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### OFF---Blockchain DA---1NC

#### Shipping’s adoption of blockchain is expected to grow & modernize the maritime industry---agreements survive scrutiny only because of antitrust immunity

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An important milestone for the implementation of blockchain technology in the container shipping sector took place earlier this year, as the Federal Maritime Commission (“FMC”) completed its review of an agreement among five major carriers to collaborate on a new blockchain platform called “TradeLens,” which aims to modernize the international logistics arena. Blockchain itself has already received considerable attention in other commercial areas (particularly digital currencies).

This article specifically focuses on the TradeLens concept, which leverages the shipping industry’s unique antitrust exemption to create standardized blockchain tools for a number of major carriers.

The TradeLens Concept

TradeLens was launched on August 9, 2018, through a joint collaboration between Maersk GTD and IBM. The TradeLens model seeks to apply distributed ledger technology to the global logistics industry and is described as an effort to “reduce the cost of global shipping, improve visibility across supply chains and eliminate inefficiencies stemming from paper-based processes. In short, to bring global supply chains into a more connected and digitized state—for everyone.”

Shippers, freight forwarders, ports, terminals, ocean carriers, intermodal operators, government authorities, and customs brokers are the intended users of the electronic platform. The program itself is structured to function as an open, neutral electronic platform that “digitizes” the global supply chain “through innovations like a shared ledger, smart contracts, encrypted transactions, continuous audit history and transaction endorsement.”

By streamlining and digitizing the connections between the parties in the global supply-chain ecosystem, TradeLens ultimately hopes to expedite decision-making and lower “the administrative frictions in trade.” It is no easy task to bring together all of the key parties listed above. However, major stakeholders in the logistics industry have taken keen notice of TradeLens over the past year, and Maersk and IBM report that the concept is currently supported around the world by more than 100 diverse organizations, such as carriers MSC, Maersk, CMA CGM, ONE, and Hapag Lloyd; cargo owners, such as Procter & Gamble; global port operators, such as APM Terminals; and numerous global Customs authorities.4 Notably, U.S. rail carrier CSX joined the program in November 2019. As of the publication of this article, the TradeLens website reports that the program is “already handling more than 700 million events and six million documents a year.” These players—and numbers—clearly demonstrate that the market is paying considerable attention to the opportunities that blockchain technology can provide to the international logistics industry.

Filing with the FMC

The TradeLens concept took a major step in clearing U.S. regulatory hurdles on December 23, 2019, when CMA CGM, Hapag-Lloyd, Maersk A/S, MSC, and Ocean Network Express filed the TradeLens Agreement6 with the FMC. By way of background, the FMC is an independent federal agency responsible for regulating shipping lines, marine terminal operators, and intermediaries to ensure competition and to otherwise protect the public from unfair and deceptive trade practices, in accordance with the Shipping Act of 1984. Among other things, the Shipping Act requires that carriers entering into cooperative working agreements file those agreements with the FMC. Generally, such agreements go into effect after a 45-day waiting period, 2020] Antitrust Immunity for TradeLens Blockchain Agreement 3alhough the review can be extended if the FMC seeks additional information. Once the review period concludes and the agreement takes effect, the participants enjoy antitrust immunity for matters covered by the agreement. With this regulatory framework in mind, the TradeLens Agreement’s stated purpose is to “authorize the parties to cooperate with respect to the provision of data to a blockchain-enabled, global trade digitized solution that will enable shippers, authorities, and other stakeholders to exchange information on supply chain events and documents. . . .”

Notably, the TradeLens Agreement expressly states that it is not designed to authorize the parties to discuss or agree on their respective vessel capacities, the terms and conditions of their respective ocean transportation services, or the rates that are charged between the parties and their respective customers. Instead, the thrust of the TradeLens Agreement appears to be directed to the terms and conditions of the provision of data on the TradeLens platform, the input of products and services related to the platform, and the marketing of same, as well as the use of transportation-related documents on the platform itself. The TradeLens Agreement is not the only new forum on file at the FMC for carriers to explore and harmonize new technologies to facilitate intermodal logistics and trade, however. The Digital Container Shipping Association Agreement7 authorizes the parties to form a nonprofit corporate entity through which they can discuss, exchange information, and agree on the development, establishment, standardization, and harmonization of terminology, guidelines, and standards for information technology used in the movement of containers. That broader forum includes the TradeLens parties as well as Hyundai Merchant Marine, ZIM Integrated Shipping Services, and Yang Ming Marine Transport Corporation.

Going Forward

The adoption of the TradeLens Agreement is significant in that it represents a considerable step in attempting to advance blockchain technology in the maritime logistics realm. It will be interesting to see how cooperation and coordination in the area of blockchain adoption and other digital technologies will change the logistics environment, whether similar types of agreements may be submitted to the FMC going forward, and whether new legal issues will arise out of this accelerating effort to modernize the supply-chain arena.

#### Maritime blockchain prevents extinction

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Climate change is often associated with rising temperatures and carbon emissions. And to combat it, our intuitive action is to plant trees and take public transport. We should rethink those instincts.

Research tells us that it would be more impactful to focus our attention on the oceans. The Intergovernmental Panel on Climate Change (IPCC): Special report on the ocean and cryosphere in a changing climate (2019) highlights that the oceans cover 71% of the Earth’s surface and contain 97% of the total water on Earth. The oceans are integral for the cycling of essential nutrients like carbon, nitrogen, and phosphorous. And account for over eight times the amount of primary productivity than land does (16 x 1010 tonnes) (Encyclopedia Britannica, 2021, IPCC 2019).

The Earth’s oceans are under attack. Surface temperatures are rising at an unprecedented rate. Causing the polar ice to melt and enormous amounts of water flow into the ocean basins, which degrades and erodes coastlines. The consequences are catastrophic, coastal communities will be underwater, natural habitats will be lost, and ecosystems harmed.

The balance of carbon between the atmosphere and oceans is changing. As the acidity of the oceans increases, they become less inhabitable for many creatures, and the total diversity drops (IPCC, 2019). The oceans fuel life, drive chemical cycles, such as the uptake of nutrients and gases and global export and circulation (Sigman, 2012). By targeting the oceans, we can mitigate the future impacts of climate change. But there is no time to waste.

Blockchain and distributed ledger technologies are already streamlining our mitigation techniques in sectors such as energy, carbon finance, and even biodiversity. However, there are concerns that the energy requirement of blockchain technologies is too high to justify their use in climate change mitigation strategies. For example, the energy needed for the Bitcoin network alone could result in a global temperature increase of 2 °C by 2050 (Howson, 2020). But innovation is addressing these concerns. Climate conscious initiatives such as SolarCoin use blockchain to reward solar installations. And it is hoped that this approach can power blockchain and bitcoin development (Howson, 2020). These developments highlight the progress made, but where does that leave blockchain and the oceans?

Within the maritime industry, which is a fundamental part of the oceanic network, there have been blockchain developments in landing, shipping, smart contracts, marine insurance, financial investment, supply chain, and workflow (MI News Network, 2021). It is a positive start, breaking down barriers within the marine shipping industry and reducing carbon emissions. But more can be done with blockchain to combat the direct impacts of global warming on the ocean. There has been much success through having a collective database where all parties in the maritime and shipping industry have improved the decision-making time, security, and transparency (Crawford, n.d.). The main setbacks noted by the industry so far have been the complexity, where it becomes challenging to incorporate all of the working parts without intermediaries, especially concerning maritime insurance (Crawford, n.d.).

These breakthroughs in shipping are huge, but they are met with concerns about the effect of climate change on biodiversity, the health of the oceans, and the planet as a whole. Distributive ledger technology could promote transparent access to wastewater and emission impacts and facilitate increased market access and commodity exchange (Howson, 2020). Not only would this successfully drive the maritime and marine economy but also regenerate the entire ecosystem (Crawford, n.d.).

The future of blockchain is exciting as it has the potential to aid and regenerate some of the most beautiful places on our planet. In our last-ditch efforts to preserve our marine and terrestrial environments, cutting out the expensive intermediaries is a hurdle we need to overcome.

### OFF---Trade DA---1NC

#### 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.

#### Specifically, we’ll target the EU and China, triggering retaliation.

Dr. Brian Ikejiaku 21, Senior Lecturer in Law at Coventry University, PhD from the Research Institute of Law, Politics, & Justice (RILPJ) at Keele University, and Cornelia Dayao, LL.M in International Business Law, “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US”, Utrecht Journal of International and European Law, Volume 36, Issue 1, Gale Academic Complete

Today, there is a growing fear of resurfacing protectionism, from United States’ trade-war with China, to UK’s Brexit, to the less known trade-restricting measures adopted by countries globally. The General Agreement on Trade & Tariff (GATT), superseded by the World Trade Organisation (WTO) since 1995, rendered the classic forms of protectionism such as tariffs obsolete. However, it did not defeat protectionism; instead, protectionism has evolved through its protean capacity to adapt into new and often undetectable forms, now labelled as ‘murky’ protectionism (e.g. competition law enforcement and the recent bailout packages). It is argued that there are two ways in which States can utilise competition law to impair free-trade and restrict foreign firms’ access to domestic markets: the exemption of certain anticompetitive conduct under national competition law and the strategic application of domestic competition law. This article considers competition law as an instrument of protectionist policy with comparative analysis of the US and the European Union. Using an international political economy (IPE) perspective underpinned by overlapping theories of (legal/political) realism, this article establishes that, while no direct robust empirical evidence of protectionist motivations on competition law enforcement exists, particularly on ‘merger regulation and export cartel exemptions’, the presence of political elements on the decision-making, the wide discretion granted to competition authorities and the ‘sponge’ nature of competition law present an opportunity for the use of competition law for protectionist tendencies.

#### US-EU relations stop global hotspot escalation and existential threats.

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Rather than merely preserve the Atlantic alliance, it’s in our mutual interest to strengthen it. Only on this foundation can we jointly address shifts in global power and threats.

In 1981, when the position of Transatlantic Coordinator was created, the Federal Republic of Germany was in the initial throes of a heated rearmament debate. Global political tensions were high, and ultimately would peak with the imposition of martial law in Poland. Against this uneasy backdrop, one faction of the leading party in the ruling coalition joined forces with the burgeoning peace movement and took a stance against the United States and the transatlantic alliance. At the same time, the European integration process was stagnating. It took a refocusing of attention on the core aims of European and transatlantic policy under the clear leadership of Helmut Kohl to generate new momentum on both sides of the Atlantic. European integration and transatlantic cooperation became two sides of the same coin – and the years from the early 1980s to the early 1990s became a European and transatlantic decade of modernization. This symbiosis would culminate in German unification.

The process began with the resolute choice to remain tied to the West. It was the key lesson drawn from the horrors of the 20th century. Thanks to US support for European integration, transatlantic cooperation and European integration were never mutually exclusive; instead, they formed the two pillars that underpinned the Federal Republic of Germany’s ties to the West. From the beginning, support for these pillars came not only from heads of state and government. Rather, transatlantic ties have been upheld by an extensive network at the level of civil society.

The Transatlantic Coordinator plays a key role in this civil-society network, by providing stability in the ebb and flow of day-to-day politics. This keeps differences in political opinion from burdening relations at the level of civil society and harnesses the diversity of people-to-people contacts, creating new political momentum.

GLOBAL POWER SHIFTS

Today, we face tremendous challenges from within and without, whose effects are being felt by the European Union and are testing our transatlantic friendship. We are finding that in a world where power is diffused across the globe, the possession of military, economic, and political power no longer guarantees success in the pursuit of one’s goals. This state of affairs could be called a “global disorder”. Transatlantic ties have not been spared by this development. On the contrary, they are being fundamentally transformed.

The actual break with the past, however, occurred more than thirty years ago. In 1989 and 1990, the ground rules of the international order changed. In the bipolar world, every transatlantic crisis could essentially be resolved because the external threat outweighed any disputes the partners may have had with one another. For this same reason, transatlantic power imbalances were not only irrelevant, but possibly even intentional. With the US’s security guarantees, free Europe became increasingly politically stable and economically developed.

With the end of the Cold War came greater foreign policy leeway, for both the United States and the Europeans. All of a sudden, power asymmetries began to play a role in the transatlantic relationship. Furthermore, new focal points of political and economic power arose in Asia, and this presented the transatlantic partners with fresh challenges. New global threats, such as climate change and international terrorism, can no longer be framed through outdated concepts of foreign and security policy. They call for new strategies.

FORTIFYING THE TRANSATLANTIC PARTNERSHIP – THROUGH A STRONG EUROPE

Regardless of these developments – or, rather, because of them – our transatlantic partnership persists. Because the transatlantic alliance is built on common values, on political, economic, and cultural interdependencies, and on institutional ties. We should not only safeguard but also strengthen these ties – as we have a mutual vested interest in them. They form the basis for how we jointly deal with global shifts in power and threats.

First, and especially in view of the outcome of the recent US presidential election, we must make greater use of existing forums for transatlantic exchange, as well as create new ones. In both people-to-people and political relations, a partnership needs shared spaces of encounter. Only by engaging in conversation and constantly striving to put forward better arguments and finding the right solutions can we create a solid, long-term basis for transatlantic partnership and action. Naturally, we will argue from time to time. But we did that during the days of the East–West confrontation as well. What fundamentally matters is that freedom, democracy, and the rule of law are not merely political maxims. They are, instead, crucial norms for the functioning of states and societies, as they shape the actions of citizens, businesses, and governments – not only in domestic but also in foreign policy.

Second, as Europeans, we must go beyond merely presenting arguments based on our values and interests. We must also prove that we are capable of action. Only then will we also be a strong partner for our transatlantic friends, one that can stand by their side as we jointly confront the “global disorder” and compete with autocratic powers. For many years, paying lip service to a rules-based order and being part of the transatlantic “convoy” was sufficient.

Since World War II, despite setbacks and challenges, this rules-based order has bestowed a period of peace and ever growing prosperity on the world. To maintain this order, we must strengthen the European Union. Following the UK’s departure from the EU – the withdrawal of a country that has long functioned as a linguistic and cultural catalyst – this task assumed even greater prominence. As Europeans, we must be capable of action, be seen as a serious partner, and be an independent actor. Because when we are able to act we widen our policy options. Also, in this way, burden sharing becomes the best option rather than a last recourse. In the process, we will help make Europe a more attractive partner for Washington.

This attractiveness comes from our willingness and ability to act, our sense of solidarity, and our efforts to modernize. For this, we must address existing innovation gaps, invest in a digital, climate-neutral, resilient, and competitive Europe, not shy away from public–private partnerships, and become more efficient and agile overall. In so doing, we will not just be setting standards before others set those standards for us; we will also be defining benchmarks for others to measure themselves against.

Presidents Dwight D. Eisenhower and Ronald Reagan encouraged Europe to move toward being capable of action and more self-assertive when they spoke of a third great “power mass” and a “more genuinely European Europe”. And, of course, this has a magnetic effect on potential multilateral partners. Partnership, and not just allegiance, must be our aspiration.

Strengthening Europe, however, does not mean questioning the multifaceted character of the European Union; its nations and regions; its diversity of languages and religious faiths; the experiences of various peoples, social groups and individuals; and the differences between north and south, west and east. The regions play an important role as regulatory and cross-border actors. If the supranational and national levels are a kind of switchboard, then the regions are the cross-connections in the European network that make possible and necessitate international cooperation on all levels. The subnational level also plays a key role in transatlantic relations. Federalism is something Germany and the United States of America have in common – in the constitutional, political, and social spheres. That’s why we must expand relations between our federal states, provinces, and regions on both sides of the Atlantic, in the realms of politics, business, academia, and culture. Because mutual understanding is the ground on which communication thrives.

Of course, we need the supranational level so that the European Union can wield its influence on the global political stage. In some policy areas, including international trade, we have been doing this successfully for many years. In others, such as the common foreign, security, and defense policy, or regarding climate policy, we have launched important initiatives but can achieve so much more.

TRADE POLICY AS A CATALYST FOR EUROPEAN–TRANSATLANTIC RELATIONS

Trade policy is the European Union’s oldest, and in many ways most successful, instrument for shaping its external relations. In this sphere, we are on an equal footing with the United States because, many decades ago, we grasped the possibility, thanks to our cooperation with the United States, to help shape a global economic and trade order founded on liberal and multilateral principles. “They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them,” the parties to the North Atlantic Treaty declared as their common goal. We should remain committed to this goal as we work to strengthen the European healthcare sector, for example, and make Europe more resilient to crises and less reliant on global supply chains.

The EU’s new trade agreements underscore the commitment to free trade. Our strong position in terms of economic policy with respect to the United States shows how partnerships can include occasional disputes. This is all the more reason for us to remain engaged in forging a common understanding about what we want the economy of the future to look like – especially when it comes to the digital revolution – and for us to agree on common standards for new technologies. All this would not only strengthen transatlantic cohesion, but would also benefit our societies and enhance our efforts to modernize Europe. Finally, it would send a clear, and possibly the most important, signal to the People’s Republic of China – because there is transatlantic agreement that China is not only a negotiation partner and competitor but also a rival. Only through transatlantic efforts will we continue to ensure that global trade and new technologies bear the stamp of our liberal system, norms, and standards. Instead of a comprehensive trade deal, this will require a multitude of related steps.

SECURITY POLICY: UPHOLDING THE ALLIANCE AND REMAINING A RELIABLE PARTNER

In its transatlantic relations, the European Union is strong on trade policy. However, it falls short on security and defense policy, judging by the targets it has set for itself and in light of US expectations. The call for a fairer share of the burden is as old as the alliance – and touches a raw nerve. Those who rely on partnerships must be reliable partners themselves. This has nothing to do with militarization. Over a decade ago, all NATO member countries pledged to spend two percent of their respective GDP on defense. This is not just a NATO target – in the context of PESCO, it is also a European target. And that’s how we should frame this issue. Moreover, our ability to defend ourselves and uphold the alliance is in the vested interest of Germany and at the same time helps defend our values, principles, and future.

The challenges we face in the coming years are more likely to increase than abate. Geographically, there will be a focus on an arc of problems that stretches from northern Africa to the Middle East and to Central Asia. In our policy on Russia, together with the US we can recommit to the formula set out more than fifty years ago in the Harmel Report, which defined a form of coexistence through deterrence and détente, i.e., maintaining adequate defence while promoting political détente. Aside from this, the United States will devote increasing attention to the Pacific region – while in Europe, unlike the US, we will have to address in particular the impact and aftermath of wars, civil wars, and failing states on our doorstep. Ten years after the revolutions in northern Africa and the Middle East, we are still insufficiently prepared to do so.

As Europeans, as Americans, and when and wherever possible as transatlantic partners, the challenges faced by our counterpart do indeed concern us, as they have for the past forty years. This shared history enables us to pose questions relating to the past, in order to learn from mistakes that were made – and especially with a view to once again, in the years ahead, creating a decade of European and transatlantic modernization. In this way, we can significantly contribute to forging a lasting and liberal global order.

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#### The 50 state governments and relevant sub-federal territories, in coordination through the National Association of Attorneys General, should substantially increase prohibitions on anticompetitive business practices by the private sector by prohibiting global ocean carriers from colluding to set unfair prices and service terms.

#### 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---Multilat CP---1NC

#### The United States federal government should establish and advocate a framework for contingent international cooperation that substantially increases prohibitions on anticompetitive business practices by the private sector by prohibiting global ocean carriers from colluding to set unfair prices and service terms.

#### bypasses generic barriers AND spills over to deep economic integration

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

B. Between Contracts and Networks: Frameworks

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

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

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

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

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

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

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

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

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

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

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

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

#### 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

Geoffrey A. Manne 13, Lecturer in Law at Lewis & Clark Law School, Executive Director of the International Center for Law & Economics, JD from the University of Chicago Law School, Former Olin Fellow at the University of Virginia School of Law, and Dr. Seth Weinberger, PhD and MA in Political Science from Duke University, MA in National Security Studies from Georgetown University, AB from the University of Chicago, Associate Professor in the Department of Politics and Government at the University of Puget Sound, “International Signals: The Political Dimension of International Competition Law”, The Antitrust Bulletin, Volume 57, Number 3, Last Revised 7/18/2013, p. 497-503

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---FTC Tradeoff DA---1NC

#### 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---T Subsets---1NC

#### Topical affs must be economy-wide

Dr. Babette Boliek 11, Associate Professor of Law at Pepperdine University School of Law, J.D. from the Columbia University School of Law, and Ph.D. in Economics from the University of California, Davis, “FCC Regulation Versus Antitrust: How Net Neutrality is Defining the Boundaries”, Boston College Law Review, 52 B.C. L. Rev. 1627, November 2011, Lexis

Although the two regimes share a commonality of purpose--to protect consumers and to promote allocative efficiencies in production--the two have quite distinct, predominately opposing, means of securing social benefits. As Justice Stephen Breyer stated when serving [\*1629] as a judge on the U.S. Court of Appeals for the First Circuit, although regulation and the antitrust laws "typically aim at similar goals--i.e., low and economically efficient prices, innovation, and efficient production methods"--regulation looks to achieve these goals directly "through rules and regulations; [but] antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about." The battle between these two regimes may be broadly summarized in a single issue thusly: in the face of the industry-specific regulator, what is (or what should be) the role of antitrust law?

Antitrust law preserves the process of competition across all industries by condemning anticompetitive conduct when it occurs. In contrast, industrial regulation by its nature is a public declaration that, in a given industry, market forces are too weak or underdeveloped to produce the consumer benefits that are realized in competitive markets--regulated industries are carved out from the rest of the economy and are subject to proactive, regulatory intervention that goes above and beyond antitrust enforcement measures. Not surprisingly, regulatory agencies were historically created as substitutes for market forces in the few markets that, by the nature of the product or technology, were natural monopolies or severely prone to monopoly. In the vast majority [\*1630] of markets, however, the antitrust law is the default government control, designed to supplement market forces to inhibit or prevent the growth of monopoly.

Again, although the goals of the two regimes may be similar, the means by which each can achieve those goals are in opposition. Therefore, the threshold determination of which industries are to be singled out for industry-specific regulation, and to what degree, is of vital importance as it simultaneously determines the predominance of the regulator versus the antitrust authority in securing the social good.

#### Vote neg:

#### Limits---they devolve into hundreds of specific subsets like aviation, ag, defense or rail AND allow thousands of cases that deny single mergers OR regulate individual companies like Facebook or Amazon

## Supply Chain Advantage

### Supply Chain ADV---1NC

#### Immunity is irrelevant---FMC has adequate authority now but resource constraints, staff, industry capture, & operating hours thump

* [UK is Yellow]

Hannah 1AC Brown 22, “Amidst a Record Supply Chain Crisis, What is the Federal Maritime Commission’s Capacity”, <https://therevolvingdoorproject.org/amidst-a-record-supply-chain-crisis-what-is-the-federal-maritime-commissions-capacity/>, January 4th, 2022

One tiny federal agency with 116 full-time employees and a $28.9 million dollar budget is in charge of regulating the global marine economy, which contributes $397 billion to the US GDP annually and accounts for 80 percent of goods shipped worldwide. That’s not just an apples and oranges discrepancy—that’s like an apple versus Apple. The budget for the military’s marching bands is fifteen times greater than the Federal Maritime Commission’s budget; the Marines alone have five times more musicians than the Commission has staff. Meanwhile, for months now, aerial views of America’s biggest ports have shown dozens of **massive container ships backed up for miles**, blotting the ocean as far as the eye can see. Billions of dollars of imported goods sit idly on the water for weeks, depreciating in value, while trucks face over 24-hour waits outside of port gates. The logjam is terrible for people’s health, too—the California Air Resource Board estimates that the sitting ships’ increased pollution is equivalent to adding an obscene 5.8 million cars and 100,000 big rig trucks to the area. The complex and interconnected web of the global supply chain is in a crisis that defies simple solutions. But **addressing that crisis is made** more **difficult by decades-old deregulation** of the ocean shipping industry, and the fact that a few powerful global entities are making billions of dollars from its continued dysfunction. Three alliances of the nine biggest shipping container lines control 83 percent of the global shipping market and 95 percent of critical East-West trade lanes.They are on track to make an eye-watering $150 billion dollars in 2021—more than 25 times their 2019 profit. Terminal operators are also turning a profit, as most terminals are operated by U.S. subsidiaries of those same foreign container lines. It’s worth noting that the top 25 container lines are all foreign companies; the US’s largest container line, Matson, holds only a 0.3 percent share of the market. These three carrier-operator alliances are effectively holding the global supply chain hostage in order to milk as much money as they can from heightened demand and stifled supply. These alliances have no economic incentive to increase supply. Their incentive is to continue to reap windfall profits. Yet significant investment in supply is precisely what the public complaining about inflation and shortages requires, and what the industry’s regulator ought to be demanding on behalf of the people. And who is that regulator? The pea-sized Federal Maritime Commission, squashed under the industry’s gigantic mattress. The Federal Maritime Commission is like David up against the shipping line Goliaths, if David voluntarily put down his slingshot and tied his hands behind his back. For being the only federal agency in charge of regulating a behemoth industry, the Commission is markedly anti-regulation. “I have never seen a regulation I liked,” said Commissioner Rebecca Dye, now in her nineteenth year at the agency. The Commission voluntarily embraced Trump’s 2017 “eliminate two existing regulations for every new regulation” Executive Order, and reviewed its own regulations for potential repeals. The Commission’s deregulatory spirit dates back more than two decades, to the passage of two laws: the Shipping Act of 1984, and the Ocean Shipping Reform Act of 1998. Both of these laws substantially lessened the Commission’s authority. The Federal Maritime Commission’s regulatory authority stems from the handful of maritime laws that it enforces. (These include the Shipping Act of 1984 and the Ocean Shipping Reform Act of 1998, as well as Section 19 of the 1920 Merchant Marine Act, the Foreign Shipping Practices Act of 1988, and sections 2 and 3 of Public Law 89-777.) At the time of its founding in 1961, the Commission’s responsibilities were outlined by the Shipping Act of 1916, which granted the agency a lot of authority. Under the 1916 Act, it was mandatory for carriers to file all tariffs (official rates) and agreements with the Commission. The Commission would review and approve all agreements before they came into effect. Approved agreements were exempt from U.S. antitrust laws. To streamline what had become a time-consuming approval process, the Shipping Act of 1984 changed this procedure so that once agreements are filed with the Commission, they are automatically approved after 45 days unless the Commission moves to block them. Tariffs were also no longer required to be filed with the Commission, just published publicly. Then, the Ocean Shipping Reform Act of 1998 took industry autonomy several steps further. The 1998 Act allowed carriers and shippers to negotiate confidential contracts for the first time. These agreements are still filed with the Commission, but their terms are otherwise secret. The importance of publicly reported tariffs rapidly diminished, now that prices can be negotiated and set in private. And through all this, carriers retained their antitrust immunity. This deregulatory push was in the name of “competition” and the “marketplace,” but its effect was to crush smaller competitors and encourage monopolistic alliances, while preventing public scrutiny and most antitrust intervention in the industry. Over the past two decades, every sector of the ocean shipping industry has consolidated. Not only do three alliances of nine carriers now control 83 percent of container ship capacity, but three Chinese manufacturers produce 83 percent of all new containers, and five companies control 82 percent of container leasing. Smaller ports have suffered as the big carriers buy bigger ships; a capital-intensive strategy for cutting costs that excludes smaller carriers, and forces costly adaptations upon ports. Larger ships initially provided greater efficiency and cost-savings for carriers, but now, with many mega-ships larger than the Empire State Building, their increasing diseconomies of scale read as a monopolistic tool to force the industry to operate on their terms. This is why we see megaships stuck for days at port; they’re not profitable to sail unless they’re entirely full, and it takes a long time to load and empty them. Meanwhile, ocean carriers and marine terminal operators can charge demurrage and detention fees to the shippers, intermediaries and truckers when things get behind schedule. Where the Commission Comes In All of that explains why importers, exporters, intermediaries, and truckers have repeatedly asked the Commission to become more involved, while carriers and terminal operators have argued that the Commission lacks authority to do so. Such a dispute broke out over the Commission’s 2020 interpretive rule clarifying what constitutes reasonable demurrage and detention fees. The Commission’s commentary on this rule and the controversy it generated illuminates how the Commission perceives its own role and authority. While the Commission acknowledged that “one purpose of the Shipping Act is to minimize government intervention,” it countered that that “does not mean that the Commission may abandon its duty to prevent unreasonable practices.” So while the laws the Commission is in charge of administering expressly put limits on its power, the Commission still has regulatory responsibilities it must fulfill. While the Commission claims that it “prefers commercial solutions to demurrage and detention problems,” the Commission’s investigation found that “commercial solutions are only adequate from the perspective of ocean carriers and marine terminal operators.” In other words, when left to their own “free market” devices, carriers and operators bulldozed the other industry parties, forcing a reluctant Commission to intervene. By the 2010s, the ocean supply chain’s vulnerability and inefficiencies were already visible. The Commission’s response, spearheaded by Commissioner Rebecca Dye, was to bring together various industry stakeholders in conversation. The 2017 Report of this “Supply Chain Innovation Teams initiative” offers further insight into the Commission’s view of its responsibilities and, perhaps, capacity. Dye reports that industry participants “indicated that they had little appetite for governmental prescriptions or requirements,” and adds that “from the outset, the Commission recognized that additional government regulations were not the answer.” It is alarming to see a regulatory agency renege its chief function. The Commission decided to serve instead as “a catalyst for stakeholder-identified commercial solutions” (emphasis in original). Is this decision evidence of corporate capture, or the result of an agency whose resources are dwarfed by its mandate, still striving to make an impact? Whatever the cause of the Commission’s reluctance to advance regulation, it appears that both the White House and a bipartisan coalition of lawmakers see regulation as the best path out of our current quagmire. While the Commission’s response to the supply chain crisis continues to emphasize “commercial solutions,” and includes the creation of a new National Shipper Advisory Committee, convening major shippers like Walmart, Tyson Foods, Amazon and DuPont to advise the Commission on ocean shipping policy, Congress is looking to the proposed Ocean Shipping Reform Act of 2021 for answers. The House of Representatives agreed to suspend the usual rules (which they do for noncontroversial bills) and passed the Ocean Shipping Reform Act of 2021 in a bipartisan 364-60 vote on December 8. The bill has already been sent to the Senate, read twice, and referred to committee. The 2021 Act would give the Federal Maritime Commission more authority to crack down on bad practices by carriers and terminal operators, including discriminating and retailiating against shippers, making false certifications, and imposing unreasonable demurrage and detention fees. It would leave to the Commission’s discretion whether and when it is reasonable for carriers to refuse US agricultural exports when it is more profitable to send empty containers back to China. The White House, meanwhile, has directed the Federal Maritime Commission to “​​use all of the tools at its disposal to ensure free and fair competition.” This includes the Commission’s unique ability to intervene on antitrust issues: “while the alliances between the carriers receive statutory immunity from antitrust laws, the FMC can challenge those agreements if they ‘produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost or … substantially lessen competition.’” In reality, though the Commission has labored to avoid stepping on industry toes, it has substantial authority to enforce antitrust laws when shipping agreements—the confidential agreements that only the Commission gets to read—reduce competition and damage supply chain resilience. An encouraging sign that the Commission recognizes its antitrust capacity comes in the form of a Memorandum of Understanding with the Department of Justice’s Antitrust Division this summer, committing the two agencies to cooperate on “the enforcement of antitrust and other laws related to the Industry.” While the Federal Maritime Commission’s singular discretion when it comes to challenging shipping agreements for antitrust violations may be its sharpest tool, it has a broad mandate to monitor all parties in the US-international ocean shipping industry to ensure “just and reasonable practices.” It is also the Commission’s job to facilitate “alternative dispute resolution” when problems crop up between parties, and to seek remedies when necessary. The Commission has the authority to conduct investigations and hold legal proceedings overseen by the Commission’s Administrative Law Judges, and prosecuted by its Bureau of Enforcement. Yet despite audible discontent within the industry, the Commission has found that “few private parties have filed complaints seeking reparations,” in part because shippers and truckers fear retaliation. While the Commission is taking steps to minimize barriers to private party complaints, the prohibitive cost of retaliation is indicative of the container lines’ tight grip on the industry. Fully tapping into these powers, old and new, to take a more leading role in resolving the international supply chain crisis, will almost certainly require that the Commission receive a bigger budget and more staff. Like many federal agencies, the number of Commission employees has been waning when it should be waxing. In 1998, the Federal Maritime Commission had 139 full-time employees. By 2006, the Commission had 121 full-time employees, and by 2020, only 111. Likewise, accounting for inflation, its budget has essentially remained flat over the past decade, rising nominally from $24 million in 2012 to $27.4 million in 2020. In contrast, the transport volume of ocean trade has steadily increased over the past thirty years, from 4 billion tons annually in 1990 to over 10 billion tons in 2020. Likewise, the world’s fleet of merchant ships has doubled in size since 1990, even while the US share of the global fleet has shrunk from 16.9 percent in 1960 to 2.7 percent in 1990 to only 0.4 percent in 2019. As it is both the Federal Maritime Commission’s responsibility to support the development of a US liner fleet, and to combat unfair practices by foreign carriers, the Commission’s responsibility for regulating a growing industry has increased even as its capacity has shrunk. The Commission monitors an ever-growing number of rates, agreements, alliances and disputes in the international shipping industry. Per its annual report, in 2020 the Commission was continuously monitoring over 300 cooperative agreements, and received 45,164 new service contracts and 779,884 contract amendments. The Commission accepted 375 new and 273 amended ocean transportation intermediary (OTI) applications, and 285 OTI licenses were revoked or surrendered. Through the Commission’s informal conflict resolution program, it resolved 241 ombud matters, and responded to 1,730 queries from the public (a 52 percent increase from 2019). If the Commission is to take on additional enforcement responsibilities, it should bring on more staff to avoid information overload. While the Commission’s leaders do not set their own budget, they can help to influence funding levels by highlighting these gaps. In recent years, however, their requests have been seemingly inadequate to fill them. In its 2022 budget request, the Commission set a goal of 128 employees, only a modest increase over current staffing levels. Commission leadership can also work directly with the Office of Personnel Management (OPM) to streamline its hiring processes to ensure its budget, at whatever level, is put to efficient use onboarding new staff. A majority of the Commission’s positions fall under the General Schedule, meaning that hiring for them involves a number of procedures that can slow the process. The Commission should consider requesting hiring flexibilities from OPM to expedite this process, in addition to exploring ways to improve recruitment. If the Commission’s current leadership proves unwilling to rise to the challenge, Biden has the opportunity to fill two of five Commissioner seats. His challenge will be to find a labor-minded Republican (as the agency requires partisan balance) to enact the bold regulatory agenda that the moment demands. Elsewhere in the agency, the bright side of hiring amidst the supply chain crisis would be that new Commission employees may be less invested in preserving the status quo. The proposed Ocean Shipping Act of 2021 would provide the Federal Maritime Commission with a moderate increase in funding, from $29.6 million in 2021 to $32.6 million in 2022 and $35.8 million in 2023. But overall, the 2021 Act bestows more new requirements upon the Commission than new powers. Increasing an already skeptical agency’s obligations without substantially increasing their resources is an effort destined to fall short. Many snarls in the supply chain web remain outside of the Commission’s purview and go unaddressed by the bill, from the chassis shortage to the comparatively limited operating hours of American ports, leaving its impact unknown.

#### Its about congestion at China’s Port of Yantian

* [UK is Yellow]

Mike 1AC Short & James Mancini 21, “Overcoming the 5 Supply Chain Barriers that Threaten the Growth of Renewable Energy”, <https://www.chrobinson.com/blog/overcoming-the-5-supply-chain-barriers-that-threaten-the-growth-of-renewable-energy/>, June 28th, 2021

**Renewables are expected to account for 90% of new power generation globally through 2022. But the world’s demand for clean energy is running up against some hard realities in the global supply chain and one of the most erratic transportation markets in history. Here are the five key project logistics challenges we’re seeing in renewable energy and how to overcome them.** Tighter budgets for renewable energy projects **The cost of wind and solar energy has been declining relative to fossil fuels for years, making it more attractive to more investors. That’s good news for climate change, but some new factors could throw that trend off track.** The shortage of semiconductors plaguing the auto industry has become a problem for the renewables sector as well, because semiconductors are needed to convert wind and solar into electricity. Scarcity of steel is driving up prices for wind turbines and the mounting systems that point solar panels toward the sun. Polysilicon, an essential building block for solar panels, is the world’s second most abundant element but the cost has recently quadrupled. Rising material costs and historically high freight rates can eat into the profitability of your renewable energy project. That makes it even more important to avoid unexpected costs in your project logistics. **The supply chain for wind and solar farms is vast and complex, starting in precious-metal mines and culminating in some of the most remote places on Earth. To make sure you come in on budget, choose a project logistics provider that has deep and specific industry knowledge.** When you’re renting a crane for $100,000 a day, you can’t afford for the wind turbines to be three days late. Every county those will travel through requires a permit, which is typically granted for just a few days. If you miss that window, those permits must be renewed in every county. Meanwhile, you’re paying the installation crew to wait. These projects have too many moving parts and variables to try to piece it together yourself, and it exposes you to too much financial risk to count on the disparate processes of multiple vendors. An experienced provider can deliver end-to-end project logistics. That includes making sure manufacturers upstream of your project can reliably get raw materials. That includes anticipating every possible contingency to mitigate disruptions in shipping. That includes technology to track every piece of equipment’s path to the installation site. Renewable energy logistics has been a specialty of C.H. Robinson’s for more than a decade. That expertise helps you avoid the unexpected costs that can easily erase your project’s profit margin. Unpredictability in shipping The majority of solar equipment manufacturers are in China, Vietnam, Thailand, and Malaysia. Four companies dominate more than half the manufacturing of wind turbines, with most production in Asia. Five years ago, the movement of containerized goods out of Asia was high volume, low cost and consistent. For breakbulk cargo, you could call to book space on a vessel for next week. That world—where you could plan week-to-week—is gone. **Now, ship capacity is scarce and exponentially more expensive because of the contraction of shipping lines and a global container shortage. Port congestion is making it hard to know when incoming ships will be able to berth. It’s gotten to the point where schedule reliability has dropped from about 80% at this time last year to 5%. New disruptions can make it even more challenging to get everything for your renewable energy project where it needs to be when it needs to be. Congestion at China’s Port of Yantian is a case in point, creating massive backlogs of shipments to North America, Latin America, Europe, and Oceania that could take months to clear.**

#### Disruptions are inevitable BUT the supply chain and trade have rebounded

Yen Nee Lee 21, Lee is a senior correspondent for CNBC.com based in Singapore, covering a range of business topics from around the region, including trade, finance and macroeconomic trends, “The worst is over for global supply chains, but shipping association says industry faces lingering issues” <https://www.cnbc.com/2021/11/24/worst-is-over-in-global-supply-chain-disruptions-shipping-association.html>, November 24th, 2021

The worst is over for global supply chains, but not all problems the shipping industry faces have gone away, said the chairman of a shipping association.

“There may still be swings, but overall, I think the worst is over,” Esben Poulsson, who chairs the International Chamber of Shipping, told CNBC’s “Squawk Box Asia” on Tuesday.

Poulsson explained that retailers had made a “significant level” of pre-orders, and that should help ease shortages of goods. In addition, new container ships are being built and will add to existing capacity in the next 24 to 36 months, he said.

Global trade rebounded strongly after a slump in the initial months of the Covid-19 pandemic.

Freight rates spiked as shipping companies, logistics providers and ports struggled to keep up with the jump in trade volume, while Covid resurgences in parts of Asia earlier this year threatened the supply of goods from electronics and auto parts to coffee and apparel.

The World Container Index compiled by Drewry, a maritime research and consulting firm, indicated that global freight rates inched 0.5% lower to $9,146 per 40-foot container in the week of Nov. 18 compared with a week ago. But rates remained 238% higher than the same week last year.

Difficulties in crew changes

The shipping industry still has some lingering problems, said Poulsson. That includes the difficulties in crew changes and the slow progress in vaccinating seafarers, he said.

Many countries have continued to impose travel restrictions to curb the spread of Covid. That has impeded the ability of some seafarers to travel between ships — their workplace — and their countries of residence.

Such a situation was made worse by seafarers’ limited access to Covid vaccines at a time when many countries require travelers to be fully vaccinated.

Poulsson said more seafarers have been vaccinated, which offers “some improvement” to the situation. A report by the non-profit Global Maritime Forum said the proportion of seafarers who have been vaccinated rose from 31% in October to 41% this month.

But “this problem has not gone away,” said Poulsson. He explained that his organization has been urging governments to designate seafarers as “key workers” so that more could be prioritized for vaccination — but many countries have failed to do so.

#### Supply chains are resilient, or COVID disproves their impact.

Ozdemir et al. 22, Dilek Ozdemir, Assistant Professor at Izmir Katip Celebi University, Ph.D. in Management Engineering from Istanbul Technical University; Mahak Sharma, Researcher at the National Institute of Industrial Engineering, Ph.D. in IT Innovations and Management from the National Institute of Industrial Engineering; Amandeep Dhir, Professor of Research Methods at the University of Agder, Ph.D. in Consumer Psychology from the University of Helsinki, D.Sc. in Information Systems from Aalto University; Tugrul Daim, Professor in the Department of Engineering and Technology Management at Portland State University, Ph.D. and M.S. in Engineering Management from Portland State University, “Supply chain resilience during the COVID-19 pandemic,” Technology in Society, Vol. 68, February 2022, <https://doi.org/10.1016/j.techsoc.2021.101847>

The literature on supply chain resilience includes studies on various types of disruptions. However, pandemics are unique because they are unpredictable in terms of time and scale. The COVID-19 pandemic has caused business disruptions on an unprecedented scale. All industries have suffered sharp alterations in supply and demand structures. In fact, the pandemic disrupted markets so rapidly that companies could not develop and apply risk-aversion strategies, and they were simply unprepared when the disruption occurred [48]. The disruption thus forced them to make real-time decisions and act reactively [98]. Among all sectors, the perishable goods sector assumes exceptional importance because it provides people with essentials items [99]. Therefore, we aimed to investigate the ability of resilience-building efforts to absorb the effects of a disruption and enable recovery.

Our findings are twofold. Although all resilience-building efforts can mitigate disruptions within predetermined limits, the pandemic has exceeded these limits. Therefore, it has not only disrupted supply chains but also caused failures in resilience-building capabilities [100]. Our first significant finding indicates that organisations that were more effective in resilience-building activities were also less affected by the disruption. Some researchers have already sought to explain why some companies are more vulnerable than others. Belhadi et al. [15] report that service and manufacturing companies experience the negative effects of disruptions differently, and companies in global supply chains are more vulnerable to pandemic-related disruptions. Ivanov and Das likewise examined global supply chains and confirmed their greater vulnerability; however, they believe that local alternatives cannot replace the efficiency and effectiveness provided by global supply chains, which, they predict, will survive after the pandemic. Still, they suggest that working with local suppliers would create some flexibility during unexpected global crises [101]. Discussing the food supply chain performance of England during the pandemic, Garnett et al. [100] recommend investing in the agri-food sector and developing locally sustainable capacity that is sufficient to satisfy food demand in England. While they noted the inability of seasonal workers from other countries to cross the border during pandemics, the accuracy of this observation remains in question because such studies are rare and mostly compare companies from different industries. Our study examines only the perishable goods industry, and difference still exists.

Because the pandemic is recent and ongoing, very fewer papers in the supply chain literature have attempted to explain its interactions with supply chains. To the best of our knowledge, previous scholars have not statistically tested the effect of disruption on resilience-building activities or efforts. Our work also statistically demonstrates that less affected companies are perceived as higher performers in supply chain resilience activities. Understanding this phenomenon might provide clues for building more resilient supply chains in the future.

Understanding the effectiveness of existing practices must figure prominently on the agenda of the supply chain literature in the face of the pandemic. Our second main finding indicates that both proactive and reactive resilience-building activities have enhanced supply chain velocity during the pandemic. Studying the effect of supply chain risk management on supply chain resilience and robustness, El Baz and Ruel [102] report similar results. Examining supply chains of essential goods, Sodhi et al. assert that traditional approaches, such as redundancies, can be effective during pandemics [103]. Sharma and her colleagues state that focusing on resilience not only helps during pandemics but also exerts positive long-term effects on supply chain viability [104]. While noting that companies have applied multiple practices, Woong and Goh [105] identify ‘increasing capacity’, ‘diversifying single-product categories’, ‘local sourcing’, ‘prioritising critical categories’, ‘repurposing assets’, ‘establishing partnerships’ and ‘leveraging social media influence’ as the most common supply chain risk management practices. Consistent with our findings, they suggest that both proactive and reactive strategies have helped companies to overcome problems in their supply chains. Although these findings are valuable, the area remains open to additional investigation.

Highly contradicting findings and diverse perspectives exist in the pandemic-era supply chain literature. Nevertheless, we know that the pandemic has affected every industry differently; thus, no one-size-fits-all solution exists. The extant literature on supply chain resilience in the pandemic context emphasises the need to think outside the box. Supply chains must be reconsidered and redesigned to enhance their viability [37,48,101,[104], [105], [106]]. Our results reveal that existing resilience-building approaches are effective but insufficient.

We also know that the pandemic has changed every aspect of life. Some of these changes will persist in the post-pandemic period, while others will be discarded as soon as possible [107,108]. In any case, people, firms and supply chains will continue to face new demands and new concerns that require innovativeness. Thus, post-pandemic markets may include highly innovative actors [109] who have experience in failing supply chains. We predict that the supply chain management discipline is poised to enter an extremely innovative era, whose seeds the pandemic has sown. Our findings clearly demonstrate the crucial role of innovation in resilience building. Therefore, the next step should be qualitative analyses of success and failure stories to gather in-depth information and identify the critical decisions that brought failure and the critical innovations that produced success. We suggest that future researchers concentrate on qualitative studies to accumulate insights useful for building more resilient supply chains.

## Naval Industries Advantage

### Naval Industries ADV---1NC

#### 2---Decline of maritime dominance is inevitable even with heightened domestic ship production

Rachel Premack 21, senior features reporter at Business Insider, “How America quietly lost 2,700 ships”, <https://www.businessinsider.com/how-america-quietly-lost-2700-ships-maritime-dominance-2021-6>, June 18, 2021

The 'flag of convenience' loophole Where did these ships go? The new behemoths may shock you: Panama, Liberia, and the Marshall Islands. Those three countries have the most ships by deadweight tonnage registered with their flags. It's thanks to a trick in which a ship may be owned and operated by one group, but registered in another country. About three-quarters of ships are registered in a country separate from where they're owned. German shipping giant Hapag-Lloyd, for instance, operates the ship Afif, which is owned by a company based in the United Arab Emirates. But Afif sails under the Marshall Islands flag. Countries like the Marshall Islands have an "open registry" in which anyone can register their vessel there, sometimes called a "flag of convenience." And boy, is it convenient! The reason for this complexity is, of course, that it saves money. Registering your ship in, say, Panama means you can hire cheaper labor, deal with fewer pesky safety regulations, and avoid income taxes altogether. Mercogliano said the open registry trend, which began after World War II, was a major slam to American shipping power. "None of the big shipping companies are American anymore," Mercogliano said. "Basically, everything shifted overseas. And at the same time that we see our fleet decreasing, global trade has increased tremendously." How the wimpy American fleet points to the shipping crisis Even if there were more American ships, we would still have a global crisis. China, South Korea, and Germany, all of which have strong ocean carriers, are also experiencing the congestion that's striking US ports. Still, some say the lack of American presence in shipping, particularly at our own ports, could be harmful. The federal government launched an investigation last fall into allegations that foreign-owned shipping companies are refusing to carry containers loaded with American agricultural goods — instead preferring to move empty containers, which have a shorter turnaround time. "The control is outside of US control, it's in the hands of these other companies," Mercogliano said. "Now I'm not saying it's nefarious or conspiratorial, but they have different interests."

#### 4---The navy is strong now---there are zero challengers

Gregg **Easterbrook 18**, author of eleven books, he has been a staff writer, national correspondent or contributing editor of The Atlantic for nearly 40 years, was a fellow in economics, then in government studies, at the Brookings Institution, and a fellow in international affairs at the Fulbright Foundation, “It's Better Than It Looks: Reasons for Optimism in an Age of Fear,” pgs 136-9, 02-2018

FROM BEFORE THE COMMON ERA until Pearl Harbor, great powers competed at sea as much as on land. Carthage, Rome, and Troy fought regularly on the waters of the Mediterranean. Enormous fleets—the 1588 Spanish Armada boasted 130 ships—plied the oceans, fighting other fleets, seizing prizes, and staking claims to territory. Even in the days of sail, warships crossed the world: early in the sixteenth century, the Chinese and Portuguese navies clashed repeatedly near what's now Hong Kong. For millennia, nations sunk into their navies amounts that might have ended want, only to behold the investments literally sink. During the modern era, Argentina, Brazil, Britain, Chile, France, Germany, Japan, Russia, and the United States have expended groaning chests of treasure on warships. Naval rivalries between Britain and Germany helped ignite both world wars. The Pacific Theater fighting of World War Il began in part because of America's 1940 decision to forward-deploy its fleet from California to Hawaii, closer to Tokyo, and in part because Japan placed an existential wager on the maritime theories of Alfred Thayer Mahan, a member of the society of famous persons who proved, following their deaths, to have been wrong about practically everything. Many centuries of an extravagant naval arms race culminated in the October 1944 Battle of Leyte Gulf, where 367 warships and 1,800 aircraft hammered at each other with cannon, bombs, torpedoes, and battleship shells weighing up to 3,000 pounds apiece. Then the naval arms race stopped. So did naval fighting. The seas have been quiet for nearly seventy- five years, perhaps the longest stretch without bloodshed on the waters since first the sail was hoisted. Some Argentine and British ships clashed during the 1982 Falklands conflict, and Iranian and Iraqi vessels scuffled around oil tankers during the mid- 1980s, but big fights at sea have come to a halt, as has the great-power naval competition. The last time a major naval battle occurred, India was not yet an independent nation, the solid-state transistor had not been invented, and the Dodgers played in Brooklyn. Century upon century of great-power competition at sea ended with a final score of 10—0. That's the number of supercarrier strike groups possessed by the United States (ten) versus the number possessed by all other nations combined (zero). World War Il left the warships of the Axis powers in Davy Jones's locker. The Soviet Union tried to step in with bucket-of-bolts vessels that craved return to port; since about 1960, the US Navy has enforced hegemony over the blue water. "Hegemony" has a bad reputation in political science, assumed always to be undesirable. In this case, the size, power, and competence of the US Navy has banished fighting from much of Earth's surface. For a half-century, no nation has even attempted to contest US naval dominion. The all-electric, stealth- hull cruisers the United States builds are so advanced —nicknamed "arsenal ships" for their firepower—that no other nation has even experimented with a vessel of this general type. The supercarrier strike groups that America deploys—full-deck, nuclear-powered carriers bearing long-range jets, protected by guided-missile destroyers and screened by nuclear submarines—are so potent, to say nothing of so expensive ( naval hegemony cost the United States $155 billion in 2017), that no other nation has tried to build one. China and Russia possess no nuclear supercarriers, and have none under construction. The limited-deck, diesel-powered carriers China began laying down in 2015 will be suitable for patrolling coastal areas but not for the open ocean, while everything the US Navy builds is intended to travel beyond the horizon. Because the US Navy operates far from the homes of Americans, many are not attuned to its size and might. Soldiers can march in Fourth of July parades, and Air Force fighters can perform Super Bowl flyovers; the Navy's boats can be observed only on the waves. Most who live in other nations are not attuned to the US Navy either. There's no compelling reason to think about a well-behaved military force stationed on the opposite side of the globe. Under US Navy hegemony, piracy still occurs, but great powers have not seized merchant ships in three generations. That cargo ships whose decks are stacked with containers of valuable goods can steam anywhere without fear of being impounded by a warship is the unseen reason global trade took off, and global trade benefits almost everyone, while reducing war. The reality that the US Navy rules the blue water both reduces a historic cause of conflict and enables the prosperity of the contemporary era. Speaking at West Point as president, Obama said that the United States does not use its might to acquire territory or seize resources. Instead, American might is employed to pursue what US leaders believe is best for the world. Such beliefs may be wrong, even tragically so. But has any other nation that possessed overwhelming military force ever refrained from using force for conquest or pursuit of riches? That is the unseen question of the oceans—unseen because fighting on the water has stopped.

#### 5---U.S. leadership is locked in---the material base of primacy is overwhelming

Carlo Catapano 21, PhD Candidate in International Studies at the University of Roma Tre, MSc in International Relations of the Americas at UCL, “Book Reviews: Unrivaled: Why America will Remain the World’s Sole Super-power, by Michael Beckley. Ithaca: Cornell University Press, 2018, pp. 231.”, Interdisciplinary Political Studies, Volume 7, Number 1, p. 249-252

Despite the many contrasting opinions on the trajectory of US power and the forthcoming structure of the international system, a conventional wisdom seems to have emerged in the literature, which suggests that the era of US unipolarity is fading and China is ready to step up as a superpower able to equal – or even substitute – US primacy in terms of material capabilities. Michael Beckley’s work counters this widespread interpretation and tackles the empirical observations on which it rests. It does so by pursuing an accurate criticism of the gross indicators (like GDP or military spending) conventionally employed to measure state power, and by proposing an alternative methodology to evaluate states’ capabilities in net terms.

Without considering the costs that countries face for protecting their territories and populations, he argues, gross indicators tend to overstate the capabilities of large and populous countries. Accordingly, Beckley proposes (Chapter 2) to deduct three types of costs (production, welfare and security costs) to the gross indicators of states’ economic and military resources. From this operation, it derives a net measurement of one country’s power that – Beckley maintains – is more accurate and revealing than classic indices. To prove this point, he offers a recalculation of the capabilities of the great powers involved in prolonged, militarized rivalries over the last two centuries and shows that – when their resources are measured in net terms – the power asymmetry between them is an effective means to predict their failure or success. The best examples are the major conflicts involving China and Russia in the nineteenth and twentieth centuries such as the two Opium Wars between China and Britain or the Russian-German rivalry culminated in WWI, to name but a few. In terms of gross indicators, China and Russia represented the strongest side in all the conflicts considered; nevertheless, they have always been defeated. By counting state capabilities differently, in fact, however, those countries’ net power position com-pared to their rivals (either Britain, Japan, or the US) was considerably weaker; it is exactly this gap in net resources – Beckley argues – that explains their defeats.

Moving on to the emerging rivalry between China and the United States, Beckley acknowledges that the Asian giant is its most likely challenger. However, his detailed evaluation of Beijing’s economic and military resources leaves no room for doubts: China lags behind the US on almost every net indicator, and the gap between the two is unlikely to vanish any time soon. This conclusion is surprising if one considers the constant references – in academia and the media – to China’s rise and the Asian century. Beckley points out the weaknesses of the Chinese economy (Chapter 3), the hidden costs for a large, populous and developing country that are not included in gross estimates, and the various advantages that the US economic system still owns despite the limited growth of the post-2008 period.

Similarly, he compares (Chapter 4) the net military capabilities of the two powers by subtracting, for example, the costs to maintain security at home from their overall military assets. Also, he addresses the geopolitical factors that separate the US and Chinese ability to project their military power abroad. From this analysis, it emerges that China’s position is severely constrained by the high costs paid to assure its internal security and the defense of its national borders as well as by the welfare costs associated to the large number of troops composing the People’s Liberation Army. Beckley argues that China’s rising military capabilities are also constrained by the continued presence of US outposts in the region and the improvements made by China’s neighbors to their own military forces. Overall, this assessment leaves few chances for Beijing to obtain the regional hegemony that it would need to challenge the US on a global scale.

Beckley’s analysis also indicates the path forward (Chapter 5), starting from the rejection of the theories usually employed to predict the fate of US power (balance-of-power theory and “convergence” theory). All indicators suggest that the US will retain its role of leading global power in the coming years, notwithstanding China’s uninterrupted rise. Beckley is eager to point out, however, that this conclusion should not be confused with the praise of American superiority or invincibility. At no point, does his analysis suggest that Washington’s primacy is uncontestable or destined to last forever. Instability with weaker countries, unnecessary wars, internal polarization and disunity, can all produce unpredicted losses and undermine the position of the most powerful country in the world (Chapter 6). Beckley’s argument, therefore, consists in a re-evaluation of the sources of power that have guaranteed the US primacy since the end of the Cold War. Those same sources still place the United States in a category of its own, apart from the other great powers of the system. This book’s claim, in the end, is about the duration of the unipolar era, which it predicts will last more than usually expected, not about the infallibility or moral virtues of US power.

A few years later on the publication of this book, its central tenets are even more relevant. Events such as Trump’s nationalist policies, the trade war with China, the COVID-19 outbreak seem to have accelerated history and the shift away from the post-Cold War unipolar configuration. Beckley’s work, however, invites to reject simplistic predictions about the dismissal of US primacy. The decline in Washington’s global influence as well as the retrenchment from its international responsibilities do not necessarily mean that its net position in terms of material capabilities has collapsed or that a condition of power parity with China has finally emerged. Even if outcomes are not favorable to US interests, it does not mean that US power has vanished. This is a relevant reminder for policymakers in both Washington and Beijing.

## Cyber Advantage

### Cyber ADV---1NC

#### 2---Critical infrastructure can easily manage risks.

Pfeiffer et al. 17, Kyle B. Pfeiffer, Director of the National Preparedness Analytics Center within the Decision and Infrastructure Sciences Division at Argonne National Laboratory, M.S. in Science and Technology Leadership from Brown University; Carmella Burdi, Senior Geographic Information Systems Analyst in the Decision and Infrastructure Sciences Division at Argonne National Laboratory, M.S. in Geographic Information Systems from Northwest Missouri State University; Scott Schlueter, Senior Geographic Information Systems Analyst at Argonne National Laboratory, M.S. in Geographic Information Science and Cartography from the University of Washington, “Local Supply Chains: the Disaster Management Perspective,” International Journal of Safety and Security Engineering, Vol. 7, No. 3, 2017, https://www.witpress.com/elibrary/sse-volumes/7/3/1886

Managing risk, even for a simplistic supply chain, has become a professional responsibility. In the United States, both small and large private sector organizations employ logisticians, continuity experts, and risk analysts to help identify and mitigate risks to their enterprise. Their focus can be everything from coordination of supply and demand to minimizing disruption of normal activities. For the purpose of this research, disruption risks are examined, as they are more likely to intersect with the roles and responsibilities of public safety officials. [2] Furthermore, those in the public sector may be able to effect the most change around them. Disruption risks can be described in four broad categories: operational contingencies, natural hazards, terrorism, and political instability. Operational contingencies are systematic failures, such as the August 2003 Northeastern United States grid blackout, which caused curtailment of operations for many supply and demand nodes. [2, 3]. Natural hazards are events such as hurricanes, wildfires, earthquakes, or flooding which can disrupt critical components of a supply chain – such as the fuel shortages in the New York–New Jersey area following Superstorm Sandy in 2012. [4] Terrorism, the next category of disruption risks, may include indiscriminate destruction of critical supply chain components or targeted sabotage of known critical assets and systems. [3] Lastly, political instability may disrupt supply chains, such as oil production curtailment in Iraq and Syria, given the regional strife since 2012.

In the United States, operational contingencies and natural hazards are among the most likely disruption risks to significantly affect supply chains that are critical to communities following a disaster. The effects of these disruptions may directly impact the ability of a community to obtain food, fuel, prescription medication, or other critical goods and services in the minutes, days, or weeks following a disaster. Understanding the behavior of these supply chains, particularly in near real-time after a disaster, may help officials to make more informed decisions regarding response and recovery activities.

#### 3---Cyber attacks won’t take down the grid

Victoria Craig 16, Analyst at Fox Business, Citing the Senior Manager of Industrial Control Systems at Mandiant, “The U.S. Power Grid is 'Vulnerable,' But Don't Panic Just Yet”, http://www.foxbusiness.com/features/2016/02/02/u-s-power-grid-is-vulnerable-but-dont-panic-just-yet.html

The idea of the nation's power grids becoming the next battleground for cyber warriors could make hacking into consumers’ credit card accounts and personal information seem like child’s play. While U.S. power companies are likely targeted by foreign governments and others in increasingly sophisticated breaches, actually shutting off the lights and causing chaos is far more complicated than many pundits make it seem. Dan Scali, senior manager of industrial control systems at Mandiant, a cybersecurity consulting arm of FireEye ([FEYE](http://www.foxbusiness.com/quote.html?stockTicker=FEYE)), explained that while cyber criminals may gain access to power and utility data systems, it doesn’t necessarily mean the result will be a power outage and a total takedown of power grid control systems. In other words, the power grid is controlled by more than just a panel of digital buttons. “Losing the control system is bad from the perspective that it takes you out of your normal mode of operations of being able to control everything from one command center, but it doesn’t mean you’ve lost control or all the lights go out [in the city],” Scali explained. While many of the systems have been modernized to include digitized control panels, if a hacker were to infiltrate the system, a utility worker could still have the ability to manually control the machines by flipping a switch, pushing a button, or tripping a breaker. As the world saw with the recent attack in Ukraine, which caused a blackout for 80,000 customers of the nation’s western utility, the biggest problem may be ensuring the power grid’s control systems are not vulnerable to cyber break ins. The January attack in Ukraine was likely caused by a corrupted Microsoft Word attachment that allowed remote control over the computer, according to the U.S. Department of Homeland Security. Scali said there was no evidence from the incident in Ukraine that the hacker’s malware was able to physically shut down the power. “It wiped out machines, deleted all the files. Kill disk malware made it impossible to remotely control things. It caused chaos on the business network, and the area where control system operations sat. But the attacker, we believe, would have had to actually used the control system to cause load shedding, which caused the power to go out, or trip breakers to cause the actual problem. Malware itself didn’t turn the power out,” Scali said. He said what most likely happened in that incident was the hacker stole user credentials and logged into the system remotely. The bottom line: Yes, a similar event could happen in the U.S. And corporate America is concerned. A recent survey released in January on the state of information security, conducted by consulting firm Pricewaterhouse Coopers, showed cybersecurity as one of the biggest concerns among the top brass at U.S. power and utilities firms. Part of the problem, Brad Bauch, security and cyber sector leader at PwC said, is the interconnectedness of the industry’s tools. “Utilities want to be able to get information out of [their] systems to more efficiently operate them, and also share that information with customers so they have more real-time information into their usage,” he explained. While allowing access to their own consumption data allows the companies to give their customers more of what they want, it also opens up a host of access points for hackers, making the systems more vulnerable than they otherwise would be. But to say that the power grid is susceptible to cyber hackers is a bit of an oversimplification.

#### 4---Grid’s resilient---no collapse

Jim Avila 12, Senior National Correspondent at ABC News, “A U.S. Blackout as Large as India’s? ‘Very Unlikely’”, http://abcnews.go.com/blogs/headlines/2012/07/a-u-s-blackout-as-large-as-indias-very-unlikely/

As India recovers from a blackout that left the world’s second-largest country — and more than 600 million residents — in the dark, a ripple of uncertainty moved through the Federal Regulatory Commission’s command center today in the U.S. The Indian crisis had some people asking about the vulnerability of America’s grid.

“What people really want to know today is, can something like India happen here? So if there is an outage or some problem in the Northeast, can it actually spread all the way to California,” John Wellinghoff, the commission’s chairman, told ABC News. “It’s very, very unlikely that ultimately would happen.”

Wellinghoff said that first, the grid was divided in the middle of the nation. Engineers said that it also was monitored more closely than ever. The grid is checked for line surges 30 times a second.

Since the Northeast blackout in 2003 — the largest in the U.S., which affected 55 million — 16,000 miles of new transmission lines have been added to the grid.

And even though some lines in the Northeast are more than 70 years old, Wellinghoff said that the chances of a blackout like India’s were very low.

## 2NC

### Multilat CP---2NC

#### Global antitrust is critical for shipping AND the only way to prevent trade conflicts

Masako Wakui 19, Professor at the Graduate School of Law at Kyoto University, LLD and LLM from Kyoto University, LLM from the University of Law (UK), Specially Appointed Professor at the Osaka City University Faculty of Law, “Liner Shipping Antitrust Exemptions in the Pacific Rim Regions”, Journal of Antitrust Enforcement, J Antitrust Enforcement (2019) 7(1), 8/19/2019, Lexis

Extraterritorial Application and International Co-operation

The need for international co-operation in enforcing competition rules is great in the liner shipping sector, as liners are based throughout the world and are active globally. The citizens of a particular jurisdiction are harmed not only by anti-competitive practices occurring on the route to and from the jurisdiction but also those on routes connecting foreign ports. Although in theory, such issues may be resolved unilaterally by extraterritorial application of a country’s competition law, 118 an international co-operation agreement would be a better approach as it avoids diplomatic conflict. 119

[FOOTNOTE] 119 n119 US exterritorial application of domestic antitrust law in the ocean maritime sector once triggered counter extra-territorial legislation in the UK. See Protection of Trading Interests Act 1980, ch 11. [END FOOTNOTE]

#### US action alone fails

Rachel Premack 21, senior features reporter at Business Insider, “How America quietly lost 2,700 ships”, <https://www.businessinsider.com/how-america-quietly-lost-2700-ships-maritime-dominance-2021-6>, June 18, 2021

Even if there were more American ships, we would still have a global crisis. China, South Korea, and Germany, all of which have strong ocean carriers, are also experiencing the congestion that's striking US ports. Still, some say the lack of American presence in shipping, particularly at our own ports, could be harmful. The federal government launched an investigation last fall into allegations that foreign-owned shipping companies are refusing to carry containers loaded with American agricultural goods — instead preferring to move empty containers, which have a shorter turnaround time. "The control is outside of US control, it's in the hands of these other companies," Mercogliano said. "Now I'm not saying it's nefarious or conspiratorial, but they have different interests."

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

David J. Gerber 12, Distinguished Professor of Law at Chicago-Kent College of Law, B.A. from Trinity College, M.A. from Yale University, and J.D. from the University of Chicago, Awarded the Degree of Honorary Doctor of Laws by the University of Zurich, Former Visiting Professor at the Law Schools of the University of Pennsylvania, Northwestern University, and Washington University, Global Competition: Law, Markets, and Globalization, p. 297-298

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.

#### 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

Dr. Rachel Brewster 6, Bigelow Fellow & Lecturer in Law at the University of Chicago Law School, BA and JD from the University of Virginia, PhD in Political Science from the University of North Carolina – Chapel Hill, Received the John Patrick Hagan Award for Excellence in Undergraduate Teaching, Former Assistant Professor of Law and Affiliate Faculty Member of The Weatherhead Center for International Affairs at Harvard University, “Rule-Based Dispute Resolution in International Trade Law”, Virginia Law Review, Volume 92, 92 Va. L. Rev. 251, April 2006, p. 281-282

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.

#### ‘Antitrust law’ is U.S. domestic policy

Sean Murray 17, JD and Stein Scholar at the Fordham University School of Law, BA in Economics and Political Science from Vassar College, Associate at Case & White LLP, Research Assistant at the Fordham Competition Law Institute, Former Intern with the Federal Trade Commission, Former Intern with the U.S. Department of Justice, Former Junior Consultant with NERA Economic Consulting, “With A Little Help From My Friends: How A US Judicial International Comity Balancing Test Can Foster Global Antitrust Private Redress”, Fordham International Law Journal, Volume 41, Issue 1, 41 Fordham Int'l L.J. 227, November 2017, Lexis

For clarity's sake, the term "antitrust" is an American convention, whereas the more commonly employed synonymous term is "competition." See ELEANORA POLI, ANTITRUST INSTITUTIONS AND POLICIES IN THE GLOBALISING ECONOMY 2 (2016) (describing the genesis of the American "antitrust" as relating back to the late nineteenth century when US cartelists would label their joint activities "trusts" to conceal their collusive nature); PETER MORICI, ANTITRUST IN THE GLOBAL TRADING SYSTEM: RECONCILING U.S., JAPANESE, AND EU APPROACHES 3-4 (2000) (noting that though competition policy has a broader meaning than antitrust policy in most cases, the terms are used interchangeably); Diane P. Wood, The Impossible Dream: Real International Antitrust, 1992 U. CHI. LEGAL F. 277, 278 (1992) (noting that "antitrust" is synonymous with "competition" and "antimonopoly"). Labels may vary by country, such as in China where "antimonopoly" is used or in France where "concurrence" is used for the body of law. See "[THE ORIGINAL CHARACTER SET CANNOT BE REPRINTED HERE. PLEASE SEE TEXT IN ORIGINAL DOCUMENT] (Anti-Monopoly Law of the People's Republic of China) (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China) (setting out China's antitrust law); CODE DE COMMERCE [C. COM.][COMMERCIAL CODE] arts. 410-1 to 470-8 (Fr.) (book IV entitled "de la liberté des prix et de la concurrence," or "Freedom of Prices and Competition").

#### It’s an alternative to the plan

Anu Bradford 3, Published under the Maiden Name of Anu Piilola, Henry L. Moses Professor of Law and International Organization at Columbia Law School, LLM from Harvard Law School, Master of Laws from University of Helsinki, JD from Harvard Law School, Licentiate in Laws from the University of Helsinki, Fulbright Scholar, “Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation”, Stanford Journal of International Law, Volume 39, Issue 2, 39 Stan. J Int'l L. 207, Summer 2003, Lexis

Antitrust law is illustrative of the legal realms in which conflicting ideas of international and national regulatory frameworks have yet to find a satisfactory equilibrium. While competition among multinational enterprises has increasingly disregarded national borders, antitrust laws have remained predominantly national. The traditional, though perhaps most controversial, way to deal with international antitrust issues is to rely on a unilateral application of national antitrust laws. This type of extraterritoriality, however, has caused significant tension and resistance. 1 A more radical, equally controversial approach would be to harmonize national antitrust laws or establish unified supranational antitrust rules. This is a far-reaching solution that lacks adequate support in today's political climate. 2 Other alternative [\*208] routes to solving existing frictions would be, for example, to expand bilateral and regional cooperative arrangements or to establish a choice of law system.

Consequently, there is an ongoing debate over whether there is a need to create an international antitrust regime that could better respond to the new economic environment, increased cross-border business activity, and the integration of markets. Proponents of such a regime view international antitrust rules as necessary tools to reduce transaction costs, increase efficiency, and cultivate legal certainty. However, there is little agreement concerning the form, substance, or timeframe of the proposed regulatory reform. Those who oppose the creation of an international antitrust regime emphasize the divergent policy goals of different nations and the conflicting understandings of the role and extent of antitrust enforcement in different jurisdictions. They argue that discrete policy and enforcement concerns clearly hinder attempts at internationalization and highlight the necessity of maintaining regulatory diversity. In this view, countries should retain regulatory powers on the national level, as part of the exclusive right of sovereign states to design their market structures and economic policies.

#### ‘Its’ refers to the U.S., is possessive, and exclusive

Douglas F. Brent 10, Attorney and Co-Chair of the Privacy & Information Security Practice at Stoll Keenon Ogden LLP, JD from the University of Kentucky College of Law, BA from the University of Kentucky, “Reply Brief on Threshold Issues of Cricket Communications, Inc.”, Commonwealth of Kentucky Before the Public Service Commission, 6/2/2010, http://psc.ky.gov/PSCSCF/2010%20cases/2010-00131/20100602\_Crickets\_Reply\_Brief\_on\_Threshold\_Issues.PDF [italics in original]

AT&T also argues that Merger Commitment 7.4 only permits extension of “any given” interconnection agreement for a single three year term. AT&T Brief at 12. Specifically, AT&T asserts that because Cricket adopted the interconnection agreement between Sprint and AT&T, which itself was extended, Cricket is precluded from extending the term of its agreement with AT&T. Id

This argument relies upon an inaccurate assumption: that the agreement (contract) between Sprint and AT&T, and the agreement (contract) between Cricket and AT&T, are one and the same. In other words, to accept AT&T’s argument the Commission must conclude that two separate contracts, i.e. the interconnection between Sprint and AT&T in Kentucky (“Sprint Kentucky Agreement”) and the interconnection between Cricket and AT&T in Kentucky (“Cricket Kentucky Agreement”), are one and the same.

Upon this unstated (and inaccurate) premise AT&T asserts that “*the ICA* was already extended”; id. at 14, and “*the ICA* Cricket seeks to extend was extended by Sprint . . . .”; id. at 15, and, finally, “Cricket cannot extend *the same ICA* a second time . . . .” Id. (emphasis added in all). Note that in the quoted portions of the AT&T brief (and elsewhere) AT&T uses vague and imprecise language when referring to either the Sprint Kentucky Agreement, or the Cricket Kentucky Agreement, in hopes that the Commission will treat the two contracts as one and the same.

But it would be a mistake to do so. The contract governing AT&T’s duties and obligations with Sprint is a legally distinct and separate contract from that which governs AT&T’s duties with Cricket. The Sprint Kentucky Agreement was approved by the Commission in September of 2001 in Case Number 2000-00480. The Cricket Kentucky Agreement was approved by the Commission in September of 2008 in Case Number 2008-033 1.

AT&T ignores the fact that these are two separate and distinct contracts because it knows that the merger commitments apply to *each* agreement that an individual telecommunications carrier has with AT&T. Notably, Merger Commitment 7.4 states that “AT&T/BellSouth ILECs shall permit *a requesting telecommunications carrier* to extend *its* current interconnection agreement . . . . As written, the commitment allows any carrier to extend “*its*” agreement. Clearly, the use of the pronoun “its” in this context is possessive, such that the term “its” means - *that* particular carrier’s agreement with AT&T (and not any other carrier’s agreement). Thus, the merger commitment applies to each agreement that an individual carrier may have with AT&T. It necessarily follows then, that Cricket’s right to extend its agreement under Merger Commitment 7.4 is separate and distinct right from another carrier’s right to extend its agreement with AT&T (or whether such agreement has been extended).

#### The framework is opt-in---the only outcome is a voluntary commitment that’s not binding, even if later implementation is

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

Structured cooperation, such as opt-in frameworks could be feasible, although binding commitments are likely to be difficult to agree on multilaterally. Such an approach could be particularly effective if combined with reporting obligations as is with the Global Compact – firms who have signed up must report annually on their efforts to comply in order to remain a member of the framework. Such comply-and-explain mechanisms are arguably effective, even if on a voluntary basis.280 Structured cooperation should focus on where sufficient common ground can be found, such as in procedural matters and concerning hard-core cartels. Other, more suitable fora exist for discussing points of divergence, such as how to treat firms in strong market positions, or how to address state aid and other industrial policy questions.

It is important for international antitrust to remain responsive. In the pluralist and polycentric environment that it is, norm collision will continue to occur. As such, fixed and binding constitutionalism is neither possible nor desirable, but rather ways should be found which preemptively coordinate the conduct of actors – competition agencies, policymakers, and firms alike – to avoid unnecessary conflict and to develop tools in which to reconcile and manage the remaining inevitable norm collision.281

#### ‘Prohibitions’ must be binding

Dr. Francis Jacobs 90, Member of the European Court of Justice, DPhil from the University of Oxford, Former Professor of European Law at the University of London and Director of the Centre of European Law for King's College London School of Law, “Commission of the European Communities v French Republic – Opinion of Mr Advocate General Roberts”, European Court Reports 1990 I-00925, Case C-62/89, 2/20/1990, p. 942

20. In my view, those arguments cannot be accepted. It is plain from the wording of Article 10(2) of Regulation No 2057/82 and from the scheme and objectives of the Community legislation that Member States are required to anticipate the exhaustion of the quota and to act to prohibit fishing provisionally before the quota is exhausted . That the exhaustion of the quota must be anticipated is indicated by the requirement in Article 10(2) that each Member State shall determine the date from which its vessels "shall be *deemed to have exhausted* the quota ..." ( emphasis added ). The use of the word "prohibit" in Article 10(2) and the mandatory wording of the second subparagraph of Article 10(3) (" Fishing vessels ... shall cease fishing ...") indicate that the measures taken to halt fishing provisionally must be of a binding nature. It is moreover apparent from the scheme of the legislation that the obligation imposed on Member States by Article 10(2) is of crucial importance for ensuring respect for quotas: the obligation must therefore be construed strictly. An interpretation of Article 10(2) which would permit Member States to wait until after the quota was exhausted before taking action, or to adopt measures of a non-binding nature, would be inconsistent with the binding character of the quotas. It would also undermine the underlying objective of quotas, i.e. the conservation of scarce fishing resources.

#### They must be immediately effective, not a result

Dr. Howard Newby 4, BA and PhD from the University of Essex, Chair of the Higher Education Funding Council for England, Former Vice-Chancellor of the University of Liverpool, “Joint Committee on the Draft Charities Bill - Written Evidence”, Memorandum from the Higher Education Funding Council for England, 9/30/2004, http://www.publications.parliament.uk/pa/jt200304/jtselect/jtchar/167/167we98.htm

9.1 The Draft Bill creates an obligation on the principal regulator to do all that it "reasonably can to meet the compliance objective in relation to the charity".[ 45] The Draft Bill defines the compliance objective as "to increase compliance by the charity trustees with their legal obligations in exercising control and management of the administration of the charity".[ 46]

9.2 Although the word "increase" is used in relation to the functions of a number of statutory bodies,[47] such examples demonstrate that "increase" is used in relation to considerations to be taken into account in the exercise of a function, rather than an objective in itself.

9.3 HEFCE is concerned that an obligation on principal regulators to "increase" compliance per se is unworkable, in so far as it does not adequately define the limits or nature of the statutory duty. Indeed, the obligation could be considered to be ever-increasing.

#### Europe and China will say ‘yes’

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

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

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

#### 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

#### 3. It’s from ’05, in the wake of failed WTO negotiations. Everything is different now.

Robert D. Anderson 20, Honorary Professor at the School of Law at the University of Nottingham, External Faculty Member at the International Public Procurement Management Program at the University of Rome Tor Vergata, and Public Policy Consultant, William E. Kovacic, Global Competition Professor of Law and Policy and Director of the Competition Law Center at The George Washington University Law School, Anna Caroline Muller, Legal Affairs Officer for the Intellectual Property, Government Procurement and Competition Division at the WTO Secretariat, Antonella Salgueiro, Legal Consultant at the European Bank for Reconstruction and Development and Former Young Professional at the WTO Secretariat, and Nadezhda Sporysheva, Legal/Economic Analyst for the Intellectual Property, Government Procurement and Competition Division at the WTO Secretariat, “Competition Policy and the Global Economy: Current Developments and Issues for Reflection”, George Washington Law Review, 88 Geo. Wash. L. Rev. 1421, November 2020, Lexis

Since the work in the WTO Working Group ceased in 2004, important contextual developments have occurred that imply a deepening need for international consensus building and, potentially, lessened resistance to the development of modest international norms in this area. 13 These include the following:

\* A dramatic expansion in the number of competition laws and enforcement authorities across the globe. 14 Whereas, in 1999, roughly 60 WTO Member countries had enacted competition regimes, 15 currently, over 130 countries have such regimes. 16 This figure includes important emerging economies (for instance, Brazil, China, India, the Russian Federation, South Africa, and Pakistan) 17 that previously either had no generally applicable competition laws (e.g., China) 18 or had antiquated regimes which have now been effectively modernized (e.g., India) 19;

\* The widespread adoption of competition policy components in regional trade agreements ("RTAs"), highlighting the relevance of competition policy as a complement to trade liberalization and, potentially, implying possible approaches to related issues at the multilateral level; 20

\* New challenges for both competition authorities and the global community as a result of digitalization 21 and the [\*1426] emergence of global value chains ("GVCs"). The latter, in particular, involves potential competition policy concerns regarding vertical market restraints. 22As such, competition policy may come to be seen as an important tool to ensure that GVCs function in ways that serve the global community efficiently and fairly; 23

\* Significant global progress toward shared understanding of the objectives and sound applications of competition policy. To a great degree, this result is attributable to the work of the International Competition Network ("ICN"), related initiatives involving international organizations such as the Organization for Economic Cooperation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD"), initiatives by nongovernmental organizations ("NGOs") such as the Consumer Unity and Trust Society ("CUTS"), and the capacity building activities of leading national agencies; 24

\* Important progress in the global competition community, with support from the international business community, regarding the development of standards to ensure procedural fairness in the enforcement of competition law internationally. 25

#### 4. He concedes it’s a fringe opinion AND only about a specific form, not across-the-board

Paul B. Stephan 5, Lewis F. Powell, Jr., Professor and Hunton & Williams Research Professor at the University of Virginia School of Law, “Global Governance, Antitrust, and the Limits of International Cooperation”, Cornell International Law Journal, 38 Cornell Int'l L.J. 173, Lexis

Conclusion

In the last decade or so, economists have developed the concept of "government failure" to complement the traditional notion of "market failure." 151 The idea, roughly put, is that the structure of government can cause suboptimal outcomes and avoidable deadweight losses. 152 The broader implication of the concept is that an analyst cannot make the case for government action simply by identifying a market failure. The question always remains whether a governmental response will make the problem better or worse. The economist's cliche, "Compared to what?" applies here too.

This paper argues that the problem of government failure exists at the international level. To make the point, I have focused on a classic market failure problem, namely private actions that frustrate competition. A conventional analysis suggests that, in a world of international transactions, states will fail to pursue competition policies that maximize global efficiency. Most analysts have understood this argument to dispose of the question of whether some kind of international governance is necessary to respond to the problem, with disagreement limited to the best design of the institutional response. I, in contrast, argue that a significant risk of government failure attends any proposal for serious international governance in this area, and that under certain assumptions the market failure may not be as great as first believed.

Why has the policy consensus so largely settled on a different approach? Perhaps I am simply a contrarian, and the case for some kind of international governance is stronger than I acknowledge. One should consider, however, reasons why the policy debate might be skewed in favor of governance, even in the absence of a strong affirmative case.

A sociological observation might provide one answer. Legal elites benefit from governmental action. They design the structure, staff it, and criticize it. This general point takes on particular salience in the international arena, where messy encumbrances on elite policy formation - elections, competitors, and the like - do not exist. For someone committed to the proposition that ideas and articulateness have a privileged role in policy formation, international governance is an inviting playground.

The possibility that technological innovation and capital might provide a better check on anticompetitive behavior than do government agents is especially disconcerting for members of this class. The people who make these economic forces possible - compulsive tinkerers, lunatic risk- [\*218] takers - often have little affinity with the bright, well-spoken, and presentable folks who make legal institutions work. 153 Ceding power to people who often cannot explain what they do is sufficiently unwelcome that fair-minded lawyers will struggle with evidence suggesting that they should.

I do not claim that this sociological explanation suffices as a ground for governmental inaction across the board. Rather, it suggests that the proponents of new governmental structures, free of the constraints that bind national states, bear a special burden of justification and need to draw on extra reserves of skepticism. The current debate on international antitrust wants these qualities.

#### 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

Dr. Valerie Demedts 19, Professor of Competition Law at Ghent University, PhD from the European Institute at Ghent University, Master of Laws Degree from Ghent University, Master of Arts in EU External Relations and Diplomacy from the College of Europe in Bruges, Studied at Université Paris Descartes, Former Summer Intern at the Brussels Office of Cleary Gottlieb Steen & Hamilton, The Future of International Competition Law Enforcement: An Assessment of the EU’s Cooperation Efforts, p. 19-21 [italics in original]

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

Abbott B. Lipsky 9, Jr., Member of the District of Columbia Bar, JD from Stanford Law School, Partner at Latham & Watkins LLP, Former Deputy Assistant Attorney General, MA from Stanford University, AB from Amherst College, “Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement”, Antitrust Law Review, Volume 75, Number 3, p. 993-995

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.

#### Resource depletion---extinction

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

1. The Four Horsemen

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

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

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

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

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

#### Human rights---failure cause nuclear war

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Competing Views on Instability

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

## 1NR

### Blockchain DA---1NR

#### Blockchain initiatives are coming now which is critical to widespread adoption

Bertrand Chan 22, CEO at Global Shipping Business Network, “How The Shipping Sector Will Come Of Age”, <https://www.forbes.com/sites/forbestechcouncil/2022/01/07/how-the-shipping-sector-will-come-of-age/?sh=6751bcb37e63>, January 7th, 2022

For the shipping sector to meaningfully change, policymakers must provide legal frameworks allowing for digitized shipping. Electronic-based records rules have now been adopted in Singapore and Bahrain, which will promote the adoption of electronic bills of lading, allowing for a paperless, efficient system.

China’s 14th five-year plan is promoting the use of technology to enable digital transformation for industries. Its Ministry of Transport is pushing for the trade ecosystem in China to adopt blockchain technology to improve the customer experience of shippers, especially when it comes to making cross-border e-commerce paperless. Such government-led initiatives are critical to driving adoption in a sector that historically has been reluctant to change.

Additionally, change cannot be accomplished without involving the expansive ecosystem of shipping lines, terminal operators, freight forwarders, customs and banks. They are all ultimately responsible for the services that enable global trade. Right now, there is a lot of confusion and angst about the impact of digitization on the business model of those organizations. However, as more participants realize the importance of value creation and resilience, they will find a better way of collaborating.

Finally, venture capital has seen a record number of liquidity events lately. In 2021, the value created by U.S.-based venture-backed companies for its shareholders has surpassed half a trillion dollars for the first time ever (paywall). Storied venture capitalists such as Andreesen Horowitz are now talking about the digital transformation of the supply chain.

The current crisis has highlighted the importance of the shipping sector and the potential impact of digital transformation. Logistics technology, or logtech, is becoming an attractive investment area, but what’s missing is an industry-wide digital infrastructure to allow startups to build on top to solve the problems of the shipping sector. Logtech companies need their version of AWS or Azure to facilitate and accelerate this transformation.

The good news is, things are evolving rapidly, and blockchain-enabled digital infrastructure platforms are coming to support a thriving ecosystem in the shipping sector. With this, we hope to see the coming of age for the shipping sector.

#### Maritime blockchain is rapidly evolving---exemptions will guide future adoption & governance structure

Ryan C. Thomas & Peter Julian 20, Ryan has 20 years' experience across many sectors, including semiconductors, hardware and artificial intelligence (AI), financial institutions, payment products and services, pharmaceuticals, ophthalmic lenses and eyewear, aerospace, medical devices, and consumer and industrial goods, Peter has extensive experience advising clients on a broad range of antitrust issues. Peter also defends clients in complex antitrust class action litigation, including briefing and motion practice, pretrial discovery, and trial preparation in federal and state forums, “Blockchain Technology: A Future Antitrust Target”, The Journal of the Antitrust, UCL and Privacy Section of the California Lawyers Association, Fall 2020

Blockchain technology is being rapidly adopted by the global shipping industry. The industry is drowning in paperwork required by dozens of governmental agencies, banks, customs bureaus, and other entities. All of these entities need to sign off on the goods whenever a cargo ship enters or leaves a port, creating a lengthy administrative process dominated by paperwork. With the adoption of blockchain technology, authorized participants can view the status of goods on the ledger and understand where a container is in transit. In addition, customs documents, bills of goods, and other pertinent paperwork can be accessed in real time. Also, given the anti-tampering architectural properties of blockchain, there is an inherent assurance that no party has modified, deleted, or appended transactions without consensus from others on the network. Because these permissioned blockchain networks involve collaborations among carriers, some have sought antitrust exemptions from the Federal Maritime Commission (FMC).100 The requests for exemption shed light on how to potentially navigate antitrust concerns.

To date, one blockchain shipping network, TradeLens, has received an antitrust exemption, while another request from Global Shipping Business Network (GSBN) is pending before the FMC.101 GSBN is seeking FMC’s approval to operate “a blockchain enabled, global trade digitized process that will enable shippers, authorities and other stakeholders to exchange information on supply chain events and documents.”102 Under the agreement, GSBN will provide participants with: APIs for publishing and subscribing to event data related to cargo; the ability to store and share documents with blockchain participants; and a user interface to view event data and documents, and to manage access permissions.

Given the potentially sensitive nature of information that will be provided on the blockchain network, GSBN proposed measures to address antitrust concerns.104 The proposed agreement prohibits network participants from sharing with rivals confidential information such as their vessel capacity, customer terms and conditions, or rates and charges that customers will pay.105 The GSBN petition is based on TradeLens’ approved petition, which had sought the same approval in its petition to the FMC.

These two agreements offer useful guidance for other blockchain networks. When a network would necessarily involve providing competitively sensitive information, there should be clear parameters of which type of information can and cannot be shared with other blockchain participants at different levels of the supply chain, including prohibitions on sharing with competitor information that could harm competition or facilitate collusion, such as prices. In addition, the governance structure and rules to participate in the blockchain should be transparent and objective to avoid unreasonably disfavoring some blockchain participants or excluding competitors.

#### Blockchain solves ALL three advantages!

HSN 19, Online daily newspaper on Hellenic and International Shipping, “Blockchain at sea: How technology is transforming the maritime industry”, <https://www.hellenicshippingnews.com/blockchain-at-sea-how-technology-is-transforming-the-maritime-industry/>, August 3rd, 2019

Shipping is the engine of the global economy, making up some 90% of world trade. That’s not easy to express in monetary terms, although experts estimate it at over $10 trillion a year. Maritime blockchain could transform this industry and bring multiple benefits to importers, exporters, transporters, ship owners, and even governments.

Blockchain technology has the potential to revolutionise the maritime industry and bring it into the 21st century. This complex ecosystem could greatly benefit from a robust digital platform to exchange data in real time.

In fact, the industry has been testing maritime blockchain applications since 2017. Some of the most important shipping companies, such as Maersk, Hyundai Merchant Marine, and Maritime Silk Road Platform, have teamed up with tech giants to create blockchain shipping systems to streamline maritime logistics.

Maritime blockchain speeds up document flows

One of the main benefits of introducing blockchain to the maritime industry is cutting down bureaucracy. For international shipments, companies and customs officials are forced to fill out over 20 different types of documents (most of them paper-based) to move goods from exporter to importer.

Most of these documents fail to provide real-time visibility and data quality, which often causes setbacks in financial settlements. These types of delays and inefficiencies are hard to accept in a data-driven, digital world.

An international consortium of shipping companies and European customs has tested a blockchain solution that eliminates printed shipping documents from the process. Not only did blockchain speed up operations, but this pilot proved how organisations in the maritime industry can save hundreds of millions of dollars annually.

Blockchain not only makes cargo checks faster, it also minimises the risk of penalties for customs compliance that are levied on customers.

The maritime industry can also benefit from predictive analytics

Big data is having a huge impact on the industry, thanks to its potential to optimise operations, improve cybersecurity, and increase the overall efficiency of the supply chain.

However, data alone can’t change the way the maritime industry works. Companies, ports, and governments need to analyse the information to reap real benefits from the findings. This industry generates about 100-120 million data points every day. It was impossible for existing technologies to gather and analyse this amount of data efficiently.

Blockchain can help by placing the crucial data in one place and creating a unique platform for solution providers, ports, and agents that operate along the supply chain.

By tracking cargo in real time using blockchain technology, shipping companies and ports can plan land procedures ahead of time, speeding up terminal works and cutting down costs. They can also use data to make educated predictions that enhance their operations and increase efficiency.

Maritime blockchain increases trading safety and transparency

The maritime industry includes multiple parties. Most of these communicate through lengthy paper chains, making it impossible to track shipments currently. This, combined with high transaction volumes, leads to little or no transparency in most processes.

Blockchains can secure the integrity of any record, reducing the risk of damaged or missing shipments. By replacing the old paper system, all parties involved have access to information, making it easier to plan operations efficiently and save on costs.

The information stored in the blockchains is impossible to delete or edit without leaving traces, so this transparency also increases security.

It reduces data entry errors and can improve fraud detection. Maersk’s collaboration with IBM, for example, also stipulates the development of means to streamline customs and security inspections, as well as tracking shipping containers for commercial purposes.

Maritime blockchain and cost efficiency

The blockchain-based Bill of Lading created by Maersk and IBM showed in early tests that administrative costs could be reduced by as much as 15% of the value of shipped goods, thanks to tracking shipping containers and eliminating paper documents.

It may seem like a small percentage, but that could create savings of $1.5 trillion globally.

Besides costs related to documentation, companies can also significantly reduce expenses caused by data entry errors, procedural delays, and discrepancies.

Blockchain technology is transforming the maritime industry

The maritime industry is still struggling with high costs and a high level of pollution. Blockchain technology can help with both issues, by cutting down administrative costs and providing environment-friendly solutions. All while protecting the industry against cybercrime and piracy, and ensuring a fairer deal for all parties involved.

### Trade DA---1NR

#### US/China decoupling causes nuclear war AND amplifies existential threats

Dr. Jeffrey Bader 20, Senior Fellow in the John L. Thornton China Center at the Brookings Institution, PhD from Columbia University, “Introduction Meeting The China Challenge: A Strategic Competitor, Not An Enemy”, in The Future of US Policy Toward China: Recommendations for the Biden administration, Ed. Haas, McElveen, and Williams, November 2020, p. 5-6

The central challenge for the United States, however, will be how to project and protect our interests in the face of this emerging competitor but without losing our way by exaggerating or misunderstanding the nature and magnitude of that challenge. We cannot compete with China by outbidding China in an unwinnable race to the bottom through technology and social media prohibitions, expansive definitions of national security in trade and investment, managed trade, cancellation of scholarly and research exchanges, visa and immigration bans, and imposition of diplomatic restrictions. When we feel the need to use such tools in order to gain greater reciprocity, our goal should be for both sides to eliminate restrictions whenever possible, not impose them permanently. Our strength lies in our traditional openness, which cannot be casually tossed aside in every skirmish that comes along. The United States also cannot neglect one of its great assets: the alliances and partnerships we have built up over the last 70 years in Asia and Europe. Our allies and partners will not follow us in radical decoupling from China or a new Cold War, but they share many of the same grievances and can be a powerful force multiplier on all manner of issues if we treat them and their interests with respect.

Many of the trends in Chinese development can become serious threats, but in some cases, they could be opportunities for cooperation, depending on China’s behavior but also on our intentions. China’s economic growth and presence, for example, can close overseas markets to American companies or expand American opportunities as wealth is created abroad. It is worth recalling that the great recession of 2008 would have become a depression without U.S.-China joint efforts to cushion the fall and provide massive stimulus. Continued Chinese construction of coal-fired power plants will contribute to global warming, but if the United States doesn’t work with China to combat global warming, the results will be catastrophic for the world. As two deadly epidemics (SARS and COVID-19) emerged from China in the last two decades, it is clear that isolation and sanctions alone cannot keep China-born viruses outside our borders. Rather, both countries must also engage in intensive scientific and public health cooperation. China does not agree with U.S. sanctions-based policies to deal with North Korean and Iranian nuclear weapons programs, but it does wish to roll back both, and it is naïve to believe that the United States will have success in containing either program without Chinese cooperation.

The costs of radical decoupling have received little attention in the rush to announce the arrival of an ominous new strategic rival. The inevitable ensuing enmity would exacerbate an arms race that would crowd out pressing domestic priorities. It would divide scientists, researchers, and scholars working on common problems. Ethnic hatred and stereotypes would find fertile soil. Above all, it would increase the risk of military conflict between two nuclear powers.

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

Anu Bradford 19, Henry L. Moses Professor of Law and International Organization at Columbia Law School, LLM from Harvard Law School, Master of Laws from University of Helsinki, JD from Harvard Law School, and Dr. Adam S. Chilton, University of Chicago, Professor of Law and the Walter Mander Research Scholar at the University of Chicago Law School, MA in Political Science from Yale University, JD and PhD in Political Science from Harvard University, “Trade Openness and Antitrust Law”, Journal of Law & Economics, Volume 62, Number 1, 62 J. Law & Econ. 29, February 2019, Lexis

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.

#### Trade is growing and stable BUT vulnerable

Inga Fechner 2-4, Economist at ING, Degree in Economics from the University of Münster, and Rico Luman, Senior Sector Economist at ING, Studied Economics and Law at the University of Amsterdam, “Clogged Supply Chains Won’t Hold Back Trade”, ING, 2/4/2022, https://think.ing.com/articles/hold-monthly-trade-outlook-2022-clogged-supply-chains-wont-hold-trade-back

World trade normalises and continues to grow despite challenges

Going into 2022, we expect trade growth rates to return to their pre-pandemic levels in line with a continued but weakened global economic recovery. 2021 was an exceptional year driven by pandemic-related catch-up effects. For this year, we pencil in a growth rate in merchandise world trade of 4.1%, while we expect world GDP growth to come in at 4.4%.

Despite ongoing supply chain frictions and average containerised transport costs expected to remain high, a shift by consumers back into services will only be moderate in 2022 because of Covid caution. They might reduce some of their increased spending on the likes of electronics and furniture while resuming spending on services, while seeing higher energy and food prices. Overall, however, the preference for goods remains elevated as recent data on consumer spending in the US or the eurozone shows.

Asia to remain a driving force in 2022

Trade growth remains uneven, however, when you look at different regions. Intra-Asia trade still has strong growth perspectives, following an improvement in Asian industrial production over 2021 as well as significantly higher container throughput. A slowdown of economic activity in China, however, remains a concern for northeastern Asian industrial economies. Here, less real estate construction activity could be offset by more infrastructure investment though.

On a global level, we expect larger flows of oil and oil products alongside the global recovery of road and airline traffic and we think that China should remain a major driver of growth for metals stimulated by the energy transition. We expect global automotive production to increase by up to 10% and that will create extra trade volumes although the semiconductor shortage will remain a limiting factor. Lastly, the implementation of regional trade agreements in Asia and Africa will likely affect regional trade flows positively.

Supply chain slump and elevated tariffs will drag through 2022

Yet, a combination of shipping capacity and container shortages, unforeseen incidents and ongoing labour shortfalls which contributed to spiking container rates last year, might dampen our growth outlook. And 2022 started off with new records here. Based on UNCTAD data, those costs pushed China to Europe port-to-port container costs up to some 15% of the average value of goods transported (up from 2-3%).

The effect of massive port congestion occupying 10-15% of the global fleet capacity feeds back to that disruption. After Chinese New Year we do expect things to improve. But when spot rates come down, term contract rates of large shippers are still being negotiated higher. We concluded earlier that container rates will remain under upward pressure and won’t return to pre-pandemic levels anytime soon.

Risks ahead but trade fundamentals are still solid

The pandemic remains an uncertain factor affecting the outlook for 2022. Supply chain troubles and higher shipping costs also continue to pose risks to growth. At the same time, last year also showed this doesn’t necessarily hamper the world from continuing to trade. We're optimistic given the economic outlook, a hopefully receding pandemic, and clear evidence of richly filled order books. We expect trade volume growth to hold up well this year, resulting in a more moderate but still sound growth rate for world trade.

#### Trade’s growing AND will continue

Markit 1-22 – IHS Markit, World Leader in Critical Information, Analytics and Solutions for the Major Industries and Markets That Drive Economies Worldwide, “Global Trade Outlook 2022: Moderate Growth; Supply Chain Disruption Likely To Continue In H1”, Seeking Alpha, 1/12/2022, https://seekingalpha.com/article/4479178-global-trade-outlook-2022-moderate-growth-supply-chain-disruption-likely-to-continue-in-h1

Summary

* Our forecasting model predicts the real value of global trade to go up to USD 20,175 billion in 2021 and USD 21,038 billion in 2022.
* Therefore, IHS Markit anticipates a year-on-year increase in the real value of global trade by 12.6% in 2021 (prior, it was +8.5%) and by 4.3% in 2022.
* The global merchandise trade volume forecast will grow to 15.2 billion metric tons in 2021 and 15.8 billion metric tons in 2022 (significantly higher than our prior forecasts for 2022).
* It points to a recovery in the forthcoming years with year-on-year growth rates of 8.7% in 2021 and 4.4% in 2022 (an adjustment by + 2.1% and 2.0%, respectively).
* The Omicron variant can adversely affect economic activity in Q1 2022. Supply chain disruptions are unlikely to subside in H1 2022.

Introduction

2021 was the second year of the ongoing COVID-19 pandemic, marked by rapid recovery from the dramatic 2020 resulting from the initial outbreak in Q1 2020. Q2 of 2020 proved to be the worst quarter for global trade on record, but the situation started to improve relatively fast.

#### Antitrust will stall in the courts---only the plan’s success signals a sea change in the law

Tara L. Reinhart 10-6, Partner for Antitrust/Competition at Skadden, Arps, Slate, Meagher & Flom LLP, J.D. from the Catholic University of America Columbus School of Law, B.A. from the University of North Carolina, et al., “FTC Chair Khan Highlights Key Policy Priorities Going Forward, but Aggressive Agenda Faces Uphill Climb”, JD Supra – Newstex Blogs, 10/6/2021, Lexis

Practical Limitations on Implementation of Chair Khan's Policy Priorities

Chair Khan describes the antitrust agenda outlined in her memorandum as 'robust,' and the memo communicates her intention to attempt to reshape antitrust policy and enforcement. However, a revolutionary shift in antitrust enforcement by the FTC will face substantial practical challenges.

Most significantly, the path to reshaping antitrust enforcement will be constrained by the substantial body of existing antitrust law and the need to convince a federal judge that the conduct in question is unlawful. Chair Khan's memo generally advocates for a new, more expansive and holistic approach to identifying antitrust harms beyond the traditional focus on consumer welfare and price effects. However, courts have — and will likely continue to — rely on existing standards developed in the case law over many decades. Those standards focus on consumer welfare and predominantly price effects. Absent legislative change, then, a practical gap will persist between Chair Khan's vision of refocused and more assertive antitrust enforcement, on the one hand, and the law that would apply to any FTC enforcement action, on the other.2[2]

Moreover, Chair Khan's plan to revise the merger guidelines and her desire to target 'facially illegal deals' will also face constraints based on current law. First, the antitrust guidelines typically incorporate existing legal standards, making radical change difficult to achieve. The 1982 Guidelines, which impactfully affected merger enforcement with the implementation of the hypothetical monopolist test, provide the last dramatic revision. Whether courts will accept major revisions at this stage will be an open question. Second, agency merger review is shaped by the existing review process enacted by the Hart-Scott-Rodino Act, regardless of whether the FTC believes a deal is facially illegal. Unlike regulators in other jurisdictions, the FTC must file a lawsuit and prevail in court if the agency wants to block a pending transaction.

Relatedly, Ms. Khan's ability to implement her ambitious agenda will be subject to the fact that changing these legal frameworks will depend on either Congressional action, which is far from certain, or litigation victories, which require the commitment of significant resources at a time when the FTC claims to already be stretching its capacity. Despite her recognition of the demands already imposed on FTC staff and plan for 'intentional' resource allocation, Chair Khan envisions the FTC undertaking increased vigilance and a more assertive agenda. If the existing resource constraints grow in response to Chair Khan's enhanced enforcement ambitions, the FTC could face difficulty balancing its investigatory agenda with the ability to litigate those cases, particularly considering the complex nature of antitrust matters, which often take years to resolve and require millions of dollars for experts and other related costs as well as a large team of attorneys and staff to manage. In addition, though Chair Khan referenced her hope for increased cross-bureau coordination in cases, it is unclear that such coordination would be efficient or create the capacity needed to fulfill the new agenda, especially when attorneys from other government divisions have already been recruited to help reduce burdens on matters of antitrust enforcement.

Finally, Chair Khan's desire to expand the agency's regional footprint and supplement the staff with various nonlawyer roles may further strain the budgetary resources needed to keep pace with the new agenda and present their own management challenges. Whether funding from Congress is imminent, whether it would be used to onboard lawyers or the other potential staff Ms. Khan desires, and how quickly hiring could reach the scale necessary to support the FTC's newly announced enforcement priorities are not yet clear.

Conclusion

Given the challenges to implementing the generalized policy goals set by Chair Khan, we do not expect an immediate fundamental sea change in antitrust enforcement. The practical obstacles described above mean that Chair Khan's FTC will be unable to contest every instance of what the agency might perceive to be unlawful conduct or unfair competition. We expect that the FTC will need to continue to be selective in the cases that it brings, which may mean that in the near-term, it will focus available resources on sectors of the economy perceived as involving 'the most significant actors,' such as large technology firms that Chair Khan has frequently referenced, particularly to the extent they engage in transactions that implicate the novel considerations under the proposed 'holistic' approach to identifying antitrust harms.3[3] We still expect to see some matters receive extensive investigations and proceed to litigation, and the outcomes of these matters will likely partially signal the success of the new agenda.

#### It's not law---changes to statute won’t happen

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

Scott Helfstein 19, Co-Head of Market Research and Strategy and Head of Thematic Portfolios at Morgan Stanley Wealth Management, Former Professor of Social Science at the United States Military Academy, Research Director at the Combating Terrorism Center, and Analyst at the Federal Reserve Board of Governors, “What Happens When Antitrust and Protectionism Cycles Collide”, Harvard Business Review, 12/4/2019, https://hbr.org/2019/12/what-happens-when-antitrust-and-protectionism-cycles-collide

Decision Nodes

There are two critical questions that impact decision makers. First, is this the beginning of an antitrust cycle or the last days of the past cycle? Second, is this the start of a new protectionist period or short-lived noise? These questions help determine whether we should prepare for protectionism, antitrust activity, or the unusual confluence of both.

Antitrust activity reached an all-time high in 2011 when there were 111 cases filed. That number has dropped precipitously with only 42 actions in 2018 and 18 year-to-date in 2019. While the number of filings is down, the targets of recent government probes are disproportionately large entities that represent $3.2 trillion in market capitalization or 12.3% of S&P 500. Further, the domestic drivers of prior antitrust periods, such as frustration with the status quo, appear firmly in place reflected by the anti-establishment movements arising around the world.

#### Governments are avoiding protectionism now.

Dr. Daniel Gros 21, Director of the Centre for European Policy Studies, Ph.D. in Economics from the University of Chicago, Fulbright Scholar, Former Visiting Professor at the University of California at Berkeley, BA in Economics from the University of Rome, Former Economic Advisor to the Directorate General II of the European Commission, “The Great Lockdown and Global Trade”, Project Syndicate, 6/8/2021, https://www.project-syndicate.org/commentary/how-globalization-and-trade-survived-the-pandemic-by-daniel-gros-2021-06?barrier=accesspay

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.

#### Open trade barriers are being curtailed by generalized agreements and the WTO---antitrust is a unique threat

Dr. Brian Ikejiaku 21, Senior Lecturer in Law at Coventry University, PhD from the Research Institute of Law, Politics, & Justice (RILPJ) at Keele University, and Cornelia Dayao, LL.M in International Business Law, “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US”, Utrecht Journal of International and European Law, Volume 36, Issue 1, http://doi.org/10.5334/ujiel.513

(ii) Competition law and protectionism

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

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

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

#### Talks are defusing China tensions

David Lawder 11-10, Reporter at Reuters, “U.S. trade chief Tai says getting 'traction' with China in 'Phase 1' Deal Talks”, Reuters, 11/10/2021, https://www.reuters.com/business/us-trade-chief-tai-says-getting-traction-with-china-phase-1-deal-talks-2021-11-10/

The Biden administration is getting traction with China in talks over Beijing’s compliance with a Trump-era trade deal, US Trade Representative Katherine Tai said on Wednesday, but she declined to predict an outcome while discussions continue.

She told reporters in Washington the administration aims to hold China accountable to the two-year phase one trade deal signed in January 2020 and is exploring all weaknesses in China’s performance, including its lack of purchases of commercial aircraft.

China is running far behind in its promises in the deal to boost purchases of US goods by US$200 billion during 2020 and 2021, compared to 2017 levels, reaching only 60 per cent of the target through September 30, according to data compiled by trade economist Chad Bown of the Peterson Institute for International Economics.

Asked if she was pushing in the talks for China to take steps to allow for purchases of Boeing commercial aircraft – a purchase category identified in the phase one agreement – Tai said: “If you’re looking at where the weaknesses might be, in terms of phase one, you should expect that we are talking through it and exploring all of it.”

US President Joe Biden and Chinese President Xi Jinping have a virtual meeting scheduled as early as next week amid rising tension between the world’s two largest economies.

Tai said the meeting would be helpful and their understanding of each other would benefit a complex relationship.

But she said the leaders’ engagement was not necessary to facilitate the trade discussions.

“We’re talking and we’re working. So we don’t need, you know, Dads to come in,” she added, referring to Biden and Xi.

Asked if the administration was considering easing tariffs on Chinese goods as a way to reduce inflationary pressures on the US economy, Tai said USTR was viewing the “Section 301” tariffs on Chinese goods as part of a strategy to seek an advantageous position to more effectively compete with China.

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

Ismael Beltrán Prado 20, J.D. from the Javeriana University, LL.M from Columbia University, Master’s in Applied Economics Candidate at the Andes University, Commercial and Antitrust Lawyer and Coordinator of the Public Procurement Collusion Task Force, at the Colombian Competition Authority, Pursuing a Master’s in Applied Economics at the Andes University, “Competition Policy After COVID-19”, Competition Policy International, 4/26/2020, https://www.competitionpolicyinternational.com/competition-policy-after-covid-19/

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.