# 1nc – round 4

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### 1nc – deadlock da

Deadlock DA

#### Bedoya’s confirmation is likely, BUT opposition to the antitrust agenda threatens to indefinitely deadlock meatpacking enforcement – and everything else

Moran 1-6-22 (Max Moran, Research Director of the Personnel Team at the Revolving Door Project, studied International Relations and Journalism at Brandeis University, “Merrick Garland Is Undermining the Biden Antitrust Strategy,” The American Prospect, 1-6-2022, https://prospect.org/justice/merrick-garland-is-undermining-biden-antitrust-strategy/)

The Biden administration is threatening new anti-monopoly enforcement actions against the Big Four meatpacking companies, in part to counter inflation at the grocery store and in part to address decades of exploitation of small farmers. On Monday, the president dispatched Agriculture Secretary Tom Vilsack and Attorney General Merrick Garland to hear grievances from small ranchers, while the White House builds a new web portal to gather complaints. While the White House’s proposals for funding small meat processors to increase competition are rather unsatisfying, the enforcement piece could have a real impact.

This initiative has caused the usual grumbling from neoliberal economists, and the usual corrections to the usual grumbling. But no one has yet explained how Biden plans to actually follow through on his threat—a problem for which Garland is partly to blame.

As The Information’s Josh Sisco reported on Tuesday, there are currently just two deputies trying to manage the entire DOJ Antitrust Division (ATR) alongside Assistant Attorney General Jonathan Kanter, who was confirmed only two months ago. ATR typically has at least 12 deputies and top advisers in the “front office” who oversee about 700 career staffers. And that was under past administrations, which didn’t have nearly as ambitious an antitrust agenda as Biden’s. Reversing four decades of Borkian antitrust sloth requires a cohesive and energetic senior leadership team.

Meanwhile, the Federal Trade Commission, the executive branch’s other main antitrust enforcer, remains in a 2-2 partisan deadlock, as Senate Republicans blockade Biden nominee Alvaro Bedoya from being confirmed as a commissioner. He has a path to 51 Senate votes, but arcane (and unnecessary) procedural hurdles have slowed the process to a crawl, hindering the other avenue to antitrust action.

Biden can only do so much to move Bedoya’s nomination. But in theory, nothing prevents him from hiring whomever Kanter personally trusts to help execute their shared agenda. The deputies at ATR are not Senate-confirmed positions. So what’s causing the chaos?

The problem isn’t procedural; it’s political. In addition to diversity concerns, Sisco reports that “ideological divisions” about anti-monopoly enforcement within the Biden administration are causing fights over any potential selection for the ATR deputies.

These divisions should be familiar to anyone who followed the initial fight over antitrust nominees during the Biden transition last year. While Biden himself seems sold on the benefits of a strong anti-monopoly agenda, Garland testified last year that he sees no problem with hiring big corporations’ preferred defense attorneys to oversee their former firms and clients. Garland and other anonymous voices floated a slew of names to run ATR throughout last year—anyone but Kanter, whom progressives favored.

While Garland lost that initial fight, he seems content to starve Kanter of resources as a work-around, even if it means sabotaging his own president’s agenda. Garland, after all, appears to consider it core to his job to throttle the better parts of the Biden administration for the sake of an imagined apolitical comity. He rushed to the Trump administration’s defense over the objections of the White House many times over the last year, and continues to undermine environmental action wherever he can. It’s perfectly in keeping with his priorities to undermine antitrust enforcement too.

The corporate revolvers and pro-monopoly hacks Garland boosted also haven’t gone anywhere. Again according to Sisco, Sonia Pfaffenroth is now in the mix for one of those coveted jobs in the ATR “front office.” Pfaffenroth revolved from Arnold & Porter into the Obama ATR and back over the last two decades. In private practice, she’s defended pharmaceutical firms, fossil fuel companies, and mining companies from class actions, price-fixing cases, and of course antitrust lawsuits.

One should look to Pfaffenroth’s record from her past stint at ATR to get a sense of what a second go-around might look like. Under the Obama administration, Pfaffenroth blessed tie-ups between Virgin America and Alaska Airlines, as well as US Airways and American Airlines. Today, just four mega-airlines control 80 percent of U.S. air traffic.

Pfaffenroth even approved the $107 billion merger between Anheuser-Busch InBev and SABMiller, allowing 30 percent of the world’s beer market volume and 60 percent of the world’s beer market profits at the time to be controlled by one firm. Today, AB InBev has essentially hacked the multitiered regulatory system that kept the alcohol market competitive for decades. In some cases, AB InBev’s distributors only allow craft brewers to distribute their drinks to retailers if they keep overall production low. This bottlenecking, alongside the pandemic, has been devastating for craft brewers.

Pfaffenroth’s record at ATR reveals someone whose poor judgment has harmed major American industries. But her judgment is reflective of the failed antitrust status quo, and in antitrust and everything else, Garland sees maintaining the status quo as inherently salutary. Where you or I might see bad calls, Garland likely sees jurisprudence executed according to a well-worn book. Whether the book is right or wrong is immaterial, in his eyes.

To state the obvious, Biden ought to reject Pfaffenroth and empower Kanter with deputies ready to throw that book aside, or else his antitrust agenda on meatpacking and everything else will get tossed on the growing pile of broken promises that are cratering his approval ratings. Doing so, however, will require standing up to Garland.

Thus far, Biden has appeared reluctant to do so, for fear of threatening the attorney general’s independence. There’s a kernel of truth here, after the Justice Department was turned into the president’s personal law firm under Trump. But there is a big difference between deploying the DOJ’s resources to help friends and target enemies and ensuring the DOJ has the staff and leadership necessary to execute its policy agenda. One is a blatant abuse of power, the other a clear presidential prerogative.

It’s an awkward situation for a president, but Biden must recognize that achieving his goals—especially the ones that improve working people’s economic fortunes—does far more for the health of the nation than sticking to a failed principle for its own sake. The president badly needs to remember that the buck stops not at Main Justice, but the Oval Office. Biden can demonstrate his commitment to fulfilling his promises and vision by empowering those of his appointees who are showing the necessary courage.

#### It’s NOT about Bedoya – it’s a referendum on the scope of the current agenda – deadlock is the point

Murphy 21 (Kathleen Murphy, Senior Reporter at FTC Watch, former Section Research Manager, Specialist at Congressional Research Service, former Managing Editor at CQ Roll Call and Bill Analysis Editor at Congressional Quarterly, “Bedoya’s confirmation hearing draws closer,” FTC Watch, Issue 1016, 11-1-2021, <https://www.mlexwatch.com/articles/13940/print?section=ftcwatch>)

When Alvaro Bedoya, President Joe Biden’s nominee to the Federal Trade Commission, faces US senators, he will be asked about his scholarly views on privacy. But the hearing also gives senators a chance to assess the agenda of the last FTC nominee they confirmed, Chair Lina Khan.

The Senate Commerce, Science and Transportation Committee is set to consider Bedoya’s nomination, although no hearing date has been set. It’s most likely to occur the week of Nov. 15 or early December, based on the 2021 Senate calendar.

Serving on the FTC means Bedoya, a Georgetown University professor and former congressional lawyer, would end a 2-2 split and give Democrats a majority to implement the chair’s policies. Bedoya, founding director of the Center on Privacy & Technology at Georgetown Law, would replace former Commissioner Rohit Chopra who left Oct. 8 to serve as director of the Consumer Financial Protection Bureau.

Biden nominated Bedoya in mid-September. Khan, meanwhile, started serving as FTC chair in mid-June after an 83-day confirmation process. (See FTCWatch, No. 1002, March 29, 2021.)

‘99% about FTC Chair Lina Khan’

Michael Keeley, co-chair of the antitrust practice at Axinn, Veltrop & Harkrider, tweeted: “Bedoya confirmation is going to be 99% about FTC Chair Lina Khan, and 1% to do with Alvaro Bedoya. (And hopefully 0% about the Vertical Merger Guidelines.)”

Keeley said he expects the focus of the hearing to be assessing the wisdom of the policies being pursued by Khan.

#### Plan expands opposition, derailing confirmation

Kovacic 20 (William E. Kovacic, former FTC Chair, Global Competition Professor of Law and Policy, George Washington University Law School, JD Columbia University, “Keeping Score: Improving the Positive Foundations for Antitrust Policy,” U. of Pennsylvania Journal of Business Law, 23(1), 2020, https://scholarship.law.upenn.edu/jbl/vol23/iss1/3/)

THE POLITICAL ASSAULT ON THE FTC

From the late 1960s through the 1970s, the FTC pursued an extraordinarily ambitious agenda of competition and consumer protection matters.107 Significant antitrust litigation included challenges to dominant firm misconduct and collective dominance, distribution practices, horizontal restraints, and facilitating practices. 108 Many matters involved powerful economic interests,109 and in a number of cases the Commission sought structural relief in the form of divestitures or the compulsory licensing of intellectual property. 110 In 1974, the agency also initiated a program that required certain large firms to provide “line-of-business” data concerning a range of performance indicators.111

In the same period, the Commission used a mix of litigation and rulemaking to transform its consumer protection agenda.112 Through policy guidance and litigation, the agency introduced its advertising substantiation program that required firms to have support for factual claims made in their advertisements.113 The Commission initiated over twenty-five rulemaking proceedings and promulgated final rules involving a broad collection of product and service sectors.114

As a group, the FTC’s competition and consumer protection initiatives aroused fierce opposition from the affected firms and industries, which contested the agency’s actions in court and before Congress. 115 The complaints of industry resonated with a large, powerful bipartisan coalition of legislators116 who criticized the Commission’s activism, proposed various measures to curb the agency’s authority, 117 and ultimately adopted a number of restrictions in The Federal Trade Commission Improvements Act of 1980 (FTC Improvements Act). 118 In 1980, bitter opposition to elements of the FTC’s competition and consumer protection programs led Congress to allow the FTC’s funding to lapse, forcing the agency to temporarily cease operations. 119 Perhaps emboldened by the weak political support the Commission enjoyed before 1981, when the Democrats controlled the White House and both chambers of Congress, the Reagan administration briefly resumed the assault on the agency’s funding. In January 1981, David Stockman, Ronald Reagan’s first Director of the Office of Management and Budget (OMB), launched a short-lived effort to eliminate funding for the FTC’s competition policy program.120

The congressional and executive branch officials who criticized the FTC in this period advanced two positive claims to justify recommendations for withdrawing authority or funding for the Commission. One claim was that the agency’s choice of competition and consumer protection programs had contradicted congressional guidance about how the FTC should use its authority and resources.121 Many legislators complained that the agency had disregarded the legislature’s preferences and used its powers in ways that Congress never contemplated to fall within the FTC’s remit.122 As Congress considered bills in 1979 to limit the Commission’s powers, Congressman William Frenzel captured the prevailing legislative mood:

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

Ignoring Congress can be a virtue, but the FTC’s excessive nose-thumbing at the legislative branch has become legend. In short, the FTC has made itself into virulent political and economic pestilence, insulated from the people and their representatives, and accountable to no influence except its own caprice.123

The Commission, Frenzel concluded, was “a rogue agency gone insane.”124

The accusation of Commission disobedience figured prominently in Senate deliberations on the 1980 FTC Improvements Act. In less-flamboyant but still pointed terms, the chief Senate sponsors of the FTC Improvements Act said restrictions were necessary to curb the agency’s unauthorized adventurism. Senator Howard Cannon explained: “The real reason that we have proposed this legislation for the FTC is because the Commission appeared to be fully prepared to push its statutory authority to the very brink and beyond. Good judgment and wisdom had been replaced with an arrogance that seemed unparalleled among independent regulatory agencies.”125

The accusation of disregard for congressional will soon echoed in statements by high level officials in the newly arrived Reagan administration. OMB Director Stockman recited a variant of this theme in an appearance before a House of Representatives Committee early in 1981 to address his proposal to eliminate funding for the agency’s competition mission. Stockman said, “ . . . in recent years the FTC has served the public interest very poorly, in major part because it has sought to expand its power and influence beyond that envisioned by Congress.”126

Beyond generalized claims of institutional disobedience, the accusation of disregard for congressional will was invoked to justify proposals to impose restrictions on specific FTC initiatives. For example, in the fall of 1979, the Senate Commerce Committee held hearings on a proposal by Senator Howell Heflin to eliminate the FTC’s power to order divestiture or other forms ofstructural relief in non-merger cases.127 This was a shot across the bow of the FTC’s pending “shared monopoly”128 cases involving the breakfast cereal and petroleum refining sectors, where the FTC had requested structural relief (divestitures and, in the cereal case, compulsory trademark licensing) to restore competition.129 Congress did not adopt the Helfin proposal, but the idea of eliminating or restricting the FTC’s power to seek divestiture remained a serious threat to the agency. Roughly a year after the Commerce Committee hearings on the Heflin amendment, on the day before the balloting in the 1980 presidential elections, Vice-President Walter Mondale appeared at a campaign rally in Battle Creek, Michigan (the headquarters of the Kellogg Company). The Vice-President assured his audience that, if he and President Jimmy Carter were reelected, the Carter administration would seek legislation to ban the FTC from obtaining divestiture in the breakfast cereal shared monopolization case.130

A second, related claim was that the FTC had abandoned any adherence to sound administrative practice and descended into utterly irrational decision making. The agency was not merely disobedient (“rogue”) but crazy (“insane”), as well.131 Here, again, Congressman Frenzel pungently made the point. The FTC, Frenzel said, “is a king-sized cancer on our economy. It has undoubtedly added more unnecessary costs on American consumers who it is charged with protecting, than any other half dozen agencies combined.” 132 David Stockman’s initial broadside against the Commission in February 1981 echoed this sentiment. In a newspaper interview, Stockman said the FTC “is a passel of ideologues who are hostile to the business system, to the free enterprise system, and who sit down there and invent theories that justify more meddling and interference in the economy.”133

The accusation of disobedience and the diagnosis of insanity fit poorly, or at least awkwardly, with the positive record of the FTC’s activities in the 1970s. As discussed immediately below, the rogue agency story clashes with the many instances, especially between 1969 and 1976, in which congressional committees and key legislators directed the agency to carry out an aggressive, innovative enforcement program against major commercial interests. In 1969, numerous legislators endorsed the view of two external studies that the FTC had used its authority timidly and ineffectively.134 Leading members of Congress demanded that the agency transform its competition and consumer programs or face extinction.135

Congress described the content of the desired transformation in several ways. At a high level, oversight committees and individual legislators called for a dramatic boost in the agency’s appetite to undertake ambitious, risky projects—to replace a cautious, risk-avoiding decision calculus with a bold philosophy that erred in favor of intervention and used the agency’s elastic powers innovatively. Congress’s admonition to be aggressive and use power expansively emerged again and again in confirmation proceedings and routine oversight hearings.136 During hearings in 1970 to confirm Caspar Weinberger to be the Commission’s new chair, Senator Warren Magnuson, Chairman of the Senate Commerce Committee, told the nominee to “maintain the right kind of morale by recruiting strongly and expanding . . . Trade Commission programs in order to perform the job well.”137 In setting out this charge, Magnuson seemed to recognize that the FTC would have to be steadfast in resisting backlash—including from Congress—that would emerge as the FTC went about “expanding” its programs. The Commerce Committee Chairman said Congress was calling on the FTC to perform “tasks that require a great deal of attention and a great deal of fortitude not to respond to any pressures that come from any place.”138

Weinberger’s successor, Miles W. Kirkpatrick, received similar, and even more explicit congressional guidance, to apply the Commission’s powers broadly and aggressively. In 1969, Kirkpatrick had chaired a blueribbon American Bar Association panel whose report recommended the FTC implement an ambitious antitrust agenda that involved significant doctrinal, operational, and political risks.139 In his appearances as FTC chair before congressional committees, Kirkpatrick often heard legislators applaud the risk-preferring approach of the ABA study. In Kirkpatrick’s first appearance before the Commission’s Senate Appropriations subcommittee in 1971, the Subcommittee Chairman, Senator Gale McGee, provided the following guidance:

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

Too often it has been either shy or bashful. . . . That is why we were having a rather closer look at your requests just in the hopes of encouraging you, if anything, to make mistakes, but I think the mistakes you are to make ought to be mistakes in doing and trying rather than playing safe in not doing. I believe that is the most serious mistake of all . . . you are not faulted for making mistakes. You may be for making it twice in a row, for not learning properly but, we would rather you make a mistake innovating, trying something new, rather than playing so cautiously that you never make a mistake. . . . 140

In his appearance before the same subcommittee a year later, Senator McGee observed with approval that Kirkpatrick had “responded to the criticism . . . by both Mr. [Ralph] Nader and the American Bar Association by moving aggressively against some of the major industries in the United States.” 141 Recognizing that the approach he described could elicit opposition from affected business interests, McGee promised that he and his colleagues would exercise best efforts to watch the agency’s back: “[I]f you step on toes you are going to catch flak for it, but I hope we will be able to push this even more aggressively by backing you more completely with the kind of help that I think you require.”142 McGee closed the proceedings with militant instructions:

“Stay with it and flex your muscles, clinch your fists, sharpen your claws, and go to it. We think this is desperately important in the interest of the Congress, whose creature you are, and the consumer whose faith and substantive capabilities in surviving hang very heavily upon what you succeed in doing.”143

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

Under . . . Weinberger and Kirkpatrick, the Commission has taken on new life beginning with the search for strong and imaginative, rigorous developers and enforcers of the law and reaching out with innovative programs to restore competition and to make consumer sovereignty more than chamber of commerce rhetoric. 144

With evident approval, Moss recounted how the FTC had “stretched its powers to provide a credible countervailing public force to the enormous economic and political power of huge corporate conglomerates which today dominate American enterprise.” 145 The members of the Senate Commerce Committee, Moss concluded, “consider it one of our solemn duties to protect the Commission from economic and political forces which would deflect it from its regulatory zeal.” 146 Member after member of the Commerce Committee echoed Moss’s message to Engman. Senator Ted Stevens, an Alaska Republican, told the nominee, “I am really hopeful that . . . you will become a real zealot in terms of consumer affairs and some of these big business people will complain to us that you are going too far. That would be the day, as far as I am concerned.”147

The FTC got the message. The words and actions of Weinberger, Kirkpatrick, Engman, and other FTC leaders in this period reflected a preference for boldness, aggressiveness, innovation, and zeal. In a letter to Senator Edward Kennedy in July 1970, Weinberger reported that the FTC was trying “to make the most of that other resource given to us by Congress – our statutory powers.” 148 Weinberger said the Commission had “encouraged the staff to make recommendations to us which will probe the frontiers of our statutes,” had made progress in “[p]robling the outer limits” and “exploring the frontiers” of the agency’s authority, and had shown it “is receptive to novel and imaginative provisions in orders seeking to remedy unlawful practices.”149 In a speech to a professional association in 1971, Kirkpatrick reported that the Commission was “moving into ‘high gear’ in the task of preserving and promoting competition in the American economy.”150 He said he and his fellow board members “fully intend to be in the vanguard of exploration of the new frontiers of antitrust law.”151

By mid-1974, the FTC had launched several significant cases involving monopolization and collective dominance, including pathbreaking shared monopolization cases against the breakfast cereal152 and petroleum refining industries.153 With these matters underway, Engman in 1974 appeared at a congressional hearing of the Joint Economic Committee and received criticism that the FTC had been insufficiently active in challenging monopolies.154 The Joint Committee’s chairman, Senator William Proxmire, told Engman “the FTC, like a number of other regulatory agencies seems to concern itself with minor infractions of the law, and to spend much of its time on cases of small consequence.”155 Perhaps astonished to hear that cases to break up the nation’s leading breakfast cereal manufacturers and petroleum refiners involved minor infractions or matters of small consequence, Engman replied, “The Federal Trade Commission today is very aggressive. . . . We have seen a total turnaround in terms of the types of matters which are being addressed by the Bureau of Competition.”156

Beyond general policy exhortations to exercise power boldly and to err on the side of intervention, of doing too much rather than too little, Congress in the early to mid-1970s instructed the Commission to focus attention on specific commercial sectors and competitive problems within them. In the face of severe fuel shortages and price spikes for petroleum products in the early 1970s, numerous legislators demanded that the FTC conduct investigations and challenge the conduct of large, integrated petroleum companies. 157 Many insisted that the FTC use its competition mandate to force integrated refiners to deal on equitable terms with independent refiners and distributors.158 The Commission’s decision to file the Exxon shared monopoly case, which sought extensive horizontal and vertical divestiture remedies, can be explained as a response to these demands.159 In the same period, Congress applied strong pressure upon the FTC to examine and correct what it believed to be serious structural obstacles to effective competition in the food manufacturing industry.160 Here, also, the agency’s decision to prosecute the shared monopolization case against the country’s leading producers of ready-to-eat breakfast cereals can be seen as a response to this concern and faithful to the congressional prescription that the FTC use novel, innovative approaches to cure competitive problems.161 In these and other matters, the Commission explored the frontiers of its powers in the development of new cases.162

When one aligns the guidance of Congress in the early to mid-1970s about the appropriate content of FTC policy making with the FTC’s activity in the decade, it is apparent that the critique of the agency as disobedient to legislative will is a fiction, or at least badly misleading. A more accurate positive depiction of events in the 1970s is that the Commission faithfully followed legislative instructions given from 1970 up through the mid-1970s about the appropriate philosophy and means of enforcement, and that, as the decade came to a close, Congress changed its mind about what the FTC should do and how it should do it. As described below in Section IV.D., 163 that change in legislative temperament and the response by Congress to industry backlash against the FTC’s program have important implications for how the FTC plans programs and selects projects in the future. Accurate positive analysis reveals that the agency was not disobedient to Congress but was inattentive to the operation of a political feedback loop that exposes Congress to industry pressure once the FTC implements programs that involve significant economic stakes and endanger powerful commercial interests.164

Nor does a careful study of the positive record of the 1970s show that the FTC policy making was “insane.” Measured by its contributions to institution-building, the Commission did many things that epitomize good public administration. It carried out important organizational and personnel reforms that upgraded its operations and personnel.165 As explained more fully below, the agency also improved its mechanisms for setting priorities and selecting projects to achieve them and strengthened investments in policy research and development (including a program to evaluate the effects of completed cases).166 The FTC successfully carried out new regulatory duties entrusted by Congress in the 1970s; most notable was the implementation of the premerger notification mechanism that Congress created in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.167 In all of these areas, the Commission of the 1970s made enduring enhancements to the institution and set important foundations for successful programs that followed in the next forty years. An insane agency could not have done so.

Another focal point for attention in assessing the FTC’s performance in the 1970s was the quality of its substantive agenda. Was the FTC’s substantive program in the 1970s “insane”? Many Commission competition and consumer protection initiatives in the 1970s encountered grave problems. FTC efforts to execute the bold, innovative, risk-preferring program that Congress had called for earlier in the decade generated a number of serious project failures.168 Insanity, on the part of individual leaders or the institution as a whole, does not explain the failures. These outcomes have more prosaic causes whose understanding is important to the future formulation of competition policy. Chief among the FTC’sflaws were a lack of historical awareness about the political hazards associated with undertaking an agenda of bold, innovative cases against powerful commercial interests; inadequate appreciation for the demands of bringing large numbers of difficult cases and promulgating ambitious trade regulation rules would impose on the agency’s improving but uneven human capital; and underestimation of the change in the center of gravity of economic learning that supports the operation of the U.S. antitrust system. As described below, many of these failings are rooted in weaknesses in the FTC’s knowledge in the 1970s of the positive record of its past enforcement experience.169

B. The Inadequate and Misdirected Enforcement Activity Narrative

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

Implicit or explicit assumptions about the level of enforcement activity have provided a central foundation in the modern era for broad normative claims of poor system performance. One collection of inadequacy critiques attacks federal enforcement program of the Reagan administration – a period characterized by what one journalist described as an “almost total abandonment of antitrust policy.” 170 In 1987, in discussing Reagan-era federal antitrust enforcement, Professor Robert Pitofsky said the DOJ and the FTC had produced “the most lenient antitrust enforcement program in fifty years.” 171 Professor Milton Handler remarked that in the Reagan era “a policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot remain free.” 172 Professors Lawrence Sullivan and Wolfgang Fikentscher observed, in addressing the treatment of civil nonmerger matters, “enforcement ceased.”173

A second body of commentary assails the work of the federal agencies in the George W. Bush administration. For example, in 2008, during his campaign to gain the Democratic Party’s nomination for the presidency, Barack Obama said the George W. Bush administration “has what may be the weakest record of antitrust enforcement of any administration in the last half-century.” 174 The Obama statement did not compare activity levels across all administrations over the 50-year-long comparison period, but the statement suggested that the general claim was based on variations in activity over time.

A third version of the inadequacy narrative marks the beginning of the decline of effective enforcement at the outset of the George W. Bush administration and extending through the present.175

A fourth variant writes off the entire period from roughly 1980 onward as an antitrust catastrophe.176 After noting that for most of the 20th century “antitrust enforcement waxed or waned depending on the administration in office,” Professor Robert Reich recently wrote that “after 1980 it all but disappeared.”177 He added that Presidents Bill Clinton and Barack Obama “allowed antitrust enforcement to ossify, enabling large corporations to grow far larger and major industries to become more concentrated.” 178

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

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

Many commentators have offered explanations for why federal antitrust enforcement became inadequate after the late 1970s. One major positive explanation is that the modern Chicago School of antitrust analysis, grounded largely in the writings of Robert Bork, inspired a severe retrenchment of enforcement at the DOJ and the FTC and led the federal courts to narrow antitrust doctrine since the late 1970s.179 A major focus of this discussion of the causes for changes in enforcement involves rules governing the treatment of dominant firms.180

A second cause offered to explain a redirection of enforcement is the ascent to the presidency of Ronald Reagan and his appointment of permissive leadership to the DOJ and the FTC.181 The Reagan administration is said to have inherited a generally well-functioning antitrust enforcement system and run it into the ground.

The Chicago School, Bork-centric, and Reagan-centric explanations for policy change can be misleading due to mischaracterizations of what took place and their tendency to omit other forces that had helped narrow the scope of antitrust enforcement. Bork and the Chicago School unmistakably have exerted a significant impact upon modern antitrust policy, but the retrenchment of antitrust enforcement in some areas cannot accurately be attributed to them entirely or, for a number of important developments, even principally. 182 Many proponents of the inadequacy narrative make little or no mention of the role of modern Harvard School scholars, such as Philip Areeda and Donald Turner, in leading courts and enforcement agencies to move the antitrust system toward a less interventionist stance.183

Areeda and Turner encouraged courts to forego reliance on noneconomic goals in deciding antitrust cases. 184 The two Harvard scholars also advocated the adoption of stricter procedural and doctrinal screens to counteract what they perceived to be flaws in the U.S. system of private rights of action.185 The inadequacy narrative often overlooks the influence of the modern Harvard School and thus misses how much the permissiveness of modern antitrust policy reflects the Harvard School’s concern that private rights of action over-deter legitimate business conduct by dominant firms.186 This yields a faulty positive diagnosis of the forces that have reduced the reach of the U.S. antitrust regime. As noted below, understanding how the institution-grounded limitations proposed by the modern Harvard School have imposed greater demands on plaintiffs has important implications for government plaintiffs seeking to devise a strategy to reclaim doctrinal ground lost since the 1970s.187

Similar imprecision and omission characterize the portrayal of the Reagan administration as the force that swung antitrust policy away from a sensible interventionist equilibrium and gave it a durably noninterventionist orientation. Some elements of the Reagan-centric narrative turn events 180 degrees around from their positive roots.188 More significant, the narrative does not address how badly the Congress and the White House had damaged the FTC’s stature and operations before Ronald Reagan took office in late January 1981. By the end of 1980, the Commission had been shoved into the equivalent of political bankruptcy by a Congress and a White House under the control of the Democratic Party.189

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

#### Solves rural political alienation

Kelloway 21 (Claire Kelloway, senior reporter and researcher with the Open Markets Institute, primary writer of FoodAndPower.net, former sustainability fellow with Bon Appetit Management Company, BA political science, concentration in political economy and sustainable development, Carleton College, “How Biden can rein in the Big Meat monopoly,” Vox, 2-24-2021, https://www.vox.com/future-perfect/22298043/meat-antitrust-biden-vilsack)

Taking on Big Meat wouldn’t just help consumers, farmers, and meatpacking workers; one poll found 82 percent of independent rural voters would be more likely to vote for a candidate who supports “a moratorium on factory farms and corporate monopolies in food and agriculture,” so it could also help halt Democrats’ losing streak in rural areas and heartland states.

As progressives take their campaign against consolidation into a higher gear with a friendlier administration in power, Big Meat needs to be on the priority list.

#### That’s the root cause of US populism

Rodriguez-Posea 21—(Professors of Economic Geography at the London School of Economics). Andrés Rodríguez-Posea, Neil Lee, & Cornelius Lipp. August 11, 2021. “Golfing with Trump. Social capital, decline, inequality, and the rise of populism in the US”. Cambridge Journal of Regions, Economy and Society. Accessed 10/2/21.

We hypothesise that low social capital alone is unlikely to have triggered the swing of voters to Donald Trump and that interpersonal inequality at the local level is unrelated to increases in Trump’s vote share. We propose that it is precisely the long-term economic and demographic decline of the places that still rely on a relatively strong social capital that is behind the rise of populism in the US. Strong, but declining communities in parts of the American Rustbelt, the Great Plains, and elsewhere, reacted at the ballot box to being ignored, neglected and being left-behind.

The results of the analysis show that increases in populist vote in the US are fundamentally driven by the economic and demographic decline of strongly cohesive midtown and rural America. These places still have greater levels of social capital than more dynamic and unequal areas of the US. This social capital has played a role in the swing of votes within communities driven by a growing feeling of frustration, increasingly known as the rising geography of discontent (McCann, 2020) or the politics of resentment (Cramer, 2016). In small cities and rural areas of the US, scattered predominantly across the Rustbelt and the Great Plains, the rise in populist vote represents a reaction of strong communities in which individual losses are identified with collective losses. These so-called ‘places that don’t matter’ (RodríguezPose, 2018) have had enough of seeing their people leave and their jobs go and have used the ballot box to exact revenge on a system they consider offers little to them. By contrast, the more dynamic, mainly urban, areas of the US, where society is often less cohesive, where there is less social capital and where interpersonal inequalities are significantly higher, have, for the moment, shunned the calls of populism.

We argue that our results have implications beyond the United States. In particular, work across Europe, including studies considering Brexit (e.g., Carreras et al., 2019; Lee et al., 2018) and Euroscepticism more generally (Dijkstra et al., 2020), have highlighted the importance of long-term decline in explaining the growth in populism. Yet the focus has tended to be on income and industrial decline, rather than employment and population decline, as a cause. The decline of previously tight-knit communities has been underplayed in this literature, but our results provide an important justification to investigate whether they can be generalised outside the United States.

The paper is structured as follows. The next section studies the rise of Trumpism in the US. This is followed by a section looking at explanations for the growth of the Trump vote, focusing, in particular, on social capital, interpersonal inequality, and long-term economic and demographic decline. The methods and data used in the analysis are presented in the ensuing section, which is followed by the econometric analysis. The main conclusions of the study are put forward in the final section.

The rise of populism in the US

On 8 November 2016, Donald Trump was elected president of the US. Trump, a businessman with limited previous political experience, managed against the odds first to secure the Republican Party nomination and then the presidency on a political platform with strong nationalist and authoritarian populist tendencies (Norris and Inglehart, 2019).

Trump’s election was achieved on the wings of winning the electoral votes of crucial swing states, such as Pennsylvania, Ohio, Michigan and Wisconsin. In these states, like very much everywhere else in the US, the votes for the Democratic candidate, Hillary Clinton, were geographically concentrated in the larger cities. Clinton triumphed in cities like Philadelphia, Pittsburgh, Columbus, Cincinnati, Cleveland, Detroit, Milwaukee and Madison, and took some university towns in Ohio and Pennsylvania. The suburbs, towns and rural areas, by contrast, provided fundamental support for Donald Trump (Rodden, 2019).

Figure 1 shows the Trump margin, the swing in the share of votes towards the Republican Party between the 2012 presidential election, when Mitt Romney was the Republican presidential candidate, and the 2016 election. The Trump margin is highest in most of the mid-Atlantic, Midwest, and Great Plains states. The greatest swing took place in an arch surrounding the Great Lakes, drawing a semicircle expanding from northern Maine in the East to north-eastern Minnesota in the West (Figure 1).

The geography of the Trump margin changed relatively little in the 2020 election (Figure 2). Despite losing the election to Joe Biden, Donald Trump increased his margin relative to the votes obtained by Mitt Romney in 2012 across many rural and small-town counties where he had already prevailed four years earlier. He also managed to make forays into territories traditionally relatively hostile to the Republican Party, such as southern Texas and parts of New Mexico (Figure 1). However, the main geographical traits of the 2016 election remained untouched in November 2020. The Trump margin was, once again, highest in rural and small-town communities around the Great Lakes, the Midwest and the Great Plains.

In contrast, Donald Trump attracted less votes along both coasts and in large urban agglomerations everywhere in the US (Figure 1).

Possible explanations for the rise of Populism

Why did Donald Trump get elected in 2016? Why did he almost get re-elected in 2020? What are the reasons behind the rise of authoritarian populism in the US?

The rise of Trumpism in the US has coincided with that of forms of authoritarian populism in other western democracies. Especially in the second half of the 2010s, researchers have tried to investigate the causes of populism from different perspectives. The main divide in the studies of populism has been between those focusing on cultural parameters versus those emphasising economic explanations.

Those examining culture and values have centred their explanations around the role of values (Norris and Inglehart, 2019). Citizens embracing populism are those that feel ill at ease with what they increasingly regard as a different society from the one they grew up in or with the image of society transmitted to them by their parents and family. These citizens generally regard globalisation, migration and multiculturalism as key factors behind the rise of economic (but also cultural and identity) insecurities (Norris and Inglehart, 2019; Salmela and von Scheve, 2017). The change in cultural values threatens their identity and undermines family and religious traditions, transforming the environment they live in into one they no longer feel comfortable with (Norris and Inglehart, 2019). Gradually, this insecurity has morphed into anger and resentment towards a system that, in their view, no longer values them (Salmela and von Scheve, 2017).

Economic explanations revolve around the economic insecurity brewed by deregulation and globalisation (Guiso et al., 2017). Factors such as the openness to trade and the exposure to Chinese goods (Autor et al., 2013, 2016; Colantone and Stanig, 2018) rank high in this strand of research. Recent economic transformations are exploited by populists, invoking protectionism while stoking economic nationalism, such as in Donald Trump’s ‘Make America great again’ 2016 campaign slogan. Post-financial crisis austerity has also been considered a driver of discontent (Gray and Barford, 2018).

Cultural and economic transformations are causing rising resentment with a system, which is increasingly reflected in the electoral ballot. Voters supporting populist options are both swayed by their individual characteristics, such as age, race, education, exposure to new technologies, health, work status or welfare dependency, as well as by the conditions of the places where they live (Alabrese et al., 2019).

At the intersection between culture and economics, two factors were signalled by Putnam as the main risks for American democracy. Social capital, as ‘the performance of […] democratic institutions depends in measurable ways upon social capital’ (Putnam, 2000: 349), and interpersonal inequality and the increasing polarisation of American society.

Putnam argued these trends went hand in hand and reinforced one another (Putnam, 2000: 359): ‘the last third of the twentieth century was a time of growing inequality and eroding social capital. By the end of the twentieth century, the gap between rich and poor in the United States had been increasing for nearly three decades, the longest sustained increase in inequality in at least a century, coupled with the first sustained decline in social capital’.

In the next subsections, we look at the potential role of both factors in the rise of populism, as well as that of long-term economic and demographic decline as a possible alternative.

Social capital as a driver of populism

Social capital has become one of the dominant concepts in the social sciences. The concept draws on a longstanding body of research, which suggests that social networks matter for all sorts of social and economic outcomes. Coleman (1988) defined social capital as a resource considering (a) obligations and expectations, (b) information channels and (c) social norms. These three aspects of social relationships reduce the coordination costs of shared action and improve outcomes, moving away from a static view of social relations and economic activity as being about individualised actors, towards a view that economic activities are relational rather than simply transactional (Rodríguez-Pose and Storper, 2006). Putnam took on this concept and defined it as ‘the features of social life— networks, norms and trust—that enable participants to act together more effectively to pursue shared objectives’ (Putnam, 1995: 664).

Most views of social capital consider it a force for good. In his work on the strength of weak ties, Granovetter (1973) showed the importance of social relations in enhancing economic outcomes, while Putnam (2000: 394) indicated that social capital ‘strengthens our better, more expansive selves’.

Hence, the long-term decline of social capital in the US posed a serious threat to American society and its democracy, as it pushes citizens to free-ride ‘by neglecting the myriad civic duties that allow […] democracy to work’ (Putnam, 2000: 349).

However, there are also longstanding concerns that it can have negative consequences. Olson (1965) viewed associational behaviour as lapsing into special interest groups. Overall, closed networks may enable the development of social capital, but they can also allow the development of group-think and incentives to engage in factional behaviour rather than in the general interest (Rodríguez-Pose and Storper, 2006) and prevent the progress of new ideas and social change (Coleman, 1988). In short, a tight-knit community can entrench the ‘forces of tradition’ and restrict social change (Farole et al., 2011: 68).

In terms of how social capital can affect voting behaviour, social capital is often seen as a pillar of a functioning democracy, something which goes back to Alexander de Tocqueville and his argument that civic association underpinned the US democratic model. Similarly, Putnam (1993) argues that the lack of adequate social capital in southern Italy undermined democracy and legitimate political representation. His arguments for the US are that declining social capital not only depresses civic engagement and political participation but that it also destroys connectedness and trust. The increasingly empty public forums that became the norm in the last third of the 20th century represented a threat to American democracy (Putnam, 2000: 412).

In this respect, social capital can be considered as a form of protection against populism or demagoguery. Pre-dating the post-crisis resurgence of populism, Fieschi and Haywood (2004) indicated that a lack of trust in political institutions could fuel populism. Both Putnam (1993; 2000) and Fieschi and Haywood (2004) viewed social capital as essential for a healthy democracy and having a purely negative impact on populism (i.e., where there is greater trust, political relationships are healthier and more mutually respectful, and so populists are less able to blame elites).

But this positive view of social capital has, more recently, also been challenged. Satyanath et al. (2017), for example, showed that German states with higher levels of social capital, proxied by associational behaviour, facilitated a rapid expansion of Nazi ideas and, in turn, Hitler’s accession to the Chancellery through higher shares of votes for the Nazi party. The presence of large and dense networks involving high levels of trust expedited a swift flow of information and a more rapid exposure to Nazi party propaganda.

Interpersonal inequality and populism

Putnam (2000) saw rising interpersonal inequality as the other main risk for American democracy. For him, the increase in interpersonal inequality and the decline of social capital were two sides of the same coin. On the one hand, the rise in inequality of the last third of the 20th century (Katz and Murphy, 1992) disrupted participation and reduced civic engagement. On the other, the decline in social capital accelerated the disintegration of American communities and eased the implementation of policies and the passing of legislation that fermented greater inequality. This process also had a geographical component as ‘the American states with the highest levels of social capital are precisely the states most characterised by economic and civic equality’ (Putnam, 2000: 359). This view of interpersonal inequality as a threat to democracy and, therefore, a driver of populism has been shared by many economists who have examined the roots of the recent rise of authoritarian populism in developed countries. The rise in wealth polarisation in American society, as well as elsewhere in the developed world, is a fundamental factor for the increasing support of extreme antisystem options at the ballot box. Economic transformations in recent decades, and, above all, globalisation and automation, have driven ‘multiple, partially overlapping wedges in society’ (Rodrik, 2018: 23). One of these wedges concerns income and wages. The economic system has been leaving increasing shares of the population behind, in conditions that are financially insecure (Eichengreen, 2018; Guiso et al., 2017). The concentration of wealth in a dwindling number of hands (Milanovic, 2016; Piketty and Saez, 2014)—the top 1% (Dorling, 2019)—and the parallel rise in the people at risk of poverty in developed countries (O’Connor, 2017; Rodrik, 2018) is considered tainted with a stigma of unfairness (Rodrik, 2018: 23). Citizens have come to believe that the growing wealth of the elites has been earned unfairly and, consequently, the tolerance towards inequality has decreased (Pastor and Veronesi, 2018). Hence, interpersonal inequality, often confounded with economic unfairness (Starmans et al., 2017), is, from this perspective, pushing voters towards illiberal and anti-system parties at the ballot box. Inequality is perceived to drive a reaction against the status quo, resulting in an erosion of democratic institutions and leading to nativism and plutocracy (Milanovic, 2016).

For Putnam (2000: 359) ‘there is every reason to think that the twin master trends of our time—less equality, less engagement—reinforce one another’. Thus, fighting the decline of social capital is also a way to prevent the rise of inequality and vice versa. It is also the best way to combat the challenges besieging American democracy.

The role of long-term economic decline

Putnam’s work is about all sorts of decline. From that in civic engagement or in political participation to declines in bowling or card playing. All these declines are meticulously documented in Bowling alone. Yet, there is one type of decline that is conspicuously absent from Putnam’s (2000) analysis: that of smalltown and rural America. Similarly, the growth of territorial inequalities and the rising geographical polarisation in the US does not feature prominently in Putnam’s work.

However, the demographic and economic decline of small-town and rural America has been documented for quite some time (e.g., Fuguitt et al., 1989; Johnson, 2006). Small towns and large swaths of rural areas have been losing population and jobs throughout the second half of the 20th and the beginning of the 21st century. The decline of these areas has been matched by the evolution of many large cities, such as Detroit, Cleveland, Buffalo, Milwaukee or Toledo, once among the most dynamic industrial hubs in the US (Hartt, 2018). Many of these cities articulated, and still articulate, large hinterlands in ‘Rustbelt’ states.

Such decline has had important implications for social capital. According to Putnam (2000: 207), ‘the decline in social connectedness over the last third of the twentieth century might be attributable to the continuing eclipse of smalltown America’. This is because small-town and rural America have for long been the centres of civic engagement. In these areas, people have been and remain community-oriented (Wuthnow, 2019: 4). During most of America’s history this feeling of community, widespread across the whole of the US, was regarded as a force for good. ‘Residents of small towns and rural areas are more altruistic, honest and trusting than other Americans’, noted Putnam (2000: 205). They are viewed as deeply proud, caring about their communities and wanting the best for them (Wuthnow, 2019). Communities with a better endowment of social capital have been perceived as better able to cope with all sorts of economic and social challenges (Rupasingha et al., 2006).

However, when these communities suffer long-term population and economic decline and when the way of life that created and sustained the feeling of community ebbs away (Rodríguez-Pose, 2018; Wuthnow, 2019),2 the very social capital behind the cohesiveness and former dynamism of these areas can also channel the growing anger and resentment felt by those being left behind. When the feeling of neglect becomes widespread, when there is growing resentment about the rising economic gulf between large cities and small communities (Cramer, 2016: 83), social capital at a local scale can become the mechanism to diffuse that anger and outrage at a system they feel no longer represents and serves them. Areas with a strong social capital develop a consciousness that helps shape their political views (Cramer, 2016) and this consciousness is inherently related to place. Locals concerned about the many problems afflicting their communities, from population loss, brain drain and ageing to social disintegration and increasing drug addiction, feel that their plights are ignored by the federal government (Wuthnow, 2019) and can react collectively at the ballot box. In this respect ‘place matters because it functions as a lens through which people interpret politics’ (Cramer, 2016: 12). This consciousness is both rooted in place and class, but also ‘infused with a sense of distributive injustice’ (Cramer, 2016: 12). And it may also be the mechanism that feeds the increasing call for attention of places that have seen far better times, have been devastated by economic processes such as globalisation or automation and where people are becoming effectively stuck because of lack of capacity and/or opportunities for mobility (Rodríguez-Pose, 2018: 202). These processes have contributed to render their economies redundant and, often, undermine the self-esteem and sense of purpose of many local dwellers. Such consciousness is contributing to spread out a geography of discontent (Dijkstra et al., 2020; McCann, 2020) and a politics of resentment (Cramer, 2016) to areas that have had a rough ride linked to both economic and cultural transformations and have seen their friends and neighbours leave, their jobs dwindle, and their services gradually disappear (Collantes and Pinilla, 2019; Guilluy, 2019). Social capital can, in this respect, provide the vehicle for this anger to come out into the open at the ballot box (Rodríguez-Pose, 2018) or, increasingly, through rebellion and revolt (Guilluy, 2019).

Bringing together social capital, inequality, and demographic and economic decline

What can be expected from the combination of dwindling social capital, rising inequality, and the demographic and economic decline of many cities, small towns, and rural areas in the US? Depending on the perspective adopted, two potential outcomes can emerge.

On the one hand, as posited by Putnam (2000), the threats posed by populist tendencies to American democracy could be addressed by redressing the decline of social capital and the increase in inequality. Anger at the system would, therefore, be more prevalent in those places where there is a combination of high inequality and low social capital. That is, predominantly, in large American cities. In these places ‘efforts to strengthen social capital should go hand in hand with efforts to increase equality’ (Putnam, 2000: 359).

On the other, remnants of strong social capital that foster a pervasive consciousness within declining cities, especially in small towns and rural areas across the US, could have served as a means to channel the growing anger of long-term decline to the ballot box in numbers and ways that would be impossible in places with lower social capital stock.

The evidence of the 2016 and 2020 presidential elections points to the latter explanation. The demographically and economically more dynamic, mainly urban areas in the US, where society is less cohesive, but where interpersonal inequalities are significantly higher, shunned the calls of populism and voted in large numbers for the Democratic candidates. By contrast, many long-term declining communities with strong social capital embraced Donald Trump in far greater numbers than they had supported Mitt Romney, a far more mainstream Republican presidential candidate, in 2012.

Hence, in this paper, we will argue that the rise of populism in the US, as proxied by the swing to Donald Trump, is not related, as feared by Putnam (2000), to low levels of social capital, high interpersonal inequality, or their combination, but mainly to long-term economic and demographic decline. We will also argue that strong social capital, civic engagement and cohesiveness may have contributed to the revenge at the ballot box of places left behind (Wuthnow, 2019) that have felt neglected and snubbed for a considerable amount of time (Cramer, 2016; McCann, 2020). Their strong social identity and local consciousness—in other words, their social capital—may have expedited the rise of Trumpism in ways that would have been impossible in the most dynamic US cities and towns. This form of American populism will thus be mainly driven by the long-term economic and demographic decline of the strong communities that built America, while the rise of interpersonal inequality, something that could generate future conflict, is, for the moment, not associated with populism.

Model and data

Model

In order to demonstrate that:

(a) Economic and demographic decline are fundamental factors in the rise of the Trump vote and that this process has become exacerbated in the tightly-knit communities with strong social capital that have witnessed an erosion of their relevance;

(b) This process is not limited to the aftermath of the crisis, but goes back a long way, with roots that can be traced to, at least, the 1970s; and

(c) Trumpism is more connected with long-term decline than with local interpersonal inequality, which tends to be far higher outside those tightly-knit communities;

we will analyse the swing of votes to the Republican Party between the 2012, on the one hand, and the 2016 and 2020 presidential elections—the Trump margin—on the other and regress it on the three factors that might have driven the surge in vote for Trump: social capital, interpersonal inequality, and economic and demographic decline. In view of the theoretical framework developed above, we will also look at the interactions between those factors, as the Trump vote could have increased in a) those places having suffered a long-term decline that are more unequal; in b) places with high social capital that are more unequal; and c) in places having suffered a long-term decline, with a strong level of social capital.

The model adopts the following form:

TMc,20xx−2012 = α + β1 Income pcc,2016 + β2 Inequalityc,2016

+β3 Social Capitalc,2016 + β4 Economic

& Demographic Changec,2016−t + γ1X¯c,t + νs + εc

where,

TMc, 20xx−2012 represents the Trump margin, that is the change in the share of the vote between Donald Trump in 2016 or 2020 and Mitt Romney in 2012;

Income pcc,2016 denotes the income per capita in a county in 2016;

Inequalityc,2016 is a measure of income inequality within a county in 2016;

Social Capitalc,2016 depicts the level of social capital in a county in 2016;

Economic & Demographic Changec,2016−t indicates changes in employment, population, average earnings, and average wages in a given county between 2016 and any year marking the start of a decade, going back to 1970;

X¯c,t is a vector of other variables that could have affected a shift in the vote for Donald Trump. These include variables that have been identified in the scholarly literature as factors behind the rise in Trump and/or populist vote, including population density, levels of unemployment, education, the racial composition, the sex ratio, the age structure, the share of married adults, or the local impact of imports from China at the county level;

finally,

νsis a state − level f ixed − ef fect, while εc

denotes the error term.

Data

Geographical units

The analysis is conducted at county level. This approach allows us to investigate very long-term impacts on local areas in a consistent way. However, one critique of using counties as our unit of analysis is the ecological fallacy, as we are generalising from the individual to the county level. This is unlikely to be a major problem here, however, as studies show that local context is an important determinant of individual attitudes (e.g., Reeves and Gimpel, 2012).3 As the data are drawn from multiple sources and cover the last five decades, there was a need for some matching to reflect changes in county boundaries over the period of analysis. The data have, therefore, been levelled at the county geographical division used by the Bureau of Economic Analysis (BEA) in 2017. As county boundaries underwent extensive changes, particularly in the state of Virginia, some modifications have been included. In the case of Virginia 51 counties in the state have been assembled into 23 ‘county compounds’, or county-equivalents. Alaska, which also underwent considerable modification in local boundaries, is excluded from the analysis. In the rest of the US, county adjustments are either inexistent or very minor. 3067 of the 3143 county or county-equivalents across the US are included in the analysis.4

Dependent variable and independent variables of interest

The dependent variable in our model is the ‘Trump Margin’ (Figure 1), which represents the difference in the share of voter support for Donald Trump in the 2016 or 2020 presidential election relative to that of the previous Republican candidate, Mitt Romney, in 2012. It uses data drawn from the MIT Election Data and Science Lab for 2012 and 2016 and from McGovern et al (2020) for 2020. Following Goetz et al. (2019) and Agnew and Shin (2019), we use the difference in share instead of Trump’s overall share of votes, as we deem that this margin better signifies the increase in populist vote between both elections.5

The three main independent variables of interest depict (following the theoretical discussion above) social capital, interpersonal inequality and economic and demographic decline.

The measure for social capital is based on an update by researchers at Penn State for the year 2014 of Rupasingha’s et al. (2006) index. Rupasingha et al. (2006) created—inspired by Putnam’s (1993, 2000) concept of civic engagement and using principal component analysis—a social capital index at county level for the US including four key components. These were: a) the number of non-profit organisations in a county, excluding those with an international approach; b) the census response rates in 2010; c) voter turnout in the 2012 presidential election and d) a number of associational indicators, including bowling centres, business, civic and social associations, golf courses and country clubs, labour, professional, religious and political organisations, fitness and recreational sports centres and sports teams and clubs, with all these factors aggregated and divided by population. The four factors included in the index were standardised. The first principal component is considered as the index of social capital.

Mapping this index at county level provides a very uneven geography of social capital across the US. The highest levels of social capital were concentrated around the Midwest and, especially, the Great Plains states. Both Dakotas, Iowa, Kansas, Minnesota, Montana, Nebraska and Wyoming boasted the highest level of social capital. Social capital was also high in the northwest (Oregon and Washington state) as well as in some areas around the Great Lakes, such as Wisconsin, rural Illinois, Ohio, eastern Pennsylvania and parts of New England. Social capital was, by contrast, significantly weaker in the South, particularly in Kentucky and Tennessee, and in some Mountain states, such as Arizona, Nevada and Utah (Figure 3).

The second independent variable of interest, Interpersonal inequality, is based on data drawn from the 2013–2017 5-year American Community Survey (ACS). At the core of the analysis is the 2016 county-level Gini index of incomes in a county. Two alternative measures are considered for robustness. These are the share of the population in the county in the top income quintile and that in the top 5% of income.

Income inequality in the US is highest in the Deep South, particularly in states such as Alabama, Arkansas, Louisiana, Mississippi, South Carolina and eastern Kentucky, as well as in the largest urban agglomerations, such as New York City, Los Angeles, Chicago, Houston, Miami, Detroit and the Bay Area (Figure 4). The lowest differences in income inequality are found in Midwestern states, and mainly in small-town and rural communities in Illinois, Indiana, Iowa, Missouri, Ohio and Wisconsin, as well as in some parts of the Mountain states such as Nevada, Utah or Wyoming (Figure 4).

The third and final independent variable of interest is Economic and demographic decline. In the econometric analysis, we use four different proxies: three for economic change (employment change, change in average earnings per job, and change in average wages and salary) and population change as a proxy for demographic change. The benchmark measure of change at the county level is employment change between 1980 and 2016. However, in successive parts of the analysis all four economic and demographic change indicators are considered, covering, by decade, the period between 1970 and 2016. The data for 2016 are drawn from the 2013–2017 5-year ACS. For earlier years, we resort to Bureau of Economic Analysis data. To ensure a normal distribution of residuals, all change variables are transformed logarithmically.

Figure 5 provides an indication of economic change across counties in the US. It represents changes in employment between 1980 and 2016. As expected, the biggest growth in employment over that period of 36 years took place along the Pacific coast, in the north-east urban corridor, and in southern Florida. The lowest levels of employment growth occurred in the Great Plains states, along a strip running from East Texas in the south to North Dakota in the north (Figure 4). Many areas south of the Great Lakes and in the South have also performed relatively badly in employment terms. However, all is not gloom around the Great Lakes, as the area between Chicago and Milwaukee witnessed considerable growth in employment, as did most of the counties on the shores of Lake Erie.

Control variables

In addition, several control variables, representative of factors that have been associated with the rise of populism in the US and elsewhere, are included in the analysis. First, we consider income per capita in 2016, as variations in the territorial levels of wealth have been related to populist vote. Population density has been highlighted by certain authors (e.g., Rodden, 2019) as a driver of populism. Traditional parties, and mainly those of the left, are increasingly struggling in suburbs and rural areas of the US (Rodden, 2019). Population density at the county level is represented by its value in 2016. Unemployment is frequently regarded as another determinant linked to the rise of discontent and populism (Algan et al., 2017; Guriev, 2018). We control for the unemployment rate at the county level in 2016. Education is also a prominent factor behind the rise in antisystem voting. Low levels of education have been seen to be crucial for Brexit, the election of Donald Trump and the rise of populist alternatives elsewhere (e.g., Essletzbichler et al., 2018; Goodwin and Heath, 2016; Sides et al., 2017). We, therefore, use an indicator of the percentage of adults with higher education in each county in 2016. The racial dimension has been recurrent in the analysis of the outcome of the 2016 US presidential elections, with some accounts highlighting that the role of race and racial attitudes may be more important than economic factors (e.g., Morgan and Lee, 2018; Reny et al., 2019; Sides et al., 2017). We control for the share of black population in 2016 in US counties and, in alternative specifications, for the share of whites in that year. Demographic variables have also featured prominently (e.g., Goodwin and Heath, 2016). We include three such variables: the sex ratio of the population, the young-age dependency ratio and the share of married adults. Finally, the ‘China shock’ is often signalled as a trigger of discontent at the ballot box (Autor et al., 2016). We, therefore, include a measure of imports from China at county level.

A list of the variables in the analysis, together with their definitions and sources, is included in Supplementary Table A1 in the Supplementary Appendix.

Descriptive analysis

What is the connection between the dependent variable (the Trump margin) and the independent variables of interest? Plotting the correlation between the Trump margin in the 2016 and 2020 US presidential elections and the three independent variables of interest reveals that the correlation between social capital, inequality and employment change since 1980, on the one hand, and the Trump margin, on the other, is, at best, tenuous. The strongest correlation is between employment change and the swing in votes towards Donald Trump. Counties with a greater decline in employment over the period of analysis supported Donald Trump in far greater shares than they supported Mitt Romney in 2012. The link between interpersonal inequality and the increase in the Republican vote is inexistent, while places with a higher social capital 2014 showed marginally higher shifts in votes towards Donald Trump (Figure 6).

The correlations among the independent variables of interest are similarly weak. There is no link between inequality and changes in employment, while counties with higher levels of social capital have, on average, slightly lower interpersonal inequality and witness marginally lower employment growth since 1980 (Figure 7). The link between county size and any of the correlations is highly imperfect, although larger counties are somewhat more unequal, have lower social capital, and experience, with notable exceptions, greater employment growth (Figure 7).

Econometric analysis

Basic model

The question is whether these relationships stand when all these factors are included together with additional controls in a regression analysis. The results of regressing model (1), using simple ordinary least squares (OLS) and including state fixed-effects, are presented in Table 1. Regressions 1 through 5 report the estimation for the 2016 election, while Regression 6 does it for the 2020 election. We run both elections separately as the conditions of both elections were very different: in 2016 Trump voters were electing an outsider with a limited track record in politics, while in 2020 they were voting for an incumbent president.

The results highlight that, once the income per capita of the different counties in the US and the conditions of their state are controlled for, interpersonal inequality, long-term employment change and differences in social capital across US counties are connected to a swing towards Donald Trump in the 2016 presidential election (Table 1, Regression 4).

However, this connection is not always in the direction expected by Putnam (2000) in Bowling alone. The combination of social capital and lower inequality as a protector of American democracy is not discernible. While richer counties shifted towards Trump’s populist positions in lower numbers than poorer counties both in 2016 and 2020, more unequal areas of the country were less swayed by Trump’s brand of populism. By contrast, places with greater civic engagement and a stronger social capital opted in larger numbers for the more extreme option in 2016, although the connection is not significant in the 2020 election, once other control variables are included. Counties that have witnessed considerable destruction of employment since 1980 were also convinced to a greater extent by Trump’s discourse than areas that experienced greater job creation (Table 1). These results are robust to including the three independent variables of interest together in the regression (Table 1, Regression 4) and additional controls expected, according to the literature, to affect populist vote (Table 1, Regressions 5 and 6). They are also robust to clustering the standard errors at county level (Supplementary Table A2). The coefficient for inequality, which is significant and negative when all the controls regressed together in the 2016 election (Regression 5), becomes insignificant in the 2020 election (Regression 6). In 2016 citizens living in the more unequal counties of the US were far less inclined to swing towards Donald Trump, but this relationship became weaker four years later.6

The coefficients for the control variables are generally in line with expectations. More densely populated counties, counties with a higher share of university graduates, those with a higher share of black population, those less affected by imports from China, and those with a younger population swung less to Trump (Table 1). The unemployment rate yields insignificant coefficients in both elections, while the increase of support for Donald Trump is higher in places with a lower share of married adults.7

These results are robust to changing the share of black population in a county by that of whites (Supplementary Table A5), with counties with a greater share of white population swinging towards Donald Trump, and to changes in the measurement of inequality at the county level. Counties with a greater percentage of people in the top income quintile (Supplementary Table A6) and those with a higher proportion of individuals in the top 5% of the income distribution (Supplementary Table A6) had a lower Trump margin in 2016, but not in the 2020 elections.

The introduction of interactions between the independent variables of interest barely alters the results emanating from the basic model. Changes in employment since 1980 and all the control variables, including income per capita at the county level, yield the same sign in the coefficients and similar levels of significance. Once again, counties that have seen a greater employment decline put more trust in Donald Trump than they did in Mitt Romney (Table 2). Social capital remains positive and significant, apart from Regression 2, where it becomes insignificant for the 2016 election, and insignificant in 2020. While inequality displays a negative coefficient that is significant for the 2016 election and in 2020, when the interaction between employment change and inequality is considered (Table 2).

The significant interactions are those between employment change and interpersonal inequality in 2016 and 2020 and between employment change and social capital in 2020. In the case of the former, both coefficients are positive and significant, meaning that the swing to Donald Trump was more pronounced not only in poorer counties, in those with lower interpersonal inequalities, and those that had suffered a long-term employment decline, but also in counties where high levels of employment growth were matched by a high degree of interpersonal inequality (Table 2, Regressions 1 and 4). In the case of the latter, citizens living in counties with higher levels of social capital voted less for Trump in 2020, if employment had grown more than elsewhere in the previous 40 years (Table 2, Regression 6).

Different types and time horizons of decline

So far, we have concentrated just on one side of economic and demographic change: employment change since 1980. What happens if we consider different types of decline? In Table 3 we take into consideration, not just employment change, but also population change (Regressions 2 and 6), change in average earnings per job (Regressions 3 and 7), and in average wages and salaries (Regressions 4 and 8).

The results indicate that long-term employment and population decline over a period of almost 40 years has been strongly connected with a swing to Donald Trump at the ballot box in both 2016 and 2020 (Table 3, Regressions 1, 2, 5 and 6). Declines in average earnings and in wages and salaries are, in contrast, disconnected from the Trump margin in 2016. By contrast, counties that increase their average earnings per job and average wages and salaries, once other factors are controlled for, swung more towards Trump in 2020. In these counties presence of strong social capital was also linked to a higher Trump margin (Table 3, Regressions 7 and 8).

These results chime well with the literature highlighting that the rise of populism in the US has more to do with racial issues than individual economic factors (Norris and Inglehart, 2019; Reny et al., 2019) and with a sense of alienation of the white working classes (Cramer, 2016; Morgan and Lee, 2018; Walley, 2017), what Kimmel (2017) calls ‘angry white men’. However, they also powerfully relate to the literature that has focused on geographical dimensions and, in particular, with long-term economic decline, mostly in Europe (e.g., Guilluy, 2019; Rodríguez-Pose, 2018) but, increasingly, in the US (e.g., Wuthnow, 2019). However, in contrast to the findings for Europe, where the rise of anti-system voting at the ballot box has been linked to economic and industrial decline, but not to employment and demographic decay (Dijkstra et al., 2020), in the US it is the slow demise of still strong communities that have been losing employment and population for some time that triggers the reaction at the ballot box to a far greater extent than declines in earnings and salaries. Once we have established that long-term unemployment and demographic decline have a powerful connection to Trump’s vote margin, the question is whether this association waxes or wanes with time. Table 4 looks at the change in these relationships over time, including the link with changes in average earnings and wages and salaries, since 1970 in ten-year intervals. This implies that the regressions are the same as in Table 3, only substituting the time covered in each of the economic and demographic decline variables. Only the coefficients for these variables are reported, as there are no significant changes in the other coefficients.

The coefficients displayed in Table 4 show that the link between employment and population decline at the county level and Trump’s vote margin is not a recent phenomenon. The coefficients for employment and population change are always negative and highly significant, regardless of the period and election considered. Counties that have been shedding employment and losing population since the 1970s have been more inclined to support Donald Trump than they did Mitt Romney in 2012. Having said that, the dimension of the negative coefficients is generally larger for the more recent periods than for longer time spans. The 2008 Great Recession has provided a springboard for the rise of populist discourse and a populist candidate, but the seed of discontent was planted, as indicated by Cramer (2016), quite some time earlier.

Table 4 once again points to the fact that this reaction at the ballot box is more about the long-term decline of communities shedding jobs and people than about the loss of earnings, wages, and salaries. The coefficients for the change in average earnings per job are mostly insignificant. However, it is often the case that counties witnessing a higher increase in wages and salaries swung more towards Donald Trump, particularly in the 2020 election. Hence, ‘it is not the very poor that are threatening the political system but the large numbers of still relatively well-off people—often seen as the threatened middle classes—still living relatively comfortable lives but in declining places’ (Rodríguez-Pose, 2020: 1–2).

Conclusions

Two decades ago, Putnam (2000) warned that American democracy was at risk from the twin challenges of the decline in civic engagement and social capital on the one hand, and the rise in interpersonal inequality on the other. More Americans bowling alone and engaging to a far lesser extent than before in local communities and an increasingly divided society from an economic perspective represented a twin threat to the democratic institutions that had been built since independence.

Sixteen years later his forecast materialised with the election of Donald Trump, an outsider and political novice with strong populist tendencies, who first stunned the Republican Party elite by securing its presidential nomination, and then went on to beat the Democratic party candidate, Hillary Clinton, in the November 2016 election.

Yet, the election of a candidate that, by shaking the system, has stretched American democracy to the limit, may have had little to do with declining social capital and rising interpersonal inequality and much more with the long-term employment and population decline of many formerly prosperous American communities. These communities are precisely those where social capital—the very form of capital that, according to Putnam (2000), was supposed to provide the glue for America’s democratic institutions—has held stronger than elsewhere.

This is what this paper has shown. By combining social capital with interpersonal inequality and long-term economic and demographic decline at county level in the US and linking it to the swing to Donald Trump at the ballot box in the 2016 and 2020 presidential elections, it has revealed that the rise in discontent identified by some scholars (e.g., Cramer, 2016; Kimmel, 2017; Wuthnow, 2019) is at the root of the Trump electoral tsunami. However, this analysis has provided evidence for the deep geographical roots of this phenomenon. It is not just simply the white working class that is rebelling against the system. There are plenty of white working-class voters on the West Coast, along the eastern megalopolis or in American large cities, as well as in medium-sized cities, towns and rural areas that did not swing and/ or did not vote for Donald Trump. It is middleand working-class individuals, who live in communities that have seen better times and have for long experienced a slow, but relentless employment and population decline, and where social capital has remained relatively strong, that cast the decisive votes to put Donald Trump in office in 2016. The link between social capital and the Trump margin became weaker in the 2020 election when considering population and employment decline, but not when taking into account changes in earnings per job and in wages and salaries. Hence, social capital and local civic engagement may not have acted as the positive forces envisaged by Granovetter (1973) or Putnam (2000), but, in most cases, more in the negative way suggested by Satyanath et al. (2017), through mechanisms possibly linked to local consciousness and identity (Cramer, 2016).

The long-term economic and demographic decline of many tightly-knit American communities has driven the rise of Trumpism. A decline that can be traced back to the last quarter of the 20th century and that has created a malaise that goes well beyond the crisis and that is increasingly manifesting itself at the ballot box. Declining, but still rather cohesive communities with strong social capital are the drivers of this process. In mostly small-town and rural areas of the US, the rise in the populist vote is a consequence of a reaction of communities in which individual losses are strongly identified with collective losses. And social capital may act as one of the transmission mechanisms. Individuals living in these communities know that a loss for one is a loss for all. Therefore, the rise of populism in the US is fundamentally linked to the geography of decline; to places that, despite remaining relatively homogeneous in terms of interpersonal inequality, have witnessed considerable employment and demographic decay over the long term. The Great Recession of 2008 may have ignited the fuse that resulted in the election of Donald Trump as president, but the discontent has roots that are far deeper.

#### It's an independent existential risk and magnifies all others

Andrew Leigh 21, Australian member of Parliament, former professor of economics at the Australian National University, 2021, What's the Worst That Could Happen?: Existential Risk and Extreme Politics, unpaginated ebook version

How likely is it that humanity could end? Experts working on catastrophic risk have estimated the chances of disaster for a wide range of the hazards that our species faces. Adding up the threats, philosopher Toby Ord estimates the odds that humanity could become extinct over the next century at one in six, with an out-of-control superintelligence, bioterrorism, and totalitarianism among the largest risks. He argues that most of the risks have arisen because technology has advanced more rapidly than safeguards to keep it in check. To encapsulate the situation facing humanity, Ord titled his book The Precipice.

A one in six chance of going the way of dodos and dinosaurs effectively means we are playing a game of Russian roulette with humanity’s future. Six chambers. One bullet. Even the most foolhardy soldier usually finds an excuse not to play Russian roulette. And that’s when just their own life is at stake. In considering extinction risk, we’re contemplating not one fatality but the death of billions or possibly trillions of people—not to mention countless animals.

It can seem impossible to imagine our species becoming extinct due to a catastrophe such as nuclear war, asteroids, or a pandemic. But in reality, the danger surpasses plenty of perils we already worry about. One way to put catastrophic risk into perspective is to compare it with more familiar risks. If extinction risk poses a one in six risk to our species over the next century, then it means that it is far more hazardous than many everyday risks. Specifically, it suggests that the typical US resident is fifteen times more likely to die from a catastrophic risk—such as nuclear war or bioterrorism—than in car crash.2

Extinction risk outstrips other dangers too. Ask people about their greatest fears, and you’ll get answers like “street violence,” “snakes,” “heights,” and “terrorism."4 But in reality, these are much less hazardous than catastrophic risks. People in the United States are 31 times more likely to die from a catastrophic risk than from homicide. Catastrophic risk is 3,519 times likelier to kill than falls from a height, and 6,194 times more likely to kill than venomous plants and animals. If you have ever worried about any of these threats, you should be more fearful about cata- strophic risk. Extinction risks aren’t just more dangerous than any of them; they are more hazardous than all of them put together. Catastrophic risk poses a greater danger to the life of the typical US resident than car accidents, murder, drowning, high falls, electrocution, and rattlesnakes put together.

A one in six risk is just the danger in a single century. Suppose that the risk of extinction remains at one in six for each century. That means there’s a five in six chance humanity makes it to the end of the twenty-first century, but less than an even chance we survive to the end of the twenty-fourth century. The odds that we survive all the way to the year 3000 are just one in six. In other words, if we continue playing Russian roulette once a century, it’s probable that we blow our brains out before the millennium is halfway through, and there’s only a small chance that we make it to the end of the millennium.

Part of the reason humans undervalue the future is that it’s hard to get our heads around the idea that our genetic code could live on for millions of years. At present, the best estimates are that our species, Homo sapiens, evolved around three hundred thousand years ago.1 That means we have existed for about ten thousand generations. But we have another one billion years before the increasing heat of our sun brings most plant life to an end.1 That’s plenty of time to figure out how to become an interstellar species and move to a more suitable solar system. Humans could live to enjoy another thirty million generations on earth.

Thinking about the mind-boggling scale of these numbers, I’m reminded of the Total Perspective Vortex machine, created by Douglas Adams in The Restaurant at the End of the Universe. Anyone brave enough to enter sees a scale model of the entire universe, with an arrow indicating their current position. As a result, their brain explodes. As Adams reflects, the machine proves that “if life is going to exist in a universe of this size, then the one thing it cannot afford to have is a sense of proportion.”

Still, let’s try. Imagine your ancestors a hundred generations ago. They are your great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-great-great-great-great-great-great-great-great- great-great-great-grandparents. These people lived around 1000 BCE, at the start of the Iron Age. They might have been part of Homeric Greece, ancient Egypt, Vedic age India, the preclassic Maya, or Zhou Dynasty China.

Contemplate for a moment about what the hundred genera- tions between our Iron Age ancestors and today have achieved. They built the Taj Mahal and Sistine Chapel, the Angkor Wat and Empire State Building. Thanks to them, we can relish the poetry of Maya Angelou, novels of Leo Tolstoy, and music of Ludwig van Beethoven. An abundance of inventions has delivered us deli- cious food, homes that are comfortable year-round, and technol- ogy that provides online access to a bottomless well of entertain- ment. If time machines existed, we might pop in to visit our great100 grandparents, but few would volunteer to stay in the Iron Age.

Yet humanity is really just getting started. If things go well, it’s ten thousand generations down, thirty million to go. Imagine what those future generations could do, and how much time they have to enjoy. Here’s one way to think about what it means to have thirty million generations ahead. Suppose humanity’s potential time on the planet was shrunk down to a single eighty- year life span. In that event, we would now be a newborn baby— just nine days old. Homo sapiens is a mere 0.03 percent through all we could experience on earth.

We won’t meet most of those who follow us on the planet, but we should cherish future generations all the same. If you value humanity’s past achievements—the Aztec and Roman civiliza- tions, art of the Renaissance, and breakthroughs of the Industrial Revolution—then the generations to come are just as worthy. This is what political philosopher Edmund Burke meant when he described society as “a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born.’- To appreciate the past is akin to admiring the achievements of distant places. Like geography, his- tory helps us better understand the way of the world.

Politicians like me like to speak fondly about looking after "our children and our grandchildren.” But it usually stops after a generation or two. Policy pays little heed to the many generations that will follow. For my own part, it took a coronavirus-induced shutdown to have the time to spend reflecting deeply about the long term. This book had been rattling around in my head for years, but it was only when all my meetings, events, and travel were canceled that I had the time to write it. Pandemics are one of the threats to humanity that I’ll discuss in this book, but in this instance, it provided a chance to reflect on the long term. It’s tempting to ignore the distant future. It’s easier to love the grandchildren whom we hug than the great-great-great-grand- children whom we’ll never get to smile on. But that doesn’t make those far-flung generations any less important. Via my wife, our children can trace their lineage to Benjamin Franklin, but I’m more excited about the potential achievements of the generations yet to be born.

For companies and governments, a major impediment to long- term thinking is the idea of discounting the future. When investing money, this is a reasonable approach. A dollar in a decade’s time is less valuable than a dollar today for the simple reason that a dollar today could be invested and earn a real return. Share markets have good and bad years, but based on returns from the past 120 years, someone who put $1,000 into the US stock market for an average year could expect it to be worth $1,065 after twelve months (accounting for dividends and inflation).2 Approximating these returns, when governments contemplate making investments, they often apply a discount rate of around 5 percent, while companies use rates that are higher still.2

When it comes to growing your greenbacks, this makes perfect sense. If Kanesha offered you $ 1,000 today, and Jane offered you $ 1,000 in a year’s time, most of us would think that Kanesha was making the more generous offer. Kanesha’s cash can be put to productive use and would be worth more than Jane’s when the year is out.

But what if we’re talking about Kanesha and Jane themselves? Suppose Kanesha is alive today, and Jane is yet to be born. When discounting is applied to lives, it suggests that Kanesha’s life to- day is worth twice as much as Jane’s life in fifteen years’ time. It implies that Kanesha today is worth 132 times as much as Jane in a century’s time. So if we’re spending money to keep them safe, a 5 percent discount rate indicates that we should spend more than a hundred times as much to protect Kanesha today than to pro- tect Jane in a century’s time.

The further we stretch the time period, the more ridiculous the results become. Discounting at a rate of 5 percent implies that Christopher Columbus is worth more than all eight billion people on the planet today.— Naturally, it also implies that your life is worth more than eight billion lives in five hundred years’ time. Even if you value the hug of a loved one over the unseen successes of next century’s generations, is it fair to ruthlessly dis- miss the distant future? Discounting is the enemy of the long term.

As philosopher Will MacAskill points out, there is something morally repugnant about concluding that the happiness of those who will be alive in the 2100s is inconsequential simply because they live in the future. MacAskill coined the term “presentism” to refer to prejudice against people who are yet unborn.” Just like racism, sexism, or other forms of bigotry, he argues that mis- treating those who live a long way in the future is unfair. To dis- criminate in favor of Kanesha against unborn Jane is a form of presentism. If you traveled back in time to the 1500s and met someone who claimed that they were worth more than everyone alive in the 2000s, you’d rightly regard them as an egomaniac. Isn’t it equally narcissistic to ignore the happiness of people in the 2500s?

Some have contended that we should favor the living over the unborn for the same reason that philanthropy favors the down- trodden over the wealthy. If incomes rise over time, the argument goes, then asking today’s citizens to help those in the future is like taking from the poor to give to the rich.— But this reasoning ignores the fact that we are talking about the survival of future generations. Theoretical riches won’t do them any good if they are practically dead—or if planetary apocalypse snuffs out their chance to be born. Similarly, it misses the possibility that future pandemics, wars, or climate disasters could make coming genera- tions significantly poorer.—

Insights from behavioral science help explain why humans aren’t good at understanding extinction risk.— Our thinking about dangers is skewed by an “availability bias”: a tendency to focus on familiar risks. Like the traders who failed to forecast the collapse of the securitized housing debt market, we are lousy at judging the probability of rare but catastrophic events. Most important, our instincts fail us as the magnitudes grow larger. In research titled "The More Who Die, the Less We Care,” psychologists Paul Slovic and Daniel Vastfjall argue that we become numb to suffering as the body count grows.— Humans’ compassionate instincts are aroused by stories, not statistics. Indeed, one study found that people were more likely to donate to help a single victim than they were to assist eight victims. This may help explain why the international community has been so slow to respond to genocide, including recent incidents in Rwanda, Darfur, and Myanmar. As artificial intelligence researcher Eliezer Yudkowsky notes, human neurotransmitters are unable to feel sorrow that is thousands of times stronger than a single funeral.— The problem is starker still when it comes to extinction risk. Our emotional brains cannot multiply by billions.

Add to this a media cycle that has become a media cyclone, in which stories explode in a matter of minutes, and “outrage porn” seems to drive the news choices of many outlets. In the 2016 US election, researchers found that for every piece of professional news shared on Twitter, there was one piece of “junk news.’’— Conflict fueled by social media keeps us in a primal state of rage and retaliation. And this isn’t the only force that makes politics myopic. Campaign contributions tend to come from donors who have an immediate interest in a “today” issue rather than from people aiming to solve long-term problems. This kind of “instant noodle” politics prioritizes quick results and sidelines fundamental challenges.

In this environment, a special style of politics has thrived: populism. The term “populist" gets thrown around a lot—typically as an insult—so it’s worth taking a moment to define it precisely.— Populists see politics as a conflict between crooked elites and the pure mass of people. Many candidates trying to defeat an incumbent will criticize “insiders,” but populists make a stronger attack on elites, claiming that they are dishonest or corrupt. Populists then claim that they—and only they—represent the “real people.” Populists combine a fierce critique of elites and personal appeal to the “silent majority.”

The political strategy of populists involves critiquing intellectuals, institutions, and internationalism. The political style of populists tends to be fierce. They do not strive for unity and calm consensus. Populists share with revolutionaries a desire for sudden and dramatic change. They have little respect for experts and the systems of government. Populists’ priorities tend to be immediate issues such as crime, migration, jobs, and taxes. Consequently, the electoral success of populists has served to sideline work on long-term dangers such as climate change and nuclear war.

Donald Trump may have lost his presidential reelection bid, but he has transformed the Republican Party, which has jettisoned its longstanding commitment to free trade, immigration, and global alliances. Many moderate Republicans, who might have served comfortably under Ronald Reagan or George H. W. Bush, have quit the party or been defeated by Trump-supporting populists. The Republican Party, which holds nearly half the seats in Congress and controls a majority of state legislatures, has embraced populism to a degree that was unimaginable when it was led by George W. Bush, John McCain, or Mitt Romney. After four years under President Trump, the Republican Party is now more cynical and isolationist, focused on immediate grievances rather than long-term challenges.

Yet while the strength of populism threatened to sideline issues of catastrophic risk, coronavirus did the opposite. The worst pandemic in a century led to the most severe economic crisis since the Great Depression. Churches and concert halls fell silent. International travel collapsed. The Summer Olympics were postponed. Stocks plunged, and for a brief moment, the price of a barrel of oil went negative. Globally, millions lost their jobs, and millions more faced famine.

COVID-19 never threatened to extinguish humanity, but it highlighted our vulnerability to infectious diseases. More than at any time in living memory, people focused on the dangers of pandemics. The popularity of Geraldine Brooks’s Year of Wonders, Stephen King’s The Stand, Emily St. John Mandel’s Station Eleven, and Albert Camus’s The Plague vividly illustrates the way in which fear of pandemics has become more acute.

We know that disasters can remake society. The black death helped usher in the Renaissance.— The Great Depression made a generation of investors more risk averse.— World War II spawned the United Nations and formed the modern welfare state. In autocracies, droughts and floods can topple dictators.—

Coronavirus is reshaping the world in numerous ways.— Handwashing is in. Cheek kissing is out. The rise of big cities is slowing as people consider the downsides of density. Firms that automated their production systems to deal with physical dis- tancing requirements and stay-at-home orders are discovering that they can get by permanently with fewer staff. More tele- working and less business travel is leading to a drop in demand for receptionists, bus drivers, office cleaners, and security guards. When it comes to our use of technology, coronavirus suddenly accelerated the world to 2030. When it comes to globalization, the pandemic took us back to 2010.

But it’s still an open question as to how COVID-19 will affect humanity’s ability to think about the long term. Most of the examples I’ve listed are instances in which crises affected societies organically: the shock came, and it changed our behavior. But accentuating the long term requires taking risk more seriously and placing greater emphasis on saving our species. Linebackers are swift to respond when an offensive player suddenly takes a step to the right. But it takes longer to recognize that a team’s offensive plays are skewed to the right and modify the defensive formation accordingly.

Like a football team that adapts its tactics, this book argues that we should lengthen our thinking. At minimal cost, society can massively reduce the odds of catastrophe. By ensuring that the big threats get the attention and resources they need, we can safeguard the future of our species. As insurance policies go, this one is a bargain.

In the chapters that follow, I’ll outline the biggest risks facing humanity. I’ll begin in chapter 2 with pandemics, such as the possibility that the next virus might combine the infectiousness of COVID-19 with the deadliness of Ebola. What can we do to shut down exotic animal markets, speed up vaccine develop- ment, and create surge capacity in hospitals? I’ll then delve into bioterrorism, and the danger of extremists developing their own versions of smallpox or the bubonic plague. How difficult is it for them to create these devilish diseases, and what can we do to prevent it?

In chapter 3, I’ll then explore climate change—perhaps the in- tergenerational issue that has received the most public attention in recent years. While much of the modeling looks at how global warming could be bad, my focus is on the chances that it’s catastrophic. This isn’t about climate change shortening the ski season; it’s about the possibility of temperatures rising by 18°F (10°C), rendering large sections of the planet uninhabitable. What does the risk of cataclysmic climate change mean for energy policy?

Next, I’ll turn to nukes. As a child in the 1980s, I vividly re- member watching The Day After. My classmates and I agreed that a nuclear war was inevitable. When the Cold War ended, the world seemed safer, but in the three decades since, the threat from new nuclear powers has made the problem less predictable. As I discuss in chapter 4, what we used to call an arms race now looks more like a bar fight, with hazards coming from unexpected directions, including terrorist groups. Yet just as there are practical ways to avoid pub brawls (don’t drink past midnight, avoid the stairs, look out for the glass), so too are there sensible strategies that can reduce the odds of nuclear catastrophe (adopt a “no first use" policy, reduce the stockpiles, control loose nukes).

A superintelligence has been dubbed the “last invention” we’ll ever make. An artificial intelligence machine whose abilities exceed our own could turbocharge productivity and living stan- dards. But it could also spell disaster. If we program our artificial intelligence to maximize human happiness, it could fulfill our wishes literally by immobilizing everyone and attaching electrodes to the pleasure centers of our brains. As chapter 5 notes, what makes artificial intelligence different from every other risky technology is its runaway potential. Once a superintelligence can improve itself, it is unstoppable. So we need to build the guardrails before the highway.

What are the odds? In chapter 6,1 complete the discussion of catastrophic danger by examining less risky risks, including asteroids and supervolcanoes. I also consider the prospect of “unknown unknowns.” For example, prior to the first atomic bomb test, some scientists thought there was a chance it could set the atmosphere on fire, destroying the planet. When the Large Hadron Collider was being built, critics warned that the particle collisions inside it could create micro black holes. Although neither situation eventuated, they raise the question of what other doomsday scenarios could be lurking around the corner. How should the prospect of these unexpected risks change our approach to cutting-edge science? Drawing together these dangers with the major hazards, I report the likely probability of each, benchmarking existential risks such as nuclear war and pandemics against individual risks such as being struck by lightning or dying on the battlefield.

Ultimately, tackling existential risks is a political problem. Private citizens can achieve many things, but preventing nuclear war, averting bioterrorism, and curbing greenhouse emissions are fundamentally problems of government. Governments control the military, levy taxes, and provide public goods. So the values of those who run the country will determine how much of a priority the nation places on averting catastrophe.

That’s why the rise of populists is crucial to humanity’s long- term survival. In chapter 7,1 discuss the factors that have led to the electoral success of populists during recent decades, and why populists tend to be uninterested in dealing with long-term threats. Populists’ focus on the short term means that—like a driver distracted by a back seat squabble—we’re in danger of missing the threats that could kill us. I’ll explore why populists around the world struggled to respond to COVID-19, and what this says about the dangers that populism poses to our species. Most critics of populism have concentrated on the present day. They’re missing the bigger picture. Populists are primarily endangering the unborn.

Bad politics doesn’t just exacerbate other dangers; it represents a risk factor in itself through the possibility of a totalitarian turn —in which democracy is replaced by an enduring autocracy. The road to democracy is not a one-way street. Over the centuries, dozens of countries have backslid from democracy into autocracy —abandoning the institutions of fair elections, protection for minorities, and free expression. Such an outcome could be deadly for dissenters and miserable for the multitudes. Chapter 8 explores why democracy dies and identifies the signs that institutions are being undermined. Chapter 9 suggests how we might strengthen democracies to allow citizens to have a greater say, and lower the chances of the few taking over from the many. Chapter 10 concludes the book.

When COVID-19 hit, many rushed out to buy life insurance.— In our personal lives, we know that spending a small amount on insurance can guard against financial ruin. Societies can take a similar approach: implementing modest measures today to safe- guard the immense future of our species. For each of the existential risks we face, there are sensible approaches that could curtail the dangers. For all the risks we face, a better politics will lead to a safer world.

Because of its focus on the urgent over the important, populist politics should perhaps bear the label, “Warning: populism can harm your children." But what is the alternative? In the conclusion, I argue that the answer lies in the ancient philosophy of stoicism. A stoic approach to politics isn’t about favoring one side of the ideological fence over another. Instead, it’s about the temperament of good political leadership. Stoicism emphasizes that character matters and holds that virtue is the only good. Decisions are based on empirical evidence, not emotion. Anger has no place in effective leadership. Strength comes from civility, courage, and endurance. Stoics make a sharp distinction between the things they can change and those they cannot.

### 1nc – RoR pic

Rule of Reason PIC

#### Counterplan:

#### The United States federal government should substantially increase prohibitions on anticompetitive private naked price-fixing practice in cases where foreign plaintiffs cannot secure adequate relief in alternative fora.

#### Solves every extraterritorial cartel case their ev’s about – those are naked price fixing that’s illegal per se – BUT avoids rule of reason slogs

Hovenkamp 13 (Herbert Hovenkamp, Professor of Law, University of Iowa, “Extraterritorial Criminal Jurisdiction Under the Antitrust Laws,” Faculty Scholarship at Penn Law, 2-27-2013, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2852&context=faculty\_scholarship

Much conduct abroad, particularly involving agreements among competitors, would be illegal per se if it were domestic—that is, it would be condemned without proof of particular effects and with little regard for possible justifications. Does extraterritoriality call for a fundamentally different analysis? Perhaps sometimes, but clearly not always.

Domestic antitrust policy uses per se rules for conduct that, in most of its manifestations, is potentially very dangerous with little or no redeeming virtue. That rationale would be inapplicable to foreign restraints that either pose very little danger to American commerce or have more persuasive justifications than are likely in similar restraints at home. For example, price fixing in a foreign country might have some but very little impact on United States commerce at all. This would be true, for example, if a naked foreign cartel made no sales into the United States, either directly or indirectly. Alternatively, the foreign cartel it might be encouraged or even compelled by the foreign county's domestic policy.

Nevertheless, one should not leap too quickly from the premise that additional “reasonableness” inquiries are necessary when the restraint occurs abroad, to the conclusion that all foreign restraints merit full rule of reason inquiries, including rigorous market definition, market power assessment, and a conclusion supported by a well-developed record about overall anticompetitive effects. To be sure, we sometimes say that the per se rule condemns practices without a showing of competitive effects in the particular case. By contrast, appraising restraints abroad requires an assessment of effects on American foreign commerce.

But the effects to be measured are not the same. An impact on prices or injury to several American traders or interests might be quite sufficient to indicate a significant effect on commerce, but identifying these effects alone would not be sufficient to a full rule of reason inquiry, which must often make some assessment of overall market impact and also consider defenses. This is especially true when considerations of comity point in favor of liability. For example, the competition law of the European Union and most countries today abhor “naked” cartels about as much as United States law does.2

Jurisdiction in the courts of the United States over such a cartel under the “effects” test can generally be established simply by showing that the naked price fixing exists and that a substantial number of sales were made to United States buyers. No considerations of comity require analysis beyond the observation that the restraint is just as unlawful under the relevant foreign law as under the Sherman Act. At that point the same considerations that justify a per se inquiry for a domestic cartel would apply: Nothing is likely to be gained by a further, expensive inquiry into market definition or power or a consideration of defenses relating to the reasonableness of the prices charged and the like. Further, the rule of reason makes criminal prosecution virtually impossible, yet extraterritorial criminal jurisdiction under the federal antitrust laws seems relatively clear. Finally, discovery in rule of reason cases is difficult and costly enough in domestic antitrust disputes. These difficulties and costs can loom far larger when the relevant markets to be considered are abroad.

### 1nc – court clog

#### Expanding FTAIA via rule of reason causes a crushing flood of litigation.

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

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

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

C. Empagran

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

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

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

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

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

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

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

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

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

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

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

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

V. THE GOVERNMENT'S AMICUS CURIAE BRIEF

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

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

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

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

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

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

VI. IMPLICATIONS

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

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

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

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

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

Intellectual Property in “Interesting Times”

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

The Changes In Intellectual Property Law

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

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

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

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

Patents

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

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

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

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

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

Copyrights

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

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

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

Trademarks

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

Trade Secrets

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

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

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

Privacy Rights

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

America’s Need For Strong Intellectual Property Protection

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

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

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

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

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

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

Conclusion

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

### 1nc – t-scope

#### Scope is when the law applies

Dernbach 21 --- John C. Dernbach et al, Professor of Law at Widener's Harrisburg campus, teaching administrative law, environmental law, property, international law, international environmental law, sustainability and the law, and climate change, “A Practical Guide to Legal Writing and Legal Method”, In “Chapter 5: Reading and Understanding Statutes”, Feb 25th 2021,

Understanding the scope of a statute is the second step. A statute’s “scope” defines the persons to whom and the circumstances to which the statute applies. Some statutes, such as criminal statutes, apply to almost everyone with only minor exceptions (e.g., young children). Other statutes, however, apply only to certain classes of people, and/or only when certain factual circumstances exist. If the person or organization that you represent is not subject to the statute’s requirements, then the statute is not applicable to your client. Similarly, if your client’s conduct or desired course of action is not addressed in the statute, the statute is not applicable. Thus, efficient research and effective representation depend on a lawyer’s ability to determine whether and when a given statute applies to a client’s situation.

#### Expanding requires a reversal of legislative intent

Garubo 84 --- Angelo G. Garubo, Senior Vice President and Corporate Secretary, Commercial Credit Group, Juris Doctor, magna cum laude, from California Western School of Law, “Severing the Legislativ ering the Legislative Veto Provision: The Aftermath of Chada vision: The Aftermath of Chada”, California Western law Review, Vol 21 No 1, 1984, https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1559&context=cwlr

Since a veto provision can qualify as a proviso, the rule in Davis v. Wallace 147 and Frost v. Corporation Commission 148 can be applied to show that the legislative intent test is inadequate to determine if a veto provision should be severed. In Davis and Frost, the Supreme Court ruled that a proviso could not be severed if it was originally written into the statute. 149 The Court reasoned that severing such a provision would result in an extension of the scope of the statute.' 50 Such an extension would be contrary to the legislative intent of a statute by including subject matter which the legislature expressly chose to exclude.151 The Davis and Frost analysis can be applied to the "congressional veto" because (1) the veto provision can be considered a proviso 152 and (2) severing a veto provision will expand the scope of the statute contrary to legislative intent. 5 3 By severing a veto provision the executive branch would be free to expand or limit the scope of a statute through its implementation. Such an expansion or limitation would constitute a defacto contradiction of legislative intent by altering the purview of the statute.' 54 A veto provision is a control mechanism.' 55 Its mere presence in a statute indicates the legislature's desire to restrict the scope of that statute. 5 6 By removing it, the court would affect a fundamental change in the nature of the statute, which was not accounted for when the legislature enacted the law. 157 Because a veto provision is a proviso, its excise from a statute would contradict legislative intent. A test which uses legislative intent to determine if a veto provision is severable could only find that the provision is not severable. Thus, when literally applied, the legislative intent test is not adequate to determine if a veto provision should be severed from its statutory framework.

#### Violation --- Plan only enforces an existing dictate of the statute --- vote neg for limits and ground --- allows affirmatives to defend the status quo and circumvents core neg links

Lane 92 --- Mills Lane, Judge on the Second District Court of Nevada, “STATE, GAMING COMM'N V. GNLV CORP”, https://www.casemine.com/judgement/us/5914875dadd7b049344e3895

Moreover, an administrative agency is not required to promulgate a regulation where regulatory action is taken to enforce or implement the necessary requirements of an existing statute. K-Mart Corp. v. SIIS, 101 Nev. 12, 17, 693 P.2d 562, 565 (1985). "An administrative construction that is within the language of the statute will not readily be disturbed by the courts." Dep't of Human Res. v. UHS of The Colony, Inc., 103 Nev. 208, 211, 735 P.2d 319, 321 (1987). The Commission did not engage in ad hoc rule-making because the Commission did not expand the scope of the statute, but merely enforced the requirements of NRS 463.3715(2) in accordance with the plain dictates of the statute.

### 1nc – korea da

#### South Korean courts model the extraterritorial scope of U.S. antitrust jurisprudence – currently perceive restraint

Park 20 (Park Seon-wook, Gachon University, “Standards of Extraterritoriality of US Antitrust Law: Applying the US Supreme Court’s Analysis in RJR Nabisco to Foreign Component Cartels,” Dong-A Journal of International Business Transactions Law, 2020, (30), pp.227-262, http://journal.kci.go.kr/IBT/archive/articleView?artiId=ART002613798)

In a globalized market where supply chains grow longer, many products or components of those products are manufactured around the globe and all come together through layers of distribution to create the final product that ends up in the consumer’s hand. As a result, some of those parts may have been subject to a foreign cartel’s anticompetitive conduct, such as price-fixed costs. U.S. Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA) to have clarification of the Sherman Act’s scope. However, the ambiguity of the FTAIA has created considerable confusion among circuit courts. This uncertainty stems from courts’ differing interpretations of the application of the FTAIA in the context of foreign component cartel activity. Current law cautions against the extraterritorial application of federal statutes as reflected in the recent Supreme Court decision, RJR Nabisco v. European Community, which is instructive on the extraterritoriality and scope of other federal laws, including U.S. antitrust laws. The Seventh Circuit’s interpretations in Motorola are most in accord with the reasoning of the Supreme Court. The presumption against extraterritoriality is a principle that applies to all federal statutes and must be applied to each separate provision of a statute. Courts must look to the same two-step analysis outlined in RJR Nabisco, to determine the statute’s reach when the claim is a private right of action by a foreign plaintiff for recovery from foreign injury. The presumption is likely rebutted on the substantive provision if the effect meets the “direct, substantial, and reasonably foreseeable” requirement, however, the absent a domestic injury, the effect will not give rise to the plaintiff’s claim, barring recovery. American legal and precedent trends have implications for our legislation. The Korean Supreme Court presented only an abstract standard in judging whether or not to apply the Monopoly Regulation and Fair Trade Act (Korean competition law) in an international air cargo fuel surcharge cartel case, and thus failed to secure legal stability and clarity. The Korean Supreme Court and the Korean Fair Trade Commission, need to consider the restrictive effectiveness criteria that US courts use in judging extraterritorial application of the US antitrust law. In order to develop future policies related to fair trade and foreign trade, it is necessary to analyze the laws of the US antitrust law, which have been developed through precedents, based on the principles of effect theory and presumption against extraterritoriality of federal law.

#### Judicial moderation is the only restraint on Korean extraterritorial antitrust parochialism – reversal tanks growth, investment, and innovation

Kay 15 (Roger Kay, founded Endpoint Technologies Associates, Inc., independent technology market intelligence company, former vice president of Client Computing at IDC, MBA University of Chicago Graduate School of Business, BFA Bennington College, “South Korea At A Crossroads,” Forbes, 6-22-2015, https://www.forbes.com/sites/rogerkay/2015/06/22/south-korea-at-a-crossroads/)

South Korea, long-time US trading partner and home to several major tech industry giants, is at a crossroads. In the space of the next few months, the country will choose between a path that leads toward an autocratic and arbitrary trade regime like China’s or to a more transparent, open, and fairer system like those of Western Europe and North America.

Championing the former is the Korea Fair Trade Commission (KFTC), an antitrust agency analogous to the US Federal Trade Commission. The KFTC has pretty much run amok in recent years, slapping spurious charges on foreign companies as it attempts to execute a protectionist agenda that it thinks benefits entrenched South Korean manufacturing interests. Taking a page from the Chinese National Development and Reform Commission (NDRC), which has boldly shaken down foreign firms in key sectors like semiconductors and software, the KFTC has tried to hold up a long list of foreign companies, including Apple , Google , Intel , Microsoft , and Qualcomm with varying degrees of success. An increasing proportion of these decisions have been overturned in South Korean courts, an independent judiciary that has tended to weigh cases on their merits.

Arguing for the latter is current President Park Geun-hye. She enjoyed high popularity after her inauguration in February 2013, but her political capital declined after a series of missteps and mishaps (e.g., corruption charges against government officials, the ferry accident in 2014). Although she cannot serve as president for more than her single five-year term, she does remain concerned about her party’s position going into the next election, if not about her legacy, both on her own and her family’s behalf. (Her father, Park Chung-hee, was the 3rd president of South Korea and is heralded as the architect of the country’s post-war economic rise.) She would like to cement South Korea comfortably and permanently into its place among first-class trading nations like Japan and those in Europe and North America, where intellectual property rights are respected. At least initially, Park was determined to make the most of her bully pulpit (e.g., her creative economy initiative), but the KFTC could derail her progress.

Will South Korea choose a path toward an enlightened intellectual property regime or allow nationalistic antitrust authorities to derail the country’s economic progress?

Her aspirations are not entirely about taking the high road on the basis of moral principles, however. They are also about protecting the South Korean economy’s place in the sun over time. Unlike China, South Korea does not survive entirely on high-volume, low-cost manufacturing. Its companies also derive an increasingly important proportion of their revenue stream from their own intellectual property licensing. South Korea has come a long way in a mere thirty years, choosing democracy and an open market to propel the country to first-world status. It would be a pity to squander these gains now.

The large Chaebols, publicly traded but family-dominated enterprises that, according to the Wall Street Journal, accounted for an astounding 82% of the total economy in 2012, are themselves becoming intellectual-property powerhouses and want to participate in a fair and open market where they can monetize these assets. These companies include behemoths Samsung, LG, Hyundai, and SK Group as well as a number of smaller firms. The revenues of the largest, Samsung, represented 17% of the entire Korean GDP in 2012.

In addition, President Park is aware that intellectual property in the “new” economy spins up from small startups, universities, and independent divisions of larger companies, and she would like to see that sector nurtured as well.

But the KFTC sees things differently. It panders to the Chaebols’ more feudal impulses, and although they may derive short-term benefit from the KFTC’s protectionist activity, it undermines President Park’s efforts to lay a foundation for a vibrant, creative, intellectual-property-based economy with a strong small and midsize business sector. It also chills foreign investment and concentrates power in the Chaebols, opposite results from those that she promised to seek on behalf of the South Korean people when she ran for office. The Chaebols want it both ways — seeking protection for their own intellectual property while simultaneously ignoring or bypassing others’ intellectual property rights — and the KFTC panders to their more primitive inclinations.

These contrasting motivations create a difficult relationship between President Park’s administration and the Chaebols, which are conservative and protectionist in some cases and entrepreneurial and open in others. Given its character and disposition, the KFTC’s role has been to fan the protectionist flames whenever possible.

Politicians need the Chaebols’ support around election time, and that support sometimes falls back on a short-term, conservative viewpoint in harmony with the KFTC. Chaebols wishing to up-end foreign rivals wrap themselves in the flag and talk about what’s good for the company being good for the country. In this mode, all respect for international law goes out the window in the face of a politically expedient parochial interest.

But South Korea is not China. Unlike its larger, more powerful neighbor, South Korea is a democracy and its companies are not beholden to a one-party regime. Despite talk of a pan-Asian trade block working together to counterbalance the power of North America and the European Union, South Korea’s bread is better buttered with the Organization of Economic Cooperation and Development (OECD) nations than with its unpredictable neighbors. While China has a large domestic market in which to launch and sustain new ideas and companies, South Korea has a smaller internal market and is therefore more export-dependent. For this reason, South Korea will ultimately see greater net benefit from an open approach.

South Korea, the only Asian OECD member other than Japan, needs to live up to the expectations of a first-world country. It cannot afford to appease the KFTC and the more conservative forces in the private sector and then discover that in doing so it has foreclosed the burgeoning innovation of its small and midsize businesses as well as the more modern divisions of its major companies. Any future leading company must necessarily arise from these latter groups. President Park has observed how US firms like Tesla, Facebook, and VMware have come out of nowhere to dominate entire new business segments that barely existed before they created their respective markets. She wants that future for South Korean companies and must resist the KFTC’s baser instincts in order to bring it about.

#### Collapses Asian interdependence and escalates multiple scenarios for nuclear conflict

Michael Auslin 17. Williams-Griffis Fellow in Contemporary Asia at The Hoover Institution, Stanford; PhD. “The end of the Asian Century: War, stagnation, and the risks to the world’s most dynamic region.” American Enterprise Institute. January 10, 2017. <http://www.aei.org/publication/the-end-of-the-asian-century-war-stagnation-and-the-risks-to-the-worlds-most-dynamic-region/>

As this is being written, China’s economy has dramatically slowed, North Korea claims that it has a hydrogen bomb and is widely believed to be able to put nuclear weapons on top of ballistic missiles, Thailand’s military has launched its second coup in a decade, and Chinese newspapers warn that war with America is “inevitable” if Washington does not back down from opposing China’s territorial claims in the South China Sea. These are just some of the more visible dangers that perturb the Indo-Paciﬁc. We are on the cusp of a change in the global zeitgeist, from celebrating a strong and growing Asia to worrying about a weak and dangerous Asia. For all its undeniable successes and strengths, the broader Indo-Paciﬁc region faces signiﬁcant, potentially insurmountable challenges.

The rest of us should worry because none of these problems threaten only Asia. Whether one cares about the Indo-Paciﬁc or not, it is half of our world. Today, one out of every three persons on earth is of Chinese or Indian descent, and the countries of the Indo-Paciﬁc account for nearly 60 percent of the world’s population. The World Bank estimates that the economies of Asia produce nearly 40 percent of total global output, and they are central to everything from weaving textiles to crafting the most advanced electronic technology. The militaries of Asia’s countries have grown dramatically, and China, India, and North Korea are nuclear powers. Democracies jostle with authoritarian states as neighbors in the world’s most dynamic region.

But the globalization that we continue to celebrate has its dark side as well. If an economic or security crisis erupted in Asia, it would reverberate around our increasingly interconnected world. Those risks are festering, some visible, others still hidden. The number one priority for the countries of the Asia-Paciﬁc, and the rest of the world, over the coming decade is managing and mitigating the risks that threaten the Asian Century.

To properly conceive of these trends, one must imagine a “risk map” of Asia. Unlike a traditional geographic map, this map is a conceptual tool for identifying the most important trends in the region and assessing their risk. This book maps out five discrete yet interrelated risk regions.

The first such region is the threat to Asia’s growth from the end of its economic miracle and the failure of reform. Thousands of headlines and dozens of books continue to proclaim the economic miracle as if it were destined to last forever. Yet dig beneath the headlines, and you find major problems, many of which national governments are failing to solve.

From Japan to India, the nations of Asia struggle to maintain growth, balance their economies, and fight slowdowns. For most of these countries, the days of high-flying growth are long over, while for others, they never began. It is past time for the rest of the world to pay attention to the threats to Asia’s economic health. Uneven development, asset bubbles, malinvestment, labor issues, and state control over markets are just some of the features of economic risk in the Asia-Pacific. And because Asian economies are increasingly interlinked, problems in one country spill over to others.

This region of Asia’s risk map, economic slowdown or collapse, directly concerns non-Asian nations. Global stock markets tanked in the summer of 2015 and the beginning of 2016 when China’s stock exchanges collapsed. Even if Asia’s economies manage to muddle through, the world must ask what will happen to global trade and investment if growth in Asia simply cools off. It is increasingly prudent to prepare for a far less economically energetic Asia than we are used to. And we must account for both long-term structural stagnation, as in Japan, and the style of house-of-cards capitalism currently practiced in China. There is little doubt that the world must prepare for a China whose growth has dramatically slowed if not stagnated, and for mature economies like Japan’s never to recapture their former vibrancy. As for the developing states, the risk is that they will never attain the growth needed to ensure the modernization of their societies.

## solvency

### 1nc – solvency

#### No solvency – courts are inefficient and wreck signaling

1AC Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>) MULCH

3. Problems with a Judicial Response

Still, forum non conveniens is not a panacea for Empagran-type cases for reasons that are true of any judicial response, including interest-balancing comity analysis. These court-made doctrines require detailed, fact-specific, case-by-case analyses by individual judges who may weigh similar facts differently. Before a court can consider invoking forum non conveniens, it must first determine what laws, rights, remedies, and procedures would apply if the case were tried in the alternate forum. This inquiry requires a court to determine whether the antitrust laws and procedures of foreign jurisdictions are "clearly unsatisfactory," something many courts may feel ill-equipped to judge. Precedent will often be an ineffectual guide in these factual inquiries, given the frequent changes in the antitrust policies of foreign nations.270

The resultant inconsistency and unpredictability across the district courts could frustrate one of the reasons for using the doctrine-to provide a clear standard for exercising jurisdiction based on the availability of adequate relief in other countries implicated in the litigation. With so many fact-specific factors in play in a court's decision, neither plaintiffs nor defendants could accurately assess how a judge will rule on jurisdiction. This uncertainty encourages foreign plaintiffs to file antitrust suits in the United States, and it raises the costs to defendants of doing business in the United States. A caseby-case approach to resolving jurisdiction over Empagran-type suits will likely lead not only to forum shopping internationally, but also venueshopping domestically. Because public factors are assessed and weighed in the analysis, foreign nations will also operate in an uncertain environment. They therefore have no reason to enact laws and policies in harmony with those of the United States; one district court could still choose to exercise jurisdiction over that countries' nationals. Piper's forum non conveniens analysis articulates the principles to apply in Empagran-type suits, but its case-by-case application fails to provide an effective, national solution to resolve jurisdiction in Empagran-type suits.

## cartels

### 1nc – cartels

#### Cartels solve themselves quickly

DePaola 14 (Joe DePaola, Managing Partner & President at BizShifts, former VP Worldwide Sales & Business Development, CIC Inc., former PhD student Business/Engineering, Stanford University, MS Engineering, New York University, “Sinister-Side of Cartels, Collusions… For Dominating Markets: Sleeping with the Competition is a Dubious Business Strategy,” BizShifts-Trends, 4-10-2014, https://bizshifts-trends.com/sinister-side-cartels-collusions-dominating-markets-sleeping-competition-dubious-business-strategy/)

Generally cartels contain seeds of their own destruction... cartel members are reducing their output below their existing potential production capacity, and once the market price increases, each member of the cartel has the capacity to raise output relatively easily. The tendency is for cartel members to ‘cheat’ on their quota, increasing supply to meet market demand and lowering their price.

Most cartels agreements are unstable at the slightest incentive they will quickly disband, and returning the market to competitive conditions… Cartels appeared most strongly in those industries defined by scale and scope economies and with high fixed costs… Therefore, they are more common in wealthy countries with big businesses. Cartels also tended to appear among domestic firms first, before going international (except, for example; early– zinc, rail, shipping… cartels)…

### 1nc – food

#### Aff can’t solve food security

Philip Watson & Jason Winfree, 21. Watson is an Associate Professor, Agriculture Economics & Rural Sociology at the University of Idaho. Winfree is an Associate Professor of Agricultural Economics and Rural Sociology at the University of Idaho. "Should we use antitrust policies on big agriculture?" Applied Economic Perspectives and Policy (2021): 1-14.

Market control and food security/safety

Others argue that antitrust laws should be used in agricultural markets owing to the amount of control certain firms have in the food supply and the potential effect that this might have on food security and safety (Hendrickson et al., 2017). The market control concern is similar to the arguments being made to break up technology firms such as Google, Twitter, and Facebook, and is again somewhat subject to the scrutiny of contestability. While technology firms often have a large share of the social media market, these markets could be thought of as contestable, and consumers and competitors are free and able to switch platforms. It is difficult to say whether this is comparable in food markets. While many aspects of the food industry might be considered contestable, especially in the long term, large sunk costs may prevent some competition in some markets. Certainly, control of the food supply, or even widespread adoption of technology, can generate risk. For example, in 1970, over 80% of corn in United States was Texas cytoplasmic male sterile corn. This type of corn was susceptible to fungus (Southern corn leaf blight) and caused a drastic reduction in corn yield. If market concentration creates less genetic diversity, it is possible that this is a cost. However, the association between market concentration and food safety is not entirely clear and using antitrust with this intention would be complex. For example, as previously stated, large firms can often implement safety standards more easily. While controlling the food supply is certainly an incredible responsibility with an enormous downside potential, it is not clear how much actual power firms have and why this power would harm consumers. This may be an area of research that might help inform this policy process.

### 1nc – climate

#### They require rare metal extraction—still links to environment collapse.

Pitron 18—(M.A. in International Law from the University of Georgetown, French journalist). Guillaume Pitron. 10/30/18, “The energy transition will be a metallic one,” <https://www.linkedin.com/pulse/energy-transition-metallic-one-guillaume-pitron?articleId=6463071096034983936#comments-6463071096034983936&trk=prof-post>

From December 3rd to 14th, the world will have its eyes set on Katowice. The 24th United Nations Climate Change Conference (COP 24) will take place in this southern Polish city. Green Climate Fund (GCF) subsidies, carbon trading mechanisms, precise deadlines setting... 196 delegations will work for "the practical fulfillment of the Paris climate agreement," signed in 2015 during the COP 21. As laudable as these goals might be, a significant stake risks to go unreported in Katowice: the vast amounts of mining resources necessary for the achievement of the energy transition. Electric cars, windmills, solar panels, cities and intelligent network... All these "green" and digital technologies share the specificity of being highly metal-consuming. Technology minerals include basic metals such as iron, copper or zinc as well as less abundant ones. Cobalt, tungsten, Rare Earth elements, tantalum, vanadium, indium, or gallium are sought after for their great optical, catalytic or magnetic properties. These "small metals" are the lesser known base of digital and green tech, presented as environment-friendly. We already consume over two billion tons of mineral resources each year, i.e., about 500 Eiffel Towers daily. Given these new needs, the German agency for mineral resources predicts that the demand for metals such as germanium could double up around 2035, that for dysprosium and tantalum could quadruple and needs for cobalt could be multiplied by 24. In a 2017 report, the World Bank estimated that lithium extraction, could, on the medium term, grow by 1000% because of the demand for batteries. The energy transition is a metallic one. And yet, the 2015 Paris agreement on climate doesn't say a word on environmental, economic and geopolitical challenges surrounding this new dependency. Words such as "metals," "minerals" or "raw materials" aren't even mentioned. Will we avoid this fatal mistake in Katowice? The question is all the more crucial given that the environmental impact of rare metals' extraction and refining contradict the incantatory spells on the coming of a greener world. In Chile, the Democratic Republic of Congo or even Kazakhstan, copper, cobalt and chrome extraction and refining go hand in hand with ecosystems' pollution and massive sanitary consequences. China has paid a very hefty price. We visited the mining areas of the southern Jiangxi province and the Inner Mongolia Autonomous Region. We can testify about the paradox of green energies. So-called clean technologies require metals which extraction is particularly damaging. Likewise for "renewable" energies: they do not function without non-renewable ones. As for digital technologies meant to dematerialize our lifestyles, they benefit from phenomenal amounts of solid materials. Which ones among these thirty heads of State expected in Katowice know about this darker side of green energies? In the West, the question was concealed from the beginning of the 1990's. At the time, many States closed their mines and refining factories, deemed as too polluting, while less industrialized countries would take on this burden to catch up with their industrial delay. In other words, the westerners have delocalized green technologies' pollution, and these political choices lead the world to a binarism between the dirty ones and those pretending to be clean. The parenthesis of the "happy globalization," with every resource handy, anywhere and at any cost, shuts down little by little. The "markets' invisible hand" is not sufficient to smooth the new tensions around rare metals' supply. We expect the first mineral resource shortages to happen long before petroleum ones! A question arises, incongruous yet essential. Could we fail in leading the energetic transition achievement, not due to a lack of agreement on either GCF or carbon finance in Katowice, on December 14th, instead because we will lack minerals and energies to industrialize them? The COP24 could be the occasion to shut up the doom-mongers while engaging a courageous and practical dialogue on the necessary rationalization of mineral resources. A robust circular economy of metals implies tackling waste ending up in electric discharges on the African continent. This goal also means that we eco-design technological products, an essential condition for better recycling of rare metals (the recycling rate of some doesn't go beyond 1%). The fight against planned obsolescence should as well be systematized. A successful, energetic transition implies to rethink our economic models, that are too focused on short-term benefit and a religious seeking of the lower cost. The deployment of an economy based on functionality that gets most of its profits not from its products but its related-services is an inspiring track. The question of the frugality of our consumption habits is central because without adequate resource management, as the World Banks reminds, "a future founded on green technologies [...] could ruin [...] sustainable development goals".

#### No CRM hoarding---stockpiles, new deposits, and recycling.

Lovins 17, Cofounder and Chairman Emeritus of Rocky Mountain Institute, energy advisor to major firms and governments in 70+ countries for 45+ years, has written 31 books and more than 600 papers, advised major firms and governments worldwide, and received 12 honorary doctorates and many international awards. (Amory, 5-23-2017, "Clean energy and rare earths: Why not to worry", *Bulletin of the Atomic Scientists*, https://thebulletin.org/2017/05/clean-energy-and-rare-earths-why-not-to-worry/)

Rare earths’ uses are highly specialized but diverse. These elements are used in mobile phones, superstrong magnets and hence advanced motors and generators, some oil-refinery catalysts, certain lasers and fluorescent-lamp or flat-screen phosphors, some batteries and superconductors, and other technologies important to modern life. Some rare earths are particularly useful in energy applications. Around 2010, some articles and commentators warned that shortages of rare earths, or China’s near-monopoly on them, could choke off the West’s shift to renewable energy and other clean technologies. This was never true—but the myth persists.

Bubble and burst. Rare earths concerned only specialists until about 2009–10. In the mid-1990s, China had consolidated its control over most of the global rare-earth market, and the last US mine and mill, once the world’s dominant producer, closed in 2002 because it was unprofitable. China began imposing export quotas in 2006, and limited exports to Japan (a major user of rare earths for high-tech miniature motors) during a diplomatic spat in 2009–10, so global prices and anxieties soared. US government agencies published urgent reports about the rare-earth crisis and its threat to national security. Could China’s control of these crucial elements—roughly 97 percent at the time—block Washington’s ability to produce Tomahawk missiles, F-35 jets, and night-vision goggles, as some military writers warned, never mind electric vehicles and wind-power turbines?

As a technologist who had advised major mining companies, written two books on metal mining and a 445-page text on efficient motor systems, done rare-earth physics experiments at MIT Lincoln Laboratory, and consulted for MIT’s Francis Bitter Magnet Laboratory, I knew enough to be unconvinced by rare-earth alarm bells. It all felt like a commodity bubble, based more on a shortage of understanding—of rare earths, economic geology, and resource efficiency and substitution—than on a shortage of rare earths.

Sure enough, the debate was heavy on the supply of rare earths but light and often misinformed on the demand side. The few observers who focused more on demand suspected that rare earths’ price spike wouldn’t last long, whether or not it reflected mining-stock hype. I called the coming crash, to general ridicule, in 2010. Rare-earth prices soared through spring 2011—when a rare-earth bonanza was fondly predicted for Helmand Province in Afghanistan—but then plummeted.

US supplier Molycorp reopened its California rare-earth mine in 2012, but went broke in 2015 when low world prices wouldn’t support its high costs. By 2015, MIT Technology Review asked, “What Happened to the Rare-Earths Crisis?” It misleadingly called rare earths “crucial to the permanent magnets used in wind turbines and motors in hybrid or electric cars,” and concluded that worries about them had “seemingly dissipated without much fanfare” as “demand fell more than expected,” but never connected the dots by asking why demand did that. By 2016–17, the market was in the doldrums, with China planning to limit annual production to 140,000 metric tons beginning in 2020 to try to raise prices again. An investor in the rare-earth industry in 2007 would have lost 81 percent of her portfolio value after a classic decade-long boom-and-bust wild ride (see the chart at the top of this article from buyupside.com).

This is not how a durably scarce and valuable commodity behaves. What happened? Just what you’d expect of a thin market influenced by ignorance but ultimately tamed by reality. When prices soared, stockpiles rose, idle mines reopened, explorers sought and found new deposits, and recycling increased (for example, cerium in glass polishing). Most important, as customers from General Electric to Toyota to Ford sought to cut costs and boost performance, the costlier materials were used more frugally and often replaced with cheaper, better solutions—all as I’d predicted in 2010. Prices fell accordingly.

#### No climate energy wars

Meierding 20 (Emily Meierding, assistant professor of national security affairs at the Naval Postgraduate School in Monterey, California, “The Exaggerated Threat of Oil Wars,” Lawfare, 8-2-2020, <https://www.lawfareblog.com/exaggerated-threat-oil-wars>)

Over the past year, Chinese seismic survey vessels and their paramilitary escorts have interfered repeatedly with Vietnamese and Malaysian oil and natural gas exploration in the South China Sea, harassing drilling rigs and support ships. These confrontations have prompted concerns that they could provoke a larger military conflict, especially as China exploits the unsteadiness created by the coronavirus to become more aggressive in its various international territorial disputes.

Happily, the historical record indicates that China and its neighbors are unlikely to escalate their energy sparring. Contrary to overheated rhetoric, countries do not actually “take the oil,” to use President Trump’s controversial and inaccurate phrase. Instead, my recent research demonstrates that countries avoid fighting for oil resources.

No Blood for Oil

Between 1912 and 2010, countries fought 180 times over territories that contained—or were believed to contain—oil or natural gas resources. These conflicts ranged from brief, nonfatal border violations, like Turkish jets entering Greek airspace, to the two world wars. Many of these clashes—including World War II, Iraq’s invasion of Kuwait (1990), the U.S. invasion of Iraq (2003), the Iran-Iraq War (1980-1988), the Falklands War (1982), and the Chaco War between Bolivia and Paraguay (1932-1935)—have been described as classic oil wars: that is, severe international conflicts in which countries fight to obtain petroleum resources.

However, a closer look at these conflicts reveals that none merits the classic “oil war” label. Although countries did fight over oil-endowed territories, they usually fought for other reasons, including aspirations to regional hegemony, domestic politics, national pride, or contested territories’ other strategic, economic, or symbolic assets. Oil was an uncommon trigger for international confrontations and never caused major conflicts.

On approximately 20 occasions, over almost a century, countries engaged in minor conflicts to obtain oil resources. However, these “oil spats” were brief, mild, mostly nonfatal, and generally involved countries whose hostility predated their resource competition. Greece and Turkey have prosecuted oil spats. So have China and Vietnam, Guyana and Venezuela, and a dozen other pairs of countries. These confrontations inspired aggressive rhetoric while they were underway, but none of them ever escalated into a larger armed conflict.

Oil has periodically influenced the trajectories of major conflicts that were launched for other reasons. At the end of World War I, British troops seized Mosul province in order to secure its oil resources. Oil aspirations also motivated Germany’s invasion of the Russian Caucasus (1941-1942) and Japan’s invasion of the Dutch East Indies (1941-1942). While the latter attack precipitated U.S. involvement in World War II, it was also a continuation of the Second Sino-Japanese War (1937-1945). All of these “oil campaigns” were inspired by aggressors’ wartime resource needs. Absent the ongoing conflicts, these countries would not have fought for oil.

The historical record also reveals one “oil gambit”: Iraq’s invasion of Kuwait in 1990. Conventional explanations for the attack assert that Saddam Hussein was either greedily attempting to grab his neighbor’s oil resources or needily attempting to limit Kuwait’s oil output in order to raise oil prices and escape from a deepening economic crisis caused by falling oil prices and Iraq’s large debts, incurred during the Iran-Iraq War. The first explanation is wrong. The second is correct, but incomplete, because it omits Saddam’s larger motive for aggression: his fear of the United States. The regime’s records, seized during the 2003 U.S. invasion, reveal Saddam’s belief, nurtured since the 1970s, that the United States was determined to contain Iraq and remove him from power. In 1990, this false conviction led Saddam to assume that the United States was engineering Iraq’s economic crisis by encouraging Kuwait and the United Arab Emirates to exceed their OPEC oil production quotas and refuse Iraq’s repeated entreaties to cancel its war debts. After his infamous meeting with U.S. Ambassador April Glaspie failed to persuade Saddam of the United States’s benign intentions, he concluded that conquering Kuwait was his only remaining means of survival. Fear of U.S. hostility, not oil aspirations, prompted Iraq to invade Kuwait.

A Question of Value

The absence of oil wars is surprising and counterintuitive. Petroleum is an exceptionally valuable resource. It fuels all countries’ economies and militaries. Oil sales are also a crucial revenue source for producer states. Surely, countries are willing to fight to obtain petroleum resources.

In fact, classic oil wars are extraordinarily costly. A country that aims to seize foreign oil faces, first, the costs of invading another country. International aggression is destructive and expensive under the best of circumstances. It may also damage the oil infrastructure that a conqueror hopes to acquire. Next, if a conqueror plans to exploit oil resources over the long term, it faces the costs of occupying seized territory. As the United States has learned from its “endless wars,” foreign occupation is extremely challenging, even for the world’s most powerful country.

Additionally, a conqueror faces international approbation for oil grabs. As censorious responses to Trump’s proposition that the United States “take the oil” from Syria, Iraq and Libya have indicated, seizing another country’s oil is considered reprobate behavior. It violates international laws against plunder and materially threatens to consolidate control over global oil resources. As Iraq learned in 1990, other countries and international institutions respond to oil grabs with diplomatic censure, economic sanctions and even military force. Finally, if a conqueror manages to maintain control over foreign oil resources, it may not be able to exploit them. Conquest scares off the foreign oil companies that many countries rely on to finance and manage oil production.

Because of the high costs of invasion, occupation, and international opprobrium, classic oil wars are simply not worth the effort, regardless of petroleum’s value. Countries may occasionally decide that it is worth initiating an oil spat to obtain desired resources, especially when targeted territories are contested and other issues are at stake. However, fighting major conflicts for oil does not pay.

Keep Your Eyes Off the Prize

All of this is good news for stability in the South China Sea and other oil-rich regions. There is no reason to expect that China’s recent energy sparring with Vietnam and Malaysia will escalate into a larger international conflict, at least with regard to the oil at stake. Oil spats never do, no matter how acrimonious they appear while underway.

That being said, China and its neighbors could still fight for other reasons. The South China Sea’s abundant but impacted fisheries are a critical food and livelihood source for the littoral states’ populations. Critical sea lines of communication pass through the region. And China has attempted to extend its hegemonic influence in the South China Sea by refusing to abandon its legally untenable “nine-dash line” maritime claim and by constructing artificial islands on numerous maritime features. Any of these factors could spark a larger international conflict.

This also means that the low oil prices that are expected to accompany peak oil demand will not produce a peace dividend. Countries won’t engage in fewer conflicts as oil’s value declines, because they weren’t fighting over oil in the first place.

It’s tempting to use oil to explain armed conflict. Oil is valuable and tangible, so it seems to be an obvious target for international aggression. In contrast, factors like hegemonic aspirations and national pride are amorphous and their value hard to quantify. Yet, historically, these other factors have caused significant numbers of severe international conflicts, while petroleum has not. To effectively discourage conflict escalation in the South China Sea and elsewhere, policymakers need to focus on these factors, and resist being distracted by oil.

## development

### 1nc – development

#### Their World Bank ev explicitly says they could not possibly solve cartels in developing economies – even we can only detect a tiny fraction

World Bank 21, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (2021, “FIXING MARKETS, NOT PRICES”, https://openknowledge.worldbank.org/bitstream/handle/10986/35985/Fixing-Markets-Not-Prices-Policy-Options-to-Tackle-Economic-Cartels-in-Latin-America-and-the-Caribbean.pdf?sequence=1&isAllowed=y)

Cartels in LAC have affected hundreds of markets and the large majority went undetected22

Over the last 4 decades, more than 300 economic cartels have been revealed - mostly in markets that provide key inputs to firms or essential goods to families. Between 1980 and 2020, in over 300 incidences, firms supplying markets as critical as milk, sugar, poultry, transport, energy and medicines chose to jointly fix higher prices, restrict total production, divide or share markets, rig bids, or obstruct the entry of new competitors – that is, to create economic cartels. Instead of vying for consumers with better deals and higher quality, more than 2,500 firms and 153 trade associations engaged in these agreements in 19 different sectors.

Cartels affect important markets with large market players. Previous evidence of international cartels from 1990 to 2007 suggests that between USD 150 and 200 billion worth of sales in LAC were affected by discovered cartels, and consumers in this region paid overcharges of at least USD 35 billion from 1990 to 2007 (Ivaldi, Julien, Rey, Seabright, & Tirole, 2003).23 Based on newly available information, 89 of the firms that formed cartels in LAC had total revenues of USD 81 billion in 2019, equivalent to what would constitute the 8th largest GDP in LAC.24

The cartel activity revealed so far affects a significant share of the economy. Evidence based on a selected number of cartels in developing economies between 1995 and 2013 shows that affected sales of cartel members related to GDP at a given point in time reaches up to 6.4 percent. As much as 3.4-8.4 percent of imports in developing countries may be affected by cartel agreements (Levenstein, Suslow, & Oswald, 2003). New evidence for LAC now reveals that the Competition Watchdog in El Salvador, even with limited cartel enforcement trajectory, has detected 7 cartels that affected sales in the amount to 0.4 to 0.8 percent of GDP between 2006 and 2011. This does not even take into account that some of the cartel agreements occurred at the upstream level and may have also affected the downstream industries (such as in the case of wheat and bread).

The true pervasiveness of economic cartel activity is at least tenfold. While over 300 cartels have been detected and dismantled by respective authorities in LAC, studies from advanced economies show that even mature competition authorities only detect between 10 and 20 percent of cartel activity (See Box 1). Given the incipient status or even entire lack of cartel enforcement in most parts of LAC, the extent to which consumers and businesses are affected is likely manifold. For example, of at least 84 large global cartels that were shown to fix prices in LAC at some point between 1990 and 2007, only four were investigated by authorities in this region (Connor, 2008).

Detection rates of cartel activity in LAC may be particularly low in some sectors, such as the financial sector. In the European Union (EU), 28 percent of cases against anti-competitive practices between 2013 and 2017 targeted the financial sector and revealed several high-profile price-fixing agreements in markets such as financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR), Japanese Yen LIBOR, Swiss Franc IRDs and future Swiss Franc LIBOR. However, only one of seven mature competition authorities in LAC have opened antitrust investigations in the banking sector, and only one of them related to cartel activity: Mexico detected and fined agreements to manipulate sovereign bond prices (WBG, 2020). In Colombia, 2 banking associations, 14 banks and 2 payment systems network providers entered into commitments with the competition authority to end an investigation regarding an agreement among banks to fix interchange fees.2

Cartels hurt the poor, stifle growth and limit policy effectiveness

Cartels are particularly harmful for economic development objectives: By eliminating competition among firms, they lose incentives to innovate, and charge higher prices. These consequences disproportionately and directly affect the poorest households. Cartels limit growth by affecting productivity and competitiveness. Finally, cartels undermine effectiveness of public policies. Benefits of trade liberalization do not materialize when firms collude across borders or agree to block imports. Governments can procure fewer public goods and services (medicine, public works, school supplies, etc.) when procurement processes are rigged. The following section will briefly discuss the existing evidence and new insights from the novel data on LAC.

Economic cartels affect the poor. Cartels disproportionally affect poor households because they are common in markets affecting products in the basic consumption basket. At least 21 percent of the cartels detected involved basic consumption products such as sugar, toilet paper, wheat, poultry, milk, and medicines.26 Global estimates suggest consumers pay on average 49 percent more when buying from cartels, and 80 percent more when cartels are stronger.27 In LAC, in 65 percent of cartels detected over the last decades with information available on prices charged, consumers experienced overcharges ranging between 5-25 percent and in at least 4 percent of the cases, consumers had to pay as much as twice for the products and services. A simple comparison of public expenditure efficiency from South Africa suggests that public resources spent on cartel enforcement would be 38 times more effective in tackling poverty than cash transfers, when considering that part of the cash transferred to eligible household is spent on overcharges for basic food items (Purfield, et al., 2016).

Collusive agreements lower economic growth prospects by depressing productivity growth and reducing competitiveness. First, agreements among competitors to limit competition affect productivity. The introduction of anti-cartel policy is related to higher labor productivity growth in industries affected by collusive behavior, which otherwise record a 20 to 30 p.p. lower labor productivity growth (than industries without cartels) (OECD, 2014). Evidence from a 40-year long cartel in the United States suggests that quantity-productivity declined by 22 percent (Bridgman, Qi, & Schmitz Jr, 2009). Systematically allowing for cartel activity can further curb total productivity growth across the economy (Petit, Kemp, & Van Sinderen, 2015). Second, cartels distort important markets in LAC’s value chains. 34 percent of collusive agreements detected occurred in the manufacturing sector (Figure 1). Another 15 percent of cartels affected wholesale and retail trade activities transportation activities, respectively.28 Within the manufacturing sector, cartels across LAC region are particularly frequent in the meat processing activity in Brazil, Chile, and Panama, and in the manufacturing of basic chemicals in Argentina, Brazil, Colombia, Panama, and Peru.29 Within the wholesale and retail trade sector, trade of pharmaceutical goods are also found in Brazil, Chile, Honduras and El Salvador. In the transport sector, Chile fined six shipping lines with USD 95 million for colluding in multiple tender processes for providing maritime transport services to manufacturers and consignees of various car brands imported to Chile beginning in 2000. Mexico sanctioned seven shipping lines for engaging in nine collusive agreements and segmenting the car transport market into different routes between 2009 and 2012. Some of the sanctioned firms were also investigated in Chile and Peru (WBG-USAID, 2018) .

Cartel agreements undermine the benefits of trade opening and liberalization. In the Pacific Alliance30 – the group of countries with the lowest trade barriers in the region – at least 67 cartels were detected in sectors generally considered tradable, and a third of those operated in the market for more than 5 years. Even though Colombia is an open market economy, sugar traders from the region were able to sell in Colombian markets only after a decade-long cartel agreement by domestic sugar mills was broken up in 2015: 12 mills had been explicitly coordinating to obstruct sugar imports.31 Import competition does not preclude the formation of cartels in tradable goods. Such agreements can operate at the regional or even global level: In Chile, Peru, and Colombia, three international firms jointly raised prices for toilet paper by up to 30 percent for over 10 years (Dinamo, 2015). In smaller LAC economies, where connectivity issues are central to economic growth, such as those of the Caribbean Community (CARICOM), cartels have also been uncovered, for example in shipping services.32

When cartels raise prices, the state can provide fewer public goods and services and cartels can even distort the market of government bonds. At least one in four cartels formed among firms participating in government procurement process. In such cases, taxpayers bear the burden of the overcharges. In Peru, between 2010 and 2012, 31 providers of hemodialysis services rigged the bids by abstaining from participating in public tenders called by one of the Peruvian public healthcare administrators with the objective of increasing reference prices in subsequent tenders. This led to overcharges in each tender of approximately over USD 10 million.33 Similarly in 2014, Peru sanctioned an engineer’s cartel that affected public-construction contracts worth USD50 million which had been designated for the expansion of the public highway network34 (Martinez Licetti & Goodwin, 2015). In Mexico, seven banks entered into at least 142 agreements to manipulate the price of the Mexican sovereign bond market between 2010 and 2013 by limiting sales and acquisitions of bonds with losses to the market of over USD 1.443 million.35 In Colombia, the government and ultimately the taxpayers incurred in losses of at least USD 11 million for the overcharges paid in the construction of a major highway (Ruta del Sol II), due to an anticompetitive agreement that favored a particular group of firms in the concession process.36

Recent developments in LAC also suggest that economic cartels undermine public trust in market economies. In 2016, 73 percent of the population in Chile considered collusion to be a reproachable conduct, even more reproachable than violations of labor laws.37 This sentiment was preceded by several years of successful breakups of cartels, and a historic confirmation by the Supreme Court of the decision to fine a group of poultry producers for having agreed to limit output. The protests in 2019 were partly motivated by discontent with the private sector (Freire, 2020) . As part of the government’s response in form of an “anti-abuse agenda”, the executive submitted four bills to Congress in March 2020 aiming at increased enforcement of the laws against white collar crimes, including cartels.

On the upside, consumers and businesses benefit from effective anti-cartel enforcement. For example, so-called leniency programs – which offer firms the possibility to come clean about their involvement in cartel conduct in exchange for immunity or reduction of financial penalties - (and as we will see later) render any agreement less stable, because any member of the cartel has incentives to break out and report the cartel. Thus, these programs shorten the duration of harmful cartels and can even reduce the level of anti-competitive overcharges by cartels.38 Miller (2009) finds empirical support for these effects: the leniency program in the United States increased the rate of cartel detection by 62 percent and reduced the rate of cartel formation by 59 percent. Yusupova (2013) also finds that the 2009 revision of the Russian leniency program was effective in reducing the size and duration of cartels. Choi & Hahn (2014) show that the leniency program in Korea shortened cartel duration. Leniency programs can also speed up the process of breaking up cartels. Brener (2009) demonstrates how leniency reduces the average sanctioning process by 1.5 years on average. In Europe, nearly 60 percent of detected cartels are discovered through leniency (Jaspers, 2020). Overall, leniency programs can have significant effects on competition intensity. Klein (2011) revises data from 23 OECD countries and finds that leniency policies were associated with a decrease in the industry-level price-cost margin of 3 to 5 percent.

However, many LAC countries do not have any tools to deter and prevent economic cartels. 28 percent of countries in the region do not have an operational competition legal framework. In only 5 out of 15 countries where the legal framework is in place, there are effective anti-cartel enforcement tools.

#### They’ll say that’s why deterrence is key – BUT even treble damages is wholly insufficient to affect cartels’ risk-reward calculations

Sprigman 5 (Christopher Sprigman, Fellow, Center for Internet & Society, Stanford Law School, “Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels,” The University of Chicago Law Review, vol.72, 2005, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5325&context=uclrev)

There is significant reason to doubt, moreover, that even treble damages are sufficient. Adequate deterrence requires the imposition of penalties that not only remove all of a cartel's supracompetitive profits, but that also reflect the likelihood of detection." The economic literature on the risk of cartel detection is scanty. One empirical study examining U.S. domestic cartels finds, at most, a risk of detection of between 13 and 17 percent." That would imply that penalties must equal between six- and sevenfold the cartel's profits for deterrence to be optimal, and potentially higher if international cartels are more difficult to detect and prosecute than domestic ones. 10

#### Developing economies need the cases the plan redirects to develop their own regimes – even if initial cases fail

Murray 17 [Sean; 2017; J.D. from Fordham University, B.A. from Vassar College; Fordham International Law Journal, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” vol. 41]

With nowhere else to go, private litigants have naturally flocked to the United States for remedial assistance, creating an issue for developing antitrust regimes.12 Several implications attend foreign plaintiffs seeking recovery in the United States. American courts have recognized the importance of allowing foreign plaintiffs to bring claims in the United States under the Sherman Act.13 Before 2004, there was a significant chance that parties injured abroad by global cartels that directly harmed the United States would be able to sue in US courts to recover their losses.14 But, as illustrated above, private litigants applying US antitrust law for redressing harm that occurred abroad create tensions over sovereignty with other countries.15

Moreover, bringing claims to the United States strips valuable opportunities for young foreign antitrust regimes to develop their own jurisprudence, depressing the effectiveness of global antitrust enforcement and stalling the emergence of private redress.16 Worldwide jurisdictions are increasingly recognizing the importance of private rights of action to enforcement efforts.17 Within the past ten years several countries have expanded private parties’ ability to recover harm from unlawful anticompetitive behavior by allowing collective action.18 However, private actions remain rare in many developing antitrust jurisdictions with little, if any, precedent establishing the basis for compensatory damages or discovery.19

In response to international criticism of the statute’s unbridled transnational application, the United States has curtailed the Sherman Act’s reach both judicially and legislatively.20 Judicially, courts looked to international comity, the practice of taking into account the interests of other nations.21 The Ninth Circuit was the first court to invoke international comity in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., which used an interest-balancing test to determine whether exercising jurisdiction was proper.22 Legislatively, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), which attempts to delimit and define the cross-border reach of US antitrust laws by introducing an objective test under the effects doctrine.23 Powerful arguments can be advanced in the American interest for applying US antitrust laws beyond US borders, including adequately protecting American competition and consumers, deterring inimical foreign anticompetitive behavior affecting the United States, especially in an increasingly globalized economy, and providing remedial measures to US victims of such conduct.24 However, these interests in providing protection and redress are counterbalanced by equally important rationales for limiting the extraterritorial span of US antitrust law, such as costly overregulation, avoiding international disputes, allowing nascent worldwide antitrust regimes to develop to beget increased antitrust enforcement, and avoiding harmful interference with antitrust regulators’ amnesty programs.25

The aforementioned responses to these competing concerns have been ambiguous, inconsistent, and over-inclusive or under-inclusive.26 In particular, the poorly worded FTAIA has created more problems than it has solved, including inconsistent holdings, wrongly decided cases, and disagreements among the circuit courts over interpreting the statute’s language.27 The most recent interpretational difficulty involves determining what constitutes a “direct” domestic effect under the FTAIA. Some courts have held that “direct” takes on a broader meaning, where conduct causing domestic effect need only be an “immediate consequence.”28 In comparison, other courts have narrowly interpreted the statute’s “direct” domestic effect requirement as calling for “a reasonably proximate causal nexus,” drawing from tort law to exclude an injury that is too remote from the injury’s cause.29 The most recent appellate decision involving the FTAIA, Motorola Mobility LLC v. AU Optronics Corp., has contributed to the statute’s confusion.30 There, the Seventh Circuit held that a US parent company failed to show that it suffered direct injury as a result of foreign anticompetitive conduct, despite the fact that price-fixed component products were purchased by its majority-owned foreign subsidiaries to be incorporated into final products purchased by the US parent and sold to US customers.31

Nevertheless, various delineations already exist that suggest a solution to the inconsistency is attainable and may be designed to enhance global antitrust enforcement through greater availability of worldwide private redress. What is apparent from the succession of decisions from Hartford Fire Insurance Co. v. California32 to F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran)33 is that the FTAIA grey area has been sufficiently tapered to allow for the return of a comity balancing test to appropriately reconcile the conflicting interests at hand in the residual universe of cases.34 This Note argues that Hartford Fire, its progeny, and Empagran form confining parameters on the applicability of the FTAIA, namely that cases that do not involve a US party, domestic effect, and domestic injury arising from that effect will fail the FTAIA’s exemption test. Moreover, because the FTAIA’s “direct, substantial, and reasonably foreseeable” effect test can be construed as a proxy for the United States’ prescriptive jurisdiction interest, comity analysis is helpful in its interpretation.35 Thus, claims which are based on exclusively non-US conduct that questionably has a “direct effect” on US commerce resulting in the plaintiff’s injury are more properly decided not by the courts’ current focus on statutory interpretation, but rather by a Timberlane-style ad hoc fact-intensive balancing test that contemplates factors more suitable to the modern global economy and promoting international dialogue.36

In sum, this Note proposes the introduction of a new international comity balancing test into US antitrust jurisprudence with the aim of fostering and strengthening global antitrust enforcement and private redress. It does so in four parts. Following this introduction, Part II briefly summarizes the expansion of US antitrust extraterritorial application. Next, Part III discusses various developments undertaken to limit and demarcate the reach of US antitrust law. Part IV raises issues arising from those efforts that have resulted in inconsistent and questionable holdings. Finally in Part V, by analyzing and synthesizing the existing precedent, this Note contends that a judicial international comity balancing test would most appropriately determine the propriety of US antitrust extraterritoriality for particular types of private recompense cases that are problematic under the current framework.

#### Tons of thumpers make decline inevitable

World Bank 1-11 [World Bank, 1-11-2022 https://www.worldbank.org/en/news/feature/2022/01/11/developing-economies-face-risk-of-hard-landing-as-global-growth-slows]

As coronavirus-weary countries enter the third year of the pandemic, global growth is expected to slow sharply. Against this difficult backdrop, a variety of economic challenges mount for emerging market and developing economies (EMDEs)—including continued COVID-19 outbreaks, elevated inflation, record debt levels, and rising income inequality.

The latest Global Economic Prospects report predicts that global growth will decelerate from 5.5 percent in 2021 to 4.1 percent in 2022 and 3.2 percent in 2023 as pent-up demand dissipates and as fiscal and monetary support is unwound across the world. The rapid spread of the Omicron variant, moreover, indicates that the pandemic will likely continue to disrupt economic activity in the near term. Among EMDEs, growth is expected to drop from 6.3 percent in 2021 to 4.6 percent in 2022 and 4.4 percent in 2023.

The outlook poses particular dangers for EMDEs. First, the notable deceleration in major economies—including the United States and China—will reduce external demand for goods and services for many EMDEs. Moreover, the slowdown is occurring just when governments in many of these economies are running out of policy space to respond, if necessary, to the emerging challenges: new COVID-19 outbreaks, persistent supply-chain bottlenecks and inflationary pressures, and elevated financial vulnerabilities in large swaths of the world. The combination of these threats could increase the risk of a hard landing in these economies.

### 1nc – mena

#### Don’t solve MENA – the problem’s state-owned-enterprises – sovereign immunity checks

MSU=Blue

World Bank 19, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (October 2019, “Reaching New Heights: Promoting Fair Competition in the Middle East and North Africa”, https://thedocs.worldbank.org/en/doc/660811570642119982-0280022019/original/ENMEMReachingNewHeightsOCT19.pdf)

1A. Making MENA Markets Competitive10

Economies in the Middle East and North Africa (MENA) have two faces. One is the concentrated and sclerotic formal sector, often dominated by state-owned enterprises (SOEs) and politically connected private companies. That economy keeps out competitors, misallocates resources, and generates excessive profits for participants. The official economy coexists with an informal economy in which most of the population toils in relatively small operations at low wages and with few social protections.11

A powerful way to invigorate MENA economies would be to inject more competition. That would create a more efficient official economy and reduce informality.

Economists suggest that competition is a powerful tool for ensuring that resources are used in the best way that is technologically feasible—minimizing costs (and therefore prices) and helping ensure that goods and services are provided in the amount and variety consumers desire. As firms compete against each other to make a profit, they have an incentive to invest in research and development to improve the production of existing goods and services and to introduce new ones12. More competition also leads to higher growth in output per worker (productivity) and therefore is a key ingredient in long-run sustainable development13.

Market entry by new firms and the exit of inefficient companies are potent sources of competition. But in the MENA region there are often sizeable barriers that prevent new firms from entering existing markets and protections for inefficient ones. Ease of entry and exit is what determines contestability, and it is the result of the interplay between the available production technology and the regulatory framework in place.

Moreover, when state-owned enterprises (SOEs) are present, it is fundamental that they do not benefit from any type of advantage over their private competitors—whether by obtaining specific inputs (physical or financial) or by receiving easier market access. In brief, the institutional framework must be geared towards the principle of competitive neutrality—that all enterprises face the same set of rules whether they are public or private and that government involvement or ownership of a firm confers no special advantage.

Competition and contestability are essential to creating economic opportunity, which allows workers to help shape their destiny through personal initiative. Competition also increases the purchasing power of incomes, because firms find it harder to set prices above cost. Moreover, these effects are reinforced through cost-reducing technological progress and firm turnover, which allows the most productive firms to survive14. The overall effect is that competition can be an antidote to inequality15. As Eleanor Fox put it: “Markets empower people to help themselves. Markets and access to markets stand side by side with food, health, shelter, education, environment, infrastructure, and institutions as critical tools to combat the world’s greatest economic deprivations”16. But, as the father of modern economics, Adam Smith, recognized in The Wealth of Nations, a well-functioning competitive process cannot be taken for granted17.

That means countries must undertake policies that foster competition. Those policies include an effective antitrust law that keeps in check restrictive practices of the private sector and of government interventions to preserve a level playing field—which means that any regulation that distorts markets in pursuit of the general interest18 should not create any unnecessary barriers. But it also means that when state owned enterprises (SOEs) are present or subsidy programs are involved, competitive neutrality should be ensured for all market participants (see Figure II.1).

In 1890, the United States recognized that legislation was needed to preserve and nurture competitive forces by passing the Sherman Act. The law was a reaction to the dangerous concentration of economic and political power in large companies and trusts that characterized the so-called Gilded Age19. Since then, almost every country has adopted some form of competition law, with a substantial acceleration during the past few decades20.

In the MENA region, four countries lack antitrust legislation—Iran, Lebanon, Libya and West Bank and Gaza–while Bahrain and Iraq have no competition authority to enforce their law (see Table II.1).

Extensive information exists about the competition frameworks of seven MENA countries—Algeria, Egypt, Jordan, Kuwait, Morocco, Oman, and Tunisia21. The evidence shows that they lack key elements of effective regimes, placing substantial costs on their economies. In addition, weak enforcement is a major problem. Its importance is demonstrated by the increase in the value of the divested assets that followed successes in breaking up market concentration.

The breakup of Standard Oil in the United States is a vivid example. When the U.S. government sued Standard Oil in 1906, the company controlled more than 90 percent of U.S. oil refining. After the courts broke Standard Oil into 34 entities in 1911, their combined stock value increased so rapidly that a few years later it was five times higher22. Such an experience is relevant for the MENA countries, where many economic sectors are dominated by few companies even though there are no technological reasons for such a level of market concentration. A striking example is exclusive import licensing for goods for which countries are not self-sufficient (see Box II.1).

Moreover, strong antitrust action can unleash substantial technological advancement, as suggested by two landmark U.S. cases—against IBM and Microsoft 23. The IBM case effectively opened the software industry by forcing IBM to stop selling computers and software as a package.24 The Microsoft case in 2001 likely kept the Seattle-based giant from trying to monopolize the nascent new economy by preemptively crushing companies such as Amazon, Facebook and Google (as it did to the competing web-browser Netscape, which sparked the antitrust action).

Lack of contestability in MENA is arguably a main culprit in the slow pace of technology adoption that has historically characterized the region, which significantly hurt its growth performance. Without substantial reforms to encourage competition, MENA countries risk missing the opportunities offered by digitization and the so-called Fourth Industrial Revolution (See Box II.2).

#### Instability inevitable – hundreds of years of tensions and animosity

#### No MENA escalation

Sano 15 - Yoel, Head of Global and Political Security Risk at BMI Research, August 25, "Why Great Power Conflict Risk Is Rising", http://thewhyforum.com/articles/why-great-power-conflict-risk-is-rising

Middle East: A conflict between Israel and Iran, between Iran and Saudi Arabia, or Iran and Turkey, would be unlikely to escalate into a world war, because the scope for combat to spread beyond the Middle East is highly limited. For example, the Iran-Iraq War of 1980-1988 was certainly substantial, and involved the US, USSR, and several Arab countries as proxy players, but was limited in geographic scope to the Gulf region. So too were the Gulf War of 1991 and the Iraq War of 2003-2011. While the US could get dragged into a new Middle Eastern quagmire in Syria and Iraq as a result of the militant group Islamic State's advances, or against Iran if the present rapprochement fails, neither Russia nor China has the combined ability and willingness to intervene directly on behalf of Iran.

### 1nc – latin america

#### State corruption outweighs the effect of cartels in LAC countries

Lagunes 19 (Paul Lagunes, Ph.D., Board of Advisors Visiting Fellow, Baker Institute; Xiaoxuan Yang, Quantitative Methods in the Social Sciences, Columbia University; Andrés Castro, Quantitative Methods in the Social Sciences, Columbia University; “The State of Corruption in Latin America,” Report, Rice University’s Baker Institute for Public Policy, 7-8-2019, https://scholarship.rice.edu/bitstream/handle/1911/108102/bi-report-070819-latam-corruption.pdf?sequence=1&isAllowed=y)

The state of affairs in Latin America gives observers cause for concern due to the pervasive influence of corruption.1 Firms influence regulatory agencies and persevere in erecting buildings that violate the law (Barstow 2012; Barstow and Xanic von Bertrab 2012). Officials rig government procurement procedures and steal funds meant for the construction of public infrastructure (Di Tella and Schargrodsky 2003). Transit police unfairly target the poor with requests for bribes (Fried, Lagunes, and Venkataramani 2010). From the public graveyard to the office of the president, in a number of Latin American countries, there is scarcely an area of government that is beyond corruption’s reach (Hunt 2006; Grajales, Lagunes, and Nazal 2018).

The gravity of this issue is reflected in the high-profile scandals embattling the region, and also in the available data. With regard to the latter, in this report, we analyze survey-based measures of corruption made available by Transparency International (2018) and the Latin American Public Opinion Project (AmericasBarometer 2016). Among our findings, we confirm that Latin America’s average level of perceived corruption is relatively high. We also note that Latin America as a whole is not showing improvements in this area. This is concerning for a number of reasons, including the widely held suspicion that corruption has a negative impact on the economy. Our analysis reveals that higher rates of perceived corruption are associated with lower levels of economic welfare and direct foreign investment in the region. We conclude this report with suggestions for how government integrity can be improved.

CORRUPTION THEN & NOW

Corruption stubbornly thrives in Latin America, a fact that is confirmed by Transparency International’s Corruption Perception Index (CPI). First established in 1995, the index attempts to measure public sector corruption and is calculated using surveys aimed at country experts and business leaders.2 A CPI score of 100 represents high levels of perceived integrity in government, while 0 stands for the opposite. Building on these data, Figure 1 shows a series of 21 boxplots. The boxplots in green represent the 20 countries with the lowest CPI scores, while the blue boxplots represent the 20 countries with the highest CPI scores. The remaining boxplots (i.e., those in orange) represent 18 Latin American countries.3 A key takeaway from this figure is that Latin America’s average level of government integrity was considerably lower than that of the countries with the most honest governments between 2012 and 2018. This is to say that Latin American countries are among the most burdened by corruption in the world (Morris and Blake 2009, 2). Another key insight from Figure 1 is that, during the time period of interest, the region made no perceived progress in the control of corruption.

#### Biden appeasement and structural incentives makes China and Russia sphere of influence encroachments inevitable

#### No organized crime impact – their ev says “security” but no scenario and doesn’t escalate

Patrick 6 (Stewart Patrick, he senior fellow and director of the program on International Institutions and Global Governance (IIGG) at the Council on Foreign Relations. “Weak States and Global Threats: Assessing Evidence of “Spillovers” January 2006. <http://www.cgdev.org/files/5539_file_WP_73.pdf>)

Second, the list of “weak and failing states” in Table 3 obviously captures a diverse collection of countries that pose an array of potential challenges to U.S. foreign and national security policy -- as well as for U.S. development policy. Most of the countries with the weakest governance are either in conflict or recovering from it, have experienced recurrent bouts of political instability, and rank among the lowest in terms of the “human security” they provide to their inhabitants.39 Several are “outposts of tyranny,” in the Bush administration’s parlance (e.g., North Korea, Belarus, Cuba, and Zimbabwe), authoritarian states which appear superficially strong but rest on a brittle foundation. Others are sites of ongoing U.S. combat and reconstruction efforts (e.g., Iraq, Afghanistan); active or potential proliferators of weapons of mass destruction (e.g., North Korea, Iran and Pakistan); past or present safe havens for terrorism (e.g., Afghanistan, Yemen); anchors of regional stability or instability (e.g., Nigeria, Pakistan); bases for narcotics trafficking and organized crime (e.g., Burma); potential sources of uncontrolled migration (e.g., Haiti); critical energy suppliers (e.g., Venezuela, Nigeria); locations of epidemic disease (e.g., Angola, Democratic Republic of Congo), and settings for recent atrocities and humanitarian crises (e.g., Sudan, Liberia, Burundi, Sierra Leone). Needless to say, these categories of concern often overlap in particular states. Third, as will become clear below, the relationship between state weakness and spillovers is not linear. It varies by threat. Some salient transnational dangers to U.S. security come not from states at the bottom quintile of the Governance Matters rankings, but from the next tier up - - countries like Colombia, the world’s leading producer of cocaine, or Saudi Arabia, home to a majority of the 9/11 hijackers. These states tend to be better run and more capable of delivering political goods: indeed, nearly half are eligible -- or on the threshold of eligibility -- for the MCA

#### COVID proves organized crime resilient and empirically no impact

#### Plus, global alt causes – at best, you only solve Latin America

# 2NC

## RoR Pic

### AT: Not Per Se

#### Price-fixing is per se – avoids rule of reason analysis

Yun 19 (John M. Yun, Associate Professor of Law at the Antonin Scalia Law School, George Mason University, Deputy Executive Director at the Global Antitrust Institute, former Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, FTC, “News Media Cartels are Bad News for Consumers,” Competition Policy International, 4-25-2019, https://www.competitionpolicyinternational.com/news-media-cartels-are-bad-news-for-consumers/)

Antitrust has two legal standards by which to assess firm conduct. The first is the rule of reason, which applies to the majority of antitrust matters that appear before competition agencies. The second standard is per se condemnation, which is reserved for conduct that is deemed so plainly harmful that the act itself is sufficient to find liability — the canonical example being cartel price fixing. The reason why cartels are condemned under a per se standard is because there is little to no redeeming social value from allowing competitors to jointly set the terms of trade in a market. Put simply, cartels are the antithesis of competition. They collectively negotiate on behalf of their members in order to extract a greater share of the market surplus while also damaging the market through higher prices, lower output, and/or lower quality.

### AT: PDCP

#### Perm: do counterplan – is severance – both textually and functionally – it’s a voter – makes any stable offense impossible:

#### 1 – “Cartel” practices includes more than just naked price-fixing agreements – a much broader set of practices much harder to detect

Connor 4 (John M. Connor, Purdue University, Dept. AE, “Price-Fixing Overcharges: Legal and Economic Evidence,” American Antitrust Institute Working Paper No. 04-05, 11-8-2004, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1103516)

Liefmann (1932), also using a modern definition of cartels, believes that the first domestic German cartel was the Neckar Salt Union, a combination of salt mines in three German states. Two others (alum and pig-iron) were formed prior to the 1860s and three more in that decade. However, Liefmann and other writers point to the German depression of the mid 1870s as a peak for cartel formation. Schroeter (1994) calls the 1876 potash cartel one of Germany’s first. By 1905 German government surveys found 385 industrial cartels operating; the number rose to 3000 by 1925.42 As for international cartels, he identifies the 1867 merger of the Neckar Salt Union in Germany with the Eastern French Salt Works Syndicate as the first of its kind. By 1897 there were at least 40 international cartels with German companies as members, most of them in chemical or nonmetallic minerals product markets. Notz (1920) quoted a German book that found 114 international cartels in 1912; by 1920 he could detail 11 international cartels with participation of U.S. companies.

Seagar and Gulick (1929), academics at Columbia University and the University of California, authored a long book that focused primarily on trusts and the first three decades of enforcement of the Sherman Act. They illustrate the ill effects of price fixing by recounting the research of others on several examples of U.S. and European cartels. Like Ripley, they trace the earliest of the U.S. pools to the cordage industry, which began making agreements on prices at least as early as 1861; cordage manufacturers formed a formal association in 1878. The Michigan Salt Association, formed in January 1876, may be the first recorded formal U.S. cartel. Because of the high costs of transporting salt, an elaborate organizational structure, and the highly inelastic demand for salt, this cartel was successful in dominating the Midwest market for 25 years.43 As good as it is, this book contains only one fleeting reference to price effects.

Two lengthy reports from analysts in the U.S. Department of Commerce presage the triumph of the more precise German usage of the term cartel (Domeratsky 1928, Notz 1929). Notz (1929), for example, delineates in a modern manner those characteristics that are essential to a cartel and those features that may vary from cartel to cartel. Basically he accepts Liefmann’s classic definition of a private cartel: a voluntary association of two or more independent business organizations in the same line of business with the aim to control markets or reduce competition.44 The essential feature is an overt agreement to divide market territories, set or stabilize prices, limit or allocate industry supply, establish a common sales agency, pool intellectual property, or some combination of these five strategies. The business organizations may be private corporations, state enterprises, or national cartels. If the organizations are registered in at least two countries, then it is an international cartel. The legal organization of cartels ranges from informal committees that meet on no fixed schedule to formal secretariats or administrative units that may hold significant assets. However, Notz specifically excludes trusts, combines, joint ventures, holding companies and the like, because the economically distinctive characteristic of cartels is that its members retain legal independence in production and marketing decisions while at the same time subjugating their decisions for the “common good,” that is, an increase in the pool of profits generated by their cooperative actions. While the Department of Commerce reports are strong in detailing cartel membership and industry supply conditions, they have little to offer by way of price effects.

Cartels, mergers, trade, and foreign direct investment were major concerns of the League of Nations, which sponsored a major conference on the subjects in 1927. Papers prepared by some of the leading European cartel scholars of the day were published as part of the conference proceedings (de Rousiers 1927, MacDonald 1927, Wiedenfeld 1927, Economic and Financial Section 1927)45. These papers dwell on conceptual and organizational issues surrounding cartels and contain little of interest on price or welfare impacts. Indeed the near absence of empirical detail in these reports and other studies by European scholars active in the interwar period provide a striking contrast with the industrial analyses emerging in the United States. The final report of the 1927 conference revealed a deep split between those participants who believed that cartels harmed national economies and international trade and those who believed that cartels stabilized prices, investment, and employment. Perhaps to rectify these ambiguities, the League later sponsored cartel studies with more empirical content (Benni et al. 1930, Oualid 1938).

#### 2 – “Practices” plural necessarily refers to more than naked price-fixing

Wiktionary 17 (Wiktionary, the free dictionary, “practices,” last updated 4-24-201, https://simple.wiktionary.org/wiki/practices#:~:text=Singular,one%20(kind%20of)%20practice.)

practices

Pronunciation

Audio (US)

MENU0:00

(file)

Noun

Singular

practice

Plural

practices

The plural form of practice; more than one (kind of) practice.

#### Those necessarily include rule-of-reason cases with enormously complex procedural and factual burdens

Diamond 6 (S. Lynn Diamond, JD Brooklyn Law School, BA Cornell University, “Empagran, the FTAIA and Extraterritorial Effects: Guidance to Courts Facing Questions of Antitrust Jurisdiction Still Lacking,” Brooklyn Journal of International Law, 31(3), 2006, <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1267&context=bjil>)

Given the lack of unanimity on the interpretation of the FTAIA, three policy arguments have dominated the debate: (1) deterrence, (2) burden on the courts, and (3) the impact on development of antitrust regimes in countries that either have no antitrust laws or have underdeveloped systems.

Deterrence has been the most hotly debated of these arguments, with advocates on each side of the issue claiming it supports their position. On one side is the view that opening U.S. courtroom doors to a potential flood of additional lawsuits will have an enormously detrimental effect on deterrence.114 The U.S. government’s amnesty program reduces the punishment for the first cartel member to come forward with information about a cartel’s activities; the argument is that companies, when considering taking advantage of the amnesty program, assess their financial exposure to other governmental and private actions flowing from the criminal admission.115 But if their civil liabilities are almost certain to be magnified because of an increase in the pool of potential (non-U.S.) plaintiffs, or if that risk, at minimum, makes it difficult even to estimate the potential damages, potential whistle-blowers may decline to come forward, and detection of the cartel’s illegal activities will be hampered.116 The U.S. Department of Justice submitted an amicus brief arguing that the Court of Appeals’ interpretation of the FTAIA would “substantially interfere” with the government’s enforcement of the antitrust laws.117 In fact, it said, “the theoretical possibility of additional deterrence . . . would come only at the expense of weakening the ability of the United States government to discover the wrongdoing in the first place.”118 Governments of a number of other countries with developed antitrust regimes filed briefs taking the same position.119

On the other side is the view that the threat of treble damages exerts a powerful deterrent effect on potential antitrust violators, from which American consumers benefit. This view was articulated in the majority opinions in Pfizer v. Government of India120 and Kruman v. Christie’s Int’l, 121 and in Judge Patrick Higginbotham’s widely cited dissent in Den Norske v. HeereMac.122 The D.C. Circuit in Empagran found the deterrence argument to be “most compelling”123 in deciding that it should take the “less restrictive view” of the FTAIA, citing Judge Higginbotham’s opinion for the proposition that “a global price-fixing scheme could sustain monopoly prices in the United States even in the face of domestic liability, since the profits from abroad would subsidize the U.S. operations.”124

Another policy concern is the potential impact on U.S. courts if the FTAIA provided wider access to foreign plaintiffs. Observers predicted that already burdened courts would be forced to deal with extremely difficult cases involving complex procedural issues and factual inquiries.125 The Sherman Act covers not only price-fixing, the adjudication of which is fairly straightforward, but also other more complex and subjective antitrust issues.126 If the FTAIA did not preclude jurisdiction over foreign plaintiffs whose antitrust claims were independent of U.S. effect, plaintiffs would be able to bring claims on any antitrust basis.127

**[FOOTNOTES]**

125. Den Norske, 241 F.3d at 431 (“Any reading of the FTAIA authorizing jurisdiction” in the case “would open U.S. courts to global claims on a scale never intended by Congress.”). The issue was raised in oral argument before the Supreme Court in Empagran. Stephen M. Shapiro, attorney for petitioners-defendants, stated:

[C]onsider global plaintiffs from 192 countries coming to the United States and asking a single district court judge to decide how much they’ve been overcharged, how much competition there was locally, what trade barriers there were that might have prevented competition, calculate the damages for every man, woman, and child on the face of the Earth that perhaps . . . has an antitrust claim.

Transcript of Oral Argument at \*11, F. Hoffman-La Roche, Ltd. v. Empagran S.A. (Empagran I), 542 U.S. 155 (2004) (No. 03-724). When a member of the court commented, “I suppose that’s the penalty for engaging in a worldwide conspiracy,” id. at \*11–12, Shapiro answered, “But that penalty is imposed on our district court judges. They would . . . be forced to untangle these incredibly different procedural problems . . . . U.S. courts are not world courts equipped to do this.” Id. at \*12. The U.S. government’s amicus curiae brief argued the same point, noting that for plaintiffs who would be allowed to sue under the D.C. Circuit’s holding, the statutory inquiry would turn on claims and persons not before the court. “The court of appeals’ decision thus would thrust upon federal courts the potential for burdensome and protracted satellite litigation that is far removed from the claim before the court.” Brief for the United States as Amicus Curiae Supporting Petitioners at 23, F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724).

126. Transcript of Oral Argument at \*17–18, Empagran I, 542 U.S. 155 (No. 03-724). Attorney General R. Hewitt Pate argued,

[T]o pursue this path would embroil the district courts around the country in all forms of satellite litigation, and it’s very important to recognize that this is not a test that would apply only to a notorious worldwide conspiracy, such as was at issue here, but would apply to rule of reason cases, joint venture cases, could apply even to Section 2 cases under the Sherman Act any time a plaintiff was able to allege that some other plaintiff somewhere suffered from a U.S. effect that was related to that conduct . . . . So in our judgment, the Court should pay attention to the practical realities of enforcement.

Id.

127. Id

#### Grammar outweighs and turns any standards they make up for why they shouldn’t have to defend their plan text – it’s the only stable locus of all meaning, prerequisite to limits and ground – any AFF ballot incentivizes stringing random words together so the 2AC can re-clarify to shift out of offense

#### Independent real-world education DA – it’s an important teachable moment

Chun 12 (Janean Chun, Huffington Post, “Kyle Wiens Of iFixit Won't Hire The Grammatically Challenged,” 10-10-2012, http://www.huffingtonpost.com/2012/10/03/kyle-wiens-ifixit-grammar\_n\_1937902.html)

If you confirm an interview with Kyle Wiens with a note that says, "See you their," you'll never be hired at iFixit. Wiens, CEO of the San Luis Obispo, Calif.-based online repair community, won't hire anyone who uses poor grammar or misspells words. In fact, he thinks people who haven't mastered basic grammar deserve to be passed over, even if they're otherwise perfect for the position. "The person who has decided to not care about grammar is not the kind of person I want to work with," Wiens said. "I understand missing a comma, but if you use 'to,' 'too' and 'two' incorrectly, it shows me you have no idea what you're talking about. There's a very big difference between a typo and something that makes it clear you're fundamentally incompetent." Wiens requires the hundreds of job applicants who want to join iFixit's 50 employees to take a grammar test. The test offers "an insight into aspects of someone's personality," Wiens said. "We need a serious commitment to attention to detail. Our grammar test shows us the early warning signs that a person doesn't have the same values we have." Online repair manuals are iFixit's business, although Wiens uses grammar as a criterion even for jobs that aren't directly related to writing or publishing, including receptionist and sales positions. "Grammar is a critical baseline," he said. "It's probably even more important in sales or reception because you're dealing with so many people. It's important that we present a professional image and make sure all our communications with clients are held up to professional standards. It's hard to take someone seriously if he sends you an email that's written like a text message." Correct grammar is critical regardless of industry, according to Wiens. "Every company that is dealing with professional clients should have a modicum of professionalism in their communications," he said. Indeed, with communication via email, text messages and social media so pervasive, many employers seem to agree with Wiens about the importance of writing skills. After he blogged about his grammar fixation in the Harvard Business Review in July, Wiens said, he received a lot of feedback from employers and human relations personnel who wanted to use a grammar test. "There is pent-up demand for something like this," he said. In a survey by the Society for Human Resource Management and AARP, about half of the organizations indicated that English skills, including grammar and spelling, were lacking in younger workers. Forty-five percent reported increasing employee training programs and cross-training efforts to improve skills such as grammar. Wiens isn't the only employer taking a hard line against bad grammar. For years, Don Silver, who runs a Fort Lauderdale, Fla.-based marketing and crisis communications company, charged a 25-cent fine each time an employee misused the word "like," according to a recent Wall Street Journal article. Bryan A. Garner, president of Dallas legal writing consultants LawProse, also requires job applicants to pass a grammar test, even if that job is just to pack boxes.

### A2: L2NB

### AT: LTNB \*\*read as 1st link on the DA if they don’t say this on the CP

#### Price-fixing’s per se – those cases are quick and avoid clog – it’s everything else that links

Cavanagh 11 (Edward D. Cavanagh, Professor of Law, St. John’s University School of Law, “The FTAIA and Claims by Foreign Plaintiffs Under State Law,” Antitrust, 26(1), Fall 2011, https://lawprofessors.typepad.com/files/fall11-cavanaghc.pdf)

The application of state antitrust laws to foreign claims beyond the bounds set by the FTAIA and Empagran would likely introduce uncertainty and confusion in the law and frustrate the Congressional intent that the United States speak with one voice on the issue of American jurisdiction over foreign commerce. Similarly, sanctioning state regulation of foreign transactions would make it more difficult for American companies to assess the legality of the foreign conduct under American laws. In addition, allowing state laws to reach foreign claims that the FTAIA placed beyond the purview of the Sherman Act would create a fundamental conflict with the statutory goals set forth above.

Finally, if the states were given free rein to entertain matters involving foreign commerce that are beyond the bounds set by the FTAIA for federal antitrust law, the explicit purpose of Congress to accommodate the antitrust schemes of other nations would be hopelessly compromised. The Court in Empagran concluded that, in Sherman Act cases involving international transactions, any attempt to analyze comity concerns on a case-by-case basis would be too complicated to prove workable. The Empagran I Court explained:

Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing, price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more nature of that enterprise means lengthier proceedings, appeals and more proceedings—to the point where procedural costs and delays could themselves threaten interference with a foreign nation’s ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damages liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty programs). How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously? 47

The complexities identified by the Supreme Court in Empagran involve potential conflicts between only the Sherman Act and foreign law. Those complexities would be multiplied significantly if courts were directed instead to analyze potential conflicts between foreign law and laws of perhaps 30 or 40 states. Evaluation of state statutes on a case-by-case basis would undermine the stated goals of Empagran I to promote comity. Under these circumstances, assertion of state authority over foreign conduct must be preempted. Otherwise, state law would stand as an obstacle to achieving the goals of the FTAIA.

### Their Ev that says price fixing is key

#### Their metals and minerals card is worded generally – BUT other studies demonstrate it’s overwhelmingly price-fixing

Kooroshy 14 (Jaakko Kooroshy, former Research Fellow in the Energy, Environment and Resources Department at Chatham House; Felix Preston, Senior Research Fellow in the Energy, Environment and Resources Department a Chatham House; and Siân Bradley, Research Associate in the Energy, Environment and Resources Department at Chatham House; “Cartels and Competition in Minerals Markets: Challenges for Global Governance,” Chatham House Research Paper, December 2014, https://www.chathamhouse.org/sites/default/files/field/field\_document/20141219CartelsCompetitionMineralsMarketsKooroshyPrestonBradleyFinal.pdf)

Historically, prices for many metals, ores and concentrates were often fixed for specific periods, whether for a quarter or a year. Price levels were either set unilaterally by producers or determined through bargaining among key players. The negotiated price then served as a benchmark for price formation in the rest of the market. Over time, spot pricing – where the price for an individual delivery contract is negotiated ‘on the spot’ between a buyer and a seller – has become increasingly common.

#### Their ag cartels card is only about price-fixing

ETC 13, \*ETC, Action Group on Erosion, Technology and Concentration, staff and board members come from a variety of backgrounds, including community and regional planning, ecology and evolutionary biology, and political science; (September 2013, “Putting the Cartel before the Horse ...and Farm, Seeds, Soil, Peasants, etc.”, https://www.etcgroup.org/sites/www.etcgroup.org/files/CartelBeforeHorse11Sep2013.pdf)

Introduction: 3 Messages

ETC Group has been monitoring the power and global reach of agro-industrial corporations for several decades – including the increasingly consolidated control of agricultural inputs for the industrial food chain: proprietary seeds and livestock genetics, chemical pesticides and fertilizers and animal pharmaceuticals. Collectively, these inputs are the chemical and biological engines that drive industrial agriculture.

This update documents the continuing concentration (surprise, surprise), but it also brings us to three conclusions important to both peasant producers and policymakers…

1. Cartels are commonplace. Regulators have lost sight of the well-accepted economic principle that the market is neither free nor healthy whenever 4 companies control more than 50% of sales in any commercial sector. In this report, we show that the 4 firms / 50% line in the sand has been substantially surpassed by all but the complex fertilizer sector. Four firms control 58.2% of seeds; 61.9% of agrochemicals; 24.3% of fertilizers; 53.4% of animal pharmaceuticals; and, in livestock genetics, 97% of poultry and two-thirds of swine and cattle research. More disturbingly, the oligopoly paradigm has moved beyond individual sectors to the entire food system: the same six multinationals control 75% of all private sector plant breeding research; 60% of the commercial seed market and 76% of global agrochemical sales.1 Some also have links to animal pharmaceuticals. This creates a vulnerability in the world food system that we have not seen since the founding of the UN Food and Agriculture Organization. It’s time to dust off national competition / anti-combines policies and to consider international measures to defend global food security.

2. The “invisible hold” of the market is growing. For all the talk of the invisible hand of the free market, the market is evermore opaque and far from “free.” As the concentration grows, companies are more guarded with their information. Further, the investment companies that analyze markets have also become more concentrated and more proprietary (and their information is more expensive). As the “invisible hold” tightens, it is harder and harder for governments – and more so, peasants – to understand the level of food system control exercised by a handful of multinational enterprises. As a result, ETC’s data – in order to be accurate – is dependent upon 2011 figures. Be assured that corporate concentration in these sectors is not receding. Agribusiness must be legally obliged to provide full and timely data on sales and market share.

3. Climate research shows that we don’t know (that) we don’t know our food system: One positive outcome since our last update is that society in general – and governments in particular – are more aware of the threat posed by climate change to global food security. There is now a popular mantra (but not much movement) emphasizing the central importance of smallholder producers in meeting global food requirements in the decades ahead. We couldn’t agree more. To help policymakers move from mantra to marching orders, this Communiqué is accompanied by a poster contrasting the capacity of the Industrial Food Chain and the Peasant Food Web to address climate chaos. The poster raises 20 genuine questions. It is a work-in-progress. There may be more than one answer to the questions, but the data provides a basis for a fundamental change of mind and shift in policy direction. For some of the reasons cited already, the data policymakers need to make decisions are not always available (or accurate). As the United Nations Framework Convention on Climate Change prepares to receive the fifth assessment report of the Intergovernmental Panel on Climate Change over the coming months, we hope this report and accompanying poster will encourage a much needed constructive debate and complementary research on all of the issues we are raising.

Over the past half-century, the corporations that dominate the industrial food system have wrested control of the agricultural R&D agenda while concentrating power and influencing trade, aid and agricultural policies to fuel their own growth. There was cautious hope in the United States that a new era was dawning when, in 2009 – the first year of President Obama’s first term – the US Department of Agriculture and the Antitrust Division of the Department of Justice (DOJ) announced a joint investigation into anticompetitive practices in agriculture. The news that Monsanto specifically had been required to turn over internal documents related to seed prices raised the level of optimism. But when the DOJ dropped the Monsanto investigation almost 3 years later without explanation, it was clear that antitrust fervour had fizzled, despite the breathless claims2 (which happen to be true) that anticompetitive practices in agriculture pose a threat to public health and security.

#### Bunkanwanicha is based on a database only about price-fixing even though it discusses collusion in general terms

Bunkanwanicha 21, \*Pramuan Bunkanwanicha is a full Professor of Finance at ESCP Europe - Paris Campus, where he teaches Corporate Finance, Emerging Markets Finance, and International Finance. He received a Doctorate in Economics from the Université Paris 1 Panthéon-Sorbonne in 2006 with an Habilitation in Management Sciences from the Université Paris - Dauphine in 2013. He also holds the degrees of MBA from AIT and B.Eng. from King Mongkut’s University of Technology North Bangkok. Prior to joining ESCP Europe, he was a visiting scholar at Columbia Business School and Yale University. He was also a visiting professor at Boston College and Hitotsubashi University. He is "Dean of Research"; (2021, “Good Faith Competition as a Natural Mechanism for Sustainable Economic Growth”, https://academ.escpeurope.eu/pub/IP%202021-31-EN.pdf)

Introduction

Microeconomic theory defines the market as perfect competition when firms provide goods at a price that equals their marginal cost. Some common characteristics of a perfectly competitive market include homogenous products, all buyers and sellers as price takers, there is complete information, and no entry and exit barriers. Under the assumption of prices equal marginal costs, firms would have no or little incentive to innovate.

It is reasonable to expect that most industries are characterized by some degree of heterogeneity and product differentiation. In this situation, the competition encourages profit-maximizing firms to innovate to achieve abnormal returns.

Rooted in management literature known as the resource-based view of the firm, Barney (1991) argues that sustainable competitive advantage derives from the resources and capabilities a firm controls that are valuable, rare, imperfectly imitable, and not substitutable. It is arguable that the firm's sustainable competitive advantage should be connected with the environment where the firm operates. Good faith competition incentivizes firms to build sustainable competitive advantages through R&D investments, product differentiation, advertising, and capital- and cost-efficiencies. Firms need to invest in tangible and intangible resources to create competitive advantages and generate abnormal returns (returns on equity higher than the cost of equity). Firms also need to continue investing in maintaining those advantages over time to create long-term value.

Kline and Rosenberg (2010) define the process of innovation as a series of changes that affect not only hardware but also production, markets, and organizations. In fair competition markets, a firm's search for creating competitive advantages provides a continuous investment process and stimulates innovation, providing economic growth, employment, and welfare enhancement (Baumol and Strom 2007, OECD 2007, Daniels 1996).

Sustainable economic growth has important implications for society. In the long run, economic growth is mainly explained by technological progress. Sustained economic growth has an amplified effect on per capita income, and it is an effective mechanism to reduce poverty rates (Barro and Sala-i-Martin 2004, Sala-i-Martin 2006, Dollar et al. 2013). United Nations' 2030 Agenda for Sustainable Development1 includes eradicating poverty as an indispensable requirement for sustainable development. In fair markets, firms competing for competitive advantages take a crucial role, bringing the power of innovation that generates economic growth, resulting in an improved standard of living for the wider society. However, some firms may have incentives to collude to obtain extra-profits, harming consumers and, at the same time, negatively affecting the power of innovation. Regulators have to ensure the fair functioning of markets.

II. Advantages of good faith competition

The positive effect on society of firms' rivalry is based on three central ideas. The first one is that firms pursue a profit maximization strategy and expect to achieve abnormal returns. The second one is that industries have some degree of heterogeneity and product differentiation. Lastly, firms compete in fair markets. In this scenario, firms pursuing abnormal returns will make investments in order to develop competitive advantages. Investment in R&D is one of the most important activities driving competitive advantage, and firms in competitive industries enter into innovation races to differentiate their products. Innovation affects long-term economic growth through technological progress. The European Central Bank supports innovation as an essential driver of economic progress that benefits consumers, businesses, and the economy as a whole.

Fair market competition is one of the pillars for obtaining positive effects from rivalry. National and supranational organizations acknowledge the benefits of good faith competition. The Autorité de la concurrence, the competition regulator in France, argues that competition forces companies to be innovative and to stimulate growth and jobs. The European Union states that having firms competing fairly in the market benefits society. Consumers receive higher quality products at better prices, and competition incentivizes firms to innovate to differentiate their products and make firms more competitive in global markets.

In fair markets, the search for competitive advantages stimulates innovation and strengthens long-term economic growth. The Presidency Report to the Council of the EU (September 20th, 2019) on developing long-term strategies of sustainable growth identifies Research and Innovation (R&I) as a critical driver in response to the main challenges of the European economic growth model. Economic growth does not need to be explosive but recurrent over the long term. An example of the positive effects of long-term economic growth on income per capita is the U.S. economy. The US GPD per capita grew at a yearly rate of 1.8% between 1870 and 2000, resulting in an increase of 10 times, from $3,340 to $33,330 measured in 1996 dollars. However, reducing the yearly growth rate to 0.8%, the per capita rent in 2000 would have been $9,450, only 2.8 times the value of 1870, and the U.S. would be ranked in 45th position instead of 2nd out of 150 countries (Barro and Sala i Martin 2004). Arguably, designing good faith competition markets is a natural mechanism to promote sustainable economic growth.

Fair competition stimulates innovation, which is the main contributor to sustainable economic well-being.

III. Market failures and the need for regulation to avoid firms' misconduct

Collusion is a market failure that occurs when firms in a market coordinate, restricting competition and negatively affecting prices, outputs, and innovation. Public institutions are making a great effort in detecting firms' collusion practices that harm competition. Research on cartel overcharge shows a significant increase in price attributable to collusion (Connor 2010; Smuda 2014; Boyer and Kotchoni 2015). Among other adverse effects, collusion may provoke an extraction of consumers' welfare in favor of the cartel firms, reducing firms' incentives to invest in innovation. It is important to contextualize the relevance of collusion agreements. Private International Cartels (PIC) database, developed by Professor John M. Connor, contains detailed information for price-fixing cartels detected between 1990 and 2017. Relative to the GDP, cartels operating in Europe are triple those operating in North America, while the affected sales' size is equal between both markets, with affected sales' totaling about $900 billion, of which global cartels account for 37%.

One clear example of market manipulation is the truck cartel. In July 2016, the European Commission ("E.C.") imposed a record fine of €3 billion to MAN, Volvo/Renault, Daimler, Iveco, and DAF for continuing collusion in the medium and heavy truck market. Over 14 years, the firms colluded on pricing, the introduction of new emission technologies, and passing on compliance costs with stricter emission rules. Scania was part of the cartel practices but did not accept the fine and initiated a separate legal proceeding to defend itself from the accusations. Scania was eventually declared guilty by the E.C. and received a fine of €880m2.

One essential piece to improving good faith competition is an efficient competition law that avoids firms' misconduct. Antitrust is considered as one of the most important public policies that has aimed at protecting a public good as well as protecting consumers from predatory business practices: good faith competition. There are substitute arguments on the necessity of governments' intervention. The theory of "public interest" is based on the assumption that government can solve inefficiencies caused by monopolistic conduct and externalities through intervention. The second stream of thought states that competition and private enforcement mitigate market failures within strong legal systems and well functioning courts (Coase 1960). Shleifer (2005) highlights that the enforcement environment determines the optimal intervention system (public regulation or court-based system).

In antitrust cases, victims can initiate an action from scratch (stand-alone) or after the competition body adopts an infringement decision (follow-on). Claimants initiating a standalone action have to prove the infringement, while in follow-on actions, the claimants benefit from the antitrust resolutions. Stand-alone damage actions have high barriers for victims due to the difficulties obtaining evidence of the infringement conduct. These actions are highly costly and risky. Therefore, it may not achieve the deterrence function for colluding firms.

Private enforcement is the necessary complement for public enforcement to have efficient competition law. However, a study commissioned by the EU in 2004 identified actions for damages against antitrust infringement were totally undeveloped. In 2014, the EU adopted antitrust actions for damages to eliminate obstacles to compensation for antitrust victims and better define the relationship between public and private enforcement. The Directive 2014/104/EU facilitates private enforcement through follow-on actions for damages on European Commission or national competition bodies' resolutions.

Among other changes, the Directive establishes that the competition regulators' final decision is binding before courts. It also states that there is a presumption that cartels cause harm3 , and cartel victims have to prove in national courts the amount of loss they suffered from an infringement. The Directive establishes a time-barred period of five years to bring cases to courts since the infringement has ceased, so victims will have had sufficient time to bring an action. Before the Directive enaction, limitation periods differed considerably among member states, and the starting period cannot be precisely identified.

While this new regulation facilitates victims' actions and incentivizes private enforcement, it is still complex in time and cost. The main difficulties that claimants face are related to proving and quantifying this misconduct's effects on their specific situation. The quantification of the economic effects usually requires a large sample of data and a high level of expertise to deal with it properly. It is difficult to prove the economic effects of the misconduct with single-case data.

The limitations associated with single enforcements have generated an opportunity for funds who are willing to invest in damage claims. Currently, litigation funds provide complete financing for the process under a profit-sharing structure, and even some investors are directly acquiring such claims4 .

In December 2020, the European Union adopted the Directive 2020/1828 on representative actions to protect consumers' collective interests. It is one additional step in the regulation process to protect consumers' interests against infringement actions.

The new regulation, jointly with the interest of funds to support these claims, enhances private enforcement in Europe, and it is an important element in promoting the good faith competition disincentivizing firms to collude.

IV. Conclusion

Within perfect competition, profits are zero at the maximum, and firms have little or no incentives to innovate because they cannot create sustainable competitive advantages. However, most industries have some degree of heterogeneity and differentiation. In product-differentiation markets and under good faith competition, profit-maximization firms have incentives to obtain abnormal returns through value-creating strategies that competitors cannot replicate. This search for competitive advantage creates a virtuous cycle of innovation, which is the pillar for economic growth, employment, and welfare enhancement.

Poverty reduction is one of the main goals of governments and multilateral organizations. Sustained economic growth is a powerful mechanism to reduce poverty providing new employment opportunities and making education more accessible to the wider population. It also incentivizes entrepreneurship. All these factors improve competitiveness, which results in more economic growth.

Markets have to operate in good faith to achieve the advantages of innovation. Governments have to ensure the fair-functioning of the markets. However, firms may try to extract consumers' welfare through anti-competitive agreements. Cartels are situations in which firms decide to cooperate and not compete, thereby injuring customers by rising prices, restricting production, or reducing their investments in R&D. These anti-competitive agreements reduce innovation and negatively affect economic growth.

Competition law plays an essential role in disincentivizing firms to collude. The interaction of antitrust regulation and private enforcement is a powerful instrument in deterring future antitrust violations and supporting good faith competition.

Sustainable growth is one dimension of sustainable development. The evaluation of sustainable development requires the inclusion of other relevant factors in the equation, such as reducing carbon emissions and global warming, reducing « with-in » countries' inequality, and ensuring equal opportunities for all.

There is an open discussion on the correct balance between the three dimensions of sustainable development- economic, environmental, and social. One example of the adequacy of the sustainability indicators is the recent research developed by Einsenmenger et al. (2020) that criticizes the overweight of economic growth versus ecological integrity in the SDGs of the U.N.'s 2030 Agenda for Sustainable Development. Some economic models offer a new approach for including sustainability factors in the equation. The so-called Doughnut Economy (Raworth 2017) includes planetary and social as upper and lower boundaries for economic growth. The planetary boundaries assure that economic growth does not put too much pressure on the planet's health and includes, among other concepts, climate change, ocean acidification, and the loss of biological diversity. The social boundaries include life's essentials, from food to healthcare and education. Lastly, there is a sweet spot area for economic growth within those two boundaries, environmentally friendly and socially.

In sum, there are multiple potential trade-offs between economic growth and social and environmental impacts, and each generation will have to decide what is the right balance. But whatever the chosen balance is, we argue that good faith competition is still a minimum requirement to promote long-term sustainable growth that helps reduce poverty and improve people's standard of living and well-being around the world.

#### Their MENA card is only about price-fixing

World Bank 19, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (October 2019, “Reaching New Heights: Promoting Fair Competition in the Middle East and North Africa”, https://thedocs.worldbank.org/en/doc/660811570642119982-0280022019/original/ENMEMReachingNewHeightsOCT19.pdf)

1A. Making MENA Markets Competitive10

Economies in the Middle East and North Africa (MENA) have two faces. One is the concentrated and sclerotic formal sector, often dominated by state-owned enterprises (SOEs) and politically connected private companies. That economy keeps out competitors, misallocates resources, and generates excessive profits for participants. The official economy coexists with an informal economy in which most of the population toils in relatively small operations at low wages and with few social protections.11

A powerful way to invigorate MENA economies would be to inject more competition. That would create a more efficient official economy and reduce informality.

Economists suggest that competition is a powerful tool for ensuring that resources are used in the best way that is technologically feasible—minimizing costs (and therefore prices) and helping ensure that goods and services are provided in the amount and variety consumers desire. As firms compete against each other to make a profit, they have an incentive to invest in research and development to improve the production of existing goods and services and to introduce new ones12. More competition also leads to higher growth in output per worker (productivity) and therefore is a key ingredient in long-run sustainable development13.

Market entry by new firms and the exit of inefficient companies are potent sources of competition. But in the MENA region there are often sizeable barriers that prevent new firms from entering existing markets and protections for inefficient ones. Ease of entry and exit is what determines contestability, and it is the result of the interplay between the available production technology and the regulatory framework in place.

Moreover, when state-owned enterprises (SOEs) are present, it is fundamental that they do not benefit from any type of advantage over their private competitors—whether by obtaining specific inputs (physical or financial) or by receiving easier market access. In brief, the institutional framework must be geared towards the principle of competitive neutrality—that all enterprises face the same set of rules whether they are public or private and that government involvement or ownership of a firm confers no special advantage.

Competition and contestability are essential to creating economic opportunity, which allows workers to help shape their destiny through personal initiative. Competition also increases the purchasing power of incomes, because firms find it harder to set prices above cost. Moreover, these effects are reinforced through cost-reducing technological progress and firm turnover, which allows the most productive firms to survive14. The overall effect is that competition can be an antidote to inequality15. As Eleanor Fox put it: “Markets empower people to help themselves. Markets and access to markets stand side by side with food, health, shelter, education, environment, infrastructure, and institutions as critical tools to combat the world’s greatest economic deprivations”16. But, as the father of modern economics, Adam Smith, recognized in The Wealth of Nations, a well-functioning competitive process cannot be taken for granted17.

That means countries must undertake policies that foster competition. Those policies include an effective antitrust law that keeps in check restrictive practices of the private sector and of government interventions to preserve a level playing field—which means that any regulation that distorts markets in pursuit of the general interest18 should not create any unnecessary barriers. But it also means that when state owned enterprises (SOEs) are present or subsidy programs are involved, competitive neutrality should be ensured for all market participants (see Figure II.1).

In 1890, the United States recognized that legislation was needed to preserve and nurture competitive forces by passing the Sherman Act. The law was a reaction to the dangerous concentration of economic and political power in large companies and trusts that characterized the so-called Gilded Age19. Since then, almost every country has adopted some form of competition law, with a substantial acceleration during the past few decades20.

In the MENA region, four countries lack antitrust legislation—Iran, Lebanon, Libya and West Bank and Gaza–while Bahrain and Iraq have no competition authority to enforce their law (see Table II.1).

Extensive information exists about the competition frameworks of seven MENA countries—Algeria, Egypt, Jordan, Kuwait, Morocco, Oman, and Tunisia21. The evidence shows that they lack key elements of effective regimes, placing substantial costs on their economies. In addition, weak enforcement is a major problem. Its importance is demonstrated by the increase in the value of the divested assets that followed successes in breaking up market concentration.

The breakup of Standard Oil in the United States is a vivid example. When the U.S. government sued Standard Oil in 1906, the company controlled more than 90 percent of U.S. oil refining. After the courts broke Standard Oil into 34 entities in 1911, their combined stock value increased so rapidly that a few years later it was five times higher22. Such an experience is relevant for the MENA countries, where many economic sectors are dominated by few companies even though there are no technological reasons for such a level of market concentration. A striking example is exclusive import licensing for goods for which countries are not self-sufficient (see Box II.1).

Moreover, strong antitrust action can unleash substantial technological advancement, as suggested by two landmark U.S. cases—against IBM and Microsoft 23. The IBM case effectively opened the software industry by forcing IBM to stop selling computers and software as a package.24 The Microsoft case in 2001 likely kept the Seattle-based giant from trying to monopolize the nascent new economy by preemptively crushing companies such as Amazon, Facebook and Google (as it did to the competing web-browser Netscape, which sparked the antitrust action).

Lack of contestability in MENA is arguably a main culprit in the slow pace of technology adoption that has historically characterized the region, which significantly hurt its growth performance. Without substantial reforms to encourage competition, MENA countries risk missing the opportunities offered by digitization and the so-called Fourth Industrial Revolution (See Box II.2).

#### Their LAC card is based on the same price-fixing database as Bunkanwanicha

World Bank 21, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (2021, “FIXING MARKETS, NOT PRICES”, https://openknowledge.worldbank.org/bitstream/handle/10986/35985/Fixing-Markets-Not-Prices-Policy-Options-to-Tackle-Economic-Cartels-in-Latin-America-and-the-Caribbean.pdf?sequence=1&isAllowed=y)

Cartels in LAC have affected hundreds of markets and the large majority went undetected22

Over the last 4 decades, more than 300 economic cartels have been revealed - mostly in markets that provide key inputs to firms or essential goods to families. Between 1980 and 2020, in over 300 incidences, firms supplying markets as critical as milk, sugar, poultry, transport, energy and medicines chose to jointly fix higher prices, restrict total production, divide or share markets, rig bids, or obstruct the entry of new competitors – that is, to create economic cartels. Instead of vying for consumers with better deals and higher quality, more than 2,500 firms and 153 trade associations engaged in these agreements in 19 different sectors.

Cartels affect important markets with large market players. Previous evidence of international cartels from 1990 to 2007 suggests that between USD 150 and 200 billion worth of sales in LAC were affected by discovered cartels, and consumers in this region paid overcharges of at least USD 35 billion from 1990 to 2007 (Ivaldi, Julien, Rey, Seabright, & Tirole, 2003).23 Based on newly available information, 89 of the firms that formed cartels in LAC had total revenues of USD 81 billion in 2019, equivalent to what would constitute the 8th largest GDP in LAC.24

The cartel activity revealed so far affects a significant share of the economy. Evidence based on a selected number of cartels in developing economies between 1995 and 2013 shows that affected sales of cartel members related to GDP at a given point in time reaches up to 6.4 percent. As much as 3.4-8.4 percent of imports in developing countries may be affected by cartel agreements (Levenstein, Suslow, & Oswald, 2003). New evidence for LAC now reveals that the Competition Watchdog in El Salvador, even with limited cartel enforcement trajectory, has detected 7 cartels that affected sales in the amount to 0.4 to 0.8 percent of GDP between 2006 and 2011. This does not even take into account that some of the cartel agreements occurred at the upstream level and may have also affected the downstream industries (such as in the case of wheat and bread).

The true pervasiveness of economic cartel activity is at least tenfold. While over 300 cartels have been detected and dismantled by respective authorities in LAC, studies from advanced economies show that even mature competition authorities only detect between 10 and 20 percent of cartel activity (See Box 1). Given the incipient status or even entire lack of cartel enforcement in most parts of LAC, the extent to which consumers and businesses are affected is likely manifold. For example, of at least 84 large global cartels that were shown to fix prices in LAC at some point between 1990 and 2007, only four were investigated by authorities in this region (Connor, 2008).

Detection rates of cartel activity in LAC may be particularly low in some sectors, such as the financial sector. In the European Union (EU), 28 percent of cases against anti-competitive practices between 2013 and 2017 targeted the financial sector and revealed several high-profile price-fixing agreements in markets such as financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR), Japanese Yen LIBOR, Swiss Franc IRDs and future Swiss Franc LIBOR. However, only one of seven mature competition authorities in LAC have opened antitrust investigations in the banking sector, and only one of them related to cartel activity: Mexico detected and fined agreements to manipulate sovereign bond prices (WBG, 2020). In Colombia, 2 banking associations, 14 banks and 2 payment systems network providers entered into commitments with the competition authority to end an investigation regarding an agreement among banks to fix interchange fees.2

Cartels hurt the poor, stifle growth and limit policy effectiveness

Cartels are particularly harmful for economic development objectives: By eliminating competition among firms, they lose incentives to innovate, and charge higher prices. These consequences disproportionately and directly affect the poorest households. Cartels limit growth by affecting productivity and competitiveness. Finally, cartels undermine effectiveness of public policies. Benefits of trade liberalization do not materialize when firms collude across borders or agree to block imports. Governments can procure fewer public goods and services (medicine, public works, school supplies, etc.) when procurement processes are rigged. The following section will briefly discuss the existing evidence and new insights from the novel data on LAC.

Economic cartels affect the poor. Cartels disproportionally affect poor households because they are common in markets affecting products in the basic consumption basket. At least 21 percent of the cartels detected involved basic consumption products such as sugar, toilet paper, wheat, poultry, milk, and medicines.26 Global estimates suggest consumers pay on average 49 percent more when buying from cartels, and 80 percent more when cartels are stronger.27 In LAC, in 65 percent of cartels detected over the last decades with information available on prices charged, consumers experienced overcharges ranging between 5-25 percent and in at least 4 percent of the cases, consumers had to pay as much as twice for the products and services. A simple comparison of public expenditure efficiency from South Africa suggests that public resources spent on cartel enforcement would be 38 times more effective in tackling poverty than cash transfers, when considering that part of the cash transferred to eligible household is spent on overcharges for basic food items (Purfield, et al., 2016).

Collusive agreements lower economic growth prospects by depressing productivity growth and reducing competitiveness. First, agreements among competitors to limit competition affect productivity. The introduction of anti-cartel policy is related to higher labor productivity growth in industries affected by collusive behavior, which otherwise record a 20 to 30 p.p. lower labor productivity growth (than industries without cartels) (OECD, 2014). Evidence from a 40-year long cartel in the United States suggests that quantity-productivity declined by 22 percent (Bridgman, Qi, & Schmitz Jr, 2009). Systematically allowing for cartel activity can further curb total productivity growth across the economy (Petit, Kemp, & Van Sinderen, 2015). Second, cartels distort important markets in LAC’s value chains. 34 percent of collusive agreements detected occurred in the manufacturing sector (Figure 1). Another 15 percent of cartels affected wholesale and retail trade activities transportation activities, respectively.28 Within the manufacturing sector, cartels across LAC region are particularly frequent in the meat processing activity in Brazil, Chile, and Panama, and in the manufacturing of basic chemicals in Argentina, Brazil, Colombia, Panama, and Peru.29 Within the wholesale and retail trade sector, trade of pharmaceutical goods are also found in Brazil, Chile, Honduras and El Salvador. In the transport sector, Chile fined six shipping lines with USD 95 million for colluding in multiple tender processes for providing maritime transport services to manufacturers and consignees of various car brands imported to Chile beginning in 2000. Mexico sanctioned seven shipping lines for engaging in nine collusive agreements and segmenting the car transport market into different routes between 2009 and 2012. Some of the sanctioned firms were also investigated in Chile and Peru (WBG-USAID, 2018) .

Cartel agreements undermine the benefits of trade opening and liberalization. In the Pacific Alliance30 – the group of countries with the lowest trade barriers in the region – at least 67 cartels were detected in sectors generally considered tradable, and a third of those operated in the market for more than 5 years. Even though Colombia is an open market economy, sugar traders from the region were able to sell in Colombian markets only after a decade-long cartel agreement by domestic sugar mills was broken up in 2015: 12 mills had been explicitly coordinating to obstruct sugar imports.31 Import competition does not preclude the formation of cartels in tradable goods. Such agreements can operate at the regional or even global level: In Chile, Peru, and Colombia, three international firms jointly raised prices for toilet paper by up to 30 percent for over 10 years (Dinamo, 2015). In smaller LAC economies, where connectivity issues are central to economic growth, such as those of the Caribbean Community (CARICOM), cartels have also been uncovered, for example in shipping services.32

When cartels raise prices, the state can provide fewer public goods and services and cartels can even distort the market of government bonds. At least one in four cartels formed among firms participating in government procurement process. In such cases, taxpayers bear the burden of the overcharges. In Peru, between 2010 and 2012, 31 providers of hemodialysis services rigged the bids by abstaining from participating in public tenders called by one of the Peruvian public healthcare administrators with the objective of increasing reference prices in subsequent tenders. This led to overcharges in each tender of approximately over USD 10 million.33 Similarly in 2014, Peru sanctioned an engineer’s cartel that affected public-construction contracts worth USD50 million which had been designated for the expansion of the public highway network34 (Martinez Licetti & Goodwin, 2015). In Mexico, seven banks entered into at least 142 agreements to manipulate the price of the Mexican sovereign bond market between 2010 and 2013 by limiting sales and acquisitions of bonds with losses to the market of over USD 1.443 million.35 In Colombia, the government and ultimately the taxpayers incurred in losses of at least USD 11 million for the overcharges paid in the construction of a major highway (Ruta del Sol II), due to an anticompetitive agreement that favored a particular group of firms in the concession process.36

Recent developments in LAC also suggest that economic cartels undermine public trust in market economies. In 2016, 73 percent of the population in Chile considered collusion to be a reproachable conduct, even more reproachable than violations of labor laws.37 This sentiment was preceded by several years of successful breakups of cartels, and a historic confirmation by the Supreme Court of the decision to fine a group of poultry producers for having agreed to limit output. The protests in 2019 were partly motivated by discontent with the private sector (Freire, 2020) . As part of the government’s response in form of an “anti-abuse agenda”, the executive submitted four bills to Congress in March 2020 aiming at increased enforcement of the laws against white collar crimes, including cartels.

On the upside, consumers and businesses benefit from effective anti-cartel enforcement. For example, so-called leniency programs – which offer firms the possibility to come clean about their involvement in cartel conduct in exchange for immunity or reduction of financial penalties - (and as we will see later) render any agreement less stable, because any member of the cartel has incentives to break out and report the cartel. Thus, these programs shorten the duration of harmful cartels and can even reduce the level of anti-competitive overcharges by cartels.38 Miller (2009) finds empirical support for these effects: the leniency program in the United States increased the rate of cartel detection by 62 percent and reduced the rate of cartel formation by 59 percent. Yusupova (2013) also finds that the 2009 revision of the Russian leniency program was effective in reducing the size and duration of cartels. Choi & Hahn (2014) show that the leniency program in Korea shortened cartel duration. Leniency programs can also speed up the process of breaking up cartels. Brener (2009) demonstrates how leniency reduces the average sanctioning process by 1.5 years on average. In Europe, nearly 60 percent of detected cartels are discovered through leniency (Jaspers, 2020). Overall, leniency programs can have significant effects on competition intensity. Klein (2011) revises data from 23 OECD countries and finds that leniency policies were associated with a decrease in the industry-level price-cost margin of 3 to 5 percent.

However, many LAC countries do not have any tools to deter and prevent economic cartels. 28 percent of countries in the region do not have an operational competition legal framework. In only 5 out of 15 countries where the legal framework is in place, there are effective anti-cartel enforcement tools.

#### Even if they win a deficit the magnitude of the impact to it is empirically negligible – median overcharge for non-price-fixing is only 25% of the price-fixing cartels

Connor 14 (John M. Connor, Professor Emeritus at Purdue University, “PRICE-FIXING OVERCHARGES: REVISED 3rd EDITION,” February 2014, https://www.govinplace.org/content/John%20Connor\_Price-Fixing%20Overcharges.pdf)

The primary findings are: (1) the median average long-run overcharge for all types of cartels over all time periods is 23.0%; (2) the mean average is at least 49%; (3) overcharges reached their zenith in 1891-1945 and have trended downward ever since; (4) 6% of the cartel episodes are zero; (5) median overcharges of international-membership cartels are 38% higher than those of domestic cartels; (6) convicted cartels are on average 19% more effective at raising prices as unpunished cartels; (7) bid-rigging conduct displays 25% lower mark-ups than price-fixing cartels; (8) when cartels operate at peak effectiveness, price changes are 60% to 80% higher than the whole episode; and (9) laboratory and natural market data find that the Cartel Monopoly Index (CMI) varies from 11% to 95%. Historical penalty guidelines aimed at optimally deterring cartels are likely to be too low.

## 2NC – Case

## DE ADV

#### Democracy resilient

Wollack 16 ---- Kenneth, president of the National Democratic Institute, former co-editor of the Middle East Policy Survey, former senior fellow at UCLA’s School for Public Affairs, “How Resilient is Democracy?” This text is the transcript from an interview with Alexander Heffner, PBS – The Open Mind, 10/15, <http://www.thirteen.org/openmind/government/how-resilient-is-democracy/5553/>

Well I think we’re seeing a number of phenomena that take place. Um, first of all you have new democracies around the world, that are struggling to deliver for its people. New institutions, political institutions that for the first time have legitimacy among the people, but in order to succeed and sustain their democratic system, they have to deliver on quality of life issues for, for the entire population. And if those institutions don’t deliver in many of these new democracies that have emerged over the last forty years, uh, then you’re gonna see backsliding and people will either go to the streets or vote for a populist demagogue who promises to bring sort of instant solutions to their problems. And then in non-democratic countries, you have what is called authoritarian learning, and that is autocrats today that are smarter than they were before, uh, that are fearful of diffusion of political power, uh, fearful of losing power themselves. Um, and they are using uh, traditional means and new legal means in which to repress the population, prevent the emergence of civil society, and not to speak of opposition political parties. And then you have a situation that you see in a number of countries in the Middle East where you have a sectarian strife and conflict. Uh, but in all of these situations, what you find is democratic resilience. That people around the world basically want the same thing. They want to put food on their table, uh, they want to have jobs and shelter and they want a political voice. And that, those aspirations and those hopes, uh, and those desires as I said are universal, and if you look at public opinion polls around the world, uh, people do want to have democratic systems that allow them to participate in the political life of their country. And that is, we are in the optimism business, and we believe in people and I think that ultimately those efforts, um, will, will succeed. But they need a lot of support, they need backing, um, uh, in order for uh, some very brave and courageous people to, to move the democratic for—uh, process forward in some of the most unlikely places in the world.

### 2NC---AT: I/L---Cartels

#### The growth effects of cartels are insignificant

Petit 15 --- Lilian T.D. Petit, Economist at Authority for Consumers and Markets (ACM) and Erasmus School of Economics,

Erasmus University Rotterdam, et al, “CARTELS AND PRODUCTIVITY GROWTH: AN EMPIRICAL INVESTIGATION OF THE IMPACT OF CARTELS ON PRODUCTIVITY IN THE NETHERLANDS”, Journal of Competition Law & Economics, 11(2), 501–525, 28 May 2015, <https://academic.oup.com/jcle/article-abstract/11/2/501/872328?redirectedFrom=fulltext>

***TFP = total factor productivity growth***

Table 2 presents the average TFP growth in three different settings. First, the average TFP growth is presented for the cartel entry periods compared to the periods with no cartel entry. In years with cartel entry, the TFP growth is lower than years without cartel entry. This indicates that cartel entry has a negative effect on productivity growth. Second, the average TFP growth is presented for the cartel exit periods and the periods without cartel exit. Years with cartel exits show on average higher TFP growth rates; the exit of a cartel has a positive effect on the productivity growth. Finally, we examine the average TFP growth differences for periods where there is a cartel present and periods where no cartels are present. Years with cartel presence show on average higher TFP growth rates than no-cartel years. This is contrary to our expectations. The means of all three settings are, however, not significantly different from each other at a 5 percent level of significance.

VI. EMPIRICAL RESULTS

This section presents the results of our fixed effect panel estimation (see appendix 3 for the correlation matrix). In Table 3, regression (1) represents the baseline model where the TFP growth is explained by the technology gap, the growth of the frontier leader, the stock of human capital, the entry of cartels, the exit of cartels and the presence of cartels.69 We observe a significant positive effect of the technology gap. This is in line with our expectations. If an industry is further behind the frontier leader, it will experience higher growth rates. The growth of the TFP leader positively influences the TFP growth of the Netherlands industries. However, the variable is insignificant. Human capital enters positively but is insignificant as well. The cartel entry dummy (Dum cartel entry) indicates that the presence of at least one cartel entry negatively influences the TFP growth in an industry, yet its significance exceeds the 10-percent level. The cartel exit dummy (Dum cartel exit) enters positively; this indicates that cartel exit positively influences the TFP growth. Nevertheless, this variable is insignificant as well. Finally, cartel presence (Dum cartel presence) enters negatively and significant. This indicates that a cartel presence led to a 2 percent reduction of TFP growth.

Regression (2) makes a distinction between manufacturing industries and non-manufacturing industries as regards the technology gap and the growth of the frontier leader. Nicoletti and Scarpetta,70 find for instance a more rapid catch-up effect in servicing industries. These sectors were able to adjust faster. Bernard and Jones71 suggest that this might be due to the greater heterogeneity in the manufacturing industries, which consequently experience a lower catch up rate. Hence, we allow for different slopes between manufacturing and non- manufacturing industries. We observe a more rapid catch-up effect in manu- facturing industries than non-manufacturing industries. This contradicts both results of Nicoletti and Scarpetta'2 and those of Bernard and Jones/3 Conversely, the coefficient of the growth of the TFP leader is higher for non- manufacturing industries. We observe that the signs and magnitude of the cartel entry, exit and presence dummy remain unchanged.

Regression (3) adds a similar distinction regarding manufacturing and non- manufacturing industries, as introduced in Regression (2) presence dummies. Since the cartel entry and exit dummies were insignificant, we will not make a further distinction. It might be the case that due to the high risks and capital costs such as present in the manufacturing sectors, cartelization has other effects in these sectors than in non-manufacturing sectors/4 Hence, we allow for different TFP-efifects in the manufacturing and non-manufacturing sectors. The signs and magnitude of the technology gap and the growth of the frontier leader remain roughly unchanged as compared to Regression (2). The cartel entry and cartel and exit dummy remain insignificant. The magnitude of cartel presence is slightly higher in manufacturing industries than in non- manufacturing industries.

All equations included time dummies, these dummies are included to adopt time specific effects which occur in the entire economy. The time dummies do significandy affect the TFP growth in some years. Moreover, they significandy deviate from zero taken altogether. As a robustness check, we eliminate the time dummies in the regression. The overall significance of the coefficients remains unchanged, but in Regression (3) the cartel dummy (non- manufacturing) becomes insignificant. Yet, their magnitude (particularly cartel presence) diminishes.

As an extra robustness check the exit dates were defined alternatively. The coefficient of the cartel dummy (non-manufacturing) in Regression (3) becomes insignificant. Overall, we observe a negative effect of cartelization on the TFP growth. The coefficient of the cartel presence dummy varies between -0.02 and -0.03. The cartel entry and exit dummy have the correct signs, but both variables remain insignificant. We can tentatively state that the presence of at least one cartel resulted in an approximate 3 percent reduction of the TFP growth in the manufacturing industries, in the non-manufacturing indus- tries this is 2 percent. Once we translate those findings to the overall labor productivity growth, we can conclude that cartelization curbed the labor prod- uctivity growth via the TFP growth. Since the contribution of the TFP growth to the labor productivity growth is approximately factor 1, the cartelization effect directly influences the labor productivity growth with about 2 percent.

VII. CONCLUSION

Our goal in this paper is to assess the relationship between cartels and product- ivity growth. Vital competition is expected to generate more efficient and pro- ductive results than anticompetitive restrictions. This study is one of the first studies to examine a cartel register for the purpose of estimating productivity effects. Micro interventions are used to estimate the macro impact of cartels in the Netherlands. Today, there are only a few studies that examined the macro effects of cartels. These insights are highly important in order to legitimatize the existence of competition policy and more specific the prohibition of cartels.

With our unique cartel dataset, we estimate the effects of cartel formation, cartel termination and cartel presence on the TFP growth. We looked into 27 industries of the Netherlands economy in the period 1982-1998. Our research results suggest that cartel presence, such as registered in the cartel register, indeed restricts productivity growth. Therefore the detection of cartels and the conviction of their members is an important task of competition authorities. As expected, cartel formation points to a lower TFP growth rate and cartel termination points to a higher TFP growth rate. However, these two events show- insignificant effects.

With respect to further research, we recommend to enrich the cartel dataset. Particularly, the scope and affected turnover of agreements may be useful add- itional information. It is than possible to compile a cartel indicator that is more representative than the cartel dummy used in this study. Furthermore, the level of aggregation in this study is still rather high, particularly due to a lack of data on productivity'. It would be interesting to take a specific industry (or a limited number of industries) as a subject to scrutiny and gather firm specific data. Ideally, as Van der Wiel° argued, the cartel-productivity relationship should be studied with firm level data as well.

#### Small collusion is inevitable but the bigger --- and more threatening to the economy --- it gets, the more market push there is to self correct

**Crews & Young 19** --- Clyde Wayne Crews, vice president for policy and a senior fellow at the Competitive Enterprise Institute, He holds a Master of Business Administration from William and Mary, Ryan Young, Senior Fellow at the Competitive Enterprise Institute, M.A. in economics from George Mason University, “The Case against Antitrust Law”, Competitive Enterprise Institute, 04/16/2019, <https://cei.org/studies/the-case-against-antitrust-law/>

3: Collusion: Cartels, Price Fixing, and Market Division

Adam Smith famously observed that, “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”63 He was right. This is one reason why, historically, price fixing is by far the most common cause for antitrust lawsuits.64 This is usually done by means of formal and informal cartels and agreed-upon market divisions. But this does not mean such arrangements are effective; companies that collude tend to be less profitable than companies that do not.65

There are two problems with cartels, price fixing, market division, and other forms of collusion.

The first—a common one with antitrust issues—is where to draw the line. Every corporation in existence engages in some form of what could be considered collusion. A classic example is a law firm. When two or more lawyers join together in a law firm, they agree in advance to charge certain rates and not to compete with each other for clients. They set market divisions, say, with one attorney specializing in contract law and another in patent law. These are all examples of collusion, yet no antitrust regulator would file a case against such a firm. If collusive behavior is acceptable inside a single firm, why is identical behavior unacceptable between separate firms? No compelling argument for this legal and logical oddity exists.

The second problem with attempting to regulate collusion is that cartels do not last, at least without government help. Its members have strong incentives to defect and charge lower prices or increase output. Even if price fixing and other collusion were the result of deliberate anti-consumer mischief, we would be better off allowing markets, rather than regulators, to take their course. The instability of inefficient cartel arrangements serves as a built-in insurance policy for consumers.

Moreover, if cartel members stop competing on money prices, they can compete on other features such as quality, shorter wait times, warranties, or other add-ons. Consumer welfare depends on more than just money prices. The tendency to undermine agreements, and seek a bit of competitive advantage, renders inefficient cartel arrangements unstable and sets in motion their destruction— unless government enforces the cartel. The more inefficient a cartel becomes— prices are too high or some territories are underserved—the stronger the incentive for new competitors to enter the market.

A prominent example of collusion in U.S. history is the pre-deregulation airline industry.66 Before the Carter administration and the economist Alfred E. Kahn’s deregulatory efforts, airlines were unable to compete freely on interstate flights. The Civil Aeronautics Board (CAB) ran a cartel arrangement in all but name. If an airline wanted to add, say, a New York to Los Angeles flight, it first had to apply to the CAB. If the agency thought the route was already sufficiently served, it could deny the application. The CAB also set fares, so airlines were unable to compete on price. Instead, airlines competed on non-price features such as in-flight service and other perks, but air travel remained out of reach of many people’s budgets. When the CAB was abolished, prices went down and supply went up almost immediately. The cartel, just as economists predicted, was unsustainable without government regulation.

The Civil Aeronautics Board did not have jurisdiction over intrastate flights, and the vibrancy of those markets compared to the CAB-regulated interstate market was striking. Southwest Airlines began flying only inside the state of Texas. It found high demand for inexpensive, low-frills flights. Deregulation allowed Southwest to take this business model national, and it is now the fourth-largest airline in the United States.67 Airlines such as Pan American and Braniff were unable to keep up and went out of business. Surviving airlines had to cut costs to remain competitive, and new airlines such as JetBlue and Spirit emerged with their own takes on cost-cutting and unbundling of various amenities and services.68

Because cartels and other forms of collusion are inherently unstable, many such cases involve rent-seeking. The remedy for such cases is not antitrust enforcement. It is making rent-seeking more difficult, such as by reforming tax and regulatory codes to inoculate them against special interest lobbying.

#### Cartels are self-correcting

CCPF 21 --- Calvin Coolidge Presidential Foundation, Debate Brief, November 2021, https://coolidgefoundation.org/wp-content/uploads/2021/10/Antitrust-Brief-FINAL.pdf

Other antitrust proponents worries about “cartels,” which are agreements among businesses to sell their products at the same higher-than-normal price, thus giving customers no choice but to pay a high price if they wish to buy a good. But prices go up and down for many different reasons, so how does one know whether today’s price is a high cartel-driven price, versus a normal price at which multiple businesses happen to sell?

It is not even clear that cartels really exist in the marketplace. Any business that is part of an alleged cartel would have a strong incentive to be the first one to break out of the cartel and sell its product at a lower price, thus gaining market share. Ironically, the most obvious examples of real cartels are government-created cartels, such as the Organization of the Petroleum Exporting Countries (OPEC), which was created between the governments of 13 countries. 12 In reality, consumers do not need the government to worry about cartels in normal markets because cartels—if they even do exist—are unstable and self-correcting.

### DE Adv – Thumpers – 2NC

#### Competition enforcement is a drop in the bucket – even if you have cards the plan “helps growth,” it can’t offset losing 7% of overall growth

Smith 1-17 [Elliot Smith is a Markets Reporter for CNBC in London 1-17-2022 https://www.cnbc.com/2022/01/17/death-of-austerity-huge-elections-political-events-to-watch-in-emerging-markets.html]

The World Bank cautioned last week that as growth slows in 2022 and 2023 amid renewed threats from Covid variants and surging inflation, debt and income inequality, along with an unwinding of fiscal and monetary stimulus, emerging economies are particularly vulnerable.

“Rising inequality and security challenges are particularly harmful for developing countries,” World Bank President David Malpass said.

The D.C.-based institution projected that while all advanced economies will have achieved a full output recovery by 2023, emerging and developing economies will remain 4% below the pre-pandemic trend. Countries affected by conflict or fragile political institutions will be 7.5% lower, the report added.

#### COVID has created conditions for long-term inequality

World Bank 1-11 [World Bank, 1-11-2022 https://www.worldbank.org/en/news/feature/2022/01/11/developing-economies-face-risk-of-hard-landing-as-global-growth-slows]

But inequality spans more than income, particularly in EMDEs and low-income countries. Vaccine coverage remains highly uneven across the world. Troubled by procurement obstacles, just 8 percent of the population in low-income countries has received at least one dose—a rate that will result in only about one-third of the population receiving one vaccine dose by the end of 2023 at current rates. About 55 percent of the total population of EMDEs is vaccinated, compared with more than 75 percent in advanced economies.

Pandemic containment measures have severely disrupted children’s learning, intensifying educational inequality. Telecommuting and digital opportunities such as remote education have not been equally accessible to low-income households. Gender inequality has also increased and informal workers have suffered particularly large job and income losses.

Over the long term, within-country inequality could continue to rise, as countries face rising inflation—especially food price inflation—and pandemic-related disruptions to education.

## Resources Adv

### 2NC – Resource Wars !

#### No resource wars —

#### 1. countries are more likely to cooperate than go to war. Logically, if you need CRMs you’ll make trade agreements rather than go to war. That’s Meierding.

#### 2. No shocks---the market is resilient and self-corrects

Blagden & Porter 21, \*David, Senior Lecturer in International Security at the University of Exeter, \*\*Patrick, Professor of International Security and Strategy at the University of Birmingham. (2-21-2021, “Desert Shield of the Republic? A Realist Case for Abandoning the Middle East”, *Security Studies*, DOI: 10.1080/09636412.2021.1885727, pg. 26-27)

The hydrocarbon market itself is changing and becoming more resilient, meanwhile.80 Western economic exposure to oil shocks is reducing, thanks to increases in efficiency. These increases come from several factors, including the development of North American shale, other stocks becoming increasingly accessible through improving extraction technologies, better-managed shipping routes/fleets, and the capacity to call on public/private inventories and the redistributing function of the International Energy Agency. Spare capacity and strategic petroleum reserves are also now better used to moderate supply shocks. The United States already has adaptive mechanisms, apart from security guarantees and bases, that it can use to mitigate disruptions. Indeed, in every oil shock since 1973, these mechanisms have been used, increasing production from other sources.81 And such market evolutions simultaneously diminish supply manipulation’s utility as a coercive lever, both for OPEC as a whole and for major vendors therein. Even the 1973 oil embargo crisis was created not primarily by the drop in production, which only fell by 2–4%, but by the Nixon administration’s imposition of price controls.82 Large-scale disruptions to oil markets—for instance, the Iran–Iraq War of the 1980s—historically led to rapid third-party adaptation, meanwhile.83 As Justin Logan observes, “a major disruption in one location, temporarily reducing global supply and raising prices, incentivizes producers elsewhere to increase oil production.”

### 2NC – No Minerals impact/resource war

#### No shocks---the market is resilient and self-corrects

Blagden & Porter 21, \*David, Senior Lecturer in International Security at the University of Exeter, \*\*Patrick, Professor of International Security and Strategy at the University of Birmingham. (2-21-2021, “Desert Shield of the Republic? A Realist Case for Abandoning the Middle East”, *Security Studies*, DOI: 10.1080/09636412.2021.1885727, pg. 26-27)

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### 2NC – No food wars impact

#### No impact

Rosegrant 13 – M ark W., Director of the Environment and Production Technology Division at the International Food Policy Research Institute, et al., 2013, “The Future of the Global Food Economy: Scenarios for Supply, Demand, and Prices,” in Food Security and Sociopolitical Stability, p. 39-40

The food price spikes in the late 2000s caught the world’s attention, particularly when sharp increases in food and fuel prices in 2008 coincided with street demonstrations and riots in many countries. For 2008 and the two preceding years, researchers identified a significant number of countries (totaling 54) with protests during what was called the global food crisis (Benson et al. 2008). Violent protests occurred in 21 countries, and nonviolent protests occurred in 44 countries. Both types of protest took place in 11 countries. In a separate analysis, developing countries with low government effectiveness experienced more food price protests between 2007 and 2008 than countries with high government effectiveness (World Bank 201la). Although the incidence of violent protests was much higher in countries with less capable governance, many factors could be causing or contributing to these protests, such as government response tactics, rather than the initial food price spike.

Data on food riots and food prices have tracked together in recent years. Agricultural commodity prices started strengthening in international markets in 2006. In the latter half of 2007, as prices continued to rise, two or fewer food price riots per month were recorded (based on World Food Programme data, as reported in Brinkman and Hendrix 2011). As prices peaked and remained high during mid-2008, the number of riots increased dramatically, with a cumulative total of 84 by August 2008. Subsequently, both prices and the monthly number of protests declined.

Several researchers have studied the connection between food price shocks and conflict, finding at least some relationship between food prices and conflict. According to Dell et al. (2008), higher food prices lead to income declines and an increase in political instability, but only for poor countries. Researchers also found a positive and significant relationship between weather shocks (affecting food availability, prices, and real income) and the probability of suffering government repression or a civil war (Besley and Persson 2009). Arezki and Bruckner (2011) evaluated a constructed food price index and political variables, including data on riots and anti-government demonstrations and measures of civil unrest. Using data from 61 countries over the period 1970 to 2007, they found a direct connection between food price shocks and an increased likelihood of civil conflict, including riots and demonstrations.

Other researchers have broadened the analysis by considering government responses or underlying policies that affect local prices, and consequently influence outcomes and the linkage between food price shocks and conflict. Carter and Bates (2012) evaluated data from 30 developing countries for the time period 1961 to 2001, concluding that when governments mitigate the impact of food price shocks on urban consumers, the apparent relationship between food price shocks and civil war disappears. Moreover, when the urban consumers can expect a favorable response, the protests only serve as a motivation for a policy response rather than as a prelude to something more serious, such as violent demonstrations or even civil war.

Many in the international development community see war and conflict as a development issue, with a war or conflict severely damaging the local economy, which in turn leads to forced migration and dislocation, and ultimately acute food insecurity. Brinkman and Hendrix (2011) ask if it could be the other way around, with food insecurity causing conflict. Their answer, based on a review of the literature, is "a highly qualified yes," especially for intrastate conflict. The primary reason is that insecurity itself heightens the risk of democratic breakdown and civil conflict. The linkage connecting food insecurity to conflict is contingent on levels of economic development (a stronger linkage for poorer countries), existing political institutions, and other factors. The researchers say establishing causation directly is elusive, considering a lack of evidence for explaining individual behavior. The debate over cause and effect is ongoing.

## 1NR

## Korean DA

### thumper

#### NEITHER circuit splits NOR global extraterritorial actions thump – DOJ guidance AND court rulings have BOTH perceptually and substantively reduced the scope due to comity

Buretta et al 21 (John D. Buretta, Partner, Litigation, at Cravath, Swaine & Moore, LLP, former Principal Deputy Assistant Attorney General and Chief of Staff, Criminal Division, U.S. Department of Justice, JD Georgetown University Law Center; and John Terzaken, Global Co-Chair of Simpson Thacher’s Antitrust and Trade Regulation Practice; “Chapter 29 UNITED STATES,” in *The Cartels and Leniency Review*, Ninth Edition, eds. John Buretta and John Terzaken, Simpson Thacher & Bartlett LLP, March 2021, https://www.stblaw.com/docs/default-source/publications/cartelsleniencyreview\_2021.pdf)

VIII EMERGING TRENDS

There is a persistent tension between the Antitrust Division’s interest in seeking greater penalties for cartel offenders on the one hand, and the need for more careful consideration and exercising prosecutorial discretion on the other. Further complicating the picture, there appears to be no end to the continuing trend towards hotly contested litigation regarding the appropriate bounds of the extraterritorial reach of US antitrust laws. All these trends reflect the globalisation of the practice of cartel enforcement and defence, a phenomenon born of worldwide developments in the increased criminalisation of cartel offences, proliferation of leniency programmes, greater cooperation and coordination among authorities, and more aggressive enforcement policies.

Despite a downturn in enforcement statistics in recent years, the risk for companies and individuals who participate in cartels affecting US commerce remains high. Fines for corporations continue to rise, both in terms of the total amount of the fines imposed and the maximum fines imposed against particular corporations.243 Fiscal year 2015 was a record-breaking year, with nearly US$3.6 billion in fines imposed, owing in large part to the fines levied in the foreign exchange investigation. That amount was more than the combined total of fines imposed in two prior record-breaking years: fiscal years 2013 (US$1 billion) and 2014 (US$1.3 billion).244 Prison terms for individuals have also increased dramatically since the turn of the century. The total prison days the Antitrust Division imposed on individuals more than doubled from eight months in 1990–1999 to 20 months in 2000–2009, an average term that remained consistent between 2010 and 2017.245

The Antitrust Division seems determined to continue to push for longer prison sentences and higher fines, especially for defendants who insist on a jury trial rather than admitting guilt. Although the court did not agree to the Division’s request for 10-year prison terms for individual defendants or a US$1 billion fine for the corporate defendant in the AU Optronics case, the mere fact of the request for such extraordinary penalties sends a strong signal to the defence bar regarding the Division’s intentions.246 The Division has also succeeded in securing significant prison sentences, including a five-year term, which remains the longest imposed to date for a single Sherman Act violation.247 There is also a rejuvenated focus on individual culpability and accountability. The Division’s tough stance, combined with the Eighth Circuit’s affirmation of the district court’s upward departure from the Sentencing Guidelines in VandeBrake, and the AU Optronics finding on aggregated gain and loss under Section 3571, suggests that we are likely to see even longer prison terms and higher fines for cartel defendants going forward. The Antitrust Division believes strongly that such a trend would contribute to appropriate deterrence.248

The trend towards increasing penalties may be tempered, at least in part, by separate trends indicating a willingness by the Division to consider more consistently exercising prosecutorial discretion in international cartel cases and to recognise effective compliance programmes as part of its sentencing considerations. On 13 January 2017, the DOJ and the Federal Trade Commission issued revised Antitrust Guidelines for International Enforcement and Cooperation to replace the similar guidelines they issued in 1995, which provide guidance to businesses engaged in international activities.249 The revised Guidelines acknowledge the increased trade between the United States and other countries, and the increased role of US federal antitrust laws in protecting US customers and businesses from anticompetitive conduct when they are engaged in the purchase of US import commerce or the sale of US export commerce. The revised Guidelines also recognise the increased action by foreign authorities to investigate anticompetitive conduct, particularly conduct that is multi-jurisdictional. To this end, the Guidelines articulate the guiding principles that will be employed when confronting the question of whether to exercise discretion in response to a parallel foreign enforcement action. Aimed at ‘building and maintaining strong relationships with foreign authorities’, the revised Guidelines’ goals are to (1) increase global understanding of different jurisdictions’ respective antitrust laws, policies, and procedures, (2) contribute to procedural and substantive convergence towards best practices, and (3) facilitate enforcement cooperation internationally.250 The application of these principles could result in the Antitrust Division reducing the scope of the activities it may investigate against a particular defendant, reducing the penalties applicable to a violation, waiving the prosecution of a defendant or waiving a matter altogether. The Division is also advocating that other authorities take steps to adopt similar principles to ensure consistency in international investigations. However, the Guidelines’ newly added commentary on the FTAIA and the illustrative examples included demonstrate the many ways that foreign commerce may still fall within the reach of the Sherman Act and the Federal Trade Commission Act.

In light of the new compliance guidance, the Antitrust Division is likely to continue to give credit in sentencing to corporations that implement and maintain effective compliance programmes. Prior to the guidance, the trend already seemed to be in favour of awarding such credit251 where a compliance programme was implemented or augmented following the initiation of an investigation.252 For example, in Kayaba the Division gave credit for the subject policy because it ‘ha[d] the hallmarks of an effective compliance policy, including direction from top management at the company, training, anonymous reporting, proactive monitoring and auditing, and provided for discipline of employees who violated the policy’.253 The Division’s new guidance codifies this approach.

Our experience reinforces the fact that the extraterritorial reach of the Sherman Act will continue to be a hotly litigated issue in both public and private enforcement cases for years to come. In the criminal context, the agreement around the FTAIA’s substantive nature imposes additional hurdles in criminal cases, requiring the government to plead and prove the elements of the FTAIA to bring a criminal prosecution. In the civil arena, courts do not appear to be interpreting the FTAIA to permit plaintiffs to obtain relief from US courts, either where the pleaded impact on US commerce was merely an indirect result of a foreign conspiracy to fix prices in a global market, or where the immediate harmful effects of the conspiracy take place abroad. The Seventh Circuit made use of the extraterritorial application of the Sherman Act in the civil antitrust suit brought by Motorola against members of the LCD cartel.254 The relevance of the Seventh Circuit’s opinion in Motorola is three-fold. First, it supports the Division’s contention that integrated products subject to collusion can still have a direct, substantial and reasonably foreseeable effect on US commerce under the FTAIA. Second, it addresses the concerns raised in the amicus curiae briefs filed by Taiwan, Japan and Korea regarding the potential harm to international comity that an exorbitant extraterritorial application of US antitrust law may involve. Third, it hints at a distinction in the extraterritorial reach of the Sherman Act for civil and criminal cases, so that a higher degree of self-restraint and consideration towards other nations’ sovereign authority in the former do not jeopardise the Division’s enforcement efforts beyond US borders in the latter. Despite the growing tension in lower courts, the Supreme Court denied certiorari in Motorola and Hsiung. 255 As the intricacies of international services and global manufacturing chains continue to test the courts’ application of the FTAIA, this will remain an area to watch closely.

Finally, the Antitrust Division continues to stretch the bounds of criminal antitrust enforcement into new areas. In October 2016, it announced its intention to investigate naked ‘no-poach’256 and wage-fixing agreements among companies as criminal violations, regardless of whether those companies were competitors for the same goods or services, and issued guidance for human resources professionals.257 Although the Division resolved its first post-guidance no-poach case as a civil settlement,258 leadership has indicated that it is investing heavily in investigating allegations relating to wage-fixing and no-poach agreements. The Division has also become increasingly focused on the use of algorithms to set prices, as businesses continue to shift to online platforms. Following an enforcement action in 2015 against competitors who agreed to use the same pricing algorithm,259 the Division has continued to investigate the use of pricing algorithms to execute or facilitate illicit agreements, although it has expressed caution with regard to labelling pricing algorithms as inherently suspicious.260

IX CONCLUSION

In many ways, the United States remains the world’s leading jurisdiction for cartel enforcement, and counsel for companies that may have engaged in wrongdoing must keep their clients’ potential US exposure at the front of their minds. However, the Antitrust Division’s sustained effort to export the US model has succeeded to such a degree that the rest of the world is now rapidly catching up in its commitment to enforcement and in the sophistication of its methods of investigation, detection and punishment. The European Union in particular has built a robust enforcement mechanism, and Canada, the United Kingdom, Japan, Korea, Brazil and China,261 among others, are close behind. In addition, the US agencies have formalised their cooperative relationships with countries such as Peru, South Korea and Colombia, and have bolstered relationships by discussing enforcement roles and developments at high-level meetings.262 The United States need not, indeed cannot, go it alone. Its bilateral and multilateral relationships will play an increasingly important role as the globalisation of cartel enforcement continues.

When leniency is available in the United States, it is generally a good idea for counsel to move expeditiously to seek a marker. The benefits of leniency are compelling. However, the decision to cooperate with the US investigation is likely to raise collateral risks that must be considered at the outset, including criminal liability for individual employees,263 and the potential for information disclosed to the Antitrust Division being used by the Criminal Division264 and discovered in follow-on litigation. Fortunately, the Antitrust Division aims to be transparent and predictable in its dealings with cooperators, whom it views as furthering US enforcement goals. Thus, counsel should be able to manage the leniency process with a measure of certainty regarding the terms of the agreement the corporation or individual is entering into, and the Antitrust Division’s expectations regarding cooperation.

While the general trend in public enforcement is strongly towards convergence, the United States remains something of an outlier in the scope and complexity of its private enforcement regime. Many jurisdictions continue to treat cartel enforcement entirely as a matter for public enforcement. Those jurisdictions that have moved towards a private right of action for damages are largely still trying to work out the scope of that right. Two significant features of the US model (treble damages and the class action mechanism) have not been widely adopted. These features may not map easily onto the institutional traditions of other jurisdictions. In the United States, however, private plaintiffs are confronted by several obstacles to recovery, including the FTAIA, the pleading demands of Twombly and a measure of judicial hostility to class actions. Nonetheless, the risk of follow-on litigation remains very substantial, especially when plaintiffs have the benefit of a guilty plea by the corporation.

In the end, cartel enforcement in the United States will no doubt remain a priority regardless of changes in administration or in the leadership of the Antitrust Division. The Division’s efforts will continue to be marked by transparency in policy and predictability in results, themes that both fit with traditional US notions of due process and create the kind of environment in which the Division’s Leniency Program is likely to function best. In its dealings with its partners abroad, the Division will continue to try to lead by example and advocate its policy views while remaining cognisant of the comity considerations that are essential to what is increasingly a cooperative regime of global enforcement.

#### Global perception is universally that the “direct effects” test is restrained now – particularly in Korea

Jurata et al 15 (John “Jay” A. Jurata, Jr., partner in the Antitrust and Competition Group of the Washington, D.C. office of Orrick, Herrington & Sutcliffe LLP, specializes in the intersection of antitrust and intellectual property, represented Microsoft in the Korean Fair Trade Commission’s (“KFTC”) challenge of the Microsoft-Nokia acquisition; and Inessa Mirkin Owens, associate in the Washington, D.C. office of Orrick, Herrington & Sutcliffe LLP, specializes in antitrust and intellectual property issues, including the extraterritorial application of antitrust law to foreign patent rights; “A New Trade War: Applying Domestic Antitrust Laws to Foreign Patents,” George Mason Law Review, 22(5), 2015, pp.1130-1132, http://www.georgemasonlawreview.org/wp-content/uploads/22\_5\_Jurata.pdf)

By way of example, in the United States, the Foreign Trade Antitrust Improvements Act (“FTAIA”) implements the effects test by extending the Sherman Act to certain extraterritorial conduct and establishing a uniform test under which jurisdiction can only be asserted over conduct that has a “direct, substantial, and reasonably foreseeable” effect on U.S. domestic or export commerce.14 The FTAIA thus clarifies that U.S. antitrust law—and, specifically, the Sherman Act—does not prohibit anticompetitive behavior occurring outside the U.S., as long as the adverse effect of such behavior exists primarily in foreign markets. If negative effects occur within the United States, however, then such conduct may well fall within the scope of the Sherman Act.15 Notably, the U.S. Department of Justice’s interpretative guidance on the application of U.S. antitrust laws to foreign conduct indicates that

[t]o the extent that conduct in foreign countries does not “involve” import commerce but does have an “effect” on either import transactions or commerce within the United States, the Agencies apply the “direct, substantial, and reasonably foreseeable” standard of the FTAIA. That standard is applied, for example, in cases in which a cartel of foreign enterprises, or a foreign monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary, as well as in cases in which foreign vertical restrictions or intellectual property licensing arrangements have an anticompetitive effect on U.S. commerce.16

Other key jurisdictions have likewise adopted the effects test. The European Union’s approach is largely consistent with that of the United States, with the General Court of the European Union adopting a version of the effects test in Gencor Ltd. v. Commission17 in 1999.18 The Court explained that “[a]pplication of the [EU’s Merger Control Regulation]19 is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community.”20

Likewise, Korea’s Monopoly Regulation and Fair Trade Act (“MRFTA”) reflects the effects doctrine in its Article 2-2, which provides that when there is an effect on the domestic market, the MRFTA applies even “[i]n cases where an act [is] performed abroad.”21 The Korean Supreme Court explicitly set forth the limits of that jurisdiction in the recent Air Cargo22 decision:

MRFTA should apply to the conduct that has direct, substantial and reasonably foreseeable effect on the domestic commerce. To determine whether MRFTA should apply to foreign conduct, the court should adopt the totality of the circumstances test such as the conduct’s contents, intent, characteristics of the relevant goods and services, transaction structure and the extent and substances of the effects on the domestic market.23

Although in many ways China’s approach to extraterritorial application of its Anti-Monopoly Law (“AML”) is still developing, Article 2 of the AML provides that “this law shall apply to the monopolistic conducts outside the territory of the People’s Republic of China that has the effect of eliminating or restricting competition on the domestic market of China.”24 Thus, the AML explicitly provides for a version of the effects doctrine, though the application and interpretation of this provision has yet to be refined.25

In short, most jurisdictions having sophisticated antitrust enforcement regimes recognize that there is no basis for extraterritorial application of domestic antitrust laws absent a direct, foreseeable, and substantial effect on domestic markets. There seems to be universal recognition that, in theory, attempts to regulate primarily foreign conduct implicates concerns related to state sovereignty and international comity. However, as discussed below, recent investigations by competition authorities in Asia suggest that practice does not always follow theory.

### addon

#### Unrestrained Korean parochialism devastates the LIO and accelerates global protectionism – AND turns harmonization

Nam ‘18

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National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,152 and scholarship touching upon the furtherance of nationalist goals by various antitrust agencies dates back decades.153 However, a creeping loss of public confidence in open markets—coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act’s influence, as illustrated in this Article—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”154 in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late.155

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality and the concurrent liberal peace156 often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country’s companies,157 to an international competition regime binding on member states in at least some areas of antitrust.158 Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for “our country, right or wrong” protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act’s formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order’s intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

## Clog DA

### 2NC – Innovation !

#### Adv 2 – and, strategies for adv 1

#### And, tech leadership---global war---turns democracy, caps escalation, and turns the case

Franklin D. Kramer 16, Distinguished Fellow and Board Member at the Atlantic Council and Former Assistant Secretary of Defense, and James A. Wrightson, Jr., Former Aerospace Executive, Most Recently with Lockheed Martin Corporation, “INNOVATION, LEADERSHIP, AND NATIONAL SECURITY”, 4/11/2016, p. 3-4

Innovation will be a crucial requirement for US leadership and national security in the twenty-first century. The United States faces an era of global competition across all elements of national power. In the economic arena, American domination has necessarily been comparatively receding as the world continues to develop. Militarily, challenges have expanded geographically and qualitatively as multi-polarity and diffusion of power increases the number of capable state and nonstate actors. Diplomacy has become more complex as information capabilities are available throughout the world, populaces are more engaged, and there are strong ideological challenges to the Western, liberal rules-based model. The United States is still the most powerful nation, but maintaining successful leadership and strong national security will require the United States to build on and enhance its existing strengths. A crucial element of that requirement will be the capacity to innovate regularly and effectively. Innovation will be a prerequisite to leadership across all elements of national power.

This report proposes that both the US government and the American private sector take significant steps to encourage innovation beyond what the United States, already an innovative society, has successfully accomplished. The key elements will be enhanced development of the “cluster model” for innovation, which engages the public, private, and nonprofit sectors jointly; greater government focus on innovation; increased support for innovation by corporations; expanding the spectrum of entrepreneurs; and maintaining the diversity of ideas and approaches necessary for innovation while expanding the synergies between and among the multiple elements of the innovation landscape, including increasing the permeability between the national security agencies and the private sector.

I. THE INNOVATION IMPERATIVE— LEADERSHIP AND NATIONAL SECURITY

“[R]esearch has become central; it also becomes more formalized, complex, and costly,” President Dwight D. Eisenhower, Military-Industrial Complex Speech, 1961

“Whether it’s improving our health or harnessing clean energy, protecting our security or succeeding in the global economy, our future depends on reaffirming America’s role as the world’s engine of scientific discovery and technological innovation. “ Remarks by President Barack Obama on the “Educate to Innovate” Campaign and Science Teaching and Mentoring Awards, January 6, 2010

The United States has long been the world’s most innovative society, and that innovation has been a key element undergirding America’s international leadership and strength. The national security strategy states that “Scientific discovery and technological innovation empower American leadership with a competitive edge that secures our military advantage, propels our economy, and improves the human condition.”1 This requirement for innovation has become increasingly critical as America’s overwhelming dominance in other arenas—a key factor in the twentieth century—has been comparatively reduced.

• Economically: While the United States remains the world’s largest economy, there are expectations that it will be overtaken in gross size by China.2 Per capita income in the United States is below multiple countries3 while median real income has actually fallen since 1999.4

• Militarily: While United States forces have unparalleled capabilities, the challenges posed by Iraq, Afghanistan, ISIS, the worldwide demands of counterterrorism, Russian actions in Ukraine and elsewhere, and the confrontations in the East and South China Seas all demonstrate the multiple and diverse demands that the military faces. Without innovation in defense capabilities, the United States will face technological parity, losing the advantage it has maintained for over half a century.

### AT: N/U

#### BUT, litigation is controlled

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

This law-centric orientation is strikingly different from that of most Americans, despite popular claims about their litigiousness. Most individuals never even identify the civil legal problems they experience as "legal." Only a tiny minority will ever seek legal advice in response to a problem, and most are more likely to do nothing than to file a lawsuit. Decades of empirical scholarship have confirmed that despite the prevalence of civil legal problems in everyday life, there is remarkably little recourse to formal law. [FOOTNOTE BEGINS] DAVID M. ENGEL, THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE 3 (2016) (noting that "specious claims of a litigation explosion have been made so often that they have rooted themselves in the national psyche"). [FOOTNOTE ENDS]

#### Filing data proves

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

Concerns about increased government liability were in the air during the 1970s and 1980s. During that period, the "dominant articulated perception of constitutional tort litigation" was that § 1983 "cases flood the federal courts." The Supreme Court first recognized a cause of action against state and local government officials under § 1983 in 1961, and the number of civil rights filings increased from several hundred to tens of thousands in the years between 1961 and 1979. This expansion in federal civil rights filings and liability corresponded with a collapse of the insurance market for municipal liability coverage. As John Rappaport has described, municipal liability insurance was widely available from the 1960s to the mid-1970s. Then the market contracted, with [\*323] premiums doubling between 1974 and 1976, and many jurisdictions were left uninsured by 1977. After a few years of improvement, there was another decline in the early 1980s. [FOOTNOTE BEGINS] Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 645 (1987); see also Maine v. Thiboutot, 448 U.S. 1, 24 (1980) (Powell, J., dissenting) ("There is some evidence that § 1983 claims already are being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought."); Federalism and the Federal Judiciary: Hearings Before the Subcomm. on Separation of Powers of the S. Comm. on the Judiciary, 98th Cong. 5-13 (1984) (statement of John D. Ashcroft, Att'y Gen. of Missouri) (explaining that § 1983 filings against police officers "skyrocket[ed]" from the mid-1960s to the mid-1970s, growing "in the thousands of percentage increase[s]"); Ruggero J. Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 LAW & SOC. ORD. 557, 563, 567 (arguing that the "deluge" of § 1983 cases from 1960 to 1971 and the Court's decisions that "substantially expand[ed] section 1983's subject matter jurisdiction" have "placed additional burdens on federal courts"). Note, however, that Eisenberg and Schwab, after examining the evidence, concluded that "[n]ational filing data refute the myth of a recent civil rights litigation explosion." Eisenberg & Schwab, supra, at 695. [FOOTNOTE ENDS]

### AT: N/L – T/L

#### Plan’s expansion beyond Empagran uniquely spurs clog – new rule of reason investigations are particularly burdensome – their arg’s determining jurisdiction’s easy because DOJ makes a list – BUT our ev’s about the merits

Kneedler et al 4 (Edwin S. Kneedler, Acting Solicitor General, US DOJ; R. Hewitt Pate, Assistant Attorney General, US DOJ; Makan Delrahim, Deputy Assistant Attorney General, US DOJ; William H. Taft, IV, Legal Adviser, US Department of State; John D. Graubert, Acting General Counsel, Federal Trade Commission; Lisa S. Blatt, Assistant to the Solicitor General, US DOJ; Robert B. Nicholson, and Steven J. Mintz, Attorneys, US DOJ; “Brief of the United States as Amicus Curiae Supporting Petitioners in F. Hoffman-La Roche Ltd. v. Empagran,” (Sup. Ct. No. 03-724), Feb 2004, https://www.justice.gov/sites/default/files/osg/briefs/2003/01/01/2003-0724.mer.ami.pdf)

c. The court of appeals’ decision also would be likely to burden the federal courts with a wave of antitrust cases raising potentially complex satellite disputes. For cases in which defendants contest whether the Sherman Act applies to foreign conduct covered by the FTAIA, plaintiffs must prove both that the challenged foreign conduct had the requisite effects on United States commerce and that those effects give rise to a claim. 15 U.S.C. 6a(1) and (2).

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

#### AND, saying but there’s a list ignores that they have to investigate whether or not the plaintiff is actually from there and that they tried to pursue a case there first – obviously, once the list is published, everyone in the world who wants their case to be heard will do whatever they can to make it seem like they’re eligible

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

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

#### Antitrust litigation is uniquely complex and resource-intensive – a spike trades-off with judicial functioning in other areas

Daniel R. Warren 15, JD from the Boston University School of Law, BS from Ohio State University, “Stress Fractures: The Need to Stop and Repair the Growing Divide in Circuit Court Application of Summary Judgment in Antitrust Litigation”, Review of Banking and Financial Law, 35 Rev. Banking & Fin. L. 380, Lexis

A. Summary Judgment Can Cut Short Extreme Costs

Antitrust litigation can involve enormous discovery costs, particularly when antitrust litigation overlaps with class action litigation. Due to the wide scope of many antitrust claims, discovery can implicate a broad range of documents, records, interrogatories, and depositions. In fact, "[s]trategically minded" plaintiffs can take advantage of antitrust law's "onerous discovery costs" by requiring the defendant "to respond to wide-ranging interrogatories, produce documents, and prepare for and defend depositions" with only a "facially plausible allegation" of an antitrust violation. These costs can take a very large toll on both large and small businesses. The legal hours necessary to answer and address discovery challenges can also impose extreme costs.

Plaintiffs can often use discovery costs as a weapon against defendants in antitrust litigation. The Seventh Circuit Court of Appeals stated that "antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work" in explaining that the "very nature" of antitrust litigation should encourage summary judgment. The court's language here supports [\*389] the idea that in antitrust litigation, summary judgment has a special value, greater even than its normal use in other areas of the law. Summary judgment can be used to cut short lengthy litigation where parties have already accrued extreme costs from discovery and one party still cannot produce a genuine issue of material fact.

In antitrust litigation, the value of summary judgment to mitigate discovery costs through shortening litigation is elevated to a special importance even greater than normal for three reasons. First, antitrust litigation normally involves large organizations, which magnifies the costs of those firms going through the discovery process. Large firms have a great number of involved employees and departments, all of which would likely be subject to the broad discovery that is characteristic of antitrust litigation. Summary judgment, though normally considered after discovery, is a procedural weapon available at nearly any point in this process, as "a party may file a motion for summary judgment at any time until 30 days after the close of all discovery." The existence of a stay for extension of discovery shows that summary judgment need not automatically wait for discovery's completion, and thus can be an invaluable safeguard against otherwise incredibly costly discovery. This safeguard allows summary judgment to be a powerful tool to radically lower discovery time and costs without "railroad[ing]" the other party.

Second, antitrust litigation is normally a slow process that takes a great deal of time. The amount of time necessary to process and review evidence produced by discovery leads to incredible legal costs, often disproportionately placed on the defendant firm. The plaintiff has the advantage over the defendant in deciding the scope of discovery costs, and may often tailor its claim in such a way as to avoid the discovery costs that a defendant's counterclaim may reflect [\*390] back on the plaintiff. These lengthy trials can be effectively truncated by summary judgment, and thus summary judgment's normal value is even greater in the world of antitrust litigation where protracted trials are the norm.

Finally, the vast amount of evidence necessary to prove the elements of an antitrust claim contribute to the large discovery costs tied to antitrust litigation by overwhelming judges' ability to reign in discovery costs. Currently, we rely on judges to limit the range of discovery requested, but in the context of antitrust litigation, judges have difficulty dealing with the broad variety of evidence that may be called for. One analysis of the power of discovery described it as a costly and potentially abusive force, and determined judges' abilities to limit discovery costs on their own as "hollow" at best:

A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define "abusive" discovery except in theory, because in practice we lack essential information. Even in retrospect it is hard to label requests as abusive. How can a judge distinguish a dry hole (common in litigation as well as in the oil business) from a request that was not justified at the time?

[\*391] Summary judgment can also reduce costs to both parties by reducing time and discovery costs to the parties, and to the judicial system itself, by cutting short lengthy litigation. Both sides often incur costs from employing experts in various areas, researching and producing evidence necessary to prove or disprove elements of antitrust actions, and in the great many legal hours necessary for both plaintiffs and defendants--not to mention costs to the state--during lengthy litigation that is often fruitless due to an "incentive to file potentially equivocal claims." Antitrust law is structured in such a way as to have a "special temptation" for what would otherwise be frivolous litigation. As antitrust law is, by its very nature, between competitors, there is significant motivation to force costs on to other firms, perhaps even through frivolous legal claims or intentionally imposing other large legal costs. Costs can also multiply in antitrust litigation because antitrust actions are often combined with other particularly complex areas of law, such as patent law or class actions. Class actions particularly in the antitrust context can make trials "unmanageable." Combining two already complex areas of law is a recipe for large legal costs and prolonged litigation. The value of cutting costs short cannot be overstated, as antitrust litigation takes place in the arena of business competition. This means that firms are already engaged in close competition for antitrust cases to be relevant, and thus unnecessary costs can further distort the market.

### AT: N/I/L – No Tradeoff

#### Trade-off is likely:

#### The patent system is wide ranging, relying on courts at all levels. Investors require confidence in stable to fund R&D and commercialization. Even a small disruption on critical cases cascades, given the outsized importance of U.S. leadership---that’s Rando.

#### Particularly true of antitrust cases---they’re uniquely intensive, and require trade-offs with other issues---that’s Warren

#### Judicial resources are finite---Rule of Reason will cause trade-offs.

Alan Grant & Chetan Sanghvi 21, Respectively, Associate Director and Managing Director at National Economic Research Associates (NERA Economic Consulting), “The Economic Foundations and Implications of the Per Se Rule,” Columbia Business Law Review, vol. 2021, no. 1, 1, 06/14/2021, journals.library.columbia.edu, https://journals.library.columbia.edu/index.php/CBLR/article/view/8476

A. Scarcity Is the Foundation of the Per Se Rule

The per se rule seeks to truncate antitrust inquiry into certain conduct.3 Why not delve fully into all matters? It must be that we believe that the judicial resources required to litigate are scarce, so that there is excess demand for these resources.4 [FOOTNOTE 4 BEGINS] 4 The per se rule is sometimes justified as being necessary to prevent “deep pocketed” defendants from exhausting the resources available to plaintiffs or enforcers.

The goal of preventing false positives provided a focus for the comparative evaluation of alternative legal rules, and became a barometer for evaluating the scope of antitrust prohibitions. This translated into a call for a higher evidentiary burden on plaintiffs . . . which included a requirement of more economic evidence to support competitive harm allegations. Many of the assumptions that guided this generation-long retrenchment of antitrust rules were mistaken[.] . . . Continued reliance on what are now exaggerated fears of “false positives,” and failure adequately to consider the harm from “false negatives,” have led courts to impose excessive demands of proof on plaintiffs that belie both established procedural norms and sound economic analysis. This does not result in more reasonable antitrust standards, but instead results in an embedded ideological preference for non-intervention and a “thumb on the scales” that creates a tendency toward false negatives . . . . Indeed the effect goes well beyond a “thumb on the scales,” because it effectively shifts the default presumption from neutral to pro-defense.

Andrew I. Gavil and Steven C. Salop, Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct, 168 U.PA.L.REV.2107, 2111–13 (2020) (footnotes omitted). While such justifications for the per se rule focus on distributive aspects, they are still founded on the scarcity of resources. [FOOTNOTE 4 ENDS] To see this, consider the counterfactual in which the resources—including time—necessary to litigate all types of matters are available in such abundance that the parties can litigate every matter in full depth without an opportunity cost. In this scenario, it would be in society’s interest to litigate fully all antitrust matters, including those involving conduct that now falls under the per se rule. There would be no point in truncating a litigation to conserve judicial resources because—by construction—there are abundant resources to litigate fully all other matters, including matters that do not involve antitrust allegations.

Thus, the principled justification for the per se rule derives from a fundamentally economic concern: when judicial resources are scarce, how do we best allocate those resources to serve society’s interests?5 [FOOTNOTE 5 BEGINS] 5 Administrative convenience alone is not enough to justify the per se rule, Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 894–95 (2007), but the rule increases “business certainty and litigation efficiency,” Arizona v. Maricopa County Medical Society,457 U.S. 332, 344 (1982), by simplifying cases where economic effects are relatively clear. See Leegin, 551 U.S. at 894–95; Herbert Hovenkamp, The Rule of Reason, 70 FLA.L.REV. 81, 98 (2018) (“One must assume that a full-blown rule of reason inquiry is much costlier than analysis under the per se rule. . . . Thus, the rule of reason is justifiable only to the extent that it provides superior outcomes.”). [FOOTNOTE 5 ENDS] In the language of economists, how do we allocate resources in order to maximize social welfare?

#### Trade-offs are likely AND occur cross-issue---the courts are stretched thin AND think they’re at risk of overload, so they’ll preemptively scale back in other areas for docket control

Matthew A. Shapiro 21, Assistant Professor of Law at Rutgers Law School, “Distributing Civil Justice”, Georgia Law Journal, 109 Geo. L.J. 1473, June 2021, Lexis

C. JUDICIAL RESOURCES

Proponents of access to justice advocate more egalitarian distributions not only of party resources, but also of judicial resources. By "judicial resources" I mean judicial personnel (judges, court staff, and jurors), the time and attention of those personnel, and the financial and other wherewithal of courts, as well as the ways in which procedural rules and doctrines allocate those other resources. The basic demand of access to justice with respect to judicial resources is that they be distributed more or less equally across different categories of cases and different groups of litigants. Conversely, access to justice is undermined when a larger [\*1491] share of judicial resources is devoted to certain, favored categories of cases than to other, disfavored ones.

Although rarely presented in such stark terms, the demand for a more egalitarian distribution of judicial resources is implicit in certain critiques of contemporary civil practice. Many of those critiques fault courts for focusing unduly on "big" or "complex" cases (often with larger financial stakes) at the expense of more routine cases, skewing the distribution of judicial resources in favor of the former. There are several different mechanisms through which such maldistribution of judicial resources can occur.

In the most direct mechanism, courts foreclose a particular cause of action, effectively withdrawing all judicial resources from that category of litigation so that they can be reserved for other, "more important" cases. This occurs, for instance, when courts embrace the "floodgates" argument, the idea that

certain sorts of law suits should not be allowed because to do so would 'swamp' the courts with litigation. The court supposes that if it were to allow that type of suit it would lack the time to consider promptly enough other law suits aiming to vindicate rights that are, taken together, more important than the rights it therefore proposes to bar.

The access-to-justice concern with the floodgates argument is that courts invoke it disproportionately to avoid having to deal with disfavored claims typically brought by disfavored groups of litigants, such as prisoners or discrimination plaintiffs. When they do so, courts are effectively reallocating their resources away from those disfavored cases toward ones deemed more important.

Courts can also end up distributing judicial resources among different categories of cases somewhat more indirectly, simply by devoting more time and attention to some and thereby leaving less for others. This seems to be one potential concern with the practice that Judith Resnik has dubbed "managerial judging," whereby judges focus on the "managerial" tasks associated with shepherding cases through the pretrial phase (usually resulting in settlement) at the expense of the more traditionally "adjudicatory" tasks associated with actually deciding cases on the merits. Criticisms of managerial judging have tended to focus on [\*1492] the practice's costs for managed cases, particularly the risk that judges will abuse their power to prematurely terminate potentially meritorious lawsuits. But managerial judging might also have more systemic implications for the distribution of judicial resources. In particular, insofar as more complex cases require more case management, judges who adopt a more managerial posture will end up spending more time and attention on complex cases than they otherwise would, necessarily reducing the time and attention they have to spend on more routine cases. The prevalence of managerial judging can thereby end up slighting routine cases. Once again, from an access-to-justice perspective, the worry is that courts are giving certain categories of cases short shrift so that they can focus on the ones that, from many judges' perspectives, really matter.

### At: covid thumps

#### The DA’s on the brink – recovery now

Gzybowski 21 (Michael, QUAL, “Covid-19’s Impact on U.S. Patent Filings,” https://news.bloomberglaw.com/ip-law/covid-19s-impact-on-u-s-patent-filings)//NRG

In contrast, during the coronavirus pandemic of 2020, faith and confidence in a quick recovery was illusive. Information about the extent and severity of the pandemic kept changing weekly. How Covid-19 affected people, how to treat infections, how the virus spread and how to prevent it from spreading, and how to develop and test vaccines to prevent infections were all new endeavors. The majority of employed workers were sent home to work remotely in 2020 with short notice. Many others were laid off. While the federal government sent out rounds of stimulus checks directly to families and provided hundreds of billions of dollars for small business payrolls, money was tight and 52% of Americans cut back on spending. The first wave of Covid-19 infections in the U.S. was managed by local government-imposed restrictions. The second wave of infections is being managed by aggressive vaccination programs. As we reach “herd immunity” level for those that have survived Covid-19 infections and those who have been fully vaccinated and see the rate of new infections steadily dropping, confidence within the general public including consumers and companies is increasing and providing optimism. As workplaces are reopening and employees are being called back, consumer spending will increase and companies that have held off on developing and bringing new products to market will recharge their research and development (R&D) departments. Applications, Consumer Spending Increasing Patent application filings increased for five years after the 2009 economic downturn and consumer spending steadily increased all the way though 2019. Patent application filings have increased in 2020, and are expected to continue to increase.