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#### ADVANTAGE 1---TRADE

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

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

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

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

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

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

II.Why should we worry about uncertainty costs?

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

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

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

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

III. Legal uncertainty has increased significantly in recent years

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

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

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

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

#### This will dry up cross-border commerce and investment---foreign companies won’t participate if there’s the prospect of discrimination

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After setting our theoretical priors, we empirically test our two hypotheses on sector-level data covering 53 U.S. industries over the 2002–2017 period. Our panel-data empirical results indicate that merger policy investigative activities disproportionately deter foreign acquirers in local M&A markets. Specifically, increases in merger policy risk and merger policy uncertainty lead to reduced foreign acquirer presence in the U.S. markets for corporate control. The empirical evidence then suggests that merger policy enforcement is protectionist in effect, as foreign investment activities are more adversely affected by the application of merger policy as compared to domestic investment activities. These results yield salient implications for the international business literature on hostcountry characteristics and foreign investment activities.

In order to comprehensively examine the relationship between merger policy enforcement and foreign acquirer presence in local M&A markets, we structure the remainder of this paper as follows. We present a theoretical framework that focuses on the salience of policy risk and policy uncertainty in generating two hypotheses regarding the relationship between the enforcement of merger policy and the participation of foreign acquirers in domestic M&A markets. After setting out our theoretical priors, we describe our sector-level data on U.S. merger control and acquisition activities, formulate our estimation strategy, present our empirical results, and discuss robustness testing. The last section concludes.

HYPOTHESES DEVELOPMENT

A considerable amount of IB literature has examined the impact of country-level political risk and uncertainty on inward FDI activities – see the literature reviews by Kobrin (1979), Fitzpatrick (1983) and Liesch, Welch, and Buckley (2011). The basis behind this literature is that political risks and uncertainties can ‘‘arise from the actions of national governments which interfere with or prevent business transactions’’ (Weston & Sorge, 1972: 60). Firms generally react to such political hurdles by reducing their willingness to make investments as the option value of delaying investment becomes higher under such risks and uncertainties (Bloom, 2014; Brouthers, Brouthers, & Werner, 2008). While political hurdles and hazards can negatively influence the investment activities of all firms, foreign firms are generally considered to be more sensitive to such shocks. For one, foreign firms might be more frequently targeted when burdensome laws, regulations and policies are implemented by national governments; e.g., Eden (1994) observes that national policies practiced in a parochial manner represent fundamental threats to multinationals. Furthermore, foreign firms often lack the local information, legitimacy and contacts which might help them properly assess and mitigate political constraints. As Werner, Brouthers, and Brouthers (1996: 572) underscore, ‘‘firms commonly find international business opportunities to be inherently more risky than domestic ones’’ due to the stark differences in political environments and the inherent legal uncertainties characteristic of foreign investment endeavors. It is no surprise then that a great deal of empirical literature (e.g., Delios & Henisz, 2000, 2003b; Henisz & Delios, 2001) indicates that uncertainty in the political environment substantially deters foreign investment activities. Indeed, Kobrin (1979) highlights how the response to political risk and uncertainty is frequently avoidance, as multinationals simply do not get involved in countries perceived as risky.

While macro-level studies regarding the relationship between political risk and FDI tend to dominate the literature (Vadlamannati, 2012), there have been efforts to follow the prescriptions of Kobrin (1979) to consider the industry-, firm-, and project-specific factors relating to political risk and uncertainty. For one, Miller (1993) breaks down the salient host-country environmental uncertainties into six different dimensions – where uncertainties with respect to specific government policies represent the first dimension. Werner et al. (1996) follow in this line of research by considering the national laws which affect foreign firms; and Grosse (1985) and Bonaime, Gulen, and Ion (2018), respectively, consider the impact of regulatory policies and uncertainties on FDI and M&A activities. The conduct of national merger policy represents a particular regulatory policy that involves a direct threat to the participation of foreign firms in local M&A markets. Specifically, the presence of a national merger policy can negatively impact foreign acquirers by slowing down the consummation of their cross-border acquisitions via antitrust investigations, curtailing the profitability of these cross-border acquisitions by requiring structural remedies, and by even outright prohibiting them. Thus, merger control is a specific and salient government barrier that foreign acquirers must successfully navigate in order to gain access to local M&A markets (Brouthers et al., 2008; Clougherty, 2005).

While the IB literature lacks empirical scholarship concerning this topic, many IB scholars (e.g., Brewer, 1993; Buckley & Casson, 1996; Hymer, 1970; Spar, 2001) have posited that the national enforcement of merger policy potentially restrains the level of inward FDI. It is with these concerns in mind that many policy advisors recommend that countries do not prioritize competition policy, as it could discourage inward FDI via the creation of additional regulatory barriers and uncertainties for foreign investors (Oliveira et al., 2001). Moreover, the conduct of national merger policy lends itself well to analyzing the deterrence effects with respect to acquisition activities in a manner that is consistent with the pre-existing literature on political risk and uncertainty. First, merger policy is conducted at the industry level and exhibits cross-sector variation in antitrust scrutiny (Clougherty & Seldeslachts, 2013); thus, it represents an industryspecific policy context worth analyzing for policy risk factors in line with Kobrin’s (1979) prescriptions. Second, merger policy involves both policy risk and policy uncertainty – both of which may disproportionately deter foreign acquirers as compared to domestic acquirers. We turn now to a discussion of these concepts and to the formulation of our theoretical priors.

Merger Policy Risk

The concept of risk goes back to Knight’s (1921) fundamental insights, where he considered risk to be a known probability distribution over a set of events; for example, flipping a coin involves risk, but with known odds. In moving from the concept of risk to its application in IB political risk, Kobrin (1979) observes that risk is at play when managers have knowledge regarding the possibility and probability of different political outcomes via either calculations or past experience statistics. While the relevant information is available with political risk, and observers generally agree with respect to the probabilities of different outcomes, foreign investors are often considered to be at a disadvantage as compared to domestic investors due in part to inherent information asymmetries (Gehrig, 1993; Gordon & Bovenberg, 1996; Liesch et al., 2011). As Gehrig (1993: 98) makes clear, ‘‘information may have to be interpreted in the light of the legal conventions and business culture of a particular community, which may be difficult for foreigners to assess’’. Thus, domestic investors are better informed and better able to interpret the relevant probabilities as compared to foreign investors, and, as a result, foreign managers tend to overestimate the risks and underestimate the benefits involved with host-country investment activities (Liesch et al., 2011). Simply put, the lack of information, knowledge, and experience with respect to the intricacies of host-country activities accentuates the perceptions of risk when considering foreign investments. A great deal of the political risk literature accordingly focuses on the probabilistic estimates of different policy outcomes and how increased risk leads to decreased foreign investment activities. With the above as a backdrop, we consider how the policy risk involved with merger control might disproportionately affect foreign investors considering participating in the local markets for corporate control.

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

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Section 1: Introduction

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

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

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

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

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

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

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

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

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

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

Section 2: A Conceptual understanding of relevant concepts

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

(i) Competition

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

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

(ii) Merger

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

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

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

(iii) Export cartels

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

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

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

(iv) Trade policies

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

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

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

Part II

Protectionism

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

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

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

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

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

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

(i) Competition and Trade Policies

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

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

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

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

(ii) Competition law and protectionism

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

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

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

(iii) Merger regulation and protectionism

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

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

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

(iv) Export cartels exemption and protectionism

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

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

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

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

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

Secular Stagnation

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

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

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

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

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

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

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

Illiberal Globalization

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

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

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

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

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

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

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

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

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

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

#### Recent, robust studies prove our impact

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Why does protectionism lead to conflict and why does free trade help prevent it? Learn about the connection between peace and free trade.

Frédéric Bastiat famously claimed that “if goods don’t cross borders, soldiers will.”

Bastiat argued that free trade between countries could reduce international conflict because trade forges connections between nations and gives each country an incentive to avoid war with its trading partners. If every nation were an economic island, the lack of positive interaction created by trade could leave more room for conflict. Two hundred years after Bastiat, libertarians take this idea as gospel. Unfortunately, not everyone does. But as recent research shows, the historical evidence confirms Bastiat’s famous claim.

To trade or to raid

In “Peace through Trade or Free Trade?” professor Patrick J. McDonald, from the University of Texas at Austin, empirically tested whether greater levels of protectionism in a country (tariffs, quotas, etc.) would increase the probability of international conflict in that nation. He used a tool called dyads to analyze every country’s international relations from 1960 until 2000. A dyad is the interaction between one country and another country: German and French relations would be one dyad, German and Russian relations would be a second, French and Australian relations would be a third. He further broke this down into dyad-years; the relations between Germany and France in 1965 would be one dyad-year, the relations between France and Australia in 1973 would be a second, and so on.

Using these dyad-years, McDonald analyzed the behavior of every country in the world for the past 40 years. His analysis showed a negative correlation between free trade and conflict: The more freely a country trades, the fewer wars it engages in. Countries that engage in free trade are less likely to invade and less likely to be invaded.

Trading partners

The causal arrow

Of course, this finding might be a matter of confusing correlation for causation. Maybe countries engaging in free trade fight less often for some other reason, like the fact that they tend also to be more democratic. Democratic countries make war less often than empires do. But McDonald controls for these variables. Controlling for a state’s political structure is important, because democracies and republics tend to fight less than authoritarian regimes.

McDonald also controlled for a country’s economic growth, because countries in a recession are more likely to go to war than those in a boom, often in order to distract their people from their economic woes. McDonald even controlled for factors like geographic proximity: It’s easier for Germany and France to fight each other than it is for the United States and China, because troops in the former group only have to cross a shared border.

The takeaway from McDonald’s analysis is that protectionism can actually lead to conflict. McDonald found that a country in the bottom 10 percent for protectionism (meaning it is less protectionist than 90 percent of other countries) is 70 percent less likely to engage in a new conflict (either as invader or as target) than one in the top 10 percent for protectionism.



#### Protectionist fragmentation causes catastrophic geoengineering

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

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

HOW WE GOT THERE

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

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

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

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

#### Extinction

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

### 1AC

#### Plan

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

### 1AC

#### ADVANTAGE 2---HARMONIZATION

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

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B. Between Contracts and Networks: Frameworks

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

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

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

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

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

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

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

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

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

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

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

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

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

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a. *Criteria for goals*

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

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

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

b. Goal structure

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

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

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

c. Potential problem areas

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

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

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

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

4. Commitment in norm-setting

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

a. Potential obstacles

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

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

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

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

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

b. Specific types of norms—cartels

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

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

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A. The international political environment

At the root of international political theory is the fundamental maxim that relations between sovereign nations in the absence of mitigating factors is characterized by intense competition, mutual distrust, the inability to make credible commitments, and war.20

[FOOTNOTE] 20 Political scientists characterize the international system as “anarchic.” In the absence of world government (or other mitigating force), competition between states is largely unregulated by external laws or enforcement. The world is characterized by mistrust, the inability to contract, and the ultimate reliance on a state’s own devices. See THOMAS HOBBES, LEVIATHAN 80 (Edwin Curley ed., 1994) (in the state of nature “the condition of man . . . is a condition of war of everyone against everyone”). In fuller terms:

There is no authoritative allocator of resources: we cannot talk about a ‘world society’ making decisions about economic outcomes. No consistent and enforceable set of comprehensive rules exists. If actors are to improve their welfare through coordinating their policies, they must do so through bargaining rather than by invoking central direction. In world politics, uncertainty is rife, making agreements is difficult, and no secure barriers prevent military and security questions from impinging on economic affairs.

ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 18 (1984). Efficiency-enhancing gains from trade are difficult to appropriate because trade itself (and any other form of exchange or agreement between nations) is characterized by the absence of credible commitments to future behavior. And underlying the problem is the ever-present threat of the use of force. See, e.g., Kenneth N. Waltz, Anarchic Orders and Balances of Power, in NEOREALISM AND ITS CRITICS 98, 98 (Robert O. Keohane ed. 1986) (“The state among states . . . conducts its affairs in the brooding shadow of violence . . . . Among states, the state of nature is a state of war.”). Although this dire characterization of the international environment is, of course, a stylized approximation of the real world—there are always overlying constraints on sovereign behavior in the form of norms, reputational effects, and customary international law, HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (1977)—it is a useful and widely accepted heuristic for crafting a theory of international politics. [END FOOTNOTE]

As one commentator notes, “Nations dwell in perpetual anarchy, for no central authority imposes limits on the pursuit of sovereign interests.”21 And states are “unitary actors who, at a minimum, seek their own preservation and, at a maximum, drive for universal domination.”22 As a result, states operating on the international stage are unable to judge the sincerity of each others’ stated intentions when those intentions are contrary to this manifest interest. Because of self-help rules, states are forced in the main to assess their own security environment by assessing the capabilities of competitors, downplaying their motives. Given that the nature of the competition can implicate the fundamental survival of one (or more) of the actors, actions taken by one state to improve its own security must necessarily decrease the security of its competitor; in the absence of mitigation, security is a zero-sum game.23 In a world where cooperation is exceedingly difficult (because there is no authority to enforce agreements, nor any basis for assessing the reliability of another state’s commitments), international relations are characterized by a continuous race to the bottom, a mindless arms race rather than the opportunity to realize gains from cooperation.

It is obvious that not all relations between states are characterized by the security dilemma, however. Canada, for example, shares an unprotected border with the most powerful nation in the world without degenerating into a destructive and costly arms race. By some mechanism, then, Canada must be able reliably to judge U.S. intentions, even absent the apparent ability by the United States credibly to bind itself to a nonaggressive policy toward Canada. The key to mitigating the pressures of the security dilemma is the ability to distinguish a state with aggressive and expansionist tendencies from a benign one.24 States can be distinguished by their fundamental type. They can be classified as “revisionist,” that is, they seek to subvert the dominant order, or they can be classified as “status quo,” that is, they seek to support it.25 But, as noted, a state’s ability to judge another’s intentions (as opposed simply to counting its armaments) is extremely tenuous and comes at great cost. In fact, political science offers few well-understood mechanisms for judging a state’s propensity for aggression.

At the same time, hegemonic states have an abiding interest in spreading and maintaining their dominant worldview.26 Not only is it imperative that dominant states receive credible signals about other states’ intentions, but it is also important that dominant states attempt to inculcate their norms within other states that, over time, might mount credible challenges to the dominant states’ security.27 The spread of hegemony through internalization of norms occurs for three reasons. First, states with similar institutions and sympathetic domestic norms are simply better and more reliable trading partners, and it is in the hegemon’s economic interest to instill its norms.28 Second, states with defensive military postures and that adhere to the status quo present significantly less security risk to dominant states.29 And finally, the hegemon has a normative interest in the spread of its culture, its worldview, and its norms.30 This conception of the playing field upon which states interact leads to the conclusion that, entirely apart from the immediate and substantial economic benefits to a state from well-ordered interactions with other states, hegemonic states also have a national security and a normative interest in the information to be gleaned from the fact that these interactions are, in fact, well ordered.

In the absence of centralized enforcement, privately held and nonverifiable information as to a state’s fundamental type is the critical problem in assessing motives.31

[FOOTNOTE] 31 See KEOHANE, supra note 20, at 31 (“Order in world politics is typically created by a single dominant power [or hegemon].”). States are consequently classified as one of two types, “revisionist” or “status quo,” based on their acceptance and adherence to the political norms, institutions, and rules created by the hegemon. Status quo states are those that try to improve their condition from within the framework of the accepted world order. Revisionist states, by contrast, seek to gain position both by working outside that order and by working to subvert the hegemonic order itself. For instance, the existing world order is generally accepted to be that created by the United States after World War II. It comprises a liberal international economic order, the use of multilateral institutions (such as the United Nations and the WTO), negotiation for dispute resolution rather than the threat of violence, and the promotion of liberal democratic moral norms. See, e.g., Schweller, supra note 24, at 85; HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 32 (1948). Trade disputes between status quo states (like tariff disputes between the United States and Europe) are resolved through peaceful negotiation rather than the threat of war. Although status quo states do not entirely eschew the use of violence, they typically seek international authorization and legitimization before employing military force, as in the multilateral operations in Iraq, Kosovo, and Afghanistan. Revisionist states, on the other hand, such as North Korea, Iran, and China, will more readily use military force as a bargaining tool and are more reluctant fully to participate in transparent military, economic, and political negotiations. [END FOOTNOTE]

States wishing to escape the pressures of the security dilemma and engage in cooperative behavior need a means of conveying their preferences to others in a credible manner. There are, in general, two means by which such information can be transmitted: states can either bind themselves in such a way that they are unable to deviate from a stated behavior (known as “hands tying” in Schelling),32 or they can signal their intention to engage in a specified course of action by incurring costs sufficiently large that they discourage the misrepresentation of preference.33

International institutions can play a crucial role in facilitating the transmission of this information.34 In particular, international agreements over the terms of trade, even without binding supranational enforcement authority, provide a means for states to bind themselves to a desirable course of behavior in the short run and, more importantly, to signal their acquiescence to the ruling world order in the long run. Because compliance with treaty obligations often requires signatories to alter their domestic laws to reflect the terms of the treaty, the costs of compliance can be substantial. In the short run, to the extent that states enforce their domestic laws they can bind themselves to a certain course of behavior. In the long run, a state’s willingness to incur the substantial costs of changing its laws, both the transaction costs inherent in changing domestic laws and the even more substantial costs in domestic political capital, signals a willingness to engage other states on the terms set by the reigning international power. Moreover, there may be unintended effects, as changes in domestic laws result in a new set of domestic incentives to which actors respond, and new windows of opportunity may open up through which policy entrepreneurs can push for the internalization of new norms.35 Competition laws in particular are susceptible to this mode of analysis.

Most nations have adopted competition laws as a way to actualize (as well as to symbolize) a degree of commitment to the competitive process and to the prevention of abusive business practices . . . . The introduction of competition laws and policies has also gone hand in hand with economic deregulation, regulatory reform, and the end of command and control economies.36

The surest way to remove the threat of war, increase wealth, conserve resources, and protect human rights is through fundamental agreement between all states (or at least effective agreement between verifiably status quo states) under a normative umbrella that promotes all of those values. This normative convergence can be effected through the stepwise internalization of the sorts of economic and democratic values inherent in international economic liberalization, perhaps most notably through the adoption of principled international antitrust standards.37

#### Resource depletion causes extinction

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

1. The Four Horsemen

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

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

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

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

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

#### Human rights failure causes nuclear war

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Competing Views on Instability

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

#### Antitrust convergence strengthens governance globally---competition law’s the vital foundation

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In addition, conforming antitrust laws to the United States’ standards, for example, involves adopting principles of transparency, indiscriminate application of the law, the incorporation of economic principles into the legal code, the creation of fair and independent judiciaries, the creation of highly technical and independent enforcement agencies, and the emergence of an epistemic professional community of lawyers to interpret the changes. The adoption of all of these steps is the mechanism by which the lock-in phenomenon mentioned earlier can occur. These principles spill over into other areas of law and society and ultimately alter actors’ incentives and behaviors in ways that can result in the long-term internalization of these liberal norms. In particular, more than perhaps any other area of commercial law, antitrust principles contain within them the logic of significant constraints, not only on private, but also on government, conduct in every other facet of regulation and governance.

#### Robust governance prevents extinction

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Governance for Sustainability in light of (post) COVID-19 recovery

The ongoing COVID-19 crisis is generating massive adverse health and socio-economic impacts for societies around the globe, which require further attention for managing the pandemic as well as generating green, just and lasting recovery efforts. The crisis also brings many issues of relevance for ongoing sustainability transformations into the spotlight. One such issue is the role of governance, which we here broadly define as “the totality of actors, rules, conventions, processes and mechanisms concerned with how relevant…information is collected, analysed and communicated, and how management decisions are taken.” (IRGC 2005; see also Ostrom 2009).

The approaches taken to address COVID-19 bring to the fore relevant lessons – some (still to be) learnt - regarding global, national and subnational governance and potential changes needed to inform a shift towards sustainable development pathways. They also offer insights into opportunities and challenges for catalysing transformational change through decisive actions, e.g. as done with social distancing measures strongly informed by scientific advice, albeit not necessarily always based on robust evidence. Yet, COVID-19 also highlights significant gaps in the science-policy-society interface – including with regard to access to reliable, verifiable data to better inform decision making, in the prevalence of institutional mechanisms to deal with systemic and compound crises, and in the preparedness of global and national science communities and governance systems, among others.

It is widely recognised that the existential challenges that humanity is facing, such as climate change, biodiversity loss, increased prevalence of infectious diseases and others, require ‘robust’ governance structures that foster cooperation and collaboration as never before (WBGU 2014).

COVID-19 provides encouraging as well as challenging lessons for enhancing governance for sustainability. In several ‘early-mover’ countries, bold and decisive national government action coupled with clear communication initially led to containing the spread of (the first wave of) COVID-19 (e.g. South Korea, Singapore). Globally and regionally, the fact that COVID-19 has resulted in amplifying geo-political divides, such as between China and the US, and the challenges to the unity of the European Union, have been widely discussed in the media, illustrating the need for effective global governance structures that foster needed cooperation and at the same time respect local knowledge and democratic process.

What is more, COVID-19 is but one example in a string of health and other disasters and crises that the world has faced with increasing frequency in the recent past. As global warming continues, it will certainly not be the last. It is thus key to address the new set of risks and uncertainties in order to reduce risks and be prepared for other extreme events that may follow. Not all disasters are about health. Climate scientists are warning us about global tipping points (Lenton et al. 2019) and local adaptation limits (Mechler et al. 2020) as well as about ‘unknown unknowns,’ which demand capacity to take robust, nimble, yet evidence-based responses that find acceptance by affected societies.

This draft note for the IIASA-ISC COVID-19 recovery pathways initiative lays out our approach and initial thinking on the theme of “Governance for Sustainability” in terms of identifying relevant questions to learn from COVID-19 and draw lessons towards governance for sustainability pathways. We suggest four guiding questions (plus additional supporting questions), which we will further refine and seek answers to as part of the online consultations and further interactions with experts and the advisory panel. The ambition of the consultation process is to proceed towards co-generating some relevant policy recommendations for enhanced governance that is more agile, responsive, empowering, coherent, transparent, and adaptable in an ever more uncertain future, threatened by climate change and other stressors.

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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

3. Agreement in which exporting state considers foreign harm

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

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

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

# 2AC

## T Per Se---2AC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### ‘Practices’ can be singular

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

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

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

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

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

## T- Should---2AC

#### ‘Prohibit’ means to create a standard that forbids incompatible conduct

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

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

#### That expands Sherman AND Clayton---it’s explicitly lawful now

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

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

Strategic trade theory is often used to explain the States’ support for export cartels.152 Exporting States, by supporting their domestic firms engaged in export cartels, increase their national income through export revenues and promote producers’ (exporters’) welfare at the expense of the importing States. Under the strategic trade theory, exporting States will oppose any of the extraterritorial enforcement of competition law by the importing State, which curtails the export cartels.153 Just as blocking statuses show the applicability of domestic competition laws to anticompetitive acts and measures of State and State-owned firms internally. This is evidenced by the (Blocking) Order which hinders foreign investigations and enforcement of foreign decisions and judgments against Russian strategic enterprises.154 In addition, non-cooperation with the importing State’s investigation may also be due to the lack of incentive for an exporting State to immediately discipline the export cartel since it does not have any adverse effect on the domestic economy.155 Not only current trade laws but also national competition laws are insufficient to address the problem of anticompetitive conduct in foreign States which is prejudicial to the target State; this results from the fundamental differences between competition policy and trade policy.156

#### ‘Expansion’ is an addition to an existing law

Sarah H. Warren 20, Judge on the Georgia Supreme Court, Premier Health Care Invs., LLC v. UHS of Anchor, L.P., 310 Ga. 32, 32, 849 S.E.2d 441, 443, 2020 Ga. LEXIS 736, \*1 (Ga. October 5, 2020), 10/5/2020, Lexis

HN6 Certificates of Need, Hospitals

The Psychiatric Rule provides that a Certificate of Need (CON) shall be required prior to the establishment of a new or the expansion of an existing acute care adult psychiatric and/or substance abuse inpatient program, and defines "Expansion or Expanded" as the addition of beds to an existing CON-authorized or grandfathered psychiatric and/or substance abuse inpatient program. Ga. Comp. R. & Regs. 111-2-2-.26(1)(a), (2)(c). More like this Headnote

#### ‘Scope’ means authority

William R. Johnson 89, Judge on the New Hampshire Supreme Court, Appeal of Rehabilitation Assocs., 131 N.H. 560, 565-566, 556 A.2d 1183, 1187, 1989 N.H. LEXIS 22, \*11-13 (N.H. April 7, 1989), 4/7/1989, Lexis

The board, however, refused to approve the change in site from Allenstown to Concord without first having an opportunity to review the final plan, because of its belief that such a change could constitute a change in scope. The board was particularly concerned that the change in site might affect various financial variables. Although the administrative interpretation of a statute is entitled to deference, it is not ordinarily controlling. N.H. Dept. of Rev. Administration v. Public Emp. Lab. Rel. Bd., 117 N.H. 976, 977, 380 A.2d 1085, 1086 (1977). With regard to CONS, the board was given the authority by statute to determine what information must be included in an initial application; the statute, however, expressly [\*\*\*12] designated when an applicant who has submitted a completed application or a holder of a CON had to go back to the board for approval. The interpretation of the word "scope" to some extent defines the board's authority. The board's interpretation of the "scope" of the project to include a change in the site without a [\*566] change in the service area, or a change in a financial variable without a substantial change in the total expected capital expenditure, does not comport with the ordinary meaning of that term, and serves to expand the board's authority beyond its statutory limits. See Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); see also Hamby v. Adams, 117 N.H. 606, 609, 376 A.2d 519, 521 (1977) (even longstanding administrative interpretation of statute not controlling if contrary to express statutory language). We hold that a change in the site of a facility without a change in a factor affecting the "scope" of the project, as defined here, does not require prior board approval. Our decision is not intended to prevent the board from requiring the filing of a "change of scope" in accordance with RSA 151-C:12, [\*\*\*13] IV-a (Supp. 1988), effective June 1988, if any documents or materials submitted to it indicate that the change in site has changed the "location", "nature" or "scope" of the project as those terms must be understood.

#### ‘Increases’ are by expanding the scope. That defines the medium of action.

Merriam-Webster’s 21 Online Dictionary, ‘by’, https://www.merriam-webster.com/dictionary/by

: through or through the medium (see MEDIUM entry 1 sense 2) of : VIA

enter by the door

#### ‘Scope’ is authority, not actions

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

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

## Transparency CP---2AC

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

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

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

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

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

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

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

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

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

#### Exporting states block enforcement.

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

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

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

#### Giving jurisdiction to importing states fails.

Brendan Sweeney 7, Department of Business Law & Taxation, Monash University, Journal of International Economic Law, J Int Economic Law (2007) 10 (1), 3/1/2007, Lexis

2. Agreement to give jurisdiction to the importing state

The most appropriate judge of the anti-competitive nature of an export cartel is in fact the importing state. Although the importing state is likely to ignore the producer benefits experienced in the exporting state in its calculation, the substantive outcome (other things being equal) is more likely to be in accord with general competition principles than regulation by the exporting state.

However, there are three major objections to this suggestion. First, many developing states do not have the enforcement infrastructure or resources needed to determine cases of collusion occurring outside the jurisdiction. Even if the problems of accessing foreign-based evidence could be solved, many developing states just do not have the skills to pursue complicated competition cases.

Secondly, the importing state may not be able to enforce its remedies. This is likely to be the case where, as often occurs in developing states, the exporters have no assets within the jurisdiction of the importing state. This is a problem because developing states are likely to be a major source of complaints.

Thirdly, to hand jurisdiction to the importing state would involve a considerable sovereignty sacrifice because the exporting state would be relinquishing control over activities occurring within its borders probably involving its citizens. 98 There is no indication that states are prepared to make this kind of sacrifice. In fact, the history of competition law extraterritoriality suggests that states do not lightly surrender jurisdiction to another state. 99 Consequently, an agreement to shift jurisdiction to the importing state should only be adopted if there is no less intrusive alternative.

## DOJ Tradeoff DA---2AC

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

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

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

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

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

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

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

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

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

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

#### All efforts fail without ending national silos

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

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

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

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

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

Background on the Proposed Deal

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

DOJ’s Objections to the Proposed Deal

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

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

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

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

Focus on Labor

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

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

Moving Away from Price Effects

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

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

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

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

Looking Forward

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

## Politics---2AC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Tons of thumpers.

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

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

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

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

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

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

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

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

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

#### Antitrust harmonization is popular

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Winners win

Paul Kane 21, Senior Congressional Correspondent and Columnist at the Washington Post, “Day-to-day, Biden’s Agenda Looks Rocky. But Congressional Democrats Say Things Are Far Rosier If You Take The Long View.”, Washington Post, 7/24/2021, https://www.washingtonpost.com/powerpost/biden-agenda-democrats-congress/2021/07/24/83b776be-ebc0-11eb-ba5d-55d3b5ffcaf1\_story.html

There is, so far at least, little fear that Democrats are spreading themselves too thin by eschewing the traditional practice of focusing on a handful of domestic policy issues in the first two years of an administration.

“Political momentum and political capital is like a muscle. The more you exercise it, the more of it you have. It is not like a finite resource that you can run out of if you spend too much of it. What happens is that if we do a lot of positive things, then we’ve got more political clout to do even more positive things,” Sen. Brian Schatz (D-Hawaii) said.

# 1AR

### Say yes

#### There’s unique global momentum for opt-in

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

Further, a renewed interest in multilateral, structured resolutions should be encouraged. The realities of international antitrust have changed since the past true attempt in the early 2000s. In particular, the number of competition authorities has increased drastically, as has the amount of competition law they enforce. Also, many more nations nowadays possess substantial experience in international cooperation in competition matters than ever before, which has led to an arguably higher level of trust. The time may be right to consider multilateral initiatives with a stronger level of commitment than those based purely on voluntary cooperation, an example of which is a so-called “opt-in” model. Initiatives aiming at streamlining procedural matters and preventing cross-border anticompetitive conduct could and should be considered – ones that would, however, not result in a transfer of nations’ sovereignty over their domestic markets.

### T

#### ‘Should’ means desirable---this does not have to be a mandate

AC 99 – Atlas Collaboration, “Use of Shall, Should, May Can,” http://rd13doc.cern.ch/Atlas/DaqSoft/sde/inspect/shall.html

shall

'shall' describes something that is mandatory. If a requirement uses 'shall', then that requirement \_will\_ be satisfied without fail. Noncompliance is not allowed. Failure to comply with one single 'shall' is sufficient reason to reject the entire product. Indeed, it must be rejected under these circumstances. Examples: # "Requirements shall make use of the word 'shall' only where compliance is mandatory." This is a good example. # "C++ code shall have comments every 5th line." This is a bad example. Using 'shall' here is too strong.

should

'should' is weaker. It describes something that might not be satisfied in the final product, but that is desirable enough that any noncompliance shall be explicitly justified. Any use of 'should' should be examined carefully, as it probably means that something is not being stated clearly. If a 'should' can be replaced by a 'shall', or can be discarded entirely, so much the better. Examples: # "C++ code should be ANSI compliant." A good example. It may not be possible to be ANSI compliant on all platforms, but we should try. # "Code should be tested thoroughly." Bad example. This 'should' shall be replaced with 'shall' if this requirement is to be stated anywhere (to say nothing of defining what 'thoroughly' means).

#### ‘Should’ doesn’t require certainty

**Black’s Law 79** Black’s Law Dictionary – Fifth Edition, p. 1237

Should. The past tense of shall; ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from “ought.” It is not normally synonymous with “may,” and although often interchangeable with the word “would,” it does not ordinarily express certainty as “will” sometimes does.

### PTX

#### It signals momentum, which discourages opposition

James Politi & Lauren Fedor 21, staff writer at the Financial Times, “Joe Biden’s challenge: big, early victories in a toxic political climate,” Financial Times, 1-19-2021, https://www.ft.com/content/fa01bc64-a80c-4c32-abad-f8eb778c4fe6

The bleak circumstances of Mr Biden’s first day in office have added sobriety to the moment, and pointed to the massive political challenge he is facing. Having won the White House by projecting a mix of competence, empathy and renewal to American voters after four years of Trumpism, he will have to translate all that into governing at a wrenching moment in US history.

Mr Biden is no stranger to tough starts, given that he became vice-president to Barack Obama at the height of the financial crisis. But the problems now confronting the country are arguably more severe and multi-faceted than they were in 2009, requiring even more sure-handed intervention and political skill. Many Democrats believe Mr Obama spent too much of his first year trying to win bipartisan support for his plans. They are well aware that to be successful, Mr Biden will need to show rapid concrete results.

“To be able to deliver tangibly in the near term in ways that all people in the country can see and feel and know is a critically important thing to do,” says Mara Rudman, vice-president for policy at the Center for American Progress, a left-leaning Washington think-tank, and a former official in the Clinton and Obama administrations.

“We have had a self-perpetuating cycle in a very negative direction,” she adds. “I think we have the opportunity to get to a self-perpetuating cycle in the positive direction.”

The president-elect’s transition team has already set out plans for a barrage of unilateral executive orders during the first 10 days to rejoin the Paris climate agreement and scrap the travel ban imposed on certain Muslim-majority countries, undoing some of Mr Trump’s most controversial policies. It has also made clear that Mr Biden wants to rebuild the US’s traditional alliances with other western nations that frayed during the past four years, while being more focused in confronting strategic rivals such as China and Russia.

But Mr Biden has tried to focus the attention of lawmakers rattled by the assault on the Capitol — and an anxious public — primarily on his prescriptions to resolve America’s health and economic crises, as he prepares to enter the White House. Nearly 400,000 Americans have died from Covid-19, and 9.8m fewer Americans are employed compared with last February.

At the Queen, the president-elect called on Congress to pass his sweeping relief plan, which includes a new round of direct payments to Americans, aid to cash-strapped states and cities, a top-up of federal jobless benefits, a beefed-up tax credit for children and more funding for vaccinations.

Securing its passage will be the first big test of Mr Biden’s presidency, and no easy task given his Democratic party’s exceedingly tight edge in both the House of Representatives and the Senate — and the toxic climate on Capitol Hill that may be exacerbated by Mr Trump’s second impeachment trial.

“There is going to be a compulsion to get something done and get something done quickly, but it is definitely under more difficult circumstances given the political environment, the non-cooperation of the Trump administration, the severity of the pandemic itself and the close margins in Congress,” says John Lawrence, former chief of staff to Nancy Pelosi, the House speaker. “It is going to be tough.”

#### It won’t pass BUT at best it gets cut down and delayed.

Market Screener 11/11, News site focusing on markets and monetary and fiscal policy, “Changing Our Call on the Social Spending Bill and Fed Policy,” Market Screener, 11/11/21, https://www.marketscreener.com/quote/stock/AGF-MANAGEMENT-LIMITED-1408936/news/Changing-Our-Call-on-the-Social-Spending-Bill-and-Fed-Policy-36984004/

A FIRESTORM OVER INFLATION has arrived in Washington, where Democrats are in a near-panic over the 2022 elections and Republicans argue that too much stimulus is backfiring.

REGULAR READERS KNOW THAT WE THINK the economy has gotten too much medicine this year. To be charitable to Biden, there's no playbook for ending a once-in-a-century pandemic; economic dislocations were inevitable in these uncharted waters.

BUT THAT'S NO EXCUSE TO STICK WITH POLICIES that are making things worse. Sen. Joe Manchin may be a camera-hungry opportunist, but he's correct: it's time to reconsider spending another $2 trillion on an economy that's over-heating. Democrats on Capitol Hill acknowledge privately that the spending package may have to be delayed

until inflation cools off.

SO WE'RE CHANGING OUR ODDS ON PASSAGE of the Build Back Better bill, the massive cradle-to-grave spending package that also includes several tax increases. With the Senate tied, 50-50, even one Democratic defector can kill the measure, and Manchin is prepared to pull the trigger.

WE DON'T RULE OUT A MODEST BILL that extends the child tax credit - but in a climate of rising inflation, is there a need right now for liberalizing the state and local tax benefit or adding more housing aid when not all of the money in May's $1.9 trillion bill hasn't been spent?

OTHER CONGRESSIONAL PRIORITIES: Between Thanksgiving and Christmas, Congress will have to raise the debt ceiling, fund the government, and pass a massive Pentagon spending bill that could be the vehicle for other provisions (a classic "Christmas tree" bill). Is there time, in this crowded agenda, to pass Build Back Better?

OUR ODDS NOW ARE ABOUT 60 PERCENT that the entire package stalls, perhaps temporarily, perhaps permanently. There's a 40 percent chance that something scaled-back could still pass.