# Round 2---UK---vs. Cal Berkeley EE

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### OFF---Trade DA

#### The plan sends a protectionist shockwave that ends the last semblance of global free trade

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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.

#### Nuclear war

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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.

### OFF---Multilat CP

#### The United States federal government should establish a framework for contingent international cooperation that increase antitrust prohibitions on standard essential patent holders that engage in anticompetitive licensing practices

#### The CP’s framework multilateralizes antitrust---explicit reciprocity bypasses generic barriers AND spills over to deep economic integration

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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

#### Only harmonized transnational antitrust solves the case---compliance and competition require streamlining the regulatory drag of conflicting legal systems, but the plan’s ad hoc unilateralism proliferates it

Camilla Jain Holtse 20, Associate General Counsel in Maersk Line, LL.M in European Law from King’s College, Master’s Degree from University of Aarhus, “Navigating Through Uncertain Waters—The Importance of Legal Certainty, Predictability, and Transparency in Future Antitrust Enforcement”, Journal of European Competition Law & Practice, Volume 11, Issue 8, October 2020, p. 446-447

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 protectionist systems 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.

#### 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

### OFF---Regulation CP

#### The United States federal government should require that

#### Regulation solves without ‘antitrust’ or FTC involvement

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A. Antitrust and Regulation as Policy Alternatives

A variety of institutions can govern economic competition. Decentralized, capitalist economies generally rely on markets themselves to provide the incentives and discipline necessary to keep prices low, output high, and innovation moving forward. 8 But sometimes market forces alone cannot ensure efficiency and economic welfare--for example, when the market structure has changed due to mergers or the rise of a dominant firm, or when the market is an oligopoly susceptible to parallel conduct or collusion. In such cases, governance of competition by a nonmarket institution might be warranted. Because concentrated markets or even monopolies can arise for good reasons related to efficiency, innovation, and consumer preference, the governance of competition more often involves vigilance than liability or injunctions. Then-Judge Stephen Breyer, long [\*1926] a leading scholar of antitrust and regulation, described the best situation as being an unregulated, competitive market in which "antitrust may help maintain competition." 9

Antitrust law aims to prevent the improper creation and exploitation of market power on a case-by-case basis while avoiding the punishment of commercial success justly earned through "skill, foresight and industry." 10 Thus, competition authorities like the FTC and the DOJ's Antitrust Division review mergers, investigate single-firm conduct, and prosecute collusion. 11 Private plaintiffs can pursue civil antitrust liability through suits in the federal courts. 12 To win their claims, enforcement agencies and private plaintiffs bear the burden of showing that the effect of a firm's activity is "substantially to lessen competition, or to tend to create a monopoly," 13 or to constitute a "contract, combination, . . . or conspiracy" in restraint of trade, 14 or to "monopolize, or attempt to monopolize" any line of business. 15

Antitrust is not, however, the only institution through which government addresses competition concerns and market failures. Congress can give regulatory agencies authority to intervene where they see the need to address competition and market structure--and Congress has often done so. With such statutory authority, "[i]n effect, the agency becomes a limited-jurisdiction enforcer of antitrust principles." 16 For example, the Department of Transportation (DOT) has jurisdiction to approve transfers of routes between airlines carriers, giving it a role in reviewing airline mergers. 17 The 1992 Cable Act gave the FCC authority [\*1927] to limit the share of the national cable market that a single operator could serve, thereby giving the agency some control over the industry's market structure. 18 The FCC has long regulated market entry and, through its control over license transfers, reviewed mergers and acquisitions in several sectors of the telecommunications industry. More recently, the FCC issued, 19 and then repealed, 20 "network neutrality" regulations intended to preserve ease of entry and a level playing field for digital services. The Food and Drug Administration (FDA), Securities and Exchange Commission (SEC), Department of Energy, and numerous other federal agencies have various powers that directly affect competition. 21 State regulation can be important as well in governing competition, particularly in the insurance and healthcare industries. 22

In contrast to the case-by-case approach of antitrust, regulation typically imposes ex ante prohibitions or requirements on business conduct. The Telecommunications Act of 1996, for example, required incumbent local telephone companies to grant new competitors access to parts of their networks and prohibited incumbents from refusing to interconnect calls from their customers to customers of competing networks. 23 With the rule in place, the FCC bore no burden of proving that a specific instance of network access was necessary for competition, or that a specific denial of interconnection would harm competition. In contrast [\*1928] to antitrust, where the burden of proving liability is on the agency, under a regulatory regime the burden of seeking a waiver from regulation or challenging an agency's enforcement decision is usually on the regulated party.

Antitrust and regulation therefore present alternative approaches to governing competition and addressing market failures. 24 The government can review individual mergers under the antitrust laws, as it does in most markets, or it can set rules that impose clear, ex ante limits on the extent of concentration, as the FCC did for media ownership under the Communications Act. 25 Government can investigate under the antitrust laws whether a firm has monopoly power that it has "willful[ly]" acquired or maintained other than "as a consequence of a superior product, business acumen, or historic accident." 26 Alternatively, with authority from Congress an agency can regulate how much of a market a single firm can serve, as the FCC tried to do with cable companies, 27 or require firms to dispose of key assets in order to promote competition in a relevant market, as the DOT has done with airline slots. 28

### OFF---Biz Con DA

#### The plan creates an abrupt shift and doctrinal instability in antitrust that spills over throughout the economy---it’s impossible to distinguish specific industries because, unlike regulation, it’s enforced in generalist common law

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I. GOING BEYOND ADJUDICATION FOR ANTITRUST ENFORCEMENT

Antitrust statutes are primarily enforced in court, usually through the adjudication of specific cases or settlement against the backdrop of court-made antitrust doctrine. Indeed, despite statutory authority for the FTC to issue competition rules, and despite the technical complexity of many antitrust cases, antitrust enforcement and policy in the United States has evolved primarily through precedent developed by generalist courts, not specialized agencies. 18To be sure, the Department of Justice and the FTC influence policy through the investigations they pursue and the consent decrees they reach with parties. The FTC itself adjudicates some cases, although it does so largely according to law developed in the federal courts, to which parties can appeal any FTC decision. 19Academics and other commentators have also affected the evolution of antitrust in the United States, from supporting an economic, notably price-focused framework for U.S. competition policy to sparking a rethinking of that framework in contemporary debates. As the courts have absorbed such learning, antitrust doctrine has evolved over the decades through the push and pull of precedent across the United States judicial circuits, with the Supreme Court periodically stepping in to correct, clarify, or resolve differences among the lower federal courts. Commentators often cite antitrust as a rare example of "federal common law" in the U.S. system. 20

The adjudicatory model for implementing antitrust enforcement has several key attributes, which in turn have both advantages and disadvantages. We put aside for now the question of who is adjudicating--whether it be an expert tribunal or a court of general jurisdiction, for example--and focus on three characteristics of antitrust adjudication itself.

A. Case-by-Case, Fact-Specific Approach

Complexity of underlying issues aside, adjudication is well suited to settings in which applicability of the law is contingent on case-specific facts. With the exception of the limited conduct that the antitrust laws prohibit per se, courts review most business activities through a rule of reason, under which some conduct that is illegal in one set of circumstances is allowable in [\*1918] another. 21The inquiry into liability goes beyond whether particular conduct in fact occurred (which is the extent of the inquiry into conduct that is illegal per se) and extends into a balancing of the conduct's likely effects on competition. 22The more that liability is contingent on such case-specific facts, the more difficult it is to determine liability in advance of the conduct's having taken place. Adjudication typically occurs when conduct either is imminent or has already occurred, at which point the relevant facts as to the effects of the conduct are, in principle, more readily measured. 23Such "ex post" mechanisms of enforcement can reduce the risk of over-enforcement when compared to alternative approaches, like some forms of regulation, that spell out more comprehensively in advance what conduct is illegal. 24Reducing false positives, however, may or may not be a virtue--that calculation depends on the extent to which particular adjudicative institutions and processes under-enforce by allowing harmful conduct or transactions to slip through the liability screen.

B. Slow, Usually Predictable Doctrinal Development

A second attribute of the American adjudicatory process for antitrust is stability. While antitrust doctrine has occasionally swerved abruptly over the past century, the common-law process through which antitrust law has developed usually provides clear notice that a change is coming. As a recent example, the Supreme Court's shift in *Leegin Creative Leather Products, Inc. v. PSKS. Inc*. 25from per se liability to a rule of reason for resale price maintenance likely caught few observers by surprise. 26

Antitrust adjudication's stability, like its suitability for fact-dependent situations, is potentially double-edged. Antitrust jurisprudence can be slow to adjust to changes in economic learning or changes in the underlying economy that alter the effects of a particular kind of business conduct. For [\*1919] example, nearly thirty years ago the Supreme Court in Brooke Group v. Brown & Williamson Tobacco Corp. 27required that plaintiffs claiming predatory pricing show not only prices below some measure of incremental cost, but also that the defendant could recoup its losses. 28No plaintiff has prevailed in a predatory pricing case in a U.S. federal court since. 29That outcome might not be of concern were it the case that the Supreme Court's test accurately captures the incidence of predatory pricing. 30Economic research demonstrates, however, that predatory conduct does occur and does not depend on either below-cost pricing or recoupment. 31Predation is just one area in which court-made doctrine appears out of step with relevant economic facts and knowledge. To be sure, other forces could accelerate the common-law process of doctrinal development. For example, Congress could legislate changes to the scope, presumptions, and other parameters of antitrust law in ways that would immediately alter precedent and bind the courts going forward. 32 In practice, however, such intervention is rare and unlikely, making significant lags in doctrine a reality of antitrust adjudication in the courts.

C. Market-Driven Case Selection

In the United States, most adjudicative bodies do not select the cases that come before them. To be sure, courts have jurisdictional limitations that prevent them from hearing certain kinds of cases, and doctrines exist that allow courts to reject weak or poorly conceived complaints. Beyond those mechanisms, however, independent parties decide when and whether to pursue litigation as method of relief. One potential virtue of this separation between decisionmaking and case selection is that the market can drive the focus of judicial attention. Assuming the most widespread and most troublesome anticompetitive conduct will receive the greatest investment of litigation resources, that conduct will in turn receive the most adjudication and doctrinal development.

[\*1920] Unfortunately, the separation between adjudication and case selection will not necessarily lead to an efficient match between judicial attention and the most pressing antitrust violations. In practice, even conduct that is clearly prohibited can persist when offenders think detection is difficult; one only has to look at the consistently high number of civil and criminal price fixing cases that wind up in court, even though that conduct has clearly been illegal per se for nearly a century. 33The most widespread anticompetitive conduct might not therefore be the conduct most in need of doctrinal development--it can be just the opposite, as the persistence of cartels demonstrates. 34Moreover, if the courts develop doctrine that needs revisiting, but that deters the government or private plaintiffs from filing cases, 35then the market for judicial attention to antitrust conduct will not work well dynamically; once doctrine is settled, there may be no mechanism outside of legislation or regulatory intervention to drive doctrinal change. We return to this issue below.

D. Generalists versus Industry Experts

Returning to an issue we put aside earlier, who is doing the adjudication can matter for substantive outcomes. In U.S. antitrust law, that adjudication has occurred, at least ultimately, in generalist federal courts. That institutional locus might well make sense given the wide variety of conduct, industries, and factual circumstances that antitrust cases present. However, as specific industries come to pose particular challenges for antitrust enforcement, the case for more specialized enforcement decisionmakers becomes stronger. Traditionally, where detailed, industry-specific knowledge is required to make sound competition policy decisions, Congress has assigned authority over those decisions, at least in part, to industry-specific regulatory agencies. Thus, the Securities and Exchange Commission has authority over competitive conduct in key financial sectors. 36The FCC has parallel authority with the Department of Justice (DOJ) over telecommunications mergers and sole authority to establish terms for competitive entry into various telecommunications markets. 37State [\*1921] regulators govern entry into hospital markets through Certifications of Public Need. 38The federal courts have increasingly safeguarded the domain of industry specific regulators over competition issues even when agency decisions might be in tension with antitrust law. 39

As antitrust enforcement focuses on distinct challenges posed by a particular industry, whether digital platforms, pharmaceuticals, or something else, expert and specialized knowledge becomes even more essential to making good enforcement decisions. Under current law and enforcement frameworks, there is no systematic way to bring such specialization into the ultimate adjudication of antitrust cases in industries not already covered by specific, competition-related, regulatory statutes. To be sure, the FTC and DOJ have divisions that specialize in various industrial sectors in which they have considerable expertise. Those divisions bring that expertise into their review of conduct and transactions, but neither the FTC nor DOJ has ultimate adjudicative authority over the cases they choose to litigate. The DOJ must go to federal court to seek enforcement. The FTC can opt for an administrative enforcement mechanism with the Commission itself sitting in appellate review of initial adjudication by an administrative law judge. The Commission's decision is, however, subject to review by federal appellate courts, which have not hesitated to reverse the agency's decisions. 40 The result is that, even when agencies have brought specific industry expertise into antitrust enforcement, doctrinal application and resolution still proceeds through the common-law process of adjudication by generalist judges.

E. Tradeoffs Inherent in the Adjudicatory Approach to Antitrust

As the foregoing discussion suggests, the ex post case-by-case approach, slow doctrinal evolution, and case selection mechanism of antitrust adjudication have potential advantages and disadvantages. The tradeoffs become particularly clear through the interaction of those three characteristics.

[\*1922] Adjudication may mitigate the rate of false positives or false negatives obtained through enforcement, as proceeding case-by-case is less likely to bring about those results than are general rules that impose limits on business conduct in advance, regardless of specific circumstances. Broad ex ante specifications could prohibit beneficial or harmless conduct, and narrow ex ante specifications could fail to prevent anticompetitive practices. As a decisionmaking process moves from strict ex ante prescription to pure case-by-case adjudication, particular facts and circumstances increasingly predominate over generic categorization of conduct. 41In principle, the movement along that spectrum enables the decisionmaker to avoid under-inclusiveness or over-inclusiveness of categorical rules. 42

The extent to which an adjudicator actually succeeds in reducing enforcement errors in either direction depends on the doctrine and precedent through which it evaluates the case-specific evidence. Doctrine and precedent will determine how a court allocates burdens, prioritizes facts, and weighs presumptions in evaluating the legality of conduct. If precedent provides mistaken guidance on those factors, case-specific adjudication might do no better a job than ex ante prohibitions in avoiding errors or bias toward either under or over-enforcement. For this reason, the evolutionary pace of doctrinal development through antitrust adjudication is very important. Where that evolution has been toward convergence with state-of-the-art analysis and evidence as to the effects of conduct, doctrinal stability is a virtue. Reasonable people disagree over the Supreme Court's movement from per se illegality to rule of reason treatment of vertical price restraints, as Justice Breyer's dissent in Leegin demonstrates. 43 The decision in that case nonetheless drew on a body of legal and economic analysis that, over decades, had continually narrowed the application of per se rules to vertical conduct and led logically (even if some might argue incorrectly) to the majority's conclusion. 44Many commentators might therefore say Leegin is a good example of where the evolution of doctrine through adjudication worked well: stakeholders had notice and the doctrine moved in an internally consistent direction. While it is debatable whether the per se rule against restraints on [\*1923] intra-brand competition has in recent years led to over-enforcement, there is a good case that it had done so in the past, 45so that the doctrine plausibly moved in an error-reducing direction.

However, where doctrine gets on the wrong track, the application of precedent will perpetuate rather than reduce enforcement errors. In the case of predation, for example, there is a good argument that, in the light of current economic knowledge, the Brooke Group decision has led to underenforcement. 46The potential case-by-case advantages of adjudication are lost where judicial precedent renders important facts and circumstances irrelevant. In such cases, the relatively slow process of doctrinal correction through common law evolution is harmful to sound antitrust enforcement.

The discussion above shows that the error-reducing potential of a case-by-case, adjudicatory approach to antitrust enforcement depends heavily on the actual doctrine courts apply and on the process by which that doctrine evolves. Similarly, whether case selection in an adjudicatory approach in fact directs judicial attention to the conduct that most warrants oversight depends on existing doctrine and precedent. It may well be that the conduct doing the most harm is also the conduct for which the courts impose the highest burdens of proof on plaintiffs. The deterrent effect of those burdens likely leads to fewer cases than the conduct's actual effects warrant. 47Similarly, doctrine that too readily imposes liability could have the opposite effect: lower barriers for plaintiffs would lead to too many cases and more devotion of judicial resources than the conduct deserves. 48Like error-reduction, the distribution of antitrust cases brought for adjudication depends heavily on the state of the doctrine and on the ability of the common law process to correct course where necessary.

The potential disadvantages of antitrust adjudication by generalist courts raise the question of whether a different approach might be preferable, specifically with regard to digital platforms. Digital platforms present relatively novel challenges. Considering the tenuous fit between some [\*1924] potential theories of harm and current antitrust doctrine, the complexity of the underlying technical issues in antitrust cases, and the interrelatedness of those issues and adjacent policy goals, a more informed, comprehensive approach coordinated by an expert regulatory agency might foster more advantages than does the exclusive resort to traditional antitrust adjudication. However, before we turn to the form such regulation might take, we briefly identify some general principles for such regulation.

#### Unpredictable shifts ruin biz con AND overall growth

Sarah Chaney Cambon 21, Reporter on The Wall Street Journal's Economics Team, BA in Business Journalism from the University of North Carolina-Chapel Hill, “Capital-Spending Surge Further Lifts Economic Recovery”, Wall Street Journal, 6/27/2021, https://www.wsj.com/articles/capital-spending-surge-further-lifts-economic-recovery-11624798800

Business investment is emerging as a powerful source of U.S. economic growth that will likely help sustain the recovery.

Companies are ramping up orders for computers, machinery and software as they grow more confident in the outlook.

Nonresidential fixed investment, a proxy for business spending, rose at a seasonally adjusted annual rate of 11.7% in the first quarter, led by growth in software and tech-equipment spending, according to the Commerce Department. Business investment also logged double-digit gains in the third and fourth quarters last year after falling during pandemic-related shutdowns. It is now higher than its pre-pandemic peak.

Orders for nondefense capital goods excluding aircraft, another measure for business investment, are near the highest levels for records tracing back to the 1990s, separate Commerce Department figures show.

“Business investment has really been an important engine powering the U.S. economic recovery,” said Robert Rosener, senior U.S. economist at Morgan Stanley. “In our outlook for the economy, it’s certainly one of the bright spots.”

Consumer spending, which accounts for about two-thirds of economic output, is driving the early stages of the recovery. Americans, flush with savings and government stimulus checks, are spending more on goods and services, which they shunned for much of the pandemic.

Robust capital investment will be key to ensuring that the recovery maintains strength after the spending boost from fiscal stimulus and business reopenings eventually fades, according to some economists.

Rising business investment helps fuel economic output. It also lifts worker productivity, or output per hour. That metric grew at a sluggish pace throughout the last economic expansion but is now showing signs of resurgence.

The recovery in business investment is shaping up to be much stronger than in the years following the 2007-09 recession. “The events especially in late ’08, early ’09 put a lot of businesses really close to the edge,” said Phil Suttle, founder of Suttle Economics. “I think a lot of them said, ‘We’ve just got to be really cautious for a long while.’”

Businesses appear to be less risk-averse now, he said.

After the financial crisis, businesses grew by adding workers, rather than investing in capital. Hiring was more attractive than capital spending because labor was abundant and relatively cheap. Now the supply of workers is tight. Companies are raising pay to lure employees. As a result, many firms have more incentive to grow by investing in capital.

Economists at Morgan Stanley predict that U.S. capital spending will rise to 116% of prerecession levels after three years. By comparison, investment took 10 years to reach those levels once the 2007-09 recession hit.

Company executives are increasingly confident in the economy’s trajectory. The Business Roundtable’s economic-outlook index—a composite of large companies’ plans for hiring and spending, as well as sales projections—increased by nine points in the second quarter to 116, just below 2018’s record high, according to a survey conducted between May 25 and June 9. In the second quarter, the share of companies planning to boost capital investment increased to 59% from 57% in the first.

“We’re seeing really strong reopening demand, and a lot of times capital investment follows that,” said Joe Song, senior U.S. economist at BofA Securities.

Mr. Song added that less uncertainty regarding trade tensions between the U.S. and China should further underpin business confidence and investment. “At the very least, businesses will understand the strategy that the Biden administration is trying to follow and will be able to plan around that,” he said.

#### Decline cascades---nuclear war

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Various scholars and institutions regard global social instability as the greatest threat facing this decade. The catalyst has been postulated to be a Second Great Depression which, in turn, will have profound implications for global security and national integrity. This paper, written from a broad systems perspective, illustrates how emerging risks are getting more complex and intertwined; blurring boundaries between the economic, environmental, geopolitical, societal and technological taxonomy used by the World Economic Forum for its annual global risk forecasts. Tight couplings in our global systems have also enabled risks accrued in one area to snowball into a full-blown crisis elsewhere. The COVID-19 pandemic and its socioeconomic fallouts exemplify this systemic chain-reaction. Onceinexorable forces of globalization are rupturing as the current global system can no longer be sustained due to poor governance and runaway wealth fractionation. The coronavirus pandemic is also enabling Big Tech to expropriate the levers of governments and mass communications worldwide. This paper concludes by highlighting how this development poses a dilemma for security professionals.

Key Words: Global Systems, Emergence, VUCA, COVID-9, Social Instability, Big Tech, Great Reset

INTRODUCTION

The new decade is witnessing rising volatility across global systems. Pick any random “system” today and chart out its trajectory: Are our education systems becoming more robust and affordable? What about food security? Are our healthcare systems improving? Are our pension systems sound? Wherever one looks, there are dark clouds gathering on a global horizon marked by volatility, uncertainty, complexity and ambiguity (VUCA).

But what exactly is a global system? Our planet itself is an autonomous and selfsustaining mega-system, marked by periodic cycles and elemental vagaries. Human activities within however are not system isolates as our banking, utility, farming, healthcare and retail sectors etc. are increasingly entwined. Risks accrued in one system may cascade into an unforeseen crisis within and/or without (Choo, Smith & McCusker, 2007). Scholars call this phenomenon “emergence”; one where the behaviour of intersecting systems is determined by complex and largely invisible interactions at the substratum (Goldstein, 1999; Holland, 1998).

The ongoing COVID-19 pandemic is a case in point. While experts remain divided over the source and morphology of the virus, the contagion has ramified into a global health crisis and supply chain nightmare. It is also tilting the geopolitical balance. China is the largest exporter of intermediate products, and had generated nearly 20% of global imports in 2015 alone (Cousin, 2020). The pharmaceutical sector is particularly vulnerable. Nearly “85% of medicines in the U.S. strategic national stockpile” sources components from China (Owens, 2020).

An initial run on respiratory masks has now been eclipsed by rowdy queues at supermarkets and the bankruptcy of small businesses. The entire global population – save for major pockets such as Sweden, Belarus, Taiwan and Japan – have been subjected to cyclical lockdowns and quarantines. Never before in history have humans faced such a systemic, borderless calamity.

COVID-19 represents a classic emergent crisis that necessitates real-time response and adaptivity in a real-time world, particularly since the global Just-in-Time (JIT) production and delivery system serves as both an enabler and vector for transboundary risks. From a systems thinking perspective, emerging risk management should therefore address a whole spectrum of activity across the economic, environmental, geopolitical, societal and technological (EEGST) taxonomy. Every emerging threat can be slotted into this taxonomy – a reason why it is used by the World Economic Forum (WEF) for its annual global risk exercises (Maavak, 2019a). As traditional forces of globalization unravel, security professionals should take cognizance of emerging threats through a systems thinking approach.

METHODOLOGY

An EEGST sectional breakdown was adopted to illustrate a sampling of extreme risks facing the world for the 2020-2030 decade. The transcendental quality of emerging risks, as outlined on Figure 1, below, was primarily informed by the following pillars of systems thinking (Rickards, 2020):

• Diminishing diversity (or increasing homogeneity) of actors in the global system (Boli & Thomas, 1997; Meyer, 2000; Young et al, 2006);

• Interconnections in the global system (Homer-Dixon et al, 2015; Lee & Preston, 2012);

• Interactions of actors, events and components in the global system (Buldyrev et al, 2010; Bashan et al, 2013; Homer-Dixon et al, 2015); and

• Adaptive qualities in particular systems (Bodin & Norberg, 2005; Scheffer et al, 2012) Since scholastic material on this topic remains somewhat inchoate, this paper buttresses many of its contentions through secondary (i.e. news/institutional) sources.

ECONOMY

According to Professor Stanislaw Drozdz (2018) of the Polish Academy of Sciences, “a global financial crash of a previously unprecedented scale is highly probable” by the mid- 2020s. This will lead to a trickle-down meltdown, impacting all areas of human activity.

The economist John Mauldin (2018) similarly warns that the “2020s might be the worst decade in US history” and may lead to a Second Great Depression. Other forecasts are equally alarming. According to the International Institute of Finance, global debt may have surpassed $255 trillion by 2020 (IIF, 2019). Yet another study revealed that global debts and liabilities amounted to a staggering $2.5 quadrillion (Ausman, 2018). The reader should note that these figures were tabulated before the COVID-19 outbreak.

The IMF singles out widening income inequality as the trigger for the next Great Depression (Georgieva, 2020). The wealthiest 1% now own more than twice as much wealth as 6.9 billion people (Coffey et al, 2020) and this chasm is widening with each passing month. COVID-19 had, in fact, boosted global billionaire wealth to an unprecedented $10.2 trillion by July 2020 (UBS-PWC, 2020). Global GDP, worth $88 trillion in 2019, may have contracted by 5.2% in 2020 (World Bank, 2020).

As the Greek historian Plutarch warned in the 1st century AD: “An imbalance between rich and poor is the oldest and most fatal ailment of all republics” (Mauldin, 2014). The stability of a society, as Aristotle argued even earlier, depends on a robust middle element or middle class. At the rate the global middle class is facing catastrophic debt and unemployment levels, widespread social disaffection may morph into outright anarchy (Maavak, 2012; DCDC, 2007).

Economic stressors, in transcendent VUCA fashion, may also induce radical geopolitical realignments. Bullions now carry more weight than NATO’s security guarantees in Eastern Europe. After Poland repatriated 100 tons of gold from the Bank of England in 2019, Slovakia, Serbia and Hungary quickly followed suit.

According to former Slovak Premier Robert Fico, this erosion in regional trust was based on historical precedents – in particular the 1938 Munich Agreement which ceded Czechoslovakia’s Sudetenland to Nazi Germany. As Fico reiterated (Dudik & Tomek, 2019):

“You can hardly trust even the closest allies after the Munich Agreement… I guarantee that if something happens, we won’t see a single gram of this (offshore-held) gold. Let’s do it (repatriation) as quickly as possible.” (Parenthesis added by author).

President Aleksandar Vucic of Serbia (a non-NATO nation) justified his central bank’s gold-repatriation program by hinting at economic headwinds ahead: “We see in which direction the crisis in the world is moving” (Dudik & Tomek, 2019). Indeed, with two global Titanics – the United States and China – set on a collision course with a quadrillions-denominated iceberg in the middle, and a viral outbreak on its tip, the seismic ripples will be felt far, wide and for a considerable period.

A reality check is nonetheless needed here: Can additional bullions realistically circumvallate the economies of 80 million plus peoples in these Eastern European nations, worth a collective $1.8 trillion by purchasing power parity? Gold however is a potent psychological symbol as it represents national sovereignty and economic reassurance in a potentially hyperinflationary world. The portents are clear: The current global economic system will be weakened by rising nationalism and autarkic demands. Much uncertainty remains ahead. Mauldin (2018) proposes the introduction of Old Testament-style debt jubilees to facilitate gradual national recoveries. The World Economic Forum, on the other hand, has long proposed a “Great Reset” by 2030; a socialist utopia where “you’ll own nothing and you’ll be happy” (WEF, 2016).

In the final analysis, COVID-19 is not the root cause of the current global economic turmoil; it is merely an accelerant to a burning house of cards that was left smouldering since the 2008 Great Recession (Maavak, 2020a). We also see how the four main pillars of systems thinking (diversity, interconnectivity, interactivity and “adaptivity”) form the mise en scene in a VUCA decade.

ENVIRONMENTAL

What happens to the environment when our economies implode? Think of a debt-laden workforce at sensitive nuclear and chemical plants, along with a concomitant surge in industrial accidents? Economic stressors, workforce demoralization and rampant profiteering – rather than manmade climate change – arguably pose the biggest threats to the environment. In a WEF report, Buehler et al (2017) made the following pre-COVID-19 observation:

The ILO estimates that the annual cost to the global economy from accidents and work-related diseases alone is a staggering $3 trillion. Moreover, a recent report suggests the world’s 3.2 billion workers are increasingly unwell, with the vast majority facing significant economic insecurity: 77% work in part-time, temporary, “vulnerable” or unpaid jobs.

Shouldn’t this phenomenon be better categorized as a societal or economic risk rather than an environmental one? In line with the systems thinking approach, however, global risks can no longer be boxed into a taxonomical silo. Frazzled workforces may precipitate another Bhopal (1984), Chernobyl (1986), Deepwater Horizon (2010) or Flint water crisis (2014). These disasters were notably not the result of manmade climate change. Neither was the Fukushima nuclear disaster (2011) nor the Indian Ocean tsunami (2004). Indeed, the combustion of a long-overlooked cargo of 2,750 tonnes of ammonium nitrate had nearly levelled the city of Beirut, Lebanon, on Aug 4 2020. The explosion left 204 dead; 7,500 injured; US$15 billion in property damages; and an estimated 300,000 people homeless (Urbina, 2020). The environmental costs have yet to be adequately tabulated.

Environmental disasters are more attributable to Black Swan events, systems breakdowns and corporate greed rather than to mundane human activity.

Our JIT world aggravates the cascading potential of risks (Korowicz, 2012). Production and delivery delays, caused by the COVID-19 outbreak, will eventually require industrial overcompensation. This will further stress senior executives, workers, machines and a variety of computerized systems. The trickle-down effects will likely include substandard products, contaminated food and a general lowering in health and safety standards (Maavak, 2019a). Unpaid or demoralized sanitation workers may also resort to indiscriminate waste dumping. Many cities across the United States (and elsewhere in the world) are no longer recycling wastes due to prohibitive costs in the global corona-economy (Liacko, 2021).

Even in good times, strict protocols on waste disposals were routinely ignored. While Sweden championed the global climate change narrative, its clothing flagship H&M was busy covering up toxic effluences disgorged by vendors along the Citarum River in Java, Indonesia. As a result, countless children among 14 million Indonesians straddling the “world’s most polluted river” began to suffer from dermatitis, intestinal problems, developmental disorders, renal failure, chronic bronchitis and cancer (DW, 2020). It is also in cauldrons like the Citarum River where pathogens may mutate with emergent ramifications.

On an equally alarming note, depressed economic conditions have traditionally provided a waste disposal boon for organized crime elements. Throughout 1980s, the Calabriabased ‘Ndrangheta mafia – in collusion with governments in Europe and North America – began to dump radioactive wastes along the coast of Somalia. Reeling from pollution and revenue loss, Somali fisherman eventually resorted to mass piracy (Knaup, 2008).

The coast of Somalia is now a maritime hotspot, and exemplifies an entwined form of economic-environmental-geopolitical-societal emergence. In a VUCA world, indiscriminate waste dumping can unexpectedly morph into a Black Hawk Down incident. The laws of unintended consequences are governed by actors, interconnections, interactions and adaptations in a system under study – as outlined in the methodology section.

Environmentally-devastating industrial sabotages – whether by disgruntled workers, industrial competitors, ideological maniacs or terrorist groups – cannot be discounted in a VUCA world. Immiserated societies, in stark defiance of climate change diktats, may resort to dirty coal plants and wood stoves for survival. Interlinked ecosystems, particularly water resources, may be hijacked by nationalist sentiments. The environmental fallouts of critical infrastructure (CI) breakdowns loom like a Sword of Damocles over this decade.

GEOPOLITICAL

The primary catalyst behind WWII was the Great Depression. Since history often repeats itself, expect familiar bogeymen to reappear in societies roiling with impoverishment and ideological clefts. Anti-Semitism – a societal risk on its own – may reach alarming proportions in the West (Reuters, 2019), possibly forcing Israel to undertake reprisal operations inside allied nations. If that happens, how will affected nations react? Will security resources be reallocated to protect certain minorities (or the Top 1%) while larger segments of society are exposed to restive forces? Balloon effects like these present a classic VUCA problematic.

Contemporary geopolitical risks include a possible Iran-Israel war; US-China military confrontation over Taiwan or the South China Sea; North Korean proliferation of nuclear and missile technologies; an India-Pakistan nuclear war; an Iranian closure of the Straits of Hormuz; fundamentalist-driven implosion in the Islamic world; or a nuclear confrontation between NATO and Russia. Fears that the Jan 3 2020 assassination of Iranian Maj. Gen. Qasem Soleimani might lead to WWIII were grossly overblown. From a systems perspective, the killing of Soleimani did not fundamentally change the actor-interconnection-interaction adaptivity equation in the Middle East. Soleimani was simply a cog who got replaced.

### OFF---FTC Tradeoff DA

#### The plan’s new scope trades-off with FTC’s ongoing outreach to globally coordinate investigations---that crushes cooperative controls of AI

Matthew Boswell 19, Commissioner of Competition of the Competition Bureau Canada; Laureen Kapin, Practiced Consumer Protection Law with the U.S. Federal Trade Commission, Molly Askin, Counsel for International Antitrust at the U.S. Federal Trade Commission’s Office of International Affairs, Fiona Schaeffer, Antitrust Partner at Milbank LLP, Maria Coppola, Counsel for International Antitrust at the U.S. Federal Trade Commission, Marcus Bezzi, Executive General Manager at the Australian Competition and Consumer Commission (ACCC), “FTC Hearing #11: The FTC’s Role in a Changing World,” 3/26/19, https://www.ftc.gov/news-events/events-calendar/ftc-hearing-11-competition-consumer-protection-21st-century

MR. BOSWELL: Oh, okay. Well, I'll go back to what has been a common theme, which is supporting the ongoing personal relationships between people around the world. You know, people move in and out of jobs. You have to keep those relationships, and it can be expensive. And it can be to certain outside parties hard to justify to expend those resources on having people attend, for example, ICN workshops so that they know people around the world, they're sharing best practices, we’re not reinventing the wheel. Somebody has come up with a good way to do something, we should have those relationships where we can learn it, but it costs money to invest and to always invest in relationships.

MS. KAPIN: Well, I want to thank everyone. I think we heard a recognition that we should recognize the value of infrastructure, some common protocols and definitions and best practices can also help us overcome the challenges for international cooperation. But first and foremost, what I heard echoed was the recognition that this human glue really is the stuff that lets us stick together and accomplish our common goals. So, Molly?

MS. ASKIN: I think one thing I've also heard is the importance of the networks that we have seen evolve over, if we’re looking at the past 25 years, either be founded in the first instance or have changed in their mission to really be able to be nimble enough to address some of these important issues and give agencies a forum for interaction that can facilitate both the tools and the relationships. So thank you all very much for participating. And we are now going to go into a 15- minute break and return for the next panel at 11:30. Thank you.

MS. KAPIN: Thank you.

CONSUMER PROTECTION AND PRIVACY ENFORCEMENT COOPERATION

MS. FEUER: Okay, it’s about one minute early, but we’d like to get started. I’m Stacy Feuer. I’m the Assistant Director for International Consumer Protection and Privacy here at the FTC’s Office of International Affairs. This entire morning we’ve heard about a number of very interesting enforcement developments and challenges all over the world. Now we’re going to take a deeper dive into enforcement cooperation in the area of consumer protection and privacy. One of the most interesting aspects of our work here at the FTC on international consumer protection and privacy matters is the very wide range of issues we cooperate on, everything from telemarketing scams to online subscription traps to cross-border data transfer mechanisms, and to other privacy law violations. Equally remarkable to me is the incredibly wide range of authorities that we cooperate. So, for example, we cooperate with not only consumer protection agencies but data protection authorities, criminal regulators, and sometimes telecommunications and financial regulators. Our panelists that we have here today represent these different strands of our enforcement cooperation activities. They will highlight the issues involved in some of these different cooperation strands, and I will introduce them individually as we move through this panel. I do want to remind you at the outset that we have comment cards available, and please do send up questions. We’ll try and be a little interactive and ask some of your questions during the panel and not just wait until the end. So please ask away. So we’ve segmented our panelists into mini- groups so as to better draw out some of the cooperation strands. I’ll turn first to James Dipple- Johnstone who is the Deputy Commissioner at the UK’s Information Commissioner’s Office and ask him, and then followed by Deputy Assistant Secretary Jim Sullivan from the Department of Commerce’s International Trade Administration for their thoughts about cooperation and particularly focusing on the privacy sphere. We are so pleased that you are both here. So, Commissioner Dipple-Johnstone, can you begin?

MR. DIPPLE-JOHNSTONE: Yes, and thank you, Stacy, and thank you to FTC colleagues for your invite and the opportunity to speak with you today. I’m looking forward to our discussion of these important issues, and it was interesting to hear the different perspectives from the previous panel. A little bit about the Information Commissioner’s Office first, given there’s a range of different types of organizations on the panel, in case it helps with my comments later on. With the implementation of the GDPR, which has already been referenced this morning, I’m pleased to hear, and the new equivalent legislation in the UK, the ICO has been through a significant growth process over the past 12 to 18 months. We’ve taken on new powers, and as has been mentioned this morning, as many other organizations, we’ve been through a capability growth over the past few months, which has begun to see us work more internationally and deal with more complex and challenging caseload. This reflects in part the importance the UK Government places on data protection and consumer protection, but also the seriousness of some of the recent scandals we’ve seen, for example, that involving Cambridge Analytica recently. In granting powers, the UK Parliament has gone further than many other EU legislatures to ensure that the ICO has both the funding through its funding regime to give us the financial resources, but also the new powers to do its work in the digital age. There was significant national debate in the UK about these new powers, many of which are actually quite intrusive and are more common in law enforcement agencies than in a traditional data protection authority and the balances in checks and balances being put in place to go with those powers through the UK’s Information Rights Tribunal who oversee our work and our individual case judgments. I couldn’t come here and talk to you without recognizing there’s quite a lot of difference within the ICO as well. As well as our data protection remit, we have a remit for access to information. So one part of the office is working very hard around keeping privacy concerns and how data can be safeguarded and secured and only disclosed where appropriate; another side of the office is hearing appeals about how to make public information more widely available. We have around 700 officers and new powers to seize equipment, search premises, examine algorithms in situ for bias to make sure that they are working effectively, and audit company systems and processes. We also have powers which were touched upon this morning as well, around the power to compel provision of information from wherever and whomever holds it, which is quite a wide remit for an office of our type. We deal with around 50,000 citizen complaints each year and undertake around 3,500 investigations across different parts of our office. And we cover both the commercial sector, but also the public and law enforcement sector. In many ways, as colleagues are, we're learning as we go with these powers and these new resources. And one of those key areas of learning has been that which has been touched upon this morning. And that’s the importance of working collaboratively with others internationally. Many of the most significant files on my desk -- and I have responsibility for the enforcement and investigation arms of the office -- in the last 12 months, we’ve engaged with 50 international colleagues on various different files. And most of the major cases we have on at the moment are involving international colleagues, either as joint investigations, seconding staff to and from other offices, or sharing information and intelligence about the work we're doing. As our citizens become more aware and concerned about the use of data and as the digital economy becomes the economy, people expect this kind of international engagement. And with this in mind, we value hugely the UK's positive relationship with its colleagues on this side of the Atlantic, the FTC, but also our colleagues in Canada who have been speaking this morning. We value the different networks we're involved in. There have been mention of some of those networks already, but in particularly GPEN, the Global Privacy Enforcement Network, but also those networks which involve looking at unsolicited communications, which continues to be a significant part of my office's work. We learn a huge amount from these relationships, as well as the sort of human glue that was described this morning, just the opportunity to discuss tactics, approaches, to understand how each other work is a real positive that comes out of that work and allows us to do our jobs more effectively. To support this, we have a number of legal gateways to share and receive information. These are backed by strict protections within UK domestic law, which bite both collectively on the organization but also the individual officials within that. They are backed by criminal sanctions, and nothing focuses the mind like those. In the course of our investigation, we could use one or any of MOUs, MLATs, and we’ve heard about the challenges with the time scales that MLATs take. Membership arrangements, such as GPEN or the International Conference of Data and Privacy Commissioner arrangements or, indeed, Convention 108. This very much depends on the exchange of information, what's involved, who it’s going to, who’s asked for it, and what we need to do our work. Of particular note are the DPA 2018, which is the Data Protection Act in the UK. That contains formal information gateways. That allows us to share information for law enforcement purposes or for regulatory purposes where there’s an overlap and there’s a public interest. Of relevance to the FTC in particular is Schedule 2 of the DPA. That sets out the conditions for public interest and information- sharing within the UK law. And I understand the UK has been working through these for a number of years from the 1998 act and now into the 2019 act and working with colleagues at the FTC through the SAFE WEB Act provisions and the criteria for sharing information there with foreign enforcers. And that's been a huge positive. Just in the short time I've been with the Office over the last two years, there have been a number of cases that we've been working on, on sharing information and understanding. And, of course, this goes alongside our EU work. We mustn’t forget that. We are a competent authority under the GDPR, the EU provisions for the one-stop-shop mechanism. And around a fifth of those cases in the mechanism over the past year have involved the UK as either a lead supervisory authority or a concerned supervisory authority. Many of the big issues we are grappling with is privacy authorities, algorithmic transparency, adtech, microtargeting and profiling of citizens, part of the bread and butter of those cases we're working through. And our ability to work with international colleagues, in particular the FTC, has been really helpful in us discharging our role, notably on the Ashley Madison file, but also on other confidential matters more recently, where we found the insight afforded by our bilateral arrangements with the FTC help us fill in the missing pieces. They help us make better investigations. We know that the FTC has helped us by using its SAFE WEB powers to obtain information for us, in particular with some of the -- I think you call them robocalls here, but unsolicited communications in the UK, and that information has been hugely beneficial in protecting UK citizens. And we hope the reciprocal has been helpful to the FTC and colleagues here. And I’m mindful of time, but in closing, I'd just like to say we're very keen in the ICO to continue to use these positive engagements and continue to build them, particularly as you come to look at the renewal of the SAFE WEB Act. Thank you. MS. FEUER: Thank you very much. Deputy Assistant Secretary Sullivan, how does the issue of privacy enforcement cooperation come within your purview at the Department of Commerce?

MR. SULLIVAN: So in my role, I'm in the International Trade Administration, which is one of the agencies at the Commerce Department, and one of the offices that I oversee is responsible -- they are the US Government Administrator for and our interagency lead on different privacy frameworks -- international privacy frameworks, including both privacy shield frameworks, the EU and US Privacy Shield and the Swiss-US Privacy Shield. We're also very actively engaged in promoting the expansion of the Asia-Pacific Economic Cooperation and Cross-Border Privacy Rule system, APEC CBPR as it’s called. And we work extremely closely with the FTC on those issues around the world as we see a growing number of countries grappling with privacy while trying to balance innovation at the same time, which as everyone here knows, I'm sure it's not always the easiest formula. So that's a quick summary of what we do at Commerce. I'll leave it at that for now.

MS. FEUER: Great, great. Well, it's interesting to hear you both speak about the importance of enforcement cooperation in the privacy area, James, for your agency on many, many individual files and Jim as the sort of overarching systemic systems for cross-border transfers. So I want to follow up with a few questions. So, James, sort of the elephant in the room, we've heard a lot this morning in the first panel about privacy as a "barrier" to regulatory enforcement cooperation. And I’m wondering what your view is of that statement or assertion and what kinds of tools do agencies need to cooperate effectively given some of these limitations and, of course, in privacy enforcement investigations?

MR. DIPPLE-JOHNSTONE: Yes, yes. And it's not something we've -- you know, which is uncommon to us. We get that call often. I mean, we want to be clear, we're not the “ministry of no.” But, actually, what’s really important in this space is to do that groundwork and that thinking about what information do you need, how is it going to be transmitted, how is it going to be secured, what purpose is it going to be used for. And we often find there are many avenues and routes to be able to share information. We also get the -- interesting when we ask for information, we sometimes get from colleagues internationally, we can't because of privacy. And, oh, that's an interesting concept. How do we work through that? We've often found there is a way through. Sometimes where these arrangements are being agreed internationally and where, for example, it was mentioned this morning about the challenge with the advent of the GDPR, IOSCO working with colleagues at the EDPB and needing to sort of tease through that, it can sometimes be tough to be the first going through that process, but once those processes are in place, people understand how they work, those relationships are built, that common understanding is built. Things do flow a lot quicker and a lot easier in subsequent cases. And so very much it’s that sort of keep talking, keep engaging. And, importantly, I've recently come back from an international conference working group, where one of the key challenges has been that with the scale and pace of change internationally with enforcement agencies and enforcement bodies, some of which, again, was referenced this morning, just keeping pace of who can do what where and with what data is really important. So if those international networks can really help their members understanding where the right levers are and how their respective national laws work, that can only be a good thing.

MS. FEUER: Thank you. Well, Secretary Sullivan, in your experience, how important has the issue of enforcement cooperation been with the foreign governments and stakeholders that you have negotiated these international data transfer mechanisms with, and how important are the powers that the FTC has in those discussions?

MR. SULLIVAN: So, again, I'm going to refer to the three frameworks that I cited just a moment ago. And both the enforcement power and the international cooperation authority granted to the FTC under the SAFE WEB Act are both integral to the functioning of those frameworks, I think. Without them, they would lack legitimacy or credibility. You have to have some teeth behind these frameworks so that folks know that companies are going to be held accountable for the pledges and the promises and commitments they're going to make to comply with the principles or the practices that they have pledged to comply with in accordance with these frameworks. I don't know how that would be possible without what we just cited to, both the powers to enforce but also to coordinate with other enforcement agencies cross-border.

MS. FEUER: Thanks. As a follow-up, I asked you about how important this is for foreign governments, but I'm wondering what you hear from your industry stakeholders here in the US.

MR. SULLIVAN: I don't want to generalize. We certainly hear a lot. I think there's a strong recognition among most of the stakeholders that we engage with, sort of along the lines of what I just said. I mean, first of all, what would be the incentive to comply with something that really didn't have any teeth? I think they know increasingly how important it is to align their practices with these frameworks, given a lot of the developments. We’ve seen recently, and it's I think -- they generally -- and I am generalizing -- they do want to see strong frameworks that are actually enforceable and, they do want to see, as I think James just alluded to, greater collaboration because that’s going to lead to more consistent best practices or principles and approaches to a lot of these issues as opposed to just this fragmented, diverse, ad hoc approach to a lot of these same dilemmas that we're all facing.

MS. FEUER: Thank you. I want to ask my fellow panelists, while we're talking about privacy, whether there was anything that they want to add in sort of response to what Commissioner Dibble-Johnstone and Secretary Sullivan were talking about. So does anyone want to -- it looks like Marie-Paule wants to hop in.

MS. BENASSI: Yes. What I would like to say is that we should make a difference between issues related to privacy and to the confidentiality of investigations. And very often, indeed, it is quite a common answer to refuse cooperation, to say, oh, no, we cannot share information because of problems of privacy. But in the European Union, first of all, I think we have solved this, and I think that our GDPR itself helps a lot to clarify that authorities can exchange information, including information which contains personal data. And so this enables, in principle, very seamless type of cooperation in the European Union, because for law enforcement purposes, we can exchange this information between authorities in one member state or in other member states. And this -- I think in this way, the GDPR is an enabler. And when we look into the implementation of the GDPR for international cooperation, we should also look at it in the same way as an abler and enabler, because if it is respected; then exchange of information for law enforcement purposes should be facilitated. And, for example, we are also doing adequacy decisions, for example, with some other countries in order to also create the seamless facilities, including for law enforcement purposes.

MS. FEUER: Thank you. Anyone else? Kurt.

MR. GRESENZ: So I agree with Marie-Paule's sentiments there. You know, the issue that we encountered at the SEC as a civil agency with administrative investigatory powers, while the Department of Justice was out in front with an umbrella agreement to facilitate cooperation in the criminal sphere under the public interest mechanism, which is something that James talked about at the beginning, it was less clear how that applies in the civil or administrative context. So the step that IOSCO took to negotiate what is the first administrative arrangement under the GDPR will enable the second step of what Marie-Paule talked about, which are transfers of personal data from the EU to jurisdictions and authorities outside the EU. And now with that process, as Jean-François in the earlier panel talked about, having been blessed by the European Data Protection Privacy Board, we in the security space are looking forward to the data protection authorities in the 28, possibly 27, EU members states adopting that and approving that and so it can be the standard with the securities authorities who are IOSCO members.

MS. FEUER: Thanks. So I want to shift us now from what has been a privacy-heavy conversation to more of a focus on consumer protection. Our second pair of panelists represent two of the different strands of the kind of consumer protection enforcement cooperation we do here. So to hear about the EU enforcement model, we'll have Marie-Paule Benassi from the European Commission’s DG Justice, and to hear about our cross-border work with our Canadian criminal counterparts, we'll hear from Jeff Thompson, Acting Superintendent in Charge of the RCMP's Canadian Anti- Fraud Centre. So, Marie-Paule, can you start us off?

MS. BENASSI: So thank you, Stacey and thank you for the FTC to invite me. So, first of all, I would like to remind you that the European Union is currently counting 28 member states, and it's very well known for being something very complicated, and I would like to try to break that myth. But unfortunately, I think, or fortunately for a better understanding of the complexity of the Union, I think that Brexit and the interest which this is bringing in the headlines is also maybe shedding some light on why it is so complicated. So we have an integration of EU-level and national laws, a model, and this is where I think it’s simple. It's based on a very simple principle. We have one EU law in a certain domain, and it tries to harmonize national laws using key high-level principles. What is not harmonized is how this law is implemented. So it is -- except in a very few cases, it is implemented nationally. It is enforced nationally, and we try to do this in a way which preserves the diversity of the enforcement model in the member states. And so in the area of consumer protection, it is how it works. And the European Commission for which I'm working has no direct enforcement power. It is the member states which have the enforcement powers. So when I speak of enforcement, it means enforcement of the law towards businesses and other possible subjects because the European Commission is in charge of checking that the member states are enforcing the laws correctly, but we are not directly involved to stamp out illegal practices. In the area of consumer protection, so we have a strong role. And this role has been strengthened in the recent past. What is our role? Our role is to facilitate the cooperation of the member states because this is a EU, I would say, a harmonized law, and we want it to be implemented in a consistent manner in all the member states. And to do this, the only solution is cooperation. So we have a long tradition of cooperation inside the European Union and now we are doing it via a law which is called the Consumer Protection Cooperation Regulation. This law is establishing the framework for cooperation. So we start by first saying even if the member states are very different, they should have similar type of powers, so investigative powers. For example, the power for mystery shopping, the power to request information on financial flows, the power to obscure illegal content online. Another thing, also, is the framework for cooperation. So we have two types of cooperation now in our new legislation. One is what we call the bilateral cooperation, the more traditional cooperation, where one member state asks -- requests enforcement cooperation from another member state. But now we have this new system which is E- level coordination. And there, the European Commission has a new role because we have a role of market surveillance. And from this role, we can ask the member states to check some practices that we think are likely to be illegal. And if the member states find that there is sufficient evidence to start an investigation, then the Commission is coordinating this investigation. We also have a new power in terms of intelligence I mentioned. And we are also doing coordination of priorities. So, in fact, the role which we have is quite strong. And the new model, which we are going to implement from January next year, in fact, is already functioning, maybe in a lighter way. And it's working. So we have in the past done some coordinated actions, which are concerning. For example, illegal practices by big companies operating at the level of the European Union. Today, we are publishing a press release on an action done in the field of car rental, for example. So with the authorities, we have been working together with the authorities to find -- to analyze bad practices of the five leaders of this sector, and we wrote a common position asking these companies to change their practices. They made commitments, and now we have been monitoring the commitments and concluding that finally these companies are implementing these commitments. This is a negotiated procedure, so this is another element I would like to stress. These EU-level actions are not based on strong enforcement means because they don't exist at the European level. They are based on a coordinated approach and the cooperation with the traders. If the traders refuse to cooperate, do not cooperate sufficiently, or do not follow their commitments, then what is going to happen is coordinated enforcement action by the member states. And we have just added something very recently which is a system of fining that can be applied for this kind of EU-level infringement and coordination of the fines. And this is a big -- it's not yet completely finalized, but it's going to be a big step forward because in certain member states, they don't even have a fining system for consumer offenses. So we are building the system. So for the future, what is -- what can we do? We can do international agreements. So there is a possibility on the basis of this framework to agree international cooperation agreements with certain countries. And the framework which I've described can be applied also with the said countries to the extent possible, of course, depending on the type of base laws that exist in the member states. And what I could say is that we would like to start discussing on the basis of this new regulation with the FTC, if we can progress such an agreement. Why an agreement would be necessary? Because it's important that the formal part is there. Because as we heard from various speakers, the formal part is an enabler also for an efficient cooperation. This system, however, has several challenges. One of the challenges, as I said, it’s based on negotiation with traders. So it doesn't work when there is fraud, fraudulent operators. This is really required to develop additional cooperation, for example, with police forces because in most of our EU member states, they don't have this possibility of going against fraudulent operators. They need the cooperation of police, so this is an area where we need to develop in the future. And then relation with competition, relation with data protection, these are the future avenues for our cooperation. Thank you.

MS. FEUER: Thank you very much, Marie- Paule. And that was the perfect segue to Jeff Thompson, who is from the RCMP's Canadian Anti-Fraud Centre. And, Jeff, maybe you can sort of talk us through a little bit about what some of the tools and challenges you face and we face in cooperating on US- Canada cross-border fraud matters.

MR. THOMPSON: Sure. Thank you, Stacy. It's a pleasure to be here today to talk about international cooperation and consumer protection. Since the start of my career, I've learned that cross- border fraud was an evolving criminal market that cannot be tackled by any one country alone and even more so today. Consumer Sentinel reporting shows more than 1.4 million reports were received in 2018, up from 433,000 in 2005. Similarly, the Canadian Anti- Fraud Centre data shows annual losses to fraud continues to increase, reaching 119 million in 2018, a 495 percent increase since 2005. So it's easy to say that mass marketing fraud and cross-border fraud continues to be a threat to the economic integrity of Canada and the US, furthermore, if you consider technology, voice-over- net protocols, social media, virtual currencies, money service businesses, and other key facilitators that continue to provide criminals and criminal organizations behind a scam opportunities to operate across multiple international jurisdictions. And as we heard this morning, while this is an evolving threat, there is good news. There are, indeed, existing strategies that do exist and tools that provide an effective approach to attack on this criminal market. In fact, as we heard this morning again, the history between Canada and the US is long. It dates back to 1997, when Former President Clinton and Prime Minister Chretien met at the first US Cross- Border Crime Forum. It was at this meeting that telemarketing fraud first got identified as a major Canada-US cross-border crime concern. And it also made a number of recommendations, including the establishment of a multiagency task force, the development of consumer reporting and information- sharing systems, enforcement actions, and better public education and prevention measures. Since then, both US and Canada cooperate to implement and refine a number of these strategies, and while all recommendations made are important, I'm going to focus my discussion on the existing multiagency task force, or in today's terms, strategic partnerships. This case and work that the partnerships have done showcase an effective enforcement approach. They highlight intelligence-led policing and integrated policing models, along with providing insight into some of the tools and approaches to consumer protection. So if we consider the cross- border fraud partnerships as an intelligence-led approach, what we see is a group of key stakeholders joining efforts to achieve a common enforcement objective, namely, reducing fraud. To give you a practical idea of this, I think back to some of my early meetings at the Toronto Strategic Partnership. I did not fully recognize or appreciate the significance of the discussions held around the table. Members from several different agencies and organizations discussed top reported scams, scam trends, top offenders, current investigations, and gaps and challenges in enforcement options. Oftentimes, this intelligence-led approach was started by members from the Federal Trade Commission or the Canadian Anti-Fraud Centre, bringing intelligence developed from their respective central databases, Consumer Sentinel and the Anti-Fraud Centre database. This dialogue helped identify the new and emerging scam trends and discussion around the key facilitators to the scams. It also helped to coordinate joint priority setting, identify lead agencies, investigative assistance, and actions required to complete the files, and in many cases helps with deconfliction amongst the agencies. Sharing information around the table was a key factor, and as long as there’s a willingness to share, there is a way to share. There is also a common trust and understanding amongst the partners to share information within the confines of law. Thus, the partnerships serve as an intelligence-led approach in as far as they create a platform to share and synthesize information from multiple perspectives. Turning now to consider the partnerships as an integrated policing approach, we begin to realize that criminals and criminal markets can be disrupted through civil, regulatory, or criminal investigations and that different agencies and different laws all play a role. If we dissect again the Toronto Partnership, we have a minimum of eight different organizations: the Federal Trade Commission, the Royal Canadian Mounted Police, the United States Postal Inspection Service, Toronto Police, the Ontario Provincial Police, the Ministry of Consumer and Government Services, the Competition Bureau of Canada, and the Ministry of Finance. The FTC alone has 70 different laws that it enforces. Who really knew that the Ministry of Consumer and Government Services enforces numerous consumer protection laws such as the Loan Brokers Act, which can be used to go after the advance-fee loan scammers? Or that, again, as we heard this morning, CASL legislation also has clauses that allow for foreign enforcement to request assistance from respective Canadian law enforcement partners? At the heart of an integrated policing model is a give-and-take approach. And in the US-Canada cross-border partnership context, this approach is formalized by MOUS. As recent as 2017, the Federal Trade Commission and the Royal Canadian Mounted Police formalized an MOU that identifies best efforts that participants can use to further the common interest of combating fraud. The language used highlights the foundation of information-sharing and cooperation. Participants shall share materials, provide assistance to obtain evidence, exchange and provide materials, coordinate enforcement, and meet at least once a year. So, again, if we take a practical view, the strategic partnership model against cross-border fraud uses intelligence-led and an integrated policing approach that allows investigators from Canada and the US to move beyond simply coming together to talk about cross-border fraud concerns to developing investigative plans that identify investigative steps and processes needed to gather that evidence. Each participant brings a range of tools that can be leveraged to ensure the effective cooperation. One such tool that we’ve heard plenty of today is the US SAFE WEB Act. From a Canadian-US perspective or from the Canadian perspective, I mean, it provides us an avenue to formally seek investigative assistance in the US from the FTC. It also formally acknowledges by name some of the regional partnerships that exist today. This act alone has assisted strategic partnerships in countless cases, at least 22 by my count since 2007, and as we’ve heard, a lot more. These cases have led to arrests -- civil arrest charges, civil forfeitures, and, most importantly, victim restitution, which in the Canadian context is often rare to see. This includes Operation Telephony, which involved more than 180 actions brought by the Federal Trade Commission, including actions in Canada and the US, and it also includes the Expense Management Case that we heard about in the last panel involving $2 million that was eventually turned over to the FTC for consumer redress. And while there's a history of success and continuing work and outcomes to look forward to, we know that the criminals adapt. Today's frauds typically involve solicitations coming from one country targeting consumers in another country and funds going to yet another one. Mass marketing fraud is truly a transnational crime. We know that in a number of cases, the criminals and criminal groups involved are deeply rooted in Canada and the US and that moreso today, the work being done by these partnerships exposes these international networks who are also providing each other an opportunity to leverage our international networks to tackle this problem collectively. And we’re already doing this to some extent. The International Mass Marketing Fraud Working Group is another example of how Canada and the US cooperation has extended beyond North America. As recently as March 7th, this group announced -- or the US Department of Justice announced the largest ever nationwide elder fraud sweep, and the International Mass Marketing Fraud Working Group played a role. At least eight different countries were engaged. At the same time, there are other challenges, such as the willingness of other countries to identify mass marketing fraud as a transnational threat, whereas in many cases fraud or financial crime is not a priority. And this even holds true today to some extent. The parties and law enforcement agencies are subject to change, and the ability of any one agency to solely lead a partnership can be impacted by this change. Albeit, there's still partnership models that work in which chairs to partnerships rotate and changing priorities are acknowledged. In May of 2018, the RMCP coordinated a national mass marketing fraud working group meeting whereby we acknowledged the changing nature of mass marketing fraud and sought to renew our efforts. We also sought input from key US stakeholders. The Federal Trade Commission and the United States Postal Inspection Service were at these meetings. And while work continues to renew this renewal, such as the emergence of a Pacific partnership to replace Project Emptor, there's still work to be done. So in concluding, there’s a long and successful history of Canada-US enforcement in consumer protection, and that demonstrates effective cooperation through integrated and intelligence-led approaches and that this continued cooperation is integral to combating this transnational crime today. Thank you.

MS. FEUER: Thank you very much, Jeff. So I think that we now have a couple of very interesting issues out on the table about consumer protection and enforcement cooperation, both the EU model of the CPC network and the FTC Canada model, which focuses on these seven strategic partnerships that exist in Canada. So I want to ask a few questions of our panelists, Marie-Paule and Jeff Thompson, and then I do want to turn back to Secretary Sullivan. But, first, Marie-Paule, I did want to ask you one thing. I know that the CPC network uses a technological tool to facilitate the cooperation among the 28 member agencies. I'm wondering your thoughts about how well that works and how it might work in a more multilateral context.

MS. BENASSI: Thank you, Stacy, for this. So, first of all, I think I would like to make two types of tools. One is the system which we use to network, and I would say this is based on technologies of collaborative websites. And we have been using them now since several years and we are quite confident that it is safe for exchanging information and including information on containing personal data, for example, on businesses or on witnesses, and also it can be adapted. But currently, the CPC system doesn't contain a lot of cases. So it's growing organically, I would say. And it's also very much used to exchange information, best practices, for example. In the future, we are building something which is going to be a case management system and it will contain several modules, including a module for our external [indiscernible]. So we are going to open this to various entities -- NGOs, entities. And so we are going to build doors, in fact, in such a way that the two systems can communicate, but without having [indiscernible] you know, for -- so that the stakeholders will only see their external areas. And I'm quite confident that we can build the same type of modules for international cooperation with our technology. But what I would like to say is that we are also developing technologies for online enforcement tools. And what we want is to create, for example, a system where we would have an internet lab that could be used by the various member states, and we are also building capacities of administration in the EU countries. We are developing training, and we think also that this kind of tools could benefit from pooling of expertise from various agencies, including in an international context.

MS. FEUER: Thank you. So I want to turn -- before I turn back to Jeff Thompson, I want to turn back to Secretary Sullivan and ask what are the tools that can be used to facilitate cooperation under the various cross-border mechanisms? And why are they important?

MR. SULLIVAN: So in terms of why they’re important, I mean, again, a lot of this is probably self-evident to those in this room, but the data explosion we've seen is only going to continue. And we now have these cross-border data flows that really do benefit stakeholders across our societies and our economies. So you’ve seen these cross-border data flows help enable consumers, for example, to access more and better services and products. They help our companies to increase the efficiency of operations and innovation, and they help nations in terms of their competitiveness and their ability to help create jobs and facilitate economic growth. So this is all great. The problem we're dealing with is that different counties now take very different approaches to how they regulate these data flows specifically on privacy. And so what I wanted to just touch on a bit was what we do, the Commerce Department, in conjunction and partnership with the FTC to deal with this issue, this dilemma. How do you continue to facilitate these cross-border data flows when you are dealing with countries that have all adopted varying approaches, legal regimes, or policy priorities. I touched on the three frameworks, and I just quickly wanted to go through some of the tools within those frameworks, if I could, which from our perspective are absolutely critical to digital trade because, again, right now, there is no single comprehensive binding multilateral approach governing these cross-border data flows. So you know, again, I'm repeating myself a bit but we have stakeholders that we meet with all the time coming in, telling us about this constantly shifting and evolving and rapidly accelerating policy landscape that they have to deal with. So in response to this challenge, one approach that we've taken, as I alluded to earlier, for example, is the APEC CBPR system. And it's basically a voluntary enforcement code of conduct based on internationally recognized data protection guidelines. It establishes principles for both governments and for businesses to follow to protect personal data and to allow the data flows between APEC economies. To join this system, an APEC economy has to designate a third party called an accountability agent. And that accountability agent is empowered to audit a company's privacy practices and take enforcement action as necessary in some instances, but if that accountability agent cannot do that, resolve a particular issue, an APEC economy, their domestic enforcement authority serves as a backstop for dispute resolution. And in the United States, the FTC is our designated regulator, obviously, and enforcement authority for the CBPR system. And they enforce the commitments that are made by the CBPR participating companies to comply with the principles that they have committed to comply with. I do want to note all CBPR participating economies also have to join the cross-border privacy enforcement arrangement, CPEA, to ensure cooperation and collaboration among their designated enforcement authorities. To date, if memory serves, I know the FTC has brought four enforcement actions against companies for making deceptive statements about their participation in CBPR, and it’s also used its authority under the SAFE WEB Act to enhance cooperation with other privacy and data protection regulators within APEC. So, again, as I noted at the outset, FTC enforcement and international cooperation are absolutely critical to the credibility, to the integrity, and the success of the CBPR system. There are currently eight economies in APEC of the 21 economies participating in the system: the US, Japan, Mexico, Canada, South Korea, Singapore, Australia, and Chinese Taipei. And the Philippines is currently working on joining the system as well. I want to underscore that if this system were to scale across APEC, the framework would help underpin over a trillion dollars in digital trade. So we regard that as a very big priority and, again, we cannot emphasize enough just how critical the FTC is to that framework. And it's also a similar dynamic with the EU. It's been, the FTC, extremely integral to the success of both privacy shield frameworks. We all know, and it’s been touched on, about a year ago, GDPR was put into effect in Europe. And like the predecessor directed before it, it imposes certain restrictions on the ability of companies to transfer certain data from Europe to other jurisdictions, so we have Privacy Shield. And, again, like CBPR, it's a voluntary enforceable mechanism that companies can use to promise certain protections for data transferred from Europe to the United States, and the FTC enforces those promises made by Privacy Shield-participating companies in its jurisdiction. Again, I talked about how big APEC was and how these data flows underpin trade there. The EU is actually the largest bilateral trade investment relationship with the US in the world. That, too, is valued at over a trillion dollars. And I know the Transatlantic economy accounts for about 46 percent of global GDP, about one-third of global goods trade, and the highest volume of cross-border data flows in the world. And the Privacy Shield program is absolutely key to underpinning this economic relationship. We have about 4,500 companies now participating in the program. They've all made these legally enforceable commitments to comply with the framework, and they range from startups and small businesses to Global 1000 and Fortune 500 companies across every sector, from manufacturing and services to agriculture and retail. And I do want to note that about 3,000 -- nearly 3,000 -- of those companies are actually SMEs, so it’s not just the big tech companies that we're talking about. So to help protect data against improper disclosure or misuse, the Commerce Department and the FTC do work together, and they move swiftly to ensure that participating businesses who join Privacy Shield and certify under Privacy Shield are complying with their obligations. And over the last two years, Commerce, for example, has implemented a buying arbitration mechanism and new processes to enhance compliance oversight and reduce false claims. And by the same token, the FTC has enforced companies’ Privacy Shield declarations and commitments by bringing several cases pursuant to Section 5 of the FTC Act, which prohibits unfair and deceptive acts. We also refer false claims participation in the program to the FTC, which have often resulted in FTC settlement agreements. And under those agreements, the FTC can obtain certain remedies such as remediation measures and compliance monitoring that are, I think, generally otherwise unavailable in an enforcement action. And to date, the FTC has brought about four false claims cases. So, again, as with CBPR and APEC, the FTC has been just an essential element in bridging the gap between the EU and the US approaches to privacy. And, again, I'll just end by saying you're not going to get buy-in legitimacy or credibility without that enforcement power and that collaboration and cooperation that we're all talking about today. So thank you.

MS. FEUER: Thank you very much. I want to turn back to Jeff for a minute. So everyone has done, I think, a really fantastic job of outlining the tools. And, Jeff, you talked about these partnerships, and I guess I'd like to know a little bit more about the partnerships in terms of their status today, whether you think that they kind of could be adapted for a more, I guess, global enforcement model and whether you have any ideas about how cross-border cooperation and consumer protection matters could be improved.

MR. THOMPSON: Sure. Thanks, Stacy. So, yeah, the status of the partnerships -- as I mentioned, the partnerships stem from a 1997 meeting. There were three partnerships created across Canada -- one in Vancouver, one in Toronto, Ontario, and one in Montreal, Quebec. At one point in time, we saw this increase to seven Canada-US cross-border partnerships, but that wasn't maintainable for a number of reasons, primarily being there wasn't a lot of enforcement work in Atlantic Canada and Saskatchewan, for instance. So, I mean, things changed. And, again, as I said, priorities change. So right now we have three partnerships, including the new Pacific partnership which replaced Project Emptor. The Montreal Canada project, Project Colt is also defunct currently, but I mentioned we're working on renewing these efforts and coordinating something there. So, right now, as it stands, there’s the Alberta Partnership and the Toronto Strategic Partnership, and the Montreal Partnership. As far as improvements go, one area for I think more global enforcement cooperation that we discuss a lot at the office is disruption. And by disruption, I'm not talking about actual enforcement action. I'm talking about cooperation with private sector partners, using the data that we capture in our central fraud databases to block, say, shut down foreign numbers, to get bank accounts blocked. In Canada, we're sharing information with banks and credit card providers to go after the subscription traps, the continuity schemes, the counterfeit sales of other goods online and nondelivery goods. So the information we house that there's other alternatives to enforcement, and those are some of the areas that need to be improved on internationally.

MS. FEUER: Thank you very much. I now turn to Kurt Gresenz, who is the Assistant Director at the SEC’s Office of International Affairs. And, Kurt, as we heard earlier from Jean-François Fortin, securities enforcement collaboration is truly global and truly impressive, I have to say. I'm interested in hearing more from your perspective to inform our thinking about the cooperation in the areas that fall within the FTC's jurisdiction.

MR. GRESENZ: Thank you, Stacey. Let me start out by giving the disclaimer I’m required to give, that these are my views, only my views, and not necessarily those of the Securities and Exchange Commission, its Commission, or its staff, which I like doing because that frees me up now to say what I would like to say, which hopefully follows what the SEC would say. Okay, so let me start out with building on some of the themes that have been talked about. One of the reasons, I think, that we have been successful in forging a pretty broad alliance of securities authorities around the world that are cooperating is by virtue of the fact that the IOSCO principles of securities regulation are part of what national economies are assessed against as part of the financial sector assessment program that is done by the IMF. So essentially when the IMF and team comes into a jurisdiction to grade you on your financial resiliency and financial regulation, they're going to look at the IOSCO principles. And the IOSCO principles say that your securities has to have certain minimum powers and also the ability to share information across borders for enforcement purposes. And I think that has been one of the key tools that has caused one of the things that Jean-François talked about from early adoption, say two dozen countries in 2002 under the MMOU to where we are now as 121, that it's an easy way to getting a failing grade by not being signed up to the MMOU. And national legislatures have, for the most part, made the amendments to their domestic law to enable them to meet the MMOU standards. So in the scale of cooperation, Jean- François talked about over 5,000 requests that were made under the MMOU last year. The SEC is, as you might expect, a big user of those, probably 600 to 800 of those were ours. So we have an incentive in that process working smoothly. And where the parallels are, I think, for me is when I talk to my colleagues at the FTC, we're talking about consumer protection. And the concept of investor protection is essentially the same concept. The investor is our consumer. And one of the focuses of our enforcement priorities is on the mom-and-pop investor, the retail investor who really is somebody that will benefit from an active securities authority acting in their stead. In the securities context, one of the things Jeff talked about was he mentioned you have people set up in one country, you have targeting of investors somewhere else and then you have sending the funds elsewhere. I would actually build on that. In an ICO case for example, the entities might be incorporated in two or three different jurisdictions. The investors might be targeted in the UK, Australia, and the US. They might be storing their documents in a fourth or fifth jurisdiction or in the cloud so it’s very difficult to, you know, figure out where those are to begin with. So those are the challenges, and building through those, and I think we've had a good discussion of the privacy challenges, but two things I want to mention that also came up in the earlier points is one is what I call regulatory arbitrage, which somebody called regulatory competition. Cooperation works very well, but we also have to be cognizant that there are competing policy concerns with how we approach our enforcement tasks. So for example, a sophisticated fraudster is going to have some basic awareness of what the regulatory scope is in a given jurisdiction. And these people may set up shop in particular places and do things in particular places for taking advantage of whatever the legal system is there, and often that legal system may be one that is less conducive to cross-border sharing. So then as we advance down the path of the investigation, either related to that or other things, regulators move at different speeds. They may have different approaches as to how they approach witnesses. Are we going to go let everybody know in advance? I will tell you that from an SEC investigative perspective, which I'm sure people around the room and at this table would share, that people acting in a manner that is entirely consistent with their own investigative processes and procedures, but that may be contrary to what somebody is doing elsewhere. Those are things that are going to almost always result in people wanting to control their own investigation, perhaps at the expense of greater coordination. And I think that's where, you know, discussion is certainly important. And I don't know if this is really privacy. Maybe this goes to confidentiality. Also, different authorities have different legal requirements when it comes to what types of information they have to disclose in a particular setting. So let's say that we transmit files to an authority who assigned assurances of confidentiality and then we read a newspaper report that talks about things that we disclosed on a confidential basis, and then we drill down and it turns out that, well, yes, they kept it confidential but not from a lawful request, and it might be a Freedom of Information Act request or something like that. So that’s obviously going to be something that maybe you don't anticipate on the front end, but it might chill information exchanges going forward. And then the case of the ambitious prosecutor, he or she who may leak to the press. I know that that’s always a source of great consternation, whether it's the SEC or DOJ or elsewhere, when you read confidential details that are unattributed by a source who’s not authorized to speak about something that you thought you transmitted in confidence. So I do want to talk about those. I think the last thing I want to talk about in challenges is one of the things that we are dealing with frequently at the SEC, and I think we sort of have a little bit of a handle on it, and I know it must be something that the FTC confronts, also, but the law has been unsettled for a number of years as it relates to the Electronic Communications Privacy Act and what type of records we can get from internet service providers, and maybe who a subscriber is, who is the identity of a particular account. Maybe that’s something that is reachable, but what about the cases where you know there's communications and you want those communications, and maybe there's impediments there. I know that the criminal authorities can go through a warrant process for things like that. What is the recourse of an administrative agency where we don't necessarily have recourse to a criminal mechanism to show just cause, due cause, probable cause, reasonable suspicion, whatever the standard is. So cooperation works, but we have to be, I think, vigilant of the challenges to that, and like we’ve already talked about in the GDPR space, how do we get to a solution that works for most people most of the time.

MS. FEUER: Thank you very much. So let me ask you one follow-up, which is about your statutory authority which underlies your ability to cooperate. I know that you have some tools that you've had since the 1970s that are somewhat similar to what we have in SAFE WEB. And I'm wondering how they actually underpin what you do and how effective you think having that statutory authority has been.

MR. GRESENZ: So there are three sections that I'll talk about. And absent these three things, we would not be able to meet the IOSCO principles, which means we wouldn't be able to sign the MMOU, which means the Treasury Department would be unhappy when we were adjudged to be noncompliant in an FSAP in these areas. The first one is what I call our access request authority, and what this says is the Commission has discretion to share confidential file materials with any person, provided that person demonstrates need and can make appropriate provisions of confidentiality. And I think more or less that tracks what the FTC can do, although maybe the Safe Web is restricted to regulatory authorities, where the SEC, in theory, has discretion to share with any person. Our Commission has delegated that authority to exercise the discretion to the staff in the area where I work with, which is cross-border enforcement cooperation. Now, typically, my office will look at any request for access for SEC files that comes from a foreign authority, and we will make a baseline determination of whether sharing is appropriate with that organization or not. Obviously, if they’re an MMOU signatory, that question is easier. So that's the first one, the ability to give access to materials and files. The second one is to use our compulsory power on behalf of a foreign authority. And I think, again, here, there's probably parallels all down the line with the FTC's existing authority, is we have to make sure that there's -- well, for us to start with, the requesting authority has to be a foreign securities authority, which means do they enforce laws that fall within their securities regulation. Number two, the authority has to be able to provide reciprocal assistance. And, again, if it’s an MMOU party, that's already written in and baked into our principal cooperation mechanism. The sharing has to be consistent with the public interest of the United States, and we go through that process of the deconfliction process with the US Department of Justice. So that's something else that is taken care of. And one interesting fact here is it's not necessary for the conduct to be a violation of US law. So, for example, if it's illegal in Country X but it may not be illegal here, we do have the authority to assist in appropriate circumstances. The third piece after the access request and the compulsory authority, you know, of course, you list three and then you forget the third one. Let me come back to that one. I should have made a note when I was thinking about this.

MS. FEUER: Okay. Well, that's great. So we have a lot here to work with to start us off on questions, and there are so many strands to the strands that we've brought out that it's hard to know where to start, but I am going to start with two questions that have come in. And the first really builds on, Kurt, what you were just talking about, that your investigative assistance power doesn't require the law violation to be a law violation in the United States if it is a law violation in another country. And we actually have a question on that. And this is, I think, to the consumer protection and privacy areas where I think laws diverge more than they do in the securities arena. But the question is this, when an act or practice would violate consumer protection law in a consumer's home country but it isn’t against the law in the seller's country, should agencies cooperate? When there is a conflict of laws, what should consumer and privacy agencies do? And I'm going to throw that out to the panel and see who hops on it. James?

MR. DIPPLE-JOHNSTONE: Is it helpful to say just in terms of our experience at the ICO's offices for that very reason is our legal gateways are framed with a public interest test? And that's a very widely drawn public interest test, so it doesn't need to be a specific offense in the UK for us to be able to cooperate and exchange information, for that very reason is there is quite a variety.

MS. FEUER: So that's helpful to know. By way of background, the FTC's -- yes, I work for the FTC -- the FTC’s authority to obtain investigative assistance for foreign counterparts relates to unfair or deceptive acts or practices, as well as violations of laws that are substantially similar to those that the FTC enforces. So we have a little bit more defined statutory language, although as you can see here, it allows to us cooperate with a wide variety of agencies. Anyone else want to opine on this first question from our audience? Marie-Paule?

MS. BENASSI: Yes, thank you. It's a very important and interesting question. So in the European Union, we have laws which are harmonized, fully harmonized, or minimum harmonization. So our system of cooperation for enforcement actions are based on the minimum harmonization, when it is minimum harmonized. So it means that you cannot take an enforcement action for a violation which goes beyond the minimum harmonization and which would not be the same in one -- in your member state where the trader is established compared to the member states of the consumer. But requests for information and other types of assistance I think can function. And what we see when we work with cooperation in an informal setting with other jurisdictions outside of the European Union is that very often the principles -- at least the principles are quite the same. And so it’s on this basis, I think, that in many cases exchange of information can be possible.

MS. FEUER: Jeff.

MR. THOMPSON: Yeah, I think this touches a little bit on what I was referring to with disruption as well. Enforcement is not the only answer where we can't enforce the law in another country or a law doesn't exist that prohibits a certain action. However, we may be able to work with, again, private sector partners or other agencies to block these services from being offered in Canada. Binary options was a great example in Canada where we worked with credit card companies, and Canadian law prohibits the sale of securities if somebody is not registered. So, therefore, there was no binary options. Companies registered in Canada, therefore, any sales to Canadians are against our laws. So we're able to work with Mastercard and Visa and the credit card companies to prevent any Canadian transactions for binary options.

MS. FEUER: So that’s very interesting. So there are really a range of options here from a very broadly defined public interest standard to the European Union's concept of minimally or maximally harmonized laws, which essentially means whether every EU country has the exact same law or whether they have more leverage and freedom to implement laws differently. To the example that Jeff has given with disruption and also being able to cooperate across the civil and criminal divide, because we obviously cooperate with the RCMP as a criminal agency, and many of our colleagues, for example, the UK ICO, has criminal authority as well as civil authority. Kurt, I saw you want to say one more thing here.

MR. GRESENZ: Yes, I was actually thinking about a topic that you and I have talked about. So one of the questions that can come up in the work that I do is there might be a hesitation on the part of some of our foreign counterparts to work with us in some cases if they are afraid that an SEC outcome will foreclose them from acting. And I think this is the result of different legal interpretations of what amounts to double jeopardy. So you know, in the US, depending, we have different sovereigns for different purposes. What some of my colleagues overseas have said that essentially should the SEC take some action, even administrative action against an actor where the conduct is based on something the foreign authority is looking at that that could potentially preclude the foreign authority from doing any action at all? So that's in one direction we have to be sensitive to that. You know, the question there is let's say we ask for help in a case and they're looking at it and they say, well, we don't want to tell you because you're going to take action and then we're going to be left with nothing. And, again, we would work through that stuff, but it's a real issue. You know, from our side, we take Foreign Corrupt Practices Act violations seriously. And from an economic perspective, my personal view is there's a really good strong reason to do that. That's not always the approach that some foreign jurisdictions take. And we have from time to time encountered hesitancy to help us on our FCPA investigations on the SEC side, not speaking for the Department of Justice, because of a view that well, you know, I don't understand how that falls into a securities violation. It could be just code for, well, we don't really look at it in that way from our country. So we don't think we can help you. Again, people have to decide are they going to step up and are they going to help.

MS. FEUER: Right. So really interesting question and really interesting responses. I want to turn to another question that sort of focuses on one of the hot topics of today, which is this. Congress is considering passage of a comprehensive data protection and privacy law. How might that change or affect the relationship between US regulators and those in Europe and elsewhere, particularly as it relates to privacy investigations and litigation? And I'm going to put James on the spot first.

MR. DIPPLE-JOHNSTONE: Okay. Well, I think in many ways, you know, we should look at the opportunities. There are many countries around the world which are looking either at their first data protection act or privacy act or enhancing the one they’ve got. And I think the key things are to make sure that, you know, as referenced by the international conference, that there are those opportunities to collaborate and cooperate to ultimately do what we’re all there to do, which is to keep our citizens safe. And this will continue to be a theme as we go forward. Countries like India are looking at the data protection bill, going through their Parliament and their legislative process. They will be significant, given the scale and size of their economies and their country. So we should look for the opportunities to work better together.

MS. FEUER: And I thought you were going to mention GPEN again.

MR. DIPPLE-JOHNSTONE: Well, GPEN provides a great opportunity to do that, both in terms of the cooperation, but also more importantly the technical challenges, the assistance. One of the great things GPEN does, if I can make a plug for it, is coordinate around sweeps, so looking at upcoming threats and risks that might affect privacy authorities and sharing that load out and sharing that learning out in terms of all of us looking consistently at threats within each of our nations and then bringing together the results of that for a common discussion.

MS. FEUER: So any other observations on the question? It focuses on whether changes in privacy laws might affect cooperation, but I think the question is really broader. As we talked about this morning, many countries are in the process of updating their laws, whether it be consumer protection laws, privacy laws, securities laws, maybe? And so I wonder how this whole issue of changing laws, changing standards affects the way or the opportunities or the challenges for cooperation. And I'll throw that out to whoever wants to go first. Secretary Sullivan.

MR. SULLIVAN: So I'll just say, we in the International Trade Administration have been working with the National Telecommunications Information Administration and the National Institute of Standards and Technology, also sister agencies at the Commerce Department, to evaluate what, if anything, the Federal Government should do to address some of the privacy concerns that have certainly captured a lot of attention in the last couple of years. I think this goes back to what I was talking about. This is my personal opinion. I think we're probably quite a long ways off from any global standard. I think -- you know, you talked about India, Brazil. A lot of countries, you know, many have been looking to GDPR as an example, but no one is replicating GDPR exactly. There are still these differences, and those are going to continue because, as I think I said earlier, different countries have different cultural norms and legal traditions and histories, and they have different policy priorities that are all going to, you know, result in differences of kind if not degree. Again, I sound like a one-trick pony, but this goes back to the APEC CPBR system because what that basically is, is it takes these internationally recognized norms that we all agree on, which came from the OECD guidelines and the fair information principles before that and said let's all agree to these baselines, because you are going to have these differences. And we have to find a way to bridge these differences between these different regimes that countries have. I think, again, you know, there are aspirations for a single global standard. I don't think that’s about to happen anytime soon, so we’ve got to figure out, you know, how these different regimes can be made to work together. The approach in APEC is this interoperability approach, which I really think has a lot of appeal, is very well developed, and has been embraced, as I said, by a lot of countries in APEC, and we’ve heard a lot of interest from other countries around the world because it really is very flexible and can be adapted. On the one hand, it definitely protects privacy, but it can deal with technology because we in government are always going to be one step behind in regulation and legislation to begin with, but in this space in particular with the technology evolving so quickly, I really think there’s great appeal there.

MS. FEUER: Thanks. Anyone else? Marie-Paule?

MS. BENASSI: I agree with what James Sullivan said. I think it's going to be really incredibly difficult to sort of have a very harmonized universal framework for that data protection but also for consumer protection. And in the European Union, we are -- we have these principle-based laws and even in case of maximum harmonizations, there remain some differences. So our reply is to work on common enforcement actions and develop these actions in a way that they have become also guidance in a way. So -- and they are less theoretical than the law because they are applied to practical problems, practical practices. And in the future, what we want to do is to do more of these actions where, in fact, we have -- we publish the common position of the CPC network in the form of a guidance that can be applied by all the different operators in a certain industry. The other point I wanted to mention is notice and action procedures. So in the European Union, we have a law which is called the E-Commerce Directive, and which provides that marketplaces and social networks do not have a duty to monitor illegal practices, but they have a duty to act upon notification against an illegal practice. And this means, for example, withdrawing the account, obscuring the information. One of the problems of these operators, because we are now discussing a lot with them, is that, first of all, the domain of laws, which should apply, which is enormous and then it's -- for them, it's very difficult in a way to have an efficient action when the domain of law is so big and also the enforcement type are very big. And so I think that also cooperation on common notice and action procedures at the international level with a certain level of recognition, so this is what Jeff is saying about this disruption, so looking into also other type of models which are more based on practical enforcement tools, systems.

MS. FEUER: Thank you. Anyone else? So in the few minutes we have remaining, what I'd like to do is turn to each of the panelists and, similar to the first panel today, ask for a one-, maybe two-minute takeaway of what you see as the most important tools for international cooperation, what you see as your main challenges, and how you might remedy them. So I'm going to put Kurt on the spot and ask our SEC colleague to start first.

MR. GRESENZ: So when you started with tools, I did remember the third tool that was so important that I forgot it, but it actually is very important. So we have two provisions of law which help us protect information we receive from foreign authorities. The first one is a statutory protection that protects from any third parties any materials that we receive from foreign securities authorities. So outside of the litigation context, that essentially gives us ironclad protection for SEC files for enforcement purposes. But more recently, we added a legal amendment, a new tool that protects in litigation any material that would be privileged in the foreign jurisdiction. So let's say, for example, we get confidential financial intelligence from a foreign authority, and as a condition of receiving that, the foreign authority makes a good faith representation that this is for intelligence purposes, and it is privileged from disclosure in our jurisdiction. Under Section 24(f) of our 34 act, that protection would carry over into US law, and there is an absolute privilege it would stand discovery, for example, that it will carry over the foreign privilege to US law. And it could be anything. It could be financial intelligence, it could priest-penitent. I mean, if there is a privilege that is recognized in the foreign jurisdiction and we receive materials pursuant to that privilege without waiver, then there's no examination behind the statute for the court to make. It just has to be the representation. So that, I think, gives us added teeth when it comes to representations that we, in fact, can protect things in our files. So, you know, the takeaway for me is the big difference that I see is it looks like what we do in the security space is much more concentrated. You know, we know exactly who the players are. We see them all the time. There's crossover to some criminal authorities and other domestic agencies, but by and large, we seem to be in a more narrow lane. And I think my takeaway would be that listening to my colleagues here is there's a lot of lanes running in parallel and overlapping and overpasses and other sides that I think that we just don't have that much of in the security space in my view.

MS. FEUER: Thanks. And that raises two interesting points. I think this afternoon we'll have a panel on competition enforcement, and I think there might be a few less lanes, although I know there are some. And, also, your mention of your statutory ability to protect information, we have an analog in the SAFE WEB context for information provided by foreign law enforcement agencies when they ask for confidentiality that gives a privilege against FOIA disclosure. So turning now to Jeff, your top takeaway.

MR. THOMPSON: At the end of the day, what I got out of this is, I mean, there's an increasing abundance of information in the world, and we need to be able to prioritize our enforcement efforts. So it's processing all that information that’s certainly a challenge, and there’s all kinds of technology tools to help us. But not only that, it’s setting the right priorities and working smarter. So the intelligence- led approach, where we’re using the central fraud databases such as Consumer Sentinel or Anti-Fraud Centre to start driving enforcement action in a more targeted and effective manner.

MS. FEUER: Thank you. So intelligence is key to international cooperation. Marie-Paule?

MS. BENASSI: So I wanted to say two things. The first thing Jeff said it already, which is about prioritization. And I think that fraud is becoming internet fraud, all the different facets of it, and its internationalization, I think, is becoming a very big problem in terms of the harm caused to consumers and collectively in the world. And also in this respect, the role of the big platforms, you know? And if we don't prioritize and don't find efficient ways, building also on what this platform can do, I think is going to become more and more difficult to prevent fraud. And we see organized crime moving into these kind of activities, which seems to be giving them the possibility to earn a lot of money very easily. But then we have a different type of problem which we didn't discuss much, because also we have a bit -- had discussions a bit in silos here, but which is how to tackle the new types of misleading practices which are developing and which are based on the data economics. So on this we need to build links between competition, data protection, and consumer protection in order to understand this and see how -- what are the impact on consumers in terms of also the possible harm and also for businesses, possible lack of competition that this type of new data models are creating.

MS. FEUER: Thank you. Secretary Sullivan.

MR. SULLIVAN: So, again, for me, my perspective, the biggest challenge we're dealing with right now is the fragmentation or the vulcanization of the internet around the globe. You're seeing rising delocalization, which, again, I think that just impoverishes everybody, those within the country that have imposed delocalization measures, those that have overly strict restrictions on data flows. I think certainly we share a legitimate and strong desire for consumer privacy with a lot of other countries. And as I noted earlier, we take different approaches. I do think we need to be very wary because these issues, the way we're headed and in the coming years, we're going to be looking at, you know, more and more connected devices that are transmitting data, and this data has to be protected on the one hand, but it can lead to such tremendous opportunities. I mean, in the public sphere, in terms of smart cities and efficiencies and health breakthroughs and precision medicine and detecting disease patterns. And we want to be very wary of going too far in one direction, I think. So I agree with you about the balancing of these interests. And, again, I'll go back to my -- I really think, you know, the EU, for example, and the US do take different approaches, but we ultimately share, at eye level, the very same goal. And I think interoperability between GDPR on the one and CBPR on the other could be a very positive development. I know there was a referential a few years ago with BCRs, binding corporate rules, which is an EU proof mechanism for data transfers and mapping it relative to CBPRs. And, again, these all derive from the same OECD guidelines, and I think there's a lot of overlap. And I know GDPR allows for certification mechanisms, and I think there's a tremendous opportunity there for us to make these systems work together and make sure that we are extending privacy protections around the globe, while at the same time making sure that we're not quashing or squashing innovation and, again, doing damage to our long-term interests. So I think interoperability would be my solution there. And as, again, I've said a couple times already, you know, the FTC is probably the preeminent privacy data protection authority, as it were, in the world going back to the 1970s, has been a great partner as we go around the world and talk to countries on this. And so we should continue to do that. And I hope we can partner with other like- minded countries to that end.

MS. FEUER: Thank you. And the clock is quickly counting down, so I’ll ask Commissioner Dipple-Johnstone to say a final word.

MR. DIPPLE-JOHNSTONE: I will be very quick, then. I mean, I can almost echo the comments of others. I think it’s that keeping updated and keeping pace with vast changes in the landscape and technology and making sure that we don't become the ministries of no, that we support innovation in a very practical sense. And as part of that, it’s making sure we make the right links both internationally with each other but also in each of our respective homes with the other agencies and authorities we have to work with so that the offer we can make internationally is the right one.

MS. FEUER: So thank you very much to the panel for some incredibly thought-provoking ideas. Before we break for lunch, I just want to mention that the Top of the Trade on the 7th floor has catering available for you to purchase. There's a handout on the table just outside with information about nearby restaurants. If you leave the building, you will have to go through security again unless you are an FTC employee. And be mindful that there is a small group of protesters outside the building, so leave ample time to get back in for our fascinating afternoon panels. Thank you. (Applause.)

AFTERNOON SESSION

COMPETITION ENFORCEMENT COOPERATION

MS. COPPOLA: Okay. I’m getting the green light from Bilal Sayyed, our head of Policy. So I think we should get started. Thank you all for coming to this afternoon’s panel. Today, we’re going to talk about enforcement cooperation on the competition side. You’ve just heard, in the break before lunch, about cooperation on the consumer side. It has a very different nature on the competition side. So we’ll be talking about that this afternoon. I’d like to introduce my panelists briefly. Starting with -- going in alphabetical order, Nick Banasevic. Nick is from the European Commission’s DG Competition where he heads the unit that covers IT, internet, and consumer electronics. So we’ve had the very good fortune to cooperate with Nick on a number of cases. Next to Nick is Marcus Bezzi. He is the Executive Director at the Australian Competition and Consumer Commission, where, among other things, he oversees all of the ACCC’s international engagements. So I also have had a great time working with him, even though very often the calls were extremely early for us and extremely late for him. We still have a terrific relationship. Then we have Fiona Schaeffer, who is an Antitrust Partner at Milbank LLP. She has practiced on both sides of the Atlantic. So she brings unique perspective in that sense and has lot of experience in multijurisdictional mergers in particular. Then just to my left -- I was a little thrown off because I thought it was alphabetical and that’s why I was -- yeah, you didn’t look like Jeanne, anyway. So Jeanne Pratt, who is Senior Deputy Commissioner from the Canadian Competition Bureau. She oversees their abuse of dominance and mergers and noncartel horizontal conduct matters. She also has experience at the ACCC. So I’m sure that she will bring that to the discussion today. So those are our panelists and you’re going to hear from them, not from me. Just by way of background, a lot of the cooperation issues that are relevant to the competition enforcement discussion were addressed in this morning’s session. So we’ll try to get into a little bit more granular level so that we don’t repeat what was discussed this morning. Just I guess to set the stage in thinking about cooperation in general, we engage in enforcement cooperation for a number of reasons. Often, we find that it will improve our own analyses. It allows us to identify issues where we have a common interest, it allows us to avoid inconsistent outcomes, and perhaps, most importantly, for the outcome to coordinate remedies. So with that in mind, I have asked the panel to start off -- we’re trying to understand strengths and weaknesses of enforcement cooperation, get some advice for the FTC. So before we delve into specific questions, I’ve asked each of the panelists to deliver the headline of their story. What is your elevator speech? Starting with Nick.

MR. BANASEVIC: Thank you, Maria. Thank you to you and to the FTC. It’s really a great pleasure to be here and, hopefully, share some interesting insights. My elevator ride is 27 floors up and it takes about half a minute. So I don’t know if that’s how long I’ve got. But I think my five-second message is don’t neglect cooperation, it can really bring benefits. Of course, I think the first instinct that we have and what we’re responsible for by definition is our own jurisdiction, and the bread and butter of that is doing individual cases and that’s what we focus on. That’s, as I say, the bread and butter of our work. Beyond that we have our policy, guidance, soft law role which is complementary to the actual case enforcement. I think my core message and, hopefully, I’ll illustrate it during the panel is, although you’re not going to necessarily spend the majority of your time, although you might spend a lot in an individual case on cooperation, I think it’s trying really -- in terms of what agencies can gain and benefit mutually. Don’t view it as add-on activity, something extra that you have to do. It can really bring organic benefits to either an individual case -- and, hopefully, I’ll give some examples -- and also to policy to avoid misunderstandings, to converge where possible. It’s really something that should be fostered over the years. I’ve known Maria and her colleagues and colleagues at the DOJ for many years, and it’s really very useful in terms of building trust, facilitating relationships, and understanding where each of us are coming from. So from my perspective, I’ve had very good experiences over the years and I will give some more insights as we go on.

MS. COPPOLA: Thanks. Marcus?

MR. BEZZI: Well, if Nick had been standing next to me in the elevator, I would say I agree with all of that. I’d also say -- make the point that was made a lot this morning, that commerce is now more global than ever and, indeed, that’s a trend that’s significantly enhanced by the digital economy. And the corollary of that is that enforcers have to respond to the pace of change and globalization by working more closely together. We have to be more joined up and timely. And we need to do this for three reasons. Firstly, because I believe that in doing so, we will facilitate more efficient commerce. It will actually be better for the commercial parties if we are more joined up. Secondly, it will make us better at our jobs. We’ll be more effectively able to police compliance with laws in our jurisdictions. And, finally, because we’ve got scarce resources and working closely together is likely to prevent us from reworking issues, from seeking to reinvent the wheel or overlapping each other’s work. It will make us more efficient. Thanks.

MS. COPPOLA: Great.

MS. SCHAEFFER: Well, hopefully, we’re not in a Dutch elevator so there’s room for me as well. I certainly agree with everything that both Nick and Marcus have just said. I particularly like the idea that cooperation is not the icing on the cake, but, hopefully, the glue, as Kovacic would say, or the icing in the middle. What does cooperation mean? It doesn’t mean achieving the same result on the same timetable in every transaction or investigation. That’s not cooperation. That’s utopia. And that’s never going to exist. But I do think it can and often does mean a greater understanding of the issues, an enhanced understanding, as you said, Maria, for your own investigation and how to address concerns. And it, hopefully, can be used to maximize all of the efficiencies in the process given the substantive constraints and the procedural limitations that each jurisdiction has to live within. So I think from a private practitioner perspective, I agree there is a lot to be gained from cooperation. And I would love to use this panel to talk about practical ways that we can enhance cooperation, again using Kovacic’s human glue analogy, more at that human level than at the formal, procedural MLAT kind of level that I think we’ve all worked with or had our frustrations with over the last decade or so, and have found that it is these informal connections and understandings that have facilitated greater cooperation more than the very formalistic process.

MS. PRATT: Well, I agree with everything that everyone said. The only thing I would add is I don’t think cooperation is only good for enforcement agencies, I think it’s good for business. It allows competition law enforcement agencies to benefit from the experience of one another, reach conclusions quicker, and with less probability of conflict and ultimately, hopefully, increased timeliness and effectiveness of the outcome. But it’s -- as all of these people have said, it’s more than about sharing information, it’s that human glue. It’s having the trust amongst agencies to be able to have productive discussions, to be able to exchange theories of harm, to talk about what they’re hearing from the marketplace, to sort of be in a united front with the businesses so that they understand that it is in their benefit and it will be more efficient for them to cooperate with all of us together. And so I think the result, hopefully, is that investigations aren’t longer, are more focused, and the probability of outcomes being conflicting outcomes is minimized, and ultimately for all of us, the predictability, consistency, and effectiveness of outcomes across jurisdictions is maximized. The Canadian Competition Bureau, as you heard from Commissioner Boswell this morning and as you heard from some of my colleagues from the RCMP, I think Canada generally is a strong advocate for international cooperation and we’re always looking for opportunities to cooperate further, including with respect to not just merger cases, but unilateral conduct cases as well.

MS. COPPOLA: Thanks, Jeanne. Okay. So there’s a lot of human glue. So we seem to all agree that there’s a lot of great things that come out of cooperation, cooperation is very important. I guess drilling down to the next level, what can parties expect for agencies, and I guess for Fiona, what can agencies expect at a more detailed level from cooperation. Why don’t we start with Marcus this time.

MR. BEZZI: Thanks, Maria. Well, there are things like sharing case theories, if waivers are given there will be sharing of information. If we use our formal processes, they can expect them to take a long time. In our experience, MLATs -- well, I’ll just relate one story. We used an MLAT in a criminal matter recently and were absolutely stunned to get a result from the process in one year or a little bit less than one year. That’s the fastest that anyone can ever think of. Mostly, they take two years, three years, four years. We’ve got 19th Century formal cooperation procedures, 19th Century timetable for our formal cooperation procedures. So really we spend most of our time on the informal. And I must say, I listened to some of the sessions this morning and heard people talking about the IOSCO MMOU. I was very envious hearing about how quickly their processes work. They really do seem to operate at a more reasonable speed given the speed of commerce today. I should say that in mergers, the informal cooperation works extremely well and we don’t have to rely upon the formal. A lot of the time in Australia, we use the processes to coordinate remedies and people can reasonably expect us to do that in a fairly efficient way. I think that is a good aspect of the current system.

MS. COPPOLA: Thanks. Jeanne, do you want to –

MS. PRATT: Sure. I mean, we cooperate very closely with the Federal Trade Commission and with the US Department of Justice and the DG Comp. Those are the three jurisdictions or three agencies that we cooperate most with. And if you’re a party either on the merger side or on the conduct side, you can expect that we would have in-depth discussions related to investigative approach, theories of harm, market definition, concerns expressed by market contexts in the various jurisdictions and, frankly, our analysis of the data and evidence that we’ve seen. In some cases, you will see us do joint market interviews of joint market context. We’ll have sometimes joint calls with the parties and we’ll coordinate that interaction with the parties to make sure that the risk of uncertain or conflicting messages is minimized. And where cross border competition concerns are identified, you can expect the Canadian Competition Bureau to engage agencies in remedy discussions, because we need to make sure that those remedy discussions are considered in the broader context, including the need for remedies in one or more jurisdictions and whether a remedy in one jurisdiction may actually be sufficient to address concerns in another, so that we may not need our own consent agreement in Canada. We also look at whether a common monitor should be appointed or looking at the consistency of the language around preservation of assets or hold separate arrangements. And in some cases that cooperation with the Canadian Competition Bureau may ultimately lead to us accepting a remedy that is proposed from a sister agency and it can, where appropriate, ensure the most efficient and least intrusive form of remedy for market participants. So we do cooperate very deeply with our agency. And that, again, is based on a strong foundation of trust that has been built over 20 years of cooperating with the counterparts with whom we cooperate most frequently.

MS. COPPOLA: Thanks, Jeanne, very much. I’m very sorry to have to ask Nick to add to that because I think you about covered the universe. But, Nick, what do you think that parties can expect from cooperation and thinking specifically about your perspective from a shop that deals with conduct matters?

MR. BANASEVIC: I agree with everything so far. So not –

MS. COPPOLA: Okay. Can we be clear? You have to disagree at some point. This would be like dreadfully boring if you –

MR. BANASEVIC: In the post-panel, perhaps. No, but I think, as Jeanne said -- and perhaps -- and this is something I think we’ll develop perhaps as a difference in terms of incentives in conduct in mergers. Most of what my experience, in terms of what parties have incentive-wise, is in conduct. I’ve worked on a few mergers where the incentives have been aligned. We’ve had issues with parties where sometimes they don’t want to give waivers in conduct cases because they feel that that would somehow not be beneficial to them. That is, of course, their prerogative. My personal view is that actually, you know if they’ve got a good story to tell, there’s no issue with giving away, but because it’s precisely those things that we can discuss openly with them and with our colleagues, our sister agencies. But I think exactly the kinds of things that -- whether or not there is a waiver, because I think even without a waiver we’re able to, from our perspective, in terms of what we can gain, talk about theories of harm in the abstract and general levels, test, test theories, test realities. So I think if we’re doing that anyway, there is an interest for parties to give us a waiver. Again, that’s my personal view. But as I say, we’ve had some cases where we haven’t had waivers. To switch, in terms of what -- because I think we do have that responsibility ourselves to parties. And, again, maybe it’s more in mergers that it happens that they have these incentives where they’re aligned in terms of timing, coordination. In terms of what we can expect as an agency, just to develop a bit what I was saying at the beginning, I think, again, it’s not that we must always dream of having the uniform solution worldwide. We all have different legal traditions, different systems. Having said that, I think where we can achieve at least a high level of convergence where possible, I think that’s something that is desirable. So I think we, in terms of both policy development -- and then when we’re doing cases, I think it is invaluable and we each have a lot to gain in terms of, again, coming back to some of the things I’ve said in terms of case specifics, theories of harm, making sure that we’ve got a reality check on whether something is correct or not, testing these theories with each other, and if appropriate, moving the cases forward in the same or similar direction. If not, at least understanding the background to where we’re each coming from and why we may take a different approach. And I found that invaluable over the years in many cases, and I’ll develop that a bit more a bit later.

MS. COPPOLA: Thanks. I think that the last point you mentioned, this idea that the effects of case cooperation are not just contained to the case itself, but to a longer-term story of deepening the understanding between agencies is really important. Fiona?

MS. SCHAEFFER: Sure. Well, I think from the parties’ perspective -- and my comments are primarily in the context of merger reviews -- the goals of what can realistically be achieved from cooperation include reducing duplicative effort, reducing the burdens of investigation, convincing the agency, through cooperation, that just because there is a hill there to climb doesn’t mean that everyone has to climb it. One can climb and report, assuming, of course, it is a similar hill. We hope to have consistent, if not identical, outcomes and that includes, where possible, hopefully convincing an agency that they don’t need to have the same remedy as everyone else just because someone else has a remedy. We don’t have to have every jurisdiction reviewing, believing that it needs to have its pound of flesh in order to believe that it’s conducted an effective review. And that, of course, involves some levels of trust between the different agencies as well, that the enforcement of a remedy in one jurisdiction is going to be sufficiently robust to protect others. And, you know, that may not always be the case and it may vary by jurisdiction. We hope, also, that through cooperation we will, if not have a shorter overall timetable, certainly not a longer one. I think that is sometimes a concern that private parties feel is that a potential cost of cooperation is that you may be put on, in essence, the timeline of the slowest jurisdiction, rather than promoting efficiency throughout the process. I guess a word on waivers just to Nick’s point. In principle, I agree that knowledge is power and I like everyone at the table to have a similar level of knowledge, if we have good substantive points and arguments and documents to share, or even if not so good. The agency can do a better job armed with that knowledge than if there is some game-playing and trying to orchestrate the process and manage who knows what. I do think that that calculus is quite different in merger versus conduct cases. And it’s not a question of giving different agencies the same level of knowledge, necessarily, although in some cases it can be. But I think for us there is a bigger concern in conduct cases that information provided to one regulator and then shared more broadly increases the risk of discovery obligations and private class action consequences that aren’t so much of a practice concern in a merger context. So it’s not the sharing within the agencies necessarily that is the biggest challenge there; it’s what can be done with the information once it is within multiple agencies. We know that we’re dealing with jurisdictions that have very different levels of confidentiality protection, and in some instances, for example, are required to give third parties due process or other government agencies access. So I think there’s a greater feeling of concern about being able to manage the flow of that information in the conduct arena.

MS. COPPOLA: Thanks, Fiona. I think we’ll come back to that point about information exchange in a moment. But I think, before that, I want to pick up on Marcus’ point about keeping pace. I don’t know that -- the 19th Century might be a bit of an exaggeration, but I think even 20th Century tools are not fit for purpose. Last night, I was watching All the President’s Men with my 12-year-old son and they were trying to find the phone number for someone and they had a room full of phone books, and he just kind of said, what’s that, what are they doing? Anyhow, what types of things, what kind of -- what would a tool look like that was fit for the 21st Century? Are these more in the realm of informal cooperation? What tools do you use? What tools do you wish you had? What can we learn from you?

MR. BEZZI: Would you like me to go first?

MS. COPPOLA: Yes. That’s why I’m looking at you. I’m sorry. (Laughter.)

MR. BEZZI: Well, where do I start. So informal -- I’ll start on the informal. And, look, I should say 95 percent of the cooperation that we’re involved in -- probably more than 95 percent is informal and it’s very effective and it involves engagement with the various agencies that we’ve got excellent relationships with. We have many counterpart agencies that we’ve got second generation cooperation agreements with or first generation cooperation agreements with. And they help to create a formal framework in which we can engage in informal cooperation. And I should actually just go back a step. The formal arrangements really do enhance the informal. We have a very formal arrangement with the United States. We have a treaty with the US. I think we’re the only country that has an antitrust cooperation treaty with the US. We rarely use it. I think the number of times it’s been formally used you could probably count on probably less than two hands. But I believe that it promotes the use of waivers, it promotes the cooperation of witnesses, the cooperation of parties with our investigations, and it really facilitates and creates the atmosphere in which informal cooperation works very, very well. So what does that actually mean? It means that we can have case teams that have regular phone calls if we’ve got a common investigation or we’re investigating common or related issues. We can talk about case theories. We can talk about practical things like when we’re going to interview common witnesses. We can talk about lines of inquiry that have not been successful that have been a waste of our time and suggest to each other perhaps don’t bother going there, it won’t lead anywhere or, actually, look here, it’s a better place to look. Those sorts of discussions happen between case teams and they are really valuable. The exchange of information when we’ve got waivers -- confidential information when we’ve got waivers is very, very useful. I should emphasize that we very, very rarely -- in fact, I can’t think of a single occasion that we’ve done it using a waiver, but we very rarely exchange evidence. I can think of two cases where we’ve done that using formal processes. If we want evidence, we will go to the source and get the evidence from the source if we possibly can. It’s much more valuable to us that way, anyway. So I think you said, what would be better? Well, some of the processes that exist under IOSCO where -- and, indeed, exist under the antitrust treaty that we have with the US -- where we can ask counterpart agencies to compel testimony, we can ask counterpart agencies to compel the production of evidence or production of information and to do so in a very timely way, to put in a request that can be responded to in days or weeks rather than months or years. Those sorts of things are things that we aspire to. We get a lot of it informally, I should emphasize that. I don’t want to understate the importance of the informal. But having a more formal framework which would enable more of that -- and I think they have in IOSCO context -- would really be a facilitator of even greater informal cooperation.

MS. COPPOLA: I think we heard on the consumer protection and privacy panel that some of that investigative assistance is already happening on that side. So it’s –

MR. BEZZI: Very much so, yes.

MS. COPPOLA: Since we’re all -- many of us have it housed in the same agency, you would hope that we can have that transfer over to the competition side. Jeanne, could you pick up a little bit on the informal cooperation point and tools?

MS. PRATT: Yeah, I’ll try not to do –

MS. COPPOLA: So we can just –

MR. PRATT: I, again, agree with everything that Marcus said. And I think what I would say is it only works -- those informal cooperation tools, again, only work if you’ve got trust in the legitimacy, the competence, the candor and, frankly, the ethics of your counterparts in the other agency. And you can’t develop that necessarily in the context of just having a case discussion. You’ve got to take the time to have the conversations to understand different frameworks, to understand how they go about doing their work. And, frankly, that in our experience has led to us getting to learn some of the lessons from our colleagues so that we don’t have to repeat the same mistakes and, hopefully, we have also shared some of those with our foreign counterparts. So some of the mechanisms that we use outside of informal cooperation on a case to try and do that are the case team leader meetings that you heard Commissioner Boswell talk about this morning, which I find incredibly useful because it is our officers who are doing the work, that are leading those cases, that will take some time out to talk about how they do their work, what issues they are facing. Sometimes it’s talking about a particular case development or a lesson learned that they have from their jurisdiction. And that builds relationships amongst our staff, it builds trust, it builds confidence in our counterpart’s abilities as economists and lawyers doing the same type of work. Exchanges are another tool. And as was mentioned this morning, I am the very lucky candidate who got to go to the ACCC for a full year and see how they do their merger work, and I benefitted greatly as an individual. But I also I think benefitted the Bureau because we got to see not just how a particular case unfolds, but how you actually manage the organization, how you do your work, what tools you use and, frankly, seeing how something can be so different in some areas, but there’s a lot of commonality in the analysis that we do in mergers.

MR. BEZZI: We loved having you, too, Jeanne. It was great having you.

MS. PRATT: It was a tough winter in Ottawa, I have to say. The other thing that we have found valuable is taking some time out, maybe more publicly, to have workshops on particular issues. The FTC and the DOJ and the Competition Bureau in 2018 had a joint workshop on competition in residential real estate brokerage. And, you know, we had eight years of litigation in the real estate industry surrounding the use and display of critical sales information through digital platforms that wasn’t resolved until years after the US. But because we had taken so long, there had been a lot of evolution in the law and the economy. And so some of the lessons that we learned along the way were also informative to update since the fight in the US. So the only other formal thing that I think I would I say, not the informal, is we have a gateway provision in the Canadian Competition Act, Section 29. So when we’re doing mergers, we don’t ask for waivers in Canada. As long as we’re working on a case and we feel that that cooperation is necessary for enforcement of the Competition Act in Canada, we feel that that gives us the ability to have that conversation with our counterparts. So if you -- and I think this would be particularly useful in the unilateral conduct side where you may be looking at different incentives. The merging parties may want to get through our process as quickly as possible. They, I think, have come to see more of the benefits of our cooperation to get them where they need to get to with less conflict and quicker results. But, you know, that kind of a gateway provision could allow us to have discussions on the unilateral conduct side because the discussion is only as good as the two-way communication allows.

MS. COPPOLA: Thanks. The senior level exchange, I think, would be a big hit here if the destination was Australia. But I guess kidding aside, it’s interesting because what you learn there, you’re coming back and you’re in charge so you can actually implement the changes. So that must have had a terrific effect. Okay, Nick, just thinking a bit more about cooperation in conduct investigations. I almost said antitrust investigations because I was looking at you. What kind of practical experience tips do you have that you would like to share?

MR. BANASEVIC: So I’m going to go back in time a bit and give you a couple of examples of very intense cooperation with the FTC and the DOJ. Actually, let me first say, to go back a step even, for us, cooperation starts at home in the sense that we’ve got the European Competition Network, which in -- I don’t know if “unique” is the word, but it’s the network of us, the European Commission with all the national member state competition authorities in the EEA, the European Economic Area, all applying European competition law. And so we first need to cooperate at home in terms of both just allocating cases and, of course, generally the European Commission does the cases that are over a broader geographic scope, whereas the national agencies tend to focus on more national ones and in terms of substance coordination as well. Beyond that, I think we have extensive international cooperation with all the major competition authorities around the world, including Canada and Australia. But to give the two examples that, for me, have been personally particularly instructive over the years, going back to the beginning of the century is first the Microsoft case with DOJ, where, as background, you remember that the D.C. Circuit Court of Appeals affirmed a monopoly maintenance finding here under Section 2. And that was while our case was still ongoing in Europe. We had an interoperability and a tying abuse, tying of Media Player. And then there was a remedy implemented in the US that changed the way that some things were done. So it had a kind of factual impact on some of the things that we were doing in our case while it was still ongoing. And the issues were also -- even though the liability case here was little bit different, through the remedy, there was an interoperability element as well. So the kinds of issues were very similar. We met, I think, for a period of a few years twice a year. We would come here once a year and the DOJ would come to see us in Brussels. And it was invaluable just to exchange theories, to understand where each side was coming from, and to develop a trust and understanding over the years. So I think it’s fair to say that even though the issues were different, there wasn’t always perfect agreement, but it was a relationship that we valued and that really brought a lot in terms of understanding where we were coming from and in my view, at least, having a solution that was not necessarily exactly the same, didn’t lead to an overt situation of conflict, which, again, in my view was greatly facilitated by these contacts. The second example is the kind of policy and case area standard essential patterns. This goes back to even Rambus with the FTC where we had a similar case ourselves in Europe. But more generally and more recently, or five, six years ago, I guess, this issue of injunctions based on standard essential patterns. The FTC -- I think it was 2013 you had the consent decree with Motorola and we had a prohibition decision against Motorola a year earlier on the same kind of issue. And, again, take a step back or try and remember, this is a very -- I don’t know if “novel” is the word, but it was a controversial area of law. And perhaps it still is. For us in Europe, at least, we adopted a prohibition decision, which said that injunctions against willing licensees, based on standard essential patterns where you’ve given a commitment to license on FRAND terms, are an abuse. That was confirmed by our Supreme Court, the European Court of Justice, in a separate case, but the principle was confirmed. But it was, and still is, a subject that attracts a great deal of attention and a great deal of controversy. There were many people -- and that debate still goes on. But there were many people saying, how can you possibly do this? There are some people saying that. But against that background of that -- again, I’m not sure if “novel” is the word, but a very complex, important issue, it was really invaluable to have both the case coordination with the FTC on Motorola, where we had regular contact in terms of meetings and calls, and then on the policy level with both the FTC and the DOJ, where essentially we were on the same page in terms of developing this policy and this approach towards how we deal with the specific issue of injunctions based on standard essential patterns. I think particularly because it was an area that was so complex and controversial, my personal view is that we all mutually benefitted from being able to really share these experiences and insight. So those are two examples and there are many more, but it’s really, for me, a manifestation of just concrete case teams talking to each other regularly, being open, exchanging ideas, evidence if appropriate, if you have the waiver, and it’s been a great benefit.

MS. COPPOLA: Yeah, I think interplay of the case level and the policy level is a really good point that really deepens greatly the discussion and understanding. Fiona, we’ve heard kind of rah-rah-rah cooperation and lots of pluses on cooperation. You’ve talked about how cooperation doesn’t mean getting to the finish line at the exact same time. What are some of the practical limitations on cooperation from a private practitioner’s perspective?

MS. SCHAEFFER: Well, I think we start out with very different procedural frameworks in different jurisdictions. We happen to have probably two of the closest jurisdictions here in Canada and the US, on process. But others look quite different in terms of the amount of prefiling work in a merger context that needs to be done, the time that that will take, the uncertainty around when you actually get on the clock in say Europe or China versus in the US. And all of that leads to, you know, in many cases, if not an impossibility, certainly, all of the stars would have to align for the timing to actually be the same. So we are working with different processes, different timetables, and I think we have to accept that the timing is not going to be the same. The question is, can we make it sufficiently compatible that we can have substantive discussions at a similar time frame, particularly on remedies. That will, you know, minimize inefficiencies and maximize the ability to have a consistent compatible remedy. And even when you’ve done all of those things and there’s been I think an earnest, concerted goodwill effort to align those discussions, you’re inevitably going to have cases where, you know, something surprising happens like one jurisdiction decides, yes, we like the remedy package that everyone else has agreed to, but lo and behold, we think there ought to be a different purchaser in our jurisdiction, which shall remained unnamed, than in the rest of the world, which as you can imagine when you’re dealing with products that are sold around the globe under one brand name can be pretty challenging. I’m not sure that cooperation could have changed that result. But you’re always going to have these unpredictable aspects of a multijurisdictional merger review that can occur right up until the end. What can we do to enhance practical day-to- day cooperation, I think your earlier question. A lot of the time when we talk about cooperation, it’s really in a bilateral context. You’ve got parties speaking with Agency A, parties speaking with Agency B, parties speaking with Agency C, and then similar conversations happening between those agencies who are essentially, you know, in some cases, playing Chinese whispers, but reporting on conversations they’ve had trying to find common approaches, common understandings. I wonder sometimes can we expedite -- streamline those conversations to have fewer bilateral conversations and more multilateral conversations in the same room. Just as when we are faced with a conduct or a merger investigation ourselves, trying to understand better the facts, what’s going on, where, we often have multijurisdictional, multicounsel calls. I don’t see why we couldn’t do more of that involving multiple agencies on the same video conference or the same phone call. There is a limit, of course, where you get these huge conversations that, you know, are impossible to schedule, and no one says anything because there’s 100 people on the line. So yes, that level of cooperation can be unwieldy, but I think we can do more to explore having simultaneous conversations. I think there’s been a mindset probably maybe more in the minds of -- well, maybe equally in the minds of the companies and counsel, as well as agencies, that everyone needs to have their kind of process, everyone needs to have their separate meeting, everyone needs to have the merger explained to them, you know, Australian or in Canadian or in -- (Laughter.)

MS. SCHAEFFER: But I don’t think that that’s necessarily the case, not for all meetings or forms of cooperation. So that’s something I think we could do more with.

MS. COPPOLA: That’s a really interesting idea. I mean, we’ve heard earlier, and on this panel, that there’s a lot of joint third party calls. I know at the FTC we have limited experience with joint party calls, but that’s a really neat idea and it’s certainly very 21st Century if it’s video. So thinking I guess -- so those are some of the practical limitations on the practitioner’s side. Thinking about some of the practical limitations on the agency’s side, it seems like the one that has appeared a few times in this discussion is confidentiality. Nick has already talked a little bit about what we can exchange when we don’t have waivers. So what falls within the realm of public or agency nonpublic information, so, as he said, theories of harm, market definition, kind of basic thinking on remedies. But, of course, those discussions are much more robust when we’re saying because of evidence of X, Y, and Z. Marcus, you had mentioned that you have an information gateway in Australia. What does that mean and what can the FTC learn from that?

MR. BEZZI: So an information gateway is a legislative provision that enables our Chairman to make a decision to release material that we’ve obtained through some confidential process either a compulsory power, exercise of a compulsory power, requiring compelled production of information, or otherwise, and it enables us to release that information without the consent of the party whose information it is. So it’s something we don’t do lightly and it’s something we don’t do often. And it’s something we’ll only do if there are -- if we’re really 100 percent confident that people are going to comply with the conditions that are imposed on the release of the information. So if we’re dealing with a trusted agency, and we are confident that they will maintain the confidentiality of the information that we disclose, then we have got the capacity to release it. As I say, it doesn’t happen very often. There will be more than just a set of conditions imposed. There’s usually a fairly rigorous process that we put in place to ensure that the conditions are complied with. So there’s reporting. And after the agency that’s received the information has finished with it, we’ll require them to give the information back. And I should say this is a very similar provision to a provision that the CMA has in the UK and that Canada has. And it, as I say can be -- it’s more useful in being there than in being used, if I could put it that way.

MS. COPPOLA: Right, right. Thanks, Marcus. I think, Jeanne, I’ll have you answer next because he’s just talked about your information gateway. Does this have an impact on kind of target parties, third parties’ willingness to provide information, and what kind of notice do they get before you share the information? What are some of the consequences?

MS. PRATT: Yeah, I mean with great -- it’s -- we have to take that very, very seriously. So when we’re using our gateway provision, we have very transparent policies to stakeholders. It’s written in a confidentiality bulletin what the conditions of sharing are. Every time we do a market contact, it is disclosed to that market contact that we do have the information gateway, that we may use it obviously in an international merger context, that we may share it with our counterpart agencies and discuss it where they have waivers. So I think the lesson for us is transparency is really important to maintain your reputation because without our reputation to maintain the confidential information, we won’t be able to do our job and the effectiveness of our agency is diminished. It’s fundamental, frankly, to how we do our job. So in our confidentiality bulletin, we do set out the conditions quite clearly and we do say that we will seek to maintain the confidentiality of information through either formal international instruments or assurances from a foreign authority. And the Bureau also requires as a condition that the foreign authority’s use of that information is limited to the specific purpose for which it was provided. So our information gateway provides that we can use it for enforcement of the Act, which, for us, means if we’re working on a common case with an agency with whom we have a foreign -- or an instrument and we’ve got those certainties that that is when we will do so. Where there is no bilateral-multilateral cooperation instrument in force, the Bureau does not communicate information protected by Section 29 unless we are fully satisfied with the assurances provided by the foreign authority with respect to maintaining the confidentiality of the information and the uses to which it will be put. And this, again, is where trust becomes key for us, we’re not going to put our reputation and our effectiveness on the line if we are not certain that those conditions will be satisfied. In assessing whether to communicate the information and the circumstances, we do also consider the laws protecting confidentiality in the requesting country, the purpose of the request, and any agreements or arrangements with the country or the requesting authority. If we are not satisfied that it will remain protected, it is not shared. Likewise, when foreign authorities are typically communicating confidential information to the Bureau, they are doing so on the understanding that the information will be treated confidentiality and used for the purposes of administration and enforcement of the Act. I should mention, too, we do have another provision in our Act which ensures that all inquiries conducted by the Competition Bureau are conducted in private and that provides some legislative certainty that it will be maintained in confidence on our end. So I guess I would say the gateway for us, while similar to Australia, I think has been used a little bit different and that mostly is a result of practice, our transparency, the market having a lot of faith in our practices and procedures, to maintain confidentiality. And without it, I don’t think it would be as effective.

MS. COPPOLA: Thanks very much. Nick, turning to the European Commission, I mean, you have sort of the highest level of information sharing and investigative assistance with the ECN and you also have things like the second generation agreement that you have with Switzerland. Do you want to share a little bit of your experience with those?

MR. BANASEVIC: Sure. Again, the ECN is -- again, I don’t want to say it’s the highest level of cooperation, but everything is open there.

MS. COPPOLA: Right, right.

MR. BANASEVIC: There’s automatic transmission of everything, there is -- I mean, that’s a consequence of what the EU or the EEA is in a sense. So it’s critical that we share up front information just about who’s got what case so that we can allocate them most efficiently and to coordinate on issues of substance because we’re all applying the same law. In terms of outside the ECN and outside the EEA, I -- as a general point, I think the main issues have been outlined in terms of maybe there being different incentives -- I’m talking outside Switzerland, which I’ll mention briefly now in terms of different incentives maybe between mergers and conduct. I take Fiona’s point about -- concern about disclosure in another jurisdiction. I understand that. I think the instances that I have referred to in some conduct cases have rather been a concern about not wanting agencies to discuss theories of harm even. So that’s a different thing. And in terms of Switzerland, actually, I think it resonated. I mean, we have a second generation agreement with Switzerland, which means in practice that we can transmit evidence between us without consent. Obviously, we’re talking about where the same conduct has been investigated. And what we found -- and this resonated when Marcus was talking about it -- is actually we haven’t needed to use -- to invoke those provisions. And it’s actually encouraged that that framework, and maybe the trust or the mechanics of how things work, have encouraged information provision without needing to use the formal provisions under the agreement. So I think that’s an interesting point.

MS. COPPOLA: Right, yeah, yeah. Fiona, you’ve touched on this a tiny bit already, but what are -- can you bring out a little bit some of the concerns that agencies might have either about these types of agreements or about granting waivers in the nonmerger context? What are some of the red flags?

MS. SCHAEFFER: From a merging party’s perspective or from an investigated party’s perspective?

MS. COPPOLA: From both.

MS. SCHAEFFER: Yeah, I think there is -- certainly in terms of the exchange of confidential information as opposed to permitting agencies to discuss case theories, I think there is an understandable sense that if an agency really needs that kind of information and has a right to obtain that kind of information domestically, then they should just ask the parties for it directly rather than get it -- you know, it sounds a bit pejorative -- but through the back door. I do think, on the merger side, the incentives are greater to provide it anyway. But I think, also, at the same time, the actual exchange of confidential information is relatively rare and I think its use is overrated. I think the biggest benefit that I’ve seen from cooperation from a private party’s perspective -- and I suspect the agencies might agree with this -- is just being able to discuss the case, the theories, the investigation, the legal analysis, the basic understanding of how the products work, what third party concerns are without, you know, revealing any confidential information. And all of that dialogue I’ve found in all of the deals I’ve worked on, and maybe I’ve just been lucky, but I can’t recall a single case where we facilitated cooperation and we suddenly found that Agency C, that had been going on its normal course of business and investigating without big concerns, suddenly had a new theory of the case that was going to put them into an extended review. I’ve always had the opposite. Namely, Agency C, when we have facilitated contact with Agency A and B, typically has been relieved to know that Agency A and B is investigating these particular various areas, that it doesn’t necessarily have to cover all of the same ground. And I have found that it’s expedited, not prolonged, the review or started new lines of attack that didn’t exist before. And I think that could also hold true, although it’s less tested in conduct cases where some of the theories of harm are just more wacky or radical. And I think agencies that have been at it for a longer period of time, in that investigation or generally, may be able to help other agencies understand what are the real issues here, what are some of the false paradigms or paths that, you know, we looked at five years ago but discovered really weren’t productive.

MS. COPPOLA: Right, right. Sometimes that thinking can go the other way, too. The learning can go the other way. I think I want to circle back on your point on forbearance. But before I do that, does anyone have any reactions to what Fiona was saying about information sharing and thinking of it as a backdoor way when it’s done -- the confidential information between agencies?

MS. PRATT: Well, I think it’s -- I guess from my perspective it would -- I’ve never seen that risk become realized. Because each of our agencies are very concerned about the confidential forecast that we have, that we want to minimize the risk of that because, otherwise, it would be a reputational risk for us doing our job.

I do think a lot of the value, unless you are doing a joint investigation where there is evidence that you need in another jurisdiction, most of the value of that cooperation can come from not providing confidential, competitively-sensitive third party information. So if you have waivers or you have a gateway provision, that facilitates that cooperation quite well.

MR. BEZZI: I agree with that. I mean, parties know -- if ever we are using an information gateway, and it happens rarely, but they know. It’s not done secretly; it’s done in their knowledge; it’s done transparently.

MS. COPPOLA: Fiona, I may have misinterpreted you. When you were talking about backdoor, I think you meant even in the presence of waivers. You didn’t mean out extralegally, right?

MS. SCHAEFFER: Yeah, I meant exchange of confidential information, where there are waivers, but the agency couldn’t get the information directly.

MS. COPPOLA: Right, right. Nick, do you have anything you wanted to add here?

MR. BANASEVIC: Nothing spectacular.

MS. COPPOLA: Okay. I have one question from the audience, but before we -- and I encourage other questions. So now is the time to write them. But before we get to that, I wanted to talk, I think because at the end of the day, the immediate goal in a particular case of cooperation is making sure that you don’t have conflicting remedies, that you have remedies that are, if not identical, at least interoperable. And we’ve heard some discussion today that, you know, there’s been a lot of agencies, more agencies looking at things than there used to be. And sort of the question about should we be giving more attention to cooperation, in the form of forbearance, than coordination. And, Fiona, if you could start that discussion for us.

MS. SCHAEFFER: Sure. Well, we were having a discussion at lunch and Marcus mentioned the magic pudding story. I said to Marcus, will this audience understand the magic pudding story? And looking around the room, I see there are bemused faces. Well, it’s a story we all told our children growing up in Australia where, as a child, I really enjoyed it. The magic pudding just never stopped producing pudding until the entire town was flooded with porridge and pudding everywhere. Well, no agency is a magic pudding. Agencies have limited resources. They can’t just keep on producing. And I think from an agency perspective, as well as from the parties’ perspective, one always ought to ask what are the incremental benefits of this additional investigation we’re doing over -- you know, on top of what five other agencies are doing? What are the incremental benefits of a remedy that is the same or virtually identical to what another agency has obtained as opposed to taking our limited resources and using them for investigations and transactions that these other five agencies couldn’t review? And it’s been interesting to me just to look at how different agencies have been allocating their resources over time. Brazil is an agency that comes to mind. When I come to think about some of the cartel investigations, the merger investigations they focused on maybe ten years ago, my anecdotal perception is that there was a lot more of an international dimension to them than there is today. I think some of the larger Brazilian investigations have involved, in more recent times, transactions in the educational sector and the health care sector, in the domestic financial services sector. And their bang for their buck in those investigations I think is significantly higher than it would be if they were another me-too in a global transaction. Having said that, is it realistic to say if the US is looking at a deal or the EU is looking at a deal or Canada and they’ve got remedies, that everyone else should just back off? No, of course not. But I think at each stage of the investigation, it’s useful for the agencies to ask themselves, what is the incremental value and what are the areas of this transaction that may be specific to our jurisdiction that the other people aren’t covering? What are the holes that we need to fill potentially for our jurisdiction that the others aren’t worrying about as opposed to retreading the same ground? And as counsel to parties to transactions and conduct investigations, we ought to be asking ourselves those same questions about what are the specific impacts of this transaction or our conduct on this jurisdiction.

MS. COPPOLA: Mm-hmm, mm-hmm. That’s very interesting. Thank you, Fiona. Marcus, what did you say to the magic pudding discussion and what are your thoughts on the topic more generally?

MR. BEZZI: Well, exactly, we are not a magic pudding. We have limited resources. We’ve got to use them intelligently. So we’ve got to focus on the things that are most important within our jurisdiction.

Fiona raised the cartel issue and international cartels. We could all spend all of our time doing international cartels and nothing else. But -- and they’re important, don’t get me wrong. Many international cartels have a big impact in Australia. But we’ve explicitly said in our enforcement and compliance policy, which sets out our priorities for enforcement and is adjusted each year, that we will focus on international cartels that have an impact on Australians and Australian consumers. It’s the detriment in Australia that is the focus. If there’s no detriment in Australia, then we’ll let other agencies deal with those cartels.

Similarly, in mergers, we will focus on the detriment in Australia. We’ll focus on a remedy that can fix the problems we have identified in Australia, and if it happens that that remedy has already been devised somewhere else and the remedy somewhere else will completely fix the problem in Australia, then what we can do is accept what’s called an enforceable undertaking, which is essentially a statutory promise, which requires the parties to give effect to whatever the commitment that’s being given outside Australia is, give them -- they are required to give that commitment to us in Australia, and that essentially is -- deals with the problem that we’ve got jurisdiction to deal with.

MS. COPPOLA: Right. That allows you to have something that you can enforce of there is a –

MR. BEZZI: We’ve got something that we can enforce.

MS. COPPOLA: Right.

MR. BEZZI: And we’re recognizing that our resources will be managed in a better way.

MS. COPPOLA: Better focused. Right, right.

Jeanne?

MS. PRATT: Well, I guess speaking -- the Canadian approach in mergers in particular, we actually have accepted and gone probably one step further than what Marcus was saying and not even put a consent agreement in place in Canada because we have been satisfied that the remedy mostly in the United States addresses our concern.

The only way we get there, though, is, again, to have really close cooperation. We need to understand the scope of the issues, we need to understand the scope of the remedy, and, frankly, we also need to have trust in the agency that they are going to enforce that remedy at the end of the day, which we have full faith in the US Department of Justice and the US Federal Trade Commission to do that.

One of the primary reasons that we do use comity and forbearance is because we think it allows a more effective and streamline remedy that’s least intrusive to business, avoids conflict, and simultaneously allows us, as a very small agency north of the 49th Parallel, to focus our scarce enforcement resources.

So two examples I would give, we had one where we accepted the US FTC’s remedy in the GSK/Novartis merger in 2015. So we were satisfied there. We didn’t even need a me-too registered consent agreement. We were fully satisfied that the scope of the remedy addressed our concerns and would address the anticompetitive effects on the Canadian market.

The second one, which is more recent, was a case we cooperated on with the US Department of Justice, UTC/Rockwell last year, which was an aerospace systems review, and in that case just to underscore the importance of the cooperation to get us to the comity, we cooperated closely with the US DOJ and the DG Comp throughout the review.

There were waivers in place in both those jurisdictions by all the parties. We shared information and conducted some joint market calls. We discussed issues of market definition, presence of global effective remaining competition and remedies. And we determined that there were likely a substantial lessening of competition in two product markets for pneumatic ice protection system and trimmable horizontal stabilizers actuators, THSAs.

And Rockwell’s relevant business -- they were located primarily in the US and Mexico and these products were distributed on a global basis. So we got to a place where we didn’t have any assets relevant to the remedy in our jurisdiction and we were fully satisfied that the remedy addressed our concerns.

The other side of comity, which, you know, I’m not sure the parties appreciated at the time, Commissioner Boswell talked about our simultaneous filing of litigation in the Staples/Office Depot merger a couple of years ago. Part of that was we did not see the need to file an injunction the same day because we knew that there would be an injunction proceeding by the FTC. So the parties did actually benefit because they didn’t have to face an injunction proceeding north of the border as well as south of the border. We benefitted greatly from cooperation in that case.

Again, we had one of our Department of Justice lawyers come and was seconded and was actually part of the FTC counsel team to see how the injunctive process worked, to see the evidence go in, and at the end of the day, the injunction in the United States took care of the issues in Canada. So they still benefitted. They probably didn’t like it because it was in the form of litigation, but it could have been worse.

MS. COPPOLA: You know, in GSK/Novartis, it’s interesting, we did a lot of trilateral calls in that case with the EC, Canada, and the US. And that’s not obvious in a pharmaceutical case where you expect the markets to be very different. But, certainly, in trying to understand the markets, I think the third parties were very happy to have one call and not three. So that’s an interesting case.

Nick, we haven’t heard from you yet on remedies coordination or forbearance. Is there anything you want to add?

MR. BANASEVIC: The first thing I want to say is I’m going to look up, after this panel, what a trimmable horizontal actuator is.

(Laughter.)

MS. SCHAEFFER: I was going to say, that’s what you need cooperation for. It takes three agencies to understand that.

MS. COPPOLA: Right.

MR. BANASEVIC: And there was another adjective there as well. But, anyway, for us, I mean, if you look at mergers and conduct, of course, we have an obligatory notification system in mergers, once you reach certain thresholds. I mean, you have to reason every decision whether it’s a clearance of remedies or a prohibition. So there’s no discretion as such in that sense. But, of course, there’s great benefit in the cases that we’re looking at more closely and we’ve got many examples that have been mentioned in terms of coordinating on the substance, on the timing, and, if appropriate, the remedies and the potential impact and how that might read across. Where we have the discretion in terms of choosing which cases we do and which cases we don’t,

with scarce resources that any public body has by definition, is a number of things, but not least the impact -- the potential impact in our market, in our jurisdiction. We’re responsible for a jurisdiction of 500 million people.

So I think it’s likely if we believe that there is an issue in that market that we are going to want to look at it more closely, even if there are similar investigations going on or not around the world. So I think that’s the first thing to say.

That being said, I think I understand as well the argument, particularly in the sector for which I’m responsible, the high-tech sector, companies operate globally, so the issue is raised, well, could you have different solutions in different jurisdictions? I actually think this risk of diversion is somehow overblown in terms of just perception. It’s not that this is going around willy- nilly in every case in every sector. I think that’s slightly a perception issue and, actually, more generally illustrates my core point in the benefits of really having up front, preemptively with partner agencies, discussions about the approach to be taken.

Again, it’s not that one can or need guarantee precisely the same outcome, given the differences possibly in even conduct. I mean, some of our markets are national for some of the products even if the companies are operating globally. But I think there is a great benefit in this up-front shaping, sharing thoughts to, to the extent possible, minimize the risk of divergences.

MS. COPPOLA: We have a question from the audience about the ongoing investigations of the tech platforms. The EC, the Japan Fair Trade Commission, are already investigating these firms. What’s important to effectively investigate, including cooperation? Another question, what you can expect from the FTC, but as I’m not a speaker, but a moderator, I think I will punt that to what can you expect from the investigating agencies. And, Nick, according to this week’s Economist, you guys are the determinators. So I’m going to let you answer that question.

MR. BANASEVIC: Is that a type of actuator? A determinator?

MS. COPPOLA: There’s these like big guns and, yeah, sledgehammers.

MR. BANASEVIC: I’m not allowed to say anything about ongoing cases, so –

MS. COPPOLA: Right.

MR. BANASEVIC: So what was the –

MS. COPPOLA: The question was, how can -- I think the question is, how can those agencies effectively investigate? What kind of joint –

MR. BANASEVIC: I think I have to go back to my examples from the past. I think that’s the most instructive thing. I mentioned two. There have been others where in the US and in the -- particularly the same cases or the same issues have been looked at. In some, we’ve had waivers; in others, we haven’t. I don’t want to monopolize the last 2 minutes and 30 seconds.

MS. COPPOLA: Right.

MR. BANASEVIC: It’s really been of tremendous use. And it’s my opening statement, it’s not an add-on. It can really -- for these big cases where they’re very important, sensitive, and you want to get it right, there’s just a great benefit in sharing experiences, knowledge, with colleagues who have the same -- who want to get it right as well and get the best result. So it’s a very good thing that we shouldn’t have just as just a bolt-on.

MS. SCHAEFFER: Can I just add on to that? Maybe the Cooperation 2.0 for digital platform investigations is not necessarily between antitrust agencies, but between antitrust agencies, consumer protection, and privacy agencies. Because -- and I think the term “forbearance” might come in there as well, in that not everything involving a digital platform is necessarily an antitrust issue.

And we certainly have a lot of intermelding of privacy and consumer protection concerns, as we see with the Australian ACCC report. And how do we jointly investigate those issues or maybe have antitrust not be the primary investigation and enforcement mechanism there?

MS. COPPOLA: We are very close to the end of the session. So I guess, Marcus and Jeanne, starting with you, and if there’s time, we’ll move on to Fiona and Nick. What are your last words of advice for the FTC in the area of enforcement cooperation?

MS. PRATT: I’m not sure I have advice. I think, as you’ve heard, I have found or we have found that gateway provision in our legislation to be particularly useful and, you know, it might be interesting to consider that in your context and whether it’s appropriate.

And I would just want to lastly say thank you very much for having us here. I know the FTC can continue to rely on the Canadian Competition Bureau’s commitment to continuing to build upon the solid cooperation foundation that we have and in particularly dynamic fast-moving markets that we have today. I think the business case for cooperation is only getting stronger and will only get better from here.

MR. BEZZI: So I won’t advise the FTC, but the advice that I’ll give to the ACCC is that we need 21st Cooperation and mutual assistance frameworks.

MS. COPPOLA: Thanks.

Nick, Fiona, anything to add?

MR. BANASEVIC; I’ve said it all, I don’t want to repeat. I think it’s don’t underestimate it, use it, and benefit from the interactions and the knowledge you can have with colleagues.

MS. COPPOLA: Well, thank you all very much for your insights. These have been tremendous. Coming into the panel, I wasn’t sure I would learn anything since I spend most of my day engaged in enforcement cooperation. But I did. So bravo. Thanks so much for participating. I think we’ll move on to the next panel now.

(Applause.)

(Brief break.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY

MS. WOODS BELL: Hello, everyone. Welcome back from break. I’m Deon Woods Bell. I’m a lawyer in the Office of International Affairs at the Federal Trade Commission. I’m so excited to be here today.

It is my extreme pleasure to introduce Julie Brill. Julie is Corporate Vice President and Deputy General Counsel for Global Privacy and Regulatory Affairs at Microsoft. Of course, everybody in the building knows her as a former Commissioner and friend of the Federal Trade Commission. She’s widely recognized for her work on internet privacy and data security issues related to advertising and financial fraud.

She’s received so many awards we could not list them all in her bio, nor could I enumerate them here today. One of my favorite is the Top 50 Influencers on Big Data in 2015. And one of my favorite memories is working together with her in Brussels on these same issues. Thank you, and please welcome Julie.

(Applause.)

MS. BRILL: Thank you, Deon. I remember that event, too, and it was great to work with you there. And it’s really an honor to be here today to contribute to today’s important discussions on the FTC’s international role in a world transformed by digital technology.

I am particularly excited to begin this session today that focuses on artificial intelligence. We have a truly distinguished panel, some of whom are -- here they come -- of experts from around the world, who will explore the implications of artificial intelligence at a time when innovative technology calls for innovative thinking about policy and regulation.

Today’s discussion comes at a critical moment. During the past few years, how people work, play, and learn about the world has been transformed. Industries have been reinvented. New ways to treat diseases emerge almost every day. Driving all this change are groundbreaking technologies like cloud computing that enable us to collect and analyze data scale that has never before been possible. But what we have experienced so far is just the beginning.

Rapid progress in the field of artificial intelligence has delivered us to the threshold of a new era of computing that will transform every field of human endeavor. Already, almost without us noticing, AI has become an essential part of our day- to-day lives. It powers the apps that help us get from place to place, predict what we might want to buy, and protects our systems from malware and viruses.

This is just a hint of what’s possible. Artificial intelligence has the potential to improve productivity, drive economic growth, and help us address some of the most pressing challenges in accessibility, health care, sustainability, poverty, and much more. Yet, history teaches us that change of this magnitude has always come with deep doubts and uncertainty.

I believe that if we are to realize the promise of artificial intelligence, we must acknowledge these doubts and work to build trust, trust that technology companies are working not just to maximize profits, but to improve people’s lives; trust that we use the personal data we collect safely, responsibly, and respectfully. But as we are learning the hard way, in the technology industry, trust is fragile.

In the wake of the Cambridge Analytica scandal and the spectacle of tech industry experts being hauled before Congress to answer for their business practices, people wonder if technology and technology companies can be trusted. The truth is that technology is neither inherently good nor bad. Cloud computing and artificial intelligence are just tools that people can use to be more productive and effective, basically the equivalent of the first Industrial Revolution’s steam engine. But it is also true that because technology has never been more powerful, the potential impact, both positive and negative, has never been greater.

So where does trust come from? It begins when companies like Microsoft, that are at the forefront of the digital revolution, acknowledge that in this time of sweeping change, we must consider the impact of our work on individuals, businesses, and societies. Today, we must ask ourselves not just what computers can do, but what they should do. This means there may be times when we have to be willing to decide that there are things that they should not do as well.

To guide us as we weigh these decisions at Microsoft, we have adopted six ethical principles for our work on artificial intelligence. It starts with transparency and accountability. We know that trust requires clear information about how AI systems work, coupled with accountability for the people and companies who develop them. We believe strongly in the principles of fairness which means AI must treat everyone with dignity and respect and without bias.

Our fourth principle encompasses reliability and safety, particularly when AI makes decisions that affect people. We also are strongly committed to the principles of privacy and security, for people’s personal information. And we believe that AI solutions should be built using inclusive design practices that affect the full range of experiences of all who might use them.

Now, while these principles are at the center of every decision we made about artificial intelligence research and development, we also know that the issues at stake are simply too large and too important to be left solely to the private sector. Trust also requires a new foundation of laws.

Here in the United States, right now, one area of the law demands our attention above all others. That area is privacy. Because so much of who we are is expressed digitally and so much of how we interact with each other and the world is captured and stored in digital form, how people think about privacy has changed. For more than a century, our understanding of this most fundamental human right has been shaped by the definition set forth by the great American legal thinker and fathers of the FTC, Louis Brandeis, who defined privacy as the right to be let alone. That right will always be important. But, by itself, it is no longer sufficient.

Now, modern privacy law must embrace two essential realities of life in the digital age. The first is that people expect to use digital tools and technologies to engage freely and safely with each other and with the world.

The second is that people expect to be empowered to control how their personal information is used. Whether we protect these two things is one of the critical challenges of our time. What we need is a new generation of privacy policies that embrace engagement and control without sacrificing interoperability or stifling innovation.

This is why we were the first company to extend the rights that are at the heart of the European general protection regulation, and we extended those to our customers around the world, including the right to know what data is collected, to correct that data, and to delete it or take it somewhere else. And over the last year, we’ve seen

the rise of a global movement to adopt frameworks that enhance consumer control mechanisms modeled on those required by Europe’s GDPR.

With participants here from India, Kenya and Brazil, this panel of distinguished guests is a perfect illustration of this important trend. Brazil’s general data protection law, which goes into effect a year from now, includes provisions that extend new privacy rights to individuals and mandates new requirements for notification, transparency, and governance for organizations. All of these requirements that will be new in Brazil are tightly aligned with GDPR.

In India and Kenya, new privacy laws modeled on GDPR are also currently moving through the legislative process.

Here in the United States, the California Consumer Privacy Act includes provisions that give people more control over their data. And Washington State is considering legislation based on consumer rights protected by GDPR as well.

As part of Microsoft’s commitment to privacy, we offer a dashboard where people can manage their privacy settings. Since May of last year, more than 10 million people around the world have used this tool, with the number growing every day. I think it is telling that while millions of people around the world are using our tool, our data demonstrates that US citizens are the most active in controlling their data. All of this should serve as a wakeup call for US companies and the US Government.

At Microsoft, we believe it is time for United States to adopt a new legal framework for access and use of data that reflects our new understanding of the right to privacy. To achieve this, I believe a strong US framework -- frankly, a strong privacy framework anywhere in the world -- should incorporate four core elements, transparency through robust standards that include and appropriate privacy statements within user experiences, individual empowerment that grants people meaningful control of their data and privacy preferences, corporate responsibility that is built on rigorous assessments that weigh the benefits of processing data against the risk to individuals whose data may be processed, and strong enforcement and rule-making. And, here, that means in the United States that should be all embedded at the US Federal Trade Commission.

While updated privacy laws are essential to building trust, new uses for artificial intelligence are emerging that will require special consideration for their own specific regulations. Facial recognition is a prime example. This technology has shown that it can provide new and positive benefits when used to identify missing children or diagnose diseases. But there is a real risk that -- there is a real risk which includes the danger that it will reinforce social bias and be used as a surveillance tool that encroaches individual freedom.

This is why Microsoft has called on the US Government to regulate facial recognition with a focus on preventing bias, preserving privacy, and prohibiting government surveillance in public places without a court order. It is also one of the reasons we have testified in support of the Washington State privacy bill, which includes provisions that address many of these important concerns about facial recognition technology.

We need laws that place appropriate guardrails to ensure that companies don’t take unfair advantage of individuals or violate people’s fundamental rights. That is the essence of trust. We believe that guardrails can be designed in ways that facilitate global interoperability and promote innovation so we can all work together to continue to harness the potential of the digital revolution to improve people’s lives and drive economic growth.

This will require a commitment from all of us to engage in ongoing discussions and consultations that span governments and sectors. This means it’s essential for the US Government and its agencies, including the FTC, to engage in a broad range of discussions with other governments on digital issues like we are doing with the honored guests here today.

Just as important are gatherings like this that will bring people together from around the world to explore policy approaches to new emerging technologies like artificial intelligence. More than 100 years ago, when Brandeis defined the right to be let alone in his famous Law Review article, The Right to Privacy, he described, with great eloquence, the ongoing process by which rights evolve as humanity progresses and how the law adopts and adapts in response.

“Political, social, and economic changes entail the recognition of new rights,” Brandeis wrote, “and the law in its eternal youth grows to meet demands of society.” Brandeis was moved to write this article because of the impact of photography, mechanical printing presses, and other disruptive new technologies of his time.

Today, we stand at the beginning of a new era of disruption and change, a time of technology- driven transformation that will require the recognition of new rights and the development of new laws to meet the demands of our societies. It’s a task that will ask us to convene in hearings like this one and in forums, meetings and conferences around the world to grapple openly and honestly with a host of issues that will touch on virtually every aspect of our lives and our businesses.

We, at Microsoft, look forward to being a part of these conversations and to working in close partnership with all of you to make sure that technology moves forward within a framework of respect for human dignity and with the goal of serving the greater good. Thank you.

(Applause.)

INTERNATIONAL ENGAGEMENT AND EMERGING TECHNOLOGIES: ARTIFICIAL INTELLIGENCE CASE STUDY (PANEL)

MS. WOODS BELL: Thank you. Thank you very much, Julie, for those remarks. You outlined very well the tremendous potential of AI and that’s one of the reasons why we’re here today, to discuss them even further.

Well, I’m still Deon Woods Bell. And my co- moderator here is Ellen Connelly, an Attorney Adviser in the Office of Policy and Planning. And, together, we want to welcome you to our panel on international engagement and emerging technologies focusing on artificial intelligence.

You’re in for a treat. As Julie described, we have quite a panel assembled for you here today. This session is a follow-on to the hearings in November, which focus on the same topic. And following the November meetings, colleagues here at the FTC -- and a lot of influence from Ellen here -- said we should go deeper, we should focus on international issues. So today, we’re thrilled to have this impressive group of international officials, practitioners, and academics here and on the line from Harvard.

During this panel, we’ll touch upon a variety of issues and we’ll go deeper and let you see what these colleagues have to offer. We won’t go into great detail on their bios, but we couldn’t resist showing off a little bit for you and letting you know who they are.

On the line from Harvard is Chinmayi Arun. She’s a fellow at the Harvard Berkman Klein Center for Internet & Society, and she’s the Assistant Professor of Law at the National Law University in Delhi. Her chair is there and her picture will soon be on the line as she can hear us right now.

Next, we have, again, he’s still James Dipple-Johnstone. You saw him earlier. He’s a Deputy Commissioner from the UK’s ICO, and prior to the ICO, he was in the Solicitor’s Regulatory Authority where he had been Director of Investigation and Supervision, and he’s not from the ministry of no.

(Laughter.)

MS. WOODS BELL: Next, Francis Kariuki, Director General of the Competition Authority of Kenya. Mr. Kariuki is the founding member and the current Chairman of the African Competition Forum. He’s also an expert in FinTech.

Next over to Marcela. She’s a partner at VMCA Advogados in Brazil focusing on data protection and antitrust. She’s served as Advisor and Chief of Staff for the President of Brazil’s famous CADE.

Over to Isabelle. She’s President and Member of the Board Autorité de la Concurrence, as she was previously the President of the Sixth Chamber of the Conseil d'État, the French Supreme Administrative Court, and other governmental capacities.

And last but not least, we have Omer Tene. Omer is a Vice President and Chief Knowledge Officer at the International Association of Privacy Professionals. He wears so many hats, we couldn’t list them either. He’s an Affiliate Scholar at Stanford and Senior Fellow at the Future of Privacy Forum.

So, before we get started, we want you to be open to looking to questions. We have our colleagues here. We’re going to have short introductory comments from each colleague, and then after this, we’ll have a moderated panel discussion, and we hope that you enjoy.

MS. CONNELLY: Great. So I will start us off by giving each of our panelists a chance to make a brief introductory statement to describe for us the key competition, consumer protection and privacy issues that they see emerging around the artificial intelligence field. We will start with Chinmayi.

MS. ARUN: Thank you for having me. It’s such an honor to be a part of this panel, and I’m happy to see that the FTC is listening to voices from around the world.

If I were to give you the three or four big highlights of how I would think about AI and the right to privacy in data sets in India, it would be -- the first would be in terms of global companies, usually American companies, operating in India versus Indian companies operating both in India, as well as elsewhere in places like Kenya.

The second would be in terms of data because, as you know, it’s a very big country and it provides large and rich data sets that can be complicated in ways that I’m going to describe to you shortly.

The third is that perhaps some of you have heard that there has been a rich and, again, contentious conversation about the right to privacy in India in the context of state surveillance, but also in the context of state protection. So we’ve had a major case on the right to privacy, and we’ve also got a data protection bill, which is very interesting, so I’m going to describe the highlights of that for you.

And the final -- because we’re discussing this in such an international context is this sort of almost a clash of jurisdictions that arises from the Indians, for example, floating proposals of data localization in certain contexts, but also the ways in which India is coping with norms that are emerging from the US and from Europe.

So the first is very simple, which is that as you know the major technology platforms, like Facebook and WhatsApp and Google, are used extensively in India and they have huge user bases in India, but there are also many Indian citizens that access them and have their data on them. Although I will focus a little bit more on the information platforms, it’s good to know that Airbnb, Uber, and other technology platform companies are also offering services in India.

So our legislation, our new privacy act, our proposed amendment to our information technology act are all coping now with the very real idea that there are many Indian citizens whose lives are affected by these technologies that are designed elsewhere based on rules from elsewhere. At the same time, they’re also trying to keep Indian companies competitive because there are Indian companies offering similar services in India.

Our NITI Aayog, which is sort of our version of the planning commission, has described India as the AI garage for 40 percent of the world, and they’ve got a strategy paper on AI. As you know, the big data set question, it’s complicated because, again, India is looking at it as a way towards machine learning, but there are also concerns of data protection and privacy that arise in that context.

And the big tension really is that, on one hand, the policymakers want to leverage this and have this data and sort of learn from it and, on the other, of course, there’s the question of the privacy rights of Indian citizens and especially of marginalized citizens, people who are not able to assert their rights in the consumer forum.

And the final -- so none of this is law yet, but both in the proposed privacy legislation and in the proposed IT amendment act, the question has arisen of whether foreign companies with a sizable user base in India should be asked to localize data in India. So both these proposed legislations have suggested that these companies might be made to host their data sets in India, and I think that that also is cause for concern if they’re thinking about it from a privacy and data protection point of view.

I’m going to stop here. I just wanted to flag all of this in case anyone has questions later. Thank you so much.

MS. CONNELLY: Thank you very much for those really interesting comments.

We’ll move down the line and next up is James.

MR. DIPPLE-JOHNSTONE: Thank you very much and thank you. It’s an honor to be here on this panel with you today.

So I’ve got four issues. And I think the first, which has already been very ably covered, which is that about public trust and the risk of losing public trust in the rollout of AI systems and the role of regulators needing to work together both within country, but also internationally, which is my second theme.

This is an emerging area, one where I don’t think we still have a clear picture of what AI’s impact on our societies will be. And with that in mind, it’s important that regulators keep themselves up to date, keep relevant and work together with others. And that’s very much the approach we’ve taken in the UK. The ICO has a remit in some of the technology, but actually, we work very closely with, for example, colleagues at the Competition and Market Authority, the Financial Conduct Authority, the Center for Data Ethics and Innovation and the Alan Turing Institute to look at the common issues that face us all and how we can improve our regulation.

An important third issue is to look at not only whether the data’s held -- and when we talk about big data sets, we sometimes think of the big tech companies, but in the UK context, the state has large and valuable data sets, too. The UK National Health Service and the UK Education Service have very comprehensive data sets with millions of data points, which would be of value to a number of organizations around the world.

And we are seeing increasing use of AI in the public sector as a model of efficiency and to help us all strive to meet our budget considerations. AI is being looked at for use to decide whether UK citizens are likely to commit crimes, which crimes should be investigated, who’s likely to reoffend, who’s likely to pay their rent on time. And that is beginning to introduce issues of fairness, accountability, and transparency.

And so that’s why, as a regulator, we are really keen to keep abreast of developments. So we are putting a lot of effort into doing that. We are recruiting post-doctoral researchers to help us look at how to regulate AI. We’ve taken new powers to examine AI’s use and look at AI systems in practice and in operation and we’ve reconfigured the office to set up an entire part of the office that will just focus on innovation and technology.

I said it this morning; I’ll keep saying it. We’re not the ministry of no, but we think the GDPR provisions around data protection impact assessments and our work around, for example, regulatory sand boxes and innovation hubs with other regulators. We’re trying to encourage early dialogue to tease through some of these issues together, because I’m not sure any one of us has the perfect answer for all the scenarios.

MS. CONNELLY: Thank you.

Francis?

MR. KARIUKI: Thank you, Ellen and Deon. It’s a pleasure for me to be here and to share my thoughts in regard to AI.

And my view is as a competition and consumer protection regulator, what am I worried about? And I have about four issues, and these are transparency and information asymmetries. What I would like to say is that AI has both created positive and external -- externalities. And in terms of competition and consumer protection, there’s an argument which has been found that they bring more efficiency in terms of prices and greater transparency compared to the traditional retail sales channels, and this is an inquiry which has been conducted in Europe and it has shown that. And, also, they provide additional benefits on these platforms. For example, AI [indiscernible], such platforms could improve choice and value for consumers.

However, the other challenge of -- an encountered challenge in regard to we don’t appreciate the criteria behind the decisions of AI, they are only known to the designer of these systems, and, therefore, the merchant or the consumer may not be aware of how the system has been created and it’s allocating the prices. So there’s the risk of intentional design of the systems in favor of certain participants in the market.

And this could be quite catastrophic in the continent I come from where there’s a lot of market concentration, and, therefore, the companies which are in Africa then can expand their space by being biased against the consumers in Africa.

The other areas that’s also barriers or pathways to entry are, in Kenya, I’ve seen some positive externalities especially AI has enabled new innovations, where in Kenya we have seen recent expansion of financial services for people who are not included in the financial services. And, therefore, companies have been enabled to expand financial services through lending positions for previously people who were not captured in the financial services and also in the insurance sector.

The challenge I see also from the AI is the line between open and proprietary data. AI often creates what is called, in fair data, an individual that is not perhaps -- not factual but opinion based, and, therefore, we may not get an optimal position for the product which is being offered or the prices which are being offered in the market. And, therefore, the challenge going forward is how do we determine data which is a product and which data is an input, and this choice of where the line is will have significant competitive implications as we move.

Besides information asymmetry, I’ve seen AI can also be used in consumer protection issues, discrimination based on other social issues like the region where people come from or even race, as I had mentioned earlier, and these are some of the things where we need, as regulators, both competition and consumer, to look before we fly, because right now is that we are flying blindly and we might be flying into a storm.

MS. CONNELLY: Thank you.

Marcela?

MS. MATTIUZZO: So first of all, thank you, Deon and Ellen, for the invitation for the FTC, to you both for inviting me personally, but also Brazil to be a part of this discussion.

A lot of the points that have been raised here focus on procedural challenges of AI. What I would like to also mention is perhaps the difficulty in both attaining international convergence in these topics, not necessarily laws that are exactly the same, but that point in the same direction, and also convergence within the many fields of law that are connected to AI.

So here, at the FTC, we’re naturally discussing antitrust, consumer protection, and privacy. And even when we’re speaking only of these three areas of law, we can already see that sometimes the objectives of these policies are not always totally convergent.

So, what I would like to -- just to give an example, I guess, that is comparing privacy and antitrust that to me is very clear. What technology has enabled today is for many companies to unilaterally access information and AI has also allowed that information, this data, to be combined and used efficiently for many purposes. So now we can know who bought something, how that person bought it, and so forth, and create, for example, consumer profiles.

Perhaps from an antitrust point of view, one of the solutions to a potential problem of unilateral abuse of this information would be to share the databases with other companies. So we would have many companies that have the access to the same set of data and, therefore, of course, we can have problems of collusion. But leaving that aside, we would have a level playing field.

If, however, we look from the consumer or data protection side of the discussion, we may come to a very different conclusion. And we may come to realize that, perhaps, consumers don’t want their data shared across different platforms and shared across many companies. So, naturally, both objectives pursued by either antitrust or privacy and consumer protection agencies, in the case of Brazil specifically as I hope to make clear throughout my interventions, we are at very different development stages. When it comes to antitrust and consumer protection, we are much more developed and, as you may be aware and former Commissioner Julie Brill already mentioned, in regards to data protection legislation, our specific legislation was approved just last August, August 2018, and has not yet come into force.

So building policy that brings all of these areas of law together in a coherent fashion to address AI challenges seems to me to be a particularly important goal and a particularly important topic for us to focus on.

MS. CONNELLY: Thank you, Marcela. Isabelle?

MS. DE SILVA: Thanks a lot to the FTC for the invitation. I’m really glad to be here.

I would like to say that, for me, the main point is that we think data, artificial intelligence, algorithm, are really key to the competitive process and that is why we must look at it closely. Of course, those processes affect also the way the state is being run. They also affect and they change society, but for us, the main issue is how do they affect the competitive process and the way companies do business?

So what we see is that we really need to invest a lot more than before in understanding what is going on in the market, in the companies, and also to use all our different tools, legal tools, to gain a better understanding and also to give better vision to the market, and I will try to illustrate this with some examples.

So first of all, we use sector inquiries. That is a tool that is common among agencies. But how do we use it? We really take a lot of time to understand a specific market that we deem to be interesting or a process. So that’s what we did with online advertising last year, and, of course, we had very interesting dialogue and followup with Australia, who has finished a very interesting report on online advertising.

And in this way, we get a lot of information from companies. They are sometimes reluctant to give information, but we have the legal framework that enable us to get a lot of information.

And also we give information back to the market. I think this is really something interesting because some sectors are moving so fast that even the companies engaging in the sector don’t always have the big picture, and that is something that has been deemed very useful in the field of what we did about programmatic advertising and the way it’s being run because it’s a very complex and new ecosystem.

Another type of tool we are using very much is the joint studies with other agencies. That’s what we did with the CMA about closed ecosystem in 2014, what we did with the German agency in 2016 about big data, and what we are doing right now about algorithm still with the German agency.

So what is the interest of this? It’s really to show the impact we see that algorithms have on the competitive process and maybe I will tell about a little bit more about this later. This is really something where we draw about, of course, what the experts have written about algorithm, but also in a very practical manner how do companies use algorithm and how does it change the way they do business in the market?

And, finally, another tool that we use is the conference or hearings like you have today at the FTC, but really focusing on what is new, for example, in the field of algorithm. Last year, we had lots of meetings with scientists, sociology experts about what is new about algorithm and also about companies. For example, we had meetings with Google and Facebook to know how they use algorithm in a very precise and detailed matter to help us to understand how it’s being used.

#### Upside AND downside risks of AI are existential---effective governance is key

Themistoklis Tzimas 21, Faculty of Law at the Aristotle University of Thessaloniki, “Chapter 2: The Expectations and Risks from AI”, in Legal and Ethical Challenges of Artificial Intelligence from an International Law Perspective, Springer, 2021, pp. 9–32 Open WorldCat, https://doi.org/10.1007/978-3-030-78585-7

Therefore, it is only natural to be at least skeptical towards a future with entities possessing equal or superior intelligence and levels of autonomy; the prospect even of existential risk looms as possible.7

AI that will have reached or surpassed our level of intelligence make us wonder why would highly autonomous and intelligent AI want to give up control back to its original creators?8 Why remain contained in pre-deﬁned goals set for it by us, humans?

Even AI in its current form and narrow intelligence poses risks because of its embedded-ness in an ever-growing number of crucial aspects of our lives. The role of AI in military, ﬁnancial,9 health, educational, environmental, governance networks-among others—are areas where risk generated by AI—even limited— autonomy can be diffused through non-linear networks, with signiﬁcant impact— even systemic.10

The answer therefore to the question whether AI brings risk with it is yes; as Eliezer Yudkowski comments the greatest of them all is that people conclude too early that they understand it11 or that they assume that they can achieve it without necessarily having acquired complete and thorough understanding of what intelli- gence means.12

Our projection of our—lack of complete—understanding of the concept of intelligence on AI is owed to our lack of complete comprehension of human intelligence too, which is partially covered by the prevalent and until now self- obvious, anthropomorphism because of which we tend to identify higher intelligence with the human mind.

Yudkowski again however suggests that AI “refers to a vastly greater space of possibilities than does the term “Homo sapiens.” When we talk about “AIs” we are really talking about minds-in-general, or optimization processes in general. Imagine a map of mind design space. In one corner, a tiny little circle contains all humans; within a larger tiny circle containing all biological life; and all the rest of the huge map is the space of minds-in-general. The entire map ﬂoats in a still vaster space, the space of optimization processes.”13

Regardless of what our well-established ideas are, there are many, different intelligences and even more signiﬁcantly, there are potentially, different intelli- gences equally or even more evolved than human.

From such a perspective, the unprecedented—ness of potential AI developments and the mystery surrounding them emerges as not only the outcome of pop culture but of a radical transformation of our—until recently—self—obvious identiﬁcation of humanity with highly evolved and dominant intelligence.14

The lack of understanding of intelligence and therefore of AI may be frightening but does not lead necessarily to regulation—at least to a proper one. We could even be led into making potentially catastrophic choices, on the basis of false assumptions.

On top of our lack of understanding, we should add a sentiment of anxiety as well as of expectations, which intensiﬁes as an atmosphere of emergency and of expected groundbreaking developments grows. The most graphic description of this feeling is the potential of a moment of singularity, as mentioned above according to the description by Vinge and Kurzweil.

As the mathematician I. J. Good–Alan Turing’s colleague in the team of the latter during World War II—has put it: “Let an ultraintelligent machine be deﬁned as a machine that can far surpass all the intellectual activities of any man however clever. Since the design of machines is one of these intellectual activities, an ultraintelligent machine could design even better machines; there would then unquestionably be an “intelligence explosion,” and the intelligence of man would be left far behind. Thus the ﬁrst ultraintelligent machine is the last invention that man need ever make, provided that the machine is docile enough to tell us how to keep it under control.”15 This is in a nutshell the moment of singularity.

The estimates currently foresee the emergence of ultra or super intelligence—as it is currently labelled—or in other words of singularity, somewhere between 20 and 50 years from today, further raising the sentiment of emergency.16 We cannot even foretell with precision how singularity would look like but we know that because of its expected groundbreaking impact, both states and private entities compete towards gaining the upper hand in the prospect of the singularity.17

Despite the fact that such predictions have been proven rather optimistic in the past18 and therefore up to some extent inaccurate, there are reasons to assume that their materialization will take place and that the urgency of regulation will be proven realistic.

After all, part of the disappointments from AI should be blamed on the fact that certain activities and standards, which were considered as epitomes of human intelligence have been surpassed by AI, only to indicate that they were not eventu- ally satisfactory thresholds for the surpassing of human intelligence.19 Partially because of AI progress we realize that human intelligence and its thresholds are much more complicated than assumed in the past.

The vastness’s of deﬁnitions of intelligence, as well as its etymological roots are enlightening of the difﬁculties: “to gather, to collect, to assemble or to choose, and to form an impression, thus leading one to ﬁnally understand, perceive, or know”.20

As with other relevant concepts, the truth is that until recently our main way to approach intelligence for far too long was “we know it, when we see it”. AI is an additional reason for looking deeper into intelligence and the more we examine it, the most complicated it seems.

The combination of lack of complete understanding of intelligence, the unpredictability of AI, its rapid evolution and the prospect of singularity explain both the fascination and the fear from AI. Once the latter emerges, we have no real knowledge about what will happen next but only speculations, which until recently belonged to the area of science ﬁction.

We are for example pretty conﬁdent that the speed of AI intelligence growth will accelerate, once self—improvement will have been achieved. The expected or possible chain of events will begin from AI capacity to re-write its own algorithms and exponentially self—improve, surpassing human intelligence, which lacks the capacity of such rapid self—improvement and setting its own goals.21

We can somehow guess the speed of AGI and ASI evolution and possibly some of its initial steps but we cannot guess the directions that such AI will choose to follow and the characteristics that it will demonstrate. Practically, we credibly guess the prospects of AI beyond a certain level of development.

Two existential issues could emerge: ﬁrst, an imbalance of intelligence at our expense—with us, humans becoming the inferior species—in favor of non-biological entities and secondly a lack of even fundamental conceptual communication between the two most intelligent “species”. Both of them heighten the fear of irreversible changes, once we lose the possession of the superior intelligence.22

However, we need to consider the expectations as well. The positive side focuses on the so-called friendly AI, meaning AI which will beneﬁt and not harm humans, thanks to its advanced intelligence.23

AI bears the promise of signiﬁcantly enhancing human life on various aspects, beginning from the already existing, narrow applications. The enhanced automation24 in the industry and the shift to autonomy,25 the take—over by AI of tasks even at the service sector which can be considered as “tedious”—i.e. in the banking sector—climate and weather forecasting, disaster response,26 the potentially better cooperation among different actors in complicated matters such as in matters of information, geopolitics and international relations, logistics, resources ex.27

The realization of the positive expectations depends up to some extent upon the complementarity or not, of AI with human intelligence. However, what friendly AI will bring in our societies constitutes a matter of debate, given our lack of unanimous approach on what should be considered as beneﬁcial and therefore friendly to humans—as is analyzed in the next chapter.

Friendly AI for example bears the prospect of freeing us from hard labor or even further from unwanted labor; of generating further economic growth; of dealing in unbiased, speedy, effective and cheaper ways with sectors such as policing, justice, health, environmental crisis, natural disasters, education, governance, defense and several more of them which necessitate decision-making, with the involvement of sophisticated intelligence.

The synergies between human intelligence and AI “promise” the enhancement of humans in most of their aspects. Such synergies may remain external—humans using AI as external to themselves, in terms of analysis, forecasts, decision—making and in general as a type of assistant-28 or may evolve into the merging of the two forms of intelligence either temporarily or permanently.

The second profoundly enters humanity, existentially—speaking, into uncharted waters. Elon Musk argues in favor of “having some sort of merger of biological intelligence and machine intelligence” and his company “Neuralink” aims at implanting chips in human brain. Musk argues that through this way humans will keep artiﬁcial intelligence under control.29 The proposition is that of “mind design”, with humans playing the role that God had according to theologies.30

While the temptation is strong—exceeding human mind’s capacities, far beyond what nature “created”, by acquiring the capacity for example to connect directly to the cyberspace or to break the barriers of biology31—the risks are signiﬁcant too: what if a microchip malfunction? Will such a brain be usurped or become captive to malfunctioning AI?

The merging of the two intelligences is most likely to evolve initially by invoking medical reasons, instead of human enhancement. But the merging of the two will most likely continue, as after all the limits between healing and enhancement are most often blurry. This development will give rise, as is analyzed below, to signif- icant questions and issues, the most of crucial of which is the setting of a threshold for the prevalence of the human aspect of intelligence over the artiﬁcial one.

Human nature is historically improved, enhanced, healed and now, potentially even re-designed in the future.32 Can a “medical science” endorsing such a goal be ethically acceptable and if yes, under what conditions, when, for whom and by what means? The answers are more difﬁcult than it seems. As the World Health Organi- zation—WHO—provides in its constitution, “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or inﬁrmity”.33

Therefore, why discourage science which aims at human-enhancement, even reaching the levels of post-humanism?34 Or if restrictions are to be imposed on human enhancement, on what ethics and laws will they be justiﬁed? How ethically acceptable is it to prohibit or delay technological evolution, which among several other magniﬁcent achievements, promises to treat death as a disease and cure it, by reducing soul to self, self to mind, and mind to brain, which will then be preserved as a “softwarized” program in a hardware other than the human body?35

After all, “According to the strong artiﬁcial intelligence program there is no fundamental difference between computers and brains: a computer is different machinery than a person in terms of speed and memory capacity.”36

While such a scientiﬁc development and the ones leading potentially to it will be undoubtedly, groundbreaking technologically-speaking, is it actually—ethically- speaking—as ambivalent as it may sound or is it already justiﬁed by our well— rooted human-centrism?37

Secular humanism may have very well outdated religious beliefs about afterlife in the area of science but has not diminished the hope for immortality; on the contrary, science, implicitly or explicitly predicts that matter can in various ways surpass death, albeit by means which belong in the realm of scientiﬁc proof, instead of that of metaphysical belief.38

If this is the philosophical case, the quest for immortality becomes ethically acceptable; it can be considered as embedded both in the existential anxiety of humans, as well as in the human-centrism of secular philosophical and political victory over the dei-centric approach to the world and to our existence.

From another perspective of course and for the not that distant philosophical reasons, the quest for immortality becomes ethically ambiguous or even unacceptable.39 By seeking endless life we may miss all these that make life worth living in the framework of ﬁniteness. As the gerontologist Paul Hayﬂick cautioned “Given the possibility that you could replace all your parts, including your brain, then you lose your self-identity, your self-recognition. You lose who you are! You are who you are because of your memory.”40

In other words, once we begin to integrate the two types of intelligence, within ourselves, until when and how we will be sure that it is human intelligence that guides us, instead of the AI? And if we are not guided completely or—even further—at all by human intelligence but on the contrary we are guided by AI which we have embodied and which is trained by our human intelligence, will we be remaining humans or we will have evolved to some type of meta-human or transhumant species, being different persons as well?41

AI promises tor threatens to offer a solution by breaking down our consciousness into small “particles” of information—simplistically speaking—which can then be “software-ized” and therefore “uploaded” into different forms of physical or non-physical existence.

Diane Ackerman states that “The brain is silent, the brain is dark, the brain tastes nothing, the brain hears nothing. All it receives are electrical impulses--not the sumptuous chocolate melting sweetly, not the oboe solo like the ﬂight of a bird, not the pastel pink and lavender sunset over the coral reef--only impulses.”42 Therefore, all that is needed—although it is of course much more complicated than we can imagine—is a way to code and reproduce such impulses.

Even if we consider that without death, we will no more be humans but something else, why should we remain humans once technologies allow us be something “more”, in the sense of an enhanced version of “being”? Why are we to remain bound by biological evolution if we can re-design it and our future form of existence?

Why not try to achieve the major breakthrough, the anticipated or hoped digita- lization of the human mind, which promises immortality of consciousness via the cyberspace or artiﬁcial bodies: the uploading of our consciousness so that it can live on forever, turning death into an optional condition.43

Either through an artiﬁcial body or emulation-a living, conscious avatar—we hope—or fear—that the domain of immortality will be within reach. It is the prospect of a “substrate-independent minds,” in which human and machine consciousness will merge, transcending biological limits of time, space and mem- ory” that fascinates us.44

As Anders Sandberg explained “The point of brain emulation is to recreate the function of the original brain: if ‘run’ it will be able to think and act as the original,” he says. Progress has been slow but steady. “We are now able to take small brain tissue samples and map them in 3D. These are at exquisite resolution, but the blocks are just a few microns across. We can run simulations of the size of a mouse brain on supercomputers—but we do not have the total connectivity yet. As methods improve, I expect to see automatic conversion of scanned tissue into models that can be run. The different parts exist, but so far there is no pipeline from brains to emulations.”45

The emulation is different from a simulation in the sense that the former mimics not only the outward outcome but also the “internal causal dynamics”, so that the emulated system and in this particular case the human mind behaves as the original.46 Obviously, this is a challenging task: we need to understand the human brain with the help of computational neuroscience and combine simpliﬁed parts such as simulated neurons with network structures so that the patterns of the brain are comprehended. We must combine effectively “biological realism (attempting to be faithful to biology), completeness (using all available empirical data about the system), tractability (the possibility of quantitative or qualitative simulation) and understanding (producing a compressed representation of the salient aspects of the system in the mind of the experimenter)”.47

The technological challenges are vast. Technologically speaking, the whole concept is based on some assumptions which must be proven both accurate and feasible.48 We must achieve technology capable of scanning completely the human brain, of creating software on the basis of the acquired information from its scanning and of the interpretation of information and the hardware which will be capable of uploading or downloading such software.49 The steps within these procedures are equally challenging. Their detailed analysis evades the scope of this book.

Some critical questions—they are further analyzed in the next chapters—emerge however: how will we interpret free will in emulation? What will be the impact of the environment and of what environment? How will be missing parts of the human brain re-constructed and emulated? What will be the status of the several emulations which will be created—i.e. failed attempts or emulations of parts of the human brain—in the course of the search for a complete and functioning emulation? Will they be considered as “persons” and therefore as having some right or will they be considered as mere objects in an experimental lab? How are we going to decode the actual subjective sentiments of these emulations? Essentially, are emulations the humans “themselves” who are emulated or a different person? Even further what will human and person mean in the era of emulation?

From a different perspective, the victory over death may be seen as a danger of mass extinction, absorption or de-humanization. In this new, vast universe of emulations will there be place for humans?50

From the above—mentioned discussion, it becomes obvious that at a large extent, the prospect of risk or of expectation is a matter of perspective, for which there is no unanimous agreement in the present. This may be the greatest danger of all, for which Asimov warned us: unleashing technology while we cannot communicate among us, in the face of it.

The existential prospect as well as the risks by AI may self-evidently emerge from technological advances but are determined on the basis of politico—philosophical or in the wider sense, ethical assumptions. This is where the need for legal regulation steps in. Such a need was often underestimated in the past in favor of a solely technologically oriented approach—although exceptions raising issues other than technological can be found too.51 The gradual raising of ethic—political, philosoph- ical and legal issues constitutes a rather recent development, partially because of the realization of the proximity of the risks and of the expectations.

The public debate is often divided between two “contradictory” views: fear of AI or enthusiastic optimism. The opinions of the experts differ respectively.

Kurzweil, who has come with a prediction for a date for the emergence of singularity—until 2045—expects such a development in a positive way: “What’s actually happening is [machines] are powering all of us,” Kurzweil said during the SXSW interview. “They’re making us smarter. They may not yet be inside our bodies, but, by the 2030s, we will connect our neocortex, the part of our brain where we do our thinking, to the cloud.”52

In a well-known article—issued on the occasion of a ﬁlm—Stephen Hawking, Max Tegmark, Stuart Russell, and Frank Wilczek shared a moderate position: “The potential beneﬁts are huge; everything that civilization has to offer is a product of human intelligence; we cannot predict what we might achieve when this intelligence is magniﬁed by the tools AI may provide, but the eradication of war, disease, and poverty would be high on anyone’s list. Success in creating AI would be the biggest event in human history. . . Unfortunately, it might also be the last, unless we learn how to avoid the risks.”53

### OFF---States CP

#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General’s, should that increase antitrust prohibitions on standard essential patent holders that engage in anticompetitive licensing practices

#### State action solves, won’t be preempted, and causes federal follow-on

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Prior to the enactment of the first federal antitrust law – the Sherman Act – in 1890, state antitrust enforcement was quite robust in the United States because at least 26 states had already enacted some form of antitrust prohibition.[2] In addition, state enforcers had often used general corporation law and common law restraint of trade principles to regulate anticompetitive business practices and transactions.[3] This well-established state antitrust enforcement infrastructure – coupled with the fact that the Antitrust Division and FTC had only recently been created – permitted state attorneys general to continue playing a leading enforcement role for the first 30 years after the Sherman Act’s passage.[4] Indeed, state attorneys general successfully prosecuted a number of the most consequential antitrust enforcement actions during this period.[5]

In the early 1920s, however, state antitrust enforcers began playing a less prominent role because ‘the national dimension of the most important trusts, . . . as well as their ability to restructure in order to evade problematic state laws’, made clear that the federal government needed to step forward in order to adequately protect consumers and the competitive process.[6] As a result, the DOJ and FTC – whose national jurisdiction and greater resources enabled them to tackle the most pressing competition issues of the time – displaced state attorneys general as the primary source of government antitrust enforcement within the United States.[7] This largely remained true until the mid-1970s when Congress, in response to the DOJ and FTC’s perceived inactivity, passed two laws that expanded the authority of state attorneys general to enforce the federal antitrust laws and provided them with financial resources to do so.[8]

In 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvement Act, which, among other things, authorised state attorneys general to bring *parens patriae* suits (i.e., legal actions brought on behalf of natural persons residing within their states) seeking monetary (treble damages) and injunctive relief for Sherman Act violations.[9] Congress also passed the Crime Control Act of 1976, which, among other things, provided state attorneys general with tens of millions in federal grants as ‘seed money’ for the creation of antitrust bureaus within their offices.[10] These laws had their intended effect of reinvigorating state antitrust enforcement.

During the 1980s, for example, state attorneys general once again emerged as vigorous antitrust enforcers, especially with respect to the prosecution of resale price maintenance practices and other vertical restraints.[11] The rise in the level and prominence of state antitrust enforcement during this period was largely due to a perceived enforcement void at the federal level, where the DOJ and FTC had mostly limited their focus to ‘prohibiting cartels and large horizontal mergers’.[12] No longer content with ceding antitrust enforcement to federal enforcers, state attorneys general expanded their antitrust dockets from prosecuting purely ‘local matters, such as bid-rigging on state contracts’, to actively investigating and litigating matters with multistate and national implications.[13] To help ensure that they had a larger seat at the antitrust enforcement table, state attorneys general also increased the coordination of their enforcement efforts and competition advocacy through organisations such as the National Association of Attorneys General (NAAG), which created a Multistate Antitrust Task Force and issued state Vertical Restraints and Horizontal Merger Guidelines during this period.[14]

Since the reawakening of state antitrust enforcement nearly 30 years ago, state attorneys general have continued to play an important role in the enforcement of both state and federal antitrust laws. During periods of lax federal antitrust enforcement, state attorneys general have often ramped up their enforcement activity in order to protect consumers from anticompetitive transactions and business practices.[15] During periods of vigorous federal antitrust enforcement, they have often served as strong partners for the DOJ and FTC by, among other things, offering valuable insights about competitive dynamics in local markets, assisting with obtaining information from key market participants (including state governmental entities that are direct purchasers of goods and services), and helping develop and implement litigation strategies for cases being tried before federal judges presiding in their states.[16]

Since January 2017, state attorneys general have increasingly played a leading and independent antitrust enforcement role. State antitrust enforcers have significantly increased their enforcement activity and willingness to act separately from their federal counterparts because many of them believe that there has been ‘under-enforcement’ by the DOJ and FTC.[17] State antitrust enforcers have also been able to enhance their influence over key competition policy issues and the antitrust enforcement agenda within the United States because there appears to have been a significant decline in the coordination and relationship between the DOJ and FTC.[18]

In once again flexing their enforcement muscle, state attorneys general have shown a willingness to publicly disagree with the DOJ and FTC on both policy and enforcement decisions, and have also sought to pressure their federal counterparts into more aggressively policing certain industries. Recent examples of the increased independence and assertiveness of state antitrust enforcers include:

* The DOJ, FTC and several state attorneys general have been actively investigating and prosecuting ‘no-poach’ agreements (i.e., where competitors for employees agree not to recruit or hire each other’s employees) in recent years. However, the DOJ and state attorneys general have taken directly opposing positions in private litigation challenging the legality of ‘no-poach’ clauses in corporate franchise agreements. The DOJ has argued that courts should review these clauses under the rule of reason whereas various state attorneys general have argued that these clauses should be deemed per se unlawful.[24]
* In their joint investigation into the T-Mobile/Sprint merger, nearly 20 state attorneys general sued to block the transaction in September 2019 even though the DOJ, along with seven state attorneys general, approved the deal after securing certain structural and behavioural remedies.[19] After the DOJ announced its proposed settlement with the companies, the Attorney General for New York, who led the states’ challenge to the merger, issued a press release dismissing the adequacy of the remedies negotiated by the DOJ: ‘The promises made by [the divestiture buyer] and [the merging companies] in this deal are the kinds of promises only robust competition can guarantee. We have serious concerns that cobbling together this new fourth mobile [phone] player, with the government picking winners and losers, will not address the merger’s harm to consumers, workers, and innovation.’[20] Thereafter, the DOJ opposed the states’ enforcement action by, among other things, moving to disqualify the private counsel hired by the states to represent them[21] and filing submissions that argued against the states’ requested injunction.[22] Ultimately, the state attorneys general were unsuccessful in their bid to block the deal.[23]
* None of the more than 20 state attorney general offices that actively investigated the AT&T/Time Warner merger joined the DOJ’s unsuccessful challenge to the transaction despite the DOJ’s concerted effort to secure their support.[25] In fact, nine state attorneys general filed an amicus brief opposing the DOJ’s appeal of the trial court’s decision.[26]
* After the FTC declined to seek any Colorado-related remedies in connection with Optum’s acquisition of DaVita Medical Group, the Attorney General for Colorado required the merging companies to lift the exclusivity provisions in contracts with certain healthcare providers and to extend their existing contracts with certain health insurers. In announcing this settlement, the Colorado Attorney General stated: ‘I recognize that this case marks an important step in state antitrust enforcement . . . . I am committed to protecting all Coloradans from anticompetitive consolidation and practices, and will do so whether or not the federal government acts to protect Coloradans.’[27]

After voicing displeasure with federal antitrust enforcement in the technology sector, numerous state attorneys general launched their independent investigations into ‘Big Tech’ companies even though the DOJ and FTC have ongoing investigations into these companies.[28]

### OFF---T Expand Scope

#### ‘Expanding’ requires bringing new areas into the domain of antitrust law

Dr. Janet McIntyre-Mills 14, Associate Professor at Flinders University, Honourary Professor at the University of South Africa and Adjunct Professor at the University of Indonesia, Systemic Ethics and Non-Anthropocentric Stewardship: Implications for Transdisciplinarity and Cosmopolitan Politics, p. 25

Giddens (2009) points out that social movements will not be sufficient to bring about change. Nation states together with international organizations will need to implement international laws to protect the environment:

Decentralisation contributes to democratic deepening if and when it expands the scope and depth of citizen participation in public decision making. Expanding the depth means incorporating previously marginalised or disadvantaged groups into public politics. Expanding the scope means bringing in a wider range of social and economic issues into the authoritative domain of politics (shifting the boundary from the market to the demos. Democratic decentralisation in other words means redistributing power (the authority to make binding decisions about the allocation of public resources) both vertically (incorporating citizens) and horizontally (expanding the domain of collective decision making). Empowered local governments deepen democracy on both counts because they foster a better alignment of decision making centres with local preferences and local sources of knowledge and infor- mation, and because it creates loci of participation that reduce the costs and unevenness of collective action (Heller 2001, p. 140).

#### ‘Scope’ refers to authority of law, not actions

Kenneth H. Kato 99, Judge on the Washington Appeals Court, Division Three, JD and BA from the University of Washington, “Spokane v. Civil Serv. Comm'n”, Court of Appeals of Washington, Division Three, Panel Four, 98 Wn. App. 574, 576, 989 P.2d 1245, 1246, 1999 Wash. App. LEXIS 2158, 12/21/1999, Lexis

For purposes of RCW 41.56.100, which provides that a public employer is not required to collectively bargain with its employees when the subject matter involved has been "delegated to any civil service commission or personnel board similar in scope, structure and authority" to the state personnel board, "scope" refers to the body's jurisdiction or authority to take various actions.

#### Violation---the plan enforces existing antitrust law, it doesn’t increase its range of authority

#### Vote neg:

#### Limits---there are thousands of enforcement decisions: they could deny current mergers, reverse previous ones, launch new DOJ investigations, levy fines, or prosecute individuals. ‘Enforcement action-of-the-week’ cases massively overstretch research.

## Innovation Advantage

### Top Level---1NC

#### 2---Rules fail---they slow down SSOs and reduces legal clarity.

David J. Teece & Edward F. Sherry 3, Mitsubishi Bank Professor in the Haas School of Business and Director of the Institute of Management, Innovation and Organization at the University of California, Berkeley, Ph.D. in Economics from the University of Pennsylvania; Senior Managing Economist at LECG, “THE INTERFACE BETWEEN INTELLECTUAL PROPERTY LAW AND ANTITRUST LAW: Standards Setting and Antitrust,” Minnesota Law Review, Vol. 87, June 2003, accessed via Lexis

These two interpretations have fundamentally different bases and policy implications. In our opinion, it is simply unnecessary to adopt mandatory rules in this area. SSOs are perfectly capable of adopting their own search, disclosure, and licensing rules, and of adapting those rules to the needs of the SSO participants. The results of Professor Lemley's survey indicate that SSOs have a variety of different rules. 227 There is no reason why a "one size fits all" mandatory-type approach is appropriate. 228

[\*1986] We find it is extremely telling that, at the recent FTC and Department of Justice (DOJ) hearings on the intersection between antitrust and intellectual property, both of the comments from SSOs expressed the belief that the current system worked reasonably well, and expressed concern that the antitrust authorities might adopt a "one size fits all" interventionist approach to standards issues. 229 We believe that those comments, coupled with the results of Professor Lemley's survey showing the wide diversity of policies across SSOs, 230 strongly suggest that the antitrust authorities should proceed cautiously in this area.

In particular, we are concerned that antitrust intervention may reduce the clarity of the rules, thereby making participation in SSOs more risky and reducing the willingness of firms with valuable IP (and which therefore presumably have much to contribute to selecting the appropriate standard) to participate. If the SSO's rules are unclear, the obvious public policy solution is to encourage SSOs to adopt clearer rules on a going-forward basis.

Most significantly, we believe that intervention runs a significant risk of slowing down the standards-setting process, thus delaying the adoption of new standards and new products made in accordance with those standards, to the detriment of consumers and of society generally.

This is not, of course, to suggest that there will never be an appropriate role for antitrust scrutiny of the standards-setting actions of SSOs or their participants. There is no question but that the activities of SSOs can affect non-participants, and one [\*1987] rationale for antitrust intervention is to protect the interests of such non-participants from being adversely affected by decisions in which they did not participate or could not exert influence. And there are obvious examples of manipulation of SSO rules/policies, such as the "stuffing the ballot box" example of Allied Tube, 231 in which antitrust intervention may be the only solution.

But we believe that the antitrust authorities are likely to give too little weight to the fact that SSOs, as voluntary organizations, must often walk a fine line between competing interests. In our view, ex post intervention runs the serious risk of failing to recognize the ex ante balancing of competing interests.

#### 3---FRAND is carefully calibrated---upsetting its balance with antitrust decks innovation.

Gregory J. Werden & Luke M. Froeb 19, former Senior Economic Counsel in the Antitrust Division of the U.S. Department of Justice; William C. Oehmig Chair in Free Enterprise and Entrepreneurship at Vanderbilt University, former Chief Economist of the Antitrust Division of US Department of Justice, Ph.D. in Economics from the University of Wisconsin, “Why Patent Hold-Up Does Not Violate Antitrust Law,” Texas Intellectual Property Law Journal, Vol. 27, 2019, accessed via Lexis

A (valid) patent can have great value if it claims technology essential to devices from which many consumers derive substantial utility. The owner of such a patent possesses a monopoly of sorts, and the investment in the technology could pay off handsomely. A technology standard tends to increase the pay off by causing standard-essential technology to be used in more units of royalty-paying components or devices. 13Moreover, a standard locks in technology choices, so patents essential to a standard-complaint version of a particular component or device could be inessential [\*6] to a noncompliant version of the component or device that uses alternative technologies.

Inventors that become monopolists with the adoption of a standard generally accept an important restriction on the grant of monopoly. They commit to license their SEPs to all comers and to do so on FRAND terms. FRAND, however, is neither a number nor a formula, and innumerable FRAND commitments were made before any court had interpreted the concept. As a matter of economic theory, broad agreement exists on how to conceptualize a FRAND royalty: It is the royalty that would have been negotiated just before the standard was adopted. 14This is the benchmark used in economic analyses of patent hold-up. 15The scenario defining FRAND is properly termed " ex interim bargaining" because it occurs before implementers invest but after inventors invest. 16

Bargaining theory predicts that bilateral negotiations divide the total gain to both parties reaching agreement. 17The original theory of John Nash posited an even division, 18but economic analyses of patent hold-up posit a division determined by relative bargaining skill. 19In ex interim bargaining, inventors and implementers would have divided the incremental gain from using the best technical solution instead of the next-best alternative. This incremental gain would be huge for a breakthrough invention but very small if alternative technical solutions to a particular problem were almost equally good.

Licensing SEPs before adoption of a standard likely is infeasible because some SEPs have not been issued and their claims are unsettled. 20Before taking all the necessary licenses, implementers are apt to make sunk investments in product development and manufacturing. Once they have, replacing a particular technology in a standard with the next-best alternative ex interim might be impossible, in which [\*7] case all of an implementer's sunk investments in standard-compliant products would be lost if bargaining over the royalty failed to produce an agreement. This puts SEP holders in a position to engage in what is called patent hold-up, meaning that the SEP holder exploits the bargaining advantage afforded by the implementer's sunk investment.

A concrete example clarifies the insight that ex interim and ex post bargaining produce different royalties because they involve different metaphoric pies: Suppose that an implementer expects to manufacture a standard-compliant component with a marginal cost of $ 2 and a price of $ 8. The difference of $ 6 is not expected profit because the implementer incurred sunk costs. But once those costs are sunk, the per-unit gain from reaching agreement with holders of SEPs is the full $ 6, so ex post bargaining splits $ 6. If sunk development costs amortized to $ 4 per unit, ex interim bargaining would have split just $ 2. If bargaining splits gains evenly a la Nash, conducting the bargaining after product development costs are sunk increases the per-unit royalty (divided among all SEP holders) from $ 1 to $ 3. 21

The foregoing ignores external influences on the bargaining outcome, and there are several. An inventor can seek an injunction, and threat of an injunction could affect the bargaining outcome. 22An implementer can seek a declaratory judgment that the patent is invalid or not infringed, 23and the threat to do so could also affect the bargaining outcome. And, of course, an implementer can bring an action to enforce the FRAND commitment, 24and the threat to do that could also affect the [\*8] bargaining outcome. Courts have observed that a FRAND commitment is meant to achieve the outcome that ex interim bargaining would have produced, 25and they have acted accordingly in determining SEP royalties. 26

Antitrust intervention in patent royalty disputes also would alter the bargaining outcome. Section 4 of the Clayton Act allows any person injured "by reason of anything forbidden by the antitrust laws" to sue for treble damages. 27If patent hold-up was deemed an antitrust violation, damages presumably would be computed as the difference between the royalties paid and the royalties later determined to have been FRAND. With uncertainty about what royalty a court would choose, the threat of antitrust damages would cause the bargaining to settle on a royalty less than the expected court-determined FRAND royalty. 28Reducing SEP royalties would cause inventors to reduce their investment and would result in less innovation, thereby harming consumers. 29

#### 4---Innovation is high.

Thomas A. Lambert 20, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri School of Law, J.D. from the University of Chicago, “The Case Against Legislative Reform of U.S. Antitrust Doctrine,” University of Missouri School of Law Legal Studies Research Paper No. 2020-13, 05-12-2020, https://ssrn.com/abstract=3598601

Reduced Investment in Innovation? Proponents of reforming the antitrust laws have also pointed to reductions in the level of venture capital investment as indicative of a market power crisis in the U.S. Such investment slowed somewhat after 2015 (though it appears to have rebounded),27 and some venture capitalists have referred to a “kill zone” around dominant technology firms.28 The claim is that big technology firms either usurp small firms’ innovations or use their power over platforms to force smaller firms that need access to those platforms to sell out at a bargain price. Venture capitalists are less inclined to invest if such outcomes are likely, and innovation therefore suffers.

The evidence, however, does not support the view that lax U.S. antitrust is reducing innovation. Eleven of the top sixteen global spenders on research and development are U.S. firms,29 and six of those—Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook—are “Big Tech” firms that have been accused of acting like monopolists. Moreover, the U.S. is home to half (178 of 356) of the world’s so-called “unicorn” companies—i.e., private companies valued at greater than $1 billion. China ranks second with 90, and all of Europe contains a fraction of that number. The U.S. also far outpaces Europe in terms of venture capital spending, with 10,777 investments in 2019 worth $136.5 billion compared to Europe’s 5,017 deals worth $36.3 billion. Finally, the fact that large American technology firms are purchasing smaller producers of complementary products or technologies in no way implies that the incentive to innovate is thereby reduced. Many start-ups are organized with the goal of being bought out by a larger firm; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company’s having to incur the significant cost of a public offering.

#### 5---No emerging tech impact

Caitlin Talmadge 19, Associate Professor of Security Studies in the School of Foreign at Georgetown University, as well as Senior Non-Resident Fellow in Foreign Policy at the Brookings Institution. "Emerging Technology and Intra-War Escalation Risks: Evidence from the Cold War, Implications for Today." https://www.tandfonline.com/doi/full/10.1080/01402390.2019.1631811

Yet the future relationship between emerging technologies and escalation may not be as straightforward as these statements imply. The debate about emerging technologies tends to portray them as a powerful independent variable – an exogenous factor that is both necessary and sufficient to cause conflict escalation. This paper argues instead that emerging technologies are more likely to function as intervening variables; they may be necessary for escalation to happen in some cases, but they alone are not sufficient, and sometimes they will not even be necessary. The strongest drivers of escalation will actually lie elsewhere, in the realms of politics and strategy. As a result, concern about new technologies is warranted, but determinism is not. An overemphasis on the dangers of technology alone ignores the critical role of political and strategic choices in shaping the impact of technology, and also could lead to a misplaced faith in arms control or other means of trying to stuff the technological genie back in the bottle.5

#### 6---No cyber war or retaliation

Jasmine Rodet 18, Master’s Degree in Cyber Security, Strategy, and Diplomacy from the University of New South Wales, Cyber Security Program Manager at Fortescue Metals Group, “The Threat of Cyber War is Exaggerated”, 11/11/2018, linkedin.com/pulse/threat-cyber-war-exaggerated-jasmine-rodet/

For the regular person on the street, the term ‘cyber war’ is more likely to bring to mind the 1983 movie “WarGames” and the doomsday articles that appear regularly in the media about the ‘cyber battlefield’ and an impending World War III. This essay argues that the threat of cyber war is exaggerated and although it can, by definition, be stated that we are already in a state of cyber war, the impact on states is negligible compared to conventional war domains.

The argument is presented in 3 steps. The first step is to define cyber war and cyber weapons, referencing scholars and experts in the area of conventional war and the cyber domain. The second step is to explore who has been exaggerating the threat of cyber war and what their motivations might be. The third is to explore the evidence and quantify the probability and impact that cyberwar has had on states to date.

‘Cyber war’ is a term often used interchangeably in media with cyber-crime, cyber-attacks, cyber-conflict and cyber-incidents, creating confusion amongst the public and scholars alike. Clausewitz (1989, 75), in his book, On War, defines war as ‘an act of force to compel the enemy to do our will’. Rid (2012, 7) on the other interprets Clausewitz use of ‘force’ as meaning ‘violent’ force. According to Rid, if an act is not potentially violent, it is not an act of war. However, Stone (2013, 107) describes ‘cyber war’ as a politically motivated act of force, not necessarily lethal and not necessarily attributable. The definition by Powers and Jablonski states more simply that cyber war is the utilisation of digital networks for geopolitical purposes (Nocetti 2016, 464). Neither of the latter two definitions requires violence to qualify as cyber war. Under these definitions, the Stuxnet cyber-incident in 2010 and the Estonia incident in 2007 would constitute an act of cyber war, and as such we could say that nations have been at cyber war in the past and are likely to continue to engage in cyber war in years to come.

For this essay, I will use Stones definition to argue that even though states may engage in cyber war, the concept of cyber war is exaggerated. It seems that cyber war is deliberately exaggerated in the media and by politicians for financial and political gains. There are countless examples in the media and in politics of the exaggeration of the threat of cyber war and the language used plays a big factor in creating a sense of fear in the community.

The Four Corners report, Hacked, is a classic example where the reporter, Andrew Fowler describes the current situation in Australia as ‘… a secret war where the body count is climbing every day’ (Fowler 2013). The documentary reveals nothing violent or lethal about cyber incidents. The documentary is actually about hackers working from locations overseas, having targeted key Federal Government departments and major corporations in Australia.

In another example, NATO may be interpreted as exaggerating the threat of Cyber War when they invited Charlie Millar to present at their Conference for Cyber Conflict at the NATO Cooperative Cyber Defence Centre of Excellence in 2017. Millar is an independent security evaluator, and his presentation was titled ‘Kim Jong-il and me: How to build a cyber army to attack the US’. He later presented similar content at Def Con 2018. His presentation described the steps he would take to mount a cyber war, including the types of people he would engage, how much he would pay them, what his strategy would be and how much it would cost in total.

Who stands to gain from the exaggeration and hype? Logically, one group would be those that gain financially from the sale of cyber protective services and software. According to Valerino, 57% of technical experts surveyed said that we are currently in a cyber arms race and 43% said that the worst-case scenarios are inevitable (Valeriano and Ryan 2015). Translate this into sales and Gartner projects worldwide security spending will reach $96 Billion in 2018, up 8 Percent from 2017 and to top $113 billion by 2020 (Gartner 2017).

Additionally, there may be political motivations to exaggerate the threat of cyber war. Cyberspace is not well understood by the general public and fear is natural. In the US’s cyber security debate, observers have noted there is a tendency for policymakers, military leaders, and media, among others, to use frightening ‘cyber-doom scenarios’ when making a case for action on cyber security (Dunn 2008, 2).

There is some evidence to suggest that more recently in the political arena; we may be maturing in our understanding of the real threat of cyber war. The Tallinn Manual, an academic, non-binding study on how international law applies to cyber conflicts and cyber warfare, was written at the invitation of the Tallinn-based NATO Cooperative Cyber Defence Centre of Excellence. It was first published in 2013 with the title ‘The Tallinn Manual on the International Law of Cyber War’. In 2017, it was re-released with the revised title ‘Tallinn Manual 2.0 on the International Law of Cyber Operations’. The change in title from ‘war’ to ‘operations’ signifies a more moderate use of language from NATO and is an acknowledgement that cyber incidents generally fall below the threshold at which International Law would declare them to be a formal act of war. Experience over the 4 short years from 2013 to 2017 has demonstrated that cyber incidents tend to have a low-level impact on the target state. As the book’s authors put it ‘the focus of the original Manual was on the most severe cyber operations, those that violate the prohibition of the use of force in international relations, entitle states to exercise the right of self-defence, and/or occur during armed conflict’ while the new version ‘adds a legal analysis of the more common cyber incidents that states encounter on a day-to-day basis and that fall below the thresholds of the use of force or armed conflict’ (Leetaru 2017).

To get a better sense if cyber war is exaggerated, we must also consider the probability of cyber war in the future. The probability of cyber war should be weighed up against the probability of conventional war. Where tensions are already high, for example, between North Korea and the US or Russia and Estonia, I would argue that cyber war is more likely than conventional war. This is due to factors including; cyber warfare is less costly than conventional warfare, states are less rational in their decision space in the cyber realm, states find cyber attribution very difficult to achieve so attacks can be undertaken covertly and cyber war is considered ‘a challenge’ and central to the hackers’ ethos (Junio 2013, 128). Further, Sanger describes in his book, The Perfect Weapon, cyber weapons (such as cyber vandalism, Distributed Denial of Service (DDOS), intrusions and advanced persistent threat (APT)) as the ‘perfect weapons’ for the following reasons;

They are cheap: When compared to Nuclear weapons, there are only a handful of nations globally that can afford the technology to create a nuclear weapon.

They are easily accessible: Unlike a Nuclear bomb that requires uranium, a highly protected metal, in the production process, a cyber weapon can be created with minimal investment and highly available IT infrastructure.

They can be dialled-up or dialled-down relatively easily. A ballistic missile, the force of the explosion cannot be adjusted as easily as a DDOS attack. A DDOS attack can be adjusted to last an hour, a few days or a few weeks.

They have a huge range in how they are used: Sabotage as with Stuxnet, Espionage as with the Chinese industrial spying on the US, North Korea’s infiltration of Sony, the Iranians attack on Las Vegas Sands Corp. casino operators.

The significant factor is that cyber weapons can and are being used every day for discrete, low-level cyber conflicts to undermine and disrupt rivals, but historically it has not progressed to open conflict, nor has it warranted a military response (Sanger 2018). Additionally, massive cyber operations would necessarily impact the civilian population and violate the immunity of non-combatants. The conditions of war dictate that this is “taboo” and to date, rival states have shown restraint in their use of cyber weapons for this reason (Valeriano and Ryan 2015). It appears that the threat that cyber weapons represent to national security is overstated and the threat of cyber war is overstated.

The US and likely other highly networked nations appear reticent about using cyber weapons for significant cyber conflict given their vulnerabilities. Ironically, NSA programs such as PRISM have made the US more of a target given the sheer volume of sensitive information stored in one place. Regardless of US defences, there is no way to make this information completely secure from intrusion, and as such, the very act of storing the information makes them more vulnerable.

Rid (2012) is among some academics who argue that cyber war has never and will likely never eventuate. The benefits of being on this side of the debate mean that public funding can be allocated away from offensive cyber security initiatives to other, potentially more important initiatives, such as public health and housing. The government is constantly under pressure to prioritise public spending and it is imperative that they have realistic, accurate projections regarding the risk of cyber war, the probability and the impact, to allow them to focus spending on the most important areas.

### Resource Wars D---1NC

#### Resource wars are fake

Emily Meierding 16, assistant professor at the Naval Postgraduate School in Monterey, Calif., 5-19-2016, "Oil wars: Why nations aren’t battling over resources," Washington Post, https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/19/oil-wars-why-nations-arent-battling-over-petroleum-resources/?utm\_term=.b334c10dbcbd

The confrontation died down, but a critical question remains: Do countries fight over oil resources? The question isn’t just pertinent to the South China Sea. The Arctic, Caspian, East China Sea and eastern Mediterranean have all been identified as potential “hot spots” for international oil conflicts. Numerous conflicts, including Iraq’s invasion of Kuwait, Japan’s invasion of the Dutch East Indies in World War II, Germany’s attacks against the Russian Caucasus in the same war, the Iran-Iraq War, the Chaco War between Bolivia and Paraguay, and even the Falklands War, have been described as international “oil wars.” However, contrary to the conventional wisdom, the risk of international oil wars is slim. Although oil is an exceptionally valuable strategic and economic resource, fighting for it does not pay. The belief that countries fight for oil rests on a flawed foundational assumption: Countries reap the same benefits from foreign oil resources as from domestic oil resources. In reality, profiting from oil wars is hard. Countries face at least four sets of obstacles that discourage them from fighting for oil: invasion costs, occupation costs, international costs and investment costs. Invasion costs are the damage that wars inflict on oil fields and infrastructure. Occupation costs arise from local resistance to foreign occupation, which can target oil industry infrastructure and personnel. International costs are imposed by the international community, which can respond to oil grabs with economic sanctions and military interventions. Investment costs are the challenges of attracting foreign capital and technical expertise to occupied oil fields. Collectively, these four sets of costs dramatically reduce the payoffs of fighting for oil and the appeal of oil wars. When the many other costs of war, including manpower and materiel, are taken into account, fighting for oil becomes even less attractive. From a purely rational standpoint, countries shouldn’t launch oil wars. But, countries don’t always act rationally. To test the oil war hypothesis, we have to take another look at historical so-called oil wars. Closer examination shows that oil has not been the fundamental cause of any international wars. The Falklands War in 1982 was triggered by national pride and Argentine officials’ fear that their window of opportunity for retaking the islands was closing. Rather than fight over oil, Britain and Argentina tried to use it as a catalyst for cooperation. In the 1970s and 1990s, they tried to jointly develop the Falklands’ oil resources. The Iran-Iraq War, from 1980 to 1988, was also not an oil war. Iraq initially aimed only to gain control over the Shatt al-Arab waterway and 130 square miles of contested territory. In the early stages of the war, Iraq repeatedly offered to withdraw from Iran, if Tehran would accept those demands. However, Iranian officials accused the Iraqis of fighting for oil in order to discredit them internationally. The Chaco War, from 1932 to 1935, was also launched for other reasons. Bolivia and Paraguay knew that oil discoveries in the Chaco region were unlikely. They fought because of national pride and to avoid further territorial dismemberment, after major losses in the 19th century. The oil explanation didn’t appear until the war bogged down, when leaders tried to transfer responsibility for the devastating conflict onto international oil companies. On three occasions, countries have launched major military campaigns targeting oil resources. However, these were fundamentally wars for survival, not for oil. In World War II, Japan invaded the Dutch East Indies and Germany attacked the Russian Caucasus because leaders realized that, without more oil, their regimes would collapse. Japan would have to withdraw from China, which was “tantamount to telling us to commit suicide,” as Japanese Foreign Minister Togo Shigenori put it. Hitler was even more succinct: “Unless we get the Baku oil,” he stated, “the war is lost.” Iraq’s invasion of Kuwait in 1990 was a war for survival. Contrary to popular beliefs, Saddam Hussein was not attempting to greedily grab more oil resources. Instead, he was afraid that the United States was trying to overthrow his regime. The United States had supported the Kurds’ rebellion in the 1970s, perpetrated the Iran-Contra scandal in the 1980s, and by 1990, seemed to be squeezing Iraq economically. According to Hussein, the United States was driving down oil prices by directing Kuwait to exceed its OPEC production quota. Hussein believed that seizing Kuwait offered the only means of eluding the United States’ hostile designs. By controlling his neighbor, Hussein could raise oil prices, escape his economic crisis and regain domestic support. He knew that the maneuver was a long shot. Regime records show that Hussein expected the United States would try to force him out of Kuwait. Still, it was either that or regime collapse. As Hussein’s deputy, Tariq Aziz, said after the war, “You will either be hit inside your house and destroyed, economically and militarily. Or you go outside and attack…” Japanese, German and Iraqi leaders believed that they were fighting wars for survival. Participants in other so-called oil wars were fighting for additional reasons, like national pride. None of the conflicts were driven by oil ambitions. This is good news for contemporary international relations. Oil competition in areas like the South China Sea is not a serious threat to international security. Countries may engage in minor oil spats, like China and Vietnam’s rig confrontation, to reinforce their resource claims. However, these incidents will not escalate into international wars. There is also little risk of oil imperialism. Countries like China will not satisfy their oil needs by seizing foreign oil fields. Historically, leaders have only initiated oil grabs when they believed that their survival depended on it. This condition is exceedingly rare, even in wartime. And, it’s unrelated to the price of oil. The United States considered grabbing Middle Eastern oil in 1975, after the first energy crisis drove up prices. However, the Ford administration refrained, because the costs of aggression were too high. Lastly, oil won’t inspire great power wars. The United States and China may eventually come to blows. Some of their military campaigns may target oil resources, if controlling them seems necessary for regime survival. However, oil will not be the fundamental cause of a Sino-American conflict. It’s not worth fighting for.

## China Advantage

### Top Level---1NC

#### 2---China prefers peaceful rise

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But this policy mantra has two fundamental problems: it mischaracterizes China’s strategic intentions in the region, and it is based on a U.S. strategic objective that is probably no longer achievable. First, China is pursuing hegemony in East Asia, but not an exclusive hostile hegemony. It is not trying to extrude the United States from the region or deny American access there. The Chinese have long recognized the utility—and the benefits to China itself—of U.S. engagement with the region, and they have indicated receptivity to peaceful coexistence and overlapping spheres of influence with the United States there. Moreover, China is not trying to impose its political or economic system on its neighbors, and it does not seek to obstruct commercial freedom of navigation in the region (because no country is more dependent on freedom of the seas than China itself). In short, Beijing wants to extend its power and influence within East Asia, but not as part of a “winner-take-all” contest. China does have unsettled and vexing sovereignty claims over Taiwan, most of the islands and other features in the East and South China Seas, and their adjacent waters. Although Beijing has demonstrated a willingness to use force in defense or pursuit of these claims, it is not looking for excuses to do so. Whether these disputes can be managed or resolved in a way that is mutually acceptable to the relevant parties and consistent with U.S. interests in the region is an open, long-term question. But that possibility should not be ruled out on the basis of—or made more difficult by—false assumptions of irreconcilable interests. On the contrary, it should be pursued on the basis of a recognition that all the parties want to avoid conflict—and that the sovereignty disputes in the region ultimately are not military problems requiring military solutions. And since Washington has never been opposed in principle to reunification between China and Taiwan as long as it is peaceful, and similarly takes no position on the ultimate sovereignty of the other disputed features, their long-term disposition need not be the litmus test of either U.S. or Chinese hegemony in the region. Of course, China would prefer not to have forward-deployed U.S. military forces in the Western Pacific that could be used against it, but Beijing has long tolerated and arguably could indefinitely tolerate an American military presence in the region—unless that presence is clearly and exclusively aimed at coercing or containing China. It is also true that Beijing disagrees with American principles of military freedom of navigation in the region; and this constitutes a significant challenge in waters where China claims territorial jurisdiction in violation of the UN Commission on the Law of the Sea. But this should not be conflated with a Chinese desire or intention to exclusively “control” all the waters within the first island chain in the Western Pacific. The Chinese almost certainly recognize that exclusive control or “domination” of the neighborhood is not achievable at any reasonable cost, and that pursuing it would be counterproductive by inviting pushback and challenges that would negate the objective. So what would Chinese “hegemony” in East Asia mean or look like? Beijing probably thinks in terms of something much like American primacy in the Western Hemisphere: a model in which China is generally recognized and acknowledged as the de facto central or primary power in the region, but has little need or incentive for militarily adventurism because the mutual benefits of economic interdependence prevail and the neighbors have no reason—and inherent disincentives—to challenge China’s vital interests or security. And as a parallel to China’s economic and diplomatic engagement in Latin America, Beijing would neither exclude nor be hostile to continued U.S. engagement in East Asia. A standard counterargument to this relatively benign scenario is that Beijing would not be content with it for long because China’s strategic ambitions will expand as its capabilities grow. This is a valid hypothesis, but it usually overlooks the greater possibility that China’s external ambitions will expand not because its inherent capabilities have grown, but because Beijing sees the need to be more assertive in response to external challenges to Chinese interests or security. Indeed, much of China’s “assertiveness” within East Asia over the past decade—when Beijing probably would prefer to focus on domestic priorities—has been a reaction to such perceived challenges. Accordingly, Beijing’s willingness to settle for a narrowly-defined, peaceable version of regional preeminence will depend heavily on whether it perceives other countries—especially the United States—as trying to deny China this option and instead obstruct Chinese interests or security in the region.

## 2NC

### CP

#### FRAND must be set globally---SEPs are an inherently multilateral area

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Introduction

Technologies that operate across many different devices and geographical regions are all around us. As one example, today's mobile telephones can connect to 3G/4G/LTE and WiFi networks and communicate with other devices virtually anywhere in the world. This is made possible because all of these devices comply with highly specific technical standards that are promulgated by national and/or international standards setting organizations (SSOs), made up of companies involved in developing and building these global technologies.

When aspects of technical standards are protected by patents, the patent owners are generally obligated by the pertinent SSO to offer licenses to their patented technology under "fair, reasonable and non-discriminatory" (FRAND) terms, as the quid pro quo for having their patented technology included in the standard. The purpose behind the FRAND requirement is to prevent patent owners from gaining an unfair advantage over companies who must make devices that practice the standard in order to participate in the market; and are therefore necessarily “locked in” to standard-compliant designs.

Over the past several years, the licensing and litigation landscape involving standard essential patents (SEPs) and FRAND has become a matter of intense focus. Numerous technology industries, as well as courts around the world have begun to grapple with key issues such as “How do you determine what a FRAND licensing rate should be?” and whether a licensor’s offer is FRAND or not. This article summarizes several recent developments in the transnational licensing of SEP portfolios.

The Overall Landscape

Not surprisingly, most of the recent licensing disputes over SEPs involve the worldwide telecommunications industry. A host of multinational companies have been involved in developing the 2G, 3G, 4G and soon-to-be-commercialized 5G standards (aspects of which are also described by a bewildering array of acronyms, such as "LTE" and "LTE Advanced" ) These standards specify the technical features included in mobile phones and their networks.

The European Telecommunications Standards Institute (ETSI) is an SSO charged with developing worldwide standards for these technologies. Early on, SSOs recognized that the incorporation of patented technology into a standard could give the patent holder significant leverage when negotiating licenses. SSOs therefore required the patent holder to agree to make its SEPs available on FRAND licensing terms. However, ETSI, like other SSOs, does not provide guidance on how to structure licensing terms that meet the FRAND requirement. Indeed, doing so or setting price or royalty rates among entities in a given industry may raise antitrust issues. This leaves it to others to work out the specifics of how SEP owners can comply with the FRAND requirement.

#### Only harmonization solves holdups and innovation---the fractured global landscape makes efficient impossible

Dongwook Chun 11, Visiting Scholar at Cornell Law School and Deputy Director in the Ministry of Knowledge Economy in the Republic of Korea. LL.M from Cornell Law School, B.S.E. from Seoul National University, “Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome”, Journal of Patent & Trademark Official Society, 93 J. Pat. & Trademark Off. Soc'y 127, July 2011, Lexis

Uncertainty and Unpredictability

The fragmented patent system that causes the uncertainty on delays and unpredictability of enforcement can be a grave concern for business society. Delays causing uncertainty may be particularly problematic for startups with high growth potential 64 because such delays and uncertainty can cause difficulty in securing patents and venture funding in a timely fashion. 65 Moreover, the uncertainty associated with patent delay imposes significant costs not only to patent applicants but also to potential competitors. 66 These competitors cannot know where to focus their research and development investments until they know precisely what a patent applicant has been able to claim as its inventive territory. 67 Accordingly, companies in this situation may make fewer investments in innovation that are potentially misdirected and wasteful. 68

Another great concern for multinational corporations is the unpredictability in patent enforcement or validity. In fact, costly infringement suits on parallel patents have become common. 69 If a patent office grants a patent that is subsequently invalidated or subject to invalidation proceedings, not only does the office waste its own time, the time and money of the applicant, and that of the applicant's competitors, but such a later-invalidated patent also distorts the market. 70 Often, this type of problem occurs as a result of the examination's failure to possess the most relevant prior art at the time the patent is granted. 71 And, patent litigation in a fragmented system with large institutional and cost differences can lead to a proliferation of litigation tactics and strategies that cause hold-up problems and wasteful duplication. 72 Although different results are technically possible in that national patents are independent of one another 73, inconsistent outcomes in that different parties win in different locations can complicate global marketing efforts. 74 Furthermore, [\*137] legal uncertainty also generates the following indirect transaction costs such as (1) costs of collecting information, (2) costs of legal disputes, (3) costs of setting incentives for pushing through legal claims, and (4) other transaction costs. 75

#### Patent rules are global, so innovation-stifling disharmony is inevitable without the CP

Dongwook Chun 11, Visiting Scholar at Cornell Law School and Deputy Director in the Ministry of Knowledge Economy in the Republic of Korea. LL.M from Cornell Law School, B.S.E. from Seoul National University, “Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome”, Journal of Patent & Trademark Official Society, 93 J. Pat. & Trademark Off. Soc'y 127, July 2011, Lexis

Patent systems are designed with the objectives to incentivize innovation, development, and commercialize inventions. 2 Initially, the effectiveness of patent law was restricted to national boundaries so as to encourage local inventive and innovative activities. 3 Later on, the concern grew beyond national territories paralleling the expansion of industrialization and international trade. 4 As intellectual property continues to grow as a component of global trade, the costs of worldwide protection and enforcement have soared. 5 Accordingly, patent holders continue to seek ways to acquire and maintain their exclusive rights more efficiently in an integrated world marketplace. 6 They also bear increasing frustration because of the need to pursue multiple [\*129] actions for infringement in cross-border disputes. 7 Under the bedrock principle of territoriality, successive litigations can trigger different applications of domestic and international patent norms to the same set of facts, which can lead to conflicting judgments and arguably irreconcilable outcomes. 8 At this stage, proposals to further harmonize domestic patent laws at the international level 9 have understandably attracted considerable attention. 10 The 1883 Paris Convention on Industrial Property Protection was a reflection of earlier days' concerns. 11 The dramatic turning point in recent phases of development concerning international patents was the Trade Related International Property Agreements (TRIPS), which laid down substantive principles that applied to all members of the WTO. TRIPS had substantial international impact because it signaled the inevitability of a more harmonized and stronger global patent system. 12

#### Disharmony crushes innovation by duplicating costs and creating gaps that undermine patent protections

Kelly C. McKinney 8, JD Candidate at University of Houston Law Center, “The Patent Reform Act of 2007 and International Patent Law Harmonization”, Houston Journal of International Law, 31 Hous. J. Int'l L. 125, Lexis

In addition, concerns exist over the lack of harmonization between the U.S. patent system and patent systems abroad. 66 In an increasingly global economy, an inventor or assignee may want to file patent applications in several different countries in order to secure the most effective patent protection. 67 Unfortunately, because there is no universal global patent grant available, seeking patent protection abroad can prove to be very complex, expensive, and time consuming. 68 Despite recent global harmonization efforts, inconsistencies remain between the U.S. patent system and those of leading countries abroad. 69

[\*134] Another issue concerns "patent speculators" 70 or "patent trolls," 71 as they are sometimes called. Many believe patent speculators chill innovation by acquiring patents for the sole purpose of enforcing them. 72 As a general matter, these patent speculators have no intention of practicing or further developing the patented inventions they accumulate--their sole purpose is to make substantial amounts of money in patent infringement proceedings. 73 Some have argued that patent speculators may also create problems by securing "submarine patents," which either take too long to issue or are overly broad enough to create industrywide disruption and uncertainty. 74 Further, when speculators sue for infringement, they are usually not amenable to infringement counterclaims asserted by the defendant because they neither participate in the marketplace nor develop products of their own. 75 Many perceive this imbalance to be unfortunate because it gives patent speculators an unfair advantage in patent litigation cases. 76

A final issue of congressional concern involves the specific needs of smaller business entities with respect to the patent system. 77 In particular, individual inventors, universities, small firms, and entrepreneurs are often heavily dependent upon the [\*135] patent system--much more so than larger business entities. 78 This is because larger business entities likely have adequate substitutes to the patent system at their disposal that smaller entities do not have access to, including "trade secrecy, ready access to markets, trademark rights, speed of development, and consumer goodwill." 79

As a result, all of these congressional issues are addressed at least to some extent in the Patent Reform Act of 2007. 80

3. Likely Impact of the Patent Reform Act of 2007 on Different Industries

Various industries will likely react to the patent reform bill in different ways. 81 For example, pharmaceutical companies and software companies have different views on patent reform and the patent system in general. 82 Specifically, pharmaceutical companies favor strong patent rights because they spend a substantial amount of time and money conducting clinical trials and research. 83 Even though they invest a substantial amount up front in order to develop a particular drug, it is relatively easy to reproduce that drug once it has been formulated. 84 It is because of this ease of drug reproduction that pharmaceutical companies favor strong patent rights 85 and, therefore, oppose patent reform that seemingly weakens patents.

On the other hand, software companies favor weak patents because the inherent nature of software development is cumulative, involving several different patented technologies and several different patent holders. 86 According to software [\*136] companies, a strong patent system is disadvantageous because it is not flexible enough to accommodate software and computer technologies. 87 Software companies argue the result of this mismatch has been uncertainty and continuous patent litigation. 88

Because these industries have competing views, the ultimate resolution of their differing desires on patent reform is unclear. 89 Inevitably, the tension between these industries will persist regardless of whether the patent reform bill is enacted into law. 90

C. A Global Perspective

Even though no universal global patent grant exists, 91 patent systems abroad are nevertheless linked by international agreements and treaties that "comprise the international intellectual property regime." 92 Fortunately, this international regime has facilitated efforts to seek patent protection in foreign countries. 93

One such international agreement is the 1883 Paris Convention for the Protection of Industrial Property (Paris Convention). 94 The Paris Convention obligates member countries, including the United States, to provide "national treatment" to their fellow members. 95 One of the advantages of [\*137] being a member of the Paris Convention is that a patentee can secure a priority date by filing a patent application in any member country. 96 If the patentee then decides to file in another member country, he can enjoy the benefit of the earlier filing date as long as he files subsequent applications within twelve months of the first application's file date. 97 This twelve month grace period is advantageous because it prevents later inventors from securing patent rights in their own countries before the rightful patentee has an opportunity to seek foreign patent protection. 98 In spite of this grace period, however, U.S. inventors must still comply with the U.S. time bar limitation. 99

In addition, the Patent Cooperation Treaty (PCT) contributes to the international intellectual property regime. 100 Formed in 1970, the PCT greatly streamlined and simplified the process for securing patent protection in multiple countries. 101 For example, by filing a single PCT international application, a patentee can secure patent protection in any member country or countries that he designates. 102 Because the United States is a signatory of the PCT, by filing an international application and designating the United States, a foreign patentee can secure a U.S. patent filing date (even against U.S. time bars) without ever setting foot in the United States. 103 Designated member countries have agreed to treat a patentee's international application filing date as the actual filing date secured in their respective countries. 104 However, the PCT does not require member countries to adopt international application requirements outlined in the treaty. 105 Indeed, filing an [\*138] international application under the PCT is an efficient and viable beginning option for a patentee seeking multinational patent protection. 106

A third contributor to the international intellectual property regime is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). 107 The TRIPS Agreement is notable because it is the first agreement to require member countries to adopt and maintain standardized substantive patent law 108 in order to promote international trade. 109 The TRIPS Agreement includes a national treatment provision that resembles that found in the Paris Convention. 110 The United States, a member country of the TRIPS Agreement, passed the Uruguay Round Agreements Act (URAA) during the Clinton Administration in an attempt to comply with TRIPS Agreement standards. 111 In particular, the URAA introduced provisional patent applications into the U.S. patent system, extended the patent term to twenty years minus the time spent prosecuting the application, and designated proof of invention in member countries as being acceptable evidence for securing [\*139] patent rights in the United States. 112 By making these amendments, the United States has shown at least some commitment to strive toward, and be a key player in, global patent law harmonization. 113

III. STATUTORY COMPARISON AND FITTING INTO THE GLOBAL PATENT LAW HARMONIZATION SPECTRUM

Harmonization with patent systems abroad is an ideal characteristic of any domestic patent system. 114 Indeed, global patent law harmonization will reduce global patent protection costs, make the USPTO and foreign patent offices more efficient, and improve the quality of patent rights. 115 Further, harmonization may allow the United States to enter into a symbiotic patent relationship with foreign patent systems. 116 In this regard, global patent law harmonization may facilitate the acquisition of foreign patent rights for American patent applicants, while simultaneously facilitating the acquisition of American patent rights for foreign patent applicants. 117 If global patent players can cooperate in this way, inventors will have an incentive to continue innovation on a global scale, which is an objective of international patent law. 118 Indeed, these benefits may be a natural consequence if the United States adopts patent reform legislation that seeks to promote global patent law harmonization. 119

#### Independently, the CP solves through follow-on:

#### International agreements trickle down---they’ll be codified in domestic policy

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The most distinctive advantage of a commitment pathway strategy may lie in its capacity to maintain commitment. A bicycle analogy captures this basic point. As long as the bicycle and its rider are moving forward, physical dynamics keep it upright and provide momentum, and the more energy supports its forward momentum, the more likely it is to stay on the desired course.

Such a project can effectively utilize the interplay between national and international dynamics. Improved cooperation on the international level can support national developments, and developments on the domestic level can support transnational cooperation and attract commitment from others. Where, for example, officials and/or the public in one country learn that project-based cooperation has led to the demise of a cartel in another country, this creates incentives for them to fulfill their obligations in order to gain similar benefits. In general, knowledge that other participants are benefiting from the project can provide support for it. A pathway strategy allows participants to perceive benefits from competition and from competition law before participation imposes significant costs.

The time element in the strategy also allows networks to develop among the participants and on the basis of shared commitments. Each additional participant provides momentum for the project, but more importantly each perceived benefit from the project—useful information supplied, cartel discovered, dominant firm conduct changed—can increase this network value.¹⁰ As on the domestic level, time allows potential benefits of the project to be perceived before extensive participation costs are imposed.

The development of network relationships over time can also generate trust among the participants. As scholars such as Elinor Ostrom and Richard McAdams have demonstrated, this type of trust is often the basis for effective cooperation.¹¹ The deep suspicions that abound in the area of international economic policy, especially between developed countries and much of the developing world, are not likely to be overcome by the signing of an agreement or by technical assistance alone. A gradualist program of increasing cooperation and participation-based movement toward a shared goal can, however, change attitudes. The successes of the European integration process over the last fifty years may be the most poignant demonstration of this potential.

#### ‘Substantial’ requires immediate law

**Words and Phrases 64** (40 W&P 759)

The words “outward, open, actual, visible, substantial, and exclusive,” in connection with a change of possession, mean substantially the same thing. They mean not concealed; not hidden; exposed to view; free from concealment, dissimulation, reserve, or disguise; in full existence; denoting that which not merely can be, but is opposed to potential, apparent, constructive, and imaginary; veritable; genuine; certain; absolute; real at present time, as a matter of fact, not merely nominal; opposed to form; actually existing; true; not including admitting, or pertaining to any others; undivided; sole; opposed to inclusive. Bass v. Pease, 79 Ill. App. 308, 318.

#### So does ‘should’

Justice Summers 94, Oklahoma Supreme Court, “Kelsey v. Dollarsaver Food Warehouse of Durant”, 1994 OK 123, 11/8/1994, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13

4 The legal question to be resolved by the court is whether the word "should"[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn13) in the May 18 order connotes futurity or may be deemed a ruling in praesenti.[14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn14) The answer to this query is not to be divined from rules of grammar;[15](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn15) it must be governed by the age-old practice culture of legal professionals and its immemorial language usage. To determine if the omission (from the critical May 18 entry) of the turgid phrase, "and the same hereby is", (1) makes it an in futuro ruling - i.e., an expression of what the judge will or would do at a later stage - or (2) constitutes an in in praesenti resolution of a disputed law issue, the trial judge's intent must be garnered from the four corners of the entire record.[16](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker3fn16)

[TO FOOTNOTE]

[13](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn13) "Should" not only is used as a "present indicative" synonymous with ought but also is the past tense of "shall" with various shades of meaning not always easy to analyze. See 57 C.J. Shall § 9, Judgments § 121 (1932). O. JESPERSEN, GROWTH AND STRUCTURE OF THE ENGLISH LANGUAGE (1984); St. Louis & S.F.R. Co. v. Brown, 45 Okl. 143, 144 P. 1075, 1080-81 (1914). For a more detailed explanation, see the Partridge quotation infra note 15. Certain contexts mandate a construction of the term "should" as more than merely indicating preference or desirability. Brown, supra at 1080-81 (jury instructions stating that jurors "should" reduce the amount of damages in proportion to the amount of contributory negligence of the plaintiff was held to imply an obligation and to be more than advisory); Carrigan v. California Horse Racing Board, 60 Wash. App. 79, [802 P.2d 813](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=802&box2=P.2D&box3=813) (1990) (one of the Rules of Appellate Procedure requiring that a party "should devote a section of the brief to the request for the fee or expenses" was interpreted to mean that a party is under an obligation to include the requested segment); State v. Rack, 318 S.W.2d 211, 215 (Mo. 1958) ("should" would mean the same as "shall" or "must" when used in an instruction to the jury which tells the triers they "should disregard false testimony"). [14](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=20287#marker2fn14) In praesenti means literally "at the present time." BLACK'S LAW DICTIONARY 792 (6th Ed. 1990). In legal parlance the phrase denotes that which in law is presently or immediately effective, as opposed to something that will or would become effective in the future [in futurol]. See Van Wyck v. Knevals, [106 U.S. 360](http://www.oscn.net/applications/oscn/deliverdocument.asp?box1=106&box2=U.S.&box3=360), 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882).

#### Each action must be interlinked and conditional---otherwise, it’ll collapse

Dr. Daniel Francis 21, Climenko Fellow and Lecturer on Law at Harvard Law School, Doctorate from the NYU School of Law, Master of Laws Degree from Harvard University, JD from Trinity College at Cambridge University, “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

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

[FOOTNOTE] 168 It is almost universally appreciated that reciprocal behavior plays a crucial rule in compliance with international law more generally. See, e.g., Andrew T. Guzman, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (Oxford 2008) 42 (“Reciprocity can serve as a powerful compliance-enhancing tool in the right circumstances.”). [END FOOTNOTE]

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

#### Including the plan shreds U.S. leverage

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Congress can always eliminate the President's agenda-setting power by engaging in unilateral trade policies. The Constitution allocates to Congress the power to set international commercial policy. The President only has significant trade-policy power (beyond his veto power) because the United States has chosen to engage in multilateral trade negotiations. 84 If Congress wished to undertake unilateral free trade policies, then the President's bargaining leverage would be reduced to threatening a veto, the same as in the realm of domestic legislation. Congress is unlikely to take such steps, however, because reciprocal agreements are valuable political commodities. 85 International agreements offer domestic exporters greater access to foreign markets, which could be lost if Congress were to pursue the unilateral route.

#### It creates a coalition of the willing that bypasses general obstacles

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.

#### Europe and China will say ‘yes’

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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.

#### That’s sufficient

Michael Ristaniemi 18, 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, “Convergence, Divergence or Disturbance – How Major Economic Powers Approach International Antitrust”, Concurrences, Number 3, September 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3266018

2. This will be done by analysing the recent stances that major world economic powers have taken as well as longer trends in their actions and inactions in terms of international cooperation on competition issues. The guiding assumption is that whatever actions such major powers decide to employ, they will significantly affect the kind of cooperation undertaken by other nations in the world in trade policy generally as well as in competition policy as a part of it. Bradford & Posner argue that “international law is best understood as the result of overlapping consensus” of the otherwise conflicting views of major powers, at the core of which nations consider themselves bound, that such consensus is a fluid concept and is subject to change at the whim of each major power, and that it would be wrong to consider otherwise.3 This is a relevant backdrop also in relation to assessing potential for international cooperation in the realm of competition policy. 1

3. The paper’s focus is on three major economic powers: The United States (US), the European Union (EU), and China.4 Collectively they account for over 60% of the global economy and are consequentially all major economic powers.5 Each of them has a differing historical background to competition and competitive markets, and each has a unique presence and unique intentions in policy questions affecting competition globally. The three major powers are all exceptional states.6 This refers to a state which believes its values should form part of the global framework and has the power to influence this. This is particularly true now that the US’s influence is decreasing and there is room for a more diverse world order, in which China will likely be an increasingly important actor.7

#### Core agreement snowballs, but isn’t all-or-nothing OR a comprehensive settlement of all antitrust issues---tacit deals on specific issues make hold-outs impossible

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2. Participation

An effective global strategy for combating anti-competitive conduct will eventually require the participation of all or at least most significant participants in the global economy. There is, however, no need for all such states to accept identical obligations or for all obligations to become effective at the same time. For example, agreement among the major trading states and a broad group of states representing the main categories of interests in the global economy (eg high income countries and developing countries of various types) would create incentives for other states to participate in the process in order to influence its development. If broader agreement does not initially prove feasible, agreement could be limited initially to particular regions (eg West Africa) or groups (eg developing countries relying on the export of one or a few extractive industries). This could help to prepare the way for a global agreement by revealing issues and problems likely to be common in any transnational competition law context. International organizations and non-governmental organizations could be included in such an agreement and bring significant value to it.

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

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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

#### Biden will support multilat---especially on economics

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International observers of US foreign policy can be excused for feeling disoriented. Just four years ago, Donald Trump entered the White House promising to put “America First” and repudiated seven decades of US internationalism. Since January, his successor, Joe Biden, has reasserted American global leadership and rededicated the United States to multilateral cooperation, including at the United Nations and other major international bodies. This new orientation is most obvious in global health, climate change, nuclear weapons, the Western alliance, and the defence of democracy. Although things are more complicated when it comes to trade, even here the president’s instinct is to work with others.

#### The U.S. will support it---recent shifts distance from old opposition

Michael Ristaniemi 18, 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, “Convergence, Divergence or Disturbance – How Major Economic Powers Approach International Antitrust”, Concurrences, Number 3, September 2018

2. Means to reach goals

16. The US aims at securing its companies’ interests abroad in a number of ways. At its most aggressive, it has several times applied its antitrust laws extraterritorially when its markets have been impacted by foreign conduct—acts which risk sparking trade friction.21 A more amiable way of ensuring favourable conditions abroad is contractually agreeing with foreign governments and enforcers to, respectively, enact or maintain certain standards with relation to antitrust in their domestic legislation and enforcement thereof as well as cooperate in investigations and otherwise share relevant information, whether as a part of broader trade agreements or in agreements dedicated to antitrust enforcement cooperation.

17. Cooperation in enforcement is nowadays not uncommon for the DOJ or the FTC, the US enforcers, particularly with more mature competition law regimes.22 This is especially the case concerning mergers, but cooperation also occurs in relation to international cartels as well as unilateral conduct, on occasion.23 The relationship between the US and Canada serves as an example of cooperation. The two nations have concluded agreements about cooperation in competition issues: one covering general aspects of enforcement cooperation, supplemented by provisions on positive comity, as well as desired “best” practices in merger cooperation.24 Recent cases including cooperation include the FTC cooperating with its Canadian counterparts in reviewing the Novartis/ GSK25 and Staples/Office Depot mergers,26 as well as the DOJ cooperating with the Canadian Competition Bureau in finding Nishikawa Rubber guilty of bid rigging in the car manufacturing industry in ways that affected both the US and Canada.27

18. There are several recent developments in the US. First, the DOJ has recently stated its intention to increasingly cooperate more, particularly in cartel cases, in order to maintain a level of efficiency, given that the number of enforcers and leniency regimes worldwide has significantly increased in the past decades.28 Another indication of the same is the new chapter on cooperation with foreign enforcers, added to the FTC and DOJ joint guidelines for international aspects of antitrust in early 2017.29 The FTC stated that “[t]he agencies’ enforcement of the US antitrust laws now frequently involves activity outside the United States, increasingly requiring collaboration with international counterparts,” as a reason for why the update was needed to the guidelines.30

19. Second, at the executive level, an expert-driven report published in March 2017 (“Report”) listed recommendations to the White House on how to better use competition policy to protect US interests abroad. Action recommendations included creating a government-wide strategy and action to combat alleged antitrust abuses abroad, and taking steps together with other nations either directly or via international organizations to help ensure that competition investigations and procedures are conducted in a transparent and non-discriminatory manner worldwide.31 The Report embraces two very different types of approaches: one promoting dialogue and cooperation to facilitate further mutual understanding and convergence of competition policy internationally, and the other setting forth the “weapons of trade” that the US could use to seek revenge for harm that other nations cause to its companies. It remains to be seen which approach the US will follow, but the latter option does present risks of its own for the US.32

#### Overall effectiveness is impossible without harmonization

-- conflicts, simultaneous enforcement, and unilateral extraterritorial application are inevitable without harmonization

-- causes unpredictability and high cost of compliance

-- system ‘efficiency’ is low: antitrust is but over- and under-enforced due to duplication and gaps

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 success of voluntary cooperation, the *status quo* is, however, not without problems. On the contrary, due to increasing international trade, there is more business taking place that simultaneously affects several jurisdictions. This trend is underscored by the significant global influence of digital platforms and the underlying digital economy that transcends national frontiers.74 Further, the prevalence of competition laws and authorities means that there are also ever more jurisdictions whose competition laws may simultaneously apply and whose laws may be enforced simultaneously, including extraterritorially.

The increase in jurisdictions with competition law and enforcers is – in itself – a positive development, but not unconditionally. International antitrust has traditionally been dominated by American and European voices. This traditional dichotomy is already becoming broader, with regimes such as Brazil and Canada making interesting and relevant contributions.75 However, along with this increase in regimes with active views on antitrust increases in the complexity and difficulty for the primary market actor, the firm, to operate. The *status quo* is thus one of both substantial and procedural inconsistency, which leads to unpredictability for businesses as well as economic inefficiency in general.

Examples of problematic gaps and overlaps are numerous and diverse. One could highlight definition issues, such as those concerning joint ventures. Some jurisdictions differentiate joint ventures with a more independent nature (also known as “full-function”)76 from other cooperation relationships, while other jurisdictions do not.77 Also, expected firm conduct varies, as is clear from the diverging views on how to enforce conduct in a very strong market position. Some jurisdictions impose significant obligations to avoid exploiting its stakeholders,78 while others do not.79 Further, most jurisdictions allow export cartels as well as grant state aid either without restriction or even with the express purpose of improving their firms’ foreign business.80 These last two points where competition law is effectively excluded represent major gaps. All of this – both collectively and individually – creates true harm to business, which in turn hinders the efficiency of the international trading system.

Extraterritorial application of national competition law is a crude way of unilaterally trying to patch the gap created by allowing export cartels. Such an approach creates collateral damage by creating problems of its own, exacerbated by the drastic increase in competition regimes, which oftentimes adopt similar approaches. The *status quo* represents a significant coordination problem and calls for an update on the systemic and international level.

The growing influence of China, in particular, is noteworthy. Quite the newcomer to competition law – and to market economy more generally – China has the potential to alter the traditional power balance of international antitrust cooperation. Particularly China’s insistence of retaining strong reservations for considering its industry policy is a point of divergence, compared to the other major economic powers: the EU and the US.81 Ng argues that an underlying reason for this lies in its markedly more state-centered approach in comparison with most competition regimes that are consumer-centered.82 Should it so desire, China could leverage its influence to improve the legitimacy for such reservations. This would likely see support in a number of developing countries, which could create a significant counterweight.83

Despite the shortcomings in the current state of affairs, there does not, however, seem to be much appetite for change. Convergence is taking place through information sharing and national competition authorities are gaining experience and capacity, but the developments and plans of major powers and the main international organizations going forward appear largely incremental and technical in nature.84 Nothing transformational is in sight.

#### Siloed national regimes make enforcement gaps inevitable

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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

#### Fragmentation allows foreign violations---they rebound domestically, destroying the case

-- lack of harmonization creates legal lacunae and enforcement gaps

-- purely-domestic enforcers will be parochial and encourage foreign anticompetitive conduct

-- foreign conduct is a ‘training ground’ for domestic collusion---the skills and mindsets developed abroad rebound locally

-- even if not, enforcement domestically collapses because it lacks credibility (the law says you can commit certain acts abroad but not domestically, a hypocritical stance)

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I. INTRODUCTION

Progressing the integration of national economies into a global system has delivered a variety of benefits in recent decades, especially faster economic growth. However, current regulatory frameworks are inadequate when it comes to transnational anticompetitive conduct. Despite the development of a robust regulatory regime facilitating international trade, restrictive business practices continue to be dealt with domestically, except for some instances of regional integration (such as the European Union [EU]).1

Although the concept of illegal transnational conduct may seem distant or even abstract, it often affects everyday items. For example, a price-fixing cartel was discovered among producers of refrigeration compressors—the devices producing the cooling effect in fridges and freezers. In this case the violators were fined in the United States,2 Canada,3 the EU,4 New Zealand,5 Chile,6 Mexico,7 and Brazil,8 indicating how widespread their operations were. However, due to the variety of challenges and limitations involved, such conduct frequently escapes scrutiny, or worse, escapes liability even when uncovered, often hiding behind a false pretence of ungovernability. The economic harm in question is significant. Connor estimates that, between 1990 and 2016 the discovered private international cartels alone affected sales of over $51 trillion worldwide.9 The estimated global overcharges exceeded $1.5 trillion.10 In fact, international cartels overcharge much more than similar domestic arrangements.11 Furthermore, unlike in a domestic setting, such competitive harm is not just a matter of distribution of resources between producers and consumers. It constitutes an extraction of wealth from the affected state to the state hosting violators.

This article, in Part II, analyses the current regulatory regime governing anticompetitive conduct, showing that it is composed of a patchwork of rules and instruments of diverse origin and nature. These are both hard and soft laws. Some are domestic, others are international. The analysis, in Part III, identifies some of the key gaps within this regulatory framework, which creates enforcement lacunae and provides room for transnational anticompetitive practices to flourish at the expense of consumers, principally in the less resourceful and less developed states. Many states have introduced competition laws12 and an international consensus has emerged as to the harmful nature of some of the most damaging types of anticompetitive arrangements. Yet gaps persist that were not addressed by the significant growth in contacts and cooperation between competition law enforcers all over the world. This article shows that the current regime de facto works for the select few, principally developed states, but offers little recourse to other countries affected by transnational violations of competition law. In doing so, it identifies the issue of wealth transfer, which should inform any approaches to rectifying violations.13

The current system of competition law enforcement requires a realignment to recognize and overcome some of its pitfalls. Part IV proceeds with a series of clear policy recommendations addressed principally to competition agencies and their respective constituencies. The proposals are underpinned by pragmatism, calling for incremental changes and fine-tuning within the existing regulatory framework, rather than a major overhaul. They focus exclusively on pursuing international cartels, which constitute the most rampant example of anticompetitive conduct and which are virtually universally condemned. The emphasis is principally on public enforcement, given that private enforcement is nascent or non-existent in most competition systems. Implementation of these proposals requires no international negotiations and most carry little, if any, inherent extra cost. If implemented by a sufficient number of states (a bottom-up regulatory change), these proposals would importantly readjust the currently sub-optimal system of enforcement, which gives violators ample opportunities to extract wealth from less affluent states.

II. PART II: CURRENT REGULATORY FRAMEWORK

A. Conduct Causing Competitive Harm Abroad—Free from Domestic Scrutiny

In the 1950s, fewer than 20 states had competition laws. By 1990 that number nearly doubled. In the last three decades the number of jurisdictions that introduced domestic competition laws increased to well over 120.14

Anticompetitive conduct harming the domestic market is prohibited in virtually all states that introduced competition legislation. That is the raison d’être of such legislation. Conduct harming only foreign markets (causing outbound competitive harm) is virtually never proscribed. Arrangements causing competitive harm abroad are legal under most domestic competition laws. For example, in the United States the 1982 Foreign Trade Antitrust Improvement Act ‘cut back the reach of the Sherman Act [the key U.S. competition law statute] … principally to protect U.S. sellers from challenges … for their activity abroad.’15 Export cartels, for example, are permitted in virtually all jurisdictions.16 Hosting states— which are best positioned (in terms of the relative ease of enforcement) to deal with such anticompetitive conduct—wash their hands of it. Essentially, states care about national, not global, welfare.

In the long-term this is problematic. If conduct that causes harm abroad is not illegal, law enables businesspersons involved in transnational commerce to develop skills and mindsets that may be later used to cause competitive harm on the domestic market, which—in turn—will be costly and difficult to uncover and remedy. From a normative perspective, it sends contradictory signals to the public, undermining the credibility of the law, especially in those jurisdictions that envisage the severe sanction of imprisonment for some violations of competition law, such as cartel conduct or bid rigging (rigging public tenders). At a minimum, a policy of ‘you’ll go to jail if you do it here, but we do not mind if you do it elsewhere’ is unlikely to reinforce a belief in the serious nature of any such violations.

Moreover, there is now an international consensus as to the harmful nature of hardcore cartels, which entail horizontal agreements between competitors aiming, in particular, to fix prices, submit rigged bids, set output quotas, and share or divide markets. This consensus was solidified internationally by means of a soft law instrument. As early as 1998 the Council of the Organisation for Cooperation and Economic Development (OECD) adopted a recommendation that called for an effective prohibition of such arrangements.17 This prohibition was echoed and built upon in various broader fora since then.18 The widespread recognition of the harmful nature of hardcore cartels is in stark contrast to the acceptance of and indifference towards such conduct causing outbound competitive harm.

Two facts help to understand the passive acceptance, if not encouragement, of conduct causing outbound competitive harm. First, such conduct creates a transfer of wealth from the affected market to the state hosting violators. The economy of the latter benefits from the harm to foreign consumers. This may also explain why some states with well-established competition agencies seem to tolerate conduct that causes harm in the domestic market also. If the extraction of wealth from abroad is considerable, it may be outweighing the domestic harm, which is, after all, principally distributional in character (that is, from a wealth distribution perspective, anticompetitive conduct distorts allocation of resources within an economy). For example, Canada is the world’s leading producer of potash, over 95 per cent of which is sold via an export cartel (which is legal under Canadian law) on foreign markets. Overall the Canadian economy benefits greatly, even if the domestic economy is adversely affected by inflated prices of potash.19 Second, law enforcement is costly. It can be argued that any enforcement against conduct causing outbound competitive harm comes at the cost of enforcement aimed at protecting the domestic market. If that is a true trade-off, focusing exclusively on domestic harm may be rational. However, one should also factor in the already mentioned possible adverse consequences for the domestic economy of creating conditions conducive to development of anticompetitive attitudes within the business community. Nevertheless, conduct causing only outbound competitive harm is currently legal in virtually all states. Domestic competition laws do not prohibit it. Anticompetitive conduct that harms the domestic market only tangentially is likely to be seen as a low priority matter.

B. Lack of a Satisfactory International Response

The issue of transnational anticompetitive conduct could be addressed at the international level. Despite numerous efforts, the international community has so far failed to develop any binding multilateral mechanisms to deal with public or private anticompetitive conduct.20 This is so even in case of hardcore cartels, which—as mentioned earlier—are universally condemned. Public anticompetitive conduct, in some circumstances, could be challenged within the framework of the World Trade Organisation (WTO),21 but as yet such actions have been few and largely unsuccessful.22 While no progress has been achieved on the multilateral level when it comes to binding instruments, a number of valuable initiatives and platforms have emerged, allowing for interactions and experience sharing between domestic competition agencies.23 While useful, none of these frameworks offers practical help in ongoing investigations.

#### Businesses will shift abroad to antitrust havens---unilateralism races to the bottom

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The existence of substantive conflicts is mainly caused by different traditions of competition policy and divergent industrial (or other) policy goals.46 The simultaneous investigation of a case by several competition authorities without cooperation implies a duplication of efforts and expenses for both the agencies and companies involved. International mergers can be subjected to reviews by five, ten, or twenty other agencies around the world 47 Different deadlines and requirements may have to be fulfilled, burdening the undertakings involved with additional costs and legal unpredictability.48 Remedial problems are best illustrated by the infamous GE/Honeywell and Boeing/McDonnell cases, which are discussed below (see below, Part i, 2.2.5). The abovementioned problems can be described as consequences of ‘over- regulation', in the sense that they are caused by the applicability of more than one set of national competition rules. System friction between different anti- trust regimes, or the fact that one country’s competition laws may facilitate conduct that another country’s laws prohibit, is not mitigated in the field of antitrust by supranational choice of law rules 49 If certain anticompetitive behaviour is governed by multiple competition laws, the company will end up complying with the most restrictive rule. While this does not always result in truly conflicting obligations for the firm, it is a disincentive for innovation and pro-competitive behaviour.50 It results in a veto power in the hands of the most restrictive jurisdiction.51 Moreover, if any given competition authority has a 5% probability of a false positive for instance, conduct scrutinized by 20 enforcers is faced with a 64% chance of at least one enforcer erroneously prohibiting the conduct.52 However, ‘under-regulation’ can occur as well in the form of laws that are too lenient or exemptions and exclusions from the application of competition rules, restrictions in the scope of application, procedural or enforcement difficulties, lack of enforcement or strategic law enforcement. The behaviour of competition agencies hoping to free ride on the enforcement actions of others may result in collective action problems and gaps in the protection of competition.53 Companies can benefit from these gaps to engage in anti-competitive behaviour. This can be linked to the so-called ‘regulatory competition’ among states. It was already mentioned that it becomes increasingly difficult for a single state to govern the behaviour of large corporations. Open economies provide opportunities “*for firms to seek the most favourable regulatory climate, either by relocating production elsewhere or by voicing their interests to regulators*.’\*\* Powerful firms may exert influence on lawmakers and this may result in their preferences shaping state regulations.55 This can take the form of either explicit statutory exceptions or weak enforcement, allowing states to compete with each other to provide competitive advantages to local firms.56 As a consequence of globalisation, the range and domain of cases on which governments act, sometimes to influence the activities of firms in other jurisdictions, has continuously expanded.57 Regulatory competition can then result in sub-optimal protection of competition on the market with the rules being dictated by firm-interests rather than the public interest.58

[FOOTNOTE] When firms are faced with a – to them – unfavourable change in regulation, they can act in different ways. They can accept the regulation and do nothing, but they could also 'vote with their feet’ and relocate, or they could lobby, educate, and litigate regulations that reflect their interests. Governments will compete with each other over economic power. (D. Murphy, The structure of regulatory competition - Corporations and public policies in a global economy, Oxford, Oxford University Press, 2004, 5. Also see J. Trachtman, “Inter- national regulatory competition, externalization, and jurisdiction”, Harvard International Law Journal, Vol. 34, No. 47,1993,51-52.) [END FOOTNOTE]

In sum, the de facto regime consisting of an overlap of an increasing number of domestic regulatory environments causes legal uncertainty for firms engaging in international business as well as problems of both over- and under regulation.59 Stephan compared the superimposing of differing laws of multiple jurisdictions on a single firm to a perverse and harmful tax on firms that operate internationally.60 These issues cannot be tackled by individual states alone, and require international cooperation.

#### It rolls back solvency---stagnation from regulatory prolif will cause a broad global rejection of antitrust enforcement

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As former Council of Economic Advisers Chair Herb Stein used to say, “Unsustainable trends tend not to be sustained.” Can antitrust reform itself from “within,” building on the ICN and other cooperative organizations and relationships to rein in the complexities and overlaps of international antitrust? Or will the global antitrust enforcement network ultimately lead the world economy into an era of stagnation, inviting the type of sudden and profound reform characteristic of epochal shifts in norms and standards (comparable to U.S. antitrust reforms of the early Reagan years)—an “antitrust revolution”? This seems a close question to me. If the reform is to be internal, the existing institutions need to shake a leg—in seven years the ICN has roared to life as a governmentagency forum but the reforms achieved have been limited in comparison to the complexities to be overcome. ICN had a promising start, but performance tests need to continue ratcheting up.

What would external reform look like, perhaps following a global economic collapse or other major upheaval? A takeover of the international antitrust system by the WTO or absorption of antitrust into broader economic institutions like the IMF? A broad political movement in favor of a drastically different approach to antitrust—perhaps a broad rejection of antitrust or a sudden and profound cutback in its scope and power? It is difficult to picture the specifics.

Comedian Steven Wright—a bit of a surrealist, as comedians go—tells the joke about the photographer who drove himself crazy trying to get a close-up of the horizon. At its current rate of expansion, global antitrust will reach a point of crisis or collapse if the costs, burdens, and complexities cannot be reduced by at least one order of magnitude. With the overwhelming majority of world economic activity now subject to antitrust rules, with thousands of enforcers in hundreds of regional, national, and subnational jurisdictions, we can begin to glimpse the point on the horizon where that collapse occurs. Antitrust enforcers, economic policy makers, and leaders of government need to start planning how to avoid that crisis. To plan, we need to see more clearly what is happening out there on the horizon, where we are destined to reach the crisis point. We need to move in and get that close-up.

## 1NR

### DA

#### Breakdown escalates civil conflicts that draw in Iran, Russia, and North Korea---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.

#### Trade turns and solves the case---foreign competition is better than antitrust

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2.1. Trade and Antitrust Law as Substitutes

Many scholars suggest that trade liberalization may make adopting an anti trust regime unnecessary (Bhagwati 1968; Helpman and Krugman 1989; Blackhurst 1991; Neven and Seabright 1997; Melitz and Ottaviano 2008). According to this view, free trade is an effective way to ensure that markets remain competitive because facilitating entry checks market power (Baumol, Panzar, and Willig 1982). For example, when an economy is open to trade, monopolists refrain from abusing their market power because low external barriers ensure that competitors can enter the market and contest any such abusive practices. In this way, trade liberalization renders an anti trust intervention into monopolistic practices superfluous. Exports fueled by trade liberalization should also enhance market competition. New opportunities in export markets ensure that more firms can reach an efficient scale of production, which further spurs competition and reduces the need for an anti trust regime (Bartók and Miroudot 2008).

Relying on trade liberalization to safeguard market competition could have several advantages. First, foreign producers must incur certain fixed costs and variable trade costs to enter a new market that domestic producers do not incur. If foreign firms are able to enter and effectively compete even after incurring those costs, they are presumably more efficient and hence may act as an even more effective discipline on the market than domestic firms (Bartók and Miroudot 2008). Second, choosing free trade over anti trust regulation eliminates the need to rely on government bureaucracies. Many who remain skeptical of governmental intervention favor free trade and thus prefer to have imports discipline [\*33] anticompetitive behavior. This argument may gain all the more force today considering the complexities associated with antitrust regulators from over 130 countries all applying different rules in an effort to regulate the global marketplace. Finally, although trade openness may "act as an effective antitrust policy" (Pomfret 1992, p. 11), an effective antitrust policy does not act as an effective trade policy. For example, if the United States were to impose a 30 percent tariff on foreign producers today, foreign firms would likely not enter no matter how competitive the markets are behind the border. Domestic antitrust laws thus may do little to facilitate market entry in the presence of highly protectionist trade policy.

#### Unilateral antitrust will be manipulated AND perceived as protectionist---that shatters co-op and is the nail in trade’s coffin---only prior harmonization avoids the link

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VI. CONCLUSION

There is a clear "conflict between the evolving economic and technical interdependence of the globe and the continuing compartmentalization of the world political system composed of sovereign states . . . ." 196 This conflict can breed protectionist political views. Unless and until there is a complete paradigm shift away from protectionism, which is impossible, the global economy will not meet the "rational" assumptions necessary to preserve free market efficiency.

Some amount of protectionism is inevitable. Although "inefficient" in economic and academic circles, protectionism preserves the sovereign powers enjoyed by certain countries. In this way, it is a necessity of free [\*146] trade. This paper is not intended to be a commentary on whether protectionism is right or wrong, but rather a demonstration and prediction that antitrust law, a tool of political and economic power, can and will be wielded by individual countries to promote protectionist policies that will affect the international trade landscape in the near term.

While attempting to act on this protectionism is difficult because of the web of international trade agreements currently in existence, individual countries may still use domestic antitrust law to meet protectionist aims, especially given that an international authoritative body governing the use of antitrust does not exist. Countries serious about preserving free trade may cooperate with one another to adopt realistic economic policies that serve to dull the blade of antitrust law through regional agreements, but ought not to attempt to eliminate it altogether.

Antitrust law, like medicine, must be used appropriately to be effective. While antitrust laws generally should encourage free trade, as promoting competition is the aim of their enforcement, they are also at risk of being used to thwart free trade. That risk is further exacerbated by perceptions of unfair enforcement and the divisive rhetoric of world leaders. In this way, antitrust law has the potential to weaken the already delicate international cooperative framework that exists to foster free trade. Absent a change in perceptions and the protectionist rhetoric fueling the current political landscape, antitrust law is likely to be manipulated to serve protectionist viewpoints, making it increasingly likely to become a nail in free trade's coffin, instead of the key to its preservation. It may be a nail that nations are able to ignore for the sake of its benefit, or it may be the one that finally puts an end to the pursuit of truly international free trade. Only time will tell, but one thing is clear: anti-trust law is a field that will impact the international economic community significantly for years to come.

#### Patent controls will be disparately applied as veiled protectionism

Dongwook Chun 12, JD from Cornell University, LLM from Cornell University, Member of State Bar of California, “Justifying Patent Harmonization”, Asper Review of International Business and Trade Law, 12 Asper Rev. Int'l Bus. & Trade L. 99, Lexis

II. FREE TRADE AND PATENT HARMONIZATION

It has been argued that patent harmonization is indispensable for global free trade and the TRIPs agreement is a part of the WTO treaties. Some countries claim that shortcomings in availability and enforcement of intellectual property rights (IPRs) constitutes a barrier to trade, as potential exports by inventors or creators may be prevented or diminished by counterfeit versions of their products in foreign markets. 14 For example, if a country had no IP protection, then presumably that country would be a source for counterfeit goods. Some of these goods would then find their way into markets where there is IP protection. Thus, a heavier burden would be placed on border monitoring of imports. This monitoring would impose a cost on international trade that would be avoided with a certain minimum level of IP protection in all countries--so that IP rights holders could try to stop the counterfeiting at its source, instead of the less efficient method of blocking the exports of goods to countries with IP protection. Supporting this argument, it was stated that:

[T]rade distortions and impediments were resulting from, among other things: the displacement of exports of legitimate goods by unauthorized copies, or of domestic sales by imports of unauthorized copies; the disincentive effect that inadequate protection of intellectual property rights had on inventors and creators to engage in research and [\*102] development and in trade and investment; the deliberate use in some instances of intellectual property right protection to discourage imports and encourage local production, often of an inefficient and small-scale nature; and the inhibiting effect on international trade of disparities in the protection accorded under different legislations. 15

In line with this argument, the preamble's chapeau of TRIPs highlights the reduction "of distortions and impediments to international trade" as the main target of the Agreement. 16 This statement suggests that improving the protection of IPRs could contribute to such a reduction. 17 Because free trade is theoretically beneficial to all participating countries, this theory suggests that a harmonized patent law would contribute to the removal of trade barriers and to the free movement of resources, which benefits all countries involved.

The tensions caused by differences in IPRs as a barrier to trade are contemplated in Article XX(d) of the GATT, 18 which permitted GATT Contracting Parties to justify trade restrictions imposed by IPRs. 19 Specifically, GATT Article XX, General Exceptions states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the protection of patents, trademarks and copyrights . . . 20

#### Business lobbies will push for and receive protection to balance increased antitrust enforcement

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The Day After COVID-19

Some countries are beginning to ease their lockdowns. The fear of a deeper recession put pressure on governments to reduce shutdowns in order to revive the economy. Unemployment is particularly worrisome in many countries, even in the United States, where unemployment claims have reached 22 million.4 Latin American countries with already relatively high unemployment rates – on average 8.1 percent in 20195 – are particularly vulnerable in this respect.

Such a disturbing outlook brings me to some competition concerns for three reasons.

Firstly, competition authorities have begun to relax the enforcement of some competition rules. For example, on March 19, the UK Competition and Markets Authority (“CMA”) stated that it had no intention of taking competition enforcement action against cooperation between businesses to the extent necessary to protect consumers or ensure supplies.6 The Mexican Competition Authority (“COFECE”) recently took a similar approach.7 Nevertheless, the urgency of acting now might pave the way for setting aside future competition policies necessary for healthy markets. Therefore, in my view, it should be clear that the current approach of dealing with the emergency must be temporary.

Secondly, after the spread of COVID-19 slows, governments will prioritize the recovery of local markets even if that implies embracing extreme protectionism, which in turn will reduce foreign competition. This is important because this trend would be a force in the same direction as relaxing the enforcement of some competition rules. Competition authorities must bear this in mind for post-COVID-19 times.

Thirdly, and closely related to the two previous concerns, domestic corporations will have strong incentives to lobby for softer enforcement of competition law and might request additional protectionist measures as compensation for corporate generosity and flexibility during the pandemic. If some protectionist measures are arguably acceptable for some time, they should not be at the expense of strict enforcement of competition law in domestic markets.

In such a context, my concern is that competition policy might become excessively lenient. This would be a questionable policy choice. If protectionism was winning supporters before the pandemic, a post-COVID-19 world will tolerate more protectionism in order to back domestic industries and businesses.

#### The prospect of discrimination causes investor pull-out---the threshold’s low due to systematic overestimation of antitrust’s costs

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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.

#### FDI independently stops global war

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Brooks builds on Kirshner’s argument to assert that in the present era, economic actors in mature capitalist economies no longer need to actively lobby against war “because economic globalization—the accumulation of decisions by economic actors throughout the globe—now has sufficiently clear economic incentives for leaders” (2013, 867). He notes that while wars may have once been a useful means of gaining territory and resources, trade and, perhaps more potently, FDI is a cost-effective substitute for conflict. To support his claim, he points to states’ increased willingness to enact regulatory changes to make themselves more attractive to investment (876). To wit, most modern trade agreements, such as the TPP, are less about decreasing the barriers to imports but are designed to address the regulatory hurdles to trade and investment. Additionally, he points to the fact that in the current environment “governments who are host to FDI have generally shown a great willingness to act against threats to MNC [Multinational Corporations] assets that emerge from nonstate actors within their territory,” whereas in previous eras, “powerful states where MNCs were based that often were the ones who had to intervene to protect MNC assets from nonstate actors” (Ibid.). This thesis is buoyed by the multiplicity of studies that have found a link between FDI and reduced militarized conflict, for example (Bussmann 2010; Gartzke, Li, and Boehmer 2001; Kim 2013; H. Lee and Mitchell 2012; Masterson 2012; Rosecrance and Thompson 2003; Suzuki 1994). Furthermore, Brooks’s argument illustrates the need to look beyond activities of direct lobbying as a means of influence to the power of agenda setting and personal networks.

#### The XO is empty talk that’s years from being implemented

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Despite its breadth, the immediate effect of the EO on law or regulation is less clear. The EO itself does not enact any new law or regulation. Rather, the EO often uses vague language in instructing or guiding the actions of agencies. This is likely purposeful in many instances, including when the EO refers to independent agencies, like the FTC, Federal Communications Commission, Maritime Commission, Consumer Financial Protection Bureau, and the Surface Transportation Board. Nonetheless, for almost every initiative, there is likely to be a significant gap between the action directed or encouraged by the EO and the time it will take for the relevant agency to investigate, evaluate, and potentially implement a new rule or policy. Even where the direction to an agency is explicit, issuing a new rule or regulation takes time. An agency must first draft a rule, allow for a notice-and-comment period, make any necessary revisions, and then issue and start to enforce a final rule. And this does not account for likely legal challenges. In some instances, the EO directs the agencies to submit a report on the issue first rather than make any immediate changes, pushing any resulting regulatory activity out at least until the period following completion of the report.

#### It's non-binding AND will be blocked by the court and Congress

Lewis Brisbois 21, JD, Lewis Brisbois Bisgaard & Smith LLP, “President Biden Signs Executive Order on Promoting Competition in the American Economy”, 7/12/2021, https://lewisbrisbois.com/newsroom/legal-alerts/president-biden-signs-executive-order-on-promoting-competition-in-the-american-economy

On July 9, 2021, President Biden signed an “Executive Order on Promoting Competition in the American Economy.” According to a Fact Sheet released in advance of the signing, the Executive Order takes “decisive action to reduce the trend of corporate consolidation, increase competition, and deliver concrete benefits to America’s consumers, workers, farmers, and small businesses.”

Among other things, the Executive Order encourages the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) to focus enforcement efforts on problems in key markets and coordinate other federal agencies’ responses to corporate consolidation. Further, the Executive Order calls on the FTC and DOJ to “enforce the antitrust laws vigorously.” The Executive Order would also make it easier for high tech workers to change jobs by banning or limiting non-compete agreements, lower prescription drug prices by supporting programs to import cheaper prescription drugs from Canada, make it less expensive to repair products by limiting manufacturers from barring self-repairs or third-party repairs of their products, and increase opportunities for small businesses by directing all federal agencies to promote greater competition through procurement and spending decisions. In all, the Executive Order outlines 72 initiatives that attempt to rein in corporate powerhouses that control markets.

In the Fact Sheet, the Biden Administration compared its Executive Order to the responses of previous Administrations to “growing corporate power,” expressly citing the trust-busting efforts of the Theodore Roosevelt and FDR Administrations’ “supercharged antitrust enforcement” agendas.

Although Democratic lawmakers and union leaders have cheered the Executive Order, some business advocacy groups have reportedly warned that such measures as those in the Executive Order could slow the economy.

Executive Orders are expressions of policy intent that have no actual binding legal force. Their ability to change the law lies in follow-up implementation by federal agencies that act to implement presidential initiatives. Those changes are limited by the extent of underlying statutory authority, and the courts in recent years have appeared reluctant to expand the scope of what is considered anticompetitive activity under the antitrust laws. Business interests should keep a close eye on the regulatory proposals that result from this Executive Order and consider engaging on those that affect their business operations.

#### Trade is stable and growing---governments are avoiding protectionism, the key threat

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Global supply chains have weathered the pandemic intact, and the deep recession has not unleashed a wave of protectionism. That is good for global trade, and probably for foreign direct investment, too, and suggests that predictions of globalization’s demise were premature.

Trade is recovering robustly alongside the upticks in growth in major economies. This good news deserves more attention. Less than 12 months ago, many observers were predicting an end to globalization. The pandemic disrupted supply chains, and governments, suddenly confronted with the resulting vulnerabilities and dependencies, encouraged “reshoring” production of critical goods.

Today, the outlook is much brighter. There is little indication of a sustained movement away from global supply chains. And many governments have realized that trade is more of an opportunity than a threat to national sovereignty. As a result, the World Trade Organization expects the volume of global trade to increase by 8% in 2021, more than offsetting last year’s 5.3% decline.

True, foreign direct investment (FDI) still lags, having plummeted 42% in 2020. Europe actually recorded a negative flow. But the pandemic’s differential impact on trade and investment is not surprising. Transporting goods around the world requires little physical human interaction. Giant cranes, often remotely operated, load and unload containers, and supertankers pump oil ashore.

In contrast, acquiring a firm or establishing a new production facility in another country requires travel to meet potential partners, and in many cases close contact with foreign governments to obtain permits. Pandemic-induced border closures and travel restrictions obviously made this much more difficult.

But FDI is notoriously volatile, often plunging one year and recovering the next, so it could still bounce back strongly in 2021. In fact, the OECD has already detected signs of a recovery.

Moreover, global supply chains have proved to be less vulnerable than many had feared. The notion of a “supply chain” conjures up an image of a fragile arrangement, with each enterprise depending on inputs from the adjacent link. And a chain is only as strong as its weakest link.

The global trading system’s vulnerability to choke points seemed to be driven home in March, when a single large freighter blocked the Suez Canal, after sandstorms restricted visibility and transformed the huge stack of containers on board into sails. But this incident, which was resolved relatively quickly, is not representative of how global trade works.

It is more accurate to talk of interrelated networks of suppliers than supply chains. Most enterprises have more than one supplier of key components, and multinational companies with operations in many countries source supplies from many other countries. The pandemic has reinforced multi-sourcing, rather than triggering a retrenchment from the division of labor.

Yes, governments almost everywhere have interfered with trade during the pandemic to address acute shortages of key products, such as personal protective equipment in 2020 and COVID-19 vaccines during the first few months of 2021. But both of these products, while vital in the context of the pandemic, play only a marginal role in the wider economy. The rich countries could vaccinate the entire world for less than a dollar a week from each citizen.

The main danger is that governments, fearing similar dependence on foreign suppliers for many other key products, introduce protectionist measures. Prompted by the EU’s concern that such dependence could leave the bloc vulnerable to political pressures from hostile governments, the European Commission has recently completed a fascinating study of strategic dependencies and capacities.

The Commission examined more than 5,000 products and found only 137 in the most sensitive sectors, accounting for about 6% of all EU imports by value, for which the EU is highly dependent on imports from outside the bloc. For 34 of these products, constituting only 0.6% of all imports, the EU could be more vulnerable, owing to the low potential for further import diversification or substitution through EU production.

In other words, for the overwhelming majority of products, large economies like the EU have a sufficiently diversified supply base to make them independent of any single supplier. And broad protectionist measures like tariffs or quotas would have little impact on the few goods for which only a single source may exist.

Moreover, most of the 137 sensitive products that the Commission identified are raw materials and related commodities that are easy to store. It would thus be relatively straightforward for the EU to build up strategic stockpiles of those goods.

In the end, governments do not appear to have resorted to protectionism in response to the COVID-19 crisis. Although precise data on new trade barriers erected last year are not yet available, the strong expansion of trade in 2021 implies that the use of such measures must have been limited.

#### Trade’s rebounding

Laura Wood 9/16, Senior Press Manager at Research and Markets, “Global Terminal Tractor Market (2021 to 2026) - Advancements in Terminal Tractors Presents Opportunities”, Research and Markets, 9/16/2021, https://www.globenewswire.com/en/news-release/2021/09/16/2298189/28124/en/Global-Terminal-Tractor-Market-2021-to-2026-Advancements-in-Terminal-Tractors-Presents-Opportunities.html

However, a strong rebound in global trade with the recovery of major industries across the globe since the middle of last year has helped soften the impact of the pandemic for trade. The global economic recovery is also expected to be fueled by the higher production of vaccines and vaccination rates, allowing businesses to reopen more quickly. According to World Trade Organization (WTO), the volume of world merchandise trade is expected to increase by 8.0% in 2021 after having fallen 5.3% in 2020, continuing its rebound from the pandemic-induced collapse that bottomed out in the second quarter of 2020.

#### China trade’s stable---Biden rejected decoupling

Jianli Yang 10/1, Founder and President of Citizen Power Initiatives for China, “Biden Calls For International Cooperation, But How To Cooperate With China?”, The Hill, 10/1/2021, https://thehill.com/opinion/international/574380-biden-calls-for-international-cooperation-but-how-to-cooperate-with

Responding to the China threat, some in Washington have been advocating for a total decoupling with China — namely, to shut down all “areas of cooperation” altogether. However, this is unrealistic. Even during the past two years of heightened tensions between the U.S. and China, the trade volume between the two hostile nations has remained relatively stable, and has even shown signs of growth. Moreover, it would be detrimental to global welfare if the world’s two major powers — which are also the two largest economies — were unable to collaborate on issues of global concern, such as climate change and the coronavirus pandemic. Even during the peak of the Cold War, the U.S. and the Soviet Union were able to negotiate and work out deals on arms control, most notably the Anti-Ballistic Missile Treaty. Responding to the question of whether the Trump administration was seeking to “decouple” from China, then Vice President Mike Pence stated bluntly in his Oct. 24, 2019, address at the Woodrow Wilson International Center for Scholars, “The answer is a resounding ‘no.’”

The Biden administration and the preceding Trump administration both agree that decoupling from China is neither possible nor desirable — and both can be considered the most hawkish U.S. administrations toward China over the past 40 years. Kerry announced on the day following Biden’s U.N. address that he would go to China again, in his effort to seek collaboration with China.

#### China conflicts are being resolved

Ruidong Gao 9/2, Chief Macroeconomist at Everbright Securities Co. Ltd., “Opinion: Why the U.S.-China Trade War Will Ease in the Fourth Quarter”, Caixin Global, 9/2/2021, https://www.caixinglobal.com/2021-09-02/opinion-why-the-us-china-trade-war-will-ease-in-the-fourth-quarter-101767913.html

Political maneuvering between Beijing and Washington has become the norm these days, with the U.S. sure to continue to pressure China regarding the international order and tracing the source of the coronavirus among other things. However, in terms of the economy and trade, we believe the last quarter of 2021 will likely see an easing of tensions.

Both China and the U.S. have incentives to reduce tariffs or make exemptions. Since the second quarter of 2021, China and the U.S. have restarted discussions on the economy and trade, signaling tensions are already easing.

#### There’s no significant antitrust enforcement

Joseph Charles Folio 21 III, Lawyer at Morrison Forrester, and Lisa M. Phelan Co-chair Global Antitrust Law Practice Group at Morrison Forrester, Jeff Jaeckel, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, and Alexander Paul Okuliar, Co-chair Global Antitrust Law Practice Group at Morrison Forrester, “Antitrust Update: Up and Down the Avenue”, 3/22/2021, https://www.mofo.com/resources/insights/210322-atr-update.html

Are the stars aligning for antitrust reform? President Biden is filling key positions in the White House (Timothy Wu, National Economic Council) and at the FTC (Lina Khan, nominee for commissioner) with lawyers who have advocated for increased antitrust enforcement, especially against “big tech.” In Congress, the House antitrust subcommittee concluded a year-long investigation in October 2020 and found bipartisan agreement on discrete areas for reform. With Democrats now in control of both houses of Congress, antitrust legislation seems close. But not so fast.

The House and Senate antitrust subcommittees have held four hearings since February 25, 2021, but it is crucial to view these recent developments in their proper context. Even when politicians and enforcers appear to agree on a goal, it can still be a long and winding road to actual policy reform.

Two to go

Although antitrust reform advocates cheered President Biden’s initial appointments, two of the most consequential antitrust positions—the assistant attorney general (AAG) for antitrust and the FTC chair—remain open. Both the AAG and FTC chair wield tremendous authority; they approve cases, guide investigations, and will decide how to proceed with ongoing litigation. It is unlikely that the Biden administration will make any significant decisions, or support any particular legislation, before its key personnel are firmly in place. And that can take time. Former AAG Makan Delrahim was nominated in March 2017 but not confirmed until September 2017.

Interestingly, the pressure to nominate like-minded antitrust reformers for these two positions is coming from multiple angles. One public interest group recently sent a letter to White House chief of staff Ron Klain and, after “highly commend[ing]” the nomination of Ms. Khan to be an FTC commissioner, warned against the influence of certain White House and DOJ officials over the AAG and FTC chair nominations because of their links to “big tech” companies.[1] Additionally, many in the press have been critical of the level of tech enforcement activity during the Obama administration and want to avoid a replay of those years.[2]

#### Enforcement’s declining

Douglas H. Ginsburg 20, U.S. Court of Appeals for the D.C. Circuit and Professor at the Antonin Scalia Law School at George Mason University, and Cecilia (Yixi) Cheng, Law Clerk for the U.S. Court of Appeals for the D.C. Circuit, “The Decline in U.S. Criminal Antitrust CaseS: ACPERA and Leniency in an International Context”, George Mason University Law & Economics Research Paper Series, 19-31, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3460091

II. Downward Trend in Cartel Cases

The number of criminal cases filed annually by the Division decreased from 90 in 2011 to 18 in 2018, the lowest it has been since 1972.7 Similarly, whereas 27 corporations were charged with criminal antitrust violations in 2011, only 5 were charged in 2018. The total criminal fines obtained by the Division have also fallen, from an average of more than $1 billion per year in 2012 through 2015 to $172 million in 2018.

Criminal enforcement at the Division has always ebbed and flowed, of course, but this recent downward trend marks the greatest reduction in criminal enforcement activity since the leniency program was reformed in 1993:

Chart, line chart

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#### Apple won! There was no antitrust ruling. The only violation was California consumer law.

Leah Nylen 9/10, Reporter Covering Antitrust and Investigations for POLITICO Pro, Former Reporter for MLex, “Apple Wins Epic Antitrust Suit”, Politico, 9/10/2021, https://www.politico.com/news/2021/09/10/apple-wins-antitrust-challenge-as-judge-rules-commissions-dont-violate-law-511142

A federal judge sided with Apple on Friday, finding that the iPhone-maker isn't violating antitrust law by imposing tight restrictions on app developers and charging a 30 percent commission for digital goods and services offered on its platforms.

The decision by U.S. District Judge Yvonne Gonzalez Rogers was a blow to Epic Games, the maker of the popular video game Fortnite, which had sought to ride a wave of anti-big tech sentiment with a suit targeting Apple's lucrative App Store.

However, Gonzalez Rogers found that Apple has been violating California state laws by writing contracts with developers that prohibit them from telling customers that cheaper options exist online outside the App Store. She ordered the company to eliminate those provisions.

On the main allegations against Apple, though, her ruling offered yet another sign of the high legal bar that Silicon Valley's critics face in proving antitrust violations.

#### The court didn’t expand antitrust

GSM 9/11 – GSM Arena, “Epic Games v. Apple Ruling: iPhone-Maker Wins the Antitrust Lawsuit, But It Must Allow Use Of Alternative In-App Payment Methods”, 9/11/2021, https://www.gsmarena.com/epic\_games\_apple\_lawsuit\_ruling-news-50891.php

Epic Games and Apple were engaged in a legal battle since last August after the former sued the latter for its anti-competitive and monopolistic practices, and Apple has emerged as the winner of the case after the United States District Judge Yvonne Gonzalez Rogers handed a 185-page ruling on the lawsuit.

The legal battle between the two companies started last year after Apple removed Epic Games' Fortnite from its App Store, citing violation of its policies as the reason since the video game publisher by-passed the Cupertino-based tech giant's in-app payments platform by introducing an alternative, direct payment method inside the game. This allowed Epic Games to avoid paying a 30% commission to Apple on all in-app purchases.

Epic sued Apple after Fortnite's removal from the App Store, claiming the tech giant's actions were monopolistic and violated the US antitrust law. Those claims have been quashed, though, as Judge Rogers said that "Given the trial record, the Court cannot ultimately conclude that Apple is a monopolist under either federal or state antitrust laws."

#### MNCs will be specially targeted

Dr. Filomena Garcia 21, Professor of Economics at Indiana University, Ph.D. from the Universit Catholique de Louvain, Dr. Jose Manuel Paz y Mino, Assistant Professor of Economics at the Department of Social Sciences at Catholic University of Uruguay, PhD in Economics from Indiana University, and Dr. Gustavo Torrens, Professor of Economics and Director of the Political Economy Program at the Ostrom Workshop at Indiana University, “Nationalistic Bias in Collusion Prosecution: The Case for International Antitrust Agreements”, June 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2943073

Globalization has brought new challenges to antitrust policy (see, for example, Connor (2004), Connor and Helmers (2007), Barnett (2007)). National competition authorities have reacted to the rise of globalization by devoting special attention to collusive practices involving multinational companies. The challenges associated with international antitrust enforcement have also led to proposals for increasing international cooperation among competition authorities (see, for example, Barnett (2007)). Nevertheless, most of the formal literature that studies anticompetitive behavior focuses on closed economies and disregards interactions among national competition authorities.1 The aim of this article is to provide a formal analysis of the incentives of antitrust authorities to prosecute domestic and foreign rms involved in anticompetitive behavior when prosecution in one country generates informational spillovers to other countries.

#### The best empirical evidence agrees

Dr. Joseph A. Clougherty 21, Professor of Business Administration at the University of Illinois Urbana-Champaign, Ph.D. in Political Economy & Public Policy from the University of Southern California, and Dr. Nan Zhang, Assistant Professor of Management at California State University, Stanislaus, Ph.D. in Business Administration from the University of Illinois at Urbana-Champaign, “Foreign Investor Reactions to Risk and Uncertainty in Antitrust: U.S. Merger Policy Investigations and the Deterrence of Foreign Acquirer Presence”, Journal of International Business Studies, Volume 52, Issue 3, June 2021, p. 455-456

The methodological practices generally employed by the pre-existing empirical literature potentially contribute to these mixed empirical findings, as such practices can yield biased results. Specifically, the empirical literature exhibits a proclivity to engage in cross-country empirical studies (e.g., Bris et al., 2007; Clarke, 2003) that do not comprehensively account for potentially confounding factors. Yet, establishing sound causal inferences regarding the relationship between competition policy and inward FDI is fraught with identification challenges in empirical contexts, where omitted country-level factors likely correlate with both the implementation of competition policy and the openness of a country toward FDI. For instance, the pro-market tendencies characteristic of the U.S. – observed by Peng, Wang and Jiang (2008) and others – represents a potential omitted construct that will tend to enhance both competition policy and inward FDI activity, thereby adding observations to a naı¨ve cross-country OLS estimation that would bias the coefficient estimates toward a positive relationship (Bascle, 2008; Wooldridge, 2013).

With the above methodological deficiencies in the pre-existing literature in mind, we attempt to bring some definitive empirical evidence to bear in order to establish whether competition policy might negatively affect inward FDI activity levels. We first narrow the focus of study by considering the impact of U.S. merger policy enforcement on the proclivity of foreign acquirers to participate in the U.S. markets for corporate control. While competition policy involves three elements (merger review, price collusion, and abuse of dominance), merger policy represents the most important element of a national commitment to antitrust principles (Viscusi, Vernon, & Harrington, 1995), and the most salient element of competition policy concerning foreign investors.1 Second, we move beyond a cross-country methodological approach by employing sector-level data on U.S. merger policy investigations and sector-level data on the acquisition activities undertaken by foreign and domestic firms. The sector-level empirical approach mitigates the concern with respect to omitted country-level factors being responsible for a spurious causal relationship between competition policy and inward FDI.

In addition to the empirical features of our analysis, we ground our conceptual development within the IB literature, focusing on the relevance of political risk and uncertainty in foreign investment decisions (e.g., Delios & Henisz, 2000, 2003a, b; Kobrin, 1979; Kobrin, Basek, Blank, & La Palombara, 1980). Thus, in focusing on the application of U.S. merger policy and how that policy might negatively impact foreign acquirers as compared to domestic acquirers, we consider the ability of merger control to manifest both policy risk and policy uncertainty. By policy risk, we refer to situations where the possibilities and probabilities of policy outcomes are known to market participants in the sense that they can be forecast (Knight, 1921; Kobrin, 1979); and by policy uncertainty, we refer to situations where the possibilities and probabilities of policy outcomes are not well known to market participants, in the sense that it is difficult to forecast the likelihood of future policy states (Bloom, 2014; Knight, 1921; Kobrin, 1979). Moreover, our theoretical priors consider how merger policy enforcement involves both policy risk and policy uncertainty elements, where increases in these factors would lead to foreign acquirers being disproportionately deterred from engaging in acquisitions as compared to domestic acquirers.

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 host country characteristics and foreign investment activities.

#### a) Recent, robust studies

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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.



#### b) Empirics

Cary Huang 18, Senior Writer and Veteran Columnist at the South China Morning Post, Former China Editor for The Standard, “Trade Wars Cause World Wars, History Shows. Will This Time Be Different?”, South China Morning Post, 7/17/2018, https://www.scmp.com/comment/insight-opinion/united-states/article/2155565/trade-wars-cause-world-wars-history-shows-will

History provides ample evidence that trade problems have heightened tensions among nations. Such fights lead to economic crises, and trigger political and social crises and, finally, trigger wars.

A full-blown trade war often features the combination of a tariff war and currency war. In practice, exporting countries will, in response to imposed tariffs, resort to currency manipulation, moving to cheapen their money to offset the impact of the tariffs.

But a competitive devaluation among trade partners makes a currency war meaningless. Once countries realise that currency wars do not work, they resort to all the tools available to set up barriers to block trade. This seems evident amid the escalating US-China trade feud. The slump in the renminbi in past few months is stoking fears in markets that China’s policymakers are deliberately pushing the currency’s depreciation in an effort to offset the US tariff hikes.

Trump staring down barrel of yuan devaluation in trade war

Before the first world war, most countries accepted the classical gold standard of pegging their currencies to gold as an effort to anchor smooth trade. However, from 1913, countries began to suspend or abandon the system as they devalued their currencies to compete for export markets in the ongoing tariff war.

The end of the first world war sparked the first worldwide currency war, starting in Weimar Germany in 1921, followed by France in 1925. In the end, all the major economies scrambled to devalue their currencies – sterling, the franc and the US dollar – throughout the 1930s.

In 1930, US president Herbert Hoover signed into law the Smoot-Hawley Tariff Act, which intensified the currency war and deepened the Great Depression. The protectionist law raised tariffs on more than 20,000 imported products and triggered retaliation from many US trade partners.

Trade wars stoke nationalism and hatred among people and finally trigger wars, as evidenced by the breakout of the second world war: the Japanese invaded Manchuria in 1931, and the whole of China in 1937; the Germans invaded Poland in 1939, then the rest of Europe; and the Japanese attacked Pearl Harbour in 1941.

Could Trump’s trade war turn into a third world war?

A quote often attributed to the 19th-century French economist, Frédéric Bastiat, goes: “When goods do not cross frontiers, armies will.” It is obvious that the current US-China trade war is stoking geopolitical tensions between the world’s two largest economies and chief political adversaries, as they become more confrontational over their discord on maritime issues in the South and East China seas and over Taiwan.

History often repeats itself

if we do not learn from it. The two full-blown trade wars some 80 and 100 years ago helped to ignite the two world wars. Could such a catastrophe happen again?