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Onshoring cp

#### The United States should pass the Clean Energy for America Act

#### CP solves --- creates domestic supply lines

Williams & Sutton 21 --- Mike Williams is a senior fellow at the Center for American Progress. Trevor Sutton is a senior fellow at the Center, “Creating a Domestic U.S. Supply Chain for Clean Energy Technology”, Center for American Progress, OCT 4, 2021, https://www.americanprogress.org/article/creating-domestic-u-s-supply-chain-clean-energy-technology/

The amount of materials and products needed to supply this growth in production will increase exponentially over the next few years. That raises the question: Will these materials and products come primarily from abroad, or will they be sourced and manufactured in the United States? From lithium in electric vehicle (EV) batteries, to the steel in a wind turbine, to the polysilicon in a solar panel, the next decade represents the best opportunity to date to onshore the manufacturing supply chains of clean technology. In doing so, this country would create and retain4 tens of thousands, and potentially hundreds of thousands, of good jobs for working Americans.

This issue brief examines one set of proposed policies that will help build domestic renewable energy supply chains: investment tax credits for renewable energy facilities that use domestically made or domestically sourced goods. Such domestic content provisions can be found in the Clean Energy for America Act5 proposed and moved by the Senate Finance Committee as well as comparable provisions6 in the House Ways and Means Committee’s contributions to the Build Back Better legislation—the effort by Congress to put into law President Joe Biden’s agenda of creating jobs and lowering costs for working families. This brief explains why such provisions should be included in clean energy legislation considered by Congress, arguing that domestic content tax credits will create good jobs for working Americans, help fight the climate crisis, and strengthen U.S. national and economic security.

Federal support to American industry through domestic content requirements has a long history. The Buy American Act of 19337 (BAA) instructed federal agencies and contractors to buy U.S.-manufactured end products and construction materials on contracts valued above a certain threshold. The BAA’s requirements can now be waived at the discretion of the president in order to comply with international treaty obligations—for example, commitments to afford foreign goods the same treatment as domestic ones. Such waivers became substantially harder to obtain under the Trump administration, which ordered8 federal agencies to make efforts to ensure contractors are not using so-called dumped goods—that is, foreign goods sold at a lower price than in their domestic market. For its part, the Biden administration is seeking to ensure that federal procurement supports American workers and businesses through a Buy American rule9 proposed in July.

The Clean Energy for America Act—and comparable provisions in the House Ways and Means Committee’s provisions—represents a new approach to domestic content requirements. Under the act, investments in renewable energy facilities—those producing zero greenhouse gas (GHG) emissions—put in service starting in 2023, or electric grid improvement properties, will receive a 30 percent tax credit relative to the value of the investment. For certain facilities in disadvantaged communities, the credit increases to 40 percent. In cases where the taxpaying entity lacks sufficient revenue to benefit from these tax credits, it can receive a direct, or cash, payment from the government equal to the amount of the tax credit. These provisions would substantially enhance some existing tax credits for investments in renewable energy and make permanent others that are set to expire.

The proposed domestic content credit under the act would increase the renewable energy tax credit available to all investments by 10 percent where the facility in question is composed of domestically made steel or iron and/or manufactured products. In the case of manufactured products, “domestically made” means that at least 55 percent of the total cost of the components of the product can be attributed to domestically produced items.10 Additionally, a clean electricity project will eventually lose the opportunity to receive a direct payment in lieu of a tax credit if the project fails to meet domestic content requirements.

The domestic content credit is novel in two ways: First, it encourages onshoring of supply chains through the tax code, rather than through public procurement requirements, and second, it extends the incentive to buy American to private sector actors, unlike the BAA, which applies only to federal agencies and their contractors. By guiding private markets, this tax credit has the potential to move the renewable energy sector toward domestic supply chains in a manner that was previously possible only for industries that depended heavily on federal contracts, such as aerospace and defense.

Building a domestic supply chain for renewable energy: It’s now or never

These domestic content provisions come at a crucial juncture for the renewable energy industry and its suppliers. Today, renewable energy accounts for barely more than one-tenth11 of total energy generation and consumption in the United States. The Biden administration has set a target12 of 80 percent clean power by 2030 and a fully carbon-free electricity grid by 2035. While achieving those targets will depend on many factors—most crucially, the fate of climate legislation in Congress—there is no question that the U.S. renewable energy sector is poised for a massive expansion in the coming decade. This growth in renewables will require a comparable growth in the supply of both finished and component goods to support the construction of new facilities and the upgrading of existing ones.

Currently, the U.S. renewables sector is highly dependent on foreign supply chains. Chinese exports dominate13 the supply of solar panels used in both commercial and private energy generation, owing in large part to years of Chinese subsidies; funding for research and development; and what the United States and European Union have characterized as prohibited dumping14 practices. In the case of offshore wind, meanwhile, both the industry and, by extension, the U.S. supply chain are “immature”15 to the point of being nonexistent; however, there is significant domestic industrial capacity to support manufacturing offshore wind turbines and their component parts as more offshore wind projects come online in the next decade.

While the prospect of rapid growth in renewable energy presents an opportunity for domestic suppliers to meet rising demand, that outcome should not be assumed; the experience of other industries—for example, semiconductors—reflects that a growing domestic market does not translate into more onshore production and jobs. This means that the next decade presents a critical window for American industry to support a massive expansion in U.S. renewable infrastructure—one that will likely never recur. The supply chain relationships that develop during the coming renewables boom will likely define the industry for the foreseeable future. If U.S. manufacturers of solar panels, wind turbines, and utility-scale batteries—as well as the inputs used in the production of these technologies, such as steel and aluminum—are not able to secure a favored, or at least competitive, place in those supply chains, their commercial outlook will be substantially ~~impaired~~. It is not inconceivable that the renewable industry could follow the path of semiconductors16 and consumer electronics, in which engineering and design occurs in the United States, but most production occurs overseas with foreign components.

The tax credits connected to domestic content—alongside direct investments in industry such as the 48C credit17—provided in clean energy tax legislation currently moving through the Senate and House of Representatives can help domestic industry meet this challenge. More than a decade of focused industrial policy vaulted Chinese solar manufacturing into a position of global dominance.18 If the United States hopes to compete in this and other renewable sectors globally, it will need to show a similar focus and commitment to supporting industry during critical growth periods.

All of this raises the question: From a public policy perspective, why should the United States seek to ensure that renewable energy supply chains are manufactured domestically? This issue brief sets out three key reasons below.

1. Domestic manufacturing will create good jobs and contribute to a revitalized middle class

Plainly stated, manufacturing is a boon to the economy. It supports local communities and often provides quality, middle-class livelihoods for working people. According to the Economic Policy Institute,19 manufacturing workers—who make up more than 11 million people in the U.S. workforce—earn 13 percent more in hourly compensation than comparable workers in other industries, and they have an advantage in health care and retirement benefits.

Manufacturing’s impacts on the broader economy are foundational and yet often understated.20 The act of producing a good has a long stream of value, from the processing of the raw materials through the production process and then into the downstream sales. Analysis21 that considers the value from inputs not including downstream output shows that manufacturing accounts for more than 11 percent of the U.S. gross domestic product (GDP), including a total output of more than $2.3 billion in 2018. Research22 shows that these numbers may be lower than the reality, as they underestimate the “multiplier effect”—which shows the impact on other industries from economic activity in manufacturing—notably by excluding the downstream impact. The MAPI research shows that manufacturing accounts for roughly one-third of U.S. GDP when considering the full value stream impact.

Now consider this in less technical terms by envisioning a hypothetical situation. An EV is manufactured in America—say, for example, in Michigan. Thinking about the upstream value, its frame is made with steel melted and poured in Pennsylvania and comes from iron ore mined in Minnesota. Its battery is assembled in Georgia and includes lithium that comes from California. Those materials, and many more, need to be produced and refined in their own manner and then transported to the point of assembly. Once assembled, the EV itself is then transported to dealerships across the country. At every point in this hypothetical journey, there would be real communities with real people who benefit from these jobs.

2. Locating manufacturing supply chains in the United States meets the country’s climate and justice goals

Manufacturing’s environmental and societal impacts are not uniform. A good can be produced utilizing a workforce with full rights and decent pay, or it can come from the hands of a workforce subject to dangerous workplace conditions and low pay relative to local cost of living, or even forced labor. A good can be produced in a facility with efficient and advanced pollution controls—even with minimal to no pollution—or it can emerge from a facility that degrades the local and global environment.

Starting with the climate impact, manufacturing is responsible for roughly one-third23 of global GHG emissions. Iron and steel alone make up 11 percent24 of global emissions, and cement produces 4.5 percent25 of emissions. China accounts for more than half26 of the world’s steel production, and it manufactures steel with upward of twice27 the emissions intensity on average that is produced in the United States. With regard to vehicles, the United States is a net importer28 of embodied emissions—the emissions associated with a good’s production—across multiple sectors of vehicles, ranging from two to four times more emissions in the goods this country imports than those that are domestically produced.

The situation with human rights is perhaps even bleaker. The solar industry is working to realign its global supply chains to avoid the provinces of China where there are allegations of forced labor.29 The minerals that go into many clean energy products, most notably batteries, currently come from mining processes that have been particularly harsh to the miners and the communities where the mines are located. Cobalt is an egregious example, where there is an ongoing lawsuit30 alleging the use of child labor. The mining of lithium and copper in Chile has contributed to the desolation31 of the Atacama Desert.

Sourcing critical minerals from countries with poor human rights and environmental records is effectively streamlining this part of the supply chain in a manner that places profits over the human impacts. Similarly, as this supply chain grows in the United States, it is critical that strong safeguards for working people, their communities, and the environment are in place. A recent report32 from a coalition of environmental and conservation organizations phrased it well: “This requires smart planning, stakeholder collaboration and careful execution. History provides a powerful lesson on what happens when those attributes are absent.”

The United States needs batteries, steel, and cement to produce the clean energy products that will drive its emissions to zero. How America chooses to produce these materials is not forced on it. The country can produce these goods with minimal impact on the environment and with a workforce treated with decency and respect. America’s best hope to achieve this is by controlling its own destiny and producing materials domestically. Then, using this example, the country needs to establish a significantly more just trade regime that lifts up workers and protects the environment.

3. Sourcing supply chains domestically is critical to ensuring national and economic security

Last but not least, promoting the onshoring of renewable energy supply chains would carry significant national security benefits to the United States. The COVID-19 pandemic has laid bare the substantial risks to the health and well-being of U.S. citizens posed by “just-in-time”33 supply chains—that is, supply chains designed to deliver only enough inventory to meet anticipated market demand, and no more—in areas such as personal protective equipment, medicine, and even basic hygiene and sanitation supplies. These supply chains, while carrying cost advantages to industries during ordinary times, proved fragile and unreliable in a period of economic and political crisis.

U.S. policymakers are currently examining34 the threat of supply chain fragility across a range of industries that are viewed as strategically sensitive to U.S. interests—most prominently, semiconductors—with a view toward building redundancy and resilience in the supply of critical goods. The purpose of such efforts is to ensure that future disruptions do not deprive the U.S. government and ordinary Americans of goods that are vital to their safety, security, and comfort. Such future disruptions could include not only natural disasters, such as another pandemic, but also those arising from geopolitical tensions. As illustrated by Russia’s energy politics in Eastern Europe,35 a supply chain that is concentrated in the territory of a geopolitical adversary makes the United States and its consumers vulnerable to retaliation and extortion by a foreign government.

There is a compelling argument for treating resilient renewable energy supply chains as a critical national security issue. Energy security has long been a national security priority of the United States and most other countries. During the past decade, the United States has substantially increased its domestic energy base, but it has done so primarily through innovations in hydraulic fracking that have increased the availability of natural gas and oil. Renewable energy offers the country a way of sustaining—and eventually increasing—its energy security in a way that does not contradict its climate goals. This sector also does not subject communities to the rapacious cycle of extraction and abandonment that characterizes the boom-and-bust world of fracking.

But achieving energy security through a pivot to renewables is only possible if the products and components used to generate solar, wind, and other forms of clean energy are reliably available to operators of energy grids. And that, in turn, requires onshore supply chains with substantial capacity to make up for disruptions in global trade, whether natural or resulting from geopolitics or armed conflict. If renewable energy supply chains remain concentrated in foreign jurisdictions—especially in those with authoritarian governments, whose values and interests are often antagonistic to those of the United States and its democratic allies—policymakers will face an unenviable choice between greening the U.S. energy base and exposing the U.S. economy to foreign influence and coercion.

America should demand that public funds used to support an industry maximize public good

The summary of these three arguments can be boiled down to this: When public funds are used to support an industry, that money should prioritize the public good. Good jobs, a clean environment, and energy and national security meet the vision laid out in President Biden’s Build Back Better agenda.

Americans should not ignore that this effort may require time to invest in domestic facilities in order to build up capacity. This type of retooling and new investment is not unique, however; there are many examples36 of companies meeting the moment of the coronavirus crisis and rapidly switching their production to produce personal protective equipment. The Manufacturing Extension Partnership37 exists to help manufacturers achieve exactly this, and there is a significant level of funding included in the proposed Build Back Better legislation38 to support the resilience, diversity, and strength of domestic supply chains.

Conclusion

The level of investment in clean energy deployment, paired with direct investments and domestic content requirements in the Build Back Better legislation, creates a clear path for manufacturers to take on a large portion of the clean energy supply chain. This is America’s moment to act.

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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.

#### Key to break the political power of Big Ag broadly – spills over to deconsolidate farming

Gustin 19 (Georgina Gustin, covers agriculture for Inside Climate News, won numerous awards, including the John B. Oakes Award for Distinguished Environmental Journalism and the Glenn Cunningham Agricultural Journalist of the Year, formerly reported for the St. Louis Post-Dispatch and CQ Roll Call, graduate of the Columbia University Graduate School of Journalism, “Industrial Agriculture, an Extraction Industry Like Fossil Fuels, a Growing Driver of Climate Change,” Inside Climate News, 1-25-2019, https://insideclimatenews.org/news/25012019/climate-change-agriculture-farming-consolidation-corn-soybeans-meat-crop-subsidies/)

Meat and Mergers

Critics say that lax enforcement of antitrust laws has enabled even more concentration in the hands of fewer companies.

That concentration has occurred not just at the farm level but throughout the food system, including in fertilizer and pesticide manufacturing, grain distribution, food processing and grocery retailing. Four companies or fewer control each of these sectors of the food industry.

Recent mega-mergers of agricultural chemical and seed companies—Monsanto and Bayer, ChinaChem and Syngenta, Dow Chemical and DuPont—have further concentrated seed technology in the hands of a few companies. Critics worry that could leave farmers with fewer choices over what to plant and how.

Nowhere has the consolidation been more pronounced than in the meat industry, a hugely profitable and influential force in American agriculture. Today, a handful of companies, led by Brazil-based JBS Holdings, dominate the global meat industry, wielding enormous economic and political might.

“It’s JBS and Smithfield,” said Joe Maxwell, a hog farmer from Missouri and executive director of the antitrust watchdog Organization for Competitive Markets. “They want the U.S. to be the cheapest place to raise meat. They drive the political power in D.C. The result is that farmers are locked into farming for government programs that are not sustainable, economically and environmentally.”

The consolidation in meat production is also what’s driving the consolidation of crop farming, Maxwell said.

Livestock is now commonly raised or fattened in confinement on a diet of soybeans and corn instead of grass or other forage.

“The decades-long removal of livestock from diversified farms and moving into industrial facilities has certainly increased corn and soybean acreage. Those two things go hand in hand,” Hoefner said. “I think it’s a very open question whether that kind of transition back to a more integrated crop and livestock system is even possible. We’ve made such major landscape changes.”

#### Key to regenerative farming

Tam 21—(writer at UCLA Undergraduate Law Journal, won the UCLA Prize for Undergraduate Research, supervised by William Boyd, Professor of Law at UCLA School of Law and Institute of the Environment and Sustainability). Kristen Tam & Olivia Bielskis. April 1, 2021. “Stimulating Antitrust Enforcement to Expand the Regenerative Agriculture Movement”. UCLA Library. <https://escholarship.org/uc/item/0m16g2r5#main>.

INTRODUCTION

The failures of the federal courts and agencies to adequately enact antitrust enforcement has resulted in extensive consolidation of the agricultural marketplace creating conditions in which few distributors, meatpacking firms, and farms hold disproportionate percentages of the market power. Such instances of consolidation in the market are intended to be regulated through federal policies such as the Clayton Antitrust Act. However, the influence of Robert Bork and the Chicago School, which both argue to prioritize efficiency through consolidation over small businesses and competition in the market, resulted in an era from the 1980s to the present where the federal courts and agencies have adopted a less precautionary philosophy in interpreting antitrust laws, allowing large firms to merge, and leaving the marketplace largely unregulated.

The first gatekeepers that regulate corporation consolidation are the Department of Justice’s (DOJ) Antitrust Division and the Federal Trade Commission (FTC), which are responsible for reviewing new and existing mergers. To supplement, the Courts evaluate cases that involve mergers that seek to persist despite the DOJ or FTC preventing the merge. The Courts can also hear cases in which other firms on the market claim they will be substantially threatened by a potential merger. Often, mergers are brought up to the Courts under the Clayton Act, which requires proof of antitrust injury to sue. Suffering “antitrust injury” can include acts that “may substantially lessen competition,” as stated in Section 7 of the Act.

The impacts of large mergers are especially staggering when examining the dominance of the agriculture industry’s distributors, largest meat packing firms, and largest farms, which can all be referred to as agriculture firms in this paper. In 2017, four beef packaging firms owned 83 percent of the market.1 With only four firms holding a substantial percentage of market power, smaller firms and farms were obligated to decrease their selling price in order to compete with larger firms maintaining high economies of scale. This hinders the profitability of small farms, ultimately resulting in market failure because these farms are eventually driven out by their untouchable competitors, allowing the largest agriculture firms to hold monopolistic power. In the 1980s, farmers profited 37 cents per dollar spent in production,2 while in 2018, farmers made less than 15 cents per dollar.3 Decreasing profit margins are being perpetuated by the few gargantuan distributors that control the marketplace, allowing them to pay farmers or ranchers the price they want to set, often below market rate.

Decreasing competition and profit margins threatens the existence of small farmers and poses a substantial threat to essential climate change mitigation by hindering the growth of regenerative farming. Large industrial agriculture firms mostly utilize destructive farming practices including applying toxic synthetic fertilizers, planting monoculture fields, and tilling their soil. Tilling, the practice of overturning soil for the purpose of reducing soil compaction4 and mixing nutrients, decreases water retention, destroys vital soil microbes, and results in the release of carbon dioxide, a harmful greenhouse gas contributing to climate change.5 Every year, 44.02 billion tons of chemical fertilizer are applied onto U.S. soil,6 while every minute thirty soccer fields worth of soil are lost due to tilling practices.7 This is threatening food security, ecosystems, and the climate.8 The Intergovernmental Panel on Climate Change (IPCC) prescribes that the world needs to limit global temperature rise to 1.5 degrees Celsius by 2050. Agriculture contributes to 10.5 percent of the United States’ emissions, therefore we have a significant capacity to instead decrease emissions by implementing more sustainable farming practices.9

Conversely, a majority of smaller farms avoid these harmful practices and work to combat climate change by implementing regenerative techniques such as practicing no till, applying compost as fertilizer, and planting cover crops. In addition to building soil health, increasing soil water retention, and sequestering carbon dioxide from the atmosphere, small farms are able to implement farming practices that fit the local environment and adapt quickly with flexibility to maintain production during changing environmental conditions.10 Although small farms are more likely and willing to implement regenerative practices, their ability to switch to regenerative practices is dampened because they have limited money, time, or resources to do so with low profit margins. Failure to regulate the market is hindering a transition that would benefit the industry and planet in the long run. Although there are no laws in place that limit soil degrading practices, antitrust laws were created to prevent monopolies and undue concentration of market power in the hands of a few corporations, such as the beef packing conglomerates, from forming on the marketplace. If implemented properly, these laws have the potential to protect competition in the agriculture industry, keep small farms alive, and decrease the amount of soil being destructively farmed.

The federal government’s lackluster antitrust enforcement is born from a history of jurisprudential doctrines that favor large corporations and efficiency and subsequently discourage federal agencies from striking down harmful mergers. This paper first discusses the impact of lackluster enforcement of antitrust laws on the agriculture industry, focusing specifically on the hindrance of regenerative farming practices. Antitrust laws were created to prevent and correct such consolidation, thus, I enlist a two-pronged approach that identifies the main avenues through which consolidation has increased, and recommend remedies. The first prong addresses how the merge permitted between two meat packing corporations in Cargill v. Monfort contradicts the purpose of the Clayton Act and has set substantial precedent for the court's non precautionary interpretation of antitrust laws and what constitutes as “antitrust harm” under the Clayton Act. I argue that the Courts should set a new judicial standard that allows the “threat of loss of profits due to possible price competition” to constitute “antitrust injury,” and that they must default to precautionary measures and strike down mergers that have the capacity to acquire an undue percentage of the market share. The second prong addresses how the negligence of the DOJ and FTC has yielded a significant increase in consolidation of agriculture firms in the United States. To do so, I argue that these agencies must increase the number of agriculture and meatpacking merger acquisitions they block by holistically analyzing the scope of the mergers market power. Additionally, the reinvestigation of current corporations in the market holding unruly market power is essential in remedying the adverse impacts of market consolidation in agriculture.

I. The Current Market: As Farms Consolidate, the Growth of Regenerative Farming is Hindered

A. Increased Consolidation in the Agriculture Industry as Deregulation Heightens on Farms, Meat Packing, and Other Food Corporations

As defined by the United States Department of Agriculture (USDA), a “farm” is any place from which $1,000 or more of agricultural products were produced or sold during the year.11 This section discusses the historical and current consolidation trends in the agriculture marketplace for farms, meatpacking firms, and many other food corporations. I find that the overall number of farms has decreased while the size of each farm or firm has increased, and the number of farms in higher sales classes have increased along with their subsequent share of farmland.12

Farm numbers have decreased since the onset of the 20th century, however, due to Robert Bork and the Chicago School’s influence that prioritized economic efficiency and consumer prices over small businesses,13 the number of farms in the United States started decreasing at faster rates. In 1975, there were 2.5 million farms across the country,14 which declined by an average of 2.41 percent per year.1516 Comparatively, from 1980 to 1985, the number of farms decreased by an average of 6.15 percent per year,17 alluding to increased rates of consolidation.

While farm numbers continue to decrease, output production size and the Gross Cash Farm Income (GCFI) of large farms has increased. From 2012 to 2018, the number of farms decreased from 2.11 to 2.03 million farms, while the average farm size increased from 429 to 443 acres.18 Specifically, the growth in land holdings has increased the greatest in the largest farms. In 1987, 57 percent of the United States cropland was operated by midsize farms with 100 to 999 acres of cropland while only 15 percent was operated by large farms over 2,000 acres.19 In 2012, cropland operated by midsize farms drastically decreased to 36 percent while cropland operated by large farms increased to 36 percent, more than doubling the figure from 1987.20 In addition to holding control of more land and market power, and decreasing competition in the marketplace, these larger farms hold a disproportionate majority of agricultural commodity profits. In 1991, small farms, defined as farms whose income is less than $350,000, took in 46 percent of agricultural profit, while in 2015, small farms took in only 25 percent of agricultural profit.21 Large farms, who make more than $1,000,000 held 31 percent of the GFCI in 1991, while in 2015, their share increased to 51 percent.22

The trend towards consolidation is also prevalent in the livestock, poultry and meat packing industries, seeing as the number of farms and packaging plants decrease while the number of animals raised per farm increases. From 1987 to 2017, there was a 28.50 percent decrease in the number of cow, pig and chicken farms.23 While the number of farms decreased, the midpoint numbers for the number of livestock per farm increased; where half of the livestock are above, and half are below it. In 1987, the midpoint number of cows for each livestock feeding industry was 80, while in 2012, this increased to 900, an increase of 1,025 percent.24 The number of meatpacking plants, where farmers sell their animals to be slaughtered, packaged, and distributed, also decreased which allows meatpackers to run roughshod over farmers by giving them power to pay their desired lower prices, disadvantaging farmers.

Consolidation in other food industries is increasing as well, seeing as in 2012 four firms owned 89 percent of the peanut butter industry, a staggering figure which increased to 92 percent in 2017.25 In 2015 the two largest corn seed firms owned 78 percent of the market share,26 in 2017 the four largest jelly firms owned 85 percent of the industry,27 and in 2018, two firms owned 87 percent of the mayonnaise market share, a $1.6 billion dollar industry.28 These figures showing monopolization exemplify the formidable proportions to which the agriculture and food industry is consolidated. These trends underscore how the regulation mechanisms in place to promote competition and prevent monopolization are not working.

B. Consolidation Threatens Democratic Systems

The consolidation and existence of merged corporations harms farmers and consumers and contradicts the democratic spirit of objective policy creation for the good of the people, not the corporation. Limited choices in the marketplace increases reliance on those select businesses, allowing them to have a significant influence on the government to make decisions in their favor. If any of those firms becomes economically endangered, the government is more inclined to to bail them out because they rely on their product or service. For instance, Tyson is one of America’s largest meat processing companies.29 Because they control a sizable majority of the market, when problems hindering production arise, including when multiple plants shut down during the onset of the coronavirus pandemic in 2020, a large decrease in the nation’s slaughtering capacity comes about, resulting in food shortages. Because of their essential position in the food supply, these meatpacking businesses can use their large market power to put pressure on the government to provide subsidies and bail them out of lawsuits and business failures. This dynamic harms farmers who have few or no other choices to sell their livestock to for slaughter in order to go to the market. These firms can extract these advantages even when problems such as COVID-19 outbreaks in the plants resulted from deliberate neglect to implement adequate safeguards by company heads.30 In addition to providing an unwavering safety net regardless of firm malpractice, the government often bends to the firm’s demands if they seek subsidies or exemptions from prosecution.31 In effect, when firms become so large that they cannot be allowed to fail, they begin to have disproportionate power over the political process.32

C. Consolidation Threatens the Growth of Regenerative Farming

I. Regenerative Farming is Reducing Emissions, Bolstering Biodiversity, and Increasing Food Security, a Critical Practice to create a Climate Resilient Future

The United Nations IPCC report calls for a rapid greenhouse gas reduction to limit temperature rise to 1.5 degrees celsius by 2050.33 Given that agriculture and forestry accounted for 10.5 percent of greenhouse gas emissions in 2018,34 farming practices can play a crucial role in meeting these goals. Farming the land in ways that build healthy soil, maintain biodiversity, and sequester carbon dioxide are critical measures that will help America cultivate a sustainable food system, protect the land for generations to come, and meet greenhouse gas emission reduction goals.

Currently, the practices that dominate the American agricultural landscape often till the soil, plant only one to two crops at a time, and input large sums of fertilizer, herbicides, pesticides, and other chemicals to streamline production. Industrialized agriculture values efficiency, maximizing yield, and decreasing labor input. In contrast, regenerative agriculture practices maintain soil health for long term benefit by applying compost as fertilizer, planting cover crops, implementing diverse crop rotation, rotating livestock grazing, limiting fertilizer and pesticide use, and eliminating tillage practices.35 Although opponents highlight that regenerative practices yield less products per acre and require more labor input, they neglect the significance of their energy input being 30-60 percent less than traditional methods because they do not use machines, fertilizer, and herbicides.36 This practice ultimately increases the long term productivity and stability of food production because it doesn’t rely on the continuous purchasing and application of chemicals into the soil. Instead, it builds soil health by increasing nutrient and water retention, both of which increases land productivity.37

II. Small Farms are More Likely to Implement Regenerative Fertilization Practices

One of the defining regenerative agriculture practices is applying compost and manure as fertilizer. There are three different types of fertilization methods that the USDA measures every few years, manure, organic, and commercial that help replenish soil nutrients. Manure is the application of animal bio excretions,38 organic fertilizer is the use of organic matter, compost, animal manures or green manures and does not include any chemical fertilizers,39 and commercial fertilizer is the application of chemically derived fertilizers such as nitrogen, phosphate and potash.40 For these figures, manure and organic fertilizers are categorized as “regenerative fertilizers” because they represent methods that replenish soils with naturally derived as opposed to chemically manufactured nutrients.

Small farms, 10.0 to 49.9 acres, are more likely to implement regenerative fertilizer methods than medium sized, 260 to 499 acres, and large sized, 1,000 to 1,999 acre farms. In 2017, 32.74 percent of small farms used regenerative fertilizer, compared to 27.27 percent of medium and 21.63 percent of large farms.41 Small farms are also transitioning away from commercial fertilizer to regenerative fertilizer methods at a faster rate than medium and large farms. From 2012 to 2017, small farms had the greatest percent decrease in number of farms using commercial fertilizers, 6.50 percent, and the largest percent increase for regenerative practices, 6.47 percent. Medium farms experienced a 2.28 percent decrease in the number of farms implementing commercial fertilizers, while a 2.57 percent increase in regenerative fertilizers. Large farms experienced a 2.31 percent decrease in the number of farming implementing commercial fertilizers, while a 2.32 percent increase in regenerative fertilizers.42 This demonstrates that smaller farms are more willing and better suited to implement regenerative practices.

#### Extinction

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We hear a lot about how we’re running out of antibiotics. But we are also doomed to run out of pesticides, because insects inevitably develop resistance, whether toxic chemicals are sprayed directly or genetically engineered into the plants.

Worse yet, weeds, insects, and fungus develop resistance in just 5 years on average, which has caused the chemicals to grow increasingly lethal over the past 60 years. And it takes on average eight to ten years to identify, test, and develop a new pesticide, though that isn’t long enough to discover the long-term toxicity to humans and other organisms.

And this devil’s bargain hasn’t even provided most of the gains in crop yields, which is due to natural-gas and phosphate fertilizers plus soil-crushing tractors and harvesters that can do the work of millions of men and horses quickly on farms that grow only one crop on thousands of acres.

Yet before pesticides, farmers lost a third of their crops to pests, after pesticides, farmers still lose a third of their crops.

Even without pesticides, industrial agriculture is doomed to fail from extremely high rates of soil erosion and soil compaction at rates that far exceed losses in the past, since soil couldn’t wash or blow away as easily on small farms that grew many crops.

But pest killing chemicals are surely accelerating the day of reckoning sooner rather than later. Enormous amounts of toxic chemicals are dumped on land every year — over 1 billion pounds are used in the United State (US) every year and 5.6 billion pounds globally (Alavanja 2009).

This destroys the very ecosystems that used to help plants fight off pests, and is a major factor biodiversity loss and extinction.

Evidence also points to pesticides playing a key role in the loss of bees and their pollination services. Although paleo-diet fanatics won’t mind eating mostly meat when fruit, vegetable, and nut crops are gone, they will not be so happy about having to eat more carbohydrates. Wheat and other grains will still be around, since they are wind-pollinated.

Agricultural chemicals render land lifeless and toxic to beneficial creatures, also killing the food chain above — fish, amphibians, birds, and humans (from cancer, chronic disease, and suicide).

Surely a day is coming when pesticides stop working, resulting in massive famines. But who is there to speak for the grandchildren? And those that do speak for them are mowed down by the logic of libertarian capitalism, which only cares about profits today. Given that a political party is now in power in the U.S. that wants to get rid of the protections the Environmental Protection Agency (EPA) and other agencies provide, may make matters worse if agricultural chemicals are allowed to be more toxic, long-lasting, and released earlier, before being fully tested for health effects.

Meanwhile chemical and genetic engineering companies are making a fortune, because the farmers have to pay full price, since the pests develop resistance long before a product is old enough to be made generically. Except for glyphosate, but weeds have developed resistance. Predictably.

In fact, the inevitability of resistance has been known for nearly seven decades. In 1951, as the world began using synthetic chemicals, Dr. Reginald Painter at Kansas State University published “Insect Resistance in Crop Plants”. He made a case that it would be better to understand how a crop plant fought off insects, since it was inevitable that insects would develop genetic or behavioral resistance. At best, chemicals might be used as an emergency control measure.

Farmers will say that we simply must carry on like this, there’s no other choice. But that’s simply not true.

Consider the corn rootworm, that costs farmers about $2 billion a year in lost crops despite spending hundreds of millions on chemicals and the hundreds of millions of dollars chemical companies spend developing new chemicals.

To lower the chances of corn pests developing resistance, corn crops were rotated with soybeans. Predictably, a few mutated to eat soybeans plus changed their behavior. They used to only lay eggs on nearby corn plants, now they disperse to lay eggs on soybean crops as well. Worse yet, corn is more profitable than soy and many farmers began growing continuous corn. Already the corn rootworm is developing resistance to the latest and greatest chemicals.

But the corn rootworm is not causing devastation in Europe, because farms are smaller and most farmers rotate not just soy, but wheat, alfalfa, sorghum and oats with corn (Nordhaus 2017).

Before planting, farmers try to get rid of pests that survived the winter and apply fumigants to kill fungi and nematodes, and pre-emergent chemicals to reduce weed seeds from emerging. Even farmers practicing no-till farming douse the land with herbicides by using GMO herbicide-resistant crops. Then over the course of crop growth, farmers may apply several rounds of additional pesticides to control different pests. For example, cotton growers apply chemicals from 12 to 30 times before harvest.

Currently, the potential harm is only assessed for 2 to 3 years before a permit is issued, even though the damage might occur up to 20 years later.

Although these chemicals appear to be just like antibiotics, that isn’t entirely true. We develop some immunity to a disease after antibiotics help us recover, but a plant is still vulnerable to the pests and weeds with the genetics or behavior to survive and chemical assault.

Although there are thousands of chemical toxins, what matters is how they kill, their method of action (MOA). For herbicides there are only 29 MOAs, for insecticides, just 28. So if a pest develops resistance to one chemical within an MOA, it will be resistant to all of the thousands of chemicals within that MOA.

The demand for chemicals has also grown due the high level of bioinvasive species. It takes a while to find native pests and make sure they won’t do more harm than good. In the 1950s there were just three main corn pests. By 1978 there were 40, and they vary regionally. For example, California has 30 arthropods and over 14 fungal diseases to cope with.

When I was learning how to grow food organically back in the 90s, I remember how outraged organic farmers were that Monsanto was going to genetically engineer plants to have the Bt bacteria in them. This is because the only insecticide organic farmers can use is Bt bacteria, because it is found in the soil. It’s natural. Organic farmers have been careful to spray only in emergencies so that insects didn’t develop resistance to their only remedy. Since 1996, GMO plants have been engineered to have Bt in them, and predictably, insects have developed resistance. For example, in 2015, 81% of all corn was planted with genetically engineered Bt. But corn earworms have developed resistance, especially in North Carolina and Georgia, setting the stage for damage across the nation. Five other insects have developed resistance to Bt as well.

GMO plants were also going to reduce pesticide use. They did for a while, but not for long. Chemical use has increased 7% to 202,000 tons a year in the past 10 years.

Resistance can come in other ways than mutations. Behavior can change. Cockroach bait is laced with glucose, so cockroaches that developed glucose-aversion now no longer take the bait.

It is worth repeating that chemicals and other practices are ruining the long-term viability of agriculture. Here is how author Dyer explains it:

“Ultimately the practice of modern farming is not sustainable” because “the damage to the soil and natural ecosystems is so great that farming becomes dependent not on the land but on the artificial inputs into the process, such as fertilizers and pesticides. In many ways, our battle against the diverse array of pest species is a battle against the health of the system itself. As we kill pest species, we also kill related species that may be beneficial. We kill predators that could assist our efforts. We reduce the ecosystem’s ability to recover due to reduced diversity, and we interfere with the organisms that affect the biogeochemical processes that maintain the soils in which the plants grow.

Soil is a complex, multifaceted living thing that is far more than the sum of the sand, silt, clay, fungi, microbes, nematodes, and other invertebrates. All biotic components interact as an ecosystem within the soil and at the surface, and in relation to the larger components such as herbivores that move across the land. Organisms grow and dig through the soil, aerate it, reorganize it, and add and subtract organic material. Mature soil is structured and layered and, very importantly, it remains in place. Plowing of the soil turns everything upside down. What was hidden from light is exposed. What was kept at a constant temperature is now varying with the day and night and seasons. What cannot tolerate drying conditions at the surface is likely killed. And very sensitive and delicate structures within the soil are disrupted and destroyed.

Conventional tillage disrupts the entire soil ecosystem. Tractors and farm equipment are large and heavy; they compact the soil, which removes air space and water-holding capacity. Wind and water erosion remove the smallest soil particles, which typically hold most of the micronutrients needed by plants. Synthetic fertilizers are added to supplement the loss of oil nutrients but often are relatively toxic to many soil organisms. And chemicals such as pre-emergents, fumigants, herbicides, insecticides, acaricides, fungicides, and defoliants eventually kill all but the most tolerant or resistant soil organisms. It does not take long to reduce a native, living, dynamic soil to a relatively lifeless collection of inorganic particles with little of the natural structure and function of undisturbed soil”.

When I told my husband all the reasons we use agricultural chemicals and the harm done, my husband got angry and said “Farmers aren’t stupid, that can’t be right!”

I think there are a number of reasons why farmers don’t go back to sustainable organic farming.

First, there is far too much money to be made in the chemical herbicide, pesticide, and insecticide industry to stop this juggernaut. After reading Lessig’s book “Republic, Lost”, one of the best, if not the best book on campaign finance reform, I despair of campaign financing ever happening. So chemical lobbyists will continue to donate enough money to politicians to maintain the status quo. Plus the chemical industry has infiltrated regulatory agencies via the revolving door for decades and is now in a position to assassinate the EPA, with newly appointed Scott Pruitt, who would like to get rid of the EPA.

Second, about half of farmers are hired guns. They don’t own the land and care about passing it on in good health to their children. They rent the land, and their goal, and the owner’s goal is for them to make as much profit as possible.

Third, renters and farmers both would lose money, maybe go out of business in the years it would take to convert an industrial monoculture farm to multiple crops rotated, or an organic farm.

Fourth, it takes time to learn to farm organically properly. So even if the farmer survives financially, mistakes will be made. Hopefully made up for by the higher price of organic food, but as wealth grows increasingly more unevenly distributed, and the risk of another economic crash grows (not to mention lack of reforms, being in more debt now than 2008, etc).

Fifth, industrial farming is what is taught at most universities. There are only a handful of universities that offer programs in organic agriculture.

Sixth, subsidies favor large farmers, who are also the only farmers who have the money to profit from economies of scale, and buy their own giant tractors to farm a thousand acres of monoculture crops. Industrial farming has driven 5 million farmers off the land who couldn’t compete with the profits made by larger farms in the area.

But farmers will have to go organic whether they like it or not

It’s hard to say whether this will happen because we’ve run out of pesticides, whether from resistance or a financial crash reducing new chemical research, or whether peak oil, peak coal, and peak natural gas will cause the decline of chemical farming. Agriculture uses about 15 to 20% of fossil fuel energy, from natural gas fertilizer, oil-based chemicals, farm vehicle and equipment fuel, the agricultural cold chain, distribution, packaging, refrigeration, and cooking to name a few of the uses.

At some point of fossil decline, there won’t be enough fuel or pesticides to continue business as usual.

Farmers will be forced to go organic at some point. Wouldn’t it be easier to start the transition now?

### 1NC

#### Plan wrecks European antitrust amnesty and cartel enforcement – turns case

Bloom 5 (Margaret Bloom, King's College London and Freshfields Bruckhaus Deringer, Former Director of Competition Enforcement, UK Office of Fair Trading, “Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies - A Post-Empagran Perspective from Europe,” New York University Annual Survey of American Law, 61(3), 2005, pp.433-452, HeinOnline)

The first two U.S. Court of Appeals cases decided since the Supreme Court's Empagran decision also suggest the lower courts may be inclined to interpret narrowly the circumstances in which plaintiffs with injuries caused by conduct outside the United States may sue in U.S. courts.1 But these cases may be distinguishable from international cartel cases involving commodities. Courts are expected to hand down decisions this year on several cases of claims against international cartels.

What will be the implications for European deterrence of cartels and other anticompetitive behaviour if foreign purchasers can make U.S. treble damages claims for foreign transactions that are somehow "linked" to domestic effects felt by purchasers in the United States? "Linked" is not a precise concept and, if the U.S. courts were to treat it loosely, the exception would overwhelm the comity-based policy articulated by Justice Breyer in the main part of the Empagran decision.12 This policy can be illustrated by the following extract from the opinion: "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?"13

This article provides a perspective from Europe and strikes a note of concern. It rests on the reality that the United States has by statute and judicial decisions established a bounty-based system of antitrust recoveries through treble damages for violations that goes well beyond any policy that any European country has chosen to adopt.'4 This system is supported by plaintiff-friendly court procedures and costs arrangements that mean that almost any plaintiff that can plausibly squeeze its way into a U.S. federal court will seek to do so.15 This article considers two likely adverse implications of anything but a narrow interpretation of the "linked effects" exception to the otherwise highly desirable Empagran decision. These adverse implications would be reduced effectiveness of European leniency programs and weakened private antitrust enforcement in European national courts. The likely result would be more cartels and other anticompetitive behaviour in Europe. This emphasises the importance of the comity-based policy articulated by the Supreme Court.

This article first discusses the implications of a wide interpretation of the "linked effects" exception in Empagran for European leniency programs. It then considers the implications for private antitrust enforcement. The term "leniency program" is used in this article to describe all programs which offer either full immunity—that is, amnesty—or a significant reduction in penalties that would otherwise have been imposed on a participant in a cartel, in exchange for the freely volunteered disclosure of information on the cartel which satisfies specific criteria prior to or during the investigative stage of the case, and does not cover reductions in the penalty granted for other reasons.

II.

EUROPEAN LENIENCY PROGRAMS

It is well established that an effective leniency program is the best way to uncover cartels. For example, in the United States, James Griffin, then deputy assistant attorney general, U.S. Department of Justice Antitrust Division, was clear that the Division's 1993 program is their most effective investigative tool. "[T]he Leniency Program is the Division's most effective generator of international cartel cases, and it is the Department's most successful leniency program."16

The Organisation for Economic Cooperation and Development (OECD) recently concluded that "[e]xperience has shown that a properly structured leniency programme can dramatically increase the success of an anti-cartel effort."'7 Following the success of the U.S. program, the European Commission introduced a leniency program in 1996. More recently, various European Union (EU) member states have introduced national programs. A major factor has been increasing awareness in Europe of the very real benefits of the U.S. program in unearthing and deterring cartels. Currently, seventeen of the twenty-five member states have programs and others are being developed.'8 Elsewhere in Europe, Norway9 and Switzerland20 also have leniency programs.

Europe is following the valuable lead of the United States in implementing leniency programs in order to uncover and deter cartels. It would be ironic, indeed, if another U.S. development—foreign purchaser access to U.S. antitrust damages—undermined the effectiveness of these programs.

A. The EU Leniency Program

The EU leniency program21 is a key measure in the European Commission's fight against cartels, as explained by Olivier Guersent, then Head of the Scrutiny and Coordination Unit in the DG Competition of the European Commission, at the October 2003 Fordham International Antitrust Conference.

[S]ince 1996, the Leniency Program has been the most effective generator of important cases. About 100 companies have filed leniency applications under this program and, since 1996, the Commission has taken 24 formal decisionst22] in cartel cases in which companies co-operated with the investigations.

…

Already the new [revised program23] is very successful. Since 19 February 2002, the date of publication of the new Notice, more than 50 new leniency applications have already been submitted,E241 amongst which 44 applications [were] for immunity [i.e., amnesty]. These include a number of simultaneous applications for immunity in both the United States and the EU (and some simultaneous applications in Canada), which allowed in a number of cases for close co-operation and/or simultaneous investigative measures.25

Since then, applications have increased even more, with 29 requests in 2004 compared to 16 in 2003.26 Between 1996 and 1998, none of the on-site inspections carried out by the European Commission was based on a leniency request.27 However, as the leniency program became more widely known, the position changed dramatically. Between 2001 and 2003, nearly two-thirds of inspections were based on leniency requests. Another striking fact is that throughout the eight-year period to 2003, there were generally three or four inspections a year that were not based on leniency requests.28 But inspections based on leniency applications rose steadily from one in 1999 to fourteen in the first nine months of 2003. This demonstrates the value of the EU leniency program for uncovering cartels. Almost all the European Commission inspections since 1996 have resulted in decisions.29

B. EU Member States' Leniency Programs

The EU member state programs have generally been introduced too recently for hard results to be demonstrated in infringement decisions by national competition authorities prohibiting cartels and imposing fines (other than on those companies granted amnesty). Following the "modernisation" of Community competition law on May 1, 2004, the national authorities will handle many Article 81 and 82 cases.30 These will include some cartel cases that would have been investigated and decided by the European Commission prior to May 2004. It is therefore increasingly important that the member state leniency programs work well in addition to that of the Commission. In a further modemisation development, it is possible that a comprehensive leniency program will be developed to be run jointly by the European Commission and the member states. But, as with the current programs, that would be as part of a civil rather than criminal regime.

C. Enforcement is Generally Civil Rather Than Criminal, Which Materially Affects Risk Assessment by Those Involved in Cartels

A key point is that almost all European leniency programs have been developed in an environment where the sanctions for cartels are civil-essentially fines. There is normally no risk of imprisonment for those involved in cartels-unlike in the United States. This is important in considering the impact on leniency applications of opening up access to U.S. damages for foreign purchasers. While leniency in Europe will deliver no (or reduced) fines, it exposes companies to private actions for damages, because knowledge of the cartel will become public when the infringement decision is published by the competition authority. And the fines are generally imposed solely on the companies-unlike in the U.S. Only a few member states can fine individual executives. In the absence of access to U.S. damages for foreign purchasers, a potential leniency applicant will weigh the benefit of no (or reduced) fines against the risk of European private actions for damages. This is essentially a financial assessment. This is in marked contrast to the United States, where freedom from imprisonment is a powerful reason to seek amnesty.

The risk of European private actions for damages is currently small but increasing, as discussed later in this article. There are no treble damages awards within Europe, although exemplary damages have not been ruled out in, for example, the UK Even though private damages awards will increase in Europe, they may not reach a level at which they will become a significant deterrent to leniency applications. However, if they do, this would be another reason for criminal sanctions for cartels to be adopted more widely in Europe. The risk of possible U.S. treble damages in addition to European single damages would be likely to tilt the financial assessment so much that leniency applications will be reduced. This reduction is unlikely to be alleviated much by the new U.S. law that eliminates treble damages awarded against a defendant who has received criminal antitrust amnesty from the U.S. Department of Justice.31 A potential leniency applicant will also consider the risk that another member of the cartel might go to the competition authorities first. However, unless there are criminal sanctions, the other members will make the same financial assessment of fines against private damages. If there is a risk of U.S. treble damages, this is likely to outweigh the risk of civil fines-and deter leniency applications by all members of the cartel.

The issue of possible imprisonment does not normally arise in Europe. Only a few European countries, so far, have criminal sanctions (including custodial sentences) for cartel behaviour: Austria, Estonia, France, Germany, Ireland, Norway, and the UK. The European Commission has no criminal powers, and none of the European countries with criminal sanctions has yet imprisoned anyone for cartel conduct. Experience in the United States is that a criminal regime is a powerful deterrent to cartels and a powerful incentive to apply for leniency. The UK government is similarly convinced that fines alone are not a sufficient deterrent to cartel activity. Hence, the UK Enterprise Act 2002-which came into force in June 2003-introduced criminal sanctions for hard-core cartels.32 But this view is not widely held elsewhere in Europe. At least, not as yet.

#### Key to European energy security and global influence

Goldthau et al 15 (Andreas Goldthau, Belfer Center for Science and International Affairs, Harvard Kennedy School of Government, Harvard University, Department of Public Policy, Central European University, Hungary; and Nick Sitter, Department of Public Policy, Central European University, Hungary, Department of Accounting, Auditing and Law, BI Norwegian Business School, Norway; “Soft power with a hard edge: EU policy tools and energy security,” Review of International Political Economy, 22(5), 2015, pp.941-955, [DOI: 10.1080/09692290.2015.1008547](http://dx.doi.org/10.1080/09692290.2015.1008547))

1. INTRODUCTION

The European Union (EU) is usually described as a civilian or soft power: an economic giant but a military dwarf. The reason for this lies in the EU’s lack of ‘hard power’ policy tools: it does not have sizeable armed forces under joint command, a substantial federal budget or direct control of firms. Its ability to use ‘hard power’, by means of coercion and payment (Nye 2004), is limited. Indeed, very little power is centralized at the EU level. However, the present article argues that the EU’s soft power comes with a hard edge. The EU’s ability to exert more than mere soft power is a consequence of its attractiveness as a USD 17.3 trillion economy and the world’s largest single market, and it is brought to bear by a policy entrepreneur with a well-stocked regulatory toolbox: the European Commission. Indeed, although its international military and economic power may be limited, the EU features a formidable regulatory state. Its Single European Market (SEM) operates on a liberal, rule-based model. In EU competition policy, the European Commission has a powerful tool to enforce this model, albeit directed as much at firms as at governments. The central point here is that this tool reaches well beyond the borders of the EU.

The SEM exerts soft power inasmuch as it attracts non-EU companies to ‘come and play’ on the EU’s turf and accept its rules as the price for access, or when neighbouring states voluntarily choose to adopt EU rules and regulations as their own. However, to the extent that the European Commission the EU’s SEM watchdog uses these rules purposefully to target external firms, this soft power acquires a hard edge. By these means, the EU can and does use its regulatory toolbox to foster strategic goals in the near abroad and at the global level.

We use energy security as a critical case for testing the ‘hard edge’ argument about the EU’s power on the international stage, and its role in the international political economy of energy. For one, energy security is one of the key policy challenges that the EU faces today. The problem is not so much that the EU imports more than 50 per cent of its primary energy (Eurostat 2012), but rather that, unlike the USA, its energy imports do not come in the shape of reliable supply at affordable prices (Yergin 2006). Even before the ‘revolution’ in unconventional oil and gas put the USA on a trajectory towards net import independence, the country imported much of its oil and gas from Canada (with significant additional imports coming from Mexico), thus having a much higher share of secure energy supply than that which the EU achieves through imports from neighbouring Norway. The prospect for remedies by way of unconventional oil and gas in the EU is far slimmer than public debate suggests, for reasons of local politics, geology, technological feasibility, and regulatory frameworks (Stevens 2010). An additional, ‘midstream’ challenge for the EU lies in the management and operation of transit pipelines (Stulberg 2012).

As a series of ‘gas disputes’ between Russia and the Ukraine has vividly demonstrated, conflict involving the owner of crucial supply infrastructure can present great risk for European consumers. The fact that many of the third-country firms involved are state-owned gives the EU’s company-targeted power a political dimension that is stronger in the energy sector than in the case of non-strategic industries. Besides bringing Europe’s import dependence back into political debates, the 2014 Ukraine crisis unfolding in conjunction with Russia’s annexation of Crimea once again highlighted Europe’s exposure to supply risks relating to eastern transit routes.

Second, although energy is a private good, and traded as such in the EU, it is not a commodity like any other. Not only does it have public goods dimensions; some of its public goods characteristic are also of a strategic nature. Like almost no other commodity, energy has therefore been at the centre of power struggles, international conflict, and realpolitik (Abdelal 2013; Colgan 2013). For an import-dependent economic bloc such as the EU, reliable energy supplies are vital for military security, economic prosperity, and human welfare. Unlike the market for shoes, the market for molecules cannot be allowed to fail. This makes energy policy a good case for studying the external nature of the EU regulatory state, and for investigating whether what might be labelled ‘soft power with a hard edge’ can amount to a consistent and realistic policy strategy. Critics who call for a more proactive ‘hard power’ approach to energy security (Youngs 2009) tend to see the Commission’s perception of security of supply as a question of market failure as a weakness and a source of its inability to address the energy security concerns of its eastern member states. We suggest that the Commission’s approach to this question is linked to the EU’s nature as a ‘regulatory state’, and that the ‘hard edge’ of its policy tools is derived from its ability to target third-country firms.

The article is organized in three parts. The first part extends the debate on soft and hard power to the EU, and operationalizes this for energy security. Although the EU’s quest for energy security includes important internal dimensions in the shape of reduction of demand (improved energy efficiency) and increased domestic production (more nuclear or renewable power), we focus on the more pressing question of managing external security of supply in oil and gas in the face of geopolitical instability. The second part of the article explores the nature of ‘soft power with a hard edge’: the rules of the SEM, how they are applied, how they affect external actors, and how they take into account the ‘strategic good’ aspect of energy. The third part discusses the long reach of the SEM: the gravitational ‘pull’ as the SEM regime influences policy-making in the ‘near aboard’ as well as the EU’s ‘push’ to improve midstream transit infrastructure and upstream investment. The final section returns to the question of what this means for the EU as an international actor.

2. SOFT AND HARD POWER, POLICY TOOLS, AND ENERGY SECURITY

The EU’s toolbox is primarily defined by its nature: the EU is a ‘regulatory state’. Although the European Economic Community was established after the Second World War as part of a wider set of West European institutions designed to promote security, democracy, and prosperity, the organization’s mandate was to pursue these goals largely by economic integration. More to the point, this would be rule-based economic integration: governance by regulation rather than direct intervention in the industry or the economy. Accordingly, the Commission’s main policy tools are regulatory (Lodge 2008; Majone 1996; Moran 2002). They are designed to make economic agents alter their behaviour, in order to correct market failures and to ensure proper market functioning (Begg 1996). This comes with the clear notion of regulation as a precondition of capitalism, with states (and their regulatory actions) creating markets in the first place (Wilks 1996). In short, as a regulatory state, the EU seeks to create markets and to make them work efficiently. Most states have a wider set of policy tools at their disposal. These include not only to authority to make rules, but also the financial resources needed to provide incentives or subsidize production of goods and services, and organizational resources in the shape of bureaucracies, armies, and nationally owned industries and public services (Hood 1983; Solomon 2002). As a regulatory state, the EU has the former, but lacks the latter two.

Because of its focus on markets and, as a corollary, as a result of its (limited) policy toolbox the EU is typically boxed into the category of an actor that almost exclusively exerts ‘soft power’. In the realm of ‘hard power’, by contrast, the EU level is usually diagnosed with an ‘expectations-capability gap’ (Hill 1993), a function of both lack of tools and lack of political will or consensus. More specifically, the EU can deploy hard power only if all states agree (or agree to not block this), and a few of the big states in effect the UK or France will provide the necessary hardware. The crisis brought about by Russia’s 2014 annexation of Crimea illustrated the point: the EU agreed on sanctions, but required time to build consensus on this and started with more modest steps than the USA. However, the EU has one policy tool that can be wielded by a single actor, without the need for cross-member state agreement on every action: the Commission’s enforcement of the rules of the SEM in its capacity as the executive arms of the EU’s regulatory state. Much of the focus in this article is, therefore, directed at the Commission’s use of the available policy tools.

The distinction between hard and soft power in international relations, elaborated by Joseph Nye (2004), is based on the contrast between coercion used by a state and backed by the threat of military or economic force one hand, and the way a state influences world politics because of the attractiveness of its culture, values, and even the very legitimacy of its foreign policy on the other hand. In Nye’s own words: ‘simply put, in behavioural terms, soft power is attractive power’ (Nye 2004), 6); or, focusing on the policy tools used, ‘the ability to affect others to obtain the outcomes one wants through attraction rather than coercion and payment’ (Nye 2008, 95). Nye’s work builds on a sociological tradition of thinking about power as more than mere direct use of force. For example, in the 1960s,Schattschneider (1960) and Bachrach and Baratz (1962) elaborated on the importance of the power to structure alternatives. A decade later, Lukes (1974) added ideological power in these sense of the ability to shape or influence what other actors want and desire. His distinction between tools (coercion, payment, attraction) and resources (military and economic, and culture, values, and legitimacy) allows Nye to note that the military and economic resources normally associated with coercion and payments can also be used to attraction.

This article is far from the first to explore the grey areas between hard and soft power. Indeed, Nye himself emphasizes that hard and soft power is a continuum, not a dichotomy (2004). The spectrum of behaviour thus runs from command, coercion and inducement on the hard side, to agenda-setting, attraction, and co-optation on the softer side, but also includes a range of options in between and through combining different tools. Likewise, all three ‘faces of power’ come in both hard and soft varieties (Nye 2011). The related ‘smart power’ debate (Armitage and Nye 2007; Nye 2009; Wilson 2008) explores the room for combining hard and soft power, with the ‘smartness’ entailing integrated strategies that combine the tools and resources of both, and require ‘contextual intelligence’ (Nye 2011; Nye 2008). For the case of the USA, this means to focus on international institutions, development, public diplomacy, free trade, and US leadership in combating climate change and energy insecurity (Armitage and Nye 2007).

These notions clearly also resonate in both political and academic debates on EU power. Catherine Ashton, the then EU’s High Representative for Foreign Affairs and Security Policy, put it succinctly: ‘the EU is not a state or a traditional military power. It cannot deploy gunboats or bombers. It cannot invade or colonize. It can sign free trade agreements or impose sanctions only when all 27 states agree. [...] the EU has soft power with a hard edge more than the power to set a good example and promote our values. But less than the power to impose its will’ (Ashton 2011). Robert Cooper, the EU Council’s former Director-General for external relations and political-military affairs, saw the EU as a civilian power, but with its exercise of soft power dependent on a track record of protecting its member states and successfully achieving its goals: ‘Hard power and soft power are two sides of the same coin. [...] There is no soft power without hard power’ (2004), 1749180). Pointing to a broad range of soft or ‘civilian’ instruments for projecting international influence, some scholars also allude to the EU as ‘smart power’ (Moravcsik 2010) and ‘normative power’ (La€ıdi 2008; Sjursen 2006; Whitman 2011) (see also Hyde-Price 2006).

In order to further theorize about the notion of soft power and its possible ‘hard edge’, we draw on Barnett and Duvall’s (2005) insights about power in international relations and the application of this type of analysis to the EU. Emphasizing social relations, Barnett and Duvall note that power involves the ability to shape the capacities of other actors, and that this can be done both directly (compulsory power) and indirectly. A direct exercise of power comes closest to Nye’s classic form of hard power. Indirect forms include the ability to shape the settings in which actors operate (institutional power), the very identity of social actors (structural power), or even the way global politics is interpreted and given meaning (productive power). For example, the EU’s use of conditionality for applicant states can be considered institutional power: it is indirect and works only because of the EUs overall power of attraction. By contrast, the EU’s use of its trade power (Meunier and Nicolaidis 2006) comes closer to Barnett and Duvall’s compulsory power: here power is a function of the EU’s sheer economic strength that can be directly targeted at states or other actors. An important point with respect to the debates about the EU’s power, therefore, is that power can be used actively and directed at given targets, but also used passively without a designated target.

The EU’s trade power ranges from solely exporting goods, to exporting the very rules based upon which these goods are traded. As Meunier and Nicolaidis’ (2006) argue, ‘[t]he EU speaks the language of shared norms developed through consensus and co-operation. [...] trade power is about using ‘carrots’ and ‘sticks’ to enforce such norms on trading partners’ (Meunier and Nicolaidis 2006, 920). As Zielonka (2008) has argued, this makes the EU an ‘empire by example’ partly because of its ability to exercise economic power for political ends, an approach which ‘seems most effective when its power is overwhelming and its norms are shared’ (Zielonka 2008, 482; see also Lavenex 2014, 886). This is soft power, where trading partners agree to operate under certain rules or norms. However, the EU can also direct its economic power at specific target, when it demands compliance with its own rules as the price of access to the SEM. Importantly, it is not only governments and international organizations that present themselves as a target of the EU’s economic power, but also other actors such as firms (Damro 2012, 690).

In light of this, Damro (2012) coined the term ‘market power Europe’, to capture the way the EU ‘exercises its power though externalization of economic and social market-related policies and regulatory measure’ (Damro 2012, 682). As a concept, ‘market power Europe’ emerges an alternative to the in Barnett and Duvall’s categories ‘structural’ or even ‘productive’ argument of the EU as a ‘normative power’. Similar to Meunier and Nicolaidis, Damro conceptualizes the EU as an international actor whose power derives from its explicit efforts to use its sheer economic weight in order to extend its own liberal principles to the international stage, notably through regional and global trades. Following Daniel Drezner’s line of reasoning (2007), Damro notes that countries have also chosen to align with EU regulatory regimes and standards, even absent any direct EU pressure. This is a function of EU market size. Examples include the GSM (global system for mobile communications) mobile telephony standard (cited by Damro; see also Pelkmans 2001). Similarly, Sweden’s decision in the early 1990s to adopt EU competition policy rules to an extent that went beyond requirements for the run-up to EU membership followed a dialogue between the government and industry about the benefits of a single set of rules for the national and EU levels (Sitter 2001). This is what Lavenex (2014) labels a form of passive use of power, or structural power in Barnett and Duvall’s typology, as ‘third countries adopt rules not because the EU asks them to but because they fear the costs from not doing so’ (887).

The mechanisms of rule diffusion at work here are indirect and comprise learning, socialization, and technocratic cooperation in policy networks, as well as emulation and competition. As the Swedish case shows, it can also include an element of bottom-up pressure from industry on a non-member state (or applicant state) to adopt the EU’s rules and procedures at home to reduce transaction costs. Yet all mechanisms serve the EU’s overall purposes in foreign policy and trade more generally, and its sectoral preferences more specifically. Importantly, market might couple with transactions costs and the ability to sanction non-compliance with EU regulatory requirements (notably through the Commission) allows the EU to also exert direct influence in crucial global policy areas. Bradford (2012), therefore, argues that the EU has acquired ‘unilateral power to regulate global markets’ (3), i.e. the ability to export its laws and regulations beyond its borders by way of market mechanisms. The EU disposes of significant ‘extraterritorial regulatory capacity’ (Bradford 2012, 22), notably with a view to foreign companies whose economic actions may have impact on EU market affairs or functioning.

In short, the EU’s economic power can result from the EU’s mere existence and the size of its market, and work through less coercive mechanisms; but it can be also directed at specific targets, involve conditionality and exert extraterritorial impact through regulatory and sanctioning authority. This finding stands in contrast to the hard/soft power debate, even if ‘hard and soft’ are not understood purely as a dichotomy. Essentially, hard power involves a situation marked by conflict of interest, in which one actor coerces or induces the other to act (or not) in a particular way, by means of economic or military resources. By contrast, in the case of soft power, an actor gets its way by way of the attraction of this values, institutions or ideology. Neither of the two ideal types obviously captures the way the EU exerts external (economic) power. The EU exerts hard power when it makes other countries or foreign firms adopt EU rules or standards, even though it does not do so in a direct and targeted way. At the same time, the EU’s economic power may prevent another actor from exercising hard power through economic tools. This situation may involve a conflict of interests and be of coercive nature, but clearly the exercise of power is indirect or passive. On the other hand, the EU can also exert targeted influence on companies or governments based on the overall attraction of the EU market and its rule-based model. The costs of non-adoption are a case in point: third parties may decide to resist EU regulatory diffusion (and the policy agendas coming with it), but this may come with direct effects on their ability to operate within or with the EU. This extends to conditional access to the single market: unless companies or governments have a viable alternative to becoming part of or operating in the EU market, conditionality becomes a direct (and hence targeted) way of exerting soft power.

In order to account for the distinct way, the EU exerts power in international energy politics and markets. It, therefore, becomes imperative to differentiate both between power that is based primarily on coercion and attraction, and whether this power is directed at a given target or not. That way all attributes of the power debate can be combined in new ways, thus shedding more light on the grey area between hard and soft power. In Table 1, we therefore suggest two additional analytical notions: ‘passive hard power’, i.e. hard power that is not directed at a given target, and ‘soft power with a hard edge’, i.e. power based on attraction that features some degree of conditionality.

The upper left and lower right cells in Table 1 are the classic cases of hard and soft power. The central, defining, feature of hard power is coercion. This can come in the shape of outright commands, or work through economic incentives. Hard power can also be exerted by depriving the targets of economically viable policy alternatives. In the standard version of hard power, this involves one actor (usually a government) telling another what to do or to refrain from doing. By contrast, the key to soft **[TABLE 1 OMITTED]** power is its element of attraction. Here, voluntary behaviour drives the choices of the target actor who is at the receiving end. Moreover, whereas coercion involves a specific target, attraction can apply across the board without a single, designated, target. For example, the US values (notably democracy) and products (Rock ‘n’ Roll and Coca Cola) derive their attractiveness from their universal character, and from the fact that they resonate with societies and individuals across the globe.

Hard power has long been the most common type of power exerted in the international energy sector. Cases in point include the establishment of the Anglo-Persian Oil Company as a means to safeguard British dominance over the Middle Eastern energy reserves; the Western support of the cartel of the ‘Seven Sisters’ to secure control over oil producers and rents (Yergin 1991); the First Gulf War (whose link to oil remains debated); and the American presence in the Persian Gulf in the shape of the Fifth Fleet, with a view to keeping the Strait of Hormuz open to international crude trade (Noreng 2006, xv). For the EU, hard power in the energy sector lies with the member states, rather than at the ‘federal’ level. To the extent that bilateral energy deals qualify as hard economic power, these are concluded between EU countries and third suppliers. More unambiguous forms of hard economic power include EU member states maintaining national oil companies (NOCs) or backing private companies (national champions), and lending them government support for commercial activities. For example, strong diplomatic ties with the Gaddafi regime allowed ENI to develop large-scale upstream activities in Libyan oil and gas (Willey 2012). Moreover, ‘state flanking’ can be a form of hard power when national ‘energy champions’ ‘go out’ and acquire energy assets in third countries. A case in point is China’s controversial ‘energy diplomacy’ in Africa (Alden, Large, and Oliveira 2007; Evans and Downs 2006). Finally, some armed interventions in the Middle East and Africa have been motivated by more than purely humanitarian rationales. For instance, critics have linked France’s military engagement in the Central African Republic to energy interest, more specifically to Areva’s interest in uranium mines there.1

Moving to the lower left quadrant, this represents a situation where hard power resources, by their mere existence, provide a shield against an adversary’s ability to use hard power. This is why it is labelled ‘passive hard power’. In the energy sector, a striking contemporary example is the shale oil and gas ‘revolution’. The surge in domestic hydrocarbon production, resulting in lower import needs, has lowered USA’s exposure to the risk of external suppliers using oil or gas as a (hard power) policy tool. With the possible exception of Norway, few, if any, European states enjoy a similar shield from hard power in the petroleum or gas sector. As a corollary, potential US energy exports resulting from a domestic oil and gas glut may check dominant energy exporters such as Russia, without the US exercising targeted hard power. Still, this type of power is passive: even if the US policy-makers acknowledge that lower oil prices put pressure on Iran, and might help negotiations over that country’s nuclear programme; this is a fortuitous effect and not the reason for the increased US production.

The upper right cell, finally, is the most interesting one, both theoretically and empirically. This cell depicts a situation where attractiveness (e.g. of the EU’s large market) is coupled with a targeted and conditional policy that controls or restricts access (e.g. the Commission’s regulatory governance). In fact, this can be observed empirically both in the EU and the USA. Both require third countries or their firms to comply with a given set of rules that allows them to gain full access to their (large and attractive) market. In this case, they exercise soft (economic) power in ways that are targeted and conditional. Importantly, however, whereas the US government has a diverse toolbox at its disposal, including soft and hard power tools, for the EU, this kind of conditional soft power is usually its main policy tool. By necessity, therefore, the European Commission seeks to explore and perfect the various types of soft power instruments, including the type of soft power that comes with conditions and requires third parties comply with EU rules and regulations. This approach is backed up by the Commission’s clear and strong enforcement capacity. In the European energy sector, rules that force external supplies of gas to comply with EU competition law when they sell to the SEM is a good example of this.

As a big market indeed the biggest integrated market in the world the EU is a mighty economic player in its own right. By simply existing, it influences the behaviour of firms in other countries that want to sell goods on the EU market from Indonesian palm oil producers who need to comply with EU biofuel standards, to the Chinese aviation sector which recently became subject to European carbon taxes. This attractiveness comes close to classic soft power. In this, it surely is passive power. However, economic soft power can also be directly targeted at specific actors, particularly firms. For instance, the US law can require foreign firms to comply with US rules in order to gain market access. The IranLibya Sanctions Act precluded firms that did business with the two named regimes from operating in the USA while the US Foreign Corrupt Practices Act requires US firms to comply with good governance standards even when operating in foreign jurisdictions. Foreign firms and governments may even be obliged to comply with the US law in their own countries, e.g. the Dodd-Frank Wall Street Reform and Consumer Protection Act mandate the US Securities Exchange Commission to enforce compliance with respect to ‘conflict diamonds’, bribes and even mine safety standards in the Republic of Congo and elsewhere. This is not hard economic power in the sense of coercion, let alone the exercise of economic power backed up by gunboat diplomacy. It is a matter of giving soft power a hard edge, because compliance can only be forced on firms that want access to markets.

As the guardian of the SEM, the European Commission uses a similar type of soft power that is conditional and targeted. Firms that want to come and play on the EU market are subject to the full range of the EU’s regulatory powers. The Commission can, and does, demand that foreign firms alter their behaviour, and not just their products, as the price of accessing the SEM. Still, the EU’s soft power, stemming from its economic might, remains passive and, as Gray (2011) reminds us, can hardly be strategically deployed. The key point here is that the Commission can also give its soft power a hard edge, the effect of which can be observed in the shape of behavioural change against the targeted actors’ own preferences.

At the ‘federal’ EU level, hard power can hardly be observed in the energy sector for the simple reason that the EU lacks the cohesion to exercise military and economic hard power to secure energy supplies a frequent point of criticism among security scholars and analysts (Youngs 2009); see also contributions in Birchfield and Duffield (2011). To be sure, the EU has exercised hard power, in the form of counter-terrorist and counter-piracy operations in the Horn of Africa (Operation Atalanta), but not in order to secure energy supplies. The EU has also used energy as means and ways of exercising hard power, such as the oil embargo on Iran (effective of July 2012) aimed against the latter’s nuclear weapons programme, but it has not used hard power for energy-related ends, which would point to energy as part of EU grand strategy (O’Sullivan 2013). In short, to the extent that European countries use hard power in the energy sector, it is not usually mandated or coordinated by the EU, and to the extent that it is EU power, it is rarely hard power.

The EU’s soft power, on the other hand, can be effective also with regard to energy security. The problem is that it has been most effective where it is least needed, but has had a less impressive effect on Russia. If non-member states find it attractive to participate in the European integration project, this can give the Commission leverage. A good example is Norway joining the European Economic Area, and thus effectively becoming a quasi-member of the EU, not because of hard power or inducement specifically related to energy but because of the attractiveness of the SEM (Eliassen and Sitter 2003). Although this did have an effect on how Norwegian gas was sold to the EU, it hardly affected the Norwegian government’s or firms’ willingness to sell gas to the EU or the implausibility of a security of supply crisis. Obviously, however, this approach may be problematic if the ‘target’ (e.g. Russia) does not find the EU model attractive. A case in point is the EU’s effort to extend its regulatory regime for investment, trade, and transit to the former Soviet states in the shape of the European Charter Treaty. The treaty provides a legally binding framework covering all commercial activities in the energy sector and featured a multilateral dispute settlement mechanism, based on the liberal trade and regulatory blueprint (Bamberger and Waelde 2007). It eventually failed because Russia regarded it as informed by a generally unattractive model, and as imposed at a moment of relative geopolitical weakness (Belyi 2009). Therefore, whilst Moscow signed the treaty in 1994, it never ratified it and pulled out altogether in 2009.

The central argument in the two sections that follow is that the EU has turned a weakness into a strength, and developed a set of tools that sharpen the way soft power is exercised in the energy sector both at home and in the ‘near abroad’.

3. SOFT POWER WITH A HARD EDGE AND THE REGULATORY STATE: THE EXTERNAL EFFECTS OF THE SINGLE EUROPEAN MARKET AND EU COMPETITION POLICY ON FIRMS

The most powerful tool in the EU’s public policy tool box when it comes to governing the SEM and indeed the energy sector is competition policy. McGowan and Wilks (1995) memorably described competition law as the EU’s first supranational policy, and the Commission’s Directorate General for Competition (or DG IV, as it then was) as effectively a supranational independent regulator. Indeed, DG Competition has emerged an agent of further market integration and continuously kept on pushing for deepening the SEM. Yet, whilst important sectors such as telecommunication or postal services were subject to liberalization measures in the early 1990s, energy remained an exception until the end of the decade and well into the 2000s. To be sure, this proved less of a problem in oil, which has effectively been traded on an international, fully fungible, market since the 1980s. Gas markets, by contrast, continued to be characterized by national champions, long-term bilateral contracts, take-or-pay arrangements and, until recently, a dominant oil price peg and even destination clauses that prevent re-sale of gas.

In fact, until 1992, European gas markets were effectively national. Three sets of directives, the key legislative act of the EU, were designed to open the EU market gradually: the 1998 directive (European Parliament and the Council 1998) allowed states to define ‘eligible costumers’ (i.e. who could access the competitive market), limited initial opening to 20% of national markets allowed different regimes for third-party access to gas pipelines (negotiated or regulated TPA) and accepted a series of derogations and exemptions. Take-or-pay contracts the standard practice in bilateral gas relations with non-EU suppliers were permitted upon decisions by states or their regulatory authorities subject to Commission review, as were derogations for emergent markets or markets with only one external supplier. The directives of 2003 (European Parliament and the Council 2003) and 2009 (European Parliament and the Council 2009) extended liberalization: all states were to adopt a regulated access tariff, establish independent regulators, strengthening legal and ownership unbundling of transport from trading services, and established a new EU regulatory agency European Agency for the Cooperation of Energy Regulators (ACER) from 2010.

The three ‘energy packages’ had wide-ranging consequences for companies that operate in the EU downstream market. Now, they must abide by a set of rules made up of the general single market regulation, competition law, and the three liberalization packages. The key general rules and principles include the EU Treaty’s rules that ban agreements between companies that restrict competition (article 101), prohibit the abuse of a dominant position (article 102), promote market opening to competition and dismantling national monopolies (article 106), and restrict state aid (article 107). They also include regulations and case law that operationalize the EU’s rules on mergers and acquisitions, non-discrimination, and free movement of goods and services. The Commission enforces these principles in the gas market: by the early millennium, it had initiated a number of cases initiated against Germany’s E.ON Ruhrgas, Spain’s Repsol and Gas Natural, and Romania’s Distrigaz based on allegations of anti-competitive behaviour. This marked the end of the traditional model in the European downstream natural gas market (De Hauteclocque 2008).

Although SEM rules primarily apply to EU firms and third-country firms that operate within the EU, the Commission’s power of enforcement also reaches companies that export to the single market. In other words, the energy ‘packages’, coupled with SEM rules and competition policy, gave the European Commission a powerful means also to address challenges to European energy supplies, i.e. in the upstream market segment. A major case in point was the Commission’s ruling that broke up the Norwegian Gas Negotiation Committee the country’s gas export monopoly in 2001. To be sure, this was an intermediary case because of Norway’s quasi-membership of the EU since 1994. But the Commission did not shy away from turning its regulatory big guns also on external suppliers such as Russia or Algeria. In the 2000s, the Commission had already stopped restrictive internal cross-border trade that limited buyers’ freedom to re-sell gas by way of territorial restriction clauses, through cases against amongst others Statoil, ENI, and Gaz de France. Now it targeted destination clauses and similar mechanisms that had been part of bilateral gas contracts with non-EU companies and prevented gas-on-gas competition on the EU market. By 2007, major bilateral supply contracts between Gazprom on the one side and Italy’s ENI, Germany’s EON Ruhrgas, and Austria’s OMV on the other, as well as between Algeria’s Sonatrach and its European business partners were stripped of destination clauses through a mixture of regulation and negotiation (Talus 2011; Talus 2012).

Coupled with the provision that a company must not simultaneously be involved in gas supply and transmission, this meant that the traditional way external suppliers operated in the European market had come to an end. What is more, in doing so the Commission effectively went against the core of a business model that had cemented the dominant role external suppliers enjoyed in their gas relations with individual European countries and allowed them to apply what observers have termed ‘divide and rule’ tactics (Smith 2008). EU companies that imported gas (e.g. Italy’s ENEL that imports Nigerian LNG) had to comply with this ban as well. This reflects both the Commission’s interpretation of security of supply as a matter of market failure, and the actual policy tools at its disposal.

In September 2011, the Commission took the next step and carried out a dawn raid on Gazprom’s German, Czech, Polish, Bulgarian, and Austrian subsidiaries and partners, on the grounds of suspicion of breaches of EU Treaty articles 101 and 102 in the form of non-transparent pricing, obstacles to network access, market partitioning, and other abuse of its dominant position to hinder the liberalization of EU energy markets (Barry 2011). This was followed by an antitrust investigation against Gazprom, launched by DG Competition, on 4 September 2012 (European Commission 2012). In 2013, the Commission started preparing charges against the Russian monopolist for violating EU antitrust laws by hindering the free flow of gas across the EU, operating unfair pricing practices and linking the price of gas to the price of oil (Chee and Sytas 2013). The focus of attention here was on Central Eastern Europe, traditionally the region mostly affected by lopsided import dependence and Russian energy politics. Whilst the final ruling is pending, observers have noted that this antitrust case is likely to severely impact on Gazprom’s ability to maintain a commanding role in European gas supply security (Riley 2012).

Finally, in order to ensure that the functioning of the internal market is not unduly distorted by external NOCs, the EU’s third energy package included a clause targeted specifically at third-country firms the socalled ‘Gazprom clause’ (European Parliament and the Council 2009, article 11). The measure is in fact not only directed at the Russian energy giant, but designed to allow national regulators to take security of supply risks into account when certifying third-country firms’ acquisition, ownership, and operation of transmission networks, and ultimately to withhold certification (Cottier, Matteotti-Berkutova, and Nartova 2010). As SEM rules require all non-EU gas companies that operate in the SEM to register with a local regulator, this effectively amounts to an instrument for excluding certain suppliers from market access. For governments that are concerned about Russian use of energy as a ‘weapon’ (Smith 2006), this provides a tool for dealing with Gazprom’s asymmetric power.

In all, the finding is that the SEM certainly constitutes soft power for the EU with respect to external companies that want to operate on the attractive EU market, whether directly or through subsidiaries and partners. This soft power clearly comes with a hard edge in the shape of competition law, which is applied on a case-by-case basis, i.e. in a targeted way. It is complemented by special scrutiny applied to potential threats to security of supply. That way, the EU forces external suppliers such as Gazprom to change their business practices and thus limits the ability of those actors to operate energy deals on grounds of broader foreign policy considerations. The very fact that many of these firms notably Gazprom and its counterparts in other former Soviet states and in Algeria are state-owned, means that the effects of the EU’s regulatory power is felt by state actors too. Therefore, whilst it is unlikely that the attractiveness of the EU energy market will trigger domestic business lobby against their governments’ overall strategy in these countries an effect observed in EU accession states the Commission’s approach certainly limits third-country governments’ ability to use their energy companies as policy tools in a broader geopolitical contest (which, indeed, is one threat to the security of supply).

To be sure, the EU typically communicates its actions in terms of its market integration narrative, rather than in geopolitical terms. However, clearly the EU’s SEM rules as applied have a strong external dimension; they affect non-EU actors, and often in a targeted way rather than across the board. This exercise of EU power is about more than influencing what other want (Nye’s ideal-type soft power); it is also about deterring actors from a particular course of action and even compelling them to do certain things that is in the EU’s specific interest – notably supplying the European gas market at terms the EU sets.

#### Broadly checks many intersecting existential risks

Rodrigues 21 (Maria João Rodrigues, President of the Foundation for European Progressive Studies, former Portuguese Minister of Employment, professor of European economic policy at the European Studies Institute–Université Libre de Bruxelles, and at the Lisbon University Institute, “Introduction,” in *Our European Future: Charting a Progressive Course in the World*, ed. Maria João Rodrigues, Foundation for European Progressive Studies, 2021, ISBN: 978-1-913019-33-4, pp.ix-xix)

A civilization’s future depends on the internal forces it has to recreate itself. We are referring here to human civilization, but the same can be said about the rich set of components that are part of it, including the European one.

Right now, humankind is struggling against global existential challenges: pandemics, irreversible climate change, scarce resources in the face of ongoing demographic expansion, and deepening inequalities between countries and between people. There are different ways to respond to today’s challenges: paralysis, competition, cooperation or coordination for upward convergence.

The European Union can play a key role in influencing which road is taken, but it must start with itself. It must assert itself as a full-fledged political entity, with economic, social and cultural dimensions, and it must take internal and external actions that are decided democratically by its citizens.

That is why a Conference on the Future of Europe is so necessary at this particular historical juncture. This book comes out of a larger intellectual and societal movement in Europe that is willing to make a contribution to a conference that should meet its historical responsibility.

A VISION FOR OUR EUROPEAN FUTURE

Our vision of how to live on this planet will doubtless be deeply transformed by our current collective experience of the Covid-19 pandemic and by the looming climate disaster. Now is therefore the right time to develop a common vision together.

The first step in this process is to change the relationship between humankind and nature. We are part of nature, and we therefore need to respect it by looking after its resources and biodiversity. This aspiration comes at a time of technological developments that will enable new ways of producing, consuming, moving around and living. Now is the time to create and disseminate a new generation of products and services that are not only low carbon and zero waste, but also smarter, because they are built on artificial intelligence. Our houses, schools, shops, hospitals, meeting places, cities and our way of life can all be completely transformed.

New economic activities and jobs will emerge while others will decline. An immense transformation of the structure of employment is already underway, and it has been accelerated by the various Covid-related lockdowns. Although there are jobs for which the main tasks can be replaced by automation and artificial intelligence, there are also new jobs dealing with climate action, environmental repair, human relationships and creativity of all sorts, and these roles can be multiplied. We need to support this transformation through massive lifelong learning programmes, as well as by using social protection to cover the various social risks.

All of this requires us to build a welfare system fit for the twenty-first century, based on the assumption that we will all end up combining a range of different activities – paid work, family care, community service, education and personal creativity – throughout a life cycle. And, of course, we also need to find new ways of financing this welfare system, by tapping into new sources of added value and by updating our tax structures.

These new aspirations will be claimed by many citizens, from all generations and from all countries, and this will inevitably create a push for deep policy shifts.

In the meantime, the current gap between global challenges and global governance is becoming more and more evident, and it requires an ambitious renewal of the current multilateral system.

This renewal is needed initially to cope with the current Covid19 pandemic and the resulting social and economic crises that are unfolding. Indeed, we need to have large-scale vaccination for universal access, and we need more powerful financial tools to counter the recession and to turn stimulus packages into large transformations of our economies in line with the green and digital transitions that are underway and with the need to tackle increasing social inequalities.

Our response to the Covid crisis should not delay our urgent action on climate change, however, otherwise the damage caused to the environment will become largely irreversible, with implications across the board.

Additionally, our digital transition is in a critical phase, where the diffusion of artificial intelligence to all sectors risks being controlled by a small set of big digital platforms. But there is an alternative: we can agree on a common set of global rules to ensure that we have different choices, and to ensure that we improve fundamental standards regarding the respect of privacy, decent labour conditions and access to public services. These global rules would also bring in new tax revenue to finance public goods.

It is crucial that we have a strong multilateral framework to underpin the green and digital transitions, so that we can better implement the sustainable development goals and reduce social inequality within and between countries.

Nevertheless, we need to identify which actors the multilateral system can be renewed with, and how we can therefore improve global governance. The way the global multipolar order is currently evolving means there is a real danger of fragmentation between different areas of influence, and there is the additional problem of increasing strategic competition between the United States and China. The recent election of Joe Biden in the United States is very good news, and it creates a fresh basis for updating the transatlantic alliance. But the world has changed. There are other influential players now, so we need to build a larger coalition of actors – governments, parliamentarians, civil society organizations and citizens themselves – to push for these objectives using a model of variable geometry.

The EU should take an active and leading role in building the coalition of forces necessary to renew the multilateral system. At the same time, it should develop its bilateral relations with countries and regional organizations so that we can cooperate and move in the same direction. The EU’s ‘external action’ must cover other relevant dimensions: from defence and cybersecurity to energy, science and technology, education, culture and human rights. Promoting the sustainable development goals in all of the EU’s relationships should also be a priority.

Alongside this, the EU needs to build on the recent historical leap forward that it made when it finally agreed on the launch of a common budget financed by the joint issuance of bonds to drive a post-Covid recovery linked to green and digital transformations. This is a unique opportunity that we cannot afford to miss. It requires all member states to implement national recovery plans to transform their energy and transport infrastructures and to promote clusters of low-carbon and smart activities while creating new jobs. This needs to be combined with the development of new public services and new social funding for health, education and care.

These things should be at the centre of a new concept of prosperity that is driven by well-being. A welfare state for the twenty-first century should support the necessary transitions to new jobs, new skills and new social needs, and it should be based on an advanced concept of European citizenship that includes not only economic and political rights but also social, digital and environmental rights.

This advanced concept of European citizenship, as proclaimed by the European Social Pillar, also needs to be underpinned by a stronger European budget, joint debt issuance, tax convergence and European taxation. This will be at the core of stronger European sovereignty – which is needed to cope with the current challenges we face – while strengthening internal regional and social cohesion.

Stronger European sovereignty must in turn be founded on strengthened democracy at the local, national and European levels, and it should better combine representative and participatory mechanisms. The current Europe-wide situation caused by the Covid crisis is opening up new avenues of hybrid democratic activity that offer interesting potential for exploration.

TAKING A HISTORICAL PERSPECTIVE

Taking a historical perspective, we are certainly now entering a new phase of the European project – a project that all started more than 70 years ago with the aim of uniting Europeans to shape their future together. The general approach of combining a large open market with social cohesion and deeper democracy has persisted, but the central problem to be addressed has changed over time.

In the beginning, that central problem was peace. This was secured with the bold and groundbreaking agreement that emerged from the ashes of World War II to build a common market along with the early stages of a social fund and a supranational power. This power was represented by a European Commission, which was accountable to a Council and to a European Parliament, as enshrined in the Treaty of Rome in 1957. A more ambitious approach – the single market agenda – was then introduced during the Jacques Delors period. This agenda was underpinned by the Single European Act, in 1986, which enabled more decisions to be taken by qualified majority voting. It also enabled a stronger Community budget, which in turn enabled stronger common programmes and greater regional and social cohesion.

A second phase of the European project came with the fall of the Berlin Wall and the need to conduct enlargement along with the deepening of European integration. This need was translated into a common currency and the creation of a political union, with legal identity and European citizenship, enshrined in the Maastricht Treaty of 1992.

A third phase came with large-scale globalization. This called for comprehensive action and a development strategy that included social policies: the Lisbon strategy. It also required reform of the European political system – enshrined in the Lisbon Treaty of 2007 – in order to strengthen European external action and deepen European democracy, notably the role of the European Parliament. This was done by extending co-decision to many new common policies.

A fourth phase of the European project was triggered by the global financial crisis of 2008, which then created a eurozone crisis exposing the flaws of the project’s economic and monetary union. In order to reduce dangerous financial, economic, social and political divergences between and within member states, an initial solution was drawn up with the creation of a European Stability Mechanism and with stronger action to be taken by the European Central Bank. However, a European budgetary capacity financed by the joint issuance of bonds would only come to be be accepted when a larger-scale economic slump, triggered by the Covid-19 pandemic, threatened all member states. A European Pillar of Social Rights also had to be defined and implemented in order to create a safety net to protect against further divergences and growing anti-European populism.

Alongside this, several disturbances to peace in countries neighbouring the EU have translated into a large wave of inward migration. This has required renewed organization of European borders, as well as developments in EU neighbourhood policies for Eastern Europe, the Middle East and Africa. All of this, together with the unprecedented decision of one member state to leave the EU – the Brexit saga – has led to a new reflection about the possible ways to organize the European space according to different circles of integration and coordination.

While all these problems overlap, we might argue that the central problem marking this current new phase of the European project is the deep structural transformation that is taking place on the ecological, digital and demographic fronts. This transformation requires more strategic state intervention, larger partnerships, renewed social and regional cohesion, stronger global action, and deeper democracy and citizenship at all levels. The technocratic mode of conducting European integration has now become obsolete.

As an intellectual, a policymaker and an elected politician who has been able to work inside the various European institutions on a wide range of policies – and as someone who has circulated around Europe and beyond dealing with many different actors – I have had the opportunity to be deeply involved in these most recent phases of the European project.

This started in the 1990s when I served as a minister in the Portuguese government at the time when the European employment strategy was adopted to counterbalance the Stability and Growth Pact and when the membership of the eurozone was being prepared.

In 2000 I was in charge of designing the Lisbon strategy – the EU’s first comprehensive development strategy – and I then worked to translate it into the EU budget and into the national policies with what is now called the European semester.

I was also a member of the team in charge of rescuing the Constitutional Treaty and of negotiating the Lisbon Treaty while a full set of strategic partnerships was being developed between the EU and other global players, including the United States, China, India,

Russia, Brazil and Mexico.

In addition, I have worked with many other policymakers and experts, exploring a wide range of new instruments to address the dramatic eurozone crisis.

When I was elected as a member of the European Parliament, I worked to build a large parliamentary majority to adopt a European Pillar of Social Rights and overcome the resistance of certain national governments that were arguing there was no need for such a pillar to underpin European integration.

More recently, due to my work on the international front on proposals to renew multilateralism, I found myself in New York for the 2019 UN Climate Action Summit, where I was able to witness the confrontation between Donald Trump and António Guterres, whom I know well as a Portuguese minister and European sherpa for several years. This was the moment when, after the 2019 European elections, a Conference on the Future of Europe was announced.

Discussion about the future of Europe was already underway during Jean-Claude Juncker’s term, which came to an end in 2019, and at that time I could identify four possible scenarios. I believe those scenarios remain relevant.

POSSIBLE SCENARIOS FOR EUROPE

Scenario A: status quo/inertia

The too little too late scenario would continue in the post-2019 EU legislature. In this scenario, the newly announced geopolitical EU would be first absorbed by post-Brexit complications and then weakened by them. The EU’s strategic partnerships and trade agreements with other major global actors would be used neither to support the upward convergence of environmental and social standards nor to strengthen the multilateral system. European foreign policy would find it difficult to assert itself, even in cases of major international conflict, due to the unanimity voting rule. The development of a European defence capacity would remain hesitant and with ambiguities regarding engagement with NATO. The EU’s new partnership with Africa would disappoint, clearly being less firm than China’s engagement with the continent.

In a world with two competing world orders led by the United States and China, the EU would slide towards a secondary position in both political and technological terms, despite the size of its market remaining relevant and interesting. The EU would fail to become a relevant geopolitical actor through a lack of vision and ambition, and also through a lack of internal cohesion.

Internal deliberation within the bloc about its multiannual financial framework (MFF) would result in an insufficient budget, leaving it unable to support all of its member states and citizens in their transition to a successful low-carbon, smart and inclusive economy. This transition would be slow and unbalanced across the continent, with some regions advancing but many lagging behind. The new European Green Deal would remain an undelivered promise, or might even become a source of new social problems in certain European regions.

Meanwhile, the digital revolution, driven by American and Chinese standards, would extend precarious work and undermine the financial basis of existing social protection schemes. The general deficit in strategic public and private investment would remain evident due to a conservative banking and financial system, conservative budgetary rules, and the political inability to complete a banking union and create budgetary capacity within the eurozone.

The creation of jobs would therefore remain sluggish, and the systemic difficulties of sustaining and renewing European welfare systems would increase social anxiety, particularly among the younger generations, as the baby boom generation hits retirement age. Migration inflows would increase, but they would do so in the face of internal resistance to manage and integrate them as a dynamic factor for European societies.

Underpinning all this inertia we find not only political hesitation but also passive and active resistance to real European solutions in order to protect vested interests, to promote national preferences, whatever the collective costs, or simply to assert the viewpoint of authoritarian and conservative governments.

This would be a very disappointing scenario of external and internal decline. But it is possible to identify another plausible scenario that looks even worse.

Scenario B: nationalistic fragmentation

The shift we have seen in some places to inward-looking and nationalistic attitudes might spread across the world in the face of a range of insecurities: climate disturbances, conflicts over natural resources, technological change and job losses, migration inflows and security threats. The European political landscape might also move in this direction, building on the weak links of Hungary, Poland, Italy, France and Germany.

A United Kingdom led by Boris Johnson would strengthen this trend from the outside by developing a special partnership, undermining European solidarity on a permanent basis. Similar pressures would come from a Russia led by Vladimir Putin and a China led by Xi Jinping. The digital revolution driven by the American–Chinese war over spheres of influence would turn Europe into an increasingly attractive land for this guerrilla action.

In such a scenario, the European Green Deal would fail through a lack of basic political and financial conditions – starting with the incapacity to agree on a stronger multiannual EU budget, not to mention the minimum financial instruments to make the eurozone sustainable in the longer term.

Deepening regional and social differences, despite some countries adopting nationalistic social protection schemes, would increase Euroscepticism and criticism everywhere, leading to decreasing democratic participation at all levels. The inability to define a European policy to manage migration and to set up a new partnership with Africa would both multiply the tragedies of rejected migrants and refugees and create cultural hostility to any kind of foreign presence.

The survival of the EU would be at stake, when it comes not only to the political union but also to the European single market with a common acquis of economic, social and political standards.

Scenario C: a liberal–green European revival

This scenario would see a coalition of forces relaunch the European project with the triple ambition of responding to climate change, increasing EU trade agreements and building up a European defence capacity, despite American resistance.

The four freedoms of the European single market would be defended, despite attempts by a Conservative-led United Kingdom to undermine them, notably by using the digital revolution and through the redesign of global supply chains. Nevertheless, it would also be key in this scenario to attempt to ensure a win–win relationship with the post-Brexit United Kingdom.

Internal regional and social inequalities would increase due to a lack of active European industrial, regional, social and taxation policies, but migration inflows would be better managed and would contribute to limiting demographic decline. They would, though, deepen social inequalities.

The attention paid to the rule of law and to political rights at the European level would limit the scope for nationalistic and authoritarian surges in EU member states, but European citizenship would remain poor when it comes to social rights, education opportunities and real economic chances. The EU project would be modernized but would remain quite technocratic and elitist.

Scenario D: European citizenship at the core of a new European project

This scenario would see a paradigm shift.

A stronger sense of European citizenship would lead to the construction of new tools of European sovereignty, which would allow us to respond to common challenges while reducing internal differences. We would see a stronger European budget for research, innovation and industrial policy, for energy, digital and mobility infrastructures, and for defence capabilities. And we would also see a stronger budget for reducing internal differences in access to new technological solutions, to education and to social protection. This would require new sources of taxation to be launched and coordinated at the European level to ensure more tax convergence.

This European sovereignty would also be translated into a more active role on the international scene when it comes to developing strategic partnerships, building coalitions and strengthening the multilateral system to bring about more effective responses to the global challenges we face: climate change, sustainable development, the digital revolution, social inequalities, the promotion of democracy and human rights and ensuring peace and security. A crucial test would be Europe’s capacity to cooperate with Africa in the interests of a visible leap forward on sustainable development, education, gender equality, peace and democratic governance.

The external influence of Europe would increase, not just as a large market but also as a geopolitical entity that acts in every dimension: economic, financial, social, political and cultural. This external influence would be higher if Europe could lead by example when it comes to responding to climate change with social fairness, by driving the digital revolution for better working and living conditions, by increasing gender equality, updating social rights and strengthening an inclusive welfare system, by developing scientific and cultural creativity and deepening democracy at all levels.

In conclusion, whatever happens, the critical factor will be progressive European leadership to turn European citizenship into a new political force that is able to overturn the inertia of the past.

### 1NC

#### The United States federal government should establish interpretive rules and policy statements prohibiting <x behavior> under Section 5 of the Federal Trade Commission Act, and enforce the prohibitions accordingly.

#### Interpretive rules and policy statements avoid rollback AND solve the case.

Pierce 21 (Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University School of Law; “Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?;” 2021, GW Law School Public Law and Legal Theory Paper No. 2021-42, <https://ssrn.com/abstract=3933921>, TM) [language modified, denoted by brackets]

The FTC does not need to use the notice and comment process to accomplish that worthy goal, however. It can issue an interpretive rule in which it announces and explains why it interprets section five of the FTC Act to ban the inclusion of non-compete clauses in contracts to employ low paid employees. It can couple that interpretive rule with a general statement of policy in which it announces its intention to take aggressive action against any employer who acts in a manner that is inconsistent with its interpretation of the Act. It can follow those two actions with a couple of well-chosen, [high profile] ~~visibility~~ enforcement actions against firms that act in ways that are inconsistent with its interpretation of the Act.

That approach to the problem would be as effective as issuance of a legislative rule, and it would have major advantages over issuance of a legislative rule. There is no doubt that the FTC has the power to issue interpretive rules and policy statements to implement section five of the FTC Act. It has issued scores of interpretive rules and policy statements for many decades. The FTC can issue interpretive rules and policy statements in days, in contrast to the years required to complete a notice and comment rulemaking. There is also no doubt about the FTC’s authority to use adjudication to implement section five. It has exercised that power for over a century. The enforcement actions would be easy to win, given the powerful empirical evidence that non-compete clauses cause significant harm to the performance of both labor markets and product markets and that non-compete clauses in the contracts of low paid employees have no plausible offsetting benefits. In a matter of months, the FTC could use the combination of an interpretive rule, a policy statement, and a couple of high visibility enforcement actions to ban non-compete clauses in the contracts of low paid workers.

By contrast, the notice and comment proceeding required to issue a legislative rule would take years to complete. Once the FTC issued such a rule, it would be subjected to judicial review to determine whether the FTC has the power to issue legislative rules to implement section five of the FTC Act. Since the FTC has never previously attempted to exercise that power, there is a good chance that the issue would go all of the way to the Supreme Court. That could delay the effect of the rule for many years. If the FTC lost in that test of its authority, it would have wasted many years of hard work and a great deal of its scarce enforcement resources engaging in an exercise in futility.

### 1NC

**CP:**

The United States federal government should:

--not increase prohibitions on anticompetitive conduct by amending the Foreign Trade Antitrust Improvements Act to include a provision that in applying the statute a wholly owned or controlled subsidiary of a US parent would be considered part of the parent rather than an independent entity, remanding relevant antitrust cases to The International Trade Commission,

--clarify that 19 U.S.C. § 1337 authorizes remedies against import trade on the basis of anticompetitive business practices by the private sector, considering a wholly owned or controlled subsidiary of a US parent to be part of the parent rather than an independent entity, under subsection (a)(1)(A), irrespective of subsections (a)(2) and (a)(3), utilizing an attenuated antitrust injury requirement,

--and provide all resources necessary for adjudicating and proactively investigating such cases.

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

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

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

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

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

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

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

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

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

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

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

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

## Adv 1

### Cartels hurt competition

#### 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)…

#### COVID thumps supply chains but also triggers re-shoring which solves the case

Tsang et al 21 (Raymond Tsang, and Gerry Mattios, both partners and leaders of Bain & Company's Performance Improvement practice based in Shanghai and Singapore respectively; and Sri Rajan, partner based in San Francisco; “Confronting a new era of supply chain volatility,” Bangkok Post, 4-8-2021, https://www.bangkokpost.com/opinion/opinion/2096827/confronting-a-new-era-of-supply-chain-volatility)

As Covid-19 threw fragile global supply chains into disarray, many companies were stunned by their own vulnerability. The risk of depending on a supply base that is concentrated in one geographic region has been increasing over the past 30 years, but the pandemic quickly demonstrated how much chaos and pain one unexpected event could inflict.

It was a powerful wake-up call. The disruption triggered by Covid-19 has prompted leadership teams to confront a new era of supply chain volatility.

Bracing for an era of increased turbulence, leading multinationals are rethinking their supply chain strategies to lower the risk of disruption. In a recent survey of 200 global manufacturers by Bain & Company and the Digital Supply Chain Institute, executives ranked flexibility and resilience as their top supply chain goals. Only 36% of senior executives ranked cost reduction as a top three goal, down from 63% who saw it as a priority over the past three years.

To improve supply chain resilience, 45% of respondents plan to shift production closer to home markets in the coming years. The good news is that automation has reduced the cost of manufacturing, eroding the labour arbitrage advantage that fuelled decades of investment in offshore production.

The cost of humanoid robots is comparatively lower now which means companies with processes capable of being automated such as consumer electronics can opt to move supply chains closer to home without raising costs significantly.

For the last 30 years, manufacturing companies have wrung out supply chain costs by disaggregating the various steps of the value chain, concentrating each step with a limited number of companies and geographies to improve economies of scale.

As a result, most leadership teams lack sufficient supply chain visibility to assess their geopolitical and geographical risks.

Before investing in a new supply chain strategy, successful leadership teams evaluate their supplier and contract manufacturer risk according to two factors: the country where goods are produced and the supplier's headquarters location.

Two key factors that determine geopolitical supply chain risk are the supplier's headquarters and its manufacturing location.

Once leaders understand their risk exposure, they start building resilience into their value chains in a two-step process. First, they quickly add flexibility to the supply of finished goods and high-risk subcomponents where possible, to limit immediate risks and satisfy customers. Second, they take a strategic approach to rethinking the value chain from end to end. That includes deciding the pace of change and periodically reviewing decisions based on external conditions and internal capabilities. Below are three steps to help companies pioneer the shift to supply chain resilience:

1. Boost flexibility

Supply chain flexibility is becoming a more and more important concept for gaining competitive advantages. The first priority in making supply chains shock-proof is increasing flexibility for supplying finished goods and high-risk subcomponents. This would open the possibility for companies to respond to short-term changes in demand and supply situations as well as structural shifts in the environment of the supply chain on an immediate basis.

Not many countries have the capacity and infrastructure to handle all the volume, so manufacturers often have to piece together a solution across multiple neighbouring countries. For many companies, aligning a new production location with demand can deliver significant benefits, particularly in industries where demand is rising even through the downturn, including MedTech and certain consumer products.

2. End-to-end network rethink

For each value chain, leadership teams need to properly balance risk and resilience at the lowest total landed cost. This includes decisions on single vs. multiple sourcing, where to manufacture at each stage of assembly, and proximity to customers. They also need to determine whether to produce in-house or outsource, taking into account variables such as national incentives and declining manufacturing costs. Successful companies revisit their value chain choices regularly, especially in turbulent times.

3. Balancing cost and risk

Resilience does not eclipse every consideration. As leadership teams start to understand where they need flexibility, they face important trade-offs on cost. Investing in too much flexibility can render a company uncompetitive. As they look to reshape supply chains for the future, successful companies determine how much resilience they need, where it matters most, and what they can afford.

Resilient and flexible supply chains can be a powerful defensive hedge, but also a source of competitive advantage. Leaders make the most of options such as capacity buffers, digital infrastructure and nimble teams to react faster and more efficiently than their peers.

The investment to build and maintain these capabilities varies, depending on a company's need for responsiveness and efficiency, as well as the level of industry competition. This is why the roadmap for resilient supply chains must be linked to a company's long-term business strategy. For example, a high-growth business that has high margins and short product life cycles, and is dependent on components coming from widely distributed sources such as high-end cell phones, will require a different type of supply chain resilience than a hypercompetitive low-margin business, such as clothing or toys, which relies on imported finished goods.

Geopolitical volatility and market turbulence will transform supply chain management in the coming decade. Leadership teams that invest in strategies to increase supply resilience will simultaneously create a new source of competitive advantage.

### Graphene

#### Graphene access inevitable

Ghaffarzadeh 19 --- Dr Khasha Ghaffarzadeh, IDTechEx, “Graphene: can China retain its leading position?”, Mai 22, 2019, https://www.idtechex.com/de/research-article/graphene-can-china-retain-its-leading-position/17235

Chinese graphene firms were amongst the first to claim application success. Large volume sales into the energy storage sector were reported and now IDTechEx Research hear that Chinese companies are supplying graphene into the flagship product of a major mobile phone brand. This is reported to be a 200+ ton order. They are also marking strong progress on anti-corrosion coatings, heating (on-textile, underfloor, wall, etc) amongst others. To learn more on these trends please refer to the IDTechEx Research report Graphene, 2D Materials and Carbon Nanotubes: Markets, Technologies and Opportunities 2019-2029.

An important question is whether this advantage will represent a permanent state of affairs or not? There are many reasons and signs to think not. First, local advantage matters both in customer development and in securing supplier contracts. This is especially true in nanomaterials and in times when product development still requires a close collaboration between the supplier and user. Chinese players are expanding their sales and marketing presence in Europe; they are in the process of clearing some regulatory hurdles, but they still must play catch-up. Non-Chinese players, especially small to medium sized graphene firms, face major barriers in entering and exploring the Chinese markets. These barriers are of a regulatory, cultural, and organizational nature.

The state of the end-use industry and its value chain will also impact the prospects of each locality. For example, Asia (including and increasingly China) is the leading territory in energy storage (ES) production. This will benefit local suppliers. China itself is a major player in ES with a growing local manufacturing base. China is also a leading in the production and sale of electric vehicles, which also translates into opportunities for local players. Europe and the US are, however, still strong in high-value chemicals and plastics and automotive manufacturing. This gives western suppliers the chance to connect with end users and markets, IDTechEx believe the situation differs on an application-by-application basis.

Second, non-Chinese players are also expanding, fast. In the US, one of the older graphene producers has secured a supply contracted into the automotive industry and installed additional capacity. In Canada, a producer is pursuing an aggressive scale-up and vertical-integration plan; their ambition appears to be making graphene widely available and highly affordable. These products are being positioned as the next-gen of high-volume carbon black. In Europe, some companies are reporting that demand has outstrip their capacity to supply and are therefore preparing to scale up. In Australia too companies are reporting progress. The sum of all these activities and trends is that the centre of gravity can tile away from China.

Third, excellent expertise and knowhow exists outside China (although many Chinese research institutes regularly report cutting edge results). Research grants have created communities of trained scientists and engineers and have led to the build-up of laboratory and pilot-scale equipment. The investments have also created growing academic-industry networks. These networks are often based around various centres of excellence who are increasingly positioning as specialised providers of vital application development knowhow to help end users shorten their development times and risks.

IDTechEx Research have analysed examples of how the landscape might be reconfigured. It appears that, if plans are fulfilled, China (TW included) will no longer hold the largest nominal capacity. Other indicators are also showing signs of rebalancing. For example, still the largest revenues are claimed by Chinese firms however other companies are also transitioning into commercial sales.

### Space coop

#### Space coop inevitable --- incentives always exist --- no ev the plan is key

#### Sanctions perma-wrecks cooperation – they told us to go to space on brooms, no way the aff overcomes

Joffre 3/3 (TZVI JOFFRE, REUTERS, March 3rd 2022, “Russia stops space cooperation with US: 'Let them fly on brooms’” The Jerusalem Post, https://www.jpost.com/breaking-news/article-699203)

Dmitry Rogozin, director-general of Roscosmos, announced that Russia would be halting the delivery of rocket engines to the US, saying "let them fly into space on their brooms," according to RIA Novosti.

Rogozin added that Russia would be ending cooperation with the US on experiments on the ISS. He added that the priority of the country's space program would be adjusted to focus on satellites for defense interests.

Rogozin announced as well on Thursday that Roscosmos would be freezing cooperation with the German Aerospace Center (DLR) in a letter to the administrator of the DLR, Anke Kaysser-Pyzalla. The DLR announced on Thursday that it was terminating all collaboration activities with Russian institutions and would not start any new projects or initiatives with them.

"The termination of cooperation with the Russian Federation in the field of higher education, scientific research and professional training announced by the leadership of the Federal Republic of Germany, of course, causes irreparable damage to the established long-term cooperation ties and significantly slows down activities in the field of outer space exploration for peaceful purposes," wrote Rogozin.

### Climate Change

#### No climate impact

Zycher 21 --- Benjamin Zycher is a resident scholar at the American Enterprise Institute, doctorate in economics from UCLA, a Master in Public Policy from the University of California, Berkeley, and a Bachelor of Arts in political science from UCLA, “The Case for Climate-Change Realism”, National Affairs, Summer 2021, https://www.nationalaffairs.com/publications/detail/the-case-for-climate-change-realism

Beyond exhibiting extreme overconfidence in a cherry-picked analysis of climate-change causes, politicians and activists frequently ground their alarmism in frightening predictions about consequences that are likewise far from certain. This is not only true within the very new (and still quite unreliable) field of predictive climate science; it is true even in the context of ongoing climate phenomena. Indeed, politicians and journalists frequently characterize dramatic or unusual climate phenomena as the product of anthropogenic climate change, yet there is little evidence to support those claims

For one thing, there is no observable upward trend in the number of "hot" days between 1895 and 2017; 11 of the 12 years with the highest number of such days occurred before 1960. Since 2005, NOAA has maintained the U.S. Climate Reference Network, comprising 114 meticulously maintained temperature stations spaced more or less uniformly across the lower 48 states, along with 21 stations in Alaska and two stations in Hawaii. They are placed to avoid heat-island effects and other such distortions as much as possible. The reported data show no increase in average temperatures over the available 2005-2020 period. In addition, a recent reconstruction of global temperatures over the past 1 million years — created using data from ice-sheet formations — shows that there is nothing unusual about the current warm period.

Rising sea levels are another frequently cited example of impending climate crisis. And yet sea levels have been rising since at least the mid-19th century. This rise is tied closely with the end of the Little Ice Age that occurred not long before, which led to a rise in global temperatures, some melting of sea ice, and a thermal expansion of sea water. There is some evidence showing an acceleration in sea-level rise beginning in the early 1990s: Satellite measurements of sea levels began in 1992 and show a sea-level rise of about 3.2 millimeters per year between 1993 and 2010. Before 1992, when sea levels were measured with tidal gauges, the data showed an increase of about 1.7 millimeters per year on average from 1901 to 1990.

But because the datasets are from two different sources — satellite measurements versus tidal gauges — they are not directly comparable, and therefore they cannot be interpreted as showing an acceleration in sea-level rises. Moreover, the period beginning in 1993 is short in terms of global climate phenomena. Since sea levels have risen at a constant rate, remained constant, or even fallen during similar relatively short periods, inferences drawn from them are problematic. It is of course possible there has been an acceleration in sea-level rise, but even still, it would not be clear whether such a development stemmed primarily from anthropogenic or natural causes; clearly, both processes are relevant.

A study of changes in Arctic and Antarctic sea ice yields very different inferences. Since 1979, Arctic sea ice has declined relative to the 30-year average (again, the degree to which this is the result of anthropogenic factors is not known). Meanwhile, Antarctic sea ice has been growing relative to the 30-year average, and the global sea-ice total has remained roughly constant since 1979.

Extreme weather occurrences are likewise used as evidence of an ongoing climate crisis, but again, a study of the available data undercuts that assessment. U.S. tornado activity shows either no increase or a downward trend since 1954. Data on tropical storms, hurricanes, and accumulated cyclone energy (a wind-speed index measuring the overall strength of a given hurricane season) reveal little change since satellite measurements of the phenomena began in the early 1970s. The number of wildfires in the United States shows no upward trend since 1985, and global acreage burned has declined over past decades. The Palmer Drought Severity Index shows no trend since 1895. And the IPCC's Fifth Assessment Report, published in 2014, displays substantial divergence between its discussion of the historical evidence on droughts and the projections on future droughts yielded by its climate models. Simply put, the available data do not support the ubiquitous assertions about the causal link between greenhouse-gas accumulation, temperature change, and extreme weather events and conditions.

Unable to demonstrate that observed climate trends are due to anthropogenic climate change — or even that these events are particularly unusual or concerning — climate catastrophists will often turn to dire predictions about prospective climate phenomena. The problem with such predictions is that they are almost always generated by climate models driven by highly complex sets of assumptions about which there is significant dispute. Worse, these models are notorious for failing to accurately predict already documented changes in climate. As climatologist Patrick Michaels of the Competitive Enterprise Institute notes:

During all periods from 10 years (2006-2015) to 65 (1951-2015) years in length, the observed temperature trend lies in the lower half of the collection of climate model simulations

, and for several periods it lies very close (or even below) the 2.5th percentile of all the model runs. Over shorter periods, such as the last two decades, a plethora of mechanisms have been put forth to explain the observed/modeled divergence, but none do so completely and many of the explanations are inconsistent with each other.

Similarly, climatologist John Christy of the University of Alabama in Huntsville observes that almost all of the 102 climate models incorporated into the Coupled Model Intercomparison Project (CMIP) — a tracking effort conducted by the Lawrence Livermore National Laboratory — overstate past and current temperature trends by a factor of two to three, and at times even more. It seems axiomatic to say we should not rely on climate models that are unable to predict the past or the present to make predictions about the distant future.

The overall temperature trend is not the only parameter the models predict poorly. As an example, every CMIP climate model predicts that increases in atmospheric concentrations of greenhouse gas should create an enhanced heating effect in the mid-troposphere over the tropics — that is, at an altitude over the tropics of about 30,000-40,000 feet. The underlying climatology is simple: Most of the tropics is ocean, and as increases in greenhouse-gas concentrations warm the Earth slightly, there should be an increase in the evaporation of ocean water in this region. When the water vapor rises into the mid-troposphere, it condenses, releasing heat. And yet the satellites cannot find this heating effect — a reality suggesting that our understanding of climate and atmospheric phenomena is not as robust as many seem to assume.

The poor predictive record of mainstream climate models is exacerbated by the tendency of the IPCC and U.S. government agencies to assume highly unrealistic future increases in greenhouse-gas concentrations. The IPCC's 2014 Fifth Assessment Report, for example, uses four alternative "representative concentration pathways" to outline scenarios of increased greenhouse-gas concentrations yielding anthropogenic warming. These scenarios are known as RCP2.6, RCP4.5, RCP6, and RCP8.5. Since 1950, the average annual increase in greenhouse-gas concentrations has been about 1.6 parts per million. The average annual increase from 1985 to 2019 was about 1.9 parts per million, and from 2000 to 2019, it was about 2.2 parts per million. The largest increase that occurred was about 3.4 parts per million in 2016. But the assumed average annual increases in greenhouse-gas concentrations through 2100 under the four RCPs are 1.1, 3.0, 5.5, and an astounding 11.9 parts per million, respectively.

The studies generating the most alarmist predictions are the IPCC's Special Report on Global Warming of 1.5°C and the U.S. government's Fourth National Climate Assessment, both of which were published in 2018. Both assume RCP8.5 as the scenario most relevant for policy planning. The average annual greenhouse-gas increase under RCP8.5 is over five times the annual average for 2000-2019 and almost four times the single biggest increase on record. Climatologist Judith Curry, formerly of the Georgia Institute of Technology, describes such a scenario as "borderline impossible."

RCP6 is certainly more realistic. It predicts a temperature increase of 3 degrees Celsius by 2100 in the average of the CMIP models. But on average, those CMIP models overstate the documented temperature record by a factor of at least two. Ultimately, models with a poor record of successfully accounting for past data and highly unrealistic future greenhouse-gas concentrations should not be considered a reasonable basis for future policy formulation.

### REMs

#### No REM 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.

### Smart cities

#### Deterrence not key to prevent Taiwan war

Lungu 21 --- Andrei Lungu is president of The Romanian Institute for the Study of the Asia-Pacific (RISAP), “Taiwan invasion doesn’t hang in the military balance”, East Asia Forum, Aug 19th 2021, https://www.eastasiaforum.org/2021/08/19/taiwan-invasion-doesnt-hang-in-the-military-balance/

There is growing speculation and alarm about a possible Chinese invasion of Taiwan after Beijing sharpened its rhetoric towards the Taiwanese government and increased its military manoeuvres around the territory. The Biden administration is worried that if Chinese leaders are overconfident in China’s growing power and assume Washington’s decline, they might decide to invade Taiwan.

The US government has taken numerous actions to clearly signal its capacity and commitment to defend Taiwan. Growing diplomatic engagement with Taiwan, increased military manoeuvres, joint statements alongside Japan, South Korea and the G7, as well as developing a common response to a war over Taiwan with Japan and Australia are all part of this new framework.

Although these actions intend to decrease the risk of military conflict by strengthening military deterrence, they are unlikely to achieve it. This is because Beijing’s Taiwan calculus — which has always been more complex than simply focussing on the conventional military balance — involves three distinct factors that have dissuaded a Chinese invasion.

The first is military power. Chinese leaders still doubt whether China could defeat and then conquer Taiwan, let alone successfully fight the United States.

Secondly, there is an understanding that war over Taiwan would portend disastrous consequences for China’s economy, foreign relations and global image. Worse still, a conflict could pose an existential risk to the Chinese Communist Party: a war would mean fighting and killing ‘brothers and sisters’, while defeat would bring echos of 1895. A war would also undermine economic development — a pressing goal that is closely linked to the ‘great rejuvenation of the Chinese nation’.

The third factor is time. Chinese leaders wait based on the hope that ‘peaceful reunification’ is still possible and that time is on their side, as China’s power is growing. Their historical goal has been to prevent independence or a change of the status quo. Waiting still makes sense

, as China is pursuing its decades-long military modernisation process.

By ignoring these last two factors, Washington risks focussing too much on the assumption that Chinese leaders have become overconfident about the erosion of military deterrence. Fear of the United States was never the sole factor preventing a Chinese invasion in the first place.

Hong Kong illustrates this thinking well. Without having to contend with the possibility of an opposing military, Beijing remained acutely aware of the economic and diplomatic consequences of sending military or paramilitary troops to directly suppress protests. It instead adopted a slower strategy of tightening control to reduce the political costs of its actions.

Beijing only imposed national security legislation on Hong Kong when the problem had gotten ‘out of hand’ — not as a proactive measure. The Chinese leadership tried to gradually build control over the territory for years, believing time was on its side. It only implemented radical measures when it believed the status quo was changing to its detriment.

Chinese leaders haven’t yet decided that an invasion of Taiwan is unavoidable because they still hope that ‘peaceful reunification’ is achievable, but they worry about Taiwan’s steady drift towards the United States. Beijing sees Washington’s growing ties with Taiwan as undermining the status quo and diminishing the prospects for ‘peaceful reunification’.

#### Smart cities don’t solve sustainable development

Cavada et al 16 --- Dr. Marianna Cavada, Lecturer Design Urban Policy at Lancaster University, Dexter V.L. Hunt, MEng (hons). PhD. PGCert, FHEA. Doctor of Civil Engineering, and Chris D.F. Rogers, Department of Civil Engineering, University of Birmingham, “Do smart cities realise their potential for lower carbon dioxide emissions?”, Engineering Sustainability, Volume 169 Issue 6, December 2016, pp. 243-252, https://www.icevirtuallibrary.com/doi/full/10.1680/jensu.15.00032#\_

It is suggested that cities lead the smart agenda by ‘redefining what it means to be a smarter city’ (IBM, 2012) where technology is used for systems optimisation and leadership to tackle climatic issues successfully (Hill et al., 2011). IBM supports the idea that this technology is the medium for enhancement of city operations and city life: in particular, efficient infrastructure (utility, sewerage, energy, security systems and health innovations) that will run operations more smoothly and improve sustainability. However, perhaps this understates what smartness is (or is not) because of the context and complexities of where ‘smartness’ is created, and where exactly it is constrained requires a little more investigation. For example, in the developed world many embrace ‘smart’ technological opportunities from within cities, and argue that they act as a connection platform between citizens, geographical context and ‘things’, allowing for people to be seamlessly ‘connected’ using data, information and technology in real time (Doherty, 2013). However, this inherent widening of the horizon of citizens’ own options (intimately connected to those of other citizens) might then be the forbearer of a society in which innovative city interventions are developed and implemented (Harrison et al., 2010) without considering the consequences. In some respects perhaps the smart cities agenda inadvertently moves (or has moved) towards a simulated city context in which deployment of ‘netizens’ (or cybercitizens) exists, and according to Gabrys (2014) could provide a fiscal process that is worth trillions of dollars. Moreover, might the action of merely concentrating on the technology alone ultimately prove harmful to the necessary ideology that a truly smart city requires (Murgante and Burroso, 2013)?

However, as sceptics suggest, misconceptions of ‘technology’ and ‘controlled behaviours’ should be the positive perspective of a smart city ideal, leading to an array of economic risks that would undermine the smart agenda (Greenfield, 2013). In general, it is assumed that advanced technology is the main driving commodity, the likely biggest facilitator in which engagement is required in the wider conceptual system of sustainable urbanities. Undoubtedly, innovations within technology and efficiency sectors will implement city advancements, although these require careful consideration as what appears to be smart in one city may or may not be smart in another – ‘smartness’ is context dependent. This requires those involved in the smart agenda to work alongside all stakeholders (Lombardi et al., 2011a) to develop a city’s smart vision, taking into consideration contextual and geographical differences – what is sustainable is determined locally: local conditions set local priorities (Lombardi et al., 2011b). The smart ideal, as an enabler towards sustainable city living, is a ‘holistic frame’ based on three principles: ‘to reduce their ecological footprints and resource needs, to deepen connections to landscape and place and to enhance livability and quality of life while expanding economic opportunities’ (Beatly and Newman, 2013). Complex city systems and human interventions are the ones risking climate change, whereas understanding issues connected with cities and complexities can help measure and decrease the impacts of carbon dioxide (CO2) emissions and climate change (NAS, 2010). In this respect, individual choices would either reflect a response to city challenges, such as carbon dioxide reduction, or be stringently set within the context of a lens that considers most deeply their views. Within an energetic economic context, this might provide a foundation for enjoyable, sustainable and optimal smart city living (Duckenfield, 2013) and as a primary solution to problems of rapid development seen ever more frequently within many cities (Nam and Pardo, 2011).

While it might be suggested that technology leads to optimisation in cities there may also be disbenefits, the long-term impact of which is yet unknown. In addition, the inextricable links between liveability and fiscal prospects, with innovation as the main urban element (e.g. ‘eco-districts’, ‘local gardens’ and technological projects such as the ‘centre for neighbourhood technology district downtown’ and others) cannot be ignored (Eugenios et al., 2014).

Therefore, evaluating the carbon dioxide significance of smartness is undoubtedly going to be problematic, not least when engineers have yet to evaluate fully the complexities of the smart agenda itself. In other words, what is the real meaning of the term ‘smart city’ when we take into consideration, as with sustainability, local priorities and local conditions (Cavada et al., 2014)? Without such a definition and associated indicators, there would undoubtedly be confusion and much difficulty when trying not only to quantify, but also to compare readily, what constitutes city smartness in different areas worldwide – carbon dioxide reduction being a small element within this overarching philosophy.

With this in mind one of the associated challenges appears to be a lack of official smartness indicators at international or national levels, and where they do exist ‘low carbon dioxide’ appears to be somewhat lost within the smart cities agenda. This may be because existing rankings that reveal the smartest cities (and highlight related initiatives) have been generated by single institutions and publications, meaning compatibility is subjective at the very least while it is also evident that a smart city is more than achieving carbon dioxide reduction alone. In addressing this problem more clearly this paper identifies a range of sources that provide smart city rankings to elucidate where ‘smart’ fits in and how this relates to an agenda of ‘low carbon dioxide’.

2 Methodology

Through a stepwise methodology this research examines the initiatives related to the smart cities agenda. A database in Microsoft Access is created, to describe the complexity of smartness. It documents the individual cities that have been announced smart in addition to the initiatives that these cities adopted and awards they won. In the dataset, the relationship between ‘city and initiatives’ is explored to give information on the city with the most initiatives, number of smart cities awards and awards themes. Due to the plethora of initiatives, we are able to see the figures of initiatives per city, initiatives themes and initiatives categories. The authors then examine the ranking in initiatives categories and identify the role of the carbon dioxide emissions as part of the initiatives. To identify carbon dioxide emissions on individual smart cities, we test the smart initiatives as case studies and record how they differentiate. The following are the stepped objectives of this paper

Step 1: to create a smart city database that can be interrogated (Section 3.1)

Step 2a: to identify trends in published material on city rankings (Section 3.2)

Step 2b: to establish key themes used within city rankings (Section 3.3)

Step 2c: to identify leaders in city rankings (Section 3.4)

Step 3a: to establish smart categories, subcategories and initiatives (Section 3.5)

Step 3b: to investigate smart city status in two case studies (Section 3.6).

3 Results

The dataset is created from smart city publications, having the city as the focus of the dataset, which becomes the connection between the city information (scale, location and information source) and initiatives. This allowed for datasets to be interrogated according to areas within this research according to each key step and the initiatives that smart cities have taken to become smart to be determined. In addition, the awards that smart cities were awarded can indicate some of the steps that these cities took to become smart. Both initiatives and awards are supported by their sources, whereas the initiatives are categorised according to initiative themes (Figure 1).

By looking at published materials on smart city awards (and related ranking) over the period 2004–2014 (Figure 2), it can be seen that there is growing interest for those reporting on and comparing the performance of cities in terms of smartness and related themes (see Section 3.3). City awards were the first to introduce awards for intelligence as a shift towards digitalisation, followed by the EU Civitas awards and Eurocities awards during the first decade of the new millennium. Soon after 2010 the awards for EU biodiversity capital and EU green capital were introduced, along with the first smart cities awards; however, probably for economic reasons, these stopped. It is evident that city awards started as intelligence awards; there was a shift early in the current decade towards climate response, green and Civitas awards (city, vitality, sustainability). However, the rapid growth of the awards from 2013 indicates a resurgence of international interest.

When comparing these published materials on city rankings it is possible to characterise them according to five overarching themes, as shown in Table 1. Most of the sources belong to a smart theme, although these are complemented by other key city themes – sustainability and climate, innovation and liveability.

Interestingly, when considering the themes being used to judge the awards to cities it can be seen that many focus on climatic responses, intelligent communities, design, mobility, technical innovation, public participation and smartness – see, for example, the Civitas Initiative (2004–2014) co-financed by the EU, Intelligent Community (ICF, 2002–2015), the EU Climate Leadership Awards (C40, 2013–2014), World Design Capital (ICSID, 2008–2014), green EU Capital of Biodiversity (Fundacion Biodiversidad, 2011) and Smart City Expo (2012), between 2002 and 2015. Therefore, the majority of the awards are given primarily on green (including climate change mitigation) and innovation criteria, whereas mobility, resilience and economy have less prominence (Figure 3).

When considering all of these key ranking systems, which in total consider 282 cities from 52 countries in five continents, it appears that the EU has the biggest concentration of so-called ‘smart cities’ (Figure 4(a)). The USA is considered the smartest country, followed by The Netherlands (Figure 4(b)), and New York is considered the smartest city, followed by Amsterdam (Figure 4(c)). Interestingly, Stockholm, Ghent and Nantes have at least three awards each for sustainability (Figure 5), but it is of interest to note that they do not feature in the smartest top 12 city leaders according to the authors’ research of existing smart city rankings, although Toronto and Seoul do. Interestingly, cities internationally provide a wider smart roadmap, which includes technological innovations as well as smart interventions apart from just sustainable solutions.

In order to describe, rank, then make an award for smart city performance accurately, the primary step has to be to identify the generic key criteria (or subcriteria) and initiatives (considered here to be an action taken to improve a city’s smartness associated with an indicator that can be used to measure the efficacy of this action) that are being adopted. For example, in Scotland a smart initiative was considered to be the introduction of ‘open data’ (OpenDataScotland.org, 2013) to achieve smarter, more transparent and efficient data use.

When considering all the smart city approaches in parallel, this research has identified that six broad categories exist, consisting of 798 initiatives (Table 2).

According to Table 2 it can be seen that environmental sustainability is the dominant category with a total of 179 indicators and actions in cities. Climate change is very much considered within this section, with 64 indicators and actions associated with it (Figure 6). What is surprising, and what is most striking from Table 2, is that ‘smart city programme’ features within the ‘civic’ sections, and therefore the link between carbon dioxide reduction and smartness is being lost even though the link is readily apparent. On the whole, cities are responding to the carbon dioxide reduction challenge (Figure 6), but it is not necessarily being driven by (or even linked sufficiently to) the smart cities agenda. The question is whether it could be or should be in order that opportunities are not lost.

The interesting point here is that systems not derived for measuring smartness per se have categories (akin to drivers of change) and indicators not dissimilar to smart city categories. For example a ‘sustainability rankings’ system from Corporate Knights (2013) uses a combination of three themes (ecology–economic–culture) that encompass 27 indicators and actions (focused on sustainability and material flow analysis) applied to 20 cities (within the USA and Canada). While this research presented some contextual differences in terms of economic, climatic and census data, it can be seen that five categories emerge, which in combination create a sustainability index providing a narrative of ‘environmental quality, economic security, governance and empowerment, infrastructure and energy and social wellbeing’. This might be considered a complete view of the sustainable city (Corporate Knights, 2013), but is not derived exclusively to measure smartness.

On the other hand the ‘smart cities wheel’ (Cohen, 2014) ranking approach applied to 12 cities provides a simple methodology of ‘actions and indicators’ specific for smart cities and is equally divided into very similar (albeit broad) themes

environment

economy

society (people and living)

mobility

government.

In this system a collection of 400 indicators are equally distributed between: smart environment, which contains urban planning; resource management; and smart buildings, which includes carbon footprinting and energy consumption indicators (Cohen, 2014). While there is no unique category for smart technology within this methodology, it does feature as an indicator in the government, mobility, society and economy dimensions. Smart living corresponds to the quality of life dimension and refers to culture and happiness, safety and wellbeing in terms of living conditions. In other words, it appears that existing sustainability indicator systems are being applied (or reinterpreted) according to a smart cities agenda. In a way this almost mirrors how environmental indicators were reinterpreted in the late 1990s to fit the sustainability agenda. There is nothing wrong with this approach – it merely shows how robust some indicator sets are and how flexibly they can be applied.

In this step the criteria highlighted in step 3a are applied to two case studies: Copenhagen and Singapore. Both have been awarded exemplar status in terms of ‘smartness’, although by different institutions. Firstly, in 2014 Copenhagen became the first three-time winner of the most liveable city in the world award according to the ‘Quality of Life Survey 2014’ carried out by the international magazine Monocle (2014). This was based on considering the ‘human dimension’ in urban planning, taking into consideration liveability, which includes regional and cultural differences and integration across all five driving forces (i.e. social coherence, economic growth, environmental sustainability, infrastructure and energy, and good governance). While smart was not at the core of this ‘liveability’ award, its contribution to the smart agenda cannot be ignored. For example, in the same year Copenhagen was awarded the European Green Capital Award (EC, 2015a). ‘Green initiatives’ have proved to be a fiscal element of why Copenhagen has become a smart city – the creation of a green economy has not only added value to the development of companies themselves, but also added value in terms of lower carbon dioxide emission gains (Abild, 2011). In 2012 it was ranked as the number one smart city in Europe, once again due to a focus on its citizens and green initiatives, contributing towards a shared aim of becoming carbon dioxide neutral by 2025 (Cohen, 2014). Copenhagen is now considered a thriving city populated with cyclists and pedestrians who are proud of its inherent green qualities. As one of the ‘most impressive smartest cities of the world’, these qualities extend from its green corporations to everyday green living and the long-term planning processes, which for Copenhagen started back in 1925 during an initial ‘urban planning commission’ (Delgado, 2012). Even now this ethos remains and forms a cornerstone for why Copenhagen is so highly rated among its city peers. For example, the 2011 City Council plan outlined for 2025 shows the growth plans of the city and focuses on climatic challenges and low carbon dioxide emissions. The key to its success is within the citizen–business–governance collaboration (Mortensen et al., 2012). The main aim of the green vision embedded therein was carbon dioxide neutrality, although what is interesting is the fact that this has led to improvements in employment and development, and a shared vision that builds on existing knowledge, rather than reliance on new developments in ‘smart’ technology and research (Mortensen et al., 2012). Copenhagen’s cleantech companies’ community and fiscal development appears to be key to a system that values employment growth and overall desire to become smarter therein (Lubanski, 2012). The fact that Copenhagen has been named a smart city is due not only to the clarity of its shared green vision, but to the way that the vision has worked as a catalyst for its city life, improved mobility, creation of a green economy and enhancement of research knowledge. In Figure 7(a), created according to the categories outlined previously in Table 2, it can be seen that the main focus that makes Copenhagen smart is its drive for sustainability (42%) followed by technology (31%) and mobility (19%).

In comparison, Singapore (Figure 7b), which was named number one smart city by Forbes magazine (Laneri, 2009), the Institute of Mechanical Engineers (IME, 2014) and BBC news (Wakefield, 2013), has focused more on technological innovation (38%) and human talent (29%). This shows that, overall, a very different perspective was taken in each, contributing towards their smartness accreditation in very different ways. Most strikingly, technology is prominent, but is not the only contributor as some may imagine.

If context is considered as smartness empowerment within cities, as suggested in the introduction, then most likely Singapore has succeeded as an international trade centre, and has enabled active business due to the short span of the nation’s history and geographical location that suggested Singapore be a trading hub between other nations (Mahizhnan, 1999). Unlike other cities, Singapore was more able to ‘exploit the differential in information between people and between places’, and after 150 years had the chance to become independent to upgrade its information technology services and telecommunications – not due to its gradual industrialisation, but by rapidly educating its citizens and getting the know-how of the new technologies. According to the national information technology plan in 1986, the focus of the city smartness therein was not on the economic paradigm, but more on the smartness of its people (Mahizhnan, 1999). Singapore’s vision now, as described in iN2015 (2006) is very much about finding ways to use technology information (‘infocomm’) to improve commercial sectors and citizen’s lives, and is much less associated with carbon dioxide. However, advancements therein (e.g. energy efficient appliances/vehicles, wireless communications, smart metering, longer battery life) are all part of the solution by doing more with less, thus allowing citizens to be connected while reducing the need to move or providing a means by which it can be done more efficiently and cleanly. The smart vision fundamentals are, however, much broader in Singapore; they empower innovation, integration and internationalisation by focusing on people, infrastructure and the global economy. Since this 10-year vision started, Singapore has advanced its digitalisation capabilities in governance, health, tourism and connectivity, and set itself up as not only a highly regarded international competitor (iN2015, 2006) but also a ‘smart’ city – yet in a very different guise to Copenhagen.

### Sustainable development

#### Their ev’s just the UN Sec Gen waxing poetic – development goals fail regardless of antitrust

Ben Deighton 19, Postgraduate journalism degrees, Managing Editor of SciDev.Net, 2/18/19, “SDGs ‘failing to create transformational change’” https://www.scidev.net/global/news/sdgs-failing-to-create-transformational-change/

The Sustainable Development Goals (SDGs) are often failing to produce the profound changes needed to achieve their ambitious objectives due to a lack of coordination across the 17 separate goals, the American Association for the Advancement of Science (AAAS) annual meeting heard.

“The reality is that if they are just seen as aspirational goals what happens is — what is actually happening now — is that governments are just labelling what they are doing anyhow as being in the obligation of the SGDs,” Peter Gluckman from the University of Auckland, New Zealand, told a panel discussion during the event, held in Washington, DC from 14-17 February.

The SDGs were adopted by the United Nations in September 2015, and call for governments to achieve goals such as ending poverty, eradicating hunger and ensuring everyone has access to clean, affordable energy by 2030.

“It’s almost an order if you go to those meetings you have to wear the SDG badge, but the question is to what extent they really do understand the need of transformation, which is not the incremental approach anymore,”

Nakao Ishii, chief executive of Global Environment Facility

However, global hunger has risen for the third year in a row, according to the latest UN’s world food security report, while fewer than five per cent of countries are on track to meet childhood obesity and tuberculosis targets, according to a study published in The Lancet in 2017.

Global carbon emissions were also set to rise by two per cent in 2018 to hit an all-time high, according to a report by the UK’s University of East Anglia and the Global Carbon Project. The trend is driven by rises in the use of coal, oil and gas.

“Don’t get me wrong, those [the SDGs] are critically important and we are fully committed — but let’s be honest about lots of words and lots of talk, but perhaps little action,” Daan du Toit, deputy director-general for international cooperation at the South African Department of Science and Technology, said during a panel discussion.

### Grid

#### Cyber attacks in other countries thump grid collapse. Their impact isn’t about the U.S. and says any snowballs globally.

#### No extinction: we’d rebuild and it only targets the U.S.---Europe and Asia won’t be affected

#### Grid’s resilient AND no cascades.

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

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

### Battery Tech

#### Small laser weapon deployment now --- solves battery tech access

Hambling 21 --- David Hambling, Forbes, Aerospace & Defense, “U.S. Navy Building ‘Portable’ Laser Weapon”, Sept 2021, https://www.forbes.com/sites/davidhambling/2021/09/27/us-navy-building-portable-laser-weapon/?sh=2149d3c3247e

Laser weapons are now a battlefield reality; the U.S. Navy deployed the LAWS laser on the U.S.S. Ponce back in 2016. However, so far we have only seen large weapons – laser cannon, so to speak – mounted on ships or other vehicles. Miniaturization is on the way.

According to the contract notice last month, laser specializes MZA Associates of Albuquerque, New Mexico, will “will design, develop, deliver, integrate, test and demonstrate a compact, portable, low-cost and reliable C-UAS HELWS” – this last alphabetic jumble being short for ‘Counter-Unmanned Air Systems High Energy Laser Weapon System.’ In other words, a laser to zap small drones. While other laser systems go up to 150 kilowatts and can take on a range of targets, a 10-Kw laser is just powerful enough to take down small consumer quadcopters, an increasing threat on the battlefield.

### Korea War

**No NoKo war or first strike**

**Kang & Cha, 18** – David C. Kang and Victor Cha (Kang is Maria Crutcher Professor of International Relations at the University of Southern California; Cha is Director for Asian Affairs in the White House's National Security Council, with responsibility for Japan, North and South Korea, Australia, and New Zealand. 2018. “THREATENING, BUT DETERRENCE WORKS.” Nuclear North Korea, Columbia University Press, pp. 41–69. JSTOR, http://www.jstor.org/stable/10.7312/cha-18922.8.)

This raises another question: does North Korea have legitimate security fears? In a nutshell, the problem is this: the United States **refuses** to give **security guarantees** to North Korea until it proves it has **dismantled** its weapons program. The North **refuses** to **disarm** until it has **security guarantees** from the United States. **Hence, stalemate.** The key issue is whether North Korea has legitimate security concerns. If it does—and I will argue that **this is the case**—we can explain the pattern of North Korean behavior and also point to a **solution**. North Korea’s nuclear weapons, missile programs, and massive conventional military deployments are aimed at deterrence and defense. If **No**rth **Ko**rea really wanted to develop nuclear weapons for **offensive** purposes, it **would have done so long ago**. Even if the North develops **nuc**lear weapon**s**, it **will not use them because of a devastating U.S. response**. The North wants a guarantee of security from the U.S., and a policy of pressure will only make North Korea feel even more insecure. Even **isolation** is at best a **holding measure**, while economic sanctions—or even economic engagement alone—will be unlikely to get North Korea to abandon its **weapons program**. Without movement toward resolving the **security fears** of the North, progress in resolving the **nuclear weapons issue** will be **limited**. The United States and North Korea are still technically at war—the 1953 armistice was never replaced with a peace treaty. The U.S. has been unwilling to discuss even a nonaggression pact, much less a peace treaty or normalization of ties. With the U.S. calling North Korea a terrorist nation and Donald Rumsfeld discussing the possibility of war, it is no surprise that North Korea feels threatened. Upon closer examination, **No**rth **Ko**rea never had the material capabilities to be a serious contender to the U.S.- ROK alliance, and it **quickly fell further behind**. So the real question has not been whether North Korea would prevent or preempt as South Korea caught up, but instead why North Korea might **fight as it fell farther and farther behind**. To paraphrase William Wohlforth, “theorists tended to concentrate on dynamic challengers and moribund defenders. But in Korea the North was the moribund challenger, and the South was the rising defender.”7 **If North Korea was so weak, why did so many people conclude that North Korea was the likely instigator of war?** Since North Korea was not powerful, scholars and policymakers hypothesized extreme **psychological tendencies** to North Korean leaders. That is, if the **material conditions** such as military or economic power did not lead logically to a conclusion of North Korean threat, then the leadership’s **psychology** was what must matter. These ancillary and ad hoc psychological assumptions range from an irrational North Korean leadership to an extremely strong preference for invasion. Most theories of war focus on material conditions such as relative power, but in the case of North Korea, the real analytic lifting has been done by psychological assumptions about intent. As I will show, **none of these assumptions are tenable**.8

**The explanation for a half-century of stability and peace on the Korean peninsula is actually quite simple: deterrence works**. Since 1953 North Korea has faced both a determined South Korean military, and more importantly, U.S. military **deploy**ments that at their height comprised **100,000 troops** and more than **100 nuclear-tipped Lance missiles** aimed at North Korea. Even today the United States maintains bases in South Korea that include 38,000 troops, nuclear-capable airbases, and naval facilities that guarantee U.S. involvement in any conflict on the peninsula. While in 1950 there might have been reason for confidence in the North, the war was **disastrous for the Communists**, and without massive **Chinese involvement** **North Korea would have ceased to exist**. Even during the cold war, North Korea’s leadership **never challenged this deterrence** on the peninsula. As I will show, the attempted assassinations of South Korea’s authoritarian leaders during the 1970s and 1980s have stopped because they would be clearly **counterproductive** in a democratic South Korea, and **will not begin again**. Given the tension on the peninsula, small skirmishes have had the potential to spiral out of control, yet these incidents on the peninsula have been **managed with care** on both sides. The peninsula has been **stable for fifty years because deterrence has been clear and unambiguous.** The end of the cold war marked a major change in North Korea’s security position. The past fifteen years have seen the balance of power turn sharply against the North. What was stable deterrence during the cold war by both sides has swung quickly in favor of the West and South Korea.19 In the 1990s North Korea lost its two **cold war patrons**, experienced economic and environmental crises, and fell far behind the South. Although during the cold war the North was the aggressor, **this shift in power put it on the defensive**. It was only when the balance began to turn against the North that it began to pursue a nuclear weapons program. Both the weapons program and the bellicose nature of its rhetoric are an attempt to continue to **deter the U.S. from taking any preemptive moves against it.** North Korea has the worst public relations in the world. The North’s anachronistic cold war rhetoric and seeming inability to present itself reasonably make it difficult for even impartial people in the West to make sense of its actions. This chapter is aimed at providing an explanation. As history has shown, pressure only exacerbates North Korean security fears. Since North Korea does not pose the threat many analysts think it does, the United States may be **wasting resources** aimed at the North, and may also be unnecessarily raising tensions throughout the region. I want to emphasize that I am neither defending nor justifying North Korean behavior. Much of the regime’s actions are abhorrent and morally indefensible. However, sound foreign policy is built upon clear and objective analysis of the conditions at hand. Emotion and ideology have often interfered with the reasoned study of North Korea, and this has led scholars and policymakers to consistently overestimate the North Korean threat and to misunderstand the motivations behind North Korea’s actions. This chapter is focused on explaining the pattern of North Korea’s military and security policies. A complete picture of North Korea must also include the dramatic steps taken in the past decade to reform and open up its economy. In chapter 4 I will discuss North Korea’s economy and what it tells us about their foreign policy. In this chapter I perform four tasks. First, I show why North Korea is not a threat. Second, I explain why deterrence has worked for fifty years, and show that the changing balance of power has increased North Korea’s security fears. Third, I show why, even if North Korea develops a nuclear weapons capability, it will not use them, and also why North Korea is unlikely to engage in terrorism. Finally, I examine the “madman hypothesis” to show how questionable assumptions can be smuggled into the analysis of North Korea, and show why assuming irrationality is unproductive. WHY NORTH KOREA IS NOT A MILITARY THREAT In explaining North Korea’s foreign policy, a useful place to begin is by exploring why North Korea has become weaker and what has deterred it from starting a war. North Korea chose not to attack the South during the cold war, even though it was at the height of its power and was supported by the PRC and the Soviet Union. The past fifteen years have led to severe economic and military decline in North Korea, and it is now much weaker than South Korea. Intuitively, it follows that this nation is fearful of the United States. The majority of international relations theories conclude that the source of threats is clear: power is threatening. Kenneth Waltz writes that “balance of power theory leads one to expect that states, if they are free to do so, will flock to the weaker side. The stronger, not the weaker side, threatens them. . . . Even if the powerful state’s intentions are wholly benign, less powerful states will . . . interpret events differently.”10 Because states are concerned primarily with their own survival, and since states are concerned about relative power, there always exists the possibility that a strong nation may decide to begin hostilities with a weaker nation. Viewed differently, “parity preserves peace.”11 Thus a potential aggressor will not initiate a conflict if it cannot win. Threats arise by the mere presence of capabilities. Even if a nation was peaceful when it was weak, changes in power can bring changes in goals. Robert Gilpin writes that “rising power leads to increasing ambition. Rising powers seek to enhance their security by increasing their capabilities and their control over the external environment.”12 In this sense intentions are not fixed, but instead flow from and respond to changes in capabilities. The obverse of Gilpin’s argument is that as a nation’s capabilities fall behind, as it grows relatively weaker, its fears about the external environment will increase. Its ambitions will lessen, and its perception of external threat will rise. A preventive war might occur if the challenger’s economic and military capabilities begin to catch those of the defender. In that case, there exists the possibility that the defender will decide to fight a preventive war to keep the challenger from catching up, or that the challenger will fight after it catches up.13 However, there are two generic problems in applying the theories to the Korean peninsula. First, the theories predict peace if a small challenger falls farther behind the defender.14 If a nation was deterred from attacking when it was 60 percent the size of the defender, why would it attack after it has fallen to 30 percent, or even less, of the defender’s size? There are only two logical ways in which one can end up with the weaker power attacking the stronger. The first argument is well elucidated by Victor Cha in chapter 1, which I will discuss that at length in chapter 4. The [[GRAPH 2.1 OMITTED]] second way is to assume that the leader is irrational.15 I will show below why the **madman theory** does **not make** much **sense**. Before that, however, I will show how absolutely weak the North actually is. The first calculation compares only North and South Korea, while the second calculation includes likely U.S. actions in these assessments. The typical approach has been to take both North and South Korea and compare them along a range of economic and military measures, and I will show that North Korea’s capabilities were never preeminent over the South. More important, however, is an assessment of relative power that includes the U.S. forces that would be involved on the peninsula in event of a conflict. Scholars rarely consider this balance of forces, but this is a mistake, because **any war would certainly involve the United States**. Both of these measures show **clearly** that **preventive war and power transition theories are not applicable to the Korean case**. [[GRAPH 2.2 OMITTED]] South Korea has always had twice the population of the North. In economic terms, North Korea was never as large as the South, and even at its closest was no more than three-quarters the size of the South. Graph 2.1 shows estimates for the gross national product (GNP) of North and South Korea from 1953 to 2000. It is clear that North Korea was never close to the South in absolute size, and indeed after 1960 rapidly began falling farther and farther behind. North Korea’s GNP in 1960 was $1.52 billion, while South Korea’s GNP was $1.95 billion. By 1970 North Korea had grown to $3.98 billion, while in the South GNP was $7.99 billion. On a per capita income basis the North was never much farther ahead of the South, either. The North and South were roughly equivalent until the mid-1970s, when the South began to rapidly leave the North behind (graph 2.2). In 1960 North Korea’s per capita GNP was $137 as compared to $94 in the South, and in 1970 the North’s per capita income was $286 to $248 in the South. [[GRAPH 2.3 OMITTED]] However, by 1980 the North’s income was $758 per capita, while the South’s was $1,589, and by 1990 $1,065 to $5,569. Furthermore, in terms of preventive war, per capita income is not as important as absolute size, because small nations may be rich on a per capita basis (Singapore, Switzerland) but be militarily insignificant. In terms of defense spending, North Korea quickly fell behind the South, spending less on defense by the mid-1970s (graph 2.3). As far back as 1977 the South was spending more than the North on defense in absolute dollar terms, $1.8 billion in the South opposed to $1 billion by the North.16 The only measure by which the North outspent the South was on a per-capita GNP basis, which is an indicator of weakness, not strength.17 Additionally these numbers do not include military transfers from their respective patrons. Between 1965 and 1982 North Korea received $1.5 billion in military transfers, mostly from the Soviet Union. Over the same time period South Korea received $5.1 billion from the United States.18 [[GRAPH 2.4 OMITTED]] Thus the most common measures of power in international relations—economic size and defense spending—show quite clearly that North Korea was **never larger than South Korea**, has been smaller on an absolute and per-capita basis than the South for at least thirty years, and **continues to fall farther behind**. Those who see North Korea as **threatening** need to explain **why North Korea— having waited fifty years—would finally attack now that it is one-twentieth the size of the South**. In military capabilities the North and South Korea were in rough **parity** for the first two decades following the Korean War (1950–1953), and then the North began to fall behind. Graph 2.4 shows the number of men in the armed forces from 1963 to 1998. Most interesting is that North Korea did not begin its massive expansion of its armed forces until well into the 1970s. This is most **probably** a **response to its falling** further **behind** the South. But for the past thirty years, North Korea’s training, equipment, and overall military quality has steadily **deteriorated** relative to the South. The South Korean military is better-equipped, better-trained, and more versatile with better logistics and support than the North Korean military, and some assessments suggest that this may double combat effectiveness.19 Although the military has continued to hold pride of place in the North Korean economy, there have been increasing reports of reduced **training** due to the **economic problems**. Joong-Ang Ilbo, one of South Korea’s major daily newspapers, quoted an unidentified Defense Ministry official as saying that North Korea’s air force had made one hundred training sorties per day in 1996, down from three hundred to four hundred before the end of 1995, and that the training maneuvers of ground troops had also been reduced to a “minimum level.”20 American military officials have noted that individual North Korean pilots take one training flight per month, compared with the ten flights per month that U.S. pilots take.21 This drastically degrades combat readiness. Table 2.1 shows a comparison of weaponry in North and South Korea in 1997. The bulk of North Korea’s main battle tanks are of 1950s vintage, and most of its combat aircraft were introduced before 1956. Evaluations after the Gulf War concluded that Western weaponry is at least twice, or even four-times, better than older Soviet-vintage systems.22 By the 1990s North Korea’s military was large in absolute numbers but the quality of their forces was severely degraded relative to South Korea’s and the U.S. military. Michael O’Hanlon notes that: “Given the obsolescence of most North Korean equipment, however, actual capabilities of most forces would be notably less than raw numbers suggest. About half of North Korea’s major weapons are of roughly 1960s design; the other half are even older.”23 To view the North as superior in military terms is a mistake. But even more surprising about many of these accounts is that they measure the strength of the North Korean military **only against that of the ROK**, without including the **U.S.** forces, either **present** in Korea or those potential **reinforcements**. North Korea knows that it would fight the United States as well as the South, and it is **wishful thinking** to hope that the North Korean military [[TABLE 2.1 OMITTED]] planners are **so naïve** as to ignore the U.S. military presence in South Korea, **expect**ing the U.S. to **pack up and go home** if the North invaded. Comparisons between the South and the North that ignore the role of the United States are seriously misleading as to the real balance of power on the peninsula.24 In event of a full-scale conflict, the United States could reinforce the peninsula with **overwhelming power**. Currently 36,000 U.S. troops are stationed in Korea, including the U.S. Second Infantry Division and 90 combat aircraft including 72 F-16s. In addition, 36,000 troops are stationed in Japan, including the headquarters of the Seventh fleet at Yokosuka naval base, 14,000 Marines, and 90 combat aircraft. This is only the beginning, as more would soon arrive from within the United States.25 This economic and military comparison of North and South Korea shows that North Korea never had a lead over the South, and after the 1960s quickly began falling behind. The end of the cold war marked the beginning of a major change in North Korea’s fortunes, as North Korea continued to have economic difficulties, while its allies deserted it. This situation has only become more grave in the new millennium. **North Korea is not a threat to start an unprovoked war**. North Korea was never in a preeminent position relative to the South, and the real question for the pessimists is why they continue to believe that a nation that is far behind and falling farther behind might still attack. The weak may attack the strong—but the conditions under which we expect that to happen **do not exist** on the peninsula. Yet many people still see the situation as tense and threatening. This is true, but it is true because **deterrence at its heart** requires both sides to know that the other side can **severely damage** it. DETERRENCE AND THE CHANGING BALANCE OF POWER North Korea has not attacked for fifty years because **deterrence works**. Despite the **tension** that has existed on the peninsula, the **balance of power has held.** For more than fifty years neither side has attempted to mount a major military operation, nor has either side attempted to challenge deterrence on the peninsula.26 Any war on the peninsula would have disastrous consequences for both sides. The tightly constricted geographic situation **intensifies** an **already acute security dilemma** between the two sides.27 The capitals of Seoul and Pyongyang are less than 150 miles apart—**closer than New York and Baltimore**. Seoul is **30 miles from the** de-militarized zone that separates the North and the South (**DMZ**), and easily within reach of North Korea’s **artillery** tubes. One estimate calculates that a war on the Korean peninsula would cost the **U**nited **S**tates more than **$60 billion** and result in **3 million casualties**, including 52,000 U.S. military casualties. The North, although it has **numerically** larger armed forces, faces a much more highly **trained** and **capable** U.S.-ROK armed forces. This led to stalemate: there was little room for barter or bargaining. The result has not been surprising: although tension is high, the **balance of power has been stable**. **Far** from being a **tinderbox**, both sides have moved **cautiously** and **avoided major military mobilizations** that could spiral out of control.

### Semicondictor

#### Chip shortages inevitable or resilient

Leonhardt 1/25 (Megan Leonhardt is a senior money writer with Fortune, January 25th, 2022, Fortune, “Chip armageddon reveals how terrifyingly fragile the U.S. supply chain actually is” <https://fortune.com/2022/01/25/how-expensive-are-used-cars-semiconductor-chips-shortage-supply-chain-crisis-inflation/>) MULCH

The supply-chain crisis was terrible in 2021, but we didn't know just how bad. It was actually a five-days-from-emergency kind of bad.

A new report from the Department of Commerce released Tuesday found that the typical inventory of semiconductor chips fell from 40 days in 2019 to less than five days in 2021. Some key industries were especially strapped.

That had a big impact, particularly for automakers, consumer electronics, LED lights, and even wind turbine producers. The global auto industry, for example, lost about $210 billion in revenues in 2021 thanks to the global chip shortage that forced companies to scale back production. What's more, the chip shortage also drove up inflation because both new and used cars got so expensive, as automakers need chips to make new vehicles. The price of new cars and trucks in December was up a shocking 11.8% year-over-year.

Tuesday's report is based on responses from more than 150 companies that responded to a Request for Information that Commerce sent in September, asking for information about inventories, demand, and delivery dynamics from anyone involved in the semiconductor supply chain.

“That means if a COVID outbreak, a natural disaster, or political instability disrupts a foreign semiconductor facility for even just a few weeks, it has the potential [to] shut down a manufacturing facility in the U.S., putting American workers and their families at risk,” Commerce said Tuesday.

The data also showed that not only were companies operating with very lean inventories, but demand for chips last year was at least 20% higher than 2019. Industry experts expect the chip shortage to continue into 2022.

#### ZERO ev links price-fixing cartels to semiconductors – literally NOT a thing

Faris 21 (James Faris, long-term investor in Advanced Micro Devices, “Analysis: Semiconductor industry ready for 2021 rebound,” Madison Business Review, 1-6-2021, https://www.breezejmu.org/business/analysis-semiconductor-industry-ready-for-2021-rebound/article\_c50fa9b8-4eb5-11eb-865b-9340685ba93a.html)

The semiconductor supplier market type is best described as a non-cooperative, tight oligopoly that’s competitive but largely controlled by the top four firms — Samsung Electronics, Intel, SK Hynix and Micron Technology. Those four suppliers controlled 77.6% of the market in 2018 and accounted for $210.5 billion of the industry’s $271 billion total sales in that year.

The semiconductor vendor market type is best described as a non-cooperative, loose oligopoly that’s competitive and contestable, as evidenced by the decrease in sum of squared market shares from 2012 to 2019 and the growth of Samsung Electronics, SK Hynix, Micron Technology and NXP while Intel, the leader in the space, saw its market share fall. The four-firm concentration of 38.4% in 2019 is substantial but far lower than that of semiconductor suppliers.

Firm conduct is largely free of cooperative and collusive behavior, evidenced by an overall decline in average unit selling prices that has limited top-line industry revenue growth for vendors, according to IBIS World.

Theoretically, firms could collude to raise prices because of the relatively inelastic demand for semiconductors, so constant price declines for semiconductors and electronic components in the past decade is remarkable and suggests there is little to no cooperation or collusion among firms. If there was collusion, we would expect to see industry prices rising as firms agree to collectively limit output or raise prices above competitive levels, as is the custom in a cartel.

### Taiwan

#### Deterrence not key to prevent Taiwan war

Lungu 21 --- Andrei Lungu is president of The Romanian Institute for the Study of the Asia-Pacific (RISAP), “Taiwan invasion doesn’t hang in the military balance”, East Asia Forum, Aug 19th 2021, https://www.eastasiaforum.org/2021/08/19/taiwan-invasion-doesnt-hang-in-the-military-balance/

There is growing speculation and alarm about a possible Chinese invasion of Taiwan after Beijing sharpened its rhetoric towards the Taiwanese government and increased its military manoeuvres around the territory. The Biden administration is worried that if Chinese leaders are overconfident in China’s growing power and assume Washington’s decline, they might decide to invade Taiwan.

The US government has taken numerous actions to clearly signal its capacity and commitment to defend Taiwan. Growing diplomatic engagement with Taiwan, increased military manoeuvres, joint statements alongside Japan, South Korea and the G7, as well as developing a common response to a war over Taiwan with Japan and Australia are all part of this new framework.

Although these actions intend to decrease the risk of military conflict by strengthening military deterrence, they are unlikely to achieve it. This is because Beijing’s Taiwan calculus — which has always been more complex than simply focussing on the conventional military balance — involves three distinct factors that have dissuaded a Chinese invasion.

The first is military power. Chinese leaders still doubt whether China could defeat and then conquer Taiwan, let alone successfully fight the United States.

Secondly, there is an understanding that war over Taiwan would portend disastrous consequences for China’s economy, foreign relations and global image. Worse still, a conflict could pose an existential risk to the Chinese Communist Party: a war would mean fighting and killing ‘brothers and sisters’, while defeat would bring echos of 1895. A war would also undermine economic development — a pressing goal that is closely linked to the ‘great rejuvenation of the Chinese nation’.

The third factor is time. Chinese leaders wait based on the hope that ‘peaceful reunification’ is still possible and that time is on their side, as China’s power is growing. Their historical goal has been to prevent independence or a change of the status quo. Waiting still makes sense,

as China is pursuing its decades-long military modernisation process.

By ignoring these last two factors, Washington risks focussing too much on the assumption that Chinese leaders have become overconfident about the erosion of military deterrence. Fear of the United States was never the sole factor preventing a Chinese invasion in the first place.

Hong Kong illustrates this thinking well. Without having to contend with the possibility of an opposing military, Beijing remained acutely aware of the economic and diplomatic consequences of sending military or paramilitary troops to directly suppress protests. It instead adopted a slower strategy of tightening control to reduce the political costs of its actions.

Beijing only imposed national security legislation on Hong Kong when the problem had gotten ‘out of hand’ — not as a proactive measure. The Chinese leadership tried to gradually build control over the territory for years, believing time was on its side. It only implemented radical measures when it believed the status quo was changing to its detriment.

Chinese leaders haven’t yet decided that an invasion of Taiwan is unavoidable because they still hope that ‘peaceful reunification’ is achievable, but they worry about Taiwan’s steady drift towards the United States. Beijing sees Washington’s growing ties with Taiwan as undermining the status quo and diminishing the prospects for ‘peaceful reunification’.

## Adv 2

### Africa Famine

#### Ukraine thumps food prices – energy prices are a magnifier

Smith 3/2 (Kelly Anne Smith, Forbes Advisor Staff, March 4th2022, “How The War In Ukraine Could Impact Your Grocery Bill” forbes, <https://www.forbes.com/advisor/personal-finance/russia-ukraine-war-food-prices-rising/>) MULCH

What’s happening in Ukraine is a devastating humanitarian crisis, and its ripple effects could inflame the financial burden Americans have already been grappling with—notably, their grocery bill.

Food prices are 7.5% higher in Jan. 2022 than in Jan. 2021, according to the Bureau of Labor Statistics’ consumer price index report. As the war continues, some experts say food prices are going to surge as a result.

Is the War in Ukraine Going to Cause Food Prices to Increase?

It’s possible that the war will increase food prices—but how it will play out is complicated.

Russia and Ukraine are some of the largest producers of wheat globally. Together, they account for 29% of all wheat exports. But with a war raging on, those exports may come to a halt.

The United States doesn’t rely heavily on the region for wheat, but the shock to the global supply chain could ultimately affect the U.S. The countries that depend on the region for wheat will be forced to buy it elsewhere, including from the U.S. An increased demand from a smaller inventory could ultimately drive food prices up.

A USDA spokesperson told Forbes Advisor that the department is closely monitoring the situation, “but we currently do not foresee the conflict in Ukraine as having a significant impact on food prices in the United States.”

Others, though, aren’t so optimistic.

While increased costs due to a wheat shortage could be small, there’s another factor at play that could cause larger food price increases: Energy costs, which are already soaring.

“Energy and food commodities are intertwined,” says Robert Frick, corporate economist at Navy Federal Credit Union. He describes these increasing energy prices as the “compounding factor” that will drive food prices up.

Frick says that several components of food production rely on energy, including transporting the raw materials, processing them, packing them and transporting final products to stores.

“[An increase in energy costs] is going to amplify the increase in food prices,” Frick says. “The increase could be a lot more than people are expecting.”

### Africa state collapse

#### No African instability NOR escalation

Dr. James A. Schear 16, PhD, Global Fellow with the Africa Program at the Woodrow Wilson, “FORGING SECURITY PARTNERSHIPS IN AFRICA: WHAT LIES AHEAD?”, Wilson Quarterly, Winter, http://wilsonquarterly.com/quarterly/the-post-obama-world/forging-security-partnerships-in-africa-what-lies-ahead/

More than a generation later, the tempo of political violence has greatly subsided across large areas of southern and eastern Africa and, more recently, in parts of coastal west Africa. Tragically, other venues — most notably central Africa’s Great Lakes region, as well as the Maghreb and Sahel to the north — are still riven by deep-set instabilities. And, yes, colonial-era legacies do still exert some malign influences, state fragility poses perennial relapse risks, and new threats are ever-evolving.

Despite these complexities, any geostrategist would have to acknowledge contemporary Africa’s positive features. The continent has not seen a war between sovereign states since the late 1990s, when Eritrean and Ethiopian forces waged large-scale mechanized warfare along their (still) disputed border. Nor is Africa a venue for aggressively overreaching hegemons. None of its largest, strongest countries — Angola, Ethiopia, Kenya, Nigeria, South Africa and Tanzania — are locked into polarizing rivalries with each other, and growing economic interdependencies within and beyond their regions have tended, on balance, to aid local stability. This is all good news, but alas, it is only part of the story.

### Food shocks

#### No food wars---no causal evidence, only small states, and government responses solve

Mark W. Rosegrant 13, 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.

Policies can nevertheless be implemented to reduce price variability. Less costly forms of stabilization, at least in terms of government outlays, include reducing import tariffs (and quotas) to lower prices and restricting exports to increase food availability. However, these types of policy responses, while perhaps helping an individual country's consumers in the short run, can lead to increased international price volatility, with potential for disproportionate adverse impacts on other countries that also may be experiencing food insecurity.

# 2NC

## CP---Section 5

### 2NC---O/V

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

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

#### First, expand the scope---regulations don’t.

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.

#### Contextual evidence proves---guidance documents interpreting Section 5 don’t expand the scope---merely alter enforcement.

Federal Register: Rules and Regulations - ‘9 (Federal Trade Commission - *16 Code of Federal Regulations*- 255 Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; *Final Rule* - “Rules and Regulations” - Federal Register - Vol. 74, No. 198 - Thursday, October 15, 2009 - #E&F - https://www.ftc.gov/sites/default/files/documents/federal\_register\_notices/guides-concerning-use-endorsements-and-testimonials-advertising-16-cfr-part-255/091015guidesconcerningtestimonials.pdf)

b. Examples 7-9 – New Media Several commenters raised questions about, or suggested revisions to, proposed new Examples 7-9 in Section 255.5, in which the obligation to disclose material connections is applied to endorsements made through certain new media.91 Two commenters argued that application of the principles of the Guides to new media would be inconsistent with the Commission’s prior commitment to address word of mouth marketing issues on a case-by-case basis.92 Others urged that they be deleted in their entirety from the final Guides, either because it is premature for the Commission to add them, or because of the potential adverse effect on the growth of these (and other) new media.93 Two commenters said that industry self-regulation is sufficient.94

The Commission’s inclusion of examples using these new media is not inconsistent with the staff’s 2006 statement that it would determine on a case-by-case basis whether law enforcement investigations of ‘‘buzz marketing’’ were appropriate.95 All Commission law enforcement decisions are, and will continue to be, made on a case-by-case basis, evaluating the specific facts at hand. Moreover, as noted above, the Guides do not expand the scope of liability under Section 5; they simply provide guidance as to how the Commission intends to apply governing law to various facts. In other words, the Commission *could* challenge the dissemination of deceptive representations made via these media regardless of whether the Guides contain these examples; thus, not including the new examples would simply deprive advertisers of guidance they otherwise could use in planning their marketing activities.96

#### Second, ‘increase prohibitions by… law’---regulations don’t.

John Roberts 15, Chief Justice, US Supreme Court, “Department of Homeland Security, Petitioner v. Robert J. MacLean,” 135 S.Ct. 913, WestLaw

The Government argues that this whistleblower statute does not protect MacLean because his disclosure regarding the canceled missions was “specifically prohibited by law” in two ways. First, the Government argues that the disclosure was specifically prohibited by the TSA's regulations on sensitive security information: 49 CFR §§ 1520.5(a)-(b), 1520.7(j) (2003). Second, the Government argues that the disclosure was specifically prohibited by 49 U.S.C. § 114(r)(1), which authorized the TSA to promulgate those regulations. We address each argument in turn.

\*390 A

1

\*391 In 2003, the TSA's regulations prohibited the disclosure of “ [s]pecific details of aviation security measures ... [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations.” 49 CFR § 1520.7(j). MacLean does not dispute before this Court that the TSA's regulations prohibited his disclosure regarding the canceled missions. Thus, the question here is whether a disclosure that is specifically prohibited by regulation is also “ specifically prohibited by law ” under Section 2302(b)(8)(A). (Emphasis added.)

The answer is no. Throughout Section 2302, Congress repeatedly used the phrase “law, rule, or regulation.” For example, Section 2302(b)(1)(E) prohibits a federal agency from discriminating against an employee “on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation.” For another example, Section 2302(b)(6) prohibits an agency from “grant[ing] any preference or advantage not authorized by law, rule, or regulation.” And for a third example, Section 2302(b)(9)(A) prohibits an agency from retaliating against an employee for “the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.”

1In contrast, Congress did not use the phrase “law, rule, or regulation” in the statutory language at issue here; it used the word “law” standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. Russello v. United States, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). Thus, Congress's choice to say “specifically prohibited by law” rather than “specifically prohibited by law, rule, or regulation” suggests that Congress meant to exclude rules and regulations.

\*392 The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here for two reasons. First, Congress used “law” and “law, rule, or regulation” in close proximity—indeed, in the same sentence. § 2302(b)(8)(A) (protecting the disclosure of “any violation of any law, rule, or regulation ... if such disclosure is not specifically prohibited by law”). Second, Congress used the broader phrase “law, rule, or regulation” repeatedly—nine times in Section 2302 alone. See §§ 2302(a)(2)(D)(i), (b)(1)(E), (b)(6), (b)(8)(A) (i), (b)(8)(B)(i), (b)(9)(A), (b)(12), (b)(13), (d)(5). Those two aspects of the whistleblower statute make Congress's choice to use the narrower word “law” seem quite deliberate.

\*\*920 We drew the same inference in Department of Treasury, IRS v. FLRA, 494 U.S. 922, 110 S.Ct. 1623, 108 L.Ed.2d 914 (1990). There, the Government argued that the word “laws” in one section of the Civil Service Reform Act of 1978 meant the same thing as the phrase “law, rule, or regulation” in another section of the Act. Id., at 931, 110 S.Ct. 1623. We rejected that argument as “simply contrary to any reasonable interpretation of the text.” Id., at 932, 110 S.Ct. 1623. Indeed, we held that a statute that referred to “laws” in one section and “law, rule, or regulation” in another “cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.” Ibid. That inference is even more compelling here, because the statute refers to “law” and “law, rule, or regulation” in the same sentence, rather than several sections apart.

Another part of the statutory text points the same way. After creating an exception for disclosures “specifically prohibited by law,” Section 2302(b)(8)(A) goes on to create a second exception for information “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” This exception is limited to action taken directly by the President. That suggests that the word “law” in the only other exception is limited to actions by Congress—after all, it would be unusual \*393 for the first exception to include action taken by executive agencies, when the second exception requires action by the President himself.

In addition, a broad interpretation of the word “law” could defeat the purpose of the whistleblower statute. If “law” included agency rules and regulations, then an agency could insulate itself from the scope of Section 2302(b)(8)(A) merely by promulgating a regulation that “specifically prohibited” whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word “law.”

2

2The Government admits that some regulations fall outside the word “law” as used in Section 2302(b)(8)(A). But, the Government says, that does not mean that all regulations are excluded. The Government suggests two interpretations that would distinguish “law” from “law, rule, or regulation,” but would still allow the word “law” to subsume the TSA's regulations on sensitive security information.

First, the Government argues that the word “law” includes all regulations that have the “force and effect of law” (i.e., legislative regulations), while excluding those that do not (e.g., interpretive rules). Brief for Petitioner 19–22. The Government bases this argument on our decision in Chrysler Corp. v. Brown, 441 U.S. 281, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). There, we held that legislative regulations generally fall within the meaning of the word “law,” and that it would take a “clear showing of contrary legislative intent” before we concluded otherwise. Id., at 295–296, 99 S.Ct. 1705. Thus, because the TSA's regulations have the force and effect of law, the Government says that they should qualify as “law” under the statute.

The Government's description of Chrysler is accurate enough. But Congress's use of the word “law,” in close connection with the phrase “law, rule, or regulation,” provides \*394 the necessary “clear showing” that “law” does not include regulations. Indeed, using “law” and “law, rule, or regulation” in the same sentence would be a very obscure way of drawing the Government's nuanced distinction between different \*\*921 types of regulations. Had Congress wanted to draw that distinction, there were far easier and clearer ways to do so. For example, at the time Congress passed Section 2302(b)(8)(A), another federal statute defined the words “regulatory order” to include a “rule or regulation, if it has the force and effect of law.” 7 U.S.C. § 450c(a) (1976 ed.). Likewise, another federal statute defined the words “State law” to include “all laws, decisions, rules, regulations, or other State action having the effect of law.” 29 U.S.C. § 1144(c)(1) (1976 ed.). As those examples show, Congress knew how to distinguish between regulations that had the force and effect of law and those that did not, but chose not to do so in Section 2302(b)(8)(A).

Second, the Government argues that the word “law” includes at least those regulations that were “promulgated pursuant to an express congressional directive.” Brief for Petitioner 21. Outside of this case, however, the Government was unable to find a single example of the word “law” being used in that way. Not a single dictionary definition, not a single statute, not a single case. The Government's interpretation happens to fit this case precisely, but it needs more than that to recommend it.

Although the Government argues here that the word “law” includes rules and regulations, it definitively rejected that argument in the Court of Appeals. For example, the Government's brief accepted that the word “law” meant “legislative enactment,” and said that the “only dispute” was whether 49 U.S.C. § 114(r)(1) “serve[d] as that legislative enactment.” Brief for Respondent in No. 11–3231 (CA Fed.), pp. 46–47. Then, at oral argument, a judge asked the Government's attorney the following question: “I thought I understood your brief to concede that [the word “law”] can't \*395 be a rule or regulation, it means statute. Am I wrong?” The Government's attorney responded: “You're not wrong your honor. I'll be as clear as I can. ‘Specifically prohibited by law’ here means statute.” Oral Arg. Audio in No. 11–3231, at 22:42–23:03; see also id., at 29:57–30:03 (“Now, as we've been discussing here, we're not saying here that [the word “law”] needs to encompass regulations. We're saying statute.”). Those concessions reinforce our conclusion that the Government's proposed interpretations are unpersuasive.

In sum, when Congress used the phrase “specifically prohibited by law” instead of “specifically prohibited by law, rule, or regulation,” it meant to exclude rules and regulations. We therefore hold that the TSA's regulations do not qualify as “law” for purposes of Section 2302(b)(8)(A).

B

3We next consider whether MacLean's disclosure regarding the canceled missions was “specifically prohibited” by 49 U.S.C. § 114(r)(1) itself. As relevant here, that statute provides that the TSA “shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that \*396 disclosing the information would ... be detrimental to the security of transportation.” § 114(r)(1)(C).

This statute does not prohibit anything. On the contrary, it authorizes something—it authorizes the Under Secretary to “prescribe regulations.” Thus, by its terms Section 114(r)(1) did not prohibit the disclosure at issue here.

The Government responds that Section 114(r)(1) did prohibit MacLean's disclosure by imposing a “legislative mandate” on the TSA to promulgate regulations to that effect. See Brief for Petitioner 28, 33; see also post, at 2–3 (SOTOMAYOR, J., dissenting). \*\*922 But the Government pushes the statute too far. Section 114(r)(1) says that the TSA shall prohibit disclosures only “if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation.” § 114(r)(1)(C) (emphasis added). That language affords substantial discretion to the TSA in deciding whether to prohibit any particular disclosure.

The dissent tries to downplay the scope of that discretion, viewing it as the almost ministerial task of “identifying whether a particular piece of information falls within the scope of Congress' command.” Post, at 3. But determining which documents meet the statutory standard of “detrimental to the security of transportation” requires the exercise of considerable judgment. For example, the Government says that Section 114(r)(1) requires the Under Secretary to prohibit disclosures like MacLean's. The Government also says, however, that the statute does not require the Under Secretary to prohibit an employee from disclosing that “federal air marshals will be absent from important flights, but declining to specify which flights.” Reply Brief 23. That fine-grained distinction comes not from Section 114(r)(1) itself, but from the Under Secretary's exercise of discretion. It is the TSA's regulations—not the statute—that prohibited MacLean's disclosure. And as the dissent agrees, a regulation does not count as “law” under the whistleblower statute. See post, at 1.

### 2NC---AT: Rollback---AT: Congress Backlash

#### Congress wouldn’t waste their time retaliating.

Raso ’10 CONNOR N. RASO – J.D., Yale Law School expected 2oo; Ph.D., Stanford University Department of Political Science expected 2010 - “Strategic or Sincere? Analyzing Agency Use of Guidance Documents” – Yale Law Journal – v. 119:782 - #E&F - https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5196&context=ylj

Agencies facing a hostile Congress should use guidance documents more frequently to avoid attracting additional scrutiny. Measuring congressional preferences toward an agency or a particular issue is difficult. Roll call votes rarely concern one issue or even one agency. Congress rarely votes on individual agency budgets, and the few available votes are contaminated by the threat of a presidential veto. Other potential measures of congressional dissatisfaction, such as attempts to override agency rules, occur too infrequently.

### 2NC---AT: Links to DOJ DA

#### Counterplan text says FTCA---that’s exclusively the FTC.

Anker 22 (Kimberly H. Anker, BA from Colby College, J.D. Candidate at Boston College Law School; “Best Frenemies: Evaluating the Dual Jurisdiction of the Federal Antitrust Agencies;” 01-27-22, Boston College Law Review, Vol. 63, Issue 1, <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=4038&context=bclr>, TM)

Even though the DOJ and FTC act as complementary institutions, they retain limited exclusive jurisdiction over certain areas of antitrust regulation.58 Under the Sherman Act, the DOJ has exclusive jurisdiction to prosecute criminal anticompetitive conduct.59 In contrast, the FTC has the exclusive authority to bring actions under the FTC Act for unfair methods of competition.60

**[[BEGIN FOOTNOTE 60]]**

60 Federal Trade Commission (FTC) Act of 1914, 15 U.S.C. § 45(a); see Pierce, supra note 41, at 2028 (explaining that the FTC has sole jurisdiction to enforce the FTC Act and shares jurisdiction with the DOJ to enforce the Sherman Act and Clayton Act).

**[[END FOOTNOTE 60]]**

### 2NC---AT: Rollback---AT: Not Binding

#### It’s binding on actors---courts agree.

Seidenfeld ’11 Mark Seidenfeld – Patricia A. Dore Professor of Administrative Law, Florida State University College of Law. “Substituting Substantive for Procedural Review of Guidance Documents” - 90 TEX. L. REV. 331 (2011) -#E&F - https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1004&context=articles

A. Legal Effect and the Distinction Between Legislative Rules and Guidance Documents

The first school to emerge, led by Robert Anthony, was motivated by a concern for agency abuse of guidance documents.75 When agencies adopt rules with the force of law, they are supposed to use notice-and-comment rulemaking. Often, however, agencies will adopt policy statements or interpretive rules that in practice bind regulated entities without following notice-and-comment procedures.76 Professor Anthony devoted a good part of his scholarship to advocating that courts should police such abuse by determining which purported guidance documents actually do create new, practically binding law and reversing them on grounds that they are really "spurious rules"—legislative rules issued improperly without notice-and-comment procedures.77

Anthony advocated different tests to determine whether purported policy statements, as opposed to interpretive rules, were spurious rules.78 On the one hand, a policy statement is an indication of how an agency intends to exercise discretion that it is given to implement the statutes and regulations it administers. Policies do not follow from the language of these statutes and regulations, but to qualify as a policy statement, the document must not definitively identify the manner in which the agency will apply these sources of law.79 An interpretive rule, on the other hand, is meant to explain preexisting legal obligations and relations that are embodied in the agency’s authorizing statutes and regulations.80 Hence, a document is a valid interpretive rule and needs not go through notice and comment if it follows from the language it is interpreting.

1. Statements of Policy.—For a policy statement, the “ex ante legal effect” school looks at whether the document was issued with intent to bind or otherwise had binding effect.81 Indicia of such bindingness include, most importantly, definitive language indicating the course of action the agency would take when applying relevant statutes and regulations to particular situations.82 Other factors that might indicate sufficient bindingness are whether the agency indicated a clear intent to follow the document when addressing particular cases, whether the agency published the document in the Code of Federal Regulations, and whether the agency expressly indicated that the document was meant to be a nonlegislative rule.83

A major problem for this ex ante approach is that binding legal force comes in many flavors and intensities, and it is not self-evident from the face of a policy statement how the agency will apply it in subsequent particular situations. As already noted, virtually everyone accepts that only legislative rules can have independent legal force.84 This means that a person who is alleged to have violated an agency’s regulatory law must be shown to have violated the underlying statute or legislative rule that an agency is implementing; it is not sufficient for the agency to demonstrate that the person violated a policy statement.85 But Anthony advocates that documents that are practically binding should be deemed to be legislative rules as well.86 This raises the question of what makes a rule practically binding.

Courts have ruled that a policy statement specifying precisely what a regulated entity can do to comply with agency legislative rules is binding.87 Such a statement poses a dilemma for an entity about whether to comply with the announced policy or risk prosecution and potential penalties. To the extent it induces changes in the entity’s conduct, the statement may appear sufficiently forceful to be a legislative rule that cannot be promulgated without notice and comment.

#### The evidentiary findings for the rulemaking create a public record supporting the plan---this results in judicial uptake.

Joshua D. Wright 13, Commissioner, Federal Trade Commission, “Section 5 Recast: Defining the Federal Trade Commission’s Unfair Methods of Competition Authority,” Executive Committee Meeting of the New York State Bar Association’s Antitrust Section, 6/19/13, https://www.ftc.gov/sites/default/files/documents/public\_statements/section-5-recast-defining-federal-trade-commissions-unfair-methods-competition-authority/130619section5recast.pdf

II. WHY IS A SECTION 5 POLICY STATEMENT NECESSARY?

There are at least two principal reasons for issuing a policy statement regarding the Commission’s unfair methods of competition authority. The first is that the ambiguity associated with the current state of the Commission’s application of its unfair methods of competition authority can lead to overbroad enforcement that creates uncertainty in the business community about the legality of various types of business conduct. This uncertainty potentially has grave consequence for our nation’s economy because it inevitably deters some firms from engaging in efficiency‐enhancing conduct for fear that that the conduct may draw the ire of the Commission. The second reason is that, in mapping out the Commission’s institutional blueprint, Congress envisioned that Section 5 would play a key role in the Commission’s mission by leveraging its unique research and reporting functions to develop evidence‐based competition policy. This promise has remained largely unfulfilled, in part because the Commission has failed to articulate a coherent framework for applying its unfair methods of competition authority. I will briefly discuss each of these concerns in turn.

a. Uncertainty in the Business Community

In the absence of any meaningful limiting principle distinguishing lawful conduct from unlawful conduct under Section 5, the breadth of the Commission’s authority to prosecute unfair methods of competition creates significant uncertainty among members of the business community. Without a policy statement that clearly articulates how the Commission will apply its Section 5 authority, businesses must make difficult decisions about whether the conduct they wish to engage in will trigger a Commission investigation or worse. Such uncertainty inevitably results in the chilling of some legitimate business conduct that would otherwise have enhanced consumer welfare but for the firm’s fear that the Commission might intervene and the attendant consequences of that intervention. Those fears would be of little consequence if the Commission’s Section 5 authority was clearly defined and business firms could plan their affairs to steer clear of its boundaries.

In practice, however, the scope of the Commission’s Section 5 authority today is as broad or as narrow as a majority of the commissioners believes that it is. This lack of institutional commitment to a stable definition of an unfair method of competition leads to at least two sources of problematic variation in Section 5 interpretation by the agency. One is that an agency’s interpretation of the statute in different decisions need not be consistent even when the individual commissioners remain constant. Another is that as the members of the Commission change over time, so does the agency’s Section 5 enforcement policy, leading to wide variation in how the Commission prosecutes unfair methods of competition. These two sources of variation give firms little if any ability to plan long‐term strategies that may involve conduct that one commission might consider permissible while another commission might find offensive. Thus, it should come as no surprise that even when a commissioner articulates his or her position on the scope of Section 5, that position provides little reassurance to the business community. Take for instance the position offered by one commissioner who several years ago stated that conduct can constitute an unfair method of competition when it includes “actions that are collusive, coercive, predatory, restrictive, or deceitful, or other‐wise oppressive, and does so without a justification that is grounded in legitimate, independent self‐ interest.”12 I do not know any antitrust practitioners who would have felt comfortable providing guidance to clients on how to avoid the “otherwise‐oppressive” prong of an unfair method claim.

The uncertainty surrounding the scope of Section 5 is exacerbated by the administrative procedures available to the Commission for litigating unfair methods claims. This combination gives the Commission the ability to, in some cases, take advantage of the uncertainty surrounding Section 5 by challenging conduct as an unfair method of competition and eliciting a settlement even though the conduct in question very likely would not violate the traditional federal antitrust laws. This is because firms typically will prefer to settle a Section 5 claim rather than going through lengthy and costly administrative litigation in which they are both shooting at a moving target and have the chips stacked against them. Such settlements only perpetuate the uncertainty that exists as a result of ambiguity associated with the Commission’s Section 5 authority by encouraging a process by which the contours of the Commission’s unfair methods of competition authority are drawn without any meaningful adversarial proceeding or substantive analysis of the Commission’s authority.

Critics have offered at least two rejoinders in response to claims that the uncertainty surrounding Section 5 may chill legitimate business conduct. The first is that the courts have provided sufficient guidance on the scope of Section 5 to alleviate concerns about its imprecise boundaries.13 The second is that they claim the Commission has used Section 5 very judiciously and only in appropriate circumstances.14 Neither argument is particularly compelling. On the first point, although the Supreme Court has decided a handful of cases in which it examined the scope of the Commission’s authority under Section 5, no court has set out the elements necessary to challenge conduct that falls outside the traditional federal antitrust laws. Moreover, the Supreme Court has not examined the breadth of Section 5 in nearly four decades. This suggests that a policy statement actually is more important today in light of dramatic changes in antitrust jurisprudence since the Supreme Court last considered the Commission’s authority under Section 5.15 Quite a bit has happened within antitrust jurisprudence during this timeframe. The Supreme Court has issued nearly one hundred antitrust decisions since 1972 that can be explained in large part by a move toward bringing modern antitrust law in line with economic thinking.16 No serious antitrust scholar argues that merger law would better serve consumers by relying exclusively upon the language in Brown Shoe,17 Von’s Grocery,18 and Pabst Brewing19 rather than the updated economic thinking provided by the Horizontal Merger Guidelines.20 Similarly, court decisions from the early 1970s are not a serious argument against providing agency guidance on Section 5; rather, they are evidence demonstrating the need for it.

With respect to the second point, the naked assertion that the Commission only uses Section 5 judiciously, and only in appropriate circumstances, provides very little comfort to a firm who must guess how any particular Commission will apply its unfair methods of competition authority to the firm’s business practices, whether that Commission’s views will remain consistent, or whether the views of any particular Commission will survive a change in membership. Take for example the position articulated by one FTC Chairman just over three decades ago who said “no responsive competition policy can neglect the social and environmental harms produced as by‐ products of the marketplace: resource depletion, energy waste, environmental contamination, worker alienation, the psychological and social consequences of producer‐stimulated demands.”21 Now, I do not think that any of my colleagues would endorse such an expansive use of Section 5, but the point is that under the current state of affairs where the Commission has not committed itself to a coherent operational framework, what the Commission’s Section 5 enforcement looks like can vary dramatically from commissioner to commissioner, and commission to commission. No amount of pointing to recent cases as examples of the Commission’s “judicious” and “responsible” use of Section 5 and no number of commissioner speeches—including this one—can be counted upon to supply businesses with the information they require to ensure that they do not violate the statute.

b. Leveraging Institutional Advantages to Steer Competition Policy

The second reason for issuing a policy statement with respect to the Commission’s unfair methods of competition authority is that Congress intended Section 5 to play a key role in the Commission’s competition mission.22 Specifically, Congress intended for the Commission to use Section 5 to reach business conduct outside the scope of the traditional federal antitrust laws. A key rationale for creating a competition statute that reaches behavior not otherwise unlawful under the Sherman Act and Clayton Act is that the Commission, as an expert administrative tribunal, could interpret its operative statute in a manner that is flexible to changes in the marketplace and capable of expanding beyond current judicial interpretations. In order to expand beyond current judicial interpretations, Congress authorized the Commission not only to bring enforcement actions, but also to conduct studies of business practices in order to understand their competitive implications.23 These institutional design features were intentional and were undertaken with the hope that, as former Chairman Bill Kovacic and Marc Winerman have described, Section 5 would “help make the Commission the preeminent vehicle for setting competition policy in the United States.”24

Specifically, the Commission’s unique policy authority would allow competition policy research and development that would complement the agency’s enforcement mission and guide commissioners in identifying the appropriate standards of liability. Ultimately, “courts would eventually look to the Commission for guidance about how to frame and apply antitrust rules.”25 The combination of these institutional design features and expertise would generate sound competition rules and reliable guidance for the business community. This promise, however, has remained largely unfulfilled.26 In fact, the evidence suggests that the Commission’s use of Section 5 has done very little to influence antitrust doctrine and even less to inform judicial thinking or to provide guidance to the business community. In my view, this is in large part because the Commission has failed to articulate a coherent framework for the application of Section 5.

### 2NC---Solvency---AT: Extraterritoriality Deficit

#### FTC has authority under Section 5 to enforce antitrust law extraterritorially – AND doing results in the same interpretation of comity as the plan

Ruhl 89 (Jesse R. Ruhl, JD candidate, Dickinson School of Law, BA Franklin & Marshall College, “The International Law Limits to the FTC's International Activity: Does the Law of Nations Keep the FTC at Home?” Penn State International Law Review, 7(3), 1989, https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1100&context=psilr)

IV. Domestic Limitations to the Extraterritorial Jurisdiction of the FTC

Although the Constitution gives Congress plenary power to regulate commerce with foreign nations, congressional power to regulate international antitrust is limited by international law and comity.' The Supreme Court indicated this principle early in the history of the United States by recognizing that no state may exercise sovereign powers within the borders of another state without the latter's consent . 4 Nevertheless, the United States Supreme Court has ratified a series of actions by the Department of Justice where the United States has asserted jurisdiction over agreements made outside the territorial limits of the United States governing trade and commerce. The jurisdictional nexus, according to the courts, has been found when some "effect" of the agreement has been felt within the United States itself.47

A. Delegation of the Extraterritorial Authority to the FTC

As indicated earlier,4 8 Congress has delegated some of its authority to regulate commerce to the FTC.4 The FTC's authority to regulate international commerce originates in the FTC Act and the FTC's authority to enforce the FTC Act.3 0 Section 5(a) of the Act includes, as a jurisdictional feature of the statute, the authority to regulate "trade or commerce with foreign nations."51 Congress had authority to enact and the FTC has authority to enforce the Act only because the FTC Act is within the Constitutional delegation of authority to Congress "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.""2

B. FTC's Ability to Regulate Conduct of Citizens Abroad

After the Wheeler-Lea Act," the FTC's authority to regulate United States citizen's conduct occurring outside the territorial boundaries of the United States has never been seriously questioned." The scope and power of that authority was demonstrated in Branch v. FTC.58

In Branch, the FTC issued a cease and desist order 56 ordering Branch to discontinue soliciting a phony "diploma mill" in Latin America."' Branch contested the order, complaining that the FTC had no jurisdiction over his "institute" because the advertising occurred outside the territorial boundaries of the United States.58 The United States Court of Appeals for the Seventh Circuit rejected Branch's appeal. The court reasoned that since the FTC was motivated to protect Branch's competitors engaged in foreign commerce, as opposed to protecting those residents of central America who may be injured by Branch's phony activities, 9 the FTC had jurisdiction to order Branch to discontinue his practices. In so holding, the court remarked:

The Federal Trade Commission does not assume to protect the petitioner's customers in Latin America. It seeks to protect the petitioner's competitors from his unfair practices, begun in the United States and consummated in Latin America. It seeks to protect foreign commerce . . . . The right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within its territorial jurisdiction has been recognized repeatedly .... Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.6 "

The question then left for the court to decide was whether Congress had delegated to the FTC the power to regulate Branch's activity.6'

The court found that Congress had granted the authority to the FTC in § 5(a) of the Federal Trade Commission Act.62

C. FTC's Ability to Regulate Foreign Nationals

The Federal Trade Commission Act also allows the FTC to exercise jurisdiction over foreign nations located outside the territorial boundaries of the United States. The United States has consistently applied its own rules of conduct concerning anticompetitive acts of foreigners outside the territorial United States which produced deleterious economic effects within the territorial United States. 3 The conflict with international law arises when the United States, through the FTC or the Department of Justice, attempts to punish a foreign national for acts which occurred outside the territorial United States but violated the United States' antitrust laws.6 It is not doubted that foreign nationals are liable for their acts which occur within the territorial United States. The question is whether an exemption exists to the principles of territorial sovereignty so that the United States may prosecute foreign nations for conduct committed outside the United States, and thus in another sovereign's territory.65

The leading case supporting this exception to territorial sovereignty principles is The S.S. Lotus,66 in which the Permanent court of International Justice held that a state may punish a foreigner for his acts abroad if those acts "form a constituent element of a crime consummated within the territory of the State. '6 7 In this case, a collision between a French and a Turkish ship had resulted in the sinking of the Turkish ship and the deaths of Turkish seamen. When the French ship later docked in Constantinople, the French officer in charge when the collision occurred was put on trial in Turkey and convicted of involuntary manslaughter. France protested the sentence, and both countries resorted to the Permanent Court of Inter national Justice to resolve the question of whether Turkey had violated France's territorial sovereignty by prosecuting the French officer. The court determined that, because the crime had effected Turkish territory (the Turkish vessel), 8 Turkey could exercise jurisdiction over the Frenchman notwithstanding the fact that the French officer had at all times remained on board the French vessel:

[I]t is certain that the courts of many countries, ... which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there . ... "

The S.S. Lotus now stands for the principle of international law that a state may exercise jurisdiction over a party if the party has in fact perpetrated conduct in a foreign country which effects the country asserting the jurisdiction. This measure of jurisdiction has now developed into the "effects doctrine" upon which the United States can reach out, through the FTC and its other regulatory agencies, to regulate conduct by actors who are not located within United States territory.7"

### 2NC---Solvency---AT: Threat Fails

#### The effect is identical to rulemaking---business will behave as if it were binding and comply

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The choice between notice-and-comment rulemaking and guidance is also frequently presented as a tradeoff between regulatory flexibility and effectiveness, on the view that the greater flexibility of guidance compared to notice-and-comment rules is offset by guidance not being legally binding. Although the formal distinction is technically accurate, as numerous commentators have noted, the reality is otherwise, rendering the ostensible distinction quite misleading. As one leading casebook puts it well:

If you are a regulated party, and the agency issues an interpretive rule or policy statement indicating its present view of the law, you will probably make serious efforts to comply with that rule even if it is not formally binding. At a minimum, the rule alerts you to the kind of conduct that the agency regards as worthy of prosecution; at a maximum, the rule may effectively dictate how the agency will [\*283] conduct its prosecutorial adjudications. The *practical effect* of such rules on regulated parties may be hard to distinguish from the practical effect of legislative rules.

The unvarnished reality that firms will behave as though guidance pronouncements are, in fact, binding rules is particularly applicable to financial institutions, the focus of this Article's analysis, given the repeated interaction between financial firms and regulators. This interaction facilitates regulators' ability to retaliate on numerous dimensions through supervision and examination, in addition to their ability to bring enforcement actions for noncompliance with a specific policy. Moreover, the licensing feature of financial regulation (i.e., regulators can shut down a bank's lines of business, as well as a bank itself) is a powerful inducement for financial institutions to comply with, rather than challenge, guidance pronouncements.

As a consequence, by using guidance strategically instead of notice-and-comment rulemaking, particularly in the financial-entity regulatory context, an agency can obtain the benefit of a rule (regulated entities' compliance), without incurring the procedural costs that are legally supposed to accompany the imposition of obligations on private parties under requirements imposed on regulatory decisionmaking by Congress and courts in order to protect the public and regulated entities from arbitrary and capricious decisions. A critical issue, then, is an empirical one: to what extent can an agency shape its agenda to impose rule-like constraints on conduct while avoiding the procedural protections that are supposed to accompany such activity? But consideration of that inquiry is [\*284] not independent of another feature of administrative governance--namely, agency design, the degree to which an agency's structure is insulated from political accountability.

#### Threats of enforcement empirically work and is perceived as credible.

Justin (Gus) Hurwitz 14, Assistant Professor of Law, University of Nebraska College of Law, “Chevron and the Limits of Administrative Antitrust,” University of Pittsburgh Law Review, vol. 76, no. 2, 2, 2014, lawreview.law.pitt.edu, doi:10.5195/lawreview.2014.324

Cases in which the FTC has asserted a broader understanding of Section 5 have generally been resolved in one of two ways: settlement or litigation. Most of the attention paid to the FTC’s expanded use of Section 5 unfair methods of competition claims has focused on high-profile cases that have ultimately settled. When initially bringing a claim, the FTC need not allege anything more than a reason to believe that Section 5 has been violated.147 The FTC need not frame its allegations with any greater specificity; in particular, it need not specify whether it asserts a violation of the traditional antitrust laws (which it can enforce under Section 5) or a standalone Section 5 claim. Rather than limit its options, the FTC typically does not specify a precise legal theory but rather embraces the expansive ambiguity inherent in Section 5’s “unfairness” standard. This approach increases the litigation uncertainty faced by the targets of an FTC investigation, which can be used as leverage by the FTC in securing a favorable settlement.148 This was the pattern used in McWane (discussed below). The FTC also used it in three recent high-profile investigations into high-tech industries: Intel,149 N-Data,150 and Google.151 This approach has also been the basis of the FTC’s privacy and data security jurisprudence, spanning more than one hundred cases.152

While the FTC’s use of Section 5 in high-profile cases has garnered the most attention, its use of Section 5 in lower profile cases, especially those that do not settle, is more revealing. As an administrative agency, a case brought by the FTC is typically heard by an Administrative Law Judge (“ALJ”).153 The FTC prepares and files a complaint, the subject of the investigation files an answer, and both parties submit briefs of their arguments to the ALJ, who will then submit findings of fact and law in an Initial Decision to the Commission.154

A curious thing has happened between the complaint and briefing stages of unfair method of competition cases that the FTC brings before an ALJ. Often, the complaint will cite only Section 5 as the legal basis for the complaint. In the vast majority of cases, this is sufficient to spur the target of the investigation to settle, and, typically, the settlement will have been agreed to prior to the filing of the complaint. In those cases that do not settle, the FTC explains in its brief that Section 5 unfair methods of competition claims incorporate Sections 1 and 2 of the Sherman Act.155

#### The deterrent effect alone solves, even if it is not prioritized or widespread.

Hayes 21 (Stephen Hayes, J.D., Partner at Relman Colfax; Kali Schellenberg, Attorney at Relman Colfax; “DISCRIMINATION IS "UNFAIR" Interpreting UDA(A)P to Prohibit Discrimination;” April 2021, Student Borrower Protection Center, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832022>, TM)

The federal agencies with administrative authority over the unfairness laws should also pursue complementary regulatory actions. First, they could issue guidance or interpretive rules that do not require notice-and-comment rulemaking in which they formally adopt this construction and advise entities of how the agencies intend to exercise their supervisory and enforcement authorities in this area.102 That type of announcement has the benefit of reminding entities of their non-discrimination obligations and obviating any potential fair-notice defense that an entity might attempt in future supervision or enforcement actions. This type of clarification also facilitates enforcement of the Dodd-Frank Act by state attorneys general and enforcement agencies that might be reluctant to be first movers advancing the unfairness-discrimination application.103 And, this guidance can play an important deterrent effect: notice of this application can prompt entities to adopt and extend policies, procedures, and compliance systems designed to mitigate risks, even if enforcement is not prioritized or widespread.

### 2NC---Solvency---AT: Civil Damages Key

#### Section 5 has a better deterrent effect than treble damages---our ev is comparative.

Melamed ’16 A. Douglas Melamed - Professor of the Practice of Law, Stanford Law School – “PREPARED STATEMENT For the SENATE COMMITTEE ON THE JUDICIARY SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS on SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT” - April 5, 2016 #E&F - https://www.judiciary.senate.gov/imo/media/doc/04-05-16%20Melamed%20Testimony.pdf

(2) Some have emphasized that only the FTC can enforce Section 5 and that the only remedy for Section 5 is a “cease and desist” order issued by the FTC. Because there are no treble damages for Section 5 violations, it is suggested, there should be no fear that businesses will be unfairly punished for engaging in conduct that they did not understand to be unlawful or that businesses will be deterred from engaging in procompetitive conduct for fear of violating an ambiguous Section 5. Of course, if that were true, the prospect of standalone Section 5 enforcement would also not deter anticompetitive conduct.

There are two problems with this argument. First, the premise that remedies for violating Section 5 are inconsequential is incorrect. The FTC has for decades taken the position that its authority to issue “cease and desist” orders permits it to enter broad injunction orders that require parties to take a wide range of actions to rectify alleged harm and to ensure that they will not engage in the future in what the FTC regards as conduct similar to that alleged to have violated Section 5. Businesses sometimes find the prospect of such intrusive or sweeping restrictions on how they conduct their business to be far more worrisome than the prospect of treble damage liability.

#### FTC can issue civil damages under Penalty Offense Authority

Gordon ’21 et al; Len Gordon, chair of Venable’s Advertising and Marketing Group, is a skilled litigator who leverages his significant experience working for the Federal Trade Commission (FTC) to help protect his clients’ interests and guide their business activity. Len regularly represents companies and individuals in investigations and litigation with the FTC – From: “The Regulatory Road Ahead: Payments Law Virtual Bootcamp” - June 8, 2021 – This specific section was written January 19, 2021 and reconsolidated into a broader doc - #E&F - https://www.venable.com/-/media/files/events/2021/06/the-regulatory-road-ahead.pdf?la=en&hash=7DA62C06072C24DB3A3C8A743AEE41FCC12E3410

Finally, the FTC could utilize a somewhat unused avenue for obtaining redress—the Penalty Offense Authority, which we’ve previously discussed here. This Authority authorizes the FTC to seek civil penalties (directly not through the DOJ) against a defendant in federal court where (1) the FTC has obtained a litigated cease and desist order against another party through an administrative proceeding pursuant to Section 5(b) of the FTC Act; (2) the cease and desist order identifies a specific practice as unfair or deceptive; and (3) a party on notice of the order (i.e., someone with actual knowledge that the practice is unfair or deceptive) then engages in that same violating conduct after the order is final.

### 2NC---AT: Judicial Rollback

#### Guidance uniquely avoids rollback---it’s not judicially reviewable because it’s not legally binding---guidance is neither ripe nor final.

Kessler 21 (Jeremy Kessler, Professor of Law at Columbia University; Charles Sabel, Maurice T. Moore Professor of Law at Columbia University; “The Uncertain Future of Administrative Law;” 08-01-21, Daedalus, Vol. 150, Issue 3, pp. 188-207, <https://doi.org/10.1162/daed_a_01867>, TM)

Yet government-by-guidance has provoked significant legal controversy, for at least three related reasons.18 First, as notice-and-comment rulemaking became accepted as the paradigmatic mode of administrative rulemaking, the less procedurally onerous issuance of guidance began to strike some scholars, litigants, and judges as a potential cheat. As Justice Elena Kagan put it during an oral argument in 2015, this is the recurrent concern that “agencies more and more are using interpretive rules and are using guidance documents to make law and that … it is essentially an end run around the notice and comment provisions.”19 A second, related fear is that because the provisionality of guidance documents makes them difficult to challenge in court, agencies can use guidance to evade not only the pre-issuance notice-and-comment process but also post-issuance judicial review as well.20 A final concern relates to the proliferation of doctrinal deference to agencies' interpretation of their statutory mandates and prior regulations. Critics warn that such deference perversely shelters agency interpretations announced in guidance documents from judicial scrutiny, even though they do not reflect the deliberation and evidence-gathering required by the notice-and-comment process or by formal agency adjudication.21

Underlying these technical legal objections are deeper normative concerns about the relationship of regulation as “current thinking” to conventional forms of legal authority–legislative, executive, and judicial–that help to explain why guidance continues to bedevil American courts and legal commentators. Guidance, unlike notice-and-comment rules, cannot be seen as analogous to and directly descended from legislation as a natural outgrowth of the constitutional order. But neither does guidance have the finality that marks the culmination of lawful executive or judicial action. Unlike prosecutorial indictments and administrative enforcement actions, it does not purport to represent the executive branch's determination that a particular private party has violated the law; unlike administrative orders and judicial decisions, it is not an assessment of the guilt or liability of an accused party. Guidance is always ripening into a conclusive decision, but it is never ripe; for this reason, unlike administrative rules and orders, it is not reviewable by the courts as a matter of course.

## CP---Onshoring

### 2NC---Condo---Short

## Adv---Cartels

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

### 2NC---AT: Space Col !

#### Space col fails – laundry list of reasons

Hamilton 19 --- Tech Fellow at Business Insider citing David Armstrong, an astrophysics professor at the University of Warwick, and Kevin Moffat, who specialises in human physiology in extreme environments. (Isobel Asher Hamilton, *Business Insider*, 8-18-2019, “Here are some of the gaping holes in Elon Musk and Jeff Bezos' plans to conquer space,” <https://www.businessinsider.com/gaping-holes-elon-musk-and-jeff-bezos-space-plans-2019-7>, NREM)

But neither men are content to talk about near-term goals. Both have laid out grandiose visions for space colonization, and have even sparred with each other in trying to assert that their own plan is the best. In terms of settlement, Elon Musk's gaze remains fixed on Mars, where he claims he wants to start building a human settlement by the 2050s and where he has said he would like to die (although, he noted, not on impact). Bezos' rhetoric is no less modest. He has said he wants to develop a "sustained human presence" on the moon, has proposed that heavy industry could be moved off-Earth, and has said that humanity could live in O'Neill cylinders— huge spinning space stations which would simulate gravity. So how close are we to actual space colonization? Business Insider spoke to three experts to sift through the tech moguls' bombastic rhetoric and uncover some of the real scientific challenges. Low gravity thins our bones, weakens our muscles, and makes our hearts change shape Being in space for long periods of time has a big impact on human bone density. A 2013 study of 35 astronauts found that on average they lost more than 10% of bone density after flying missions of between 120 to 180 days. "Mars has more gravity than the ISS [International Space Station] but not a lot, it's still about a sixth of Earth's. So you've got a serious issue there as to whether people can live there for any serious length of time at all. That doubles down if you want to try raising children and anything that approaches an actual colony," said David Armstrong, an astrophysics professor at the University of Warwick. "If trained astronauts, who are prime people, are losing significant amounts of bone density — enough that you'd normally lose by the time you're 50 and 60 — how could someone live permanently in that environment?" he asked. Another side-effect of microgravity is a drop in muscle mass. According to Prof. Kevin Moffat, who specialises in human physiology in extreme environments, there's no proven way of counteracting it. "There's all sorts of debate over what happens with muscle conditioning. Tim Peake when he was up there you saw him conditioning himself on these running machines. The evidence is still pretty equivocal whether that really helps very much, but I suspect if I was up there I would do that as well just in case it worked," he said. British astronaut Tim Peake used a treadmill to run the London marathon in 3 hours and 35 minutes on the ISS in 2016. However, one observed change Moffat noted is that the lack of gravity on the ISS causes the astronauts' hearts to change shape. "In space your heart become rounder… because there's no gravity to pump against," he said. The shape-change is thought to lead to a higher risk of kidney stones, and so Moffat concludes is likely to affect other bodily processes in ways we don't know yet. Space changes our "natural killer cells" and the microbiome Moffat said there are two more areas of human physiology in space which are too often overlooked. The first is the immune system— specifically a kind of cell called "natural killer cells" which help guard the body against cancer. "We know that their levels drop massively in astronauts that live in the ISS. If you're up there for six months, probably it won't make much difference. But if you're there for two years, five years, ten years, a lifetime, then there's a set of worries I would suggest that your immune system may not be functioning to monitor your body for rogue cells," he said. While there's still research to be done on exactly why astronauts' immune systems dip, Moffat hypothesises it's due to the change in bone density. Specifically, he thinks it has something to do with bone marrow, which is where blood cells are generated. A second change astronauts undergo is to their microbiome. "There is as many cells in you, and on you, as of you. You're made of just as many microbes and fungi and bacteria as you are of cells of yourself. So you're just basically a machine for other stuff," says Moffat. This collection of fungi and microbes makes up a healthy microbiome. A paper published in 2019 compared the microbiomes of two twins — one who went to the ISS and one who stayed on Earth. "There does appear to be changes in the bacterial community in their gut at least. That's a worry as well, because that will alter what you can eat," said Moffat. Radiation poisoning The Earth's magnetosphere and ozone layer protect us from radiation thrown out by the sun. Astronauts visiting the moon or the ISS receive higher doses of radiation than they do on Earth, but not deadly amounts. But venturing any further (to Mars for example) means facing deep-space radiation. This poses a big problem for Bezos' O'Neill cylinders. "You need a huge amount of shielding material, way more than you need to build the actual structure, just to stop people getting essentially sterilized quite quickly... some of the estimates I've seen are for tens of millions of tonnes of shielding material essentially," said Warwick University's Armstrong. Getting that amount of material into space is "beyond economically feasible," he added. A Musk-style expedition to Mars would need to make provisions for sudden bursts of radiation. "If you happen to be out during a time of high solar activity, so some sort of solar storm or a flare... things like that, that's particularly bad. There's talk of having high-shielded areas on spacecraft which astronauts could retreat to when events like that were occurring," Armstrong explained. The problems with "terraforming" and the Biosphere 2 disaster Musk has talked about terraforming the surface of Mars. The term is borrowed from science fiction, and means transforming the make-up of a planet to make it habitable for human life. Armstrong doesn't dismiss the idea of terraforming out of hand, simply because it's so wild you would need to account for future technologies that don't yet exist. "For these projects we're talking thousands and tens of thousands of years really," he said. Mars' atmosphere poses a big problem, as it is so thin and Mars' gravity is so weak, molecules easily escape off into space. "We think Mars' atmosphere is so thin because it was bombarded by asteroids early on and with that low gravity that led to a lot of the atmosphere escaping," said Armstrong. "In any short, medium, or even somewhat long-term, we're talking living in domes. On the surface is just not plausible," he said. But dome-living comes with its own dangers. Armstrong pointed to Biosphere 2, an experiment from the 1990s which was built to simulate a closed space-colony. "The experiment crashed and burned in all kinds of ways, but one thing that came out of it was that there were just endless complexities people didn't really expect. The concrete slowly decaying and polluting the air over long timescales, this sort of thing," he said. Toxic plants Quite apart from its atmosphere, Mars' soil poses a big problem. The film "The Martian" popularized the idea of growing plant-life on the Red Planet, and according to Armstrong, it's not beyond the realms of possibility. "The Earth's soil is a very complex thing that's been built from millions of years of organic material growing and dying, and Martian soil does not have that. There are various experiments growing things in simulated martian soil and they do actually tend to come out with positive results. The problem is that those stimulants aren't necessarily accurate," he said. "Some of the most damaging materials in the Martian soil is something called perchlorate, which we think are really quite bad," he added. Chances are any Martian plants would take up these heavy minerals, which could ultimately kill people, depending on the level of exposure. No room for democracy in space Forgetting for a moment the considerable physical and engineering challenges that go with living in space, there's another important element Musk and Bezos don't tend to dwell on. Social structure. Political philosopher Felix Pinkert of the University of Vienna believes that an off-world colony would not have room for democracy as we know it. The challenge as he sees it is that any mission to Mars, for example, would have to start with just sending a small handful of experts who specialise in particular areas, and could lead to a hierarchy of technocrats dictating people's lives. On top of this, if private companies are in charge of shipping people out to these colonies you could end up with effective dictatorships. "Companies are already governments in themselves. They function like governments, but they're private governments in the sense that they are not governed by the people who are affected [by them]. They are governed by the shareholders or the CEO or whatever. So it's like a dictatorship." Pinkert is surprised that the social structures of these futuristic colonies, as well as their relationship to Earth, isn't talked about more by Musk and Bezos. "As a species, we've got to do this" Despite the endless complexities associated with space habitation, none of the experts we spoke to seemed in much doubt that it's on the way — with varying degrees of trepidation. "On the small scale it's probably closer than you think," said Armstrong. "And having four people on Mars in a terrible environment where they're probably all going to die quite quickly but nonetheless they're there. Given how many resources Elon Musk has, I wouldn't want to put a bet against him. It's alarmingly close on a small scale, it's ludicrously far off on a big scale." He added in an email to Business Insider that the capacity of these colonies poses an ethical problem. "However successful these colonization programs are, it's worth remembering that the vast majority of currently alive humans are going to stay on the Earth. Bezos optimistically talked about O'Neill cylinders hosting a million people, and a Martian colony is going to be some way under that.

### 2NC---AT: Warming !

#### Other countries solve

Miyazu 22 (Hina Miyazu, Shibuya Data Count, provides market research reports to various business professionals across different industry verticals, “Distributed Energy Generation Market Size, Demand, Outlook, Trends, Revenue, Future Growth Opportunities,” MarketWatch, 1-3-2022, <https://www.marketwatch.com/press-release/distributed-energy-generation-market-size-demand-outlook-trends-revenue-future-growth-opportunities-2022-01-03#:~:text=%22Global%20Distributed%20Energy%20Generation%20Market,the%20forecast%20period%202020%2D2027>.)

"Global Distributed Energy Generation Market is valued at approximately USD 243 billion in 2019 and is anticipated to grow with a healthy growth rate of more than 11.5% over the forecast period 2020-2027. The distributed energy generation (DEG) is a kind of decentralized system used to produce electricity energy and is served to homes, businesses, and industrial areas. These systems are frequently performed their functions through using technologies, such as solar power and fuel cells. More often, distributed energy generation systems are utilized to offer as substitute or addition to the conventional electric power system, and they deliver small-scale electricity generation (usually in the range of 1 kW to 10,000 kW). Distributed energy can be derived from both renewable and non-renewable sources. Furthermore, the deployment of distributed energy generation system also becomes more significant in many countries, with the legislative package on the new electricity market. For instance, the European Commission's has developed a new legislative policy within the Clean Energy Package. As such, the revised Electricity Regulation, which will enter into force on 1st January 2020, opens up opportunities for electricity wholesale markets to renewables, and energy storage. This, in turn, is expected to accelerate the installation of distributed energy generation system in the region. Moreover, the rise in investments in renewable energy projects and smart grid infrastructure, along with growing government focus on reduction of carbon footprint level and usage of cleaner energy resources are the few factors responsible for the high CAGR of the market during the forecast period. For instance, in 2020, the Korean government planned to invest 11 trillion won (USD 9 billion) in renewable energy projects for the upcoming three years. Whereas, Southeast Asian countries will invest USD 9.8 billion in smart grid infrastructure from 2018 to 2027. This, in turn, is likely to strengthen the demand for distributed energy generation, thereby contributing to the market growth around the world. However, the regulatory issues associated with distinct distributed energy resources is one of the prime the few factors restraining the market growth over the forecast period of 2020-2027.

The regional analysis of the global Distributed Energy Generation market is considered for the key regions such as Asia Pacific, North America, Europe, Latin America, and Rest of the World. Asia-Pacific is the leading/significant region across the world in terms of market share owing to the rising renewable energy generation capacity, along with the growing investment & deployment of smart grid and microgrid in the region. Whereas Asia-Pacific is also anticipated to exhibit the highest growth rate / CAGR over the forecast period 2020-2027. Factors such as the stringent government norms concerning environment safety and emission, coupled with the presence of significant number of market players across the developing nations, such as China and India, are the few factors creating a lucrative opportunity for the growth of the Distributed Energy Generation market in the Asia-Pacific region.

#### Warming won’t cause global conflict

Dr. Ian Cook 20, Senior Lecturer in Global Politics and Policy at Murdoch University, PhD in Political Theory from the University of Queensland, The Politics of the Final Hundred Years of Humanity (2030-2130), Springer Singapore, Kindle Edition

Yet another problem with the assumption that catastrophic human-caused environment change simply causes civil war, as Salehyan and Hendrix noted, is that violence at the scale of a civil war requires significant resources. In their view, civil wars are more likely to occur in times of relative abundance. While “riots and protests, may emerge from conditions of scarcity,” they argue, “sustaining a militant organization requires considerable planning and resources” (Salehyan and Hendrix 2014, p. 240). Reasons to fight might exist. For this to turn into civil war, however, people “also need the capability to do so, and environmental scarcity may limit such capability, thus undermining the resource base necessary for mobilizing armed violence” (Salehyan and Hendrix 2014, p. 240).

A related debate concerns what Adams and colleagues have claimed to be a sampling bias in studies of the connection between environment change and armed conflict (Adams et al. 2018). Levy accepts the existence of some sampling bias but rejects the view that this bias results in an overstatement of the connection between environment change and conflict. “Knowing that case selection is biased is useful, but not a reason to lower our estimate of the climate’s impact on conflict” (Levy 2018, p. 441).

In responding to Levy’s criticism, authors claiming bias wrote that they did not “deny a link between climate change and conflict in principal. Indeed, some of our own recent work indicates that such a link exists, but it is highly conditional.” Their problem with the research being done in this field was that “sampling biases… increase the risk that such links are overstated, that crucial world regions do not receive sufficient attention and that little knowledge is produced on peaceful adaptation” (Ide et al. 2018, p. 442– 3).

After reviewing the literature on the relationship between climate change and violent conflict, Sakaguchi, Varughese and Auld concluded that the “current literature offers mixed evidence. This makes it difficult to render a definitive statement about the climate-conflict relationship” (2017, p. 640). While they pointed out that just over 60% of the studies they reviewed found “that climate change variables are positively correlated with higher levels of violent conflict,” Sakaguchi, Varughese and Auld also argued that “many subtleties and countertrends underlie this overall pattern” (2017, p. 640). Thus, even though “a majority of reviewed studies envision climate variables influencing conflict through a causal pathway, … these pathways are often theoretically underspecified and have only weak empirical support” (Sakaguchi et al. 2017, p. 641).

As Koubi put it, the research that has been done on this question “provides some evidence that climatic changes could act as a ‘threat multiplier’ in several of the world’s regions. In particular, the extant literature shows that climatic conditions can lead to conflict in agricultural-dependent regions and in combination and interaction with other socioeconomic and political factors” (Koubi 2018, p. 200). After having claimed that, to their knowledge, “no one in the field of climate research has suggested that climate change could be the ‘sole cause’ of war, violence, unrest or migration”, Butler and Kefford recommended “viewing climate change instead as a risk multiplier, influencer or co-factor … In this way of thinking, environmental and ecological factors interact with social determinants, including those that are economic, demographic and political, to produce phenomena such as migration, conflict and famine” (2018, p. 587).

There can be no doubt that conflict will increase during the final hundred years of humanity. But it will result from a complex interaction of socio-political factors and a catastrophically changed environment. It may not go beyond conflict between different groups or between the government and opposition groups and become civil war. This depends on the capacity of those opposition groups. In many cases, they will lack the resources to conduct a civil war. The Syrian war is itself a good illustration of the problem, as the groups opposed to the Syrian government have only been able to conduct the extended civil war in which they have been engaged with the support of outside groups. (Mazzetti and Apuzzo 2016).

The question of whether civil war will break out is something that can only be answered “region by region” and the answer must be based on “knowledge of pre-conflict geographies, such as drivers of resilience and vulnerability” (Farbotko 2018). Sometimes governments may abandon territory and opposition groups can seize control of that land. But it is likely to be land that is suffering worst from the effects of catastrophic human-caused environment change and will not be habitable. To replace an existing government or take control of a region within a country through civil war is no simple thing. It may happen. But it will not happen on the scale that some people have predicted. And it will not happen just because of the weather.

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

#### Cartelization irrelevant from REM supplies---even if China cuts off all supplies, we’ll have enough

Hsu 19 (Jeremy Hsu, writer for Scientific American, “Don’t Panic about Rare Earth Elements”, 05/31/19, <https://www.scientificamerican.com/article/dont-panic-about-rare-earth-elements/>, TM)

Don't Panic about Rare Earth Elements As trade tensions rise between the U.S. and China, rare earth minerals are once again in the political spotlight. Today Chinese mines and processing facilities provide most of the world's supply, and Chinese leader Xi Jinping has hinted about using this as political leverage in trade negotiations with U.S. President Donald Trump's administration. But in the long run, many experts say the global market involving these materials would likely survive even if China completely stopped exporting them. The 17 rare earth elements, which cluster near the bottom of the periodic table, play a vital role in several industries: consumer electronics including Apple AirPods and iPhones, green technologies such as General Electric wind turbines and Tesla electric cars, medical tools including Philips Healthcare scanners, and military hardware such as F-35 jet fighters. The U.S. government lists them among minerals deemed critical to the country's economic and national security, and the Trump administration notably exempted rare earth elements from tariffs it imposed on $300 billion worth of Chinese goods. On the other side of the trade conflict, Xi recently made a politically symbolic visit to one of China's main rare earth mining and processing facilities, and China used tariffs of its own to target a U.S. rare earth mine in California. Such political posturing on both sides, however, may overemphasize the world's reliance on China's supply of rare earth elements. "Politicians get too alarmed or too wrapped up in the idea of political manipulation of markets," says Eugene Gholz, an associate professor of political science at the University of Notre Dame. "There's a big difference between individual companies making or losing money, and the large-scale ability to get political influence in this particular market." The "rare" in the name of this group of elements is actually somewhat misleading; the U.S. Geological Survey describes them as "relatively abundant in the Earth's crust." But extraction is complicated by the fact that in the ground, such elements are jumbled together with many other minerals in different concentrations. The raw ores go through a first round of processing to produce concentrates, which head to another facility where high-purity rare earth elements are isolated. Such facilities perform complex chemical processes that most commonly involve a procedure called solvent extraction, in which the dissolved materials go through hundreds of liquid-containing chambers that separate individual elements or compounds—steps that may be repeated hundreds or even thousands of times. Once purified, they can be processed into oxides, phosphors, metals, alloys and magnets that take advantage of these elements' unique magnetic, luminescent or electrochemical properties. The strong and lightweight nature of rare earth magnets, metals and alloys have made them especially valuable in high-tech products. China currently has most of the world's separation facilities—but if it ever were to stop exporting the purified materials, other options exist. In the short term, U.S. companies that rely on these minerals would likely have inventory stockpiles for brief supply shortages, Gholz says, who served from 2010 to 2012 as senior advisor to the Pentagon's Deputy Assistant Secretary of Defense for Manufacturing and Industrial Base Policy. To stretch those stockpiles out, the overall market could prioritize rare earth elements for crucial applications such as military and medical technologies, while forcing makers of headphones or golf bags to pay more. "I don't think there is an obvious supply gap or hole where someone will not be able to get a Prius or Tesla or whatever they're looking at," Gholz says. In the event of a longer Chinese supply interruption, the U.S. rare earths mine at Mountain Pass, Calif., would likely become the first place to step up production, Gholz explains. The mine's previous owner, Molycorp, spent approximately $1.5 billion building a new separation facility for producing rare earth concentrates. It did not, however, complete the downstream processing needed to produce purified rare earth materials before the company went bankrupt in 2015 because of Chinese competition. The mine's new owner, MP Materials, plans to reactivate and complete the mothballed facility for fresh operation starting in 2020. Another alternative is Australian company Lynas Corp., the world's only significant rare earths producer outside China. It currently operates a mine at Mount Weld in Australia, and sends ores to a separation facility in Malaysia that can purify the rare earth materials—but a complication has arisen from the fact that some ores contain radioactive thorium. Environmental concerns about low-level radioactive waste from the separation facility recently led Lynas to announce it will move some some of the "upstream" processing (which involves the radioactivity) back to Australia, while keeping "downstream" processing in Malaysia. The company has also announced it will work with Texas-based Blue Line Corp. to build a new separation facility in the U.S. for operations starting in 2022 at the earliest. Beyond existing mines, companies that dig for other resources might start extracting rare earth elements from deposits of different materials. For example, the U.S. could someday obtain these elements as byproducts from power plant coal ash and coal mining waste. And radioactive material mixed in with ores could end up being positive: If thorium-based nuclear plants prove viable, expanded thorium mining would also turn up usable rare earth minerals. Researchers have even begun investigating a large concentration of rare earth elements in deep-sea mud from an ocean floor deposit near Japan. LESS IS MORE Some industries that rely on rare earth elements are going outside the box and looking for ways to bypass mining entirely. After all, such operations in China and elsewhere have significant environmental impacts that can threaten human health in the absence of strict regulation. The presence of radioactive thorium in some ore is one example. In addition, some mining and separation processes involve chemicals that produce toxic wastewater. All of these dangerous byproducts require scrupulous storage and disposal. With China threatening to weaponize its advantage when it comes to rare earth elements, more companies may invest in innovations that could replace these materials with something else. Gholz points to a 2010 incident in which China temporarily cut off Japan from its supply of rare earth elements. Afterward, Japanese automakers such as Toyota and Honda began developing hybrid car motors that greatly reduced or even eliminated rare earth elements, such as terbium and dysprosium, from the powerful magnets used in electric motors. During the 2010 supply scare, other large industries that used rare earth elements also discovered they could do without some of them. Oil refinery operators temporarily stopped using the rare earth element lanthanum, which improves oil refining efficiency, when the price went up. The glassmaking industry largely abandoned using the rare earth element cerium for polishing. Although industries related to national security would be unable to entirely forgo rare earth minerals, Gholz thinks the U.S. military's demand could be "easily satisfied by non-Chinese production" because this need represents less than 5 percent of the total market. REDUCE, REUSE, RECYCLE In any case, a variety of industries will continue to rely heavily on rare earth minerals. To obtain them without depending on Chinese or U.S. mines, they could recycle those elements already used in products, says Eric Schelter, a professor of chemistry at the University of Pennsylvania, whose research projects include developing new chemical processes for separating rare earth elements from ore. "The appeal here is that there has already been a significant energy input and waste output to purify rare earth elements from their ore materials," he says. "Simply throwing them away is therefore wasteful, considering that in technological devices, they are typically relatively pure compared to their ores." He pointed to many research projects at both academic and government labs: the latter include the U.S. Department of Energy's Critical Materials Institute at the Ames Laboratory and the Oak Ridge National Laboratory. For example, rare earth elements such as neodymium and dysprosium are frequently combined in permanent magnets. To separate them, Schelter's lab has developed chemical processes that can selectively dissolve one rare earth element while the other remains solid. It's a "fast and efficient approach to metals separation," he says, but the cost is currently not competitive with mining. Still, he thinks that could change because the market price of rare earth elements is currently kept "artificially low"—it does not account for the cost of waste treatment and handling during the mining and separation processes. If the recycled versions of these materials were marketed as cleaner alternatives to mined rare earth elements, it might encourage companies seeking a greener image to pay more for them. "Consumers recognize the importance of free trade coffee and consequences of blood diamonds," Schelter says. "It stands to reason that ethical cobalt and clean or recycled rare earth elements can contribute to a more sustainable picture for this industry."

### 2NC---AT: Smart Cities !

#### Smart cities don’t solve sustainable development

Cavada et al 16 --- Dr. Marianna Cavada, Lecturer Design Urban Policy at Lancaster University, Dexter V.L. Hunt, MEng (hons). PhD. PGCert, FHEA. Doctor of Civil Engineering, and Chris D.F. Rogers, Department of Civil Engineering, University of Birmingham, “Do smart cities realise their potential for lower carbon dioxide emissions?”, Engineering Sustainability, Volume 169 Issue 6, December 2016, pp. 243-252, https://www.icevirtuallibrary.com/doi/full/10.1680/jensu.15.00032#\_

It is suggested that cities lead the smart agenda by ‘redefining what it means to be a smarter city’ (IBM, 2012) where technology is used for systems optimisation and leadership to tackle climatic issues successfully (Hill et al., 2011). IBM supports the idea that this technology is the medium for enhancement of city operations and city life: in particular, efficient infrastructure (utility, sewerage, energy, security systems and health innovations) that will run operations more smoothly and improve sustainability. However, perhaps this understates what smartness is (or is not) because of the context and complexities of where ‘smartness’ is created, and where exactly it is constrained requires a little more investigation. For example, in the developed world many embrace ‘smart’ technological opportunities from within cities, and argue that they act as a connection platform between citizens, geographical context and ‘things’, allowing for people to be seamlessly ‘connected’ using data, information and technology in real time (Doherty, 2013). However, this inherent widening of the horizon of citizens’ own options (intimately connected to those of other citizens) might then be the forbearer of a society in which innovative city interventions are developed and implemented (Harrison et al., 2010) without considering the consequences. In some respects perhaps the smart cities agenda inadvertently moves (or has moved) towards a simulated city context in which deployment of ‘netizens’ (or cybercitizens) exists, and according to Gabrys (2014) could provide a fiscal process that is worth trillions of dollars. Moreover, might the action of merely concentrating on the technology alone ultimately prove harmful to the necessary ideology that a truly smart city requires (Murgante and Burroso, 2013)?

However, as sceptics suggest, misconceptions of ‘technology’ and ‘controlled behaviours’ should be the positive perspective of a smart city ideal, leading to an array of economic risks that would undermine the smart agenda (Greenfield, 2013). In general, it is assumed that advanced technology is the main driving commodity, the likely biggest facilitator in which engagement is required in the wider conceptual system of sustainable urbanities. Undoubtedly, innovations within technology and efficiency sectors will implement city advancements, although these require careful consideration as what appears to be smart in one city may or may not be smart in another – ‘smartness’ is context dependent. This requires those involved in the smart agenda to work alongside all stakeholders (Lombardi et al., 2011a) to develop a city’s smart vision, taking into consideration contextual and geographical differences – what is sustainable is determined locally: local conditions set local priorities (Lombardi et al., 2011b). The smart ideal, as an enabler towards sustainable city living, is a ‘holistic frame’ based on three principles: ‘to reduce their ecological footprints and resource needs, to deepen connections to landscape and place and to enhance livability and quality of life while expanding economic opportunities’ (Beatly and Newman, 2013). Complex city systems and human interventions are the ones risking climate change, whereas understanding issues connected with cities and complexities can help measure and decrease the impacts of carbon dioxide (CO2) emissions and climate change (NAS, 2010). In this respect, individual choices would either reflect a response to city challenges, such as carbon dioxide reduction, or be stringently set within the context of a lens that considers most deeply their views. Within an energetic economic context, this might provide a foundation for enjoyable, sustainable and optimal smart city living (Duckenfield, 2013) and as a primary solution to problems of rapid development seen ever more frequently within many cities (Nam and Pardo, 2011).

While it might be suggested that technology leads to optimisation in cities there may also be disbenefits, the long-term impact of which is yet unknown. In addition, the inextricable links between liveability and fiscal prospects, with innovation as the main urban element (e.g. ‘eco-districts’, ‘local gardens’ and technological projects such as the ‘centre for neighbourhood technology district downtown’ and others) cannot be ignored (Eugenios et al., 2014).

Therefore, evaluating the carbon dioxide significance of smartness is undoubtedly going to be problematic, not least when engineers have yet to evaluate fully the complexities of the smart agenda itself. In other words, what is the real meaning of the term ‘smart city’ when we take into consideration, as with sustainability, local priorities and local conditions (Cavada et al., 2014)? Without such a definition and associated indicators, there would undoubtedly be confusion and much difficulty when trying not only to quantify, but also to compare readily, what constitutes city smartness in different areas worldwide – carbon dioxide reduction being a small element within this overarching philosophy.

With this in mind one of the associated challenges appears to be a lack of official smartness indicators at international or national levels, and where they do exist ‘low carbon dioxide’ appears to be somewhat lost within the smart cities agenda. This may be because existing rankings that reveal the smartest cities (and highlight related initiatives) have been generated by single institutions and publications, meaning compatibility is subjective at the very least while it is also evident that a smart city is more than achieving carbon dioxide reduction alone. In addressing this problem more clearly this paper identifies a range of sources that provide smart city rankings to elucidate where ‘smart’ fits in and how this relates to an agenda of ‘low carbon dioxide’.

2 Methodology

Through a stepwise methodology this research examines the initiatives related to the smart cities agenda. A database in Microsoft Access is created, to describe the complexity of smartness. It documents the individual cities that have been announced smart in addition to the initiatives that these cities adopted and awards they won. In the dataset, the relationship between ‘city and initiatives’ is explored to give information on the city with the most initiatives, number of smart cities awards and awards themes. Due to the plethora of initiatives, we are able to see the figures of initiatives per city, initiatives themes and initiatives categories. The authors then examine the ranking in initiatives categories and identify the role of the carbon dioxide emissions as part of the initiatives. To identify carbon dioxide emissions on individual smart cities, we test the smart initiatives as case studies and record how they differentiate. The following are the stepped objectives of this paper

Step 1: to create a smart city database that can be interrogated (Section 3.1)

Step 2a: to identify trends in published material on city rankings (Section 3.2)

Step 2b: to establish key themes used within city rankings (Section 3.3)

Step 2c: to identify leaders in city rankings (Section 3.4)

Step 3a: to establish smart categories, subcategories and initiatives (Section 3.5)

Step 3b: to investigate smart city status in two case studies (Section 3.6).

3 Results

The dataset is created from smart city publications, having the city as the focus of the dataset, which becomes the connection between the city information (scale, location and information source) and initiatives. This allowed for datasets to be interrogated according to areas within this research according to each key step and the initiatives that smart cities have taken to become smart to be determined. In addition, the awards that smart cities were awarded can indicate some of the steps that these cities took to become smart. Both initiatives and awards are supported by their sources, whereas the initiatives are categorised according to initiative themes (Figure 1).

By looking at published materials on smart city awards (and related ranking) over the period 2004–2014 (Figure 2), it can be seen that there is growing interest for those reporting on and comparing the performance of cities in terms of smartness and related themes (see Section 3.3). City awards were the first to introduce awards for intelligence as a shift towards digitalisation, followed by the EU Civitas awards and Eurocities awards during the first decade of the new millennium. Soon after 2010 the awards for EU biodiversity capital and EU green capital were introduced, along with the first smart cities awards; however, probably for economic reasons, these stopped. It is evident that city awards started as intelligence awards; there was a shift early in the current decade towards climate response, green and Civitas awards (city, vitality, sustainability). However, the rapid growth of the awards from 2013 indicates a resurgence of international interest.

When comparing these published materials on city rankings it is possible to characterise them according to five overarching themes, as shown in Table 1. Most of the sources belong to a smart theme, although these are complemented by other key city themes – sustainability and climate, innovation and liveability.

Interestingly, when considering the themes being used to judge the awards to cities it can be seen that many focus on climatic responses, intelligent communities, design, mobility, technical innovation, public participation and smartness – see, for example, the Civitas Initiative (2004–2014) co-financed by the EU, Intelligent Community (ICF, 2002–2015), the EU Climate Leadership Awards (C40, 2013–2014), World Design Capital (ICSID, 2008–2014), green EU Capital of Biodiversity (Fundacion Biodiversidad, 2011) and Smart City Expo (2012), between 2002 and 2015. Therefore, the majority of the awards are given primarily on green (including climate change mitigation) and innovation criteria, whereas mobility, resilience and economy have less prominence (Figure 3).

When considering all of these key ranking systems, which in total consider 282 cities from 52 countries in five continents, it appears that the EU has the biggest concentration of so-called ‘smart cities’ (Figure 4(a)). The USA is considered the smartest country, followed by The Netherlands (Figure 4(b)), and New York is considered the smartest city, followed by Amsterdam (Figure 4(c)). Interestingly, Stockholm, Ghent and Nantes have at least three awards each for sustainability (Figure 5), but it is of interest to note that they do not feature in the smartest top 12 city leaders according to the authors’ research of existing smart city rankings, although Toronto and Seoul do. Interestingly, cities internationally provide a wider smart roadmap, which includes technological innovations as well as smart interventions apart from just sustainable solutions.

In order to describe, rank, then make an award for smart city performance accurately, the primary step has to be to identify the generic key criteria (or subcriteria) and initiatives (considered here to be an action taken to improve a city’s smartness associated with an indicator that can be used to measure the efficacy of this action) that are being adopted. For example, in Scotland a smart initiative was considered to be the introduction of ‘open data’ (OpenDataScotland.org, 2013) to achieve smarter, more transparent and efficient data use.

When considering all the smart city approaches in parallel, this research has identified that six broad categories exist, consisting of 798 initiatives (Table 2).

According to Table 2 it can be seen that environmental sustainability is the dominant category with a total of 179 indicators and actions in cities. Climate change is very much considered within this section, with 64 indicators and actions associated with it (Figure 6). What is surprising, and what is most striking from Table 2, is that ‘smart city programme’ features within the ‘civic’ sections, and therefore the link between carbon dioxide reduction and smartness is being lost even though the link is readily apparent. On the whole, cities are responding to the carbon dioxide reduction challenge (Figure 6), but it is not necessarily being driven by (or even linked sufficiently to) the smart cities agenda. The question is whether it could be or should be in order that opportunities are not lost.

The interesting point here is that systems not derived for measuring smartness per se have categories (akin to drivers of change) and indicators not dissimilar to smart city categories. For example a ‘sustainability rankings’ system from Corporate Knights (2013) uses a combination of three themes (ecology–economic–culture) that encompass 27 indicators and actions (focused on sustainability and material flow analysis) applied to 20 cities (within the USA and Canada). While this research presented some contextual differences in terms of economic, climatic and census data, it can be seen that five categories emerge, which in combination create a sustainability index providing a narrative of ‘environmental quality, economic security, governance and empowerment, infrastructure and energy and social wellbeing’. This might be considered a complete view of the sustainable city (Corporate Knights, 2013), but is not derived exclusively to measure smartness.

On the other hand the ‘smart cities wheel’ (Cohen, 2014) ranking approach applied to 12 cities provides a simple methodology of ‘actions and indicators’ specific for smart cities and is equally divided into very similar (albeit broad) themes

environment

economy

society (people and living)

mobility

government.

In this system a collection of 400 indicators are equally distributed between: smart environment, which contains urban planning; resource management; and smart buildings, which includes carbon footprinting and energy consumption indicators (Cohen, 2014). While there is no unique category for smart technology within this methodology, it does feature as an indicator in the government, mobility, society and economy dimensions. Smart living corresponds to the quality of life dimension and refers to culture and happiness, safety and wellbeing in terms of living conditions. In other words, it appears that existing sustainability indicator systems are being applied (or reinterpreted) according to a smart cities agenda. In a way this almost mirrors how environmental indicators were reinterpreted in the late 1990s to fit the sustainability agenda. There is nothing wrong with this approach – it merely shows how robust some indicator sets are and how flexibly they can be applied.

In this step the criteria highlighted in step 3a are applied to two case studies: Copenhagen and Singapore. Both have been awarded exemplar status in terms of ‘smartness’, although by different institutions. Firstly, in 2014 Copenhagen became the first three-time winner of the most liveable city in the world award according to the ‘Quality of Life Survey 2014’ carried out by the international magazine Monocle (2014). This was based on considering the ‘human dimension’ in urban planning, taking into consideration liveability, which includes regional and cultural differences and integration across all five driving forces (i.e. social coherence, economic growth, environmental sustainability, infrastructure and energy, and good governance). While smart was not at the core of this ‘liveability’ award, its contribution to the smart agenda cannot be ignored. For example, in the same year Copenhagen was awarded the European Green Capital Award (EC, 2015a). ‘Green initiatives’ have proved to be a fiscal element of why Copenhagen has become a smart city – the creation of a green economy has not only added value to the development of companies themselves, but also added value in terms of lower carbon dioxide emission gains (Abild, 2011). In 2012 it was ranked as the number one smart city in Europe, once again due to a focus on its citizens and green initiatives, contributing towards a shared aim of becoming carbon dioxide neutral by 2025 (Cohen, 2014). Copenhagen is now considered a thriving city populated with cyclists and pedestrians who are proud of its inherent green qualities. As one of the ‘most impressive smartest cities of the world’, these qualities extend from its green corporations to everyday green living and the long-term planning processes, which for Copenhagen started back in 1925 during an initial ‘urban planning commission’ (Delgado, 2012). Even now this ethos remains and forms a cornerstone for why Copenhagen is so highly rated among its city peers. For example, the 2011 City Council plan outlined for 2025 shows the growth plans of the city and focuses on climatic challenges and low carbon dioxide emissions. The key to its success is within the citizen–business–governance collaboration (Mortensen et al., 2012). The main aim of the green vision embedded therein was carbon dioxide neutrality, although what is interesting is the fact that this has led to improvements in employment and development, and a shared vision that builds on existing knowledge, rather than reliance on new developments in ‘smart’ technology and research (Mortensen et al., 2012). Copenhagen’s cleantech companies’ community and fiscal development appears to be key to a system that values employment growth and overall desire to become smarter therein (Lubanski, 2012). The fact that Copenhagen has been named a smart city is due not only to the clarity of its shared green vision, but to the way that the vision has worked as a catalyst for its city life, improved mobility, creation of a green economy and enhancement of research knowledge. In Figure 7(a), created according to the categories outlined previously in Table 2, it can be seen that the main focus that makes Copenhagen smart is its drive for sustainability (42%) followed by technology (31%) and mobility (19%).

In comparison, Singapore (Figure 7b), which was named number one smart city by Forbes magazine (Laneri, 2009), the Institute of Mechanical Engineers (IME, 2014) and BBC news (Wakefield, 2013), has focused more on technological innovation (38%) and human talent (29%). This shows that, overall, a very different perspective was taken in each, contributing towards their smartness accreditation in very different ways. Most strikingly, technology is prominent, but is not the only contributor as some may imagine.

If context is considered as smartness empowerment within cities, as suggested in the introduction, then most likely Singapore has succeeded as an international trade centre, and has enabled active business due to the short span of the nation’s history and geographical location that suggested Singapore be a trading hub between other nations (Mahizhnan, 1999). Unlike other cities, Singapore was more able to ‘exploit the differential in information between people and between places’, and after 150 years had the chance to become independent to upgrade its information technology services and telecommunications – not due to its gradual industrialisation, but by rapidly educating its citizens and getting the know-how of the new technologies. According to the national information technology plan in 1986, the focus of the city smartness therein was not on the economic paradigm, but more on the smartness of its people (Mahizhnan, 1999). Singapore’s vision now, as described in iN2015 (2006) is very much about finding ways to use technology information (‘infocomm’) to improve commercial sectors and citizen’s lives, and is much less associated with carbon dioxide. However, advancements therein (e.g. energy efficient appliances/vehicles, wireless communications, smart metering, longer battery life) are all part of the solution by doing more with less, thus allowing citizens to be connected while reducing the need to move or providing a means by which it can be done more efficiently and cleanly. The smart vision fundamentals are, however, much broader in Singapore; they empower innovation, integration and internationalisation by focusing on people, infrastructure and the global economy. Since this 10-year vision started, Singapore has advanced its digitalisation capabilities in governance, health, tourism and connectivity, and set itself up as not only a highly regarded international competitor (iN2015, 2006) but also a ‘smart’ city – yet in a very different guise to Copenhagen.

### 2NC---AT: SDGs !

#### Sustainable development not key to solve extinction---only terminal is biodiversity

Dr. John Halstead 19, PhD, University of Oxford, researcher at Founders Pledge; citing Dr. Peter Kareiva, PhD in ecology and evolutionary biology, Cornell University, director of UCLA’s Institute of the Environment & Sustainability; also citing Valerie Carranza, PhD student in Kareiva’s lab, 5/1/2019, “Centre for the Study of Existential Risk Six Month Report: November 2018 - April 2019,” <https://forum.effectivealtruism.org/posts/zbZxisJRJBCdtYvh9/centre-for-the-study-of-existential-risk-six-month-report>, pacc

Can you explain what the mechanism is whereby biodiversity loss creates existential risk? And if biodiversity loss is an existential risk, how big a risk is it? Should 80k be getting people to go into conservation science or not?

There are independent reasons to think that the risk is negligible. Firstly, according to wikipedia, during the Eocene period ~65m years ago, there were thousands fewer genera than today. We have made ~1% of species extinct, and we would have to continue at current rates of species extinctions for at least 200 years to return to Eocene levels of biodiversity. And yet, even though significantly warmer than today, the Eocene marked the dawn of thousands of new species. So, why would we expect the world 200 years hence to be inhospitable to humans if it wasn't inhospitable for all of the species emerging in the Eocene, who are/were significantly less numerous than humans and significantly less capable of a rational response to problems?

Secondly, as far as I am aware, evidence for pressure-induced non-linear ecosystem shifts is very limited. This is true for a range of ecosystems. Linear ecosystem damage seems to be the norm. If so, this leaves more scope for learning about the costs of our damage to ecosystems and correcting any damage we have done.

Thirdly, ecosystem services are overwhelmingly a function of the relations within local ecosystems, rather than of global trends in biodiversity. Upon discovering Hawaii, the Polynesians eliminated so many species that global decadal extinction rates would have been exceptional. This has next to no bearing on ecosystem services outside Hawaii. Humanity is an intelligent species and will be able to see if other regions are suffering from biodiversity loss and make adjustments accordingly. Why would all regions be so stupid as to ignore lessons from elsewhere? Also, is biodiversity actually decreasing in the rich world? I know forest cover is increasing in many places. Population is set to decline in many rich countries in the near future, and environmental impact per person is declining on many metrics.

### 2NC---AT: Grid !

#### Intervention solves---it wont cascade

Marciano, utilities worker and researcher, 16

(Chris, “Could terrorists shut down the United State's entire power grid?”, https://www.quora.com/Could-terrorists-shut-down-the-United-States-entire-power-grid)

Unlikely. First off, there are three separate grids in the US: the Eastern Interconnect, the Western Interconnect, and Texas (called ERCOT). Yes, Texas is its own entity. Don't act surprised. You can take an electron and run it from Louisiana to Maine, but you can't go to Houston or San Francisco. Several changes were made due to the Northeast Blackout of 2003. The grid operates on a principle of redundancy to avoid cascading failures. When a power line fails, the electrons near-instantaneously go to other lines. If the addition of those electrons cause these lines to overload and fail, the failures will continue like a domino effect. The operators of the grid, using fancy software, manage the grid so that no single failure leads to a cascading failure. If one failure does occur, they will make necessary changes to prevent another single failure from causing a cascading failure; that could include a starting reserve generation in particular areas (even if that generating resource is more costly) or by turning off the power of select areas.

### 2NC---AT: Lasers !

#### BUT, even if, we’d crush them.

James Harding 17, Captain in the U.S. Marine Corps – oorah – “If The Us And North Korea Engage In War, Will It End The Human Race?”, Quora, 2017, https://www.quora.com/If-the-US-and-North-Korea-engage-in-war-will-it-end-the-human-race

If the US and North Korea engage in war, will it end the human race?

James Harding, Captain at U.S. Marine Corps (2003-present)

Absolutely not. Regardless of posturing, the Democratic Peoples' Republic of North Korea has no long-range nuclear weapons delivery system. They do have a submarine capable of firing ancient SLBMs, but those would be easy prey for the United States' ABM weapons systems. A nuclear reply would be unlikely, for political reasons. Following a ridiculously pointless launch by NK, the United States would launch a massive combined-arms assault the likes of which haven't been seen since Okinawa. With the US Army rolling across their southern border, the Marines landing on their beaches, and the United States Air Force bringing death from above, the war would last about a day. If the Chinese get involved, it would take a bit longer, but the US would kick ass. Who knows, maybe NATO and the rest of the world would take the opportunity to test their new weapons systems.

### 2NC---AT: China War !

#### No China war or rise.

Norrlof ’21 [Carla; March 23; Visiting Professor at the Finnish Institute of International Affairs in Helsinki, Senior Fellow at The Atlantic Council and at Massey College, Associate Professor at the University of Toronto, and Research Associate at The Graduate Institute of Geneva; The Washington Quarterly, “The Ibn Khaldûn Trap and Great Power Competition with China,” vol. 44]

The return of great power rivalry has been the defining feature of the 21st century. Since the beginning of the new millennium, China and Russia have openly defied the United States and upset the stability of the liberal international order. Both China and Russia share physical and material attributes possessed by the United States that are traditionally required for great power status: land mass, a sea portal, a large population, and technology to field and develop a competitive military capability. Most scholars and policymakers agree that China presents the largest challenge to US interests and the US-led liberal international order. Economic and military growth in China has been astounding, surpassing Russian expansion. China’s outward extension is not primarily resource-based as is Russia’s but multidimensional, posing a structural challenge to US military and economic dominance.

Much ink has been spilled over the nature of US-China rivalry and whether the two great powers are destined for war. Structural factors figure prominently when predicting US-China relations. A famous deadly Greek trap describes how the fear of a hegemonic power sparks catastrophic war with a rising power. In the History of the Peloponnesian War, Thucydides writes, “What made war inevitable was the growth of Athenian power and the fear which this caused in Sparta.” 1 Thucydides’ statement has been widely adopted as a metaphor for the dangers associated with great-power transition. Both A.F.K. Organski’s power transition theory and Robert Gilpin’s realism see great-power wars as most likely to occur when a rising challenger is about to surpass a declining hegemonic power. 2 Today, the Thucydides Trap is highly relevant insofar as we have a clear incumbent power, the United States, and according to many measures of great powerhood, a clear rising power—China—with military, manufacturing, and commercial, and corporate power.

However, the analogy mismatches international hierarchy and regime type. In classical times, the incumbent land power, Sparta, was the authoritarian power who feared the rise of the democratic maritime power,

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Athens.3 This incongruity is not even the biggest problem with the analogy. In order for the Thucydides Trap to apply, China would have to significantly narrow the power gap with the United States. While China has caught up with the United States in important respects, it has not caught up with the United States in terms of the logic and networks that inform dominance in the key economic and security areas required for power transition.4 Apart from the obvious inhibiting factors of nuclear weapons and economic interdependence, the United States and China are nowhere close to the power parity likely to spark a major power war between them. The Thucydides Trap is a powerful analogy for bellicose dynamics between a hegemonic power and a rising power, but in the near term, war between the United States and China for the reasons proposed in the Thucydidean analogy is highly unlikely.

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## Adv---Cartels

#### Finishing 2NC Card:

Athens.3 This incongruity is not even the biggest problem with the analogy. In order for the Thucydides Trap to apply, China would have to significantly narrow the power gap with the United States. While China has caught up with the United States in important respects, it has not caught up with the United States in terms of the logic and networks that inform dominance in the key economic and security areas required for power transition.4 Apart from the obvious inhibiting factors of nuclear weapons and economic interdependence, the United States and China are nowhere close to the power parity likely to spark a major power war between them. The Thucydides Trap is a powerful analogy for bellicose dynamics between a hegemonic power and a rising power, but in the near term, war between the United States and China for the reasons proposed in the Thucydidean analogy is highly unlikely.

## Adv---Global Dev

### 2NC---AT: Food Wars !

#### No correlation between food shortages and conflict – other factors.

Buhaug et al 15 [Halvard Buhaug, Peace Research Institute in Oslo an Norwegian University of Science and Technology. Tor Benjaminsen, Espen Sjaastad, Ole Magnus Theisen.] “Climate variability, food production shocks, and violent conflict in Sub-Saharan Africa” Environmental Research Letters, Volume 10, Number 12 (http://iopscience.iop.org/article/10.1088/1748-9326/10/12/125015) - MZhu

Across all models, we find relatively weak and insignificant effects for domestic food production and we also note that the sign of the coefficients shifts between outcome types. In this sense, table 1 implicitly contrasts both claims that political violence is more prevalent when basic needs are met (Salehyan and Hendrix 2014) and claims that agricultural income shocks increase civil conflict risk (von Uexkull 2014). The results are consistent with Koubi et al (2012) and van Weezel (2015), however, who conclude that rainfall—a significant determinant of yields in SSA—has little impact on conflict either directly or through economic performance. The covariate that best and most consistently explains temporal variation in political violence is the time-lagged conflict incidence indicator. Models 1–2 show that a new civil conflict is unlikely to break out if another one is already ongoing in the same country whereas Models 3–6, which capture the occurrence of less organized conflict, demonstrate that violence begets violence. Coups d'état (Models 7–8) exhibit a comparatively weak temporal correlation pattern in our data and are generally regarded as a highly unpredictable phenomenon (Luttwak 1979). Next, we estimate the same set of models on a subsample of 14 countries in SSA where rainfall has a large and significant positive effect on food production (figure 2(b); see supplementary information, section B for details). To better capture the influence of climate variability and reduce concerns with endogeneity, we further replace the standard OLS model with two-stage instrumental variable regression. The first stage in this model estimates the joint influence of annual rainfall (linear and squared terms) and temperature (linear) on contemporaneous food production. This effect then constitutes the exogenous instrument for food production in the second stage. The results are reported in table 2. Mirroring the results presented above, we fail to uncover a robust signal for agricultural performance, although the sign of the coefficient for food production now remains negative in seven of the eight specifications. Food production shocks may have different consequences depending on the socioeconomic context, so next we consider a series of interactive relationships. Specifically, we investigate the joint effect of food production and (i) low level of development, (ii) extent of discriminatory political system, and (iii) economic dependence on agriculture; three conditions whereby loss of income from agriculture might constitute a particular challenge to society. To model these interactions, we include time-varying regressors instead of country-fixed effects where (i) is represented by infant mortality rate (IMR; World Bank 2014), (ii) is captured using the Ethnic Power Relations v.1.1 data (Cederman et al 2010), while (iii) uses an index of agricultural contribution to GDP (World Bank 2014). Moreover, to preserve focus on temporal dynamics, food production is now operationalized as yearly deviation from the country mean, 1961–2009. We use additive inverse deviation values to ensure theoretical consistency among the components in the interaction terms. All models control for (ln) population size, conflict history, and a common time trend, and models without IMR and agricultural dependence additionally control for (ln) GDP per capita. The results are presented in table 3. Again, we are unsuccessful in establishing a consistent covariation pattern between agricultural performance and political violence. Interpreting the combined effect of interaction terms with continuous parameters is inherently difficult but figure 4 shows that food production is insignificantly related to all conflict outcomes across levels of socioeconomic development for all three interaction terms. The sole exception is the result in Model 24, where lower food production in highly discriminatory societies is negatively associated with non-state conflict. This result would seem to contradict the standard scarcity thesis (Homer-Dixon 1999) although it is consistent with observations that conflict is more prevalent during surplus years (Witsenburg and Adano 2009, Salehyan and Hendrix 2014). Mirroring earlier research, ethnopolitical exclusion is strongly related to higher civil conflict risk, but not necessarily to other forms of political violence. Infant mortality rate and economic dependence on agriculture appear largely irrelevant. While this may come as a surprise, recall that most countries in SSA are characterized by underdevelopment and a large agricultural sector, implying that the variation in values on these indicators is modest. Large parameter uncertainties and p-values above the conventional significance threshold (5%) may disguise substantively important effects (Ward et al 2010). Accordingly, as a final assessment, we conduct a set of out-of-sample simulations and compare predictions for models with and without food production. The models are estimated on a subset of the full sample, in this case all years before 2000, and the estimated effects are then used to predict conflict outcomes out of sample, i.e., the 2000–09 period. Figure 5 shows the predicted values from four pairs of models that are specified similarly to Models 17, 20, 23, and 26, except for the shorter time period and the fact that one model in each pair drops the food production deviation variable. For civil conflict and social unrest, the models generate very similar predictions, signaling that agricultural performance adds little to the models' predictive power. There is more spread in the predictions for the remaining two outcome categories. Puzzlingly, the model without food production performs better in both cases—i.e., the Receiver Operating Characteristics curves have higher 'Area Under the Curve' scores. We hesitate to put too much emphasis on the ROC tests, given the rareness of the outcomes (notably Models 17 and 26) and the relatively small training samples (Models 20 and 23), but nonetheless the patterns observed in the out-of-sample simulations substantiate the regression results reported above; fluctuations in agricultural output explain little of the observed variation in political violence in post-colonial Sub-Saharan Africa. 5. Concluding remarks Emerging evidence suggests that food price shocks are associated with an increase in social unrest (Smith 2014, Bellemare 2015, Hendrix and Haggard 2015, Weinberg and Bakker 2015). Yet, the robust 'non-finding' presented here implies that so-called 'food riots' play out largely isolated from climate-sensitive production dynamics in the affected countries. Likewise, claims that adverse weather and harvest failure drive contemporary violence in Africa (e.g., Hsiang et al 2013, IFPRI 2015) are not supported by our analysis. Instead, social protest and rebellion during times of food price spikes may be better understood as reactions to poor and unjust government policies, corruption, repression, and market failure (e.g., Bush 2010, Buhaug and Urdal 2013, Sneyd et al 2013, Chenoweth and Ulfelder 2015).

### 2NC---AT: African Instability !

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

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

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

## Overview

### O/V – Link T/C

#### Link alone turns case – it’s NOT just the EU that plan wrecks, but the US too – amnesty’s key to net more cartel enforcement than everything else combined

Kneedler et al 4 (Edwin S. Kneedler, Acting Solicitor General, US Department of Justice; R. Hewitt Pate, Assistant Attorney General, US Department of Justice; Makan Delrahim, Deputy Assistant Attorney General, US Department of Justice; 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 Department of Justice; Robert B. Nicholson, and Steven J. Mintz, Attorneys, US Department of Justice; “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)

3. Important Policy Considerations Grounded In The Antitrust Laws Significantly Undermine The Court Of Appeals’ Interpretation

a. The court of appeals’ interpretation of the FTAIA would substantially interfere with the primary enforcement of the antitrust laws by the United States Government. Price-fixing conspiracies, including those operating globally, are inherently difficult to detect and prosecute. Cooperation by one of the conspirators, through provision of documents or testimony, is often vital to law enforcement.

In light of those practical realities, the Antitrust Division of the Department of Justice maintains a robust amnesty program that offers strong incentives to conspirators who voluntarily disclose their criminal conduct and cooperate with prosecutors. Cf. Germany Am. Br. Pet. Stage 14-16 (discussing EU and German amnesty policies). Since 1993, the program has offered: (1) automatic (i.e., not discretionary) amnesty to corporations that come forward prior to an investigation and meet the program’s requirements; (2) the possibility of amnesty even if cooperation begins after an investigation is underway; and (3) if a corporation qualifies for automatic amnesty, all directors, officers, and employees who come forward and agree to cooperate also receive automatic amnesty. 4 Trade Reg. Rep. (CCH) ¶ 13,113 (Aug. 10, 1993). Critically, amnesty is available only to the first conspirator to break ranks with the cartel and come forward. The incentives, transparency, and certainty of treatment established by the program set up a “winner take all” dynamic that sows tension and mistrust among cartel members and encourages defection from the cartel.

The amnesty program has been extremely valuable to enforcement of the antitrust laws. The majority of the Antitrust Division’s major international investigations, including the investigation of the vitamin cartel, have been advanced through cooperation of an amnesty applicant. The program has been responsible for cracking more international cartels than all of the Division’s search warrants, secret audio or videotapes, and FBI interrogations combined. Since 1997, cooperation from amnesty applications has resulted in scores of criminal convictions and more than $1.5 billion in criminal fines.

The court of appeals’ interpretation of Section 6a would undermine the effectiveness of the government’s amnesty program. Even those conspirators who come forward and receive amnesty from criminal prosecution still face exposure to private treble damage actions under 15 U.S.C. 15(a). Potential amnesty applicants therefore weigh their civil liability exposure when deciding whether to avail themselves of the government’s amnesty program. The court of appeals’ interpretation would tilt the scale for conspirators against seeking amnesty by expanding the scope of their potential civil liability. Faced with joint and several liability for coconspirators’ illegal acts all over the world, a conspirator could not readily quantify its potential liability. The prospect of civil liability to all global victims would provide a significant disincentive to seek amnesty from the government.

#### AND, ends coordination and intel-sharing – key to the rest – AND means case can’t turn the DA // AND turns harmonization/indigenous regimes

Gaubert et al 5, John D. Graubert, Acting General Counsel, Federal Trade Commission; R. Hewitt Pate, Assistant Attorney General; Makan Delrahim, Deputy Assistant Attorney General; Robert B. Nicholson, Steven J. Mintz, Attorneys, U.S. Department of Justice, Antitrust Division, “Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Defendants-Appellees in Response to Court Order of November 22, 2004,” 2/16/5, EMPAGRAN, S.A., et al., Plaintiffs-Appellants, v. F. HOFFMAN-LAROCHE, LTD., et al., Defendants-Appellees, 2005 WL 388672, WestLaw

Because of the United States' leading role in promoting tougher anti-cartel enforcement around the world, the government is concerned that a decision that weakens the U.S. amnesty program will jeopardize the trend toward rigorous enforcement that the United States has worked hard to foster. In addition, the \*26 dialogue and network of cooperation that the United States has developed with foreign authorities depend on mutual good will and reciprocity. It is well known, as the Supreme Court noted, id. at 2368, that our trading partners disapprove of treble damages and other features of U.S. private antitrust litigation, and the foreign government amicus briefs filed in the Supreme Court described the ‘blocking’ and ‘claw back’ statutes, refusals to enforce U.S. court judgments, and other measures taken by foreign governments in the past. The government is concerned that if our foreign counterparts fear that the fruits of their cooperation will be used to support follow-on treble damages actions in U.S. courts that they perceive as inappropriate, cooperation will be strained, to the overall detriment of international cartel enforcement.

### O/V – ! T/L

#### AND, failure of ongoing actions to contain non-kinetic attacks on energy flows sparks rapid escalation to nuclear war

Holstein 20 (Alex Holstein, Managing Partner at Holstein Gray, consulting firm specializing in international government relations and private capital advisory services, MSc Russian and Post-Soviet Studies, London School of Economics, “Invisible Warfare: NATO and the Geopolitical Storm on the Market Economy Horizon,” Geopolitical Monitor, 10-21-2020, https://www.geopoliticalmonitor.com/invisible-warfare-nato-and-the-geopolitical-storm-on-the-market-economy-horizon/)

As market economies evolve and integrate by engaging commerce and leveraging technology, the blend between national security and socio-economic imperatives becomes even more prescient. This carries with it both advantages and disadvantages. Traditionally, NATO military forces have relied on critical civilian infrastructure such as communications, food and water, industrial capacity, civil transport and energy supplies to conduct operations. The additional rise of non-kinetic asymmetric threats – cyberwarfare, information warfare, EMP attack – against non-traditional targets, such as banks or major multinational corporations that comprise key components of this critical infrastructure, adds an entirely new dimension to the defense requirements of the 21st century. In addition to dealing with more conventional kinetic threats from traditional and emerging adversaries, NATO must prepare itself for this new era of invisible warfare through deeper strategic cooperation with the private sector and corporate entities.

Great Powers and non-state actors alike can now conduct non-kinetic attacks just as devastating as any nuclear, biological or chemical WMD, resulting in millions of deaths and the mass breakdown of societies, while in turn undermining the doctrine of Mutually Assured Destruction and other deterrents against nuclear war. But even contained instability within specific regions could still disrupt markets on a global scale, whether directly targeting infrastructure or as a knock-on effect of a conventional engagement, as in the case of Nargono-Karabakh and the threat to Europe’s energy supplies. A European energy crisis alone could prove the tipping point toward a wider war, or a societal breakdown, without a single shot fired.

#### Scope – mathematically outweighs the case – most cartels are European – so the portion of the case they’ll claim to solve can never be bigger than the portion we turn, even if we win the distinct link turns DOJ amnesty arg above, which turns the entire case

Connor 8 (John Connor, Professor of industrial-organization economics at Purdue University, specializes in empirical research in antitrust policy, PhD University of Wisconsin, “The United States Department of Justice Antitrust Division’s Cartel Enforcement: Appraisal and Proposals,” American Antitrust Institute Working Paper No. 08-02, 6-10-2008, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1130204)

Second, many legal-economic commentators believe that the individual and collective probability of cartel detection13 by the world’s antitrust authorities has also risen. The most common reason given for an increase in the probability of detection is launching of corporate leniency programs (e.g., Spratling and Arp 2005). There is no question that there have been large numbers of leniency applications in response to the Division’s Corporate Leniency Program after 199314, to the EU’s revised leniency policy15 after 2002, and adoption of similar programs in a dozen or more additional antitrust authorities (ibid.). One appealing study of the effects of the 1993 U.S. Corporate Leniency Program finds evidence from hard-core cartel convictions by the Division that detection levels have increased and formation levels have declined – both by about 60% (Miller 2007). However, the weight of the evidence is that detection rates have remained very low and constant from the 1960s to the early 2000s.16

Third, the rise in the pace of cartel discoveries could be correlated with an increase in the total number of cartels in existence.17 18 Admittedly, little is known about trends in the total number of modern prosecutable cartels.19

**[FOOTNOTE 19 BEGINS]**

19 However, Levenstein and Suslow (2002, 2006) note that U.S. government antitrust prosecutions in the 1940s accounted for only 10% of some of the known cartels operating in the interwar period (p.16). Around 200 such cartels have been identified, none of them intentionally clandestine and most of them based in Europe and legally registered with their home governments. The majority of these cartels were composed entirely of firms that were domiciled outside the United States. Consequently, their contracts and management frequently were matters of public record, and they were formed with a detection probability of zero.

**[FOOTNOTE 19 ENDS]**

However, even if detection rates have risen, it is highly doubtful that they have sextupled.20 If so, it follows that the number of annual cartel formations is also up since the 1980s.21

#### US enforcement is unnecessary – intel-sharing and cooperation with European enforcement is high and increasing – AND empirically effective

Ritz et al 21 (Christian Ritz, partner and co-head of the Global Cartel Investigations Group at Hogan Lovells, ranked Top Lawyer for Antitrust & Competition in Germany by WirtschaftsWoche 2021, LLM, University of Sydney, legal education at the Rheinische Friedrich-Wilhelms-Universität Bonn and the Université Paris-Sud, France; Dr. Florian von Schreitter, senior knowledge lawyer at Hogan Lovells; Suyong Kim, Edith Ramirez, Kathryn Hellings, Christopher Hutton, Omar Guerrero, Christopher Thomas, Casto Gonzalez-Paramo, Chuck Loughlin, Adrian Emch, all partners at Hogan Lovells; Rachel Brandenburger, Senior Advisor & Foreign Legal Consultant to Hogan Lovells US LLP; counsel May Lyn Yuen; Matt Giles, senior knowledge lawyer ; and Jill Ottenberg, knowledge lawyer; “Post-pandemic antitrust – what to expect and what to do,” 7-2-2021, https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2021-pdfs/2021\_07\_02\_gcr\_post-pandemic-antitrust\_what-to-expect-and-what-to-do.pdf)

Over the last few years, and in particular in the wake of the covid-19 pandemic, competition authorities worldwide have continuously expanded their cooperation mechanisms and seek to further strengthen their ties, including by sharing intelligence to support their investigations. This means that the number of local, jurisdiction-specific problems shrinks – while at the same time the increasing number of transnational problems will continue to translate to real-life antitrust enforcement, more or less simultaneously across the globe. There is a proven track record of successful cooperation among enforcers which has already resulted in the prosecution of global cartels in several countries, such as the ‘air cargo’ and the ‘capacitors’ cartels in the EU and the US or the worldwide shipping cartel that was investigated in Australia, the US, Japan and the EU.

We expect these ties between enforcers to be strengthened. While many observers perceived an Atlantic divide between the competition policies of the last US administration and its counterparts in Europe, the Biden administration appears likely to build new bridges, resulting in more aligned views on substantive issues and procedural cooperation. Similarly, despite Brexit, the EU and the UK are already preparing negotiations for a ‘Competition Cooperation Agreement’ similar to the agreements in place between the EU and the US, Canada, Japan, South Korea and Switzerland. The BRICS competition authorities have also recently expanded their cooperation agreement.

### Link

#### Resolving the circuit split regarding interpretation of “direct effect” on the US is what creates perceived risk – all of our Bloom ev is after the Empagran decision and is explicitly speaking to expanding the scope beyond it to confirm a presumption that multinational cartels have a direct effect on the US – which is distinct from and NOT thumped by existing interpretations

Bloom 5 (Margaret Bloom, King's College London and Freshfields Bruckhaus Deringer, Former Director of Competition Enforcement, UK Office of Fair Trading, “Should Foreign Purchasers Have Access to U.S. Antitrust Damages Remedies - A Post-Empagran Perspective from Europe,” New York University Annual Survey of American Law, 61(3), 2005, pp.433-452, HeinOnline)

F. The Mix of Civil Leniency Regimes and Possible U.S. Treble Damages Will Discourage Leniency Applications in Those Cases Where Plaintiffs Might Be Able to Establish a Link With the United States

Given that the incentive to apply for leniency is likely to be significantly weaker in a civil regime than a criminal one, there is a real risk of deterring applications by opening up the possibility of U.S. treble damages actions. If so, fewer cartels will be uncovered. The amici curiae briefs in Empagran for the United Kingdom, Ireland, and the Netherlands4' and for Germany and Belgium argued this point strongly.42 However, even where there is the possibility of such U.S. treble damages actions, some leniency applications might continue if executives consider they could be at risk of imprisonment by a European court. But even in those member states with criminal powers, this may not be a sufficiently strong countervailing factor until some executives have been sentenced to jail. In international cartels that include the United States, the decision whether to apply to the Department of Justice for amnesty will be the key one. If, despite the risk of extensive private actions, a company makes a U.S. application, it will also make follow-on or parallel applications in Europe.

The possibility of U.S. treble damages will discourage leniency applications if plaintiffs might establish a link with the United States. Uncertainty creates a disincentive to seek leniency. A party that has done no business with U.S. purchasers, but has been engaged in a global cartel, may well be prepared to run the risk of fines in the EU, rather than make a leniency application that will trigger the risk of engagement in U.S. legal proceedings with potentially substantial treble damages awards by a jury. If so, they will not apply for immunity in Europe and the cartel will probably not be uncovered.43 Apart from any applications that follow on or are parallel to those of the Department of Justice, surviving applications to the European authorities would likely mostly concern smaller cartels clearly having no effect on the U.S., such as national or local cartels and those in non-tradable goods or services. Some examples of these could be the cartels of brewers in Belgium and in Luxembourg that were prohibited by the European Commission in 2001 with fines of C92m44 and C0.45m45 respectively, and the industrial gases cartel in the Netherlands that was prohibited by the European Commission in 2002 with fines of C26m.46 Leniency programs are not only beneficial through uncovering cartels but also through deterring cartel behaviour because of an increased risk of defection and exposure. Hence, bigger European cartels would likely increase undetected.

### AT: L/T

#### Amnesty’s net better at deterrence – AND more importantly, key to detection, which turns their link to deterrence AND direct extraterritorial enforcement – prefer DOJ’s experience to their random JD candidate’s opinion

Kneedler et al 4 (Edwin S. Kneedler, Acting Solicitor General, US Department of Justice; R. Hewitt Pate, Assistant Attorney General, US Department of Justice; Makan Delrahim, Deputy Assistant Attorney General, US Department of Justice; 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 Department of Justice; Robert B. Nicholson, and Steven J. Mintz, Attorneys, US Department of Justice; “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)

From a practical standpoint, moreover, the court of appeals’ analysis of deterrence is unsound because its focus is on private lawsuits that often follow the exposure of a cartel by the government. Such lawsuits are possible, of course, only if the cartel is discovered in the first place. A private action “supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws.” United States v. Borden Co., 347 U.S. 514, 518 (1954).

In the government’s judgment, the amnesty program, by creating a high risk of defection and exposure, deters cartel behavior more effectively than an increase in private litigation after the cartel has been exposed. It follows that deterrence is best maximized, and United States consumers are best protected, not by maximizing the potential number of private lawsuits, but by encouraging conspirators to seek amnesty and thus expose cartels in the first place.

#### AND, lit consensus and empirical studies

--empirical results acknowledge that the deterrent effect is real: PROA reduces number of cartels – so does amnesty – but more importantly, PROA increases stability/durability, i.e. they’re only caught with amnesty – empirical comparison proves prices are higher with treble damages, proving net negative effect and that amnesty solves ther impacts better than the plan

Bodnar et al 19 (Olivia Bodnar, Melinda Fremerey, Hans-Theo Normann, and Jannika Schad, Duesseldorf Institute for Competition Economics (DICE), Heinrich-Heine University, “The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence,” March 2019, https://www.cresse.info/wp-content/uploads/2020/02/2019\_ps1\_pa3\_EPDCCS.pdf)

At first sight, it seems that private damage claims nicely complement public enforcement. They raise the expected penalty for forming a cartel and therefore add to the deterrent effect of the fines imposed by antitrust authorities. Already, Becker (1968) argued that increased sanctions, as it would be the case with private damage suits, decrease the number of cartels. More recently, Chowdhury and Wandschneider (2018) provide a detailed analysis in which they account for the deterrent effect of penalties for cartels.3

There are, however, growing concerns about negative effects of private enforcement. Especially, the detrimental impact that compensation payments for damaged parties have on the attractiveness of leniency programs are discussed. Whereas penalties are waived or reduced for cooperating leniency applicants, leniency programs give only restricted protection against third party damage claims. The effect is severed by the fact that cartel members are jointly liable for the entire damage caused by the cartel, and compensation payments are not capped, in contrast to fines which may not exceed 10% of annual turnover (European Commission, 2011). With regards to private damage claims, the European legislation restricts the applicants’ liability to the harm caused to their own direct and indirect purchasers. In any event, applicants remain fully liable when non applicants are not able to entirely compensate the injured parties (European Commission, 2014, Rn(38)).

The literature appears to largely acknowledge this trade off between private damages claims and public leniency programs. Canenbley and Steinvorth (2011); Cauffman and Philipsen (2014); Kirst and van den Bergh (2016); Knight and de Weert (2015); Migani (2014); Wils (2003, 2009) find that it is less desirable for firms to apply for leniency when they are liable for private damage claims. The higher the expected third party claims, the lower the incentives to apply for leniency. As this is also anticipated by other cartel members, it could have a stabilizing effect on cartels (Huschelrath and Weigand, 2010). Buccirossi ¨ et al. (2015) argue that a leniency applicant might become an easy target of damage suits due to its self-identification as guilty. For example, Deutsche Bahn sued Lufthansa for 1.76 billion euros of damage in December 2014 right after Lufthansa applied for leniency in the airline-cargo cartel case (Kiani-Kreß and Schlesiger, 2014). This raises the question whether applying for leniency remains attractive after the introduction of private damage claims.

In the end, it seems an empirical question whether private damage claims raise or lower the deterring effects of public enforcement. On the one hand, higher fines should increase deterrence. On the other hand, they may render leniency ineffective. Somewhat surprisingly, we have not been able to find any empirical assessment of the introduction of private enforcement.

We propose the experimental approach to study the effects of private damages empirically. Laboratory experiments present a readily available testbed which is unaffected by the sample selection problems which may bias field-data studies. Bigoni et al. (2012) mention that it is difficult to evaluate the deterrent or stabilizing effects of antitrust policies compared to other law enforcements because the number of cartels and changes in cartel formation is unobservable.4 Experiments can be a useful instrument for the evaluation of new policy tools and to analyze effects of cartel stability ceteris paribus.

We build on—and extend— established experimental literature on the effects of leniency programs (Apesteguia et al., 2007; Bigoni et al., 2012; Hinloopen and Soetevent, 2008). This literature has, to the best of our knowledge, not studied the effect of private damage claims on leniency programs. Apesteguia et al. (2007) examine the effect of leniency programs in oneshot Bertrand games. They find that the implementation of the leniency rule tends to increase self-reporting and to decrease cartel formation and leads to significantly lower market prices. Bigoni et al. (2012) and Hinloopen and Soetevent (2008) analyze the repeated game with Bertrand duopolies and triopolies, respectively. The main result of this literature is that an introduction of leniency leads to a reduction in cartel formation.

A second dimension along which we extend the literature is that we allow for free chat-like communication between participants (Dijkstra et al., 2018). Some of existing leniency experiments analyze structured communication in the form of price announcements among players where subjects have available boilerplate messages (Bigoni et al., 2012; Hinloopen and Soetevent, 2008). (Apesteguia et al., 2007; Dijkstra et al., 2018) combine leniency experiments with chat communication. In the context of cartels, chat and structured communication seems plausible, however to best of our knowledge there is no comparison of structured and chat communication in the context of leniency experiments. In general cheap talk is recognized as an important tool for the coordination of cooperative outcomes (Blume and Ortmann, 2007; Camera et al., 2011; Cooper et al., 1992) in experiments. In the field of antitrust, experiments identify this kind of chat as a powerful device to foster collusion (Brown Kruse and Schenk, 2000; Cooper and Kuhn, 2014; Fonseca and Normann, ¨ 2012; Waichman et al., 2014). While the comparison of chat to structured price announcements has been made for collusion experiments without leniency (recently, Harrington et al. (2016)), it seems promising to conduct this comparison including leniency.

Our experiment is designed to analyze the effects of private damage claims on leniency, cartel formation and cartel stability. We have two main research questions. First, do we observe fewer cartels after the introduction of private damage claims? And, second, can we observe a decreasing rate of leniency applications ex-post? Our experimental design is largely based on Bigoni et al. (2012) and Hinloopen and Soetevent (2008). Subjects play a repeated homogeneous-goods Bertrand triopoly game. They decide whether they want to engage in collusive behavior by communicating about prices, and we vary the communication format available to subjects. We investigate settings with and without private damage claims. Thereby, we focus on the case relevant in the field where, to begin with, no private damages exist but are later introduced as a policy regime change (within-subjects design).

Our results are as follows. We show that cartel formation at the individual and the group level is significantly lower with private damage claims. When private damage claims apply leniency application rates are lower and therefore, cartels are more stable. Cartel prevalence demonstrates that in total there are fewer cartel with private enforcement. The effect on consumer welfare depends on the form of communication. Private enforcement decreases average prices and therefore increases consumer surplus when communication is structured. In a treatment with chat communication, prices tend to increase with private enforcement suggesting a negative effect of private damage claims on consumer welfare.

### UQ

#### NEITHER circuit splits NOR global extraterritorial actions thump – DOJ guidance AND civil court rulings have BOTH perceptually and substantively reduced the scope of liability – AND no-one else has treble damages

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.

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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 the EU

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

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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.

### AT: N/L – Not Private / Treble Damages

#### Any violation of Sherman – and therefore FTAIA amended – OR Clayton – necessarily generates liability for treble damages – it’s NOT discretionary

Lane ’19 [Matthew; August 9; Writer; Disruptive Competition Project, “Antitrust in 60 Seconds: Private Rights to Enforce the Antitrust Laws,” <https://www.project-disco.org/competition/080919-antitrust-in-60-seconds-private-rights-to-enforce-the-antitrust-laws/>]

The 60-Second Read:

U.S. antitrust enforcement relies on [a combination](https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers) of public and private rights of action to secure its objectives. Public enforcement is led by the Department of Justice’s Antitrust Division, the Federal Trade Commission, and the states. Those harmed by anticompetitive actions that violate the Sherman or Clayton Act also have the right to bring a private cause of action for treble damages (triple the amount of actual damages) plus attorney’s fees and costs. These treble damages are mandatory, and private plaintiffs are further incentivized to enforce the antitrust laws by the absence of the typical requirements to sue in federal court. This reliance on private enforcement is somewhat unique in the world and is not without controversy. There are many instances in which private enforcement follows, not leads, public enforcement. Some [have argued](https://www.judiciary.senate.gov/imo/media/doc/Kovacic%20Testimony1.pdf) that private rights, especially the mandatory trebling of damages, have led to judges trending towards narrow interpretations of antitrust laws because of their discomfort with the possibility of multiple damage awards stemming from a single finding of bad behavior.

The U.S. relies heavily on delegating antitrust enforcement to private parties. The ratio of private cases to public enforcement actions a decade ago was [ten to one](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028196). The U.S. gives [many tools](https://www.judiciary.senate.gov/imo/media/doc/Kovacic%20Testimony1.pdf) to private plaintiffs: mandatory treble damages, asymmetric shifting of costs, broad rights of discovery, class actions, and jury trials. In contrast, in the EU, the [decision to prosecute](https://www.judiciary.senate.gov/imo/media/doc/Kovacic%20Testimony1.pdf) is largely dedicated to public authorities.

#### It’s a definitional feature of “antitrust laws”

Lewers et al. ’19 [Joanne, Paul Saint-Antoine, Lee Roach, Lucas Michelen, John Yi, and Amanda Pasquini; March 1; Legal associates, partners, or researchers at Drinker Biddle & Reath LLP; Thomas Reuters Practical Law, “Private antitrust litigation in the United States: overview,” Westlaw]

US antitrust laws provide for a dual enforcement regime. Generally, private litigation follows closely after the announcement of a government investigation or enforcement action. However, private antitrust litigants can also bring stand-alone actions. When a government investigation has been commenced, a private litigant need not await its completion, and a private litigant can also continue even after the government investigation is completed without a finding of a violation.

At the federal level, the primary statutory source of antitrust liability is the Sherman Act, which prohibits conspiracies in restraint of trade and unlawful monopolisation (see [Question 9](https://content.next.westlaw.com/6-632-8692?__lrTS=20210213235748824&transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a153517)).

The legal basis for commencing a private federal antitrust action is contained in the Clayton Act (15 U.S.C. § 15(a)) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States…"). Additionally, the Attorneys General of individual states have statutory authority to commence federal antitrust actions on behalf of their citizens (15 U.S.C. § 15c).

# 2NR

## DA---Amnesty

### 2NR---AT: No Link

#### The plan’s scope necessarily includes not only parent companies suing foreign defendants, but vice versa, too – their advocate

Murray 17 (Sean Murray, JD candidate and Stein Scholar, Fordham University School of Law, BA Vassar College, “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” Fordham International Law Journal, 41(1), 2017, p.272, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj)

That leaves the question of what type of effect “gives rise to a claim” that the Ninth and Seventh Circuits have attempted to address: a US plaintiff bringing a claim against a non-US defendant encompassing wholly foreign conduct and an effect felt in the United States, such as if the US clothier from the opening hypothetical decided to sue the Pakistani textile manufacturers in the United States.195

**[FOOTNOTE 195 BEGINS]**

195. Or, conversely, a non-US plaintiff bringing suit against a US defendant for exclusively foreign conduct and a domestic effect and injury. Suppose a US oil producer enters into a worldwide conspiracy to fix the price of tar produced at its Canadian refinery. The producer sells at the fixed, anticompetitive price to one of its wholly-owned subsidiaries in the United States with instruction to pass on the price to downstream purchasers in the United States. One of those purchasers is a German firm. While the conduct in question was exclusively foreign, it seemingly produced an effect in the United States that may “give rise to a claim” for the German firm under the Sherman Act. As mentioned, though the FTAIA was meant to limit antitrust liability for US sellers transacting abroad with foreign buyers, lawmakers still wanted to afford foreign purchasers the protection of US laws when transacting within the United States. See supra note 120 and accompanying text.

**[FOOTNOTE 195 ENDS]**

It is this type of narrow case, where prescriptive jurisdiction hangs on the “directness” of the effect, that a balancing test would prove beneficial in the absence of a circuit split resolution.196 So, while the Supreme Court has cautioned against case-by-case comity inquiries, this balancing test is only employable in a small universe of cases.197 Consequently, the balancing test would not be “too complex to prove workable,” as imagined by the Court in Empagran, particularly taking into account the stylized factors to be discussed.198 But even if the case technically meets the standards for FTAIA’s exemption, the balancing test may still be used to evaluate whether extraterritorial application of US antitrust laws is apt.199