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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

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

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

INTRODUCTION

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

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

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

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

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

METHODOLOGY

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

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

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

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

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

ECONOMY

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

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

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

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

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

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

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

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

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

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

ENVIRONMENTAL

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

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

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

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

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

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

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

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

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

GEOPOLITICAL

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

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

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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

ITC CP

#### The United States federal government should clarify that 19 U.S.C. § 1337 authorizes remedies against anticompetitive business practices conducted against wholly owned foreign subsidiaries of United States based parent companies 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 covering business practices conducted against wholly owned foreign subsidiaries of United States based parent companies.

#### 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

Politics DA

#### Dems will pass limited climate provisions, but PC and time are key.

Mike Lillis 2-3, Senior Reporter for The Hill, “House Democrats warn delay will sink agenda,” The Hill, 02-03-2022, https://thehill.com/homenews/house/592594-house-democrats-warn-delay-will-sink-agenda

House Democrats of all stripes are pressing for quick action on the climate, health and education package at the heart of President Biden’s domestic agenda, warning that a long delay in revisiting the Build Back Better Act is the surest way to kill it.

The lawmakers are citing a host of reasons for their pleas of urgency, including the fast-approaching midterm elections, the desperate desire to give an unpopular president a big boost and the party’s fragile Senate majority that’s just one tragedy away from flipping to GOP control — a dynamic highlighted this week when Sen. Ben Ray Luján (D-N.M.) announced that he’s recovering from a stroke.

But the common theme is clear: Time, they say, is not on their side.

“There are great dangers involved in dragging it out, including all kinds of intersecting battles,” said Rep. David Price (D-N.C.), a member of the House Appropriations Committee.

“I, and most members who have been involved in this, who have a stake in it, we have a sense of urgency,” he added. “It’s certainly not an impossible situation. But it’s gone on too long; there’s been too much focus on our internal [disagreements].”

Price has plenty of company.

Last week, Rep. Pramila Jayapal (D-Wash.), head of the Congressional Progressive Caucus, urged Biden and Senate leaders to get moving on efforts to revive the Build Back Better Act or risk its failure this year, while Democrats still control both chambers of Congress. She proposed a specific deadline: March 1, in time for Biden to promote the bill’s many family benefits during his State of the Union address.

“This desperately needed relief cannot be delayed any longer,” she said.

In making their case, liberals like Jayapal are pointing to the economic strains facing families amid the long-running COVID-19 pandemic, including the rising cost of prescription drugs. Vulnerable incumbent Democrats, meanwhile, are eager to have a big legislative victory to take back to their districts ahead of November’s midterms. And environmentally minded lawmakers are warning that a failure to address climate change immediately will only make it harder — and more expensive — to do so in the future.

“The time is now, because the problems are now,” said Rep. Katie Porter (D-Calif.). “I don’t think it’s any particular date. But the answer is: today, tomorrow, the day after — as soon as we can get it done. Because ... it gets more expensive and more difficult and we risk falling farther behind our competitors if we wait.”

Rep. Jared Huffman (D-Calif.) ticked off a host of reasons why a delay is dangerous for Build Back Better supporters, not least the shrinking calendar heading into the midterms.

“Everybody knows there’s a point at which you get too close to the election to do big bills,” he said, adding that “there’s just a bunch of reasons why a four-corner offense is a bad strategy in the Senate.

“You’ve got to move it along.”

They have a difficult road ahead.

The House passed the $2.2 trillion Build Back Better package late last year, but it has stalled in the Senate, where the moderate Democratic Sen. Joe Manchin (W.Va.) has balked at such a massive spending package in the face of skyrocketing inflation and a national debt that just topped $30 trillion.

Manchin had been in talks for months with the White House and congressional leaders in hopes of finding a compromise he could support. But on Tuesday, he deflated hopes that such an agreement is imminent, saying there are no discussions happening at the moment.

“It’s dead,” he told reporters in the Capitol.

The comments have infuriated House Democrats, who were already frustrated with the West Virginia centrist for single-handedly blocking a central plank of Biden’s domestic platform. Some are wondering if Manchin ever had an interest in supporting the legislation at all.

“It’s hard to get inside his head. If I thought he had a strategy, I’d be more comfortable. But I don’t know if he does; he’s just trying to be in the way,” said Rep. Dan Kildee (D-Mich.).

“It raises a lot of questions as to whether there’s anything he would actually be willing to do,” he added. “He’s going to have to show that he’s willing to be for something. And I don’t know why that’s such a hard calculation for him to make.”

To entice Manchin’s support, House Democrats across the spectrum have acknowledged the need to cut a number of provisions from their $2.2 trillion package if they’re to have any chance of getting it through the Senate and to Biden’s desk — cuts they say they’re willing to make.

“I’ve heard the Speaker and others say, ‘This is an agenda that’s big and broad, but if there are pieces that he’s for, we’ll do it,’” Kildee said, referring to Manchin.

Manchin has been nebulous about his demands, suggesting he’s interested in a deal one day and lashing out at reporters for seeking updates the next.

Still, both Biden and Speaker Nancy Pelosi (D-Calif.) have made getting some version of Build Back Better enacted a top priority this year. With that in mind, House Democrats remain optimistic that something will be done, even if they don’t know yet what it will be.

“I don’t know what the deal’s going to look like, but I don’t think in principle it is a multiweek, complicated deal,” Price said. “It’s a matter of getting agreement with the key people on the key points.”

#### The plan saps both

Peter C. Carstensen 21, Fred W. & Vi Miller Chair in Law Emeritus at the University of Wisconsin Law School, LL.B. from Yale Law School, MA in Economics from Yale University, “The “Ought” and “Is Likely” of Biden Antitrust”, Concurrences – Antitrust Publications & Events, February 2021, https://www.concurrences.com/en/review/issues/no-1-2021/on-topic/the-new-us-antitrust-administration-en

14. Similarly, despite bipartisan murmurs about competitive issues, the potential in a closely divided Congress that any major initiatives will survive is limited at best. In part the challenge here is how the Biden administration will rank its commitments. If it were to make reform of competition law a major and primary commitment, it would have to trade off other goals, which might include health care reform or increases in the minimum wage. It is likely in this circumstance the new administration, like the Obama administration’s abandonment of the pro-competitive rules proposed under the PSA, would elect to give up stricter competition rules in order to achieve other legislative priorities.

15. Another key to a robust commitment to workable competition is the choice of cabinet and other key administrative positions. Here as well, the early signs are not entirely encouraging. In selecting Tom Vilsack to return as secretary of agriculture, the president has embraced a friend of the large corporate interests dominating agriculture who has spent the last four years in a highly lucrative position advancing their interests. Given the desperate need for pro-competitive rules to implement the PSA and control exploitation of dairy farmers through milk-market orders, the return of Vilsack is not good news. Who will head the FTC and who will be the attorney general and assistant attorney general for antitrust is still unknown, but if those picks are also centrists with strong links to corporate America the hope for robust enforcement of competition law will further attenuate!

16. In sum, this is a pessimistic prognostication for the likely Biden antitrust enforcement agenda. There is much that ought to be done. But this requires a willingness to take major enforcement risks, to invest significant political capital in the legislative process, and to select leaders who are committed to advancing the public interest in fair, efficient and dynamically competitive markets. The early signs are that the new administration will be no more committed to robust competition policy than the Obama administration. Events may force a more vigorous policy—I will cling to that hope as the Biden administration takes shape.

#### Failure to rescue negotiations causes extinction-level climate change.

Jordan Weissmann 12-23, Senior Editor at Slate, “Up in Smoke,” Slate, 12-23-2021, <https://slate.com/business/2021/12/manchin-build-back-better-environment-biden.html>

The Build Back Better Act might be dead. Or maybe it’s just on life support. Nobody but Joe Manchin can say for sure. The West Virginia senator ambushed his party on Sunday by announcing he was a hard no on the bill, imperiling the core of the Biden administration’s domestic agenda. After the initial furious reaction, both the White House and Democrats in Congress have begun trying to rescue negotiations, but their chance of success is unclear.

One thing is quite certain, though: If the defibrillators fail and President Joe Biden can’t resuscitate a deal, it will be an absolute catastrophe for America’s attempts to combat global warming. The bill that House Democrats passed in November was not everything clean energy and environmental activists had hoped, since some of its most aggressive proposals to limit greenhouse gases were stripped to appease Manchin. But by providing hundreds of billions of dollars to speed up the country’s green transition, it would have been an absolutely crucial and historic step toward meeting the climate goals Biden announced when the U.S. rejoined the Paris accords earlier this year. Without it, the country is unlikely to come anywhere near those targets, even if in an abstract, technical sense they’d still be within reach.

“Let me put it this way. The U.S. can still achieve its [Paris commitments] through pathways that don’t require Build Back Better, which lean heavily on federal regulation and state action,” Anand Gopal, executive director of strategy and policy at the climate think tank Energy Innovation, told me. “But it will be damn hard.”

Here’s a simple way to think about the blow U.S. climate policy is facing. The Biden administration has pledged to reduce U.S. emissions 50 percent from 2005 levels by 2030. Under the House legislation, the United States would cut its carbon footprint by 44 percent, according to an analysis by the REPEAT Project at Princeton’s Zero Lab. But under current law, the U.S. would only cut emissions by 27 percent—not even in the ballpark.

It is possible that the Princeton analysis is overly optimistic about the impact Build Back Better would have. For instance, it factors in reductions from a fee on methane included in the House bill, which looked like it would be pared back in any final version. But almost every analysis of the bill’s key pieces has found that it would have a dramatic impact and potentially put our Paris targets within reach, thanks to roughly $325 billion of green energy, electric vehicle, and other tax credits that anchor its climate section (the bill’s total spending on climate amounts to $555 billion). Those subsidies would bring down the cost of a new solar or wind plant by 30 percent and shave thousands from the price of an EV, making clean tech even more competitive than it already is.

Without Build Back Better, the Biden administration will be left to rely almost exclusively on its regulatory powers to curb emissions. This is the strategy that some progressives already seem to be preparing for. “Biden needs to lean on his executive authority now,” Rep. Alexandria Ocasio-Cortez tweeted earlier this week. “He has been delaying and underutilizing it so far. There is an enormous amount he can do on climate, student debt, immigration, cannabis, health care, and more.”

There are certainly important ways Biden can flex his executive authority on climate. His administration has already announced a strict new rule on methane leaks and tougher fuel economy standards that it could ratchet up again in the future. States could also contribute significantly if, for instance, California follows through on its promise to ban the sale of new gas-powered cars by 2035.

But there are legal and political limits to what Biden can accomplish through regulation alone. The Environmental Protection Agency is often required by statute to weigh the cost to consumers and industry when crafting new rules. And the administration may blanch at pursuing aggressive new regulations on power plants that might increase electricity prices at a moment voters are worried about inflation (and are as sensitive to gas prices as ever).

The tax credits in Build Back Better were meant to lower both of these hurdles by making green technology less expensive. Without them, Biden has less room to be bold. “All of these regulatory actions and state actions are more politically feasible and easier when there’s half a trillion dollars in subsidies to smooth the way,” John Larsen, head of energy systems research at the Rhodium Group, told me. “Without those subsidies, maybe executive actions could make up some of the tons [of CO2 reductions] you don’t get from Build Back Better. But it’s a very big ask from the executive branch to deliver all of the tons without the financial support.” Congress’ failure to legislate will also make it harder for Biden to regulate.

And that’s before you factor in the Supreme Court. In 2016, the justices stayed President Barack Obama’s Clean Power Plan, suggesting they were ready to hem in the administration on climate. Since then, the court has moved further to right with a 6-to-3 conservative majority, and its members have shown an interest in rolling back the power of federal regulators across the government. At the moment, the justices are preparing to hear a case, West Virginia v. EPA, in which they may decide the administration does not have the authority to limit emissions from power plants. In an absolute worst-case scenario, they could revive a version of the nondelegation doctrine, a pre–New Deal idea that would essentially hobble the entire structure of modern administrative government by holding that Congress simply can’t hand certain decision-making powers to executive agencies, which would kneecap the EPA’s authority on climate and other issues.

We might not get to that point. But it’s not unthinkable. “Everyone from me to my first-year law students is guessing what this court is going to do,” Nathan Richardson, a University of South Carolina law professor specializing in climate policy, told me. “It seems inclined to constrain the administrative state more broadly, and the sharp end of that spear is climate.”

Given that Biden’s ability to regulate carbon is limited and vulnerable to being struck down by an activist court, passing Build Back Better may be our last shot at serious climate policy for the next decade. One of the questions hanging over the negotiations is whether Manchin is actually open to a serious green energy plan or has simply pretended to be in order to run out the clock on negotiations. Before talks exploded, he reportedly made a counteroffer to the White House that included $500 billion in climate spending. But the specifics of what the money was for are unknown. Manchin is also tightly connected to the coal companies that dominate his state, still has a financial interest in the family coal brokerage on which he made his personal fortune, and has lately adopted the industry’s talking points criticizing Build Back Better’s energy section. It’s possible he simply doesn’t want a deal, in the end.

If Manchin is still open to something that looks roughly like Build Back Better’s climate plan, though, Democrats should be willing to give up a lot to get the deal. Because when it comes to the future of the planet, our plan B doesn’t look so promising.

### 1NC

Torts CP

#### The United States federal government should prohibit anticompetitive business practices conducted against wholly owned foreign subsidiaries of United States based parent companies as tortious interference.

#### The CP solves the case by prohibiting conduct as unlawful interference---tort liability has the same penalties, unlimited capacity for expansion, and is entirely distinct from antitrust

Christopher B. Hockett 14, Lecturer at the University of California, Berkeley Law School, Chair of the Section of Antitrust Law at the American Bar Association, JD from the University of Virginia, “The Evolving Role of Business Torts in Antitrust Litigation” in Business Torts and Unfair Comp Handbook, Third Edition, Lexis

A. Introduction

Antitrust and business tort laws cover much common territory. Both regulate the commercial conduct of marketplace participants, including manufacturers, distributors, retailers and consumers, and both establish norms for competitive relationships as well as relationships between buyers and sellers.

It is thus not surprising that antitrust and business torts are frequently involved in the same litigation. This may occur in several ways. A plaintiff may join a business tort claim with an antitrust claim, either as an alternative theory of recovery for the same wrong, as a claim based on a separate but related wrong, or as a claim based on a wrong that constitutes a part of a pattern of anticompetitive conduct. n1

Additionally, a business tort may be offered as proof of anticompetitive or exclusionary conduct in support of a claim under sections 1 or 2 of the Sherman Act. n2 Conversely, a claim of tortious interference may be based on wrongful conduct that also creates or perpetuates an unlawful restraint of trade. n3

[FOOTNOTE] n3 . See Chapter II, Part F.3; see also RESTATEMENT (SECOND) OF TORTS § 768(1)(c) cmt. f (1979) (an intent to unreasonably restrain competition can support a tortious interference claim); Caller-Times Publ'g Co. v. Triad Commc'ns, 855 S.W.2d 18, 21-22 (Tex. App. 1993) (same; citing RESTATEMENT). [END FOOTNOTE]

Although these two areas of the law are at times consistent, they have developed separately and reflect different economic and social policy concerns. Contrasting unfair competition and antitrust law, the Fifth Circuit has remarked:

[T]he purposes of antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition. The law of unfair competition tends to protect a business in the monopoly over the loyalty of its employees and its customer lists, while the general purpose of the antitrust laws is to promote competition by freeing from monopoly a firm's sources of labor and markets for its products. n4

The Seventh Circuit has observed that "[c]ompetition is a ruthless process. A firm that reduces cost and expands sales injures rivals-- sometimes fatally. . . . These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds." n5 Going further, Judge Easterbrook has characterized competition as "a gale of creative destruction. . .and it is through the process of weeding out the weakest firms that the economy as a whole receives the greatest boost. Antitrust law and bankruptcy law go hand in hand." n6

The U.S. Supreme Court has long stressed that the antitrust laws are for "the protection of competition, not competitors." n7 But it is also true that there can be no competition without competitors, and a competitor often will be the market participant most likely to both recognize and have the incentive to challenge exclusionary conduct. n8 And "merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well." n9 Tortious conduct seldom can be characterized as efficiency-enhancing competition on the merits, n10 and "'[i]improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.'" n11

Business torts also may be relatively "cheap" to implement and lack any procompetitive virtues. A campaign of removing a competitor's point-of-sale displays from retail locations may be much more cost effective than, say, engaging in predatory pricing. n12 Unfair competition through false statements likewise can protect a monopoly and is unlikely to be procompetitive. For example, in United States v. Microsoft Corp., n13 the government alleged that Microsoft deceived Java developers into believing that their software would run on non-Windows platforms. The Justice Department claimed that this was part of Microsoft's plan to prevent Java from threatening its operating system monopoly. The D.C. Circuit observed:

Microsoft's conduct related to its Java developer tools served to protect its monopoly of the operating system in a manner not attributable either to the superiority of the operating system or the acumen of its makers, and therefore was anticompetitive. Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive developers. n14

This chapter examines the role that business torts play in establishing antitrust claims as well as the use of business torts as additional claims in private antitrust litigation.

B. Historical Underpinnings: The Pick-Barth Doctrine

Antitrust law and business torts intersected in earnest in the First Circuit's 1932 decision in Albert Pick-Barth Co. v. Mitchell Woodbury Corp. n15

The plaintiff alleged a scheme by the defendants to appropriate its business by hiring away the plaintiff's employees and inducing them to take the plaintiff's customer lists, business plans and other records, and sought recovery under section 1 of the Sherman Act. n16 The First Circuit affirmed judgment for the plaintiff, reasoning that "[i]f a conspiracy is proven, the purpose or intent of which is by unfair means to eliminate a competitor in interstate trade and thereby suppress competition, such a conspiracy . . . is a violation of section 1 of the Sherman Act" as a matter of law. n17 In reaching this conclusion, the First Circuit characterized the business tort of unfair competition as a per se antitrust violation when conducted through collusion among competitors. n18

Unlike other per se illegality rules under the antitrust laws, Pick-Barth's focus was on "fairness" to competitors, rather than the potential effects of the defendants' conduct on competition. When the First Circuit revisited Pick-Barth almost thirty years later in Atlantic Heel Co. v. Allied Heel Co., n19 it again concluded that "the purpose of destroying a competitor by means that are not within the area of fair and honest competition is a purpose that clearly subverts the goal of the Sherman Act." n20 Evaluating conduct factually similar to the allegations in Pick-Barth, n21 and relying on the Supreme Court's intervening decision in Klor's, Inc. v. Broadway-Hale Stores, n22 which involved a conspiracy to eliminate a competitor through a "group boycott" or concerted refusal to deal, N23 the Atlantic Heel court reaffirmed that a conspiracy to destroy a rival constituted a per se violation of section 1. n24

Very few courts followed the First Circuit's Pick-Barth rationale, and the cases that did usually involved egregious misconduct. n25 For example, in C. Albert Sauter Co. v. Richard S. Sauter Co., n26 the Eastern District of Pennsylvania held that the defendants' tortious acts, which included hiring away the plaintiff's key employees, misappropriating the plaintiff's confidential business information, intentionally confusing customers by using a deceptively similar trade name, and disparaging the plaintiff's business, amounted to a per se violation of section 1 because such acts "'unreasonably' restrain[ed] competition"; the defendants' conspiracies were "accompanied with a specific intent to accomplish a forbidden result." n27

C. The Decline of Pick-Barth

Subsequent decisions questioned Pick-Barth's rationale, or specifically limited the decisions following it to their facts. n28

In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, n29 the First Circuit critically analyzed whether unfair competitive practices accompanied by an intent to hurt a competitor should qualify as per se violations of the antitrust laws. After considering the "aggregation of dirty tricks, played by those with little market power," allegedly committed by the defendants, the court concluded that, while the actions were unfair and reprehensible, they did not constitute a per se antitrust violation. n30

The Whitten court offered several reasons for refusing to apply the per se rule. On a practical level, the court noted that Pick-Barth and Atlantic Heel condemned as anticompetitive practices that were commonplace but prohibited in very few cases. Therefore, the Whitten court reasoned that Pick-Barth and Atlantic Heel provided no clear basis upon which to distinguish the "unfair" practices that would amount to an antitrust violation from those that would not. n31 Additionally, the court observed that tort law is available to deal with "garden variety" unfair competitive business practices and that extending the per se classification to competitive torts would tend to create a federal common law of unfair competition, an undertaking the federal courts have long resisted. n32

Instead, the court analyzed the defendants' conduct under "the rule of reason," which assesses the effect of the unfair practices in the relevant market. n33 Although the plaintiff may have lost some contracts due to the defendants' actions, the Whitten court observed that there was no evidence of harm to the competitive process. The number of competitors was not affected, and the market was neither fixed nor manipulated. Regardless of how offensive, the defendants' behavior simply did not amount to an antitrust violation. n34 Nevertheless, the court stopped short of formally overruling Pick-Barth. Noting that the pirating of key employees and theft of trade secrets involved in Pick-Barth and Atlantic Heel - efforts "to eliminate a competitor" - were going for the "jugular," the court concluded that the defendants' conduct in Whitten affected only "lesser arteries" - "concentrating on winning customers" - and thus rendered use of the per se rule inappropriate. n35

Later cases further eroded Pick-Barth. In Northwest Power Products v. Omark Industries, n36 the Fifth Circuit considered "unfair conduct" similar to Pick-Barth: solicitation of the plaintiff's employees, misappropriation of customer lists, and circulation of false and disparaging comments to the plaintiff's customers about its alleged financial difficulties. The effect of the defendants' actions was to diminish the plaintiff's market share while increasing that of one defendant. n37 The court discussed Pick-Barth at length and rejected it. n38 Rather than condemn the defendants' conduct as a per se violation of section 1, the court concluded that the defendants' tortious acts in fact had a positive effect on competition. By replacing the plaintiff, which had a 20 percent share of the market, with one of the defendants, which achieved an 11.5 percent share, the alleged conspiracy actually enhanced rivalry and created greater competitive possibilities. n39

The Northwest Power court gave two reasons why a defendant's market power is critical in determining whether unfair competition amounts to an antitrust violation. First, absent some market impact comparable to that prohibited by the law of mergers, antitrust interests are not implicated. Second, only when the defendant gains an increment of monopoly power through unfair competition are treble antitrust damages appropriate, as "[s]ingle damages or equivalent injunctive relief

is thought sufficient to compensate a firm for unfair competition." n40 The Northwest Power court determined that the defendant lacked the level of market power necessary to raise antitrust concerns and affirmed summary judgment for the defendants. The court concluded that the plaintiff made no showing that substitution of one distributor for another affected consumers in the relevant market. n41

Several other courts likewise have rejected Pick-Barth's application of the per se rule, concluding that the elimination of a competitor through unfair means must be evaluated under the rule of reason. n42

As a leading commentator has noted, "the cases giving rise to Pick-Barth claims have not been disputes involving naked cartel exclusion," but rather involved single-firm conduct or vertical relationships, which generally require proof of anticompetitive effects. n43 "If properly restricted, a version of the Pick-Barth rule does seem to describe a per se violation of the antitrust laws. A 'naked' agreement among two rivals to drive a third rival out of business could be a violation of § 1" of the Sherman Act. n44

Accordingly, absent conduct amounting to naked cartel exclusion, a plaintiff seeking to advance a section 1 claim cannot merely allege that its business was harmed by a competitor's inequitable and unfair practices; the plaintiff must go further and establish actual or threatened harm to competition in the marketplace.

D. Business Torts Under the Rule of Reason

In Associated Radio Service Co. v. Page Airways, n45 the Fifth Circuit had occasion to revisit its decision two years earlier in Northwest Power. Recalling the court's observation in the earlier case that "[t]he more modern courts examining the Pick-Barth rule have stated that it applies only when the defendant is a 'significant existing competitor,'" n46 the Associated Radio court expressed the belief that "[w]hile this requirement begins to limit Pick-Barth to Sherman Act proportions, it fails to do the job entirely." n47

Invoking the Northwest Power court's observation that "absent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise," n48 the Fifth Court concluded that "Northwest Power establishes for unfair competition cases under section 1 of the Sherman Act a two-part test: (1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by defendant that threatens Sherman Act values." n49

Applying this test to the facts before it, the Fifth Circuit noted that the relevant market was highly concentrated, there was conclusive evidence that the defendant was a potential entrant into that market, and that the plaintiff was the most significant existing competitor in that market. n50 Accordingly, under the Supreme Court's decision in FTC v. Procter & Gamble Co., n51 the defendant's attempt to acquire the plaintiff directly would have violated the merger provisions of the antitrust laws. n52 Additionally, there was evidence that the prices the defendant charged its customers as well as its profits dramatically exceeded those of the plaintiff, and that its market share had risen to 64 percent by the time of trial. n53 Based upon its finding that the defendant could not have acquired the plaintiff lawfully under the antitrust laws and the evidence that the defendant's tortious conduct, which included bribery, had the requisite anticompetitive effect, the Fifth Circuit found it unnecessary to reach the issue whether business torts, standing alone, could ever rise to the level of a section 1 violation. n54

E. The Role of Business Torts in Section 2 Claims

In addition to potentially supporting a rule of reason claim under Sherman Act section 1, business torts may, in an appropriate case, constitute exclusionary conduct actionable under Sherman Act section 2.

A leading antitrust treatise defines exclusionary conduct as acts that:

(1) are reasonably capable of creating, enlarging or prolonging monopoly power by impairing the opportunities of rivals; and

(2) that either (2a) do not benefit consumers at all, or (2b) are unnecessary for the particular consumer benefits claimed for them, or (2c) produce harms disproportionate to any resulting benefits. n55

The Supreme Court has explained that when determining whether conduct can be condemned as exclusionary in an antitrust sense, it is not enough to focus simply on its effect on the competitor plaintiff; rather, it is necessary to consider the effect on consumers, the defendant's rivals and the defendant itself. n56 The Court has further explained that if the defendant '"has been attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." n57

Just as a section 1 claim cannot be based on business torts alone, a section 2 claim requires more than proof that a dominant firm engaged in business torts that injured a smaller rival. Absent some reason to believe that the defendant's tortious acts are likely to contribute to the acquisition or maintenance of monopoly power, or to materially impair the competitive opportunities of rivals, business torts - even when committed by a dominant firm - are unlikely to qualify as "exclusionary" for section 2 purposes. n58

When it appears that a firm's use of business torts is likely to contribute to the acquisition or maintenance of a dominant position, courts have been willing to recognize an antitrust claim based on tortious conduct. n59

Examples of tortious conduct that may qualify as exclusionary include misrepresentations to buyers; deceptively influencing purchaser specifications; disparagement of rivals; compromising rival's employees; compromising rival's suppliers; industrial espionage; payments to buyer's employees; monopolist permeation of a customer with former employees; premature delivery dates and exaggerated advertising claims; sham litigation; concealment of transactions through straw parties; interference with contracts; and retaliation for privileged conduct. n60 When the defendants' tortious conduct appears unlikely to contribute to the acquisition or maintenance of a dominant position, however, the courts have been less likely to uphold a section 2 claim. n61

Associated Radio illustrates the successful use of business torts in support of a section 2 claim. In that case the plaintiff alleged a variety of tortious conduct, including bribery, the defendant's use of sham litigation to delay the payment of needed funds owed to the plaintiff, and inducement of the plaintiff's employees to disclose the plaintiff's confidential business information to the defendant. n62

Agreeing with a leading treatise that the courts should be wary of invitations to find antitrust violations from acts of unfair competition, and that a de minimus standard should be applied, the court found that the plaintiffs' evidence was probative of enough instances of exclusionary behavior to constitute more than de minimus violations of section 2. n63

A more recent case, Conwood Co., L.P. v. United States Tobacco Co., n64 which involved one of the largest civil antitrust awards ever rendered, likewise was based on business torts. In that case the plaintiff complained that the defendant had engaged in a widespread campaign of removing and destroying the plaintiff's point-of-sale displays of its moist snuff products in retail locations. The plaintiff also complained that the defendant used its position as "category manager" for moist snuff products to limit or eliminate competitive products, including lower priced products, and to give preferential position to the defendants' products at the point-of-sale. Rejecting the defendant's argument that the evidence amounted to no more than "insignificant" tortious behavior and acts of ordinary marketing services, n65 the Sixth Circuit affirmed a treble damages judgment under Sherman Act section 2 of $ 1.05 billion.

F. The Additional Requirement of "Antitrust Injury"

In addition to proof of harm to competition, a private antitrust plaintiff must establish "antitrust injury." n66

The Supreme Court articulated this principle in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., n67 a merger case under section 7 of the Clayton Act. There, the plaintiffs alleged that the defendant, one of the nation's largest bowling equipment manufacturers and bowling center operators, violated section 7 of the Clayton Act by acquiring bowling centers that had defaulted in their payments for equipment. The plaintiffs, competing bowling center operators, sought treble damages for the anticipated increase in profits the plaintiffs would have reaped had the rival bowling centers instead gone out of business. n68 Rejecting this claim, the Court emphasized that the antitrust laws are designed to protect competition, not individual competitors, and that it would be inimical to the purpose of the antitrust laws to award the plaintiffs damages for profits they would have realized had competition been reduced by elimination of the acquired assets from the market. n69 To recover antitrust damages, the Court explained, a plaintiff must prove more than that its injury was causally linked to an illegal presence in the market; rather, antitrust plaintiffs must prove "antitrust injury . . . of the type the antitrust laws were intended to prevent." n70 Such injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. n71

The antitrust injury requirement stands as one of the most significant barriers to competitor plaintiffs seeking to recover antitrust damages. n72 As the Seventh Circuit observed:

[T]here is a sense in which eliminating even a single competitor reduces competition. But it is not the sense that is relevant in deciding whether the antitrust laws have been violated. Competition means that some may be forced out of business; not a guarantee of tenure for every competitor in the marketplace. n73

G. The Assertion of Business Torts in Addition to, or in Lieu of, Antitrust Claims

In addition to constituting conduct that supports an antitrust claim, business torts can be joined with antitrust claims as additional grounds of recovery. This is often sensible in cases that involve alternative, complementary claims and overlapping evidence. Tortious conduct by a dominant firm may support both a claim of tortious interference and a claim of anticompetitive or exclusionary conduct under the Sherman Act. n74

[FOOTNOTE] n74 . This was the case in Conwood Co. v. U.S. Tobacco Co, 290 F.3d 768, 773 (6th Cir. 2002) (plaintiff asserted a claim of monopolization as well as claims for tortious interference with contract and prospective advantage; prior to trial the plaintiff dropped the tortious interference claims and proceeded only on the section 2 claim). [END FOOTNOTE]

In other cases, however, the underlying theories and principles involved may conflict, or the pursuit of multiple claims may raise problems of damages apportionment. n75 And there are situations when invocation of every conceivable claim engenders confusion and frustration. n76

Litigation strategy can involve consideration of several factors that may impact antitrust or tort theory selection, including jurisdiction and venue, conflict of laws, remedies, direct and indirect purchaser considerations, other standing rules, and the availability and scope of potential classwide relief. Judicially created obstacles to the successful maintenance of antitrust claims often make statutory and common law unfair competition and tort claims attractive alternatives for plaintiffs. n77

[FOOTNOTE] n77 . William L. Jaeger, New Tools for the Plaintiff in the 1990s, 4 ANTITRUST L.J. 4, 5 (1990) ("Consigning state claims to second class status in an antitrust case may not be the wisest move for plaintiffs, in view of the increasing hostility of the federal courts to antitrust claims, and the eagerness of some courts to dismiss antitrust claims on summary judgment motions."); Harvey I. Saferstein, The Ascendancy of Business Tort Claims in Antitrust Practice, 59 ANTITRUST L.J. 379 (1990). The Supreme Court has noted the "considerable disadvantages" of antitrust claims to private litigants. Verizon Commc'ns v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 412 (2004). [END FOOTNOTE]

#### Using torts as an independent limit on anticompetitive conduct revitalizes the field

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But amid this general expansion of tort law, certain theories of liability have faded or disappeared. A century ago, a husband could recover substantial damages from someone who had sex with his wife, 6 even if the interloper had no idea that his lover was married. 7 In the Deep South, a Caucasian rail passenger could bring a claim against a railroad company if a conductor directed him or her to a compartment used by African-American customers. 8 And in several states, a wife could proceed against a tavern for the wages that its patron-her alcoholic husband-had failed to earn due to his chronic inebriation. 9 Should a contemporary plaintiff have the temerity to press any one of these claims, most courts would reject his or her lawsuit out of hand.

Scholars have paid more attention to how new torts are born than to how-and why- torts die. 10 But torts do die. Formerly prominent causes of action-of which the aforementioned criminal conversation, insult, and spousal alcoholism torts are but three of many-have become rare or have vanished altogether. Some of these torts have been abolished by courts or legislatures, others have been abandoned by plaintiffs, and still others have been abrogated in some jurisdictions and deserted elsewhere. In a few instances, a particular impetus (for example, the end of Prohibition) clearly bears responsibility for the demise of a related cause of action (claims against public officers for failing to enforce dry laws). 11 Other torts have disappeared under more mysterious circumstances, with the precise cause of death re- [\*361] maining unknown. Adding to the mystery, these claims have withered and died even as other torts have thrived in seemingly inhospitable environments.

A few authors have performed autopsies on specific torts and identified the suspected reasons behind their deaths. 12 These analyses, though interesting, are by their own admission of limited scope and do not provide especially useful analytic or predictive tools. This Article has a broader goal. Just as pathologists and epidemiologists study how fatal illnesses spread, 13 conservation biologists examine why animal species go extinct, 14 and geographers and anthropologists try to understand why societies succeed or fail, 15 this Article surveys the roster of dead and dying torts and then asks (and tries to answer) a novel question: Why do torts die? This question quickly breaks down into several other queries, of which the following are just a few: Do defunct tort theories share a common fatal flaw? Do torts die for reasons of substance, procedure, or some combination of both? What roles do courts, legislatures, and plaintiffs each play in the deaths of torts? And what, if anything, can the disappearance of some tort theories tell us about what makes other claims survive and prosper?

This Article proposes some answers to these questions. The discussion below offers and develops a framework for analyzing why torts die that focuses upon the contributions made by the following six factors: (1) the changes in the cultural atmosphere surrounding a tort; (2) the quality of the arguments directed against the tort; (3) the interests, abilities, and limitations of the audiences that entertain and act upon these arguments; (4) the influence exerted by the agents who advocate or oppose the elimination of the tort; (5) the attractiveness of alternatives, if any, that may exist to tort liability; and (6) the attributes of the tort itself that make it more or less susceptible to abolition or abandonment. When tested through case studies, this model suggests that torts die when atmosphere, arguments, audiences, agents, alternatives, and attributes combine to direct a tort toward abolition, abandonment, or both. Put another way, most bygone torts have not died simply because times changed. Changing times, or other ambient conditions of the environment in which a tort operates, may prove lethal to a tort if and when they produce arguments against the cause of action that are properly at- [\*362] tuned to the interests, concerns, and capabilities of the agents and audiences who endorse or reject theories of liability, and the attributes of the tort and any available alternatives accelerate, rather than defuse, the drive toward abolition or abandonment. Where these factors are not properly aligned, a tort may prove capable of tacking into the prevailing cultural winds.

This Article proceeds as follows. The first step in developing the argument summarized above requires that I establish that some torts actually have died or are dying. Toward this purpose, Part II of this Article maps the graveyard of extinct or moribund torts, in which are buried the "amatory" or "heartbalm" 16 torts (alienation of affections, breach of promise to marry, criminal conversation, and seduction); bad faith denial of contract claims; corpse mishandling claims; claims for insult; the torts of maintenance and champerty; claims seeking consequential damages for injuries negligently inflicted on servants; certain nuisance suits; support actions by the wives of alcoholics; suits involving unsent, misdirected, or garbled telegrams; tort claims attacking a range of unfair trade or labor practices; and personal injury actions against employers, to the extent these suits sound in negligence. In this Part, I briefly describe the gist of each departed cause of action and review the evidence of its decrease or demise.

Next, Part III discusses how atmosphere, arguments, audiences, agents, alternatives, and the attributes of a given tort theory affect its ability to survive. To better ascertain how these factors operate and interact, Parts IV, V, and VI relate how claims for insult, "obesity lawsuits," and the heartbalm torts have arrived at the brink of extinction. To summarize these studies, the insult tort has vanished due to an atmospheric change-a marked decrease in passenger rail travel (which formerly produced the lion's share of insult claims)-combined with the cannibalizing effect of an alternative form of relief, the "new tort" of intentional infliction of emotional distress. The "obesity lawsuit" has come under attack because it threatens the interests of a cohesive group of potential defendants and has no comparably motivated base of supporters; additionally, holding the food industry accountable for the health effects of its products has been portrayed, effectively, as inconsistent with prevailing values. Finally, the amatory torts have fallen victim to the legal equivalent of a "perfect storm," in which fierce opponents, persuasive arguments, flaws within the torts themselves, and unfriendly cultural trends produced [\*363] two perversely complementary rounds of abolitionist fervor-the first of which followed from a perceived excess of heartbalm suits in the 1920s and early 1930s, and the second, decades later, from a sense that so few of these claims were being filed by then that the torts no longer served a useful purpose. In each instance, the studied tort or torts succumbed to a confluence of compromising circumstances, implicating multiple components of the framework proposed in this Article.

Finally, Part VII of this Article reviews a few lessons that the three case studies provide. These studies establish the need to account for the impacts of atmosphere, arguments, audiences, agents, alternatives, and attributes when studying the death of a tort. Not all of these factors may be involved in the death of a cause of action, but as the case studies suggest, they often interact in interesting and unanticipated ways. The case studies also indicate that an unused tort is an endangered one, and thus portend that even modest "tort reform" measures cast as mending, not ending, the tort system may lead to the demise of tort theories by setting in motion a series of events in which the causes of action are first forsaken by plaintiffs and then eventually abolished by courts or legislatures.

II. Dead or Dying Torts

Tort plaintiffs today can recover for far more affronts than their ancestors ever dreamed possible. Across our nation, courts and legislatures seem to place an ever-broadening array of causes of action in the hands of plaintiffs and their attorneys. 17 But it would be a mistake to conclude from this overall expansion of tort liability that, once born, torts never die. On the contrary, just as animal species go extinct, buildings collapse, and stars implode into black holes, certain torts have already vanished, and others will disappear in the future.

To give an idea of the menagerie of defunct causes of action, the following is a partial 18 roster of extinct or endangered torts. 19

A. The "Heartbalm" Torts

The heartbalm or amatory torts all involve derailed intimate relationships. An alienation of affections claim arises when a defendant 20 intentionally interferes with a marriage, straining relations between husband and wife. 21 Criminal conversation occurs when the defendant engages in sexual intercourse with a married person. 22 The plaintiff in a breach of promise to marry suit attacks a failure to follow through with an accepted promise of marriage. 23 Seduction, the fourth and final heartbalm tort, involves at least one act of intercourse between the defendant and an unmarried woman, accomplished by way of artifices and persuasions. 24

A century ago, leading treatises devoted extensive discussion to the amatory torts. 25 Today, these claims barely survive. As of this writing, all but a handful of states have abolished or substantially limited claims for alienation of affections 26 and criminal conversation, 27 and about half of the states have abrogated or pared back claims for breach of promise to marry 28 and seduction. 29 Even where these claims persist, few plaintiffs show much interest in them. With [\*365] the notable exceptions of Mississippi 30 and North Carolina 31 (both of which have recently entertained a spate of alienation of affections suits), over the past several years very few states have witnessed even a handful of cases implicating any of the heartbalm torts. 32

B. Support Actions by Wives of Alcoholics

An ancient common law rule provided that the mere provision of alcohol to someone who subsequently committed a liquor-fueled wrong did not provide a basis for imposing liability on the seller. 33 This rule changed starting in 1849, 34 when the temperance movement brought about the enactment of the first of the more than thirty civil liability laws-also known as "dramshop acts"- passed by various states. 35

Consistent with one of the principal evils associated with alcohol back in the 1800s-the abandonment or neglect of families by chronically inebriated husbands and fathers 36 -several of these statutes were construed as allowing the wives of alcoholics to recover damages against saloonkeepers who sold drinks to their drunkard, unemployed-but otherwise healthy-husbands. The theory underlying these suits was that these sales worsened the husbands' alcoholism and thus prevented them from supporting their families through gainful employment. 37 Spousal alcoholism claims of this type were [\*366] quite common in the early 1900s, particularly in the Midwestern states. 38 There, church groups went so far as to give seminars that taught women how to bring these suits. 39

Spousal alcoholism actions dwindled during Prohibition, as the taps ran dry at the saloons whose owners once had been named as defendants. These claims disappeared altogether once temperance fervor abated, 40 leading to the repeal of both Prohibition 41 and many of the dramshop acts from which the spousal alcoholism tort sprouted. 42 Notwithstanding the recent reemergence of statutes and [\*367] case law that permit suits against bars and restaurants for the consequences of questionable or unlawful alcohol sales, 43 claims seeking recovery for lost wages due to spousal alcoholism alone are almost certainly a thing of the past.

C. Maintenance and Champerty

Maintenance occurs when a third party provides a plaintiff with money for the purpose of bringing or sustaining a lawsuit. 44 A maintenance claim holds the sponsor liable for any injurious consequences of these payments. 45 Champerty, a particular type of maintenance, develops when a person or entity otherwise without a stake in a lawsuit agrees to fund the suit in exchange for a share of the profits, if any, reaped by the action. 46

Tort claims for maintenance or champerty have never been common in the United States. 47 Beginning in the mid-1800s, American courts and legislatures determined that contingency-fee contracts between attorneys and their clients were not champertous, withdrawing the most common form of "officious intermeddling" 48 from the maintenance theory. 49 Maintenance and champerty have been invoked in modern cases typically only as defenses to allegedly unlawful contracts, not as affirmative causes of action in tort. 50 In the rare situations in which plaintiffs have alleged these theories as torts, a majority of courts have determined that maintenance and [\*368] champerty claims are no longer viable, if they were ever recognized at all. 51

D. Bad Faith Denial of Contract

A tort does not have to be old to die. A tort claim for bad faith denial of the existence of a contract was first recognized in Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 52 a 1984 decision by the California Supreme Court that espied a tort when a defendant, in addition to breaching a contract, "seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." 53 That same court repudiated the bad faith denial of contract tort just eleven years later. 54

Other claims embraced by the California Supreme Court in the 1980s under Chief Justice Rose Bird ultimately shared the fate of the bad faith denial of contract tort after Bird and two other progressive justices were replaced by more conservative jurists in 1986. 55 Under Chief Justice Malcolm Lucas, who took over for Bird after the 1986 election, the court revisited language in Tameny v. Atlantic Richfield Co. 56 that suggested that an employee could sue his or her employer in tort for a breach of the covenant of good faith and fair dealing that was implicit in an employment contract. 57 In Foley v. Interactive Data Corp., 58 the Lucas court concluded that no such cause of action existed. 59 The court also backed off its earlier position 60 that a landlord was strictly liable for injuries caused by defects associated with rented premises, 61 a retreat construed by some as abandoning what had been a new cause of action against landlords. 62 Also, in Moradi- [\*369] Shalal v. Fireman's Fund Insurance Cos., 63 the court overruled an earlier decision, Royal Globe Insurance Co. v. Superior Court, 64 to the extent that Royal Globe had read into state insurance law a statutory cause of action against insurers for an unreasonable failure to settle a claim. 65

E. Mishandling of Dead Bodies

Sometimes a tort remains viable in theory, but ignored in practice, as when it is displaced by an alternative cause of action without ever being formally abolished. One such forsaken tort concerns the abuse or mishandling of dead bodies. Courts and commentators once treated claims involving such facts as giving rise to a distinct and unique "corpse mishandling" tort. 66 It was said that the deceased's next of kin had a property right in, 67 or "a right of custody, control and disposition" of, 68 the corpse for purposes of burial or cremation and that infringements of this right would support a tort claim for injured feelings. 69 Thus, an action lay when a passenger on a steamship died during a voyage and his body could have been returned to the decedent's relatives, but was buried at sea instead. 70 Unauthorized dissections or autopsies also provided fertile grounds for litigation under this theory of recovery. 71

The occasional decision recognizing a distinct wrongful autopsy or mishandled cremation tort still appears from time to time. 72 In practice, however, this cause of action is slowly being swallowed by the "new torts" of negligent and intentional infliction of emotional distress. This is a case of a child overtaking its parent; as originally devised, the emotional distress torts knit together under a single theory several formerly distinct torts, of which corpse mishandling was one, which shared little except that they all permitted plaintiffs [\*370] to recover emotional distress damages even if they had not suffered any physical harm. 73 The widespread acceptance of the emotional distress torts over the past half-century has meant that plaintiffs suing upon facts that once would have supported a claim labeled "corpse mistreatment" are instead choosing to plead and prove their lawsuits under a negligent or intentional infliction of emotional distress framework. 74 Courts, meanwhile, have taken to treating the formerly distinct cause of action for corpse mishandling as a mere subspecies of the emotional distress torts, 75 in some cases requiring plaintiffs to apply an emotional distress label to their corpse mishandling claims. 76

The net result has been a leaching away of corpse mistreatment's identity as a distinct tort-death by absorption, one might say. The Restatement (Second) of Torts continues to devote a separate section to corpse mishandling claims. 77 The treatise acknowledges, however, that "in reality the cause of action has been exclusively one for the mental distress," 78 and its drafters expressed some doubt as to whether this type of claim still merited independent treatment in light of recent recognition of the emotional distress torts. Ultimately, the drafters concluded that it was "probably" desirable to retain the original Restatement's discussion of corpse mishandling claims, "at least for this Restatement." 79

F. Loss of Services Actions

As masters and servants have evolved into employers and employees, the law governing their respective rights has likewise undergone a transformation. In the past, a master could recover for consequential damages attributable to an injury negligently inflicted upon his servant. 80 This cause of action vindicated and protected the [\*371] master's property interest in the servant, 81 whom the master was required to support. 82

Attempts have been made to transfer this rule to the modern context of business employers and employees, 83 but the doctrine has not thrived in this new setting. Scholarly criticism of this cause of action as archaic and ill-suited to modern employment relations has not helped matters. 84 As it stands, opinions in which an employer has been allowed to seek or recover consequential damages assignable to an injury negligently wrought upon an employee represent a decided, and possibly extinct, minority of modern decisions addressing this subject. 85

G. Insult

The insult tort departs from the general rule that denigrating (but nonslanderous) words normally provide no basis for a tort claim. 86 A century ago, if an employee of a railroad or another common carrier directed harsh words toward a customer or (in some jurisdictions) failed to protect a passenger from verbal abuse by third parties, this action or inaction conferred a cognizable tort claim upon the victim. 87

To recover under this theory, the plaintiff (often a woman) 88 merely had to be subjected to language that would offend "a normal person of ordinary sensibility" 89 -that is, "such language as is by common consent among civilized people regarded as vulgar, coarse, immodest, and offensive." 90 Actionable misconduct included

[p]rofane and indecent language, abusive and insulting epithets, indecent proposals, accusations of dishonesty or immoral conduct, insinuations as to poverty or stinginess, threats of violence, the attempt to put a white man into a Jim Crow car, shaking a ticket punch under a passenger's nose, and other assorted varieties of unpleasantness. 91

The Restatement (Second) of Torts continues to recognize the tort of insult 92 as an exception to the more general rule that only extreme and outrageous behavior by a defendant will lead to liability for "pure" emotional distress unaccompanied by an invasion of another personal or property right. 93 But if the tort of insult still exists in theory, today it is a mere shadow of its former self. One author has observed that the "cause of action has largely vanished from American tort practice." 94 The available evidence bears out this statement. While an American Law Reports annotation on liability for insulting or abusive language identifies several dozen decisions implicating the tort of insult, 95 the vast majority of these cases date from the late 1800s or the first few decades of the 1900s, and the author has located only a smattering of published decisions over the past half-century in which plaintiffs have recovered even a pittance under an insult theory. 96

H. Nuisance

Make no mistake: the law of nuisance is alive and well. But this "impenetrable jungle" 97 no longer covers certain factual acreage. For instance, courts in the United States have rejected the old English "ancient lights" doctrine. 98 Long ago, a landowner invoking this rule could acquire a prescriptive right to the free flow of sunlight and air across neighboring land owned by another, 99 a right enforceable through a nuisance action. 100 As Blackstone wrote, "to erect a house or other building so near to mine, that it obstructs my ancient lights and windows is a [nuisance]." 101 Although some jurisdictions in this country initially embraced this doctrine, 102 the switch was flipped more than a century ago. Over the past one hundred and fifty years, one decision after another has gainsaid a compensable right to the maintenance of ancient lights. 103 During this span, only a handful of states, desirous of encouraging solar power, have permitted tort claims for interrupted sunlight. 104

I. Telegram Suits

Telegraph companies used to find themselves on the wrong end of verdicts holding them liable in tort for the negligent transmission of messages. Even though the transmission of a telegram was governed by a contract, tort liability adhered to Western Union and other companies when they did not send a message or somehow garbled the transmission. 105 One common fact pattern involved a failure to transmit, or the delayed transmission of, a message conveying a lucrative job offer or another business opportunity. 106

This sort of claim disappeared in the early 1900s, once the federal and state governments began to comprehensively regulate the telegraph industry. 107 These schemes typically required telegraph companies to file tariffs with the appropriate regulatory agencies. 108 The tariffs set the rates and terms of service; they also typically included terms limiting the liability of the regulated interest for lapses or mistakes in service. 109 In 1921, the United States Supreme Court upheld the validity of these liability limitations, holding that they went hand-in-hand with the strict government control and rate structures to which the companies had submitted. 110 This determination, and the gradual displacement of the telegraph by other methods of communication, triggered a decline in this type of litigation. 111

J. Unfair Trade and Labor Practices

The common law of the late 1800s treated certain labor and marketing practices as essentially tortious in nature. Grievances assessed under a tort rubric included labor strikes and boycotts, which were adjudicated under principles borrowed from the torts of interference with contract and interference with prospective economic advantage, 112 and claims alleging that the defendant passed off its products as those of the plaintiff, behavior that was regarded as a type of deceit. 113

Plaintiffs still sue for similar wrongs today. However, lawyers no longer dress these claims in tort clothing, and courts do not look to tort law to supply the pertinent rules of decision. Instead, we regard [\*375] these claims as properly addressed by, and under, the distinct fields of labor and trademark law. 114 Statutes enacted to dispel the confusion (or repeal the rules) attendant to the adjudication of these disputes under common law principles 115 now provide the rules of decision for these actions. In labor law, the forum for resolution of these conflicts has changed as well, with administrative agencies assuming responsibility for entertaining most grievances between labor and management and between individual employees and unions. 116

The disappearance of trademark and labor disputes from the Restatement of Torts reflects their reassignment from tort law to newly developed fields of study. The First Restatement devoted numerous sections to distinguishing fair from unfair trade practices 117 and legitimate from illegitimate labor activities. 118 These sections were deleted from the Second Restatement, which was published just a few decades later. An introductory note in the Second Restatement explained the drafters' decision to omit the discussion of unfair trade practices:

The rules relating to liability for harm caused by unfair trade practices developed doctrinally from established principles in the law of Torts, and for this reason the decision was made that it was appropriate to include these legal areas in the Restatement of Torts, despite the fact that the fields of Unfair Competition and Trade Regulation were rapidly developing into independent bodies of law with diminishing reliance upon the traditional principles of Tort law. In the more than 40 years since that decision was initially made, the influence of Tort law has continued to decrease, so that it is now largely of historical interest and the law of Unfair Competition and Trade Regulation is no more dependent upon [\*376] Tort law than it is on many other general fields of the law and upon broad statutory developments, particularly at the federal level. The Council formally reached the decision that these chapters no longer belong in the Restatement of Torts, and they are omitted from this Second Restatement. 119

#### Expanding tortious interference stops natural resource degradation from an unenforceable public trust---extinction

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I Introduction

Tortious inference with the public trust has always been actionable under state law as a substantive right of the state trustee in its fiduciary capacity suing on behalf of the public for injury or impairment to natural resources belonging to the people. 1That right arose "when the [American] revolution took place," and the thirteen colonies won their independence, thus making King George transfer the trusteeship to the thirteen colonies at the conclusion of the Revolutionary War, not upon ratification of the Constitution. 2

Two things are tricky with the public trust doctrine, and that is what this Article addresses. First, what is the subject matter of the public trust and how should it evolve? Second, what tools are available to the trustee to protect the public trust? Most state public trust doctrines at least provide that the tidelands and lands beneath tidal and navigable waters are held in trust by the state to promote the public interest. 3Navigation, commerce, and fishing were originally seen as serving the public interest. 4But a lot has changed since colonial times, and our conception of the public interest has evolved to include values like [\*41] recreation, preservation, and restoration of natural resources. The public trust doctrine protects the public interest even in the face of private property rights:

The law we are asked to interpret in this case - the public trust doctrine - derives from the English common law principle that all of the land covered by tidal waters belongs to the sovereign held in trust for the people to use. That common law principle, in turn, has roots in Roman jurisprudence, which held that "by the law of nature[,] ... the air, running water, the sea, and consequently the shores of the sea," were "common to mankind." ... No one was forbidden access to the sea, and everyone could use the seashore "to dry his nets there, and haul them from the sea... ." The seashore was not private property, but "subject to the same law as the sea itself, and the sand or ground beneath it." In Arnold v. Mundy, the first case to affirm and reformulate the public trust doctrine in New Jersey, the Court explained that upon the Colonies' victory in the Revolutionary War, the English sovereign's rights to the tidal waters "became vested in the people of New Jersey as the sovereign of the country, and are now in their hands." 5 Arnold, addressed the plaintiff's claim to an oyster bed in the Raritan River adjacent to his farm in Perth Amboy. Chief Justice Kirkpatrick found that the land on which water ebbs and flows, including the land between the high and low water, belongs not to the owners of the lands adjacent to the water, but to the State, "to be held, protected, and regulated for the common use and benefit." 6

This is an exciting time in the development of the public trust doctrine. Courts are more frequently recognizing a standalone public trust action 7 or natural resource damages action, 8 empowering trustees to protect the public interest by undoing decades of pollution. These recent developments have built on earlier cases 9 and portend future developments. 10

II Public Trust

Most courts today acknowledge that the public trust must be allowed to evolve to meet changing conceptions of the public interest, 11such as recreation, 12 ecological management and restoration, 13and environmental justice. 14 States have the right to protect and manage the water, 15 air, and land 16 over which they are trustees to advance the public interest. The doctrine itself "imposes duties on government[,] instills certain inalienable rights in the people[, and] ... constitutes the sovereign legal obligation that facilitates the reproduction and survival of our society... ." 17Under the public trust doctrine, citizens stand as beneficiaries, holding public property interests in these essential natural resources. The public trust significantly demarcates a society of "citizens rather than of serfs." 18Today, the public interest is generally seen to encompass a broader range of interests expanding the trustee's duties. 19 The tools available to protect the public trust should be clarified and improved. In states with a narrower judicial definition of the public trust doctrine, the state as trustee often sues as parens patriae in its quasi-sovereign capacity to protect public health, safety, and the environment. 20Other states prefer to sue directly for interference with [\*43] the public trust. 21States may even sue in their proprietary capacity where they own the natural resource, such as water bottoms. Although there are clear differences among suits to protect the public trust as parens patriae or in a proprietary capacity, advocates and judges often muddle their reasoning, comingling, say, public trust language and parens patriae language. Because there are limits to the reach of parens patriae, it is important to skip the verbiage and focus on the substantive content of common law public trust claims. 22

The term "public trust" refers to a fundamental understanding that "we the people" share equally in certain natural resources, that private property rights are limited by the public's interest in certain natural resources, that government must protect the public as a fiduciary, and that no legislature may legitimately abdicate its core sovereign responsibility by undermining the public interest in natural resources. 23

In a constitutional system of checks and balances, the public trust is among the fundamental checks on government. In a nonenvironmental case, Stone v. Mississippi, the Supreme Court held the following:

No legislature can bargain away the public health or the public morals ... The supervision of both these subjects of governmental power is continuing in its nature ... The power of governing is a trust committed by the people to the government, no part of which can be granted away. 24

The public trust doctrine prohibits complete privatization of sovereign resources because privatization would constitute an impermissible transfer of governmental power into private hands, wrongfully limiting the powers of later legislatures and the rights of the public to safeguard crucial societal interests.

The public trust doctrine also focuses on the government's obligation to protect. Nonalienation is only one aspect of this - as is the [\*44] state's obligation to protect and, if necessary, restore the public trust. 25"The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public ... are protected, and to seek compensation for any diminution in that trust corpus." 26This is crucial because the trustee cannot have a duty without the ability to discharge that duty by litigation for damages or equitable relief. The duties owed by a public trustee to protect the public trust are generally analogous to those of a private trustee. 27For example, courts have adopted § 174 of the Restatement (Second) of Trusts, which states that "the fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care." 28The comments to § 174 of the Restatement (Second) of Trusts clarify that if the trustees were selected because they have specialized knowledge or training, they will be held to that standard of skill and care: "If the trustee procured his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has." 29Trustees, therefore, have the authority and duty to protect the public trust from tortious interference and to protect the State's natural resources for the benefits of its citizens. 30In New Jersey, a suit in the State's capacity as parens patriae and a suit in its capacity as public trustee of the State's [\*45] groundwaters generally afford the State identical remedies. 31In effect, New Jersey already recognizes a standalone public trust claim, including the protection of the public to have meaningful access to the state's beaches. 32

There are a number of reasons favoring the more articulated use and development of tortious interference with the public trust. First, parens patriae actions for public nuisance involve a balancing of interests, which often fails to give due weight to the public's interest or jus publicum, trumping private interests or the jus privatum. Second, these same public nuisance claims do not compensate the public trust for loss of use of the damaged property and the delta between abatement and restoration to pre-nuisance conditions. In multi-defendant cases, a series of abatement orders may produce a patchwork of fixes as opposed to an appropriate trustee-implemented master plan. 33Third, a minority of courts have not favored public nuisance claims against a product manufacturer. 34Fourth, a minority of courts have failed to allow the state to sue for trespass despite the jus publicum because a parens patriae plaintiff does not have a sufficient property interest to sustain a trespass action for natural resources which belong to everyone. The argument generally is that the trustee lacks a right to exclusive possession of the resource which belongs to everyone. 35 [\*46] However, it is well settled that in other contexts a trustee may sue for trespass to property owned by trust beneficiaries. 36Trespass which tolerates no invasion of interests may be a better fit for public trustees than public nuisance. Fifth, parens patriae causes of action lack the evolutionary purpose of public trust cases as set forth in cases like Illinois Central. Sixth, remedies that are suited to private individuals may not work for natural resources protected by the public trust. For example, public nuisance is often limited to abating the nuisance, though some courts have moved away from this, recognizing that the trustee can only undo damages to scarce natural resources with money to pay for natural resource damages. We are seeing more parens patriae cases attempting to invoke the public trust doctrine to address these and related concerns. 37However, both parens patriae and tortious interference with public trust can and should also evolve independently.

The public trust means the jus publicum trumps the jus privatum. This was the case in Illinois Central. Likewise, in Just v. Marinette County, the Wisconsin Supreme Court upheld wetland regulations that diminished property values under the public trust doctrine without finding a takings, meaning the jus privatum takes subject to the jus publicum:

This case causes us to re-examine the concepts of public benefit in contrast to public harm and the scope of the owner's right to use of his property. In the instant case we have a restriction on the use of a citizens' property, not to secure a benefit for the public, but to prevent a harm from the change in the natural character of the citizens' property. We start with the premise that lakes and rivers in their natural state are unpolluted and the pollution which now exists is man-made. The state of Wisconsin under the trust doctrine has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters. This is not, in a legal sense, a gain or a securing of a benefit by the maintaining of the natural status quo of the environment. What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty. Swamps and wetlands were once considered wasteland, undesirable, and not picturesque. But as the people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the [\*47] balance of nature and are essential to the purity of the water in our lakes and streams. 38

Cases like Just v. Marinette County, and others, 39remind us that the public trust requires us to look at the positives to the trust and its beneficiaries, not just the negatives, as is often the case in some parens patriae litigation. 40Thus, for example, a public trust approach allows for loss of use damages and restoration for damaged resources both to compensate the public and to incentivize the tortfeasor to restore resources as quickly as possible. 41

Parens patriae often focuses on loss and requires "an injury to a "quasi sovereign' interest" (an interest different from the interest of private parties), and that the injury is to a "substantial segment of the population." 42 Alfred L. Snapp & Son v. Puerto Rico, was decided as a parens patriae case. 43The underlying issue arose in the labor context but does a good job of explaining the concept:

Parens patriae means literally "parent of the country." The parens patriae action has its roots in the common-law concept of the "royal prerogative." The royal prerogative included the right or responsibility to take care of persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property." At a fairly early date, American courts recognized this common-law concept, but now in the form of a legislative prerogative: "This prerogative of parens patriae is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function ... often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." 44

[\*48] Tortious interference with the public trust action is a stand-alone claim tied to government's fiduciary duties regarding public resources. 45 Parens patriae is a tool of the state's police power. The parens patriae claim gives the state standing to protect its quasi-sovereign interests by prosecuting the nongovernmental rights of its citizens under various state causes of action, such as public nuisance, 46strict liability, 47trespass, 48and unjust enrichment, 49among others. 50In some cases, the state may sue under the public trust and as parens patriae 51 for damages and unjust enrichment. 52

In re Matter of Steuart Transportation likewise relied on both public trust and parens patriae language to find state and federal rights to sue for the loss of migrating waterfowl resulting from an oil spill while explaining their differences:

This Court is of the opinion that both of these doctrines are viable and support the State and the Federal claims for the waterfowl ... . Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people. Likewise, under the doctrine of parens patriae, the state acts to protect a quasi-sovereign interest where no individual cause of action would lie. In the case currently before this Court, no individual citizen could seek recovery for the waterfowl, and the state certainly has a sovereign interest in preserving wildlife resources. 53

In some cases, the trustee may "bring suit [as parens patriae] to protect a broader range of natural resources than the public trust doctrine because it does not require state ownership of such resources." 54Many opinions recognize tort remedies including strict liability, nuisance, and trespass, as tools for the state or its trustee to fulfill its fiduciary duty to the public. However, these same opinions are unclear as to whether the action is based on the public trust or on a parens patriae theory.

Because of some overlap (in the sense of both being applicable to a given case) and some jurisprudential confusion, some courts erroneously label public trust claims as " parens patriae" cases, and vice versa. These courts, and other courts, seemingly improperly examine public trust cases in terms of the elements of other tort claims, such as public nuisance. Sometimes the court gets it right when the advocate may not. 55On the other hand, as shown below, the tort of tortious interference involves an unreasonable interference with the public trust. 56Clearly, a wrongful interference exists if defendant engaged in trespass-like conduct 57or a public nuisance-like situation, for example, so we are not faulting that analysis; instead, we address the labeling of the underlying state claim that the court is vindicating. 58In some cases, the label may not matter to the outcome, but it often [\*50] does matter. Specifically, the elements of tortious interference do not require proof of a public nuisance, trespass, or any other tort.

III Elements of Tortious Interference

A. Elements

In order to show tortious interference with the public trust, 59 the State needs to show

(1) a protectable public trust interest; 60

(2) an unreasonable interference with that interest; 61 and

(3) a reasonable likelihood that the interference caused the loss to that protected interest or nexus. 62

B. Protectable Public Trust Interest

In a natural resource damage case, a protectable public trust interest includes water bottoms, 63waterfront land, 64migratory birds, 65 fisheries habitat, 66 groundwater, 67 air, land and water, 68 coastal waters, 69 wildlife, and other natural resources by which the injured resource is no longer able to serve the everchanging public interest. Protected public trust interests continue to develop at common law and include both the defense, restoration, or enhancement of natural resources damages 70and access to those resources. 71

This has become particularly clear in recent cases involving the injury to natural resources caused by products like MTBE, 72PCBs, 73PFAS 74, and legacy pollution cases. 75The courts focus on the substance of the interest, not necessarily its form. 76The public interest preexisted [\*52] and survived the creation of private property rights; the public trust may overlap and trump private property rights. The limits imposed on private property by the public trust have been the subject of numerous cases, finding in favor of the State's right to enforce the jus publicum without committing a taking. 77For example, the U.S. District Court for the District of Massachusetts held that when the federal government or the State conveys public trust property to a private individual, that individual takes subject to the terms of the trust - "the trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign." 78Our analysis here focuses on natural resource damage public trust cases, but it is worth noting that the public trust extends to more than just natural resources. 79

Part of the public trust doctrine and its protectable interests reveal how society harmonizes private property rights ( jus privatum) and public property rights ( jus publicum). 80Strictly speaking, the public trust arises from the State's duty to its citizens, not traditional property law. 81The case law clearly provides the states with the common law [\*53] power to protect the public trust. Each state is a trustee of its natural resources. 82In Phillip Petrol. Co. v. Mississippi, the court explained, "It has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." 83What is less often discussed is how to cubbyhole or name the common law theories of liability available to the states. The scope of private property rights is decided by the state, subject to the public trust, and private property is taken subject to that understanding. In ExxonMobil, Judge Anzaldi specifically found that public trust extended to Exxon's private property but rejected trespass theory on the "exclusive possession" issue. 84In Deull Fuel Judge Mendez reached the opposite conclusion on trespass that "the public trust doctrine trumps the exclusivity element of a trespass claim":

This responsibility to protect public lands and natural resources forms the basis of the State to take action consistent with the policy stated by the Legislature. In this court's opinion, the remedy of trespassing as outlined in Count Four of the Complaint is available to the State as it performs its fiduciary obligation to ensure the rights of the public and to prosecute claims to protect the environment. Based on the facts alleged in the Complaint, the Public Trust Doctrine trumps the exclusivity element of a trespass claim. While possessory interests are usually for individual owners themselves to protect, when the harm is as extensive to the State's natural resources as [\*54] outlined in the Complaint, the harm is not just to the individual, but to the people of New Jersey as a whole. 85

The jus publicum exists even if "the State [does] not expressly retain its rights as public trustee in the conveying instruments." 86It follows that title is not synonymous with trusteeship. In National Ass'n of Home Builders v. New Jersey Dep't of Envt. Prot., the court held that:

title to such "public trust property' is subject to the public's right to use and enjoy the property, even if such property is alienated to private owners... This right of the public to use and enjoy such "public trust lands' does not disappear simply because the land that was once submerged is filled in. 87

The reality is that since the State originally holds the property in trust for the people, "[it] cannot convey to their prejudice." 88

The U.S. Supreme Court first fully delineated the parameters of the environmental public trust doctrine in 1892 in Illinois Central Railroad v. Illinois. 89 In that case, the Court was asked to settle the ownership of submerged lands extending out from Chicago under Lake Michigan. 90In 1869, the Illinois legislature passed an act which gave the Illinois Central Railroad Company the right to use and develop the land. 91However, in 1873 the state repealed the act. 92When the railroad company continued to develop the land, the Illinois Attorney General filed suit against it. 93

[\*55] The Court found for the State of Illinois, holding that the rights granted by the statute were revocable. 94The Court acknowledged that the State of Illinois held the title to the lands under the water of Lake Michigan, and that, in general, title carries with it freedom of alienation. 95But the title the state holds in public lands is "different in character ... [because] it is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein ... ." 96The state may grant parcels of the property in this public trust for the construction of "wharves, piers, and docks" to the extent that the structures improve the people's interest in the land. 97But, the Court observed, this is "a very different doctrine from the one which would sanction the abdication of the general control of the state over lands." 98It held that "the state can no more abdicate its trust over property in which the whole people are interested ... than it can abdicate its police powers in the administration of government and the preservation of the peace." 99In other words, the state may grant control of the trust to a private organization in order to improve the land because private organizations may be in a better position than the state to effectuate that improvement. 100But any such improvements must be for the benefit of the people, who are the beneficiaries of the land. 101Such grants to private organizations are "necessarily revocable," and "the power to resume the trust whenever the state judges best is ... incontrovertible." 102The Supreme Court in Illinois Central applied the constitutional reserved powers doctrine to natural resources, which are held in trust and cannot be fully privatized. 103At issue was control of Chicago's harbor, which the Illinois legislature had privatized. In an explanation that extends beyond submerged lands, the Court explained the rationale of the public trust doctrine:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private [\*56] parties ... than it can abdicate its police powers in the administration of government and the preservation of the peace... . Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the state can be resumed at any time... . The trust with which they are held, therefore, is governmental, and cannot be alienated ... . 104

Illinois Central made clear that alienating or destroying essential resources would amount to relinquishing sovereign powers in violation of the constitution's reserved powers doctrine. 105Land must remain with the sovereign in perpetuity. 106Legislatures cannot be assumed to intend to "casually dispose of irreplaceable public assets" through an act designed to merely simplify land title transactions. "We cannot ascribe to the legislature an intention that [sovereign lands] be permitted to be lost by default." 107Sovereign lands are not subject to alienability to the same degree as other lands held by the state. 108

The public trust creates the freedom to enjoy clean air and water, to recreate, and to otherwise enjoy and benefit from nature without regard to the self-interest of private parties who may have disproportionate influence over government. The public trust makes us all equal, and no amount of wealth or political influence can make one more equal or entitled than the whole of us. 109As Professor Wood has written, the public trust ensures that the government serves the common good, not itself or private individuals pursuing their own interests. 110Quoting Geer v. Connecticut,

the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. 111

The public interest evolves. "The industrial revolution has given way to the environmental revolution." 112The state administers the public trust and retains the continuing power that "extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust." 113

For example, New Jersey has recognized the broad nature of the public trust doctrine, and as such, application of the public trust doctrine has expanded over time. 114"It has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." 115For example, the Court in Arnold v. Mundy held that the public trust included land between the high and low tidewater level, dispelling the notion that the Doctrine might apply just to tidal waters. 116This evolved to include neighboring land and reasonable access, even if that access involved crossing private property. 117Still more, the public trust doctrine has been applied not only to the resources themselves, such as marshes and upland forests, but also to the public's right to recreational uses, for example, in the tidal lands, including bathing, swimming, and other shore activities. 118

New Jersey law describes the important role of natural resources to this State:

New Jersey's lands and waters constitute a unique and delicately balanced resource; [] the protection and preservation of these lands and waters promotes the health, safety and welfare of the people of this State; [] the tourist and recreation industry dependent on clean waters and beaches is vital to the economy of this State; [and] the discharge of petroleum products and other hazardous substances within or outside the jurisdiction of this State constitutes a threat to the economy and environment of this State ... . 119

The Spill Act's broad definition of natural resources arguably constitutes an effort to strengthen the public trust doctrine, especially as it relates to remedies.

C. Unreasonable Interference

Unreasonable interference, especially in the natural resource context, can occur in a number of ways, and traditional tort concepts may illuminate whether an interference is unreasonable. 120 Illinois Central is clearly a public trust case, which restrains the trustee from alienating the public trust, arguably the most extreme form of interference:

The harbor of Chicago is of immense value to the people of the State of Illinois, ... and the idea that its legislature can deprive the State of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose, - one limited to transportation of passengers and freight between distant points and the city, - is a proposition that cannot be defended. 121

Interference may also include destroying natural resources, which is another extreme form of interference. In State of Ohio v. City of Bowling Green, the Ohio Supreme Court allowed money damages to the State for a fish kill that resulted from a mishap at the municipality's sewage treatment plant. 122The court noted that "the state holds... such [\*59] wildlife as a trustee for all citizens." 123"An action against those whose conduct damages or destroys such property, which is a natural resource of the public, must be considered an essential part of a trust doctrine, the vitality of which must be extended to meet the changing societal needs." 124

In State of Maryland, Dept. of Natural Resources v. Amerada Hess, the court allowed an action for money damages for an oil spill in State waters that damaged the waters, fish, and birds. 125The Court found the Crown's Charter to Lord Baltimore to be broad enough to cover these resources and to find an unreasonable and actionable interference. 126

In Attorney General, State of Michigan v. Hermes the Court also allowed the state as trustee to bring a civil action for money damages to protect its fisheries. 127It followed other cases, including Bowling Green and Amerada Hess.

Public nuisance claims protect against a broader array of interferences. 128The Restatement definition nevertheless provides an initial standard for assessing whether the parties have stated a claim for common law interference. The Restatement definition of public nuisance set out in § 821B(a) has two elements: an unreasonable interference and a right common to the general public. 129Section 821B(2) further explains:

Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent and long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right. 130

[\*60] This is helpful but not sufficient if the public trust is at issue. For example, interference is unreasonable when it (a) significantly interferes with the (changing) public interest, and (b) a significant interference exists when a conflict arises between the jus publicum and jus privatum, say, when a developer wants to build on wetlands, though both acts and omissions by the private landowner may give risk to that conflict.

A defendant's interference is unreasonable relative to the jus publicum. A public nuisance then is "an unreasonable interference with a right common to the general public" or the interest of the public at large. 131Under common law, the destruction and alteration of natural resources is generally without justification. Unjustified interference may also arise from engaging in abnormally dangerous activities, including the discharge of hazardous substances. 132Those who "introduce extraordinary risk of harm into the community for their own benefit" are strictly liable. 133Even manufacturers may be held liable by the state for trespass. 134Conduct may also be considered wrongful if the defendant interfered with the public trust for the sake of appropriating its benefits. Additionally, conduct may be wrongful if the defendant acted for the purpose of producing the interference, or with knowledge that interference was substantially certain to occur. 135Conduct may also be wrongful if it is an independently wrongful act, culpable apart from its effect on the public trust.

[\*61] Nuisance, 136trespass, 137strict liability, 138conversion, 139products liability 140and negligence teach us a great deal about interference. However, these legal cubbyholes often obscure the boundaries between jus publicum and jus privatum. 141Thinking and talking in terms of tortious interferences with the public trust provides a more illuminating way of analyzing this boundary under a specific set of circumstances. 142In the end, courts will decide if there is a duty on the basis of the evolving standards of the community. Practical rules and not formalistic quibbling should determine duties. As Justice Holmes said, "it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." 143In general it should not matter if the label "tortious interference with public trust" hardly appears in the case law. 144

D. Nexus

There must also be a nexus between that wrongful interference and the loss to the protected interest. This requires proof that defendant's act or omission directly or indirectly led or contributed to the harm, regardless of other causes. That is, the wrongful act damaged the public trust. Damages or remedies within the nexus of harm must be determined. Harm often refers to the disruption of the ecosystem:

Biological integrity ... refers to the capacity to support and maintain a balanced, integrated adaptive biological system having the full range of elements (genes, species, and assemblages) and processes (mutation, demography, biotic interactions, nutrient and energy dynamics, and metapopulation processes) expected in the natural habitat of a region. 145

A nexus exists even if there is only a de minimis impact. "Application of [the de minimis] doctrine...may involve making it equally so elsewhere. In total consequence, the State's trust interests ... could be affected ... considerably more than a trifling matter." 146Cumulative impacts matter. 147

Nexus is different from proximate cause. 148The trustee must be able to identify an articulable nexus between the business transacted by the defendant and the resulting claim being sued upon. 149The nexus can be based on geography, market share, waste streams or other case-by-case and site-specific factors. In public nuisance cases, the plaintiff is generally required to prove causation - that "the defendant created or assisted in the creation of the nuisance," 150which is more than a nexus requirement. However, if that role cannot be traced, courts may rely on [\*63] circumstantial evidence of causation. 151Nevertheless, the added burdens and delays in a public nuisance case are other reasons to proceed under a public trust theory.

IV Common Law Is Always Evolving

"Continuity and change are essential attributes of a legal system." 152Public trust law enjoys these attributes and is no different from other common law doctrines: "the public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." 153Public trust law dates back to the Romans 154and continues to evolve at common law 155to meet the contemporary challenges of pollution and limited resources. The advent of public law enactments is not a reason to halt the evolution of the public trust, or to eliminate it entirely, but rather to allow it to develop in that new legal context in light of the changing societal values driving those enactments 156>The law should be based on current concepts of what is right and just and the judiciary should be alert to the never ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and intend to discredit the law should be readily rejected. 157

As the Matthews court said, "Archaic judicial responses are not an answer to a modern social problem." 158For example, New Jersey's natural resource restoration program is grounded in the public trust [\*64] doctrine, which originates from a body of common law 159providing that "public lands, waters and living resources are held in trust by the government for the benefit of its citizens," 160and has been enhanced by statute: 161the New Jersey Spill Act. 162The Spill Act identifies the Department of Environmental Protection (DEP) as the trustee of the State's natural resources. 163Natural resources are broadly defined to include "all land, fish, shellfish, wildlife, biota, air, waters and other such resources owned, managed, held in trust or otherwise controlled by the State." 164

V Suing to Enforce

The public trust is not self-executing, and the state must sue to enforce. 165"If the health and comfort of the inhabitant of a state are threatened, the state is the proper party to represent and defend them"; 166 since natural resources are part of the common public trust, 167 the state as trustee should sue for tortious interference. Public trust natural resources enjoy at least the same protections as private resources. Tort law, like the Spill Act, requires interpretations that deter misconduct and spur restorative actions. 168The Supreme Court has repeatedly affirmed that the state is the trustee of environmental resources, which are held in trust for the benefit of the public. 169Though governmental agencies routinely grant environmental management contracts to private organizations, the public beneficiary does not change nor does the government's fiduciary duty. 170Understandably, most public trust cases focus on the responsibilities of the state as a trustee for its people. 171The U.S. District Court for the [\*66] Eastern District of Virginia reaffirmed that "under the public trust doctrine, the [states] and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people." 172Obviously, the state's trustee's fiduciary duties include the right to sue for injury to the public trust. 173 The specific common law tools available to the trustee to discharge its fiduciary duty to preserve and protect the public trust are less often discussed.

VI Remedies

Trustees investigate natural resource injuries and determine appropriate remedies. This subject generally is beyond the scope of this article. However, it is worth noting public trustees may also recover for the defendant's unjust enrichment. 174For example:

In Wyandotte Transport Co. v. United States, the Supreme Court held that restitution was an allowable remedy for government, even though statutory penalties already applied. In Wyandotte, the government sued for the negligent sinking of a ship in a navigable river. The case can be considered a toxic tort because the sunken vessel contained chlorine. The court allowed the government to be reimbursed for the expenses of raising the ship and any cleanup involved, because statutory fines were "hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner may inflict upon the sovereign. The court further added, "denial of such a remedy ... would permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his negligence onto his victim." 175

Conclusion

The common law public trust doctrine is a dynamic and evolving doctrine. It is a "background principle" of property law. 176 Historically, courts have cubbyholed such state claims to protect the public trust as a parens patriae action or public trust action for "public nuisance," "trespass," or "strict liability," or ignored identifying the operative legal theory being used to enforce the public trust. In many ways, this jurisprudence invokes a formalism unsuited to the evolving public trust. The governing jurisprudence could be vastly improved by recognizing and evolving over time the cause of action for tortious interference with the public trust. The public trust provides a framework, integrated with applicable science and policy, to preserve, protect and help us restore our ecosystems. 177

### 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-Subsets

#### ‘Antitrust’ applies to the entire economy---targeting single industries isn’t topical

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

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

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

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

#### Vote neg:

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

#### Ground---economy-wide change ensures links to core generics like biz con and politics by forcing the aff to structurally change antitrust AND be big enough to deviate from the background noise of daily enforcement actions

## Global Supply Chains ADV

### Global Supply Chains ADV---1NC

#### Global supply chains are wrecked

Peter S. Goodman, 10-22-2021, "How the Supply Chain Broke, and Why It Won’t Be Fixed Anytime Soon," global economics correspondent, previously London-based European economics, national economics correspondent during the Great Recession. previous Shanghai bureau chief of Post, https://www.nytimes.com/2021/10/22/business/shortages-supply-chain.html

Computer chips. Exercise equipment. Breakfast cereal. By now, you’ve probably heard: The world has run short of a great many products.

In an era in which we’ve become accustomed to clicking and waiting for whatever we desire to arrive at our doors, we have experienced the shock of not being able to buy toilet paper, having to wait months for curtains and needing to compromise on the color of our new cars.

Of far greater importance, we have suffered a pandemic without adequate protective gear. Doctors cannot obtain needed medicines. In Alaska, people are struggling to find enough winter coats. Airplanes are delayed while crews wait for food deliveries.

Why is this happening?

The pandemic has disrupted nearly every aspect of the global supply chain — that’s the usually invisible pathway of manufacturing, transportation and logistics that gets goods from where they are manufactured, mined or grown to where they are going. At the end of the chain is another company or a consumer who has paid for the finished product. Scarcity has caused the prices of many things to go higher.

When did this start?

The disruptions go back to early last year, to the beginning stages of the pandemic. Factories in parts of the world where a lot of the globe’s manufacturing capacity sits — places like China, South Korea and Taiwan as well as Southeast Asian nations like Vietnam and European industrial giants like Germany — were hit hard by the spread of coronavirus cases. Many factories shut down or were forced to reduce production because workers were sick or in lockdown. In response, shipping companies cut their schedules in anticipation of a drop in demand for moving goods around the world.

That proved to be a terrible mistake. Demand for some things — restaurant meals, trips to vacation destinations, spa services — indeed cratered.

But Americans took the money they used to spend on such experiences and redirected it to goods for their homes, which were suddenly doubling as offices and classrooms. They put office chairs and new printers in their bedrooms, while adding gym equipment and video game consoles to their basements. They bought paint and lumber for projects that added space or made their existing confines more comfortable. They added mixers and blenders to their kitchens, as parents became short-order cooks for cooped-up children. The timing and quantity of consumer purchases swamped the system. Factories whose production tends to be fairly predictable ramped up to satisfy a surge of orders.

Why couldn’t factories just produce more?

Many did, but this produced its own troubles. Factories generally need to bring in components to make the things they export. For example, a computer assembled in China may require a chip made in Taiwan or Malaysia, a flat-panel display from South Korea and dozens of other electronics drawn from around the world, requiring specialized chemicals from other parts of China or Europe.

The steep surge in demand clogged the system for transporting goods to the factories that needed them. At the same time, finished products — many of them made in China — piled up in warehouses and at ports throughout Asia because of a profound shortage of shipping containers, the standard-size steel boxes that carry goods on enormous vessels.

What happened to all the giant container ships?

In simplest terms, they got stuck in the wrong places. In the first phase of the pandemic, as China shipped huge volumes of protective gear like masks and hospital gowns all over the world, containers were unloaded in places that generally do not send much product back to China — regions like West Africa and South Asia. In those places, empty containers piled up just as Chinese factories were producing a mighty surge of other goods destined for wealthy markets in North America and Europe.

Because containers were scarce and demand for shipping intense, the cost of moving cargo skyrocketed. Before the pandemic, sending a container from Shanghai to Los Angeles cost perhaps $2,000. By early 2021, the same journey was fetching as much as $25,000. And many containers were getting bumped off ships and forced to wait, adding to delays throughout the supply chain. Even huge companies like Target and Home Depot had to wait for weeks and even months to get their finished factory wares onto ships.

Meanwhile, at ports in North America and Europe, where containers were arriving, the heavy influx of ships overwhelmed the availability of docks. At ports like Los Angeles and Oakland, Calif., dozens of ships were forced to anchor out in the ocean for days before they could load and unload. At the same time, truck drivers and dockworkers were stuck in quarantine, reducing the availability of people to unload goods and further slowing the process. This situation was worsened by the shutdown of the Suez Canal after a giant container ship got stuck there, and then by the closings of major ports in China in response to new Covid-19 cases.

Many companies responded to initial shortages by ordering extra items, adding to the strains on the ports and filling up warehouses. With warehouses full, containers — suddenly serving as storage areas — piled up at ports. The result was the mother of all traffic jams.

What exactly is in short supply?

Just about anything that is produced or manufactured — from chemicals to electronics to running shoes. Shortages beget more shortages. A paint manufacturer that needs 27 chemicals to make its products may be able to buy all but one, but that one — perhaps stuck on a container ship off Southern California — may be enough to halt production.

#### Sqo solves batteries

Justine Calma, 6-8-2021, Calma; Columbia University, Graduate School of Journalism, Science Reporter, Senior Writer, "The US wants to fix its broken lithium battery supply chain," Verge, https://www.theverge.com/2021/6/8/22524663/us-lithium-battery-supply-chain-broken

The US announced plans to build out a domestic supply chain for lithium batteries, which are critical for electric vehicles and renewable energy. Its new goal is to be able to do nearly everything — from mining to manufacturing and recycling batteries — within its borders by the end of the decade. If it fails, the US could struggle to meet its own climate goals and compete in the growing electric vehicle industry.

The Department of Energy (DOE) released a “national blueprint” today outlining how it plans to boost America’s ability to make lithium batteries. Demand for these batteries has already skyrocketed for electronics and electric vehicles. Spruced-up electricity grids will also need large batteries to accommodate increasing amounts of solar and wind power. In its blueprint, the DOE even makes a case for battery-powered planes to take to the skies.

“OUR SUPPLY CHAINS FOR THE TRANSPORTATION, UTILITY, AND AVIATION SECTORS WILL BE VULNERABLE AND BEHOLDEN TO OTHERS FOR KEY TECHNOLOGIES.”

Right now, the US is a small player in the global battery industry. China dominates both battery manufacturing and mineral supply chains. On its current trajectory, the US is expected to be able to supply less than half the projected demand for lithium-ion batteries for electric vehicles on its roads by 2028.

“These projections show there is a real threat that U.S. companies will not be able to benefit from domestic and global market growth,” the blueprint says. “Our supply chains for the transportation, utility, and aviation sectors will be vulnerable and beholden to others for key technologies.”

A lot of what’s holding the US back, according to the DOE, is a lack of a national strategy. So to turn things around, the DOE laid out its priorities for federal investment in the technology this decade. One of the biggest problems to tackle is how to nab enough key minerals. There’s a looming shortage of lithium, cobalt, and nickel used in batteries. To make things worse, these things are only mined in a few places, and labor and human rights abuses are common. That makes finding new mineral sources and designing batteries that use less of these materials pretty urgent.

There’s already a race to tap lithium deposits in the US, and the DOE’s new blueprint will likely accelerate domestic mining efforts. The DOE also called for mandating recycling so that battery makers can eventually harvest more materials from old products. Longer term, the DOE actually wants to find a way to make lithium-ion batteries without cobalt and nickel by 2030. (Tesla announced last year that it would make EV battery cathodes without cobalt). Through better design, it ultimately wants to cut the cost of an EV battery pack in half by the end of the decade.

The DOE plans to distribute $17 billion in loans for EV manufacturing facilities in the US. It’s also looking to deploy more large-scale energy storage at federal sites. And it released new guidelines requiring federal contractors and grantees to manufacture the products they’re researching and developing, including anything related to advanced batteries, in the US.

THE US WILL PROBABLY NEED TO FIGURE OUT HOW TO MAKE A LOT MORE STUFF ON ITS OWN

It’s part of a broader push by the Biden administration to develop more domestic supply chains. In addition to lithium-ion batteries, they are also focused on critical minerals, semiconductor chips, and pharmaceuticals. The administration published a larger review of all those supply chains today and announced a new task force to stop supply chain disruptions. That task force is focused on finding short-term solutions after the COVID-19 pandemic revealed big weaknesses in global supply chains.

In the long term, the US will probably need to figure out how to make a lot more stuff on its own. The Biden administration will put aside $100 million in grants for state-level apprenticeship programs that will help create workforces for new domestic supply chains. “Decades of focusing on labor as a cost to be managed and not an asset to be invested in have weakened our domestic supply chains,” deputy director of the National Economic Council Sameera Fazili said in a briefing today. “It’s clear from these reports that we need to take action.”

#### No Korea war---Biden won’t respond, and Kim is deterred.

Kent Harrington 21, former National Intelligence Officer for East Asia in the Central Intelligence Agency, M.A in International Relations from the Johns Hopkins University School of Advanced International Studies, “Unfortunately for North Korea, there is a new boss in the White House,” Japan Times, 11-10-2021, https://www.japantimes.co.jp/opinion/2021/11/10/commentary/world-commentary/north-koreas-options-shrink

Nearly three years after his failed bromance with Donald Trump, North Korean dictator Kim Jong Un is once again angling for U.S. attention.

North Korea has tested a new, high-tech missile and hinted that it may agree to restart talks with South Korea, where President Moon Jae-in desperately wants to resuscitate his moribund outreach to the North. But if Kim is expecting a positive reaction from U.S. President Joe Biden, he shouldn’t hold his breath. With issues like China and the rebuilding of U.S. alliances topping Biden’s agenda, overtures to Kim are unlikely.

Kim’s dog-eared script is not helping his cause. The latest drama has unfolded all too predictably. In Act One, Kim Yo Jong, Kim’s sister and the North’s spokesperson on North-South affairs, averred that the regime might be interested in discussing a peace treaty with South Korea — an idea that Moon himself had proposed in September. She hastened to add, however, that South Korea will have to distance itself from U.S. demands for nuclear disarmament and end joint military exercises with U.S. forces.

The predictable saber-rattling came a few days later, in Act Two. Following the announcement that the regime had launched a new hypersonic missile and carried out a half-dozen other tests, Kim took to the podium (with his missilery in the background) to tout the North’s “world class defense capability.” Although the Biden administration had sent “signals that it is not hostile,” he declared that the North has “no reason to believe it.” By challenging U.S. credibility, Kim was all but asking the United States to respond, ideally by following its Korean ally’s lead and publicly throwing a bone his way.

But the newly slimmed-down Kim isn’t the only one reusing an old script. Moon’s offer to negotiate a peace treaty as a prelude to nuclear negotiations has been a perennial feature of North-South talks. As if following Kim Yo Jong’s cue, Moon’s Democratic Party followers duly played their part by calling for a suspension of military exercises and other preconditions for negotiations.

Yet, in seizing on the prospect of new nuclear talks, the political leadership in Seoul seems to have already forgotten what Kim said at North Korea’s Eighth Party Congress in January: “We must develop tactical nuclear weapons that can be applied in different means in the modern war [sic] … and continue to push ahead with the production of super-large nuclear warheads.”

As always, North Korea’s blandishments and bluster are geared toward only one goal: to loosen the vice of nuclear-related economic sanctions. Despite making economic development his domestic priority five years ago, Kim has failed to improve basic living conditions in the country. Battered by floods, food shortages and a pandemic-induced lockdown, his initiatives — market-based reforms, decentralized decision-making and more social investment — have stalled, tanking trade and economic growth. Kim acknowledged as much at the party congress in January, emphasizing the need for “self-reliance” and explicitly sidelining reform.

Unfortunately for Kim, there is a new audience in the White House, and it is far tougher than the incumbents in Seoul. Speaking before a joint session of Congress in April, Biden made clear that Kim should not expect the kind of pre-emptive concessions that Trump offered at the summits in Singapore in 2018 and Hanoi in 2019. According to Biden, the U.S. is prepared to talk anytime without preconditions about the peninsula’s denuclearization, but there will be no mano-a-mano deal-making. As Biden’s press secretary explained after his speech, “We have and will continue to consult with the Republic of Korea, Japan and other allies at every step along the way.”

Biden’s priorities in Asia pose a big problem for Kim. In early October, CIA Director William Burns announced the creation of a new China Mission Center and then disclosed that the agency’s North Korea mission center will be shut down. Although countries like North Korea and Iran will remain priorities, that work will be absorbed into the agency’s regional divisions. According to a State Department official, U.S. intelligence agencies “will continue to remain in close consultation and coordination with our South Korean allies on issues of mutual concern,” especially North Korea.

For Kim, the implications of this reorganization are obvious. While Trump was willing to backhand longstanding U.S. allies for the sake of his summitry theater, Biden insists on working closely with America’s partners. The consequences of this change are already apparent across the region. In South Korea, conservative politicians campaigning for next year’s presidential election are calling for greater pressure on the North and to repair ties with Japan, which have become badly frayed under Moon.

Similarly, in his first conversation with Biden as Japan’s newly installed prime minister, Fumio Kishida emphasized the importance of allied cooperation. Reportedly singling out the threat from a nuclear-armed North Korea, he highlighted Japan’s need for stronger missile and naval defenses.

Biden’s overarching focus on China, North Korea’s sole ally and source of economic support, also does not bode well for Kim. To be sure, the North Koreans have probably concluded, correctly, that a more fractious U.S.-China relationship will make China less likely to twist their arms on the nuclear issue. Given today’s tensions, it is highly unlikely that China would do the U.S. any more favors in this regard.

But Chinese help with the North Korean nuclear issue has only ever been intermittent at best. Because China does not want Korean refugees flooding over its border or a U.S. ally in control of the entire Korean Peninsula, it still has an interest in limiting Kim’s provocations.

In any case, having China in his corner is probably the best that Kim can hope for in the next act of the drama. By bolstering U.S. allies and deepening mutual cooperation, America’s strategic commitment to Asia not only represents a bulwark against China’s own military ambitions; it also changes the balance of forces surrounding the Korean Peninsula. Australia’s investment in nuclear submarines and enhanced alliance relations with the U.S. and the United Kingdom represent future capabilities that can focus on Pyongyang. And Kishida’s Liberal Democrats back a boost in Japan’s defense spending to 2% of GDP.

For its part, Pyongyang would do well to consider these and other forthcoming strategic changes affecting the Korean Peninsula. America’s Asian partners, with their strong economies, world-class technology and modern defense forces, are well prepared for the 21st century. Time is not on Kim’s side.

#### No hypersonics impact---the threat’s low and manageable without strategic shifts.

Jyri Raitasalo 19, Professor of War Studies at the Finnish National Defense University, Military Advisor to the Minister of Defence at the Finnish Defence Ministry, “Hypersonic Weapons are No Game-Changer”, The National Interest, 1/5/2019, https://nationalinterest.org/print/blog/buzz/hypersonic-weapons-are-no-game-changer-40632

According to the mainstream conceptualization of hypersonic weapons, the United States—with its Western allies—are on a verge of becoming vulnerable to Russian and Chinese hypersonic weapons. According to this narrative, there are no defenses against hypersonic missiles—or Hypersonic Glide Vehicles (HGV). As Gen. John Hyten, commander of U.S. Strategic Command, told the Senate Armed Services Committee in March 2018, "[w]e don't have any defense that could deny the employment of such a weapon against us". According to the dominant Western way to depict the threat from Russian or Chinese hypersonic weapons, the United States has become surprisingly quickly—within some months or years—defenseless to these weapon systems that have been in the making for at least a decade and a half. As was reported in February 2018, “America Is Desperate to Stop Russian and Chinese Hypersonic Weapons“.

The ongoing Western “hypersonic hype” is a very familiar phenomenon. The profession of security and defense analysis is flooded with buzzwords, high-tech silver bullets and slogans. Can you remember the Revolution in Military Affairs (RMA)? It was supposed to remove friction and the fog of war from the battlefield. This never materialized, although the United States and many European countries did try to ride the revolutionary wave during the late 1990s and the following decade—pouring in hundreds of billions of dollars to maintain military “edge” against all potential adversaries. Similarly, Cyberwar has supposedly been coming ever since 1993—although we have not seen one instance of cyberwar, yet. Nor do we have any solid indication that future cyberwars—if they actually will be waged—will radically alter the character of war, or how wars are waged. All defense-related buzzwords hinder—rather than help us—to understand the complex security environment and the associated military threats that already exist or those that will exist in the future. In sum, hypersonic weapons will be fielded in the near future, but there is no evidence that would suggest that the basic logic related to defence and strategy was going to change radically because of these new weapon systems. More likely, new technologies and weapon systems continue to develop and spread around the globe—and with them a new buzzword will replace hypersonic weapons—or Artificial Intelligence (AI), which is another hype of the day—within a few years.

There are many reasons why hypersonic weapons will not revolutionize strategy or warfare in the future. Not at least for the United States, which is the hub of hypersonic frenzy these days. Firstly, the military power of the United States will remain second to none for years—and more likely for decades to come. Hypersonic threats do not require hypersonic responses. The United States has a broad repertoire of effective military responses to potential hypersonic threats even if it lagged a few months or years behind Russia and China in hypersonic missiles. In addition, to think that any potential weapon system that has no known defenses is an existential threat to the United States is based on unrealistic thinking. Even if for a very brief period after the end of the Cold War this kind of thinking made some sense, it would be hubristic to assume that the United States could be a world leader in all fields of technologies at all times.

In short, if one’s strategy is based on striving for total invulnerability vis-à-vis one’s adversaries, it will inevitably end up being a failure. As John Lewis Gaddis has so eloquently noted, strategy requires balancing almost infinite aspirations (goals) with the limited means available to the actor. Striving for primacy in all possible weapons technologies is a way for disaster. The sooner the military planners and political decision-makers realize this, the better. Understanding the limits of strategy will make them think more, instead of trying to achieve the unachievable: total invulnerability vis-à-vis a very broad hodgepodge of adversaries—varying from “rogue regimes” near-peer adversaries.

The second aspect that will mitigate the threat posed by hypersonic weapons is related to the fact that in many future scenarios, the projections of adversaries’ possibilities to develop and field hypersonic weapons ignore or downplay one’s own efforts to do the same. The development of military capability is a long-term effort. Today’s wars are fought with weapon systems that have been developed and procured during the last fifty years. Some have an even longer pedigree—like the B-52 Stratofortress. Russia and China cannot escape this long-term character of defense planning and military capability development. Even if Russia or China have made some strides in developing hypersonic missiles lately, this will not turn automatically into usable military capabilities en masse. A state—any state—can regenerate approximately 2-3 percent of its total military capability during the period of one year. The long shadow of history or the long “tail” of military capability development is a fact of life in the field of defense. There just are no U-turns or quick transformations within the sphere of defense—even if some advocates of these revolutions think and speak otherwise.

Finally, the strategy of deterrence—based on real warfighting capabilities—should not be underestimated when trying to prevent adversaries from using their “hypersonic edge” against the United States. It is really a stretch to try to imagine any regime in the world that would be so suicidal that it would even think threatening to use—not to mention to actually use—hypersonic weapons against the United States or its troops deployed almost globally would end well.

Hypersonic weapon systems are coming. That is a fact. But these new weapons will not change the fundamentals of strategy, the long-term logic of defense planning or military capability development. Hypersonic missiles will not become a panacea or a silver bullet, which could give Russia or China an edge against the United States on the battlefield. Nor will hypersonic weapons derail the United States from the top position of the global military power pecking order.

Conversely, the development and fielding of hypersonic weapons by the United States will not remove the pressure that Russia and China are increasingly exerting against the liberal world order or against the United States. New technologies and weapon systems may be important, but they are not that important. Rather than being scared about the ongoing hypersonic arms race, one should take a hard look at the state of defense today—based on the long history of post-Cold War era of counterinsurgency warfare. Are the armed forces of the United States or European countries up to the task of defending against a traditional large-scale offensive with massed troops and fires?

#### 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 REM cut-off AND no impact

James Vincent 19, Reporter, AI and Robotics at the Verge. "Rare Earth Elements Aren’t The Secret Weapon China Thinks They Are”, The Verge, 5/23/2019, https://www.theverge.com/2019/5/23/18637071/rare-earth-china-production-america-demand-trade-war-tariffs

One particularly chaotic option would be a ban on the export of rare earths — raw materials that are crucial for electronics. These elements are produced mostly in China, and used in the US for everything from electric cars to wind turbines, smartphones to missiles.

Chinese state media have backed the idea, calling America’s dependence on Chinese rare earths “an ace in Beijing’s hand.” President Xi Jinping hinted at that possibility when he visited a rare earth facility at the beginning of this week. (As a ministry spokesperson commented with what seemed like a nod and a wink: “It is normal that the top leader investigates relevant industrial policies. I hope everyone can interpret it correctly.”)

Rare earth elements are sometimes described as the “vitamins of chemistry,” as small doses produce powerful salutary effects. A sprinkle of cerium here and a pinch of neodymium there makes TV screens brighter, batteries last longer, and magnets stronger. If China suddenly shut off access to these materials, it would be like rewinding the tech industry back a few decades. And no one wants to ditch their iPhone and go back to a BlackBerry.

Experts in the field, though, are much less concerned about such a chilling scenario. They say that while a restriction on rare earth exports would have some immediate adverse effects, the US and the rest of the world would adapt in the long run. “If China really cuts off supply entirely then there are short term problems,” Tim Worstall, a former rare earth trader and commodities blogger tells The Verge. “But they’re solvable.”

Far from being an ace in the hole, it turns out rare earths are more of a busted flush.

The reasons for this are numerous, and span geography, chemistry, and history. But the most important factor is also the simplest to explain: rare earths just aren’t that rare.

A group of 17 elements, rare earths are what the USGS (United States Geological Survey) describe as “moderately abundant.” That means they’re not as common as oxygen, silicon, and iron, which make up the vast majority of the Earth’s crust, but some are on a par with elements like copper and lead, which we don’t consider exotic or scarce. Significant deposits exist in China, but also Brazil, Canada, Australia, India, and the United States.

The challenge with producing rare earths (and the reason they were given their name) is that they’re rarely found in concentrated lumps. These are chemically sociable elements, happy to bond with other compounds and minerals and tumble about in the dirt. This makes extracting rare earths from common earth like convincing a drunk friend to leave a raucous party: a lengthy and harrowing procedure. As Eugene Gholz, a rare earth expert and associate professor of political science at the University of Notre Dame puts it: “Once you take it out of the ground, the big challenge is chemistry not mining; converting the rare earths from rock to separated elements.” Unlike convincing that drunk friend, though, this process involves a series of acid baths and unhealthy doses of radiation. This is one of the reasons that countries like the US have been more or less happy to cede production of rare earths to China. It’s a messy, dangerous business, so why not let someone else do it? Other factors also helped, including lower labor costs and the existence of Chinese mines that produce rare earths as a byproduct. China’s sway in the rare earths market is a fairly recent state of affairs. Between the 1960s and the 1980s, the majority of the world’s supply was actually produced in America, from the Mountain Pass mine in California. The mine’s processing plant was shut down in 1998 after problems disposing of toxic waste water, and the whole site was mothballed in 2002. It’s only from the 1990s onward that China has shouldered the bulk of production, along with the associated environmental costs. (In 2010, the Chinese government estimated that the industry was producing 22.05 million tons of toxic waste each year.) An oft-referenced figure is that China now produces some 95 percent of the world’s rare earths, but Gholz says this statistic is “wildly out of date.” The USGS pegs China’s part as closer to 80 percent.

That’s still a substantial chunk of the world’s supply, though, and with no doubt that these are important commodities, the question is: what happens if China does cut off the US?

Luckily, we have a very good idea of what would happen next because it’s already happened before. Back in 2010, China stopped exports of rare earths to Japan following a diplomatic incident involving a fishing trawler and the disputed Senkaku Islands. Gholz wrote a report of the fallout from this incident in 2014, and found that despite China’s intentions, its ban actually had little effect.

Chinese smugglers continued to export rare earths off the books; manufacturers in Japan found ways to use less of the materials; and production in other parts of the world ramped up to compensate. “The world is flexible,” says Gholz. “When you try to restrict supplies to politically influence another country, people don’t give up, they adapt.”

He says that although his report examined the rare earth industry as it was in 2010, the “conclusions are pretty much the same” in 2019.

If China did turn off the rare earth tap, there would be enough private and public stockpiles to supply essential sectors like the military in the short term. And while an embargo could lead to price rises for high-tech goods and dependent materials like oil (rare earths are essential in many refining processes), Gholz says it’s highly unlikely that you would be unable to buy your next smartphone because of a few missing micrograms of yttrium. “I don’t think that’s ever going to happen. It just doesn’t seem plausible,” he says.

Even though a ban on rare earth exports is just speculation at this point, companies have begun to preempt any new Chinese restrictions. American chemical firm Blue Line Corp and Australian rare earth miner Lynas have already proposed new production facilities in the US, and rare earth stocks around the world have surged in response to the threat.

In the event of a ban, one of the most important backstops would be America’s Mountain Pass mine. Although the mine was closed after Chinese rare earths drove down prices, the facility is intact and resumed production last January. Recent estimates suggest it’s already supplying one-tenth of the world’s rare earth ores (though not their processing), and in the event of an embargo, it would be possible to bring Mountain Pass back up to speed.

#### There’s no chance of NATO/Russia war

Aleksandr Khramchikhin 18, Deputy Director of the Institute for Political and Military Analysis in Moscow, 1/25/2018, “Rethinking the Danger of Escalation: The Russia-NATO Military Balance”, Carnegie Endowment for International Peace, https://carnegieendowment.org/2018/01/25/rethinking-danger-of-escalation-russia-nato-military-balance-pub-75346

In an atmosphere of crisis permeated by mutual recriminations and suspicions, both sides—NATO and Russia—have engaged in a series of military activities along the line of contact. These maneuvers in turn have triggered multiple warnings from both sides of a sharp deterioration in European security, a growing threat of a military confrontation between Russia and NATO, and an urgent need to deescalate the situation in order to avoid a catastrophic war with disastrous consequences for all. An emerging conventional wisdom maintains that the new Cold War in Europe, if allowed to continue unchecked, runs the risk of escalating into a hot war unless steps to reduce tensions are taken swiftly.

But conventional wisdom is often wrong, and so it is this time. The hysteria that has engulfed public commentary throughout Europe about this ostensibly dire military situation on the brink of getting out of hand has little, if any, basis in fact. Both sides in the standoff exaggerate the tensions and the danger of escalation, and the risks of the military moves—their own and their adversary’s—supposedly driving these tensions.

In reality, the military balance between Russia and NATO is stable, the danger of escalation is hardly approaching critical levels, and little needs to be done militarily to defuse the current tensions. The true cause of the tensions is not military, but political and diplomatic. Until those causes are resolved, tensions between Russia and the West will remain high. The likelihood of a military confrontation will remain low, however, because neither side’s posture points to a heightened state of readiness or intention to go on the offensive. Until that changes, political and diplomatic tensions will remain mere tensions.

THE BALANCE, THEN AND NOW

The best evidence that the military situation in Europe is stable and that the continent is not on the brink of World War III is in the forces that each side has available for conducting military operations. Even a brief comparison of the present-day arsenals of Russia and NATO to those of the Soviet Union and NATO during the height of the Cold War should allay fears of military conflict (see table 1). This comparison should also take into account critically important political and psychological factors. Russia’s and NATO’s present-day forces do not measure up well against their predecessors of a generation ago.

One remarkable feature of the present situation is that even though the number of NATO member states has nearly doubled since the end of the Cold War, the alliance’s order of battle across many classes of weaponry has decreased since 1982, when East-West tensions were high. Over the past quarter century, military technology has developed rapidly, new weaponry has come online, and many advances in warfare have taken place. However, the arsenals of most European countries have had minimal qualitative improvements that do not begin to compensate for the major reductions in their military capabilities. Major acquisitions of military hardware have been limited mostly to wheeled armored personnel carriers (APCs) to be employed in expeditionary warfare.

The size of the U.S. military presence in Europe has decreased to an even greater degree since the end of the Cold War. At the beginning of 2016, the U.S. military had deployed ten brigades in Germany, but only two of these (the 2nd cavalry regiment and 12th combat aviation brigade) were actual fighting elements; the remaining eight were purely support units.1 One American airborne brigade is deployed in Italy.2 In 2017, the U.S. Air Force component deployed in Germany, Italy, and the United Kingdom had nine wings, but these are primarily support units, and there are only six fighting squadrons.

These cuts in military hardware are consistent with a general tendency in the West (to a greater extent in Europe than in the United States) to embrace ideas of hedonism, pacifism, postmodernism, tolerance, and political correctness. A 2016 Pew survey found that Europeans overall, with the exception of the Poles and Dutch, do not support increasing defence spending. Many Europeans are reluctant to support the use of hard power in international affairs. A 2017 Pew survey found that Europeans are also divided in terms of their willingness to come to a NATO ally’s defense against Russia, with Germany, the UK, and Spain demonstrating the least support. Along with the falling birth rates experienced in these countries, this shift in defense dynamics makes it virtually impossible to conduct a war that would result in major loss of life.

As a result of these shifts in attitudes and ideological trends, NATO troops may be unlikely to demonstrate heroism and willingness to make sacrifices, elements that are absolutely essential in wartime. Almost all NATO countries have transitioned to an all-volunteer military force, which has further decreased the motivation of their military personnel, or at least suggests that they are motivated more by money than by patriotism. The transition to an all-volunteer force has also resulted in increased defense spending, for reasons that deserve further consideration.

Like those of its NATO rivals, Russia’s modern-day military capabilities do not compare favorably with the combined military machine of the Soviet Union and its Warsaw Pact allies (see table 2). Even a cursory comparison of Soviet and Eastern European militaries at the height of the Cold War—in 1982—and now makes clear that Russia is not poised for offensive action in the European theater.

THE HIGH COST OF WAR

NATO forces are highly sensitive to the risk of incurring casualties, and this heightened sensitivity was one of the reasons many Western countries chose to develop a concept of noncontact network-centric warfare heavily reliant on precision-guided munitions (PGM). However, this approach requires extremely expensive weaponry, equipment, ammunition, and supplies. Shrinking NATO military forces and arsenals mean that significant losses of lives or hardware have become unacceptable: losing even a few tanks and aircraft is now almost a catastrophe, comparable to losing a battleship or an armored division.

A high-intensity war that calls for large stocks of ammunition is also becoming prohibitively expensive—a trend illustrated by the evolution of wars that NATO countries have waged over the last quarter century. In 1991, NATO countries, with significant support from both Egypt and Syria, roundly defeated Iraq’s large and well-equipped army in Operation Desert Storm. The coalition against Iraq used PGMs only against high-value targets in the Desert Storm campaign.

#### No Taiwan war.

Dr. George Friedman 21, PhD, Geopolitical forecaster and strategist on international affairs and the founder and chairman of Geopolitical Futures, "The Unlikelihood of a War with China and Russia," Geopolitical Futures, 04/14/2021, <https://geopoliticalfutures.com/the-unlikelihood-of-war/>. language edited.

Let’s begin with China. An invasion of Taiwan would obviously be an amphibious operation. One of the principles of war is the value of surprise. Surprise is particularly important in an amphibious assault. At Normandy, for example, the U.S. and Britain mounted a massive disinformation campaign to convince the Germans they were not going to land where they did. If defenses are concentrated on the point of disembarkment, the attack could be a slaughter. Even if China had a superior force, the force multiplier of correct deployment and preparation could devastate its soldiers.

There’s also the issue of distance. Some 100 miles (160 kilometers) of water lay between China and Taiwan. Assuming a direct line of attack, the attack force will be at sea for about five hours. Apart from alerting defenders to planned positions, the force would be subject to air and missile attacks and more dangerous submarine attacks. The probability of the Chinese reaching the landing zones without enduring heavy losses is low. Even if U.S. space-based reconnaissance were completely neutralized – and I doubt it would be – submarines could provide targeting information to U.S. missiles distributed globally.

If Chinese troops successfully land, and if Taiwanese troops are forced to cede ground, supply and reinforcement will pose an enormous problem for the Chinese. At this point, the landing point would be known, and the routes needed to resupply Chinese infantry mapped. Resupply and reinforcement by aircraft would not be enough. So even if the initial landing took the beach, the resupply problem would [destroy] ~~cripple~~ Chinese operations.

There is also a political problem. A Chinese invasion of Taiwan would trigger warning signals among U.S. allies in the area, some of which, such as Japan, could prove dangerous. Of course, a stunning and low-cost victory by China might force them to reconsider their alliances, but a drawn-out conflict or an outright defeat would convince U.S. allies of Chinese intentions, and they would prepare accordingly. China must win fast if it is to use the attack as a lever to intimidate the region.

This is the ultimate problem for China. In any war you can lose. A victory would turn China into a genuine, not notional, superpower. A defeat would shatter that dream. In addition, the U.S. might choose to counter an invasion with simultaneous actions in chokeholds critical to China, such as the Strait of Malacca, or at Chinese ports. The Chinese could not control the U.S. response, which might include (or theoretically substitute for a Taiwan strategy) seeking to [disrupt] ~~paralyze~~ China’s maritime trade. This coupled with hostile economic actions by Europe would make anything but a stunningly rapid victory, potentially [devastating] ~~crippling~~.

China has not had fleet action since 1895 and initiating their unbloodied navy with an amphibious operation against the U.S. Navy could result in defeat or victory. China is aware of this, which is why they forfeited surprise. They do not intend to invade Taiwan. Alternative islands are somewhat (only somewhat) less risky. The Chinese have created a sense of impending war. An attacker might try instead to downplay war.

## Global Development ADV

### Global Development ADV---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.

#### No great power war over Africa---deterrence solves, and resource interests don’t cause escalation

Lloyd Thrall 15, Associate at the RAND Corporation, M.A. in International Studies and Diplomacy, SOAS, University of London, PhD Student in War Studies at King’s College London, "China’s Expanding African Relations Implications for U.S. National Security," 2015, <http://www.rand.org/content/dam/rand/pubs/research_reports/RR900/RR905/RAND_RR905.pdf>

There is little credible potential for a Sino-American conflict over resources in Africa. Contrary to popular and perennial assumptions about resource wars, industry and energy analysis sources project adequate supply of conventional hydrocarbons beyond 2035.6 Given reservoir depletion curves, any tightening of supply would be gradual. The adequacy of supply is further augmented when tertiary production and unconventional sources are considered (such as shale and tar sands). U.S. strength in unconventional sources, and potential energy independence, further reduces the likelihood of a conflict. Even in a future with vastly inflated hydrocarbon prices, these costs pale in comparison to those associated with a Sino-American war, the economic costs of which likely fall more heavily on China than the United States.7 Global hydrocarbon resources are distributed via a fungible global market, with many stakeholders and moderate diversity of supply. This enables importing states to buy a predictable supply of hydrocarbons at reasonable and competing prices over long contracts. African sources do not constitute a majority of this supply chain, and supposed victory in a theoretical great-power resource war would not guarantee security of resource supply. In sum, the potential for either China or the United States to be willing to enter war with a nuclear adversary over African oil, let alone other, less valuable resources, is extraordinarily small.8

# 2NC

## ITC CP

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

### 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---AT: Strike Down

#### Even if it’s not in perfect alignment, ITC decisions are only overridden when they are arbitrary, capricious, an abuse of discretion, or illegal. That is a high bar and is almost never met.

Linda Sun 19, Northwestern University Pritzker School of Law, J.D., 2020, “The ITC Is Here To Stay: A Defense of the International Trade Commission’s Role in Patent Law,” 17 NW. J. Tech. & Intell. Prop. 137 (2019), https://scholarlycommons.law.northwestern.edu/njtip/vol17/iss1/4

ITC determinations regarding remedies are also difficult to reverse.93 The Federal Circuit reverses the ITC’s remedies only when they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”94 This is a high bar that is difficult to surpass. Patent holders can have confidence in remedies given by the ITC and competitors are put on notice, with the caveat that the Federal Circuit applies a more stringent standard of review to substantive patent law determinations made by the ITC.95

### Solvency---AT: Deterrence/Certainty

#### 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.

#### The deterrent effect is massive and empirically proven.

Michael Buckler & Beau Jackson 13, 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

On the other hand, as the largest sovereign market on Earth, the U.S. economy is a powerful carrot for global behavior change and will remain so for the foreseeable future. In this vein, should a party seek to promote values consistent with the American experience (e.g., human rights), § 337 could serve as a powerful bully pulpit. Because the party's goals at the ITC would be limited to making the U.S. marketplace freer and fairer and other countries could choose to send their business elsewhere, such an action would hardly smack of cultural imperialism.

IV. Hypothetical § 1337(a) (1) (A) Investigations

In light of the above, the ITC is a compelling venue for an interest group that is opposed to an overseas practice incident to importation (e.g., child labor in garment factories) and interested in financing a ligation to challenge that practice. After identifying an unfair act (e.g., treaty violation) and partnering with a company with U.S. operations harmed by imported garments to act as a domestic industry complainant, the interest group could orchestrate the filing of a § 337 complaint, launching a worldwide campaign targeting multiple companies, myriad factories, and diverse garment offerings across several continents. Also, it cannot be understated that in the process of litigating such a § 337 investigation, a complainant's counsel would likely obtain (in the absence of defaulting respondents) discovery further explaining the strategy of the targeted industry (although the use of any such discovery designated as confidential business information would be subject to limitations set forth in an applicable protective order).2 7

Upon the ITC's institution of the investigation as published in the Federal Register, the complainant could immediately serve domestic and overseas parties who qualify as respondents (e.g., manufacturers overseas, importers, and U.S.-based wholesalers and retailers) with discovery requests seeking information about their business practices. Under ITC rules of procedure, respondents failing to appear could be held in default, and sanctions (similar to those set forth in Rule 37 of the Federal Rules of Civil Procedure) could be imposed for failure to comply with discovery requests."' Because the jurisdiction of the ITC in § 337 investigations is nationwide and in rem, the statute is a very powerful tool for this complainant.

Of course, whether interest groups can harness the power of § 1337(a)(1) (A) to redress activities occurring overseas will depend on the specific legal and factual contours of each potential case. By way of illustration, below are cursory overviews of the merits of § 337 actions falling under a non-exclusive list of four broad categories of allegedly objectionable activities: trading in conflict minerals, use of child labor, products resulting from environmental degradation, and unsafe food and drugs.

A. Conflict Minerals

There are currently few legislative tools for confronting the civil unrest associated with global trade in conflict minerals. In August 2012, the Securities and Exchange Commission ("SEC") issued a rule implementing § 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requiring all publicly traded companies, beginning in 2013, to disclose their use of certain minerals associated with conflict and used in consumer goods, such as electronic devices.22

' Assuming, arguendo, that the rule remains effective (its legality is currently being challenged by industry groups), failure to comply could give rise to a § 337 action, to the extent that companies save money by not complying and, thus, are able to import and sell goods to U.S. consumers at prices below those of competitors who expend the money required to comply with the law. The incentive to shirk compliance is significant-according to even the SEC, it will cost $3-4 billion for U.S. industry to comply with the Act, and projections from industry groups reach as high as $16 billion.222 Another possible justification for invoking § 337 is acquisition and use of such minerals in derogation of a foreign sovereign's law. According to advocacy group Global Witness, the government of the Democratic Republic of the Congo ("DRC") issued a directive in September 2011 requiring all mining and mineral trading companies operating in the country to perform supply chain due diligence, in accordance with standards set by the Organisation for Economic Cooperation and Development ("OECD"), "to ensure their purchases are not supporting warring parties in eastern DRC." In February 2012, the Congolese government codified this requirement. 22 In theory, § 337 could reach companies operating in the DRC and trading in certain minerals without performing the required Congolese compliance, where those activities result in an importation into the United States.

B. Child Labor

The illegality of child labor is widely recognized. The United Nations Convention on the Rights of the Child is a treaty that defines a child as anyone below the age of 18 and recites basic human rights for all children, including the right to protection from economic exploitation and the right to education. 25 To date, 193 countries have ratified the Convention, and although the United States is not among them for political, not philosophical, 226 reasons, it advocated for the Convention.

Additionally, the Minimum Age Convention, 1973, developed by the International Labour Organization ("ILO"), requires countries to undertake a legal promise to stop child labor and to ensure that children below a certain "minimum age" (which varies depending on the activity) are not employed. At the end of 2010, this Convention had been ratified by 156 of the 183 member States of the ILO, including most Asian and African countries, but not the United States or India. Similarly, the ILO developed the Worst Forms of Child Labour Convention, 1999.228 At the end of 2010, this Convention had been ratified by 173 of the 183 member States.229

U.S. law regarding child labor is complex. In general, for non-agricultural jobs, federal law sets 14 years of age as the minimum age for employment, and limits the number of hours worked by minors under the age of 16.23 Several exceptions to this rule exist, however, such as employment by parents, newspaper delivery, and child acting.23' Moreover, children between the ages of 16 and 18 may be employed for unlimited hours in non-hazardous occupations.232 Restrictions on agricultural employment are more lenient, allowing children under the age of 12 to work in non-hazardous jobs on small farms for unlimited hours outside of school hours with parental permission.23 The DOL issues a periodic report entitled "List of Goods Produced by Child Labor or Forced Labor."234 The report reveals domestic and international uses of child labor, which is defined as all work performed by a person below the age of 15.235 As discussed supra, the DOL also distinguishes (albeit not perfectly) between categories of child labor and the forced or indentured labor outlawed in § 307 of the Tariff Act of 1930, the latter presumably falling outside the subject matter jurisdiction of § 337."'

Section 337 is well situated for claims arising from illegal labor practices involving the voluntary work of children. While the extraterritorial application of U.S. labor standards is legally suspect,237 "nations that violate [their own] fair labor laws and accepted standards . . . [can] accrue an unfairly gained competitive advantage through unfair reduction of the cost of labor, a major input in the cost of production, thereby distorting trade."238 "This practice has been labeled 'social dumping,' which is defined as the 'export of products that owe their competitiveness to low labour standards.' 239 The worst offenders are the rising markets of today in Asia and those of tomorrow in Africa.240 Between 1999 and 2004, the top seven countries by per capita percentage of working 5-14 year-olds were in Africa.' Indeed, between 2000 and 2004, 26.4% of children aged 5-14 worked in sub-Saharan Africa, while 18.8% of children between those ages worked in Asia and the Pacific.242 A § 337 complaint could potentially help these children by threatening import-driven segments of the U.S. marketplace trafficking in goods made by them.

C. Environmental Degradation

The Lacey Act is a powerful weapon for potentially demonstrating unfairness related to environmental degradation under § 337.243 Stunningly broad, the Act makes it unlawful (and thus unfair when undertaken for business advantage) "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife[,] . . . any plant," or "any prohibited wildlife species" that has been "taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."244 Taken" encompasses "captured, killed, or collected and, with respect to a plant, also means harvested, cut, logged, or removed."245 Collectively, these terms encompass a considerable number of product lines covered by the Harmonized Tariff Schedule of the United States.

A § 337 investigation involving the Lacey Act is easy to envision. It would likely involve an allegation that complainant's competitors have flouted U.S. or foreign environmental law for the purpose of bringing a particular commodity to market at an artificially low price. For example, companies might be accused of illegally felling and using endangered lumber harvested opportunistically because it was easy to access without significant cost (e.g., tree groves close to highway infrastructure) or easy to shield from mandatory, but costly, reporting requirements.

According to the Congressional Research Service, "demand for illegal wildlife in the United States is likely to parallel U.S. demand for legal wildlife." 24" Estimates suggest that the United States purchases nearly 20% of all legal wildlife and wildlife products on the international market and that the value of U.S. legal wildlife trade grew from $1.2 billion in FY2000 to $2.8 billion in FY2007. 247 "If this is the case, the United States may be a significant destination for illegal wildlife, and the magnitude of the illegal trade may be increasing."248 According to the ocean conservation group Oceana, illegal, unregulated, and unreported ("IUU") fishing accounts for 20% of the global catch annually, amounting to 11 to 25 million metric tons of fish.249

Although § 337 could be used in conjunction with the Lacey Act to stem illicit wildlife and plant trade, its power has not yet been harnessed for this purpose. To date, the Lacey Act has been primarily utilized for piecemeal criminal prosecutions.250 Perhaps the most publicized Lacey Act criminal proceeding to date involved an iconic company-Gibson Guitar.25 In 2009, federal marshals raided three Gibson facilities in Tennessee, and the federal government launched a criminal investigation against Gibson.252 In August 2012, Gibson and the United States entered into a criminal enforcement agreement whereby Gibson admitted to illegally purchasing and importing ebony from Madagascar and rosewood and ebony from India and agreed to pay a $300,000 penalty and provide a community service payment of $50,000 to the National Fish and Wildlife Foundation.2 5 Gibson also agreed to a program designed to strengthen its compliance controls and procedures for monitoring its global supply chain.254 Under § 337, a complainant could potentially litigate alleged Lacey Act violations against many companies like Gibson at once.

D. Food and Drug Safety

"The United States imports 91% of its seafood," " 25 but only 2% is inspected by the FDA before it enters the U.S. market. Oceana found, based on the analysis of 1,200 seafood samples taken across 21 states, that 33% of samples were mislabeled, and thus sold to unsuspecting consumers under false, and potentially dangerous, pretenses.257 Sushi vendors and grocery stores, in particular, were likely to sell mislabeled food, and snapper and tuna had the highest mislabeling rates.258

According to FDA estimates, the number of drug products made outside of the United States doubled from 2001 to 2008." In 2008, 80% of active ingredients and 40% offinished drugs used by U.S. patients were manufactured abroad.2 ' Increasingly, the United States imports pharmaceutical materials from emerging economies such as India and China, yet the FDA cannot conduct sufficient oversight visits to foreign sites to ensure compliance with U.S. law."' Indeed, FDA inspected only 5.6% of Chinese sites in fiscal year 2009 (with 52 inspections that year, up from 19 in 2007).262 However, inspections are critical because good manufacturing practices are costly and thus prone to circumvention, as compliance with internal quality systems and regulations can represent up to 25% of a finished drug manufacturer's operating costs.' To offer more competitive pricing and gain market share, at the expense of compliant companies, some overseas plants have foregone good manufacturing practices and thereby caused adulteration of the U.S. drug supply.

Nothing is more quintessentially § 337 than protecting the U.S. marketplace against unfairness to domestic industries following the law, and incurring the attendant expense, where overseas operations skirt the law at a considerable cost savings and produce mislabeled or illegally harvested food or shoddy drugs that are imported into the United States to the detriment of U.S. consumers.

Conclusion

Today, as a mature and powerful statute used mostly to redress the infringement of statutory IP, § 337 appears to have ample room within its tent for protection against "[u]nfair methods of competition and unfair acts" never before litigated at the ITC.2" While there is inherent tension in using a trade statute to drive a social agenda, § 337 is broad enough to cover the common ground where these seemingly strange bedfellows overlap. Indeed, the ethos of § 337, rooted in governmental investigation of "unfairness," extends beyond patent infringement to cover a plethora of unfair acts and "the assurance of competitive conditions in the United States economy."265 In short, a complainant seeking to use § 337 to redress ethically or morally objectionable practices has a home at the ITC, so long as the complainant (alone or in partnership with another) can establish a prima face case-unfairness, nexus between unfairness and importation, domestic industry and injury, and nexus between unfairness and injury. Prior to filing a complaint, however, it is important to scrutinize ancillary considerations such as extraterritoriality, comity, GATT, conflicts of law, and anthropological considerations and unintended consequences. Having done so, the complainant can effectively pursue the types of global justice-for example, peaceful communities, liberated children, healthy ecosystems, and safe food and pharmaceuticals-that also happen to promote free and fair competition within the U.S. marketplace.

#### Very easy to establish standing to sue AND for a remedy

Elizabeth A. **Rowe &** Daniel M. **Mahfood 14**, Rowe is UFRF Professor of Law, Feldman Gale Term Professor in Intellectual Property and Director, Program in Intellectual Property Law, University of Florida Levin College of Law; Mahfood is Clerk to the Honorable Susan H. Black, United States Court of Appeals for the Eleventh Circuit. J.D., University of Florida Levin College of Law, “Trade Secrets, Trade, and Extraterritoriality,” 66 Ala. L. Rev. 63, HeinOnline

Another facet of a section 337 action that works to a complainant's advantage is that the ITC's jurisdiction to issue exclusion orders is nationwide and in rem over the imported goods. 196 This eliminates the need to establish personal jurisdiction over a respondent--a particularly useful feature when addressing foreign misappropriations--and avoids the difficulty of collecting monetary judgments against foreign defendants. 197 And while the potential relief a complainant or plaintiff can seek is narrower before the ITC than in a traditional trade secret action, the standard for obtaining injunctive relief is less burdensome in the former than the latter. 198 Whereas injunctions relating to trade secret misappropriation typically require a showing of, inter alia, irreparable injury and the lack of an adequate remedy at law, 199 the ITC grants exclusion orders without consideration of the adequacy of a legal remedy and would possibly only require a showing of injury sufficient to demonstrate a violation of section 337. 200 Finally, although Congress has amended section 337 to allow counterclaims, 201 these claims must be removed to a district court. 202 Thus, they are not likely to be adjudicated as rapidly as the primary claim and do not benefit from any of the procedural distinctiveness of the ITC.

### Solvency---AT: Private Right of Action

#### Even if not, broad evidence about private actions doesn’t apply. The ITC’s different; anyone negatively affected can sue. That’s a way lower bar than the one for district court antitrust standing.

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

On the legal question about what is needed for their antitrust case to proceed before the ITC, Complainants have a different take. They argue that their antitrust claim(s) should proceed before the ITC whether focused on price fixing or on other horizontal agreements spanning a much broader spectrum of behaviors than merely predatorily low price. This approach is easier for me to follow for the reasons explained below.

#### Very easy to establish standing to sue AND for a remedy

Elizabeth A. **Rowe 4** & Daniel M. Mahfood, Rowe is UFRF Professor of Law, Feldman Gale Term Professor in Intellectual Property and Director, Program in Intellectual Property Law, University of Florida Levin College of Law; Mahfood is Clerk to the Honorable Susan H. Black, United States Court of Appeals for the Eleventh Circuit. J.D., University of Florida Levin College of Law, “Trade Secrets, Trade, and Extraterritoriality,” 66 Ala. L. Rev. 63, HeinOnline

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## Torts CP

### AT: Process CPs Bad---2NC

### AT: Condo---2NC

## Global Development ADV

### No Modelling---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.

#### Cooperation doesn’t solve---enforcers are unaware people care what they say.

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

A starting place for the U.S. agencies in creating a respected brand is to be aware of how closely foreign observers watch the activities of the DOJ and the FTC. Although it lacks the supremacy it enjoyed in an earlier era, the U.S. system is nonetheless a powerful force in the realm of international competition law. It has an unequaled body of experience, its agencies have budgets that most agencies cannot imagine, and its contributions to the operation of international networks with norm-creating functions (such as the ICN and the OECD) are unsurpassed.

For these and other reasons, foreign jurisdictions study the U.S. agencies with exacting care. The external audience can be counted on to focus on contradictions and tensions that might go unnoticed for other authorities. At a meeting of the OECD Competition Committee in February 2015, I participated in a session dealing with questions of institutional design, including the issue of whether an agency's mandate should be limited to antitrust or should include other policy duties, such as consumer protection. After the FTC delegate spoke of the rationale for having competition policy and consumer protection under the same roof, the DOJ representative said the Antitrust Division did not have a consumer protection mandate, did not want one, and would not accept it if the possibility were offered. At the OECD meeting and on several subsequent occasions, I have spoken with foreign officials who attended that session and remember vividly the interaction between the FTC and DOJ officials and the vigor with which the [\*1197] Antitrust Division delegate brushed aside the idea that consumer protection was a good match with antitrust.

Statements that purport to reveal policy positions receive special attention. For example, I found that China's antimonopoly agencies and their advisors read virtually every word the officials from the DOJ and the FTC utter in speeches, decisions, guidelines, and testimony. Especially close attention is paid to measures that appear to create possibilities for the expansive application of competition law and the use of agency gatekeeping functions, such as merger review, to obtain concessions from parties subject to antitrust agency oversight. 194 Not only do the Chinese agencies scrutinize official texts, the agencies and their external advisors study news accounts for reports of comments by U.S. antitrust officials. Nothing goes unnoticed.

Too often the U.S. antitrust agencies, or individual officials, act without apparent regard for the possibility that foreign observers would read their comments, or without evident concern for how their comments might affect perceptions of the U.S. competition enforcement brand abroad. In nearly six years as a member of the FTC, I received questions from foreign antitrust officials that underscored for me how closely the U.S. agencies are scrutinized. At a seminar in Beijing in 2010, one Chinese official asked me if the U.S. antitrust agencies require parties to prove efficiencies as a condition for approving a merger. Another wanted to know if U.S. antitrust policy seeks to ensure high wages and working conditions for farmers. A third queried whether an unspecified concern with "fairness" was the chief motivation behind modern U.S. federal enforcement.

I said no to the first two questions, and suggested the third proposition was doubtful, as well. I wanted to know how my colleagues had formed their questions. They produced a highlighted and annotated transcript of a workshop that the DOJ convened with the Department of Agriculture earlier in the year on competition issues in agriculture. 195 In one passage, Assistant Attorney General Varney observed:

We will continue to carefully and closely scrutinize every single merger that comes before us, look at it on its facts, and make a decision on the facts of the merger. If it doesn't result in undue concentration and in lessening of competition and provides efficiency and helps farmers and growers get better prices and get more efficiency in what can get to consumers, that will be okay with us, but those that don't, we will stop. They will not go through during this Department of Justice. 196

The AAG concluded her comments as follows:

[\*1198] So you have my commitment that we're going to do everything we can to make sure that it's a competitive agriculture economy, that farmers, growers, packers, processors, are all making a decent wage, and we're getting American consumers food on their table that's safe and healthy and a decent price. 197

Attorney General Eric Holder closed the session by praising the AAG by stating: "Well, you can see why I have such confidence in this woman, right?" 198 He also stated that "the overriding concern we have in the Justice Department is maintaining fairness." 199

I proposed that my Chinese audience treat these propositions, as I understood them, warily. Neither U.S. case law nor the merger guidelines require merging parties are to prove efficiencies in order for their transaction to survive antitrust review. 200 The inquiry ends if the plaintiff cannot show a likely "lessening of competition." 201 U.S. competition policy has little to say about the attainment of "a decent wage," and the supply of "safe and healthy" food products is the province of public bodies other than antitrust agencies. 202 U.S. antitrust policy makers are guided by aims more structured and economically oriented than a generalized goal of "fairness." 203

Perhaps the statements at the agriculture workshops were simply inadvertent and not meant to be taken as restatements of doctrine and policy. Whether intentional or not, they do have an attentive foreign audience. From the perspective of international influence, to speak or write this way is unwise, for it does not advance a coherent view about U.S. policy or build a respected brand. At a minimum, speakers attentive to international perceptions of what the U.S. agencies do would think carefully before they made such remarks. A sensible process of consultation within each agency and between the agencies would review draft texts with an eye to international consequences and at least raise questions about seemingly improvident remarks. No formal or informal process of consultation of this sort takes place either within the FTC or between the DOJ and FTC.

## Global Supply Chains ADV

### Rant---2NC

### Thumped---2NC

#### COVID collapsed Global Supply Chains

Ellen **Ioanes**, 10-24-20**21**, Military & Defense Editorial Fellow at INSIDER. She is a graduate of Columbia Journalism School and Davidson College. "Why supply chain chaos and inflation could last into 2022," https://www.vox.com/2021/10/24/22743104/supply-chain-inflation-shortages-2022

Federal Reserve chair Jerome Powell said on Friday that Americans should be prepared for the global supply chain to remain in crisis through 2022 — and that the central bank is preparing to deal with the attendant challenges for the US economy.

Speaking at a Bank for International Settlements-South African Reserve Bank centenary conference, Powell warned that “supply-side constraints have gotten worse” over the course of the pandemic, while the supply chain and economic risks are “clearly now to longer and more-persistent bottlenecks, and thus to higher inflation.”

Already, those bottlenecks have slowed international commerce to a crawl as shipping containers loaded with goods wait to be unloaded and experts advise making an early start on holiday shopping.

In addition to packages taking longer to show up, consumers are likely also feeling the resulting inflation: The Consumer Price Index, a measure of the increase in the price of goods over a specific period, rose more than 5 percent in the 12 months ending in September, as Vox’s German Lopez explained.

However, Americans’ appetite to consume hasn’t diminished. After a brief dip at the beginning of the pandemic, people have embraced both e-commerce and brick-and-mortar retail as pandemic restrictions have eased. That’s good for an economy blitzed by Covid-19, but it’s also created its own set of challenges in the form of a backed-up supply chain that wasn’t built to weather a pandemic, and accompanying inflation as people buoyed by an economic recovery keep spending.

As Treasury Secretary Janet Yellen told CNN Sunday, that likely won’t be a permanent problem: She expects “improvement by the middle to end of [2022],” and pointed out that monthly rates of inflation are already declining from earlier this year.

For now, though, the Fed has some steps it can take to ease inflation, both in the short term and the long term. In the immediate term, as Powell said in September and reiterated Friday, the central bank will likely begin the process of “tapering,” or scaling back its purchases of government assets like Treasury bonds and mortgage-backed securities. The Federal Reserve spends about $120 billion per month on these assets to help fill the government’s coffers and fund the trillions in stimulus spending, which helped keep American markets afloat during the pandemic.

High demand, as partially represented by inflation and made visible by the current supply chain crunch, signals to the Fed that its stimulus purchases are having the intended effect and won’t be needed much longer, and it’s safe to gradually reduce them — probably by about $15 billion per month starting in November.

That could also ease supply chain issues by decreasing demand.

In the long term, the Fed could also increase interest rates, which limits the amount of money in circulation, thus decreasing demand and thereby inflation. But that’s on the back burner for now, Powell said Friday, as the Fed watches and waits to see if inflation will slow and the labor market will regain its strength.

However Powell and the Fed respond to inflation concerns, though, they won’t be able to fix the broken global supply chain — part of the reason inflation is so high in the first place — on their own.

The supply chain was already strained; Covid-19 pushed it to the breaking point

As Powell said Friday, inflation is being driven by high demand straining a supply chain that had issues even before the pandemic. But the global onslaught of Covid-19 knocked down that particular house of cards, and a healthy supply chain is still a fair ways off.

#### Every level of Global Supply Chains have been decked

Ellen **Ioanes**, 10-24-20**21**, Military & Defense Editorial Fellow at INSIDER. She is a graduate of Columbia Journalism School and Davidson College. "Why supply chain chaos and inflation could last into 2022," https://www.vox.com/2021/10/24/22743104/supply-chain-inflation-shortages-2022

Out in the real world, the supply chain has been disrupted at practically every level, from the factories producing goods, to the ports where they’re supposed to be unloaded and sent to store shelves, as Vox’s Sean Rameswaram detailed on Today, Explained last week.

Starting at the manufacturing level, many businesses operate on a hair-

trigger, “on demand” principle; they tend to make only what is projected to meet demand, because storing excess product in case of a supply chain or other crisis means manufacturers are spending more money on storage facilities — which they then can’t spend elsewhere, including on “bonuses for executives or dividends for shareholders,” as the New York Times’s Peter Goodman points out.

But during the pandemic, shuttered or understaffed factories couldn’t produce what people needed, and large manufacturers didn’t have reserve supplies because they weren’t designed to operate that way — meaning goods like toilet paper and hand sanitizer were missing from grocery store shelves.

Industry consolidation also contributes to supply chain chokepoints; if only one company produces computer chips, for example, there aren’t alternatives to draw on when the chip factory is closed, as many factories have been in different stages of the pandemic and continue to be in countries where vaccination rates are low.

When manufacturing powerhouses, particularly China, were able to manufacture and ship necessary equipment like PPE, those products were shipped in large containers to lots of places that don’t ordinarily export goods to China. So shipping containers full of PPE sent to places like Southeast Asian and African countries couldn’t easily justify a return journey. Now, a global shortage — or really, misplacement — of shipping containers has driven up the cost of shipping goods by tens of thousands of dollars, which then passes down to the consumer. A shortage of truckers to deliver goods by land has contributed to the crisis, too.

There’s also been a labor shortage as people fall ill or have to care for sick relatives, juggle child care and work, or, understandably, refuse to work for low wages in unsatisfactory conditions during a pandemic.

In the US, vaccinations are helping tackle one side of the problem; people are able to return to work safely, and child care outside the home is becoming increasingly available as schools and day cares reopen. Vaccine mandates have helped improve workplace safety, but widespread strikes and resignations over the general state of work in America also contribute to the supply chain crunch, and don’t appear to be ending any time soon.

All this leads to an astounding backup at ports on both coasts, with cargo ships anchored off the coasts of Savannah and Los Angeles, sometimes for days, as the ports scramble to store and ship all the cargo — otherwise known as the goods Americans are purchasing.

And now that global manufacturing is back up — and so is demand — the system is in shambles, writes Recode’s Rebecca Heilweil:

Global manufacturing has been operating at full capacity for more than a year. But without any slack to address worker shortages, bottlenecks, and delays, problems have only piled up. These issues have now reached a critical mass. So even though American consumers have started to order much more stuff, there’s no flexibility in the supply chain to accommodate that demand.

### REMs Shortage D---2NC

#### Substitution and efficiency solve

Amory Lovins 17, cofounder of and chief scientist at Rocky Mountain Institute, 5-23-2017, "Clean Energy and Rare Earths: Why Not To Worry," Bulletin of the Atomic Scientists, https://thebulletin.org/2017/05/clean-energy-and-rare-earths-why-not-to-worry/

This is not how a durably scarce and valuable commodity behaves. What happened? Just what you’d expect of a thin market influenced by ignorance but ultimately tamed by reality. When prices soared, stockpiles rose, idle mines reopened, explorers sought and found new deposits, and recycling increased (for example, cerium in glass polishing). Most important, as customers from General Electric to Toyota to Ford sought to cut costs and boost performance, the costlier materials were used more frugally and often replaced with cheaper, better solutions—all as I’d predicted in 2010. Prices fell accordingly. Efficiency and substitution. To dig a little deeper, let’s start with supermagnets. Neodymium is a rare-earth element roughly as abundant in the Earth’s crust as lead or chromium, though far less likely to concentrate in high-grade ores. In 1982, General Motors and Sumitomo discovered that compounding one-fourth neodymium by weight with three-fourths iron and boron could make the most powerful family of supermagnets then known, typically Nd2Fe14B, and that these magnets’ properties could be further improved by adding traces of other rare earths—praseodymium plus either dysprosium or costlier terbium. (See why only specialists know this stuff?) China, having lots of all these elements and preferring value-added to raw-material exports, built up a supermagnet industry whose low prices took over most of the world market and shuttered competitors. China also vigorously pursued research and development to find further uses for its rare-earth bounty. Even in 2015, China accounted for more than 80 percent of global rare-earth production but also for about 70 percent of rare-earth demand—not an unreasonable balance. Around 2010, many commentators stridently warned that China’s near-monopoly on supermagnet rare-earth elements could make the growing global shift to electric cars and wind turbines impossible—because their motors and generators, respectively, supposedly required supermagnets and hence rare earths. Some such reports persist even in 2017. But they’re nonsense. Everything that such permanent-magnet rotating machines do can also be done as well or better by two other kinds of motors that have no magnets but instead apply modern control software and power electronics made of silicon, the most abundant solid element on Earth. The first kind is the induction motor, invented by Nikola Tesla 130 years ago and used in every Tesla electric car today. The second kind, less well-known despite origins tracing back to 1842, is the switched reluctance (SR) machine, likewise made of just iron and (less) copper, but using a different geometry and operating principle. If well-designed, which many are not, SR motors are simpler than permanent-magnet motors, more rugged (so they’re widely used, ironically, in mining equipment), more easily maintained, and equally light and compact. They can switch in milliseconds between serving as a motor or as a generator, and spinning in either direction. They’re also more flexibly controllable, more heat-tolerant, and cheaper for the same torque and production volume. The only scarce resources associated with such capable SR machines are familiarity, which few motor experts have, and skill in their more-difficult design—especially at the level achieved by the UK firm SR Drives (bought first by the US firm Emerson Electric, then by Japan’s Nidec). Both kinds of magnet-free machines can do everything required not only in electric cars but also in wind turbines, functions often claimed to be impossible without tons of neodymium. That some wind turbines and manufacturers use rare-earth permanent-magnet generators does not mean others must. It’s better not to, and the word is spreading. Similarly, the red phosphors in compact fluorescent lamps traditionally used europium. But those lamps have now been largely displaced by white LEDs that use about 96 percent less europium. Moreover, new red phosphors use no rare earths, while the latest green phosphor cuts terbium use by more than 90 percent. Erbium in fiber-optic repeaters—another small-quantity, high-value use of rare earths—looks at first glance harder to substitute. But very little erbium is needed, and fiber capacity must compete with today’s bandwidth-enhancing, multiplexing, and wireless innovations. Some hybrid cars, like my 2001 Honda Insight, used nickel-metal-hydride batteries containing lanthanum, but those are now largely replaced by lighter lithium batteries, which typically use no lanthanum. (Both kinds of batteries are also recyclable, and infrastructure for recycling is emerging.) Tesla’s market-leading lithium batteries, like its motors, use no rare earths at all. Non-lithium batteries and potent potential substitutes for batteries (notably graphene ultracapacitors) are also emerging. Moreover, all electric cars need two to three times fewer batteries if we take obesity—weight and drag—out of their design, especially by replacing heavy steel with light metals or with even lighter (but stronger) carbon-fiber composites.The carbon-fiber passenger compartment in my BMW i3 is an impressive early illustration; its carbon fiber is paid for by needing fewer batteries. Newly commercialized manufacturing methods can produce such carbon-fiber structures at automotive speed and cost. Applied throughout US automaking, such ultralighting (plus better aerodynamics and tires) could save half as much oil as OPEC produces, or about one and one-half times as much as Saudi Arabia produces. The cost of achieving these savings would be below $10 per saved barrel—or about one-fifth of the world’s mid-2017 oil price. Thus the most effective substitute for rare earths, in both motors and batteries, isn’t another exotic material for making motors or batteries; it’s smarter car design that makes motors smaller and batteries fewer. Or, even better, it could be new business models—shareable services like Zipcar and GetAround, mobility-as-a-service operations like Lyft and Uber, or autonomous vehicles—that carry more people more miles in far fewer cars at astonishingly lower cost, ultimately saving on the order of $10 trillion worldwide (in net present value). Such examples illustrate the processes of resource efficiency and substitution (processes that extend far beyond rare earths). Scarcity, real or perceived, drives price, attention, R&D, and imagination. It elicits mineral exploration: At the market’s 2011 peak, some 190 companies were scouring the planet for potentially profitable rare-earth deposits. Scarcity makes end-uses more productive, durable, and closed-cycle, with recycling no longer an afterthought but a business imperative. It even drives the kind of basic research that in the United States (largely through the government agency ARPA-E) and in Japan has lately come up with even more powerful supermagnets based on iron nitride (Fe16N2) and containing no rare earths whatsoever. Sorry, China. Remember when the 1973 and 1979 oil-price shocks triggered the development of mobility alternatives that are now coming to market and threatening to smother oil demand? The 2010-era rare-earth price spike set similarly subtle but irresistible forces in motion that will make sustained high rare-earth prices unsupportable.

# 1NR

## RICO DA

### Impact---2NC

DA outweighs:

Magnitude---economic crisis cascades, causing nationalism, instability, and world war. Hotspots like Iran, Taiwan, SCS, Korea, India/Pakistan and Russia are independent triggers that go nuclear----that’s Maavak.

#### 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.

### AT: No Link

#### 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

#### The 1NC link says the plan effectively overrules *Morrison*. That revives extraterritorial RICO, causing it to be applied broadly.

Miranda Lievsay 16, J.D. Candidate, 2017, Fordham University School of Law; B.A., 2010, Georgetown University, “Containing the Uncontainable: Drawing RICO's Border with the Presumption Against Extraterritoriality”, Fordham Law Review, 84 Fordham L. Rev. 1735, March 2016, Lexis

Courts will continue to face questions about RICO's ever-expanding application - fostering uncertainty for both RICO plaintiffs and potential defendants - for several reasons. First, RICO's unfettered language 105 and incentivizing remedies have facilitated the statute's evolution into a prosecutorial powerhouse, now frequently invoked against a broad spectrum of defendants reaching even the tobacco industry and the Catholic Church. 106 Second, increasing global economic interdependence and the rise of transnationalism have encouraged the proliferation of multinational corporations, thereby raising the likelihood that an organization defending a RICO claim will touch on foreign elements. 107 Third, RICO enterprises [\*1749] similarly capitalize on globalized infrastructure 108 - including the convenience and anonymity offered by the internet - to coordinate global conduct and perpetuate criminal activities such as electronic financial transfers. 109 The simultaneous evolution of RICO's broad application and the increasingly global specter of both legitimate and illegitimate business operations ensure that courts will increasingly face RICO complaints involving extraterritorial elements. Against this tempestuous background, RICO plaintiffs must now confront the revived presumption against extraterritoriality applicable to all federal statutes - including RICO - as resurrected by the Supreme Court in *Morrison*.

### AT: Circuit Splits

### AT: DA Thumped

#### RICO’s limited---the key question is the breadth of the predicate statute

Rachel Davidson Raycraft 20, J.D. from the University of Virginia School of Law, MPP from the University of Virginia Batten School of Leadership & Public Policy, BA from Lafayette College, “Bridging the Void in Transnational Corporate Accountability: Jesner v. Arab Bank as a Call to Action”, Virginia Journal of International Law, 60 Va. J. Int'l L. 737, Lexis

However, the extraterritorial reach of RICO is quite limited, and particularly so in the context of transnational human rights abuse. Both civil and criminal RICO claims are based on predicate acts -- the acts comprising the pattern of racketeering activity -- which are enumerated within the RICO statute. 126 In 2016, the Supreme Court held that criminal RICO applies extraterritorially "only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." 127While some potentially relevant predicate acts do meet this criterion, including assassinating government officials 128and killing a U.S. national outside of the United States, 129the Court's holding made clear that the majority of predicate acts defined in the RICO statute do not extend beyond U.S. borders. 130

#### It's narrow

Laurence Steckman 20, Principal Attorney with Offit Kurman, JD from Touro Law School, and Adam J. Rader, Principal Attorney with the Law Firm Offit Kurman, JD from the University of Wisconsin-Madison Law School, “RICO Extraterritoriality, RJR Nabisco and Shareholder Residence - A Key Consideration in Determining RICO Domestic Injury”, Touro Law Review, 35 Touro L. Rev. 1343, Lexis

44 Id. at 2108; See generally Dandong Old N.-E. Agric. & Animal Husbandry Co. v. Hu, 2017 U.S. Dist. LEXIS 122471, 2017 WL 3328239 (S.D.N.Y. August 3, 2017) ("After RJR, putative RICO violations are construed narrowly to adhere to the well-established presumption against extraterritoriality.").

#### Especially, securities cases---they’re limited by directness

Erica Siegmund 11, JD Candidate at the University of Virginia School of Law, “Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims”, Virginia Journal of International Law, 51 Va. J. Int'l L. 1047, Lexis

In the context of transnational securities fraud, where a foreign plaintiff brings a claim based on wholly foreign parties, conduct, and harm, the Supreme Court has held that foreign plaintiffs do not state a claim under Section 10(b) of the Securities Exchange Act. 175 Prior to this decision, lower courts also generally concluded that allowing jurisdiction over these types of foreign claims was not necessary to protect domestic investors or domestic markets. Thus, foreign plaintiffs' claims in f-cubed securities fraud cases, premised solely on a general adverse domestic effect, have been strictly denied.

#### The same is true for RICO. It rejects incidental effect, limiting its scope.

Ryan Wham 19, Member at the Texas Law Review, J.D. from the University of Texas School of Law, “Rebutting the Presumption: A Proposed Amendment to Regulate International Business Conduct Through § 1964(c)”, Texas Law Review, 97 Tex. L. Rev. Online 138, Lexis

Because the tests for determining RICO's extraterritorial application had developed out of lower courts' securities jurisprudence, *Morrison*'s holding that § 10(b) of the Securities Exchange Act did not apply extraterritorially, and its concomitant rejection of the conduct and effects tests, returned international RICO jurisprudence to a place of uncertainty. 94 Morrison's two-pronged test for determining extraterritoriality in the securities context--directing that courts (1) look for a clear statement of the law's extraterritoriality in its plain text, and absent such a finding, in the statute's overall context; and then (2) if the presumption has not been rebutted, determine whether the claim involves a domestic application of the statute 95--led the Second Circuit to develop a new rule for RICO's extraterritorial application in European Community v. RJR Nabisco, Inc. 96

#### Liability is controlled because conduct must be direct

Christopher W. Robbins 9, Law Clerk to Judge Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania; J.D., 2009, University of Pennsylvania Law School; B.A., 2006, Tufts University, “Finding Terrorists' Intent: Aligning Civil Antiterrorism Law With National Security”, St. John’s Law Review, 83 St. John's L. Rev. 1201, Lexis

RICO's civil liability may only reach conduct that has significant ties with the United States, in contrast to the ATA. The extraterritoriality of RICO remains a matter of dispute among courts. The prevailing view applies either the conduct test or the effects test to determine whether or not RICO applies to conduct outside the United States. 150 The conduct test allows RICO to apply extraterritorially to all conduct when some material conduct leading to the injury occurs within the United States. The effects test allows for extraterritorial application of RICO when the activity is both intended to and does have a substantial and direct effect within the United States. Although, in theory, these "territorial" bases are more limited than other jurisdictional bases, in practice, these tests can reach quite far if applied loosely. For example, some courts have been less than dutiful in requiring a direct and intended effect, allowing mere knowledge of attenuated effects to satisfy the effects test. 151 At the other extreme, one court has refused to apply RICO extraterritorially at all. 152 RICO thus may apply to less than all the potential terrorist acts that harm U.S. interests due to its territorial limitations.

#### The directness standard is a critical control on corporate risk---an expansion creates unique damage

Wilson 10 – Wilson Sonsini Goodrich & Rosati LLP, “The Expanding Territorial Reach of RICO: It's Not Just For U.S.-Based Organized Crime Anymore”, JD Supra, 5/25/2010, https://www.jdsupra.com/legalnews/the-expanding-territorial-reach-of-rico-11192/

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 ("RICO"), was passed in 1970 for the primary purpose of "seeking the eradication of organized crime in the United States." Pub. L. 91-452, 84 Stat. 922, 923. Although RICO was intended to reach organized crime perpetrated by the Mafia, in the four decades since its inception, RICO has been used to reach conduct as varied as municipal tax evasion, civil fraud, and even terrorism.

Unsurprisingly, as RICO's substantive scope has expanded, so too have courts considered whether RICO may apply extraterritorially. For example, may a plaintiff (or the government) use RICO to seek redress for conduct occurring wholly outside the United States? Conversely, may foreign litigants use RICO to address activities that, while occurring in the United States, have little effect on parties in America? Courts have adopted varied "tests" to determine whether RICO may apply extraterritorially and have reached mixed results.

Now, a case pending on a writ of certiorari to the Supreme Court brings a number of these issues to the fore. United States v. Philip Morris USA, Inc. 566 F.3d 1095 (D.C. Cir. 2009) (hereinafter, BATCo), petition for cert. filed, 78 U.S.L.W. 3501 (U.S. Feb. 19, 2010) (No. 09-980) is part of a $280 billion civil RICO case the government has been pursuing against the tobacco industry for over a decade. Defendant British American Tobacco (Investments) Ltd. ("BATCo") is a British corporation with its principal place of business in England.1 BATCo is among eleven tobacco industry entities the United States government sued to recover the costs of tobacco-related illnesses allegedly caused by the defendants' conduct. See United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 31–32 (D.D.C. 2006). BATCo never marketed cigarettes in the United States and did not directly cause fraudulent statements to be made to U.S. consumers regarding the potential health effects of smoking. Yet, both the district court and the D.C. Circuit Court of Appeals held that BATCo's wholly foreign conduct provided a sufficient basis for RICO liability because that conduct was part of the tobacco industry's scheme to hide the health effects of smoking; a scheme that had consequent effects in the United States.

Indeed, the D.C. Circuit held that any time foreign conduct has adverse effects within the United States, there is actually no "true" question of extraterritoriality for the court to examine at all. BATCo, 566 F.3d at 1130. Instead, in a departure from long standing precedent establishing a presumption against the extraterritorial application of U.S. laws, the D.C. Circuit held that where such adverse effects are felt in the United States, the court need not consider that presumption, nor whether Congress intended the law to apply outside the United States. Id. at 1130.

If the D.C. Circuit Court's decision is left intact, it will represent a substantial expansion of the extraterritorial application of RICO which could present palpable risks for U.S. companies with foreign affiliates and foreign companies that conduct operations in the United States.

### AT: Cartels Turn

#### Top-line growth is booming but not inevitable

Seth Hanlon 1-19, Senior Fellow at the Center for American Progress, J.D. from Yale Law School, AB from Harvard University, et al., “The Biden Boom: Economic Recovery in 2021”, Center for American Progress, 1/19/2022, https://www.americanprogress.org/article/the-biden-boom-economic-recovery-in-2021/

January 20 marks one year since President Joe Biden took office: It’s time to take stock of the historic economic boom under his leadership.

Though the United States faces serious economic challenges amid the ongoing global pandemic, 2021 was an extraordinary year of economic growth and recovery. The country saw record job gains and an unprecedented drop in unemployment. The economy likely grew faster than in any year since 1984, as measured by real gross domestic product (GDP). In 2021, the economy not only regained all pandemic-related GDP losses—it also surpassed pre-pandemic levels. Despite elevated inflation, Americans’ disposable incomes were higher in 2021 in real (inflation-adjusted) terms than they were in 2019 and 2020. Additionally, by many important measures such as savings and bank balances, Americans are more financially secure. The United States also made dramatic progress in lowering its exceptionally high rate of child poverty.

None of this was inevitable. Rather, it was the result of bold policies that bolstered the recovery and provided direct aid to households, most importantly the American Rescue Plan Act (ARPA) and the COVID-19 vaccine program. Much of this aid was disbursed to families hit hardest by the devastating economic impact of the pandemic: the unemployed, the poor, and families struggling with the high costs of raising children. Bold federal action helped families make ends meet through additional stimulus checks; expanded unemployment insurance benefits; expanded monthly child tax credit payments; and other policies. These policies addressed weaknesses in the social safety net that became more acute during the pandemic but existed well beforehand. And many of these interventions were temporary. Much work remains to not only ensure a strong recovery but also to extend progress beyond the pre-pandemic status quo toward an economy that works for all.

While the challenges are urgent and real, the fact is that, by so many key measures, the economy today is booming. This Biden Boom has been particularly strong for workers—who have access to better-paying jobs—and are seeing their wages growing after decades of seeing economic benefits accrue to the wealthy and corporations.

#### It’s economically ruinous

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

V. CORRECTING THE “ANOMALY” – A POTENTIAL REFORM

“The court is cognizant that . . . foreign states will ‘have a more potent remedy than the United States in seeking monetary damages for violations of the RICO laws’ . . . . [H]owever, the resolution of this anomaly lies with the Congress; [sic] not the courts.”75

Congress could address this looming problem by simply adding a new subsection to §1964 that reads: “A foreign governmental entity may not sue under this section.” There is no indication that Congress, when enacting RICO, ever anticipated that foreign governments would be allowed to pursue treble damages claims – and there are many indications that it intended for only private parties to avail themselves of this remedy. Thus, the above amendment would simply restore RICO to its original meaning.

The cases set forth above demonstrate that our courts have expanded civil RICO jurisdiction by building one wobbly platform upon another. With each expansion, the courts, however reluctantly, have taken the statute beyond what was envisioned by Congress. And with each expansion, the courts signal Congress to respond. Without a legislative solution, trial lawyers will continue to evade or erode the revenue rule. They will continue to manipulate RICO to enable them and their foreign clients to saddle U.S.-based companies, not racketeers, with defense costs and possibly ruinous liabilities. Some of America’s most vital companies are the victims trial lawyers seek to target for staggering liability. They include producers of consumer goods and household appliances, banks – essentially any deep-pocketed company whose products or services can be misused in a foreign smuggling or money laundering scheme is at risk from a foreign government RICO lawsuit for treble damages from lost taxes.

#### The externally crashes the economy by obliterating cross-border investment

Erica Siegmund 11, JD Candidate at the University of Virginia School of Law, “Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims”, Virginia Journal of International Law, 51 Va. J. Int'l L. 1047, Lexis

As a result of the procedural differences stemming from the U.S. exercise of extraterritorial application of its laws, some foreign nations have taken retaliatory measures against U.S. procedural rules by enacting ""blocking' or "clawback' statutes." 162 Some of these nations have [\*1078] justified these protective statutes on the grounds that extraterritorial application of U.S. antitrust laws has the potential to conflict with their amnesty programs, 163 because "potential leniency applicants would weigh the benefits (amnesty) against the costs (civil liability) before leaving a cartel." 164

These retaliatory measures are problematic in multiple ways. They "interfere[] with U.S. regulatory objectives" and ""destroy[] a spirit of cooperation and common purpose in solving international economic problems.'" 165 Maintenance of international cooperation is critical to the ultimate achievement of a larger transnational regulatory scheme equipped to tackle future conflicts specific to the global market.

These interference and comity concerns raised by the differences in procedural systems are similar in both the antitrust and securities fraud contexts. Many of the problematic procedures, such as treble damages, class action provisions, and extensive discovery rules, are available in both antitrust and securities fraud actions. Given that the extraterritorial application of U.S. law to f-cubed securities and global market antitrust cases would inherently involve the application of U.S. procedural rules, the ensuing procedural conflicts between U.S. and foreign courts, like substantive conflicts, impermissibly threaten to interfere substantially with foreign nations' prerogatives.

C. Additional Comity Concerns

Extraterritorial application of U.S. laws to foreign plaintiffs' claims poses additional concerns that support the D.C. Circuit's strict holding. For example, a liberal effects-based jurisdictional policy could increase the cost of transnational transactions with American purchasers and [\*1079] businesses because there would be an increased risk of exposure to U.S. regulations. In the securities markets, to avoid this and associated higher costs, "foreign issuers may simply restrict their offerings to investors who are not residents of the United States." 166 This could lead to a reduction in capital mobility, which would be "harmful to all parties in the market." 167

#### FDI independently stops global war

Anita Renda Kellogg 17, PhD in Political Science from the University of California, Los Angeles, M.A.s from the Universiteit van Amsterdam and the University of Chicago, B.A. from Hendrix College, Recipient of U.S. Department of Education’s East Asian Foreign Language and Area Studies (FLAS) Summer and Academic Year Fellowships, the Herbert York Global Security Dissertation Fellowship from University of California, San Diego’s Institute on Global Conflict and Cooperation, and UCLA’s Dissertation Year Fellowship, “How the Power of Business Affects the Commercial Peace: Commercial Interests, Economic Interdependence, and Militarized Conflict”, Doctoral Dissertation, p. 25-26

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

#### ET RICO application fractures economic integration and causes global backlash

Austen Parrish 17, Professor of Law at Indiana Univeristy, “Fading Extraterritoriality and Isolationism? Developments in the United States,” Indiana Journal of Global Legal Studies, 24 IND. J. GLOBAL LEGAL Stud. 207, HeinOnline

But putting these observations aside, the prevailing assessment that the decisions reflect anti-international tendencies is problematic. One of the core problems is the breadth of agreement from the Court's members, including those that are broadly supportive of international norm development.43 In Daimler, Justice Ginsburg-long sensitive to international issues-wrote the majority. In Justice Breyer's concurrence to Kiobel and RJR Nabisco, he invoked international jurisdictional law as supporting the majority's conclusion. 44 And Justice Stevens in Morrison expressed concern over the breadth of U.S. jurisdictional assertions. 45 All three justices are hardly isolationist. 46 Indeed, several justices have been threatened with impeachment 47 and have received death threats for their willingness to consider foreign and international law sources.48 And even those justices more reticent in considering international norms appeared concerned with how aggressively broad lower court decisions had become. 49

The decisions also are more consistent with international law than what those advocating an expansion of jurisdictional authority would suggest. Long-established public international law principles of territorial integrity, sovereign equality, nonintervention, and selfdetermination limit one nation from interfering with the conduct of foreigners occurring abroad absent consent or international agreement.50 International jurisdictional principles reflect these foundational concepts, preventing adjudication of claims in the absence of a close factual nexus between the dispute's subject matter and the United States. 51 While scholars from time to time have sought to recast international jurisdictional law to make it broader, extraterritorial regulation of foreigners for foreign activity has long been, with narrow exceptions, exceptional. 52 The desire to dramatically move international law from its state-based moorings may have been an ambition, but there's little authority supporting that the move has fully occurred.53 For good or bad, jurisdiction under international law remains tied to territorial sovereignty, and states continue to consider territoriality as the most straightforward and lawful way under international law of delimiting authority between them. 54 The adherence to this longstanding approach isn't anti-international or isolationist.

Notably, the presumption against extraterritoriality, as used in recent transnational cases, is fairly similar to how the Court has treated jurisdiction in other contexts. With federal court jurisdiction, the Court has refused-absent direct and explicit Congressional authorization-to assume that Congress has conferred on the Court the full jurisdiction permitted under the Constitution.55 Similarly, the Court has assumed that Congress does not usually intend to utilize the full jurisdiction permitted under international law or the U.S. Constitution.56 The presumption may be overly broad and even problematic when considering regulation of U.S. officials, but it hardly seems extreme to err on the side of caution in areas where unilateral extraterritorial regulation has been the most contentious.

In many ways then, the U.S. Supreme Court's most recent pronouncements reflect not a hostility to international law, but rather a rejection of a new legal orthodoxy that sought to reinvent jurisdictional rules for a perceived postnational or poststatist world. Harold Koh, for example, while not focused on jurisdictional principles, envisioned the rise of transnational public litigation-drawing from how domestic pubic law litigation advanced civil rights in the United States-as a way to enforce international human rights.57 Other scholars advocated in a similar vein and focused on expanding the role of substate actors in the international system.5 8 Indeed, as interdisciplinarity and transdisciplinarity surged in legal academia, a host of legal scholars borrowed descriptive theories from other disciplines and turned those descriptions into normative visions for global governance. So while anthropologists and social scientists explained how the international order has become pluralistic, legal scholars made the jump that pluralism is normatively desirable.59 And while international relations scholars and political scientists described how the state has disaggregated, legal scholars urged that the state should disaggregate with law becoming postnational in orientation.60

The desire to move beyond territorial sovereignty as a defining principle of international law and the attempt to change international jurisdictional principles has some understandable short-term appeal. First, strict territoriality has long been discarded domestically where concepts of individual liberty and reasonableness have replaced strict territorial theories of jurisdiction, 6 ' and territoriality has been jettisoned in conflict of laws doctrine. 62 Second, transnational solutions are often demanded in an integrated, globalized world, given the ease of modern transportation and communication, the growth of international trade and multinational corporations doing business across borders, technological developments such as the internet, and the emergence of transnational criminal organizations.6 3 Third, as the United States has become less willing to enter into treaties and cooperate multilaterally, the need to find other solutions to temper the negative aspects of globalization became more pressing. 64

Under international law and in other countries, however, the turn to unilateral extraterritorial regulation of foreigners (whether through the courts or otherwise) has rarely been viewed as legitimate. The unilateral attempt to prescribe conduct abroad has been roundly viewed as exorbitant and usually inconsistent with international law.65 Unilateral extraterritorial regulation also can be deeply undemocratic and not easily reconciled with principles of self-determination. 66 Aside from the legitimacy question, there is also pragmatic consideration: progress in international regulation is unlikely to be made in hodgepodge and piece-meal fashion. The move away from multilateral lawmaking leads to fragmentation of the international system67 and to the perception of American exceptionalism.6 8 In a range of contexts, because the use of extraterritorial laws are highly contentious, attention is diverted away from the alleged violators and the unlawful acts, and directed instead to those bringing the claims.6 9 And after all that, the likelihood of success for such claims remains small, thereby giving the illusion that serious steps are being taken, when in actuality little progress has been made.70

#### 3. 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

### AT: Biz Con Thumped

#### Biz con is threading the needle---it’s just strong enough to sustain growth, but fragile

Joe Ucuzoglu 1-26, Chief Executive Officer at Deloitte US, “CEOs Eye 2022 with Optimism and a Dash of Uncertainty”, Ritz Herald, 1/26/2022, https://ritzherald.com/ceos-eye-2022-with-optimism-and-a-dash-of-uncertainty/

The first CEO survey of 2022 shows leaders threading the needle between feeling “hopeful” and “uncertain” about the year ahead. CEOs expect business growth to remain strong, but continue to highlight challenges with talent, the continued pandemic, and supply chain disruptions. Holding steady on expectations for growth, surveyed CEOs appear cautiously optimistic that their organizations have adjusted and adapted to a “new normal” marked by the enduring uncertainty of COVID-19.

When asked in the Fall 2021 survey about when pandemic business effects would be over, nearly one-third of CEOs said they didn’t expect the impact of COVID-19 ending anytime in the “foreseeable future,” while 11% said business effects would be over by the end of 2021, 23% said by mid-2022, and 35% said by the end of 2022.

The timing of the Fall 2021 survey coincided with the rise of the Delta variant in September 2021, while the current survey was fielded at the beginning of January 2022 during a time of high disruption by the Omicron variant. Even so, CEO expectations are remarkably unchanged from four months ago. Similar to predictions they made back in September, 8% of CEOs claim that the business effects of the pandemic are already over for their organization, and just under a third say they will not be over in the “foreseeable future.” About 20% say by mid-2022, and 40% say by the end of 2022.

Expectations for growth are also relatively unchanged from the Fall 2021 survey, with almost two-thirds of CEOs expecting their organization’s growth to be “very strong” or “strong” over the next 12 months. The remaining third expects “modest” growth, and a fractional 2% expect “weak” growth.

However, CEOs have updated their outlook on financial and market instability. In the current survey, 36% of CEOs pointed to this issue as a top external concern, compared to 13% in Fall 2021. That figure rises to 62% for CEOs in the Financial Services industry, where it’s the top-ranked issue.

“Notwithstanding the challenging societal circumstances at this moment presented by the Omicron surge, CEOs remain optimistic about the business environment and see strong growth opportunities over the next year. A new normal appears to be setting in whereby business leaders simply expect new challenges to arise continuously and are confident they can manage through them to achieve positive business results while making a real difference in society.” – Joe Ucuzoglu, Chief Executive Officer, Deloitte US.

#### Omicron’s already fading AND had little impact

James Knightley 2-1, Chief International Economist at ING, Studied Economics at Durham University, “2Q Rebound Expected in the US After Omicron Stalls Growth”, ING, 2/1/2022, https://think.ing.com/snaps/2q-rebound-expected-in-the-us-after-omicron-stalls-growth/

Omicron leg means growth grinds to a halt in early 1Q

The Omicron wave of the pandemic has hit the US economy pretty hard through December and January. This has already been seen in the steep drop in December consumer spending with daily google mobility data, restaurant dining numbers and air passenger figures showing little sign of improvement in January. Moreover, we can’t rule out the possibility of a decline in employment in Friday’s jobs report given the rise in jobless claims and the deterioration in the Manpower employment data.

That said, Covid cases are falling in several states and there are hints of an uptick in some states in terms of people movement around retail and recreation venues, which we take as a proxy for spending. Consequently, assuming these trends continue we expect to see more consumer re-engagement with the economy that can pave the way for much better activity number through mid-February into March and beyond.

But the outlook for 2Q is much better as labour demand soars

Today’s US data offers encouragement that the underlying fundamentals remain in good shape, particularly surrounding the prospects for the jobs markets. The JOLTS (Job Opening and Labour Turnover statistics) data shows an increase in job openings in December to 10.925mn from an upwardly revised 10.775mn in November, better than the 10.3mn expected. This means that the ratio of job vacancies to the total number of unemployed people is 1.7 – an all-time high.

Consequently, it re-affirms the view that softness in payrolls data is purely a supply side issue with companies desperate to hire staff. This will help to keep upward pressures on wages and therefore the inflation pressures emanating from the labour market. The private sector quit rate slipped back to 3.2% from 3.4%, but we suspect that the Omicron wave made people cautious and reduced people movement also limited peoples’ desire to move jobs. This should recover again in the months ahead as the Omicron wave subsides.

#### It’s basically over

Anneken Tappe 2-3, Senior Writer at CNN Business, “America's Economic Recovery Is About To Go Into Reverse”, CNN, 2/3/2022, https://www.cnn.com/2022/02/03/economy/january-jobs-report-preview/index.html

Nearly 9 million American workers said they were not working because of the virus -- either because they were sick themselves or because they cared for someone in their household -- according to the most recent US Census Bureau Household Pulse Survey, conducted between December 29 and January 10.

The good news: Omicron rates are falling rapidly, and the economy should bounce back quickly. Last winter's brief drop and the Delta surge in the summer didn't prevent a year of record-breaking jobs growth in 2021.

### AT: Biz Con Not Key

#### 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.

#### Failure causes bankruptcies and unemployment---it’s unique: confidence is slowly recovering with stable support

Dr. Laurence Boone 20, PhD in Economics from London Business School, OECD Chief Economist, Master Degree in Econometrics from the University of Reading, MAS in Modelization and Quantitative Analysis from Paris X-Nanterre University, “Building Confidence Crucial Amid An Uncertain Economic Recovery”, OECD Interim Economic Report, 9/16/2020, https://www.oecd.org/newsroom/building-confidence-crucial-amid-an-uncertain-economic-recovery.htm

With the COVID-19 pandemic continuing to threaten jobs, businesses and the health and well-being of millions amid exceptional uncertainty, building confidence will be crucial to ensure that economies recover and adapt, says the OECD’s Interim Economic Outlook.

After an unprecedented collapse in the first half of the year, economic output recovered swiftly following the easing of containment measures and the initial re-opening of businesses, but the pace of recovery has lost some momentum more recently. New restrictions being imposed in some countries to tackle the resurgence of the virus are likely to have slowed growth, the report says.

Uncertainty remains high and the strength of the recovery varies markedly between countries and between business sectors. Prospects for an inclusive, resilient and sustainable economic growth will depend on a range of factors including the likelihood of new outbreaks of the virus, how well individuals observe health measures and restrictions, consumer and business confidence, and the extent to which government support to maintain jobs and help businesses succeeds in boosting demand.

The Interim Economic Outlook projects global GDP to fall by 4½ per cent this year, before growing by 5% in 2021. The forecasts are less negative than those in OECD’s June Economic Outlook, due primarily to better than expected outcomes for China and the United States in the first half of this year and a response by governments on a massive scale. However, output in many countries at the end of 2021 will still be below the levels at the end of 2019, and well below what was projected prior to the pandemic.

If the threat from COVID-19 fades more quickly than expected, improved business and consumer confidence could boost global activity sharply in 2021. But a stronger resurgence of the virus, or more stringent lockdowns could cut 2-3 percentage points from global growth in 2021, with even higher unemployment and a prolonged period of weak investment.

Presenting the Interim Economic Outlook, covering G20 economies, OECD Chief Economist Laurence Boone said: “The world is facing an acute health crisis and the most dramatic economic slowdown since the Second World War. The end is not yet in sight but there is still much policymakers can do to help build confidence.”

She added: “It is important that governments avoid the mistake of tightening fiscal policy too quickly, as happened after the last financial crisis. Without continued government support, bankruptcies and unemployment could rise faster than warranted and take a toll on people’s livelihoods for years to come. Policymakers have the opportunity of a lifetime to implement truly sustainable recovery plans that reboot the economy and generate investment in the digital upgrades much needed by small and medium-sized companies, as well as in green infrastructure, transport and housing to build back a better and greener economy.”

### AT: No Econ Impact

#### 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.

### AT: Walt

#### Walt concludes war is possible

Dr. Stephen M. Walt 20, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

For these reasons, the pandemic itself may be conducive to peace. But what about the relationship between broader economic conditions and the likelihood of war? Might a few leaders still convince themselves that provoking a crisis and going to war could still advance either long-term national interests or their own political fortunes? Are the other paths by which a deep and sustained economic downturn might make serious global conflict more likely?

One familiar argument is the so-called diversionary (or “scapegoat”) theory of war. It suggests that leaders who are worried about their popularity at home will try to divert attention from their failures by provoking a crisis with a foreign power and maybe even using force against it. Drawing on this logic, some Americans now worry that President Donald Trump will decide to attack a country like Iran or Venezuela in the run-up to the presidential election and especially if he thinks he’s likely to lose.

This outcome strikes me as unlikely, even if one ignores the logical and empirical flaws in the theory itself. War is always a gamble, and should things go badly—even a little bit—it would hammer the last nail in the coffin of Trump’s declining fortunes. Moreover, none of the countries Trump might consider going after pose an imminent threat to U.S. security, and even his staunchest supporters may wonder why he is wasting time and money going after Iran or Venezuela at a moment when thousands of Americans are dying preventable deaths at home. Even a successful military action won’t put Americans back to work, create the sort of testing-and-tracing regime that competent governments around the world have been able to implement already, or hasten the development of a vaccine. The same logic is likely to guide the decisions of other world leaders too.

Another familiar folk theory is “military Keynesianism.” War generates a lot of economic demand, and it can sometimes lift depressed economies out of the doldrums and back toward prosperity and full employment. The obvious case in point here is World War II, which did help the U.S economy finally escape the quicksand of the Great Depression. Those who are convinced that great powers go to war primarily to keep Big Business (or the arms industry) happy are naturally drawn to this sort of argument, and they might worry that governments looking at bleak economic forecasts will try to restart their economies through some sort of military adventure.

I doubt it. It takes a really big war to generate a significant stimulus, and it is hard to imagine any country launching a large-scale war—with all its attendant risks—at a moment when debt levels are already soaring. More importantly, there are lots of easier and more direct ways to stimulate the economy—infrastructure spending, unemployment insurance, even “helicopter payments”—and launching a war has to be one of the least efficient methods available. The threat of war usually spooks investors too, which any politician with their eye on the stock market would be loath to do.

Economic downturns can encourage war in some special circumstances, especially when a war would enable a country facing severe hardships to capture something of immediate and significant value. Saddam Hussein’s decision to seize Kuwait in 1990 fits this model perfectly: The Iraqi economy was in terrible shape after its long war with Iran; unemployment was threatening Saddam’s domestic position; Kuwait’s vast oil riches were a considerable prize; and seizing the lightly armed emirate was exceedingly easy to do. Iraq also owed Kuwait a lot of money, and a hostile takeover by Baghdad would wipe those debts off the books overnight. In this case, Iraq’s parlous economic condition clearly made war more likely.

Yet I cannot think of any country in similar circumstances today. Now is hardly the time for Russia to try to grab more of Ukraine—if it even wanted to—or for China to make a play for Taiwan, because the costs of doing so would clearly outweigh the economic benefits. Even conquering an oil-rich country—the sort of greedy acquisitiveness that Trump occasionally hints at—doesn’t look attractive when there’s a vast glut on the market. I might be worried if some weak and defenseless country somehow came to possess the entire global stock of a successful coronavirus vaccine, but that scenario is not even remotely possible.

If one takes a longer-term perspective, however, a sustained economic depression could make war more likely by strengthening fascist or xenophobic political movements, fueling protectionism and hypernationalism, and making it more difficult for countries to reach mutually acceptable bargains with each other. The history of the 1930s shows where such trends can lead, although the economic effects of the Depression are hardly the only reason world politics took such a deadly turn in the 1930s. Nationalism, xenophobia, and authoritarian rule were making a comeback well before COVID-19 struck, but the economic misery now occurring in every corner of the world could intensify these trends and leave us in a more war-prone condition when fear of the virus has diminished.

On balance, however, I do not think that even the extraordinary economic conditions we are witnessing today are going to have much impact on the likelihood of war. Why? First of all, if depressions were a powerful cause of war, there would be a lot more of the latter. To take one example, the United States has suffered 40 or more recessions since the country was founded, yet it has fought perhaps 20 interstate wars, most of them unrelated to the state of the economy. To paraphrase the economist Paul Samuelson’s famous quip about the stock market, if recessions were a powerful cause of war, they would have predicted “nine out of the last five (or fewer).”

Second, states do not start wars unless they believe they will win a quick and relatively cheap victory. As John Mearsheimer showed in his classic book Conventional Deterrence, national leaders avoid war when they are convinced it will be long, bloody, costly, and uncertain. To choose war, political leaders have to convince themselves they can either win a quick, cheap, and decisive victory or achieve some limited objective at low cost. Europe went to war in 1914 with each side believing it would win a rapid and easy victory, and Nazi Germany developed the strategy of blitzkrieg in order to subdue its foes as quickly and cheaply as possible. Iraq attacked Iran in 1980 because Saddam believed the Islamic Republic was in disarray and would be easy to defeat, and George W. Bush invaded Iraq in 2003 convinced the war would be short, successful, and pay for itself.

The fact that each of these leaders miscalculated badly does not alter the main point: No matter what a country’s economic condition might be, its leaders will not go to war unless they think they can do so quickly, cheaply, and with a reasonable probability of success.

Third, and most important, the primary motivation for most wars is the desire for security, not economic gain. For this reason, the odds of war increase when states believe the long-term balance of power may be shifting against them, when they are convinced that adversaries are unalterably hostile and cannot be accommodated, and when they are confident they can reverse the unfavorable trends and establish a secure position if they act now. The historian A.J.P. Taylor once observed that “every war between Great Powers [between 1848 and 1918] … started as a preventive war, not as a war of conquest,” and that remains true of most wars fought since then.

The bottom line: Economic conditions (i.e., a depression) may affect the broader political environment in which decisions for war or peace are made, but they are only one factor among many and rarely the most significant. Even if the COVID-19 pandemic has large, lasting, and negative effects on the world economy—as seems quite likely—it is not likely to affect the probability of war very much, especially in the short term.

[THEIR CARD ENDS]

To be sure, I can’t rule out another powerful cause of war—stupidity—especially when it is so much in evidence in some quarters these days. So there is no guarantee that we won’t see misguided leaders stumbling into another foolish bloodletting. But given that it’s hard to find any rays of sunshine at this particular moment in history, I’m going to hope I’m right about this one.

[END OF ARTICLE]

#### Walt is rehashing Posen

[don’t read, but for proof—this is early/mid article, setting up the premise]

Dr. Stephen M. Walt 20, Robert and Renée Belfer Professor of International Relations at Harvard University, PhD in International Relations (with Distinction) from Stanford University, MA in Political Science from the University of California, Berkeley, “Will a Global Depression Trigger Another World War?”, Foreign Policy, 5/13/2020, https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/

But war could still be much less likely. The Massachusetts Institute of Technology’s Barry Posen has already considered the likely impact of the current pandemic on the probability of war, and he believes COVID-19 is more likely to promote peace instead. He argues that the current pandemic is affecting all the major powers adversely, which means it isn’t creating tempting windows of opportunity for unaffected states while leaving others weaker and therefore vulnerable. Instead, it is making all governments more pessimistic about their short- to medium-term prospects. Because states often go to war out of sense of overconfidence (however misplaced it sometimes turns out to be), pandemic-induced pessimism should be conducive to peace.

Moreover, by its very nature war requires states to assemble lots of people in close proximity—at training camps, military bases, mobilization areas, ships at sea, etc.—and that’s not something you want to do in the middle of a pandemic. For the moment at least, beleaguered governments of all types are focusing on convincing their citizens they are doing everything in their power to protect the public from the disease. Taken together, these considerations might explain why even an impulsive and headstrong warmaker like Saudi Arabia’s Mohammed bin Salman has gotten more interested in winding down his brutal and unsuccessful military campaign in Yemen.

Posen adds that COVID-19 is also likely to reduce international trade in the short to medium term. Those who believe economic interdependence is a powerful barrier to war might be alarmed by this development, but he points out that trade issues have been a source of considerable friction in recent years—especially between the United States and China—and a degree of decoupling might reduce tensions somewhat and cause the odds of war to recede.

For these reasons, the pandemic itself may be conducive to peace. But what about the relationship between broader economic conditions and the likelihood of war? Might a few leaders still convince themselves that provoking a crisis and going to war could still advance either long-term national interests or their own political fortunes? Are the other paths by which a deep and sustained economic downturn might make serious global conflict more likely?

#### He's wrong

Rachel Brown 20, Founder and Executive Director of Over Zero, Heather Hurlburt, Director of the New Models of Policy Change project at New America's Political Reform Program, and Alexandra Stark, Senior Researcher at New America’s Political Reform Program, “How the Coronavirus Sows Civil Conflict”, Foreign Affairs, 6/6/2020, https://www.foreignaffairs.com/articles/world/2020-06-06/how-coronavirus-sows-civil-conflict

It would be wonderful if there were such a thing as a coronavirus peace dividend—if people and governments everywhere, who have been battered by pandemic disease and economic collapse, could at least look forward to reduced violence and instability. In these pages, Barry Posen recently argued that good news was at hand: “For the duration of the pandemic, at least, and probably for years afterward, the odds of a war between major powers will go down, not up.”

While Posen may be right that COVID-19, the disease caused by the novel coronavirus, will reduce the risk of a conventional war between major global powers, the broader notion that pandemics promote peace—as the title of Posen’s piece suggests—is not just mistaken but badly misguided, the remnant of outdated thinking about what constitutes conflict and from where threats to state stability and human well-being arise. That’s because the opposite of peace is violence and instability, not just interstate military conflict. As the United States has witnessed over the past ten days, a public health crisis can highlight inequalities and contribute to domestic unrest. In fact, UN Secretary-General António Guterres recently warned the Security Council that the pandemic poses a significant threat to international peace and security.

Peace, for states and peoples alike, means not only the absence of war between countries but the absence of conflict that threatens lives, communities, and the stability of institutions and regimes. Already, more deaths—and more instability—are attributable to violent crime, state repression, terrorism, and individual incidents of politically motivated violence than to wars involving conventional militaries. If peace consists of stable governments resolving conflict without violence and providing security and other basic functions, then COVID-19 has already begun to erode peace around the world.

#### Numerous studies agree

Marius Mehrl 20, PhD Student at the Department of Government at the University of Essex, M.Sc. in Conflict Resolution from the University of Essex, B.A.s in Cultural and Social Anthropology and Political Science from the University of Munich, Former Research Assistant at the Chair of Empirical Political Research and Policy Analysis, and Dr. Paul W Thurner, Professor and Chair for Empirical Political Science and Policy Analysis at the Ludwig-Maximilians-Universität München, PhD in Political Science from the University of Mannheim, M.A. in Political Science, Sociology, and History from the University of Passau, “The Effect of the Covid-19 Pandemic on Global Armed Conflict: Early Evidence”, Political Studies Review, Volume 19, Number 2, p. 288

Background

Existing studies document substantial and long-lasting effects of armed conflict on public health outcomes, including the prevalence of infectious diseases (Bundervoet et al., 2009; Ghobarah et al., 2003; Hendrix and Gleditsch, 2012). Continued armed conflict thus has the potential to fuel the spread of Covid-19 and be a key barrier to halting it. This is why the United Nations have been emphasizing the need to cede fighting, and it makes the announcement of ceasefires in, for example, the Philippines, Libya and Colombia, a reason for optimism. However, the number of such ceasefires has remained limited and some of them were broken shortly after being announced (Rustad et al., 2020). At the same time, some analysts argue that Covid-19 may lead to a ‘Pax Epidemica’ even without ceasefires as it decreases states’ military capabilities and optimism to fight (Posen, 2020). While such a decrease in fighting would clearly facilitate efforts to tackle the pandemic, it remains unclear whether a reduction in violence is actually occurring.

Instead, it is also possible that the virus is fuelling armed conflict in currently unrecognized ways. The global economy is already experiencing substantial contractions as a result of Covid-19. With most commodity prices dropping (World Bank, 2020), developing countries are expected to be particularly affected and to see an increase in poverty (Melaine and Nonvide, 2020; Noy et al., 2020). Numerous studies suggest that worsened economic conditions can trigger and intensify fighting

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as economically deprived individuals are recruited into rebel groups (Brückner and Ciccone, 2010; Chaudoin et al., 2017; Collier and Hoeffler, 2004; Humphreys and Weinstein, 2008). The pandemic may therefore indirectly increase armed conflict due to its effects on the economy. For instance, violent protests have already erupted in Lebanon over the economic consequences of Covid-19 and of the government imposed shutdown to stop it (ABC News, 2020), while in Yemen and Somalia, rebel groups are seeking to recruit fighters among the deprived (Blanc, 2020; Nagi, 2020).