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Aerojet DA

#### The Lockheed-Aerojet merger will be approved soon because of existing antitrust precedent, but it’s a politicized test of the FTC

Marcus Weisgerber 21, Global Business Editor at Defense One, “Lockheed’s Proposed Aerojet Rocketdyne Purchase Sets Early M&A Test for Biden”, Defense One, 3/21/2021, https://seniordownsizingsolutions.com/rs1kstuq/frank-kendall-northrop-grumman

The Biden administration’s approval — or disapproval — of Lockheed Martin’s planned $4.4 billion acquisition of rocket engine maker Aerojet Rocketdyne could shape defense industry consolidation for years to come.

If approved, the deal would mean the absorption of the last independent American weapons-grade rocket maker. All U.S. rockets would be produced by Northrop, which bought Orbital ATK in 2018, and Lockheed, the world’s largest defense contractor. It would also turn Lockheed into a key supplier of Raytheon Technologies, its major rival in the missiles sector.

Lockheed executives told investors on a Monday morning call that the acquisition would allow the company to deliver weapons to the military faster and cheaper than it can today.

“This helps position us for even greater growth, in hypersonics, missile defense and space, which are key elements of the national defense strategy,” Lockheed CEO Jim Taiclet said.

Taiclet, who became Lockheed’s CEO in June, also cited flat U.S. defense spending projections as a reason for the sale.

“They're going to be asked to do more in these areas with a flattening budget,” Taiclet said. “Having a more efficient supplier and a more robust supplier ... in uncertain economic times is a positive for the Department of Defense and for NASA.”

The proposed deal — which is expected to close in late 2021 — comes two years after Northrop Grumman acquired rocket maker Orbital ATK, a deal stoked industry consolidation fears. The Federal Trade Commission put conditions on the deal that Northrop had to supply solid rocket motors to competitors.

“Our overall expectation is that that may be the same lens through which this particular transaction is viewed because of the similarities there,” Taiclet said.

Still, Boeing claimed Northrop’s buying Orbital ATK prevented it from entering a bid for an $85 billion contract to build new intercontinental ballistic missiles. That left Northrop as the only bidder.

Orbital ATK, now part of Northrop, and Aerojet Rocketdyne are the only two U.S. makers of the solid rocket motors used in ICBMs and missile interceptors.

“The proposed purchase of Aerojet Rocketdyne (AJRD) by Lockheed Martin (LMT) is the first test of the Biden Administration and its views on defense sector consolidation and structure,” Capital Alpha Partners analyst Byron Callan said in a Monday note to clients. “It may take weeks and months before those views are known.”

Loren Thompson, a consultant and defense industry analyst with the Lexington Institute, said Lockheed’s acquisition of Aerojet would create more competition for solid rocket motors.

“Aerojet Rocketdyne will now have the same kind of financial resources to draw on as Orbital did when it joined Northrop, assuring that both domestic suppliers of large solids can remain active in military and civilian markets,” Thompson wrote Monday in Forbes.

A number of government organizations — including the Defense Department — are involved in the regulatory approval process. When Lockheed acquired helicopter-maker Sikorsky in 2015, Frank Kendall, who served as the Pentagon’s top weapons buyer during the Obama administration, expressed concerns that the deal would reduce competition. Kendall is reportedly under consideration to become Biden’s deputy defense secretary.

#### The plan causes compensating denial of the deal

William E. Kovacic 20, Professor at the George Mason University School of Law, JD from Columbia University, BA from Princeton University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy”, University of Pennsylvania Journal of Business Law, Volume 23, Issue 1, 23 U. Pa. J. Bus. L. 49, Lexis

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters. Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. Many matters involved powerful economic interests, and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of [\*75] intellectual property. In 1974, the agency also initiated a program that required certain large firms to provide "line-of-business" data concerning a range of performance indicators.

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda. Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements. The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.

As a group, the FTC's competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency's actions in court and before Congress. The complaints of industry resonated with a large, powerful bipartisan coalition of legislators who criticized the Commission's activism, proposed various measures to curb the agency's authority, and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 [\*76] (FTC Improvements Act). In 1980, bitter opposition to elements of the FTC's competition and consumer protection programs led Congress to allow the FTC's funding to lapse, forcing the agency to temporarily cease operations. Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency's funding. In January 1981, David Stockman, Ronald Reagan's first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC's competition policy program.

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency's choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources. Many legislators complained that the agency had disregarded the legislature's preferences and used its powers in ways that Congress never contemplated to fall within the FTC's remit. As Congress considered bills in 1979 to limit the Commission's powers, Congressman [\*77] William Frenzel captured the prevailing legislative mood:

It is bad enough to be counterproductive and therefore highly inflationary, but the FTC compounds its sins by generally ignoring the intent of our laws, and writing its own laws whenever the whimsey strikes it . . .

Ignoring Congress can be a virtue, but the FTC's excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.

The Commission, Frenzel concluded, was "a rogue agency gone insane."

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency's unauthorized adventurism. Senator Howard Cannon explained: "The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies."

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency's competition mission. Stockman said, " . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress."

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of [\*78] 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC's power to order divestiture or other forms of structural relief in non-merger cases. This was a shot across the bow of the FTC's pending "shared monopoly" cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition. Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC's power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient ("rogue") but [\*79] crazy ("insane"), as well. Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, "is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined." David Stockman's initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC "is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy."

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC's activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively. Leading members of Congress demanded that the agency [\*80] transform its competition and consumer programs or face extinction. Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency's appetite to undertake ambitious, risky projects--to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency's elastic powers innovatively. Congress's admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings. During hearings in 1970 to confirm Caspar Weinberger to be the Commission's new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to "maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well." In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash--including from Congress--that would emerge as the FTC went about "expanding" its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform "tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place."

Weinberger's successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission's powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks. In his appearances as FTC chair before [\*81] congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick's first appearance before the Commission's Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

I think this is one of the Federal commissions that has a much larger responsibility and capability than sometimes it has been willing to live up to for reasons of congressional sniping at it in some respects or pressures put on it through the industry and the like.

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing.

I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . .

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had "responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States." Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency's back: "[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require." McGee closed the proceedings with [\*82] militant instructions:

"Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing."

Kirkpatrick served as the FTC's chair for just over twenty-nine months. The Commission's new chair, Lewis Engman, received the same policy guidance that Congress had provided Weinberger and Kirkpatrick. At Engman's confirmation hearing before the Senate Commerce Committee early in 1973, Senator Frank Moss observed:

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric.

With evident approval, Moss recounted how the FTC had "stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise." The members of the Senate Commerce Committee, Moss concluded, "consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal." Member after member of the Commerce Committee echoed Moss's message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, "I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned."

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying "to make the most of that other resource given to us by Congress [\*83] -- our statutory powers." Weinberger said the Commission had "encouraged the staff to make recommendations to us which will probe the frontiers of our statutes," had made progress in "[p]robling the outer limits" and "exploring the frontiers" of the agency's authority, and had shown it "is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices." In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was "moving into 'high gear' in the task of preserving and promoting competition in the American economy." He said he and his fellow board members "fully intend to be in the vanguard of exploration of the new frontiers of antitrust law."

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal and petroleum refining industries. With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies. The Joint Committee's chairman, Senator William Proxmire, told Engman "the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence." Perhaps astonished to hear that cases to break up the nation's leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, "The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition."

[\*84] Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors. The Commission's decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands. In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry. Here, also, the agency's decision to prosecute the shared monopolization case against the country's leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems. In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC's activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC [\*85] should do and how it should do it. As described below in Section IV.D., that change in legislative temperament and the response by Congress to industry backlash against the FTC's program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was "insane." Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel. As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases). The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

[\*86] Another focal point for attention in assessing the FTC's performance in the 1970s was the quality of its substantive agenda. Was the FTC's substantive program in the 1970s "insane"? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures. Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC's flaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency's improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC's knowledge in the 1970s of the positive record of its past enforcement experience.

B. The Inadequate and Misdirected Enforcement Activity Narrative

Like the hyperactivity narrative described above, the inadequate activity narrative relies heavily on enforcement data to support the view that the federal antitrust agencies have brought too few cases overall and, when filing cases, have focused resources on the wrong types of matters.

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration -- a period characterized by what one journalist described as an "almost total abandonment of antitrust policy." In 1987, in discussing Reagan-era [\*87] federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced "the most lenient antitrust enforcement program in fifty years." Professor Milton Handler remarked that in the Reagan era "a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free." Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, "enforcement ceased."

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party's nomination for the presidency, Barack Obama said the George W. Bush administration "has what may be the weakest record of antitrust enforcement of any administration in the last half-century." The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe. After noting that for most of the 20th century "antitrust enforcement waxed or waned depending on the administration in office," Professor Robert Reich recently wrote that "after 1980 it all but [\*88] disappeared." He added that Presidents Bill Clinton and Barack Obama "allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated."

Presented below are categories of arguments that rely upon specific assertions about the positive record of modern antitrust enforcement. These arguments make positive claims regarding either the amount of activity, the reasons for observed behavior, or both.

GENERAL CRITICISMS OF ANTITRUST ENFORCEMENT: BORK, REAGAN, AND THE DESTRUCTION OF U.S. COMPETITION POLICY

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s. A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC. The Reagan administration [\*89] is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action. The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School's concern that private rights of action over-deter legitimate business conduct by dominant firms. [\*90] This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots. More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC's stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.

By treating the 1980 presidential election as the cause of an abrupt change in federal antitrust enforcement policy, the Reagan-centric inadequacy narrative fails to grasp the significance of the political assault, led by Democrats, against the FTC in the late 1970s. Recognition of how the FTC's relationship with Congress changed over the course of the 1970s forces one to confront the question of why an agency that enjoyed powerful congressional support through much of the decade came to grief so quickly. The episode has a sobering cautionary lesson for contemporary policy making: it demonstrates how quickly congressional attitudes can change once powerful business interests affected by FTC actions bring their [\*91] resources to bear upon Congress, and how turnover in the legislature can erode vital political support. An accurate positive account of the 1970s suggests that an agency should strive to complete its cases and rulemaking initiatives as expeditiously as possible, lest long lags between the start and conclusion of matters expose the agency to debilitating political backlash. This policy making prescription becomes apparent only by forming an accurate picture of what happened to the FTC in the 1970s.

CHICAGO-SCHOOL INSPIRED FOCUS ON PRICE EFFECTS

Critics of modern FTC and DOJ law enforcement often state that the federal agencies focus entirely on price and output effects in selecting and prosecuting cases. This tunnel-visioned approach is said to ignore important considerations involving the harmful effects of business behavior on quality and innovation.

In 2019, in a newspaper op-ed, Rana Fordoohar, a journalist who covers the tech sector, stated: "But monopoly policy in America is currently driven by "Chicago School" thinking, which espouses the idea that as long as consumers aren't paying too much for a good or service, all is well." In August 2020, Joshua Brustein, a business journalist, said: "For decades, antitrust enforcers have centered on the consumer welfare standard, which defined price increases as the only valid focus of antitrust action."

Like the portrayal of activity levels, these positive descriptions of the policy concerns that have guided FTC and DOJ law enforcement are faulty. The claim that the federal antitrust agencies since the late 1970s have focused solely upon price and output effects overlooks the many important instances in which innovation and other quality-related effects were paramount in FTC and DOJ decisions to challenge mergers and bring nonmerger cases. Among other areas from the 1980s to the present, the DOJ and the FTC have emphasized innovation effects in analyzing competitive effects in deals involving defense contractors and transactions [\*92] in the health care sector.

[FOOTNOTE] See, e.g., Joint Statement of the Department of Justice and the Federal Trade Commission on Preserving Competition in the Defense Industry (Apr. 12, 2016) ("In the defense industry, the Agencies are especially focused on ensuring that defense mergers will not adversely affect short- and long-term innovation crucial to our national security. . . ."); Daniel L. Rubinfeld & John Haven, Innovation and Antitrust Enforcement, in DYNAMIC COMPETITION AND PUBLIC POLICY 65 (Jerry Ellig ed., 2001) (discussing DOJ emphasis on innovation-related effects in antitrust enforcement, including the Department's challenge to Lockheed Martin's effort to purchase Northrop Grumman in the late 1990s); William E. Kovacic, Competition Policy Retrospective: The Formation of the United Launch Alliance and the Ascent of SpaceX, 27 GEO. MASON L. REV. 863, 867-68, 899-900 (2020) [hereinafter Competition Policy Retrospective] (discussing centrality of innovation issues in modern antitrust analysis of aerospace and defense mergers). [END FOOTNOTE]

INADEQUATE ENFORCEMENT AGAINST DOMINANT FIRM MISCONDUCT

A recurring critique of modern U.S. federal enforcement is the failure of the DOJ and the FTC to police dominant firm misconduct. In 2002, Professor Robert Pitofsky wrote that "during the Reagan years, there was no enforcement whatsoever" against attempts to monopolize and monopolization. At a conference in 2009, Professor Harvey Goldschmid observed that during the George W. Bush presidency "there has been no enforcement" of Section 2 of the Sherman Act.

In a wide-ranging attack upon federal antitrust enforcement since the 1970s, Jonathan Tepper and Denise Hearn concluded:

The evidence confirms the death of antitrust. When surveying merger challenges, [Professor Gustavo] Grullon found that enforcement of Section 2 of the Sherman Act fell from an average of 15.7 cases per year from 1970-1999 to less than 3 over the period 2000-2014. . . . The recent failure to enforce antitrust is horrifying, considering how industries have become more concentrated every year.

In May 2018, Senator Richard Blumenthal and Professor Tim Wu [\*93] authored an op-ed piece that recited similar statistics: "Enforcement of the antimonopoly laws has fallen: Between 1970 and 1999, the United States brought about 15 monopoly cases each year; between 2000 and 2014, that number went down to just three."

Each of these statements about the amount of federal enforcement activity is incorrect. The Reagan antitrust agencies did not bring many cases involving attempted monopolization or monopolization, but the number exceeded what Professor Pitofsky called "no enforcement whatsoever". The number of FTC attempted monopolization and monopolization cases initiated from 2001 through 2008 exceeded what Professor Goldschmid called "no enforcement." From 1970 through 1999, federal enforcement of Section 2 of the Sherman Act and the enforcement of Section 5 of the FTC Act to challenge collective dominance or single-firm exclusionary conduct did not exceed four cases per year - a notably lower rate of activity than the number of cases per year reported by Senator Blumenthal and Professor Wu ("about 15 cases each year") and the number for the same period reported by Jonathan Tepper and Denise Hearn (15.7 cases per year).

[\*94] INADEQUATE MERGER ENFORCEMENT

Inadequacy narratives frequently use categorical statements about activity levels to demonstrate weaknesses in federal merger enforcement. In a discussion of Reagan administration antitrust policy, Professor Eleanor Fox observed that "U.S. federal merger enforcement ground to a halt." In the 2010 edition of their antitrust casebook, Professor Robert Pitofsky, Professor Harvey Goldschmid, and Judge Diane Wood observed that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." In a recent book discussing U.S. antitrust policy, Professor Tim Wu observed that the DOJ in the George W. Bush administration "did not block any major mergers."

The factual claims contained in these assessments are incorrect. Federal merger enforcement during the Reagan administration did not grind to a halt. The George W. Bush Administration did not challenge large numbers of vertical mergers, but the number was greater than the "no enforcement at all" amount claimed by Professor Pitofsky, Professor [\*95] Goldschmid, and Judge Wood. During the Bush administration, the DOJ sued and blocked mergers involving General Dynamics/Newport News Shipbuilding (nuclear submarine design and production) and United Airlines/US Airways (airline transportation services). Given the significance of the merging parties and the importance of the economic sectors at issue, competition law experts, in responding to Professor Wu, likely would score these proposed transactions as "major" mergers.

C. How Narratives Predicated Upon Mistaken Positive Assumptions Distort Understanding About the Functioning of the U.S. Antitrust Regime

Should the competition policy community of academics, advocacy groups, government officials, and practitioners care about these and other inaccurate depictions of federal enforcement activity? Indeed, they should. There is a danger that the fractured positive accounts of past activity will be taken as true and inform the debate about the future of competition policy. There is a fast-expanding literature that contends, as Professor Daniel Crane puts it, that "antitrust enforcement has drifted toward near-oblivion, with potentially dire consequences for our economy, and society more generally." The portrayal of inert federal agencies as abandoning a sensible earlier custom of robust enforcement is a particularly important pillar of modern calls for sweeping reform.

Failure to Learn from Earlier Enforcement Activities. A major hazard of the inadequacy narratives and their dismal depiction of modern antitrust policy is that they impede the learning by which an antitrust agency improves over time. If it is assumed as a fact that the federal antitrust enforcement [\*96] policy was devoid of useful activity for the past forty years or longer, then there is no point in looking for positive accomplishments. A listener who accepts as true the claim that nothing happened, or that what happened was the work of an insane agency, reasonably might conclude that there is nothing worth emulating from the earlier period.

There is a serious cost to embracing the excessive activity narrative or the inadequate activity narrative as resting on sound positive foundations. By writing off the relevant eras as a wasteland, one ignores noteworthy policy developments that modern analysts can use to guide policy going forward. Merger enforcement provides an example. If federal merger enforcement actually ground to a halt between 1981 and 1988, there would be no merger challenges to study. Yet the federal enforcers blocked a number of deals in this period and, in some instances, the government gained favorable judicial decisions that provide clues about how to formulate successful challenges in the future.

Perhaps the most notable of the government's merger litigation victories in the 1980s was the FTC's successful challenge to Hospital Corp.'s effort to acquire Hospital Affiliates International, Inc. and Health Care Corp. The Commission argued that the acquisitions would reduce competition by enabling the surviving firms to coordinate behavior more effectively with regard to pricing and other terms of service. The 117-page opinion for the Commission by Commissioner Terry Calvani is a textbook model of superb opinion-writing, what the Seventh Circuit called a "model of lucidity." Commissioner Calvani carefully set out the arguments of complaint counsel and the defendants, reviewed the precedent and literature regarding the coordinated effects theory of harm, and displayed [\*97] the type of erudition and expertise that is offered as a justification for entrusting antitrust adjudication to an expert administrative body.

Every commissioner who is assigned to write an opinion for the FTC should feel an obligation to read the Calvani Hospital Corp. decision to see the quality of analysis and style of presentation that can impress a court of appeals favorably. Rather than dismiss the period since 1980 as a barren era in federal enforcement, the advocates for a major expansion of intervention should assemble an accurate positive record of every decision and every initiative that can help them achieve their ends.

In the face of a demanding judiciary, the FTC will need every advantage it can obtain, including footholds provided by enforcement measures undertaken from the early 1980s forward. If proponents of fundamental change treat the past forty years as an empty space in antitrust policy, they will walk past precedents and practices that would advance their cause. If one assumes that timidity bordering on cowardice gripped the federal agencies after 1999, there is likewise no point in considering how the FTC in the 2010s achieved considerable success in three consecutive trips to the Supreme Court in antitrust cases - the first time the Commission had won three straight cases before the high court since the 1960s - or bothering to understand what mix of strategy and advocacy (and, perhaps, luck) made it possible.

The analysis of innovation issues provides another example of how an accurate grasp of the positive record can help build a new program. Consider the claim, noted above, that the federal agencies brought no vertical merger cases between 2001 and 2008. An observer who embraced this view is likely to overlook the FTC's decision to block the proposed merger of Cytyc and Digene. The Commission's analysis of this transaction teaches a lot about how to analyze innovation markets that reach back to the earliest stages of an R&D pipeline.

Adherence to the view that modern antitrust policy has ignored [\*98] innovation effects in merger analysis and in nonmerger cases likewise will miss important sources of insight. The experience of the two federal agencies since the early 1980s in reviewing aerospace and defense industry mergers illuminates how to analyze innovation issues and formulate successful merger challenges in dynamic, high technology sectors. The federal government's analysis of these transactions has been representative of a larger awareness that innovation concerns should be decisive, or at least equal in importance to price effects, in a significant number of merger reviews and nonmerger matters.

Diagnosing the Obstacles to Litigation Success and Overcoming Them. A second and closely related reason to resist faulty positive accounts of past experience is that they obscure the path to possible litigation success in single-firm monopolization cases. In the FTC's unsuccessful Rambus case, the U.S. Court of Appeals for the District of Columbia relied heavily on a Supreme Court decision ( NYNEX Corp. v. Discon, Inc. ) that was premised in part on concerns about overdeterrence that might arise from private treble-damage law suits. The FTC might have argued to the D.C. Circuit that the Commission, as a federal government agency, was a responsible steward of the public trust and need not be bound by doctrines designed to confine private litigants. Future attempts to use litigation to condemn dominant firm conduct, and extend the reach of antitrust oversight, might emphasize the distinctive role of public enforcement and, perhaps, resort more extensively to the FTC's administrative adjudication process.

In other words, seeing more clearly the foundations of defendant-friendly doctrine indicates what litigation strategy (i.e., premised on the distinctive role of the public prosecutor and the special capacity of the FTC's administrative process) promises the greatest prospects for success in what is today a daunting judicial environment. To use litigation to expand the zone of potential intervention, the Commission will need to study and build [\*99] upon litigation successes such as McWane, Inc. v. FTC, where the Commission prevailed on a monopolization theory of liability before a court of appeals that has not always been a favorable forum for the review of Commission antitrust cases. If one assumes, as some commentators suggest, that the federal agencies brought no monopolization cases in the past twenty years, then one is unlikely to look for or study McWane - to recognize the doctrinal footholds it provides for future cases, to analyze how the agency assembled a convincing factual record, and, more generally, to see how the agency can replicate the success in the future.

Setting a Common Foundation for Debate About Future Antitrust Enforcement. A third reason to remedy the uncertain grasp of the past is its importance to the modern debates about the proper direction for the U.S. antitrust system. Without a common understanding of what actually happened in the past, how can policy makers and commentators make sound normative judgments about what the U.S. enforcement agencies should do in the future? Professor Douglas Melamed recently has posited that the contestants in the modern debate about antitrust policy often talk past each other and do not engage on questions crucial to deciding whether and how much to modify current antitrust policy, or to create new competition policy instruments and institutions. It is doubtful that what Professor Melamed calls two largely disconnected "conversations" can be joined up without a better common understanding of what actually has taken place. In so many ways, accurate comprehension of what happened is the essential foundation for the processes of interpretation (What explains the behavior in question? What is its significance?), evaluation (Was the behavior good or bad?), and refinement (What should we do next time?).

Think of it in terms of teaching a class. Suppose the bases for the grade in the course are (a) regular attendance in class, (b) contributions to class discussion, and (c) performance on an end-of-term examination. Before we determine the quality of the student's work and assign a grade, we need first to agree about whether the student showed up for class, spoke in class, and turned in an exam. Modern discourse about U.S. competition law indicates a lack of agreement on equivalents of these basic predicates for a normative assessment of the performance of the antitrust enforcement system.

Appreciating How Institutional Arrangements Shape Substantive [\*100] Outcomes. Both of the inadequacy narratives described above lapse into describing the U.S. antitrust system as regularly succumbing to irrational (or, as Representative Frenzel put it, insane) swings in behavior, from wild overreaching in the 1970s and in earlier periods of antitrust history to excessive restraint from the late 1970s to the present. In their positive description of why events transpired as they did, the inadequacy narratives focus heavily on the role of agency leadership and personality. For example, the excessive enforcement narrative portrays federal enforcement officials in the 1960s as possessed by a deranged opposition to mergers and depicts Michael Pertschuk, the FTC's chairman from 1977-1981, as a singularly malevolent force who drove the agency off the rails. The inadequate enforcement narrative damns William Baxter, who chaired the DOJ Antitrust Division from 1981 through 1983, and James C. Miller III, who chaired the FTC from 1981 to 1984, as irrational extremists with no fidelity to norms that promote sound policy making.

The abilities and instincts of individual leaders are undoubtedly important to the success of a competition authority. Yet the personality-driven explanation for agency behavior overlooks the role that institutional arrangements have played in shaping outcomes - for example, by moderating policy impulses of some leaders and creating structures and mechanisms (such as a program of ex post evaluation of agency decisions) that improve policy making regardless of who is in charge. The single-minded focus on personalities also obscures the extent to which various institutional arrangements played central roles in the agency's achievement of successful policy outcomes. In short, one loses the ability to develop a [\*101] better sense of what accounts for policy successes and failures. Replacing a supposed pariah with a presumed miracle worker may not improve the status quo by much if deep-seated institutional weaknesses are major sources of observed policy failures.

#### Blocking the merger obliterates containment of hypersonic threats from Russia and China

Don Nickles 21, Chairman and CEO of The Nickles Group LLC, Former United States Senator, Former Director of Chesapeake Energy and Valero Energy, Degree in Business Administration from Oklahoma State University, “Why Lockheed's Acquisition of Aerojet Will Be A 'Boon for U.S. Innovation'”, Politico, 3/22/2021, https://www.politico.com/news/2021/03/22/lockheed-aerojet-acquisition-477491

The proposed acquisition by defense prime contractor Lockheed Martin of propulsion provider Aerojet Rocketdyne is facing some criticism due to alleged concerns that it would give Lockheed an unfair competitive advantage on missile and missile defense contracts.

Raytheon Technologies in particular has publicly complained that the combination would leave it dependent on a direct competitor for much of the propulsion in its missile offerings. Indeed, Aerojet Rocketdyne is a supplier of solid rocket motors and also is a source of defense technologies including hypersonic engines and the propulsive Divert and Attitude Control System that steers missile defense kill vehicles.

Such concerns ignore the important benefits, including the increased competition, which will result from this merger. And, Lockheed Martin has made it clear that Aerojet Rocketdyne will remain a merchant supplier, so these benefits will flow to all customers, including the U.S. government.

More importantly, the Lockheed-Aerojet merger will be a boon for U.S. innovation and competitiveness at a time when it faces growing threats from increasingly capable adversaries like China and Russia.

There are significant national advantages to bringing Aerojet Rocketdyne under the corporate roof of a prime contractor with $65 billion in annual revenue. Broadly speaking, it will provide financial stability for the propulsion provider while making more resources available for research and development in key technology areas.

As a stand-alone company with $2 billion in annual revenue, Aerojet Rocketdyne’s financial fortunes are tied to a few large programs that are subject to shifting political winds and the whims of prime contractors. A large program cancellation or a prime’s decision to change suppliers could substantially weaken the company, leaving it vulnerable to a takeover on unfavorable terms.

A well-resourced defense contractor like Lockheed Martin, by contrast, could be expected to invest in Aerojet Rocketdyne’s core propulsion capabilities. One area likely to see substantial investment is hypersonic weaponry, where the nation by some estimates has fallen behind Russia and China.

Moreover, by bringing a key link of its supply chain in house, Lockheed Martin will be positioned to offer better prices to its government customers and the transaction also will lead to efficiencies and innovation that will benefit the whole industry.

Such national benefits are not unique to the proposed Lockheed Martin-Aerojet Rocketdyne deal. Consider, for example, what United Technologies Corp. said in announcing its planned merger with none other than Raytheon, a deal which closed last year:

"By joining forces, we will have unsurpassed technology and expanded R&D capabilities that will allow us to invest through business cycles and address our customers' highest priorities,” said then-UTC chair and CEO Greg Hayes, who now sits at the helm of the combined company. “Merging our portfolios will also deliver cost and revenue synergies that will create long-term value for our customers and shareowners."

One of the public comments about the Lockheed Martin-Aerojet Rocketdyne deal is rooted in a commonly held assumption that vertical integration, in which primes take ownership of supply chains, stifles competition by giving these companies excessive marketplace clout. That view is myopic, especially in industries that are highly dynamic such as the defense industry.

Consider the case of United Launch Alliance, the Boeing-Lockheed Martin joint venture that until about a decade ago had a de facto monopoly on the business of launching operational U.S. government satellites. That monopoly was toppled by SpaceX, which builds some 85 percent of the components for its Falcon rockets, notably the engines, in house.

Experts have long cited SpaceX’s vertically integrated structure as the source of the company’s competitive strength, in large part because it eliminates supply chain profit margins. SpaceX founder Elon Musk has applied the same in-sourcing strategy in building up his Tesla electric car company, which has put U.S. industry at the forefront of a global trend in automobile manufacturing.

Vertical integration has been a fact of life in the aerospace and defense industry since the early 1990s, when the end of the Cold War triggered a wave of consolidation that continues today. On the propulsion side, a flurry of activity over a three-year period starting in 2001 reduced the number of U.S. solid rocket motor providers from five to just two: Aerojet Rocketdyne (then known as Aerojet); and ATK.

That situation lasted until 2014, when ATK merged with rocket and satellite maker Orbital Sciences Corp. to create the vertically integrated Orbital ATK. Less than five years later, Orbital ATK was acquired by aerospace and defense giant Northrop Grumman, a direct competitor to Lockheed Martin with nearly $37 billion in annual revenue.

Already the dominant supplier of large-diameter solid rocket motors, ATK can now draw on the resources of Northrop Grumman to advance its capabilities and boost competitiveness. Northrop Grumman recently won the prime contract for the nation’s next-generation ICBM, the Ground Based Strategic Deterrent, ensuring a healthy workload for its solid rocket motor business for years to come and ratcheting up the competitive pressure on Aerojet Rocketdyne.

As it happens, Northrop Grumman tapped Aerojet Rocketdyne for a smaller but significant role on its GBSD team, demonstrating that primes will join forces with competitors when it makes business sense.

Perhaps a better example — one that directly refutes assertions that competition requires subcontractor independence — is Northrop Grumman’s role in the Space Force’s all-important launch services program, where it supplied solid rocket motors for ULA’s Vulcan rocket even as it vied for that business with its own OmegA vehicle. In a similar vein, Blue Origin’s entry into that competition with its New Glenn vehicle didn’t stop it from supplying the main engine for Vulcan, which ultimately won the biggest share of launches.

The defense industry is replete with examples of companies supplying hardware and technology to rivals, even for programs where they compete head-to-head. Another relevant example: Raytheon in 1998 won a lucrative contract to supply missile defense kill vehicles incorporating DACS technology that at the time was supplied by Boeing — a competitor for that same contract.

For acquisitions that raise questions about access to critical capabilities, government regulators sometimes require consent decrees that commit the buyer to make these technologies available to competitors at market rates and to wall off proprietary information they might obtain in the process. In recent years, antitrust agencies have not shied away from investigating and enforcing compliance with consent decrees, including in the defense industry. There is no reason to think that would change in the future.

Some observers view the Lockheed Martin-Aerojet Rocketdyne merger as an early test of the Biden administration’s antitrust enforcement policies, and regulators will no doubt scrutinize it thoroughly to ensure competition is preserved. But there’s much more at stake here: This is about how the administration intends to deal with growing threats posed by peer and near-peer adversaries, who have eroded many of the technological advantages this nation has long taken for granted.

If the U.S. is to retake, and maintain, the lead in areas like hypersonic weaponry, a healthy and vibrant propulsion industry featuring players competing on a level playing field is essential. Regulators and policymakers should view this merger through that lens and render their decision accordingly.

#### Nuclear war

Dr. Richard H. Speier 17, Adjunct Staff with the RAND Corp, Founded the Office of Non- Proliferation Policy at the DOD, Recipient of the Meritorious Civilian Service Medal as the “Father of the MTCR,” now Consults in the Washington DC area; George Nacouzi, Senior Engineer at the RAND Corporation, Supports Projects within PAF (Project Air Force) and NSRD (National Security Research Division), Carrie A. Lee, Researcher at RAND, and Richard M. Moore, Researcher at RAND. 2017. “Hypersonic Missile Nonproliferation: Hindering the Spread of a New Class of Weapons.” RAND. https://www.rand.org/pubs/research\_reports/RR2137.html

Strategic Implications of Hypersonic Weapons Compressed Timelines The U.S. military uses an acronym to describe the decisionmaking and action process cycle: OODA (Observe, Orient, Decide, Act). These four steps take time, and hypersonic missiles compress available response time to the point that a lesser nation’s strategic forces might be disarmed before acting. As an illustration of the time required to act with respect to an existential missile threat, the Nuclear Threat Initiative organization estimated a timeline for a U.S. response to a massive Russian intercontinental ballistic missile (ICBM) attack, as follows:9 • 0 minutes—Russia launches missiles • 1 minute—U.S. satellite detects missiles • 2 minutes—U.S. radar detects missiles • 3 minutes—North American Aerospace Defense Command (NORAD) assesses information (2 minutes max) • 4 minutes—NORAD alerts White House • 5 minutes—first detonations of submarine-launched ballistic missiles • 7 minutes—locate president and advisers, assemble them, brief them, get decision (8 minutes max) • 13 minutes—decision • 15 minutes—transmit orders to start launch sequence • 20 minutes—launch officers receive, decode, and authenticate orders • 23 minutes—complete launch sequence (2 minutes max) • 25 minutes—Russian ICBM detonations. This timeline is not, of course, representative of two hostile parties in closer proximity or with less effective warning systems than Russia and the United States. Nor is it representative of less-than-Armageddon possibilities. However, for adjacent enemies within a 1,000-km range, a hypersonic missile traveling at ten times the speed of sound could cover that distance and reduce response times to about six minutes.10 Targets As discussed earlier, hypersonic missiles increase the threat over current generations of missiles in cases where the target nation has missile defenses. The targets in such nations would primarily be high value and heavily defended. Prime targets could include destroying a nation’s leadership and command and control, referred to as “decapitation,” to prevent the target nation from responding with an effective follow-on attack. Other key targets could be carrier strike groups, with the objective of striking a key blow or pushing the naval formation further from the coast. And, because of their time sensitivity, strategic forces and storage facilities for weapons of mass destruction (WMDs) could warrant hypersonic attack. Implications for Targeted Nations Any government faced with the possibility that hypersonic missiles would be employed against it—particularly in a decapitating attack— would plan countermeasures, many of which could be destabilizing. For example, countermeasures could include devolution of strategic forces’ command and control so that lower levels of authority could execute a strategic strike, which would obviously increase the risk of accidental strategic war; or strategic forces could be more widely dispersed— a tactic risking greater exposure to subnational capture. An obvious measure would be a launch-on-warning posture—a hair-trigger tactic that would increase crisis instability. Or the target nation could adopt a policy of preemption during a crisis—guaranteeing highly destructive military action. To be sure, such measures could be invoked against threats from current types of missiles.11 But, for nations with effective ballistic mis- sile and/or cruise missile defenses in the time frame when hypersonic missiles might proliferate, the hard choices would be forced when facing hypersonic threats. Advanced nations with adequate resources could take other steps against hypersonic threats. They could strengthen the resilience of their command and control, harden the siting of their strategic forces, and make a deterrent force mobile or sea-based. These tactics may or may not be effective, especially for lesser nations. And they certainly will be expensive—putting them out of reach of some. Even for major powers, the proliferation of hypersonic missiles will create new threats by allowing lesser powers to hold them at risk of effective missile attacks especially against “unhardened” targets, e.g., cities. Over the coming decades, the ability of a lesser nation with a handful of ICBMs to threaten major powers will continue to decrease as wide area missile defenses continue to improve. However, HGVs and HCMs will be more difficult to defend against. Implications for Major Powers The ability of hypersonic missiles to penetrate advanced missile defenses will increase the risks for nations with such defenses. Lesser powers with hypersonic weapons may see these weapons as a deterrent against greater power intervention, and feel free to pursue potentially destabilizing regional agendas. Moreover, lesser nations with hypersonic missiles could affect the force deployments of major powers. As noted above, carrier strike groups might be pushed further out to sea or an intervening power’s regional military bases might become exposed to more effective attacks. The Broader Picture of Increased Risk The ability of hypersonic forces to penetrate defenses and compress decision time could aggravate the instabilities in regions that are already tense—for example, Iran-Israel and North Korea–Japan. Conflicts in these regions could evolve to include major powers aligned on opposite sides. An Israel-Iran conflict, with the United States and much of Europe aligned with Israel and Russia and perhaps China aligned with Iran, would create new paths for escalation to an even-larger conflict. The basic roles of external actors would not necessarily change—the alignments would stay the same—but external powers might suddenly find themselves in a more-unstable situation in which their patron states are increasingly trigger-happy. As noted previously, lesser powers could gain influence over major powers by threatening a hypersonic attack. At the least, lesser powers might be emboldened if they saw themselves as possessing a deterrent against major power intervention. Finally, because hypersonic weapons increase the expectation of a disarming attack, they lower the threshold for military action.

### 1NC

Memo CP

#### The United States federal government should issue a policy memorandum that expands the extraterritorial scope of its core antitrust laws in accordance with a comity balancing test.

#### The CP competes because it’s not legally binding BUT solves by shifting antitrust policy

Theodore Voorhees 17, Senior Litigator and Member of the Antitrust and Competition Law Practice Group at Covington & Burling LLP, JD from the Catholic University of America, Columbus School of Law, AB from Harvard University, and Leah Brannon, Partner at Cleary Gottlieb Steen & Hamilton LLP, JD from Harvard Law School, BA with Highest Distinction from the University of Virginia, ABA 2016 Presidential Transition Task Force, “Presidential Transition Report: The State of Antitrust Enforcement”, American Bar Association Section of Antitrust Law, January 2017, http://cartelcapers.com/wp-content/uploads/2017/01/ABA-SAL-Presidential-Transition-Report-1-18-17-FINAL-2.pdf

III. ENFORCEMENT MATTERS

A. Agency Enforcement and Policy

1. Guidance

Where there are uncertainties in the Agencies' enforcement policies or priorities, it is often essential for the Agencies to provide guidance. The formal guidance can take the form of formal guidance documents (such as the Horizontal Merger Guidelines of 2010) or FTC opinions. Informal guidance can take the form of agency reports, speeches by key agency personnel, amicus briefs, decisions to litigate, or closing statements. Agency guidance is important and beneficial for multiple reasons, such as providing clarity for businesses, moving competition policy in the right direction, and ensuring a U.S. perspective on the international arena. Agency guidance is also particularly useful to communicate a shift in enforcement policy or practice.3

[FOOTNOTE] 3 The recent guidance issued by the Division and the FTC communicating the decision to treat wage-fixing and no-poaching agreements as criminal violations going forward provides an excellent example of this. See DEP’T OF JUSTICE, ANTITRUST DIV., FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), available at www.ftc.gov/system/files/documents/ public\_statements/992623/ftc-doj\_hr\_guidance\_final\_10-20-16.pdf. [END FOOTNOTE]

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

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

Speeches, while not binding on the Agencies or as long-lasting as more formal agency documents, can give advance notice of enforcement priorities and the views of agency leadership regarding how best to analyze certain forms of conduct. For instance, in her first speech as Acting Assistant Attorney General, Renata Hesse offered important insights into the use of bargaining models in analyzing vertical mergers and the Division's skepticism of procompetitive claims in horizontal mergers. Indeed, for changes in agency thinking, an agency speech or other non-enforcement guidance can be the fairer approach, at least in the first instance, than initially embarking on litigation.

Business review letters from the Division and advisory opinions from the FTC serve as another avenue for providing guidance on novel conduct. More important, by setting forth the respective agency's reasoning for how it views proposed conduct, these documents in effect make a policy statement as to what characteristics of the conduct are considered to be beneficial or harmful for consumers.

#### It avoids politics AND preserves agency PC

Dr. Nicholas R. Parrillo 19, Professor of Law and Professor of History at Yale Law School, JD from Yale Law School, PhD in American Studies from Yale University, AB in History and Literature from Harvard University, “Should the Public Get to Participate Before Federal Agencies Issue Guidance? An Empirical Study”, Administrative Law Review, Volume 71, Issue 1, 71 ADMIN. L. REV. 57, Winter 2019, Lexis

II. BURDEN OF PUBLIC COMMENT ON GUIDANCE LESS THAN LEGISLATIVE RULEMAKING

If the agency is going to solicit public comment on guidance, why not just go the whole nine yards and proceed by legislative rulemaking, which unlike guidance is genuine binding law? The reason is that the actual taking of public comment is only a fraction of the burden that legislative rulemaking imposes, and even if one focuses on the taking of comment alone, it is often less burdensome for guidance than for rulemaking. Thus, for most agencies at least, "notice-and-comment guidance" is considerably faster and less expensive than notice-and-comment rulemaking.

In discussing why legislative rulemaking takes the amount of time and resources that it does, interviewees prominently cited five aspects of the process, all of which are either absent or less costly when the process is voluntary notice-and-comment for guidance. I discuss these in roughly descending order of prominence.

A. Mandates for Cost--Benefit Analysis

Before significant legislative rules can be proposed or finalized by executive agencies, they are reviewed by the President's Office of Management and Budget to ensure, inter alia, that the agency engaged in appropriate cost--benefit analysis. OMB also reviews executive agencies' "significant" guidance documents. The relevant Executive Order's definition of "significant" is, in many ways, open-ended. According to an official at the [\*80] EPA's Office of General Counsel, the decision on which guidance documents to submit to OMB for review is made at the senior management level of the agency, by political appointees, and the handling of the question changes depending on who is in the relevant agency-manager and OMB positions.

Generally, interviewees thought OMB review was less likely for guidance than for legislative rules and, when it occurred, less time-consuming. A former senior official at the EPA's Air Program office said he thought OMB review of guidance took less time than that of legislative rules. Lynn Thorp of Clean Water Action observed that OMB scrutiny of the EPA guidance was less than that for legislative rules. A former senior FDA official noted that OMB was not much engaged with the agency's day-to-day scientific guidance, while a former senior FDA career official said many FDA guidance documents did not go through OMB at all. William Schultz, former HHS General Counsel, in discussing differences between the notice-and-comment process for rulemaking and the notice-and-comment process for guidance, cited OMB delays, which he said can be severe. Daniel Troy, general counsel of GlaxoSmithKline and former chief counsel of the FDA, said one reason for FDA personnel's preference for guidance over legislative rulemaking was that it avoided OMB review. At [\*81] USDA NOP, which does notice-and-comment on "most" of its guidance, the head of the program cited OMB review as one of a few factors that makes legislative rulemaking generally slower than guidance. Richardson, the former chair of the NOSB, said legislative rulemaking was greatly delayed by agency economic analysis in contemplation of OMB review, which was not done for guidance; and whereas OMB was a focal point for private lobbying regarding legislative rules, causing further delay, this was not true of guidance. The result was that legislative rulemaking took "much longer" than guidance even when the latter went through public comment. At the Department of Transportation (DOT), said the former general counsel Kathryn Thomson, guidance, even with public comment, was "much faster" than legislative rulemaking, mainly because it was not necessary to do cost--benefit analysis in contemplation of OMB review; OMB would accept a fast process for guidance more than it would for a legislative rule. At the DOE appliance standards program, recalled a former Department division director, OMB could delay or accelerate legislative rulemaking depending on the administration's calendar and politics, but guidance was not subjected to OMB review.

In banking regulation, where most of the agencies are independent and therefore not subject to OMB review, economic analysis can still cause legislative rulemaking to take longer than guidance, as such analysis may be required on some matters by statute or agency practice. An interviewee who held senior posts at CFPB and other federal agencies said that at the independent banking agencies (i.e., those not funded with tax revenues and not subject to OMB review), where cost--benefit analysis may be required by statute, that analysis would be done for legislative rulemaking but not for guidance, which helped explain why the former took longer. A former senior Federal Reserve official noted that, while the Federal Reserve's legislative-rulemaking-specific cost--benefit analysis was "sometimes a bit skippy," [\*82] the CFPB did voluminous cost--benefit analysis because of its fear of D.C. Circuit case law striking down SEC action for violating cost--benefit requirements.

B. Building a Record and Responding to Comments in Anticipation of Judicial Review

The advent of "hard look" judicial review in the 1970s, ratified by the Supreme Court in Motor Vehicles Manufactures Ass'n v. State Farm, pushed agencies to develop voluminous administrative records to support their legislative rules and to devote countless hours to writing long preambles responding minutely to public comments. An EPA official--in comparing legislative rulemaking (which he said took an "excruciatingly" long time) with guidance (on which he said the agency was "much more nimble")--said that a "huge" difference between the two was the time spent developing the administrative record and replying to comments, both of which he placed under the heading of "judicial review accountability," that is, the agency's "fear" of investing in a legislative rule only to have it struck down in court. EPA lawyers, he explained, were "vigilant" about ensuring that the administrative record was "all there," including the development of supporting documents, with all data gathered and analyzed, which took a "ton of time." Likewise, lawyers were vigilant in making sure the agency accounted for all comments. By contrast, "very little" of this was required for EPA guidance. There might be some accompanying materials, but it was "very rare" to do a full supporting foundation, in part because much of the necessary information would already have been gathered for a prior relevant legislative rulemaking, or would have bubbled up from the implementation process for that prior legislative rule. And even if the EPA took public comment on a guidance document and responded (which it sometimes did), "we're coasting along the surface" compared to what is done for a legislative rulemaking preamble. A former senior official at the EPA Air Program Office concurred that, for guidance, supporting material did not need to be gathered because it had already been assembled in prior legislative rulemakings, and public comments did not need to be addressed [\*83] at the same level of detail as for legislative rulemaking.

There is a similar dynamic at the FDA, which, per the GGPs, takes public comment on a very large proportion of its guidance documents. A former senior FDA official explained the difference. Legislative rulemaking required support for everything in the record and a time-consuming response to comments, and the costs of this process had been part of the agency's drive since the 1990s to rely more upon guidance, for which the process, even with public comment, was much more "abbreviated." Whereas legislative rules were "law" and had to be supported, the agency in issuing guidance felt freer not to develop a voluminous record, and the comments on guidance did not require the kind of response that was required on legislative rules. The fact that the FDA was sued much more on legislative rules than on guidance, he said, was surely part of this. Similarly, a congressional staffer observed that, although the FDA took public comment on guidance, it generally did not give any response to comments, meaning there was not the same kind of " State Farm obligation" as for legislative rulemaking, and so the process did not ensure the same careful consideration of stakeholder views. A former senior FDA official thought the lack of a requirement to respond to comments was a crucial and salutary feature of the FDA's process for guidance: if you required a preamble, you might as well do legislative rulemaking, and the whole thing would become "unworkable." A former senior FDA career official, discussing the difference between legislative rulemaking and guidance, said responding to all substantive comments in a rulemaking in writing for publication added "significantly" to the time spent. Overall, said an FDA Office of Chief Counsel official, whereas legislative rulemaking was criticized for being "ossified," it was possible to issue guidance "pretty quickly."

[\*84] Elsewhere, too, the research and analytic demands are less for guidance than for legislative rulemaking. At OSHA, said the former deputy solicitor of the Department of Labor (DOL), guidance was faster than legislative rulemaking in part because of judicial decisions requiring that the agency in each rulemaking make a showing of significant risk and technological and economic feasibility. By contrast, headquarters might have a regional office draft a guidance document, noted John Newquist, a former assistant administrator of OSHA's Region V (headquartered in Chicago).

C. Taking Comments in Itself

The actual publication of the draft rule/guidance and the taking of comments on it (as distinct from the work of responding to those comments) takes time and effort in itself, but this time and effort did not figure nearly as prominently in the interviews as did cost--benefit analysis, record-building, or responding to comments. And in any event, the burden of taking comment per se tends to be less for guidance documents than for legislative rules. At the banking agencies, said an interviewee who held senior posts at the CFPB and other federal agencies, the comment period tends to be shorter for guidance, and the comments fewer. The comment period was also said to be shorter for guidance at the USDA NOP, and in EPA clean water regulation. Comments were said to be less voluminous on guidance compared to legislative rules at the FDA.

D. Drafting Challenges

Legislative rules are typically harder to draft than guidance, which adds further to the time and resources they demand. Because legislative rules are mandatory, said an EPA official, you "sweat each detail," seeking to account for all factors and contingencies, since once the rule is promulgated, "we can't go back to it for 15 years." Guidance, he said, does not involve the same sweating of details. As to the FDA, a former senior career official [\*85] there said that, in writing guidance, you need not be as careful on wording as on a legislative rule because the language is not binding and is described as reflecting the current thinking of the agency; you are therefore more free to put in details, use narrative form, Q&A form, and plain language, since the document is not "set in stone." He recalled one subject on which he and his colleagues initially sat down to write a legislative rule and found it impossible to start with "codified language," given the complexity of the matter; he therefore suggested handling the problem by writing guidance, as a "dry run," before drawing up binding requirements. In banking regulation, an interviewee who held senior posts at the CFPB and other federal agencies said that guidance was "easier" to write and could be written "faster" than a legislative rule because "you don't need to nail everything down," as the aim is to warn regulated parties to pay attention to certain risks, not prescribe mandatory requirements.

E. Dealing with Mobilized Stakeholders

The length, officially-binding status, and public salience of legislative rulemaking make it a focal point for the mobilization of interest groups to pressure the agency and enlist political allies in Congress, the White House, and elsewhere. This, in turn, makes legislative rulemaking expensive to the agency in terms of political capital. An official at a public interest organization working on immigrants' rights said that, in his experience seeking favorable policies from DHS, he had found that legislative rulemaking tended to "exhaust all [the agency's] political capital," more than issuing guidance did. Legislative rulemaking allowed time for the opponents of an initiative to marshal their forces. If an agency and its stakeholder allies sought to proceed by legislative rulemaking, he said, they were "declaring a grand war" and had to be prepared for greater opposition. A former DOE division director, explaining why there was "no comparison" between the processes for legislative rulemaking and guidance, emphasized that the "politics" of the former process "slowed it down," for whenever the proceeding seemed to veer in a direction that one interest group did not like, [\*86] that group would marshal evidence and political support to stop the process, enlisting friendly members of Congress or the White House. With respect to the USDA NOP, the president of an organic certifier, in discussing factors that slowed legislative rulemaking, immediately cited the agency's internal process for economic analysis (not applicable to guidance), which he said could become a "pawn" in political clashes between different parts of the industry, in which members of Congress might be involved.

### 1NC

T-Courts

#### Courts cannot ‘expand’ antitrust law

George Bibikos 19, Founder of GA Bibikos LL.C., J.D. from Widener Commonwealth Law School; Supreme Court of Pennsylvania, “Commonwealth of Pennsylvania, Appelle, vs. Chesapeake Energy Corporation et al., Appellants,” <https://paforciviljusticereform.org/wp-content/uploads/2020/11/PCCJR-Chesapeake.pdf>

The court’s decision therefore (a) alters the rights of parties in Pennsylvania accused of engaging in anticompetitive behavior to defend against those claims in federal court, (b) creates new causes of action under the Consumer Protection Law, and (c) creates new remedies for antitrust violations that defendants would not face in federal court. These decisions are inherently legislative in nature. See, e.g., State v. Philip Morris, Inc., Nos. 96122017 and CL211487, 1997 WL 540913, at \*6 (Md. Cir. Ct. May 21, 1997) (“Altering common law rights, creating new causes of action, and providing new remedies for wrongs is generally a legislative function, not a judicial function.”). If these decisions are legislative in nature, then they are outside the purview of the courts and the executive.

Moreover, when the General Assembly prescribes specific statutory duties and remedies, those provisions must be strictly followed, 1 Pa.C.S. § 1504, and the courts cannot “expand coverage to subsume other remedies.” See Nat’l R. R. Passenger Corp. v. Nat’l Ass’n of R.R. Passengers, 414 U.S. 453, 458 (1974) (“A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.”). If the Consumer Protection Law is designed to protect buyers in consumer transactions and sets forth specific remedies, the courts are unable to expand the statute to subsume antitrust remedies.

#### Vote neg:

#### Limits—courts explode advantages into unpredictable precedents

#### Ground—mechanism dodges DA links

### 1NC

RICO DA

#### Judicial broadening FTAIA expands the scope of extraterritorial RICO enforcement---it’s currently limited, but unclear

Morgan Franz 14, J.D. Candidate at Pepperdine University School of Law, B.A. in Literature and Philosophy from the Azusa Pacific University, “The Competing Approaches to the Foreign Trade Antitrust Improvements Act: A Fundamental Disagreement”, Pepperdine Law Review, 41 Pepp. L. Rev. 861, Lexis

V. THE CONSEQUENCES AND RESOLUTION OF THE COMPETING APPROACHES TO THE FTAIA

The clear trend of the circuit courts in applying Arbaugh to the FTAIA is to treat the FTAIA as a substantive limitation. 270 The Third and Seventh Circuits have based this decision primarily on the text and location of the statutory provision and on Morrison's characterization of extraterritorial application as a merits question. 271 However, there are also compelling reasons to continue treating the FTAIA as a jurisdictional limitation, particularly Congress's seemingly clear intent. 272 The approach that carries the day will have consequences that impact civil procedure, international [\*897] comity, and the jurisdictional designation of other related statutes. 273 Although the uncertainty as to the nature of the FTAIA has arisen in the district and circuit courts, the resolution of the issue is ultimately beyond the purview of the lower courts. 274

A. Practical Consequences

1. Procedure

The competing interpretations of the FTAIA are not merely theoretical; they have real procedural consequences. 275 The primary procedural consequence of a substantive interpretation of the FTAIA is that plaintiffs basing their claims on foreign conduct will have to plead and prove an additional element in Sherman Act cases. 276 Additionally, the interpretation chosen determines who the decision-maker will be: the court decides whether there is subject matter jurisdiction, while whether an element of a claim has been satisfied is considered by the jury. 277 A third procedural difference between the two approaches is that parties who want to contest an antitrust suit will have to file either a 12(b)(1) or 12(b)(6) motion. 278 The [\*898] 12(b)(6) is generally acknowledged to be more favorable to plaintiffs, 279 increasing the likelihood that defendants will settle. 280 However, the heightened pleading standards of Twombly 281 and Iqbal 282 have arguably minimized these differences. 283 Additionally, the pre-trial dismissal is not typically dependent on the distinction between jurisdiction and merits. 284 Therefore, these procedural differences, while significant, are only occasionally outcome-determinative. 285

2. International Comity

The concern of international comity was of particular importance in Hartford Fire 286 and Empagran. 287 In Hartford Fire, Justice Souter stated that "concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act [\*899] jurisdiction." 288 The legislative history agrees that "[i]f a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the courts' ability to employ notions of comity." 289 If the FTAIA is ultimately considered to be substantive, jurisdiction is assumed under 28 U.S.C. § 1331 so long as a non-frivolous Sherman Act claim is asserted, and courts will therefore be able to dismiss cases based on comity concerns without establishing a domestic effect. 290 However, if the FTAIA is considered to limit jurisdiction, the effects test will have to be satisfied to establish jurisdiction before the court considers international comity, 291 which seems to be Congress's intent in the legislative history. 292 These differences may also have implications for whether courts define "direct" broadly or narrowly, which will impact comity through the number of suits that are subject to the jurisdiction of American courts. 293

3. Implications for Other Statutes

If the competing approaches to the FTAIA are a result of the differing views of the Supreme Court and Congress, the resolution of those differences will have broad consequences. 294 First, although Arbaugh rejects a categorical approach to determining the nature of a statute, the treatment of similar provisions is a factor in the "clearly states" analysis, 295 and therefore the ultimate treatment of the FTAIA would be applicable to the analysis of the extraterritorial application of any statute. If Congress unambiguously [\*900] treats the FTAIA as jurisdictional, that act would confirm that Congress re-classified section 10(b) of the Securities Exchange Act as jurisdictional in enacting the Dodd-Frank Act, and would effectively overrule the holding of Morrison that the extraterritorial application of a statute is an element of a claim. 296 That decision would have further ramifications for RICO because of its close relationship to the Securities Exchange Act and antitrust litigation. 297 However, if Congress ultimately agrees with the holding in Morrison and treats the FTAIA as imposing an additional element of a Sherman Act claim, the legislature should clarify its use of jurisdictional language in the Dodd-Frank Act. 298

#### Broadening RICO extraterritorially crushes business investment and growth

Cory L. Andrews 15, and Mark Chenowith, JDs, Washington Legal Foundation, “Brief of Washington Legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Petitioners”, RJR NABISCO, INC., et al., Petitioners, v. THE EUROPEAN COMMUNITY, Defendents, Amicus Brief, 12/18/2015, <https://www.scotusblog.com/wp-content/uploads/2015/12/WLFAmicusBriefRJRvEC.pdf> [language modified]

Reversing the panel’s expansive holding below is especially crucial in light of this Court’s recent decision in Kiobel v. Royal Dutch Petroleum Co., as activist plaintiffs are strategically pivoting to civil RICO as a surrogate for claims that are now foreclosed under the Alien Tort Statute. If this Court were to affirm the Second Circuit’s deeply flawed decision below, it would effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that Kiobel now bars them from pursuing under the ATS. Permitting the use of civil RICO as a substitute for ATS litigation would saddle U.S. multi-national companies with paralyzing [devastating] risks of liability absent any Congressional mandate to do so.

ARGUMENT

I. THE GLOBAL EXPANSION OF RICO INVITES AN EXPLOSION IN CIVIL LITIGATION ABUSE

A. Civil RICO Is Uniquely Prone to Abuse by the Plaintiffs’ Bar

Although RICO was adopted as a new law enforcement tool for combating organized crime, the civil RICO provision, 18 U.S.C. § 1964(c), has rarely been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year primarily target legitimate, everyday business activity that would not fit most people’s definition of racketeering. And because RICO is drafted so broadly, plaintiffs’ attorneys can file as RICO claims a growing number of disputes that Congress never could have foreseen. “Through innovative lawyering, civil RICO claims have centered on a myriad of subjects, including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites, anti-abortion protest activities, a parishioner’s grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful discharge action.” Petra J. Rodrigues, The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11, 64 ST. JOHN’S L. REV. 931, 936-37 (1990).

Because the “danger of vexatiousness” is especially strong in RICO cases, Int’l Data Bank, Ltd. v. Zepkin, 812 F.2d 149, 153 (4th Cir. 1987), the statute has become a highly profitable vehicle for the plaintiffs’ bar. As a result, judges and legal scholars have routinely criticized the overly expansive reach of civil RICO, which provides “many ordinary civil cases with an entrée to federal court.” Anne B. Poulin, RICO: Something for Everyone, 35 VILL. L. REV. 853, 857 (1990); see Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) (“Judicial sentiment that civil RICO’s evolution is undesirable is widespread.”); William H. Rehnquist, Remarks of the Chief Justice, 21 ST. MARY’S L.J. 5, 13 (1989) (inviting “amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court”).

The attractiveness of civil RICO for plaintiffs and the plaintiffs’ bar is not difficult to understand. RICO applies not only to individual actors, but also to corporations, and it promises treble damages and recovery of costs, including attorney fees, to prevailing plaintiffs. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) (“RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers.”). And RICO’s liberal venue provisions, which allow suit to be brought in any district where the defendant “resides, is found, has an agent, or transacts his affairs,” 18 U.S.C. § 1965(a), invite forum shopping by RICO plaintiffs.

Moreover, plaintiffs can always threaten to use the provocative public-relations implications of RICO’s title to coerce settlements from companies that understandably fear the loss of goodwill and reputation that would accompany news of the company’s being accused of “racketeering” activity. “Once a clever lawyer can characterize an opponent’s actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations.” Robert K. Rasmussen, Introductory Remarks and a Comment on Civil RICO’s Remedial Provisions, 43 VAND. L. REV. 623, 626 (1990).

Statistical studies suggest that plaintiffs are filing RICO lawsuits based on alleged “racketeering” conduct that federal prosecutors see no reason to pursue. “Between 2001 and 2006, there was an average of 759 civil RICO claims filed per year, while in those same years, a paltry average of 212 criminal RICO cases were referred to the United States Attorney’s Office.” Nicholas L. Nybo, A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse, 18 ROGER WILLIAMS U. L. REV. 19, 24 (2013). Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, Private Justice, 76 S. CAL. L. REV. 1, 22 & n.111 (2002). Even when confined to its proper domestic sphere, civil RICO is uniquely prone to abuse.

B. Extraterritorial Application of RICO Will Only Invite Further Abuse

Unless this Court reverses the aberrant holding below, frivolous RICO claims will proliferate even more. While civil actions under RICO have always been a lightning rod for criticism, extending RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, as the Second Circuit has now done, further exacerbates the problem. The unusual breadth of RICO—and the mischief that will surely accompany its extension into wholly foreign disputes—offer the Court an independent basis for overturning the panel decision below.

Among the many creative attempts to expand the law’s reach, none are more unfounded than recent civil RICO suits brought by foreign governments against American businesses for alleged “racketeering” activities overseas. See Ignacio Sanchez & Kevin O’Scannlain, Foreign Governments’ Misuse of Federal RICO: The Case for Reform, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006) (“[T]he clearest and most egregious misuse and abuse of civil RICO to date is a growing species of litigation brought not by the United States, but by foreign governments.”).3 Such use of RICO exceeds even the reach of the statute’s overly expansive language.

These disputes are best adjudicated in the courts of the countries that bring them. Nonetheless, opportunistic plaintiffs have sought to extract the settlement of frivolous claims from American companies unwilling to cope with the threat of treble damages and the unfavorable publicity that arises whenever one is labeled a “racketeer.” These plaintiffs carefully tailor their complaints to meet the statutory requirements of a RICO lawsuit:

These claims are often constructed by piggy-backing on legitimate U.S. criminal investigations of the criminal racketeers. The lawyers convert the government’s evidence (usually after extensive investigation and discovery), discard the foreign criminal racketeers and replace them with the deep pockets whose products were used illegally by the criminals. The legitimate business entity is thereby bootstrapped into alleged “schemes.” The criminal actors go unnamed in these suits, revealing their true purpose as nothing more than an attempt to wrest vast sums from corporations with extensive financial resources.

If this Court were to make an exception to the presumption against extraterritoriality in this case, foreign governments and their political subdivisions would undoubtedly view that decision as a free-standing invitation to bring RICO suits against U.S. multi-national companies in federal district courts throughout the country. And one can easily imagine the onslaught of similar RICO cases that would be brought by foreign agencies, municipalities, and business competitors against U.S. companies in the wake of such a ruling. Individual foreign plaintiffs, too, will surely take advantage of RICO’s unusual breadth to refashion foreign-law claims as civil RICO claims. The availability of extraordinary treble damages and attorney fees under RICO would dramatically increase the settlement value of otherwise ordinary claims. In addition, easy access to federal courts would provide foreign plaintiffs with American procedural advantages (e.g., discovery, class actions, jury trials, and contingent-fee arrangements with counsel) that are simply unavailable in most foreign jurisdictions.

Because RICO has been so broadly interpreted, companies—both domestic and international—desperately need a clear, bright-line rule as to when their entirely overseas conduct may be deemed subject to treble-damages liability in the United States. As this Court has emphasized, “[s]imple jurisdictional rules … promote greater predictability. Predictability is valuable to corporations making business and investment decisions.” Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010). When properly applied and enforced, the venerable presumption against extraterritoriality affords the business community with that much-needed clarity and is consistent with this Court’s precedents.

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the reach of the admittedly overbroad statute. To the contrary, WLF recognizes that it is not this Court’s role to rewrite RICO, and that any statutory deficiencies are best addressed by Congress. Sedima, 473 U.S. at 500 (“It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because the plaintiffs are not taking advantage of it in its more difficult applications.”). Nonetheless, jettisoning the traditional presumption against extraterritoriality (as the Second Circuit effectively did here) would so dramatically expand RICO that the Court should, as petitioners urge, vacate the decision below and remand with instructions to affirm the district court’s dismissal of the RICO claims in their entirety.

#### That craters the overall economy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Decline cascades---nuclear war

Dr. Mathew Maavak 21, PhD in Risk Foresight from the Universiti Teknologi Malaysia, External Researcher (PLATBIDAFO) at the Kazimieras Simonavicius University, Expert and Regular Commentator on Risk-Related Geostrategic Issues at the Russian International Affairs Council, “Horizon 2030: Will Emerging Risks Unravel Our Global Systems?”, Salus Journal – The Australian Journal for Law Enforcement, Security and Intelligence Professionals, Volume 9, Number 1, p. 2-8

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

### 1NC

ITC CP

#### The United States federal government should clarify that 19 U.S.C. § 1337 authorizes remedies against import trade on the basis of anticompetitive business practices by the private sector under subsection (a)(1)(A), irrespective of subsections (a)(2) and (a)(3), utilizing an attenuated antitrust injury requirement and a comity balancing test, and provide all resources necessary for adjudicating and proactively investigating such cases. The United States federal government should restrict the scope of its core antitrust laws in accordance with a comity balancing test.

#### It solves enforcement AND deterrence without expanding the scope of antitrust law.

Barry Pupkin 20, practices primarily before the Federal Trade Commission and the US Department of Justice, as well as other regulatory and legislative bodies including the Merger Task Force of the European Commission, US Congress and the Committee on Foreign Investment in the United States, “Beyond IP Rights: Pursuing Antitrust Claims Under Section 337 of the Tariff Act,” Global IP &amp; Technology Law Blog, 4-13-2020, https://www.iptechblog.com/2020/04/beyond-ip-rights-pursuing-antitrust-claims-under-section-337-of-the-tariff-act/

Although investigations under Section 337 of the Tariff Act of 1930 have focused on intellectual property rights involving patents, unregistered trademarks or trade secret claims, the language of Section 337 is much broader.

The provision applies to any “unfair methods of competition and unfair acts in the importation of articles.” That language is similar to the Federal Trade Commission Act, which prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”

In June 2016, decades after the last Section 337 claim based on an antitrust violation had been filed, U.S. Steel alleged, in part, a conspiracy to “fix prices and control output volumes” in order to “restrain or monopolize trade and commerce in the United States” in violation of Section 337, in Certain Carbon and Alloy Steel Products. The International Trade Commission (ITC or the Commission) dismissed the U.S. Steel complaint because the Commission said that U.S. Steel had not pleaded the requisite “antitrust injury” to proceed. In fact, the Commission stated that U.S. Steel, “if given the opportunity to amend the complaint, [] will not be able to plead or demonstrate antitrust injury.” One commissioner, Meredith M. Broadbent, dissented from the ITC decision, arguing that Section 337 confers broad unfair competition jurisdiction on the ITC, and that the Commission should not be constrained by standing requirements under US antitrust laws. She said that Section 337 was intended “to capture within its scope any nefarious practices that distort domestic competition,” and as such, the U.S. Steel petition would have been sufficient and should not have been dismissed. That said, it soon became clear that the Commission decision against U.S. Steel was not meant to foreclose future Section 337 claims based on antitrust violations. In fact, soon after the Certain Carbon and Alloy Steel decision, the ITC initiated an antitrust investigation in Certain Programmable Logic Controllers pursuant to Section 337.

Where does this leave a company interested in pursuing an antitrust-related Section 337 matter going forward?

In the Carbon and Alloy Steel case, U.S. Steel based its Section 337 claim on a violation of the Sherman Act. That Act prohibits contracts, combinations and conspiracies in restraint of trade, including price fixing and market division. The Sherman Act also prohibits monopolization and attempts to monopolize. Specifically, with regard to the U.S. Steel claims that Chinese steel producers conspired to fix prices at below-market levels and control output and export volumes, the ITC determined that U.S. Steel needed to allege that the Chinese respondents had agreed to set prices below a certain level of their cost and that the Chinese respondents had a dangerous probability of recouping their investment (i.e., their predatory below-cost prices). A private plaintiff bringing a Section 337 case, then, would need to plead and prove the same antitrust injury that courts require of private plaintiffs bringing cases under US antitrust laws.

For predatory pricing claims, antitrust injury is shown by pleading and providing evidence of below-cost pricing and recoupment. These two claims are difficult to prove given the logistical hurdles of conducting discovery and obtaining relevant cost and recoupment information in China from Chinese companies. It might have been possible, though, to plead injury based on the anticompetitive conspiracy among Chinese companies to effect price at a level that would not allow U.S. Steel to invest in new technology or to continue to provide quality service to its customers. Section 337 does not limit antitrust inquiries to predatory pricing claims alone.

In fact, in January 2018, Radwell International filed a Section 337 complaint with the ITC requesting that it institute an investigation into certain alleged unfair methods of competition and unfair acts by Rockwell Automation. In its complaint, Radwell alleged several different antitrust-based claims, which it said would “destroy or substantially injure a domestic industry in the United States” and/or “restrain or monopolize trade and commerce in the United States.” These claims included a conspiracy to fix resale prices; a conspiracy to boycott resellers; and monopolization. Just as these claims are substantially broader than the claims made by U.S. Steel, the ability to demonstrate antitrust injury for each of these claims was correspondingly broadened. On March 23, 2018, the ITC issued a notice of institution of investigation into the antitrust-based Section 337 claims brought by Radwell.[1]

What does this mean for a Section 337 litigant going forward?

It means that antitrust lawyers and trade lawyers need to work closely with one another to figure out the best, most credible claims, as well as the arguments, under both antitrust and trade law that will likely be sustained by the ITC. Given the dearth of precedent in this area, it seems that in pursuing antitrust-related Section 337 actions, it is probably best to plead as broad and as comprehensive a set of antitrust claims as possible. Counsel should assess any and all possible antitrust offenses that might be relevant to the facts, and allege, as well as gather evidence of, antitrust injury for each such offense. Alternatively, because the language of the Tariff Act is so broad, prohibiting unfair methods or acts that may “restrain or monopolize trade or commerce in the United States,” a petitioner might avoid the necessity of showing antitrust injury by grounding its complaint only on the language of Section 337.

We believe that Section 337 can become an even stronger tool to exclude certain imports from sale in the US if antitrust claims become a more routine allegation in future Section 337 actions. If this happens, and more precedent is developed, petitioners will be in a much better position to frame their competitive injury arguments going forward.

### 1NC

Litigation DA

#### Expanding FTAIA causes a crushing flood of litigation.

Dr. Thomas Koster 4 & H. Harrison Wheeler, Dr. Thomas Koster is a Member of the German Bar, the New York Bar and the Brussels Bar (List of European Lawyers); Mr. Harrison Wheeler is a Member of the Florida Bar, “Appellate Courts Split on the Interpretation of the Foreign Trade Antitrust Improvements Act: Should the Floodgates Be Opened?,” 14 Ind. Int'l & Comp. L. Rev. 717, Lexis

Given the relevance and timeliness of Den Norske, it was inevitable that the Kruman defendants would rely on it in their pleadings. The "floodgates" argument figured centrally. The defendants claimed that reading the language of the FTAIA broadly would open U.S. federal courts to all varieties of antitrust claims by foreign plaintiffs. This was especially true, argued the defendants, because the world's markets were becoming increasingly interdependent.

The Kruman majority dismissed this argument, noting that Section 6a (1) of the FTAIA was in place to combat just such a wave of frivolous and unrelated foreign lawsuits. Not only must the claim highlight an effect on the U.S. economy (as required in subsection (2) of 6a), but the effect must be "direct, substantial, and reasonably foreseeable." 29 Clearly, the court believed these elements of the FTAIA sufficient to stem the supposed flood of internationally driven lawsuits.

C. Empagran

The most recent addition to the mix was the 2003 case Empagran, decided by the D.C. Circuit. If the Fifth Circuit's holding was the most restrictive reading of the FTAIA and the Second Circuit's the most lenient, then the D.C. Circuit's ruling fell in the middle but leaning more toward the Second's interpretation. The D.C. Circuit agreed with the Second Circuit that foreign plaintiffs should be allowed to bring their claims in U.S. federal court.

In Empagran, a class of vitamin retailers brought suit against the world's leading vitamin producers, alleging a global price-fixing conspiracy among the several defendants. Just as in Den Norske and Kruman, the plaintiffs in Empagran made no claim that their injuries arose from domestic transactions.

[\*723] All their transactions, in fact, had happened outside the U.S. stream of commerce. Instead, the plaintiffs charged that the defendants' global price-fixing scheme adversely affected the U.S. economy. Prices were kept high all over the world, particularly in the United States, and American consumers suffered as a result.

To the foreign plaintiffs, the two requirements of Section 6a of the FTAIA had been met. First, by virtue of the fact that the alleged cartel controlled billions of dollars in revenue from vitamin sales, the plaintiffs argued that the actions of the vitamin producers had a "direct, substantial, and reasonably foreseeable effect" on the U.S. economy. 30 Second, they argued that this effect gave "rise to a claim." 31 Again, the issue boiled down to the interpretation of the FTAIA language.

Unlike the two previous circuits, the D.C. Circuit found no "plain meaning" in the language of the FTAIA. Instead, they found that they had to reinterpret the provisions all over again. This time, citing the statutory language itself, the FTAIA's legislative history, and public policy considerations, the D.C. Circuit determined that foreign plaintiffs should be allowed to bring their claims. While the majority deemed the Fifth Circuit's interpretation of the FTAIA "overly rigid," they also saw the Second Circuit's holding as going too far, particularly in its determination that only the "substantive provisions" of the Sherman Act need be violated to give rise to a claim.

In striking new legal ground, the court supported its judgment with three legal pillars. First, referencing the statutory language itself, the D.C. Circuit issued the following holding:

We hold that, where the anticompetitive conduct has the requisite effect on United States commerce, FTAIA permits suits by foreign plaintiffs who are injured solely by that conduct's effect on foreign commerce. The anticompetitive conduct must violate the Sherman Act and the conduct's harmful effect must give rise to "a claim" by someone, even if not the foreign plaintiff before the court. Thus, the conduct's domestic effect must do more than give rise to a government action for violation of the Sherman Act, but it need not necessarily give rise to the particular plaintiff's (private) claim. 32

The court remarked of its holding: "This interpretation has the appeal of literalism." 33 Next, the court concluded that, by and large, the legislative [\*724] history of the FTAIA favored an expansive reading of the Act's jurisdictional elements. Specifically, the court said that the legislative history, if it were interpreted to favor the more restrictive view of the FTAIA (as seen in Den Norske), did not exclude the less restrictive reading (Kruman). However, if the roles were reversed, the less restrictive reading would exclude the more restrictive view. The majority found this not only significant but also dispositive.

Lastly, in regard to the public policy issues, the court borrowed from the ruling in Kruman and Judge Higginbotham's dissent in Den Norske. Both had argued that allowing foreign plaintiffs in U.S. federal court would have a strong deterrence effect on potential anticompetitive conspirators on a worldwide scale. Whereas precluding these foreign claims in U.S. federal court could encourage a conspirator to engage in global price-fixing and offset his U.S. liabilities with profits from abroad, allowing foreign claims would obligate the conspirator "to internalize the full costs of his anticompetitive behavior." 34 Moreover, the court reasoned that domestic consumers would also benefit if foreign claims were permitted. Closing U.S. courts would have the effect of diminishing the efficacy of U.S. laws, while at the same time driving the plaintiffs back to their home fora, where the possibilities of prosecution and enforcement were uncertain. The Empagran majority finished assertively: "The U.S. consumer would only gain, and would not lose, by enlisting enforcement by those harmed by the foreign effects of a global conspiracy." 35

As a corollary to the main holding, the majority in Empagran ruled that the foreign plaintiffs in question had standing to bring their case in U.S. federal court. This issue had been left unanswered at the district court level.

Given the facts that Den Norske and Kruman reached opposite rulings and that the court split in Den Norske, the split decision in Empagran should not come as a surprise. Dissenting, Judge Henderson deemed the more "natural reading" of the FTAIA to be the narrower one espoused by the majority in Den Norske. She found it peculiar that a claim by a foreign plaintiff would be judged actionable based on the potentiality of a domestic, hypothetical claim. More reasonable to Judge Henderson was the idea that a claim -- the claim before the court -- be based on the domestic injury that affects U.S. trade or commerce.

To recap, Empagran held that U.S. federal courts have subject matter jurisdiction over Sherman Act claims brought by foreign plaintiffs whose injury resulted solely from transactions that were external to the U.S. economy but, nonetheless, had an effect on U.S. trade or commerce and gave rise to a domestic (private) claim. As long as at least one domestic plaintiff can bring a claim against these domestic or foreign defendants, so too can the foreign [\*725] plaintiff. Empagran followed the overall result of Kruman but diverged in its reasoning. The latter case was deemed to have gone too far in setting the requirements for subject matter jurisdiction, providing for a jurisdictional nexus simply when the main provisions of the Sherman Act are contravened.

V. THE GOVERNMENT'S AMICUS CURIAE BRIEF

In response to an invitation from the D.C. Circuit court, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued an amicus curiae brief in March of 2003, stating the position of the U.S. government on Empagran. Contrasting sharply with both Kruman and Empagran, the position of the government was that only those claims that arise from domestic conduct and accompanying domestic effect should be permitted under the FTAIA. Citing the importance of this area of the law and the need for agreement among the circuits, 36 the brief called for an en banc rehearing of Empagran by the D.C. Circuit to mend the split of authority. The government's argument came in three parts.

First, the brief stated that the "most natural reading" of Section 6a (2) of the FTAIA would understand the phase "gives rise to a claim" as referring not to a claim by any plaintiff but only to a claim "by the particular plaintiff before the court." 37 As the FTAIA does not talk to the purpose of allowing a remedy for foreign conduct and foreign effect, the Sherman Act cannot be stretched to include the sorts of foreign plaintiffs seen in the three controlling cases.

Next, the brief countered the legislative history argument put forth by the D.C. Circuit. Whereas the majority in Empagran concluded that, absent "express legislative history to the contrary, Congress must have intended the more expansive interpretation" 38 of the FTAIA, the government determined this to be dubious logic. The brief proposed that the default position, absent controlling language, should be one that is wholly domestically focused in terms of the effect of anticompetitive conduct. The government brief supported the position put forth in Den Norske: "Nothing is said about protecting foreign purchasers in foreign markets." 39

Lastly, the government disagreed with the majority in Empagran that extending U.S. antitrust laws would have a deterring effect on global anticompetitive conduct. In fact, the government maintained that just the [\*726] reverse was true. Prefacing its argument with the fact that "price-fixing conspiracies are inherently difficult to detect and prosecute [and therefore require the help of co-conspirators,]" 40 the government made the case that extending the jurisdiction of the Sherman Act to foreign plaintiffs injured by foreign conduct "would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency. . . . " 41 In other words, there is a certain balance at the moment between anticompetitive behavior and resulting lawsuits. The government, through its leniency program, has a way of controlling criminal prosecutions against anticompetitive entities, which in turn influences subsequent civil prosecutions. However, if jurisdiction is broadened, then countless more plaintiffs enter the equation, potentially upsetting the delicate equilibrium. This equilibrium is crucial, it will be recalled, in getting the necessary co-conspirators to come forward in the first place. Thus, co-conspirators will ultimately be deterred from divulging what they know and stopping anticompetitive conduct.

As a corollary to this counter-deterrence argument, the government highlights the "floodgates" argument as well. Noting that the government is "unaware of any decision pre-dating the FTAIA that permitted" suits based on a theoretical domestic plaintiff, the brief surmised that Empagran's new rule "threatens to burden the federal courts" with suits concerned with foreign anticompetitive conduct. 42

In summary, the government's brief centered almost entirely around the notions of domestic and foreign conduct. While the government recognized the right of foreign plaintiffs to bring antitrust claims for injuries stemming from domestic conduct, it refused to concede a similar right to those injured solely by foreign conduct. Moreover, the government found fault with the logic that this latter group of plaintiffs received this right based only on the existence of a single domestic plaintiff. In the end, the government clearly believed that the D.C. Circuit had strayed too far afield in making the jurisdictional nexus between conduct and effect.

VI. IMPLICATIONS

Two major events will flow from Empagran. First, given the split of authority and the three distinct opinions expressed by three federal circuit courts, it seems apparent that this issue is ripe for review by the Supreme Court. Second, a wave of lawsuits by foreign plaintiffs may inundate the federal court system. This was certainly foreseen in a number of sources: the holding in Den Norske, the defendants' arguments in Kruman, and the amicus brief following Empagran. Discounting this argument is not easy, for few [\*727] nations have antitrust laws allowing plaintiffs to recover treble damages and lawyers' fees in civil suits. Thus, it is not unlikely that these existing benefits, in tandem with the newly broadened jurisdictional elements to the Sherman Act, may prompt foreign plaintiffs to bring claims when they otherwise might have refrained.

Certain aspects relevant to Empagran do nothing to undercut the "floodgates" argument. Specifically, the DOJ has already obtained against the Empagran defendants, both corporate and individual, fees in excess of $ 900 million, including the largest criminal fee ever levied by the DOJ ($ 500 million). 43 These huge fines hardly dissuade foreign plaintiffs from trying themselves to reach into the defendants' deep pockets.

#### Efficient court review underpins patent-led innovation---that stops nuclear war and a range of existential threats.

Robert J. Rando 16, Founder and Lead Counsel of The Rando Law Firm P.C., Fellow of the Academy of Court-Appointed Masters, Treasurer for the New York Intellectual Property Law Association, Chair of the Federal Bar Association Intellectual Property Law Section, “America’s Need For Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters”, IP Insight, June 2016, p. 12-14 [language modified] [abbreviations in brackets]

Robert F. Kennedy’s speech, which includes his reference to the oft-quoted “interesting times” curse, applies throughout history in many contexts and, indeed, with both negative and positive connotation. While he focused on the struggles for freedom and social justice, the requisite ascendancy of the individual over the state, and the institution and integration of those ideals for the greater good, he also promoted the goals of greater global unity, cooperation and communication, which were, and could be, achieved by advances in technology. And, as noted in the excerpt, he championed “the creative energy of men.”

Intellectual Property in “Interesting Times”

It is beyond question that starting with the last decade of the twentieth century and throughout the first two decades of the twenty-first century, when it comes to matters relating to intellectual property, we have been living in “interesting times.” Some may interpret these interesting times as defined by the curse and others may view it by the ordinary meaning of “interesting.” In either case, those of us that toil in the fields of patents, copyrights, trademarks, trade secrets, and privacy rights have experienced an unprecedented sea change in the way those rights are procured, protected and enforced. Likewise, and perhaps more importantly, even those of us that do not practice in these areas of law, as well as the general public, have been, and continue to be, impacted by the consequences of these changes (both positive and negative).

The Changes In Intellectual Property Law

Examples of some of the changes in intellectual property law are: the sweeping 2011 legislative changes to the patent laws under the America Invents Act (AIA), which impact is only beginning to be fully appreciated; the various proposals for patent law reform, on the heels of the AIA, beginning with the 113th and 114th Congress; the copyright laws Digital Millennium Copyright Act (DMCA) and numerous 114th Congressional proposed copyright law changes; the recently enacted federal trade secret law (Defend Trade Secrets Act of 2016 (DTSA))2; the impact of the internet, domain names and globalization on Trademark law; the intellectual property law harmonization requirements included in various global/regional trade agreements; and the proliferation of devices (both invasive and non-invasive) that defy any rational basis for believing we can still adhere to the republic’s libertarian understanding of the right to privacy.

Without engaging in “chicken and egg” analysis, it is sufficient to observe that technological advancement, societal needs, globalization, existential threats, economic realities, and political imperatives (or what James Madison referred to in the Federalist Papers No. 10 as factious governance), have combined to create the “interesting times” for the United States [IP] intellectual property laws.

What was said by Bobby Kennedy in 1966 remains true today. We live in dangerous and uncertain times. Many of the existential threats remain the same (nuclear war and proliferation, [genocides] ~~genocidal maniacs~~ and natural disease) and some are new ([hu]manmade disease, greater awareness of environmental changes and possibly human interrelationship factors, and the unintended consequences of genetic manipulation and robotic technologies). The danger and uncertainty that pervades changes in intellectual property laws, though not an existential threat of the same manner and kind, correlates with the threat and remains “more open to the creative energy of man than any other time in history.”

Apropos the creative energy of man, there is a non-coincidental congruence and convergence of activity across and among the three branches of government, occurring almost simultaneously with the congruence and convergence of the rapid developments of technological innovation across various scientific disciplines and the information age, reflected in the transformation of the [IP] intellectual property laws in the United States.

Patents

The passage of the AIA was a culmination of efforts spanning several years of Congressional efforts; and the product of a push by the companies at the forefront of the twenty-first century new technology business titans. The legislation brought about monumental changes in the patent law in the way that patents are procured (first inventor to file instead of first to invent) and how they are enforced (quasi-judicial challenges to patent validity through inter-party reviews at the Patent Trial and Appeals Board (PTAB)).

The 113th and 114th Congress grappled with newly proposed patent law reforms that, if enacted, may present additional tectonic shifts in the patent law. Major provisions of the proposals include: fee-shifting measures (requiring loser pays legal fees - counter to the American rule); strict detailed pleadings requirements, promulgated without the traditional Rules Enabling Act procedure, that exceed those of the Twombly/Iqbal standard applied to all other civil matters in federal courts, and the different standards applicable to patent claim interpretation in PTAB proceedings and district court litigation concerning patent validity.

The Executive and administrative branch has also been active in the patent law arena. President Obama was a strong supporter of the AIA3 and in his 2014 State Of The Union Address, essentially stated that, with respect to the proposed patent law reforms aimed at patent troll issues, we must innovate rather than litigate.4 Additionally, the USPTO has embarked upon an energetic overhaul of its operations in terms of patent quality and PTO performance in granting patents, and the PTAB has expanded to almost 250 Administrative Law Judges in concert with the AIA post-grant proceedings’ strict timetable requirements.

The Supreme Court, not to be outdone by the Articles I and II branches of the U.S. government, has raised the profile of patent cases to historical heights. From 1996 to the 2014-15 term there has been a steady increase in the number of patent cases decided by the SCOTUS5. The 2014-15 term occupied almost ten percent of the Court’s docket. Prior to the last two decades, the Supreme Court would rarely include more than one or two patent cases in a docket that was much larger than those we have become accustomed to from the Roberts’ Court6.

While the SCOTUS activity in patent cases is viewed by some as a counter-balance to the perceived Federal Circuit’s pro-patent and bright line decisions, it can just as assuredly be viewed as decisions rendered by a Court of final resort which does not function in a vacuum devoid of the social, economic and political winds of the times. In recognition of the effect new technologies have on the patent law, the politicization of intellectual property law matters, especially patent law (through factious governing principles of the political branches of the government), and the maturation of the Federal Circuit patent law jurisprudence, the SCOTUS has rendered opinions in cases that impact, and perhaps are/were intended to mitigate the concerns regarding, some of the vexing issues confronting the patent community today (e.g., non-practicing entities or in the politicized parlance “patent trolls,” the intersection of patent and antitrust laws in Hatch-Waxman so called “pay-for-delay” settlements between Branded and Generic pharma companies, and the fundamental tenets that comprise the very heart of what is patent eligible subject matter).

Copyrights

The advent and ubiquity of the internet, social media and digital technologies (MP3s, Napster, Facebook, YouTube, and Twitter) represents the impetus for changes in the Copyright laws. The DMCA addressed the issues presented by these advances or changes in the differing media and forms of artistic impressions. The proliferation of digital photos, graphic designs and publishing alternatives, as well as adherence to globalization harmonization have given rise to changes in the statutory law and jurisprudence in this area of intellectual property law. Additionally, there is an overlap of patent rights and copyrights for software driven by the ebb and flow of the strength of each respective intellectual property protection.

Notably, the Patent and Copyright Clause7, in addition to Author’s writings, has been viewed as discretely applying to two different types of creativity or innovation. When drafted the “sciences” referred not only to fields of modern scienctific inquiry but rather to all knowledge. And the “useful arts” does not refer to artistic endeavors, but rather to the work of artisans or people skilled in a manufacturing craft. Rather than result in ambiguity or confusion, perhaps the Framers were either quite prescient or, just coincidentally, these aspects of the Patent and Copyright Clause have converged.

For example, none other than the famous Crooner, Bing Crosby, benefited from both protections. Well-known as a prolific and popular recording artist he also benefited from his investments in the, then innovative, recording technologies. Similarly, the Beatles, Beach Boys, as well as many other rock and roll artists, experimental efforts in music performance, recording and production, helped to transform the music industry in both copyrightable artistic expression and patentable inventions. Similarly, film, literary and digital arts reap benefits at the crossroads of both copyright and patent protections.

Trademarks

Trademark laws have been impacted by numerous changes in the business landscape. They include the internet, Domain names, international rights in a global economy, different venues and avenues for branding, marketing and merchandising, global knock-offs from nations that have a less than stellar respect for intellectual property rights, and international trade agreements. More recently, politicization (or perhaps political correctness) has creeped into the trademark law arena pitting branding rights and protections against first amendment rights.

Trade Secrets

As with Copyright and Trademark law, trade secrets law includes some of the same issues related to trade agreements. TRIPS required members to have trade secret protection in place. Initially, the United States compliance with this requirement has relied upon the trade secret law of the individual states. That compliance may be supplanted by the recently enacted DTSA. Similarly, the Trans Pacific Partnership (TPP) trade agreement contains intellectual property rights provisions that will trigger required changes to United States statutory Intellectual Property Laws.

The proposed trade secret legislation also gives rise to several concerns. For instance, there is an absence of a specific definition for trade secret, as well as potential issues of federalism, conflict with state law precedent (despite no preemption), remedies, and the impact on employer/employee relations.

There is also a real concern that the strengthening of trade secret protection in conjunction with the perceived weakening of patent protection (e.g., high rate of invalidating patents in post-grant proceedings before the PTAB and strict limitations on what is patent eligible subject matter) may very-well have the unintended consequence of contravening the purpose behind the Patent and Copyright Clause: “to promote the progress of the sciences and the useful arts.” Moreover, the incentive to innovate may very well be usurped by the advantage of withholding patent law disclosure of highly beneficial scientific advancements that directly affect the human condition, alter life expectancies and the evolution of the human species (rather than by mere “natural selection”), and what is the very essence of a human being (for better or worse). Thus, crippling innovation and the progress of the sciences and useful arts.

Privacy Rights

It is increasingly more difficult to function “off the grid.” The invasive and non-invasive attributes of the internet, the reliance upon the multitude of devices, social media, and information age technologies, and access to big data, all contribute to the decrease in and dilution of the right to privacy. Wittingly or otherwise, the strong libertarian roots of the republic have been replaced by dependence upon these modes of an information-age life. Commentary on the benefits and deficits of this reality are beyond the subject and purpose of this writing. Suffice to acknowledge that the right to privacy has been significantly reduced. The laws that protect these rights are in a constant struggle to maintain those rights while yielding to the demands of the lifestyle and security concerns. Laws that relate to cybersecurity in the global and domestic space create interplay with privacy rights. Legislation, trade agreements and jurisprudence all impact this area of intellectual property. Cross-border theft of trade secrets, competitor espionage, and loss of control over personal data are all implicated in the intellectual property law arena.

America’s Need For Strong Intellectual Property Protection

The need for strong protection of intellectual property rights is greater now than it was at the dawn of our republic. Our Forefathers and the Framers of the U.S. Constitution recognized the need to secure those rights in Article 1, Section 8, Clause 8. James Madison provides insight for its significance in the Federalist Papers No. 43 (the only reference to the clause). It is contained in the first Article section dedicated to the enumerated powers of Congress. The clause recognizes the need for: uniformity of the protection of IP rights, securing those rights for the individual rather than the state; and, incentivizing innovation and creative aspirations.

Underlying this particular enumerated power of Congress is the same struggle that the Framers grappled with throughout the document for the new republic: how to promote a unified republic while protecting individual liberty. The fear of tyranny and protection of the “natural law” individual liberty is a driving theme for the Constitution and throughout the Federalist Papers. For example, in Federalist No. 10, James Madison articulated the important recognition of the “faction” impact on a democracy and a republic. In Federalist No. 51, Madison emphasized the importance of the separation of powers among the three branches of the republic. And in Federalist No. 78, Alexander Hamilton, provided his most significant essay, which described the judiciary as the weakest branch of government and sought the protection of its independence providing the underpinnings for judicial review as recognized thereafter in Marbury v. Madison.

All of these related themes are relevant to the Patent and Copyright Clause and at the center of the intellectual property protections then and now. The Federalist Papers No. 10 recognition that a faction may influence the law has been playing itself out in the halls of congress in the period of time leading up to the AIA and in connection with the current patent law reform debate. The large tech companies of the past, new tech, new patent-based financial business model entities, and pharma factions have been the drivers, proponents and opponents of certain of these efforts. To be sure, some change is inevitable, and both beneficial and necessary in an environment of rapidly changing technology where the law needs to evolve or conform to new realities. However, changes not premised upon the founding principles of the Constitution and the Patent and Copyright Clause (i.e., uniformity, secured rights for the individual, incentivizing innovation and protecting individual liberty) run afoul of the intended purpose of the constitutional guarantee.

Although the Sovereign does not benefit directly from the fruits of the innovator, enacting laws that empower the King, and enables the King to remain so, has the same effect as deprivation and diminishment of the individual’s rights and effectively confiscates them from him/her. Specifically, with respect to intellectual property rights, effecting change to the laws that do not adhere to these underlying principles, in favor of the faction that lobbies the most and the best in the quid pro quo of political gain to the governing body threatens to undermine the individual’s intellectual property rights and hinder the greatest economic driver and source of prosperity in the country.

It is also important to recognize that the social, political and economic impact of strong protections for intellectual property cannot be overstated. In the social context, the incentive for disclosure and innovation is critical. Solutions for sustainability and climate change (whether natural, man-made or mutually/marginally intertwined) rely upon this premise. Likewise, as we are on the precipice of the ultimate convergence in technologies from the hi-tech digital world and life sciences space, capturing the ability to cure many diseases and fatal illnesses and providing the true promise of extended longevity in good health and well-being, that is meaningful, productive, and purposeful; this incentive must be preserved.

In similar fashion, advancements in technologies related to the global economy and communications will enhance the possibilities for solutions to political and cultural conflicts that arise around the globe. Likewise, the United States economy has always benefited when it is at the forefront of innovation and achieves prosperity from its leadership role in technological advancements.

Conclusion

As was the case in 1966, how we move forward today, to solve the many problems facing our country and the broader global community in these “interesting times,” both within and without the laws affecting intellectual property rights, depends upon the “creative energy of man” which must prevail. An achievable goal, dependent on the strong, stable and sound protection of intellectual property rights.

### 1NC

T-Per Se

#### ‘Prohibiting’ a practice requires per se illegality.

Lee Mendelsohn 6, Director at Edward Nathan, “KIPA Conduct Amounts to Price Fixing”, Business Day (South Africa), 6/12/2006, Lexis

The first step in any competition law analysis is to define the relevant market. There are two components to an analysis of the relevant market, namely the relevant product market and the geographic market.

The relevant product market consists of those products and services that operate as a competitive constraint on the behaviour of the suppliers of those products and/or services.

The relevant product market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to substitute the product with another product or would cause suppliers of other products to begin producing the product in question.

The relevant geographic market is determined by ascertaining whether a small but significant non-transient increase in pricing of the product in question would cause buyers to purchase the product from other geographic areas, alternatively suppliers of the product in other geographic areas to supply those products into the area in question.

For the purposes of this case study, we are instructed to accept that each medical speciality constitutes a relevant product market and that the relevant geographic market for each of them is Kleindorpie.

The Competition Act provides that "an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if … it involves … directly or indirectly fixing a purchase or selling price or any other trading condition".

An "agreement" is defined as including a contract, arrangement or understanding, whether or not legally enforceable. The term agreement is very widely defined. A "horizontal relationship" is defined as a "relationship between competitors".

The prohibition on the fixing of a purchase or selling price or any other trading condition is one of the so-called "per se" prohibitions which are included in our Competition Act. The prohibition is automatic and absolute and the fixing of prices or other trading condition cannot be justified on the basis of any technological, efficiency or other procompetitive gains that could outweigh the potential anticompetitive effect of the fixing of the price or trading condition. If the capitation plan of KIPA falls within the restrictive horizontal practice prohibiting price fixing and the fixing of other trading conditions, such practice will be a contravention of the act.

#### Limits---many standards, requiring distinct answers, make the topic unmanageable.

#### Ground---fringe standards dodge links and allow bidirectional permissiveness.

### 1NC

Offsets CP

#### The United States federal government should reduce prohibitions on anticompetitive business practices by the private sector by expanding the extraterritorial scope of its core antitrust laws in accordance with a comity balancing test and immunizing corporate cooperation that reduces energy consumption and curtails greenhouse gas emissions from antitrust enforcement.

#### The CP competes:

#### It’s a PIC of the plan’s specification that expanding antitrust law is part of an ‘increase’ in prohibitions.

#### ‘Increase’ means net

Words and Phrases 8 **–** v. 20a, p. 264-265

Cal.App.2 Dist. 1991. Term “increase,” as used in statute giving the Energy Commission modification jurisdiction over any alteration, replacement, or improvement of equipment that results in “increase” of 50 megawatts or more in electric generating capacity of existing thermal power plant, refers to “net increase” in power plant’s total generating capacity; in deciding whether there has been the requisite 50-megawatt increase as a result of new units being incorporated into a plant, Energy Commission cannot ignore decreases in capacity caused by retirement or deactivation of other units at plant. West’s Ann.Cal.Pub.Res.Code § 25123.

#### Immunizing energy reductions from antitrust is key to corporate leadership on climate---extinction

Paul Balmer 20, J.D. from the University of California, Berkeley, School of Law, BA from Pomona College, Senior Articles Editor of Ecology Law Quarterly and Treasurer of the Election Law Society, Summer Associate at Tonkon Torp, “Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change”, Ecology Law Quarterly, 7/27/2020, https://www.ecologylawquarterly.org/currents/colluding-to-save-the-world-how-antitrust-laws-discourage-corporations-from-taking-action-on-climate-change/

Even though DOJ quietly dropped the investigation in February 2020,[79] the market results of the probe itself were almost immediate and significant. In October 2019, just weeks after the antitrust investigation began, other major automakers joined the Trump Administration as parties in litigation over California’s right to set its own vehicle emissions standards,[80] even though automakers had once stood united behind the Obama Administration’s higher fuel efficiency standards.[81] DOJ’s abandoned investigation had sent a clear message to automakers: do not collude on car standards that will raise prices for consumers, or you will be investigated. With the threat of antitrust enforcement off the table for now, the Trump Administration finalized its dramatically lower fuel efficiency rule in March 2020.[82]

Despite the naked political motive and the arguably weak legal argument for antitrust enforcement against the four automakers in this case, the specter of antitrust liability will not be limited to the auto industry. At a time when companies are making serious commitments to address climate change, even the most progressive companies are likely to think twice about making commitments with competitors on any industry standard that could lead to higher consumer prices. Companies could be discouraged from moving forward on climate, at a time when bold action is needed most.

IV. Conclusion: An Antitrust Framework for the Twenty-First Century Economy

The threatened antitrust enforcement against the four automakers highlights the disconnect between corporate law and climate reality. An antitrust framework that never permits price increases resulting from coordinated action ignores both the possibility of consumer benefits beyond price as well as the changing nature of corporations. As corporations wrestle with potential legal duties to take environmental outcomes into consideration in corporate decisions,[83] they need to be able to consider a broader definition of consumer welfare. Antitrust law’s focus on short-term prices has helped mask long-term consumer harms and broader negative effects on society.[84] At the same time, corporations have been unable to successfully justify agreements that raise prices in order to achieve some societal benefit. Those two blind spots in competition law keep our legal framework stuck in a bygone era, prompting the need for change in at least three ways.

First, and at a minimum, courts need to revisit a jurisprudence that prizes low prices and market “efficiencies” as procompetitive justifications, but rejects justifications of social benefits. Courts must at least allow coordinating firms to offer cognizable counterarguments when their conduct is considered under the rule of reason. This realignment should accompany judicial acknowledgment that “consumer welfare” encompasses more than current or readily predictable price in an isolated market, and instead can include the long-term effects on things like consumer choice, consumer privacy, and local economic vitality.[85]

Second, Congress should pass legislation immunizing corporate cooperation that reduces energy consumption and curtails greenhouse gas emissions.[86] Congress has provided similar exemptions before, permitting specific industries like railroads, insurance companies, and agricultural cooperatives to coordinate on prices and terms of service where regulation was preferable to competition.[87] Allowing companies in the transportation sector—responsible for over 25 percent of U.S. emissions in 2018[88]—to coordinate on environmental efforts would be a common sense step in line with past practice.

Finally, and more broadly, the Securities and Exchange Commission could, on its own[89] or with congressional backing,[90] require companies to disclose progress on environmental efforts and benchmarks that could be set internally or externally.[91] Mandatory environmental reporting, alongside other key metrics on governance and financial issues, would have three important benefits. First, corporate performance could be measured by more than just quarterly earnings, incentivizing longer-term decision making and reflecting the broadening of corporate purpose to include societal and environmental benefits. Second, a government-required environmental disclosure—ideally translated into a comprehensible number or rank—would allow antitrust regulators and consumers alike to track corporate progress on green initiatives, ensuring that any increases in consumer price or exclusionary conduct is more than offset by tangible gains on addressing climate change and replacing the voluntary, often one-sided corporate environmental reports often derided as “greenwashing.”[92] Third, greater transparency and real environmental metrics that can be weighed alongside price and other standards could help ensure that corporations are not able to skirt competition laws to their profit, under the guise of fighting climate change. There is widespread discussion and progress on this type of mandatory reporting;[93] any new framework could easily be tailored to enforce antitrust rules for environmental coordination.

Updating antitrust and corporate law in these three ways would encourage much-needed corporate collaboration on climate change, reflect the changing nature of corporate activism, and acknowledge that consumer welfare can and must mean more than low prices. Saving the world may well depend on legalizing and incentivizing this kind of corporate collusion.

### 1NC

Uniqueness CP

#### The United States federal government should not:

#### ---update antitrust laws;

#### ---increase antitrust lawsuits;

#### ---divest ‘tech giants.’

## Cartels ADV

### Cartels---1NC

#### There’s no extraterritorial conflict.

Brendan Sweeney 07. BCom, LLB (Melbourne); PhD (Monash); Barrister and Solicitor of the Supreme Court of Victoria; Senior Lecturer, Department of Business Law and Taxation, Faculty of Business and Economics, Monash University. "Combating Foreign Anti-Competitive Conduct: What Role for Extraterritorialism?" [2007] MelbJlIntLaw 2; (2007) 8(1) Melbourne Journal of International Law 35. http://www.austlii.edu.au/au/journals/MelbJIL/2007/2.html#fn1

In the past 15 years, the level of hostility has **reduced considerably** due to a number of factors.[325] First, a growing number of **states now recognise that anti-competitive activities** — most notably hard core cartels, which until recently made up most of the international cases — **are bad for their own economies**.[326] This growing recognition has produced a rush of **new competition regimes**. It has also **fostered a spirit of cooperation**, resulting in a number of collaborative initiatives, including positive comity.[327] Second, a number of states have indicated that they are prepared to **apply their competition laws extraterritorially**; this has tended to **mute complaints by those states against US extraterritorialism.** Third, US antitrust authorities and, more recently but to a lesser degree, US courts, have become more sensitive to the legitimate concerns of other states.[328] The consequence is that competition law extraterritorialism is no longer necessarily just a matter of aggressive unilateralism. **It can, and often does, operate in a cooperative environment; it is no longer just a US phenomenon.**

#### Growth’s stabilizing

Tom Fairless 11-7, European Economic Reporter at the Wall Street Journal, Mike Cherney, BS in Journalism from Northwestern University, and David Harrison, Federal Reserve and Economics Reporter at the Wall Street Journal, “The Economic Rebound From Covid-19 Was Easy. Now Comes the Hard Part.”, The Wall Street Journal, 11/7/2021, https://www.wsj.com/articles/the-economic-rebound-from-covid-19-was-easy-now-comes-the-hard-part-11636299941

The global economy’s comeback from last year’s deep contraction is approaching a delicate juncture, as policy makers and executives grapple with the bumpy transition from the post-pandemic reopening to a more normalized pace of growth.

Central banks in the U.S. and elsewhere are trying to chart a path that will curb inflation but not choke off growth as they navigate the process of weaning economies off the extraordinary measures—including rock-bottom interest rates and enormous bond-buying programs—deployed to support their economies.

The surge in U.S. consumer demand over the past year—turbocharged by trillions in stimulus—has ricocheted outward and caused disruptions to global supply chains that are now worsening and may stretch through 2022, say executives. The resulting higher prices and the struggle to secure raw materials and labor are piling the pressure on some companies and weighing on major economies such as Germany.

Meanwhile, China is in the midst of an ambitious effort to reform its economy, including reining in household and corporate debt, particularly in the country’s housing market, clamping down on the technology sector and pursuing ambitious climate goals—factors that could slow growth there and globally.

As a result, the global recovery—while still robust—is at a precarious point, with the risk of missteps.

“This is the hard part of the recovery,” said Neil Shearing, chief economist at Capital Economics in London. “Policy makers need to work out what’s permanent and what’s likely to be short-lived.”

China is in the midst of an ambitious effort to reform its economy, including reining in household and corporate debt, particularly in the country’s housing market.

If central banks move too slowly, inflation could continue to rise, with price increases and higher wages feeding off each other. But if they increase rates too quickly, that could choke off the economic recovery in a world of high debt.

“It’s very, very difficult to forecast and not easy to set policy,” Federal Reserve Chairman Jerome Powell told reporters Wednesday after unveiling plans to begin scaling back its $120-billion-a-month bond-buying program this month.

“Inflation has come in higher than expected and bottlenecks have been more persistent and more prevalent,” he added. “We see that they’re now on track to persist well into next year. That was not expected by us, not by other macro forecasters.”

Some moves are catching investors by surprise.

The Bank of England’s decision Thursday not to raise interest rates triggered the biggest moves in U.K. bond yields in years. The same day, the Czech central bank hiked its key rate by much more than expected, to 2.75% from 1.5%.

Only about a fifth of businesses judge that the worst of the supply-chain disruptions has passed, according to an October survey of large businesses by Oxford Economics. A third of respondents said the disruption would likely extend through the end of next year or beyond.

California’s Port of Los Angeles is struggling to keep up with the crush of cargo containers arriving at its terminals, creating one of the biggest choke points in the global supply-chain crisis. This exclusive aerial video illustrates the scope of the problem and the complexities of this process. Photo: Thomas C. Miller

The challenges are especially stiff in the U.S., where fiscal stimulus worth almost $6 trillion has driven consumer spending about 9% above its pre-pandemic level and where supply bottlenecks helped push inflation up to 5.4% in September, a 13-year high.

“It’s a tough time we’re in,” said Jeffrey Edwards, chief executive at Cooper-Standard Holdings Inc., an auto-parts manufacturer, last week. “We’ve not been able to offset the widespread inflationary impacts we’re seeing in materials, energy, transportation and labor.”

The company reported lower sales and a loss in the third quarter. Mr. Edwards said the company is considering selling off some assets.

At ports along the east and west coasts, container volume was almost one fifth above its 2019 level in the three months through June, according to Fitch Ratings.

“In the spring I was pretty sure things would start to ease up in the fall. What happened is things actually got worse,” said Lars Mikael Jensen, head of network at containership giant A.P. Moller-Maersk A/S. “So I’ve stopped forecasting.”

The U.S. economy produced more than half a million new jobs in October as businesses sprang back from a summer slowdown caused by the Delta variant of Covid-19, the Labor Department said Friday. It also said about a quarter million more jobs were added in August and September than it had previously estimated. The average hourly wage for private sector workers rose by 4.9%, roughly double the annual average wage gain in the 15 years before the pandemic.

#### That solves the impact. The US isn’t key to their impacts, AND challengers don’t want wholesale revision.

G. John **Ikenberry 18**. Albert G. Milbank Professor of Politics and International Affairs at Princeton University in the Department of Politics and the Woodrow Wilson School of Public and International Affairs, also a Global Eminence Scholar at Kyung Hee University in Seoul. 2018. “Why the Liberal World Order Will Survive.” Ethics & International Affairs, vol. 32, no. 01, pp. 17–29.

In this essay I look at the evolving encounters between rising states and the post-war Western international order. My starting point is the classic “power transition” perspective. Power transition theories see a tight link between international order—its emergence, stability, and decline—and the rise and fall of great powers. It is a perspective that sees history as a sequence of cycles in which powerful or hegemonic states rise up and build order and dominate the global system until their power declines, leading to a new cycle of crisis and order building. In contrast, I offer a more evolutionary perspective, emphasizing the lineages and continuities in modern international order. More specifically, I argue that although America’s hegemonic position may be declining, the liberal international characteristics of order—openness, rules, multilateral cooperation—are deeply rooted and likely to persist. This is true even though the orientation and actions of the Trump administration have raised serious questions about the U.S. commitment to liberal internationalism. Just as importantly, rising states (led by China) are not engaged in a frontal attack on the American-led order. While struggles do exist over orientations, agendas, and leadership, the non-Western developing countries remain tied to the architecture and principles of a liberal-oriented global order. And even as China seeks in various ways to build rival regional institutions, there are stubborn limits on what it can do. Power Transitions and International Order There is wide agreement that the world is witnessing a long-term global power transition. Wealth and power is diffusing, spreading outward and away from Europe and the United States. The rapid growth that marked the non-Western rising states in the last decade may have ended, and even China’s rapid economic ascendency has slowed. But the overall pattern of change remains: the “rest” are gaining ground on the “West.” While there is wide agreement that the world is witnessing a global power transition, there is less agreement on the consequences of power shifts for international order. The classic view is advanced by realist scholars, such as E. H. Carr, Robert Gilpin, Paul Kennedy, and William Wohlforth, who make sweeping arguments about power and order. These hegemonic realists argue that international order is a by-product of the concentration of power. Order is created by a powerful state, and when that state declines and power diffuses, international order weakens or breaks apart. Out of these dynamic circumstances, a rising state emerges as the new dominant state, and it seeks to reorganize the international system to suit its own purposes. In this view, world politics from ancient times to the modern era can be seen as a series of repeated cycles of rise and decline. War, protectionism, depression, political upheaval—various sorts of crises and disruptions may push the cycle forward. This narrative of hegemonic rise and decline draws on the European and, more broadly, Western experience. Since the early modern era, Europe has been organized and reorganized by a succession of leading states and would-be hegemons: the Spanish Hapsburgs, France of Louis XIV and Napoleon, and post-Bismarck Germany. The logic of hegemonic order comes even more clearly into view with Pax Britannica, the nineteenth-century hegemonic order based on British naval and mercantile dominance. The decline of Britain was followed by decades of war and economic instability, which ended only with the rise of Pax Americana. For hegemonic realists, the debate today is about where the world is along this cyclical pathway of rise and decline. Has the United States finally lost the ability or willingness to underwrite and lead the post-war order? Are we in the midst of a hegemonic crisis and the breakdown of the old order? And are rising states, led by China, beginning to step forward in efforts to establish their own hegemonic dominance of their regions and the world? These are the lurking questions of the power transition perspective. But does this vision of power transition truly illuminate the struggles going on today over international order? Some might argue no—that the United States is still in a position, despite its travails, to provide hegemonic leadership. Here one would note that there is a durable infrastructure (or what Susan Strange has called “structural power”) that undergirds the existing American-led order. Far-flung security alliances, market relations, liberal democratic solidarity, deeply rooted geopolitical alignments—there are many possible sources of American hegemonic power that remain intact. But there may be even deeper sources of continuity in the existing system. This would be true if the existence of a liberal-oriented international order does not in fact require hegemonic domination. It might be that the power transition theory is wrong: the stability and persistence of the existing post-war international order does not depend on the concentration of American power. In fact, international order is not simply an artifact of concentrations of power. The rules and institutions that make up international order have a more complex and contingent relationship with the rise and fall of state power. This is true in two respects. First, international order itself is complex: multilayered, multifaceted, and not simply a political formation imposed by the leading state. International order is not “one thing” that states either join or resist. It is an aggregation of various sorts of ordering rules and institutions. There are the deep rules and norms of sovereignty. There are governing institutions, starting with the United Nations. There is a sprawling array of international institutions, regimes, treaties, agreements, protocols, and so forth. These governing arrangements cut across diverse realms, including security and arms control, the world economy, the environment and global commons, human rights, and political relations. Some of these domains of governance may have rules and institutions that narrowly reflect the interests of the hegemonic state, but most reflect negotiated outcomes based on a much broader set of interests. As rising states continue to rise, they do not simply confront an American-led order; they face a wider conglomeration of ordering rules, institutions, and arrangements; many of which they have long embraced. By separating “American hegemony” from “the existing international order,” we can see a more complex set of relationships. The United States does not embody the international order; it has a relationship with it, as do rising states. The United States embraces many of the core global rules and institutions, such as the United Nations, International Monetary Fund (IMF), World Bank, and World Trade Organization. But it also has resisted ratification of the Law of the Sea Convention and the Convention on the Rights of the Child (it being the only country not to have ratified the latter) as well as various arms control and disarmament agreements. China also embraces many of the same global rules and institutions, and resists ratification of others. Generally speaking, the more fundamental or core the norms and institutions are—beginning with the Westphalian norms of sovereignty and the United Nations system—the more agreement there is between the United States and China as well as other states. Disagreements are most salient where human rights and political principles are in play, such as in the Responsibility to Protect. Second, there is also diversity in what rising states “want” from the international order. The struggles over international order take many different forms. In some instances, what rising states want is more influence and control of territory and geopolitical space beyond their borders. One can see this in China’s efforts to expand its maritime and political influence in the South China Sea and other neighboring areas. This is an age-old type of struggle captured in realist accounts of security competition and geopolitical rivalry. Another type of struggle is over the norms and values that are enshrined in global governance rules and institutions. These may be about how open and rule-based the system should be. They may also be about the way human rights and political principles are defined and brought to bear in relations among states. Finally, the struggles over international order may be focused on the distribution of authority. That is, rising states may seek a greater role in the governance of existing institutions. This is a struggle over the position of states within the global political hierarchy: voting shares, leadership rights, and authority relations. These observations cut against the realist hegemonic perspective and cyclical theories of power transition. Rising states do not confront a single, coherent, hegemonic order. The international order offers a buffet of options and choices. They can embrace some rules and institutions and not others. Moreover, stepping back, the international orders that rising states have faced in different historical eras have not all been the same order. The British-led order that Germany faced at the turn of the twentieth century is different from the international order that China faces today. The contemporary international order is much more complex and wide-ranging than past orders. It has a much denser array of rules, institutions, and governance realms. There are also both regional and global domains of governance. This makes it hard to imagine an epic moment when the international order goes into crisis and rising states step forward—either China alone or rising states as a bloc—to reorganize and reshape its rules and institutions. Rather than a cyclical dynamic of rise and decline, change in the existing American-led order might best be captured by terms such as continuity, evolution, adaptation, and negotiation. The struggles over international order today are growing, but it is not a drama best told in terms of the rise and decline of American hegemony. Sources of Continuity in Liberal International Order If the liberal international order endures, it will be because it is based on more than American hegemonic order. To be sure, the United States did give shape to a distinctive post-war liberal hegemonic system, and many of its features— including the American-led alliance system and multilateral economic governance arrangements—are themselves quite durable. But the broader features of the modern international order are the result of centuries of struggle over its organizing principles and institutions. Rising states face an international order that is long in the making, one that presents these non-Western developing states with opportunities as well as constraints. The struggles over the existing international order will reshape the rules and institutions in the existing system in various ways. But rising states are not simply or primarily “revisionist” states seeking to overturn the order; rather, they are seeking greater access and authority over its operation. Indeed, the order creates as many safeguards and protections for rising states as it creates obstacles and constraints. For example, the World Trade Organization provides rules and mechanisms for rising states to dispute trade discrimination and protect access to markets. After all, more generally, it was this liberal-oriented international order—its openness and rules—that provided the conditions for China and other rising states to rise. Indeed, if the liberal international order survives, it will be in large part due to the fact that the constituencies for such an order that stretch across the Western and the non-Western worlds are larger than the constituencies that oppose it. We can look more closely at these sources of continuity and constituency.

#### Grid’s resilient---no collapse

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

As India recovers from a blackout that left the world’s second-largest country — and more than 600 million residents — in the dark, a ripple of uncertainty moved through the Federal Regulatory Commission’s command center today in the U.S. The Indian crisis had some people asking about the vulnerability of America’s grid. “What people really want to know today is, can something like India happen here? So if there is an outage or some problem in the Northeast, can it actually spread all the way to California,” John Wellinghoff, the commission’s chairman, told ABC News. “It’s very, very unlikely that ultimately would happen.” Wellinghoff said that first, the grid was divided in the middle of the nation. Engineers said that it also was monitored more closely than ever. The grid is checked for line surges 30 times a second. Since the Northeast blackout in 2003 — the largest in the U.S., which affected 55 million — 16,000 miles of new transmission lines have been added to the grid. And even though some lines in the Northeast are more than 70 years old, Wellinghoff said that the chances of a blackout like India’s were very low.

#### No blackouts

Selena Larson 18, Cyber Threat Intelligence Analyst at Dragos, Inc., “Threats to Electric Grid are Real; Widespread Blackouts are Not”, 8/6/2018, https://dragos.com/blog/industry-news/threats-to-electric-grid-are-real-widespread-blackouts-are-not/

The US electric grid is not about to go down. Though it’s understandable if someone believed that. Over the last few weeks, numerous media reports suggest state-backed hackers have infiltrated the US electric grid and are capable of manipulating the flow of electricity on a grand scale and cause chaos. Threats against industrial sectors including electric utilities, oil and gas, and manufacturing are growing, and it’s reasonable for people to be concerned. But to say hackers have invaded the US electric grid and are prepared to cause blackouts is false. The initial reporting stemmed from a public Department of Homeland Security (DHS) presentation in July on Russian hacking activity targeting US electric utilities. This presentation contained previously-reported information on a group known as Dragonfly by Symantec and which Dragos associates to activity labeled DYMALLOY and ALLANITE. These groups focus on information gathering from industrial control system (ICS) networks and have not demonstrated disruptive or damaging capabilities. While some news reports cite 2015 and 2016 blackouts in Ukraine as evidence of hackers’ disruptive capabilities, DYMALLOY nor ALLANITE were involved in those incidents and it is inaccurate to suggest the DHS’s public presentation and those destructive behaviors are linked. Adversaries have not placed “cyber implants” into the electric grid to cause blackouts; but they are infiltrating business networks – and in some cases, ICS networks – in an effort to steal information and intelligence to potentially gain access to operational systems. Overall, the activity is concerning and represents the prerequisites towards a potential future disruptive event – but evidence to date does not support the claim that such an attack is imminent. The US electric grid is resilient and segmented, and although it makes an interesting plot to an action movie, one or two strains of malware targeting operational networks would not cause widespread blackouts. A destructive incident at one site would require highly-tailored tools and operations and would not effectively scale. Essentially, localized impacts are possible, and asset owners and operators should work to defend their networks from intrusions such as those described by DHS. But scaling up from isolated events to widespread impacts is highly unlikely.

#### No resource wars

Agha Bayramov 18. PhD Candidate and Lecturer at the Department of International Relations and International Organization of the University of Groningen. “Review: Dubious Nexus Between Natural Resources and Conflict.” Journal of Eurasian Studies 9(1): 72-81

The arguments of scarcity adherents have been challenged by a number of scholars in terms of qualitative and quantitative findings. According to Stern (2016) the assumptions underpinning the scarcity notion are illogical due to the exaggeration of threats arising from oil ownership from misperceptions of market information. Furthermore, Koubi et al. (2013) explain that despite their strong empirical explanations, scarcity scholars have weak quantitative research results ones that fail to prove the link between resource scarcity and intrastate or interstate conflict. The reason for this is that some large-N findings contradict early results, which illustrate that the scarcity-conflict nexus is more complicated than scarcity scholars would have us believe. Dinar (2011), meanwhile, argues that natural resource scarcity may in fact be an important force for cooperation between states. However, scholars of natural resource scarcity have hitherto ignored the ways in which scarcity can spur cooperation (Deudney, 1999).

Considering these findings, three conclusions can be drawn from this section. First, scarcity is a complex term and it should not be equated with only natural resources. As it is explained by Kester (2016) some countries may suffer from scarcity of technical, knowledge and human capacity rather than natural resources. In light of this, without a proper capacity it is also possible to have scarcity within abundancy of resources. While supporting the scarcity argument, Andrews-Speed (2015) offer an alternative explanation that natural resources are not physically scarce but there are indeed economic, political, environmental and equity barriers that can lead to a scarcity of natural resources. Due to the strong rule of law, decent neighbourly relations and existence of strong norms for compromise and of multilateral institutions, the North Atlantic countries are highly unlikely to utilize force against or declare war to each other. However, these dimensions and buffers are currently lacking in the Middle East, Africa and Asia. As such, the U.S and Europe should work closely with these regions to prevent any resource disputes erupting (Andrews-Speed 15). Similarly, Gleditsch (1998) explains that some highly developed countries have population density, clean water, and land degradation problems but they still do not suffer from environmental violence. Thus the main issue might be that poor economic development, rather than environmental scarcity, leads to conflict. Kester (2016) names this situation as “second-order-scarcity” which refers to a lack of technology, economic capacity, and knowledge to stop resource scarcity. In this regard, it may be scarcity, itself, rather than natural resources that leads to conflict.

Second, conflict can be defined differently based on different dimensions. However, the common consensus is that conflict consists of multiple dimensions (political, economic, environmental, historical, cultural, and geographical etc.) rather than single factor. In this regard, scarcity of natural resources is not strong enough, by itself, to induce either interstate or intrastate conflict. It needs in fact to interact with other variables. Finally, related to the previous reasons, scarcity of natural resources might be a contributing or marginal reason for rather than the root cause of a given conflict. In other words, it needs to interact with non-resource factors in order to cause violence.

## Indigenous Regimes ADV

### Indigenous Regimes---1NC

#### No modeling---other countries see US antitrust as irrational, even if we get things right.

William E. Kovacic 15, Professor of Law and Policy at George Washington University, former General Counsel for the Federal Trade Commission, J.D. from Columbia University, “The United States and Its Future Influence on Global Competition Policy,” George Mason Law Review, Vol. 22, 2015, accessed via Lexis

One force that reduces the perceived legitimacy of the U.S. system is a widely accepted narrative, reflected in popular discourse and scholarly commentary, which portrays federal enforcement as irrational and unstable. 65 [\*1172] In this interpretation of modern U.S. enforcement history, antitrust policy undergoes recurring erratic shifts, with a small number of lucid intervals. For the most part, the irrationality narrative suggests that U.S. antitrust policy embraced unsupportable extremes of over-enforcement in the 1960s and 1970s, under-enforcement from 1981 to 1988 and 2001 to 2008, and achieved a sensible, balanced equilibrium only from 1993 to 2000 and 2009 to the present. 66 This accounting of antitrust history raises a troublesome question: why should any jurisdiction outside the U.S. respect a system that has lost its mind in roughly 41 of the past 55 years?

Policy-making in the irrationality narrative is sharply discontinuous, and the enforcement institutions have little evident capacity for self-assessment or correction over time. 67 Individual leaders count for everything, and institutional arrangements fail to discipline policy-making; 68 appoint a wise official and you get good results, but pick a zealot and the agency swerves toward frantic hyperactivity or utter indolence. The irrationality narrative is the public policy equivalent of an interpretation of Formula One racing that attributes the outcome in races entirely to the driver and treats the quality of the car and supporting team as largely irrelevant.

The irrationality account of U.S. enforcement history derives power from the stature of the narrators. Despite its unreliable reading of U.S. experience, the narrative's academic pedigree is daunting. Some of the greatest scholars in U.S. competition law have contributed to the story. If nonentities constructed the narrative, foreign observers would dismiss it out of hand. Instead, the narrative of irrationality and instability, often presented with the metaphor of a wildly swinging pendulum, originated and developed in the work of some of the field's most influential commentators. On many occasions outside the U.S., I have heard enforcement officials, practitioners, and scholars speak of the irrationality narrative as though it were an established truth. To these observers, the stature of the scholars who popularized the irrationality narrative invariably lends verisimilitude to the story.

As described below, the irrationality narrative of the U.S. system serves the aims of the right and the left in the debate about federal enforcement policy. For those who favor more intervention or less intervention, alike, the image of a system dangerously out of control serves to frame their own "sensible" policy proposals. By this technique, the narrator emerges as the voice of wisdom in a crazed policy environment.

[\*1173] The architecture of the modern irrationality narrative took shape in 1978 when Professor Robert Bork published the first edition of his transformative treatise, The Antitrust Paradox. 69 Professor Bork's central thesis was that "modern antitrust has so decayed that the policy is no longer intellectually respectable." 70 Each institution with a role in the implementation of the antitrust laws--the courts, the Congress, and the federal enforcement agencies--caused the decay. On antitrust matters, the Congress displayed the mentality of "the sheriff of a frontier town" who "did not sift evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people." 71 With few exceptions, the courts embraced a view of antitrust law that "teaches the necessity for government intervention when no such necessity exists, and even when intervention is positively harmful." 72 Without regard to adverse economic effects, the DOJ and the FTC "must continually press on to fresh territory, seeking theories that broaden the application of the law and make violations easier to establish." 73

In Professor Bork's telling, the implementing institutions were capricious, reckless, or bent upon self-aggrandizement. 74 As a group, the institutions have gone mad, for they have no tendency or, perhaps, any capacity to reflect on their experience, identify error, and make corrections. 75 Instead, the U.S. antitrust system had "an inbuilt thrust toward greater severity or further extension." 76 Nothing, Professor Bork warned, seemed able to contain the destructive march of intervention: "This process has no obvious stopping point." 77

The image of a system out of control served Professor Bork's rhetorical aims; it showed the urgency for reform by presenting a system in shambles. The image also distorted (more mildly, misread) current trends substantially. When The Antitrust Paradox appeared in January 1978, each institution Professor Bork rebuked--the Congress, the courts, and the federal enforcement agencies--had taken steps to rebalance the antitrust system. 78 The adjustments came slowly, but they were coming, nonetheless. If Professor Bork had acknowledged that the seemingly out-of-control institutions [\*1174] were making important adjustments, his book would have lost some (maybe much) of its force.

A second decisive contribution to the irrationality narrative came in the late 1980s and early 1990s from one of Professor Bork's harshest critics, Professor Robert Pitofsky. Though Professor Pitofsky scorned Professor Bork's calls for a vast retrenchment of antitrust enforcement, he used his own version of the irrationality narrative while setting out a more interventionist agenda. 79 Describing federal merger enforcement from the early 1960s through the early 1990s, Professor Pitofsky wrote:

American antitrust policy has tried to balance possible threats to competition against merger benefits, but remarkably, has careened from one extreme to another in this balancing process. For example, the United States had by far the most stringent antimerger policy in the world in the 1960s, striking down mergers among small firms in unconcentrated markets. By the 1980s, the United States maintained an extremely lenient merger policy, regularly allowing billion dollar mergers to go through without government challenge, even when they involved direct competitors. 80

Like Professor Bork in The Antitrust Paradox, Professor Pitofsky presented a system run amok. Federal policy "careen[s] from one extreme to another," like an automobile with an impaired driver swerving across the centerline. 81 No institutional feature in the U.S. system provided needed balance. 82

In Professor Pitofsky's version of the narrative, the solution to the aberrant enforcement behavior came by way of appointments--including his own--to the federal agencies. 83 In 2002, after chairing the FTC from 1995 to 2001, Professor Pitofsky said federal merger control by the late 1990s "stopped careening from aggressive enforcement based in some part on a populist ideology to minimalist enforcement based on hostility to the core assumptions of antitrust . . . ." 84 Under the Clinton Administration's appointees, federal policy stopped "careening," avoiding the extremes of an overheated, populist-inspired activism of the 1960s and the "minimalist" program of the Reagan presidency with its "hostility to the core assumptions of antitrust." 85

For Professor Pitofsky, like Professor Bork, the narrative of a system gripped by irrational, erratic variations in behavior served an important instrumental purpose. The portrayal of a regime swinging wildly between extremes allowed Professor Pitofsky to claim the role--as suggested in the [\*1175] title of his 2002 article, Antitrust at the Turn of the Twenty-First Century: A View from the Middle--of the wise centrist. 86 Professor Pitofsky underscored the rationality of his own program by juxtaposing it against the irrationality of his predecessors. 87 Clinton Administration antitrust officials strove to claim the mantle of wise centrism. 88 As the following passage from an essay in The Economist in 2000 shows, they framed their program as a sensible middle way between the irrational interventionism of the 1960s and 1970s and the inactivity of the 1980s:

It helps that [DOJ Assistant Attorney General Joel] Klein and his counterpart at the FTC, Robert Pitofsky, have been deliberately low-key in talking about their activities, claiming that they are modest and in the legal mainstream of legal thought and economics. They concede that they have been more interventionist than the laissez-faire ideologues of the Reagan years, but they say they are nothing like the trust-busting zealots of the 1960s who saw evil in every big company or merger. 89

In reporting on the Clinton administration strategy, The Economist presents the federal enforcement policy just as the DOJ and FTC leadership wished: a "modest" and "mainstream" program standing between two eras of irrationality; one guided by "trust-busting zealots" and the other led by "laissez-faire ideologues." 90

Taken on its own terms, the irrationality interpretation of U.S. antitrust history provides a grim picture of the American system. One should be wary of a system that intermittently has lucid policymaking intervals, but its normal state is irrationality. If everything depends on the appointment of wise centrists to head the agencies, nothing good can happen when the [\*1176] choice of DOJ or FTC leadership is not so inspired. Because personalities are decisive, when the wise centrists depart, nothing in the institutions themselves can prevent the system from returning quickly to bad old habits.

As the quotation presented above illustrates, the wise centrism story acquires force if periods of thoughtless extremism bracket the sensible policy era. As developed by Professor Pitofsky and other antitrust scholars, the irrationality narrative derives its power from the system's tendency to embrace extremes. 91 Dramatic variations in performance demonstrate the absence of thoughtful policy-making. The narrator seems sane by comparison if all others appear to be deranged. Professor Pitofsky's article in 2002 about the future of antitrust policy used this framing technique. 92 He wrote that "during the Reagan years, there was no enforcement whatsoever against non-horizontal mergers and joint ventures, boycotts, minimum resale price maintenance, exclusive dealing contracts, tie-in sales, attempts to monopolize, and monopolization." 93

The passage quoted above highlights two recurring features of the irrationality narrative. First, Professor Pitofsky's statement uses sweeping, categorical language ("no enforcement whatsoever") to describe the period of extreme inactivity. 94 In the 2002 article and in other papers, Professor Pitofsky made strong claims of inactivity to portray the Reagan Administration antitrust program as a gross departure from good practice. 95 Second, the portrayal of events, though written with the utmost self-assurance, often cannot withstand fact-checking and is verifiably incorrect. 96

[\*1177] Professor Pitofsky has plenty of esteemed company in telling the U.S. irrationality story by making bold claims belied by actual enforcement experience. As noted above, Professor Bork's denunciation of antitrust policy circa 1978 ignored important doctrinal and policy developments that fit poorly with a system out of control. 97 The story of horrible decay is less compelling if the asserted flaws are not so horrible. Other accounts of U.S. enforcement experience by the field's leading commentators include claims that during the Reagan Administration "merger enforcement ground to a halt," 98 that antitrust "[e]nforcement ceased," 99 and that the DOJ and the FTC "did not file a single vertical case." 100 Why did the U.S. system lose its mind? The answer, say two of America's best scholars, is that "extremists" took control of the enforcement agencies. 101 Experts in the U.S. might excuse these descriptions of federal enforcement as careless hyperbole. In my experience, foreign observers are more likely to take them at face value.

The story of U.S. antitrust policy in the 1980s is considerably more complex. Crucial factual tenets of the irrationality narrative are unsupportable. Merger enforcement never halted, 102 enforcement never ceased, 103 and vertical restraints cases (at least a few) still appeared. 104 To look beyond the categorical statements of inactivity and recount enforcement developments [\*1178] accurately would reveal a more thoughtful enforcement program at work. There is a major difference, for example, between saying a merger enforcement program has disappeared, and saying that boundaries have been reset, but policed actively.

Would a fuller, more accurate account of federal enforcement trends over time reveal intense debate about the proper direction of policy? Of course. Has policy shifted across administrations, especially after a regime change? No doubt. Yet, liberated from the irrationality narrative's determination to accentuate the magnitude of changes and cast decision-makers as senseless extremists, a more faithful account of U.S. federal enforcement history would portray adjustments as more gradual and nuanced, in most cases, than the irrationality narrative suggests. The discipline imposed by institutional arrangements, not simply patterns in leadership appointments (whether irrational officials or prudent centrists), would account for refinements over time.

#### Everyone looks to the EU, not the US.

Bradford et al. 19, Anu Bradford, Henry L. Moses Professor of Law and International Organization at Columbia Law School; Adam Chilton, Professor of Law and Walter Mander Research Scholar at the University of Chicago Law School; Katerina Linos, Professor of Law and Faculty Co-Director in the Miller Institute for Global Challenges and the Law at the University of California, Berkeley School of Law; Alexander Weaver, Associate at Linklaters LLP, J.D. from Columbia Law School, “The Global Dominance of European Competition Law Over American Antitrust Law,” Journal of Empirical Legal Studies, Vol. 16, 2019, https://scholarship.law.columbia.edu/faculty\_scholarship/2513

The Europeanization, rather the Americanization, of global competition law is notable because the US has a considerably longer history of using competition law. Indeed, the United States the Sherman Act long before the EU and its competition laws were conceived. The US has also been an influential leader in competition economics and law alike, spearheading early efforts to adopt competition law regimes in many parts of the world—including in the EU. However, after the EU adopted its own competition law, it eventually eclipsed the US as the leader in providing the template for the global expansion of competition laws, marginalizing the US’s global influence in the decades that followed. In other fields, such as corporate law, thousands of articles have been devoted to debating whether there’s a race to the top or the bottom, what mechanisms drive the race, whether shareholders or managers benefit, and more (e.g., Romano 1987; Roe 2003).11 However, because the literature on the world’s competition regimes is in its infancy, a key contribution of this article is to document that there exists a global regulatory race in the area of competition law, and that the EU is clearly winning it.

We also advance a set of explanations for why the European model has come to predominate. First, a set of “push factors” explains the EU’s ability to effectively externalize its laws. The EU’s competition law dominance can be partially traced to the EU’s conscious efforts to expand its regulations through a myriad of trade, association, and other political agreements. The EU has required many countries seeking greater market access or closer political association to adopt competition laws. In addition, as Bradford (2012) outlines in “The Brussels Effect,” the EU has the greatest ability to shape foreign jurisdictions’ laws given that the companies often apply the most stringent regulatory standard—typically the EU standard—across their global operations to capture the benefits of uniform production while maintaining compliance worldwide. Second, the EU competition law model also spreads due to strong “pull factors.” In many countries, domestic politics are more conducive to EU-style competition laws, which accommodate more diverse policy goals and defer less to markets and more to governments’ ability to correct market failures. Another major pull factor is the EU’s tendency to promulgate more precise and detailed rules, making them easier to copy in the absence of technical expertise in the adopting country.

Our findings have several implications. First, our results offer evidence of the EU’s outsized influence in regulating global markets. This narrative stands in contrast to many critics who have declared the end of the EU’s influence and ability to shape outcomes globally as its relative economic and political power wanes. Second, our results suggest that, although the law and economics movement may have had a large influence on the development of America’s antitrust law and policy, it may have had a more modest influence on the development of competition policy in the rest of the world (Bradford et al. 2020). Third, and more generally, our analysis illustrates the ability of a single jurisdiction to attract countries with starkly different characteristics into its orbit, vesting it with a sizable regulatory influence that spans economic, linguistic, and political boundaries. Out of this dynamic, a new form of globalization of norms emerges—globalization emerging as a result of EU’s unilateralism as opposed to multilateralism. Finally, beyond illuminating the regulatory influence in the competition law context, our results speak more broadly to the literature on regulatory competition, diffusion of norms, and legal transplants. Competition between the European and US regulatory schemes has been prominent in many areas, ranging from privacy (Schwartz 2013; Schwartz and Peifer 2017), to chemicals (Scott 2009), to finance (Gadinis 2010), to discrimination law (Linos 2010), to name but a few. Documenting the specific pathways through which the EU has succeeded in externalizing its models thus contributes to a broad range of fields and advances the diffusion literature, which to date has primarily focused on countries receiving foreign models and not on the entities promoting them.

#### SDGs fail

Jason Hickel 20, Fellow of the Royal Society of Arts, Professor at the Institute for Environmental Science and Technology at the Autonomous University of Barcelona, Ph.D. from the University of Virginia, “The World’s Sustainable Development Goals Aren’t Sustainable,” Foreign Policy, 09-30-2020, <https://foreignpolicy.com/2020/09/30/the-worlds-sustainable-development-goals-arent-sustainable>

In 2015, the world’s governments signed on to the U.N. Sustainable Development Goals (SDGs) with a commitment to bring the global economy back into balance with the living world. Now, five years later, as the U.N. General Assembly convenes online to discuss the global ecological crisis, everyone wants to know how countries are performing.

To answer this question, delegates and policymakers have referred to a metric called the SDG Index, which was developed by Jeffrey Sachs “to assess where each country stands with regard to achieving the Sustainable Development Goals.” The metric tells a very clear story. Sweden, Denmark, Finland, France, and Germany—along with most other rich Western nations—rise to the top of the rankings, giving casual observers the impression that these countries are real leaders in achieving sustainable development.

There’s only one problem. Despite its name, the SDG Index has very little to do with sustainable development all. In fact, oddly enough, the countries with the highest scores on this index are some of the most environmentally unsustainable countries in the world.

Take Sweden, for example. Sweden scores an impressive 84.7 on the index, topping the pack. But ecologists have long pointed out that Sweden’s “material footprint”—the quantity of natural resources that the country consumes each year—is one of the biggest in the world, right up there with the United States, at 32 metric tons per person. To put this in perspective, the global average is about 12 tons per person, and the sustainable level is about 7 tons per person. In other words, Sweden is consuming nearly five times over the boundary.

There is nothing sustainable about this kind of consumption. If everyone on the planet were to consume as Sweden does, global resource use would exceed 230 billion tons of stuff per year. To get a sense for what this would look like, consider all the resources that we presently extract, produce, transport, and consume around the world each year—and all of the ecological damage that this causes—and triple it.

Or take Finland, for example, which is No. 3

Marked

on the SDG Index. Finland’s carbon footprint is about 13 metric tons of carbon dioxide per person per year, similar to that of Saudi Arabia. This makes it one of the most polluting countries in the world, in per capita terms, and a major contributor to climate breakdown. For comparison, China’s carbon footprint is about 7 tons per person. India’s is less than 2. If the whole world were to consume as much fossil fuels as Finland does, the planet would be literally uninhabitable.

This isn’t just a matter of a few odd results. Data published by scientists at the University of Leeds shows that all of the top-ranked countries in the SDG Index have significantly overshot their fair share of planetary boundaries, in consumption-based terms—not only when it comes to resource use and emissions but also in terms of land use and chemical flows like nitrogen and phosphorous. It is physically impossible for all nations to consume and pollute at the level of the SDG top performers without destroying our planet’s biosphere.

In other words, the SDG Index is, from the perspective of ecology, incoherent. It creates the illusion that rich countries have high levels of sustainability when in fact they do not.

So what’s going on here? Well, the SDG Index is directly linked to the Sustainable Development Goals. There are 17 goals, each of which include a number of targets. The SDG Index takes indicators for each of these targets (where data is available), indexes them, and then averages them together to arrive at a score for each goal. Then the 17 goals are averaged together in turn to come up with the final figure. All of this seems reasonable enough, on the face of it. But taking this approach means introducing a number of analytical problems.

First, there is a weighting problem. The SDGs include three different kinds of indicators: Some focus on ecological impact (like deforestation and biodiversity loss), some focus on social development (like education and hunger), and some focus on infrastructure development (like transportation and electricity). Most of the SDGs contain a mix of these, but the ecological indicators are almost always swamped, as it were, by the development indicators. For example, the SDG Index has four indicators for Goal 11 (on “sustainable cities and communities”); three of them are development indicators, while only one of them has to do with ecological impact. This means that if a country performs well on the development indicators, its score for that goal will look good even if it fails in terms of sustainability.

This issue is compounded by a second problem, namely, that only four of the 17 SDGs deal mostly or wholly with ecological sustainability (Goals 12 through 15). The other 13 are mostly focused on development. Once again, this means that good performance on the development goals outweighs poor performance on the sustainability goals, so countries like Sweden, Germany, and Finland can rise to the top of the index (with the United States ranking in the top 20 percent) even though they have highly unsustainable levels of ecological impact.

The final problem is that the vast majority of the ecological indicators are territorial metrics that do not account for impacts related to international trade. For instance, take the air pollution indicator in Goal 11. Rich countries come out looking clean—but this is largely because they have offshored most of their polluting industries to countries in the global south since the 1980s, thus shifting the problem abroad.

So too with the indicators on deforestation, overfishing, and so on: most of this damage happens in poorer countries, but it is disproportionately caused by overconsumption in richer countries, and quite often perpetrated by corporations or investors headquartered there. As a result, poorer countries get punished in the SDG Index for being harmed and polluted by richer countries. Of course, in many cases territorial metrics are appropriate; but there are a number of indicators in the SDG Index that should be reckoned as well in consumption-based terms and yet are not.

In effect, the SDG Index celebrates rich countries while turning a blind eye to the damage they are causing. Ecological economists have long warned against this approach. It violates the principle of “strong sustainability,” which holds that good performance on development indicators cannot legitimately substitute for destructive levels of ecological impact. The SDG Index team are aware of this problem. It’s even mentioned (briefly) in their methodological notes—but then it’s swept under the rug in favor of a final metric that has little grounding in ecological principles.

Ultimately, metrics of sustainable development need to be universalizable. In other words, the top performers on the index should represent a standard that all nations could aspire to achieve without this leading to a collapse of global ecosystems. That’s not the case with the SDG Index, where rich countries are held up as models when in reality, as the Leeds research shows, they are a big part of the problem.

The United Nations needs to redesign the index to correct these issues. This can be done by rendering the ecological indicators in consumption-based terms wherever relevant and possible, to take account of international trade, and by indexing the ecological indicators separately from the development indicators so that we can see clearly what’s happening on each front. This way we can celebrate what countries like Denmark and Germany have achieved in terms of development while also recognizing that they are major drivers of ecological breakdown and need urgently to change course, with rapid reductions in emissions and resource use.

Until then, we should avoid using the SDG Index as a metric of progress in sustainable development, because it’s not. Given the stakes of the crisis we face, we need to tell more honest, accurate stories about what’s happening to our planet and who is responsible for it.

#### No sustainability impact

Dr. Robert Brinkmann 20, Professor of Geology, Environment, and Sustainability and Vice Provost for Scholarship and Research and Dean of Graduate Studies at Hofstra University, PhD in Geography from the University of Wisconsin-Madison and MSc in Geology from the University of Wisconsin-Madison, Environmental Sustainability in a Time of Change, p. 11-13

Sustainability tends to be focused on the now and on the future—how can we change what we are doing today to improve the ability of upcoming generations to thrive? We often do not look at the past and always seem to look at the present moment as our starting point for making improvements. On occasion, we point to the industrial revolution as the beginning of when things started to get out of control on the planet, but we rarely assess the sustainability of the past and often consider that times before us were much more simple or easier on the planet than the present. In many ways, this is a fundamental flaw of sustainability—our inability to look at the past creates serious limitations for the discipline. In fact, the field largely emerged out of a single report—The Brundtland Report or Our Common Future from 1987, as was discussed in Chap. 1 (Brundtland 1987). In that report, there were references to the past and unsustainable practices, but it did not systematically assess the past or provide much context beyond referencing relatively recent unsustainable practices of the twentieth century.

This chapter that every living organism has seeks to remedy the lack of substantive historical perspective in the theory and analysis of sustainability by bringing the historic idea front and center. Certainly we know some impact on the planet, but the distribution of the impact varies over time and space. While our impacts can be severe, they are not entirely unique or unexpected based on the places and times when human activity was dominant over other organisms in a region. As we will see, there are surprising and interesting social, economic, and environmental impacts that emerged at different places and times that provide context for our present interpretation of global, regional, and local sustainability. As Stephen King so interestingly notes in his Dark Tower (1982) series, “time moves on.” As it does, it doesn’t fully change human character. As time moves on, we transform the world and it changes us. What allows us to thrive or disappear is our ability to adapt to new conditions—in other words, in order to survive, we need to learn to become more sustainable within our environment.

The study of history shows us that there are many examples of cultural rise and fall. Indeed, we tend to focus on the spectacular events in history that cause sudden shifts. The rise and fall of the Roman Empire is perhaps the most cited example (1782), but the fall of the great monarchies of Europe (Davison 2018) and Asia (Frankopan 2017) are also examples. Yet what is sometimes lost in the telling of these histories is that while there are sudden jolts to human society, there is also great steadiness. The monarchy of the ancient Egyptians, for example, lasted thousands of years until the conquest of Rome. Some would even argue that the Roman Empire lived on in the monarchies of Europe and the Middle East and in the democracies of the Americas. Regardless, the point is that while there are sudden shifts, there are also important adaptations as societies react to changing social values, technologies, and environments. For indeed, regardless of time, humans do change their environments. As early hunters and gatherers, we subtly changed ecosystems as we drove some large animals to extinction (Burney and Flannery 2005). We also preferenced some plants and gradually developed agriculture (Qin et al. 2017). Once established, our farming practices significantly transformed the distribution of plants and animals and changed environments. As we developed settlements and cities, we built buildings, developed trade and transportation networks, and created complex economies and social structures (Earle 2011). Our modern impacts are large, but we have always been transforming the planet. The question is really how quickly can we adapt to the changes and whether or not the changes we make will lead to the region’s ability to support its human population.

This chapter takes a look at three distinct locations to discuss the way we can view sustainability through an historical lens. While Jared Diamond took a similar approach in his book, Collapse: How Societies Choose to Fail or Succeed (2011), my approach is much more positive. Diamond focused on examples where societies made decisions that resulted in significant ecological and social collapse. Perhaps the most cited example is from Easter Island where Diamond notes that the indigenous people of the island cut down all of the trees to make transportation devices to move the spectacular large head carvings that grace the slopes of the island. While it is a fascinating example, I contend that it does not represent the bulk of human society. We certainly do make mistakes, but we also are able to persevere. The presence of nearly 8 billion people is evidence of our success as a population, and not of our collapse and failure. The three examples presented here are all from North America and are significant because they show how societies adapted to social and environmental change over time. Some may question the use of three examples from one part of the world in a book that seeks to address sustainability at a global scale. In reality, one can find examples like this anywhere in the world. These are my examples. I urge readers to find their own historical examples from their own regions where people in the past were challenged by sustainability issues in the realms of social justice, environmental degradation, or economic growth or decline.

The first example is from prehistoric Wisconsin where a local indigenous group was confronted with another colonizing indigenous group. While there is no historical record of the meeting, archaeologists have puzzled out a fascinating interaction from the archaeological record that allow one to consider the issues of social justice within the realm of sustainability from a prehistoric perspective. As will be seen, there was considerable social change in the area that had long-term impacts for the environment and the local population. The second example comes to us from the early nineteenth-century California, where Russian colonists came to the present-day coastal Sonoma County in Northern California to establish a seal-hunting operation. They brought with them native Alaskans and interacted with native Californians, Spanish colonists from California, and Americans who found their way to the western coast of North America. The Russians found themselves in a difficult ecosystem and tried to adapt to the new region. They also caused profound environmental change. Eventually, they, and the people they impacted, had to react to the environmental change by making key decisions that had profound impacts on not only the environment, but the history of the United States and Russia. The final example comes from Michigan State University where archaeologists have been reconstructing the history of the campus through a campus archaeology program. Throughout its history, the university has been making business decisions regarding its operations that can be seen in the archaeological record. The choices that were made by administrators, faculty, and students allow one to consider how practical day-to-day management and economic decision-making can lead to complex sustainability challenges.

Some may consider that the three examples may not represent the challenges we are facing today. I would argue that they actually represent a more realistic way of approaching sustainability than that portrayed by Jared Diamond. I would also argue that while we are facing unprecedented sustainability problems that call into question the future of our society, each example references existential issues for their times. To the people that lived through the events, the issues were just as significant as our modern challenges associated with climate change or water scarcity. The first two examples are from a class of sustainability issues I call suffering sustainability. They reflect on moments of time where there are existential threats to continuation of society. The third example is from a class of sustainability issues I call surfing sustainability. There is no existential threat, just a desire to create a better and more sustainable life. There will be more in upcoming chapters about surfing and suffering sustainability. For now, it is just worth noting that while our times are unique due to the global challenges we face, the actual historical dilemmas individuals faced were similar to our own: how can we and our offspring survive into the future?

#### Bolsonaro won’t do anything about defo.

Yasmeen Serhan 11-12, Staff Writer, The Atlantic, "The Real Reason Behind Bolsonaro’s Climate Promises," Atlantic, 11/12/2021, https://www.theatlantic.com/international/archive/2021/11/the-real-reason-behind-bolsonaros-climate-promises/620666/.

As the principal steward of the world’s largest rain forest, Brazilian President Jair Bolsonaro has been at the center of much of the discussion surrounding the United Nations Climate Change Conference in Glasgow, Scotland. But the headlines are about as close as he got to the international gathering. Like a number of other nationalist leaders, Bolsonaro decided to skip the summit, opting instead to embark on a pilgrimage to the town in northern Italy where his grandparents were from before heading home.

But Brazil wasn’t completely absent from COP26. In fact, the country’s delegation was party to some of the conference’s banner announcements, including pledges to reduce methane emissions and, perhaps most notably for Brazil, to end illegal deforestation by 2030. As the home of the Amazon, the country has long faced scrutiny for its management of the rain forest, the deforestation of which has surged under Bolsonaro’s leadership. By signing on to commitments to protect the Amazon, even in absentia Bolsonaro appeared to be pivoting from his trademark disregard toward climate change to, at the very least, a general acknowledgment of Brazil’s role in fighting it.

Still, close observers remain rightly skeptical. The kind of multilateral engagement required to tackle the climate crisis is anathema to the nationalist leaders governing some of the world’s biggest polluters, Bolsonaro among them. While the international community may be cheered by promises to change tack, the real test will be what happens after COP26 ends.

In Bolsonaro’s case, there is little reason for optimism. The Brazilian president’s track record on the climate has ranged from general apathy to outright hostility. As a candidate, he pledged to follow Donald Trump’s lead by withdrawing from the Paris Agreement, on the grounds that the accord threatened Brazil’s sovereignty over the Amazon, a position he later reversed. At the time, Brazil was experiencing some of its lowest deforestation rates in decades—a short-lived achievement credited in large part to improved enforcement of environmental laws and enhanced surveillance technology. Under Bolsonaro’s watch, however, measures to protect the Amazon have been scaled back and deforestation has surged to a 12-year high. As a result, while much of the world experienced a drop in greenhouse-gas emissions during the pandemic, deforestation saw Brazil’s grow by 9.5 percent.

Bolsonaro isn’t the only nationalist leader who has demonstrated little regard for climate change. Indeed, many of the others who didn’t show up at COP26, including China’s Xi Jinping, Russia’s Vladimir Putin, and Turkey’s ​​Recep Tayyip Erdoğan, have by some measures even worse track records. “The difference is, we have the Amazon,” Ana Toni, the director of Brazil’s Institute for Climate and Society and a senior fellow at the Brazilian Center for International Relations, told me from Glasgow. Although the Amazon is often erroneously referred to as “Earth’s lungs,” it nonetheless acts as a giant natural sink for carbon-dioxide emissions around the world, and is home to much of the world’s biodiversity. So world leaders have an interest in preserving it, something that undoubtedly grates on Bolsonaro. He has previously chided international interest in the rain forest as “environmental psychosis,” adding that as far as he is concerned, “the Amazon is Brazil’s—not yours.”

His apparent about-face on climate could be indicative of a broader trend: As more and more far-right nationalists recognize the futility of denying climate change outright, many have opted for a different approach, positioning themselves as skeptics not of human-induced climate change, but rather of the elite’s proposed solutions to address it. In a regurgitation of far-right talking points about immigration and the pandemic, nationalist leaders such as Hungarian Prime Minister Viktor Orbán now argue that the economic implications of new climate policies stand to hit the middle class and ordinary working people the hardest. Similarly, the far-right Alternative for Germany, which, unlike Orbán’s Fidesz party, does not acknowledge anthropogenic climate change, has condemned the “self-proclaimed climate elite” at COP26 for demanding sacrifices from their citizens “that they are not prepared to make themselves.”

Domestic factors are at play in Brazil too. According to a recent survey conducted by PoderData and Brazil’s Institute for Climate and Society, a significant majority of Brazilian voters believe that protecting the Amazon should be among the top priorities in next year’s presidential election, with seven out of 10 agreeing that the country’s development depends on safeguarding the rain forest. When asked to assess Bolsonaro’s protection of the Amazon, 43 percent said it was “bad or very bad,” compared with just 27 percent who considered his performance to be “great or good.” This bodes poorly for Bolsonaro, who has already fallen behind former President Luiz Inácio Lula da Silva in opinion polls in the run-up to the election.

While Brazilian sentiment on the Amazon is driven in part by concerns over climate change, Toni said that it is also fundamentally about Brazilian national identity. “When the Amazon forest is burning, a bit of the Brazilian identity as a nation is burning,” she said. “Any politician that really wants to have a future in Brazil will need to protect the Amazon, otherwise they won’t be elected. That’s the reality.”

Although the Brazilian delegation has made strong commitments at COP26, including pledges to cut the country’s carbon emissions in half by 2030 with the ultimate goal of achieving net-zero by 2050, they lack the kind of credibility that only a country’s leader can provide.

“They are good pledges, and I’m glad the Brazilian government has signed them, but [Bolsonaro] only has one year,” Toni said. “There are no plans for implementation; there is no money attached … so my hopes that anything happens next year is zero.”

So far, Bolsonaro’s actions have spoken louder than any of the Brazilian delegation’s words. Back in Brazil, he lambasted a youth representative of Brazil’s indigenous community for going to COP26 only to “attack Brazil.” Surely she should have realized that the easiest way to hurt the country would have been to not attend the summit at all.

#### No impact to defo

Hannah Voak 16, Assistant Ecologist, Nurture Ecology Ltd., 4/22/16, “A World Without Trees,” <http://www.scienceinschool.org/content/world-without-trees>

There are approximately 3.04 trillion trees on planet Earth (Crowther et al, 2015), covering 31% of the world’s land surfacew1. Today, for Earth day, we’re taking a look at trees. Around 15 billion trees are cut down each year. So, hypothetically speaking, it would take just over 200 years for the world’s forests to completely disappear. While this scenario is unlikely, what would be the consequences of a tree-free planet? Let’s start with perhaps the most obvious difference – oxygen concentration. A lack of oxygen? Oxygen makes up roughly 21% of the Earth’s atmosphere, but you probably know that already. What you might be surprised to find out, however, is that only half of this oxygen is produced through photosynthesis in trees and other plants on land. The other half is produced in oceans, by microscopic marine organisms called phytoplankton. The environment would not be devoid of oxygen if all trees were lost but the oxygen level would be lower. Would it be sufficient for humans to survive? In one year, a mature leafy tree produces as much oxygen as ten people breathe. If phytoplankton provides us with half our required oxygen, at current population levels we could survive on Earth for at least 4000 years before the oxygen store ran empty. However, that’s not considering a number of other factors: increasing population size, for example, would reduce the amount of oxygen available, whilst phytoplankton blooms due to an abundance of carbon dioxide could increase oxygen levels. Suffocating smog Whilst there may be enough oxygen for humans to survive on Earth, at least to begin with, the air we breathe could still be responsible for our demise. Like giant filters, trees help to cut down on pollution levels. Leaves intercept airborne particles and ozone, carbon monoxide, sulfur dioxide and other greenhouse gases are absorbed through the leaves stomata. In 2012, outdoor air pollution was estimated to cause 3.7 million premature deaths worldwidew2. Imagine the impact removing these environmental sieves would have on humankind. Air-pollution masks would become a necessity and bottled ‘clean air’ could come at a premium. Full of hot air? Armed with pollution masks, would the climate and temperature still be suitable for us? One important consideration is carbon dioxide. In one year, an acre of mature trees soaks up the same amount of carbon dioxide that we produce by driving the average car 26 000 miles. Since human activities like this increase the normal level of carbon dioxide in the atmosphere, cutting down trees would tip the balance even further, not to mention the enormous amount of stored carbon that would be released from doing so. Deforestation is already responsible for up to 15% of global greenhouse gas emissions and you might think that an overwhelming increase in carbon dioxide would result in a much warmer planet. However, the relationship between trees and global temperature is much more complicated. Energy and water fluxes between trees and the atmosphere also play a role and a tree’s colour, for example, can affect the amount of the Sun’s energy that is absorbed or reflected. Studies have shown that Europe’s trees have actually caused a slight increase in regional temperatures since 1750w3, while transpiration from plants in tropical forests cools the surface temperature. Therefore, whether the temperature becomes too hot to handle could depend on many factors, although a recent study concluded that reducing forest size increases average air surface temperatures in all climate zones (Alkama & Cescatti, 2016).

# 2NC

## ITC CP

### Perm: Do Both---2NC

#### They want the treble damages

Lindsay Martinez 11, practice is concentrated in commercial litigation and international matters, “An Overview Of Remedies And Relief Under Section 337,” Law360, Snell & Wilmer, 6/10/11, https://www.swlaw.com/assets/pdf/news/2011/06/10/AnOverviewOfRemediesAndReliefUnderSection337\_Martinez\_WEB.pdf

The International Trade Commission has become an increasingly popular destination for companies to enforce their patent rights under Section 337 of the Tariff Act of 1930. Section 337 affords relief to owners of U.S. intellectual property rights, especially patents, from unfairly competing imports.

Section 337 litigation is often preferred, due in part, to the expedited process — a trial is often concluded in less than a year. Not even the “rocket docket” jurisdictions can compete with this timing. And the ITC’s nationwide in rem jurisdiction over the products, not the parties, is often favorable for actions that include a defendant located in a foreign country.

While fast-paced and often more cost effective in the long term than a U.S. district court proceeding, the ITC does not provide monetary remedies. There are only two remedies provided by the ITC in a Section 337 investigation: an exclusion order —general or limited — and a cease-and-desist order. These forms of relief may be either permanent or temporary in nature.

In general, costs and attorneys’ fees are not recoverable in a Section 337 action. Reasonable costs and attorneys’ fees may be imposed as monetary sanctions in appropriate cases. Other differences between ITC investigations and district court cases include the fact that the Office of Unfair Import Investigations assigns an independent, third-party attorney, representing the public interest, to most ITC matters.

In addition, ITC investigations are heard before an administrative law judge, not a jury, and decisions by the judge are reviewable by a panel of commissioners. Further, although rarely invoked, the president has authority to overturn ITC remedies on policy grounds, and the Federal Circuit can hear appeals from the panel’s decision.

A complainant in an ITC action may institute a parallel district court case to obtain monetary damages in addition to the potential exclusion order, or file a district court action after the ITC matter has been heard. Parallel district court proceedings are generally stayed during the course of the ITC investigation.

#### That’s sufficient incentive for a foreign litigant.

Shapiro 4, Mayer, Brown, Rowe, & Maw LLP, “Brief for Petitioners,” F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORP., RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., et al., Petitioners, v. EMPAGRAN, S.A., et al., Respondents., 2004 WL 226391, WestLaw

The interpretation adopted by the court of appeals would flood the federal courts with foreign claims by all persons who can allege injury from conduct that also injured “someone” in U.S. commerce. With the globalization of economic activity, foreign harms can almost always be linked to some domestic harm. There is every reason to expect that foreign claimants will attempt to assert claims under U.S. law in federal court to obtain the treble damages, liberal discovery rules, jury trials and class action procedures not available in many of their own jurisdictions. See Smith Kline & French Labs Ltd. v. Bloch, 1 W.L.R. 730 (C.A. 1982) (Lord Denning) (“As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune”). As the Solicitor General has noted, foreign plaintiffs are bringing antitrust claims to recover for injuries arising from purely foreign transactions with “increasing frequency.” Pet. App. 73a. The decision by the court of appeals, if allowed to stand, would bring about a “sea change in the number and type of private actions permitted under the Sherman Act.” Id. at 79a.

#### Redundant jurisdiction causes incongruent outcomes

Bill Watson 18, associate fellow of the R Street Institute, March 2018, “PRESERVING THE ROLE OF THE COURTS THROUGH ITC PATENT REFORM,” <https://2o9ub0417chl2lg6m43em6psi2i-wpengine.netdna-ssl.com/wp-content/uploads/2018/04/Final-Short-57-1.pdf>

Put simply, to add a second venue of administrative adjudication for disputes already within the jurisdiction of Article III courts creates problems.

Conflicting Judgments

The most obvious and direct negative consequence of duplicative litigation is the very real possibility of conflicting judgments. District courts are not required to give preclusive effect to ITC determinations, even in cases that involve the same patents, parties and products. This means that a U.S. company could be faced with an exclusion order from the ITC that requires it to take merchandise of the shelf, engineer a work-around or enter a licensing agreement, all while a district court could still determine that the patent is invalid, that the defendant was not liable for infringement or that the patent was standard-essential and subject to a requirement of reasonable and nondiscriminatory licensing, which the patent owner failed to ofer.14

Supporters of Section 337 have not offered an argument for why patent owners should have two opportunities to drag companies into patent infringement suits, often simultaneously. Nor has anyone explained why that second chance should be triggered only when the alleged infringer is an importer.

#### That crushes legal coherence, turning the case

Sapna Kumar 9, Assistant Professor at the University of Houston Law Center, 2009, “THE OTHER PATENT AGENCY: CONGRESSIONAL REGULATION OF THE ITC,” Florida Law Review, <http://www.floridalawreview.com/wp-content/uploads/2010/01/Kumar_BOOK.pdf>

First, in amending § 337, Congress created a rift between ITC and federal court patent law. Part of this problem arises from Congress’s failure to make the Patent Act binding on the ITC. In Kinik Co. v. International Trade Commission, 12 for example, the Federal Circuit affirmed the ITC’s decision that defenses under 35 U.S.C. § 271(g)13 do not apply to ITC proceedings involving § 337.14 ITC decisions, moreover, do not have collateral estoppel effect on federal court decisions,15 leading to inconsistent judgments. Such decisions cause incoherence in patent law and ultimately threaten innovation.

### Perm: Do the CP---2NC

#### Core antitrust laws are Sherman, Clayton, and FTCA

Kendall Kuntz 21, J.D. Candidate at The University of Maryland Francis King Carey School of Law, “Can the Courts and New Antitrust Laws Break Up Big Tech?,” 2/23/21, https://www.law.umaryland.edu/Programs-and-Impact/Business-Law/JBTLOnline/Break-Up-Big-Tech/

There are three core antitrust laws in effect today: the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. These three antitrust laws attempt to protect market competition for the benefit of consumers. The Sherman Act outlaws monopolies and contracts that unreasonably restrain trade. The Clayton Act prohibits mergers and acquisitions that substantially lessen competition or create a monopoly. Lastly, the Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” Antitrust laws are not established to punish success, but are focused on preventing anticompetitive effects, exclusionary practices, reduced consumer choice, and hindered innovation.

#### Their scope is what those provisions cover

Donald F. Parsons Jr. 14, Vice Chancellor of the Court of Chancery of Delaware, “Vichi v. Koninklijke Philips Electronics, N.V.,” 85 A.3d 725, Lexis

As an initial matter, I reject the proposition that the determination of who can invoke a choice of law provision must precede the analysis of the provision's validity and scope. The “scope” of a choice of law provision refers to how broadly or narrowly that provision applies and includes the question of whether the provision created enforceable rights in third parties.310 The only case Philips N.V. cites in support of its assertion that Delaware law should govern whether it can invoke the choice of law clause merely stands for the proposition that a Delaware court will apply its own conflict of laws rules to determine which jurisdiction's substantive law will govern the claims before it.311 As noted previously, under Delaware conflict of laws rules, the scope of a valid choice of law provision is determined by the law of the selected jurisdiction—in this case, England.

#### ‘Of’ means that coverage must come from the core laws

M. Margaret McKeown 11, Judge, US Court of Appeals for the 9th Circuit, “Simonoff v. Expedia, Inc,” 643 F.3d 1202, Lexis

Our recent decision in Doe 1 is central to our analysis. There we considered a forum selection clause in AOL's website user agreement that [\*\*5] provided for "exclusive jurisdiction for any claim or dispute . . . in the courts of Virginia." Id. at 1080. We concluded that the choice of the preposition "of" in the phrase "the courts of Virginia" was determinative—"of" is a term "'denoting that from which anything proceeds; indicating origin, source, descent, and the like.'" Id. at 1082 (quoting Black's Law Dictionary 1080 (6th ed. 1990)). Thus, the phrase "the courts of" a state refers to courts that derive their power from the state—i.e., only state courts—and the forum selection clause, which vested exclusive jurisdiction in the courts "of" Virginia, limited jurisdiction to the Virginia state courts. Id. at 1081-82.

#### The CP doesn’t do that---it expands the scope of 19 U.S.C. § 1337, which is the Tariff Act

F. Scott Kieff 18, Fred C. Stevenson Research Professor at George Washington University Law School and Senior Fellow at Stanford University’s Hoover Institution, “Private Antitrust at the U.S. International Trade Commission,” https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2597&context=faculty\_publications

This paper, drafted as an adjudicator’s opinion in a recent case of nearly first impression,7 explores a different approach to aligning the strengths and opportunities available through the ITC by considering how more ordinary antitrust issues can be adjudicated through the Section 337 portion of the ITC’s docket. This might be done using existing law. The basic theme is that there are several significant reasons why even a Title VII skeptic – as well as an antitrust skeptic – should be significantly less worried when cases normally expected to be brought in the Title VII portion of the ITC’s docket as petitions are instead brought in the Section 337 portion of the ITC docket as complaints alleging ordinary violations of the antitrust laws.

#### That’s categorically different.

Geoffrey Manne & Kristian Stout 18, Manne is the president and founder of the International Center for Law and Economics (ICLE), a nonprofit, nonpartisan research center, distinguished fellow at Northwestern University Center on Law, Business, and Economics, FCC’s Broadband Deployment Advisory Committee, and he recently served for two years on the FCC’s Consumer Advisory Committee; Stout is ICLE's Director of Innovation Policy is an expert in intellectual property, antitrust, telecommunications, and Internet governance, “The Tariff Act is indeed protectionist — and that’s how Congress wants it,” Truth on the Market, 5-11-2018, https://truthonthemarket.com/tag/international-trade-commission/

A tale of two statutes

The case appears to turn on an arcane issue of adjudicative process in antitrust claims brought under the antitrust laws in federal court, on the one hand, versus antitrust claims brought under the Section 337 of the Tariff Act at the ITC, on the other. But it is actually about much more: the very purposes and structures of those laws.

The ALJ notes that

[The Chinese steel manufacturers contend that] under antitrust law as currently applied in federal courts, it has become very difficult for a private party like U.S. Steel to bring an antitrust suit against its competitors. Steel accepts this but says the law under section 337 should be different than in federal courts.

And as the ALJ further notes, this highlights the differences between the two regimes:

The dispute between U.S. Steel and the Chinese steel industry shows the conflict between section 337, which is intended to protect American industry from unfair competition, and U.S. antitrust laws, which are intended to promote competition for the benefit of consumers, even if such competition harms competitors.

Nevertheless, the ALJ (and the Commission) holds that antitrust laws must be applied in the same way in federal court as under Section 337 at the ITC.

It is this conclusion that is in error.

Judging from his article, it’s clear that Kieff agrees and would have dissented from the Commission’s decision. As he writes:

Unlike the focus in Section 16 of the Clayton Act on harm to the plaintiff, the provisions in the ITC’s statute — Section 337 — explicitly require the ITC to deal directly with harms to the industry or the market (rather than to the particular plaintiff)…. Where the statute protects the market rather than the individual complainant, the antitrust injury doctrine’s own internal logic does not compel the imposition of a burden to show harm to the particular private actor bringing the complaint. (Emphasis added)

Somewhat similar to the antitrust laws, the overall purpose of Section 337 focuses on broader, competitive harm — injury to “an industry in the United States” — not specific competitors. But unlike the Clayton Act, the Tariff Act does not accomplish this by providing a remedy for private parties alleging injury to themselves as a proxy for this broader, competitive harm.

As Kieff writes:

One stark difference between the two statutory regimes relates to the explicit goals that the statutes state for themselves…. [T]he Clayton Act explicitly states it is to remedy harm to only the plaintiff itself. This difference has particular significance for [the Commission’s decision in Certain Carbon and Alloy Steel Products] because the Supreme Court’s source of the private antitrust injury doctrine, its decision in Brunswick, explicitly tied the doctrine to this particular goal.

More particularly, much of the Court’s discussion in Brunswick focuses on the role the [antitrust injury] doctrine plays in mitigating the risk of unjustly enriching the plaintiff with damages awards beyond the amount of the particular antitrust harm that plaintiff actually suffered. The doctrine makes sense in the context of the Clayton Act proceedings in federal court because it keeps the cause of action focused on that statute’s stated goal of protecting a particular litigant only in so far as that party itself is a proxy for the harm to the market.

By contrast, since the goal of the ITC’s statute is to remedy for harm to the industry or to trade and commerce… there is no need to closely tie such broader harms to the market to the precise amounts of harms suffered by the particular complainant. (Emphasis and paragraph breaks added)

The mechanism by which the Clayton Act works is decidedly to remedy injury to competitors (including with treble damages). But because its larger goal is the promotion of competition, it cabins that remedy in order to ensure that it functions as an appropriate proxy for broader harms, and not simply a tool by which competitors may bludgeon each other. As Kieff writes:

The remedy provisions of the Clayton Act benefit much more than just the private plaintiff. They are designed to benefit the public, echoing the view that the private plaintiff is serving, indirectly, as a proxy for the market as a whole.

The larger purpose of Section 337 is somewhat different, and its remedial mechanism is decidedly different:

By contrast, the provisions in Section 337[] are much more direct in that they protect against injury to the industry or to trade and commerce more broadly. Harm to the particular complainant is essentially only relevant in so far as it shows harm to the industry or to trade and commerce more broadly. In turn, the remedies the ITC’s statute provides are more modest and direct in stopping any such broader harm that is determined to exist through a complete investigation.

The distinction between antitrust laws and trade laws is firmly established in the case law. And, in particular, trade laws not only focus on effects on industry rather than consumers or competition, per se, but they also contemplate a different kind of economic injury:

The “injury to industry” causation standard… focuses explicitly upon conditions in the U.S. industry…. In effect, Congress has made a judgment that causally related injury to the domestic industry may be severe enough to justify relief from less than fair value imports even if from another viewpoint the economy could be said to be better served by providing no relief. (Emphasis added)

Importantly, under Section 337 such harms to industry would ultimately have to be shown before a remedy would be imposed. In other words, demonstration of injury to competition is a constituent part of a case under Section 337. By contrast, such a demonstration is brought into an action under the antitrust laws by the antitrust injury doctrine as a function of establishing that the plaintiff has standing to sue as a proxy for broader harm to the market.

Finally, it should be noted, as ITC Commissioner Broadbent points out in her dissent from the Commission’s majority opinion, that U.S. Steel alleged in its complaint a violation of the Sherman Act, not the Clayton Act. Although its ability to enforce the Sherman Act arises from the remedial provisions of the Clayton Act, the substantive analysis of its claims is a Sherman Act matter. And the Sherman Act does not contain any explicit antitrust injury requirement. This is a crucial distinction because, as Commissioner Broadbent notes (quoting the Federal Circuit’s Tianrui case):

The “antitrust injury” standing requirement stems, not from the substantive antitrust statutes like the Sherman Act, but rather from the Supreme Court’s interpretation of the injury elements that must be proven under sections 4 and 16 of the Clayton Act.

\* \* \*

Absent [] express Congressional limitation, restricting the Commission’s consideration of unfair methods of competition and unfair acts in international trade “would be inconsistent with the congressional purpose of protecting domestic commerce from unfair competition in importation….”

\* \* \*

Where, as here, no such express limitation in the Sherman Act has been shown, I find no legal justification for imposing the insurmountable hurdle of demonstrating antitrust injury upon a typical U.S. company that is grappling with imports that benefit from the international unfair methods of competition that have been alleged in this case.

Section 337 is not a stand-in for other federal laws, even where it protects against similar conduct, and its aims diverge in important ways from those of other federal laws. It is, in other words, a trade protection provision, first and foremost, not an antitrust law, patent law, or even precisely a consumer protection statute.

#### It is an alternative to the plan.

Ian Simmons & Julia Schiller 16, Attorneys at O’Melveny LLP, “International Comity Saves Vitamin C Defendants from $147 Million Judgment,” OMM, 9-22-2016, https://www.omm.com/resources/alerts-and-publications/alerts/in-re-vitamin-c/

With its decision this week in In re Vitamin C Antitrust Litigation,1 the Second Circuit resolved a case of first impression and weighed in on the question of how far the Sherman Act extends abroad. The Second Circuit vacated a $147 million judgment against Chinese vitamin C manufacturers that admittedly conspired to fix prices and output in violation of the Sherman Act.2 Relying on the principle of international comity, the Second Circuit held that exercising jurisdiction over the defendants was improper—even though the price fixing harmed American importers and consumers—because the defendants’ actions were compelled by Chinese law.

The decision shows that American courts may be increasingly likely to dismiss US antitrust claims against foreign companies based in countries with heavy government involvement in the economy. Similar cases may be less likely to arise out of China going forward because the development of China’s antitrust regime (particularly the 2008 Antimonopoly Law) and its continued emphasis on market-oriented reforms have reduced state-compelled price fixing.

OVERVIEW OF THE CASE

The Second Circuit’s opinion brings this long-running action to a potential close. The plaintiffs, importers of vitamin C, filed the initial complaint in January 2005. The complaint alleged that four defendants—large, Chinese vitamin C manufacturers who collectively held over 60% of the worldwide market—conspired to fix prices and volumes in violation of Sherman Act § 1 and Clayton Act §§ 4, 6. In a motion to dismiss and subsequent motion for summary judgment, the defendants did not dispute the allegations, but raised three defenses: (1) foreign sovereign compulsion, (2) the act of state doctrine, and (3) the principle of international comity.3

The Chinese government—specifically the Ministry of Commerce of the People’s Republic of China (MOFCOM)—filed a sworn statement and historic amicus brief in support of the defendants’ motions, marking the first time any entity of the Chinese government appeared as amicus curiae in any US court. MOFCOM’s statement and brief stated that binding Chinese law compelled the defendants’ price fixing. US District Judge Brian Cogan nonetheless denied the defendants’ motions because he found that MOFCOM’s statement was not credible and was contrary to the factual record: “[MOFCOM’s] assertion of compulsion is a post-hoc attempt to shield defendants’ conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question.”4 Following this decision and grant of class certification, several defendants settled, marking “the first civil settlements with a Chinese company in a US antitrust cartel case.”5 The remaining defendants went to trial; the jury returned a $147 million award.

On appeal, the Second Circuit held that the district court abused its discretion by not abstaining from exercising jurisdiction “on international comity grounds,” a “principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill” between the US and other countries.6 A starkly different view of MOFCOM’s statement drove the Second Circuit’s opinion.  The court criticized the district court’s failure to give MOFCOM sufficient deference, stating that “a US court is bound to defer to [] statements” about its laws and regulations made by a foreign government directly participating in a US court proceeding.7 Crediting MOFCOM’s statement, the Second Circuit found that the Chinese government forced the defendants to fix prices, thus creating a “true conflict” as defined by the Supreme Court in Hartford Fire.8 Because a “true conflict” existed between Chinese law and US law, the Second Circuit dismissed the case on international comity grounds.

EFFECT ON THE SHERMAN ACT'S GEOGRAPHIC SCOPE

This decision is significant because it limits the extraterritorial reach of the Sherman Act, thereby echoing recent decisions narrowing the geographic scope of US law in other areas.9 The seminal Alcoa case first clarified that the Sherman Act only applied to foreign conduct that had actual and intended effects on US commerce.10 Then, in 1982, Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA) to subject to the Sherman Act import commerce and other foreign commerce with a “direct, substantial, and reasonably foreseeable effect” on the United States.11 The Supreme Court explained in Hartford Fire that “the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”12

None of these cases and statutes definitively explain how comity affects a US court’s ability to hear a Sherman Act claim against a foreign defendant. Some courts turn to comity as a principle of statutory construction to determine whether the Sherman Act grants a cause of action or jurisdiction.13 Under this view, where a claim is properly before the court, no comity analysis is necessary because Congress is best situated to make inherently political determinations about the effects of US laws on foreign relations. Other courts—including the Second Circuit in In re Vitamin C—consider that a comity analysis remains proper even where plaintiffs’ cause of action and the court’s jurisdiction are undisputed.14 This view reserves to US courts considerable power to relinquish jurisdiction over foreign defendants, such as those in this case, that are in violation of US antitrust laws and undoubtedly subject to the jurisdiction of US courts.

By exercising that power here, the Second Circuit strengthens the view that a “true conflict” between US and foreign laws nearly guarantees a case’s dismissal. Before the Supreme Court’s Hartford Fire decision, courts evaluated comity based on the factors enunciated by the Ninth and Third Circuits in Timberlane Lumber and Mannington Mills, including the degree of conflict with foreign law, the nationality of the parties, and the availability of a remedy abroad.15 Then, in Hartford Fire, the Supreme Court refused to relinquish jurisdiction on comity grounds, explaining that a “true conflict” exists only where a defendant is incapable of complying with both US and foreign law.16 That is, comity applies where one sovereign’s law compels a course of action that another sovereign’s law condemns. Courts remain divided on whether Hartford Fire’s heavy focus on the presence of a “true conflict” displaced or merely clarified the factors enunciated in Timberlane Lumber and Mannington Mills. The Second Circuit returned to the first principle of comity analysis by looking for a “true conflict” between US and Chinese law as a threshold matter, and relied on the existence of that conflict to reverse the district court. By devoting almost all of its analysis to the true-conflict factor, the court arguably confirmed that this factor is indeed the determinative one, particularly when the conflict originates from a foreign country with significant political and economic clout, such as China.

COMITY AND CHINESE ANTITRUST LAW

Exact analogs to the Vitamin C litigation are unlikely to emerge moving forward because the regulatory regime at issue in that case no longer exists. China’s first comprehensive competition statute, the Antimonopoly Law (AML) took effect in 2008. The AML and its implementing rules broadly prohibit horizontal price-fixing and output restraints referred to as “monopoly agreements,” and explicitly forbid trade associations from facilitating cartels. Over the last eight years, Chinese competition authorities have actively enforced the AML against both domestic and international cartels, including many cartels involving state-owned enterprises or trade associations. In 2015, the central government launched a new “fair competition review mechanism” aimed at paring back anticompetitive government policies and regulations. While the AML leaves some room for coordinated efforts to maintain the competitiveness of Chinese enterprises, collusion among exporters would generally be prohibited, unlike the facts presented in the Second Circuit’s Vitamin C opinion. Although significant differences between the AML and the competition laws of the US and other jurisdictions persist, a “true conflict” between the Sherman Act and Chinese law is far less likely today than in 2001.

The Second Circuit’s opinion itself hinted that the conflict between US and Chinese law that it had to resolve may be more of a relic of the past than a major concern moving forward. The court noted that the PVC program was “intended to assist China in its transition from a state-run command economy to a market-driven economy” and that “the resulting price-fixing was intended to ensure China remained a competitive participant in the global vitamin C market.”17 With these statements, the court seemed to suggest that China’s use of these types of state-sanctioned coordination is on the decline.

Nevertheless, Chinese companies operating under a hybrid state-run and capitalist economy may still pursue conduct that violates the Sherman Act under state direction in some key industries in which the government operates with a heavier hand, thereby limiting private plaintiffs’ ability to recover in federal court under the Second Circuit’s precedent. This, in turn, may push US companies to pressure the US government to bring an action at the WTO rather than rely on civil litigation, as suggested by the Second Circuit itself, or look at other avenues such as the administrative courts in the ITC, as a group of US steel manufacturers have already done.18

### Solvency---2NC

#### It’s identically solvent---barring minor necessary adaptations, they enforce the same standards, using the same balancing

Teague I. Donahey 16, Intellectual Property Litigator in the Boise, Idaho office of Holland & Hart, “Expanding Horizon of Section 337 Jurisdiction,” Holland & Hart, July/August 2016, https://www.hollandhart.com/files/36919\_IPM\_July\_Aug\_2016-Feat.pdf

The full breadth of the ITC’s § 337 jurisdiction remains untested

Notwithstanding the diverse nature of such decisions, § 337’s disjunctive reference to both unfair methods of competition and, separately, unfair acts indicates that the ITC’s § 337 jurisdiction is likely even broader. Indeed, it has long been recognised that the statutory unfair acts language provides a distinct basis for jurisdiction over and above the statute’s reference to unfair methods of competition.5

When § 337’s predecessor statute – the Tariff Act of 1922 – was originally enacted, the Senate Finance Committee reported that the provision was “broad enough to prevent every type and form of unfair practice”.6 Similarly, an early appellate decision explained that the provision’s language “is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions… Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.”7

Although the concept of unfairness is inherently vague, the ITC has attempted to define the scope of unfair acts under § 337 as being “within the general range of practices ‘heretofore regarded as opposed to good morals because characterised by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly’.”8 The ITC has further indicated that “the concept of an unfair act involves some sense of an intentional tort which constitutes an offence not merely against the immediate victim, but against the values of society as well”– in summary: “intentionally tortious behaviour contrary to public morals”.9

The ITC and the courts have also occasionally sought guidance from § 5 of the Federal Trade Commission Act (15 USC § 45), which, using language almost identical to § 337, empowers the Federal Trade Commission (FTC) to prohibit “unfair methods of competition” and “unfair or deceptive acts or practices”. In this regard, the FTC, somewhat cryptically, has interpreted the FTC Act’s reference to unfair methods of competition as including “not only those acts and practices that violate the Sherman or Clayton Act but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act.”10 The FTC Act’s separate reference to unfair acts is currently understood to be directed to consumer unfairness, with ‘unfairness’ being evaluated in light of the following factors: whether the practice injures consumers; whether it violates established public policy; and whether it is unethical or unscrupulous.11 Courts have emphasised that § 5 is intended to be flexible and that unfairness should be determined on case-by-case basis in light of the facts.

Going forward, it remains to be seen how far the ITC will permit the unfairness envelope to be pushed. Section 337 litigants have raised claims such as breach of contract and tortious interference, for example, although the jurisdictional viability of such claims has not been conclusively resolved. Could such claims ever constitute the required “intentionally tortious behaviour contrary to public morals”, or do they constitute merely private offences directed at the immediate victim alone – offences less likely to give rise to § 337 jurisdiction?

Recent observers have gone further and proposed that § 337 could cover circumstances rarely conceived as being relevant to the statute. For example, it has been surmised that § 337 could be invoked to prevent the importation of products manufactured overseas in circumstances involving: human rights violations; child labour; violations of environmental norms; food and drug safety violations; endangered plant or animal species; and/or conflict minerals.12 All of these types of conduct could arguably provide the foreign manufacturer of imported goods an unfair cost advantage over US competitors and, as such, constitute unfair methods of competition and unfair acts within the spirit of § 337. But any such claims would move § 337 well beyond its traditional frame of reference.

Regardless, it is clear that the ITC’s § 337 jurisdiction is not limited to patent infringement disputes, despite past practice before the Commission. Indeed, essentially any intellectual property dispute involving products imported into the US would be a strong candidate for § 337 enforcement before the ITC.

#### It has enormous reach and decisive institutional advantages over judicial antitrust law.

Peter M. Brody 17 & Matthew J. Rizzolo, Attorneys @ Ropes & Gray LLP, “Looking Beyond Patents at the International Trade Commission—Is the ITC an Underutilized Forum?,” Ropes & Gray, 10/18/17, https://www.ropesgray.com/en/newsroom/alerts/2017/10/Looking-Beyond-Patents-at-the-International-Trade-Commission-Is-the-ITC-an-Underutilized-Forum

Introduction

The United States International Trade Commission (“ITC”) is an independent, quasi-judicial federal agency responsible for enforcing Section 337 of the Tariff Act, a trade statute designed to protect U.S. industries from injuries caused by the importation of goods connected to unfair acts. Traditionally, the large majority of Section 337 investigations have focused on allegations of patent, copyright, or trademark infringement. However, Section 337 is not limited only to enforcement of statutory IP rights; other types of unfair acts of competition can provide the basis for filing a Section 337 complaint. This article explores the history of such claims at the ITC, and the role that the ITC and Section 337 may play within the broader context of increasingly global business competition.

I. Advantages of Litigating at the ITC—Speed and Broad Global Reach

The ITC is first and foremost a trade forum tasked with ensuring international parity in trade. The ITC promotes a level playing field where companies with a U.S. presence are insulated from unfair business actions or surprises from competitors. The default remedy—an exclusion order that bars affected products from entry into the United States—is a source of powerful leverage in business disputes. Section 337 investigations at the ITC are extremely fast, often taking less than 18 months from filing to final decision and a potential exclusion order, and rarely suffer from delays that can affect a federal district court action. And for global disputes, the fact that the ITC need only exercise in rem jurisdiction over products imported into the U.S. is often a key consideration—the ITC does not need to obtain personal jurisdiction over a respondent, and may enter an exclusion order barring products from the U.S. market even where a respondent fails to show up to defend against a complaint.

II. Non-Patent, Non-Statutory IP Claims Under Section 337

Section 337 broadly authorizes the ITC to investigate all forms of “[u]nfair methods of competition and unfair acts in the importation of articles.” These so-called “Section 337(a)(1)(A) claims” (or “nonstatutory Section 337 claims”) make the ITC a potentially attractive forum for companies seeking creative solutions to defend their rights and gain a competitive edge in global business disputes.

The requirements to bring Section 337(a)(1)(A) claims differ in two significant ways from claims relating to statutory IP rights. In asserting an (a)(1)(A) claim, a complainant must plead four elements: (1) unfair competition or an unfair act by the respondent; (2) importation, sale for importation, or sale after importation into the United States of an article; (3) the existence of a “domestic industry”; and (4) injury to the domestic industry from the alleged unfair act. In contrast, to prove a statutory cause of action (such as patent infringement), the complainant must plead only three elements—there is no requirement to prove injury to a domestic industry, because such injury is presumed when a statutory IP right is infringed. However, the complainant asserting a statutory cause of action must also tie the domestic industry to the accused product or the intellectual property in question, which is not required for nonstatutory claims.

In recent years, the ITC has instituted investigations under Section 337(a)(1)(A) based in whole or in part on allegations of trade secret misappropriation, common law trademark and trade dress infringement, breach of contract, tortious interference with contractual relations, false advertising, passing off, violation of the Digital Millennium Copyright Act (DMCA), and violation of a state-law Uniform Deceptive Trade Practices Act.1

Trade secret misappropriation cases have been particularly popular in recent years. That growth in popularity was sparked by the Federal Circuit decision in TianRui Group Co. v. International Trade Commission, an appeal from a case at the ITC in which the complainant sought to prevent steel railroad wheels manufactured by TianRui in China from being imported into the United States. The complainant argued that the ITC had authority under Section 337 to enter an exclusion order because TianRui was manufacturing the wheels using a trade secret it stole from the complainant’s licensee in China, even though the complainant itself no longer used the trade secret in the United States. In other words, although TianRui’s misappropriation of trade secrets occurred wholly overseas and were not connected to the trade secret being used in the United States, the complainant argued that the nonstatutory prong of Section 337 nonetheless authorized the ITC to act. The ITC agreed, and its decision was upheld on appeal to the Federal Circuit. Since then, several other complaints asserting trade secret misappropriation have been successful at the ITC.2

Section 337(a)(1)(A) claims based on other unfair acts have also seen increased activity at the ITC. For example, the recent decision in Certain Woven Textile Fabrics involved a claim of false advertising. The complainant in that case alleged that the respondent was unfairly and falsely advertising the thread count of its bed sheets. After investigating, the ITC found a violation of Section 337 and, notably, entered a general exclusion order—meaning that not only would respondent’s sheets be excluded, but all sheets that falsely advertised their thread count would also be excluded.3 Furthermore, Section 337 claims based on false designation of origin (mislabeling the country of origin of imported goods, often to avoid tariffs or duties) have also been on the rise. After being successful in the 1980s,4 only two such claims have been brought since 2008: Certain Footwear Products in 2014 and the currently-pending Certain Carbon & Alloy Steel Products. The latter case is particularly interesting, as it also involves the first ITC investigation based on an alleged antitrust violation in more than 25 years. There, the ITC is expected to rule soon regarding the specific showing that must be made to plead an injury for an antitrust claim under Section 337.

III. Other Potential Claims Under the ITC’s Broad Section 337 Authority

Although cases asserting nonstatutory causes of action have been on the rise, they are still a small minority compared to other cases brought under Section 337. Yet the ITC’s authority to investigate nonstatutory claims is viewed as very broad, as the permissive language of Section 337(a)(1)(A) illustrates. The legislative history of the Tariff Act and case law make clear that the ITC has the broad authority to prevent every type and form of unfair practice—thus, the breadth of Section 337(a)(1)(A) may make it ripe for bringing actions in additional contexts than those described above.

Some complainants have already started to push the envelope in the food and drug area, and the ITC has responded favorably. For example, in 2012, KV Pharmaceutical Company (“KV”) filed a Section 337 complaint alleging that several compounding pharmacies were competing unfairly by creating a drug called 17P in violation of KV’s exclusivity period granted by the Food and Drug Administration (“FDA”).5 The complaint drew a significant amount of attention, with several third parties urging the ITC to decline to investigate the complaint on the grounds that this was a matter for FDA, not ITC, jurisdiction. The ITC ultimately issued a rare denial of institution, explaining that because the FDA had already declined to pursue enforcement against the named respondents, the complained-of conduct was not unlawful. Crucially, in a concurring memorandum, two commissioners explicitly stated “that they d[id] not reach the issue of whether properly pleaded claims based on the Food, Drug, and Cosmetic Act [(“FDCA”)] may be cognizable under section 337(a)(1)(A).” Since then, at least three complaints have been filed alleging unfair acts under Section 337 based at least in part on violations of provisions of the FDCA such as drug labeling regulations. The first, Certain Potassium Chloride Powder Products, Inv. No. 337-TA-1013, resulted in an ITC investigation, and subsequently, a quick settlement. A second complaint was filed in August 2017 in Certain Periodontal Laser Devices, alleging unfair acts of false advertising relating to non-FDA-cleared medical devices. That complaint resulted in the institution of Inv. No. 337-TA-1070, which is scheduled to go to trial in April 2018. The third, Certain Synthetically Produced, Predominantly EPA Omega-3 Products (“Omega-3 Products”), was filed in late August, and a decision on institution is still pending—in fact, the complaint in Omega-3 Products has attracted significant briefing from both the parties and non-parties as to whether the ITC has jurisdiction over the complaint. The FDA even submitted a letter to the ITC, requesting that the ITC not institute the complaint.

These two latter cases are definitely ones to watch in this developing area of law; the ITC’s institution in Omega-3 Products is due October 27.

Another potential use of the ITC could be to challenge violations of the Foreign Corrupt Practices Act (“FCPA”). Although the federal government has stepped up enforcement of the FCPA in recent years, there is no private cause of action under the FCPA—similar to the FDCA implicated in the investigations discussed above. This means that a company who “has played by the rules”—and who may be at a significant disadvantage to a competitor who has engaged in illegal acts abroad—nonetheless cannot seek recourse under the FCPA. However, if the illegal acts (such as bribery) can be tied to importation of products into the United States, then the ITC may offer a way for the injured competitor to seek redress. Indeed, the U.S. Customs and International Trade Guide considers “commercial bribery” to be a “[p]ossible Section 337 violation.”6 Given the ITC’s expansive mandate to enforce Section 337, under the appropriate circumstances, the Commission may institute an investigation in this context.

Parallel importation, sometimes known as the importation of “gray market” goods, is also a prime example of a situation where Section 337 may be applicable. Gray market goods are genuine (i.e., not counterfeit) products protected by copyrights, patents, or trademarks, which are legally bought outside of the United States (usually for a lower price) and then imported into the United States and sold without authorization from the intellectual property owner. In the past, such conduct may have given rise to claims of statutory-based infringement in district court. However, two recent Supreme Court decisions may have left copyright and patent owners without an ability to enforce their rights under the traditional statutory framework. The Court in Kirtsaeng v. John Wiley & Sons, Inc. held that under the first sale doctrine, an initial sale extinguishes all copyright rights as to that copyrighted work, even if that sale is made overseas. And in Impression Products, Inc. v. Lexmark International, Inc., the Court held that under the analogous patent exhaustion doctrine, patent rights are similarly “exhausted” once an initial sale is made, regardless of geographical considerations. Under these new precedents, an IP owner would likely be unable to bring suit in district court to address the parallel importation. However, the IP owner may be able to use a Section 337(a)(1)(A) claim to argue that the foreign buyer’s conduct constitutes unfair competition or unfair acts justifying exclusion from the U.S. market.

Environmental law and fair labor standards practices are additional areas where Section 337 may be creatively utilized. Although no complaints have yet been brought under Section 337 in these contexts, there is no prohibition on such claims. Indeed, because the Commission’s Section 337 authority is broad, if a company can tie its competitors’ violations of environmental or fair labor laws to the importation of goods and show that those violations are giving its competitors an unfair advantage, it could succeed in excluding those goods from the domestic market. Notably, the ITC already has experience in investigating practices in the environmental context as they relate to international trade,7 and so could easily bring that expertise to Section 337 investigations.

Finally, the ITC may be a valuable forum to protect competition in the data privacy and security context. Hacking and data breaches are not new concepts to the ITC. In Certain Carbon & Alloy Steel Products, U.S. Steel alleged that its trade secrets were misappropriated in 2010 and 2011 through Chinese government-backed “cyber attacks intended to aid China’s state-owned steel enterprises.” While these claims were subsequently dropped, U.S. Steel’s complaint may provide a roadmap for other companies to assert claims of similar misconduct in the future. And unfair data privacy and security violations need not be tied solely to trade secrets misappropriation claims. Data privacy concerns and data breaches are generally investigated in other contexts by the Federal Trade Commission (“FTC”), and the FTC has found a multitude of unfair practices relating to data privacy and security, especially when data breaches have occurred. In the past, the ITC has looked to the FTC’s definition of what constitutes an “unfair” act in resolving its own investigations under Section 337(a)(1)(A). Therefore, the ITC may potentially investigate a broad swath of actions in the data security arena.

Conclusion

In sum, although Section 337 litigation at the ITC has traditionally focused on statutory IP claims, the Commission’s broad authority to investigate a wide range of unfair practices has lead to a growing number of complaints alleging nonstatutory claims. From trade secret misappropriation to false advertising claims, more and more companies are becoming increasingly creative in taking advantage of the ITC’s unique position in regulating international trade. Yet the Commission may still be an underutilized forum. Section 337 could be ripe for use by companies in business disputes with competitors who refuse to play by the rules in a variety of arenas.

### Solvency---Cartels / Deterrence---2NC

#### Most judicial antitrust remedies are unenforceable against international actors.

Robert Kantner 13, Partner in the International Law Firm of Jones Day, speciAlizes in Trade Secret and Other Intellectual Property Litigation and Counseling, “Protecting Trade Secrets Internationally Through A Comprehensive Trade Secret Policy,” The Practical Lawyer, February 2013, http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/TPL1302\_Kantner\_thumb.pdf

American Judgments May Not Be Enforceable In Foreign Countries

Assuming a company is able to successfully pursue its claim in an American court, it may be awarded damages and/or the defendant may be enjoined from continuing to use, or import products containing, or disclosing, the trade secrets. The next obstacle is enforcing that judgment. While the American court’s Judgment is enforceable within the United States, it may be difficult to enforce the Judgment overseas, particularly if a foreign government has supported the economic espionage in the first place.

#### China in particular will shield bad actors from the AFF. They get off totally scot-free.

Ben Bradshaw 16, Partner and Julia Schiller a Counsel in the Washington, DC office of O’Melveny & Myers LLP; Remi Moncel is an associate in O’Melveny’s San Francisco office, “International Comity in the Enforcement of U.S. Antitrust Law in the Wake of in Re Vitamin C,” The Places We Go: Developments in International Competition Law, Antitrust, vol. 31, no. 2, 2017/2016, pp. 87–93

Having found that Chinese law required defendants to violate U.S. antitrust law, the Second Circuit went on to consider whether the remaining factors in the Timberlane/ Mannington Mills balancing test weighed in favor of dismissal. The court concluded that they did.32 Of particular note, the court found that while the plaintiffs may have been unable to obtain a Sherman Act remedy in another forum, complaints as to China’s export policies could be adequately addressed through diplomatic channels and the World Trade Organization, of which both the United States and China are members.33 The court found it significant that there was no evidence that the defendants acted with the express purpose or intent to affect U.S. commerce or harm businesses in particular. Moreover, the regulations at issue were intended to assist China in its transition from a staterun economy and to remain a competitive participant in the global Vitamin C market.34 Finally, the court recognized that according to MOFCOM the exercise of jurisdiction had already negatively affected U.S.-China relations, and it would be unlikely that the injunctive relief obtained by the plaintiffs in the district court would be enforceable in China, just as a similar injunction issued in China against a U.S. company would be difficult to enforce in the United States.35 Upon consideration of all of these factors, the court concluded that exercising jurisdiction was inappropriate and dismissed the case.

#### The severity far exceeds the plan.

Matthew N. Bathon 15, Steptoe & Johnson LLP, 2015, “IP Enforcement: Domestic and Foreign Litigants in the ITC and U.S. District Courts,” University of Pennsylvania East Asia Law Review, Vol. 10, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1082&context=ealr

E. Remedies

As noted, another important distinction between the ITC and district court is the fact that money damages are not available at the ITC. The ITC, however, can issue orders excluding products from being imported into the United States through general and limited exclusions orders. Cease and desist orders can also be issued to prevent the sale of infringing products that have already been imported into the United States. Exclusion orders are enforced by CBP, whereas cease and desist orders are enforced by the ITC. The Commission has broad discretion in selecting the form, scope, and extent of the remedy in ITC investigations. 19

The Commission’s authority extends to the prohibition of all acts reasonably related to the importation of infringing products. 20 Exclusion orders are not typically limited to the specific models of accused devices found by the Commission to infringe. The Commission can direct the exclusion order to all infringing products within the scope of the investigation, as set forth in the Notice.

Since 2008, limited exclusion orders may only be issued to the respondents specifically named in the complaint.21 General exclusion orders however, can extend to infringing articles of nonnamed respondents. As discussed in Kyocera, the Commission has authority to issue a general exclusion order against products of nonrespondents if the “heightened requirements of Section 337(d)(2)(A) or (d)(2)(B) are met.”22 To obtain a general exclusion order, a party must show that a general exclusion is necessary to prevent the circumvention of an exclusion order limited to products of named persons, or that there is a pattern of violation and it is difficult to identify the source of the infringing products.23

Cease and desist orders may be issued in lieu of or in addition to exclusion orders.24 . “The Commission’s purpose in issuing cease and desist orders in patent cases has been to afford complete relief to complainants when infringing goods are already present in the United States, and thus cannot be reached by issuance of an exclusion order.”25 . The Commission issues cease and desist orders against respondents that maintain “commercially significant” inventory of the infringing products in the United States.26 What is required to satisfy the “commercially significant” requirement is based on the particular facts presented. Respondents that are found to be in default by failing to adequately participate in the investigation are presumed to maintain commercially significant inventory of the infringing products in the United States.27 . Of course, the statute does not require that a commercially significant inventory must exist.28 The Commission has entered cease and desist orders where no commercially significant inventory was shown. 29 In Certain Handbags, Luggage, Accessories and Packaging Thereof, Inv. No. 337-TA-754, the ITC issued a general exclusion order (“GEO”) that enjoined anyone – not just the named respondents – from importing products into the United States that infringed the Louis Vuitton trademarks at issue in the case.30 The Commission informed CBP that Louis Vuitton’s marks were susceptible to being infringed in a number of different ways, not necessarily only through the particular instances of infringement at issue in the investigations. The GEO in that investigation states,

For the purpose of assisting the U.S. Bureau of Customs and Border Protection in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission notes that there may be numerous ways to manipulate the trademarks at issue so as to create infringements. In an effort to provide some guidance to the U.S. Bureau of Customs and Border Protection in the enforcement of this Order, the Commission has attached to this Order copies of photographs featuring different infringements of [the trademarks at issue].31

The value of a GEO, like the one referenced above, is significant for intellectual property owners not only to stop new infringements from being imported, but as a deterrent to current infringers facing an enforcement proceeding.

In matters where money damages are important, district court cases can be filed in addition to filing a complaint with the ITC. Indeed, complainants routinely file parallel actions before the ITC and district court. In most cases, as long as the allegations are the same in the ITC and district court, the district court case will be stayed pending resolution of the ITC investigation if requested by the respondent/defendant.32 The stay is mandatory if requested by the respondent, as long as the statutory requirements are otherwise met.33 The record before the ITC can be used in connection with the district court case. For example, discovery can be crossdesignated between cases to avoid duplication between the ITC and district court. Additionally, if the district court adopts the findings of the ITC, the time required and certain costs for the district court case may be reduced.

IV. CONCLUSION

The ITC can be an advantageous forum for intellectual property owners that face significant infringement problems originating in foreign jurisdictions, and are the most likely to benefit from using the ITC as an enforcement forum. If successful, powerful exclusion orders can provide ongoing protection and strong deterrent value for years to come.

### Solvency---Indigenous Regimes---2NC

#### They have tons of experience applying comity.

Michael Buckler 13& Beau Jackson, Beau Jackson is an associate in Adduci Mastriani & Schaumberg's Washington, D.C., office; Michael Buckler is the CEO and general counsel of Village X Inc., a nonprofit that crowd funds donations to community-led projects with quantifiable impacts in developing countries and provides live picture updates of project impacts, “Section 337 as a Force for Good - Exploring the Breadth of Unfair Methods of Competition and Unfair Acts under Sec. 337 of the Tariff Act of 1930,” Federal Circuit Bar Journal, 2014/2013, vol. 23, pp. 513–560

B. Comity

"Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."'. Comity counsels that any laws "carried into execution, within the limits of any government, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens."'" Notably, the ITC has recognized that "United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States."'

Factors set forth in the Restatement of Foreign Relations Law are relevant to a comity analysis insofar as they elucidate whether "exercising that jurisdiction to prescribe law with respect to a person or activity having connections with another state" is reasonable."' Comity "is a matter neither of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.""'

As a concept, comity is broad enough to cover not only judicial comity, but what Justice Scalia has labeled prescriptive comity."' Examples of the former are litigations in which the ITC applied German bankruptcy law,"' and the Federal Circuit deferred to the judgment of a French court,"' to determine the ownership of asserted patents. Similarly, in TianRui, the Federal Circuit recognized that employees misappropriating trade secrets in China after signing contracts in China agreeing to protect such trade secrets implicated Chinese law."'

Prescriptive comity, by contrast, is "the respect sovereign nations afford each other by limiting the reach of their laws.""' According to Justice Scalia, prescriptive comity is readily apparent (at least in spirit) from the Restatement factors."' As a practical matter, a party opposed to the recognition of new-to-the-ITC unfairness under § 1337(a)(1)(A) may advance prescriptive comity as a justification for maintaining the status quo. In so doing, the party might echo Justice Scalia, who dissented vociferously against the international reach of the Sherman Act in 1995"' and (sitting on a Court with different interpretive dynamics) authored the majority opinion in 2010 that limited the international reach of the Securities Exchange Act.' However, the TianRui majority was unimpressed by the arguments of prescriptive comity,"' and it is impossible to know how, if at all, the contemporary Supreme Court would rule differently before a case squarely presents the issue to the Court.

## Offsets CP

### Offsets---Perm: Plan + Immunize Climate---2NC

#### They chose to include extraneous resolutional language in the plan. The benefit is it makes them seem more topical, the cost is that it is a function that we can exclude. That makes it fair, predictable ground AND forcing them to defend each word choice is key to precision and detailed attention to wording. That’s critical in debates about antitrust.

Dr. Josh Lange 21, Doctor of Education in Leadership from Exeter, a Master in English Literature from Reading, Certificates in Human Rights Law and Multiple Intelligences from LSE and Harvard, Founder of LegalWritingEU, “Antitrust”, https://legalwriting.eu/practice-areas/antitrust/

Vocabulary Training – Antitrust law requires intricate and deep knowledge of a very specialized set of vocabulary. Much as is the case with the very subject (antitrust vs. competition laws), terminology changes with the jurisdiction, and understanding the distinctions between otherwise very similar words and concepts can make a well-trained lawyer stand out amongst those that lack these skills. Antitrust/competition practice can often require a lawyer to become an expert in the businesses themselves, which are often from extremely divergent fields, so breadth of knowledge in vocabulary is essential.

#### The plan’s phrase ‘increase prohibitions’ must be given independent effect---the perm unpredictably renders it mere surplusage

Dr. Peter M. Tiersma 1, Professor of Law and Joseph Scott Fellow at Loyola Law School, Ph.D. from the University of California, San Diego and J.D. from the Boalt Hall School of Law, “A Message in a Bottle: Text, Autonomy, and Statutory Interpretation”, Tulane Law Review, 76 Tul. L. Rev. 431, December 2001, Lexis

A final example is the "surplusage" rule: that every word in a legal text is to be given effect and that nothing is to be considered surplusage. 113

[FOOTNOTE]

See 2A Norman J. Singer, Statutes and Statutory Construction 46.06, at 119-20 (5th rev. ed. 1992); see also Tabor v. Ulloa, 323 F.2d 823, 824 (9th Cir. 1963) ("[A] legislature is presumed to have no superfluous words."); W. Wash. Cement Masons Health & Sec. Trust Funds v. Hillis Homes, Inc., 612 P.2d 436, 441 (Wash. Ct. App. 1980) ("Statutes are to be construed so as to give effect to every word.").

[END FOOTNOTE]

The fact of the matter is that a huge amount of ordinary language is needless verbiage, perhaps even verbal garbage, when it is closely examined. Many of the words we utter in everyday life are surplusage whose main purpose is to fill in awkward pauses in conversation, to recognize friends, engage in some sort of bonding, or simply to acknowledge the presence of someone else. This situation is different with autonomous texts, of course. Because words are chosen with care and almost always reviewed and edited once or twice, if not many more times, the surplusage rule makes sense - if at all - in autonomous texts.

#### Including warming immunity as a prohibition is inconsistent and confusing---that chills action

Paul Balmer 20, J.D. from the University of California, Berkeley, School of Law, BA from Pomona College, Senior Articles Editor of Ecology Law Quarterly and Treasurer of the Election Law Society, Summer Associate at Tonkon Torp, “Colluding to Save the World: How Antitrust Laws Discourage Corporations from Taking Action on Climate Change”, Ecology Law Quarterly, 7/27/2020, https://www.ecologylawquarterly.org/currents/colluding-to-save-the-world-how-antitrust-laws-discourage-corporations-from-taking-action-on-climate-change/

II. Antitrust Scrutiny of Corporate Collaboration

As corporations pursue socially responsible strategies—whether on climate change or other social causes—the threat of antitrust enforcement looms. This threat discourages collaboration among competitors, even to meet goals that are objectively positive for society.[30] Much of this chilling effect comes from the inconsistent and evolving nature of antitrust enforcement and a general lack of bright-line rules.

Section 1 of the Sherman Act, the 1890 seminal antitrust law, prohibits “[e]very contract, combination, . . . or conspiracy in restraint of trade or commerce.”[31] Although every competitive action, and certainly every contract and agreement, restrains trade in some manner, courts have enforced section 1 to prevent “unreasonably restrictive” contracts, combinations, and conspiracies.[32] Unreasonable restraints on trade, in turn, include those that “reduce output, raise price, or diminish competition with respect to quality, innovation, or consumer choice.”[33] But how those various bad outcomes interact, or when to prioritize lower prices over other antitrust goals, is unsettled and subject to frequent debate.[34]

Courts apply two different levels of analysis to challenged contracts, combinations, or conspiracies that restrain trade. The first type of analysis categorically rejects certain types of restraint as “per se unlawful” without a more searching inquiry into the economic context of the challenged conduct.[35] The second analysis is under the “rule of reason,” a more detailed burden-shifting framework that considers procompetitive benefits of the conduct alongside an economic analysis of the restraint’s harmful effects in a given market.[36] Over time, courts have moved towards applying the rule of reason.[37] Nevertheless, uncertainty over whether courts will consider an agreement per se unlawful has significant consequences for corporate collaboration for social good.

Both price-fixing and group boycotts are often considered per se illegal, regardless of ethical merit. While unlawful price-fixing can be as blatant as competitors setting the price of a common good to increase profits, unlawful price-fixing also encompasses “agreements to artificially reduce output,” which will in turn raise consumer prices.[38] Professor Inara Scott uses the example of the volatile and scantly regulated coffee market, where coffee farmers could conceivably agree on environmental, labor, and price standards in order to reduce volatility and reduce retail prices.[39] But such agreement, even to reduce prices, is likely to be considered per se illegal price-fixing.[40] Similarly, conservation agreements to harvest fewer fish from a shared area—artificially reducing output—could be considered per se unlawful price-fixing because of the outcome on consumer price, regardless of the conservation goals.[41] Likewise, the laudable policy goals of a group boycott had no impact on its per se illegality in Federal Trade Commission v. Superior Court Trial Lawyers Association, where a legal group’s refusal to represent indigent defendants until their compensation increased was held unlawful.[42] The protest succeeded in forcing the city government to increase compensation, but they still lost in court: the Supreme Court held that though the rates had been “unreasonably low” and the boycott’s cause was “worthwhile,” it was nonetheless a classic restraint of trade.[43] In Professor Scott’s coffee market example, a cooperative of coffee roasters likely could not refuse to work with a certain roaster in protest of objectionable practices, whether using child labor or wasteful techniques;[44] this kind of group boycott to encourage a competitor to adopt “greener” practices risks per se illegal classification. Because courts cannot even consider the obviously beneficial goals of those types of agreements, corporations would be wise to avoid them entirely.

Even under the rule of reason, corporations face uncertainty over whether courts will consider procompetitive justifications rooted in social benefit. In general, courts applying the rule of reason “have rejected calls for consideration of the social value or purpose of a collective agreement.”[45] The Supreme Court has explicitly stated that “good intention” will not “save an otherwise objectionable regulation.”[46] For example, though the Court did not reject a mandatory National Collegiate Athletic Association price and broadcast agreement as per se illegal price-fixing, it still refused to consider arguments that the agreement was necessary to benefit society by maintaining the “revered tradition of amateurism in college sports.”[47] Courts have also cautioned that industry standards enforced by trade associations must be voluntary and noncoercive in order to survive scrutiny.[48] For example, binding industry standards that punish noncompliance with exclusion would likely be considered an illegal group boycott, especially if the exclusion was for the purpose of punishing the noncomplying member for its unsustainable conduct (consider a trade association removing a label certifying the product as “eco-friendly” after the company’s water uses fell out of compliance).[49] Assistant Attorney General Delrahim, Antitrust Division head, squarely reiterates that a redeeming intention cannot justify “collusive means” of enforcing cooperation.[50]

Under either type of antitrust analysis, corporate agreements that have a probable net effect of raising consumer prices or the appearance of a group boycott are likely to be met with substantial antitrust scrutiny, regardless of intent or even positive outcomes. As a result, corporations will likely refrain from socially beneficial cooperation that could raise consumer prices or exclude another competitor.[51]

III. Antitrust Scrutiny Frustrates Corporate Action on Climate Change, from Detergent to Cars

The chilling effect of looming antitrust scrutiny is especially concerning when it comes to climate change. Climate change is a unique problem, not only in that it requires uniform, ideally coordinated action, but the positive effects of addressing climate change are uniquely abstract, intangible, and distant. While the costs of climate change to business are not easily predicted,[52] the benefits of slowing or stopping climate change are most easily understood as mitigating expected losses, not generating positive economic gains. For example, limiting carbon emissions does not directly result in cheaper goods, in general.[53] This lack of clear consumer benefits leads to several distinct problems for corporate climate action.

## Cartels ADV

### No Conflict---2NC

#### Export cartels declining now.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

1. Improvement of China’s law

Private litigation can catalyse and reversely transform the legislative change although it is unlikely to resolve macroeconomic disputes.182 Some of Chinese old legislations have even legalised anti-competitive conduct, which was in direct conflict with US antitrust principles at issue in theVitamin C case.183 Similar casesmay be less likely to arise going forward because the development of China’s antitrust regime184 and its continued emphasis on market-oriented reforms have reduced state-compelled price fixing.185 It is noteworthy that antimonopoly law (AML 2008) regulates not only private actors but also government agencies when they get involved in the price fixing. 186 This means that executive branches could constitute an abuse of administrative monopoly.187 Institutionally, Chinese antitrust agencies have now been consolidated under the State Administration forMarket Regulation (SAMR).188 In the wake of the Vitamin C ruling, Anti-Monopoly Bureau is committed to advise Chinese MNCs on compliance with foreign laws.189 Accordingly, a proverbial rock and a hard place situation will be on decline, which makes it impossible for an entity to comply both conflicting sets of laws.190 Given the limited deference accorded to the MOFCOM, Chinese government agencies may thus be incentivised to avoid any potential inconsistency and even conflicts through ex ante coordination. Given the development of antitrust laws in China, US courts are less likely to encounter similar issues with Chinese MNCs in the future.191 Although significant differences between AML 2008 and the antitrust laws of the US persist, a true conflict between the Sherman Act and Chinese law is far less likely now than two decades ago.192

#### No empirical ev they even exist

Martyniszyn 12 (Dr. Marek, Senior Lecturer in Law at Queen’s University Belfast, PhD, University College Dublin, Export Cartels: Is it Legal to Target Your Neighbour?, Journal of International Economic Law, 3-29, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>, y2k)

It is acknowledged in the literature that empirical data on export cartels is lacking.16 This state of affairs seriously handicaps attempts to analyze this issue. It may well be that the greatest significance of export cartels, as seen through the lens of free trade, is symbolic. The principles underlying trade liberalization have been the antithesis of mercantilism, which is characterized by beggar-thy-neighbour policies. The fact of tolerance or even encouragement of export cartels may be seen, as Sweeney puts it, as a form of neo-mercantilism17 and thus contrary to the efforts of trade liberalisation. At the same time, Sokol rightly cautions that due to the lack of empirical data solutions to the issue of export cartels may be too reliant on theory with all the risks connected with the acceptance of various assumptions, which may be misguided.

#### No uniqueness for it

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

It is suggested that concerns regarding the link between competition policy and trade policy have been around since the pre-GATT period. There have also been attempts to integrate the competition policy with the WTO framework. Nonetheless, studies linking competition law and protectionism remained scant. While the protectionist tendencies of EU merger regulation enforcement have been explored empirically, little or nothing has been found in the US context. Furthermore, studies that relate export cartels to protectionism are mainly based on theoretical assumptions given the lack of empirical data to establish the economic effects of export cartels.

### No Blackouts Impact---2NC

#### All the important stuff is offline

Lila Kee 16, General Manager for GlobalSign's North and South American Operations, “Why Haven't We Seen a Disastrous Electric Power Grid Attack Yet?”, https://www.globalsign.com/en/blog/large-scale-electric-power-grid-attack/

If you based everything off what major news outlets are saying, you’d think our Critical National Infrastructure, particularly the energy sector, is riddled with weaknesses and ripe for a catastrophic cyber-attack. But the reality is, we haven’t experienced one yet (thankfully). Putting aside larger political reasons (fear of retaliation, widespread economic effects, etc.), is it possible that we haven’t seen one because these vulnerabilities have been overstated or the likelihood has been exaggerated? Below are some of my personal thoughts on the matter. Note: To be clear, I do not mean to imply we are “in the clear” and don’t need to worry about cybersecurity for the energy grid. On the contrary, continual efforts on best practices development, standards creation, regulation and vertical-specific technologies is of the utmost importance, especially as energy systems are brought online. I’m merely trying to see through the FUD and showcase the efforts that have helped keep the grid safe so far. Major Systems Have Been Offline and New Smart Systems Will Be Secured from the Start Grid providers are being hacked every day (303 incidents were reported to the Industrial Control Systems Cyber Emergency Response Team [ICS-CERT] in 2015), but most of those hacks were unsuccessful due to major systems that could cause devastation being either off-line or accessible only by private networks (i.e. not run over the internet). Vulnerabilities to older systems are being addressed through retrofits, but again most of these systems are offline. The good news is the next generation of smart grid systems are being designed with security in mind from day one. One good example is the Open Field Message Bus (OpenFMB) framework that provides a specification for intelligent power systems field devices to leverage a nonproprietary and standards-based reference architecture, which consists of internet protocol (IP) networking and Internet of Things (IoT) messaging. OpenFMB is one of Smart Grid Interoperability Panel’s (SGIP) Energy IoT initiative projects, developed to accelerate IoT innovation within the energy industry. As seen in other industries such as automotive, manufacturing and smart cities, the value added services around energy grid IoT innovation are virtually limitless. However, just like other industries, security concerns are top of mind. That’s where the North American Energy Standards Board’s (NAESB) role really proves vital. OpenFMB has smartly teamed with NAESB to develop a complementary set of standards for utility providers to follow. Given NAESB’s track record of standards development and tight relationship with NERC and FERC, a set of standards to accompany OpenFMB’s specification is more likely to gather industry participation and accelerate adoption.

## Indigenous Regimes ADV

### No Antitrust Modeling---Irrationality---2NC

#### Hyperpartisanship exacerbates that perception internationally.

William E. Kovacic 15, Professor of Law and Policy at George Washington University, former General Counsel for the Federal Trade Commission, J.D. from Columbia University, “The United States and Its Future Influence on Global Competition Policy,” George Mason Law Review, Vol. 22, 2015, accessed via Lexis

Since the early 1980s, the irrationality narrative has acquired an increasingly partisan dimension. 105 Partisan narrators denigrate the contributions of political opponents and exaggerate the accomplishments of their own party. 106 Partisan narratives distort antitrust experience and claim credit for achievements that required contributions across several presidential administrations, including eras in which a regime change took place. 107 The partisan voice attributes severe variations in activity to appointees chosen by one's political opponents: choose my team, and the system performs sensibly, but elect my opponents, and federal enforcement leaves the rails.

To foreign observers, the partisan explanation for enforcement variations suggests that U.S. enforcement policy is driven chiefly by politics. By this view, the system lacks a widely accepted, stable core and swings dramatically depending on election results. Through publications and speeches, the competition policy community outside the U.S. hears respected American scholars suggest that the party of the president determines whether antitrust enforcement thrives or withers. 108 In this narrative, institutional arrangements [\*1179] and a norm of professionalism play weak, secondary roles in constraining political appointees.

One sign of partisanship in the irrationality narrative is the emphatic statement of fact that the speaker knows, or should know, is incorrect. As noted above, the portrayal of irrationality relies heavily on the depiction of extreme behavior. 109 A partisan commentator strives to portray the political opponent as given to extreme policies, and this extremism is contrasted with the narrator's own sensible policy preferences. To admit that an opponent sometimes, or even often, behaves responsibly robs the narrative of its power.

Professor Pitofsky's account of Reagan Administration enforcement policy involving dominant firm behavior illustrates the phenomenon. In an article published in 1987, Professor Pitofsky said "although section 2 of the Sherman Act still outlaws monopolization, the [Reagan] Administration has brought not a single case in seven years." 110 In the first seven years of the Reagan Administration, the FTC brought two monopolization cases, including a widely publicized matter involving abuse of government processes as an exclusionary device. 111 A review of the FTC cases from 1981 through 1987 would have revealed that the FTC's prosecution of monopolization violations exceeded more than "not a single case." 112

Several years later, Professor Pitofsky again scolded the Reagan antitrust agencies for their inattention to dominant firm misconduct. As noted above, Professor Pitofsky several times accused Reagan antitrust officials of abandoning the field in the early 2000s. 113 In one article, Professor Pitofsky said that during the Reagan era "there was no enforcement whatsoever" against attempts to monopolize or monopolization. 114 In a second article, he said that during the Reagan Administration, "there was an absence of enforcement against . . . monopolization and attempts to monopolize . . . ." 115

[\*1180] The DOJ and the FTC brought a total of four matters focused on attempted monopolization or monopolization during the Reagan presidency. 116 By some historical measures, four dominant firm misconduct cases is a relatively small number. 117 It is nevertheless unmistakably more than "an absence" or "no enforcement whatsoever." 118 One of the four Reagan-era cases--the prosecution of American Airlines for attempting to monopolize passenger service in and out of Dallas-Fort Worth 119--was especially noteworthy and provided a crucial legal foundation for the DOJ's prosecution of Microsoft in the late 1990s for illegal monopolization. 120 Given its colorful circumstances and doctrinal importance, no prominent antitrust scholar could have missed it, and there is good reason to think Professor Pitofsky was aware of the case. 121 For the sake of a clean narrative that discredits political adversaries, the American Airlines 122 case had to disappear. Partisanship provides the motivation to say there was "no enforcement whatsoever" instead of acknowledging that there were a few dominant-firm-conduct cases, including at least one with arguably substantial significance. 123

The partisan ingredient of the irrationality narrative surfaced powerfully in the run-up to the 2008 presidential election and in the years following President Barack Obama's inauguration in January 2009. 124 Leading U.S. antitrust scholars argued that the wise antitrust centrism of the Clinton Administration had given way, during the George W. Bush presidency, to the inactivity doldrums seen earlier in the Reagan era. 125 Professor Pitofsky observed in 2008 that the pursuit of "a middle ground between overenforcement [\*1181] of the 1960s and underenforcement of the 1980s . . . came to an end with appointments during President Bush's second term of some agency enforcement officials, lower court judges and, most important, the confirmation of two conservative justices to the Supreme Court . . . ." 126 Through these individuals, "extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of the facts) have come to dominate antitrust . . . ." 127

I am not a disinterested bystander in these events. By the time Professor Pitofsky made the comments quoted above, President Bush had appointed a total three persons to the federal antitrust agencies: Thomas Barnett was appointed to the DOJ, while Thomas Rosch and I were appointed to the FTC. 128 During a visit to Europe in 2008 as Chair of the FTC, I met a foreign enforcement official who, after reading Professor Pitofsky's statement, had identified the three individuals appointed by President Bush in his second term to the federal antitrust agencies. Noting that the Pitofsky remark ("appointments . . . of some agency enforcement officials" 129) seemed to apply to two of the three, he asked, "Are you the one who constantly disregards the facts, or is it only Barnett and Rosch?" I can attest to the difficulty of defending the legitimacy of the U.S. antitrust system as a government official at international events after a revered U.S. scholar suggests that DOJ and FTC leadership is extremist and intellectually dishonest.

The depiction of extremism, a certifying trait of the irrationality narrative, anchored the critique of the Bush program. 130 The sweeping categorical characterizations common in discussions of the Reagan antitrust program now were cast at the Bush presidency. 131 At a conference in 2009, Professor Harvey Goldschmid said "there has been no enforcement" of Sherman Act § 2 during the George W. Bush Administration. 132 In a similar vein, in the 2010 edition of their antitrust casebook, Professor Pitofsky, Professor Goldschmid, and Judge Diane Wood wrote that there was "no enforcement at all against vertical or conglomerate mergers during the Bush Administration." 133

[\*1182] Professor Goldschmid's "no enforcement" comment ignored the FTC's prosecution during the George W. Bush administration of monopolization cases that yielded substantial, measurable economic benefits for consumers in the pharmaceutical and petroleum sectors. 134 The FTC's unsuccessful challenge to alleged monopolization by Rambus 135 is reported as a principal case in the 2010 edition of the Pitofsky, Goldschmid, and Wood casebook. 136 The efforts that casebook authors usually make to follow federal merger enforcement developments likewise would preclude a claim that there was "no enforcement at all" against vertical mergers in this period. 137

The volume of vertical merger cases from 2001 to 2008 was not high, but enforcement did take place. 138 Why would renowned students of the U.S. antitrust system insist so strongly ("no enforcement at all" 139) that nothing happened? This is the power of irrationality narrative and partisanship at work. The narrators distorted experience to create artificially sharp contrasts, disparage opponents, and showcase the wisdom of their own preferences.

As the discussion here suggests, I contest the factual assumptions that underpin the irrationality interpretation of modern U.S. federal enforcement experience. The fondness for stark polarities (my team is enlightened, your team is demented; my team did everything, your team did nothing) is destructive. It prevents the attainment of a fuller understanding of how U.S. antitrust policy has changed over time. It also obscures the complex mix of forces--individual leadership, institutional arrangements, and the larger [\*1183] economic context--that accounts for policy adjustments. The irrationality narrative is a dreadfully crude diagnostic device in an era where much better analytical tools are available.

But let's assume that the factual predicates of the irrationality narrative are exactly right. Let's say that the story accurately documents the U.S. system's tendency to swing dramatically to extremes, with only occasional periods of lucidity. This is a most discouraging portrait of American antitrust policy and not a recommendation for emulation abroad. In this regime, politics and personalities count for everything, and institutions have no capacity to discipline decision-making or foster useful policy refinements. It is easy to see how foreign observers who read such commentary would hesitate to respect or emulate an antitrust regime with a reputation so volatile and unprincipled. It is not reassuring to say that the system functions properly only if election results bounce the right way.

# 1NR

## Litigation DA

### Impact---2NC

#### It says disease---extinction

Thomas Such 21, Writer for the Glasgow Guardian, “How to Wipe Out Humanity”, The Glasgow Guardian, 2/9/2021, https://glasgowguardian.co.uk/2021/02/09/how-to-wipe-out-humanity/

Not only is a virus the key to an unpredictable disease which may one day wipe out humanity, but the origins of said virus are key. My “research” concluded that the most efficient way of killing humanity is to have the disease spread in a semi-developed country such as China; it is far easier for viruses and other diseases to spread in less developed countries - but in order to successfully achieve global transmission, a host country must have the substantial international infrastructure to spread a pandemic worldwide. Using this strategy in my “research”, I was able to play a game of Plague Inc. wherein the spread and threat of Covid-19 seemed minimal by using China as a perfect starting point to wipe out humanity. The key, as it turns out, is the spreading of the virus - something that Covid-19 has proved can be done very easily in our modern globalised society. The journey from China to Italy spreading the plague across Europe took almost 40 years back in the middle ages: in 2020, it took a mere 40 days for widespread outbreaks to begin in Italy spreading across much of Europe.

My research into the historical spread of pandemics and my attempts to create my destroyer of humanity illustrates a significant disparity between what happens in the real world and the measures one may find in a simulator. Political realities and measures many may consider “draconian” or simply unrealistic heavily impact how a pandemic may spread and the eventual impact it will have on humanity. Using Plague Inc., I was able to effectively kill off humanity in around a year using a fast transmission of virus, which also became gradually more lethal. This is essential to ensure the near-universal transmission of the virus, and to penetrate measures such as increased border security and isolated regions once the knowledge of the pandemic spreads. Whilst it is unlikely that humanity will be wiped out any time soon, it became clear to me that instead of nuclear war, alien invasion or the looming threat of global warming; the real threat to humanity and the eventual destruction of our species may come from something as simple as bacteria. While we like to revel in our scientific advancements of the modern era and the ascension of humans as Earth’s alpha species, it becomes clear that, when we adapt, our environment and the threats it poses adapt with us. Plague Inc. showed a clear pathway to killing off humanity - though, luckily, the Covid-19 threat in the program was combated due to immense political pressure, restrictions and record-making vaccine paces. The real threat, however, remains clear: if humanity becomes increasingly lax with preventive and managerial measures, it is obvious what the future may hold for us.

### AT: Link Turn

#### Even worse, cases that would meet standing requirements under their framework are uniquely burdensome because they require separate, fact-intensive, entirely foreign discovery.

William H. Taft 4, IV, Legal Adviser, United States Department of State; John D. Graubert, Acting General Counsel, Federal Trade Commission; Edwin S. Kneedler, Acting Solicitor General, Counsel of Record; R. Hewitt Pate, Assistant Attorney General; Makan Delrahim, Deputy Assistant Attorney General; Lisa S. Blatt, Assistant to the Solicitor General; Robert B. Nicholson and Steven J. Mintz, Attorneys, Department of Justice, “Brief for the United States as Amicus Curiae Supporting Petitioners,” F. HOFFMANN-LA ROCHE LTD., et al., Petitioners, v. EMPAGRAN, S.A., et al., 2004 WL 234125, WestLaw

For plaintiffs whose injuries are sustained in United States commerce, proof of the FTAIA's prerequisites will overlap substantially with the merits of the plaintiff's claim. But for plaintiffs entitled to sue under the court of appeals' holding, i.e., plaintiffs whose injuries are sustained entirely abroad and arise from purely foreign transactions, the statutory inquiry would turn on claims and persons not before the court. Courts faced with such suits nonetheless would be forced to adjudicate whether the challenged foreign conduct was part of some global conspiracy, whether that global conspiracy had the requisite effects on domestic commerce, and whether some third person was injured in United States commerce in such a way that gave rise to a claim. Pet. App. 4a, 20a. Those questions might be intensely factual, hotly disputed, and difficult to resolve, particularly when the critical person and claim are not before the court. The court of appeals' decision thus would thrust upon federal courts the potential for burdensome and protracted satellite litigation that is far removed from the claim before the court.

#### It’s not just the merits---answering the jurisdictional question alone is a massive resource drain that must be done for every litigant who decides to merely allege the existence of a cartel.

UCAR 4, “Defendants' Reply Brief in Support of Their Renewed Motions to Dismiss in Light of Empagran,” FERROMIN INTERNATIONAL TRADE CORPORATION, et al., Plaintiffs, v. UCAR INTERNATIONAL, INC., et al., Defendants.; Bhp New zealand, Ltd., et al., Plaintiffs, v. UCAR International, Inc., et al., Defendants., 2004 WL 3685128, WestLaw

Plaintiffs also fail to seriously contest that their theory of ”“linked‘’ effects would greatly expand the administrative burden on U.S. courts by inviting claims from plaintiffs injured anywhere in the world based only on allegations of a global cartel. This is precisely the result that the Supreme Court sought to avoid in Empagran. Plaintiffs claim only that this burden would be no different than the market definition requirements imposed by claims of attempted monopolization and rule of reason analysis. Plaintiffs' Opposition at 20-21. Unlike a rule of reason analysis undertaken to establish liability, Plaintiffs' theory would require courts to engage in a lengthy and fact-intensive inquiry merely to determine jurisdiction -- a threshold requirement that must be addressed in all cases. Instead of proving the relevant market at summary judgment or at trial, under Plaintiffs' theory every foreign plaintiff would have to establish the relevant market just to enable the court to evaluate jurisdiction. This result would contravene the Supreme Court's admonition that the FTAIA's jurisdictional test be capable of being applied ” “simply and expeditiously.‘’ 124 S.Ct. at 2369.

#### Spills over to other issues within AND outside antitrust law---specifically the ATS

Daniel J. Popeo & Richard A. Samp 6, Daniel J. Popeo, Richard A. Samp, (Counsel of Record), Washington Legal Foundation, “Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioners,” BELL ATLANTIC CORPORATION, et al., Petitioners, v. William TWOMBLY, et al., individually and on behalf of all others similarly situated, Respondents, 2006 WL 927205, WestLaw

The Petition fully explains why the decision below not only conflicts with the prior decisions of this Court and other circuits but also presents a recurring issue of substantial importance in the field of antitrust law. WLF writes separately to stress that review is also warranted because the decision below will have substantial impact in numerous cases not involving Sherman Act Section 1 conspiracy claims. Indeed, the unwillingness of the lower federal courts to grant meritorious Rule 12(b)(6) motions to dismiss has been a widespread problem that has resulted in wasteful litigation and nuisance settlements.

The Second Circuit readily acknowledged that permitting complaints of this sort to proceed past the pleadings stage can have significant costs:

We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the \*13 manner in which and efficiency with which business is conducted.

Pet. App. 30a. In light of those acknowledged costs, review is warranted to determine whether, as the Second Circuit believed, those costs are really necessitated by the terms of Fed.R.Civ.P. 8(a).

Moreover, those costs - including resulting payments to settle what would ultimately be shown to be meritless claims - are not confined to Section 1 cases. This brief highlights recurring claims in other areas of the law in which the inability sof defendants to prevail on meritorious Rule 12(b)(6) motions to dismiss has forced the settlement of numerous suits despite what often appear to be factually insufficient allegations in the complaint.

The Alien Tort Statute. The Alien Tort Statute (ATS), 28 U.S.C. § 1350, provides the federal courts with jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Adopted in 1789, the ATS lay dormant for nearly 200 years until the Second Circuit held in 1980 that federal courts had jurisdiction under the ATS to hear claims that a Paraguayan police officer had tortured a fellow citizen. Filartiga v. PenaIrala, 630 F.2d 876 (2d Cir. 1980). This Court held in Sosa v. Alvarez-Machain, 542 U.S. 692, 720 (2004), that “Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations.” That set of actions includes three offenses recognized by Blackstone in the 18th century - “violations of safe conducts, infringement of the rights of ambassadors, and piracy” - as well as additional actions whose scope the Court did not attempt to define: violations of “the present-day law of nations” that “rest on a norm of international character accepted by the \*14 civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” Sosa, 542 U.S. at 725.

Although the Court warned that the lower courts should exercise “great caution in adapting the law of nations to private rights,” id at 729, the number of ATS suits pending in federal court has exploded in recent years. A primary target of these suits has been American multi-national corporations whose overseas activities are alleged to violate international law. A common theme of many of these suits is an allegation that foreign governments mistreated their own citizens while providing security for an American corporation’s operations, and that the corporation should be found liable in an ATS suit for aiding and abetting the mistreatment. See, e.g., Daniel Diskin, The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute, 47 Ariz. L. Rev. 805 (2005) (collecting cases).

#### ATS litigation crushes courts

David B. Rivkin 12, Jr. Counsel of Record Lee A. Casey Mark W. DeLaquil Andrew M. Grossman Baker & Hostetler LLP, “Brief of KBR, Inc., as Amicus Curiae in Support of Respondents,” Esther KIOBEL, individually and on behalf of her late husband, et al., Petitioners, v. ROYAL DUTCH PETROLEUM CO., et al., Respondents, 2012 WL 379577, WestLaw

\*30 C. Recognizing Corporate Liability Will Open the Floodgates to Abusive Litigation

Despite Sosa’s command that lower courts should not recognize private claims for violations of norms with “less definite content and acceptance” among nations as those familiar when the ATS was enacted, 542 U.S. at 732, human rights activists, anti-business campaigners, and academics continue to develop and pursue legal theories intended to thrust federal courts into enforcing their preferred norms under the ATS. Too often, as a practical matter, they succeed.

A broad literature is devoted to teasing out often-surprising norms of international law, usually by citation to and analysis of other words in this canon, as a prelude to litigation. See, e.g., Pauline Abadie, A New Story of David and Goliath: The Alien Tort Claims Act Gives Victims of Environmental Injustice in the Developing World a Viable Claim Against Multinational Corporations, 34 Golden Gate L. Rev. 745 (2004) (arguing that the ATS should be used to enforce international environmental norms against multinational corporations); Vanessa Waldref, The Alien Tort Statute after Sosa: A Viable Tool in the Campaign To End Child Labor?, 31 Berkeley J. Emp. & Lab. L. 160 (2010) (arguing that, despite legal uncertainty, the ATS should be used to combat foreign child labor “[b]ecause corporations desire to avoid negative publicity, costly litigation, and the risk of damaging ATS precedent”); Matt Vega, \*31 Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable For Foreign Bribery Under the Alien Tort Statute, 31 Mich. J. Int’l L. 385 (2010) (arguing that “foreign bribery is a violation of the law of nations that should be actionable under the ATS”); Margaret Kwoka, Vindicating the Rights of People Living with AIDS Under the Alien Tort Claims Act, 40 Loy. U. Chi. L. J. 643 (2009) (arguing that pharmaceutical company’s lawsuits to protect their intellectual property rights over AIDS treatments are themselves actionable under the ATS); Joel Slawotsky, International Product Liability Claims Under the Alien Tort Claims Act, 16 Tul. J. Int’l & Comp. L. 157 (2007) (arguing that product liability claims are cognizable under the ATS); Comment, An Open Door To Ending Exploitation: Accountability for Violations of Informed Consent Under the Alien Tort Statute, 155 U. Pa. L. Rev. 231 (2006) (arguing that violations of informed consent in clinical trials remain actionable under the ATS after Sosa); Joel Slawotsky, The New Global Financial Landscape: Why Egregious International Corporate Fraud Should Be Cognizable Under the Alien Tort Claims Act, 17 Duke J. Comp. & Int’l L. 131 (2006) (arguing that “select” instances of corporate fraud are actionable under the ATS).

Some of these novel theories have even been the subject of actual legal claims. See, e.g., Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (reversing dismissal of ATS action claiming that pharmaceutical manufacturer failed to obtain adequate informed consent).

\*32 As unlikely as many of these theories may be to survive a rigorous application of Sosa’s principles, they need not necessarily overcome that hurdle to survive. In many cases, litigants may be able to delay or avoid real scrutiny by forcing recusals of judges believed to be unfavorable to their actions. Often, corporate defendants simply settle ATS claims, so as to avoid bad publicity, legal expenses, and the uncertain risk of a negative outcome. See, e.g., Wiwa v. Shell: The $15.5 Million Settlement, Am. Soc. of Int’l L. Insights, Sept. 9, 2009 (“The cost of ongoing litigation and prospect of negative publicity from the trial (regardless of the verdict) probably played a role in the defendants’ willingness to settle on the eve of trial,” thirteen years after the case was brought.); Major Corporations Settle Alien Tort Statute Cases Following Adverse Appellate Rulings, 103 Am. J. Int’l L. 592 (2009) (reporting other pre-trial settlements of ATS claims).

Sosa did not, in the end, shut the courthouse doors to activists’ claims against private corporations premised on highly-tenuous theories of liability under customary international law. A decision that authorizes corporate liability for violations of norms, despite that it is not established in history and practice, will unleash a flood of litigation, with many cases amounting to little more than attempts at extortion. Unfortunately, due to the practical difficulties of ATS litigation, many of these cases will linger for years, with some even being resolved in plaintiffs’ favor.

### AT: Thumpers

#### Litigation is controlled

Emily S. Taylor Poppe 21, Assistant Professor of Law at the University of California, Irvine School of Law, “Institutional Design for Access to Justice”, UC Irvine Law Review, 11 U.C. Irvine L. Rev. 781, February 2021, Lexis

This law-centric orientation is strikingly different from that of most Americans, despite popular claims about their litigiousness. Most individuals never even identify the civil legal problems they experience as "legal." Only a tiny minority will ever seek legal advice in response to a problem, and most are more likely to do nothing than to file a lawsuit. Decades of empirical scholarship have confirmed that despite the prevalence of civil legal problems in everyday life, there is remarkably little recourse to formal law.

[FOOTNOTE]

DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE 3 (2016) (noting that "specious claims of a litigation explosion have been made so often that they have rooted themselves in the national psyche").

#### Filing data proves

Joanna C. Schwartz 20, Professor of Law at the UCLA School of Law, “Qualified Immunity and Federalism All the Way Down”, Georgetown Law Journal, 109 Geo. L.J. 305, December 2020, Lexis

Concerns about increased government liability were in the air during the 1970s and 1980s. During that period, the "dominant articulated perception of constitutional tort litigation" was that § 1983 "cases flood the federal courts." The Supreme Court first recognized a cause of action against state and local government officials under § 1983 in 1961, and the number of civil rights filings increased from several hundred to tens of thousands in the years between 1961 and 1979. This expansion in federal civil rights filings and liability corresponded with a collapse of the insurance market for municipal liability coverage. As John Rappaport has described, municipal liability insurance was widely available from the 1960s to the mid-1970s. Then the market contracted, with [\*323] premiums doubling between 1974 and 1976, and many jurisdictions were left uninsured by 1977. After a few years of improvement, there was another decline in the early 1980s.

[FOOTNOTE] Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 645 (1987); see also Maine v. Thiboutot, 448 U.S. 1, 24 (1980) (Powell, J., dissenting) ("There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought."); Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 98th Cong. 5-13 (1984) (statement of John D. Ashcroft, Att'y Gen. of Missouri) (explaining that § 1983 filings against police officers "skyrocket[ed]" from the mid-1960s to the mid-1970s, growing "in the thousands of percentage increase[s]"); Ruggero J. Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 LAW & SOC. ORD. 557, 563, 567 (arguing that the "deluge" of § 1983 cases from 1960 to 1971 and the Court's decisions that "substantially expand[ed] section 1983's subject matter jurisdiction" have "placed additional burdens on federal courts"). Note, however, that Eisenberg and Schwab, after examining the evidence, concluded that "[n]ational filing data refute the myth of a recent civil rights litigation explosion." Eisenberg & Schwab, supra, at 695. [END FOOTNOTE]

#### Prefer our evidence---it’s based on the best empirical studies

Cary Coglianese 20, Edward B. Shils Professor of Law and Professor of Political Science at the University of Pennsylvania Law School, and Daniel E. Walters, Assistant Professor of Law at the Pennsylvania State University Law School, “Litigating EPA Rules: A Fifty-Year Retrospective of Environmental Rulemaking in the Courts”, Case Western Reserve Law Journal, 70 Case W. Res. 1007, Summer 2020, Lexis

Over the last twenty-five years, a number of quantitative studies have cast new light on litigation over EPA rules. In this article, we not only compile and synthesize the findings from these various studies but also offer new data of our own: the first quantitative comparison of all EPA rules issued since the agency's beginning with all appellate decisions involving EPA. Our aim here is not to distill doctrinal lessons as much as to offer some empirical observations about rulemaking litigation over the last fifty years.

These patterns can and do hold doctrinal implications. Based in part on perceptions that EPA has been besieged with litigation over its rules, administrative law scholars have argued for legal changes to avoid the ossification of administrative rulemaking. But as we show here, the sweep of EPA's history offers an empirical portrait at odds with such conventional perceptions. Judging from the sheer magnitude of EPA rules, we see little evidence that rulemaking at the agency has been ossified. Furthermore, empirical studies reveal little to suggest that EPA has ever been overwhelmed by litigation challenging its rules. Perhaps with the exception of the last few years, the agency's rules appear remarkably resistant to reversal through litigation.

### Turns Case

#### Overload from litigation trades-off with judicial exchanges

Matthew J. Wilson 13, Associate Dean of Academic Affairs and Professor of Law at the University of Wyoming College of Law, “Improving the Process: Transnational Litigation and The Application of Private Foreign Law in U.S. Courts”, International Law and Politics, Summer 2013, http://nyujilp.org/wp-content/uploads/2014/01/45.4-Wilson.pdf

In light of increasing global integration and various international outreach activities by the U.S. judiciary, the timing is right for expanding cross-border cooperation and interaction among judiciaries.98 Relationships have developed over the past several decades among judicial systems making information exchanges in civil cases possible on a level never seen before. Judges increasingly appreciate that they function within a common transnational system. Cooperative activities including international educational exchanges, “sister-court” relationships, judicial outreach activities, international judicial conferences, informal meetings, seminars, and similar opportunities for transnational judicial interaction have furthered cordial relationships. Interaction during cross-border criminal cases has done the same.

These activities have also laid a strong foundation for certification- like arrangements. The relationship between the court systems of New York and New South Wales, Australia (NSW) is a prime example. In 2010, the New York state judiciary entered into an informal certification procedure with the NSW courts in the form of a bilateral Memorandum of Understanding (MOU) that contemplates reciprocal cooperation and consultation between their respective judicial systems to enable the parties to obtain correct and authoritative applications of law.99 As the first agreement of its kind between a U.S. and foreign judicial system, this MOU was also designed to combat the high cost of legal experts and reduce the confusion caused by conflicting accounts of foreign law.100 In principle, with the litigants’ consent, the MOU allows both jurisdictions to exchange analysis about a contested dispositive legal issue.101

The path to a successful transnational certification system involves finding the time and resources to answer legal questions received from foreign courts. Court systems in the United States and other countries are often overburdened with their own civil caseloads. Adding another dimension of legal review to the mix could overwhelm some courts. However, courts might look to emeritus or retired judges for special assistance. They might also tap into other competent court officials. Many countries maintain a Central Authority that could provide accurate information regarding their domestic law. Alternatively, court systems could rely on current judges who are interested in international cooperation and who are willing to volunteer their time and expertise. By way of illustration, the New York State court system is relying upon volunteer judges to operate their informal certification system with New South Wales. New York has staffed its “certification” board with one volunteer judge from the New York Court of Appeals and one volunteer judge from each appellate division.102 With an eye towards enhancing accuracy and promoting comity, a panel of three judges functioning as referees will consider any certified questions about New York law submitted by NSW courts and provide a report prepared outside of work hours.103

## RICO DA

### Impact---2NC

#### Turns every impact

Geoffrey Kemp 10, Director of Regional Strategic Programs at The Nixon Center, Served in the White House Under Ronald Reagan, Special Assistant to the President for National Security Affairs and Senior Director for Near East and South Asian Affairs on the National Security Council Staff, Former Director, Middle East Arms Control Project at the Carnegie Endowment for International Peace, 2010, The East Moves West: India, China, and Asia’s Growing Presence in the Middle East, p. 233-234

The second scenario, called Mayhem and Chaos, is the opposite of the first scenario; everything that can go wrong does go wrong. The world economic situation weakens rather than strengthens, and India, China, and Japan suffer a major reduction in their growth rates, further weakening the global economy. As a result, energy demand falls and the price of fossil fuels plummets, leading to a financial crisis for the energy-producing states, which are forced to cut back dramatically on expansion programs and social welfare. That in turn leads to political unrest: and nurtures different radical groups, including, but not limited to, Islamic extremists. The internal stability of some countries is challenged, and there are more “failed states.” Most serious is the collapse of the democratic government in Pakistan and its takeover by Muslim extremists, who then take possession of a large number of nuclear weapons. The danger of war between India and Pakistan increases significantly. Iran, always worried about an extremist Pakistan, expands and weaponizes its nuclear program. That further enhances nuclear proliferation in the Middle East, with Saudi Arabia, Turkey, and Egypt joining Israel and Iran as nuclear states. Under these circumstances, the potential for nuclear terrorism increases, and the possibility of a nuclear terrorist attack in either the Western world or in the oil-producing states may lead to a further devastating collapse of the world economic market, with a tsunami-like impact on stability. In this scenario, major disruptions can be expected, with dire consequences for two-thirds of the planet’s population.

#### Externally---RICO suits finance state-sponsored terror

Ignacio Sanchez 6, Partner in the Washington, D.C. Office of DLA Piper Rudnick Gray Cary US LLP, “Foreign Government’s Misuse Of Federal Rico: The Case For Reform,” May, https://www.wlf.org/wp-content/uploads/2020/02/5-06SanchezWP.pdf

But the issue is larger than just opportunistic foreign governments seeking deep-pockets of American companies. Congress must also consider that if a foreign government is a “person” who can sue under RICO, it may be subject to suit as well –again, a result that Congress likely never intended. The fact is that the foreign governments that are forum shopping in U.S. courts under RICO already have, or have the power to enact, adequate judicial remedies in their own countries – and there is no reason to continue to allow them to abuse the U.S. judicial system. It is only a matter of time before governments with ties to terrorism look to these lawsuits as a potential means to finance illicit activities.

There is no legitimate policy reason to grant foreign governments more power under U.S. laws than that of the U.S. government.76 When Congress was faced with the issue of whether foreign entities could challenge U.S. regulations on Trade Promotion Authority in ways that U.S. entities could not, it made clear its objection. Congress directed the Administration to “ensure that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States.”77 Congress recognized that foreign countries should not be favored in U.S. courts in this trade agreement, and they can reaffirm this same policy with respect to foreign government civil RICO lawsuits as well.

Congress can make clear that foreign governments are not “persons” eligible to bring civil RICO damage claims with one small revision to §1964. Requests from U.S. courts to clarify statutory language must be taken seriously. Requests from the U.S. executive branch to maintain the proper separation of powers should be taken seriously as well – particularly when the adverse consequences could be as costly as they are in this matter.

#### Financing causes nuke terror---extinction

Dr. Peter J. Hayes 18, Executive Director of the Nautilus Institute for Security and Sustainability, Ph.D. in Energy and Resources from the University of California-Berkeley, Professor of International Relations at RMIT University, “Non-State Terrorism and Inadvertent Nuclear War”, NAPSNet Special Reports, 1/18/2018, <https://nautilus.org/napsnet/napsnet-special-reports/non-state-terrorism-and-inadvertent-nuclear-war/>

For non-state actors to succeed at complex engineering project such as acquiring a nuclear weapons or nuclear threat capacity demands substantial effort. Gary Ackerman specifies that to have a chance of succeeding, non-state actors with nuclear weapons aspirations must be able to demonstrate that they control substantial resources, have a safe haven in which to conduct research and development, have their own or procured expertise, are able to learn from failing and have the stamina and strategic commitment to do so, and manifest long-term planning and ability to make rational choices on decadal timelines. He identified five such violent non-state actors who already conducted such engineering projects (see Figure 3), and also noted the important facilitating condition of a global network of expertize and hardware. Thus, although the skill, financial, and materiel requirements of a non-state nuclear weapons project present a high bar, they are certainly reachable.

Table

Description automatically generated

Along similar lines, James Forest examined the extent to which non-state actors can pose a threat of nuclear terrorism.[10] He notes that such entities face practical constraints, including expense, the obstacles to stealing many essential elements for nuclear weapons, the risk of discovery, and the difficulties of constructing and concealing such weapons. He also recognizes the strategic constraints that work against obtaining nuclear weapons, including a cost-benefit analysis, possible de-legitimation that might follow from perceived genocidal intent or use, and the primacy of political-ideological objectives over long-term projects that might lead to the group’s elimination, the availability of cheaper and more effective alternatives that would be foregone by pursuit of nuclear weapons, and the risk of failure and/or discovery before successful acquisition and use occurs. In the past, almost all—but not all—non-state terrorist groups appeared to be restrained by a combination of high practical and strategic constraints, plus their own cost-benefit analysis of the opportunity costs of pursuing nuclear weapons. However, should some or all of these constraints diminish, a rapid non-state nuclear proliferation is possible.

Although only a few non-state actors such as Al Qaeda and Islamic State have exhibited such underlying stamina and organizational capacities and actually attempted to obtain nuclear weapons-related skills, hardware, and materials, the past is not prologue. An incredibly diverse set of variously motivated terrorist groups exist already, including politico-ideological, apocalyptic-millenarian, politico-religious, nationalist-separatist, ecological, and political-insurgency entities, some of which converge with criminal-military and criminal-scientist (profit based) networks; but also pyscho-pathological mass killing cults, lone wolves, and ephemeral copy-cat non-state actors. The social, economic, and deculturating conditions that generate such entities are likely to persist and even expand.

In particular, rapidly growing coastal mega-cities as part of rapid global urbanization offer such actors the ability to sustain themselves as “flow gatekeepers,” possibly in alliance with global criminal networks, thereby supplanting the highland origins of many of today’s non-state violent actors with global reach.[11] Other contributing factors contributing to the supply of possible non-state actors seeking nuclear weapons include new entries such as city states in search of new security strategies, megacities creating their own transnationally active security forces, non-states with partial or complete territorial control such as Taiwan and various micro-states, failing states, provinces in dissociating, failing states that fall victim to internal chaos and the displacement effects of untrammeled globalization, and altogether failed states resulting in ungoverned spaces. To this must be added domestic terrorist entities in the advanced industrial states as they hollow out their economies due to economic globalization and restructuring, adjust to cross-border migration, and adapt to cultural and political dislocation.

In short, the prognosis is for the fifth tier of non-state actors to beset the other four tiers with intense turbulence just as waves on a beach swirl around sandcastles, washing away their foundations, causing grains of sand to cascade, and eventually collapsing the whole structure.

Observed non-state nuclear threats and attacks

In light of the constraints faced by non-state terrorist actors in past decades, it is not surprising that the constellation of actual nuclear terrorist attacks and threats has been relatively limited during and since the end of the Cold War. As Martha Crenshaw noted in a comment on the draft of this paper:

We still don’t know why terrorists (in the sense of non-state actors) have not moved into the CBRN [chemical,biological, radiological or nuclear ] domain. (Many people think biosecurity is more critical, for that matter.) Such a move would be extremely risky for the terrorist actor, even if the group possessed both capability (resources, secure space, time, patience) and motivation (willingness to expend the effort, considering opportunity costs). So far it appears that “conventional” terrorism serves their purposes well enough. Most of what we have seen is rhetoric, with some scattered and not always energetic initiatives.[12]

Nonetheless, those that have occurred demonstrate unambiguously that such threats and attacks are not merely hypothetical, in spite of the limiting conditions outlined above. One survey documented eighty actual, planned attacks on nuclear facilities containing nuclear materials between 1961-2016[13] as follows:

80 attacks in 3 waves (1970s armed assaults, 1990s thefts, post-2010, breaches)

High threat attacks: 32/80 attacks posed substantial, verified threat of which 44 percent involved insiders.

All types of targets were found in the data set—on reactors, other nuclear facilities, military bases leading Gary Ackerman and to conclude: “Overall, empirical evidence suggests that there are sufficient cases in each of the listed categories that no type of threat can be ignored.”[14]

No region was immune; no year was without such a threat or attack. Thus, there is a likely to be a coincidence of future non-state threats and attacks with inter-state nuclear-prone conflicts, as in the past, and possibly more so given the current trend in and the generative conditions for global terrorist activity that will likely pertain in the coming decades.

Of these attacks, about a quarter each were ethno-nationalist, secular utopian, or unknown in motivation; and the remaining quarter were a motley mix of religious (11 percent), “other” (5 percent), personal-idiosyncratic (4 percent), single issue (2 percent) and state sponsored (1 percent) in motivation.

The conclusion is unavoidable that there a non-state nuclear terrorist attack in the Northeast Asia region is possible. The following sections outline the possible situations in which nuclear terrorist attacks might be implicated as a trigger to interstate conflict, and even nuclear war. Particular attention is paid to the how nuclear command, control and communications systems may play an independent and unanticipated role in leading to inadvertent nuclear war, separate to the contributors to inadvertency normally included such as degradation of decision-making due to time and other pressures; accident; “wetware” (human failures), software or hardware failures; and misinterpretation of intended or unintended signals from an adversary.

Regional pathways to interstate nuclear war

At least five distinct nuclear-prone axes of conflict are evident in Northeast Asia. These are:

1. US-DPRK conflict (including with United States, US allies Japan, South Korea and Australia; and all other UNC command allies. Many permutations possible ranging from non-violent collapse to implosion and civil war, inter-Korean war, slow humanitarian crisis. Of these implosion-civil war in the DPRK may be the most dangerous, followed closely by an altercation at the Joint Security Area at Panmunjon where US, ROK, and DPRK soldiers interact constantly.
2. China-Taiwan conflict, whereby China may use nuclear weapons to overcome US forces operating in the West Pacific, either at sea, or based on US (Guam, Alaska) or US allied territory in the ROK, Japan, the Philippines, or Australia); or US uses nuclear weapons in response to Chinese attack on Taiwan.
3. China-Japan conflict escalates via attacks on early warning systems, for example, underwater hydrophone systems (Ayson-Ball, 2011).
4. China-Russia conflict, possibly in context of loss-of-control of Chinese nuclear forces in a regional conflict involving Taiwan or North Korea.
5. Russia-US conflict, involving horizontal escalation from a head-on collision with Russian nuclear forces in Europe or the Middle East; or somehow starts at sea (mostly likely seems ASW) or over North Korea (some have cited risk of US missile defenses against North Korean attack as risking Russian immediate response).

Combinations of or simultaneous eruption of the above conflicts that culminate in nuclear war are also possible. Other unanticipated nuclear-prone conflict axes (such as Russia-Japan) could also emerge with little warning.

Precursors of such nuclear-laden conflicts in this region also exist that could lead states to the brink of nuclear war and demonstrate that nuclear war is all too possible between states in this region. Examples include the August 1958 Quemoy-Matsu crisis, in which the United States deployed nuclear weapons to Taiwan, and the US Air Force has only a nuclear defense strategy in place to defend Taiwan should China have escalated its shelling campaign to an actual attack; the October 1962 Cuban Missile Crisis, when a US nuclear armed missile was nearly fired from Okinawa due to a false fire order; the March 1969 Chinese-Soviet military clash and resulting consideration of nuclear attacks by both sides; and the August 1976 poplar tree crisis at Panmunjon in Korea, when the United States moved nuclear weapons back to the DMZ and the White House issued pre-delegated orders to the US commander in Korea to attack North Korea if the tree cutting task force was attacked by North Korean forces.

Loss-of-control of Nuclear Weapons

As is well known, nuclear armed states must routinely—and in the midst of a crisis—ensure that their nuclear weapons are never used without legitimate authority, but also ensure at the same time that they are always available for immediate use with legitimate authority. This “always-never” paradox is managed in part by a set of negative and positive controls, reliant upon procedural and technical measures, to maintain legitimate state-based command-and-control (see Figure Four).

Table

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In this framework, Jerry Conley has produced a taxonomy of nuclear command-and-control structures that embody varying notional national “command-and-control” orientations (also referred to as stability points or biases). Each nuclear armed state exhibits a distinct preference for technical and procedural measures to achieve negative and positive control of nuclear weapons. The way that a state constructs its control system varies depending on its size, wealth, technology, leadership, and strategic orientation, lending each state a unique use propensity affected by the information processing and transmission functions of the nuclear command-and-control system, that in part determines the use or non-use decisions made by the leaders of nuclear armed states. The resulting ideal nuclear command-and-control state structures are shown in Table 1.

These ideal types are summarized with respect to the defining axes of control measure in Figure Five.

Diagram

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Note: according to dominant characteristic shown in orange circle; also, real states may exhibit more than one characteristic

In Northeast Asia, a four-way nuclear threat system exists that has a three world-class nuclear armed states, the United States, Russia and China, interacting with a fourth tier, barely nuclear armed state, the DPRK. In this quadrilateral nuclear standoff, the DPRK’s simple NC3 system likely is an amalgam of a poorly resourced, militarized, and personalized leadership—which may lead it to oscillate between procedural and technical measures as the basis of control, with a primary emphasis on positive use control, not negative control to avoid unauthorized use. China’s large, centralized NC3 system co-mingles nuclear and conventional communications between national commanders and deployed nuclear forces and may emphasize negative more than positive use controls to ensure Party control. Russia’s highly centralized, complex NC3 system relies on legacy technology and limited economic base for modernization. It too may be more oriented towards negative controls in peacetime, but have the capacity to spring almost instantly to primary reliance on positive controls in times of crisis or tension. The US NC3 system is large, complex and based on wealth and technological prowess. It is under civilian, not military control, at least in principle and in peacetime, and is redundant, diverse, and relatively resilient.

The critical issue is how a nuclear terrorist attack may “catalyze” inter-state nuclear war, especially the NC3 systems that inform and partly determine how leaders respond to nuclear threat. Current conditions in Northeast Asia suggest that multiple precursory conditions for nuclear terrorism already exist or exist in nascent form. In Japan, for example, low-level, individual, terroristic violence with nuclear materials, against nuclear facilities, is real. In all countries of the region, the risk of diversion of nuclear material is real, although the risk is likely higher due to volume and laxity of security in some countries of the region than in others. In all countries, the risk of an insider “sleeper” threat is real in security and nuclear agencies, and such insiders already operated in actual terrorist organizations. Insider corruption is also observable in nuclear fuel cycle agencies in all countries of the region. The threat of extortion to induce insider cooperation is also real in all countries. The possibility of a cult attempting to build and buy nuclear weapons is real and has already occurred in the region.[15] Cyber-terrorism against nuclear reactors is real and such attacks have already taken place in South Korea (although it remains difficult to attribute the source of the attacks with certainty). The stand-off ballistic and drone threat to nuclear weapons and fuel cycle facilities is real in the region, including from non-state actors, some of whom have already adopted and used such technology almost instantly from when it becomes accessible (for example, drones).[16]

Two other broad risk factors are also present in the region. The social and political conditions for extreme ethnic and xenophobic nationalism are emerging in China, Korea, Japan, and Russia. Although there has been no risk of attack on or loss of control over nuclear weapons since their removal from Japan in 1972 and from South Korea in 1991, this risk continues to exist in North Korea, China, and Russia, and to the extent that they are deployed on aircraft and ships of these and other nuclear weapons states (including submarines) deployed in the region’s high seas, also outside their territorial borders.

The most conducive circumstance for catalysis to occur due to a nuclear terrorist attack might involve the following nexi of timing and conditions:

1. Low-level, tactical, or random individual terrorist attacks for whatever reasons, even assassination of national leaders, up to and including dirty radiological bomb attacks, that overlap with inter-state crisis dynamics in ways that affect state decisions to threaten with or to use nuclear weapons. This might be undertaken by an opportunist nuclear terrorist entity in search of rapid and high political impact.
2. Attacks on major national or international events in each country to maximize terror and to de-legitimate national leaders and whole governments. In Japan, for example, more than ten heads of state and senior ministerial international meetings are held each year. For the strategic nuclear terrorist, patiently acquiring higher level nuclear threat capabilities for such attacks and then staging them to maximum effect could accrue strategic gains.
3. Attacks or threatened attacks, including deception and disguised attacks, will have maximum leverage when nuclear-armed states are near or on the brink of war or during a national crisis (such as Fukushima), when intelligence agencies, national leaders, facility operators, surveillance and policing agencies, and first responders are already maximally committed and over-extended.

At this point, we note an important caveat to the original concept of catalytic nuclear war as it might pertain to nuclear terrorist threats or attacks. Although an attack might be disguised so that it is attributed to a nuclear-armed state, or a ruse might be undertaken to threaten such attacks by deception, in reality a catalytic strike by a nuclear weapons state in conditions of mutual vulnerability to nuclear retaliation for such a strike from other nuclear armed states would be highly irrational.

Accordingly, the effect of nuclear terrorism involving a nuclear detonation or major radiological release may not of itself be *catalytic* of *nuclear* war—at least not intentionally–because it will not lead directly to the destruction of a targeted nuclear-armed state. Rather, it may be catalytic of non-nuclear war between states, especially if the non-state actor turns out to be aligned with or sponsored by a state (in many Japanese minds, the natural candidate for the perpetrator of such an attack is the pro-North Korean General Association of Korean Residents, often called Chosen Soren, which represents many of the otherwise stateless Koreans who were born and live in Japan) and a further sequence of coincident events is necessary to drive escalation to the point of nuclear first use by a state. Also, the catalyst—the non-state actor–is almost assured of discovery and destruction either during the attack itself (if it takes the form of a nuclear suicide attack then self-immolation is assured) or as a result of a search-and-destroy campaign from the targeted state (unless the targeted government is annihilated by the initial terrorist nuclear attack).

It follows that the effects of a non-state nuclear attack may be characterized better as a *trigger* effect, bringing about a *cascade* of nuclear use decisions within NC3 systems that shift each state increasingly away from nuclear non-use and increasingly towards nuclear use by releasing negative controls and enhancing positive controls in multiple action-reaction escalation spirals (depending on how many nuclear armed states are party to an inter-state conflict that is already underway at the time of the non-state nuclear attack); and/or by inducing concatenating nuclear attacks across geographically proximate nuclear weapons forces of states already caught in the crossfire of nuclear threat or attacks of their own making before a nuclear terrorist attack.[17]

### Link---2NC

#### The legal question of the plan is the scope of extraterritoriality, not the law of antitrust---the plan creates a precedent that the courts view as directly defining AND expanding the scope of RICO

Megan L. Masingill 18, Senior Staff Member at the American University Law Review, J.D. Candidate at the American University Washington College of Law, B.A. in Spanish Studies and Business Studies from Bentley University, “Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels”, American University Law Review, 68 Am. U.L. Rev. 621, Lexis

A. Analogizing RICO and the FTAIA

Drawing the analogy between RICO and the FTAIA is possible because the Supreme Court does so itself in RJR Nabisco by relying on antitrust law and previous decisions it has made regarding the extraterritorial reach of federal statutes. 176 The Court saw a similarity between the two issues--racketeering and antitrust law--in the RJR Nabisco case and relied on antitrust law and its precedent to determine the extraterritoriality of another federal statute (RICO). 177 Though the Court declined to apply the broad application found in the Clayton Act regarding a private right of action, it did so to balance against strong concerns of "international friction" and to rule in accordance with more recent congressional decisions to "reign in" the reach of such laws. 178 By not prescribing the scope of the Clayton Act, the Court acknowledged that the purpose of enacting laws like the FTAIA was to narrow the scope of U.S. antitrust law, and that to allow a foreign plaintiff's recovery would go against current extraterritoriality jurisprudence. 179 Accordingly, the Court found that the enactment of [\*652] the FTAIA, while not independently limiting on RICO, nonetheless discouraged using Sherman Act principles to discern the scope of RICO. 180 The Court's holding to deny a private action for foreign injury from racketeering activity in RJR Nabisco reflects this analysis. 181

Additionally, the similarities between RICO and the Sherman Act, to which the FTAIA limits, are apparent--both are federal statutes aimed at counteracting corrupt activity at home and abroad having significant impacts on the commerce of the United States. Further, the relevant discussion surrounding both these statutes centers around the extraterritoriality of a federal U.S. law regarding corrupt practices, whether it be racketeering or price-fixing. 182 It is true that the two statutes pertain to separate issues--the RICO statute deals with racketeering activity and the FTAIA with antitrust violations. 183 Reducing the laws to their differences, however, is an oversimplified comparison. When reviewing the extraterritoriality of U.S. law, the analysis is the same in every situation, requiring the court to run through the same two-steps outlined in RJR Nabisco. 184 Further, in both statutes, the conduct at issue is not the focus of that analysis, but rather the impact of the conduct--the effect on U.S. commerce. 185 In fact, the laws do prohibit overlapping conduct, such as conspiracy, and both require a substantive showing that the conduct at issue had a requisite effect on domestic commerce. 186

#### The principles of RICO enforcement are guided by the FTAIA’s effects test---the standard of directness is critical AND limited BUT it’s open to revision

Morgan Franz 14, J.D. Candidate at Pepperdine University School of Law, B.A. in Literature and Philosophy from the Azusa Pacific University, “The Competing Approaches to the Foreign Trade Antitrust Improvements Act: A Fundamental Disagreement”, Pepperdine Law Review, 41 Pepp. L. Rev. 861, Lexis

2. Treatment of Similar Provisions: The Effects Test

Congress's reaction to Morrison in the Dodd-Frank Act, in reinstating the jurisdictional limitation previously used by circuit courts, arguably also reinstates the effects test used by those courts, which bears resemblance to the effects test in the FTAIA. 250 This is not the only effects test that Congress has deemed jurisdictional. 251 The Foreign Sovereign Immunities Act (FSIA) employs an effects test very similar to that of the FTAIA, 252 and Congress and the Supreme Court have consistently treated that test as a limitation on subject matter jurisdiction. 253 The FSIA initially removes all foreign sovereigns from the jurisdiction of United States courts, and then brings them back within the jurisdiction of the courts if one of several statutory exceptions applies. 254 The exception most closely tracking the language of the FTAIA is the commercial activity exception of 28 U.S.C. § 1605(a)(2), which provides that foreign sovereigns are not immune for commercial activity that has a "direct effect" in the United States. 255 The similarities between the two tests led the Ninth Circuit to adopt the FSIA's definition of "direct" in the FTAIA's domestic effects inquiry. 256

[\*895] Another effects test that is closely tied both to Morrison and the FTAIA is that of the Racketeer Influenced and Corrupt Organizations Act (RICO). 257 As the Second Circuit noted, "precedents concerning subject matter jurisdiction for international securities transactions and antitrust matters" guide the extraterritorial application of RICO. 258 Prior to Morrison, the majority of courts applied the same effects test used for section 10(b) of the Securities Exchange Act to RICO claims to determine whether subject matter jurisdiction existed. 259 That test provided for subject matter jurisdiction "if conduct material to the completion of the racketeering occurs in the United States, or if significant effects of the racketeering are felt [in the United States]." 260

Within a few months of the Morrison decision, the Second Circuit abrogated its prior use of the effects test, 261 holding that the proper question is whether "a United States federal court can provide relief, not . . . whether the court possesses subject matter jurisdiction to hear the claim." 262 Other courts have since held that, in light of Morrison, the effects test in regards to RICO is no longer good law. 263 Nevertheless, the Dodd-Frank Act's return to the pre-Morrison subject matter jurisdiction effects test may call these rulings into question. 264 The pre-Morrison jurisdictional treatment of the RICO effects test together with the similar treatment of the FSIA's effects tests gives rise to a colorable claim that Congress believes effects tests to be jurisdictional in nature. 265

### Link---AT: Link Turn

#### Recovery is strong on all indices. Only our evidence assumes revised data AND prices in every downturn.

Das ’11-8 [Nalak; November 8; Finance analyst; Yahoo News, “Three Encouraging News on U.S. Economic Recovery: 5 Top Picks,” <https://www.yahoo.com/now/three-encouraging-news-u-economic-120412188.html>]

On Nov 5, Wall Street rejoiced on three impressive news related to U.S. economic recovery. These are the October job data from the Department of Labor, a new set of data on COVID-19 vaccine and development on a government infrastructure bill.

Market participants immediately welcomed these developments. Consequently, the three major stock indexes — the Dow, the S&P 500 and the Nasdaq Composite — ended the first week of November gaining 1.4%, 2% and 3.1%, respectively.

The robust pace of U.S. economic recovery was reconfirmed despite the pandemic, higher inflationary pressure, prolonged supply-chain disruptions and acute labor shortage. On Nov 3, Fed Chairman Jerome Powell also mentioned strong U.S. economic recovery while initiating the tapering of the central’s bank’s quantitative easing program.

Robust Job Additions in October

The U.S. economy added 571,000 jobs in October, exceeding the consensus estimate of 442,000. Moreover, September’s job additions were revised upward to 312,000 from a disappointing 194,000 reported earlier. August’s data was also revised upward to 483,000 from 366,000 reported earlier.

Total private payrolls rose 604,000 in October, partially offset by 73,000 declines in government jobs. The unemployment rate came down to 4.6% in October from 4.8% in September. The consensus estimate was 4.7%.

In October, the leisure and hospitality sector, which is directly related to the reopening of the economy added the maximum 1jobs of h64,000 — reflecting a sharp reduction in new cases of the Delta variant of coronavirus. The manufacturing sector added 60,000, doubling the consensus mark. Notably, manufacturing accounts for 12% of U.S. GDP.

Hourly wage rate dropped to 0.4% in October from 0.6% in September. However, the year-over-year, wage rate increased 4.9% in October from 4.6% in September. The average workweek fell marginally to 34.7 in October from 34.8% in September.

Good News on Covid-19 Treatment

On Nov 5, Pfizer Inc. PFE reported that the clinical trial data of its COVID-19 pill when used in combination with a widely used HIV drug, reduce the risk of hospitalization or death by 89% in high-risk adults. The company will submit the data to the FDA before Thanksgiving.

Aside from Merck & Co. Inc. MRK, Pfizer is the second company to demonstrate the strong effectiveness of easy-to-administer COVID-19 pills in clinical trials. In an interview with CNBC, Pfizer board member Dr. Scott Gottlieb said, “The Covid-19 pandemic could be over in the U.S. by the time President Joe Biden’s workplace vaccine mandates take effect in early January.”

Progress on Infrastructure Bill

On Nov 5, in a majority voting of 228-206, the House of Representative passed a $1.2 trillion bipartisan infrastructure bill. The bill, cleared by the Senate in August, will go to White House for President Joe Biden’s approval.

The bill includes transport, drinking-water, broadband, manufacturing and construction infrastructure developments. Segments like basic materials, industrials, telecommunications and utilities will benefit immensely with more job creation for the economy.

Our Top Picks

We have narrowed down our search to five large-cap stocks (market capital > $10 billion) that have strong growth potential for the rest of 2021. These stocks have seen positive earnings estimate revisions within the last 30 days. Each of our picks carries a Zacks Rank #1 (Strong Buy) and has a Growth Score A or B. You can see the complete list of today’s Zacks #1 Rank stocks here.

#### Particularly, business confidence is strong, driving economic recovery

Michael Halloran 9-14, M.B.A. from Carnegie Mellon University, Former Aerospace Research Engineer, Equity Strategist; Janney, “Despite Potential Headwinds, Key Labor Market Indicators Bode Well for the Economy,” https://www.janney.com/latest-articles-commentary/all-insights/insights/2021/09/14/despite-potential-headwinds-key-labor-market-indicators-bode-well-for-the-economy

However, we remain encouraged by the recovery that has been unfolding since the economy began reopening. We continue to see improvement in important cyclical sectors of the economy while consumers are historically healthy and still have pent-up demand. Business confidence has rebounded with strong corporate profits that should support further capital spending and hiring (there are now more job openings than there are unemployed people by a record amount).

We expect to see further improvement in the international backdrop, supported by unprecedented fiscal and monetary stimulus and accelerating rates of vaccination. Although the impact of the Delta wave is still being felt, recent evidence confirms the effectiveness of vaccines in limiting deaths and hospitalizations. With the pace of vaccination now picking up in the areas most impacted by this wave—Asia and Australia—the case for fading headwinds leading to improving economic growth later this year remains positive.

The signals from financial markets themselves remain positive. Despite consolidating last week, stocks remain near record highs while the 10-year Treasury remains well above the lows of earlier this summer when concerns about Delta first emerged.

These factors support our view of a durable economic recovery from the pandemic that should continue supporting stock prices. A healthy labor market is a critical element for a sustainable recovery that supports profit growth and last week’s news from the labor market remains encouraging.

#### Studies prove biz con’s key AND depends on perceptions of political stability

Gabriel Caldas Montes 21, PhD Candidate in the Department of Economics at Fluminense Federal University and Fabiana da Silva Dr. Leite Nogueira, PhD in Economics from Universidade Federal Fluminense, Professor of Economics at the Universidade de Vassouras, “Effects of Economic Policy Uncertainty and Political Uncertainty on Business Confidence and Investment”, Journal of Economic Studies, April 2021, Emerald Insights

1. Introduction

The literature on business confidence is vast. If on the one hand some studies indicate that business confidence acts as a leading indicator of macroeconomic activity and influences the economic environment, on the other hand, some studies investigate the determinants of business confidence (Khan and Upadhayaya, 2020).

Although many advances have been made, the literature on the determinants of business confidence continues to evolve. Some studies analyze not only the effects of macroeconomic variables, but also the effects of other variables able to create (or reduce) uncertainties, such as corruption (Montes and Almeida, 2017) and monetary policy credibility (Montes, 2013; de Mendonça and Almeida, 2019). These studies reveal that low credibility and high levels of corruption reduce confidence due to the uncertainties that emerge.

Uncertain economic scenarios created by economic policy uncertainty undermine confidence, and affect the decision making of entrepreneurs, who, for example, postpone investment and employment decisions in order to gain more information (Bloom et al., 2018). Regarding the definition of economic policy uncertainty, Al-Thaqeb and Algharabali (2019) points out that “*Policy uncertainty is the economic risk associated with undefined future government policies and regulatory frameworks*” (Al-Thaqeb and Algharabali, 2019, p. 2). Baker et al. (2016) and Al-Thaqeb and Algharabali (2019) suggest that economic policy uncertainty delay economic recoveries during periods of recession as businesses and households postpone their decisions about investment and consumption expenditures due to market uncertainty. Nevertheless, regarding the effects of economic policy uncertainty on research and development (R&D) expenditures and innovation outputs, Tajaddini and Gholipour (2020) find positive relationships for a set of 19 developed and developing countries, thus, contradicting those that claim a negative association between economic policy uncertainty and R&D expenditure.

Since the work of Bloom (2009), and due to existing controversies in the literature, studies investigate the effects of uncertainty shocks on different economic variables (e.g., Baker et al., 2016; Bachmann et al., 2013; Colombo, 2013; Nodari, 2014; Donadelli, 2015; Gulen and Ion, 2015; Moore, 2017; Istiak and Serletis, 2018; Bahmani-Oskooee and Nayeri, 2018; Bahmani- Oskooee et al., 2018; Mumtaz and Surico, 2018; Gholipour, 2019; Greenland et al., 2019; Istiak and Alam, 2019, 2020; Tajaddini and Gholipour, 2020). In general, the findings suggest that macroeconomic variables such as GDP, investment and employment are adversely affected by increased economic policy uncertainty.

The political environment is also a source of uncertainty that affects the economy. Studies provide evidence that the instability of the political environment has negative effects on the economic environment (e.g., Barro, 1991; Alesina and Perotti, 1996; Svensson, 1998; Carmignani, 2003; Aisen and Veiga, 2006, 2013; Durnev, 2010; Zouhaier and Kefi, 2012; Julio and Yook, 2012; Uddin et al., 2017; Azzimonti, 2018; Jens, 2017). These studies show that political instability has negative effects on inflation, GDP and unemployment.

Political uncertainty reflects instabilities on the political scene (i.e., involving politicians). The instabilities arising from the political scenario are associated to uncertainties regarding possible changes in the “rules of the game” and in the functioning of institutions. Hence, the uncertainty related to the political system is a key feature affecting the business environment, which entrepreneurs must consider when deciding, for instance, to start or expand their businesses. The effects of political uncertainty are stronger when firms and politicians have close connections and political favors might be at play.

One can suggest economic policy uncertainty reduces entrepreneurs’ optimism about the future of the economy and their business. Similarly, an uncertain political environment can deteriorate business confidence, producing negative effects on the economic environment. Hence, some important questions arise. Does political uncertainty affect business confidence? Is business confidence affected by economic policy uncertainty? Are political uncertainty and economic policy uncertainty transmitted to investment decisions through business confidence? These questions are particularly important for developing countries since these countries often present higher levels of political uncertainty and economic policy uncertainty.

#### Benefits of antitrust require perfect application that’s impossible in practice---costly false positives are inevitable

Thomas A. Lambert 11, Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri Law School, JD from the University of Chicago Law School, BA from Wheaton College, “The Roberts Court and The Limits of Antitrust”, Boston College Law Review, 52 B.C. L. Rev. 871, May 2011, Lexis

The enforcement provisions of the antitrust laws ensure that courts are routinely called upon to make these sorts of judgments in lawsuits by private plaintiffs. The Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring a lawsuit in federal court. 25 To account for the fact that many antitrust violations occur in secret and thus escape condemnation, the statute seeks to optimize the deterrent effect of private enforcement by permitting each successful plaintiff to "recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 What we end up with, then, is a body of law that is ultimately aimed at maximizing competition (understood in terms of market output), is quite general in its literal proscriptions, becomes "fleshed out" by generalist courts adjudicating private disputes, and is highly attractive to private plaintiffs seeking super-compensatory recoveries.

Taken together, these aspects of American antitrust law--all of which predate the Roberts Court by decades--render antitrust adjudication an inherently limited enterprise. In most challenges to novel business practices (and the prospect of treble damages guarantees that there will be many such challenges), whether liability is appropriate will be difficult to determine. Challenges to concerted conduct are frequently perplexing because a great many, perhaps most, output-enhancing business innovations involve cooperation among independent economic [\*877] actors, frequently competitors. 27 Challenges to unilateral conduct that may enhance market power are often hard to resolve because all actions that help a seller win business from its rivals--even pro-consumer actions like most price cuts--technically "exclude" those rivals. 28 Distinguishing output-reducing collusion from output-enhancing coordination (in section 1 cases) and unreasonable from reasonable exclusionary acts (in section 2 cases) can be exceedingly difficult. 29 To draw the necessary distinctions, judges and juries usually must weigh conflicting testimony from economic experts and reach conclusions on a number of complex subsidiary issues, such as the contours of the relevant market, the existence and magnitude of entry barriers, and the elasticity of demand and/or supply for the product at issue.

Antitrust adjudication is thus exceedingly, and inevitably, costly. 30 Most obviously, there are significant costs involved in simply reaching a decision. The parties themselves, with the aid of lawyers and, in most cases, economic experts, must gather, process, and present a large amount of complex data. 31 The fact finder must then deliberate over the information presented and reach conclusions on both subsidiary issues (e.g., the contours of the relevant market) and the outcome-determinative question (e.g., whether the challenged trade restraint is "unreasonable" because it reduces overall market output). 32 Taken together, these costs constitute the decision costs of an antitrust adjudication.

But those are not the only relevant costs. Given the complexity of the issues presented in antitrust cases, mistakes are inevitable, and those mistakes will themselves impose costs. On the one hand, when a fact finder wrongly acquits an anticompetitive practice, market power is created or enhanced, causing loss in the form of allocative inefficiency; [\*878] consumers are injured because output is lower and prices higher than they otherwise would be. 33 On the other hand, when a fact finder wrongly convicts a practice that is, in fact, output-enhancing, the market is denied the greater output (and lower prices) that practice would have produced, and a productive inefficiency results. Again, consumers are injured by reduced output, less product variety and innovation, and higher prices. Taken together, the productive inefficiencies spawned by false positives (hereinafter "Type I errors") and the allocative inefficiencies resulting from false negatives (hereinafter "Type II errors") constitute the error costs of antitrust adjudication. As explained below, there are good reasons to believe that the costs of false positives will exceed those of false negatives. 34 But, for present purposes, the important point to see is that antitrust adjudication will inevitably involve some mistakes, and those mistakes--be they false acquittals or false convictions--will impose social costs. 35

#### It’s dominant---firms think the worst

Tom Barkin 19, President and CEO of the Federal Reserve Bank of Richmond, where he is responsible for monetary policy, bank supervision, payment services and the Fed’s National IT organization, M.B.A. from Harvard University; the Federal Reserve Bank of Richmond, “Confidence, Expectations and Implications for Monetary Policy”, 7/11/2019, https://www.richmondfed.org/press\_room/speeches/thomas\_i\_barkin/2019/barkin\_speech\_20190711

In addition, the business reaction function has gotten faster. Short-termism has increased as activism in the market for corporate control has shifted companies’ focus. Just as with consumers, I think firms’ resilience is down. They start with lower confidence—another “hangover” from the Great Recession. At the same time, businesspeople tell me the length of the current upturn makes them nervous that another recession might be right around the corner.

The speed of the reaction function may be exacerbated by higher leverage. Corporate debt as a percentage of GDP is at an all-time high. Levered companies—and their creditors—have a bias toward taking action on negative news. This can mean cutting costs, reducing staff or pricing for volume.

Taken together, all these factors lead to an asymmetry in which firms are much more cautious about the downside than they are optimistic about the upside.

Perhaps both consumers and businesses have a higher bar for spending decisions. It’s possible that some of the tepid recovery from the Great Recession was a self-fulfilling lack of belief in the strength of the economy. Firms’ fear of failure could have prevented them from making investments even in the presence of reasonable returns.

This negative tilt, or asymmetry, continues today. Firms are frustrated with political polarization and uncertainty about trade and regulation. This limits their pricing courage and caps the upside on their spending and investment decisions.

For these reasons, a drop in confidence could lead to lower investment, lower output and eventually lower employment. If employment is placed at risk, consumption won’t be far behind. And that would place us in more serious difficulty. Put another way, I don’t discount the idea that we could talk ourselves into a recession.

### Impact---AT: Defense---2NC

#### Defense doesn’t assume the post-COVID landscape---the globe’s a tinderbox, primed for conflict

Elise Labott 21, Adjunct Professor at American University’s School of International Service, Columnist at Foreign Policy, MA in Media Studies, New School for Social Research, BA in International Relations from the University of Wisconsin-Madison, “Get Ready for a Spike in Global Unrest”, Foreign Policy, 7/22/2021, https://foreignpolicy.com/2021/07/22/covid-global-unrest-political-upheaval/

To call 2021 the summer of discontent would be a severe understatement. From Cuba to South Africa to Colombia to Haiti, often violent protests are sweeping every corner of the globe as angry citizens are taking to the streets.

Each country has different histories and realities on the ground, particularly in Haiti, where years of violence and government corruption culminated two weeks ago in the assassination of President Jovenel Moïse. But they all faced a perfect storm of preexisting social, economic, and political hardships, which fallout from the COVID-19 pandemic only inflamed further. And they are merely a foreshadowing of the post-coronavirus global tinderbox that’s looming as existing tensions in countries across the world morph into broader civil unrest and uprisings against economic hardships and inequality deepened by the pandemic.

The coronavirus pandemic was a once-in-a-century crisis that not only shocked countries’ existing health systems but also demanded a response that impacted—and was itself shaped by—economic, political, and security considerations. The efforts to contain it may have curbed fatalities in the short term but have inadvertently deepened vulnerabilities that laid the groundwork for longer-term violence, conflict, and political upheaval and should serve as a danger sign to world leaders as countries reopen—including in the United States.

History is full of examples of pandemics being incubators of social unrest, from the Black Death to the Spanish flu to the great cholera outbreak in Paris, immortalized in Victor Hugo’s Les Miserables. Underlying it all this time around is a pervasive inequality. COVID-19 has ripped open economic divides and made life harder for already vulnerable groups, including women and girls and minority communities.

It has also exposed weaknesses in food security and dramatically increased the number of people affected by chronic hunger. The United Nations estimates around one-tenth of the global population—between 720 million people and 811 million—were undernourished last year. The impacts of climate change and environmental degradation have only compounded the despair.

Take the Sahel, where, due to a toxic cocktail of conflict, COVID-19 lockdowns, and climate change, the scale and severity of food insecurity continues to rise. Countries such as Ethiopia and Sudan are among the world’s worst humanitarian crises, with catastrophic levels of hunger. Droughts and locusts are coming at a critical time for farmers ready to plant crops and are stopping herders in their tracks from driving their livestock to greener pastures.

The global vaccine shortage is fueling the instability. A majority of Africa is lagging far behind the world in vaccinations, meaning COVID-19 will continue to constrain national economies and, in turn, become a source of potential political instability. The same is true for much of Latin America and Asia, where countries don’t have enough vaccines to protect their populations and simmering sources of protest—such as rising living costs and deepening inequalities—are more likely to boil over.

The global risk firm Verisk Maplecroft has warned that as many as 37 countries could face large protest movements for up to three years. A new study by Mercy Corps examining the intersection of COVID-19 and conflict found concerning trends that warn of potential for new conflict, deepening existing conflict, and worsening insecurity and instability shaped by the pandemic response.

The group found a collapse of public confidence in governments and institutions was a key driver of instability. People in fragile states, already suffering from diminished trust in their government, have felt further abandoned as they face disruptions in public services, rising food prices, and massive economic hardships, such as unemployment and reduced wages. Supply chains disrupted during the pandemic have seen food prices skyrocket, while in the global recession humanitarian aid budgets are being slashed, bringing many countries to the brink of famine. For the first time in 22 years, extreme poverty—people living on less than $1.90 a day—was on the rise last year. Oxfam International estimates that “it could take more than a decade for the world’s poorest to recover from the economic impacts of the pandemic.”

The shocks caused by the pandemic have also eroded social cohesion, further fraying relations between communities and deepening polarization. That is especially true in the United States, where social and political pressures both deepened the health crisis and were themselves worsened by it. All of this should serve as a clarion call to countries that they can’t prepare for, or respond to, future health crises in a vacuum—but must anticipate an economic, political, and social crisis. This is true for any severe shock, which brings the potential for a breakdown in public order.

### Impact---AT: Resilience

#### Growth is fragile AND economic spending cuts social services, sparking instability

Tyler Beckelman 21, Director of International Partnerships at the U.S. Institute of Peace, Master’s Degree in Conflict Resolution from Georgetown University, BA in Political Science, International Studies, and Economics from Macalester College, and Amanda Long, Senior International Partnerships Assistant at the U.S. Institute of Peace, BA in International Relations and Global Studies from the University of Texas at Austin, “A New U.S. Approach to Help Fragile States Amid COVID-Driven Economic Crisis”, United States Institute of Peace, 3/5/2021, https://www.usip.org/publications/2021/03/new-us-approach-help-fragile-states-amid-covid-driven-economic-crisis

Without a financial lifeboat, a prolonged economic and fiscal crisis will make fragile states even more fragile.

The ability of governments to spend their way to recovery is considerably strained; highly indebted regimes must confront the difficult choice of servicing debt payments or scaling up spending on social services like health care, infrastructure, and education, with most nations forced to reduce investments in services just as they’re needed most. Diminished spending on services results in widening inequality, declining trust in government, and further erosion of the social contract. With more than three-quarters of the population classified as “extremely poor” in fragile states, the potential for new waves of civil resistance, insecurity—and repression—is considerable.

### Turns Case

#### Decline turns the case---agencies will cease enforcement during the downturn

Anika Dandekar 21, Political Science at University of California, San Diego, “Politics of Antitrust Enforcement: The Influence of Ideology and Party Control on Regulatory Behavior”, Senior Thesis, 3/29/2021, https://polisci.ucsd.edu/undergrad/departmental-honors-and-pi-sigma-alpha/A.Dandekar\_Senior-Honors-Thesis.pdf

1.3.3 Bureaucratic Approach

Some scholars have tried to explain varying antitrust by changing makeup or preferences of regulatory agencies themselves.

Some suggest that the agencies respond to external factors. Amacher et al. (1985) examined FTC enforcement of the Robinson- Patman Act and found that it was influenced by economic conditions, decreasing during business contractions and increasing during periods of expansion. They suggested that this means "the FTC moves to cushion producer losses" during hard economic times, but transfers "wealth to consumers" during economic upswings. Lewis-Beck (1979) found that while small increases in the division's budget did not reduce anticompetitive behavior, a major increase in the division's budget might significantly stem merger activity because of a "threshold effect”.

#### War rolls back antitrust reform AND enforcement

Dr. Bruce A. Khula 3, Juris Doctor Candidate at Notre Dame Law School, Ph.D. and MA from The Ohio State University, Associate General Counsel at Progressive Insurance, “Antitrust at the Water's Edge: National Security and Antitrust Enforcement”, Notre Dame Law Review, Volume 78, Issue 2, 78 Notre Dame L. Rev. 629, January 2003, Lexis

A comprehensive historical analysis of the origins and development of antitrust law is clearly beyond the scope of the present work. [\*632] Besides, other scholars have already written quite excellent ones. Instead, this Note will address a specific and often under-appreciated element of antitrust politics: the intersection between antitrust law and national security. Underscoring the narrative that follows is the conviction that national security issues exert a powerful - indeed, in a great many cases, inexorable - influence on the enforcement of antitrust laws, often forcing aside domestic political considerations and efficiency goals alike. In the years since World War II, national security issues have become extremely pervasive and far-reaching, permeating many aspects of American politics and culture. The immediate concerns of national security include foreign relations, defense policy, and internal security, and this Note will limit itself to a consideration of these issues. It will demonstrate that the national security ethos acts as a political check of the highest level on antitrust law - and, in so doing, it will make plain that, like it or not, politics does indeed play a role in antitrust enforcement.

<<MARKED>>

Part I of this Note briefly lays out the history and development of antitrust, placing particular emphasis on the political nature of the law. Part II considers the historical impact of foreign policy and national security concerns on antitrust law. Such an impact necessarily includes a brief assessment of the development of foreign antitrust traditions, as well as the obstacles to enforcement stemming from comity or the involvement of multinational enterprise. The narrative and descriptive heart of this Note lies in Part III. This Part contains a case study of the dynamics of national security upon antitrust law, focusing on litigation against the United Fruit Company during the 1950s. Finally, Part IV serves as an epilogue of sorts, providing an unfinished contemporary outline of the possible political effect of national security on the Microsoft litigation.

[\*633]

I. Antitrust Law: History and Development

A good starting point for examining the origins of antitrust law might fruitfully be found in the etymology of the word "antitrust" itself. The study of etymology is not history per se, of course, but it is the history of words. And such a history - even an amateurish history, like that which follows - may be useful if one is to consider how the concept of antitrust developed as a legal and political concept. Postmodernist concerns aside, one can still assume that what a group of people call a thing can provide insight into the nature of that thing. Proceeding on this assumption, it is instructive to dissect the word "antitrust" and attempt to place the word into the context of the late nineteenth century.

Thankfully, one does not have to be a practiced etymologist to pull content out of the word "antitrust," for it breaks down quite neatly into two distinct parts. The meaning of the first part, "anti," is obvious enough, and the Oxford English Dictionary (OED) describes it as a Greek derivative, meaning "opposed, in opposition, opponent, rival." The second half of the word "antitrust" is clearly the more significant of the two.

In the 1840s, the word "trust" was a "duty or office … entrusted to one" that was commonly thought to be "created for the benefit of the whole people, and not for the benefit of those who may fill them." Rudolph Peritz claims that by the 1880s and 1890s, in the minds of Americans, the word "trust" lost this former meaning and acquired a radically different one: "trust as a fearsome concentration of economic power that unjustly enriched a select few at the expense of the commonwealth." The OED affirms this claim, and cites a passage from late nineteenth century writer James Bryce as exemplary of the transformation of the meaning of "trust." Because of its descriptive nature, Bryce's passage is worth quoting in full:

Those anomalous giants called Trusts - groups of individuals and corporations concerned in one branch of trade or manufacture, which are placed under the irresponsible management of a small knot of persons, who, through their command of all the main producing or distributing agencies, intend and expect to dominate the market.

[\*634] Peritz's claims and Bryce's diction suggest that the public discourse regarding the so-called "trust" in the late nineteenth century went far beyond concern for mere economic efficiency. Judging from the tone and insistence of Bryce's writing alone, it seems clear that the motivating sense of fear, anguish over unjust enrichment, and concern for the well-being of democratic society did not emanate from a desire for economic efficiency or consumer choice. The object of such language was concentrated power, not efficiency. Hofstadter makes this same connection, seeing fear of concentrated power as the logical thread running from "pre-Revolutionary tracts through the Declaration of Independence and The Federalist to the writings of the states' rights advocates, and beyond the Civil War into the era of the antimonopoly writers and the Populists."

This observation removes us from etymology and brings us back to history itself. As a matter of history, nineteenth century public discourse over concentrated power and the transformation of the word "trust" was rooted specifically in the rise of big business. It is difficult to date the beginnings of big business in the United States, but a general historical consensus holds that large-scale enterprise began to rise in the aftermath of the Civil War and grew almost exponentially in the following decades. Facilitated by the advent and spread of the telegraph and railroad, big business germinated in the United States and gradually acquired the following traits or characteristics: capital-intensiveness, economy of scale, separation of ownership from management, enhanced geographic scope, vertical integration, complex managerial organization, and impersonal labor relations. Technical words such as these may provide a fairly accurate description of what big business was, but they utterly fail to capture the enormous social, political, and economic impact that such business had on Americans.

The establishment of big business "constituted a massive social change" and provided a "seedbed of a new social and economic order." [\*635] Richard Hofstadter notes that the "American tradition of democracy was formed on the farm and in small villages, and its central ideas were founded in rural sentiments and on rural metaphors." The very nature of big business explicitly challenged time-honored traditions, for it accelerated urbanization, encouraged mass immigration from Southern and Eastern Europe, established new classes of industrial laborers and middle-class managers, and ultimately jarred the nation's sensibilities by creating a mass society built around mass consumption. Though not all of these transformations happened at once, most all of them were underway by the late nineteenth century and were deeply felt by Americans at all levels of society. The most important political and social movements of the late nineteenth and early twentieth century - namely, the labor movement, agrarian Populism, and Progressivism - all originated in the dislocations brought by the rise of big business. By the 1880s and 1890s, Americans were therefore struggling to place their lives back in order and reestablish control over their nation's economic institutions, particularly the new and fearsome "trusts."

Exactly what blame, one might ask, did Americans affix to the "trusts"? Or more fruitfully, what social, political, or economic ill did Americans not blame on them? William Letwin sums up nicely the broad range of anger that Americans harbored for big business:

trusts, it was said, threatened liberty, because they corrupted civil servants and bribed legislators; they enjoyed privileges such as protection by tariffs; they drove out competitors by lowering prices, victimized consumers by raising prices, defrauded investors by [\*636] watering stocks, put laborers out of work by closing down plants, and somehow or other abused everyone.

Fair or not, a significant number of Americans blamed big business for the totality of woes stemming from modern society. And just as their accusations were loud and clear, so too was their preferred remedy: "a law to destroy the power of the trusts."

It was in such an environment that modern-day American antitrust law was born. It is necessary to add such qualifiers as "modern-day" and "American" because competition law developed long before the 1890s as an element of English common law. In its incipiency, competition law sought "to encourage competitive forces by its traditional emphasis on individual liberty and economic independence." As early as the 1500s, English common law attempted to fulfill this charge by curtailing practices such as "forestalling, engrossing, and regrating," which sought to manipulate prices at the wholesale stage of the distributive process. This doctrine evolved such that its eventual usage in American common law treated "combination" or "restraint of trade" as a tort, and suits based on this kind of tort theory were brought almost exclusively by private litigants, not by municipalities or states. As Hans Thorelli notes, neither in England nor the [\*637] United States did common law competition policy accomplish very much. Enforcement was scattershot, penalties were inadequate, litigation was driven only by private parties, and results fluctuated considerably. The rise of big business and the "trusts" made all too clear the inadequacy of the common law, even if the values of liberty and economic independence that animated the common law remained as strong as ever.

The first seeds of modern antitrust law grew at the state level. Before 1890, and particularly from 1888 through 1890, a total of twenty-one states and territories adopted provisions against restraints of trade. These sorts of laws attempted to deal with the trust problem by undercutting means of collusion, holding agreements and contracts in restraint of trade to be void and unenforceable. Thorelli attributes this rush of state legislative action to strongly felt "public agitation" and adds that the state-level effort "was not enough to satisfy popular opposition to 'trusts.'" Such dissatisfaction and continued anxiety about big business surely set the stage for the passage of the Sherman Act in 1890. The specific machinations that led Sen. John Sherman to introduce his antitrust resolution on July 10, 1888, and that culminated in its enactment as law two years later is a long story, interesting in its own right, yet not the province of this Note. It suffices to note that deeply felt public sentiment - drawing upon a venerable history of antimonopoly tradition steeped in a desire for liberty and a sense of commonweal - animated Congress and the President to ensure that a federal antitrust statute became law on July 2, 1890.

In the decades following passage of the Sherman Act, the development of antitrust was pulled thither and yon by various, explicitly [\*638] political currents. The "trusts" did not, of course, immediately recede into the darkness following passage of the Sherman Act, and neither did public agitation - ostensibly the "antitrust movement" of which Hofstadter writes - dissipate. Antitrust remained one of the highest priorities in the United States well into the Progressive Era, eclipsing other social welfare issues. Early on, the battle took the form of literalists (who sought enforcement of the Sherman Act without regard to the "reasonableness" of restraints) against restorationists (who wanted the common law distinction between reasonable and unreasonable restraints restored to the Sherman Act). In essence, literalists wanted the jurisprudence of United States v. Trans-Missouri Freight Ass'n to prevail, whereas the restorationists championed the Sixth Circuit's jurisprudence in United States v. Addyston Pipe & Steel Co. This debate, it must be emphasized, was by no means strictly - or even principally - judicial; rather, it was carried on with great vigor by political figures, businessmen, farmers, labor leaders, and scholars, in addition to jurists and lawyers. The restorationists ultimately won this battle in 1911, with the establishment of the "standard of reason" in Standard Oil Co. v. United States and the contemporaneous case, United States v. American Tobacco Co.

By the time antitrust law passed its third decade and entered the 1920s, the mood of the nation had changed. The "trust" issue had been thrust aside by the First World War, and an "ethic of cooperative competition," championed by Herbert Hoover and the Republican Party more generally, prevailed. Under Hoover's secretariat, the newly invigorated Department of Commerce took the lead in creating a closer and more cooperative relationship between big business and government, and the importance of the Sherman Act waned and became principally a means to rein in those businesses whose bigness was obtained with few benefits to society at large. Hooverian politics and "cooperative competition" managed to survive the early dark days [\*639] of the Great Depression and to a considerable degree manifested themselves in the codes of competition of the National Industrial Recovery Act of 1933 (NIRA).

In the years after the U.S. Supreme Court scuttled NIRA, however, the administration of Franklin Roosevelt began to take a very different approach to antitrust law. In April 1938, Roosevelt informed Congress that his administration was concerned that the persistence of depression was abetted by monopolistic practices, and he recommended suitable action. Congress responded by creating the Temporary National Economic Committee (TNEC), and for three years the TNEC worked hand-in-hand with the Assistant Attorney General for Antitrust, Thurman Arnold, to launch a "barrage of antimonopoly action." As with most New Deal policies, this "barrage" was calculated to win political support, and, in this respect it did not fail. But this born-again antitrust zeal would not survive the coming of yet another global war.