. The allure of joining the battle, for ideological or personal reasons, is just a click away from a teenager’s computer somewhere in a European city. Intelligence services around the world are struggling to cope with a new reality, challenged by everything from well-organized, stealthy groups to self-radicalized “lone wolves”. Three years after the Snowden revelations, the debate on privacy vs. security has been slow to move on from recriminations to the search for practical solutions that command broad-based support.

Cohesion and trust between countries and societies are also under threat. In its most extreme form, this trend may lead to successful calls for withdrawal from an integrated and interlinked world, creating the 21st Century equivalent of medieval “walled cities” that offer the few a sense of security and order, protecting them from the “sea of disorder” on the outside. For instance, the disjointed political debacle over how to manage the reality of people on the move, while not primarily a European phenomenon, has led to strong demands to undo some of Europe’s primary successes of integration, like the Schengen open borders agreement. A gradual dis-integration of Europe would not only be a regional drama, it would, if it happened, have severe implications for global norms and joint aspirations.

This lack of trust and cohesion is also a factor in the development of “hybrid” war. Adversaries – be they states or non-state actors – exploit popular mistrust of government in the design of information operations deployed through conventional media channels as well as more sophisticated campaigns to influence individuals directly via social media. Asymmetric, ambiguous, grey zone, non-linear – these have become the default mode of conflict between major powers seeking to keep their rivalry below the threshold of what is legally defined as "war".

With nuclear powers upgrading their delivery systems, confirming their continued emphasis on the ultimate tool of deterrence, such deniable or indirect ways to influence events, including the use of proxy forces, are gradually becoming the norm. The face of warfare itself is changing. Aversion to outright conflict is also a factor in the rise of geo-economics, or the use of economic relations, sanctions, trade regimes and potentially even means of payment for the purpose of geopolitical rivalry.

The implications for the infrastructure of the global economy are highlighted by the fact that every conflict today is also a cyber-conflict. Cyberspace has become a domain of warfare, on pair with land, sea, air and space. In cyberspace, however, the attacker gets an advantage that he would not have in the physical world, as distance and early warning becomes largely irrelevant. Possibly, globalization has contributed to new modes of conflict that, if left unchecked, could bear the seeds of its destruction.

For some time, the World Economic Forum has warned against globalization going into reverse. The sense of the first post-Cold War decades was that economy finally was becoming open and global, free of the geopolitical lid imposed by great powers. This assumption is again challenged. We see new institutions emerge, driven by new actors, at times complementing, at times challenging the established order. Only time will tell if this is a good or a bad development.

We could see it as a trend towards a net of interlinked regional systems coalescing around regional hegemons, displacing a unified, global economic order, but still sustained by some form of overall agreement. But it could also be read as an early indication that we are transiting into a future global system not so much built on a shared set of values, but rather on tacit understanding of each other’s interests and consensus on the lowest common denominators.

Last year's edition of the Global Risk Report featured the increase of fragility and disintegration on the one hand, and the return of strategic competition between strong and well-organized states on the other. Both trends strengthened in 2015, at times merging into a perfect storm like the one we are now observing in the Middle East: the conflicts in Syria, Iraq and Yemen, to name a few, have local, regional and global dimensions. Regional players, like Iran and Saudi Arabia, compete over the future order of the region. Major global players are simultaneously competing and cooperating, at times engaged on opposing sides in the battle but also at times seeking to forge diplomatic compromises.

#### Antitrust convergence strengthens governance globally---competition law’s the vital foundation

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In addition, conforming antitrust laws to the United States’ standards, for example, involves adopting principles of transparency, indiscriminate application of the law, the incorporation of economic principles into the legal code, the creation of fair and independent judiciaries, the creation of highly technical and independent enforcement agencies, and the emergence of an epistemic professional community of lawyers to interpret the changes. The adoption of all of these steps is the mechanism by which the lock-in phenomenon mentioned earlier can occur. These principles spill over into other areas of law and society and ultimately alter actors’ incentives and behaviors in ways that can result in the long-term internalization of these liberal norms. In particular, more than perhaps any other area of commercial law, antitrust principles contain within them the logic of significant constraints, not only on private, but also on government, conduct in every other facet of regulation and governance.

#### Robust governance prevents extinction

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Governance for Sustainability in light of (post) COVID-19 recovery

The ongoing COVID-19 crisis is generating massive adverse health and socio-economic impacts for societies around the globe, which require further attention for managing the pandemic as well as generating green, just and lasting recovery efforts. The crisis also brings many issues of relevance for ongoing sustainability transformations into the spotlight. One such issue is the role of governance, which we here broadly define as “the totality of actors, rules, conventions, processes and mechanisms concerned with how relevant…information is collected, analysed and communicated, and how management decisions are taken.” (IRGC 2005; see also Ostrom 2009).

The approaches taken to address COVID-19 bring to the fore relevant lessons – some (still to be) learnt - regarding global, national and subnational governance and potential changes needed to inform a shift towards sustainable development pathways. They also offer insights into opportunities and challenges for catalysing transformational change through decisive actions, e.g. as done with social distancing measures strongly informed by scientific advice, albeit not necessarily always based on robust evidence. Yet, COVID-19 also highlights significant gaps in the science-policy-society interface – including with regard to access to reliable, verifiable data to better inform decision making, in the prevalence of institutional mechanisms to deal with systemic and compound crises, and in the preparedness of global and national science communities and governance systems, among others.

It is widely recognised that the existential challenges that humanity is facing, such as climate change, biodiversity loss, increased prevalence of infectious diseases and others, require ‘robust’ governance structures that foster cooperation and collaboration as never before (WBGU 2014).

COVID-19 provides encouraging as well as challenging lessons for enhancing governance for sustainability. In several ‘early-mover’ countries, bold and decisive national government action coupled with clear communication initially led to containing the spread of (the first wave of) COVID-19 (e.g. South Korea, Singapore). Globally and regionally, the fact that COVID-19 has resulted in amplifying geo-political divides, such as between China and the US, and the challenges to the unity of the European Union, have been widely discussed in the media, illustrating the need for effective global governance structures that foster needed cooperation and at the same time respect local knowledge and democratic process.

What is more, COVID-19 is but one example in a string of health and other disasters and crises that the world has faced with increasing frequency in the recent past. As global warming continues, it will certainly not be the last. It is thus key to address the new set of risks and uncertainties in order to reduce risks and be prepared for other extreme events that may follow. Not all disasters are about health. Climate scientists are warning us about global tipping points (Lenton et al. 2019) and local adaptation limits (Mechler et al. 2020) as well as about ‘unknown unknowns,’ which demand capacity to take robust, nimble, yet evidence-based responses that find acceptance by affected societies.

This draft note for the IIASA-ISC COVID-19 recovery pathways initiative lays out our approach and initial thinking on the theme of “Governance for Sustainability” in terms of identifying relevant questions to learn from COVID-19 and draw lessons towards governance for sustainability pathways. We suggest four guiding questions (plus additional supporting questions), which we will further refine and seek answers to as part of the online consultations and further interactions with experts and the advisory panel. The ambition of the consultation process is to proceed towards co-generating some relevant policy recommendations for enhanced governance that is more agile, responsive, empowering, coherent, transparent, and adaptable in an ever more uncertain future, threatened by climate change and other stressors.

#### Building antitrust multilaterally stops litigants from flocking to U.S. courts---that’d derail the global development of antitrust

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Moreover, bringing claims to the United States strips valuable opportunities for young foreign antitrust regimes to develop their own jurisprudence, depressing the effectiveness of global antitrust enforcement and stalling the emergence of private redress. 16

[FOOTNOTE] 16 See Fox, Remedies, supra note 14, at 580 (recognizing that effective enforcement by every antitrust jurisdiction would be better than the United States unilaterally strengthening its own enforcement efforts for global benefit). But see generally Dodge, supra note 2 (arguing that, due to the complexity of multilateral conflict-of-law approaches weighing foreign interests, US courts should only employ Alcoa's US-centric effects doctrine to encourage growth of international antitrust law so long as all courts similarly apply such unilateral approaches); Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 ANTITRUST L.J. 711 (2001) (drawing on the US prosecution of the Vitamins Case cartel to show that aggressive US extraterritoriality can lead to comprehensive international antitrust enforcement).

Others have proposed ideas for multilateral international antitrust enforcement, including a proposal from a group of antitrust scholars (the Munich Group) that involves the creation of an international agency tasked with enforcing a globally adopted antitrust code. See Int'l Antitrust Code Working Grp., Draft International Antitrust Code as a GATTMTO-Plurilateral Trade Agreement, 5 WORLD TRADE MATERIALS 126 (1993) [hereinafter DIAC] (proposing the establishment of an international antitrust agency sharing the responsibility of enforcement of an international antitrust code with national governments); Wolfgang Fikentscher, On the Proposed International Antitrust Code, in ANTITRUST: A NEW INTERNATIONAL TRADE REMEDY? 345-47 (John O. Haley & Hiroshi Iyori eds., 1995) (describing the code by one of its drafters). The DIAC addresses private redress in a similar fashion to EU law: mandating that national governments provide for certain remedies, though ultimately allowing each signatory to determine the appropriate parties to seek remedial action. See DIAC, supra note 16, at 180-81 (addressing "Remedies" under Article 15 to include redressing private harm but stopping short of creating a private right of action); see also infra § II.B (summarizing the EC Directive). However, because such an international code is not yet a practical reality, this Note will focus on how US jurisprudence should operate in absence of international law to create a suitable environment for the growth of international private redress. For more information on the DIAC or other supranational antitrust law, see Steven L. Snell, Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity, 33 STAN. J. INT'L L. 215, 221-235 (1997) (discussing the search for international consensus on antitrust law, including the DIAC); Ulrich Immenga, Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy, 4 PAC. RIM L.&POL'Y J. 93, 150-51 (1995) (introducing the recommendation for the DIAC); see generally Wood, supra note 1 (examining efforts and difficulties in establishing an international antitrust code); Mark R. Joelson & Joseph P. Griffin, International Regulation of Restrictive Business Practices Engaged in by Transnational Enterprises: A Prognosis, 11 INT'L LAW. 5 (1977) (advocating for an international convention as the most effective means of curtailing restrictive business practices engaged in by transnational enterprises while detailing challenges and past attempts). [END FOOTNOTE]

#### That crushes economic stability in BRICs---antitrust is key

D. Daniel Sokol 9, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “The Future of International Antitrust and Improving Antitrust Agency Capacity”, Northwestern University Review Collquy, 103 Nw. U. L. Rev. Colloquy 242, Spring 2009, Lexis

One of the key issues in international antitrust has been how to make antitrust more effective around the world. Most antitrust laws have been adopted or significantly modified since 1990. 1 A number of key jurisdictions are either fairly new to antitrust altogether or to an antitrust regime that effectively employs the latest in economic thinking and the legal tools necessary to promote competition. 2 Jurisdictions that have made antitrust a new and important cornerstone to economic policy include Brazil, Russia, India, and China. Because of the stakes involved in the ability of antitrust to foster economic development and to prevent misguided antitrust policy from operating as a regulatory tax, it is critical that the future of antitrust focus on improving agency capacity around the world. 3 By capacity, I mean the ability of a given antitrust agency to undertake well-reasoned and effective decisionmaking in the implementation of antitrust policy. There are two concerns for countries in various stages of antitrust development: harmonization of domestic antitrust with international antitrust "best practices" and implementation of an effective antitrust regime. 4 In an effort to solve these issues, policymakers in antitrust emphasize two dynamics to shape the development of increased capacity of younger antitrust regimes. [\*1082] The first is international antitrust institutions, such as the International Competition Network, that develop antitrust norms. 5 The other is technical assistance, either from these international antitrust institutions or directly from more developed antitrust agencies or other aid providers. By technical assistance, I mean the process through which agencies improve their capacity to undertake competition policy.

#### Nuclear war

Cynthia Roberts 19, Professor of Political Science at Hunter College, City University of New York and Research Scholar at the Saltzman Institute of War and Peace Studies at Columbia University, PhD, MPhil, and MA from Columbia University, “The BRICS in the Era of Renewed Great Power Competition”, Strategic Analysis, Volume 43, Issue 6, Taylor & Francis

The BRICS are at a turbulent crossroads as renewed great power competition intersects with countervailing tendencies in the emerging multipolar arena. Their success depends avoiding the external costs and domestic pathologies generated by great power friction. Emerging multipolarity provides opportunities for manoeuvre, but only if outsized China accommodates the other BRICS as it competes against the United States. The BRICS’ strongest common aversion concerns American hegemony and its weaponization of finance. BRICS states are defensively motivated to develop mechanisms to limit infringements on their sovereignty and autonomy. However, in China and Russia financial nationalism is also rising, bolstering Renminbi internationalization.

The multilateral group known as the BRICs (Brazil, Russia, India, China\*) first emerged during the era of post-Cold War American hegemony when the international economic order was open and offered tangible benefits, but shaped by unrivalled American power while US alliances dominated the international security landscape. Washington expected no great power challengers to emerge after the collapse of the Soviet Union, a point on which many international relations scholars concurred, discounting China’s potential power.1 At the same time, China’s economic heft—which amounted to less than 20 per cent of US GDP [in purchasing power parity (PPP) terms] in 1990 and still only about 36 per cent in 2000—had not yet dwarfed the other BRICs members (see Figure 1). Seeking to maintain its pre-eminent position by actively deterring peer competitors and co-opting potential opponents, the United States facilitated conditions for these emerging powers to behave as joiners in multilateral economic institutions, such as Bretton Woods and in international markets, but not in ways that displace America’s hegemonic positions and privileges and they were not welcome in US alliances.2

Sensitive to the costs of provoking a backlash by the incumbent powers and the need to keep their diverse coalition of democratic and authoritarian regimes intact, the BRICs adhered to a moderate revisionist strategy of the Bretton Woods order as their economies grew, and China soared. China surpassed the United States as the world’s largest economy (measured in purchasing power parity) in 2014 (see Figure 1), as the largest trading nation in 2013, and from 2000 to 2014 grew more than four times the global rate in market exchange-rate (MER) terms, although it is still about a decade away from catching up to the US in output measured in MER (see Figure 2). When the Global Financial Crisis revealed that the United States was neither omnipotent nor a guaranteed reliable steward of the international economic order, the BRICS questioned whether the Bretton Woods order was ‘losing legitimacy and effectiveness.’3 The crisis emboldened the BRICS states not only to seek seats at the top tables as creditors but also some redistribution of power to new institutions, such as from the Group of 7 (G7) to the G20 to speed their rankings among the prominent global rule-makers. As Figure 3 shows, the five BRICS’ share of global output (owing mostly to China), even measured in MER, strikingly surpassed the European Union (EU) in 2015, and the combined GDP of the BRICS even passed the G7 in PPP terms in 2016 (see Figure 1). This was despite the tapering of growth in all of the BRICS, with the exception of India, and lopsided falloff of Russia, South Africa and Brazil (see Figure 4).

Perceiving American weakness and a general decline of the West, the BRICS as a whole, and China, in particular, also began to experiment with parallel international financial institutions, such as the BRICS Development Bank and the Chinese-sponsored Asian Infrastructure Investment Bank (AIIB) both created in 2015.4 The latter especially rankled the United States and former Treasury Secretary Lawrence Summers declared its creation and ‘the failure of the US to persuade dozens of its traditional allies … to stay out of it’ marked ‘the moment the United States lost its role as the underwriter of the global economic system’ (see Figure 5 for the distribution of shareholders). Summers blamed Washington, not China, for failing to take concrete steps—including International Monetary Fund (IMF) governance reforms pushed by BRICS—to substantially adjust the global economic architecture so that it better reflects the economic size of China and India and other emerging economies that now account for at least half of global economic output, and address their frustrations finding financing for needed infrastructure funds given pervasive restrictions set by US-backed development banks. Summers was primarily concerned with a loss of American leadership, assessing that China and other emerging economies were not radical revisionists seeking to topple the international economic order from which they greatly benefited.5

President Donald Trump turned the diagnosis of disengaged US leadership over a sound liberal international order on its head, blaming China for breaking the rules through forced technology transfers in exchange for US access to the growing Chinese market, predatory licencing practices, theft of intellectual property and the state-sponsored acquisition of American companies. Notwithstanding the validity of such claims, Trump is pursuing nationalist and protection remedies that could spiral into reciprocal moves that ultimately undermine the existing structures and destabilize international relations.

With broad bipartisan support, the Trump administration also aims to counter Russia’s assertive moves to expand its reach, including through influence campaigns, cyber tools, and limited military interventions. This was as Putin and Xi were deepening their partnership. In 2019, the Director of National Intelligence assessed that China and Russia are ‘more aligned than at any point since the mid-1950s.’6 Outside the BRICS format, both Russia and China are converting economic gains to military modernization programmes and leveraging national capacity to expand their geopolitical influence in their surrounding regions and overseas, while attempting to deny control to the US and its allies. Responding to these challenges, the Trump administration declared engagement a failure and in December 2017 the National Security Strategy issued by the White House announced that the United States was re-entering an era of great power competition, in which China and Russia ‘want to shape a world antithetical to US values and interests.’7

This article examines the intersection of renewed great power competition with countervailing tendencies in the emerging multipolar arena as others hedge and resist being drawn into great powers standoffs, while navigating President Trump’s disruptive policy swings. What do these antithetical tendencies imply for the BRICS countries? Can the BRICS states successfully navigate between the Scylla of a dangerous great power competition involving two BRICS heavyweights against the current hegemon and the Charybdis of losing the BRICS cement, breaking apart, and having to go it alone, whether or not the existing order fragments? Given that China is the dominant economic power propelling the BRICS, larger than the other members combined, its strategies and preferences in the new era of great power competition are likely to have an outsized impact on the future existence of BRICS.

The evidence suggests that China was the first in this competition to embrace an ambitious great power strategy for Chinese supremacy well before the election of Donald Trump. One may recall that Deng Xiaoping, appreciating that rising powers need to avoid provoking a backlash from the incumbent powers while still on the way up, developed a 14-character strategic guideline ‘tao guang yang hui’ [keep a low profile and bide our time] at the end of the Cold War when the United States became China’s chief threat. Deng admonished Chinese leaders to ‘observe calmly, secure our position, cope with affairs calmly, hide our capacities and bide our time, maintain a low profile, and never claim leadership.’ Although Deng did not advise when to abandon the non-assertiveness posture, a more confident President Xi Jinping jettisoned tao guang yang hui in favour of a strategy premised initially on co-equal great powers. Then, Xi launched a host of still more ambitious initiatives—including through its ‘Made in China 2025’programme—to dominate key growth industries in high technology, such as advanced chip design, artificial intelligence (AI) and robotics and to realize military modernization by 2035 and become a first-tier force by 2049. Thus, by the 100th anniversary of the Chinese revolution, Beijing’s strategy is to realize a modern and powerful China by ensuring that China’s comprehensive national power and international influence will be at the forefront of world politics and civilization. In so doing, Xi’s strategy is programmed to lead to the fulfilment of the ‘Chinese dream,’ a vision he articulated for the nation’s future in November 2012 to build a moderately prosperous society and realize national rejuvenation.

Whether such lofty national aspirations are helpful modernization milestones or self-defeating, tone-deaf nationalist programmes that engender a new cycle of protectionist backlashes by Washington to avoid further loss of comparative advantage in the US, or worse, is not yet clear. However, it is notable that some American elites and officials are so alarmed by China’s rapid rise as a military technological powerhouse that they see it as a major—even existential—threat to US dominance.8 They doubt the possibility of any bargain to end the trade war, which is seen as a central front in the competition for global supremacy. Moreover, in contrast to Cold War competition with the Soviet Union, many US strategists fear China is a more formidable competitor and ‘beating the Americans at their own Game.’9

The first section below considers the likely consequences of two competing tendencies propelled by great power competition and the diffusion of power and emerging multipolar arena. Next, it turns to the tools that major powers employ in economic and financial competition beyond the blunt tariffs currently wielded by the Trump administration that often prove self-defeating. US currency and financial power is one of the hegemon’s most potent weapons, and in greater use than ever before in American history.10 All of the BRICS countries at one point have suffered wounds from the US sanctions sword and it is one of their foremost common aversions. Both collectively and individually, they are defensively motivated to find mechanisms to limit infringements on their monetary sovereignty and national autonomy. In both Russia and China, in particular, financial nationalism is also rising in parallel with a desire for international status and influence.11 Beyond the weaponization of finance,12 the analysis here leaves aside the military dimensions of great power competition given their lesser relevance to the institutionalized evolution of the BRICS.

Tendencies generated by great power competitive politics

Within five years of Xi’s change of strategy, abandoning the non-assertiveness posture embodied in China’s ‘peaceful rise,’ it is notable that the United States refocused its strategic priorities for the first time since the collapse of the Soviet Union, first with the National Security Strategy in 2017 and then the National Defense Strategy in 2018. According to the National Defense Strategy, ‘The central challenge to US prosperity and security … is the reemergence of long-term, strategic competition by … revisionist powers.’13 Russia and China are identified as the major powers seeking to dominate their regions, shift the balances of power in Europe and Asia against the United States, and project power globally. The Trump administration and many analysts trace China’s rise to the failed attempt to integrate communist and post-communist states into the liberal rules-based order.14 Although bolstered by widespread, bipartisan support for a new strategy to counter the threats posed by these great power rivals, its precise parameters and scope are being contested as the Trump administration struggles to formulate effective policies to counter rival powers’ influence on multiple fronts. Despite the world’s largest defence budget in absolute terms (not as a percentage of GDP), the US has been one of the most efficient great powers in history. Now it faces competitors, particularly China, which are ramping up their efforts asymmetrically and technologically, but competing at lower cost to their economies, unlike the Soviet Union during the Cold War.

Competitive great power politics are occasionally cooperative and plus sum—sometimes zero sum—with the risk of war, and mostly in the domain of relative gains and losses, which involves positional struggles, relational power, and shifts in the balance of power. Nuclear great powers, in particular, have a stake in avoiding negative sum outcomes, where everyone loses, not only in global financial crises and economic depressions but also in crises and conflicts that may escalate to all-out war. As great power competition becomes the driving force of national policy it is likely to shape foreign policy in four important ways:

First, it sharpens distinctions between friends and foes, and pushes others to choose sides, both domestically and internationally, in political, security and economic domains. The trade war could be the tip of an iceberg in drawing lines. Demands for protection from Chinese goods and unfair trade practices have been growing over time.15 After Beijing joined the World Trade Organization (WTO), a ‘China shock’ followed, greatly disrupting the international division of labour, US comparative advantage, and especially US industry.16 China’s use of economic statecraft leveraging large investment flows through the Belt and Road Initiative (BRI) and development of anti-access/area denial (A2/AD) capabilities in the South and East China Seas fosters geo-economic influence backed by coercive power. Russia’s asymmetric political warfare campaigns against open democratic societies in the West and A2/AD capabilities in Eastern Europe add fuel to the bipartisan wellspring of support to shift US strategy beyond the initial course correction initiated by President Barack Obama. That containment strategy included bolstering defences and trip wires in Europe and negotiating the Trans-Pacific Partnership trade treaty, which all the major presidential candidates running in 2016 opposed.

Second, great power competition tends to strengthen nationalist and protectionist coalitions and policies. When this Innenpolitik drives intensified economic and geopolitical competition, it can create negative feedback loops as in security dilemmas, increasing the possibility of conflict.17 For example, China is a growing target of a nascent coalition, including Washington political and economic hawks, military industrialists and industries affected by globalization, such as coal and steel. However, an offset of this tendency is that producers that have supported protectionism in the past, such as the automotive sector, now often depend on China not for cheap labour but as one of the world’s largest consumer markets. Thus, General Motors (GM) sold more vehicles in 2018 to Chinese buyers than to Americans, including Cadillacs which posted the highest sales in the luxury brand’s 116-year history, primarily on the strength of GM’s performance in China. Before the start of the trade war, US multinational corporations were creating jobs in China at roughly four times the rate of increase than in the United States and prefer to build their products where their sales are highest.

In China, the coalition of party nationalists, government bureaucrats, and the state-owned enterprise sector has a significant built-in advantage in the authoritarian state capitalist system and is currently edging out the loose coalition of liberal economic reformers and private sector advocates since Xi’s turn away from the market-oriented reform that generated astonishing economic growth for more than three decades. Private sector firms accounted for 70 per cent of China’s output and the most successful Chinese technology companies, such as Alibaba, Baidu and Tencent. However, in 2012, Xi shifted to a more statist approach and greater economic and political control, despite poor economic results for the SOEs.18

In Russia, the security of the regime and protecting the privileges of the elite become more intertwined with and justified by great power threats, despite popular support for improved relations with the West and the fact that Russia needs capital for development. It is the only BRICS economy that has invested more abroad than it has received in foreign investment.19

Third, great power competition elevates the saliency of national security issues over wealth enhancing agendas and blurs security and trade concerns. This tendency further bolsters protectionism and restrictions given the perceived spillover costs of open trade to national security. China systematically blocks imports of most US manufactures (with few exceptions, e.g. semiconductors and Boeing aircraft). Washington is now putting pressure on US firms to reduce perceived vulnerabilities from China’s large role in supply chains and the national security dangers of doing with business with Chinese technology giants, such as ZTE and Huawei. China’s whole of government policies that contribute to market dominance in key sectors and inability to credibly commit in any trade deal that the party-state would never interfere in the private sector for security purposes go to the core of US concerns about Chinese high technology.20

However, great power competition runs the risk of financial ruin if ambitions exceed resources and strategists fail to establish priorities that help bend the cost curve. Feelings of Schadenfreude over Russia’s economic stagnation and general decline, despite Moscow’s ability to mobilize its national capacity in support of its extensive military modernization programme, will sting if US fiscal imbalances over the next decade require a significant reduction in the share of GDP that the United States can devote to military spending. Successful competitors adopt durable cost-efficient strategies that impose disproportionate costs and competitive disadvantages on their opponents while keeping their own in check.

Fourth, great power competition widens the lens through which psychological biases may operate to distort information processing and rational decision-making. Under such conditions, Jervis shows that ‘people are slow to alter incorrect beliefs in the face of discrepant information; historical analogies are applied promiscuously; subtle—and not so subtle—signals rarely are interpreted as the sender intends; and a person who has become committed to a particular course of action may underestimate its risks.’21

A worst-case outcome is when economic competition intensifies military competition and escalates to military conflict,22 perhaps spurred by erroneous beliefs, such as over-optimism about the balance of forces and resolve. Another bad outcome could emerge from faulty attempts to pursue competitive great power politics, strengthening nationalist, protectionist and security coalitions in opposing great powers while leaving the initial side with a weaker capacity to respond.

#### A tailored opt-in framework for export cartels secures global agreement

Dr. Marek Martyniszyn 12, Senior Lecturer in Law at Queen’s University Belfast, PhD from University College Dublin, LLM (with Specializations in EU Economic and World Trade Law) from the Saarland University’s European Institute, MA Degree from the Warsaw School of Economics and Postgraduate Certificate in Higher Education Teaching (PGCHET) from Queen's University Belfast, “Export Cartels: Is it Legal to Target Your Neighbour?”, Journal of International Economic Law, March 2012

In recent years competition laws were introduced in many jurisdictions and considerable effort was invested by the international community in competition advocacy and voluntary cooperation between competition authorities (best exemplified by the creation of the International Competition Network which now has more than 100 members), leading to more dialogue and understanding in this area of law. This led, for example, to international consensus on international private hard core cartels (but not export cartels) as harmful and actual cooperation in their pursuit across jurisdictions. Taking this into consideration, the time is perhaps ripe to come back to the discussion on export cartels and to revisit narrow-focused proposals in this regard which could be introduced within the WTO framework. The one suggested by Sweeney seems particularly appealing: an agreement taking into account in antitrust investigations not only domestic, but also foreign harm caused by such cartels; reinforced by a positive comity (a commitment to investigate a particular case at the request of a foreign jurisdiction). 233 Such a regime could be adopted as a plurilateral agreement, preferably on the side and not within a major negotiation round, open to all interested jurisdictions and subject to the WTO dispute settlement mechanism. Taking into consideration that China, as the discussed cases present, is caught between a rock of antidumping and a hard place of antitrust actions, it may be interested in such a solution. The US, on the other hand, facing now Chinese export cartels with considerable state involvement may find it worthwhile to sit down and negotiate as well so as to avoid similar but greater problems in the future. The European Union, which already within the framework of the WTO Woking Group took the view that the issue of export cartels should be addressed, would surely join the talks. While developing countries were quite sceptical about competition issues on the trade agenda, the Indian experience with the US soda ash export cartel, discussed above, shows that they may now find it in their best interests to work towards an international solution to export cartels, especially if approached outside the major round of trade negotiations. 234 In fact if the tipping point has not been reached yet, the recent developments allow hoping that it is not too far away and more thought should be now invested into consideration of possible scenarios addressing export cartels, both private and public, reflecting the current challenges.235

#### Reciprocal prohibitions on export cartels are feasible and easily administered

Dr. Brendan Sweeney 11, PhD in Economics from Monash University, Deputy Head of the Department of Business Law and Taxation at Monash University, “Export Cartels” in The Internationalisation of Competition Rules: The Approach of European States, ISBN 9780415685443, Routledge, 7/29/2011, p. 397-398

3. Agreement in which exporting state considers foreign harm

A more realistic arrangement is one in which the exporting state, when determining the legality of an export cartel, agrees to take into account the consumer effects suffered in the importing state. Necessarily this will require states to agree to an export cartel rule based on anti-competitive effects. 100

Proceedings in the export state could be initiated by a request from the importing state. Given that the exporting state has incentives to tolerate export cartels, the exporting state should be required to respond to another state′s request by investigating the matter and issuing a written determination. The exporting state should also provide to aggrieved importers non-discriminatory access to their local competition law and policy processes (both administrative and judicial), to provide adequate procedural rules (for example, discovery rules), and to ensure adequate transparency. 101 A private right of action would be a desirable addition to this type of positive comity agreement. 102 Hoekman and Mavroidis have even suggested that a WTO special prosecutor might be given authority (and the resources) to bring an action on behalf of the least developed states. 103

The attractions of this solution are threefold. First, there is no need to apply law extraterritorially. Secondly, it is in the interest of the importing state to provide the necessary evidence of anti-competitive effects. Thus, the problems of evidence-gathering are likely to be minimized. Thirdly, although the exporting state will have to consider foreign effects, this is less disruptive than other alternatives, for example, handing primary authority to an international institution.

#### Other major powers will say ‘yes’

Michael Ristaniemi 20, PhD Candidate in Commercial Law at the University of Turku, Vice President for Sustainability at the Metsä Group, Participant in the Visiting Scholar Programme at the University of California, Berkeley, “International Antitrust: Toward Upgrading Coordination and Enforcement”, Doctoral Dissertation, October 2020, https://core.ac.uk/download/pdf/347180879.pdf

Despite the above, the major powers do have an interest in cooperating internationally in competition issues. The EU and the US appear to desire further convergence of practices and substantive thinking. Officially, China does not appear to have a strong stance on convergence, but recent practice shows that it too has engaged in an increasing amount of dialogue on competition matters. Indeed, there is an increasing amount of cooperation in relation to investigating international cartels, referring to cartels that operate in several nations concurrently and which seek to cartelize them.208

Further, the competition authorities of major powers have an incentive to ensure that merger control procedures affecting mergers benefiting their respective regions are as internationally streamlined and coordinated as possible given the number of multinationals that originate from each of their respective territories. Nonetheless, there are a few hurdles for streamlining international merger control. First is the dichotomous leadership of the US and the EU systems, with no single leading standard to become the global standard. Second, there are clear differences in nations’ scope of merger review that may arise from partially differing sets of goals should they attempt to address public interest or other non-competition related concerns concurrently with competition concerns.209 In any case, the aggregate cost of a fragmented system of international merger control is arguably higher than it would need to be. Improved, more structured coordination could help, as discussed further in Chapters 5 and 6 below.

#### Status-seeking drives agreement AND overwhelms economic costs

Geoffrey A. Manne 13, Lecturer in Law at Lewis & Clark Law School, Executive Director of the International Center for Law & Economics, JD from the University of Chicago Law School, Former Olin Fellow at the University of Virginia School of Law, and Dr. Seth Weinberger, PhD and MA in Political Science from Duke University, MA in National Security Studies from Georgetown University, AB from the University of Chicago, Associate Professor in the Department of Politics and Government at the University of Puget Sound, “International Signals: The Political Dimension of International Competition Law”, The Antitrust Bulletin, Volume 57, Number 3, Last Revised 7/18/2013, p. 490-492

The United States has an interest in obtaining credible long-term commitments from other states—particularly developing states—to the dominant norms of global economic and political liberalization preferred by the United States. To the extent that adherence to the tenets of economic liberalization preferred by the United States is costly, adherence to those standards conveys a measure of long-term commitment. Similarly, to the extent that states can be made to adapt their domestic infrastructure and institutions to conform with the United States’ preferred institutions of economic liberalization (an undoubtedly costly proposition8), the United States can credibly hope to initiate a process of internalization, whereby the adaptations made create a “lock-in” effect which helps to further the processes of market liberalization and democratization that the United States believes are essential for the maintenance of its preferred international order.9 In short, the more difficult and costly it is for a state to adhere to an international agreement, the more its continued, costly adherence signals the state’s long-term commitment to the underlying tenets with which the agreement is imbued.

Moreover and not least, the process of harmonization through successive, bilateral (or narrow, regional) agreements, particularly in the economic sphere, permits the measured, evolutionary adoption of international standards. The crass realpolitik of multilateral international institutions, even though imbued with desirable normative constraints, suggests that the product of their deliberations will be less economic than political. Many have suggested, however, that regulatory competition in an arena like antitrust (where laws are invariably applied extraterritorially and where states have no ability to lure incorporations with attractive antitrust laws) makes an evolutionary, competitive approach infeasible.10

The recognition of political costs, however, and a consideration of the broader political environment in which international economic laws are negotiated, suggest that an evolutionary, competitive approach is in fact possible. As described in more detail below,11 nations compete for favorable trade and other status. To the extent that their position in the normative order is affected favorably by incurring the costs of compliance with the dominant economic norms as embodied in particular agreements (because of the internalization effect), some measure of competition is possible. By this we mean that, rather than a race for the top (or bottom) engendered by the competition for incorporation fees, for example, states will compete in a race for political status. Because political status is conferred by entering into agreements with dominant economic powers, developing countries (and other states that have not yet solidified their political or economic positions) will enter into agreements without direct transfer payments in order to receive the benefits of credibility, normative change, and international acceptance. The net effect should be the effective export of consistent American (or, more recently, European) antitrust policy. Notably, because harmonization can be achieved over time, through limited agreements, the substance of the dominant international law can also be honed over time as experience proves it necessary.12

#### Even if some hold-out, the framework is flexible enough to create coalitions of the willing that expand later

Dr. Daniel Francis 21, Climenko Fellow and Lecturer on Law at Harvard Law School, Doctorate of Laws Degree from the NYU School of Law, Master of Laws Degree from Harvard University, JD from Trinity College at Cambridge University, Former Deputy Director of the Federal Trade Commission, “Choices and Consequences: Internationalizing Competition Policy after TPP”, in Megaregulation Contested: The Global Economic Order After TPP, Ed. Kingsbury, Revised 8/26/2021, p. 52-53

Conclusion

I have argued that strong, universalistic prescriptions regarding the internationalization of competition policy are unlikely to be very convincing or very interesting. Polities and societies have sharply differing accounts of what “free” and “fair” competition might mean, and when and how the state should shape it, interfere with it, or exclude it altogether. Liberalization and competition offer tremendous benefits to jurisdictions that embrace them; but no jurisdiction does so entirely, and each polity must find its own optimal balance between competition and the values that—so to speak—compete with it. This makes international action a very complex affair in which internationalization is likely to happen slowly when it happens at all. Sometimes it will be simply unavailable: “state preferences may be configured in such a way as to make cooperation unprofitable for all, in which case it will not occur, no matter what international mechanisms are in place.”204

As “[d]isagreement on matters of principle is . . . not the exception but the rule in politics,”205 I have suggested that there is considerable value in the provision of a wide range of tools and forms to facilitate international action. The bigger and more diverse the toolkit, the greater the likelihood of finding a solution that will serve the turn. To that end, I have emphasized the value of three forms of flexibility in this area: regionalism as a complement to bilateralism and multilateralism; frameworks as a complement to treaties and networks; and a willingness to explore cooperation on competition policy both alongside and separately from the liberalization of trade.

All the hard questions remain. But, as policymakers and scholars survey the wreckage of megaregionalism, I think there are plenty of reasons for optimism. I have emphasized that when grand megaregional bargains wrought in binding international law fail, other paths may remain open. Other combinations, other configurations, can offer the prospect of “progress”—in the right sense—to coalitions of the willing. At the time of writing, there is some evidence that many of the TPP’s parties continue to see value in deep cooperation in matters of trade and competition policy, even without the participation of the United States.206 With some creativity and imagination, and in partnership with like-minded jurisdictions, there is every reason to expect that they will achieve it.

## 2AC

### T Expand Scope---2AC

#### ‘Scope’ is authority

William R. Johnson 89, Judge on the New Hampshire Supreme Court, Appeal of Rehabilitation Assocs., 131 N.H. 560, 565-566, 556 A.2d 1183, 1187, 1989 N.H. LEXIS 22, \*11-13 (N.H. April 7, 1989), 4/7/1989, Lexis

The board, however, refused to approve the change in site from Allenstown to Concord without first having an opportunity to review the final plan, because of its belief that such a change could constitute a change in scope. The board was particularly concerned that the change in site might affect various financial variables. Although the administrative interpretation of a statute is entitled to deference, it is not ordinarily controlling. N.H. Dept. of Rev. Administration v. Public Emp. Lab. Rel. Bd., 117 N.H. 976, 977, 380 A.2d 1085, 1086 (1977). With regard to CONS, the board was given the authority by statute to determine what information must be included in an initial application; the statute, however, expressly [\*\*\*12] designated when an applicant who has submitted a completed application or a holder of a CON had to go back to the board for approval. The interpretation of the word "scope" to some extent defines the board's authority. The board's interpretation of the "scope" of the project to include a change in the site without a [\*566] change in the service area, or a change in a financial variable without a substantial change in the total expected capital expenditure, does not comport with the ordinary meaning of that term, and serves to expand the board's authority beyond its statutory limits. See Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); see also Hamby v. Adams, 117 N.H. 606, 609, 376 A.2d 519, 521 (1977) (even longstanding administrative interpretation of statute not controlling if contrary to express statutory language). We hold that a change in the site of a facility without a change in a factor affecting the "scope" of the project, as defined here, does not require prior board approval. Our decision is not intended to prevent the board from requiring the filing of a "change of scope" in accordance with RSA 151-C:12, [\*\*\*13] IV-a (Supp. 1988), effective June 1988, if any documents or materials submitted to it indicate that the change in site has changed the "location", "nature" or "scope" of the project as those terms must be understood.

#### ‘Expanding’ increases the area covered

Cesar A. Noble 17, Judge on the Connecticut Superior Court, Hartford Judicial District, 777 Residential, LLC v. Metro. Dist. Comm'n, 2017 Conn. Super. LEXIS 4178, \*4-5 (Conn. Super. Ct. August 1, 2017), 8/1/2017, Lexis

The defendant relies upon §7-249 as authority for the supplemental assessment. The statute provides that "[b]enefits to buildings or structures constructed or expanded after the initial assessment may be assessed as if the new or expanded buildings or structures had existed at the time of the initial assessment." The parties dispute whether the conversion of the property constitutes a construction or expansion of buildings or structures granting authority to the defendant to levy a supplemental assessment. The plaintiff argues that because the conversion did not constitute an expansion, that is, an increase in the volume or physical area of a building the defendant had no authority under §7-249 for the supplemental assessment. 5 In the view of the plaintiff it is significant that the conversion did not increase the physical footprint or interior square footage of the property in any way including by a vertical [\*5] enlargement. Absent such an increase, asserts the plaintiff, there can be no construction or expansion of any building or structure. The defendant assert that the construction of the 285 new residential units constitute new structures within the plain meaning of §7-249. The court agrees with the defendant.

[FOOTNOTE]

5 The plaintiff relies upon the definition of the word "expand" found in Merriam-Webster's Collegiate Dictionary (10th ed. 2002) of "to open up; to increase the extent, number, volume, or scope of."

### T---Private Sector

### States CP---2AC

#### The CP has zero legal effect

Rafael Leal-Arcas 6, M. Phil from the London School of Economics, LL.M. from Columbia Law School, J.S.M. from Stanford Law School, Ph.D. Candidate at the European University Institute, “The EU Institutions and Their Modus Operandi in the World Trading System”, Columbia Journal of European Law, 12 Colum. J. Eur. L. 125, Lexis

Richardson supports his thesis about the importance of a single voice in the European Union by comparing the European Union's and the U.S. power in negotiating multilateral trade agreements: "But where would some of our dynamic American friends stand in world markets if their interests were represented by 50 [\*197] separate state-level negotiating teams?" 393 This question shows the important role that the United States plays in multilateral trade negotiations by negotiating on behalf of all fifty states with one voice. The comparison is not perfect since the fifty American states are not sovereign States (they have no international legal personality) and, therefore, cannot sign any international treaties. However, in the case of the European Community, its Member States are sovereign states and can therefore sign international agreements. The idea behind this transatlantic parallelism is that, although the European Union is composed of twenty-five sovereign Member States, it is in their national interest to give up their national sovereignty to the European level in order to have a stronger negotiating position, provided that the EU common position defends that national interest. This would only be legally possible by amending the Treaties.

#### It’ll be struck down as preempted ‘foreign affairs’

David H. Moore 14, Wayne M. and Connie C. Hancock Professor of Law Professor of Law at the J. Reuben Clark Law School at Brigham Young University, BA and JD from Brigham Young University, “Beyond One Voice”, Minnesota Law Review, 98 Minn. L. Rev. 953, February 2014, Lexis

A. State Power

The one-voice doctrine has played the most consistent role in delineating the proper scope of state action bearing on foreign affairs. The doctrine's roots stretch at least as far back as the 1827 case of Brown v. Maryland, 16 in which the Supreme Court struck a state law for encroaching on the federal power to regulate foreign commerce. 17 Since that time, the Court has repeatedly emphasized that the states have no role to play in foreign affairs. 18 The Court has stated, for example, that "for national purposes, embracing our relations with foreign nations, [\*960] we are but one people, one nation, one power"; 19 that "in respect of our foreign relations generally, state lines disappear… . [and] the State … does not exist"; 20 and that "power over external affairs is not shared by the States; it is vested in the national government exclusively." 21

In making conclusions of this sort, the Court has relied heavily on the one-voice doctrine. The doctrine's prominence is evidenced by the fact that the doctrine surfaces across genres of preemption. For example, in enforcing the Constitution's Import-Export Clause, which generally prohibits states from laying "Imposts or Duties on Imports or Exports," 22 the Court, since 1976, has asked whether the challenged state law interferes with the national government's ability to "speak with one voice when regulating" foreign commerce. 23 The doctrine has also informed whether state law is preempted by statute 24 or by executive agreement. 25 The doctrine has even led to preemption [\*961] based on executive policy derived from executive agreements. 26 And, as discussed more fully below, the doctrine has justified preemption on dormant Foreign Commerce Clause and dormant foreign affairs grounds. 27 In short, the one-voice doctrine has, for years and across preemption categories, played a notable role in the prohibition of state foreign affairs activity.

#### State intrusion in foreign affairs breaks the one voice doctrine---extinction

Jade Ford 19, J.D. Candidate at Yale Law School, and Mary Ella Simmons, JD Candidate at Yale Law School, “The Treaty Problem: Understanding the Framers' Approach to International Legal Commitments”, Yale Law Journal, 128 Yale L.J. 843, January 2019, Lexis

II. THE THREAT OF WAR INHERENT IN INTERNATIONAL TREATY-MAKING AND OTHER FACTORS THAT SHAPED THE FRAMERS' CONSTRUCTION OF THE TREATY POWER

Much as the Justices' and litigants' positions diverged in Bond, their arguments shared one key similarity: they ignored crucial factors shaping the formulation of the treaty power that remain relevant today. In the Founding Era, treaty membership was a serious commitment: under international law, violating treaty obligations constituted a just cause for war. 34 As a young nation facing Europe's great powers, America could not afford to provoke an unconsidered war. Furthermore, given that the nation's economic and political survival depended on its ability to develop its reputation as a reliable trading partner, the Framers were concerned with ensuring that the national government could keep its word internationally. As our Comment reveals, the potentially catastrophic consequences of treaty violations at the time heavily influenced the Framers as [\*852] they crafted the treaty power and promoted it to the American people. This historical context should inform our contemporary understanding of the power's scope and limitations.

A. Concerns About the Threat of War During the Drafting Process and in Contemporaneous Publications

Not only were the Framers aware that treaty violations could lead to war; they were also guided by this threat in their drafting decisions. Although there is a "paucity of material directly addressing the scope of the treaty power" from the Constitutional Convention, 35 a close analysis of the ratification debates reveals that the Framers expressly considered the risk of war posed by treaty violations and invoked this threat in their arguments for a centralized treaty power. As the following Sections demonstrate, the discussions in the Constitutional Convention, state ratifying conventions, Federalist Papers, and other Founding Era documents all reveal that the Framers regularly considered the risk of provoking war through treaty violations as they conceived of and developed the treaty power.

1. The Constitutional Convention and the Origins of the Treaty Power

The threat of provoking war through treaty violations played a critical role in the development of the treaty power at the start of the 1787 Convention. In his opening speech, Virginia Governor Edmund Randolph outlined the major "defects" of the Articles of Confederation. Chief among these defects was the fact that the Articles "d[id] not provide against foreign invasion. If a State act[ed] against a foreign power contrary to the laws of nations or violate[d] a treaty, [the Confederation could not] punish that State, or compel its obedience to the treaty . . . . It therefore [could not] prevent war." 36 Randolph's emphasis on state compliance with treaties in order to "prevent war" at the outset of the Convention provides striking evidence that this threat was at the forefront of the Framers' minds as they began the drafting process. Although the two most prominent constitutional proposals, the Virginia Plan and the New Jersey Plan, conceived of dramatically different executive authorities, they agreed on one central point: the United States needed to mitigate the risk of war through mechanisms that would ensure state compliance with treaties.

[\*853] a. The Virginia Plan

The debates surrounding the Virginia Plan and the federal "negative" power it proposed provide strong evidence that the Framers were aware of and motivated by the threat of war embedded in the treaty power. The Framers of the Virginia Plan took national treaty obligations so seriously that they would have granted the national legislature the power "[t]o negative all laws, passed by the several States, contravening, in the opinion of the national legislature, the articles of union . . . or any Treaties subsisting under the authority of the union." 37 In sharp contrast to the limited authority granted by the Articles of Confederation, this sweeping power--a predecessor to the Supremacy Clause--would have provided a direct and immediate way for the national government to enforce state compliance with federal treaties. Taken alongside the concern of Governor Randolph, one of the main proponents of the Virginia Plan, with preventing "foreign invasion," the Virginia Plan's conception of a national legislature vested with the power to negative state laws demonstrates the Framers' consideration of the threat of war posed by treaty violations as they drafted the Constitution.

The evolution of the Virginia Plan's negative power further illustrates this point. The original version of the Virginia Plan's negative clause proposed by Madison only granted the federal government the power to negative state laws "contravening . . . the articles of Union." 38 When Benjamin Franklin first added "Treaties" to the shelter of the negative clause two days later, the addition generated no debate or controversy--a rarity at this early stage of the Convention. 39 Instead, the delegates appeared largely to agree on the importance of guaranteeing state compliance with federal treaty obligations, repeatedly raising the threat of provoking war through treaty violations during debates over the clause. 40 As South Carolina delegate Charles Pinkney put it, "[T]he States must be kept in due subordination to the nation . . . if the States were left to act of themselves . . . it w[ould] be impossible to defend the national prerogatives." 41 Under the Articles of Confederation, he reminded his colleagues, "foreign treaties [had not] escaped repeated violations" that could have ended dangerously for the nation. 42 Behind the scenes, other Framers made similar arguments. In a letter to [\*854] George Washington, Madison argued the "negative [power] in all cases whatsoever on the legislative acts of the States . . . appears . . . to be absolutely necessary" in order to prevent the States from "continu[ing] to . . . violate treaties." 43 Treaties were powerful, but they could also be dangerous--a reality evidently motivating the Framers who crafted and supported this progenitor of the Supremacy Clause and the treaty power.

#### The only parts of their ev about the aff are about Canada.

* Kentucky reads blue

Paquin, 20

(Stéphane, professor at l'Ecole Nationale d'administration Publique and Canada Research Chair in International and Comparative Political Economy and Globalization, “Paradiplomacy,” 2020 <http://www.stephanepaquin.com/wp-content/uploads/2020/02/Paquin2020_Chapter_Paradiplomacy.pdf> NL)

The neologism “paradiplomacy” appeared in scientific literature in the 1980s, during a revival in the study of federalism and comparative politics. It was basically used to describe the international activities of Canadian provinces and American states in the context of globalization and an increase in cross-border relations in North America (Paquin 2004). The concept’s inventor, Panayotis Soldatos, defined paradiplomacy as “a direct continuation, and to varying degrees, from sub-state government, foreign activities” (Soldatos 1990, 34). Ivo D. Duchacek also espoused the concept, finding it superior to his idea of microdiplomacy, to which a pejorative meaning could be attributed. For Duchacek, adding “para” before “diplomacy” adequately expressed what was involved, namely a sub-state’s international policies that could be parallel, coordinated, or complementary to the central government’s, but could also conflict with the country’s international policies and politics (Duchacek 1990, 32). Although the concept of paradiplomacy tends to be the most widely used, it nonetheless remains contested by several authors. Some prefer to use the expression “regional sub-state diplomacy” (Criekemans 2011) while others favor multi-track diplomacy or “multi-level diplomacy” (Hocking 1993). In France, the expression “decentralized cooperation” is sometimes used. This article is divided into four parts. In the first part, I present the debate around the concept of paradiplomacy. In the second section, I address the issue of the phenomenon’s magnitude in the world. In the third part, I examine how foreign policy skills are formed and shared, and in the last section, I strive to describe what kinds of international actors represent non-central governments in world politics. The Concept of Paradiplomacy According to Brian Hocking, the concept of paradiplomacy was created to reinforce the distinction between the central government and sub-national governments, thereby increasing aspects of conflict between the two levels of government. For Hocking, however, that approach is incorrect. It would be preferable to situate sub-national or non-central governments in their “diplomatic complex environment” (Hocking 1993). In Hocking’s view, diplomacy cannot be seen as a segmented process between actors within the same state structure. Diplomacy must be perceived as a system intermingling actors from different levels of government and ministries. Actors change according to issues, interests, and their ability to operate in a multi-tiered political environment. Hocking’s rejection of the concept of paradiplomacy is based on “imperatives of cooperation” that exist between central governments and federated states. Thus, rather than talking about paradiplomacy, it would be preferable to refer to it as “catalytic diplomacy” or “multi-level diplomacy” (Hocking 1993). A similar argument is put forward by authors interested in multilevel governance, notably in the context of the European Union. The concept strives to describe the role of Europe’s regions in the process of European construction (Hooghe and Marks 2001). These concepts are interesting and useful in particular contexts, but they remain limited as they tend to underestimate the autonomy of regions, non-central governments, or federated states in pursuing their own international policies. Bavaria, for instance, is not active solely in Europe. It is deeply involved in activities within the conference of heads of government in partner regions. This group includes seven regions of sub-state governments (Bavaria, the Western Cape, Georgia, Upper Austria, Quebec, São Paulo, and Shandong) on four continents; they represent around 180 million inhabitants with a total gross domestic product of 2000 billion euros and are working toward economic and sustainable development. The conference of heads of government also strives to create a network that will enable them to deal with the international challenges regions are facing on the international level. The concept of paradiplomacy should also be distinguished from that of “protodiplomacy” and of “identity paradiplomacy” (Paquin 2002, 2005). Protodiplomacy refers to international strategies designed to promote diplomatic recognition as a way of preparing the establishment of a sovereign country. It is by definition a transitional phase. The concept could define the Catalan government’s strategy in 2017 or that of the government of Quebec before the 1995 referendum on sovereignty-partnership. The concept of identity paradiplomacy occurs on another level. It represents the international policies of a nation without a sovereign state, such as Quebec, Scotland, Flanders, Wallonia, or Catalonia, when the governments of those nations are not seeking independence (Paquin 2002, 2005; Paquin et al. 2015). Thus, one of the fundamental goals of these nations is to work internationally to further the strengthening or building of their nation within a multinational country. The identity entrepreneurs’ objectives are to promote exports, attract investments, seek resources they lack domestically, and try to gain recognition as a nation in the global arena, a crucial process in any attempt at nation-building. This situation tends to be highly conflictual if the central government is hostile to the “other nation’s” identity-based demands, such as with Catalonia and the Basque region in Spain or with Quebec in Canada. The concept of identity paradiplomacy is useful in explaining why the Quebec government, for instance, has adopted different international policies from other Canadian provinces. There is a strong identity-driven element in the Quebec government’s international policies. The government’s goal, whether run by federalists or sovereignists, is to reinforce the French language, to support the development of Francophonie, as well as to gain recognition from foreign governments that it forms the “nation” of Quebec. The Quebec government’s bilateral relations with the French government are greater than those between Canada and France and perhaps between Canada and Great Britain. Former Prime Minister of Quebec Jean Charest met French President Nicolas Sarkozy more often than any other head of state, with the exception of the German Chancellor Angela Merkel. Furthermore, a distinction should be made between “networks of government representatives” and paradiplomacy. According to Anne-Marie Slaughter, networks of government representatives are governmental or paragovernmental actors who exchange information and coordinate their activities in order to manage shared problems on a global scale (Slaughter 2004, 2). Among these actors are financial regulators, police investigators, judges, legislators, and central bank directors, for example. These international governmental networks are a key feature of the current world order according to Slaughter and are increasingly concerned with areas of jurisdiction on all levels of governments. When the Canadian and American police forces coordinate their activities to prevent terrorist attacks, for instance, it involves networks of government representatives rather than bilateral paradiplomacy. In the case of paradiplomacy, an actor—for example, a ministry—is formally mandated by a federated state or sub-state government to defend the state’s interests and promote them in the international arena. The ministry represents the government as a whole and speaks on its behalf. For example, the empowering legislation for the Quebec government’s Ministry of International Relations and la Francophonie entrusts the ministry with the task of establishing and maintaining relations with foreign governments as well as with international organizations. The ministry must safeguard Quebec’s interests in international negotiations and oversee the negotiations and implementation of “agreements” and international treaties. It attends to the implementation of Quebec’s international policies and handles its 32 representation abroad. Magnitude of the Phenomenon A marginal phenomenon in the 1960s and 1970s, paradiplomacy was not only in evidence in North American federated states. It also developed in Europe and elsewhere around the world and even became widespread within unitary states or ones with decentralized or devolved governments such as France, Great Britain, and Spain. It was also increasingly present at the municipal level, notably in global cities like London, New York, Paris, and Shanghai. Nowadays, the paradiplomatic phenomenon is large, intensive, extensive, and permanent despite the sizeable decline after the 2008 crisis. The actors of paradiplomacy, protodiplomacy, and identity paradiplomacy have a considerable degree of autonomy, numerous resources, and increasing influence in international politics (Paquin 2004; Aldecoa and Keating 1999; Tavares 2016). Quebec already had offices in Paris and London in the nineteenth century, despite the fact that very few cases of federated states have been identified as active in the international arena before the 1960s. Since then, things have evolved quickly, to the point where the phenomenon has become quite ordinary. In the United States, for instance, only four states had foreign offices in 1980, compared to 42 with 245 representatives in around 30 countries in 2008. Due to the recession, that number went down to 212 in 2015. In comparison, the American federal government has 267 embassies and consulates around the world (Fry 2017). Germany’s Länder have created around 130 political representations around the world since the 1970s, including over twenty in the United States. In Spain, Catalonia has 4 delegations (France, Belgium, Great Britain, Germany) as well as 34 trade bureaus, 4 cultural and linguistic representatives, 9 overseas development offices, 10 tourism centers, and 5 cultural industries representatives. In 2019, the Quebec government had 32 political representations in 18 countries, including the Quebec General Delegation in Paris whose status is akin to that of an embassy. Flanders has had 100 economic offices since 2004 although its activities mainly concern export and investment issues. Wallonie-Brussels international is the institution with the greatest number of trade offices per capita in the world. The phenomenon is also present in more centralized countries. In France, for instance, the Rhône-Alpes region and its partner Entreprise Rhône-Alpes International have several economic representations abroad. The same phenomenon can be observed in Japan, India, Australia, Austria, Switzerland, Brazil, and several other countries (Paquin 2004; Aldecoa and Keating 1999; Criekemans 2011). The international policies of federated states are an important phenomenon involving all international spheres of action, including economic and trade policies, promoting exports, attracting foreign investments and decision-making centers, science and technology, energy, the environment, education, immigration, and the movement of people, bilateral and multilateral relations, international development, and human rights, which are the major paradiplomatic issues. Paradiplomatic actors are also taking an increasing interest in non-traditional security issues such as terrorism, respecting human rights, cybersecurity, pandemics, and public health (Paquin 2004; Lequesne and Paquin 2017). Some examples of non-central governments participating in various international arenas are: the creation by the governments of California, Quebec, and Ontario of the second largest international carbon market in the world after the European Union; the presence of Australian states in the Australian government’s delegation at a UN conference on development and the environment; the presence of representatives from Texas at meetings of OPEC member countries, whereas the United States is not a member of the organization; Jordi Pujol’s one-on-one discussions with all the G7 heads of state (with the exception of Canada) while he was President of Catalonia; and the Mexican state of San Luis Potosí’s activities to facilitate money transfers sent by immigrants in the United States (Lequesne and Paquin 2017). Regarding security issues, one may observe: Baden-Württemberg’s participation in peacekeeping missions in Bangladesh, Russia, BosniaHerzegovina, Burundi, and Tanzania; the sanctions imposed by the state of Maryland against South Africa in 1985, or the 1996 Massachusetts Burma Law, since invalidated by the US Supreme Court, forbidding public contracts for companies working in Myanmar (Burma); the pressure exerted on the state of Victoria, Australia, to cancel contracts with French companies to protest against the nuclear tests carried out by France in the South Pacific in 1995; national guard officers from American states participating in international military exchange programs, etc. (Paquin 2004). Constitutions and Non-Central Governments Non-central governments hold asymmetrical powers in matters of international politics, which has a considerable effect on their ability to act. That asymmetry exists between countries as well as between regions within them. As a rule, the more decentralized a country, the more non-central governments have constitutional responsibilities that increase their ability to act in the international arena. The more expertise a non-central government has, the more financial resources and a large civil service (Paquin 2004; Michelmann 2009; Criekemans 2011). In unitary states like Denmark or Israel, non-central governments have very little autonomy. In unitary states with a more decentralized structure like France, or in devolved states like the UK, or quasi-federal ones like Spain, non-central governments have more autonomy, despite the central state’s powers remaining dominant (Table 4.1). In federal countries, sovereignty is constitutionally divided between a central government and federated states, such as with Australian and American states, German Länder, Canadian provinces, and Belgium’s regions and communities. To be designated a federal government, a central government cannot unilaterally modify the constitution to its advantage. In such countries, federated states hold a very high number of responsibilities. In Canada, provinces are responsible for issues of health, education, work, culture, and municipal policies. They are also partly responsible for issues relating to economic development, environmental protection, and even justice. India and Malaysia have constitutions that explicitly assign exclusive competence in international relations to the central state. But in several other federal countries, such as Canada, Australia, and Belgium, many specialists have highlighted the difficulty for central governments to negotiate and implement international agreements when the latter involve areas of federal jurisdiction (Twomey 2009). In Australia and Canada, the courts have ruled that the central government could negotiate agreements on all subjects, including those pertaining to federal jurisdiction in domestic law, but did not have the power to force states to implement them, which can create major problems with regard to respecting those countries’ international commitments. Other constitutions, including those of Australia, Germany, Switzerland, and Belgium, grant explicit powers to regional governments in matters of international relations. The Swiss, German, and Belgian constitutions even grant states the power to sign actual treaties by virtue of international law (Michelmann 2009, 6–7). The Belgian constitution goes even further. Since 1993, Belgium has been a federation that allows states to become true international actors. The division of powers in matters of international relations follows the division of jurisdiction by virtue of the constitutional principle: in foro interno, in foro externo, which can be translated as an international extension of domestic jurisdiction. According to that constitution, there are three kinds of treaties in Belgium: (1) treaties within federal jurisdiction; (2) treaties within the individual states’ authority; and (3) combined treaties involving two levels of government that require cooperation between the two in being negotiated and implemented. Furthermore, there is no hierarchy between levels of government, meaning that in reality a Belgian ambassador is not superior in rank to a Flemish diplomat (Paquin 2010). What Kind of International Actors? What kind of international actors are non-central governments? Their status is halfway between that of a sovereign country and a non-governmental organization (NGO). Their status is ambiguous due to being both sovereignty-bound and sovereignty-free, as James Rosenau has stated (1990). Since non-central governments are sovereignty-free, they are not recognized actors in international law. Apart from certain exceptions provided for in the domestic laws of countries such as Belgium, these governments cannot formally sign real international treaties as defined by international law. Nor can they have real embassies or consulates. That said, their status as sovereignty-free actors, thus not formally recognized by international law, does not take away their entire ability to act. Their means of action are more on the level of NGOs. Indeed, non-central governments send fact-finding and outreach missions abroad, take part in trade fairs and certain international forums such as the Davos World Economic Forum, and finance public relations campaigns to increase exports and attract investments. The Canadian province of Alberta was very active in Brussels during negotiations on the EU-Canada Comprehensive Economic and Trade Agreement in order to make sure that oil from tar sands would not be subject to sanctions by the European Union. Alberta was also highly active in Washington to pressure American officials to approve the Keystone XL pipeline project. It is also easier for non-central governments to adopt idealistic international positions, and they have greater latitude to take a strong stance on delicate topics. For example, they can more easily condemn the nonrespect of human rights. Countries, on the other hand, must take a more nuanced tone and a more diplomatic approach in order to take into account a number of political and economic factors. Sub-state governments can also defend their interests in foreign courts. The government of Ontario brought the issue of acid rain directly to American judges, as did British Columbia on the subject of the “salmon war” pitting Canada against the United States. Non-central governments are also sovereignty-bound actors, in that they have partial sovereignty over their territory. Several non-central governments have a minister in charge of international relations and a corresponding ministry. Furthermore, the range of tools available to federated states for international action is nearly as great as for sovereign countries, with the exception of the use of military force. Indeed, several non-central governments have organized official visits with other regional leaders or those from sovereign countries, such as the alternating visits of the prime ministers of France and Quebec. They have representation or “mini-embassies” abroad, establish bilateral and multilateral relations with sovereign countries and other federated states, create institutions for regional or transregional cooperation, and can sign international agreements. In this regard, the government of Quebec has signed 751 of them, including 385 still in effect. Over 80% of these agreements have been signed with sovereign countries. In certain cases, such as the Belgian federated states, it involves actual international treaties (Paquin 2010). Their localization within a sovereign state gives federated states access to decision-makers from the central government, including actors in the country’s foreign policy. Sharing sovereignty with a central government gives non-central governments a reason to establish an international presence and develop their means of influence. Thus, contrary to NGOs and multinationals, for instance, the government of a federated state may enjoy special access to international diplomatic networks if the central government agrees, and may take part in international negotiations within their country’s delegation (Paquin 2004; Lequesne and Paquin 2017). The phenomenon is growing. Since the end of the Second World War, there has been an increase in multilateralism and international negotiations. While in the late nineteenth century only one or two conferences or congresses involving official representatives were documented, today there are around 9000. The register of UN treaties provides access to about 250,000 treaties.1 Multilateralism and international negotiations have therefore become an indissociable component of globalization (Paquin 2013). Parallel to the above, there has been a substantial increase in federal governments around the world. Within the European Union, for example, only two countries had federal governments after the Second World War whereas today 19 of the 27 countries in the EU have experienced a significant increase in regional governments and several have real federal governments. The Forum of Federations estimates that 40% of the world’s population live in federal countries (Lequesne and Paquin 2017). The consequence of these two phenomena has been that all fields of government activity, even in federated states and municipalities, may enter into the jurisdiction of at least one intergovernmental organization and often of several (Paquin 2010; Lequesne and Paquin 2017). Thus, in the framework of international organizations and thematic conferences, topics are addressed regarding the environment, free trade, procurement contracts, education, public health, cultural diversity, corporate subsidies, treatment of investors, the removal of non-tariff barriers, agriculture, services, etc. In this context, federated states are increasingly aware that their political power or sovereignty—in other words, their ability to develop and implement policies—is the subject of negotiations within multilateral international forums. Since international negotiations are having a growing effect on federated states’ sovereignty, the latter have become crucial actors in negotiations. In the negotiations on climate change, for instance, the UN formally recognized the importance of such actors. According to the UN Development Programme: “[…] most investments to reduce GHG (Greenhouse gas) emissions and adapt to climate change – 50 to 80 percent for reductions and up to 100 percent for adaptation – must take place at the sub-national level”.2 Furthermore, at the 16th Conference of the Parties, UN Framework Convention on Climate Change in Cancún in December 2010, the importance of the role of non-central governments was stipulated in article 7 of the Cancún Agreements. During his speech to the delegates, the Canadian representative, John Baird, explicitly recognized the role of Canadian provinces, notably Quebec, on the issue of climate change (Chaloux et al. 2015). In terms of trade negotiations, the same trend can be observed. The provinces played a greater role during Canada’s trade negotiations with the European Union, the largest since the Canada-US Free Trade Agreement in the late 1990s. The European Union demanded that the Canadian government include the provinces in its delegation, with the aim of starting negotiations for a “new generation” free trade agreement. The main reason being that the issue of public procurement contracts in Canadian provinces and cities was of special interest to the European Union in the negotiations. In that context, the European Union deemed that, for the negotiations to succeed, they had to include representatives from the provinces at the negotiating table, since the latter are not required to implement agreements signed by the federal government in their areas of jurisdiction (Paquin 2013). There are many precedents in which representatives have taken part in meetings of international institutions—the European Union, the United Nations, the World Trade Organization, the World Health Organization and Unesco, or again at the Conference of the Parties, UN Framework Convention on Climate Change—both within a country’s delegation, and at times outside it, as with Quebec, New Brunswick, and the WallonieBrussels federation regarding la Francophonie. When central governments block non-central governments’ access to international negotiations, the latter may try to influence the negotiations by going on-site. To make its voice heard, the government of Quebec sent several representatives to the conference of the parties on climate change despite the objection of Stephen Harper’s climate-skeptic government. Another strategy consists in joining networks of non-central governments and creating an accredited NGO at the negotiations, which is entrusted with the mandate of defending the interests of those actors at the negotiations. This was the case for the NGO Network of Regional Governments for Sustainable Development, which represents the regions’ interests in climate change negotiations. ∗∗∗ The paradiplomatic phenomenon, although not generally spectacular, certainly represents an important change in the study of foreign policy and international politics. It is an extensive, intensive, and permanent phenomenon. The international interests of sub-national governments are highly varied and substantial. These governments have considerable leeway and resources in their international initiatives, despite the asymmetry. In short, the phenomenon can no longer be ignored, even in centralized countries such as France or Sweden. Although paradiplomacy has progressed a great deal in the last thirty years, and case studies are increasingly numerous, there are still several blind spots. There are few studies on paradiplomacy and security issues analyzed in the broad sense, for example. Moreover, few studies exist on non-central governments and international negotiations, in particular on negotiations and the implementation of international treaties.

#### It doesn’t send a signal---that collapses harmonization

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D. International Matters

The global expansion of competition law regimes has dramatically increased the complexity and cost of compliance for U.S. businesses. The Section commends the Agencies for working to address these challenges through formal and informal cooperation, communication, and consensus-building efforts. However, there is much work yet to be done. Now, more than ever, it is important for the United States to speak with one voice in international antitrust matters. The Section encourages the Agencies to work more closely with each other and with the Administration to develop and communicate a unified global antitrust policy. To accomplish this goal, the Administration may wish to consider how the Executive Branch could facilitate more extensive coordination between the Agencies and better respond to pressing international competition law matters. The Section commends the Agencies for their efforts to promote comity through deference to foreign authorities' enforcement actions. That said, where appropriate legal grounds exist, and where consistent with U.S. policy, the Agencies should not hesitate to intervene in foreign enforcement proceedings where it appears that U.S. firms are being subjected to rules or policies that are antithetical to U.S. antitrust law, particularly where serious due process concerns are at stake. Finally, in the wake of recent federal appellate decisions opining that the Federal Trade and Antitrust Improvements Act (FTAIA) is a substantive element of a Sherman Act claim, the Section recommends that the Agencies clarify that the FTAIA places a jurisdictional limit on Sherman Act enforcement.

III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

Where there are uncertainties in the Agencies' enforcement policies or priorities, it is often essential for the Agencies to provide guidance. The formal guidance can take the form of formal guidance documents (such as the Horizontal Merger Guidelines of 2010) or FTC opinions. Informal guidance can take the form of agency reports, speeches by key agency personnel, amicus briefs, decisions to litigate, or closing statements. Agency guidance is important and beneficial for multiple reasons, such as providing clarity for businesses, moving competition policy in the right direction, and ensuring a U.S. perspective on the international arena. Agency guidance is also particularly useful to communicate a shift in enforcement policy or practice.

Furthermore, uncertainty as to the boundaries of antitrust laws may chill potentially procompetitive conduct or enable potentially anticompetitive behavior to continue unchecked. Businesses may be less willing to engage in novel business activities that could benefit consumers. Moreover, agency guidance and enforcement not only define the boundaries of how the Agencies view and enforce the law, but may also impact how courts rule in litigation.

Guidance also ensures a place for the U.S. perspective on the international stage. Because so many foreign antitrust authorities look to the Agencies for leadership and study U.S. enforcement decisions and cases, clearly articulated guidance helps achieve uniformity across jurisdictions. Moreover, an international presence and influence as to antitrust policy is particularly critical in an era in which some foreign competition agencies use the pretense of antitrust enforcement as a cover to mask decisions that are actually based on industrial policy or protectionism.

### ICN CP---2AC

#### They’ll say no---harmonization’s impossible unless fiated

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Finally, negotiating an international agreement always entails costs. Contracting costs are particularly high when numerous states with divergent preferences are seeking to agree on binding norms. 95 An antitrust agreement within the WTO framework, for instance, would require reaching a consensus among 149 heterogeneous states, as well as seeking domestic ratification by their respective legislatures. The Uruguay Round of WTO negotiations required eight years to complete. The current Doha Round, launched in 2001, has already dragged on for over five years with no end in sight. 96 Pursuing a binding international antitrust agreement within the trade regime would thus inevitably be a slow and costly process.

Consequently, the prospect of coordinating international antitrust laws, while generating some benefits, may simply not have been a priority for the United States and the EU due to certain costs, limited gains, and lack of significant opportunity costs. Alternatively, it could be that either party might have wanted to launch the negotiations, but the other party, perceiving the costs exceeded the benefits of coordination, obstructed negotiations. The possibility of asymmetrical payoffs between the United States and the EU is examined below.

#### The CP looks incoherent---that guts international acceptance

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A. Reputation

Regulatory agencies develop reputations, 31 and the reputation of a competition system affects whether other authorities choose to emulate that jurisdiction's applications, seek its know-how, or even amend their own operating systems. A competition agency's reputation is a function of many factors. The most important is the perceived quality of its programs: has the agency delivered visibly good economic results for consumers in its decisions about what to do and what not to do?

In some cases, it is possible to link improvements in economic performance directly to the agency's work. 32 Because it can be difficult to show how the operation of a competition system affects economic performance, other proxies of effectiveness serve to separate stronger competition systems from weaker ones. In many instances, the volume of the agency's activity--notably, the filing of cases and the successful defense of litigation matters in court--and the sum of monetary penalties recovered are taken as [\*1165] measures of agency quality. 33 Agencies that bring big cases and obtain substantial penalties figure prominently in discussions about agency quality. 34

Reputation also is shaped by perceptions of the quality of an agency's process. 35 One important element of process is the set of procedural techniques (both formal rules and norms) that the agency uses to ensure that it operates within the boundaries of the law and tests theory and evidence rigorously. Another ingredient of good process is meaningful public disclosure--notably, informative statements about priorities, guidelines and other commentary that spell out how the agency analyzes business behavior, and clear explanations of why the agency chose to issue complaints, close files, or settle cases. Good practice also leads agency officials to appear regularly in public to explain their views and accept criticism. A further measure is the establishment of a routine practice to evaluate the substance of the agency's work and its procedures.

B. Branding

Reputation is the central ingredient of an agency's efforts to build a well-respected brand internationally. 36 The concept of branding extends beyond the development of a good reputation to encompass efforts that make the agency well-known and well-respected in the eyes of external observers, including other competition authorities. In this way, branding has an important dimension of marketing. An agency's good work is unlikely to exert substantial influence abroad unless it is known and understood by a wider audience.

Effective branding is a function of how the agency formulates and communicates its policies. A major determinant of effectiveness is to ensure that the agency's expressions of policy--through hard tools such as law enforcement and rulemaking or though softer policy instruments, such as guidelines, reports, and speeches--are coherent. Policy coherence in turn depends heavily on the agency's ability to form an overall strategy and to set out priorities that guide its staff about the selection of programs and inform outsiders about its intentions.

Coherence also requires discipline in external communications, including the agency's public relations program. Means of informing external observers include public statements by the agency and its senior managers, [\*1166] presentations at conferences, formal decisions on the initiation or resolution of cases, and the publication of studies. Each public utterance of an agency or its officials is an occasion to emboss or tarnish the agency's brand. As a group, these messages should consistently and clearly reinforce the agency's main themes, as contained in its statement of strategy and priorities.

#### The CP’s external pressure crushes FTC independence---implodes the deal

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CONCLUSION

National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago, 152 and scholarship touching upon the furtherance of nationalist goals by [\*245] various antitrust agencies dates back decades. 153 However, a creeping loss of public confidence in open markets--coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act's influence, as illustrated in this Article--risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic "end of history" 154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late. 155

Protectionist policies designed to compromise market competition--for all its documented excesses and inadequacies--would sap its creative vitality [\*246] and the concurrent liberal peace 156 often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country's companies, 157 to an international competition regime binding on member states in at least some areas of antitrust. 158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for "our country, right or wrong" protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act's formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order's intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

#### The FTC will fight it because the plan shifts power to the USTR

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In addition to this external power struggle that manifests itself as the contest between the United States and the EU for the preeminence of their respective antitrust regimes, the U.S antitrust agencies might also oppose a WTO agreement on antitrust due to an internal power struggle. A WTO agreement on antitrust would inevitably shift powers from the Federal Trade Commission and the Department of Justice to the Office of the U.S. Trade Representative. 109 In contrast, the EU Commission's powers would increase vis-a-vis the EU member states if antitrust was brought within the WTO framework as the Commission would have exclusive competence in WTO negotiations on antitrust matters. 110

#### They’ll dig in---triggering a turf war that externally crashes harmonization

William E. Kovacic 13\* and David A. Hyman\*\*, Global Competition Professor of Law and Policy, George Washington University Law School and Non-Executive Director, United Kingdom Competition and Markets Authority, and \*\* H. Ross and Helen Workman Chair in Law and Professor of Medicine, University of Illinois, “Competition Agencies with Complex Policy Portfolios: Divide or Conquer?”, GW Law Faculty Publications & Other Works. 631.

https://scholarship.law.gwu.edu/faculty\_publications/631

4. Resilience: Is the Assignment of Functions Adaptable and Sustainable?

Statutes routinely allocate jurisdiction according to the technology used to supply a product or the status of the organization that provides the service. What happens when the character of the industry is altered by technological change or the emergence of new categories of suppliers of the sector’s goods or services? As suggested earlier, regulatory jurisdictional boundaries can shift over time in much the way that the movement of a river will sometimes alter rights in real property.64 When such changes take place, multiple agencies may seek to exercise authority by arguing that the reconfigured industry falls within their purview. A sustainable assignment of functions will be able to adapt to such changes; a non-sustainable assignment will not – making bureaucratic warfare between the rival agencies a very real possibility.65

One obvious example is the almost decade-long dispute between the SEC and the Commodity Futures Trading Commission (“CFTC”) over products that arose at the interface of regulatory authority of these two agencies. The SEC regulates securities; the CFTC regulates futures contracts. But what happens when a futures contract is for the delivery of securities? The SEC took the logical (and self-interested) position that a futures contract involving a security was subject to its jurisdiction. The CFTC took the logical (and self-interested) position that it had exclusive jurisdiction over all futures contracts. Both agencies pointed to their enabling legislation. When the CFTC approved the Chicago Board of Trade’s trading of futures contracts on GNMA certifications and the Chicago Mercantile Exchange’s trading of futures contracts on T-bills, the SEC took the position that it might view such trading as illegal, notwithstanding the CFTC’s approval. The Chicago Board of Trade brought a lawsuit against the SEC, challenging its assertion of jurisdiction.66

The SEC also brought several lawsuits challenging the CFTC’s assertion of exclusive jurisdiction.67 The dispute was finally settled with a negotiated agreement between the two agencies, which was ultimately enacted into formal law.

The regulation of financial services routinely raises this problem, because regulatory authority is generally tied to the type of entity being regulated, rather than the type of product being offered. Consider the comments of a Federal Deposition Insurance Corporation (“FDIC”) associate director, noting the complexities of determining whether a particular depository institution was indeed a bank:

First, you have to figure out, what in the hell is a bank? And what is the intent of deposit insurance? It’s a far cry from when they set it up. A typical commercial bank was one that made agricultural loans, commercial loans, and held demand deposits. . . Congress had in mind what a bank was. . . Now you may have a furniture company and they may say “we will sell a lot of couches on credit, and we borrow money to do that. We could [finance the credit] with commercial paper, but by and large we use a commercial bank for our needs. . . Why don’t I establish a bank and get insurance. . . I could go out and sell CDs. . . Then I’ve got back up and my financing rates go way down. . . Now I am a lender for couches; instead of selling the loans to the bank or borrowing, I just put the loans on my books.” Well that isn’t what anyone was thinking of or imagined at first. . . They get deposit insurance and they play on the federal guarantee to reduce interest costs and financing.68

Such border disputes can easily trigger a turf war between agencies. These dynamics are also affected by the demand side, as firms maneuver to “choose” their regulator.

An adaptive regulatory framework would have clearly allocated regulatory authority over a particular area to a specific regulatory agency -- instead of forcing personnel at multiple agencies to spend considerable time and effort disputing the allocation of responsibility. Various strategies are available to proactively address adaptability, but to a considerable degree, Congress only examines such matters in response to train wrecks and crises, in which perceived and/or real failures in the regulatory process give rise to reassessment. Dodd-Frank presents an obvious example of the end game of this dynamic – albeit one that did not provide a resilient solution to the broader problem it sought to address, with the exception of creating the CFPB.

Resilience is obviously not as important as some of the other factors, because problems will emerge, if at all, over time. But, the absence of properly defined jurisdictional boundaries will eventually lead to border wars between agencies/departments, and turf wars among congressional committees. Creating an adaptable and sustainable grant of regulatory authority helps reduce the amount of time spent on such activities.

5. Internal Organizational Cohesion

When discrete functions are combined in a single agency or department, the result is usually the creation of separate operating units for each function. As individual operating units become more specialized and autonomous, they quickly develop norms, goals, and priorities that predictably differ from other units in the same agency or department. Over time, this process results in units being staffed by personnel whose interests, training, and abilities focus narrowly on the work of their unit and have little understanding of the backgrounds and activities of other units underneath the same institutional roof. Predictably enough, each individual operating unit starts to see the other units as rivals for prestige, headcount, and budgetary resources.

This rivalry can be beneficial if it results in synergies that serve the larger aims of the agency. Conversely, the rivalry will be destructive if it manifests itself in credit-claiming or other measures designed to enhance the visibility of the operating unit as an end in itself. The third possibility is there will be neither beneficial nor destructive rivalry; individual units will simply not acknowledge the existence of the other units. Issues of culture and history loom large in determining which of these three outcomes will result.

To be sure, such difficulties are likely to arise whether we are dealing with a single agency or multiple agencies that are expected to coordinate their efforts. And, such difficulties can exist within a single department: consider the intra-service rivalries in the U.S. Air Force (bomber v. fighter pilots) and the U.S. Navy (surface navy v. aviators v. submarines).69 But, matters are often much worse across divisions within a single agency or department, such as the legendary conflicts between the rival military services contained within a single Department of Defense:

### Legalism K---2AC

#### Undoing squo power relations requires analyzing and attacking power structures through pragmatic struggle---normative appeals alone are ineffective.

Naomi **Zack 17**. Professor of philosophy at the University of Oregon. 02/2017. “Ideal, Nonideal, and Empirical Theories of Social Justice: The Need for Applicative Justice in Addressing Injustice.” The Oxford Handbook of Philosophy and Race, Oxford University Press.

Ideals of justice may do little toward the correction of injustice in real life. The influence of John Rawls’s A Theory of Justice has led some philosophers of race to focus on “nonideal theory” as a way to bring conditions in unjust societies closer to conditions of justice described by ideal theory. However, a more direct approach to injustice may be needed to address unfair public policy and existing conditions for minorities in racist societies. Applicative justice describes the applications of principles of justice that are now “good enough” for whites to nonwhites (based on prior comparisons of how whites and nonwhites are treated). Social information just dribbles in, bit by bit, and we simply get used to it. A single story about a person really hits home at once, but the grinding injustices of daily life are endured. It is easy to ignore them and we do. Judith Shklar, The Faces of Injustice (Shklar 1990, 110) IDEAL theory about justice extends from Plato’s Republic to John Rawls’s A Theory of Justice, including many careers devoted to analyses and criticism about such texts in political philosophy. Rawls offers a picture of the basic institutional structures of a just society, on the premise that in order to correct injustice, we must first know what justice is. According to Rawls, while “partial compliance theory” studies the principles that govern how we are to deal with injustice, full compliance theory, or ideal theory, studies the institutional principles of justice in a stable society where citizens obey the law. Rawls began A Theory of Justice with the claim: “The reason for beginning with ideal theory is that it provides, I believe, the only basis for the systematic grasp of these more pressing problems” (Rawls 1971, 8). Rawls’s ideal theory is too abstract to correct injustice or provide justice for victims of injustice in reality, because it is based on a thought experiment and the assumption of a “well-ordered” society in which there already is compliance with law (Zack 2016, 1–64). What people care about in reality concerning justice is not what ideal justice is or would be, but how immediate injustice can be corrected. Injustice is always specific in concrete events that are recognizable as certain types, for example, theft, murder, or police racial profiling. Injustice can be corrected by punishing those responsible for it in specific cases and instituting social changes that prevent or reduce future occurrences of the same type. Rawlsian nonideal theories of justice, constructed for societies where people do not comply with just laws, rely on ideal theory as a standard for just institutional structures. The main question driving nonideal theory is how to construct a model or picture of justice that will result in the future correction or avoidance of present injustices. John Simmons quotes John Rawls from Law of Peoples, on this matter. Nonideal theory asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible and politically possible as well as likely to be effective [LOP p. 89]. (Simmons 2010, 7) However, injured or indignant parties may not care about the long-term goal of justice that could lead to balance or compensation for their situations. Not only are what P. F. Strawson (1962) called “reactive attitudes,” such as moral indignation, blame, and a desire for deserved punishment, strong in their focus on injustice, but the best theory of justice in the world does not tell us what to do about the injustices we are faced with in the here and now, especially “the more pressing problems” of race-related injustices. Such questions cannot be answered with reference to ideal theory or some application of ideal or nonideal theory to their concrete situations, because the a priori nature of both of these does not provide a fit with specific contingencies—ideal and nonideal theories do not generate practical bridge principles. As theories, they posit ideal entities, but without the apparatus of scientific theories which provides connections to observable entities or events. (Moulines 1985). The correction of injustice or injustice theory requires a philosophical foundation for itself. Models of justice have often been naïvely utopian throughout the history of philosophy, because they are based on an assumption of automatic total compliance, as though the right words or pictures by themselves have the power to transform reality, or as though agreement with those right words or pictures will automatically result in action that will automatically make the world instantiate those words or pictures. When they are not fantastically and ineffectively utopian in this way, such models have been used to justify the already-existing dominance of some groups over others. (A prime example is John Locke’s Second Treatise of Government, written decades before 1688 Glorious Revolution, to express the interests of the new rising class of landed gentry, which were eventually fulfilled by a Protestant king on the throne and a strong representative parliament after that revolution [Laslett 1988].) Models of justice have legitimately served to inspire law in modern societies with government constitutions and national and local law. But, sometimes, as in US founding documents, although universal and absolute justice is proclaimed, subsequent events make it clear that this language was intended to legitimize just treatment for members of selected groups only, that is, white male property owners, at first. As a result of just law and its selective application, over time, there comes to be justice for an expanding group, but still not everyone in society. However, what is written, together with descriptions of real justice for some, can be a powerful lever for obtaining justice for at least some of the excluded. To understand how that works, it is necessary to develop an approach to justice that begins with injustice, in real situations where there is already some degree of justice in a larger whole. The extension of existing practices of justice to members of new groups is applicative justice, a concept with substantial historical and intellectual precedent, although not by that name. In what follows, more will be said about the idea of applicative justice and then its history will be considered. Voting rights and housing rights are examples of candidates for applicative justice in our time. Finally, content in the form of narrative may be motivational for social change. The Idea of Applicative Justice Applicative justice is an approach to justice with the goal of making the unjust treatment of some comparable to those who already receive just treatment. Applicative justice takes a comparative approach, for example, comparing how young black males are treated by police officers in contemporary US society, to how young white males are treated (Jones 2013; Zack 2013, 2015). Applicative justice rests on a pragmatic approach to social ills, which includes the premise, based on Arthur Bentley’s 1908 insights in The Process of Government, that government is much more than the apparatus of state and written laws and court decisions. Government is an extended, dynamic process, an ongoing contention among interest groups in society. This full-bodied, empirical and pragmatic view of government process entails, for example, that we consider as parts of the same political mix/phenomenon/raw material all of the foregoing: the Fourth and Fourteenth Amendments, the 1960s Civil Rights Legislation, doctrines of probable cause, the disproportionate incarceration of African Americans, racial profiling, and police homicide with impunity. Thus, Rawls’s insistence that “the rights secured by justice are not subject to political bargaining or to the calculus of social interests” (Rawls 1971, 4), should be understood as “the rights secured by justice should not be subject to political bargaining or to the calculus of social interests.” In reality, “the rights secured by justice” are constantly subject to political bargaining and the living calculus of social interests. One consequence of this empirical perspective is that moral outrage, critiques of white supremacy, or analyses of white privilege, along with other forms of blame, cannot be assumed to have the power to change anything, by themselves. By contrast, changing relationships between police officers and their local communities, or changing the rules of engagement when police stop or attempt to stop suspects, might on this view have some causal power (Ayres and Markovits 2014). It is important to realize that such changes in practice would not be specific applications of a theory of justice, but ways of changing social reality into a different political mix. However, a better theory of justice, even a more racially egalitarian one and even a theory of applicative justice that was widely accepted, would still be no more than a change in what Bentley calls “political content.” Any theory of justice or any set of just laws is compatible with widespread racially unequal and unjust practice. And the converse also holds. Unjust laws or laws with gaps for unjust practice are compatible with just practice. Thus, applicative justice is pragmatic in taking the whole political mix/ phenomenon/raw material as its subject for a specific injustice. Unlike ideal or nonideal justice theory, the applicative justice approach brooks little faith that reality can be changed by a special conceptual space or mode of critical moral discourse that is undertaken apart from reality. Reality cannot be changed by normative pronouncements, by or on behalf of the oppressed, but only by shifts in existing interests of groups of real people. To base hopes for change on normative content alone may ~~paralyze~~ [eliminate] the means for taking action that could result in change, because such content proceeds as though matters of justice were only matters of argument. Those who have opposed social racial justice have understood this well enough, because instead of mainly arguing against new just law over the twentieth century, they have taken action to block progress. Race and Justice Consideration of race and injustice together, within political philosophy, focuses on the need for specific groups to not be treated unjustly. For a group to be treated justly, a large number of its members need to be treated justly. But for a group to be treated unjustly, it is sufficient if a smaller number or lower proportion than required to meet the standard of just treatment be treated unjustly. One reason for this asymmetry is that just treatment is easily normalized within communities, whereas unjust treatment of only a few is disruptive and considered abnormal among other members of the group to which victims belong (although not necessarily by members of groups who are generally treated justly). The unjust treatment of a small number ripples from their friends and relations to other members of the same group, who realize that they are subject to similar unjust treatment from their membership in that group alone. More broadly, if the group treated justly and the group treated unjustly belong to the same larger collective, such as whites and blacks in the United States, then the unjust treatment of even a very small number of that total collective of residents or citizens should be disruptive to the whole collective, given promulgated principles of “justice for all.” But that does not always happen, at least not in ways that result in real change. Apathy and self-absorption of those not treated unjustly is part of the reason, although another significant part is that the group treated justly already knows that the national collective rhetoric of justice is intended to apply primarily to them. It is that kind of disparate treatment, which does not disrupt everyone, even though it should, which calls for a theory of applicative justice, on the abstract level where people call for justice. But applicative justice is not only an abstract theory. Applicative justice requires comparisons of group treatment. If minorities are treated unjustly, a description of that injustice does not require an ideal or nonideal theory or model of justice, but simply a comparison with how the majority is treated. (The term “minorities” refers to those disadvantaged or oppressed, because sometimes minorities are greater in number than “majorities,” e.g., blacks under apartheid in South Africa, American slaves in some Southern states, or black Americans in some twenty-first-century cities.) The principles and mechanics of justice that work well enough for most white Americans need to be applied to nonwhite Americans. For rhetorical purposes, it might be evocative to talk about black lives or black rights, but strictly speaking the subject is a racial framework that is color-blind in an important part of law—constitutional amendments and federal legislation—but not in reality. This gap between written law and social reality can be viewed as hypocrisy, racial bias, or white supremacy, only if one assumes that written law is an accurate description of, or blueprint for, social reality. But a perspective that takes in the whole process of government reveals that the gap and what is permissible within it, are parts of the same whole process. The contrast between blueprints and maps is important to consider. Political philosophers often proceed as though their writings about justice are blueprints, when they should instead begin by constructing maps. Present politics or a political party in power may present obstacles and challenges to applicative justice in any specific case. Those who aim for applicative justice must struggle against such obstacles and challenges, as well as the ignorance, prejudice, and ill will of large parts of voting publics under democratic government, and in addition, media misrepresentations, business interests in a status quo, and lack of understanding of oppression by those who are treated unjustly. For example, the injustice in the disproportionately large number of African Americans in the US criminal justice system has been supported by law-and-order politics, the War on Drugs, belief in racial gender myths (e.g., the larger-than-life black rapist), explicit racism, media sensationalism of crime committed by black men, profits made by for-profit prison corporations, and embrace of self-destructive subcultures by some black men who become incarcerated. At the same time, as an efficient cause or precipitating factor, ongoing racial profiling by police helps feed the system with new suspects, about 90 percent of whom plead guilty in preference to the risks and costs of a trial (Kerby 2013; Rakoff et al. 2014). Intergenerational poverty, unemployment, and undereducation contain people within this system, and the high rates of nonwhites in the prison population are used as official justification for racial profiling (Zack 2015, chap 2). Thus, the complexity of causes and background factors associated with the disproportionate number of African American male prison inmates can be understood through a number of approaches. The normative approach of applicative justice would be to address those causes or factors, distinctly and individually, through specific changes in concrete practice, as well as changes in law, as relevant.

### Court Clog---2AC

#### Litigation’s increasing and inevitable

Seyfarth 21 – Seyfarth Shaw LLP, Approximately 900 Lawyers Across 17 Offices, Seyfarth Shaw LLP Provides Advisory, Litigation, and Transactional Legal Services To Clients Worldwide. “Commercial Litigation Outlook.” 3/31/2021. https://www.seyfarth.com/news-insights/commercial-litigation-outlook.html

The upcoming year promises to be hectic and active on the litigation front. To help our clients anticipate and navigate what’s to come, our subject-matter experts provide insights and analysis on what you can expect. As the nation emerges from the pandemic, clients face the double-whammy of delayed resolution of existing disputes (thanks to court shutdowns) and increased litigation activity across the board. The third quarter of 2020 saw significantly increased lawsuit activity, particularly in the area of real estate litigation. The remainder of 2020 had slightly below average lawsuit filings, which we think was attributable more to delayed filing rather than avoided disputes. Indeed, prognostications from a variety of legalwatchers all agree that lawsuits will be on the rise. The burning question for many is, “when will the courts unclog?” With criminal matters taking precedence, many jurisdictions will remain bogged down with civil suits taking a back seat through the rest of the year. But some jurisdictions are already rebooting jury trials, some remote and, with full vaccine distribution possible by summer, civil trials in unclogged jurisdictions are likely by the third quarter of 2021. As you can read in the full Outlook linked below, electric vehicles are shaking up the automotive franchise world, the flood of real estate disputes will continue past 2021, and regulatory framework will trigger heightened compliance obligations for financial services companies. Other key trends in the commercial litigation space addressed in this issue are: Antitrust Biometric Privacy Laws Cybersecurity Data Protection eDiscovery Health Care Litigation Insurance We hope you find this publication informative. Please contact any of the authors for assistance with any of the issues outlined in this publication.

#### The plan’s effect is small

Joseph Harrington 15, Patrick T. Harker Professor, Department of Business Economics & Public Policy, at The Wharton School, University of Pennsylvania; CPI Antitrust Chronicle, “The Comity-Deterrence Tradeoff and the FTAIA: Motorola Mobility Revisited,” 1/29/2015, <https://www.competitionpolicyinternational.com/the-comity-deterrence-trade-off-and-the-ftaia-motorola-mobility-revisited/>

In their analysis of 60 recent large private antitrust suits, Professors Lande and Davis documented that 40 percent of them were initiated by the plaintiffs (that is, they did not follow a government case).18 By way of example, the current prosecution of the vitamin C cartel, which is composed of Chinese manufacturers, has been exclusively conducted by customers (who have antitrust standing under the FTAIA exception of “import commerce”). After eight years of private litigation, the government has yet to bring a case. In early 2013, the U.S. District Court for the Eastern District of New York found the defendants guilty and assessed damages of $54 million, which were then trebled to $162 million. As reported in The New York Times:19

James T. Southwick, a lawyer at Susman Godfrey who represented the plaintiffs in the case, said he hoped the judgment would encourage the Justice Department to investigate Chinese cartels “and begin treating Chinese cartels the same as they treat cartels from the rest of the world.”

That a cartel may be prosecuted by customers but not the government has occurred and will continue to occur.

Once private litigation is eliminated as an option, a most troubling scenario may then arise: Suspected collusion continues without interruption because the government chooses not to bring a case and, by virtue of the Seventh Circuit’s decision, U.S. consumers are prohibited from bringing a case. The Seventh Circuit seems to have missed this possibility and instead focused on the contrary concern that giving Motorola standing would cause a flood of cases:20

The mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers of their prolific foreign subsidiaries if Motorola had its way.

This prognostication misses the mark in two ways. First, there will be a mind-boggling number of antitrust suits only if there is a mind-boggling number of cartels, in which case it is quite appropriate that our minds are boggled with litigation. Of course, plaintiffs can pursue suits lacking merit but that would not seem to be a serious concern in a post-Twombly world where the hurdle is high to plead a case. Second, as I have sought to argue, there is a very real concern of too few cases which not only means that cartels are less deterred but also that uncovered cartels are allowed to continue unabashed.

#### ‘Floodgates’ are fake---established docket control works

Meredith M. Render 20, Professor of Law at the University of Alabama School of Law, JD from the Georgetown University Law Center, BA from Boston College, “Fiduciary Injury and Citizen Enforcement of the Emoluments Clause”, Notre Dame Law Review, 95 Notre Dame L. Rev. 953, January 2020, Lexis

First, as previously discussed, there is reason to be skeptical about the efficacy of the CAP rule in terms of reducing the overall number of cases in the federal courts. 315 Moreover, in addition to the fact that the CAP rule likely does little to reduce the overall number of opportunities for federal courts to judge the behavior of coordinate branches, there is reason to [\*1007] believe that the opening-the-floodgates worry itself is overblown. 316 Not only is the floodgates argument in support of the CAP rule lacking in empirical support, 317 but it may also be lacking in a clear, germane, and substantive content when used by various members of the Court. 318F or example, Professor Marin Levy has observed that "recent cases show the justices vacillating between providing assurances that their decision will not result in a deluge of new claims, and accusing each other of being driven by an improper desire to stave off such a deluge." 319 The floodgate alarm has been used in diverse and internally inconsistent contexts without the mooring benefit of evidentiary support, such that it has taken on more the character of epithet than of a serious constitutional obstacle. 320Justice Ginsburg, writing in dissent, has succinctly summarized this development, stating: "The 'floodgates' argument the Court today embraces has been rehearsed and rejected before." 321

The fact that the floodgate rationale is frequently used to support both sides of a contested determination by the Court suggests that it may lack a stable normative content. 322 The floodgate rationale is, at heart, a prediction about how future litigants will behave if the Court adopts a new rule. Yet the ordinary norms of prediction with their attendant empirical safeguards seem not to obtain. 323 Those invoking the floodgate alarm have not felt [\*1008] obliged to supply evidence of past instances in which the federal courts were in fact "flooded" as the result of similar rule changes, and that the Federal Rules of Civil Procedure were inadequate to address the "flood." 324 Given that members of the Court have so frequently predicted a litigatory deluge as a consequence of a rule change, it would seem a simple matter to confirm that a deluge has, in fact, occurred. 325 However, evidence of past flooding has yet to emerge within the floodgate discourse. 326

It is possible that the reason that the floodgate worry has not been documented may be because it has yet to come to pass. There is ample reason to believe that the Federal Rules of Civil Procedure are generally commensurate to the task of qualitatively stemming the tide of litigation. 327 The Federal Rules of Civil Procedure are designed to weed out duplicative, harassing, frivolous, and meritless cases. 328While no standing rule - including the CAP rule - prevents nonmeritorious cases from being filed in federal court, such cases are generally resolved on a Rule 12(b)(1) motion to dismiss. 329The Rule 12(b)(1) motion to dismiss is also the first opportunity during which a defendant can challenge standing. 330There is no strategic advantage to [\*1009] defendants - in terms of the expenditure of resources - to having a case dismissed for want of standing as compared to any other grounds for dismissal under Rule 12(b)(1). 331Likewise, doctrines and mechanisms designed to conserve both judicial and defendant resources, such as claim preclusion, issue preclusion, abstention, joinder, and case consolidation, all operate to prevent horizonal lawsuits alleging the same nexus of operative facts from going forward simultaneously in multiple district courts - a point that is especially important in the emoluments context where presumably any citizen suit would allege the same operative facts. 332

#### Work gets delegated OR new resources are added

Marin K. Levy 13, Associate Professor of Law at the Duke University School of Law, JD from Yale Law School, “Judging the Flood of Litigation”, University of Chicago Law Review, 80 U. Chi. L. Rev. 1007, Lexis

To be sure, judicial workload is a critical concern. As noted earlier, the lower courts have faced rising caseloads over the last several decades 285 - a fact the justices have emphasized. 286 Today, both federal district and appellate judges must contend with hundreds of filings per year, 287 meaning that their ability to give attention to individual cases is greatly reduced. Employing the tools at hand, district judges have come to rely more heavily on the aid of magistrate judges, 288 and appellate judges have come to rely on the assistance of staff attorneys and other case-management tools to cope with their workload. 289 Still, judges and scholars alike have called for an expansion of the bench 290 and limiting the flow of cases 291 to alleviate the strain on the federal courts. Thus, when the justices express their desire to avoid inviting new claims into federal courts, the underlying concern is not a trivial one. 292 The critical question, though, is [\*1066] whether considerations of judicial workload can stand as an independent factor in shaping the Court's interpretation of substantive law.

#### No nuke terror

Dr. John Mueller 20, Professor of Political Science and Senior Research Scientist with the Mershon Center for International Security Studies at Ohio State University, Senior Fellow at the Cato Institute, PhD from the University of California, Los Angeles, “Assessing International Threats During and After the Cold War”, Cato Institute, 5/6/2020, https://www.cato.org/publications/study/assessing-international-threats-during-after-cold-war

In the decade after the Cold War, a similar process of threat identification took place as problems previously considered to be of minor, or at least of secondary, concern were promoted. Anxieties about international terrorism substantially increased during the 1990s and were set into highest relief with the terrorist attacks of September 11, 2001. Extrapolating wildly from 9/11, a terrorist event ten times more destructive than any other in history, terrorism of that sort has repeatedly been taken to present a direct, even existential, threat to the United States or to the West — or even to the world system or to civilization as we know it.6 Wild extrapolations have precipitated costly antiterrorism and antiproliferation wars and huge increases in security spending. In these ventures, trillions of dollars have been squandered and well over two hundred thousand people have perished, including more than twice as many Americans as were killed on 9/11.7 There has been a tendency to see these exercises as misguided elements of a coherent plan to establish a “liberal world order” or to apply “liberal hegemony.“8 However, the overwhelming impetus was far more banal: to get the bastards responsible for 9/11.

Islamist terrorism in the United States has killed some six people per year since 9/11, and far more people in Europe perished yearly at the hands of terrorists in most years in the 1970s and 1980s.9 But there has nonetheless been a tendency to continue to inflate al-Qaeda’s importance and effectiveness.

In fact, al‐​Qaeda Central has done remarkably little since it got horribly lucky in 2001. It has served as something of an inspiration to some Muslim extremists, has done some training, seems to have contributed a bit to the Taliban’s far larger insurgency in Afghanistan, and may have participated in a few terrorist acts in Pakistan. It has also issued a considerable number of videos filled with empty, self‐​infatuated, and essentially delusional threats.10 Even isolated and under siege, it is difficult to see why al‐​Qaeda could not have perpetrated attacks at least as costly and shocking as the shooting rampages (organized by others) that took place in Mumbai in 2008, in Paris in 2015, or in Orlando and Berlin in 2016. And, although billions of foreigners have entered legally into the United States since 2001, not one of these, it appears, has been an agent smuggled in by al‐​Qaeda. The exaggeration of terrorist capacities has been greatest in the many overstated assessments of their ability to develop nuclear weapons. In this, it has been envisioned that, because al‐​Qaeda operatives used box cutters so effectively on 9/11, they would, although under siege, soon apply equal talents in science and engineering to fabricate nuclear weapons and then detonate them on American cities.11

It is possible to argue, of course, that the damage committed by jihadists in the United States since 9/11 is so low because “American defensive measures are working,” as Peter Bergen puts it.12 However, although security measures should be given some credit, it is not at all clear that they have reduced the amount of terrorism significantly. There have been scores of terrorist plots rolled up in the US by authorities but, looked at carefully, the culprits left on their own do not seem to have had the capacity to increase the death toll very much.13 As Brian Jenkins puts it, “Their numbers remain small, their determination limp, and their competence poor.“14 Nor can security measures have deterred terrorism. Some targets, such as airliners, may have been taken off the list, but potential terrorist targets remain legion.15 To a considerable degree, terrorism is rare because as Bruce Schneier puts it bluntly, “there isn’t much of a threat of terrorism to defend against.“16

### Trade-Off---2AC

#### The plan’s through the IAD---that’s separate from all other FTC activity

Dina Kallay 14, Director, Intellectual Property and Competition, at Ericsson, Former Counsel for Intellectual Proper ty & International Antitrust at the FTC Office of International Affairs, and Marc Winerman, Former FTC Staffer, Leading Authority on FTC History, The FTC International Program at 100, 29 Antitrust ABA 39, Fall 2014, 42, Lexis

International Antitrust and Consumer Protection Work in the 1980s and 1990s

In the 1980s and 1990s a number of relevant trends emerged. First, markets became more and more global, a trend expedited with the 1994 successful conclusion of the World Trade Organization's Uruguay Negotiation Round, to which 123 jurisdictions were signatories with additional ones added later. The FTC's 1995 Annual Report reflects this trend in noting "dynamic changes in the economy such as . . . the internationalization of many markets." 59 Second, with the fall of the former Soviet Union in 1989, a growing number of jurisdictions around the world began to adopt antitrust enforcement regimes as they transformed their market model from a planned one to a market-based model. More antitrust regimes meant a greater need for case and policy coordination with non-U.S. counterparts to ensure consistent outcomes, and prevent conflicting results of actions by agencies in different countries. 60 Further, the birth of many new antitrust agencies, especially in economies that lacked a competition culture, also meant these agencies were in need of training in order to successfully develop and implement a sound anti-trust enforcement regime.

The resulting needs did not go unanswered. In 1982, an International Antitrust Program was established as a separate division within the FTC's Bureau of Competition, known as the International Antitrust Division. The program included investigation and prosecution of antitrust violations that had international features, as well as international liaison activities with foreign antitrust officials. 61 It was not until 1985 when the work of this division was first acknowledged in the Commission's Annual Report, which reported its staff as having worked that year on 25 investigations that involved international aspects and having been "active in a variety of intervention matters and international liaison activities involving transnational competition and antitrust law enforcement issues impacting upon the domestic economy." 62

#### Cartel enforcement generates revenue---that’s funneled back to the FTC

Dr. Marek Martyniszyn 21, Senior Lecturer in Law at Queen’s University Belfast, PhD from University College Dublin, LLM (with Specializations in EU Economic and World Trade Law) from the Saarland University’s European Institute, MA Degree from the Warsaw School of Economics and Postgraduate Certificate in Higher Education Teaching (PGCHET) from Queen's University Belfast, “Competitive Harm Crossing Borders: Regulatory Gaps And A Way Forward”, Journal of Competition Law & Economics, Volume 17, Issue 3, September 2021, https://academic.oup.com/jcle/article/17/3/686/6095856

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

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

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

#### All efforts fail without ending national silos

Thanh Phan 18, Sessional Instructor in International Law at the University of Victoria, PhD Candidate at the Law Faculty at the University of Victoria, Doctoral Fellow at the Centre for International Governance Innovation, Former Transnational Merger Investigator and FTAs Negotiator at the Vietnam Competition Authority, Vietnam, “Realism and International Cooperation in Competition Law”, Houston Journal of International Law, Volume 40, Issue 1, 40 Hous. J. Int'l L. 297, April 2018, https://tinyurl.com/3s7rwtkc

Fourth, by conducting overlapping investigations in a certain cross-border case without cooperation, each competition authority may have a portion of evidence, but none of them may have thorough facts about the violation. 148 An international cartel may operate in different countries. Each of these countries' competition authorities can obtain evidence only within their territory, while missing any piece of evidence may make it difficult for them to prove and remedy such a transnational violation. 149 According to the OECD, cooperation allows a competition authority to use material of the counterparts and therefore offers authorities the opportunity to have more effective investigations and to generate efficiencies. 150

#### Massive overstretch now

Mary Ashley Salvino 11/1, Privacy Attorney and Senior Legal Specialist at Bloomberg Law, JD from the City University of New York School of Law at Queens College, BA in Political Science from Duke University, “ANALYSIS: How Will the FTC Get Its Privacy Mojo Back in 2022?”, Bloomberg Law, 11/1/2021, https://news.bloomberglaw.com/banking-law/analysis-how-will-the-ftc-get-its-privacy-mojo-back-in-2022

The Federal Trade Commission has faced a multitude of challenges to its enforcement authority, but there are signs that a recharged Commission will seek a consumer privacy comeback in the next year. So it bears asking: What would a restrengthened—and well funded—FTC look like? And what can legal practitioners reasonably expect regarding the FTC’s priorities in the new year?

Beleaguered by major enforcement hits, lack of staffing, and funding issues, the FTC has hit a regulatory rough patch these last few years. By my lights, it is worth examining three possible FTC strategies to bolster the regulator’s consumer privacy power:

1. Institutional innovation and creativity in rulemaking
2. Leveraging new leadership with congressional Dems’ political capital
3. Exploring unprecedented funding initiatives

Practitioners should be on notice about an active FTC that seeks to clarify data security standards and expedite the creation and passage of uniform federal privacy legislation.

Major Enforcement Hits

2021 has been a devastating year for the FTC’s remedial consumer privacy authority. The Supreme Court’s AMG Capital Mgmt. v. FTC ruling delivered a death blow to the Commission’s ability to obtain restitution and equitable redress for defrauded consumers in federal court, a powerful weapon that the Commission has wielded for nearly four decades to recoup billions.

Simply put, the SCOTUS ruling decimated the privacy agency’s longstanding and effective ability to obtain equitable monetary remedies (restitution and disgorgement) under Section 13(b) of the FTC Act. To add insult to injury, the ruling further kneecapped the under-resourced FTC with limited residual options and a dearth of viable civil penalty options. Turning the federal court recoupment faucet off means that the FTC is constrained by an extremely cumbersome and time-consuming administrative process. And while this is great news for consumer businesses, privacy practitioners will lament the loss of the FTC’s primary consumer redress tool.

Furthermore, still reeling from the Trump Administration’s gutting of resources, the FTC remains overstretched, undermanned, and underfunded. But it’s not without options. Here’s a forecast for how the FTC may respond through rulemaking, which could be useful for in-house counsel navigating these uncertain times.

#### Legislative reform is inevitable

Kevin Costello 11/3, Attorney at Sheppard Mullin Richter & Hampton LLP, “Senate Zeros in on Big Tech with Latest Antitrust Reform Bill”, JD Supra, 11/3/2021, https://www.jdsupra.com/legalnews/senate-zeros-in-on-big-tech-with-latest-1284531/

Last month, Senators Amy Klobuchar (D-MN) and Chuck Grassley (R-IA) fired the latest and perhaps most high-profile legislative salvo against Big Tech to date – the proposed American Innovation and Choice Online Act. This Senate bill would update the antitrust laws with the specific goal of reining in large technology companies. This comes after a year of high-profile hearings in which the Senate Judiciary Subcommittee on Competition Policy, Antitrust and Consumer Rights, under Klobuchar’s direction, has investigated the conduct of Apple, Google, and other big tech companies.

The Senate bill explicitly targets a small group of firms that operate “covered platforms.” Covered platforms (1) have 50 million monthly active users or 100,000 monthly active business users; (2) have sales or a market capitalization exceeding $550 billion; and (3) are a “critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.” This description implicates only the largest and most dominant tech platforms.

The Senate bill primarily aims to curtail conduct in which big tech companies leverage their dominant platforms to preference their own products and services, effectively crowding out other companies that compete on the platform. The bill is designed to give competing businesses a more even playing field when they compete against big tech firms on the firms’ own platforms, in three key ways.

First, the bill would explicitly prohibit conduct that “unfairly preference[s] the covered platform operator’s own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform.” Second, the bill would disallow unfair interference with competitors who seek to offer their products, services, or lines of business on the covered platform if those options compete with the covered platform operator’s own products or services. Third, the bill would forbid firms that operate covered platform from discriminating in the application or enforcement of their terms of service against other business users on the platform.

The bill also designates seven specific business practices by which big tech firms leverage covered platforms for competitive advantage as “unlawful conduct.” Perhaps most significant among these is the prohibition against restricting a competitor’s ability to “access or interoperate with the same platform, operating system, hardware or software features that are available to the covered platform operator’s own products, services, or lines of business that compete or would compete with products or services offered by business users on the covered platform.” This would directly impact companies like Apple, which prohibit “sideloading” and exert tight control over the programs and applications that can run on the their operating systems. Additionally, the bill restricts tech companies from “treat[ing their] own products, services, or lines of business more favorably relative to those of another business user than they would be treated under standards mandating the neutral, fair, and non-discriminatory treatment of all business users,” including in “search or ranking functionality offered by the covered platform.” This prohibition appears to implicate Google, whose competitors have long accused it of biasing search results to favor its own products and services.

The American Innovation and Choice Online Act accompanies a House bill called the “American Choice and Innovation Online Act.” The House bill, introduced on June 11 by Democrat David Cicilline (RI-01) and Republican Ken Buck (CO-04), was voted out of the House Judiciary Committee on June 24. It enjoys significant bipartisan support, including 14 Democrat cosponsors and 8 Republican cosponsors. The Senate iteration appears to have similar appeal across the aisle; its 12 cosponsors include 6 Democrats and 6 Republicans. Despite the bipartisan support, neither bill has yet to receive a floor vote.

Importantly, while the American Innovation and Choice Online Act is one of the most prominent and widely supported antitrust bills unveiled this year, it is hardly alone. In addition to the American Choice and Innovation Online Act, the House Antitrust Subcommittee has also unveiled the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act (requiring covered platforms to “maintain a set of transparent, third-party-accessible interfaces . . . to enable the secure transfer of data to a user”), the Ending Platform Monopolies Act (prohibiting technology platforms with at least 50,000,000 monthly active U.S.-based users and a market capitalization of over $600 billion from also selling products or services that they own and control), the Platform Competition and Opportunities Act (shifting the burden of proof in merger review, requiring covered platforms to demonstrate that their acquisitions are lawful), and the Merger Filing Fee Modernization Act (increasing the fees associated with Hart-Scott-Rodino Act filings for larger mergers).

On the Senate side, Senator Klobuchar has also introduced the Competition and Antitrust Law Enforcement Reform Act of 2021, which increases antitrust enforcement budgets, strengthens prohibitions against anticompetitive mergers, and updates the Clayton Act to prohibit “exclusionary conduct that presents an appreciable risk of harming competition.” Further, Senator Mike Lee (R-UT), has introduced the Tougher Enforcement Against Monopolists Act (creating market-share presumptions for merger review and codifying the consumer welfare standard), State Antitrust Enforcement Venue Act (allowing state attorneys general to keep antitrust defendants in their desired fora), and the One Agency Act (consolidating merger review in the Department of Justice). Senator Josh Hawley (R-MO) has also introduced the Trust-Busting for the Twenty-First Century Act, which would explicitly ban companies with market capitalizations exceeding $100 billion from any mergers or acquisitions.

While it is highly unlikely that all these competing bills will become law, some amount of legislated antitrust reform targeting Big Tech seems almost inevitable.

### AT: Bioterror [UGA]---2AC

#### COVID thumps access.

Blumenthal et al. 20, President of the Commonwealth Fund, a national philanthropy engaged in independent research on health and social policy; Elizabeth Fowler, Former Executive Vice President for Programs at the Commonwealth Fund; Melinda Abrams, Executive vice president for programs at the Commonwealth Fund; Sara R. Collins, Vice President for health care coverage and access at The Commonwealth Fund, “Covid-19 — Implications for the Health Care System”, The New England Journal of Medicine, 10/8/20, https://www.nejm.org/doi/full/10.1056/nejmsb2021088

INSURANCE COVERAGE

The pandemic has significantly undermined health insurance coverage in the United States. A sudden surge in unemployment — exceeding 20 million workers1 — has caused many Americans to lose employer-sponsored insurance. A recent Commonwealth Fund survey showed that 40% of respondents or their spouse or partner who lost a job or were furloughed had insurance through the job that was lost.2 Although many will continue to get employer coverage or become eligible for Medicaid or marketplace plans, a substantial number will probably become uninsured.3,4 Even workers who keep their jobs may find their coverage dropped or curtailed as financially strained employers cut costs. These developments will add to the 31 million persons who were uninsured and the more than 40 million estimated to be underinsured before the pandemic struck.5,6

This new crisis of coverage has at least two causes. The first is our continued reliance on employer-sponsored insurance to cover approximately half of Americans against the cost of illness. The second is failure to vigorously implement current law. By design, the Affordable Care Act (ACA) helps persons who lose employer-sponsored insurance by making subsidies available for the purchase of individual insurance in the ACA marketplaces, by expanding Medicaid eligibility, and by requiring that private insurance cover preexisting conditions and a basic package of benefits. However, although states with their own marketplaces have alerted the recently unemployed to their potential eligibility for subsidized plans,7 the federal government has not engaged in a parallel effort. It has neither educated the newly unemployed about their immediate eligibility outside of open enrollment periods for subsidized insurance in the federally run ACA marketplaces nor opened special enrollment periods for those wishing to enroll even if they did not previously have coverage. Furthermore, 14 states have chosen not to expand Medicaid.

DEEP FINANCIAL LOSSES FOR PROVIDERS

For the first time since the Great Depression, ~~crippling~~ [devastating] financial losses threaten the viability of substantial numbers of hospitals and office practices, especially those that were already financially vulnerable, including rural and safety-net providers and primary care practices.8 The immediate cause of this unprecedented financial crisis is substantial, unexpected changes in demand for health services. On the one hand, a novel infectious illness has increased demand for specialized acute care that has overtaxed some hospitals and imposed unexpected costs on many more. On the other hand, precipitous declines in demand for routine services have reduced providers’ revenue. Office-based practices had reductions of 60% in visit volumes in the first months of the crisis, and, by their own estimates, hospitals will lose an estimated $323.1 billion in 2020.9,10 Employment in the health care system is down by more than 1 million jobs through May.1

Providers’ vulnerability to these demand fluctuations raises a fundamental question about the way we currently pay for health care in the United States. Providers operate as businesses that charge for services in a predominantly fee-for-service marketplace. When the market for well-paid services collapses, so do health care providers.

This system has a number of adverse effects in normal times. It creates incentives to raise prices and push up volumes, shortages of poorly compensated services such as primary care and behavioral health, and an undersupply of services in less financially attractive poor and rural communities. But in the extreme circumstances of a pandemic, a new question arises: is health care an essential national resource that warrants secure financing beyond what the current fee-for-service system offers?

SUBSTANTIAL RACIAL AND ETHNIC DISPARITIES IN THE HEALTH CARE SYSTEM

Black persons constitute 13% of the U.S. population but account for 20% of Covid-19 cases and more than 22% of Covid-19 deaths, as of July 22, 2020. Hispanic persons, at 18% of the population, account for almost 33% of new cases nationwide.11 Nearly 20% of U.S. counties are disproportionately Black, and these counties have accounted for more than half of Covid-19 cases and almost 60% of Covid-19 deaths nationally.12

These racial and ethnic disparities constitute a new crisis compounding the long-standing failure of our health system to care adequately for persons of color. The causes start with a system that disproportionately fails to insure persons of color for the cost of illness, a problem reduced but not eliminated by the ACA.13 Lack of coverage causes less access to care, which results in a higher prevalence of and less-well-controlled chronic illness among persons of color. These illnesses leave them more vulnerable to the ravages of Covid-19.14

Another cause is that persons of color are more affected by nonmedical threats to health, including food and housing insecurity. They also tend to have jobs that are riskier during pandemics, such as providing care at home and long-term care facilities.15 Once ill, persons of color are more likely to get care in safety-net facilities overwhelmed by surges in demand for acute care.

Disparities in access and health outcomes are entrenched features of the U.S. health care system.16 They reflect a history of racism and discrimination that permeates society generally.

A CRISIS IN PUBLIC HEALTH

The United States has 4% of the world’s population but, as of July 16, approximately 26% of its Covid-19 cases and 24% of its Covid-19 deaths.17 These startling figures reflect a deep crisis in our public health system.

Put simply, that system failed to quickly identify and control the spread of the novel coronavirus. The United States did not make testing widely available early in the pandemic, was late to impose physical-distancing guidelines, and has still not implemented either as widely as needed.18 National guidance on managing the pandemic has been inconsistent and delayed. Many states have now abandoned stringent physical-distancing guidelines without careful attention to public health measures needed to prevent resurgence.

Although inadequate leadership and excessive partisanship have played a role in these shortcomings, other factors are also in play. Public health is a quintessentially governmental function, undertaken collectively for the public good at the national, state, and local levels. In part because of many Americans’ distrust of government, public health functions have historically been underresourced.19 The trained personnel who are needed for contact tracing — a traditional public health function long applied to such age-old afflictions as tuberculosis and sexually transmitted disease — are now scarce. Tellingly, there is no national public health information system — electronic or otherwise — that enables authorities to identify regional variation in the demand for, and supply of, resources critical to managing Covid-19. Without such information, authorities have no way to direct vital resources from areas of surplus to areas of undersupply. It is no exaggeration to say that the United States currently lacks a functioning national system for responding to pandemics.

#### FTC guidelines ensure consolidation.

Aimee Cicchiello 21, Program Assistant, Cost Control and Medicare Programs, The Commonwealth Fund, “Federal Antitrust Tools Inadequate to Prevent Consolidation,” No Publication, 5-13-2021, https://www.commonwealthfund.org/blog/2021/federal-antitrust-tools-are-inadequate-prevent-anticompetitive-health-care-consolidation

Federal antitrust enforcement agencies rely on merger guidelines created by the FTC and DOJ to evaluate proposed deals and ensure that competition and consumer welfare will not substantially suffer. But these guidelines are inadequate to promote competition in health care. As a result, consolidation is occurring mostly unchecked across the health care sector, leading to higher prices and fewer choices without a commensurate increase in quality.

Impact of Mergers

Horizonal mergers, where firms offering the same services or products in the same market integrate, have contributed to rapid consolidation among insurers, pharmacies, hospitals, and pharmaceutical companies. From 1995 to 2005, mergers among large U.S.-based pharmaceutical companies have reduced the number of those companies from 25 to 10. This has negative effects on innovation and competition. We have seen similar trends in vertical mergers — that is, a merger of companies at different levels of the supply chain (e.g., hospitals acquiring physician practices). The proportion of primary care physicians practicing in organizations owned by hospitals or health systems increased from 38 percent to 49 percent from 2016 to 2018; evidence suggests these mergers increase spending by privately insured patients. There are few federal challenges to vertical mergers.

Perhaps the most overlooked merger is the cross-market merger, where firms operating in different geographic markets consolidate. More than half of the 528 acute-care hospital mergers from 2000 to 2012 involved hospitals or systems in different markets. Evidence has demonstrated that cross-market mergers may raise prices paid by private insurers. Despite this, a case has never been brought against a cross-market merger and most escape without any inspection.

Strengthening Review

Federal merger review is a potent tool to promote healthy competition in the health care sector. Strengthening insufficient or dated standards could help to ensure that antitrust enforcers are given the tools required to subject proposed mergers or acquisitions to the appropriate level of scrutiny. Weaknesses of current standards include:

Overreliance on the Herfindahl–Hirschman Index

The Herfindahl–Hirschman Index (HHI) is a formula that attempts to determine the level of concentration within a market and the impact of a new entrant or merger. While other measures are used, the HHI is a critical factor that informs the overall evaluation of a proposed merger. The HHI, however, fails to consider complexities within markets that are especially relevant for vertical and cross-market mergers. It accounts for competition only within a small geographic region and omits any effects that could occur outside a given market. For example, the impact of a cross-market merger over multiple geographic markets would be entirely overlooked.

Large transaction thresholds

Perhaps the biggest weakness of FTC guidelines is the large transaction threshold needed to trigger an automatic review — deals must be valued at more than $92 million. Most deals fall far below this threshold but can still have substantive impact on competition. Hospitals can acquire multiple physician practices in a series of small deals without federal review. This can result in an accumulation of a huge share of market power that creates anticompetitive effects.

Narrow market definitions

Current guidelines assume that competition within a single market is impervious to shifts in other markets. But in health care, purchasers active in multiple areas can be subject to market power beyond the narrowly defined markets federal antitrust enforcers employ. Large hospital systems, for example, can use “all-or-nothing” contracting to get price increases across all their facilities. As a result, cross-market mergers and vertical mergers don’t meet the criteria for FTC or DOJ scrutiny.

Limited guidelines

Guidelines for horizontal mergers have not been updated in decades and have overlooked new economic research. Current standards, for example, do not consider that mergers can have negative effects other than higher price, affecting quality, choice, and innovation. While the FTC did recently propose new vertical guidelines, these guidelines assume that vertical integration fosters competition. As a result, the agencies allow vertical mergers to proceed if the firms promise good behavior — but the agencies do not regularly enforce these agreements. Cross-market mergers are not addressed at all, even though antitrust agencies in other countries have started to account for their impact.

The nature of the health care industry makes it vulnerable to anticompetitive effects from consolidation; however, it is also one that can benefit from oversight to ensure healthy competition. Updated health care–specific federal and state antitrust guidelines that reflect how markets function today could help to fully assess competition and ensure antitrust enforcers can address all types of consolidation. The scope of consideration also could be widened to ensure that the health care sector can compete on more than just price and include factors like consumer welfare.

#### No bioterror.

Steven **Pinker 18**. Johnstone Family Professor in the Department of Psychology at Harvard University. 2018. “CHAPTER 19 EXISTENTIAL THREATS.” Enlightenment Now: The Case for Reason, Science, Humanism, and Progress, Viking, an imprint of Penguin Random House LLC.

Biological agents are particularly ill-suited to terrorists, whose goal, recall, is not damage but theater (chapter 13).58 The biologist Paul Ewald notes that natural selection among pathogens works against the terrorist’s goal of sudden and spectacular devastation.59 Germs that depend on rapid person-to-person contagion, like the common-cold virus, are selected to keep their hosts alive and ambulatory so they can shake hands with and sneeze on as many people as possible. Germs get greedy and kill their hosts only if they have some other way of getting from body to body, like mosquitoes (for malaria), a contaminable water supply (for cholera), or trenches packed with injured soldiers (for the 1918 Spanish flu). Sexually transmitted pathogens, like HIV and syphilis, are somewhere in between, needing a long and symptomless incubation period during which hosts can infect their partners, after which the germs do their damage. Virulence and contagion thus trade off, and the evolution of germs will frustrate the terrorist’s aspiration to launch a headline-worthy epidemic that is both swift and lethal. Theoretically, a bioterrorist could try to bend the curve with a pathogen that is virulent, contagious, and durable enough to survive outside bodies. But breeding such a fine-tuned germ would require Nazi-like experiments on living humans that even terrorists (to say nothing of teenagers) are unlikely to carry off. It may be more than just luck that the world so far has seen just one successful bioterror attack (the 1984 tainting of salad with salmonella in an Oregon town by the Rajneeshee religious cult, which killed no one) and one spree killing (the 2001 anthrax mailings, which killed five).60 To be sure, advances in synthetic biology, such as the gene-editing technique CRISPR-Cas9, make it easier to tinker with organisms, including pathogens. But it’s difficult to re-engineer a complex evolved trait by inserting a gene or two, since the effects of any gene are intertwined with the rest of the organism’s genome. Ewald notes, “I don’t think that we are close to understanding how to insert combinations of genetic variants in any given pathogen that act in concert to generate high transmissibility and stably high virulence for humans.”61 The biotech expert Robert Carlson adds that “one of the problems with building any flu virus is that you need to keep your production system (cells or eggs) alive long enough to make a useful quantity of something that is trying to kill that production system. . . . Booting up the resulting virus is still very, very difficult. . . . I would not dismiss this threat completely, but frankly I am much more worried about what Mother Nature is throwing at us all the time.”62 And crucially, advances in biology work the other way as well: they also make it easier for the good guys (and there are many more of them) to identify pathogens, invent antibiotics that overcome antibiotic resistance, and rapidly develop vaccines.63 An example is the Ebola vaccine, developed in the waning days of the 2014–15 emergency, after public health efforts had capped the toll at twelve thousand deaths rather than the millions that the media had foreseen. Ebola thus joined a list of other falsely predicted pandemics such as Lassa fever, hantavirus, SARS, mad cow disease, bird flu, and swine flu.64 Some of them never had the potential to go pandemic in the first place because they are contracted from animals or food rather than in an exponential tree of person-toperson infections. Others were nipped by medical and public health interventions. Of course no one knows for sure whether an evil genius will someday overcome the world’s defenses and loose a plague upon the world for fun, vengeance, or a sacred cause. But journalistic habits and the Availability and Negativity biases inflate the odds, which is why I have taken Sir Martin up on his bet. By the time you read this you may know who has won.65

### Politics---2AC

#### Manchin will punt it to next year AND thumpers.

Hans Nichols 11/10, Political Reporter for Axios, former Pentagon Correspondent for NBC News, Former International and White House Correspondent for Bloomberg News, “Manchin may delay Biden social spending plan over inflation,” Axios, 11/10/21, https://www.axios.com/manchin-chill-bbb-6b58cd70-6c07-40f9-af4e-c944a7b3a39d.html

Red-hot inflation data validates the instinct of Sen. Joe Manchin (D-W.Va.) to punt President Biden’s Build Back Better agenda until next year — potentially killing a quick deal on the $1.75 trillion package, people familiar with the matter tell Axios.

Why it matters: The data released Wednesday set the president and White House staff scrambling. Slowing down work on the massive tax-and-spending plan is against the fervent desire of the administration and House progressives.

With a limited number of legislative days left in the year, Manchin is content to focus on the issues that need to be addressed, Axios is told.

They include funding the government, raising the debt ceiling and passing the National Defense Authorization Act.

Manchin, like a group of House moderates, also wants to see a Congressional Budget Office analysis of the true cost of each of Biden’s proposed programs, as well as the tax proposals to fund them.

The big picture: Progressives have long worried that after centrists got their $1.2 trillion bipartisan infrastructure bill, they'd find excuses not to move on the budget reconciliation package.

It includes billions to expand the social safety net and fight climate change, among other Democratic priorities.

Business groups also are stepping up their attacks on the package, warning congressional Democrats about its overall costs, potential effects on inflation and $800 billion in corporate tax increases.

Manchin still hasn't agreed to the specifics of Biden's plan to spend $555 billion to combat climate change.

Senate Majority Leader Chuck Schumer convened a call today with senators who participated in COP26, where they discussed how climate provisions in both bills were well received in Glasgow.

During the call, the senators also strategized about how to get Manchin to agree to Biden's climate provisions — a recognition they have more work to do.

Driving the news: Prices rose 0.9% from last month for an annual inflation rate of 6.2%, according to the Bureau of Labor Statistics.

The president labeled it "worrisome, even though wages are going up."

He told a crowd in Baltimore: "[O]n the good side, we're seeing the highest growth rate in decades, the fastest decrease in unemployment ... since 1950."

White House chief of staff Ron Klain tried to couch Biden's spending plan as a long-term strategy to lower inflation.

"What it does is it makes sure that our federal spending meets the things that families really need: bringing down the cost of child care, bringing down the cost of drugs, bringing down the cost of elder care, bringing down the cost of preschool, cutting taxes for middle-class families," he told CNN's Jake Tapper:

Between the lines: Manchin has been warning about inflation since the summer.

He's argued Congress should take a “strategic pause” on the bigger package until Congress had more time to assess the effects of the nearly $5 trillion COVID stimulus spending in 2020 and earlier this year.

His statements on Wednesday amounted to an I-told-you-so.

“By all accounts, the threat posed by record inflation to the American people is not ‘transitory’ and is instead getting worse,” Manchin said. “From the grocery store to the gas pump, Americans know the inflation tax is real and D.C. can no longer ignore the economic pain Americans feel every day.”

#### Tons of thumpers.

Freddy Gray 11/6, Deputy Editor of The Spectator, “Superbad: Joe Biden’s plummeting presidency,” The Spectator, 11/6/21, https://www.spectator.co.uk/article/superbad-joe-bidens-plummeting-presidency

Poor Joe. He has a lot on his addled mind. He’s been in office for less than a year and his presidency is already a catalogue of crises. On Tuesday, as the President stood on the COP stage in Glasgow, impotently lecturing China and Russia about their absence, another disaster was happening back home. His Democratic party lost the governorship of Virginia, an election widely seen as the first big test of the political temperature in the Biden era. Virginia is increasingly thought of as Democratic territory. This time last year, Biden beat Donald Trump by ten points in the state — so the result looks damning.

Last month, as the polls tightened, Biden decided to invest his own political capital in the race. He joined the Democratic candidate Terry McAuliffe on the campaign trail and tried to brand the Republican challenger, Glenn Youngkin, as a Trumpkin wolf in sheep’s clothing — ‘extremism… can come in a smile and a fleece vest,’ he said.

Biden’s intervention only made a bad situation for the Democrats worse. The fleece-wearing Youngkin was clearly not an extremist. He successfully disassociated himself from red-raw Trumpism. He also picked a culture-war fight and won. He turned education, and the Democrats’ apparent eagerness to brainwash children with critical race theory in schools, into a rallying cause. His opponent moronically said that teachers, not parents, should decide what children learn. Showing even less nous, the National School Boards Association then demanded that protesting parents should be investigated for ‘domestic terrorism’. The Virginia election thus became a ‘nationalised’ battle between American families and Biden’s hyper-progressivist elite. The families won.

It’s silly to read too much into the Virginia result, even if the Democrats also underperformed in other races. Looking ahead to the 2022 midterm elections and beyond, however, the picture for Biden and the Democrats is extremely grim.

America is a lot bigger than Virginia. Yet Biden’s polling has been tanking nationwide. His job approval rating has fallen fairly steadily since he took office, from 55 per cent in January to 43 per cent today. He isn’t quite as unpopular as his predecessor at the same stage in his presidency, but Trump’s popularity bounced off a low base throughout. Biden’s seems so far only to go down. And no postwar president has fallen faster.

The number of Americans who think their country is on the ‘wrong track’ is 71 per cent. The young are giving up on Biden: 43 per cent of 18- to 24-year-olds approve of his job performance, a drop of 20 points since June. Perhaps most alarmingly of all for Democrats, the latest NBC poll found that Republicans now hold an 18-point advantage over their rivals when it comes to ‘dealing with the economy’. That is the highest recorded gap since 1991, when the survey started asking the question.

Americans think a lot about money and are understandably worried about what Biden is doing to the financial universe. He came into power promising to ‘restore the soul’ of their nation through preposterous amounts of government spending. What could go wrong?

Various trillion dollar bills barrelled into Congress. Americans didn’t mind at first. People like receiving large stimulus cheques. Media sycophants hailed Biden’s Build Back Better agenda as the 21st-century answer to Franklin Delano Roosevelt’s New Deal. But Biden was conspicuously vague about how the government would pay for it all — aside from his insistence that the two million Americans who earn more than $400,000 a year might have to cough up. Now Build Back Better is Collapsing Very Quickly as political and fiscal realities catch up with the executive branch. A supply-chain crisis is causing bottlenecks across America and the world. Inflation is biting harder in America than in Britain, and institutions are panicking. The Federal Reserve is this week expected to ‘taper’ its enormous stimulatory bond-buying programme. The Biden administration hopes that once its $1.75 trillion infrastructure bill gets through Congress, the public mood will shift in their favour again. But spend, spend, spend is not always the most sensible political strategy. The Democrats have been squabbling over the bill and the Republicans have done a good job of presenting themselves as the voice of economic sanity.

#### Antitrust harmonization is popular.

Michael Ristaniemi 20, PhD Candidate in Commercial Law at the University of Turku, Vice President for Sustainability at the Metsä Group, Participant in the Visiting Scholar Programme at the University of California, Berkeley, “International Antitrust: Toward Upgrading Coordination and Enforcement”, Doctoral Dissertation, October 2020, https://core.ac.uk/download/pdf/347180879.pdf

Despite the above, the major powers do have an interest in cooperating internationally in competition issues. The EU and the US appear to desire further convergence of practices and substantive thinking. Officially, China does not appear to have a strong stance on convergence, but recent practice shows that it too has engaged in an increasing amount of dialogue on competition matters. Indeed, there is an increasing amount of cooperation in relation to investigating international cartels, referring to cartels that operate in several nations concurrently and which seek to cartelize them.208

Further, the competition authorities of major powers have an incentive to ensure that merger control procedures affecting mergers benefiting their respective regions are as internationally streamlined and coordinated as possible given the number of multinationals that originate from each of their respective territories. Nonetheless, there are a few hurdles for streamlining international merger control. First is the dichotomous leadership of the US and the EU systems, with no single leading standard to become the global standard. Second, there are clear differences in nations’ scope of merger review that may arise from partially differing sets of goals should they attempt to address public interest or other non-competition related concerns concurrently with competition concerns.209 In any case, the aggregate cost of a fragmented system of international merger control is arguably higher than it would need to be. Improved, more structured coordination could help, as discussed further in Chapters 5 and 6 below.

## 1AR

### T Private Sector---1AR

#### ‘Practices’ can be singular

Justice Clinton 82, Supreme Court of Nebraska, Justice. Opinion in MID-SOUTH, ETC. v. Platte Valley Livestock, 315 NW 2d 229 - Neb: Supreme Court 1982

Most words, including the word "practice," encompass more than one meaning, and the particular meaning intended must be determined from the context in which it is employed. Only two of the multiple meanings of the word practice, as found in the dictionary, can possibly apply in the context of the statute. In Webster's Third New International Dictionary, Unabridged (1968), one meaning is "to make use of: use, employ." Another meaning is "to do something habitually," or "repeated or customary action." 233\*233 The words of the statute, "and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful," § 208(a), do not suggest that the word practice includes only that which is done habitually or repetitively by the particular stockyard or marketing agency. (Emphasis supplied.) Rather, as we will later attempt to demonstrate from an analysis of the cases upon which the parties rely, repetition may be important only in determining whether a particular act is an unjust or unreasonable practice included within the evils which the act was intended to cure.

#### ‘Private sector’ is business and includes subsets

TD 21 – The Definition, ‘private sector’, https://the-definition.com/term/private-sector

Private sector refers to an umbrella term that may be applied to any or all of the nonpublic or commercial individuals and businesses, specified nonprofit organizations, most of academia and other scholastic institutions, and selected nongovernmental organizations.

### States CP---1AR

#### States are absolutely forbidden---they have no authority to negotiate an agreement

Oona A. Hathaway 13, Gerard C. and Bernice Latrobe Smith Professor of International Law atYale Law School, et al., “The Treaty Power: Its History, Scope, and Limits”, Cornell Law Review, 98 Cornell L. Rev. 239, January 2013, Lexis

See, e.g., Zechariah Chafee, Jr., Stop Being Terrified of Treaties: Stop Being Scared of the Constitution, 38 A.B.A. J. 731, 732 (1952); Chafee, Federal and State Powers, supra note 115, at 432 ("In a queer terror lest the Senate, which has been the graveyard of treaties, will suddenly nurture treaties like a crowded incubation ward in a lying-in hospital, the great difference between domestic affairs and foreign affairs has been forgotten. In domestic affairs, after the boundary of federal power is reached, there is no vacuum in the law because the states can legislate amply to meet all needs. But in foreign affairs there would be a vacuum if the federal treaty power were narrowly limited. The states cannot take over. They are forbidden to conduct negotiations with other nations. Consequently, unless the national government can act, nobody can act.").

#### Other countries know that---so they won’t engage OR trust it

Dr. Heath P. Tarbert 21, JD and JSD from University of Pennsylvania Law School, Master of Studies and Doctor of Philosophy in Comparative Law from Oxford University, “Self-Regulation in the Derivatives Markets: Stability Through Collaboration”, Northwestern Journal of International Law & Business, 41 NW J. Int'l L. & Bus. 175, Winter 2021, Lexis

2. International Harmonization

Another area where government action is necessary relates to international harmonization. While SROs are often adept at formulating cross-border principles and standards with other SROs, 150 the government--and particularly a federal agency--is critical to advancing harmonized regulatory systems with foreign governmental counterparts. An example is the recent harmonization of certain swap data reporting efforts. In proposing and finalizing a new system for data reporting by swap dealers and swap data repositories, the CFTC has worked to harmonize its framework with that of the European Securities and Markets Authority (ESMA). 151 As data is inherently borderless and because swap dealers and swap data repositories often must report data to both the CFTC and ESMA, harmonizing reporting requirements where appropriate can produce significant cost savings and efficiencies for market participants.

For example, the CFTC's efforts to bring its swap data reporting system into greater harmony with international coordination efforts has led to the publication of a CFTC Technical Specification, which contains 128 reportable data fields. 152 The Technical Specification streamlines hundreds of prior fields that were previously required by swap data repositories operating without clear CFTC guidance. This change will enable the CFTC to receive the data it needs to perform its regulatory functions while at the same time reducing duplicative reporting burdens for entities subject to [\*203] multiple jurisdictions. In proposing revisions to the swap data reporting rules, the Chairman of the CFTC stated:

As it stands today, a market participant with a swap reportable to the CFTC might also have to report the same swap to the SEC, the European Securities and Markets Authority (ESMA), and perhaps other regulators as well. The global nature of our derivatives markets has led to the preparation and submission of multiple swap data reports, creating a byzantine maze of disparate data fields and reporting timetables. Market participants should not incur the costs and burdens of reporting a grab-bag of dissimilar data for the very same swap. That approach helps neither the market nor the CFTC: conflicting data reporting requirements make regulatory coordination more difficult, preventing a panoramic view of risk. 153

Resolving situations like this requires significant federal action to coordinate with and align regulatory requirements and technical standards with foreign regulators. 154 While SROs can be very effective at constructing international standards, they lack the ability to place the imprimatur of the United States government, as a sovereign nation, on negotiations and regulatory efforts. In contrast, CFTC action in the swap data reporting context has given assurances to other regulators that harmonization efforts have the backing of the United States government. This is important not only for the mechanics of promulgating rules, but also for international comity: federal support for collaborative efforts sends a strong signal to foreign governmental counterparts that can lay the groundwork for future cooperation.

Signaling aside, there is a practical reason to prefer government action in the international harmonization space. Just as states and localities do not negotiate treaties, 155 leaving regulatory harmonization efforts primarily to federal agencies is important to produce a unified and holistic message. The numerous exchanges in the derivatives space--each an SRO in its own right--have varying interests and priorities that could complicate efforts to place them in charge of harmonization efforts with overseas regulators. The ability of the CFTC to speak with one voice on behalf of the U.S. derivatives markets when negotiating and collaborating with foreign regulators is a clear benefit of federal action in the international space.

#### Federal negotiating power is exclusive---states are preempted

David H. Moore 14, Wayne M. and Connie C. Hancock Professor of Law Professor of Law at the J. Reuben Clark Law School at Brigham Young University, BA and JD from Brigham Young University, “Beyond One Voice”, Minnesota Law Review, 98 Minn. L. Rev. 953, February 2014, Lexis

A. Federalist Dimension

In its federalist, or vertical, dimension, the one-voice doctrine serves to police state involvement in foreign relations on the ground that the federal government alone may speak in foreign affairs. The doctrine has been most prominent along this dimension. "[A] long line of [Supreme Court] decisions … has applied the "one-voice' doctrine to address the validity of state activities impinging on foreign relations." 103 As noted in the history provided above, these cases involve the Foreign Commerce Clause, Import-Export Clause, the federal foreign affairs power, federal statutes, executive agreements, and executive policies. 104 In all these areas, the preeminence or exclusivity of federal powers touching on foreign affairs result in the preemption of state law.

### Infrastructure DA---1AR

#### It won’t pass BUT at best it gets cut down and delayed.

Market Screener 11/11, News site focusing on markets and monetary and fiscal policy, “Changing Our Call on the Social Spending Bill and Fed Policy,” Market Screener, 11/11/21, https://www.marketscreener.com/quote/stock/AGF-MANAGEMENT-LIMITED-1408936/news/Changing-Our-Call-on-the-Social-Spending-Bill-and-Fed-Policy-36984004/

A FIRESTORM OVER INFLATION has arrived in Washington, where Democrats are in a near-panic over the 2022 elections and Republicans argue that too much stimulus is backfiring.

REGULAR READERS KNOW THAT WE THINK the economy has gotten too much medicine this year. To be charitable to Biden, there's no playbook for ending a once-in-a-century pandemic; economic dislocations were inevitable in these uncharted waters.

BUT THAT'S NO EXCUSE TO STICK WITH POLICIES that are making things worse. Sen. Joe Manchin may be a camera-hungry opportunist, but he's correct: it's time to reconsider spending another $2 trillion on an economy that's over-heating. Democrats on Capitol Hill acknowledge privately that the spending package may have to be delayed until inflation cools off.

SO WE'RE CHANGING OUR ODDS ON PASSAGE of the Build Back Better bill, the massive cradle-to-grave spending package that also includes several tax increases. With the Senate tied, 50-50, even one Democratic defector can kill the measure, and Manchin is prepared to pull the trigger.

WE DON'T RULE OUT A MODEST BILL that extends the child tax credit - but in a climate of rising inflation, is there a need right now for liberalizing the state and local tax benefit or adding more housing aid when not all of the money in May's $1.9 trillion bill hasn't been spent?

OTHER CONGRESSIONAL PRIORITIES: Between Thanksgiving and Christmas, Congress will have to raise the debt ceiling, fund the government, and pass a massive Pentagon spending bill that could be the vehicle for other provisions (a classic "Christmas tree" bill). Is there time, in this crowded agenda, to pass Build Back Better?

OUR ODDS NOW ARE ABOUT 60 PERCENT that the entire package stalls, perhaps temporarily, perhaps permanently. There's a 40 percent chance that something scaled-back could still pass.

#### Optimism is naïve---Manchin is slamming the brakes.

Steven Nelson 11/11, Washington Reporter at New York Post, B.A. from William & Mary, “Harris says $2T Biden bill ‘poised to pass’ – even as Manchin hits brakes,” New York Post, 11/11/21, https://nypost.com/2021/11/11/kamala-harris-says-biden-social-spending-bill-poised-to-pass/

But that optimism isn’t widely shared in Washington, where Democrats can’t afford to lose a single vote in the evenly divided Senate and can afford to lose only a few Democrats in the House of Representatives.

Sen. Joe Manchin (D-WV) said Wednesday that he’s concerned about inflation after data showed the Labor Department’s Consumer Price Index jumped 6.2 percent in October from a year earlier, reflecting the highest increase since 1990 in the cost of goods and services as well as energy and food.

“By all accounts, the threat posed by record inflation to the American people is not ‘transitory’ and is instead getting worse,” Manchin tweeted. “From the grocery store to the gas pump, Americans know the inflation tax is real and DC can no longer ignore the economic pain Americans feel every day.”

A House Democrat told The Post late Wednesday that the latest inflation numbers could kill the bill in the Senate.

“I believe it’s likely to impact Sen. Manchin’s position and may well inspire him to go from tapping the brakes to slamming on them,” the lawmaker said.

#### He’ll punt it to next year.

Sabrina Escobar 11/11, Reporter at Barron's, focusing on breaking news and developments in the stock market, B.S. from the University of Richmond, M.S. from Oxford University, M.S. in Journalism from Columbia University, “Manchin Has Inflation Concerns. Could He Push a Vote on Social Spending Bill to Next Year?,” Barron’s, 11/11/21, https://www.barrons.com/articles/inflation-manchin-biden-social-spending-bill-51636644848

House Democrats last Friday passed a procedural vote on Biden’s $1.75 trillion social spending bill, voting to proceed to debate the measure after receiving the Congressional Budget Office’s score, which could take up to two weeks.

But inflationary pressures threaten to derail Democrats from taking the next step forward if Manchin decides to step on the brakes.

The Biden administration previously said inflation was a transitory response to the economic reopening after the pandemic, but figures released by the Labor Department on Wednesday suggested that this current bout of inflation is stickier than expected. The Consumer Price Index rose 0.9% in October, pushing the year-over-year rate up to 6.2%—the fastest pace of consumer inflation since July 1982.

“I, for one, also won’t support a multitrillion-dollar bill without greater clarity about why Congress chooses to ignore the serious effects inflation and debt have on our economy and existing government programs,” Manchin said in a statement earlier this month.

Sources close to the matter said the senator may push to punt the social spending agenda until next year, killing a quick deal on the package, Axios reported.2

#### He has no PC.

Miranda Devine 11/10, Australian columnist for the Sydney Morning Herald, B.S. in Mathematics from Macquarie University, M.S. in Journalism from Northwestern University, “A President doesn't lie about good policy,” The Daily Telegraph, 11/10/21, Lexis

But the $4 trillion social welfare bill Biden tried to link to it is hostage to the Democrats' wafer thin majority and dwindling political capital.

As energy prices soar, heading into a forecast bitter winter, Biden is talking about shutting down another gas pipeline from Michigan to Canada, to the dismay of everyone except hardcore progressives in his party.

And to cap it all off, the Democrats copped a shellacking in elections across the country which are seen as a harbinger of the mid-term races next year when Republicans expect to take back the House and the Senate and leave Biden as a lame duck - if he lasts so long.

So, it's fair to say things haven't been going well for the President ­lately.

In fact, voters have already had enough of him, 10 months into his presidency. A new USA Today/Suffolk University poll asked voters to name the single most important thing for Biden to do in the next year.

The top response was "Resign or Retire".

Ouch.

His approval rating in that poll has dropped to 38 per cent, amid concerns about inflation, the economy and ­illegal migration. The only consolation is that Kamala Harris, his cackling Vice President, is even more unpopular, at 28 per cent, so no one is speaking seriously of a palace coup, despite Biden's woes.

Even though nearly two-thirds of Americans say they don't want him to run for a second term in 2024, he seems oddly insouciant about the ­parlous state he is in, even bantering on Monday with a basketball team owner about running for a second term, when he will be 82.

While hip pocket issues are uppermost on voter minds, the border crisis is a running sore that his administration has resorted to lies and trickery to hide it.

#### The docket is a minefield.

Chris Cillizza 11/10, Editor-At-Large for CNN, B.A. in English from Georgetown University, “Why the next 45 days are make or break for Democrats looking ahead to 2022,” KITV, 11/10/21, https://www.kitv.com/story/45164720/why-the-next-45-days-are-make-or-break-for-democrats-looking-ahead-to-2022

Let's first take on the challenge for Congress in the three weeks when they will be in Washington between now and the end of the year.

\* Find a way to pass President Joe Biden's $1.75 trillion social safety net bill, with disagreements between House liberals and Senate moderates still largely unresolved.

\* Avert a government shutdown. Remember that Congress kicked the debt ceiling increase down the road in early October. But, the government is now set to run out of money to pay off its debts on December 3 -- and Democrats in the House and Senate will need to decide quickly whether or not they are willing to pass the increase on a purely partisan vote. (Senate Minority Leader Mitch McConnell has previously insisted Republicans won't vote to do so.)

\* Fund the government past December 3. Just like with the debt limits, Congress, in early October, delayed a government shutdown -- but only until December 3. Which means that if an agreement can't be reached, we could very well be looking at another government shutdown sometime next month.

Add it all up and you see that Congress has not only a massive amount to do but also very little evidence that any of these legislative problems have been fixed since Congress last addressed them.

What Congress does -- and fails to do -- will almost certainly have ramifications well into next year. If, for example, Democrats are not able to get the bill containing the bulk of Biden's first term domestic agenda passed despite their slim majorities in both the House and Senate, they will affirm already-lingering doubts about their ability to get things done. If the government shuts down, it would be an absolute political cataclysm with uncertain political impacts. Should the country default on its debts, there's a very real possibility of our credit rating being lowered -- a disastrous outcome for an economy still-trying to dig out from the effects of the pandemic.

In short: There are a whole lot of minefields for Congress in the next month -- and no clear map to guide them through it.

## 2AR

### Infrastructure DA---2AR

#### It’s packed AND defense spending is on top.

Burgess Everett 11/9, Co-congressional bureau chief for POLITICO, specializing in the Senate, B.A. in Journalism from the University of Maryland; Marianne Levine, reporter for POLITICO specializing in the Senate, B.A. in International Relations and French from Stanford University, M.A. in Communication and Media Studies from Stanford University, “The Senate’s year-end to-do list is ‘going to be a train wreck’,” Politico, 11/9/21, https://www.politico.com/news/2021/11/09/senate-dems-year-end-train-wreck-520275

The Senate is only scheduled to be in three weeks for the rest of 2021, with a recess set to start Dec. 10. There's almost no chance that schedule holds at this point, with the Democratic majority facing a to-do list more daunting than a Black Friday sales rush. Congress has to fund the government past Dec. 3, pass a massive defense policy bill, finish out a $1.75 trillion party-line social spending bill and potentially maneuver around a U.S. credit default.

Each of those four bills could take several days of Senate floor time, not to mention the myriad negotiations still left to hash out Biden's GOP-free domestic agenda with Sen. Joe Manchin (D-W.Va.), who wants to slow things down. Already some senators are anticipating a short-term government funding patch for a few weeks, potentially right up until Christmas. And in a worst-case scenario, the debt limit would need to be raised right around that same time - something Republicans say they won't help with.

"It's going to be a train wreck," surmised Sen. John Thune (R-S.D.), the minority whip.

Of course, last year's Republican Senate was barely better - passing a spending deal in late December and having to work on New Year's Day 2021 to finish the defense authorization bill. But the better parallel to this year's coal-lumped holiday season might be 2009, when then-Majority Leader Harry Reid (D-Nev.) leveraged the holidays to pass the Affordable Care Act on Christmas Eve. That included holding a Saturday session during a driving snowstorm, the type of work that focuses lawmakers on getting out of Washington as soon as possible.

While Democrats still sound bullish on closing out their social safety net and climate measure by Thanksgiving, 2022 may be the real hard deadline. That's when Democrats' expanded child tax credit expires anyway - and when lawmakers will really, truly be desperate to get home after months of protracted negotiations.

"We'll finish most of our work by December 31," said Sen. Ben Cardin (D-Md.).

Senate Majority Leader Chuck Schumer was publicly eyeing Monday as the date his chamber would take up the social spending bill. But that timeline is no longer feasible, after House Democrats pushed their vote on the long-planned bill until that week, amid demands from moderates for a score from the Congressional Budget Office.

Prior to leaving for this week's recess, senators acknowledged it's possible they consider the defense policy bill before the social spending bill instead, given some of the outstanding hiccups they face finishing out Biden's agenda.

Already, the Senate is delaying the defense bill much later than usual. It's one of the few pieces of legislation that regularly passes Congress every year, usually with a strong bipartisan vote. And some senators have relayed their concerns about the delay to Schumer.

Sen. Jon Tester (D-Mont.) said that the defense bill would come "up the first day we're back" next week, "which is good."

"We will go to the reconciliation bill sometime" after that, Tester added. "But I think it's going to take a while."