# 1AC

## 1AC---Export Cartels

### 1AC---Trade ADV

#### Advantage 1---Trade

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

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. 446-448 [grammar edit]

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

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

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

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

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

II.Why should we worry about uncertainty costs?

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

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

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

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

III. Legal uncertainty has increased significantly in recent years

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

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

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

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

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

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

Section 1: Introduction

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

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

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

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

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

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

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

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

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

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

Section 2: A Conceptual understanding of relevant concepts

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

(i) Competition

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

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

(ii) Merger

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

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

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

(iii) Export cartels

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

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

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

(iv) Trade policies

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

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

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

Part II

Protectionism

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

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

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

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

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

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

(i) Competition and Trade Policies

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

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

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

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

(ii) Competition law and protectionism

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

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

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

(iii) Merger regulation and protectionism

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

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

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

(iv) Export cartels exemption and protectionism

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

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

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

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

Allison Murray 19, JD from the Loyola Law School, Los Angeles Law School, BS in Business Administration from the University of Redlands, Judicial Law Clerk at the U.S. Bankruptcy Courts, Former Corporate Paralegal at Boeing, Degree in Economics and Management from the University of Oxford, “Given Today's New Wave of Protectionism, Is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?”, Loyola of Los Angeles International and Comparative Law Review, Volume 42, Number 1, 42 Loy. L.A. Int'l & Comp. L. Rev. 117, Winter 2019, p. 117-119

INTRODUCTION

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

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

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

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

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

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

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

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

Sean A. Pager 20, Professor at the Michigan State University College of Law, LLM from the European University Institute, JD from the University of California-Berkeley, AB from Harvard University, and Eric Priest, Associate Professor at the University of Oregon School of Law, LLM from Harvard Law School, JD from the Chicago-Kent Illinois Institute of Technology, BA from the University of Minnesota, “Redeeming Globalization Through Unfair Competition Law”, Cardozo Law Review, Volume 41, Number 3, 41 Cardozo L. Rev. 2435, July 2020, Lexis

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

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

Michael F. Oppenheimer 21, Clinical Professor at the Center for Global Affairs at New York University, Senior Consulting Fellow for Scenario Planning at the International Institute for Strategic Studies, Former Executive Vice President at The Futures Group, Member of the Council on Foreign Relations, The Foreign Policy Roundtable at the Carnegie Council on Ethics and International Affairs, and the American Council on Germany, “The Turbulent Future of International Relations”, in The Future of Global Affairs: Managing Discontinuity, Disruption and Destruction, Ed. Ankersen and Sidhu, p. 23-30

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

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

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

Secular Stagnation

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

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

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

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

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

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

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

Illiberal Globalization

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

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

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

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

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

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

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

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

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

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

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

David Kampf 20, Senior PhD Fellow at the Center for Strategic Studies at The Fletcher School, MA in International Affairs from Columbia University, BA in Political Science from Bates College, “How COVID-19 Could Increase the Risk of War”, World Politics Review, 6/16/2020, https://www.worldpoliticsreview.com/articles/28843/how-covid-19-could-increase-the-risk-of-war

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

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

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

The Pessimists Strike Back

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

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

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

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

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

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

A Yugoslav Federal Army tank.

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

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

As Risks Increase, Deterrents Decline

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Protectionist fragmentation causes catastrophic geoengineering

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

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

HOW WE GOT THERE

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

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

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

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

#### Extinction

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

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

#### It also causes nuclear war

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

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

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

The pragmatist geofuture

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

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

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

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

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

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

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

### 1AC---Harmonization ADV

#### Advantage 2---Harmonization

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

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

B. Between Contracts and Networks: Frameworks

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

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

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

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

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

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

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

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

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

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

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

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

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

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. 307-312

a. *Criteria for goals*

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

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

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

b. Goal structure

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

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

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

c. Potential problem areas

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

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

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

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

4. Commitment in norm-setting

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

a. Potential obstacles

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

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

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

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

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

b. Specific types of norms—cartels

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

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

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

#### Resource depletion causes extinction

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

1. The Four Horsemen

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

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

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

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

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

#### Human rights failure causes nuclear war

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Competing Views on Instability

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

#### Global antitrust harmonization prevents waves of reactionary populism

Aurelien Portuese 21, Director of Antitrust and Innovation Policy at the Information Technology and Innovation Foundation, Doctor in Law from the University of Paris II, Graduated from the London School of Economics, Sciences Po Paris, and from the University of Hamburg, “FTC Should Have Global Antitrust Regulatory Aspirations”, Law360 Expert Analysis, 3/19/2021, Lexis

Competition has changed, the world powers have changed too. Resorting to bilateral cooperation and praising mere soft law instruments are insufficient to cope up with the breadth of the current challenges inherent to international competition.

How can the FTC better ensure that EU competition rules are compatible with U.S. antitrust laws, especially with respect to digital companies? How can America better ensure that state-owned enterprises in China compete fairly with U.S. companies on the merits, instead of benefiting from lavish subsidies and domestic planning?

And how can regulators ensure that international mergers approved in some jurisdictions do not get rejected in others, thereby creating hopelessly tangled business situations and considerable legal uncertainty?

The FTC report, unfortunately, fails to address these pressing issues. Indeed, summing up the tone of the discussions that predated the report's publication, the internationally recognized antitrust expert Tad Lipsky of George Mason University is reported to have said that "the world is not yet ready and possibly will never be ready for a binding global approach to competition law convergence."[4]

On the contrary, what the world needs now is multilateral agreements and rules that are legally binding. Otherwise, unfair global competition will exacerbate waves of tension and anger, which will further fuel populist movements across the globe.[5]

#### Nuclear war

Karl von der Heyden 17, Co-Chairman of the American Academy in Berlin, was awarded the Duke University Medal for Distinguished Meritorious Service, recipient of The International Center in New York's Award of Excellence, M.B.A. from the Wharton School of the University of Pennsylvania, “I Survived World War II. Nationalism Is a Path to War”, https://time.com/4815170/wwii-nationalism-donald-trump-america-first/

This collective tendency to forget is not a new phenomenon. After the horrors of the Napoleonic Wars, Europe was given a new order of nation states under the Treaty of Vienna, signed in 1815. The new order lasted relatively well, surviving the revolutions of 1848 and the subsequent Crimean and Franco-Prussian wars. By the time World War I began in 1914, institutional and personal memories of the post-Napoleonic order had been weakened or forgotten.

Similarly, seventy years after World War II, millions of people in the U.S. and Europe have forgotten the lessons learned from that war and from the peace that followed. Nascent nationalist and popular movements converged in Britain to produce a vote to leave the [European Union](https://time.com/4696437/european-union-future-maastricht/). Similar coalitions heavily influence the American political scene today, as they do in Poland, Hungary and even the Netherlands. White House communications that appear to realign foreign policy put in place over the last half-century are beginning to concern America’s allies.

I understand why the “[America First](https://time.com/4569845/donald-trump-america-first/)” movement propagated by Donald Trump sounds patriotic to many voters, as do other movements that favor isolationism. It is natural to blame others for our failure to adjust to new technologies, to immigration and to competition from countries whose growth rates are higher than our own. But the truth is that the “America First” movement runs the risk that it could trigger a global decline in productivity. Free trade has benefitted the U.S, Europe and much of the rest of the world. Many new businesses, particularly in information technology, can now start with a global footprint on Day One instead of being confined to a local market. NATO has preserved the freedom of the Western World from Communism. It has recently become more relevant again in view of the Russia’s efforts to disrupt it.

Perhaps most worrisome is the apparent cooling of relations between European NATO allies and the United States, which has compelled German Chancellor [Angela Merkel](https://time.com/4797241/angela-merkel-us-german-tensions-g7-summit/) to say, “The times when we could fully rely on others are to some extent over… We Europeans must really take our fate into our own hands.”

Problems arise when we start classifying our own and other countries as “winners” or “losers.” Free trade, immigration and the treatment of refugees will never be perfect — far from it. But the alternatives of walling off people, as well as trade, are worse. Appealing to ultra-nationalist and xenophobic feelings is playing with fire. With easy access to weapons of mass destruction, the danger is greater than ever.

Growing up in Germany, I saw the dangers of fascism and nationalism. I saw leaders who only made matters worse by appealing to the majority of voters who feared minorities and foreigners.

Anyone who appreciates history would know better than to make even casual references to the possibility of [nuclear war](http://www.cnn.com/2017/04/18/politics/kfile-trump-north-korea-nuclear-war/index.html).

#### Augmenting the capacity for antitrust in emerging economies is critical to global development

Dr. Armando E. Rodriguez 16, Associate Professor at the College of Business at the University of New Haven, PhD in Economics from the University of Texas, BS in Chemical Engineering from the University of Texas-Austin, and Ashok Menon, Principal Associate at Nathan Associates, M.A., International Trade, The Middlebury Institute of International Studies at Monterey, B.A. in Communications and Law from the University of California at San Diego, “Success and Limits of Competition Law and Policy in Developing Countries: The Causes of Competition Agency Ineffectiveness in Developing Countries”, Law & Contemporary Problems, 79 Law & Contemp. Prob. 37, Lexis

Examining the administrative and operational difficulties as well as the successes and failures of developing country competition law enforcement activities can help policymakers address the numerous difficulties accompanying the implementation of competition policies. 1 As Umut Aydin and Tim Buthe explain in the introductory article of this symposium, there are a variety of criteria that should be taken into account when assessing performance, and those criteria vary across countries depending on the overall goals of the agencies themselves. 2 Nonetheless, it is a task that is evidently necessary given the variation in performance across the world's competition policy enforcement agencies, as the statistical appendix to this article demonstrates. To this end, this symposium has brought together an impressive array of interdisciplinary experts, practitioners, and scholars - all charged with critically appraising the successes and shortcomings of competition policy programs worldwide. By assembling both the "lessons learned" as well as derivative recommendations or remedies that address shortcomings, it is expected that policymakers and practitioners can [\*38] develop and deploy improved competition policy mechanisms to assist in the broader objective of enhancing developing nations' economic growth.

This institutional engineering task is a challenging undertaking. The competition law enforcement apparatus can be exceedingly well-positioned to curtail the abuses of naked horizontal cartels. And at that simple task agencies do a decent job, despite being bedeviled by procedural difficulties and methodological limitations. 3 But they don't succeed often because the naked, horizontal cartels at which they aim rarely exist.

This point hinges on recognizing a distinction between private, "naked," cartels and cartels that succeed by their proximity to and close historical association with the state - publicly sanctioned cartels, for lack of a better term. In this view, the latter - the tacitly or explicitly state-sanctioned cartels - are the norm in developing economies. The presence of these cartels, their interlinkages with the state, and the strength of the association are a product of a nation's development. These state-sponsored cartels, also recognizable as combines, groups, or associations, are market participants that emerged historically to reduce transactions costs in response to artifacts and problems of development. 4 By contrast, naked private cartels emerge infrequently, unlikely to exist in pure form because they are unsustainable. 5

[\*39] Competition policy's remit is broad. It reaches beyond challenging narrow horizontal collaborations among competitors. It brings to bear the full array of antitrust proscriptions against a wide range of business practices ranging from vertical practices, abuse of dominant positions, commonplace horizontal practices, to full-fledged merger reviews.

As a practical and operational matter, the metrics and procedures on which antitrust enforcement relies are inherently imperfect and may expose it to two kinds of decisionmaking errors. First, there is the possibility of prosecuting a pro-competitive or competitively innocuous market practice. Or, second, it can overlook a patently anti-competitive one. Conventional antirust doctrine holds that there is little chance of error in prosecuting a naked cartel because naked cartels convey few pro-competitive benefits. 6 On the other hand, as the agency seeks to target violations other than horizontal cartels, the possibility of unintentionally damaging pro-competitive behavior increases, and, as a result, the associated likelihood of error increases as well.

Thus, the core enforcement tool of the agency's tool kit, its most-effective, unambiguous and well-understood competition policy principle - the prohibition of per-se anti-competitive horizontal agreements orchestrated by private cartels - is a finely honed weapon aimed at an either scarce or inconsequential problem in most developing economies. In pursuing more ambiguous business practices, false-positives are inevitable because distinguishing pro-competitive conduct from unambiguously harmful conduct is an inherently difficult task. 7

This article advances the following proposition: the level of antitrust enforcement activity in developing economies should be markedly lower than its level in developed ones. The reasoning turns on the following claims: particular [\*40] conditions of developing economies make the likelihood of antitrust enforcement error greater; and collaboration among firms is an endogenous, pervasive, necessary and often pro-competitive practice that emerged in response to the historical presence of high transaction costs endemic to developing areas. The scant presence of private cartels relative to all commercial entities suggests a low prevalence or base-rate. A failure to account for the presence of a low base rate event enhances the likelihood of error in forensic outcomes, specifically, a greater realization of false positives. 8 Sensitivity to the high cost associated with possible prosecutorial overreach suggests that competition policy, in its operation, should tread lightly and operate under a presumption of error.

In this narrative, trade associations, family-owned, or ethnic, industrial, and corporate groups, or any other variant of "self-regulating" entities found in developing economies are an organizational alternative to reduced, inadequate, or limited administrative guidance by the state. They exist due to limited access to capital and managerial talent, as well as political and socio-economic transaction costs unlikely to be significant in successful market economies. 9 These entities help coordinate decisions and efforts among association members. They therefore reduce transaction costs and create value for their members and others.

The presence of these interest groups conveys both benefits and costs to the economy and its development. As a result, the targeting of seemingly (and possibly) anti-competitive business practices without a recognition of the countervailing pro-competitive benefits results in enforcement errors that are much more damaging than the enforcement errors in developed economies. In sum, the prospective social costs of enforcement actions appear substantially greater than the benefits. This would suggest a more muted role for competition policy as a development instrument, to the extent that the error-cost tradeoff should inform the emphasis or aggressiveness of antitrust enforcement.

This hypothesis is illustrated and examined in the article. Part II describes and explains the source of the uncertainty that begets antitrust enforcement errors in developing economies. Part III describes the relevance and comparatively greater influence of business groups, industry, and regional associations, among others, which constitute private social networks that convey pro-competitive benefits. Part IV provides an accounting of the particularities of developing economies, and specifically the characteristics that handicap competition policy [\*41] practice in its orthodox deployment. Part V explains the impact of enforcement actions on the relative costs of colluding privately versus seeking state-sanctioned protections. Part VI offers some concluding comments.

A few caveats are necessary; as is a careful delineation of the scope of the commentary. This article does not seek to add to the copious scholarship on informal norms, private enforcement mechanisms, or private orderings - terms often used interchangeably. The article provides an overview of the extent to which the pro-competitive benefits of the social capital present among members of close-knit groups should be accounted for in the administration of the competition laws in developing economies. And last, although it draws from the work of commentators who question antitrust enforcement's general effectiveness, this article's analysis of antitrust policy is focused exclusively on its incantation in developing economies. 10

It follows, as a matter of policy, that antitrust in developing economies - if it's to be had at all - should be relegated to its core function: the curtailment of horizontal price-fixing. 11 The current observed ineffectiveness of competition policy enforcement in developing countries rests to a great extent on the massive enforcement agenda with which the enforcement agencies are saddled, the multiple and often contradictory policy goals, and the unattainable expectations heaped on competition policy. Competition policy agencies in developing countries should, at least in the short-term, focus on horizontal practices; all other [\*42] activities can be too costly, expensive, and counterproductive for competition agencies in developing countries to implement effectively.

II The Source Of Errors

The difficulties involved in proving the illegal nature of cartels and other anti-competitive agreements among firms are well known. Antitrust authorities can only prosecute the makers of collusive agreements if there is hard evidence of violations of the proscribed conduct. 12 This high threshold makes collusion very difficult to combat. But proceeding with less than conclusive evidence may ultimately lead to mistakenly taking action against practices that only seem anti-competitive but in reality are not collusive.

Investigating and prosecuting is costly. But investigations and false prosecutions also create unintentional social costs by "chilling competitive behavior," and instill reluctance to take risks and innovate practices for fear of running afoul of the competition agency. 13 Such litigation risk, or simply the fear of attracting unwanted regulatory attention, could even dissuade firms from deploying practices that might be only remotely similar to the scrutinized practice for fear of it being confounded. In fact, as a result of the potentially significant unfavorable impact on net welfare, several scholars have noted that it might be optimal for society to tolerate some degree of seemingly anti-competitive behavior among firms or - equivalently - that enforcement err on the side of caution and restraint. 14

#### Extinction

Thomas Kean 18, Co-Chairs the Bipartisan Policy Center’s Task Force on Terrorism and Ideology, M.A. from Columbia University Teachers College, BA from Princeton University, et al., “Fragile States Fail Their Citizens and Threaten Global Security”, United States Institute for Peace Blog, 9/5/2018, https://www.usip.org/blog/2018/09/fragile-states-fail-their-citizens-and-threaten-global-security

Fragile States Fail Their Citizens and Threaten Global Security

Each fragile state is fragile in its own way, but they all face significant governance and economic challenges. In fragile states, governments lack legitimacy in the eyes of citizens, and institutions struggle or fail to provide basic public goods—security, justice, and rudimentary services—and to manage political conflicts peacefully.

Citizens have few if any means of redress. As a result, the risk of instability and conflict is heightened. Throughout the Middle East, the Horn of Africa, and the Sahel, fragility is further exacerbated by growing youth populations. In the Arab World, about 60 percent of the population is below the age of 30, and youth unemployment, at just under 30 percent, is more than twice the global average.

In some states, governments lack the capacity to meet their citizens' needs. In many others, fragility is perpetuated by undemocratic and, often, predatory governance. In such countries, ruling elites exploit the state and enrich themselves rather than serve the citizens. They are willing to hold on to power by any means necessary: buying support through patronage, violently repressing opponents, and neglecting the rest. The resulting deep sense of political exclusion among citizens is aggravated by insecurity and shortages of economic opportunity. Repeated shocks—including the global financial downturn, the Arab Spring, and recurring cycles of crippling droughts—have roiled the Middle East, the Horn of Africa, and the Sahel in the last decade. Few states have weathered these shocks well because the conditions of fragility impede effective responses.

Almost every country in these regions falls outside the "stable" range of the Fund for Peace's Fragile States Index, occupying a spot somewhere between a "warning" and an "alert" level of state fragility. Other assessments of state fragility, such as the Organisation for Economic Co-operation and Development's States of Fragility report, reach similar conclusions.

And fragility in all three regions has deepened over the past decade. Since 2006, 30 countries across these regions have become more fragile, while only 19 have seen their fragility reduced. And the extent of these increases in fragility, on average, was greater than the decreases. Today, both the scale and the complexity of fragility are unprecedented.

Amid this ferment, extremists have launched their most daring onslaughts and made their greatest gains. Fragile states are no longer mere safe havens but instead are the battlefields on which violent extremists hope to secure their political and ideological objectives.

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

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

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

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

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

3. Agreement in which exporting state considers foreign harm

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

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

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

### 1AC---Plan

#### Plan: The United States federal government should prohibit private sector export cartel practices that produce anticompetitive effects in the markets of countries that agree to a reciprocal antitrust framework.

### 1AC---OAS ADV

#### Advantage 3---OAS

#### The credibility of the Organization of American States, or OAS, is on the brink due to lack of regional cohesion---this crushes its institutional effectiveness

Dr. Ryan C. Berg 10-6, Ph.D. and an M.Phil. in Political Science and an M.Sc. in Global Governance and Diplomacy from the University of Oxford, Senior Fellow in the Americas Program and Head of the Future of Venezuela Initiative at the Center for Strategic and International Studies, and Dr. Lauri Tähtinen, Ph.D. in History from the University of Cambridge, Master of Theological Studies at Harvard University, B.Sc. in International Relations from the London School of Economics, Nonresident Fellow at the Finnish Institute of International Affairs and Co-Founder of Geostreams, “Latin America’s Democratic Recession: How Washington Can Help Turn Things Around”, Foreign Affairs, 10/6/2021, https://www.foreignaffairs.com/articles/central-america-caribbean/2021-10-06/latin-americas-democratic-recession

The lack of regional institutional cohesion has also hobbled Latin America’s ability to establish a lasting democratic order. Rather than devoting resources to strengthening existing institutions such as the OAS, leaders throughout the Americas have cooked up an alphabet soup of regional organizations. This proliferation of organizations has served to divide rather than unite the hemisphere. The 2010 Community of Latin American and Caribbean States excluded Canada and the United States, and the 2004 Bolivarian Alliance for the Peoples of Our America originally had only two member states: Cuba and Venezuela, which then proceeded to hand select other like-minded members. The 2008 Union of South American Nations fell apart when many countries defected from it to found the Forum for the Progress and Development of South America, this time without Venezuela’s participation. As the international relations scholar Christopher Sabatini has shown, this overabundance of regional organizations has encouraged national sovereignty at the expense of the collective values articulated in the charter. It has also impaired the ability of genuinely important regional institutions, such as the OAS, to lead with authority and credibility—and to respond effectively when democracy is most at risk.

#### Harmonizing export cartel law strengthens economic integration throughout the OAS

Frederic Desmarais 9, LLB from McGill University, B.Sc. in International Studies from the University of Montreal, “Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?”, Manitoba Law Journal, 33 Man. L.J. 41, Lexis

C. The Advantages of the Harmonization Process

In its report of 1974, the CERBP of the OECD concluded that a notification procedure is desirable. 230 It recommended its member states to consider incorporating such a procedure in their national competition laws by stating that:

A notification procedure should cover details about membership, fields of action, the type of restriction involved, and the basic facts of the business done or planned. Obligatory notification of export cartels would enable the national authorities to obtain a much more clearer picture of the advantages and disadvantages of export cartels in their countries, and eventually, modify their legislation accordingly. [Emphasis added.] 231

In so doing, the CERBP shed light on the primary advantage of an explicit exemption system with a notification requirement: the ability to gather information regarding the activities of export cartels to assess the pros and cons of such associations. As a result, the IAJC should adhere to the conclusion of the CERBP.

The second advantage of this harmonization process is that it will facilitate the prosecution of anticompetitive export cartels instituted by developing American countries. As illustrated by section 2(C), developing countries are often powerless to prosecute export cartels adversely affecting their national market because they lack extra-territorial enforcement capacity, technical expertise, and access to evidence in other countries that typically don't have exemption systems with notification requirements. Some bilateral agreements provide for facilitation of [\*84] extra-territorial prosecutions but only between major American countries. 232 An informal harmonization process geared towards the explicit exemption system that comes with a notification requirement remedies, or at least diminishes, these enforcement and evidence problems.

As a final point, this harmonization process could lead to a fostering of an inter-American awareness of competition law and economic integration issues. The Canadian Department of Foreign Affairs and International Trade concluded that discussions concerning export cartels could serve to:

[D]raw isolationist elements in the U.S. Department of Justice into a process of rethinking the role of competition policy harmonization and cooperation in an integrating continental market [...].

[B]uild an understanding as to how competition policy could contribute towards deepening NAFTA and indeed multilateral market integration. [Emphasis added.] 233

Regardless, the World Bank and the OECD foresee positive developments from such action: "In any case, increased cooperation between competition authorities and pressures to harmonize competition policy worldwide are likely to result in the elimination of export cartel exemptions or at least make them impractical." 234

VII. CONCLUSION

Export cartels rest on a retrograde conception of the international system. The rationale of national enrichment to the detriment of other countries appears, from a solely national perspective, to make sense. However, the thorough analysis of the [\*85] various effects of export cartels in part II illustrates that they may be at best a zero-sum game. They not only distort international trade, but they may generate adverse and anticompetitive effects on domestic markets and on developing countries, which are the majority in the American hemisphere. Their anticompetitive effects may nullify their "potential benefits" which are, as evidenced by the United States experience, empirically unpersuasive for justifying their perpetuation. As Eleanor Fox argues: "It is in everyone's interest to be free of export cartels in an integrated world". [Emphasis added.] 235

The study conducted by the IAJC concerning cartels in the Americas takes its origins from GA's Resolution 1772 which underscored the importance of legal issues in economic integration and requested the IAJC to circumscribe its activities in that matter to competition law and protectionism in the American hemisphere. 236 Although the rapporteurs Rodas and Fried did not explicitly recommend a harmonization process in their final report, they did not disregard this alternative which is in accordance with section 99 of the OAS Charter. In the document entitled Competition and Cartels in the Americas: Suggested Conclusions to Document CJI/doc.118/03, 237 the rapporteurs pointed out, as their second conclusion that American states are politically willing to incorporate competition law and cartels issues in an international convention, namely the FTAA, which they actually did in its three drafts. But the FTAA is currently an ineffectual organization and, even in the long-term; one can doubt that American states will advance further in this integration process.

Furthermore, the United States, as evidenced by its position within the WTO framework, acts as the standard bearer of export cartel exemptions. Thus the best alternative to achieve international regulation of export cartels is establishing of an informal harmonization based on the explicit exemption system with notification, since this mechanism currently functions in American law. This would only require redirecting the political willingness of OAS member states that was underscored by the rapporteurs towards an informal harmonization process. This process has three advantages. First, it would allow access to information on the activities of export cartels so that states could assess the pros and the cons of their eventual perpetuation or ban. Second, it would facilitate legal proceedings by developing countries against harmful export cartels, thereby complying with one request of the IAJC formulated in its resolution Cartels in the Scope of the Competition Law in the Americas urging member states:

[\*86] [T]o pay special attention to the challenges faced by smaller, and less developed, member states, so that they can develop the capacity required to maintain effective administration, application, and international cooperation in this area. [Emphasis added.] 238

Third, it could foster an inter-American awareness on competition law and economic integration issues.

The United States Supreme Court reminds us that: "[T]he antitrust laws [...] were enacted for the protection of competition, not competitors". [Emphasis added.] 239 This statement is undeniably accepted among the majority of the countries of the world. For instance, the OECD recognizes that all its member states consider that this statement is accurate. 240 Export cartel exemptions are problematic precisely because they were not enacted for the protection of competition itself, but rather for the protection of competitors whose foreign activities might even generate anticompetitive effects on domestic markets. Uniformity is not an absolute good in legal matters, but in the case of export trade law it is fundamental to the welfare of consumers around the globe.

#### They’re on the brink of integration---export cartels are key

Frederic Desmarais 9, LLB from McGill University, B.Sc. in International Studies from the University of Montreal, “Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?”, Manitoba Law Journal, 33 Man. L.J. 41, Lexis

Competition law has become a topic that cannot be ignored in the activities of the major international organizations of the world. Currently, there is a favourable trend towards competition policy on the international scene, as evidenced, inter alia, by the Recommendation of the Council Concerning Action against Hard Core Cartels 1 [\*42] of the Organization of Economic Co-operation and Development (OECD), by the creation of the International Competition Network, 2 and by the Working Group on the Interaction between Trade and Competition Policy within the context of the World Trade Organization (WTO). 3 The Organization of American States (OAS) has followed this trend, and accordingly, its General Assembly (GA) has requested that the Inter-American Juridical Committee (IAJC) study competition law issues in the Americas. 4 In 2003, the IAJC published its final report entitled Competition and Cartels in the Americas. 5

The literature on hard core cartels is copious. The OECD defines a hard core cartel as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce". 6 This literature nonetheless neglects one type of cartel, which not only rests on a retrograde conception of the international system, but also which generates various anticompetitive effects: export cartels. Export cartels are associations of firms, operating in the same country, that cooperate with one another in various ways, such as fixing common prices in order to export their goods and/or services to the international market. The primary objective of this paper is to provide a comprehensive analysis of export cartels within the OAS framework, and to offer a solution to address their adverse effects on developing countries, which make up the majority of the states in the American hemisphere.

#### Extinction

Lawrence J. Gumbiner 14, Deputy U.S. Permanent Representative to the Organization of American States, World Affairs Council of Charlotte, North Carolina, HumanRights.org, “The OAS and the Inter-American System”, 4/4/2014, http://www.humanrights.gov/2014/04/04/the-oas-and-the-inter-american-system/

Introduction I want to extend my appreciation to the WAC for this invitation and the opportunity to share with you the United States’ foreign policy commitment to multilateral diplomacy through the Organization of American States and the inter-American system. In his address to an OAS General Assembly last June in Guatemala, Secretary of State John Kerry underscored that: “Across the Americas, the OAS enjoys a unique status as the region’s most inclusive, most respected regional organization…[I]t reflects the hard work of all of us trying to forge norms and create institutions that safeguard our shared commitment to our citizens of democracy and human dignity.” Multilateral diplomacy is an essential, indeed a vital, element of U.S. policy in the Western Hemisphere. Over recent decades, the Western Hemisphere has undergone profound and positive changes. People throughout the region have made enormous sacrifices to defeat dictators and strengthen their democracies, and generating increasing prosperity. We must now consolidate these gains in the face of very serious challenges. And the challenges we face emanate from poverty, from social exclusion, from struggles to provide security for average citizens and from the inability, in some societies, of democratic institutions to deliver the goods and services that people need. One fundamental debate in our hemisphere today is over how to develop truly democratic political systems. Winning elections alone is not sufficient. Elected leaders must govern justly and democratically, and respect for rule of law and democratic institutions must be instilled, to maintain legitimacy. Why the region matters But before I describe in more detail the importance of the OAS and our diplomacy in the Americas, I want to emphasize with you why, despite the cacophony of significant news from the rest of the world – from Russia to the Middle East to Asia – we should keep a keen focus on our interests in this hemisphere. With a GDP of $3.6 trillion, the Latin American and the Caribbean economy is over three times larger than that of India or Russia, and nearly as large as China or Japan. North America represented over 29% of our world trade in 2013, with Canada our top global trade partner and Mexico our third-largest partner. When it comes to energy, we are understandably very concerned about developments in the Middle East. But more than one-half of U.S. oil imports originate in this hemisphere, and this region will account for approximately 2/3 of global growth in petroleum production in the future. Venezuela has the second largest and Canada the third largest proven oil reserves. We often talk about water becoming the most valuable commodity of the future, with wars being fought and political stability threatened over its availability. With this in mind, you should know that more than 45% of the world’s fresh water is in the Americas, including five of the top eight source countries in the world — Brazil, Canada, Colombia, USA, and Peru. This hemisphere is also home to six of the top ten most bio diverse countries in the world, with all of the economic and environmental considerations that this richness entails. So when we talk about critical issues that impact the United States and where our key economic, political and security interests are at play on a daily basis — we need to start here in our own hemisphere. Why the OAS matters Which brings me back to the OAS: Why is it so important? Because it is the anchor of our engagement in the Americas. Through some of the most tumultuous periods of our region’s history, the OAS has been a voice for democracy and human rights. The OAS has been critical to peaceful development and the growth of democracy for over 100 years — it is the embodiment of the Inter-American system. The precursor of the OAS was the Pan American Union, created in 1910 as an early vision of hemispheric integration and mutual cooperation. In 1948, the OAS Charter was adopted at the Ninth Inter-American Conference in Bogota. That same year marked the adoption of the American Declaration of the Rights and Duties of Man, the first international human rights instrument, and a model for the U.N. Declaration of Human Rights. The Inter-American Commission on Human Rights was created by the OAS in 1959, the first of its kind, and also a model for the UN Human Rights Commission. As the hemisphere’s premier political multilateral institution, the OAS is the forum for the 34 democratically elected governments of the region to engage in dialogue, diplomacy, and conflict resolution. And it is for that reason that the United States is actively working to reform and strengthen the OAS and build a stronger, more vibrant, more effective institution — both financially and politically — to address 21st Century challenges affecting the region. To do that, we need to focus on its four pillars: democracy, human rights, integral development and hemispheric security. With this in mind, let me review with you the OAS progress on these pillars. Democracy On democracy, the United States is committed to working through the OAS to foster democratic governance and protect fundamental rights and liberties enshrined in the Inter-American Democratic Charter. Today, this Democratic Charter is at the core of a principled multilateralism in the Americas. With its adoption in September 2001, no OAS member state can be a disinterested spectator to what occurs in our hemisphere. The Charter, reflects a significant hemispheric commitment to the collective defense of regional democracy; a shared desire to lock in the democratic gains of recent decades and prevent a return to autocratic rule. Acting under the Inter-American Democratic Charter, and in the spirit of the Charter, the OAS has helped member states where democratic practices or institutions have been challenged. Of particular note was the OAS’ important role in Haiti, where it worked on voter registration and distribution of over 3.4 million ID cards that was essential for that country to make the transition to a functioning democracy and the elections in 2006. The OAS plays a critical role in Colombia through its mission for demobilization of illegal armed groups. In the event of a peace agreement with the guerrilla organization FARC, the OAS will be ready if requested to perform a similar function. Following the 2009 coup in Honduras, the OAS stepped in to help restore democracy. And in Venezuela, the OAS has remain engaged over the years in an effort to support and preserve democratic institutions in that country. As you are aware, a strong and vibrant debate is presently occurring at the OAS on how to deal with Venezuela’s current crisis after more than a month of protests. Fulfilling the promise of the Democratic Charter to proactively address threats to democracy is not an easy task among 34 sovereign states in a consensus-based organization. It is one of the key challenges facing the OAS as it adapts to hemispheric developments in the 21st century. Election Observation Missions (EOMS) Democracy starts with clean elections, and election observation is a key element in OAS efforts to strengthen democracy in the hemisphere. This year, the OAS has fielded or will be fielding high quality election observer missions — or EOMs — in El Salvador, Costa Rica, Colombia, Panama and Bolivia. We also expect they will assist with elections in Haiti and Antigua and Barbuda when elections there are called. The OAS enjoys a longstanding reputation for impartiality and technical competence on elections, respected worldwide for stringent standards in accordance with the United Nations supported “Principles for International Election Observation”. But what is particularly critical today is the recognition that a free and fair election is more than just counting up the ballots; indeed, the biggest threats to democratic elections in the Americas no longer come from elections that are “stolen” at the ballot box. The integrity of voter information, the politicization of electoral authorities, a weakened media, civil society and inadequate separation of powers ― are all factors that contribute to the integrity of elections. To that end, the OAS has developed groundbreaking new methodologies on such issues as campaign finance, media and gender. It is also working on election integrity and security, and sub-represented groups. The organization has created the first ever electoral quality management standard for electoral processes, officially endorsed by the International Organization for Standardization. These new approaches reflect a progressive vision of what electoral observation and analysis should be today. It is for that reason that despite much polarization in the region, the OAS stamp of approval on elections still represents the gold standard and is sought after by almost all electoral authorities in the hemisphere. Human Rights Furthering democracy through human rights is one of the institution’s most significant contributions. The Inter-American Human Rights System (IAHRS) ― the “crown jewel” of the inter-American System ― is comprised of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The United States is proud to be the largest financial supporter of the Commission, which is located in Washington. It is comprised of seven Commissioners, and eight thematic rapporteurships, including an independent Special Rapporteur on Freedom of Expression. The Commission played an historically significant role in helping to combat the dictatorships of the 1980s ― particularly in the Southern Cone and Central America ― and bring about the growth of democracy that the region enjoys today. The Commission provides a critical forum for citizens — whether acting through NGOs or on their own — to seek redress of alleged human rights abuses. One of its most important functions is to produce country reports — well documented assessments of human rights conditions and issues in countries throughout the region, with a focus on the most egregious examples of human rights abuses. While the United States is not a party to the American Convention on Human Rights ― we signed it in 1977 but have not ratified it ― and is thus not subject to the jurisdiction of the Costa-Rica based Court, we are nevertheless a strong supporter of the court’s important regional role in protecting human rights. The future of the IAHRS is one of the most politically charged debates at the OAS today. For several years the System ― particularly the Commission and its Special Rapporteur on Freedom of Expression ― have come under sharp criticism from countries, led by Ecuador, who chafe under the scrutiny that the Commission provides. They are seeking dramatic changes, including a reduction in funding and moving of the HQ out of Washington. The United States has been and will remain a firm supporter of this important institution, and we will continue our financial assistance as well as political backing to assure that this remains the backbone of human rights advocacy in the hemisphere. Integral Development Integral development has been a core pillar for the OAS since the days of the Alliance for Progress, and is a critical function for many of the smaller states in our hemisphere. It is particularly relevant for Caribbean islands who rely on the organization for many projects and activities that are not available through the UN or multilateral development banks. One of the most significant functions the OAS provides is the forum to convene ministers from throughout the hemisphere. These ministers would not meet under any other umbrella. The OAS sponsors ministerial meetings on labor, education, environment, science, culture, tourism, and social development. The U.S. is a prime supporter of the development agenda in the OAS. Last night, in conjunction with the Department of Commerce and City of Charlotte we welcomed the America’s Competitive Exchange, with some 40 entrepreneurs and government officials from throughout the hemisphere. This hands-on connection between innovators and entrepreneurs from the U.S. and the rest of the hemisphere was an example of how the OAS can build positive, practical relationships to promote integral development. Some of our other initiatives include Small Business Development Centers for the Caribbean, a grants program to promote sustainable cities and communities, and the Energy & Climate Partnership of the Americas, a program launched by President Obama at the Summit of the Americas in 2009. Hemispheric Security Hemispheric security is our final core function at the OAS. Even before the OAS was formally constituted ― mutual security was a driver of hemispheric cooperation, and the basis of the 1947 Rio Treaty on mutual defense. Today, security threats have evolved from the risk of foreign invasion to the question of citizen security – which polls show is the number one concern of citizens in our hemisphere – and one where the OAS and Inter-American System play a fundamental role. We face these threats in our hemisphere today by cooperating on anti-terrorism, counter-narcotics, anti-corruption and the fight against transnational organized crime. And we continue to promote military cooperation and civil/military education through the Inter-American Defense Board and its College. Even where some of our political relations are strained, we find that we can work effectively on many fronts with public security forces where we have common interests in providing basic protection for our citizenry. The Western Hemisphere responded to the events of 9/11 with greater resolve than any other area in the world, largely working through the OAS. Less than a year after the 9/11 attacks, the OAS adopted the Inter-American Convention Against Terrorism. As a result the OAS has become a leader in the region in the new realm of cyber-security and terrorist cyber attacks on government networks and critical infrastructure. One area where the OAS has proved most effective is in de-mining. Over the past two decades we have pored tremendous efforts into humanitarian demining, mine education, and victims’ assistance. With U.S. financial support, OAS efforts significantly contributed to the severe reduction on elimination of mines in Central America, in Peru, Ecuador and Colombia. Summits of the Americas Closely tied to the OAS is the pinnacle of U.S. multilateral engagement in the region, The Summit of the Americas ― the only hemispheric event that brings together all democratically elected Heads of State and Government in the Western Hemisphere. Since its inception in 1994 under President Clinton, six summits and two special summits have taken place from Buenos Aires to Quebec. The outcomes are too numerous to list in total here, but they have been substantial. In addition to the Energy & Climate Partnership I referred to earlier, the Obama Administration has launched through the Summit process “Connecting the Americas 2022” to facilitate universal access to electricity and cleaner, more reliable power for citizens across the region, and “100,000 Strong in the Americas”, a program to promote increased international student exchanges between the United States and Latin America and the Caribbean. The last Summit in Cartagena Colombia in 2012 featured the first “CEO Summit of the Americas”, a high-level dialogue among the region’s business and government leaders focused on pragmatic partnerships between governments and the private sector to boost economic growth. We expect that tradition to continue at the next summit, to be held in Panama in 2015. An important issue going forward is how to more closely link the Summits with the OAS. Presently, the OAS hosts the secretariat of the Summit of the Americas, and serves as a clearinghouse for the implementation of Summit objectives. Part of our discussions with the U.S. Congress on OAS reform is how to create more direct linkages between these institutions. The Challenges Ahead Over the last decades, the hemisphere and the OAS have made enormous progress, but we now face new challenges on the political, economic and security fronts that must be addressed with leadership in bilateral as well as multilateral fora. Let me briefly touch on our overall policy in the hemisphere. Our approach at the OAS represents the multilateral apporach to the policy. The themes are similar. We continue to fervently support democracy, but based on good governance and respect for diversity of opinions that underpins democratic values. Several countries in the region see threats to democratic governance and freedom of expression. We are particularly concerned by the deteriorating situation in Venezuela, where the United States has called on the Venezuelan government to respect the human rights and the rule of law and begin a peaceful dialogue that alleviates the current tension. We have made that case and will continue to do so forcefully in the OAS. Economic engagement lies at the center of our strategy. Our current efforts are focused on concluding the Trans-Pacific Partnership that include several Asian countries, our NAFTA partners plus Chile and Peru. We have a sustained economic policy dialogue with Brazil and are strengthening our ties with Pacific Alliance members Mexico, Chile, Colombia and Peru. Prosperity cannot exist without security. That is why we continue to invest in security cooperation with Mexico, Central America, the Caribbean, and Colombia. And lastly, a more vigorous energy diplomacy is a core priority. The evolving world energy map has created huge openings for greater cooperation on energy matters in the Western Hemisphere, including collaboration to promote energy security with responsible environmental stewardship. The OAS provides significant value-added on all of these themes and plays an important catalytic role in advancing our shared hemispheric agenda. But the organization must be nimble to adjust to changing circumstances, one that reflects the realities of the Americas in the 21st Century. For that reason, we are working on a reform agenda at this venerable institution. We are building a better, more modern OAS, not only based on up to date management practices, but one that focusses on the key challenges of our time.

#### Linking the U.S. and OAE economically is key to Caribbean development

Lawrence J. Gumbiner 14, Deputy U.S. Permanent Representative to the Organization of American States, World Affairs Council of Charlotte, North Carolina, HumanRights.org, 4/4/2014, “The OAS and the Inter-American System”, http://www.humanrights.gov/2014/04/04/the-oas-and-the-inter-american-system/

Integral Development Integral development has been a core pillar for the OAS since the days of the Alliance for Progress, and is a critical function for many of the smaller states in our hemisphere. It is particularly relevant for Caribbean islands who rely on the organization for many projects and activities that are not available through the UN or multilateral development banks. One of the most significant functions the OAS provides is the forum to convene ministers from throughout the hemisphere. These ministers would not meet under any other umbrella. The OAS sponsors ministerial meetings on labor, education, environment, science, culture, tourism, and social development. The U.S. is a prime supporter of the development agenda in the OAS. Last night, in conjunction with the Department of Commerce and City of Charlotte we welcomed the America’s Competitive Exchange, with some 40 entrepreneurs and government officials from throughout the hemisphere. This hands-on connection between innovators and entrepreneurs from the U.S. and the rest of the hemisphere was an example of how the OAS can build positive, practical relationships to promote integral development. Some of our other initiatives include Small Business Development Centers for the Caribbean, a grants program to promote sustainable cities and communities, and the Energy & Climate Partnership of the Americas, a program launched by President Obama at the Summit of the Americas in 2009

#### Adversaries will now exploit gaps to generate instability.

Peter Kouretsos & Josh Chang 20, Research assistant at the Center for Strategic and Budgetary Assessments, M.A. candidate at Georgetown University’s Security Studies Program, and an Associate Editor for the Americas at the Georgetown Security Studies Review; Analyst at the Center for Strategic and Budgetary Assessments and holds an M.A. in Strategic Studies from the Johns Hopkins School of Advanced International Studies, "Wrangling in The West: A Political-Military Approach To Great Power Competition In Latin America," Small Wars Journal, 11/21/2020, https://smallwarsjournal.com/jrnl/art/wrangling-west-political-military-approach-great-power-competition-latin-america.

In a great power competition, most of the United States’ policy attention has focused on East Asia and Eastern Europe. However, the incoming Biden administration should remember George Orwell’s refrain: “To see what is in front of one’s nose needs a constant struggle.” In front of the nose of U.S. leaders is an overlooked fact: a secure, peaceful, and prosperous Western Hemisphere has allowed the U.S. to confidently pursue its national interests abroad. It is imperative for the next administration to factor Latin America more greatly into U.S. strategy.

China, Russia, and Iran are making various advances in front of Washington’s nose. China is growing its investments in the region as an extension of its Belt and Road Initiative. Russia is cementing its ties with anti-U.S. states such as Nicaragua and Venezuela. Iran and its proxy Hezbollah have harnessed illicit networks in the region to finance their operations in the Middle East. For a region so geographically distant from these countries, each competitor has invested significant resources to create conditions that could challenge U.S. interests and hemispheric security. The U.S. will need to compete with these opponents in this arena now if it wishes to maintain its position as the economic, diplomatic, and security partner of choice into the future. An active defense of the U.S. position would also be a broader defense of the shared values, interests, and prosperity that have united the Western Hemisphere.

Attacking Adversarial Asymmetry

Russia, China, and Iran do not have to project extensive military power in the region to compete with Washington. They can challenge it through asymmetric, non-military means to put cumulative pressure on the U.S. and its friends during crises in other theaters. China has constructed a military-administered space facility in Argentina of unknown purposes, is competing to develop the region’s telecommunications architecture, and is operating ports on both sides of the Panama Canal, a strategic waterway for the global economy and the movement of U.S. military forces. Russia continues to provide critical military support to the Maduro regime in Venezuela and has trained more than half of the region’s security services in counterterrorism and counter-narcotics operations. It has also established RT en Español as one of its major information dissemination networks in the region. Iranian-backed Hezbollah has expanded from the Tri-Border Area of Argentina, Paraguay and Brazil to Venezuela, where it is able to launder its money for global operations.

While many of these challenges are primarily economic and political, the strategic implications and the potential for them to grow into something more is significant. In a potential crisis elsewhere, each of these powers can use these different assets to collect intelligence, influence decision-making, and monitor and interdict forces. Sustained refugee outflows in Venezuela could destabilize the Hemisphere. More serious is the possibility that a regime like Maduro’s receives Iranian missiles or more substantial Russian or Chinese military support, creating an A2/AD zone in the southern Caribbean. Economic pressure and news outlets spreading misinformation could undermine coalition-building. Ships may not be able to transit key waterways or resupply from ports. The fusion of these economic, diplomatic, informational, and criminal instruments of statecraft with select military tools presents a hybrid challenge to U.S. and partner interests. One concrete example is China’s role as a leading trade partner and investor in the region, using its economic relationships to uphold anti-U.S. governments and influence local decision-making on behalf of Beijing’s interests. China has aggressively leveraged its economic influence to deprive Taiwan of its remaining diplomatic partners, with nine of the island’s fifteen remaining diplomatic allies located in the Americas. If Beijing seeks to further weaken Taiwan, it can escalate its pressure campaign in this hemisphere and whittle down this list even further in combination with other forms of military and political pressure in the Taiwan Strait. It’s a reminder that what happens in the Western Hemisphere can also profoundly affect developments elsewhere in the world.

#### That undermines global hotspot management.

Lt. Col. Tim Gorrell 05, MA, Strategic Studies, US Army War College, "Cuba: The Next Unanticipated Anticipated Strategic Crisis?" U.S. Army War College, 03/18/2005, pg. 8-13.

The time has come to look realistically at the Cuban issue. Castro will rule until he dies. The only issue is what happens then? The U.S. can little afford to be distracted by a failed state 90 miles off its coast. The administration, given the present state of world affairs, does not have the luxury or the resources to pursue the traditional American model of crisis management. The President and other government and military leaders have warned that the GWOT will be long and protracted. These warnings were sounded when the administration did not anticipate operations in Iraq consuming so many military, diplomatic and economic resources. There is justifiable concern that Africa and the Caucasus region are potential hot spots for terrorist activity, so these areas should be secure. North Korea will continue to be an unpredictable crisis in waiting. We also cannot ignore China. What if China resorts to aggression to resolve the Taiwan situation? Will the U.S. go to war over Taiwan? Additionally, Iran could conceivably be the next target for U.S. pre-emptive action. These are known and potential situations that could easily require all or many of the elements of national power to resolve. In view of such global issues, can the U.S. afford to sustain the status quo and simply let the Cuban situation play out? The U.S. is at a crossroads: should the policies of the past 40 years remain in effect with vigor? Or should the U.S. pursue a new approach to Cuba in an effort to facilitate a manageable transition to post-Castro Cuba?

ANALYSIS OF POLICY ALTERNATIVES

The U.S. can pursue three policy alternatives in dealing with Cuba:

SUSTAIN THE CURRENT POLICY AND FULLY ENFORCE THE ECONOMIC EMBARGO

The crux of the argument for this policy is that sanctions and other restrictions will exert tremendous pressure on the Castro regime, in hope that the regime will fall prior to Castro’s death. There is little indication that this policy will succeed. The U.S. is virtually the only country pursuing a policy to isolate Cuba. In the 1990s Castro was able to develop new trade and markets. While Cuba is not a prosperous country, it has nonetheless managed to endure. The loss of Soviet subsidies, which amounted to 25% of Cuba’s national income, and the loss of the Eastern European bloc as trading partners, which amounted to 75% of Cuba’s import/export trade, left Castro with no alternative but to implement economic changes both internally and externally. 30 These initiatives have stimulated steady, but modest, economic growth.

Today in Cuba, 160,000 people (or 4% of the workforce) are self-employed.31 These entrepreneurial endeavors include small restaurants, taxi drivers, repairmen, and other service industries. If the present course of sanctions continues, the gains of these small reforms will be suppressed leading to significant deprivation for the people involved. Also, Cuba trades with over 100 countries worldwide, so while trade with the U.S. would certainly improve Cuba’s economic well-being, it is debatable whether the lack of U.S. trade is bringing the regime to its knees. The point is that sanctions are not hurting Castro, but are hurting the Cuban population. Restricting trade and travel hurts the small businesses, the tourist industry and others whose livelihood depends on a service economy. It also degrades the quality of life of those Cubans whose financial support comes from family members in the U.S.

Strategists who subscribe to current policy argue that these limitations/hardships will eventually promote an uprising among the populace to overthrow Castro. There is no substantial evidence that this will occur and much that argues against it. While Castro will not live forever, he has outlasted over 45 years of such U.S. policy. He is 78 years old and his father lived to be 80 under significantly less desirable conditions.32 If the present policy course is to wait Castro out this could potentially take another 5-10 years. The wait equates to 5-10 years of despair for the Cuban people, further decay of the country’s infrastructure and more dire conditions that would make democratic reform all the more difficult and costly when Castro actually expires.

Pursuing the present steady state policy will further alienate the Cuban people at home and abroad. The U.S. often has a myopic vision in regard to other cultures. In the case of Cuba, by focusing only on Castro and ignoring the Cuban peoples’ culture and traditions, U.S. policy makers are blinded and have failed to see a future Cuba.

RETAIN SANCTIONS AGAINST CUBA, BUT ENFORCE THEM IN VARYING DEGREES DEPENDING ON THE POLITICAL CLIMATE AND THE CUBAN REGIME’S CONDUCT IN REGARD TO AMERICAN INTERESTS

Throughout the past 15 years, the U.S. has experimented with a variable enforcement option. During the Clinton administration, restrictions were occasionally eased. For example, in March 1998, President Clinton announced: 1) the resumption of licensing for direct humanitarian charter flights to Cuba; 2) the resumption of cash remittances up to $300 per quarter for the support of close relatives in Cuba; 3) the development of licensing procedures to streamline and expedite licenses for the commercial sale of medicines and medical supplies and equipment; and 4) a decision to work on a bipartisan basis with Congress on the transfer of food to the Cuban people.33 In January 1999, President Clinton ordered additional measures to assist the Cuban people, which included further easement of cash remittances, expansion of direct passenger charter flights to Cuba, reestablishment of direct mail service, authorization for the commercial sale of food to independent entities in Cuba, and an expansion of people-to-people exchanges (i.e. scientist, students, athletes, etc.)34 This policy ended when the new administration failed to see any reciprocal progress from Castro.

Fragmenting the policy process may do more harm than good. It does too little too late and causes hard feelings among Cubans and American businesses. The carrot-stick diplomatic approach will not make Castro yield. Such policy breeds inconsistency as it can vary from administration to administration, as it has between the Clinton and Bush administrations. The rules constantly change and thus have a ripple effect on American businesses and the quality of life of Americans, Cuban-Americans and native Cubans.

Cuban trade has already declined to a trickle since the Bush administration sought to further squeeze the Castro government. Prior to the Bush administration’s trade crack down, 2004 was emerging as a record year for U.S. imports to Cuba. By the end of December 2004 U.S. suppliers and shippers were projected to have earned some $450 million, a 20% increase over 2003 sales.35 Imposing restrictions, as the Bush administration did in June 2004, perplexed American businesses with unpredicted problems. These businesses make adjustments, as do Cuban- American citizens, then must abruptly alter their business strategies because of a Congressional vote or an Executive order. This political tug-of-war does not move the U.S. any closer to realizing its security objectives.

On the Cuban American front there is eroding support for this U.S. policy position. In the 2000 presidential election, President Bush won 81% of south Florida’s Cuban-American vote. A recent poll by the William C. Veleasquez Institute-Mirram Global indicates that his support today has fallen to 66%.36 This decline signals a negative response to policy that limits travel, restricts the amount of goods people can bring to their relatives, and places limitations on sending money to family in Cuba. Cuban-Americans believe that this only hurts their poor relatives in Cuba. According to Jose Basulto, head of Brothers to the Rescue, and Ramon Raul Sanchez, head of the anti-Castro Democracy Movement, the U.S. government is using the Cuban people to harass Castro.37 Applying policy in a give-and-take manner, accomplishes little to facilitate the fall of Castro. The Cuban people enjoy brief periods of limited benefits, only to have these benefits withdrawn should the President or members of Congress wish to take another jab at Castro. American civilian businesses are also negatively affected.

LIFT ALL SANCTIONS AND PURSUE NORMAL DIPLOMATIC RELATIONS WITH CUBA

Normalcy is the only policy that the U.S. has not attempted. The present policy misses the security implications, alienates allies and others worldwide, harms U.S. businesses, and is losing support domestically. First, the U.S. must reassess the threat posed by Cuba. There is, in fact, virtually no security threat. Further, policies that were applicable in the past, when there was a threat, should not be applied to the current environment. The U.S. Cuban policy is perplexing because it appears to conflict with the ends, ways and means that the National Security Strategy is applied in other regions of the world. The U.S. has normalized relations with Vietnam and Libya and has certainly opted for an open dialogue with Communist China. Likewise, there is abundant evidence that a new policy toward Cuba could very well achieve the ends that 43 years of embargo have failed to accomplish.

Secondly, Cuba currently trades and has diplomatic ties with much of the world. The goal of U.S. sanctions is to isolate the Cuban regime; however, they have only slowed, not deterred economic growth. On 4 November 2003 the United Nations voted, for the 12th straight year, 173 to 3 (with 4 abstentions) against the four-decade U.S. embargo against Cuba.38 Voting with the U.S. were Israel and the Marshall Islands. The U.S.’ staunchest allies, the 15 members of the European Union, along with Japan, Australia and New Zealand, all object to the “extra-territorial” effect of U.S. legislation that they feel violates their sovereignty. 39 There are two schools of thought regarding trade and democracy. The first is that economic growth will promote democracy. The other questions this notion and argues that democracy must come first. 40 There is strong opinion, however, that in Cuba’s case economic engagement will bring about the desired results. Certainly many Cuban-Americans and perhaps some others in the world would not agree with this course of action. However, there is evidence that a significant number of people both within the U.S. and abroad favor a policy change. In 1992 a pastoral letter from Cuba’s Bishops stated that the US embargo “directly affects the people who suffer the consequences in hunger and illness. If what is intended by this approach is to destabilize the government by using hunger and want to pressure civic society to revolt, then the strategy is also cruel.“41

The third consideration is U.S. business. Under the current rules, U.S. businesses are permitted to sell agricultural produce to Cuba.42 Today 27 firms from 12 U.S. states are doing business with Cuba, making Cuba 22nd among U.S. agricultural markets.43 These business activities are greatly influenced by Cuban-Americans and members of Congress. The economic power of the U.S. can be our most powerful weapon. The possibilities of economic engagement offer a myriad of branches and sequels that could promote a rapport between the American people and the Cubans. The aggressive pursuit of these endeavors would go far in ensuring an orderly transition to a post-Castro Cuba. It is an erroneous assumption to believe that Castro’s demise will miraculously trigger reform and all the problems of the last 40 years will vanish. A visionary policy, albeit constrained within the parameters of the Castro regime, will go far in setting agreeable social-economic conditions in Cuba both now and in the future.

Finally, public opinion in the U.S. favors a new policy direction. A 1997 Miami Herald poll found that a majority of Cubans under the age of 45 supported “establishing a national dialogue with Cuba,” whereas for the most part their elders opposed such dialogue.44 Former President Jimmy Carter, writing in the Washington Post after his May 2002 visit to Cuba, reported that he found an unexpected degree of economic freedom. Carter went on to say that if Americans could have maximum contact with Cuban, then Cubans would clearly see the advantages of a truly democratic society and thus be encouraged to bring about orderly changes in their society. 45 Castro himself appears willing to consider greater reform. In 1998 he permitted Pope John Paul II to visit Cuba; Cubans are permitted to own property; he has opened trade; and in 2002 he broadcast former President Jimmy Carter’s address at the University of Havana.46 Additionally, he indicated that the Cuban government would return any of the Guantanamo detainees in the unlikely event that they would escape.47

CONCLUSION AND RECOMMENDATION

U.S. policy makers need to confront the real Cuba of today in order to build a “free” Cuba of tomorrow that is capable of taking its place in the world community as a responsible, democratic nation. Given the history of the past 100 years, and particularly our Castro centric policy, the U.S. needs to make a bold change toward Cuba. The U.S. has pursued a hard-line approach toward the Castro regime for over 40 years. While this policy was easily justified during the Cold War era and, to a certain degree, during the 1990s, it fails to address the present U.S. national security concerns. The globalization trends of the 21st century are irreversible, Fidel Castro is in the twilight of his life, and a new generation of Cuban-Americans is supportive of new strategies that will ease the transition to a post-Castro Cuba while buttressing economic and social opportunities in the near term. Furthermore, there is a new dimension that U.S. policy strategists must take into account in deciding the course of U.S.- Cuba relations – the GWOT. World-wide asymmetrical threats to U.S. interests, coupled with the Iraqi occupation and the potential for any one of the present hot spots (i.e. Iran, North Korea, Taiwan, etc.) to ignite, should prompt strategic leaders to work harder to mitigate a potential Caribbean crises. The prudent action would then be to develop strategies that can defuse or neutralize these situations before they require the U.S. to divert resources from protecting its interests in the GWOT.

#### Iran, Israel, Turkey, South Asia, and Korea are all triggers---each causes World War III

Kaisha Langton 9-1, MA from Queen Mary, University of London, BA from Swansea University, News Associate Degree in Journalism from News Associates London, Journalist at Daily Express, Former Reporter at Newsquest, “World War 3 MAPPED: The SIX Places Where WW3 Could Break Out In 2021”, Express, 9/1/2021, https://www.express.co.uk/news/world/1224361/world-war-3-map-where-could-world-war-3-start-in-2020-ww3-latest-news

World War 3 concerns have spiked in the wake of devastating news from Afghanistan. In a matter of days, Taliban fighters have taken control of Afghanistan - over the weekend storming the capital. Hundreds of thousands of Afghans are now in hiding or attempting to flee to other countries in a bid to find safety from this group. Given the tense relations between countries around the world, Express.co.uk has compiled a guide for the flashpoints where World War 3 is most likely to erupt in 2021.

US-Iran

The UN's nuclear watchdog has said Iran continues to produce uranium metal.

In a report issued by the International Atomic Energy Agency in Vienna to UN member states, Director General Rafael Mariano Grossi said that his inspectors had confirmed on Saturday that Iran had now produced 200 grams of uranium metal enriched up to 20 percent.

Mr Grossi previously said 3.6 grams of uranium metal had been produced at Iran's Isfahan plant.

The worsening relations between the US and Iran is thought likely to have serious economic, political and security ramifications for the USA and its allies.

If the two nations were to engage in military conflict, Iran could opt to block the Strait of Hormuz, through which 30 percent of the world's oil travels.

This would result in global oil prices rising and could risk the USA's relationship with its allies.

Any outbreak of war between the USA and Iran could also see an escalation of tensions in other countries including Syria and Yemen or a rise in Iranian missile strikes targeting US troops in the Middle East.

Iran-Israel

Tensions between Iran and Israel have been frustrated for a while with low-intensity warfare raging across the Middle East as a result.

The former nation supports anti-Israel groups in Gaza, Syria and Lebanon in particular, while Israel often strikes at Iranian forces across the region.

Overall, Israel has endeavoured to create an anti-Iran coalition at a diplomatic level, while Iran has invested in cultivating ties with militias and non-state actors.

While it may be difficult to claim these nations will launch into a wider war if Iran is determined to restart its nuclear program, Israel may choose to engage in wider strikes hitting the Iranian homeland directly.

This type of assault could have wider implications as it could prove to be a threat to global oil supplies which would inevitably cause more nations to intercede.

The two nations have been embroiled in a bitter exchange in recent months, particularly recently after the Islamic Republic was implicated in the drone strike on an oil tanker, owned by Israeli billionaire Eyal Ofer, off the coast of Oman.

Two crew members, a Briton and a Romanian, recently died in the attack.

Israel's Defense Minister Benny Gantz warned of an armed response and the Israeli Prime Minister indicated his country must "act alone" against Tehran.

US-Turkey

Tensions between the US and Turkey has heightened in recent years, initially as a result of the US providing authorisation to Turkey to clear the Syrian border of US-supported Kurds.

However, immediately afterwards, the US threatened Ankara with sanctions, causing tensions to rise.

Additionally, Turkish President Recep Tayyip Erdogan suggested he has aspirations for Turkey which could involve nuclear weapons.

As a result, the state of the US-Turkey relationship has worsened, causing fear about the subsequent impact on the NATO alliance.

President Erdogan is known for being passionate about his plan which could force Washington and Ankara to the very edge and have a result on Russia who is a neighbouring nation.

Turkish forces launched airstrikes and a ground offensive against PKK fighters in northern Iraq earlier this year.

In June, Turkish Foreign Minister Mevlut Cavusoglu said the Makhmour refugee camp in northern Iraq must be cleared of people he called Kurdish militants.

He said Turkey will clear the militants alone if the Iraqi Government does not and Turkish airstrikes killed three people at the camp.

Kashmir

In the past 10 years, the relationship between India and Pakistan has worsened, bringing the countries to the brink of war.

Since the partition of British India in 1947 and the subsequent creation of India and Pakistan, the two countries have been involved in a number of wars, conflicts and military stand-offs interspersed with periods of harmony and peace.

In 2019, Prime Minister Narendra Modi attempted to reduce the autonomy of Kashmir and to change citizenship policies within the rest of India.

These steps have caused some unrest within India and highlighted the long-standing tensions between Delhi and Islamabad.

Further domestic disturbances in India and Pakistan could lead to World War 3.

While this is unlikely, it could lead to terrorist attacks internationally or in Kashmir.

Prime Minister Modi might then feel forced to bring on a more serious conflict and given China’s vicinity, and the growing relationship between Delhi and Washington could lead to more disastrous international implications.

Indian and Pakistani intelligence officials held secret talks in Dubai in January in an effort to deescalate tensions over the Kashmir region, sources claim.

The United Arab of Emirates is also reportedly helping to mediate.

Hundreds of people in Birmingham marched across the region over the Kashmiri independence pelea.

Demonstrators walked calling on India to work in accord with the United Nations over the issue and end human rights violations, demand the return of civil liberties and release political prisoners.

Afghanistan

The nation of Afghanistan is in a state of crisis after Taliban fighters stormed the capital over the weekend.

Kabul was the last major city in the country to fall, there were scenes of panic across the region.

The airport was closed earlier for soldiers to try and clear the runways - US military planes are now landing, including one carrying US marines.

US President Joe Biden has defended his decision to pull out of Afghanistan, admitting events developed quicker than he thought.

He blamed Afghan leaders for the collapse.

Many Afghans left behind have spoken to the terror on the ground, with witnesses reporting occasional gunfire.

At least five people were reportedly killed at the airport on Monday as thousands tried to flee.

President Ashraf Ghani fled Afghanistan yesterday as Taliban leaders broadcast a victory message from the presidential palace in Kabul.

A UN document has warned the Taliban has now stepped up its search for people who worked for Nato or the previous Afghan Government.

Door-to-door searches are reportedly being undertaken in a bid to find targets and threaten their family members.

The hardline Islamist group has tried to reassure Afghans since seizing power in a lightning offensive, promising there would be "no revenge".

But these recent actions indicate the Taliban's tactics have not changed since it was in power during the 1990s.

US troops have now withdrawn from Afghanistan and the Taliban has called the nation a "free and sovereign" state, describing the departure of US troops as "historic".

US-North Korea

Fundamental tensions at the heart of the US-North Korea relationship could result in combative action.

North Korea accused US leader Joe Biden of pursuing a hostile policy against it and warned a response could leave the USA in a "very grave situation".

The North Korean foreign ministry said diplomacy was a “spurious signboard” for the US to “cover up its hostile acts,” according to state media agency KCNA.

These incendiary comments were made after President Joe Biden delivered a policy speech to Congress earlier this month during which he discussed nuclear programs in North Korea and Iran saying they posed threats which must be addressed through "diplomacy and stern deterrence".

This was just one of the explosive comments directed at the US.

Pyongyang also blasted Washington for criticizing its human rights record and Seoul for failing to stop anti–North Korea leaflets from being sent across the border.

Speaking on the topic of North Korea, first-term US leader Mr Biden said he is seeking middle ground between former president Donald Trump's emphasis on personal diplomacy and former president Barack Obama's approach of conditioning engagement on North Korean concessions.

As North Korea is a nuclear power with its own complex relationship with China, it is a critical nation for US national security concerns.

The nations undertake many weapons and missile tests, small-scale military and cyber attacks with each posing a significant risk for potential escalation.

#### OAS cred’s key to Latin American stability

Lawrence J. Gumbiner 14, Deputy U.S. Permanent Representative to the Organization of American States, World Affairs Council of Charlotte, North Carolina, HumanRights.org, “The OAS and the Inter-American System”, 4/4/2014, <http://www.humanrights.gov/2014/04/04/the-oas-and-the-inter-american-system/>

Democracy On democracy, the United States is committed to working through the OAS to foster democratic governance and protect fundamental rights and liberties enshrined in the Inter-American Democratic Charter. Today, this Democratic Charter is at the core of a principled multilateralism in the Americas. With its adoption in September 2001, no OAS member state can be a disinterested spectator to what occurs in our hemisphere. The Charter, reflects a significant hemispheric commitment to the collective defense of regional democracy; a shared desire to lock in the democratic gains of recent decades and prevent a return to autocratic rule. Acting under the Inter-American Democratic Charter, and in the spirit of the Charter, the OAS has helped member states where democratic practices or institutions have been challenged. Of particular note was the OAS’ important role in Haiti, where it worked on voter registration and distribution of over 3.4 million ID cards that was essential for that country to make the transition to a functioning democracy and the elections in 2006. The OAS plays a critical role in Colombia through its mission for demobilization of illegal armed groups. In the event of a peace agreement with the guerrilla organization FARC, the OAS will be ready if requested to perform a similar function. Following the 2009 coup in Honduras, the OAS stepped in to help restore democracy. And in Venezuela, the OAS has remain engaged over the years in an effort to support and preserve democratic institutions in that country. As you are aware, a strong and vibrant debate is presently occurring at the OAS on how to deal with Venezuela’s current crisis after more than a month of protests. Fulfilling the promise of the Democratic Charter to proactively address threats to democracy is not an easy task among 34 sovereign states in a consensus-based organization. It is one of the key challenges facing the OAS as it adapts to hemispheric developments in the 21st century. Election Observation Missions (EOMS) Democracy starts with clean elections, and election observation is a key element in OAS efforts to strengthen democracy in the hemisphere. This year, the OAS has fielded or will be fielding high quality election observer missions — or EOMs — in El Salvador, Costa Rica, Colombia, Panama and Bolivia. We also expect they will assist with elections in Haiti and Antigua and Barbuda when elections there are called. The OAS enjoys a longstanding reputation for impartiality and technical competence on elections, respected worldwide for stringent standards in accordance with the United Nations supported “Principles for International Election Observation”. But what is particularly critical today is the recognition that a free and fair election is more than just counting up the ballots; indeed, the biggest threats to democratic elections in the Americas no longer come from elections that are “stolen” at the ballot box. The integrity of voter information, the politicization of electoral authorities, a weakened media, civil society and inadequate separation of powers ― are all factors that contribute to the integrity of elections. To that end, the OAS has developed groundbreaking new methodologies on such issues as campaign finance, media and gender. It is also working on election integrity and security, and sub-represented groups. The organization has created the first ever electoral quality management standard for electoral processes, officially endorsed by the International Organization for Standardization. These new approaches reflect a progressive vision of what electoral observation and analysis should be today. It is for that reason that despite much polarization in the region, the OAS stamp of approval on elections still represents the gold standard and is sought after by almost all electoral authorities in the hemisphere. Human Rights Furthering democracy through human rights is one of the institution’s most significant contributions. The Inter-American Human Rights System (IAHRS) ― the “crown jewel” of the inter-American System ― is comprised of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The United States is proud to be the largest financial supporter of the Commission, which is located in Washington. It is comprised of seven Commissioners, and eight thematic rapporteurships, including an independent Special Rapporteur on Freedom of Expression. The Commission played an historically significant role in helping to combat the dictatorships of the 1980s ― particularly in the Southern Cone and Central America ― and bring about the growth of democracy that the region enjoys today. The Commission provides a critical forum for citizens — whether acting through NGOs or on their own — to seek redress of alleged human rights abuses. One of its most important functions is to produce country reports — well documented assessments of human rights conditions and issues in countries throughout the region, with a focus on the most egregious examples of human rights abuses. While the United States is not a party to the American Convention on Human Rights ― we signed it in 1977 but have not ratified it ― and is thus not subject to the jurisdiction of the Costa-Rica based Court, we are nevertheless a strong supporter of the court’s important regional role in protecting human rights. The future of the IAHRS is one of the most politically charged debates at the OAS today. For several years the System ― particularly the Commission and its Special Rapporteur on Freedom of Expression ― have come under sharp criticism from countries, led by Ecuador, who chafe under the scrutiny that the Commission provides. They are seeking dramatic changes, including a reduction in funding and moving of the HQ out of Washington. The United States has been and will remain a firm supporter of this important institution, and we will continue our financial assistance as well as political backing to assure that this remains the backbone of human rights advocacy in the hemisphere.

#### Draws in great powers---goes nuclear

Eric **Lindsey 14** & Andrew F. Krepinevich. Krepinevich, Jr. is the President of the Center for Strategic and Budgetary Assessments; Lindsey is an analyst at the Center for Strategic and Budgetary Assessments (CSBA). 01-09-14. “Hemispheric Defense in the 21st Century.” CSBA. https://csbaonline.org/research/publications/hemispheric-defense-in-the-21st-century

As the previous chapter demonstrates, for the past two hundred years the principal cause of concern for U.S. defense policymakers and planners thinking about Latin America has been the prospect that great powers outside the Western Hemisphere could exploit the military weakness and internal security challenges of the states within it to threaten U.S. security. While there is reason for optimism about the future of Latin America,58 there is also cause for concern. The region faces enduring obstacles to economic59 and political development60 as well as signi􀂿cant internal security challenges. As General John Kelly, the commander of U.S. Southern Command (SOUTHCOM)61 noted in his March 2013 posture statement before Congress, Latin America: 􀀾I􀁀s a region of enormous promise and exciting opportunities, but it is also one of persistent challenges and complex threats. It is a region of relative peace, low likelihood of interstate con􀃀icts, and overall economic growth, yet is also home to corrosive criminal violence, permissive environments for illicit activities, and episodic political and social protests.62 The instability and non-traditional security challenges that General Kelly cites provide potential opportunities for the United States’ major rivals to (borrowing a term from Monroe’s declaration) “interpose” themselves into the region and, by so doing, threaten regional stability and U.S. security. Two discernible trends suggest that current and prospective Eurasian rivals could seek to exploit regional conditions and dynamics in ways that could impose immense costs on the United States and divert its attention from more distant theaters overseas. The first trend is a return to a heightened level of competition among the “great powers” following two decades of U.S. dominance. The second trend concerns the growing cost of projecting power by traditional military means due to the proliferation of “anti-access/area-denial” (A2/AD) capabilities in general, and precision-guided munitions (PGMs) in particular. These trends suggest that, despite a possible decline in relative U.S. power, external forces will continue to 􀂿nd it beyond their means to threaten the hemisphere through traditional forms of power projection. Far more likely is a return of a competition similar to that which the United States engaged in with the Soviet Union during the Cold War. During that period both powers sought to avoid direct con􀃀ict with the other, given the risks of escalation to nuclear con􀃀ict. Instead each focused primarily on gaining an advantage over the other through the employment of client states and non-state groups as proxies. Proxies were employed for reasons other than avoiding a direct clash, such as gaining positional advantage (e.g., enabling the sponsor to establish bases in its country, as the Soviets did in Cuba). Proxies were also employed as a means of diverting a rival’s attention from what was considered the key region of the competition and to impose disproportionate costs on a rival (e.g., Moscow’s support of 􀀱orth Vietnam as a means of drawing o􀌆 U.S. resources from Europe). This chapter outlines trends in the Western Hemisphere security environment that outside powers may seek to exploit to advance their objectives in ways that threaten regional stability and U.S. security. This is followed by a discussion of how these external powers might proceed to do so. Seeds of Instability Crime, Illicit Networks, and Under-Governed Areas Latin America has a long history of banditry, smuggling, and organized crime. As in the case of Pancho Villa and the 1916-1917 Punitive Expedition, these activities have occasionally risen to a level at which they in􀃀uence U.S. national security calculations. Rarely, however, have these activities been as pervasive and destabilizing as they are today. Although a wide variety of illicit activity occurs in Latin America, criminal organizations conducting drug tra􀌇cking are the dominant forces in the Latin American underworld today, accounting for roughly 􀀇􀀗0 billion per year63 of an estimated 􀀇100 billion in annual illicit trade.6􀀗 Since the Colombian cartels were dismantled in the 1990s, this lucrative trade has been dominated by powerful Mexican cartels whose operations extend across the length and breadth of Mexico, as well as up the supply chain into the cocaine-producing regions of the Andean Ridge and through their wholesale and retail drug distribution networks across the United States.65 The cartels, along with countless smaller criminal organizations, comprise what the head of SOUTHCOM has described as, 􀀾a􀁀n interconnected system of arteries that traverse the entire Western Hemisphere, stretching across the Atlantic and Paci􀂿c, through the Caribbean, and up and down 􀀱orth, South, and Central America . . . 􀀾a􀁀 vast system of illicit pathways 􀀾that is used􀁀 to move tons of drugs, thousands of people, and countless weapons into and out of the United States, Europe, and Africa with an e􀌇ciency, payload, and gross pro􀂿t any global transportation company would envy.66 That being said, the drug tra􀌇cking underworld is by no means a monolithic entity or cooperative alliance. Rather, it is a fractious and brutally competitive business in which rival entities are constantly and literally 􀂿ghting to maximize their share of the drug trade and for control of the critical transshipment points, or plazas, through which it 􀃀ows. To attack their competitor’s operations and protect their own operations from rivals and the Mexican government’s crackdown that began in 2006, the cartels have built up larger, better armed, and more ruthless forces of hired gunmen known as sicarios. Using the billions of dollars generated by their illicit activities, they have acquired weapons and equipment formerly reserved for state armies or state-sponsored insurgent groups, including body armor, assault ri􀃀es, machine guns, grenades, landmines, anti-tank rockets, mortars, car bombs, armored vehicles, helicopters, transport planes, and—perhaps most remarkably—long-range submersibles.67 The cartels’ pro􀂿ts have also enabled them to hire former police and military personnel, including members of several countries’ elite special operations units68 and, in several cases, active and former members of the U.S. military.69 These personnel bring with them—and can provide to the cartels—a level of training and tactical pro􀂿ciency that can be equal or superior to those of the government forces they face. As a result of this pro􀂿ciency and the military-grade weapons possessed by the cartels, more than 2,500 Mexican police o􀌇cers and 200 military personnel were killed in confrontations with organized crime forces between 2008 and 2012 along with tens of thousands of civilians.70 In the poorer states of Central America, state security forces operate at an even greater disadvantage.71 While their paramilitary forces enable the cartels to dominate entire cities and large remote areas through force and intimidation, they are not the only tool available. The cartels also leverage their immense wealth to buy the silence or support of police and government o􀌇cials who are often presented with a choice between plata o plomo—“silver or lead.” According to the head of the Mexican Federal Police, around 2010 the cartels were spending an estimated 􀀇100 million each month on bribes to police.72 By buying o􀌆 o􀌇cials—and torturing or killing those who cannot be corrupted—the cartels have greatly undermined the e􀌆ectiveness of national government forces in general and local police in particular. This, in turn, has undermined the con􀂿dence of the population in their government’s willingness and ability to protect them. Through these means and methods the cartels have gained a substantial degree of de facto control over many urban and rural areas across Mexico, including major cities and large swathes of territory along the U.S.-Mexico border. In many of these crime-ridden areas the loss of con􀂿dence in the government and police has prompted the formation of vigilante militias, presenting an additional challenge to government control.73 Meanwhile, in the “northern triangle” of Central America (the area comprising Guatemala, Honduras, and El Salvador through which the cartels transship almost all cocaine bound for Mexico and the United States) the situation is even more dire. Approximately 90 percent of crimes in this area go unpunished, while in Guatemala roughly half the country’s territory is e􀌆ectively under drug tra􀌇ckers’ control.7􀀗 Further south, similar pockets of lawlessness exist in coca-growing areas in Colombia, Venezuela, Ecuador, Peru, and Bolivia. In Colombia and along its borders with Venezuela, Ecuador, and Peru, much of the coca-growing territory remains under the control of the Revolutionary Armed Forces of Colombia, or FARC. A guerrilla organization founded in the 1960s as a Marxist-Leninist revolutionary movement dedicated to the overthrow of the Colombian government, the FARC embraced coca growing in the 1990s as a means of funding its operations and has subsequently evolved into a hybrid mix of left-wing insurgent group and pro􀂿t-driven cartel.76 This hybrid nature has facilitated cooperation between the FARC and ideological sympathizers like the Bolivarian Alliance, Hezbollah, Al Qaeda in the Islamic Maghreb, and other extremist groups77 as well as with purely criminal organizations like the Mexican cartels. Although the FARC has been greatly weakened over the past decade and no longer poses the existential threat to the Colombian government that it once did, it remains 􀂿rmly in control of large tracts of coca-producing jungle, mostly straddling the borders between Colombia and FARC supporters Venezuela and Ecuador. In summary, organized crime elements have exploited under-governed areas to establish zones under their de facto control. In so doing they pose a signi􀂿cant and growing threat to regional security in general and U.S. interests in particular. As SOUTHCOM commander General Kelly recently observed: 􀀾T􀁀he proximity of the U.S. homeland to criminally governed spaces is a vulnerability with direct implications for U.S. national security. I am also troubled by the signi􀂿cant criminal capabilities that are available 􀀾within them􀁀 to anyone—for a price. Transnational criminal organizations have access to key facilitators who specialize in document forgery, trade-based money laundering, weapons procurement, and human smuggling, including the smuggling of special interest aliens. This criminal expertise and the ability to move people, products, and funds are skills that can be exploited by a variety of malign actors, including terrorists.78 Hezbollah and the Bolivarian Alliance Hezbollah in Latin America 􀀱on-state entities recognized by the U.S. as terrorist organizations also operate in the region, most notably Lebanon-based Hezbollah, an Iranian client group. Hezbollah maintains an active presence in the tri-border area (TBA) of South America— the nexus of Argentina, Brazil, and Paraguay—stretching back to the 1980s. The TBA has traditionally been under-governed and is known by some as “the United 􀀱ations of crime.”79 Eight syndicate groups facilitate this activity in South America’s so-called “Southern Cone,” overseeing legitimate businesses along with a wide range of illegal activities to include money laundering, drug and arms traf- 􀂿cking, identity theft and false identi􀂿cation documents, counterfeiting currency and intellectual property, and smuggling. 􀀱ot surprisingly they are linked to organized crime and to non-state insurgent and terrorist groups, such as the FARC.80 Estimates are that over 􀀇12 billion in illicit transactions are conducted per year, a sum exceeding Paraguay’s entire GDP by a substantial amount.81 Hezbollah achieved notoriety in the region in 1992 when it bombed the Israeli embassy in Argentina. This was followed with the bombing of the AMIA Jewish community center in Buenos Aires two years later. Like many other terrorist organizations, as Hezbollah expanded it established relationships with drug cartels82 that it supports in a variety of ways. For example, the cartels have enlisted Hezbollah, known for its tunnel construction along the Israeli border, for help in improving their tunnels along the U.S.-Mexican border. In 2008, Hezbollah helped broker a deal in which one of Mexico’s major drug cartels, Sinaloa, sent members to Iran for weapons and explosives training via Venezuela using Venezuelan travel documents. 83 As the locus of the drug trade and other illegal cartel activities moved north into Central America and Mexico, Hezbollah has sought to move with it with mixed success. In October 2011, Hezbollah was linked to the e􀌆orts of an Iranian-American to conspire with Iranian agents to assassinate the Saudi ambassador to the United States. The plot involved members of the Los Zetas Mexican drug cartel.8􀀗 The would-be assassin, Mansour Arbabsiar, had established contact with his cousin, a Quds Force85 handler, Gen. Gholam Shakuri. The plot is believed by some to be part of a wider campaign by the Quds Force and Hezbollah to embark on a campaign of violence extending beyond the Middle East to other Western targets, including those in the United States.86 In early September 2012, Mexican authorities arrested three men suspected of operating a Hezbollah cell in the Yucatan area and Central America, including a dual U.S.-Lebanese citizen linked to a U.S.-based Hezbollah money laundering operation. 87A few months later, in December 2012, Wassim el Abd Fadel, a suspected Hezbollah member with Paraguayan citizenship, was arrested in Paraguay. Fadel was charged with human and drug tra􀌇cking and money laundering. Fadel reportedly deposited the proceeds of his criminal activities—ranging from 􀀇50-200,000 per transaction—into Turkish and Syrian bank accounts linked to Hezbollah. In summary, Hezbollah has become a 􀂿xture in Central and Latin America, expanding both its activities and in􀃀uence over time. It has developed links with the increasingly powerful organized crime groups in the region, particularly the narco cartels, along with radical insurgent groups such as the FARC and states like Venezuela who are hostile to the United States and its regional partners. Hezbollah’s principal objectives appear to be undermining U.S. in􀃀uence in the region, imposing costs on the United States, and generating revenue to sustain its operations in Latin America and elsewhere in the world. These objectives are shared by Iran, Hezbollah’s main state sponsor. The Bolivarian Alliance As noted above, geographic, economic, and cultural factors have traditionally helped to prevent the emergence in Latin America of any real military rival to the United States. Although there are no traditional military threats in the region, there are indigenous states whose actions, policies, and rhetoric challenge regional stability and U.S. security. Over the past decade, several states have come together to form the Bolivarian Alliance of the Americas (ALBA), an organization of left-leaning Latin American regimes whose overarching purpose is to promote radical populism and socialism, foster regional integration, and reduce what they perceive as Washington’s “imperialist” influence in the region.89 Since its founding by Hugo Chavez of Venezuela and Fidel Castro of Cuba in December 200􀀗, the Bolivarian Alliance has expanded to include Antigua and Barbuda, Bolivia, Dominica, Ecuador, 􀀱icaragua, and Saint Vincent and the Grenadines. Although the members of the Bolivarian Alliance are militarily weak and pose almost no traditional military threat to the United States or its allies in the region,90 they challenge American interests in the region in other ways. First, they espouse an anti-American narrative that finds substantial support in the region and consistently oppose U.S. efforts to foster cooperation and regional economic integration.91 Second, in their efforts to undermine the government of Colombia, which they consider to be a U.S. puppet, ALBA states provide support and sanctuaries within their borders to coca growers, drug traffickers, other criminal organizations, and the FARC.92 Links to Hezbollah have also been detected.93 Perhaps of greatest concern, they have aligned themselves closely with Iran, inviting it and Syria to participate as “observer states” in the alliance. Other worrisome ALBA activities involve lifting visa requirements for Iranian citizens and hosting large numbers of Iranian diplomats and commercial exchange members that some observers believe to be Iranian intelligence and paramilitary Quds Force operatives.9􀀗 By hosting and cooperating with both foreign agents and violent non-state actors, the ALBA states have come to function as critical nodes in a network of groups hostile to the United States. A Coming Era of Proxy Wars in the Western Hemisphere? History shows that Washington has often emphasized an indirect approach to meeting challenges to its security in Latin America. Yet the United States has not shied away from more direct, traditional uses of force when interests and circumstances dictated, as demonstrated over the past half century by U.S. invasions of the Dominican Republic (1965), Grenada (1983), and Panama (1989) and the occupation of Haiti (199􀀗).Yet several trends seem likely to raise the cost of such operations, perhaps to prohibitive levels. Foremost among these trends is the diffusion of precision-guided weaponry to state and non-state entities. 92 The Second Lebanon War as “Precursor” War A precursor of this trend can be seen in the Second Lebanon War between Israel and Hezbollah.95 During the con􀃀ict, which lasted less than 􀂿ve weeks, irregular Hezbollah forces held their own against the highly regarded Israeli Defense Force (IDF), demonstrating what is now possible for non-state entities to accomplish given the proliferation of militarily-relevant advanced technologies. Hezbollah’s militia engaged IDF armor columns with salvos of advanced, man-portable, antitank guided missiles and other e􀌆ective anti-armor weapons (e.g. rocket-propelled grenades (RPGs) with anti-armor warheads) in great numbers. When the IDF employed its ground forces in southern Lebanon, its armored forces su􀌆ered severe losses; out of the four hundred tanks involved in the 􀂿ghting in southern Lebanon, forty-eight were hit and forty damaged.96 Hezbollah’s defensive line was also well equipped with latest-generation thermal and low-/ no-light enhanced illumination imaging systems, while frontline units were connected to each other and higher command elements via a proprietary, 􀂿ber-optic based communications network, making collection of communications tra􀌇c by Israeli intelligence extremely di􀌇cult. Perhaps most important, Hezbollah possessed thousands of short- and medium- range rockets, often skillfully hidden below ground or in bunkers that made detection from overhead surveillance platforms nearly impossible. During the brief con􀃀ict Hezbollah’s forces 􀂿red some four thousand unguided rockets of various types that hit Israel. Hezbollah’s rocket inventory enabled its forces to attack targets throughout the northern half of Israel. Over nine hundred rockets hit near or on buildings, civilian infrastructure, and industrial plants. Some two thousand homes were destroyed, and over 􀂿fty Israelis died with several thousand more injured. The casualties would undoubtedly been greater if between 100,000 and 250,000 Israeli civilians had not 􀃀ed their homes. Haifa, Israel’s major seaport had to be shut down, as did its oil re􀂿nery.97 Hezbollah also employed several unmanned aerial vehicles for surveillance of Israel, as well as C-802 anti-ship cruise missiles used to attack and damage an Israeli corvette. 98 The G-RAMM Battlefield The brief war between Israel and Hezbollah suggests that future irregular forces may be well-equipped with enhanced communications, extended-range surveillance capabilities, and precision-guided rockets, artillery, mortars and missiles (G-RAMM) 99 able to hit targets with high accuracy at ranges measured from the tens of kilometers perhaps up to a hundred kilometers or more. In projecting power against enemies equipped in this manner and employing these kinds of tactics U.S. forces—as well as other conventional forces— will find themselves operating in a far more lethal battlefield than those in either of the Gulf wars or in stability operations in Afghanistan and Iraq. Moreover, currently constituted conventional forces typically depend on large fixed infrastructure (e.g., military bases, logistics depots, ports, airfields, railheads, bridges) to deploy themselves and sustain combat operations. These transportation and support hubs also serve as the nodes through which internal commerce and foreign trade moves within a country. This key, fixed infrastructure will almost certainly prove far more difficult to defend against irregular forces armed with G-RAMM weaponry. Indeed, had Hezbollah’s “RAMM” inventory had only a small fraction of G-RAMM munitions, say 10-20 percent, it would have been able to in􀃀ict far greater damage than it did historically to Israeli population centers, key government facilities, military installations, and essential commercial assets such as ports, air􀂿elds, and industrial complexes. An irregular enemy force armed with G-RAMM capabilities in substantial numbers could seriously threaten Latin American governments as well as any U.S. (or external great power) forces and support elements attempting a traditional intervention operation. Implications for the U.S. and Other Major Powers The preceding narrative suggests that the combat potential of irregular forces is likely to increase dramatically in the coming years. As this occurs, the cost of operating conventional forces—especially ground forces—and defending key military support infrastructure is likely to rise substantially. Given these considerations the United States and other major powers external to the Western Hemisphere will have strong incentives to avoid the use of conventional forms of military power, particularly large ground forces, in favor of employing irregular proxy forces to advance their interests. Moreover, the high cost and questionable bene􀂿t of the campaigns in Afghanistan and Iraq are likely to create strong domestic opposition in the United States to such operations for some time to come. This must be added to the United States’ greatly diminished 􀂿scal standing that has led to large cuts in planned investments in defense. These factors suggest that Washington will be much less likely to engage in direct military action in Latin America in the coming years than historically has been the case. At the same time, rivals of the United States like China and Russia may be incentivized by these trends, as well as the United States’ overwhelming military dominance in the Western Hemisphere, to avoid the direct use of force to expand their in􀃀uence in Latin America. Instead, like some of the Bolivarian Alliance members, they appear likely to follow the path taken by the Soviet Union during the Cold War and Iran today: supporting non-state proxies to impose disproportionate costs on the United States and to distract Washington’s resources and attention from other parts of the world. This is not to say that Beijing, Moscow, and Tehran would eschew future opportunities to establish bases in Latin America. As in the past, such bases can support efforts to accomplish several important objectives. They can, for example, further insulate a Latin American regime from the threat of direct U.S. military intervention, since Washington would have to account for the possibility that the conflict would lead to a direct confrontation with a more capable and potentially nuclear-armed power .100 Bases in the hemisphere can also enable external powers to conduct military assistance activities, such as training, more easily. Electronic surveillance of the United States and Latin American states could be accomplished more cheaply and e􀌆ectively from forward positions. Finally, certain kinds of military capabilities, such as long-range ballistic missiles and attack submarines, could be pro􀂿tably stationed in Latin America by powers external to that region, particularly if they intended to create the option of initiating con􀃀ict at some future date. These reasons, among others, have made preventing an extra-hemispheric power from establishing bases in Latin America an enduring U.S. priority. Players in a Latin American Great Game Given current trends, several powers external to the region may, either now or over the coming decade, have both the motive and the means to employ both state and non-state proxies in Latin American to achieve their interests. Principal among them is Iran, which is already engaged in supporting proxies against the United States and its partners in the Middle East and has long been developing proxies in Latin America. Additionally, there are reasons to think that China and Russia may be interested in cultivating and supporting Latin American proxies as well.

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

# 2AC

## Trade ADV

## Harmonization ADV

## OAS ADV

## OFF

### T Per Se---2AC

#### ‘Prohibition’ is injunction. That can happen after review.

Sarah E. Light 19, Assistant Professor of Legal Studies and Business Ethics at the The Wharton School at the University of Pennsylvania, “The Law of the Corporation as Environmental Law”, Stanford Law Review, 71 Stan. L. Rev. 137, Lexis

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 159 There are certain kinds of actions that are per se illegal under the antitrust laws, rendering antitrust law an absolute bar. 160 Such actions include price fixing, horizontal boycotts, and output limitations. 161 Courts apply the per se rule when firms aim to "disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" 162 In the per se unreasonableness context, the plaintiff need not show anticompetitive effect, as harm to competition is presumed. 163

Before the enactment of the Clean Air Act, the federal government invoked antitrust law to end a collusive agreement among major automakers and their industry association to keep pollution control technology from reaching the California market. By 1952, authorities addressing air pollution in Los Angeles County had accepted scientific findings that motor vehicle emissions were the major source of the smog that blanketed the Los Angeles basin. 164 Local officials began to reach out to the major automobile [\*173] manufacturers about research on emissions-control technology. 165 In 1953, the Automobile Manufacturers' Association (AMA), an industry trade group, began a campaign to study the issue and committed to funding research. 166 In 1955, several automobile manufacturers, including the four major manufacturers - General Motors, Ford, Chrysler, and American Motors - entered into a formal cross-licensing agreement to share technological information and data on the development of emission-control technology, 167 an action that later became the subject of antitrust litigation. 168 They announced their decision publicly, garnering some praise for addressing the smog problem. 169

In 1960, California passed the California Motor Vehicle Pollution Control Act. 170 The Act mandated that manufacturers of new cars install emissions-control devices; however, the mandate was only triggered once such devices had been certified by the newly created Motor Vehicle Pollution Control Board. 171 By 1964, the Board had certified four emissions-control devices as meeting the state's standards, triggering the mandate under the Act. 172 Independent firms, rather than the major automakers, had developed these devices. 173 Shortly after the state certified these devices, the major automakers announced that they, too, had developed their own emissions-control technology, 174 arguably so that they would not be required to license technology from other firms. This sequence of events led some officials in California to conclude that the major automakers had conspired to delay making their own technologies publicly available. 175 After Los Angeles County officials asked the U.S. Attorney General to investigate possible collusion, a grand jury was convened. 176

Although the Department of Justice did not file criminal charges, in January 1969 it filed a civil antitrust suit against the AMA and the four major [\*174] automakers, alleging that the defendants had conspired among themselves and with smaller motor vehicle manufacturers "to eliminate competition in the research, development, manufacture and installation of motor vehicle air pollution control equipment, and in the purchase from others of patents and patent rights, covering such equipment," in violation of section 1 of the Sherman Act. 177 In response to the complaint, the defendants argued that their cooperation had actually accelerated the development of emissions-control devices and noted that collaboration was required to ensure that all manufacturers would be able to comply with the increasingly stringent standards. 178 After the lawsuit was filed, a partner in the law firm representing the AMA penned an article 179 explaining that individual consumers had been "unwilling to spend the additional small amount" necessary to purchase vehicles equipped with emissions-reducing devices. 180 Thus:

So far as the installation of devices was concerned, therefore, the manufacturers had a substantial and legitimate interest in cooperating. No company wanted to incur a cost disadvantage, either in terms of an increase in sales price or an adverse effect on vehicle driveability, without some assurance that all manufacturers were incurring similar disadvantages in the marketplace. 181

Arguably, this was as much a problem of the interaction between corporate law and antitrust law in competitive markets as it was one of antitrust law alone. If firms had a broader mandate beyond profit maximization, including to contribute to the public interest, perhaps they would have been more willing to incur a short-term cost disadvantage, even in a competitive market, rather than enter into an agreement to limit competition.

The parties resolved the suit by entering into a consent decree, which required the defendants not to conspire to delay the development of emissions-control devices and to make available without royalties both patent licenses and data on the emissions-control devices they had developed. 182 However, the decree did not require the defendants to admit liability or pay monetary penalties or damages for environmental harm; nor did it require the [\*175] retrofitting of vehicles. 183 Despite the lack of damages or penalties, in this case antitrust law served as a mandate to promote environmental goals, preventing collusion in the market when firms feared that developing an environmental product would put them at a competitive disadvantage.

A second, more recent example of antitrust law serving as an environmental mandate comes from the European Union, not the United States, but the example offers a similar lesson about the potential confluence, rather than conflict, between antitrust principles and environmental goals. In 2011, the European Commission fined two consumer products firms, Unilever and Procter & Gamble, more than 300 million euros combined for entering into an agreement to maintain prices for laundry detergent while the firms switched to selling a more concentrated, environmentally preferable formulation. 184 The firms switched to the more environmentally friendly formulation as a result of their participation in a voluntary industry initiative called the "Code of Good Environmental Practice for Household Laundry Detergents," 185 a classic example of private environmental governance. The voluntary initiative included reducing the amount of detergent needed for each load of laundry, as well as overall product weight and packaging. 186 The industry initiative appropriately did not include any commitments regarding price fixing. 187

However, the firms privately "agreed to keep the price unchanged" when the "products were "compacted'" in a way that might appear to a consumer that he would be able to wash fewer loads of laundry than the compacted product was capable of cleaning. 188 In addition, they engaged in other forms of price collusion, including "restricting their promotional activity" and "deciding not to pass the benefit of cost savings (reduced raw materials, packaging and transport costs) on to consumers." 189 The firms further agreed on direct price [\*176] increases and "exchanged sensitive information on prices and trading conditions, thereby facilitating the various forms of price collusion." 190

In this case, just as in the case of the automakers, antitrust law enforcement served as an environmentally positive mandate. Relying on antitrust law, the European Commission fined these firms for seeking to avoid passing cost savings from an environmentally beneficial product onto consumers. The motivations of the consumer products firms mirrored those of the automakers: In both cases, the firms feared that being the first to market an environmentally preferable product would reduce profits or create a competitive disadvantage vis-a-vis other firms in the marketplace. This example likewise suggests the importance of viewing antitrust law in connection with other fields, such as corporate law. Firms driven by a profit motive experience that motive in the context of a competitive environment. 191

B. Prohibitions and Disincentives: The Antitrust Per Se Rule and the Rule of Reason

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law's goals of promoting competition and environmental law's goals of promoting [\*177] conservation. 192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive.

As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition.

The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no [\*178] court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

#### ‘Practices’ can be singular

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

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

#### Coherence---it’s impossible to apply to ‘anticompetitive’ conduct

Donald L. Beschle 87, Associate Professor of Law at The John Marshall School of Law, B.A. from Fordham University, J.D. from the New York University School of Law, LL.M. from Temple University School of Law, “"What, Never? Well, Hardly Ever": Strict Antitrust Scrutiny as an Alternative to Per Se Antitrust Illegality”, Hastings Law Journal, March 1987, 38 Hastings L.J. 471, Lexis

This Article argues that the defenders of per se analysis have assigned themselves an impossible task. Arguing that types of activity can [\*476] be identified as invariably anticompetitive is futile; counterexamples can almost always be put forward. Consequently, defenders of per se categorization are reduced to one of two unattractive alternatives. First, they can concede that per se categories may in some instances prohibit procompetitive activity, but argue that the overall benefits of per se categorization justify the result. Such an argument is unsatisfying because it explicitly sacrifices particular blameless defendants in order to search for an increase in general welfare. Second, per se defenders can narrow their categories to eliminate procompetitive counterexamples. This strategy, however, threatens to destroy those categories entirely. And if most of the once-condemned activity is returned to the realm of the rule of reason, the insight that certain types of behavior are particularly dangerous is lost.

### Transparency CP---2AC

#### It fails---ET enforcement is uneven, easily dodged, and blocked by process barriers absent the plan.

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

The means by which export cartels remain legal in the state of origin matter. The more common implicit exemption deprives the home state of the possibility to monitor possible efficiency gains, and makes it difficult to scrutinize any spillover effects on the domestic market.66 At the same time, the lack of any registration requirement in the state of origin makes it more difficult for export cartels’ competitors or even competition authorities in targeted states to discover cartel operations. In this sense, explicit exemptions and registration requirements provide some transparency. They allow competitors or targeted states to react if needed. Also national competition authorities benefit from the possibility of oversight to make sure that the companies engaged in an export cartel do not try to act in an anticompetitive way domestically, or that their activities do not have spillover effects on domestic markets.67

Until now the international community has not developed international rules or mechanisms addressing cartels, including export cartels.68 There is no international forum authorized to work towards a legally binding compromise or common rules in this regard. The WTO is without a mandate to deal with such issues, although in cases of state-related export cartels there is a possibility of triggering the WTO dispute settlement framework in at least three circumstances. First, Article XI of the General Agreement on Tariffs and Trade (GATT)69 prohibits WTO members imposing or maintaining import and export restrictions. The Panel report in Japan – Trade in Semi-Conductors,70 where it has been established that a governmental scheme restricting the exportation of goods below certain price falls under prohibition of Article XI:1.71 By corollary a state-endorsed export cartel where the parties agree prices may fall within Article XI:1. In China – Measures Related to the Exportation of Various Raw Materials Panel adopted such an approach.72 Second, Article 11.1(b) of the Agreement on Safeguards73 prohibits ordering, or encouraging voluntary export restraints. Export cartels with state involvement could fall into this category as well. Finally, within the WTO framework it is possible to bring a so-called non-violation complaint,74 alleging that some new laws or regulations introduced in a particular WTO member state (in this case organizing or sanctioning export cartels) nullify or impair the benefits of WTO membership.75

Therefore, in principle, a government organizing or compelling export cartels might be found in breach of its WTO obligations.76 Yet, even if these provisions prove capable of addressing state involvement in export cartels, they do not address the issue of private export cartels.

From the perspective of a targeted state, the only way to handle export cartels formally is to act unilaterally and apply national competition laws extraterritorially.77 Extraterritoriality seems to be a phenomenon of particular relevance in antitrust. It gradually earned its present practical paramount importance with the development of the effects doctrine. This jurisdictional theory, introduced first in the US in 1945,78 provides for prescriptive jurisdiction79 over foreign-based persons and their foreign conduct if economic effects are experienced on the domestic market. It is a valuable tool in the fight against foreign anticompetitive arrangements in the absence of any international framework. The acceptance of the effects doctrine as a jurisdictional basis has been a long process, with the international community and scholars being split as to its legality and normative force.80 Nevertheless, various forms of effects doctrine have been introduced through legislation or jurisprudence in many jurisdictions,81 providing for its present broad recognition.

Extraterritoriality is potentially a powerful instrument, yet it suffers from various limitations and may not be, for practical reasons, available to all states. This is particularly so in case of developing and least-developed states. Even if they are in principle equipped with competition laws, and this is not always the case,82 such laws need to be coupled with necessary capacity and resources to be effectively enforced.83 Even if the preconditions are fulfilled, in transnational cases the evidence lies most likely abroad.84 Assuming that evidence is not an issue (a very theoretical assumption), there may be simply no scope for enforcement. Laws may prove in such cases toothless, as the assets of the parties involved may be based abroad, and as markets of such states often matter little, investment- and sales-wise, the fined companies may decide to abandon the market instead of paying the penalties or damages. Backer calls it an enforcement asymmetry.85 Fox talks about ‘practical disenfranchisement of victim jurisdictions that lack resources and are vulnerable’.86 Hawk uses the phrase ‘enforcement lacuna’.87 This issue concerns not only developing countries, but also, for example, small and remote jurisdictions,88 which may lack the commercial importance or political power necessary to make extraterritoriality work in practice.89

Even in the case of states with well-developed antitrust regimes, necessary resources and various cooperation agreements in the field of enforcement, extraterritoriality90 may be obstructed by state-related avoidance techniques.91 Depending on the scope of a state involvement in the challenged conduct, the effort of bringing a foreign export cartel to a court may be either blocked on the jurisdictional level (principle of non-justiciability/political question doctrine, the foreign state immunity doctrine), or significantly hindered by the available defences on merits (the act of state doctrine, foreign state compulsion).92 The bulwark of ‘sovereignty’ severely impedes the possibility of relying on extraterritoriality in transnational antitrust litigation involving or implicating foreign states. This is particularly so in cases concerning exploitation and exportation of natural resources, which traditionally have been seen as falling within the state domain.93

The existence of export cartels exemplifies a gap in the present regulatory framework, which is ill equipped to handle such foreign anticompetitive challenges.94 What seems to be lacking is a ‘cosmopolitan conception’95 which would allow a refocus of national competition laws from national to global welfare, taking into consideration foreign (outbound) consequences of domestic anticompetitive agreements.96 Against this backdrop, the present legal status of export cartels gives the impression they are a living reminiscence of beggar-thy-neighbour policies97 and remain a challenge for targeted jurisdictions.

#### Exporting states block enforcement.

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

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

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

#### Energy cartels cause extinction---US-based enforcement is key.

David Koranyi 16, Chief Advisor of City Diplomacy for the Mayor of Budapest, former Director of the Atlantic Council's Eurasian Energy Futures Initiative; Atlantic Council Strategy Paper, “A US Strategy for Sustainable Energy Security,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/AC_SP_Energy.pdf>

The United States should work toward a global energy system that is characterized by the reduction of excessive price volatility on global energy markets and the minimization of the impact of geopolitical upheavals. This requires the introduction of more competition, transparency, liquidity, better rules and regulations for energy trade, and the stabilization of global energy trading routes in concert with other key stakeholders. The liberalized global energy trade would be coupled with transparent and efficiently functioning global and regional markets. This necessitates energy market integration and interconnections in Europe, Asia, Africa, and Latin America alike to enhance regional synergies and create markets. This integration process should be supported by US experience and technical assistance.

It is of utmost importance to ensure that competition is not distorted, with special regard to cartelization in the regional and global gas markets. The United States should promote global principles for competition in the energy markets to reduce the risk of cartelization and price setting, cripple the disruptive ability of irresponsible players on the market, enhance security of supplies, and promote open and efficiently functioning markets.

Monitoring the implementation of global and regional climate agreements; promoting dialogue and cooperation between consumer and producer countries; introducing and enhancing dispute resolution mechanisms; increasing transparency and reducing volatility on the international energy markets; and devising international standards of physical and cyber energy infrastructure protection will be at the center of the US international energy governance agenda. Therefore, international institutions that serve US national interests need to be strengthened further with special regard to the International Energy Agency (IEA), the United Nations Sustainable Energy for All Initiative (SE4All,) the International Renewable Energy Agency (IRENA), and the Energy Charter Treaty. In particular, the IEA’s mandate, organization, and budget should be reinforced to allow the organization to conduct a global energy dialogue with all key stakeholders, and to play a robust role in facilitating the exchange of best practices in green technology deployment, energy efficiency, and other key issues in the context of the Paris Climate Agreement.

As the energy sector undergoes a fundamental transformation, new global actors emerge and play a decisive role in how to produce and consume energy and control the climate. The new ‘lateral energy regime’ vastly widens the circle of interested and invested actors and influencers.58 This new paradigm requires a fundamentally different approach to governance on all levels: local, national, and international. The United States should invest in the empowerment and inclusion of constructive new actors to co-govern the energy space, while depowering spoiler actors, such as terrorist organizations that target energy infrastructure. Designing a new model for public-private-people-partnerships (PPPP) is essential to managing the complex interplay between the traditional and new producers, transporters, and consumers of energy—municipal and regional governments and civil society actors.

Conclusion

The first of the Atlantic Council Strategy Paper Series, Dynamic Stability: US Strategy for a World in Transition, identified the protection of global commons by the United States as critically important for both material and moral reasons. It rightly argued that “it is important to include climate in the definition of global commons.”59 That paper defined ‘dynamic stability’ as the key conceptual framework to deal with a fast-changing ‘Westphalian-Plus’ world and argued for “harnessing change to preserve the liberal international order.”60

Harnessing change in the energy sector expeditiously is an existential issue for all humanity. Dynamic stability in the US energy sector would mean leveraging the unique natural bounty and technological prowess of the United States and using the very momentum created by the unconventional hydrocarbon revolution to gradually pivot away from fossil fuels. Leaving the current system unreformed and unmodernized will threaten the security and well-being of American citizens, hurt the US economy at home, and isolate the United States internationally. By compromising on market-friendly public policy measures and leveraging the low oil price environment, the United States can introduce the right incentives into the energy system to shepherd an accelerated energy transition into a more modern, low-carbon energy era that still relies heavily on natural gas—particularly during the transition—and nuclear power to provide baseload generation and counter seasonal intermittency.

### OPEC DA---2AC

#### That is proven by the WTO.

Tiffany Kwok 15, PhD Candidate at the University of Birmingham, “Export Cartels: Analysing the Gap in International Competition Law and Trade”, 2 EDINBURGH Student L. REV. 140 (2015), Hein Online

For developing countries that lack an effective competition law regime, often the only other alternative is to pursue the matter through trade mechanisms. However, this route can present its own challenges. For instance, the WTO does not explicitly prohibit the formation of an export cartel, although provisions governing similar behaviour can be used in order to challenge the cartel. Furthermore, the WTO, like most international trade organisations, only governs the actions of governments of member states, not private undertakings. This can problematic, as most export cartels are comprised of private entities. Only by proving an export cartel has some element of state involvement, whether through governmental encouragement or through state sanctioned or state owned entities, can a member state legitimately bring a claim in the WTO against another member state. Like in the international competition law community, there appears to be little consensus regarding the prohibition of export cartels in international trade and few opportunities for recourse for aggrieved parties, particularly developing countries.

It is clear that both the international competition law system and the international trade law system are need of more reform in order to better address the needs of developing countries. Some strategies of reform may include a harmonised competition law agreement or more likely, cooperation between trading partners to regulate the behaviour of export cartels. How these reforms will take place and how effective they may be remains to be seen.

### AT: Saudi Prolif Impact

#### No Saudi prolif.

Ian **Stewart &** Dominic **Williams 15**. Senior Research Fellows in the Department of War Studies at King’s College London. 05-23-15. “Is Saudi Arabia trying to get nuclear weapons?” Telegraph. http://www.telegraph.co.uk/news/worldnews/middleeast/saudiarabia/11617339/Is-Saudi-Arabia-trying-to-get-nuclear-weapons.html

Perhaps the main strategic driver relates to the P5+1’s nuclear negotiations with Iran. Saudi Arabia is one of Iran’s main regional competitors and there have long been concerns that if Iran acquired nuclear weapons other countries in the region would follow. Iran is not on the brink of acquiring nuclear weapons, however, and the negotiations currently taking place with a deadline of mid-summer could leave Iran even further from nuclear weapons than it has been for the last several years. In this context, it is important to note that the Saudi leadership has generally expressed approval for a nuclear deal with Iran. If the negotiations with Iran have triggered a renewed interest in nuclear weapons in Saudi Arabia, it is perhaps more likely that the Saudi royals are seeking to use their apparent interest in acquiring them in order to influence the negotiations rather than seeking nuclear weapons for their own use. It is also possible that Saudi’s calculus regarding nuclear weapons has changed for other reasons. One possible reason for this could be changes in the country’s leadership. King Salman’s enthronement has brought changes to the country’s approach to foreign policy and the appointment of the his son as defence minister has resulted in the country taking unusually bold action against Iran-backed forces in Yemen. It cannot be ruled out that the new leadership, unafraid of bold policy choices in pursuit of the country’s international security goals, could also decide to acquire nuclear weapons. Even if Saudi was to decide to do so, however, it is far from clear that the country is capable of acquiring nuclear weapons. After all, the country’s own nuclear infrastructure is nascent and orientated towards civil purposes. More plausibly, following a deal between the P5+1 and Iran, Saudi Arabia could seek to exercise the same right to enrich uranium that Iran claims for its own program as part of a nuclear hedging strategy. Supplier restraint in relation to transfers of enrichment technology mean that it is unlikely that Saudi could buy such a capability outright. The country does have some of the prerequisite industry to embark on an indigenous effort, however, which would be a longer term proposition (likely lasting some decades). The second possibility would be for Saudi to acquire weapons ‘off the shelf’ from Pakistan. The likelihood of this scenario is difficult to quantify: certainly, Pakistan and Saudi Arabia have a unique relationship. However, would Pakistan be willing to proliferate? Pakistan is still struggling to overcome the damaged international reputation it suffered as a result of the actions of AQ Khan, who passed on the country’s uranium enrichment and possibly nuclear weapons designs to at least three countries include Libya, Iran and North Korea. Pakistan has enacted a systematic export controls to prevent such a recurrence (although there is some question about how well this system functions as it is understood that no licences for authorised transfers of any nuclear technology have been granted). It is also likely that Chinese pressure would restrain Pakistan from transferring nuclear weapons to Saudi Arabia: China is currently subject to intense diplomatic pressure over its decision to sell nuclear reactors to Pakistan. Should an egregious nuclear transfer take place from Pakistan, the prospects of such civil nuclear cooperation, which is important to Pakistan’s own development, would be bleak. Finally, there are also practical hurdles over transferring nuclear weapons from Pakistan to Saudi Arabia (perhaps the least of which is the US 5th fleet).

#### Even if prolif occurs, no impact.

John **Mueller 18**. Adjunct Professor of Political Science and Woody Hayes Senior Research Scientist at Ohio State University and a Senior Fellow at the Cato Institute Nov/Dec 2018 https://www.foreignaffairs.com/articles/2018-10-15/nuclear-weapons-dont-matter

HOW ABOUT PROLIFERATION AND TERRORISM? Great powers are one thing, some might say, but rogue states or terrorist groups are another. If they go nuclear, it’s game over—which is why any further proliferation must be prevented by all possible measures, up to and including war. That logic might seem plausible at first, but it breaks down on close examination. Not only has the world already survived the acquisition of nuclear weapons by some of the ~~craziest~~ [most reckless] mass murderers in history (Stalin and Mao), but proliferation has slowed down rather than sped up over time. Dozens of technologically sophisticated countries have considered obtaining nuclear arsenals, but very few have done so. This is because nuclear weapons turn out to be difficult and expensive to acquire and strategically provocative to possess. They have not even proved to enhance status much, as many expected they would. Pakistan and Russia may garner more attention today than they would without nukes, but would Japan’s prestige be increased if it became nuclear? Did China’s status improve when it went nuclear—or when its economy grew? And would anybody really care (or even notice) if the current British or French nuclear arsenal was doubled or halved? Alarmists have misjudged not only the pace of proliferation but also its effects. Proliferation is incredibly dangerous and necessary to prevent, we are told, because going nuclear would supposedly empower rogue states and lead them to dominate their region. The details of how this domination would happen are rarely discussed, but the general idea seems to be that once a country has nuclear weapons, it can use them to threaten others and get its way, with nonnuclear countries deferring or paying ransom to the local bully out of fear. Except, of course, that in three-quarters of a century, the United States has never been able to get anything close to that obedience from anybody, even when it had a nuclear monopoly. So why should it be true for, say, Iran or North Korea? It is far more likely that a nuclear rogue’s threats would cause its rivals to join together against the provocateur—just as countries around the Persian Gulf responded to Saddam’s invasion of Kuwait by closing ranks to oppose, rather than acquiescing in, his effort at domination.

### DOJ Tradeoff DA---2AC

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

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

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

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

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

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

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

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

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

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

#### All efforts fail without ending national silos

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

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

#### New publisher merger crackdowns symbolize broad enforcement for years to come.

Alden Atkins & Lindsey Vaala 11-9, Partner at Vinson & Elkins LLP, J.D. from the University of Virginia School of Law; Antitrust Counsel at Vinson & Elkins LLP, J.D. from the College of William & Mary School of Law, “DOJ Suit to Block Book Publishers’ Merger Indicative of New Antitrust Enforcement Regime’s Priorities,” JD Supra, 11-09-2021, https://www.jdsupra.com/legalnews/doj-suit-to-block-book-publishers-3317239

On November 2, 2021, the United States Department of Justice (“DOJ”) filed a complaint in the U.S. District Court for the District of Columbia to block the planned $2.175 billion merger between powerhouse publishing companies Penguin Random House, LLC and Simon & Schuster, Inc. This step is an early example of the antitrust landscape ushered in by the Biden administration’s new antitrust enforcers; a landscape in which effects on labor markets are front and center and alleged anticompetitive effects are not necessarily measured by an effect on prices. Our Antitrust team is closely monitoring the evolving antitrust enforcement frontier and offer the following observations as to how this case illustrates the enforcement authorities’ changing priorities.

Background on the Proposed Deal

Penguin Random House and Simon & Schuster are two of the biggest publishers of commercial literature in the United States. In late November 2020, the two companies announced that they planned to merge in the biggest deal in the history of the publishing industry. The two companies are part of the so-called “Big Five,” the group of the five largest publishers in the United States which include other giants such as HarperCollins, Hachette Book Group, and Macmillan Publishing Group. Under the deal, Penguin Random House’s parent company, Bertelsmann SE & Co., would acquire Simon & Schuster from its parent company, ViacomCBS Inc., for $2.175 billion.

DOJ’s Objections to the Proposed Deal

The complaint alleges that the merger would likely lessen competition substantially in violation of Section 7 of the Clayton Act1 and thus should be blocked. To support this claim, DOJ contends that the merger would “eliminate a major competitor to Penguin Random House, already the market leader, and create a firm that controls a substantial share of the relevant markets.”2 The complaint further asserts that the merger harms competition in the following ways:

The merger would “result in authors earning less for their books” and “fewer and less diverse books being published.”3 The alleged harm here is two-fold. Authors, who often pit competing publishers against one another to obtain significant book advances, would have less leverage to do so post-merger. Less compensation for authors might then lead to fewer books being published, leading to less choice for consumers.

The merger would “reduce competition by facilitating coordination between the remaining major publishers.”4 The complaint identifies the book publishing industry as already highly concentrated and rejects any countervailing factors as justification, claiming that high barriers to entry and a lack of transaction-related efficiencies add to the factors condemning the transaction.

As we have reported, a touchstone of the Biden administration antitrust enforcement agenda is to combat what it sees as excessive consolidation in many industries that harms competition. For example, the July 9 Executive Order on Promoting Competition in the American Economy (the “Executive Order”) lambasts consolidation as a source of pervasive harm — from making it harder for American workers to bargain for higher wages from powerful corporate employers, to making it too hard for small family farms to survive against agriculture conglomerates, to driving up the costs of healthcare, pharmaceuticals, and communication services like cable and internet. By filing suit to block the Penguin Random House/Simon & Schuster deal, DOJ’s actions are consistent with the Executive Order’s directive to “act now to reverse the[] dangerous trend[]” of consolidation.5

Focus on Labor

Effects on labor markets is one of the Biden administration’s top priorities in competition enforcement, continuing a trend from other recent administrations. In the Executive Order, President Biden identified, among other major themes, a focus on “the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets.” DOJ’s complaint predicts that, if Penguin Random House is allowed to acquire its largest competitor, the post-merger entity will have unrivaled power to set the prices at which book authors will be paid, thus creating a monopsony and making it more difficult for authors to bargain for better compensation for their books, which might, in turn, drive authors out of the profession and reduce the variety of books being written and published.

The complaint explains the process by which authors are compensated through advances and royalties, with advances being an up-front payment that usually constitutes the entire compensation an author receives. The complaint alleges specific examples of Penguin Random House and Simon & Schuster competing aggressively with one another, and with a handful of other publishing houses, to bid on individual author contracts and deals. Under the DOJ’s theory, Penguin Random House and Simon & Schuster often end up as the two most powerful bidders, and that competition to pay larger advances would be lost by the merger.6

Moving Away from Price Effects

DOJ’s complaint also continues the Biden administration’s recent trend of moving merger review analysis away from a focus on price effects as the measure of competitive injury. The consumer welfare standard focuses on whether a proposed merger would harm consumers through higher prices or reduced output. Under that standard, experts create econometric models predicting whether quality-adjusted prices would rise after the merger. DOJ challenges to prior mergers have faltered when its economists could not confidently predict that prices would increase post-merger.7 Jonathan Kanter (President Biden’s nominee to be Assistant Attorney General for DOJ’s Antitrust Division, who has not yet been confirmed) and the other new antitrust enforcers have advocated for years that antitrust enforcement should not be limited to studying the price effects of a merger or competitors’ conduct.

DOJ’s complaint does not allege that the merger would have any effects on the prices paid by consumers. Instead, the complaint alleges that the decrease in author pay that would result from the merger would “lead to a reduction in the quantity and variety of books published”8 and that the merger would “likely reduce quality, service, choice, and innovation,” in the commercial literature market.9 Quality, variety, and innovation are all measures of output, but they are difficult to quantify. These types of concerns are exactly what the new enforcers have said should be the focus of antitrust. Indeed, new FTC chair Lina Khan has argued in the past that consolidation of the publishing industry combined with the power of online platforms like Amazon have reduced the “diversity and vibrancy of ideas in the book market.”10

Compliance Pointer: The Complaint’s Allegations are Aided by the Defendants’ Own Documents

As is often the case, DOJ’s complaint emphasizes the parties’ internal documents. While antitrust and economic theory can help predict the merger’s effects on competition, such debates can be dry and not always persuasive. Courts often find that the best way to assess real world competitive effects is through the eyes of the actors themselves. At the very least, contemporaneous documents can bolster the antitrust theory, as DOJ has done here. The complaint cites numerous statements by executives at both companies indicating that they understood that the merger would allow them to control author wages, win substantially more bids, and was not likely to be viewed favorably by DOJ. Purportedly quoting directly from company documents, the complaint states, for example, that Simon & Schuster’s CEO wrote to a best-selling author “I’m pretty sure that the Department of Justice wouldn’t allow Penguin Random House to buy us, but that’s assuming we still have a Department of Justice.”11 And the Chairman of Penguin Random House’s parent company reportedly wrote that Penguin Random House posed greater “antitrust risks” than any other potential buyer.12 We regularly counsel clients on antitrust compliance issues, including the importance of careful attention to internal documents created in the ordinary course of business.

Looking Forward

DOJ’s lawsuit signals an early step in the Biden administration’s new antitrust enforcement agenda that has shifted the focus of competition from prices consumers pay to now include other considerations such as impact on labor and qualitative effects on the competitive process. As the Executive Order makes clear and this complaint confirms, effects on labor and other non-price concerns will no longer be overlooked in merger considerations and can provide ammunition for enforcers to block transactions.

#### Other entities fill-in

Alison Jones 20, Professor at King’s College London, & William E. Kovacic, Global Competition Professor of Law and Policy, The George Washington University Law School, “Antitrust’s Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy,” The Antitrust Bulletin, Volume 65, Number 2, SAGE Publications Inc, 06/01/2020, pp. 227–255

C. Improving Capability: Agency Cooperation and Project Selection

The U.S. antitrust system is famous for its decentralization of the power to prosecute, giving many entities – public agencies (at both the federal and state levels), consumers, and businesses – competence to enforce the federal antitrust laws. The federal enforcement regime also coexists with state antitrust laws and with sectoral regulation, at the national and state levels, that include competition policy mandates.

The extraordinary decentralization and multiplicity of enforcement mechanisms supply valuable possibilities for experimentation and provide safeguards in case any single enforcement agent is ~~disabled~~ [hamstringed](e.g., due to capture, resource austerity, or corruption).75 Among public agencies, there is also the possibility that federal and state government institutions, while preserving the benefits of experimentation and redundancy, could improve performance through cooperation that allows them to perform tasks collectively that each could accomplish with great difficulty, or not at all, if they act in isolation. In the discussion below, we suggest approaches that preserve the multiplicity of actors in the existing U.S. regime but also promise to improve the performance of the entire system through better inter-agency cooperation – to integrate operations more fully “by contract” rather than a formal consolidation of functions in a smaller number of institutions.

#### They can just shift resources

Jacob T. Elberg 21, teaches in the areas of Health Law, Health Care Fraud and Abuse, Evidence, and Data Analytics, “ARTICLE: HEALTH CARE FRAUD MEANS NEVER HAVING TO SAY YOU'RE SORRY, 96 Wash. L. Rev. 371”, June 2021

Were a policy change to lead more defendants to refuse settlement in favor of trial, it would mean DOJ would need to either increase resources by hiring more personnel or handling fewer cases. The former may be preferable, as the cost of increased personnel would be negligible compared to the dollars to be gained through increased FCA enforcement, particularly of cases involving the most egregious conduct or involving the greatest amount of damages. In the context of the SEC, Professor John Coffee has suggested that the government taking on fewer cases could be a positive, as it would lead the enforcer to prioritize and put greater resources into the cases it brings. His argument is even stronger in the FCA context, where DOJ does not have to simply drop lower priority cases and allow misconduct to go unpunished - DOJ has the ability to identify appropriate cases for capable and well-resourced relator's counsel to take on a primary role, while shifting DOJ resources to higher priority cases. Greater deterrence would be achieved whether defendants make the admissions (thus increasing the severity of the resolution) or refuse to [\*416] make the admissions and the government wins at trial. Such benefits, as well as the benefits of increased legitimacy discussed in section IV.B, must also be factored into DOJ's resource allocation calculus.

### AT: China Impact

#### Espionage prosecutions fail, and no impact.

Margaret K. Lewis 21, Professor of Law at Seton Hall University, J.D. from the New York University School of Law, “Time to End the U.S. Justice Department’s China Initiative,” Foreign Policy, 07-22-2021, https://foreignpolicy.com/2021/07/22/china-initiative-espionage-mistrial-hu

The first trial of a researcher under the U.S. Justice Department’s China Initiative, a sweeping program that began nearly three years ago aimed at countering Chinese economic espionage in the United States, ended in June with a deadlocked jury. The department prosecuted the academic Anming Hu for fraud and false statements after the FBI’s investigation into potential spying crumbled. Like several other cases involving ethnically Chinese researchers under the China Initiative, the authorities appear to have gone far beyond any reasonable remit.

As we await the Justice Department’s decision by July 30 whether to pursue a retrial, three members of the House Judiciary Committee have urged an investigation into reports of alleged FBI misconduct.

The first trial of a researcher under the U.S. Justice Department’s China Initiative, a sweeping program that began nearly three years ago aimed at countering Chinese economic espionage in the United States, ended in June with a deadlocked jury. The department prosecuted the academic Anming Hu for fraud and false statements after the FBI’s investigation into potential spying crumbled. Like several other cases involving ethnically Chinese researchers under the China Initiative, the authorities appear to have gone far beyond any reasonable remit.

As we await the Justice Department’s decision by July 30 whether to pursue a retrial, three members of the House Judiciary Committee have urged an investigation into reports of alleged FBI misconduct.

Instead of continuing to pursue charges, the Justice Department should drop the case against Hu, a China-born naturalized Canadian who joined the University of Tennessee faculty in 2013. It should also end the broader China Initiative, which would reduce scrutiny of researchers of Chinese descent and, in turn, boost the United States’ economic competitiveness.

The Trump administration created the China Initiative in 2018 to disrupt and deter national security threats coming from China. To name a large-scale Justice Department initiative after a specific country was unprecedented.

The initiative is also unusual by emphasizing “nontraditional collectors”: professors, scientists, and students who do not fit the classic spy profile but who might through intellectual property (IP) theft, or by not disclosing relationships with China-based entities, spur innovation in China at America’s expense.

To be clear, there are real national security concerns. The Justice Department charged five China-related economic espionage cases in the initiative’s first two years, plus cases involving false statements and fraud. In May, Song Guo Zheng—a “researcher with strong ties to China,” according to the department—was sentenced to 37 months in prison after being arrested when boarding a chartered flight to China with several USB drives and two laptops and then pleading guilty to lying on federal grant applications.

Nonetheless, the FBI’s thousands of investigations under the initiative have not unearthed widespread IP theft among researchers. Rory Truex, an assistant professor at Princeton University, explains that 20 months of investigations in 2019 and 2020 under the initiative resulted in formal charges at 10 U.S. universities or research institutions, only three of which involved evidence of espionage, theft, or transfer of IP: “Given that there are about 107,000 Chinese citizens in science, technology, engineering, and mathematics (STEM) at U.S. universities at the graduate level or above, current [Justice Department] charges imply a criminality rate in this population of .0000934, less than 1/10,000.”

When charges are brought against academics, they are generally rooted in false statements or fraud, as alleged in Hu’s case. Even without special aggravating factors, the possible prison sentences for these crimes are harsh: a maximum of 20 years for wire fraud, five for false statements, and 10 for grant fraud.

A serious concern is that these penalties are often, though not always, grossly disproportionate to the alleged conduct. For instance, that Zheng “admitted he lied on applications in order to use approximately $4.1 million in grants from [the U.S. National Institutes of Health] to develop China’s expertise in the areas of rheumatology and immunology” combined with his arrest while fleeing to China indicates that the government likely could have substantiated charges beyond “false statements” had the case not been resolved via a plea bargain.

In contrast, Hu continued to live and work in Knoxville, Tennessee, between the time FBI agents first interviewed him in April 2018 and his February 2020 arrest for charges based on two NASA grants. As reported by the Wall Street Journal, “testimony showed university employees fumbling with unclear disclosure policies and struggling to explain to Mr. Hu the required paperwork and what constituted a conflict of interest.” Even U.S. President Joe Biden’s science advisor, Eric Lander, admitted that a maze of requirements means that it’s “very hard to figure out what you’re supposed to be disclosing.”

Last week, the Justice Department dropped a case against the Cleveland Clinic researcher Qing Wang, a naturalized U.S. citizen, stemming from his work on federal grants. The government has not explained why it changed its position after the FBI previously alleged, “Dr. Wang deliberately failed to disclose his Chinese grants and foreign positions and even engaged in a pervasive pattern of fraud to avoid criminal culpability.”

In addition to questions whether severe criminal penalties are appropriate for the disclosure-based cases under the initiative, there are concerns about the shared characteristics of many people who are investigated and charged. The FBI has not identified or released any records in response to Freedom of Information Act requests by the American Civil Liberties Union and Asian Americans Advancing Justice. And the Justice Department insists that it is only investigating criminal activity—that so many targets of investigation are of Chinese ethnicity and/or nationality because of what they do, not because of who they are.

This assurance, plus government statements that most Chinese students and scholars do not pose a threat, does not remedy the problem. Ramping up investigations under the name “China Initiative” while intermittently telling people of Chinese nationality and/or ethnicity that the effort is not really aimed at them contradicts their experience in the United States today. In Hu’s case, it also led him to be put under pressure to act as an FBI informant—a stressful form of coercion, especially for those still facing America’s immigration system.

U.S. Attorney General Merrick Garland recognized that “racism is an American problem,” and Biden affirmed that the government “has a responsibility to prevent racism, xenophobia, and intolerance.” But lumping together cases as part of a so-called China threat with language about what “China has stolen” depicts a xenophobic, existential threat rather than a focus on individualized judgments about potential criminal liability.

For example, when announcing charges against a “national of the People’s Republic of China” in January, then-Assistant Attorney General John Demers stated, “What China cannot develop itself, it acquires illegally through others. This is yet another example of a proxy acting to further China’s malign interests.” A federal prosecutor asserted when bringing fraud charges against Gang Chen, a naturalized U.S. citizen and professor at the Massachusetts Institute of Technology, “The allegations of the complaint imply that this was not just about greed but about loyalty to China.”

Such negative depictions under the China Initiative umbrella at a minimum undermine the spirit of the Justice Manual, which provides that prosecutors “should not be influenced by” a person’s race or national origin. Even taking as true government assurances that there is no intentional focus on certain groups, the phrase “influenced by” goes beyond explicit bias to include implicit bias, which affects law enforcement because, as Garland explained, “every human being has biases.” The initiative’s dominant national security framing has downplayed how unconscious bias can impact decision-making. The American Bar Association, for instance, has created resources on how prosecutors’ innate attitudes shape behavior and can distort justice.

Addressing bias is important not only for upholding civil rights but also for fueling the economy. Hu’s mistrial came on the heels of the Senate sending to the House of Representatives its massive U.S. Innovation and Competition Act that would have authorized more than $50 billion to strengthen science and innovation along with enhancing research security. The House opted to break the behemoth into individual bills, with two passing at the end of June to increase funding for the National Science Foundation and the Energy Department’s Office of Science.

Regardless of the legislation’s final form, the overarching goal is to meet challenges stemming from China’s economic rise. Yet the China Initiative threatens the very innovation that U.S. lawmakers seek to protect. A legitimate desire to raise awareness of security concerns has overcorrected to create a chilling effect on the United States’ ability to retain and attract the research talent needed for its own economic competitiveness. On June 30, a congressional roundtable titled “Researching While Chinese American” examined ethnic profiling and the possibility of a new American brain drain.

The Biden administration should be clear-eyed about the challenge of dealing with a large and genuine espionage effort from a near-peer competitor. But it should do so in a way that both upholds the American value of nondiscrimination and that best positions the United States to be a leader in science and technology in the decades ahead.

Achieving these twin aims requires adopting a country-neutral framework that does not accentuate people with connections to China (in part because people with connections to countries other than China also steal technology) as well as deepening outreach efforts with the scientific community to revise grant reporting procedures and other research security measures.

It takes more than billions of dollars to strengthen innovation. By reining in the excesses of the present approach and renewing America’s commitment to welcoming the best and brightest minds, the United States can regain an innovative edge that the China Initiative has eroded.

#### Small-scale conflict won’t escalate---especially not nuclear

Ramamurti Rajaraman 18, Emeritus Professor of Theoretical Physics at Jawaharlal Nehru University, and Rashme Sehgal, "'India-Pakistan Nuke War Not A Realistic Possibilty', Says Leading Nuclear Expert Ramamurti Rajaraman", Firstpost, https://www.firstpost.com/india/india-pakistan-nuke-war-not-a-realistic-possibilty-says-leading-nuclear-expert-ramamurti-rajaraman-3880145.html

The Chinese do make border incursions periodically and are generally aggressive towards India in a lot of ways. We have also had a war with them in 1962. There are reports that some of their intermediate range missiles are pointed towards India. Despite all this, I don’t think that there is any real danger of a nuclear threat from China, as things stand now. It is unlikely that China would attempt anything remotely like that. After all, we also have nuclear weapons and are improving our ability to deliver them on to China. They are unlikely to go beyond constant pinpricks to a regular war, let alone one involving nuclear weapons.

### Infrastructure DA---2AC

#### Tons of thumpers.

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

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

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

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

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

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

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

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

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

#### The plan isn’t Congress AND they won’t care

David A. Simon 14, Special Counsel to the General Counsel, Office of General Counsel, U.S. Department of Defense, J.D. at Harvard Law School, M.Phil. at Oxford University, Trinity College, B.A. at University of Minnesota, “Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda”, Pepperdine Law Review, 41 Pepp. L. Rev. 685, Lexis

Presidents, however, have used sole executive agreements to conclude international agreements unilaterally since the early days of the American republic. 9 In the absence of a clear constitutional provision for declaring [\*690] peace, the wars waged by the founding generation against States were all ended by peace treaties 10 (since peace treaties were the customary method of ending interstate war for much of the first part of U.S. history). 11 Before World War II, congressional approval of formal peace treaties was the standard practice for major wars. 12 Since 1945, however, as the United States has engaged in more frequent military operations of limited duration and amounting to hostilities below the threshold of war, presidents have ended wars unilaterally--often without any formal legal termination agreement. 13 At the same time, and particularly in the last few decades, it is commonplace for the executive branch to conclude international agreements without congressional approval. 14 From 1980 to 2000, for example, presidents unilaterally entered into more than 500 security-related agreements--including numerous status of forces agreements with foreign countries. 15 There is, thus, a strong trend of post-World War II congressional acquiescence in the face of unilateral presidential action to conclude international agreements--including as part of efforts to terminate wars. 16 Such historical pattern of congressional acquiescence and executive action supports the contention that the President's authority to terminate wars unilaterally through executive agreements and presidential proclamations has increased in the period since World War II. 17

#### Antitrust harmonization is popular

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

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

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

#### Political context, not capital explains passage. True for Biden---empirics and polarization prove.

Ryan Telingator 21, B.A. in Political Science and Government from Bowdoin University, "When is Change Possible? Presidential Power as Shaped by Political Context, Constitutional Tools, and Legislative Skills", 5/20/2021, https://digitalcommons.bowdoin.edu/honorsprojects/258/

My research does not support Greenstein’s theory. Instead, my findings align more closely with those of George Edwards in At the Margins, where he argues that the “national preoccupation with the chief executive is misplaced,” and that presidential power is, in fact, limited in the Constitution’s “purposefully inefficient system in which the founding fathers’ handiwork in decentralizing power defeats even the most capable leaders.”50

Instead of focusing on legislative skills as a source of presidential influence, Edwards argues that party support and public support are more important. Legislative skills are only critical for “members of Congress who remain open to change after other influences have had their impact.”51 In a time as polarized as today, where very few members of Congress are “open to chang[ing]” their vote, these skills play a minor role in legislative negotiations. Similar assertions are made in another book by Edwards, Predicting the Presidency. He argues that exploiting existing opportunities (consolidating existing party and public support) is much more important for presidential success than creating opportunities (convincing legislators to change their vote vis a vis legislative skills).52

Both Lyndon Johnson and Ronald Reagan are remembered for their exemplary political skills. The Johnson Treatment, a legislating strategy in which Johnson used his imposing 6’4”, 240-pound figure – literally physically and verbally bullying, cajoling, lobbying, and threatening – to get what he wanted out of people,53 remains infamous in presidential political literature. Similarly, Ronald Reagan, “The Great Communicator,” is still revered for his oratorial prestige. Although these legislative skills were useful in passing the pieces of legislation outlined in the case studies – Johnson gaining support from southern Democrats on the EOA and Reagan compellingly speaking in favor of the ERTA – they proved impotent in political contexts not conducive to change. After Vietnam for Johnson and after the passage of the ERTA for Reagan (in conjunction with the recession in 1982), the presidents’ policy windows closed. Their renowned legislative skills could not overcome an inopportune political context.

The case studies thus demonstrate the value of skills at the margins, but also exemplify their unsubstantial influence as the major factor driving policy. Again, the research suggests that political context is the most important factor in legislative change.

5.4 Applying Lessons to the Present: Predicting Biden’s Success

With an understanding that the political context largely drives a president’s potential for change, with skills helping on the margins, it is important to assess the 2021 political climate in order make an informed prediction about Biden’s prospects.

The COVID-19 pandemic opened a significant policy window for Biden. With a U.S. death toll nearing 580,000, massive unemployment, and a severe economic contraction, the pandemic was an all-encompassing problem that the entire country wanted addressed. Thus, the three streams of problem, policy, and politics converged to open the opportunity for the Biden administration to pass the American Rescue Plan. The Rescue Plan was signed into law in March and has received bipartisan support from the American public.54

President Biden claimed a mandate from his election, arguing that “millions of Americans” “voted for [his] vision,” giving “a clear victory” and tasking him to make his “vision real.”55 However, based on the extreme polarization in D.C., it is unlikely to become a quantifiable mandate that changes Congressional voting behavior.56 Polarization has made it impossible to win cross-party support, or, in Edwardsian terms, create new opportunities. There is deep political antagonism between parties, and even within parties,57 making any sort of bipartisanship near impossible.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### AT: Warming Impact

#### The bill dooms climate initiatives

Michael E. Mann 21, Distinguished Professor of Atmospheric Science and Director of the Earth System Science Center at Penn State University, “The Bipartisan Infrastructure Deal Is a Return to the Old Way of Politics. That’s A Problem for the Climate”, 8/6/21, https://time.com/6087933/biden-infrastructure-bill-climate-change/

The looming bipartisan infrastructure deal, if it passes, will be celebrated as a return to pre-Trump politics where politicians reach across the partisan divide, compromise where necessary, and work toward the wrong shared goals.

But it’s business as usual when it comes to the defining challenge of our time: the climate crisis. The bill provides nothing tangible to expedite the country’s urgent need to transition towards renewable energy.

This deal is a far cry from meeting the moment we find ourselves in. It does not address our dependence on fossil fuels, and instead further enables it. Instead, it is focusing money and resources on technologies that don’t work while ignoring the clear winners—solar, wind, etc.—we have in front of us.

In the bill’s current incarnation, I am left wondering what happened to President Joe Biden’s pledge to transform our heavily fossil-fuel-dependent economy into a clean-energy economy. In his campaign he promised to end climate-damaging carbon emissions from U.S. power plants by 2035. But this bill wastes billions of dollars on dubious carbon capture and the fossil fuel industry’s attempt to use hydrogen as a cover to build new gas plants—both of which will do nothing more than strengthen the industry’s hold.

This bipartisan deal disguises handouts to polluters as ostensible “climate solutions,” when they in fact fuel additional carbon emissions and, with them, ever-more searing heat waves, drenching floods, parching droughts, infernal wildfires, and devastating superstorms.

Further, while Biden pledged to address issues of environmental justice by directing 40% of the administration’s climate and clean-energy investments toward low-income and frontline communities that have most suffered the environmental and health risks from fossil-fuel dependence, this bill weakens critical environmental review processes, placing many of these communities at even greater risk. For example, one section of the bill exempts oil and gas pipelines on federal land from being subject to environmental assessments.

Donald Trump was rightly ridiculed for suggesting the solution to California’s climate-change-fueled wildfires was to cut down the trees (and adopt better raking technique). But the bipartisan infrastructure bill includes the same sort of policy Trump supported, calling the logging of 30 million acres of federal forests and $1.6 billion in new taxpayer-funded subsidies to the logging industry “wildfire risk reduction,” waiving environmental protections for logging projects in the name of “fuel breaks,” and giving hundreds of millions of dollars to the timber industry to log new areas and build new processing and power plants under the guise of “ecosystem restoration.”

What passed for wacky theatrics when Trump suggested it, now gets labeled shrewd political calculus in 2021. But it’s not wise; it’s dangerous. We need healthy forests to capture carbon in the only safe way: the natural way. Giving the timber industry the keys to our national forests is like giving fossil-fuel giant ExxonMobil the keys to our climate. And speaking of ExxonMobil, senators who belong to the infamous Exxon 11 made up a third of the bill’s co-authors.

# 1AR

## T-Per Se

### We Meet---1AR

#### The rule of reason does that. Legally, ‘unreasonable’ restraints are absolutely forbidden.

Srikanth Srinivasan 94, JD and MBA Candidate at the Stanford Law and Business Schools, “College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity”, 46 Stan. L. Rev. 919, April 1994, Lexis

Section 1 of the Sherman Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce … is declared to be illegal." 21 Interpreted literally, this provision could prohibit all commercial contracts. But courts have instead interpreted the Act to prohibit only "unreasonable" restraints on competition. 22 Courts normally assess the reasonableness of a competitive restraint by applying a "rule of reason" test that evaluates the competitive effect of the contested conduct in light of all relevant circumstances. 23 Some categories of activities are so likely unreasonable, however, that courts determine them per se unreasonable without analyzing their competitive implications. 24 For example, courts generally invalidate horizontal agreements to fix prices, the crux of the Justice Department's allegations [\*923] in Brown University, as per se illegal. 25 Courts ask three questions when evaluating agreements under Section 1: Does the activity constitute trade or commerce so that the Sherman Act applies? If so, is the activity in a category that evokes application of a per se presumption against its validity? If not, is the activity unreasonable under the rule of reason? Both Brown University decisions followed this general scheme.

#### ‘Anticompetitive’ behavior is outcome dependent

Janusz A. Ordover 85, Professor of Law at the University of Columbia School of Law, A.O. Sykes, and R.D. Willig, “Nonprice Anticompetitive Behavior by Dominant Firms Toward the Producers of Complementary Products”, in Antitrust and Regulation: Essays in Memory of John J. McGowan, Ed. Fisher, p. Google Books

In a variety of market settings dominant firms have an incentive to engage in anticompetitive practices that disadvantage the producers of complementary products. (Here, we define "anticompetitive practices" as practices that exclude other producers from markets, to the detriment of economic welfare.) These incentives arise as a result of com- plementarities in consumption and in production. For example, cameras and film are complements in consumption, whereas basic and pay programming for cable television are complements in production, at least at the distribution level. Thus, contrary to conventional think- ing, a firm with market power at one stage of production or over one component of a product may nonetheless have an incentive to extend its market power to other stages of production or to other product components.

#### It's a prohibition because conduct incompatible with the standard is illegal

John G. Koeltl 7, United States District Judge, “United States Baseball v. City of New York”, United States District Court for the Southern District of New York, 509 F. Supp. 2d 285, 297, 2007 U.S. Dist. LEXIS 63234, 8/27/2007, Lexis

The City responds that its home rule and police powers are broader pursuant to Article IX, Section 2(c) of the New York State Constitution, New York Home Rule Law § 10(1)(a)(12), and New York General City Law § 20(13) than the plaintiffs suggest. These provisions give the City the power to enact laws for the "safety, health, well-being, and welfare" of its residents. The City asserts [\*\*29] that the Bat Ordinance does not constitute a "prohibition" because it does not condemn all use of non-wood bats. It bars their use in competitive high school baseball games, but not for example in high school practices, junior high school games, "pick up" games, or youth league games that are not school-sponsored. Moreover, the City persuasively argues that the suggested distinction between "prohibitions" and other "regulations" is artificial and untenable, because all regulations prohibit some conduct that is incompatible with the regulatory standards and all "prohibitions" leave some conduct untouched. For example, a New York court upheld as a valid exercise of the police power a New York City law banning the possession in a public place of a knife with a blade of at least four inches in length in People v. Ortiz, 125 Misc. 2d 318, 479 N.Y.S.2d 613, 620 (Crim. Ct. 1984). The plaintiffs suggest the law at issue in Ortiz was a not a "prohibition," but it appears to be at least as complete a prohibition as the Bat Ordinance, which prohibits only certain uses of bats with certain defined characteristics.

#### ‘Increase’ isn’t immediate

Judge Tucker 9, Supreme Court of Virginia, Reno's Ex'rs v. Davis, 14 Va. 283, 289, 1809 Va. LEXIS 53, 11/8/1809

Thursday, November 23. On the merits, Wickham argued that, by the word "increase," children born after the death of the testator only passed; for at the time of the death and not until then, the will speaks. This is a question of intention. If the children living when the will was made had names, it would have been more natural to describe them by name, than by the word increase. But according to the general usage of the country, the word "increase" means the same as "future increase." Parol testimony on this subject is improper, as it goes to prove what the testator meant by particular words.

#### It prohibits a practices---the rule is simply a test to determine whether conduct violates that prohibition

Todd Fishman 19, [Allen & Overy LLP](https://www.jdsupra.com/profile/Allen_Overy_docs/), January 31st, 2019, “The Rule of Reason as a Bar to Criminal Antitrust Enforcement”, https://www.jdsupra.com/legalnews/the-rule-of-reason-as-a-bar-to-criminal-87406/

Antitrust law’s rule of reason was born of technical necessity. By its terms, §1 of the Sherman Act prohibits “[e] very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.” 15 U.S.C. §1. Despite the expansive language of the statutory prohibition, the Supreme Court has held that §1 prohibits only agreements that unreasonably restrain trade. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58-60 (1911). With the rule of reason, antitrust courts assumed a prudential role in administering the scope of antitrust violations, applying a factual inquiry weighing legitimate justifications for a restraint against any anticompetitive effects. Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 49 (1977).

#### Prohibition includes per se and rule of reason.

Anu Bradford 18, and Adam S. Chilton. Anu Bradford Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton. Assistant Professor of Law and Walter Mander Research Scholar.

Before discussing our data and the coding of the CLI, it is important to recognize that there are limitations to any index that attempts to quantify competition regulation. This is because it is difficult to produce a single metric that tells the comprehensive story of country’s competition regime. For example, if a specific type of conduct is prohibited, is it prohibited always (per se) or sometimes (rule of reason)? This seems like a relevant distinction to code, but it turns out to be difficult to capture systematically in many jurisdictions. For instance, Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) seems to regulate anticompetitive agreements under the rule of reason standard in the European Union, but, in practice, cartels are per se prohibited. This highlights the challenge of coding even just the law in books, let alone accounting for all the nuances of a country’s competition policies.20

#### The rule of reason ‘prohibits’

Carl J. Gaul 17 IV, J.D. from the American University Washington College of Law, B.A. in Economics and Philosophy from Cornell College, “The Ultimate Fighting Championship and Zuffa: From 'Human Cock-Fighting' to Market Power”, American University Business Law Review, 6 Am. U. Bus. L. Rev. 647, 658, Lexis

Rule of reason analysis is an in depth economic analysis conducted to determine whether a business practice is anticompetitive or restrains trade. 94 Practices challenged under the rule of reason are given the benefit of a balancing test weighing procompetitive benefits of the practice against potentially anticompetitive effects. 95 Rule of reason jurisprudence interprets the Sherman Act to prohibit business practices which have the "actual or probable" effect of imposing an undue restraint on trade and requires a balancing test. 96 This balancing test incorporates economic benefits brought about by potentially justifiable restraints of trade, such as contracts. 97 Specifically, courts will balance: (1) whether there is a potential harm to the competitive process; and (2) whether there are procompetitive justifications for the allegedly illegal behavior, called "efficiencies," to determine whether there is an illegal net anticompetitive effect. 98

#### Rule of reason prohibits---the target must only be anticompetitive conduct

Gabriel A. Feldman 9, Associate Professor of Law and Director, Tulane Sports Law Program, Tulane Law School, The Misuse Of The Less Restrictive Alternative Inquiry In Rule Of Reason Analysis, American University Law Review, 58 Am. U.L. Rev. 561, 591-592, February 2009, Lexis

Use of the less restrictive alternative inquiry as a dispositive prong changes the fundamental purpose of the antitrust laws. Under [\*592] Chicago Board of Trade and after nearly 100 years of Supreme Court precedent, Section 1 of the Sherman Act is intended to act as a gateway prohibiting agreements that cause a net anticompetitive effect on a market. The New Rule of Reason, however, uses Section 1 to prohibit agreements that are not procompetitive enough. 155 It therefore transforms antitrust into an interventionist law where judges are required to second-guess complex business judgments of defendants. 156

#### Rule of reason prohibits

Conrad Rushing 21, Former Presiding Justice of the Sixth District of the California Courts of Appeal, Bruce L. Simon is a Partner Emeritus at Pearson, Simon & Warshaw, LLP, Elia Weinbach was a judge for the Superior Court of Los Angeles County in California. Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Google Books

Because there are limits to an explicit interpretation of the antitrust laws (under which any restraint, even economically justifiable ones, can be found improper), the United States Supreme Court has developed what is known as the rule of reason. The rule of reason prohibits only those actions that cause an “unreasonable restraint of trade” [Standard Oil Co. v, United States (1911) 221 US1, 87,31 S Ct 502, 55 L Ed 619; see also People v. Building Maint. Contractors Ass’n Inc (1953) 41 c2nd 719, 727, 264 P2d 31} The test of the validity of a restraint of trade “is ehether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition” {Board of Trade v, United States (1918) 246 US 231, 238, 38 S Ct 242, 62 L. Ed 683}

### C/I---1AR

#### It can hinder, rather than be absolute

Sandra L. Lynch 2, Judge on the United States Court of Appeals, First Circuit, “Second Generation Props., L.P. v. Town of Pelham”, 313 F.3d 620, 634, 2002 U.S. App. LEXIS 25904, 12/17/2002, Lexis

§ 332(c)(7)(B). We start with the fact that Congress used "services" and not "service." A straightforward reading is that "services" refers to more than one carrier. Congress contemplated that there be multiple carriers competing to provide services to consumers. That one carrier provides some service in a geographic gap should not lead to abandonment of examination of the effect on wireless services for other carriers and their customers. Next, the phrase "have the effect of prohibiting" may well refer to actions that mostly prohibit. For example, B.A. Garner, A Dictionary of Modern Legal Usage 256 (2d ed., 1995), gives as the first definition of effective "having a high degree of effect." (emphasis added). Accord B.A. Garner, A Dictionary of Modern American Usage 237-38 (1998). Moreover, a common reading of the word "prohibition" standing alone would apply to a situation of denial of services to the vast majority of users. See, e.g., Oxford English Dictionary (2d ed. 1989) (defining [\*\*33] "prohibit" as "to prevent, preclude, hinder") (emphasis added). Thus Congress may well have meant the effective prohibition clause to reach certain situations in which there is some coverage in a gap.

#### ‘Practice’ includes single acts---once deemed unreasonable, they’re prohibited

Lawrence M. Clinton 92, Judge on the Nebraska Supreme Court, Mid-South Order Buyers, Inc. v. Platte Valley Livestock, Inc., 210 Neb. 382, 392-394, Supreme Court of Nebraska, 1/22/1982, Lexis

Although Neugebauer is a trial court opinion, the Eighth Circuit adopted its reasoning and, therefore, it is necessary to examine Neugebauer in order to interpret Rice. Neugebauer did not involve drafts or checks but did involve a single transaction. In that case the stockyard advertised for sale a group of Angus heifers, representing them to have been bred to Angus bulls. The representation was false. The Secretary entered a reparation order for the payment of money. The judge in Neugebauer wrote at 1714-16: "The allegation of lack of jurisdiction is dependent upon the interpretation of the word 'practice' found in Sec. 208 of the Act as amended. Defendant asserts that the action of defendant was a single and isolated incident and not a 'practice' within [\*\*\*18] the meaning of the Act. The United States intervened for the explicit purpose of defending the jurisdiction of the Secretary of Agriculture in this case.

"This Court is persuaded that the action of the defendant was a prohibited 'practice' within the meaning of the Act. The defendant has cited two district court cases in support of the contention that jurisdiction is lacking. McClure v. E. A. Blackshere Co., 231 F. Supp. 678 (D. Md. 1964); Guenther v. Morehead, 272 F. Supp. 721 (S.D. Iowa 1967).

"In McClure, the plaintiff had sought enforcement of a reparation order entered upon defendant's refusal to pay for livestock purchased by defendant's agent. The Court found that the Secretary did not have jurisdiction under Sec. 208 of the Act. The opinion was first premised on the basis that nonpayment of a bill did not involve a regulation or practice with respect to the furnishing of stockyard services. The Court stated:

"'It would take the most violent stretching of an elastic imagination to class the nonpayment of a bill as involving a regulation or practice in respect to the furnishing of stockyard services; . . . . McClure, supra at 681.'

[\*393] " [\*\*235] [\*\*\*19] The transaction before this Court does not relate to nonpayment of bills or an ordinary debtor-creditor relationship. The Secretary found that defendant, a registered market agency under the Act, had made false representations in the sale of Angus heifers. The Court can conceive of no action by a market agency more inextricably within the term of 'furnishing stockyard services' than representations made by a market agency in the course of an auction sale of livestock at a posted stockyard. Under Sec. 201(b) and (c) of the Act, defendant's actions were clearly in the course of furnishing stockyard services by a registered market agency.

"The Court in McClure also found that a single instance of nonpayment of a bill could not be denominated a practice within the meaning of the Act. The Court noted:

"'Practice ordinarily implies uniformity and continuity, and does not denote a few isolated acts, and uniformity and universality, general notoriety and acquiescence, must characterize the actions on which a practice is predicated. McClure, supra at 682.'

"Implicit in this analysis was the restriction that there could be only a single actor to establish a practice. The Court [\*\*\*20] finds no such limitation either in the language of the Act or the legislative history. . . .

. . . .

"The above references of legislative history would indicate that the term 'practices' found in Sec. 208 referred to practices within the industry as a whole and not to the practices of a single specific market agency. It would defeat the purpose of the Act to hold that the Secretary was devoid of jurisdiction in the instant case merely because the defendant has not made misrepresentations to the plaintiff or to other purchasers in the past."

We hold that the terms "practice" and "practices" in § 208(a) do not necessarily require repetitive acts. The term "practice" may involve a single transaction if the [\*394] unjust or unreasonable practice is among the evils the Packers and Stockyards Act was intended to remedy. The cases upon which Platte Valley relies are sufficiently distinguished in the cases we have just discussed, and we will not elaborate or repeat those distinctions in this opinion. Our holding should not be construed as indicating we disagree with the uniform holding of the cases we have discussed, that the reparation procedure does not give the Secretary jurisdiction [\*\*\*21] as a check-collecting agency. The Secretary of Agriculture had jurisdiction in this case because the act involved was, for the reasons stated in the next section of this opinion, unjust and unreasonable.

#### Per se is completely outdated and indefensible

D. Daniel Sokol 8, Assistant Professor at the University of Florida Levin College of Law, Senior Advisor at White & Case LLP, LLM from the University of Wisconsin Law School, JD from the University of Chicago Law School, MSt in History from Oxford University, AB from Amherst College, “What Do We Really Know about Export Cartels and What is the Appropriate Solution?”, Jnl of Competition Law & Economics (2008) 4(4), 12/1/2008, Lexis

A categorical ban on export cartel immunities could be imposed. 44 A more gradualist approach offered by Scherer would be to allow each country an export cartel exemption in up to three industries. 45 A full or partial ban is a difficult proposition to undertake. Because export cartels are case-specific and some export cartels may have ancillary justifications for their conduct, a general ban on immunities may not optimize global welfare. As with many per se rules, a per se ban on export cartel immunities provides a shorthand for how to address categorical conduct. However, per se rules may prohibit behavior that is pro-competitive. This is why, in the modern era, antitrust is wary of per se prohibitions generally. From the lack of empirical evidence based on data limitations, one cannot make a categorical assertion that export cartels are anticompetitive. 46

#### It's complete nonsense---‘rules’ always dissolve into standards

Daniel A. Crane 7, Assistant Professor, Benjamin N. Cardozo School of Law, Yeshiva University, Rules Versus Standards in Antitrust Adjudication, 64 Wash. & Lee L. Rev. 49 (2007), https://scholarlycommons.law.wlu.edu/wlulr/vol64/iss1/3

Before proceeding much further, it is worth pausing to consider the possibility that a world of antitrust rules would be illusory because, in practice, rules always fade into standards. Take H.L.A. Hart's observation that "[n]atural languages like English are... irreducibly open-textured" when specifying "general classifying terms,' ' 0 0 or Wittgenstein's point that the problem with rules is that they do not tell you when they should be applied.' 0 ' Because language is irreducibly open-textured and indeterminate and because rules lack internal mechanisms to specify when they should be applied, even when the law is formally framed as a rule, it requires penumbral rules, canons of interpretation, and other secondary decisional criteria which end up swallowing the apparent simplicity of the rule. 10 2 Specifying the governing law as a simple, bright-line rule may merely conceal the fact that important balancing of social interests, weighing of probabilities, and choosing between competing ends and means lurk in the shadow of the rule. Declaring a legal rule thus appears misleading or even dishonest because it hides the social preferences that animate the decision-maker's conclusion. Under one interpretation, antitrust law provides the perfect illustration for Hart and Wittgenstein's point. In this view, there never have been such things as case-determinative antitrust rules-only standards clad in rule-bound rhetoric. The current march toward standards, then, is not so much a change in liability determinants as a dissipation of the mystery surrounding antitrust's concealed methodology. In a moment, I will dispute this possibility and argue that the specification of antitrust law as rule or standard has very important practical consequences. But first, it is worth acknowledging the extent to which Hart and Wittgenstein's observation rings true in antitrust. A case in point is antitrust law's long-standing per se prohibition against "price fixing." As any antitrust practitioner will recognize, price fixing appears in quotation marks because application of the per se rule depends not on the fact that competitors have literally fixed prices but that the challenged conduct falls within the antitrust category known as "price fixing." The judicial decision often thought to have established the per se rule against price-fixing did not involve price fixing either literally or figuratively but rather a gentleman's agreement by dominant oil producers to buy up distressed oil from small refineries and thereby stabilize the wholesale market. 1 03 The defendants never came close to agreeing on price. Nonetheless, the Supreme Court held that any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" amounts to "price fixing" in the relevant legal sense, whether or not the defendants have actually done the act that a lay person might suppose "price fixing" to be-fixing a price. 1 On the other hand, the Supreme Court has described an act of apparent price fixing by competitors-an agreement on prices for blanket licensing of musical repertoires-as something other than "price fixing" and hence subject to the rule of reason. 0 5 In BMI v. CBS, the Supreme Court rejected textual "literalism" and held that application of the per se rule against price fixing is not as "simplistic" as "determining whether two or more potential competitors have literally 'fixed' a 'price.'" 06 Rather, "[a] s generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable."' 0 7 Application of the per se rule turns not on whether the conduct amounts literally to price fixing but on whether the "particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue."" 8 This flexibility in the per se rule invites endless pages of briefing on whether the conduct at issue should be properly characterized as "price fixing" because it unjustifiably tampers with the market mechanism for determining prices or as something else because it can be justified by efficiencies, a standard-favoring way of doing law.'0 9 Hence, Hart explains that rules inevitably dissolve into standards and Wittgentsein explains that rules do not tell us when to apply them.

#### Per se is arbitrary and subjective---AND---“rules of reason” are meant to be clear---semantics ensures all plans can equally be twisted to meet or not meet this interp.

Geoffrey Manne 21, President and Founder of the International Center for Law and Economics and Distinguished Fellow at the Northwestern University Center on Law, Business, and Economics, “The Rule of Reason as a Discovery Procedure: A Response to Ramsi Woodcock's Hidden Rules of a Modest Antitrust,” 105 Minn. L. Rev. Headnotes 422, 448-453

D. THE OVERSTATED DIFFERENCE BETWEEN RULE OF REASON AND PER SE

It is also inaccurate to frame per se rules as entailing no indeterminacy whatsoever. There will always be procedural, theoretical, and/or evidentiary predicates for legal liability. Per se rules are triggered by factors that can be subject to significant interpretation. And rules of reason may be designed to provide firms with safe harbors. Accordingly, the distinction between these standards is often overblown.

For example, a great deal of the enforcement activity characterized by Woodcock as movement toward a rule of reason could better be characterized as the creation of bright-line safe harbors for large swaths of conduct. There are--or were--a great number of antitrust safe harbors beginning in the 1980s and coinciding with a number of per se to rule of reason shifts. Copperweld established a safe harbor for within-firm conduct. 75 Brooke Group introduced a safe harbor in predatory pricing cases for above-cost pricing. 76 Trinko created a safe harbor for monopoly pricing (and a presumption of legality for unilateral refusals to deal). 77The Court also adopted safe harbors for [\*449] product innovation by dominant firms. 78There are numerous other examples. 79

Significantly, many of these shifts are described by Woodcock as moves toward the rule of reason from per se illegality--but they needn't be. Where Woodcock describes Jefferson Parish as having the net result that an exemption for "exclusive dealing that forecloses more than 30% of the market is subject to rule of reason treatment on the model of Tampa Electric" 80Edwards and Wright describe it as "a bright line foreclosure safe harbor to analyze the reasonableness of exclusive dealing contracts." 81

Woodcock goes on to interpret the rule set out in Jefferson Parish by noting that:

Justice O'Connor's observation in her celebrated Jefferson Parish concurrence that exclusive dealing contracts "of narrow scope pose no threat of adverse economic consequences" and "may be substantially procompetitive" referred to the character of those contracts that foreclose up to 30% of the market and are effectively per se legal today. Of the ambiguous conduct that forecloses more than that amount, Justice O'Connor expressed no opinion regarding the likelihood of harm. 82

The key language from Justice O'Connor is the following:

Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied-product market or that abet the harmful exercise of market power that the seller possesses in the tying product market. Under the rule of reason tying arrangements should be disapproved only in such instances . . . . In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question -- the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. 83

The presence of an indeterminate term like "significant fraction" does not render the rule inherently indeterminate (if that word is to have any meaning). And under this enunciated rule, exclusive dealing is unreasonable (illegal) only when it entails "significant" foreclosure. That [\*450] is a bright line, even if "significant" is indeterminate. Conduct that does not foreclose a significant fraction of buyers or sellers is per se legal. In this case, because the conduct in question foreclosed 30% of the market, a figure of 30% to 40% has been interpreted by numerous courts as the boundary of effective per se legality. 84

This may seem like a semantic distinction--but that is somewhat the point. Whether a rule is a bright-line safe harbor embedded in a rule of reason or a rule of per se legality is in the eye of the beholder. Woodcock is aware of this, but unduly dismissive of it. The prior case law did not establish per se rules that were always appreciably distinct from rule of reason analysis; they simply imposed different safe harbors or spheres of per se liability, the boundaries of which inevitably require detailed analysis, at times little different than that entailed by the later rules. 85By the same token, the rule of reason is not monolithic, either, and "[a]pplication of the rule of reason is not a rule of per se legality." 86Indeed, while "[i]n some instances, rule of reason treatment approaches per se legality; in others, the rule amounts to a rule of presumptive condemnation." 87

## OPEC DA

### Overview---1AR

#### Too many alt causes.

Sahil Mahtani 19. Strategist at Investec Asset Management. 5-23-2019. "The Dollar May Be Knocked off Its Pedestal." Wall Street Journal. https://search-proquest-com.proxy.library.emory.edu/docview/2229030097/5AA0F44CD00545F3PQ/1?accountid=10747. accessed 8-14-2019//JDi

Will the U.S. dollar soon lose its status as the world's pre-eminent currency? The consensus is no -- it's said that any move away from the dollar would take decades. This view is too complacent. Developments in foreign-exchange markets during the past 18 months point toward de-dollarization. Consider that Chinese "petro-yuan" crude-oil futures, launched last year in Shanghai, now sit right behind Brent and West Texas Intermediate in trade volume. The world's central banks bought more gold last year than at any time since President Nixon took the U.S. off the gold standard in 1971. Markets recently learned that China added gold to its reserves for the fifth month in a row. Earlier this year, the U.K., France and Germany created a new payment-processing system to permit payments to Iran. It will begin quietly with humanitarian aid, then move to other goods and services, potentially competing with the American-influenced Swift system. The increasing use of economic sanctions under Presidents Obama and Trump is the immediate cause of de-dollarization. In European finance, few have forgotten the $8.9 billion fine meted out to French bank BNP Paribas in 2014 for violating U.S. economic sanctions against Iran. It's not that surprising, or even that significant, when Russia shifts $100 billion of dollar-denominated reserves into Chinese yuan, euros and Japanese yen, as it did last year. But the change in posture among the trans-Atlantic democracies is noteworthy. At his final European State of the Union address, European Commission President Jean-Claude Juncker said: "It is absurd that European companies buy European planes in dollars instead of euros." Surging U.S. oil production also has implications for the currency. By 2025 the U.S. is expected to overtake Saudi Arabia as the world's biggest oil exporter. This has already scythed domestic oil imports by 25% since 2010, and that number will keep falling. This is in many ways positive for the U.S. economy, but if America buys less international crude oil while the Chinese ramp up purchases, the likelihood increases that oil exporters will accept currencies other than the U.S. dollar. Oil companies in Russia, Iran and Venezuela have already begun accepting yuan. Were Saudi Arabia to join them, the effects could be substantial. Structural changes in Chinese demographics play a role as well. China's working-age population peaked in 2016 and will likely continue to decline. This will reduce household savings, putting consistent pressure on China's current account. Deficits will become more common, and to avoid incurring foreign-currency debt in perpetuity, China will need foreigners to become more comfortable buying Chinese assets in yuan. That's why China has been so keen to get global-bond and equity indexes to include Chinese assets. Yuan-denominated bonds were included in the Bloomberg Barclays Global Aggregate Index in April. Meanwhile, political polarization in the U.S. implies budget deficits as far as the eye can see, driven by tax cuts and higher entitlement spending. Congressional Budget Office forecasts show U.S. federal debt hitting 152% of gross domestic product by 2048, up from 78% today. The U.S. twin deficits -- fiscal and current account -- are a good leading indicator, with a two-year lag, of dollar weakness. They currently imply double-digit percentage declines in the dollar's value over the next few years.

### No Link---1AR

#### Their only link card is an aff card! Why would the aff change current understandings? Here’s all the parts of their only link card that prove our argument. The parts they will claim don’t are a normative argument for why the exemption shouldn’t exist, not an argument for why that’s the aff. Not to mention OPEC is not a US export cartel, and those are the only things prohibited by the plan.

--[UK in yellow]

Udin 01 (Andrew C, “Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC”, American University Law Review, Vol. 50, Iss. 5) DB \*Footnotes in brackets

2. Distinguishing between governmental and commercial activities: the nature v. purpose test To distinguish between a foreign state’s governmental and commercial activities for purposes of determining sovereign immunity, a high standard of analysis must be in place.207 To facilitate this distinction, the United States, through the FSIA, developed the “nature versus purpose test.” 208 This test asserts that the commercial character of an activity shall be determined by reference to the nature of the course of conduct or of the particular transaction or act, rather than referencing that activity’s purpose.209 Under the purpose test, if the reason underlying the government’s activities relates to a given sovereign obligation, then that government retains immunity.210 Conversely, the nature test211 [211. The nature test has been described as: The distinction between acts [that have a public purpose] and acts [that have a private purpose] can only be based on the nature of the act of the State or of the resulting legal relation, not on the motive or the purpose of the activity. What is relevant is whether the foreign State acted in the exercise of its sovereign power. Exemptions from Territorial Jurisdiction: Sovereign Immunity: 6 WHITEMAN DIGEST § 20, at 567.] ignores the underlying reason, looking only to the nature of the transaction.212 The FSIA expressly adopts the nature test, but the “key to a definition of “nature” for FSIA analysis, then, requires a distinction between the legal nature of private acts and the legal nature of governmental acts.” 213 The benchmark case of Texas Trading & Milling Corp. v. Republic of Nigeria214 illustrates how courts have interpreted the commercial nature of an activity.215 The Second Circuit found, “if the activity is one in which a private person could engage, the sovereign is not entitled to immunity.” 216 Under this so-called private person test,217 if a private party has the legal right and power to engage in the same activity or commit the same act, the act or activity is commercial.218 If only a sovereign could commit the act or activity, it is considered governmental in nature.219 Each of the foregoing principles have yet to be compiled into a single test, and courts are still left with the painstaking task of deciding whether a sovereign’s acts are commercial or governmental in nature.220 The Justice Department’s Antitrust Guide for International Operations221 notes that distinguishing between “sovereign” and “commercial” activities may be difficult and “may turn in part on questions of foreign law, custom, and practice.” 222 B. The Act of State Doctrine The act of state doctrine, a further limitation on jurisdictional immunity, is a court-imposed restraint encompassing the basic rule of customary international law that one country should not inquire into the validity of “governmental” 223 acts of a foreign sovereign within its own territory.224 The doctrine recognizes the legal and physical consequences of all acts of state in other countries, acknowledging that the world is made up of independent sovereigns that possess exclusive power to govern by their own laws or decrees within their own national territorial boundaries.225 The Supreme Court first recognized the act of state doctrine as a limiting factor in assertions of jurisdiction in Underhill v. Hernandez. 226 The Court found that “[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.” 227 In 1964, in Banco Nacional de Cuba v. Sabbatino, 228 the Court revisited Underhill and intervening cases, and in its decision, added the “Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, [subject to certain possible limitations].” 229 In deciding cases such as Sabbatino, the Court’s purpose is two-fold. First, the Court seeks to emphasize constitutional issues that relate to the separation of powers between the judicial and political branches of government on matters of foreign affairs.230 Second, the Court endeavors to consider the notion of comity with respect to the applicability of the act of state doctrine, as declared in Timberlane. 231 In sum, the act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments.232 Instead, it necessitates that, in the process of deciding whether an act is governmental or commercial, the purely governmental actions of foreign states, undertaken within their own jurisdictions, shall be deemed valid.233 IV. CAN U.S. ANTITRUST LAW BE APPLIED EXTRATERRITORIALLY TO ASSERT JURISDICTION OVER OPEC? Abolition of the foregoing jurisprudential hurdles to the extraterritorial application of U.S. antitrust law may be a lofty and seemingly unrealistic goal. However, given the current global economy, there is a need for effective transitional enforcement of U.S. antitrust law.234 Yet, actions of foreign sovereigns not falling within the purview of the aforementioned exceptions to subjection of U.S. antitrust law remain immune from suit. Given that, this Comment shall now focus on the issue at hand: should current laws be altered so as to quash the safeguards protecting OPEC from being subject to antitrust prosecution in the United States? A. The First and Final Attempt at Taking Action Against OPEC: International Association of Machinists and Aerospace Workers v. OPEC In 1979, the International Association of Machinists and Aerospace Workers (“IAM”), an American labor union, brought an antitrust action in the U.S. District Court for the Central District of California challenging the price-fixing activities235 of OPEC and its then thirteen member nations, naming each nation and OPEC as defendants.236 IAM sought monetary and injunctive relief for alleged price fixing of crude oil in violation of the Sherman Act.237 The actual injury plaintiffs alleged was the payment of exorbitant prices for gasoline at station pumps, by virtue of the anti-competitive actions taken by OPEC and the antitrust violations involved.238 The district court, however, denied jurisdiction on the grounds that the suit against OPEC and its member nations was barred by sovereign immunity.239 Central to the district court’s judgment was its finding that OPEC’s alleged price fixing was a governmental rather than commercial act.240 The court held that OPEC’s purpose in setting oil prices was to ensure control of the member nations’ natural resources, a sovereign function.241 On appeal, the Ninth Circuit Court of Appeals affirmed dismissal of the suit but on different grounds.242 While not deciding the issue of whether OPEC enjoys sovereign immunity, the Ninth Circuit instead held the act of state doctrine barred jurisdiction.243 The court noted its holding was motivated by an unwillingness to rule on delicate matters of foreign policy, especially where the executive and legislative branches have chosen to approach a given case with restraint.244 B. Why OPEC Should Not Retain Sovereign Immunity At the district court level in IAM v. OPEC, Judge Hauk saw the problem as deciding whether OPEC’s acts were commercial acts in the marketing and selling of oil, or as governmental acts with respect to setting terms of the removal of a major natural resource from the member-nations’ territory.245 Judge Hauk’s rationale,246 however, was flawed, and appropriately criticized by the Ninth Circuit.247 The central question in IAM v. OPEC was whether a foreign state was immune from commercial conduct in exercising sovereignty over its natural resources.248 The following presents the tension between OPEC’s governmental and commercial capacities. It is seemingly a governmental activity for foreign nations to regulate the extraction of petroleum from its own terrain by ensuring compliance with zoning, environmental, and other regulatory establishments.249 However, by sitting together in collusion to limit their oil production with the overriding goal of increasing prices, OPEC and its member nations are engaging in a commercial activity.250 The district court, when confronted with the contentions in the complaint that “these governments went on national television and announced they were fixing prices—a per se violation of the antitrust laws,” 251 in effect said, “[n]o, no[, y]ou forgot about the sovereign immunity defense. These are sovereigns, and they are immune because the activity they were engaging in was the preservation and maximization of profit from natural resources, a clearly sovereign activity. Therefore, they are immune.” 252 These statements further substantiate the flaw of the district court’s decision. The FSIA provides instructions to look at the nature of the activity, and not its purpose.253 The nature of OPEC’s conduct was price-fixing, and, given OPEC’s overriding concern of serving its own economic interests,254 it is indeed manifest that this conduct qualifies as commercial under the FSIA.255 C. OPEC’s Actions Should Not be Deemed Acts of State A principal reason for the soaring energy prices in the United States is that international price-fixing has evaded review under U.S. antitrust law.256 The underlying rationale for this inaction results from foreign policy considerations and technical impediments in antitrust laws that prevent the effective enforcement of U.S. law with respect to international price-fixing in the energy market.257 Such policy and technical impediments include the uncertain act of state doctrine, “which has been used to bar a lawsuit directed at stopping the manipulation of energy supplies and prices because of concern that such litigation might interfere in the foreign policy of the United States.” 258 In IAM v. OPEC, the Ninth Circuit found that, notwithstanding the undeniably commercial character of its price setting and production-limiting activities, OPEC retained jurisdictional protection under the act of state doctrine.259 This was the first time a federal court, while recognizing the commercial nature of acts committed by a foreign state, accepted the act of state defense and dismissed the claim.260 Moreover, as a general principle of asserting jurisdiction over a foreign state, verification of immunity under the FSIA is a necessary precursor to entertaining any other defenses.261 The Ninth Circuit essentially deemed the act of state doctrine to be a rule of “jurisdictional immunity or abstention.” 262 Additionally, the act of state doctrine typically extends to the acts of a foreign state that are committed and have consequences within their own country.263 IAM v. OPEC, conversely, expanded the act of state notion to include acts that were not limited to its member nations’ borders, but extended to countries to which it provided services.264 “Since the 9th Circuit issued its opinion in 1981, there have been major developments in international law that impact directly on the subject matter at issue.” 265 The 1990s witnessed an increase in the efforts to seek compliance with basic international norms of behavior through international courts and tribunals.266 Additionally, as a result of the holding in Hartford Fire in 1993, the doctrine of international comity, a fundamental ingredient of the act of state doctrine, has been nullified.267 Given these considerations, a U.S. court electing to apply the act of state doctrine to a suit taken against OPEC today will most probably reach a different determination than reached by the Ninth Circuit nearly twenty years ago.268 D. OPEC’s Actions Viewed in Light of the Effects Paradigms As stated below, the Second Circuit Court of Appeals in Alcoa formulated the two-pronged “effects” test in order to establish federal jurisdiction over foreign companies.269 In its decision in Hartford Fire in 1993, the Supreme Court based its decision in part on the “effects” jurisdictional standard of the FTAIA, and examined whether the conduct at issue had a “direct, substantial, and reasonably foreseeable effect” on U.S. commerce.270 In applying the prevailing law in the United States in Hartford Fire to the actions undertaken by OPEC, the conclusion that an action against OPEC is now possible becomes more readily apparent. Under the Hartford Fire two-step test, a court will first determine whether it has subject matter jurisdiction over the claim, requiring it to consider whether the defendant intentionally caused substantial effects upon the United States.271 OPEC openly manipulates the price of oil, and it calculatedly keeps energy prices high enough to fund its members’ own economies.272 However, it does not keep these prices too high, so as to keep the United States “hooked” on oil and to keep the United States from making renewable sources or other alternatives economical.273 America’s devoted reliance on crude oil, most notably in the form of gasoline, demonstrates how OPEC’s actions have substantially affected a significant number of American citizens.274 This is a manifest violation of U.S. antitrust law, and the United States’ continued practice of excepting foreign states from its antitrust law has led to the undesirable perception that U.S. courts tolerate foreign anti-competitive conduct. The second part of the Hartford Fire test declares that once a court determines that it has subject matter jurisdiction over a claim, it will then consider whether it ought to exercise this jurisdiction in light of principles of international comity.275 Recall that the Supreme Court in Hartford Fire held that a U.S. court should not consider the interests of a foreign sovereign unless there is a “true conflict” between U.S. law and the law of the foreign state.276 There being no battle of laws in the instant analysis, U.S. courts, under a Hartford Fire analysis, need not concern themselves with comity considerations to promote the dismantling of oil price-fixing arrangements between the members of OPEC. Decisions with respect to foreign relations should be left to Congress and not the courts.277 The “effects” jurisdictional standard strikingly parallels the subject matter jurisdiction component present in the “direct effect” provision of the FSIA’s commercial activity exception.278 The FSIA criterion likewise requires that the defendant foreign state’s activities have a substantial and foreseeable effect on U.S. commerce.279 Consequently, under the “effects” jurisdictional standard, OPEC would fall under the realm of antitrust laws for the same reasons that their actions have a “direct effect” on commerce in the United States.

### No Impact---1AR

#### 1NR Gheorghe says Iran prolif causes Saudi prolif. That is inevitable.

Reuel Marc Gerecht & Ray Takeyh 10-19, "Iran Won’t Stop Until It Has a Nuclear Weapon," Wall Street Journal 10/19/2021, https://www.wsj.com/articles/iran-stop-nuclear-weapon-deal-jcpoa-bomb-aggression-11634678972.

The Islamic Republic of Iran is led by an ardent ideological regime that frequently relies on conspiracies to explain its predicament. Leaders of the regime speak incessantly about the cabal of Zionists and Jews

<<MARKED>>

who control America and plot against the Islamic revolution. Mr. Khamenei and his henchmen haven’t spent billions and endured a tidal wave of sanctions and social unrest only to get close to a nuclear weapon. They will build the bomb as soon as they can and justify it afterward.

The Iranian theocracy has gradually transformed itself. Mr. Khamenei has purged the pragmatists from Iranian leadership. The reformers who rallied around Mohammad Khatami (president from 1997 through 2005) and believed the theocracy could be softened, even superannuated, through the ballot box have been banned from the corridors of power. Even conservatives who contemplated diplomatic engagement with the West to enhance the regime’s status and economic power, like former President Hassan Rouhani (2013-21) and former Parliament Speaker Ali Larijani (2008-20), are denied a seat at the table. Iran is becoming less subtle. The new president, Ebrahim Raisi, is the personification of the new elite—cruel, dogmatic and indifferent to Western sensibilities.

As the guardians of the theocracy see it, the U.S. uses institutions like the United Nations Security Council and the International Atomic Energy Agency to pressure regimes into submission. Nonproliferation norms and international conventions are meaningless to Tehran. As Mr. Khamenei recently said, “Whenever you made your affairs contingent on Westerners’ cooperation, you failed, and whenever you moved forward and showed initiative without trusting Westerners, you succeeded.” Iran won’t try to join a global community that is designed and run by its enemies.

Iran has other compelling reasons for developing atomic weapons. So far, the theocracy has relied on Shiite proxies and militias to project its power and influence across the Middle East in a relatively low-cost and effective way. To ensure that Iran can counter the West, Israel and the Arab Gulf States, the regime will need more weapons. Building armies, armadas and air forces is expensive and requires too much foreign input; relying on proxies against well-armed adversaries is precarious. Hegemony on the cheap can come only from the atomic bomb.

There is no longer any meaningful obstacle to the regime’s nuclear ambitions. The Biden administration is too predictable and fearful. The debacle in Afghanistan and the rhetoric about ending “forever wars” has emboldened Tehran, which now toys with the U.S. through on-and-off nuclear talks. In his truculent address to the U.N. General Assembly last month, Mr. Raisi mocked America. “From the Capitol to Kabul,” he said, “one clear message was sent to the world: The U.S. hegemonic system has no credibility, whether inside or outside the country.”