# Wiki Doc---Wake R2

# 1NC

## Offcase

### 1NC – T

#### “Prohibitions” only forbid, do NOT apply legal principles

--comity = “governing principle of law” – evidenced by Gerber below

Channell et al 90 (Channell, J., with Anderson, P. J., and Perley, J., concurring, delivering the Opinion of the **Court of Appeal of California**, First Appellate District, Division Four, City of Redwood City v. Dalton Constr. Co., 221 Cal. App. 3d 1570, 1-30-1990, NexisUni)

[\*\*\*4] We agree with the trial court's conclusion. By its plain language, HN3 section 35704 exempts certain contractors from the application of an ordinance [\*1573] adopted pursuant to section 35701. Section 35701 permits cities to prohibit the use of city streets by heavy trucks. (See § 35701, subd. (a).) However, the portion of the city's hauling ordinance at issue in this case does not prohibit street use; it regulates users by requiring them to obtain a permit and pay a fee in order to lawfully drive their heavy trucks over city streets. (See Redwood City Code, §§ 20.62-20.74.) HN4 To determine the legislative intent behind a statute, courts look first to the words of the statute themselves. In so doing, we must give effect to the statute according to the usual, ordinary import of its language. ( Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144, 514 P.2d 1224].)

[\*\*200] To construe section 35704, which specifically creates an exemption from prohibition of use, to exempt the regulation of that use would violate these cardinal rules of statutory construction. CA(2) (2) The distinction between a regulation and [\*\*\*5] a prohibition is well understood in municipal law. (See San Diego T. Assn. v. East San Diego (1921) 186 Cal. 252, 254 [200 P. 393, 17 A.L.R. 513].) The term "prohibit" means "[t]o forbid by law; to prevent; -- not synonymous with 'regulate.'" (Black's Law Dict. (5th ed. 1979) p. 1091, col. 1.) The term "regulate" means "to adjust by rule, method, or established mode; to direct by rule or restriction; to subject something to governing principles of law. It does not include a power to suppress or prohibit [citation]." ( In re McCoy (1909) 10 Cal.App. 116, 137 [101 P. 419].) CA(1b) (1b) Therefore, we are satisfied that HN5 section 35704 was not intended to apply to ordinances regulating street use, but only to those prohibiting such use.

#### “Scope” refers to statutory authority

Kato et al 99 (Kenneth H. Kato, with John A. Schultheis, and Dennis J. Sweeney, concurring, delivering the Opinion of the **Court of Appeals of Washington**, Division Three, Panel Four, Spokane v. Civil Serv. Comm'n, 98 Wn. App. 574, filed 12-21-1999, NexisUni)

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

#### AND, “antitrust laws” excludes judicial acts beyond statutory interpretation

Wallace et al 92 (J. Clifford Wallace, Chief Judge, Alfred T. Goodwin and Cecil F. Poole, Circuit Judges, delivering the Opinion of the **United States Court of Appeals for the Ninth Circuit**, Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, filed 12-7-1992, NexisUni)

The Act's definition of "antitrust laws" "includes the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, the Wilson Tariff Act, and the Act of June19, 1936, chapter 592." 16 U.S.C. § 2602(1) (citations omitted). The definition's use of the word "includes" suggests that the phrase "antitrust laws" may encompass more than just these statutes. See Highway & City Freight Drivers v. Gordon Transps., Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002, 58 L. Ed. 2d 678, 99 S. Ct. 612 (1978); American Fed'n of Television & Radio Artists v. NLRB, 149 U.S. App. D.C. 272, 462 F.2d 887, 889-90 (D.C. Cir. 1972); United States v. Gertz, 249 F.2d 662, 666 (9th Cir. 1957). In interpreting another statute, the Supreme Court has held that the term "laws" encompasses both statutes and court decisions. See Illinois v. City of Milwaukee, 406 U.S. 91, 99-100, 31 L. Ed. 2d 712, 92 S. Ct. 1385 (1972). We conclude that the phrase "antitrust laws" embraces not only the text of the Sherman Antitrust Act and the other listed statutes, but also the courts' interpretations of them. [\*\*7] The state action doctrine is an interpretation of the Sherman Antitrust Act, see Parker, 317 U.S. at 350-51, of which Congress was aware, see Director, Office of Workers' Compensation Programs v. Perini North River Assocs., 459 U.S. 297, 319-20, 74 L. Ed. 2d 465, 103 S. Ct. 634 (1983), when it chose the phrase "antitrust laws." HN1 The plain meaning of section 2603(1) thus establishes that the Act is to have no effect on the applicability of the state action doctrine to gas and electric utilities like PG&E.

#### Violation – comity balancing is extra-topical – does not increase prohibitions by changing the scope of law, merely achieves similar effect by restraining use of law

--defines comity: refrain from applying law where against interests, interests = assessment of good vs bad effects on other states preferences, i.e. comity = unless it’s bad politics

--“this end” = “attempt by Congress…to reduce criticism and resistance” – NOT “defining the scope” – “thereby” proves via parallelism with “achieve this end by” – FTAIA changed the scope of Sherman to achieve the end of reducing criticism, in contrast to comity, which achieves the end of reducing criticism without actually changing the scope of Sherman

Gerber 17 (David J. Gerber, University Distinguished Professor, Illinois Institute of Technology, Chicago-Kent College of Law, “Competitive harm in global supply chains: assessing current responses and identifying potential future responses,” Journal of Antitrust Enforcement, 6(1), Sep 2017, p.11, DOI: 10.1093/jaenfo/jnx015)

The history behind the statute reveals some of the factors that shaped it and that have contributed to the confusion surrounding it.35 When the United States articulated and supported the effects principle after the Second World War, many outside the United States viewed its claim to expanded jurisdiction as a vehicle through which it sought to impose its form of economic organization on other countries. For decades, several major European countries (particularly the UK) protested the validity of the effects principle under international law.36

This led US courts to develop the so-called ‘comity’ principle, according to which US courts would refrain from applying US law in situations where the US interest in such application was less than the interest of the states in which the conduct occurred. These responses to foreign concerns about US jurisdictional assertions did not implicate the authority itself, but rather the use of that authority. By the late 1970s, the courts had produced long lists of factors to be considered in applying the law extraterritorially.37 There was, however, much criticism among US commentators and judges about the viability of this effort.38

The confusion and uncertainty created by this comity approach encouraged Congress to pass the FTAIA and shaped its content. The basic objective was to clarify and limit the scope of the effects principle as incorporated in US antitrust law while assuring that the law could not be used by others to interfere with the activities of US businesses overseas.39 The statute also represents an attempt by Congress to reduce the potential for applying US law to foreign conduct and thereby to reduce criticism and resistance to US law. Defining the scope of the effects principle was seen as preferable to the failed efforts to achieve this end by relying on judicial use of the amorphous comity principle. The statute dramatically changed analysis of the issue and moved toward a potentially more effective solution. Unfortunately, however, it has not provided the clarity needed to make the solution effective.

#### Vote NEG – fiating changes to federal decision-making beyond prohibitions permits infinite unpredictable AFF ground and bidirectional limitations on scope – nullifying antitrust PICs like regulation counterplans and topic disads

### 1NC – Politics

#### Biden’s continued PC is key to pass Build Back Better next week – despite inflation concerns

Barrón-López 11-11 (Laura Barrón-López, White House Correspondent for Politico, formerly covered Congress for the Washington Examiner, HuffPost and The Hill, BA political science, California State University, Fullerton, “Dems to White House: The only prescription is more Biden,” Politico, 11-11-2021, <https://www.politico.com/news/2021/11/11/dems-white-house-biden-520946>)

After months of deference to Congress, President Joe Biden moved more assertively last week to shepherd half his domestic agenda into law. With the other half still in limbo, Democrats want some of that Biden punch again.

Outside groups fear that congressional Democrats could come up short on Biden’s social spending package. They are concerned that moderates in the House may end up buckling if the budget scores on the bill come back worse than anticipated. And there is residual anxiety that one of the two wavering Senate Democrats — Joe Manchin of West Virginia and Kyrsten Sinema of Arizona — could vote “no” over concerns about inflation and long-term debt.

The clearest solution to avoiding this, they argue, is more Biden.

“All eyes are on the president, all expectations are on the president,” said Lorella Praeli, co-president of the progressive Community Change Action. “We are playing our role. We are mobilizing. We're reminding people everyday what this is about.”

Praeli added that Biden must ensure there aren’t future cuts to the package, which dropped from $3.5 trillion to $1.75 trillion to accommodate centrist Democrats in the House and Senate. “This is what he campaigned on. Only the president can deliver it in the end.”

Until last week, Biden’s involvement in negotiations had been more deferential than managerial. That befuddled lawmakers, who were waiting for him to draw red lines about which priorities he wants in and out of the deal or to even demand votes. To date, Biden has publicly refrained from drawing a red line around including paid leave in the final version of the legislation, leaving the leadership in the House at odds with centrists in the Senate.

But Biden did ramp up his involvement in the negotiations last week. And Democrats viewed that as key to getting an agreement in the House on their infrastructure bill, as well as on a rule to move forward with their social spending package, which funds universal pre-K, expands Medicare access, cuts taxes for families with children 18 years old and under, and combats climate change.

Now they want more. Expectations are high for Biden to keep the House to its promise of a vote on that social spending plan the week of Nov. 15.

“They basically made a promise,” said Rahna Epting, executive director of the progressive advocacy group MoveOn. “And Biden was able to get enough progressives to vote for the bipartisan infrastructure bill, on that promise. We are expecting Biden and the Democratic Caucus will make good on their word and pass the Build Back Better Act no later than Nov 15th as stated.”

White House officials contend that Biden and his team remain in close touch with the Hill, and their legislative affairs staff continues to push the social spending bill toward a vote. The White House said it is communicating regularly with a range of lawmakers including Manchin, but did not answer when asked whether Biden has spoken to the West Virginia senator or other moderates in recent days.

“There has been no kind of slowdown when it comes to our Hill outreach,” a White House official said.

The growing demands for Biden to stay heavily involved reflect a fear in the party that the window to act on the agenda is quickly closing, especially as concerns mount about lingering inflation and the midterms near. If the House meets its deadline next week and passes the social spending bill, some Democrats want Biden to issue a deadline for the Senate to act. Others noted that the end-of-year legislative calendar is short and brutal.

The “dynamic has totally changed,” said a Democratic strategist. “The president secured this agreement with the five holdouts for House passage of BBB next week and it’s on him to enforce it.”

A top climate operative echoed that assessment telling POLITICO that Biden “will have failed” on tackling climate change if the second piece of the agenda doesn’t pass.

But the operative also expressed a newfound fear that Biden’s current effort to sell the benefits of the infrastructure bill could distract or complicate Democrats’ attempt to keep public interested in the social spending plan.

"They need to sell [physical infrastructure] but also act like it's not enough," said the activist.

"How are they also creating the urgency for BBB to get done, for it to stay on the timeline of getting it done by Thanksgiving? It's a balancing act.”

Matt Bennett, co-founder of the moderate group Third Way, agreed that the dynamics were “tricky” in trying to sell one just-passed bill as historic while simultaneously making the case that another ambitious bill is needed. Biden will travel to New Hampshire and Michigan next week to highlight the money the infrastructure bill will direct toward new roads, bridges and transit projects across the country.

“This moment that we're in is hard,” said Bennett. “It will be much, much easier when both bills are completed. There is a very profound political imperative for Democrats to get this finished, to end the infighting and sausage-making and shift to creating a narrative about what Democrats have just done for Americans because they've been utterly unable to do that.”

A number of groups plan to amp up pressure next week as Congress returns. House Speaker Nancy Pelosi and the White House have repeated their desire to have a vote on the social spending plan by the end of next week. The Service Employees International Union will descend on Capitol Hill with some 500 union members, said Mary Kay Henry, the union’s president.

“We are escalating phone calls, text messages,” said Henry. “We're bringing members into Washington next Tuesday, we have the president's back, to get Congress to act quickly and get the full back package.”

Democratic outside groups have spent more than $150 million on TV and digital ads promoting the president’s social spending plan, known as “Build Back Better.” The League of Conservation Voters and Climate Power launched new digital ads calling on the five moderates who reached an agreement with the White House and House leadership last week to follow through on their commitment to pass the second piece of Biden’s economic agenda “next week.”

The longer it takes to pass the social spending plan, the harder it becomes to keep the party unified, Democrats warn, especially amid up-and-down economic news. A new report Wednesday revealed inflation hit 6.2 percent in October, its highest point in 31 years, contributing to high gas, car and food prices. It forced Biden to quickly issue a statement addressing the issue and ever-so-slightly shift his messaging, arguing that passage of the social spending plan would combat inflation.

“Inflation hurts Americans’ pocketbooks, and reversing this trend is a top priority for me,” Biden said in a statement. “It is important that Congress pass my Build Back Better plan, which is fully paid for and does not add to the debt, and will get more Americans working by reducing the cost of child care and elder care, and help directly lower costs for American families.”

#### Plan necessarily drains PC – trading off with unrelated agenda items.

Carstensen ‘21

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

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

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

#### PC’s key to global follow-through on climate post-Glasgow summit – impact’s extinction

Chon 11-8 (Gina Chon, Columnist at Reuters Breakingviews, former US Regulatory and Enforcement Correspondent, Financial Times, BS Journalism, Northwestern University, “America’s swing senator can save or scorch planet,” Reuters, 11-8-2021, <https://www.reuters.com/breakingviews/americas-swing-senator-can-save-or-scorch-planet-2021-11-08/>)

The health of the planet hangs somewhere over West Virginia. Joe Manchin, one of the coal state’s senators, is in line to cast the deciding vote on President Joe Biden’s $1.8 trillion “Build Back Better” spending plan. He’ll indirectly be voting on Biden’s ability to influence other countries to fight climate change after the COP26 summit read more.

Biden has faced two main challenges to his spending plan, a companion to the $1 trillion infrastructure legislation Congress approved on Friday. One objection comes from lawmakers worried about the amount of money at stake. After an earlier compromise, climate change initiatives are the biggest chunk of the overall blueprint at $555 billion, more than half of which comes from tax credits for cleaner vehicles and manufacturing. Manchin is already a self-confessed budget worrier.

The other obstacle is unease around specific climate initiatives. Manchin hails from a state with less than 2 million residents, but a heavy reliance on coal. His disapproval helped squash Biden’s proposal for a Clean Electricity Performance Program that would have incentivized utilities to stop using oil, coal and gas. The goal was for 80% of electricity produced in the country to come from clean sources by 2030, compared to the current 40%.

Green-energy tax credits are still on the table and offer a bigger bang for the taxpayer’s buck than the clean electricity program, think tank Resources for the Future estimates. By 2030 they would get the United States to 69% of its electricity coming from clean sources.

Manchin has good reason to keep those tax credits alive. While West Virginia is the second-largest coal producer in the United States and top five in natural gas, according to the U.S. Energy Information Administration, it’s also one of the states most exposed to damage from climate change. More than 60% of its power stations are at risk from a so-called 100-year flood, according to the First Street Foundation.

The senator’s decision will have global repercussions. China, India read more and other countries are only likely to listen to Biden’s pleas to help fight climate change if he looks able to meet such pledges himself. For example, the president wants other countries to help cut methane emissions by 30% this decade, but would still need Manchin’s support to levy fines on U.S. methane-leakers, which is far from guaranteed. For such a small population, West Virginia has a huge responsibility.

### 1NC – ITC

The United States federal government should:

--not increase prohibitions on anticompetitive business practices by the private sector by at least expanding the extraterritorial scope of its core antitrust laws, 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 extraterritorial anticompetitive business practices by the private sector under subsection (a)(1)(A), irrespective of subsections (a)(2) and (a)(3), utilizing an attenuated antitrust injury requirement,

--and 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.

### 1NC – Europe

#### 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

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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 – K

#### Attempts to achieve optimal competition subscribe to the notion of *Homo Economicus*---a desire for economic rationality that necessitates dividing society into governable entities---the impact is violent dispossession---vote NEG to forefront an analysis of institutional power relations.

Vicencio 14 (Dr. Eduardo Rivera Vicencio, Professor of the Department of Business and Economics at the Autonomous University of Barcelona; “The Firm and Corporative Governmentality: From the Perspective of Foucault;” International Journal of Economics and Accounting, DOI: 10.1504/IJEA.2014.067421, TM) [language modified]

Foucault explains the change of liberal governmentality to neoliberal governmentality in the 20th century in a detailed description of German neo-liberalism and, in less detail, the North American anarchic capitalism and French neoliberalism. In the case of Germany, the implementation of neoliberalism in the post-war period occurs in 1948, in a non-existent state and within a framework of state reconstruction requirements imposed by the USA and England. However, the theoretical origins lie in the Freiburg School in the late 1930s.

What happens at this stage with the onset of neoliberalism, is the reversal of the analysis performed by ordoliberals, with a state which provides economic freedom, a free market as the organising principle of the state, “ … a state under the supervision of a market rather than a market under the supervision of the state”. Moreover, “For liberals, the exchange is not the essence ... the essence of the market is competition”. This takes on again the classical conception that competition can ensure economic rationality. For this reason, neoliberalism becomes the creator of public law, based on the support and legitimacy of the state governments [Foucault, (2007), p.149 and 151].

Using three examples, Foucault shows the style of a neoliberal government; the first of which is a monopoly. It is referred to as a result of competition of the capitalist system, the product of capital concentration but with the objective of ensuring free competition. The state should intervene but the market itself should also respond to monopoly prices and, facing this possibility, the firm itself should opt for competitive market prices. The second example conforms to economic action which represents ongoing monitoring and activity through regulatory actions and ordering actions. In regulatory actions, price stability (inflation control), tax burden (as a way to influence savings and/or investments) and ordinary actions within the economic political framework are found and referred to as population techniques, learning and education, legal system resource availability, etc. Foucault’s third and final example is social policy which means that the economy ensures that each individual has a sufficient income to live alone or in a group and can be insured against the risks of life, old age and death and, called by the Germans, individual social policy or ‘social market economy’. He comes to the conclusion that the true and essential social politics according to neoliberalism is economic growth [Foucault, (2007), p.163 and 178].

However, the application of this scheme of social policy is not possible in Germany due to the Bismarck Socialist State, the influence of Keynesian economics or security systems that are applied in Europe. From this rejection of the application of neoliberal social policy in Germany, the Chicago School developed the ‘American anarchic capitalism’ along with the privatisation of insurance systems, where each individual, either personally or as a group, could insure against risks. This practice of neoliberal politics, says Foucault (2007, p.179) is what we see today in France (February 14th 1979 class).

Governmentality in the field of economic neoliberal thinking is a company subject to the mechanisms of competition and competitive dynamics; a partnership firm building a social network where the basic units are the way of business, where the objective of neoliberal policies is to spread, multiply and differentiate between firms. “The homo economicus who attempts to reconstruct is not the man of the exchange or the consumer, rather he is the [person] ~~man~~ of the firm and the production man” [Foucault, (2007), pp.182–187].

This subjection of society is not only economic it is vital for competitive play between companies, “... an institutional legal framework guaranteed by the state ...”; in this context, the firm becomes the key operator [Foucault, (2007), pp.209–213].

In the American neoliberalism study, as called by Foucault, anarchic capitalism is a business form based on human capital theory, where income is a capital return and, therefore, a wage is a capital income, inseparable from its holder, where the worker is a business in itself. Homo economicus is an entrepreneur, an economic subject and a legal subject; an interface between the government and the individual, a governable entity, which possesses innate elements and acquired elements. The first is genetic and the latter is the product of investing. In this way, “… the life of the individual – including the relationship, for example, with his private property, his family, his partner, his relationship with his insurance, his retirement – making it a sort of permanent and multipurpose business” [Foucault, (2007), pp.262–277].

Finally, a key element of this analysis is the civil society and its origins in the way to judge this economic subject, which is also the legal subject. “Civil society is the particular set in which it is necessary to relocate these ideal points constituted by homo economicus to manage them conveniently”. This is where the civil society and homo economicus form part of the same set of liberal governmentality technology, bound by the legal and political link [Foucault, (2007), p.336].

What unites individuals in civil society are ‘disinterested interests’ not a whole set of selfish interests and not the maximum profit in the exchange. This civil society groups sets of individuals in a number of nuclei; civil society is communal. Being the link between individuals is itself the principle of decoupling, when the economic loop is installed in society. It also works in reverse, “… the more progress towards economic status ... the more the constitutive bond of civil society and the more [hu]man is isolated is because of the economic loop with one and with everyone” [Foucault, (2007), pp..342–345]. Civil society is the engine of history [Foucault, (2007), p.347].

This paper is developed with the firm as the centre of neoliberal governmentality through the study of power relations of the firm and its discursive developments in this ideology, with reference to Foucault’s (1994, p.238) own recommendation, when he says, “… it should analyse institutions from power relations and not vice versa”

### 1NC – Section 5

#### The FTC should issue clear enforcement guidance that the presently-existent phrase “unfair methods of competition in or affecting commerce” in Section 5 of the FTCA must be in accordance with a comity balancing test. The FTC should release a policy statement and data sets that reflects this and enforce accordingly.

#### The FTC can utilize current authority without creating new prohibitions.

Khan ‘21

et al; This is a recent joint statement released by the five Federal Trade Commissioners. The Chair of the Federal Trade Commission is Lina Khan - an Associate Professor of Law at Columbia Law School. Also on the Commission is Rohit Chopra – who was previously The Assistant Director of the Consumer Financial Protection Bureau, as well as Rebecca Slaughter - an American attorney who was previously the acting chair of the Federal Trade Commission. Two others also sit on the Commission. “STATEMENT OF THE COMMISSION On the Withdrawal of the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act” - July 9, 2021 - #E&F – modified for language that may offend - https://www.ftc.gov/system/files/documents/public\_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.”1 In 2015, the Federal Trade Commission under Chairwoman Edith Ramirez published the Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (hereinafter “2015 Statement”), which established principles to guide the agency’s exercise of its “standalone” Section 5 authority.2 Although presented as a way to reaffirm the Commission’s preexisting approach to Section 5 and preserve doctrinal flexibility,3 the 2015 Statement contravenes the text, structure, and history of Section 5 and largely writes the FTC’s standalone authority out of existence. In our ~~view~~ (perspective), the 2015 Statement abrogates the Commission’s congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.

I. Background

On August 13, 2015, the Federal Trade Commission issued the 2015 Statement, which announced that the Commission would apply Section 5 using “a framework similar to the rule of reason,” by only challenging actions that “cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications[.]”4 The 2015 Statement advised that the Commission is “less likely” to raise a standalone Section 5 claim “if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm.”5

In a statement accompanying the issuance of these principles, the Commission explained that its enforcement of Section 5 would be “aligned with” the Sherman and Clayton Acts and thus subject to “the ‘rule of reason’ framework developed under the antitrust laws[.]”6 In a speech announcing the statement, Chairwoman Ramirez noted that she favored a “common-law approach” to Section 5 rather than “a prescriptive codification of precisely what conduct is prohibited.”7 She also acknowledged that the Commission’s policy statement was codifying an interpretation of Section 5 that is more restrictive than the Commission’s historic approach and more constraining than the prevailing case law.8 She added, “[W]e now exercise our standalone Section 5 authority in a far narrower class of cases than we did throughout most of the twentieth century.”9

With the exception of certain administrative complaints involving invitations to collude, the agency has pled a standalone Section 5 violation just once in the more than five years since it published the statement. 10

II. The Text, Structure, and History of Section 5 Reflect a Clear Legislative Mandate Broader than the Sherman and Clayton Acts

By tethering Section 5 to the Sherman and Clayton Acts, the 2015 Statement negates the Commission’s core legislative mandate, as reflected in the statutory text, the structure of the law, and the legislative history, and undermines the Commission’s institutional strengths.

In 1914, Congress enacted the Federal Trade Commission Act to reach beyond the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws. 11 After the Supreme Court announced in Standard Oil that it would subject restraints of trade to an open-ended “standard of reason” under the Sherman Act, lawmakers were concerned that this approach to antitrust delayed resolution of cases, delivered inconsistent and unpredictable results, and yielded outsized and unchecked interpretive authority to the courts.12 For instance, Senator Newlands complained that Standard Oil left antitrust regulation “to the varying judgments of different courts upon the facts and the law”; he thus sought to create an “administrative tribunal … with powers of recommendation, with powers of condemnation, [and] with powers of correction.”13 Likewise, a 1913 Senate committee report lamented that the rule of reason had made it “impossible to predict” whether courts would condemn many “practices that seriously interfere with competition, and are plainly opposed to the public welfare,” and thus called for legislation “establishing a commission for the better administration of the law and to aid in its enforcement.”14 These concerns spurred the passage of the FTC Act, which created an administrative body that could police unlawful business practices with greater expertise and democratic accountability than courts provided.15

At the heart of the statute was Section 5, which declares “unfair methods of competition” unlawful.16 By proscribing conduct using this new term, rather than codifying either the text or judicial interpretations of the Sherman Act, the plain language of the statute makes clear that Congress intended for Section 5 to reach beyond existing antitrust law. The structure of Section 5 also supports a reading that is not limited to an extension of the Sherman Act. Notably, the FTC Act’s remedial scheme differs significantly from the remedial structure of the other antitrust statutes. The Commission cannot pursue criminal penalties for violations of “unfair methods of competition,” and Section 5 provides no private right of action, shielding violators from private lawsuits and treble damages. In this way, the institutional design laid out in the FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act, but provides a more limited set of remedies.17

The legislative debate around the FTC Act makes clear that the text and structure of the statute were intentional. Lawmakers chose to leave it to the Commission to determine which practices fell into the category of “unfair methods of competition” rather than attempt to define through statute the various unlawful practices, given that “there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.”18 Lawmakers were clear that Section 5 was designed to extend beyond the reach of the antitrust laws. 19 For example, Senator Cummins, one of the main sponsors of the FTC Act, stated that the purpose of Section 5 was “to make some things punishable, to prevent some things, that cannot be punished or prevented under the antitrust law.”20

The Supreme Court has repeatedly affirmed this view of the agency’s Section 5 authority, holding that the statute, by its plain text, does not limit unfair methods of competition to practices that violate other antitrust laws. 21 The Court, recognizing the Commission’s expertise in competition matters, has given “deference”22 and “great weight”23 to the Commission’s determination that a practice is unfair and should be condemned.

## Cartels

### 1NC---AT: I/L

#### 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)…

#### Many thumpers to supply chain prices and disruption – BUT COVID solves – deglobalization and resilience (to both price volatility and thumpers)

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.

#### Cartels don’t harm growth or innovation

Schroter 13 --- Harm G. Schroter is professor of economic history at the University of Bergen, Norway, “Cartels Revisited: An Overview on Fresh Questions, New Methods, and Surprising Results”, Dans Revue économique 2013/6 (Vol. 64), https://www.cairn.info/revue-economique-2013-6-page-989.htm

As mentioned, the first research on cartels ever (Kleinwächter) related cartelization to downswings in the economy. He suggested cartels as a reaction of enterprise on crises (“Kinder der Not”). Since then many authors have related their case studies to this thesis and found evidence for and against it. However, more robust evidence on a large number of cases was unable to relate cartelization swings of the economy. Elmar Dönnebrink’s research found no empirical link between cartelisation and crises in Germany during an 18-years period from 1957 to 1975. [21], 24. The same impression provides the research by Martin Shanahan, David Round and Kerrie Round in this volume covering Australia between 1900 and 1940. However, a rough account for Switzerland indicates something into the direction of Kleinwächter’s idea. [22]. It seems that this question needs to be settled on the basis of solid international data. We also have to face the possibility that the result may vary according to periods, countries or even a combination of both.

When relating cartels to time, I suggest proceeding into another direction: a cartel is not just like a buying-contract on a commodity, a cartel-contract needs considerable trust on both sides, because cartel-partners vow for the future to abstain from potential steps and/or to carry out cost-generating others in order to receive a larger reward later. Trust needs time to emerge and grow, as well as a predictable environment. Exogenous shocks, such as war or revolution, create new realities after which trust needs to grow anew. This is why we have few cartels right after such external shocks. Usually time is needed on two levels, at the negotiation-table between decisive managers and on the market between the enterprises as organizations. It consequently requires a period of time to watch and test each other. Several international cartels, where managers did not know each other, singed pre-cartels for limited markets and periods as a test, before a comprehensive one was agreed upon (e.g. potash). Negotiations and test often consumed about two years. This span of time decoupled cartel-building from economic swings, even if the initial impulse was triggered by a crisis.

Many commodity-cartels were constructed with just the purpose to dampen economic swings. The focus was on stabilizing demand, production, prices and employment. Therefore governments often supported such cartels. In the interwar period several of such cartels functioned to the satisfaction of both, suppliers and customers (e.g. timber, paper). Though cartels can hardly be directly related to economic swings in the sense: more cartels in downturns, less during upswings, they still represent defensive instruments which are better remembered in times of depression than of booms. Thus the notion “Kinder der Not” is not totally wrong, but to be understood in a more abstract and long-term way.

One standard argument against cartels claims they obstruct innovation. Indeed, logic asks: why should a cartelized firm invest into r&d when competition is absent? There are also cases confirming this theory. However, in contrast to such assumptions John A. Cantwell and Pilar Barrera found: “cooperative learning [. . .] does seem to have increased innovative activity.” [23]. Innovative cartels included for… Most European cartels included organized transfer of innovation [24]. while with others no measurable impact could be detected. A third group definitely excluded transfer of knowledge (e.g. dyestuffs). However, a cartel member refraining from innovation would endanger its market share: during the periodic re-negotiation of one to three years cartel-members evaluate each other’s potential market share at an open market. A less than average innovative firm would run danger of receiving a reduced cartel-share. Furthermore, innovation cycles are often longer than these one to three years of cartel’s contracts. Consequently a non-innovative enterprise gambling on its cartel-share would undermine its own future. Because cartels exclude competition only on a defined field, the suggested behaviour of reduced investment into r&d is not found widespread in practical behaviour. There are, of course, within long-term cartels exceptional cases where smaller participants slowed their efforts (e.g. dyestuffs-cartel, which was signed for several decades). But any firm participating in an average cartel was badly advised not to be abreast with technologic development.

Margrit Müller detected another effect. Cartelized sectors used to be established ones with no high rates of growth. Participation in such cartels stimulated Swiss enterprise to invest in new innovative sectors which lay outside the cartelized field. Consequently cartelization could lead not to less but to more innovation! [25].

The question of misuse of economic power: Large firms represent a potential threat to small ones. Did large international cartels exploited small countries more easily than larger states? A first evaluation suggested: no, there was no difference to be found between the dimension of less and more powerful states. [26]. The question can be re-addressed to large, international cartels and cartel-members situated in small countries: Did such international cartels exploit their members in small nations more easy than large in large states? A more detailed evaluation could find no evidence for this thesis. It seems there was no discrimination according to the size of a member’s home-land. [28].

Cartels shelter from competition on the defined fields of the contract. This can make life easier for small enterprise. Evidence shows that cartels did not only safeguard small and medium enterprise (sme), but often sme received a larger share than in open competition. [29] Large cartel-players valued order in the market higher than a small share allocated additionally to sme. Knowing this, many sme asked aggressively for a larger share and often received it. According to George Symeonidis, cartels allowed an increased share and/or expansion of small members. These findings show cartels rather foster sme (and consequently potential competition). However, in the case of Swiss watch making the cartel prevented the industry from concentration and expansion abroad, which, according to Pierre-Yves Donzé, undermined the industry’s competitiveness. [30]. Indeed, cartels “freeze” the structure of their industry fore their defined time. From the general point of competition it is appreciated to have as many part-takers in the market as possible. However, from a perspective of a nations’s competitiveness more concentration and less national competition may be asked for. In order to strike a balance, several countries allow in certain cases sme forming a cartel, if their combined market-share does not exceed a certain margin. [31]. It is acknowledged that a cartel of sme is different from a cartel made of giant firms. But more important than firm-size is the share in the respective market.

A recent evaluation of cartels versus small states showed surprisingly no negative results concerning the latter. [32]. Cartels did not exploit customers in small countries more than in large ones. As small members the respective firms enjoyed preferential treatment not only as small firms, but often played the role of supervisor or arbitrator of the cartel. Cartel-partners from small countries were more trusted than from large states. In case large cartel-firms came from small states they did not behave differently from those based in large countries. Finally small states considered in many cases cartels as an indispensable tool for their economy. This is shown by Niklas Jensen-Eriksen in this volume, but applied also to many commodity-cartels (coffee, rubber, tin and so on) of developing countries. [33] It seems that being small was not detrimental, neither for firms nor for countries, as long as they were included as independent cartel-members.

First rank economic power is executed by government; states define legal rules and often also a frame of behaviour. It has been claimed that all types of administration, from governments to municipalities supported cartels during crises in order to maintain employment. That is passive politics. Active politics was to use them to prevent radicalization of workers (in Germany, see below), or governments used similar organizations, such as marketing boards, to pursue their ends. Why have governments permitted cartelization without asking for compensation from the cartel-members? Already Friedrich Kleinwächter suggested for to obtain a licence for a cartel, industry should guarantee social security to its workers. [34][34]For admission of a cartel, he suggested, firms should guarantee…

It has been claimed that cartels create barriers to entry into the respective industry and thus lower potential competition. [35] True, many cartels not only fought outsiders, but paid compensation for not using production facilities, thus easing competition. Several cartels had as one main aim to discourage as many potential competitors as possible (nitrogen, dyes). But is the accusation of creating barriers aimed exclusively at cartels? No, it is general practice in business. All firms try to safeguard their interest through technology, patents, know-how, amount of investment, etc. They also buy up and close down competitors and discourage newcomers with all possible means. As long as it has not been shown in comparative and representative research that cartels create more effective barriers than large enterprise it makes little sense accusing specially cartels for this practise.

Based on theoretical considerations, Manfred Neumann advocates anti-cartel policy: “Therefore, even if the per se rule against cartels may, in the short-run, yield losses, in the long-run it is the only appropriate policy to keep the competitive process going.” [36] George Symeonidis confronted this statement with practical research and came to a devastating conclusion on anti-cartel policy. In evaluating the result of uk anti-cartel legislation, he systematically compared the fate of cartelized and non-cartelized industries over two decades (mid 1950s to mid–1970s). According to him, anti-cartel policy caused prices to go up, the number of firms to decline, as well as a decrease in innovation. With other words, the theory-led political opening for more competition lead in reality to less competition. Furthermore, on profits the decision had no measurable effect. With other words anti-cartel policy achieved the opposite of its intentions, it undermined British competitiveness. Can any verdict be worse? [37] Indeed, if cartels had such a negative effect at the economy as assumed, one may ask why cartel-friendly countries such as Japan, Spain or Finland could point out to remarkable growth rates? These countries count into that group which not only allowed many forms of co-operation, including cartels, but considered them as normal or even indispensable. [38].

### 1NC – AT: Burrows

#### Decline inev

1AC Burrows 16 (Matthew Burrows, Director of the Atlantic Council’s Strategic Foresight Initiative, Ph.D. in European History, “Global Risks 2035: The Search for a New Normal,” September 2016, Atlantic Council, <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/Global_Risks_2035_web_0922.pdf>)

The multilateralist global system that the United States and the West built after the end of the Second World War was premised on an economically strong United States and West. In 1945, the United States was the only victor that was not completely devastated. World War II had brought the country out of the Great Depression, and the US GDP constituted more than 50 percent of the world’s total. Into the twenty-first century, the members of the Group of Seven (G7) were the world’s political and economic heavyweights. It has only been in the past several years that the collective GDP of the developing world—led by China—has surpassed the developed world’s. Even as non-Western powers grow, it is psychologically hard for the West to think about relinquishing its reins. Demographically, the West has, for a long time, been in the minority. What’s more recent is the aging of the Western population (analyzed in chapter 2), which is already occurring in Japan and Europe, beginning to squeeze the availability of resources for anything but health, social security, and interest payments on debt. Unless healthcare becomes far more efficient, the US economy will be overburdened with healthcare and pension costs as the “baby boomer” generation ages. Healthcare constitutes a whopping 18 percent of the US GDP—significantly more than is the case for other industrialized countries—without necessarily providing better results. With more going to health and pensions, there will be less capacity for defense and military spending. The United States is the biggest military spender, but China is increasing its portion of worldwide military spending, while the worldwide share of European NATO members is diminishing. China’s military probably will not rival the United States’ power-projection capabilities even by 2035, but it will have greater anti-access and denial powers. In a military contest, China may never be able to deliver a knockout blow, but it could tarnish the US image of military invincibility in a conventional state-on-state contest held in its region. Equally, a confrontation that results in a Chinese humiliation could set back China’s aspirations for regional leadership, if not trigger a domestic legitimacy crisis for the Communist Party leadership. Biggest Problem Is Domestic The biggest psychological blow to ordinary Western citizens has been their sagging standard of living (more analysis in chapter 1). Despite a much better record of overall growth in the United States since the 2008 financial crisis, those with median incomes have taken a hit. Worrisome for future US growth potential has been the drop in the labor-participation rate, from the 67 percent range before the 2008 financial crisis to 62-63 percent in the years since. The labor-participation rate was destined to drop due to a growing numbers of retirees, but much of the current sharp decrease comes from unskilled males in their prime working years—forties and early fifties—dropping out. Additionally, many younger women are not entering or staying in the job market. Global Trends 2030 looked at two scenarios for future US growth—one in which the United States maintained or slightly increased its average 2.5 percent pre-2008 growth rate, or one in which growth would slow to an average of 1.5 percent a year. In the first, there would still be the global economic shift to China. On the other hand, the 2.5 percent average growth would help boost average living standards, engendering a “feel-good” factor, which would make more Americans interested in reengaging with world issues.91 Given the record of slower growth and labor-force decline since the 2008 financial crisis, the likelihood of the second scenario is increasing. That scenario anticipated lower growth rates—which accelerated declines in average living standards—making it harder to continue trade-liberalization efforts. Indeed, the IMF warned in June 2016 that the United States faces potentially significant longer-term challenges to strong and sustained growth, saying, “concerted policy actions are warranted, sooner rather than later… focusing on the causes and consequences of falling labor force participation, an increasingly polarized income distribution, high levels of poverty, and weak productivity.”92 Moreover, it is not as if traditional US partners—Europe and Japan—are doing much better. Japan and many European countries are aging faster than the United States, eliminating labor-force growth as a driver of future economic growth. Europe’s and Japan’s economic performances have been declining since the 1990s. In Europe, the public discontent with high unemployment and declining incomes has helped to spur the rise of antiestablishment far-right and populist parties that want to weaken the EU and transatlantic ties. Even in richer European countries, such as Germany, a backlash has been growing against the Transatlantic Trade and Investment Partnership (TTIP), out of fear that Europe’s rewards would be meager and European standards would be diluted. McKinsey Global Institute, for example, believes a “return to sustained growth of 2-to-3 percent” is possible for Europe, but would require many politically difficult reforms.93 These include: reducing dependence on imports (much coming from Russia) for crude oil and natural gas; fostering a more vibrant digital economy; increasing workforce participation by the elderly, women, and migrants; and promoting flexibility in labor markets. China now spends a greater share of its GDP on research and development than does Europe. The latest OECD figures show that Europe now spends even less than the rest of the OECD.94 In both the United States and Europe, there is increasing anti-immigrant sentiment despite documented economic benefits from immigration. According to EU Commission Employment Analyst Dr. Jorg Peschner, productivity, by itself, will not be enough to reverse the negative employment trend absent more immigration: “EU’s productivity growth would have to double in order to keep the EU’s economy growing at the same pace as it did before the crisis started.” For employment growth to remain positive as long as possible, improving the labor participation of women, low-educated people, and migrants will also have to be a priority. In the United States, many of the new businesses started every year are started by first- or second-generation immigrants.95 Politically, there has been a large rise in support for right-wing and populist parties in the United States and Europe, undermining traditional parties. The gaps, for example, between the leadership and supporters in the US Republican and UK Tory and Labor Parties have been particularly evident in the selection of Donald Trump as presidential candidate and the June 2016 victory of the “Leave” vote in Britain. Unfortunately, there is no end of economic disruption. The job churn will continue as more and more skills and professions are automated, also increasing the potential for more “losers” from globalization, greater political polarization, and inequality. The increased competitiveness of the developing world with the West is a particular morale buster for Western middle classes who got used to ever-increasing prosperity for themselves and succeeding generations. Adapting to a new norm of economic turbulence—more prevalent in other eras—may be one of the biggest mental hurdles for Westerners. The West is used to thinking of the “Third World,” not home, as the place where economic turmoil happens. And a Multipolar Financial Architecture, Too Historically, US and Western power has rested on having a monopoly on reserve currencies and a Westerndominated financial system. In 2035, the dollar will be the biggest reserve currency, but its share of global financial transactions is expected to drop from 60 percent today to 45 percent. The euro will probably remain the second reserve currency, while the Chinese yuan or RMB—which became a part of the IMF benchmark-currency basket in 2015—will become a third reserve currency, accounting for 10 to 15 percent of global finance in two decades’ time.96 The financial architecture will also become more regionalized. The central role played by the financial centers of New York and London will also diminish, and a multitiered financial architecture will develop. Following the UK Brexit, those centers’ share in financial intermediation will decrease, as a second pole of global finance forms in the Eurozone. A third pole will develop in East Asia and Southeast Asia. Gradually, a growing share of global financial resources will be concentrated in those regional clusters. As with the growth of regional trade, the regional clusters will be more self-encapsulated, spurred by rising domestic demand in China and other developing countries with growing middle classes. With the role of electronic money likely to grow, the traditional banking system will probably also undergo major revision, with potential impacts on governmental powers. A more multipolar reserve system and regionalized financial architecture should lessen risks and contribute to greater stability. But the large-scale technological innovations—some of which contributed to the 2008 breakdown—will continue, making global finance still volatile. Emerging-market countries with fragmentary regulatory regimes will be particularly prone to suffering financial crises. The aging population factor also increases risks to public finances. This report anticipates modestly increased volatility, lower than what occurred in the global economy during the 1890s through the 1940s, but higher than in the 1950s and 1960s—more of a continuation of what has been the trend line since the mid-1980s.

#### Emerging tech regulation fails---other countries don’t follow.

1AC Burrows 16 [Mathew Burrows, Director of the Atlantic Council’s Strategic Foresight Initiative, PhD in European History from the University of Cambridge, Appointed Director of the Analysis and Production Staff (APS) in 2010, September 2016, “Global Risks 2035: Mathew J. Burrows Foreword by Brent Scowcroft The Search for a New Normal” Atlantic Council Strategy Papers, http://espas.eu/orbis/sites/default/files/generated/document/en/Global\_Risks\_2035\_web\_0922.pdf]

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China’s military probably will not rival the United States’ power-projection capabilities even by 2035, but it will have greater anti-access and denial powers. In a military contest, China may never be able to deliver a knockout blow, but it could tarnish the US image of military invincibility in a conventional state-on-state contest held in its region. Equally, a confrontation that results in a Chinese humiliation could set back China’s aspirations for regional leadership, if not trigger a domestic legitimacy crisis for the Communist Party leadership. Biggest Problem Is Domestic The biggest psychological blow to ordinary Western citizens has been their sagging standard of living (more analysis in chapter 1). Despite a much better record of overall growth in the United States since the 2008 financial crisis, those with median incomes have taken a hit. Worrisome for future US growth potential has been the drop in the labor-participation rate, from the 67 percent range before the 2008 financial crisis to 62-63 percent in the years since. The labor-participation rate was destined to drop due to a growing numbers of retirees, but much of the current sharp decrease comes from unskilled males in their prime working years—forties and early fifties—dropping out. Additionally, many younger women are not entering or staying in the job market. Global Trends 2030 looked at two scenarios for future US growth—one in which the United States maintained or slightly increased its average 2.5 percent pre-2008 growth rate, or one in which growth would slow to an average of 1.5 percent a year. In the first, there would still be the global economic shift to China. On the other hand, the 2.5 percent average growth would help boost average living standards, engendering a “feel-good” factor, which would make more Americans interested in reengaging with world issues.91 Given the record of slower growth and labor-force decline since the 2008 financial crisis, the likelihood of the second scenario is increasing. That scenario anticipated lower growth rates—which accelerated declines in average living standards—making it harder to continue trade-liberalization efforts. Indeed, the IMF warned in June 2016 that the United States faces potentially significant longer-term challenges to strong and sustained growth, saying, “concerted policy actions are warranted, sooner rather than later… focusing on the causes and consequences of falling labor force participation, an increasingly polarized income distribution, high levels of poverty, and weak productivity.”92 Moreover, it is not as if traditional US partners—Europe and Japan—are doing much better. Japan and many European countries are aging faster than the United States, eliminating labor-force growth as a driver of future economic growth. Europe’s and Japan’s economic performances have been declining since the 1990s. In Europe, the public discontent with high unemployment and declining incomes has helped to spur the rise of antiestablishment far-right and populist parties that want to weaken the EU and transatlantic ties. Even in richer European countries, such as Germany, a backlash has been growing against the Transatlantic Trade and Investment Partnership (TTIP), out of fear that Europe’s rewards would be meager and European standards would be diluted. McKinsey Global Institute, for example, believes a “return to sustained growth of 2-to-3 percent” is possible for Europe, but would require many politically difficult reforms.93 These include: reducing dependence on imports (much coming from Russia) for crude oil and natural gas; fostering a more vibrant digital economy; increasing workforce participation by the elderly, women, and migrants; and promoting flexibility in labor markets. China now spends a greater share of its GDP on research and development than does Europe. The latest OECD figures show that Europe now spends even less than the rest of the OECD.94 In both the United States and Europe, there is increasing anti-immigrant sentiment despite documented economic benefits from immigration. According to EU Commission Employment Analyst Dr. Jorg Peschner, productivity, by itself, will not be enough to reverse the negative employment trend absent more immigration: “EU’s productivity growth would have to double in order to keep the EU’s economy growing at the same pace as it did before the crisis started.” For employment growth to remain positive as long as possible, improving the labor participation of women, low-educated people, and migrants will also have to be a priority. In the United States, many of the new businesses started every year are started by first- or second-generation immigrants.95 Politically, there has been a large rise in support for right-wing and populist parties in the United States and Europe, undermining traditional parties. The gaps, for example, between the leadership and supporters in the US Republican and UK Tory and Labor Parties have been particularly evident in the selection of Donald Trump as presidential candidate and the June 2016 victory of the “Leave” vote in Britain. Unfortunately, there is no end of economic disruption. The job churn will continue as more and more skills and professions are automated, also increasing the potential for more “losers” from globalization, greater political polarization, and inequality. The increased competitiveness of the developing world with the West is a particular morale buster for Western middle classes who got used to ever-increasing prosperity for themselves and succeeding generations. Adapting to a new norm of economic turbulence—more prevalent in other eras—may be one of the biggest mental hurdles for Westerners. The West is used to thinking of the “Third World,” not home, as the place where economic turmoil happens. And a Multipolar Financial Architecture, Too Historically, US and Western power has rested on having a monopoly on reserve currencies and a Westerndominated financial system. In 2035, the dollar will be the biggest reserve currency, but its share of global financial transactions is expected to drop from 60 percent today to 45 percent. The euro will probably remain the second reserve currency, while the Chinese yuan or RMB—which became a part of the IMF benchmark-currency basket in 2015—will become a third reserve currency, accounting for 10 to 15 percent of global finance in two decades’ time.96 The financial architecture will also become more regionalized. The central role played by the financial centers of New York and London will also diminish, and a multitiered financial architecture will develop. Following the UK Brexit, those centers’ share in financial intermediation will decrease, as a second pole of global finance forms in the Eurozone. A third pole will develop in East Asia and Southeast Asia. Gradually, a growing share of global financial resources will be concentrated in those regional clusters. As with the growth of regional trade, the regional clusters will be more self-encapsulated, spurred by rising domestic demand in China and other developing countries with growing middle classes. With the role of electronic money likely to grow, the traditional banking system will probably also undergo major revision, with potential impacts on governmental powers. A more multipolar reserve system and regionalized financial architecture should lessen risks and contribute to greater stability. But the large-scale technological innovations—some of which contributed to the 2008 breakdown—will continue, making global finance still volatile. Emerging-market countries with fragmentary regulatory regimes will be particularly prone to suffering financial crises. The agingpopulation factor also increases risks to public finances. This report anticipates modestly increased volatility, lower than what occurred in the global economy during the 1890s through the 1940s, but higher than in the 1950s and 1960s—more of a continuation of what has been the trend line since the mid-1980s. Are There Alternative Visions to Western Order? Four years ago, when Global Trends 2030 was published, the answer was largely no.97 Increasingly, the facts on the ground would suggest otherwise. They do not add up to a cohesive plan to substitute wholesale all Western institutions and practices. However, they clearly indicate that there are some no-go areas, particularly those connected to regime change, democracy promotion, state control over NGOs, and maintaining sovereignty. Russia and China, in particular, see themselves as great powers and, as such, believe they have special rights to dominance in their regions. However, as other powers like India develop, it is likely that they will see themselves as regional powers with inherent prerogatives. It is worth recalling the United States’ expansive Manifest Destiny and nineteenth-century Monroe Doctrine, claiming special rights to determine the future of the Western Hemisphere. The Mercator Institute for China Studies (MERICS) has been closely following Beijing’s efforts to build a network of parallel structures to existing international organizations. It has concluded that China “is not seeking to demolish or exit from current international organizations…It is constructing supplementary— in part complementary, in part competitive—channels for shaping the international order beyond Western claims to leadership.”98 As the accompanying chart indicates, China’s shadow network of alternative international structures encompasses everything from financial and economic partnerships (the Silk Road Economic Belt and the Asian Infrastructure Investment Bank) to full-blown political groupings like the Shanghai Cooperation Organization, Conference on Interaction and Confidence Building Measures in Asia (CICA), and the BRICS association of Brazil, Russia, India, China, and South Africa.99 Moreover, there is increasing cooperation among many of the emerging powers—beyond just authoritarians—to not just limit what they see as Western meddling in domestic affairs, but to go on the attack globally. According to a recent academic study, the “Big Five” authoritarian states of China, Russia, Iran, Saudi Arabia, and Venezuela “have taken more coordinated and decisive action to contain democracy on the global level.” They have sought to “alter the democracy and human-rights mechanisms of key rulesbased institutions, including the Organization of American States, the Council of Europe, the Organization for Security and Cooperation in Europe, and international bodies concerned with the governance of the Internet.”100 How durable are these preferences for nondemocracy and state control? By 2035, if not sooner (in the case of Venezuela), some of the now-authoritarian states could be liberalized, and the perceived threat posed by Western civil-society NGOs may ease. However, China and Russia are more likely than not to want to dominate their regions. Nationalism and democracy have been shown to be highly compatible. It is not clear that an even more powerful China or India would defer to Western leadership of the global order, even if both sides’ values in other areas begin to converge. What Kind of Post-Western World? Clearly, there is a need to plan for a world that will not have the West as its big economic powerhouse—a prospect hard for Western elites and publics to conceive of, despite a decade or more of publicity about the “rise of the rest.” According to a recent survey, Europeans and Americans are more comfortable with each other than they are with anybody else. Although a majority of Europeans said, in the most recent German Marshall Fund transatlantic-trends polling, that they would like to see their country take an approach more independent from the United States, both Americans and Europeans still prefer each other over more Russian or Chinese leadership in the world. The Obama administration—considered among the most multilateralist of recent administrations— campaigned hard in 2015 to convince Europeans not to join China’s proposed Asian Infrastructure and Investment Bank (AIIB). It was as if the United States was against any governance structure not “made in the USA,” even when those running the AIIB have made clear their intentions of operating with the World Bank and the Asian Development Bank. More and more, the talk among Western elites is about locking in as much as possible the status quo, which favors the West, so that it will be harder for the newcomers to overcome. The TPP was sold as a way to set the rules before China gains much more power. A former Obama administration official advised that now might be the best time to undertake UN Security Council reform, before China and other uncooperative powers become more powerful. “A new US administration may be able to advance a proposal to address the Security Council’s anachronistic makeup while perpetuating a council that Washington can work with.”101 For Westerners, the challenge will be to plan for a future that will not be solely run by them, but which they can live with. Handovers have been historically difficult and fraught—more often than not, decided by bloody contests. One could envisage different scenarios, some already described in the earlier chapter on conflict, of military contests between the United States and China, or the United States and China with Russia, or the United States with NATO against Russia. Without delivering a knockout blow by one side or the other, these contests would most likely pit West against East, creating something akin to a new Cold War. Even if there were a knockout blow by the United States against China, it is hard to imagine a defeated China deferring permanently to the West. Its population has been imbued with such a narrative about the injustices by the West against China that any defeat or setback would be confirmation that the United States and West are dead set against a rising China. Perhaps the most harmful effect of such a contest would be to convince both sides that neither is trustworthy. For the non-West, it would confirm the suspicion that the West does not want to relinquish its leadership position. For the West, it would make it harder to ever reach out and help establish a truly global system. Need for a Second-Generation US and Western Leadership Model War is not, and should not be, inevitable as the West struggles with the growing clout of China and other developing states on the world stage. Unlike during other transitions, the tools exist for ensuring more peaceful outcomes. They will require Western acquiescence to greater roles for the developing world to set and implement new rules of the road for the international order. A key feature of the post-1945 US design for the world order is its multilateralist structures. Many of these operate below most people’s radar. This plumbing of the international system has enabled the daily functioning of globalization. To keep it viable, China, as well as other developing countries, must be accorded more representation. There are too many long-term risks involved, for example, in China having only the equivalent of France’s voting rights in the IMF, when it is the first or second economic power in the world. This is how resentments are nurtured—all the more dangerous in China’s case because of its underlying “century of humiliation” mental complex. As emerging technologies come online, the lack of a truly global institutional framework could be particularly dangerous. Assuring the future security of the Internet is particularly important in this regard, because all the new emerging technologies—bio, 3D printing, robotics, big data—take for granted a secure, global Internet. Everyone loses if cyber crime and cyber terrorism undermine the Internet. In the worstcase scenarios, in which cyber crime proliferates or strong national borders fragment the Internet, an Atlantic Council study, as mentioned, found that the economic costs could be as much as $90 trillion out to 2030, in addition to the risk of open conflict.102 Besides bringing the emerging powers into leadership roles in the panoply of multilateral institutions, the United States will need to temper its often “exemptionalist” stance to ensure the survival of the multilateralist order. According to the Council on Foreign Relations’ Patrick Stewart, a prominent scholar of global governance, one of the persistent paradoxes of the post-1945 decades has been that the “United States is at once the world’s most vocal champion of a rules-based international order and the power most insistent on opting out of the constraints that it hopes to see binding on others.”103 No country has the networks and connections that the United States does, but the system is now polycentric, rather than unipolar, and others resent the “exceptional” privileges that the United States claims. The Global Trends works have talked about the need for a new model of US global leadership. The United States needs to be guiding the international system as a “first among equals,” and willing to play by its own rules. Paradoxically, there is likely to be no vibrant global-governance system without US and Western leadership, but too much domineering behavior could doom it. Even if the United States adapted its global role, this is not to say that the tensions and differences with many emerging powers would all disappear, or that the governance system would function seamlessly. In addition to the growing number of new state actors, the increasing importance of nonstate actors adds a new complexity to the functioning of global institutions. Moreover, there are clear-cut differences between the West and emerging powers on values-based issues, such as democracy promotion and the responsibility to protect. Many developing-country publics still resent Western colonialism and equate any intrusion with past historical wrong. They point to the 2011 humanitarian intervention in Libya, for example, as cover for the Western goal of regime change. Hence, the UN Security Council failure to stop the fighting in Syria, with more than two hundred thousand killed and 7.6 million displaced. Russia and China want to make a stand against the United States and the West getting their way and ousting the Assad regime. On the other hand, the lack of a solution smacks more of anarchy than global governance. Certainly, it shows one of the gaps that remains, and likely will remain, limiting global governance because of differences in values. The speed with which new technologies are coming online and becoming an important political, military, and economic tool—for both good and bad—carries big risks for global governance. Stewart Patrick lists four potential new technologies that “cry out for regulation”: geoengineering, drones, synthetic biology, and nanotechnology. Without some setting of rules for their operation, there is the risk of major disruptions, if not catastrophes, stemming from their abuse. The recent advances in synthetic biology lower the bar to abuse by amateurs and terrorists alike, forever affecting human DNA. Geoengineering involves planetaryscale interventions that could interfere with complex climatic systems. However cumbersome, politically unpopular, and ineffective at times, there is little alternative to increased global cooperation if one does not want to see higher risks of conflict and economic degradation. Without some sort of bolstered global governance, the West would end up with less sovereignty in a “dog-eat-dog” world, in which it was increasingly in the minority. But can the United States and the West rise to the challenge of investing in a global-governance system that will not always favor their interests on every issue? Historically, the United States could be especially generous because it was on top of the world in about everything after the Second World War. Europeans came to truly believe in pooling sovereignty and joint governance after centuries of internecine conflict. The tough economic times at home have seen US and European publics become distrustful of overarching multilateral institutions, believing the will of the United States or individual European countries will not be served. It is oftentimes easier for political leaders to fall in with the public mood rather than display leadership that might appear to work against it. Over time, economic power will also be consolidated in Asia, replicating the situation three centuries ago, when China and India were the biggest economic powers in the world, and the center of the global economy was in the East. Over a longer term, one could also see a concentration in just three countries: The breakdown of the post-Cold War political and security order is irrevocable. Not only are there new powers—particularly China—that do not share the West’s vision of a liberal order, but Western publics themselves have turned against globalization, which has been the overall megatrend of the past three decades. The geopolitical landscape ahead will be much different. The best case is looking at multipolarity with limited multilateralism. In the worst case, that multipolarity evolves into bipolarity with China, Russia, and their partners pitted against the United States, Europe, Japan, and other allies. In that scenario, conflict would be almost inevitable.

### 1NC – Chem !

#### Your Kovacic ev says that antitrust laws are insufficient to solve --- the plan doesn’t make them better so cant solve

Kovacic et al. ’21 [William, Robert Marshall, and Michael Meurer; 2021; Global Competition Professor of Law and Policy at George Washington University Law School; Distinguished Professor of Economics at Pennsylvania State University; Professor of Law at Boston University; Boston University School of Law Research Paper Series, “Patents and Price Fixing by Serial Colluders,” No. 21]

For the remainder of the Article, we discuss how the existing antitrust jurisprudence regarding patents and price fixing requires major upgrades to account for the dramatic modern improvements in our understanding of the economics of collusion

#### Squo solves chem sector

Atkins 21 --- Alden Atkins et al, Partner at Vinson & Elkins LLP Specializing in Antitrust and Commercial Litigation, “2020 Energy & Chemicals Antitrust Report”, Vinson & Elkins LLP, January 7, 2021, https://www.jdsupra.com/legalnews/2020-energy-and-chemicals-antitrust-6008415/

Merger Enforcement

• 2019 witnessed the first year-over-year drop in total merger activity since 2012. The energy industry saw a corresponding reduction in the number of reportable transactions, but an increase in the number of transactions investigated. The chemical industry saw slight increases in both the number of transactions and investigations.

• Although the U.S. Department of Justice (“DOJ”) brought no energy or chemical merger enforcement actions in 2020, the Federal Trade Commission (“FTC”) was substantially more active. It secured divestitures in two cases, challenged two transactions in federal court — succeeding in one and losing in the other — and sued a company for failing to comply with a divestiture order.

• The DOJ and FTC launched new Vertical Merger Guidelines that clarify the agencies’ enforcement approach with respect to vertical transactions — those involving companies at different levels of the supply chain. The DOJ also released a new merger remedies document, which confirms its strong preference for structural remedies like divestitures.

Non-Merger Enforcement

• Congress reauthorized a key statute that provides incentives in civil actions to companies that self-report anticompetitive conduct under the Antitrust Division’s Corporate Leniency program.

• The DOJ obtained an additional settlement in its investigation into Korean fuel supply contracts and secured a guilty plea in a joint investigation into collusion impacting bids for work supporting the Department of Energy’s Strategic Petroleum Reserve.

• The Antitrust Division’s Procurement Collusion Strike Force (“Strike Force”) — unveiled in late 2019 to prioritize the detection and prosecution of collusion in the public procurement process — had a busy inaugural year, including securing its first indictment. The Strike Force’s work reportedly makes up an increasingly large portion of the Antitrust Division’s open cases, but the overall number of new criminal antitrust cases publicly filed by the DOJ in 2020 remains below historical levels.

• The DOJ opened and closed, without charges, an investigation into several car manufacturers’ agreement with the State of California regarding fuel emissions standards.

• The Supreme Court announced that it will review the FTC’s authority to pursue restitution in civil enforcement actions.

State & Private Litigation

• The rate of private antitrust litigation in the U.S. energy and chemical industries continued to be robust. Notably, the State of California and retail gasoline purchasers launched new suits against major traders of gasoline and gasoline blending components, accusing them of colluding to manipulate the spot market price of gasoline, in violation of federal and state antitrust laws.

• Courts continued to grapple with (1) whether alleged market manipulation was sufficient to cause antitrust injury sufficient to support private litigation, and (2) the intersection between antitrust and regulation (in cases dealing with the state action and filed rate doctrines).

• Consistent with its expanded focus on competition advocacy, the DOJ’s Antitrust Division submitted amicus curiae briefs in several matters involving the energy industry.

• On the chemicals side, the caustic soda price-fixing case launched last year survived a motion to dismiss, while the long-running liquid aluminum sulfate litigation concluded with a variety of settlements.

## Regimes

### 1NC – Regimes

#### Structural barriers like corruption and inefficient agencies limit competition law in developing nations

A.E. Rodriguez & Ashok Menon 16, Success And Limits Of Competition Law And Policy In Developing Countries: The Causes Of Competition Agency Ineffectiveness In Developing Countries, 79 Law & Contemp. Prob. 37, Nexis Uni

V The Competition Policy Dilemma

What is the dilemma? If the competition agency successfully prosecutes the anti-competitive practices of the merchant groups, it is likely to unintentionally destroy or impair a storied and rich source of pro-competitive benefits. There is more. Again, if the competition agency successfully prosecutes the business group practices, it sows the seeds of its own ineffectiveness in the long run. In response to the prosecution, groups are likely to turn to the state and solicit preferential treatment or seek official or implicit immunity from antitrust processes. 73 This would substitute non-tariff barriers and other instances of protectionism for private anti-competitive practices. Given the ease with which protectionist measures are made available, no interest group would seek to create a naked cartel to begin with. Thus, antitrust policy promises the prosecution of private sector activities that hardly exist.

Commentators, including erstwhile avid proponents and supporters of competition policy in transition economies have acknowledged the limited impact enforcement agencies have had. Ignacio De Leon recently stated:

The empirical evidence gathered after two decades of inception in developing countries shows that competition policy implementation is far from being successful in many developing countries. Some competition authorities appear to be making progress in defining a sound policy agenda and displaying a strong commitment towards the development of a level playing field; whereas others, after a promising start, seem to have faded into oblivion or struggling their way through. 74

And former President of the Portuguese Competition Authority Abel Mateus stated:

The following factors restrict the effectiveness of a competition enforcement regime: (1) vested interests that dominate economic policy making, either through legal means (party financing, lobbying, influence in the nomination of the government, senior officials, or the council of the national competition authority (NCA) or illegal means (corruption, abuse of public service power, or cronyism); (2) inefficient public administration and regulatory systems that limit the capacity and effectiveness of public [\*60] bodies, including the NCA; and (3) inefficient judicial systems that preclude the sanctioning of violation of the competition law. 75

Giovanni Petruzzella, head of the Italian competition authority, characterizes the presence and influence of these business conglomerates in Italy and describes a general difficulty:

The target of this current of thought is crony capitalism, which in Italy is called relationship capitalism. The latter is based on the interweaving of few big economic powers, on their relationships with the political and administrative powers, on the research of "situational rents". Crony capitalism is based on privileges, rather than on merits; it worsens inequalities, it makes society closed, static, not very much open to competition and innovation. Likewise, it sacrifices individuals' ambition of being able to improve their social position exclusively owing to their merits. Therefore, it prejudices the particular form of equality which is equality of opportunities. These tendencies, in Countries such as Italy, have favored the expansion of an unproductive and inefficient public expenditure, as regards some of its components, aimed at satisfying particularistic interests of lobbies and of rent seekers. Also this has contributed in creating the enormous public debt which constitutes a big obstacle for economic growth and an unfair burden on the new generations. 76

And from the World Bank's Competition Policy Team: Anti-cartel enforcement continues to be a challenge in developing countries where government policies still facilitate the creation and sustainability of cartel behavior among firms. 77

The World Bank commentators diagnose the problem as an operational one, arguing that the implementation and enforcement practices have been ineffective. And they recommend doubling down on deterrence practices, removing exemptions, improving and enhancing investigating powers, and other direct enforcement tools. 78

These recommendations are misguided and shortsighted. But they are entirely reasonable if it is assumed that the challenged narrow practices serve only the private interests of the business or interest group - and have only anti-competitive consequences. The implicit frame guiding the prosecutorial effort is that the social, political, and economic context in which the enforcement machinery is introduced resembles the one prevalent in western economies.

Interest groups choose whether to obtain anti-competitive rents from cartelization, seek favors from the state, or, more likely, both. Interest groups will choose the combination of private collusion and government protection that [\*61] maximizes their narrow expected benefits derived from the state's involvement. Rent-maximizing interest groups will devote resources to cartelization and government influence based on the relative costs of the two activities.

The level of benefits obtained by the interest group increases in both the amounts of rent-seeking and cartelization efforts the group undertakes. For any given budget or level of resources, the group prefers more benefit to less. Thus, a group will choose its level of activity devoted to cartelization and lobbying at the point at which their incremental costs approximate their benefits.

If an antitrust agency is established and actively and credibly sets out to enforce proscribed practices, the unit price of cartelization efforts rises. Obviously, economies of scale and scope in political influence may cause different firms to face different relative prices for particular resources. However, as the costs of cartelization rise relative to rent-seeking, at the margin the interest group will seek more rent through government protection and this correspondingly reduces their efforts toward private cartelization.

Thus, the establishment of an antitrust regime may, in response to this demand, cause an increase in the availability of other forms of government protection. If the activities of an antitrust agency only make it more difficult

to cartelize privately, the special-interest group is worse off than it was before. It will reduce its private collaboration efforts, but will shift resources into monopolization gained through government protection.

### 1NC – SDGs !

#### 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.

### 1NC – Deforestation !

#### No impact to deforestation – species resilient, pessimism pervades their stats, reseeding fills-in, and local protectors ensure survival

Pearce citing Martin 15 ---- Fred, environment consultant for New Scientist Magazine, syndicated columnist featured in The Guardian/The Independent/Foreign Policy/Popular Science/Time, the text cites Claude Martin who was the former Director General of WWF International and is the current Chancellor of the International University in Geneva, “A Welcome Dose of Environmental Optimism,” 7/1, https://www.newscientist.com/article/mg22730280-500-a-welcome-dose-of-environmental-optimism/

Optimism is in the air. Some environmentalists are shrugging off their perennial doom and gloom, and daring to think the possible – that we are not done for. After half a century of despair since the publication of Silent Spring, The Limits to Growth and The Population Bomb, the green shoots of ecological redemption can sometimes be seen between hard covers. It is a welcome relief.

In On The Edge, Claude Martin, former director of environmental group WWF International, remembers that back in the 1980s, forest biologists like him warned that the loss of pristine rainforests was driving tens of thousands of species to extinction. Yet it wasn’t so. His magisterial review of the state of those forests concedes that the “pessimistic projections”, which assumed that species would be lost as fast as forest area, have proved false.

Most species in these habitats survive even in the face of rampant deforestation. Puerto Rico lost 99 per cent of its primary forests but just seven bird species, and today has more species than before, he says. And thanks in part to reseeding by alien species, old forests are starting to grow again.

The Anthropocene geological epoch, it turns out, is not a one-way trip to ecological disaster. Nature clings on and fights back: the trick is to find ways to help. That means cosseting the vast amount of nature that persists in logged and degraded forests that conservationists traditionally snub as not “pristine”. And it also means embracing people who were once seen as enemies of conservation.

### 1NC – Food !

#### 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.

#### 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).

#### Global responses to food insecurity can effectively prevent conflict now

Emmy **Simmons 17**, nonresident senior adviser to the CSIS Global Food Security Project, independent consultant on international development issues with a focus on food, agriculture, and Africa, February 2017, “RECURRING STORMS: Food Insecurity, Political Instability, and Conflict,” http://reliefweb.int/sites/reliefweb.int/files/resources/170124\_Simmons\_RecurringStorms\_Web.pdf

Sharp rises in global food prices in 2007/08 **jolted global political leaders out of any complacency** they might have had regarding the future of food and agriculture. Street demonstrations and food riots broke out in more than 40 countries across the world, provoking unrest and violence in several places. The L’Aquila Food Security Initiative, launched by the G-8 and the G-20 in 2009, brought new funding and energy to the task of quelling the “perfect storm” of food insecurity set off by spiking global food and fuel prices, financial and commodity market turmoil, the competition of biofuel production, and adverse weather in key agricultural regions. The L’Aquila Food Security Initiative **successfully reversed** a decades-long decline in international support for agricultural development. To implement the L’Aquila Initiative, programs were put in place **across the developing world** to increase agricultural productivity, strengthen smallholder farmer linkages to commercial markets, and ensure that youth, women, and marginalized populations were full participants in the growth of the sector. But as this work went forward, new threats to sustainable food security became apparent. Changes in global weather patterns are now projected to have potentially devastating impacts on agriculture in the coming years and decades. The rising “double burden” of malnutrition already threatens to dampen global progress toward better health. Demographic change—a bulging population of youth in Africa and rapid urbanization—is creating opportunities for an economic growth spurt that will affect food demand and organized protests when food security is endangered. Food safety issues, economic and social inequities, and food price volatility are seen as persistent disrupters of food systems and food security. Outbreaks of civil unrest and violent conflict have deprived millions of reliable access to food and challenged their physical security and social cohesion. Whether these threats will combine to drive repeats of 2007/08’s “perfect storm” of food insecurity in the future is unknown. But it is predicted that, singly or together, they already pose critical risks—likely to erupt in “recurring storms”—somewhere around the globe. The L’Aquila Initiative was brought to a close in 2012. But in 2015, “ending hunger, achieving food security and improved nutrition, and promoting sustainable agriculture” was adopted as one of 17 Sustainable Development Goals (SDGs) to be accomplished by 2030. **Strong international collaboration** to build more productive and resilient households, nations, and food systems—to help them **withstand** the likely recurring storms of hunger, food insecurity, and agricultural market volatility—seems like the **obvious path forward**.

# 2NC

# 2NC---Wake R2

## CP---ITC

### 2NC---O/V

### 2NC---AT: Circuit Split

#### 2 – courts will defer on 337 determinations anyway

Casey et al 1 (Kevin R. Casey, attorney at Ratner & Prestia, former engineer with the General Electric Company, former judicial clerk to Helen W. Nies, former Chief Judge, U.S. Court of Appeals for the Federal Circuit, JD University of Illinois, MS Aerospace-Mechanical Engineering, University of Cincinnati, BS Materials Engineering and Mathematics, Rensselaer Polytechnic Institute; Jade T. Camara, Research Professor, George Mason University School of Law, JD George Mason University School of Law, BA George Mason University; and Nancy Wright, JD George Mason University School of Law, BS Accounting, Pennsylvania State University; “Standards of Appellate Review in the Federal Circuit: Substance and Semantics,” The Federal Circuit Bar Journal, 11 Fed. Cir. B.J. 279 (2001-2002), https://www.stradley.com/-/media/files/resourceslanding/publications/2001/01/standards-of-appellate-review-in-the-federal-cir\_\_/files/krc-standards/fileattachment/krc-standards.pdf)

5. CIT and ITC

Under 28 U.S.C. § 1295(a)(5)-(a)(6) (1994), respectively, the Federal Circuit has exclusive jurisdiction “of an appeal from a final decision of the United States Court of International Trade” and to “review the final determinations of the [International Trade Commission] relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930.”411 The CIT (formerly the United States Customs Court) “was intended to [have] . . . broad residual authority over civil actions arising out of federal statutes governing import transaction.”412 The most frequent types of cases appealed to the Federal Circuit from the CIT involve classification or valuation of goods and antidumping or countervailing duties.413

a. CIT

The Federal Circuit reviews the CIT’s fact-findings under a clearly erroneous standard; “questions of law are subject to full and independent review [i.e., de novo review].”414 The Federal Circuit applies a different standard of review, however, when reviewing a decision by the CIT to reverse or affirm an agency determination. Under 19 U.S.C. § 1516(a) (b) (1) (B), the CIT reviews an agency determination for substantial evidence.415 Beginning with Atlantic Sugar Ltd. v. United States,416 the Federal Circuit announced that it would “review the [CIT’s] review of an ITC determination by applying anew the statute’s express judicial review standard.”417 Therefore, the Federal Circuit must affirm the CIT’s decision unless it concludes that the agency’s determination was not supported by substantial evidence or was “otherwise not in accordance with law.”418 In essence, by focusing on whether the agency’s determination was supported by substantial evidence, the Federal Circuit is duplicating the efforts of the CIT.419

The case of Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States,420 illustrates these principles. A producer and an importer of pads for woodwind instrument keys successfully challenged, in the CIT, an antidumping order issued by the ITC .421 They “then applied for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A).”422 Although it had determined that the order was unreasonable and not in accordance with law, the CIT declined to award fees and expenses because the government’s actions were substantially justified.423 The Federal Circuit heard the appeal by the producer and importer and affirmed the denial of fees and expenses.424 The court stated that’ Under the EAJA, we review the trial tribunal’s finding that the government’s position was substantially justified under the clearly erroneous standard because that is a factual decision.”425 The appellate court distinguished its review, under the substantial evidence standard, of facts determined by the trial tribunal on the merits as opposed to the fee application.426

b. ITC

In Corning Glass Works v. United States International Trade Commission,427 the Federal Circuit set forth in detail its appellate function when appeals are taken from the ITC. “Any person adversely affected by a final determination of the Commission under subsection (d) [exclusion orders], (e) [temporary exclusion orders], (f) [cease-and-desist orders against defaulting persons]” is authorized to appeal to the Federal Circuit in accordance with the APA.428 The APA requires the Federal Circuit to “decide all relevant questions of law” and set aside findings of fact found to be unsupported by substantial evidence.429 Therefore, the Federal Circuit reviews the ITC’s interpretation of statutory provisions de novo as questions of law.430 In contrast, “Deference must be given to an interpretation of a statute by the agency charged with its administration.431 The administrative law judge’s (ALJ) decision is part of the record, of course, and the appellate court accords that decision “such probative force as it intrinsically commands.”432

Accordingly, following the APA, the Federal Circuit determines whether, on the record, the holding of the ITC is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.433 In contrast, issues of fact may be overturned “only if unsupported by substantial evidence.”434 Under this standard, the Federal Circuit will not disturb the ITC’s factual findings if they are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”435 Finally, “[a]dvisory opinions issued by the Commission are not final determinations and are not reviewable on appeal.”436

#### Counterplan alone solves by expanding ITC determinations only beyond Court and statute’s current scope

Chien and Goodlatte 12 (Colleen Chien, Assistant Professor at the Santa Clara University School of Law; and Bob Goodlatte, Representative (R-VA), U.S. House of Representatives, Chairman of the Subcommittee on Intellectual Property, Competition, and the Internet, of the Committee on the Judiciary, “INTERNATIONAL TRADE COMMISSION AND PATENT DISPUTES,” 7-18-2012, https://www.govinfo.gov/content/pkg/CHRG-112hhrg75152/pdf/CHRG-112hhrg75152.pdf)

Mr. GOODLATTE. Let me ask Professor Chien, is the ITC an appropriate forum to settle disputes over royalties for standard-essential patents between domestic industries, which is essentially how it is being used in a number of these cases?

Ms. CHIEN. Thank you for your question, Mr. Goodlatte—Chairman Goodlatte.

I think the way that the ITC is set up now it is not really designed to decide royalties. It doesn’t have that statutory authority. Nor because of the time frame it is on you can’t really put the time in to deciding that.

I think that your question raises a good possible use of the ITC to try to get people to settle potentially by using delay, but I don’t think the way that it is structured now under the statute can really accomplish the aim of getting damages or royalties awarded, if that is was your question.

Mr. GOODLATTE. Let me ask another question. Should the ITC’s jurisdiction over patent disputes be limited to those in which the accused infringer is not subject to a Federal court’s jurisdiction?

Ms. CHIEN. That would be a clean way to separate out and make sure that the ITC is really complementing rather than overlapping or conflicting with the district court, to actually just have it be hearing those cases which cannot in real life be heard in district court. I think, however, that the ITC does provide some valuable functions beyond just jurisdiction filling, that because it is a fact venue that it is—and also an efficient one that those are merits that would give it—would benefit the system in general, not just those small cases.

Mr. GOODLATTE. Thank you.

My time has expired. The gentleman from North Carolina, Mr. Watt, is recognized.

### 2NC---AT: Definition Key

#### Counterplan’s identically solvent to the plan – enforces the same standards using the same balancing – AND courts abide – that’s Pupkin – AND…

Teague I. Donahey 16, intellectual property litigator in the Boise, Idaho office of Holland & Hart, “Expanding horizon of Section 337 jurisdiction,” Holland & Hart, July/August 2016, https://www.hollandhart.com/files/36919\_IPM\_July\_Aug\_2016-Feat.pdf

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

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

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

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

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

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

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

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

### 2NC---AT: Links to NB

### AT: Deficit – PROA (DOJ 21)

#### BUT, ITC can create a private right of action for extraterritorial competition cases under 337 – just has chosen not to – counterplan fixes that

--they could be limited if there were explicit statutory language banning the plan, BUT their 7th-9th circuit split over statutory interp inherency proves such language does not exist in the context of the plan

ITC 18 (U.S. International Trade Commission, Commission Opinion, In the Matter of Certain Carbon and Alloy Steel Products, Inv. No. 337-TA-1002, 3-19-2018, <https://laweconcenter.org/wp-content/uploads/2018/05/certain-carbon-opinion.pdf>)

Section 337 has been amended several times since 1930 but has maintained the "unfair methods of competition and unfair acts" language. Notably, "[p]rior to 1974 the Commission was barred, by judicial decision starting at least as early as 1930, from reviewing the validity of patents brought before it under section 337." LC111110171 MJk. CO. V. hit '1 Trade CO111117'11, 799 F.2d 1572, 1576 (Fed. Cir. 1986). The Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975), removed this bar, and expressly authorized the Commission to consider "[a]ll legal and equitable defenses . . . in all cases." 19 U.S.C. § 1337(c). With certain narrow exceptions not relevant here, this provision entitles respondents to present the same defenses in a section 337 proceeding that are available in district court. See Lannom, 799 F.2d at 1577-78; Kinik Co. v. Int '1 Trade Comm 'n, 362 F.3d 1359, 1362-63 (Fed. Cir. 2004). In Young Engineers, the Federal Circuit observed that the 1974 amendment of section 337 permitting the presentation of all legal and equitable defenses in an instituted investigation reflected recognition by Congress that "essentially private rights are being enforced in the proceeding" and "any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent." See Young Eng'rs Inc. v. Intl Trade Comm 'n, 721 F.2d 1305, 1315 (Fed. Cir. 1983).

Over the years, the Commission has interpreted "[u]nfair methods of competition [or] unfair acts" under section 337 to apply to a broad range of substantive law, such as trade secret misappropriation, common law trademark infringement, Lanham Act violations, and antitrust law.8 Consistent with the recognition noted above that "any determination of unfair acts is dependent upon the private rights between parties," when the Commission is asked to look to a body of established federal statutory law for defining an unfair act, the Commission is guided by the express congressional limitations on the scope of that federal law as applied in district court. See Tianrui, 661 F.3d at 1333. For example, when the Commission is asked to address an allegation of patent infringement in the importation of goods under section 337, the Commission follows substantive U.S. patent law.9 See Certain Crawler Cranes and Components Thereof Investigation No. 337-TA-887, Comm'n Op. at 17-18 (May 6,2015) (public version).

In Crawler Cranes, the complainant asserted a violation of section 337 based on the future infringement of patent claims covering methods of operating a mobile lift crane. Although the accused cranes were imported into the United States, the complainant conceded that the record contained no proof that the steps of the asserted method claims were yet performed in the United States as required to find infringement under the Patent Act. Nonetheless, the complainant argued that the Commission has broad authority under section 337 to address unfair acts including unfair acts in their incipiency and therefore is not bound to follow the same limits on patent infringement as exist in district court. The Commission declined the invitation to create a right under section 337 not recognized under U.S. patent law. The Commission explained that "Congress in enacting section 337 of the Tariff Act of 1930 (19 USCA § 1337) [did not intend] to broaden the field of substantive patent rights." Id. at 17 (citation omitted). The Commission therefore found no violation of section 337 based on the undisputed fact that there was no patent infringement under 35 U.S.C. § 271.

Similar to the example with patent law, the Commission has been guided by the express congressional limitations on federal law in other substantive areas when determining the scope of unfair acts under section 337(a)(1)(A). In Certain Carbon Spine Board, the Commission dismissed a section 337(a)(1)(A) claim predicated on trade dress infringement because the complaint failed to allege all necessary elements for trade dress infringement under the Lanham Act. See Certain Carbon Spine Board, Cervical Collar, CPR Masks, and Various Medical Training Manikin Devices, and Trademarks, Copyrights of Product Catalogues, Product Inserts and Components Thereof, Inv. No. 337-TA-1008, Comm'n Op. at 10-11 (June 14, 2017). In Certain Hydroxyprogesterone Caproate, the Commission declined to institute an investigation based on the Food, Drug and Cosmetic Act and stated that the "complaint does not allege an unfair method of competition or an unfair act cognizable under 19 U.S.C. § 1337(a)(1)(A)." The Commission explained that "the Food and Drug Administration (`FDA') is charged with the administration of the Food, Drug and Cosmetic Act." See Certain Hydroxyprogesterone Caproate and Products Containing the Same, Docket No. 2919, Comm'n Correspondence (Dec. 21, 2012). And in Certain Universal Transmitters for Garage Door Openers, the Commission applied the statutory limitations of the Digital Millennium Copyright Act (DMCA) to a section 337(a)(1)(A) claim predicated on that Act. See Certain Universal Transmitters for Garage Door Openers, Inv, No. 337-TA-497, Initial Determination, 2003 \AIL 22811119, \*12-13 (Nov. 4, 2003), aff'd,Comm'n Notice (Nov. 24, 2003). The Commission determined under section 337(a)(1)(A) that it had jurisdiction over a claim for an alleged violation of the DMCA but rejected the requested temporary relief because it was unlikely Complainant would succeed on the merits of its DMCA claim. See Certain Universal Transmitters for Garage Door Openers, Inv. No. 337-TA-497, Comm'n Order at 3-4 (Nov. 24, 2003).

The Federal Circuit has approved of the Commission's understanding of "[u]nfair methods of competition [or] unfair acts" as it relates to predicate federal substantive law. In Tianrui, the respondents argued on appeal that the Commission erred in finding that cognizable trade secret misappropriation under section 337(a)(1)(A) could take place overseas. Tianrui, 661 F.3d at 1333. The respondents argued against extraterritoriality by analogizing trade secret misappropriation to the domestic application of patent infringement under the Patent Act. The Federal Circuit rejected the analogy. The Court recognized that "the Commission's broad and flexible authority to exclude from entry articles produced using 'unfair methods of competition' cannot be used to circumvent express congressional limitations on the scope of substantive U.S. patent law." Id. But because there was "no parallel federal civil statute regulating trade secret protection," the Federal Circuit explained that "there is no statutory basis for limiting the Commission's flexible authority under section 337(a)(1)(A) with respect to trade secret misappropriation." Id. The Court's discussion is consistent with our declining to interpret section 337(a)(1)(A) in a manner contrary to express proscriptions of federal antitrust law.

The Commission has addressed the issue of antitrust injury in a section 337 proceeding, albeit in a slightly different context. Specifically, the Commission has found antitrust injury to be a required element of a Sherman Act allegation raised by a respondent. In Certain Rare-Earth Magnets, the Commission found that "a private party seeking to establish an antitrust violation must also show . . . . that it has suffered an injury cognizable under the antitrust laws . . . [and this] 'antitrust injury must be a result of the alleged anti-competitive conduct." Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same, Inv. No. 337-TA-413, Final Initial Determination at 128, 132 (Sept. 8, 1999) (Judge Luckem), unreviewed, Comm'n Notice (Oct. 25, 1999). Judge Luckem cited as support a Federal Circuit decision that "rejected an antitrust claim on the ground that any injury the antitrust claimant may have suffered was the result of. . . legitimate [activities] and not the result of conduct that violated the antitrust laws." Id. at 132 (citing Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557 (Fed. Cir. 1997)).10 /

#### It's better than courts for private plaintiffs in every possible respect except that it does NOT award large treble damages – which is key to avoid the amnesty net benefit – BUT exclusion orders are a more powerful deterrent anyway – they just don’t make individuals personally liable, only products, which avoids the link to amnesty

Reuters 17 (article was edited and reviewed by FindLaw Attorney Writers, FindLaw, Thompson Reuters, “An Overview of Section 337 Actions in the ITC,” last updated 5-4-2017, https://corporate.findlaw.com/intellectual-property/an-overview-of-section-337-actions-in-the-itc.html)

An Overview of Section 337 Actions in the ITC

This article was edited and reviewed by FindLaw Attorney Writers | Last updated May 04, 2017

Introduction

Section 337(a)(1)(B) of the Tariff Act of 1930 declares unlawful "importation into the Untied States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that - (i) infringe a valid and enforceable United States patent . . . or (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent." See 19 U.S.C. ' 1337(a)(1)(B)(1994). Furthermore, Section 332 of the Tariff Act authorizes the International Trade Commission (the "ITC") to perform such investigations. ITC actions thus provide an alternative venue to the federal courts for complainants to seek redress for patent infringement. Id. at ' 1332. ITC investigations related to patent infringement are, however, limited to importation-related infringement.

The key distinctions between an infringement action in the ITC and in federal district court are that the ITC may not award damages, and the time frame for ITC proceedings is more expeditious than in many district courts. Furthermore, ITC complainants may in some situations secure temporary and permanent exclusion orders that can be different, and better, in scope than comparable district court preliminary or permanent injunctions.

Another difference between an ITC proceeding and a federal court proceeding is that the filing of a complaint with the ITC does not guarantee that an investigation will occur. The ITC has discretion to determine whether an investigation should take place, and, if it does so, the ITC itself conducts the investigation, with its staff attorneys acting as an independent party in the proceeding.

This paper includes a brief overview of the procedures involved in instituting and prosecuting an ITC investigation, followed by a discussion of the relative merits of bringing a Section 337 action in the ITC instead of the federal district courts. A review of recent case law developments related to ITC practice is then presented. Finally, key changes wrought by the 1994 Amendments to Section 337 are revisited.

#### Counterplan’s exclusion orders have a stronger deterrent effect than treble damages – BUT don’t make individuals personally liable, only products, which avoids the link to amnesty

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

E. Remedies

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

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

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

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

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

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

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

IV. CONCLUSION

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

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

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

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

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

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

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

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

A. Conflict Minerals

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

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

B. Child Labor

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

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

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

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

C. Environmental Degradation

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

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

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

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

D. Food and Drug Safety

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

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

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

Conclusion

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

### AT: Deficit – Supply Chains: Import Ban Uncertainty (Meyer 21)

#### ITC 337 cases more extensive public records provide more clarity and consistency than the plan

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

E. ITC as an Additional Option to More Traditional Venues

Keeping the private antitrust injury doctrine out of ITC practice also leaves society with a relatively low cost additional option to have private litigants bring antitrust causes of action in a forum – the ITC – that offers a distinct blend of characteristics not available in the federal courts or before the other agencies.62 When a private litigant brings an action in district court under the Clayton Act, the defendant is exposed to at least four significant categories of risk: (1) damages; (2) treble damages, costs, and attorney fees; (3) injunctions to make structural modifications to their business; and (4) class actions. At the ITC, the defendant essentially can only be kept out of the U.S. economy. There is always the risk of over-deterrence and in-terrorem threats to extract settlements; and both the courts and the ITC have various rules at their disposal to police bad-faith litigation tactics. After district court litigation, the reviewing courts typically have a black-box jury verdict and the opinion of a single jurist. After litigation before the ITC, the reviewing courts typically have an extensive administrative record, with the opportunity for it to have been bolstered by the legal advocacy on behalf of the public interest from the ITC’s independent Office of Unfair Import Investigations (“OUII”) as well as potentially by the ITC’s extensive staff of economists, industry experts, and investigators, and that typically includes an administrative law judge’s opinion and the opinion of a plurality of Commissioners. District court proceedings in complex commercial cases like antitrust typically span 3-5 years. ITC 337 proceedings typically span 18 months. Further, while government antitrust enforcement by the Department of Justice Antitrust Division (DoJ) and the FTC inherently involve the political impact of the Executive Branch both as the direct supervisor of the Department and as the one designating the FTC Chair from the members who are typically in the President’s party (and typically backed up by a majority in the President’s party), the ITC is statutorily mandated to have (when all seats are filled) a politically balanced even number of Commissioners with a Chair required to rotate person and party every two years.63 This all adds up to a view of the ITC as one option for private litigants to bring antitrust actions that provides a unique blend of characteristics not available through the other venues.64 And in recognition that ITC action might clash with the foreign policy or domestic policy goals of the Administration,65 it should be kept in mind that ITC Section 337 remedial orders are subject to a statutory period of Presidential Review.66

#### They also cause uncertainty

SAMUEL F. KAVA, JD/MBA Candidate @ JHU/UofM, ’19,"The Extraterritorial Application of the Sherman Anti-Trust Act in the Age of Globalization: The Need to Amend the Foreign Trade Antitrust Improvements Act (FTAIA) & Vigorously Apply International Comity," Journal of Business and Technology Law 15, no. 1 (2019): 135-164,

Before the FTAIA was enacted, in 1982, many of the United States' closest allies were disgruntled by the U.S. courts' expansive extraterritorial application of the Sherman Anti-Trust Act. 152 These nations confided in the territorial principle, and believed it "axiomatic that in anti-trust matters the policy of one state may be to defend what it is the policy of another state to attack."153 The United Kingdom, one of the most outspoken allies against the United States' "attempt[] to impose [its] domestic laws on persons and corporations who are not U.S. nationals and who are acting outside the territory of the United States," viewed the extraterritorial application of the Sherman Anti-Trust Act as ironic given the fact "the United States was founded by those who took exception to little matters of taxation being imposed extraterritorially." 154 Thus, in an attempt to "protect their nationals from criminal [and civil] proceedings in foreign courts where the claims to jurisdiction [were] excessive and constitute[d] an invasion of sovereignty," foreign nations enacted blocking statutes to resist the extraterritorial application of the Sherman Act.155

The blocking statutes of each nation varied, but all served to "block the discovery of documents located in their countries and bar the enforcement of foreign judgements."156 The United Kingdom achieved these goals with the Protection of Trading Interests Act, France with the French Blocking Law, Canada with the Foreign Extraterritorial Measures Act, and Australia with the Foreign Proceedings Act.157 The conflicting laws between the United States and its foreign counterparts created tremendous uncertainty regarding what nation's laws would be applied in the event of a cross-border dispute. According to Nuno Lim o and Giovanni Maggi, economists from the University of Maryland and Yale University, "as the world becomes more integrated, the gains from decreasing trade-policy uncertainty should tend to become more important relative to the gains from reducing the levels of trade barriers."158

Essentially, for trade to prosper, it is more important to provide producers and consumers with predictability and certainty (regarding the rule of law) rather than enacting laws that focus on free trade economics. Accordingly, it is in the best interest of governments to focus on unifying its laws before negotiating for the elimination of tariffs or quotas. This is not to say that eliminating trade barriers is not vital to the health of the economy-in fact, tariffs, quotas, and other trade barriers are proven to adversely affect all parties involved in the chain of distribution-however, it is more important to unify laws before focusing on the elimination of any trade barriers.159

As mentioned in Part I.C., the complaints of U.S. exporters and foreign governments were heard, and the United States Congress enacted the FTAIA "to address the concerns of foreign governments that the effects test established in the Alcoa case had not made clear the magnitude of the U.S. effects required to support a claim under the Sherman Act." 160 Thus, the FTAIA was implemented to bring certainty to consumers and producers by requiring that "conduct must have a 'direct, substantial, and reasonably foreseeable effect"' for the Sherman Anti-Trust Act to apply extraterritorially. 161 This language provided the foreign community with temporary relief, and gave producers and consumers the certainty and predictability needed to establish confidence in the markets and continue trading. However, since the passage of the FTAIA in 1982, the world has witnessed a remarkable increase in globalization, such that most conduct that takes place today has a "direct, substantial, and reasonably foreseeable effect" 162 on the U.S. economy. Epitomizing the obscureness of the FTAIA, is the fact that U.S. enforcement agencies-i.e. the U.S. Department of Justice and the Federal Trade Commission-have taken an aggressive approach to pursuing international antitrust claims. In 2017, the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") published the International Guidelines-a publication "explaining how the agencies intend to enforce U.S. antitrust laws against conduct occurring outside the United States." 163 The International Guidelines have taken the broadest approach in determining if conduct is "direct"-finding if there is a "reasonably proximate causal nexus between the conduct and the effect" conduct is "direct"-and the narrowest view that international comity bars enforcement of U.S. antitrust laws only when it is impossible for the actor to comply with both U.S. law and its foreign nation's law.164 Thus, because the FTAIA has become ineffective and there is a risk of further expansion of the extraterritorial application of the Sherman Anti-Trust Act with Apple v. Pepper, foreign nations will almost certainly strive to adopt modern and effective blocking statutes. These blocking statutes will revitalize uncertainty in the markets, and the global economy will be adversely affected.

In addition, because our world is more integrated, compared to the time when the FTAIA was implemented, the adverse economic effects may be worse if foreign nations pursue modern blocking statutes. To hedge against judicial uncertainty, corporations will likely react by hiring more robust legal teams. By re-allocating money to legal costs, with the hopes of avoiding potential litigation and ensuring compliance with all nations' laws, corporations would have foregone the opportunity to spend time and money on: (1) scaling its current line of products (which would decrease the price of goods for consumers), (2) enhancing the capabilities of its current line of products (which improve consumer capabilities and increase corporate profits), or (3) creating new and innovative products (which would benefit both consumers and producers). Thus, because corporations would be forced to spend more resources on avoiding litigation rather than research and development with the new blocking statutes, consumers, producers, distributors, and the economy as a whole will be adversely affected.

Overall, there is a significant risk that foreign nations will look towards blocking statutes to limit the extraterritorial application of the Act. The conflicting laws of the United States and international community will lead to judicial uncertainty, which will have an adverse impact on the global economy. Businesses will spend more time and money to avoid disputes; thus, undermining corporate profits, a customer's ability to purchase low cost goods, and the overall health of the global economy. The only certainty is that trade will slow down as a result of trade policy uncertainty. To avoid these adverse economic effects, it would be advantageous for the United States Congress to amend the FTAIA in a way that limits the effects of the extraterritorial application of the Sherman Anti-Trust Act. Specifically, Congress should limit the effects of the extraterritorial application of the Sherman Anti-Trust Act by expressly providing courts with a robust international comity analysis.

#### Especially because lower courts won’t follow the nuances of the AFF’s balancing / holding, they’ll just go wild – fiat does NOT solve, they only get a single ruling and have to win precedent solves, can’t future fiat how all cases are decided for the rest of time

Briggs et al 15 (John DeQ Briggs, Co-chair of the Antitrust & Competition practice at Axinn Veltrop & Harkrider LLP, Managing Partner of the firm’s Washington, DC, office, former Chair of the Section of Antitrust Law of the American Bar Association, adjunct professor of International Competition Law at the George Washington Law School; and Daniel S. Bitton, partner in the Antitrust & Competition practice at Axinn Veltrop & Harkrider LLP, focused on international antitrust, former legal advisor to the Netherlands Competition and Post and Telecommunications Authorities; “Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity,” The Sedona Conference Journal, vol.16, 2015, https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf)

Judges, especially federal judges with life tenure, seem to have very little incentive to exercise restraint in the exercise of their own extraterritorial jurisdiction. In antitrust, for example, where foreign non-import conduct generally is only possibly actionable if it produced a “direct, substantial, and reasonably foreseeable effect” in the United States,8 many U.S. courts (at the urging of the DOJ and private plaintiffs) increasingly have viewed those words as expansive, and decreasingly have viewed them as words of restraint.9 Even the Supreme Court initially seemed to use these words to eliminate much of a role for comity,10 but more recently reversed course on that.11

And while the Supreme Court increasingly has urged lower courts to exercise restraint in the extraterritorial application of U.S. law,12 and has urged lower courts to take into account principles of comity,13 those exhortations strangely seem not to have taken much root in the lower courts. In other words, the American courts are operating in the area of extraterritorial jurisdiction without close or regular supervision, and with few objective or clear restraining guidelines that provide limiting principles.

The Supreme Court has held that “where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.”14 So, even when jurisdiction is contested, district court judges exercise considerable discretion to authorize “jurisdictional discovery,” so that the court can determine its jurisdiction. This jurisdictional discovery is regularly conducted under the auspices of Rule 26 of the Federal Rules of Civil Procedure, which normally authorizes the broadest imaginable discovery. And so a rule authorizing nearly unlimited discovery is called into play to authorize plaintiffs to rummage through foreign files of foreign companies and foreign persons to develop evidence that might persuade an American court that it, in fact, has jurisdiction over the foreign enterprise, or over a domestic enterprise, for foreign conduct with some perceptible impact on American commerce. There is, however, no consensus regarding the circumstances in which jurisdictional discovery should or will be granted and the circuits are by no means uniform on this subject.15

Few if any other legal systems in the world involve circumstances where powerful courts are called upon by private parties to exercise extraterritorial jurisdiction over foreign companies, individuals, and conduct. For many people, including even relatively sophisticated judges, lawyers, and academics, this proposition is seen as unremarkable. The bench and the bar in this country seem to accept the fact of this extraordinary power as if it were an obvious adjunct to “American Exceptionalism.”16 But in nearly all other countries, the exercise of extraterritorial jurisdiction is more rare, and nearly always at the behest of a government acting through its executive branch or its legislature. Foreign courts seem to show more restraint in the exercise of their power, which is in any case more limited than that enjoyed by American courts. This might be changing. As the People’s Republic of China (PRC), along with other powerful countries, observe the American legal system, “learn” from it, and mimic it to their advantage, American or other firms whose conduct outside China can be claimed to have some perceptible effect on Chinese commerce will come to be treated in much the same way that our system treats Asian and European companies. Indeed this is already happening.17

### AT: Deficit – Delay / Expertise (Rizzolo 18)

#### BUT, if there is an appeal, the Circuit Courts will just defer to ITC and dismiss anyway

Casey et al 1 (Kevin R. Casey, attorney at Ratner & Prestia, former engineer with the General Electric Company, former judicial clerk to Helen W. Nies, former Chief Judge, U.S. Court of Appeals for the Federal Circuit, JD University of Illinois, MS Aerospace-Mechanical Engineering, University of Cincinnati, BS Materials Engineering and Mathematics, Rensselaer Polytechnic Institute; Jade T. Camara, Research Professor, George Mason University School of Law, JD George Mason University School of Law, BA George Mason University; and Nancy Wright, JD George Mason University School of Law, BS Accounting, Pennsylvania State University; “Standards of Appellate Review in the Federal Circuit: Substance and Semantics,” The Federal Circuit Bar Journal, 11 Fed. Cir. B.J. 279 (2001-2002), https://www.stradley.com/-/media/files/resourceslanding/publications/2001/01/standards-of-appellate-review-in-the-federal-cir\_\_/files/krc-standards/fileattachment/krc-standards.pdf)

5. CIT and ITC

Under 28 U.S.C. § 1295(a)(5)-(a)(6) (1994), respectively, the Federal Circuit has exclusive jurisdiction “of an appeal from a final decision of the United States Court of International Trade” and to “review the final determinations of the [International Trade Commission] relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930.”411 The CIT (formerly the United States Customs Court) “was intended to [have] . . . broad residual authority over civil actions arising out of federal statutes governing import transaction.”412 The most frequent types of cases appealed to the Federal Circuit from the CIT involve classification or valuation of goods and antidumping or countervailing duties.413

a. CIT

The Federal Circuit reviews the CIT’s fact-findings under a clearly erroneous standard; “questions of law are subject to full and independent review [i.e., de novo review].”414 The Federal Circuit applies a different standard of review, however, when reviewing a decision by the CIT to reverse or affirm an agency determination. Under 19 U.S.C. § 1516(a) (b) (1) (B), the CIT reviews an agency determination for substantial evidence.415 Beginning with Atlantic Sugar Ltd. v. United States,416 the Federal Circuit announced that it would “review the [CIT’s] review of an ITC determination by applying anew the statute’s express judicial review standard.”417 Therefore, the Federal Circuit must affirm the CIT’s decision unless it concludes that the agency’s determination was not supported by substantial evidence or was “otherwise not in accordance with law.”418 In essence, by focusing on whether the agency’s determination was supported by substantial evidence, the Federal Circuit is duplicating the efforts of the CIT.419

The case of Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States,420 illustrates these principles. A producer and an importer of pads for woodwind instrument keys successfully challenged, in the CIT, an antidumping order issued by the ITC .421 They “then applied for attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1)(A).”422 Although it had determined that the order was unreasonable and not in accordance with law, the CIT declined to award fees and expenses because the government’s actions were substantially justified.423 The Federal Circuit heard the appeal by the producer and importer and affirmed the denial of fees and expenses.424 The court stated that’ Under the EAJA, we review the trial tribunal’s finding that the government’s position was substantially justified under the clearly erroneous standard because that is a factual decision.”425 The appellate court distinguished its review, under the substantial evidence standard, of facts determined by the trial tribunal on the merits as opposed to the fee application.426

b. ITC

In Corning Glass Works v. United States International Trade Commission,427 the Federal Circuit set forth in detail its appellate function when appeals are taken from the ITC. “Any person adversely affected by a final determination of the Commission under subsection (d) [exclusion orders], (e) [temporary exclusion orders], (f) [cease-and-desist orders against defaulting persons]” is authorized to appeal to the Federal Circuit in accordance with the APA.428 The APA requires the Federal Circuit to “decide all relevant questions of law” and set aside findings of fact found to be unsupported by substantial evidence.429 Therefore, the Federal Circuit reviews the ITC’s interpretation of statutory provisions de novo as questions of law.430 In contrast, “Deference must be given to an interpretation of a statute by the agency charged with its administration.431 The administrative law judge’s (ALJ) decision is part of the record, of course, and the appellate court accords that decision “such probative force as it intrinsically commands.”432

Accordingly, following the APA, the Federal Circuit determines whether, on the record, the holding of the ITC is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.433 In contrast, issues of fact may be overturned “only if unsupported by substantial evidence.”434 Under this standard, the Federal Circuit will not disturb the ITC’s factual findings if they are supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”435 Finally, “[a]dvisory opinions issued by the Commission are not final determinations and are not reviewable on appeal.”436

#### Broadly, the ITC is far better at considering conflict of laws and harmonization interests – in=house experts are faster and more effective

Linda Sun 19, Northwestern University Pritzker School of Law, J.D., 2020, “The ITC Is Here To Stay: A Defense of the International Trade Commission’s Role in Patent Law,” 17 NW. J. Tech. & Intell. Prop. 137

B. The ITC Provides a Trade and Policy Perspective

With its basis in international trade regulation, the ITC puts a policy and trade lens on patent law. By being a part of the large patent law landscape, the ITC allows views of patent law influenced by public policy and trade to percolate. This broadens how decisions are made and decreases the chance of a “tunnel vision” view of patent law.116

Congress specifically instructed the ITC to consider the public policy of promoting free competition, which “suggests that Congress wanted the ITC to use a nuanced approach in determining patent validity and enforceability, with a focus on protecting U.S. businesses from the negative side-effects of free trade.”117 The ITC has unique trade expertise; the agency investigates trade issues from dumping to tariffs and possesses broad knowledge about trade practices that harm U.S. companies.118 This broad base of information is utilized by the ITC in its determinations of patent validity and remedies. In fact, the law requires the ITC to utilize this information. For example, before implementing an exclusion order, the ITC is required to consider whether the exclusion order is “inconsistent with the public interest, with input from other regulatory agencies.”119 The ITC is also able to order public hearings to determine whether such exclusion orders would harm the public.120 In contrast, district courts are not equipped or required to consider issues of trade and foreign policy.121

A unique element of Section 337 proceedings is the participation of an investigative attorney (or “staff attorney”) from the Office of Unfair Import Investigations.122 Each proceeding has a staff attorney who “participates in discovery, motions, and trial, creating a different case dynamic than that experienced in district court.”123 The staff attorney is a full party to the investigation and “functions as an independent litigant representing the public interest.”124 The addition of a neutral party who advocates for free trade adds a unique perspective to ITC proceedings.

In addition, the President has the authority to veto injunctions issued under Section 337 proceedings based on policy reasons.125 These policy reasons include: “(1) public health and welfare; (2) competitive conditions in the U.S. economy; (3) production of competitive articles in the United States; (4) U.S. consumers; and (5) U.S. foreign relations, economic and political.”126 The President’s decision cannot be appealed to the Federal Circuit.127 The fact that the President can veto ITC decisions makes the ITC a better-positioned forum to make policy decisions as compared to district courts, which are not under the executive branch’s purview.128 Therefore, the ITC is able to incorporate more policy considerations into its patent cases without the same decision costs of district courts. At times, a Presidential veto results in a narrowed or altered remedy from the ITC.129 Incorporating the President’s point of view adds another dimension to ITC patent decisions that sets them apart from district court decisions. Thus, the ITC adds diversity and important public interest considerations to the body of patent law doctrine that informs the Federal Circuit and Supreme Court.

## Adv---Cartels

### 2NC---AT: Solvency

#### Criminal penalties are insufficient to deter because of lack of detection.

Sokol 13 (D. Daniel Sokol, Associate Professor @ the University of Florida; “Policing the Firm;” Notre Dame Law Review, Vol. 89, Issue 2, December 2013, Accessed through HeinOnline, TM)

Cartels are a sophisticated form of corporate crime because they, like other conspiracies, inherently require coordination across multiple firms, as the air cargo cartel example illustrates.7 That the air cargo cartel was not detected 8 across its participant firms either internally or through third parties (customers and outside gatekeepers such as law and accounting firms) suggests current antitrust criminal and civil penalties are not sufficient to deter wrongdoing, nor is the probability of detection sufficiently high.

Two major trends suggest that antitrust cartel enforcement is different relative to other areas of corporate crime. First, in white collar crime overall, there has been a shift toward more significant structural penalties. Brandon Garrett named this phenomenon "structural reform prosecution," a process in which prosecutors secure the cooperation of a business to adopt internal reforms.9 Similarly, Vik Khanna and Timothy Dickinson have focused on the use of corporate monitors (embedded outside oversight personnel) to increase firm compliance.10 However, the systematic use of structural reform prosecution and monitors has been underutilized in the antitrust criminal context, even when a corporate monitor has been imposed on a firm that has committed other crimes, for example in the Foreign Corrupt Practices Act (FCPA) context, as well as antitrust violations. The lack of systematic structural reform through monitors for antitrust criminal price fixing seems surprising. One might suspect that the type of penalties imposed upon a firm would be more severe for criminal antitrust than civil antitrust. Indeed, in 2004 the Supreme Court called cartels "the supreme evil of antitrust."" Yet, it is generally civil rather than criminal antitrust that imposes corporate monitors and compliance officers.

Second, the corporate and white collar crime literature offers important governance lessons on the interaction of various internal firm stakeholders-corporate boards, shareholders, senior and mid-level management.12 Yet, antitrust scholarship on cartels generally has not recognized these insights.' 3 Instead, antitrust scholarship generally continues to see the firm as a "black box."' 4

### 2NC – Cartels – XT: Timeframe

#### Prices take years on average to stabilize – time distinction between disbandment and successful enforcement is negligible

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; **internally citing John Connor, Professor of industrial-organization economics at Purdue University, specializes in empirical research in antitrust policy, PhD University of Wisconsin**; “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/)

In the study ‘Cartels and Antitrust Portrayed: Private International Cartels’ by John Connor; calculates the range of cartel price overcharge to be between 17% and 21%… it’s important to note that the research may under-estimate the true extent of the higher price from cartels… Also, the study shows that prices don’t fall very quickly to market levels after a demise of a cartel. Rather, prices fall gradually over a period of time– few months, even few years, e.g., after the ‘construction concrete products industry’ cartel was dissolved, prices were still falling three years later…

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

#### The growth effects of cartels are insignificant

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

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

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

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

VI. EMPIRICAL RESULTS

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

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

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

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

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

VII. CONCLUSION

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

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

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

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

### 2NC---AT: Emerging Tech !

#### No emerging tech.

Sechser 19 – Todd S. Sechser, Public Policy Professor at the University of Virginia. Neil Narang, Political Science Professor at the University of California, Santa Barbara. Caitlin Talmadge, Security Studies Professor at Georgetown University. [Emerging technologies and strategic stability in peacetime, crisis, and war, Journal of Strategic Studies, 42(6), Taylor and Francis]

Yet the history of technological revolutions counsels against alarmism. Extrapolating from current technological trends is problematic, both because technologies often do not live up to their promise, and because technologies often have countervailing or conditional effects that can temper their negative consequences. Thus, the fear that emerging technologies will necessarily cause sudden and spectacular changes to international politics should be treated with caution. There are at least two reasons to be circumspect.

First, very few technologies fundamentally reshape the dynamics of international conflict. Historically, most technological innovations have amounted to incremental advancements, and some have disappeared into irrelevance despite widespread hype about their promise. For example, the introduction of chemical weapons was widely expected to immediately change the nature of warfare and deterrence after the British army first used poison gas on the battlefield during World War I. Yet chemical weapons quickly turned out to be less practical, easier to counter, and less effective than conventional high-explosives in inflicting damage and disrupting enemy operations.6 Other technologies have become important only after advancements in other areas allowed them to reach their full potential: until armies developed tactics for effectively employing firearms, for instance, these weapons had little effect on the balance of power. And even when technologies do have significant strategic consequences, they often take decades to emerge, as the invention of airplanes and tanks illustrates. In short, it is easy to exaggerate the strategic effects of nascent technologies.7

Second, even if today’s emerging technologies are poised to drive important changes in the international system, they are likely to have variegated and even contradictory effects. Technologies may be destabilising under some conditions, but stabilising in others. Furthermore, other factors are likely to mediate the effects of new technologies on the international system, including geography, the distribution of material power, military strategy, domestic and organisational politics, and social and cultural variables, to name only a few.8 Consequently, the strategic effects of new technologies often defy simple classification. Indeed, more than 70 years after nuclear weapons emerged as a new technology, their consequences for stability continue to be debated.9

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

#### No Russia OR China wars---even if revisionist.

Bruce **Jones 19**. Jones is vice president and director of the Foreign Policy program at Brookings Institution, Washington, DC, USA, a senior fellow in the Institution’s Project on International Order and Strategy, and a consulting professor at the Freeman Spogli Institute at Stanford University. 2019. “A Not Quite Multipolar World.” Think Tanks, Foreign Policy and the Emerging Powers, edited by James G. McGann, Springer International Publishing, pp. 61–78. Crossref, doi:10.1007/978-3-319-60312-4\_3.

The Rising Powers: Reformers, Not Revolutionaries With the notion that the BRICS are a unified force capable of challenging the United States shown to be more fiction than fact, it becomes clear that the rising non-Western powers are better positioned to shape the global order, gaining greater influence from acting within the international system rather than overthrowing it.32 The larger rising powers, such as India and Brazil, as well as traditional US allies like Korea and Turkey, have repeatedly demonstrated that they do not seek to break the international order, but rather to profit from it while their own power continues to grow. For these nations, a collapse of the international order would only result in unprofitable chaos, offering little incentive for rising powers to reject the US-led system for anarchy. Certainly, in this changing environment, the emerging powers will press for a greater role at the global high table, rather than merely accept Western edicts. Yet, in pursuing their own independent agendas, the emerging powers face a dilemma. They may have an impulse to rivalry and some interest in restraining US influence, but they also hold fundamental stakes in a stable global economy, and in protecting the sea and air routes through which global trade and energy flow. This is particularly true of China, which needs to maintain very rapid growth both to sustain its domestic stability and to project international influence—but this requires energy imports, the flow of which largely depends on the security maintained by American military might.33 In the end, these states will not forget that their very rise came about through integration into the established global economic system, not by rebelling against it. Select actors, like China and Russia, will continue efforts to curtail US leadership in certain domains. However, even these revisionist powers are likely to elect to cooperate with Washington and its allies in some fields, namely counter-terror and nuclear non-proliferation, the latter illustrated by the investment by Russia and China in the recently successful nuclear negotiations with Iran by the P5+1 (the five permanent members of the United Nations [UN] Security Council, China, France, Russia, the United Kingdom, and the United States, plus Germany). Their own need for continued economic growth constrains these would-be revolutionaries. On its own, neither Moscow nor Beijing is strong enough to completely topple the US-led system—they can only challenge American leadership if others follow, and so far they have found few takers. The rising middle-income nations should provide these missing followers; yet they are absent. The fundamental reality is that, for most of these states, their stories mirror that of the majority of the BRICS: the allure of remaining in the US-led system is greater than the potential benefits of working against it. As with India and Brazil, the second-tier powers have grievances with the current international order. However, these aspects point them towards reform, not revolt. Emerging potential middle powers from Nigeria to Indonesia have experienced tremendous economic growth under the Western-organized order, growth that their leaders know cannot be guaranteed if the global economic system were to collapse.34 Similarly, they appreciate the greater danger inherent in a more anarchic world. While the Western order cannot fully prevent conflict, the US-backed post-1945 norm against interstate aggression has contributed to a decline in interstate warfare since the mid-twentieth century.35 The second-tier nations have benefited significantly from this fact. For governments seeking to maintain economic growth, not having to dedicate vast resources to territorial defense is a large boon. What is more, many of these emerging middle-income countries are in Asia, and there they cast a wary eye on a growing and increasingly assertive China, clearly preferring the continuation of the existing order to what would amount to an international free-for-all. Moreover, the middle-income states paradoxically benefit most from a halfhearted BRICS challenge to the global order. In pressing the West for revisions to the international order, the BRICS shoulder the burden of opening the door for a conversation on reforming the international system. However, this push lacks the momentum to successfully create a new order. Instead, it leaves an opening for the second-tier states to put forward their own demands. Furthermore, as the BRICS economies stumble and the group’s cohesion frays, this opening only expands, enabling these middle powers to punch above their weight. Thus, these second-tier nations are likely to engage in a strategy akin to the geopolitical balance of power theory, except in economic terms. Alternating support for Western-backed institutions, such as the World Bank and IMF, will be matched with endorsements of BRICS alternatives as the middle powers effectively hedge against either group gaining concrete dominance over the international economic order. Within this framework of support for the general tenets of the international order, the emerging powers possess a strong impulse towards rivalry with the United States. At a minimum these countries have a strong impulse towards autonomy, grounded in what I call the “psychology of rise,” in which rising powers seek to undo the humiliation done unto them in their first encounters with a globalizing West and in their resulting positions within the post-war order. The psychology of rise is most evident in China’s assertive stance in defense of its interests and influence in East Asia, but it is equally present in India’s defense of its interests in the evolving climate change regime, and in Brazil’s aspiration for a bigger role in global security affairs. And, despite some economic constraints and challenges, the emerging powers have the tools to advance their aims, and even, at times, to reshape portions of the international order. China is on track to augment its regional sway through the economic diplomacy of the nascent Asian Infrastructure Investment Bank (AIIB), which has successfully drawn in US allies and partners from across the globe. Though Delhi appears to be flirting with increased use of its hard power, India enjoys a wide range of soft-power assets to draw upon.36 It boasts, as Peter Martin notes, “Bollywood, Yoga, Buddhism, and a rich philosophical tradition. It has a world-class cadre of global public intellectuals from Amartya Sen to Salman Rushdie. It also has an extensive, wealthy, and increasingly politically engaged diaspora spread across the political and economic capitals of the world.”37 While the permanent members of the UN Security Council rejected the 2010 Turkish-Brazilian diplomatic foray to broker a nuclear deal with Iran, the initiative itself, as well as global reaction, reflected Brasilia’s increasing weight in the international arena. Thus, while the rising powers will strive for autonomy, this struggle is unlikely to entirely overcome the incentives for restraint towards, and even cooperation with, the current international order and the United States. This balance between the impulse to rivalry and the incentives for restraint is the most important dynamic in contemporary international affairs; and for the moment, the balance tips towards restraint.

### 2NC---AT: Chem Innovation !

## Adv---Regimes

### 1NC – SDGs !

#### 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.

### 1NC – Deforestation !

#### No impact to deforestation – species resilient, pessimism pervades their stats, reseeding fills-in, and local protectors ensure survival

Pearce citing Martin 15 ---- Fred, environment consultant for New Scientist Magazine, syndicated columnist featured in The Guardian/The Independent/Foreign Policy/Popular Science/Time, the text cites Claude Martin who was the former Director General of WWF International and is the current Chancellor of the International University in Geneva, “A Welcome Dose of Environmental Optimism,” 7/1, https://www.newscientist.com/article/mg22730280-500-a-welcome-dose-of-environmental-optimism/

Optimism is in the air. Some environmentalists are shrugging off their perennial doom and gloom, and daring to think the possible – that we are not done for. After half a century of despair since the publication of Silent Spring, The Limits to Growth and The Population Bomb, the green shoots of ecological redemption can sometimes be seen between hard covers. It is a welcome relief.

In On The Edge, Claude Martin, former director of environmental group WWF International, remembers that back in the 1980s, forest biologists like him warned that the loss of pristine rainforests was driving tens of thousands of species to extinction. Yet it wasn’t so. His magisterial review of the state of those forests concedes that the “pessimistic projections”, which assumed that species would be lost as fast as forest area, have proved false.

Most species in these habitats survive even in the face of rampant deforestation. Puerto Rico lost 99 per cent of its primary forests but just seven bird species, and today has more species than before, he says. And thanks in part to reseeding by alien species, old forests are starting to grow again.

The Anthropocene geological epoch, it turns out, is not a one-way trip to ecological disaster. Nature clings on and fights back: the trick is to find ways to help. That means cosseting the vast amount of nature that persists in logged and degraded forests that conservationists traditionally snub as not “pristine”. And it also means embracing people who were once seen as enemies of conservation.

### 1NC – Food !

#### 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.

#### 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).

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### O/V

#### 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

#### 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.

### 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.

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.

### 2AC 1

#### 2 – even if they’re right, merely resolving the circuit split regarding interpretation of “direct effect” on the US is what creates perception of 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.

#### Even if their defense OR thumpers are true, Europe believes we’re right – and expectations create their reality in this context, as BOTH regulators and cartel lawyers change behavior in response

Briggs et al 15 (John DeQ Briggs, Co-chair of the Antitrust & Competition practice at Axinn Veltrop & Harkrider LLP, Managing Partner of the firm’s Washington, DC, office, former Chair of the Section of Antitrust Law of the American Bar Association, adjunct professor of International Competition Law at the George Washington Law School; and Daniel S. Bitton, partner in the Antitrust & Competition practice at Axinn Veltrop & Harkrider LLP, focused on international antitrust, former legal advisor to the Netherlands Competition and Post and Telecommunications Authorities; “Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity,” The Sedona Conference Journal, vol.16, 2015, https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf)

Foreign governments have also taken the view that extraterritorial application of treble damages threatens to undermine their own enforcement efforts. For example, they claim availability of private treble damages in the United States against their national companies for local conduct may have a detrimental effect on foreign leniency programs. These programs are a key tool for them in rooting out cartel activity, which has traditionally proven difficult to detect and prosecute.28 “These leniency policies seek to balance the interests of disclosure, deterrence, and punishment,” but “disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy.”29 When that reach is expanded outside of U.S. consumers in a U.S. court, “the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.”30 And as Germany and Belgium informed the Supreme Court in Empagran,31 “[h]istorically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty.”32

#### 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.

### 2AC 2

#### Alt causes are our brink, NOT their thumper – it’s literally because of cartel price fixing and EU Commission enforcement will solve prices – only proves amnesty’s key

ASUSA 21 (All Starts USA, breaking news blog, “Energy, doubts about Gazprom. MEPs: “Investigate a possible market manipulation behind the increase in bills”,” 9-20-2021, <https://allstartsusa.com/2021/09/20/energy-doubts-about-gazprom-meps-investigate-a-possible-market-manipulation-behind-the-increase-in-bills/>)

He threw the stone in the pond last week Vladimir Milov, former Russian Deputy Minister of Energy now in opposition to Vladimir Putin: “The high prices are due to one market manipulation from Gazprom around July-August and this will now lead to one scandal. I think the European Commission will open one procedure against the company for holding back volumes, because this is one direct violation of antitrust rules“. Two days later 43 MEPs wrote to the EU executive asking for a investigation urgent to shed light on these suspicions. Behind the rise of the energy bills which is affecting the entire Union – and depends only to a small extent on the rising cost of Co2 quotas – there are, according to their assumptions, deliberate actions by the Russian energy group. That would turn off the taps for to put the Old Continent in a tight spot and speed up the opening of the controversial pipeline Nord Stream 2 wanted by Angela Merkel despite the opposition of the USA as well as of Poland And Ukraine, which the pipeline bypasses passing under the Baltic. It does not seem a coincidence that the Kremlin immediately stressed that its commissioning – presumably at the beginning of 2022, but is hanging on the outcome of the German elections – “will stabilize prices”.

#### Russian energy coercion’s empirically likely – AND escalates to global war if unchecked – Russia’s NOT dependent upon revenues

--“no economic sense” actually does warrant vulnerability to antitrust, but we have other cards that speak to that much better than this one, which is just at: impact d

Danylyuk 19 (Loren Danylyuk, former Ukrainian finance minister, former secretary of the National Security and Defense Council, “How gas can lead to war (but not where you might think),” Military Times, 2016, <https://www.militarytimes.com/opinion/commentary/2019/11/19/how-gas-can-lead-to-war-but-not-where-you-might-think/>)

Despite all efforts made by the U.S. and a number of European countries, next year Russia can receive an unprecedented instrument of pressure on Europe, which can be used not only to intensify a hybrid war, but also to open the way to a full-scale European military conflict that can affect not only Ukraine, but also those countries in Eastern Europe that are NATO members. In fact, the completion of the Nord Stream 2 is the biggest security challenge in Europe since the 1960s and puts the world at risk of a new global conflict.

This is by no means an exaggeration. All Russian gas pipelines that were built and are being built in recent years, including Nord Stream 2, have no economic sense. Thanks to these gas pipelines, Russia does not increase the volume of gas it supplies to the EU, but reduces the use of existing gas pipelines passing through the territories of such European countries as Ukraine, Belarus, Poland, Slovakia, Czech Republic, Romania, Hungary, Slovenia, Austria and Croatia. Using new gas pipelines, Russia is able to move to economic pressure on these countries without worrying more about dependence on gas transit through their territories. The very opportunity to exert this economic pressure and stop gas supplies to the above countries was the real purpose of the Nord Stream-2 and other bypass pipelines.

Economic coercion is an inherent part of modern hybrid warfare, and the Russian Federation reached unsurpassed skill in its application. Gazprom, the largest gas supplier in Europe, controlled by the Russian government, is the flagship among the economic means used by the Russian Federation to achieve its geopolitical goals, including election interference and regime changes in Eastern and Central European countries. Since 1991, Russia has had nearly 60 major gas conflicts with other nations. Only 11 of them had no explicit political component. In 40 cases, Russia has imposed a suspension of gas supplies to other countries.

### 2AC 3

#### Europe’s uniquely key to mobilize the collective action necessary to manage global existential risks

Balfour 19 (Rosa Balfour, senior transatlantic Fellow at The German Marshall Fund of the United States and a member of the Steering Committee of WIIS-Brussels (Women In International Security), “The European Foreign Policy in a Hostile Environment,” The Progressive Post, Foundation for European Progressive Studies, 2019, https://progressivepost.eu/european-foreign-policy-hostile-environment/)

In a brittle world without enduring strong international alliances, the debate on Europe’s ‘strategic autonomy’ has gained new resonance, but it should not shadow the EU’s unique key international assets in the global economy and multilateral order. Working with global networks to promote norms and public goods is key to push back on nationalism, the rise of geopolitics and transactionalism.

Strategic autonomy’ and ‘complementarity with NATO’ usually appear in the same sentence in the European debate – the latest doctrinal iteration to be found in the EU Global Strategy of June 2016. The ensemble reflects Europe’s need to rely on its transatlantic relationship for security and territorial defence, empowering it to carry out foreign policy too. The EU’s greatest foreign policy achievement of enlarging to Central Europe after the Cold War, pursued in tandem with NATO expansion, is testimony to this pairing.

Since the end of 2016, the US President’s international preferences undermine directly or indirectly Europe’s security. Whether it is the insistence on greater burden-sharing, US action in the Middle East, or trade disputes with China, current US policies put Europe’s security – already challenged by Russian action in Eastern Europe and the Middle East – at risk.

If Europe wants to engage with the world and simultaneously strengthen its strategic identity it needs to square some circles

European leaders have started to question whether the transatlantic relationship needs to be preserved no matter what, or whether Europe should emancipate from it. The debate on ‘strategic autonomy’ is animating recent efforts in the field of security and defence. It refers to the ability to make and carry out decisions on defence, to conduct military operations autonomously, and to have the industrial capabilities to do so. Even if this level of strategic autonomy were agreed upon, it would take a generation for Europe to affect the world stage.

The focus on strategic autonomy speaks to present insecurities in European societies, but not to the EU’s international legitimacy where, possibly, the European Union has better opportunities to develop means of political autonomy which befit its history and international identity. The emerging debate on economic sovereignty is addressing for the first time the degree to which the EU can make political use of some of its economic and financial tools, such as the Euro as an international currency. After all, the EU and its Member States remain the world’s largest trade bloc and donor.

On the multilateral stage, Europe faces an increasingly hostile environment but remains the best hope to pursue universal principles, such as human rights and the rule of law, which underpin the resilience of that multilateral system. How to partner with other countries and actors around the globe to push back on attacks to international order is no longer a second order priority.

If the way ahead appears clear, achieving it is a tall order. The rationale for collective action for the EU seems obvious – the ‘politics of scale’, or to be stronger together rather than weaker apart – but historically difficult to achieve. The multiple threats and risks on Europe’s doorsteps have only minimally bridged the strategic divergence that continues to beset the continent, and the rise of the populist radical right is beginning to undermine existing European external policies, not to speak of a higher level of ambition.

Looking at global politics from a non-European perspective, how Europe’s friends and partners around the world will welcome a bid for greater autonomy – politically, economically, and strategically – still needs to be seen. The EU’s worldview that it has acted as a ‘force for good’ is not uncritically accepted. After all, that ethical stand was also possible thanks to the EU’s belonging to a stable and hegemonic West.

If Europe wants to engage with the world and simultaneously strengthen its strategic identity it needs to square some circles. Without giving into the facile critique that realism and geopolitics render multilateral principles obsolete and warrant hard-nosed politics, Europe should leverage its assets, which are irrevocably embedded in multilateralism and cooperation. Climate change, conflict prevention and mediation, and an open and fairer international trade system are among the assets that the EU can concretely work towards globally.

To do so it needs to engage flexibly with global actors, focusing more on multilevel networks including civil society rather than on the traditional partnerships between governments, some of which are no longer benign or useful. Both will require a dose of humility in listening to non-European world views and of pragmatism in seeking appropriate strategies and paths forward.

Last but not least, if Europe wants to imagine its own history of prosperity, democracy and peace as still relevant to the debates taking place in the rest of the world, it also needs to think about the global future sustainability of welfare, taking progressive politics outside national boundaries and engaging in a more global and open debate about public common goods.

#### Only the disad solves -- Lack of CFSP, military and cohesion are irrelevant – the Commission enforces antitrust unilaterally – BOTH necessary and sufficient to maximize global influence broadly

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.

### AT Key

#### It's reverse causal – leniency-driven enforcement solves alt causes to insecurity, including diversification, instability and infrastructure security investment

European Commission 15 (European Commission, Commission Staff Working Document, accompanying the document Report From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Competition Policy 2014, 6-4-2015, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015SC0113&rid=4)

Deltafina

The Commission leniency program is crucial to detect cartels, given their secret nature. Therefore, its efficiency depends on a very important feature of it, namely the obligation of cooperation of the leniency applicant with the Commission on a continuous basis and expeditiously, until the end of the Commission procedure. The obligation of cooperation was infringed by the immunity applicant by having disclosed its immunity application to the other cartel participants in a meeting with the latter before the Commission carried out unannounced inspections. In Deltafina 64 (Italian Raw tobacco), the Court of Justice endorsed this view and confirmed the General Court's judgment upholding the Commission's decision which refused to grant immunity and only granted a 50% fine reduction outside of the leniency program.

6.Fight against cartels remains a top priority

2014 continued DG Competition’s strong enforcement record against hard core cartels. In 2014, the Commission continued to receive a constant flow of immunity and leniency applications, close to the long term trend for applications of around 2 applications per month.

The leniency system destabilises cartels in that a Commission investigation of a cartel may through internal audits conducted by the cartelist lead to uncover other cartel activity. This may lead to further immunity applications. As indicated in the 2013 Report on Competition Policy, this led to a range of cases in the car parts sector.

Bearing case in the car parts sector

The Bearings case is part of a major investigative effort into suspected cartels in the sector of car parts. The Commission already found cartels for wire harnesses in cars and for flexible foam used in car seats and conducted inspections inter alia into thermal systems, occupant safety systems, lighting systems and exhaust systems.

On 19 March, the European Commission found that two European companies (SKF and Schaeffler) and four Japanese companies (JTEKT, NSK, NFC and NTN with its French subsidiary NTN-SNR) operated a cartel in the market for automotive bearings and imposed a total fine of EUR 953 million 65 . Automotive bearings are supplied to automotive Original Equipment Manufacturers ("OEMs"), which are car, truck and automotive component manufacturers. Cars and trucks contain numerous bearings, for example wheel bearings, bearings for gearbox, transmission, alternator or air conditioning systems. The companies involved in the bearings cartel coordinated the passing-on of steel price increases to their automotive customers, colluded on Requests for Quotations and for Annual Price Reductions from customers and exchanged commercially sensitive information for more than seven years, from April 2004 until July 2011, in the whole European Economic Area (EEA).

The Commission's investigation in the bearings industry started with unannounced inspections in November 2011. The bearings decision is adopted under the settlement procedure with all parties involved. JTEKT received full immunity under the Commission's Leniency Notice for revealing the existence of the cartel and therefore avoided a fine of EUR 86 million.

More recently, the Commission has dealt with a number of cases in financial services, and in particular in relation to the fixing or alleged fixing of benchmark rates for various currencies based derivatives and for foreign exchange transactions. On 21 October, two further decisions concerning the financial sector were adopted via the settlement route 66 , highlighting the continued success of this instrument, even in complex areas 67 .

Two other cases highlight that the Commission is fully prepared to bring contested cases to a successful conclusion via the normal cartel procedure if the settlement discussions cannot be successfully concluded like on 2 April, when the Commission adopted a decision against a long running cartel in respect of power cables 68 and on 3 September in the Smart Card Chips case 69 .

The power cables case

On 2 April, the Commission adopted a decision against a long running cartel in respect of power cables, fining the companies involved a total of over EUR 302 million. The cartel concerned an almost worldwide market and customer allocation scheme amongst the major power cables producers that lasted for almost a decade (1999 to 2009). Several European, Japanese and Korean producers of submarine and underground power cables agreed to stay out of each other's home territories and allocated projects amongst themselves based on the geographic region or customer. The cartel included cables used for the transmission and distribution of electrical power such as the connection of wind farms and power grids in different Member States. The decision was also addressed to several companies that did not directly participate in the infringement but, as parent companies, exercised a decisive influence over the direct participants. This included companies that participated in the cartel in the early period and later merged their activities into joint ventures (who continued the cartel activities) as well as to the investment company Goldman Sachs, which is a former owner of one of the cartelists.

The Commission remains committed to pursuing all cartels across all sectors where it has sufficient evidence of an infringement (more information on the cartel decisions is available in the sectoral overview). 2014 was another very effective year of enforcement as illustrated by the record number of cartel decisions adopted.

A number of statements of objections were also adopted by the Commission, such as against the non-settling parties in the Yen Libor 70 , Euribor 71 and Steel Abrasives 72 cases for their alleged participation to a possible cartel and against a number of truck producers 73 .

With 10 decisions, fines totaling approximately EUR 1.69 billion, and solid work for enforcement in future years, the Commission’s cartel enforcement record remains strong and effective.

**[TABLE OMITTED]**

Antitrust and cartel output

**[GRAPH OMITTED]**

7.Continuing the close cooperation within the European Competition Network (ECN) and with national courts

Regulation 1/2003 empowers the Commission, National Competition Authorities (NCAs) and national courts to apply Articles 101 and 102 TFEU to agreements and practices that are capable of affecting trade between Member States. Since May 2004, the Commission has investigated potential antitrust infringements across almost all sectors of the economy and has adopted over 130 decisions, many of which landmark precedents. NCAs have investigated more than 1800 cases in this period, giving rise to enforcement decisions in more than 800 cases. DG Competition and the NCAs continued to coordinate competition enforcement in the ECN in 2014.

Convergence of enforcement powers

In 2014, ECN activities focused on enhancing the functioning and convergence of the enforcement frameworks in the Member States. On 9 July, the Commission adopted a Communication on "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives" 74 . This Communication took stock of the enforcement record by the Commission and the NCAs. Furthermore, it calls upon creation of a truly common competition enforcement area in the EU, building on the current achievements. It identifies the need for appropriate initiatives in a number of areas: to further guarantee the independence of NCAs in the exercise of their tasks and that they have sufficient resources; to ensure that NCAs have a complete set of effective investigative and decision-making powers at their disposal; to ensure that powers to impose effective and proportionate fines and well-designed leniency programmes are in place in all Member States and to consider measures to avoid disincentives for corporate leniency applicants.

Cooperation with national courts

Regulation 1/2003 empowers national courts to apply Articles 101 and 102 TFEU and to ask the Commission to provide case-related information or an opinion on the application of EU competition rules (Art. 15(1)). The Commission may also submit amicus curiae observations to national courts on its own initiative when the coherent application of EU competition law is at stake (Art. 15(3)).

In 2014, the Commission responded to three requests for transmission of documents by Spanish, Belgian and United Kingdom courts. The Commission also replied to four requests for opinions: two on the protection of confidential information in damage actions to the United Kingdom High Court of Justice; one on certification agreements to a Belgian Court of First Instance; and one on the abuse of dominant position in the form of discrimination to a French Court of Appeal 75 . In addition, the Commission submitted amicus curiae observations in three cases pending at the Supreme Courts of Spain, United Kingdom and Germany concerning respectively the concept of infringement and the interpretation of one of the Block Exemption Regulations in relation to practices on the insurance market, limitation periods for damages actions and succession of companies that are subject to fines 76 .

Cooperation with national courts also includes the Grant Programme "Training of National Judges in EU Competition Law" aimed at promoting the convergence of competition law enforcement by national courts throughout the EU and boosting cross-border exchanges. In 2014, fourteen projects were funded for about EUR 1 million, including: training activities for around 1000 judges of more than 20 nationalities; the creation of websites, a database and an enforcement observatory; and the drafting of manuals and other publications.

Merger control

Merger control makes an essential contribution to growth and jobs in the European economy. Effective control of mergers maintains competitive pressure on market participants, which stimulates innovation and efficient distribution of scarce resources. It also ensures that European industries maintain access to critical input at competitive prices. Swift approval of mergers that do not raise competition concerns, as well as the approval of effective, tailor-made remedies to remove such concerns, where needed, enable industries to restructure and adapt to new market challenges.

As highlighted in the 2013 Annual Competition Report, the Commission continuously evaluates the substantive and procedural rules in force for merger control and, if necessary, launch policy changes.

1.The White Paper "Towards more effective EU merger control"

In July, the Commission launched a public consultation putting forward proposals to improve merger control at EU level outlined in a White Paper "Towards More Effective EU Merger Control" 77 .

The White Paper takes stock of the working of the Merger Regulation 10 years after the last reform in 2004. It discusses ways to enhance cooperation and convergence of the different merger control systems in the European Union at the EU and national level, following suggestions made in 2010 by Mario Monti in his report to President Barroso on the internal market 78 and in 2013 by the French Autorité de la Concurrence 79 to create a "European Merger Area" in which both the Commission and national competition authorities (NCAs) would review mergers under the same substantive rules.

The key proposals of the White Paper include the following: (i) policy choices and proposals for a light and tailor-made review of acquisitions of non-controlling minority shareholdings – these do not currently fall under the EU Merger Regulation but can cause significant harm to competition and consumers; (ii) making case referrals between Member States and the Commission more business-friendly and effective; (iii) making procedures simpler – this can be achieved for example by exempting certain non-problematic transactions from the notification obligation, or by excluding the creation of joint ventures that will operate outside the European Economic Area (EEA) and have no impact on European markets from the scope of the EU merger review; and (iv) fostering coherence and convergence – the White Paper takes stock of the use of current EU merger control rules and proposes to reflect on ways to foster convergence between Member States and the Commission as well as among Member States with a view to creating a truly level playing field and to avoid inconsistent outcomes.

2.Simplification Package successfully implemented

The Merger Simplification Package adopted in December 2013 became applicable as of 1 January 2014. The package widened the scope of the simplified procedure to review unproblematic mergers, thus significantly reducing the administrative burden for parties notifying mergers to the Commission. Streamlining of notification forms in cases of candidates for simplified procedure, which represented nearly 70% of all mergers notified to the Commission in 2014, resulted in DG Competition being able to devote more resources to problematic merger cases.

3.Recent enforcement trends

The number of notified mergers increased in 2014 compared to the last four years. Overall, 338 transactions were notified, including 35 referrals from Member States. In eight cases, the Commission opened in-depth investigations (second phase). These cases concerned media, basic industries, pharmaceuticals and energy sectors.

In 2014 the Commission took 300 decisions. The number of interventions 80 remained stable at 18 compared with the average of the last four years. 13 mergers out of them were cleared subject to commitments in first phase and five in second phase 81 . There was no case where the Commission had to prohibit a notified transaction. In one case, the Commission fined a notifying party for having implemented the transaction before it was notified to and cleared by the Commission 82 . The breach of those obligations is considered to be serious by its nature in so far as the ex ante notification system and the prohibition of implementing a concentration without prior approval from the Commission ensure that the Commission can assess mergers before they are implemented – a key safeguard that protects direct customers and final consumers from the harm that anticompetitive mergers could create.

Merger decisions

Merger cases have remained complex in 2014. Second phase investigations involve sophisticated qualitative and quantitative analyses. In some cases, complex remedies packages including far-reaching divestitures have been needed to allow a merger to go ahead while keeping markets competitive and protecting industries downstream from price rises for critical inputs.

4.Significant judgments by EU Courts in mergers

In 2014 the EU Courts handed down two judgments in the field of merger control.

On 3 July the Court of Justice 83 rejected Electrabel's appeal against the General Court judgment 84 confirming the legality of the EUR 20 million fine imposed by the Commission in 2009 for early implementation of the acquisition of Compagnie Nationale du Rhône 85 . This judgment sends an important message that the stand-still obligation is an essential element of the EU merger control process and breaches of that obligation should be treated as serious offences even in cases where ultimately no competition concerns arise.

On 5 September 86 the General Court rejected an action brought by Editions Odile Jacob against a Commission decision of May 2011 approving the purchaser of the business that Lagardère had to divest as a condition for clearance of its acquisition of Vivendi Universal Publishing in 2004 87 . The Commission had already approved the purchaser in 2004 but that decision was annulled by the General Court on formal grounds in 2010 88 . The Court's new judgment confirms that the Commission had taken the necessary action in order to comply with that first judgment.

Developing the international dimension of EU competition policy

The globalisation of the economy calls for closer cooperation among competition authorities not only in Europe, but also across the globe. International cooperation between competition agencies assists with the effective management of the challenges of globalisation and promotes convergence on competition policy principles and practices implemented throughout the world. That is why the Commission seeks to reinforce the role of competition policy in international negotiations and cooperates with competition agencies globally. Such regulatory and enforcement cooperation helps to ensure an effective enforcement and a level playing field for European companies active on global markets.

1.Bilateral relations

One of DG Competition's important field of activity at the international level is constituted by the negotiations on Free Trade Agreements (FTAs) aiming to include competition and State aid provisions in those agreements. In 2014 the negotiations with the US on a Transatlantic Trade and Investment Partnership Agreement (TTIP), launched in 2013, were one of the priorities for DG Competition's international efforts. Another important agreement being negotiated is the FTA with Japan. The proposed agreement includes competition provisions which DG Competition is following closely. In 2014 DG Competition also focused its efforts on intensive negotiations with Vietnam as the competition provisions in this free trade agreement might help to set a new standard for the region or even wider.

The Cooperation Agreement with Switzerland in competition matters was signed in May 2013 89 . An innovative feature of that agreement is that it will enable both competition agencies to exchange evidence they have obtained in their respective investigations. In 2014 both sides completed their internal approval processes and ratified the agreement in October 2014. The Agreement entered into force on 1 December. Negotiations between the Commission and its Canadian counterparts to include provisions on exchange of evidence into the existing EU-Canada Cooperation Agreement have been progressing well.

Another key area of activity of DG Competition at the international level is technical cooperation with main trading partners which are developing their competition policy and enforcement regime and with which DG Competition has signed Memoranda of Understanding (MoUs). DG Competition has signed MoUs with most BRICs countries in recent years and has engaged in technical cooperation with these countries to varying degrees 90 . DG Competition's technical cooperation activities with the Chinese competition authorities are most notable and will continue under the on-going cooperation programme (EUCTP II 91 ). A significant programme for technical cooperation with the Indian competition authorities, CITD 92 , took off in 2014 and will run until 2018.

As to the accession negotiations with candidate countries, the main policy objective, in addition to fostering a competition culture, is to further assist the candidate countries and potential candidate countries in building up a proper legislative framework and developing well-functioning competition authorities and an efficient enforcement practice in order for them to meet the conditions for EU accession in the competition policy field. In 2014, the screening of the Serbian legislation took place. DG Competition also assisted Montenegro to fulfil the Opening benchmarks of the Competition negotiations. The negotiations for a Stabilisation and Association Agreement with Kosovo 93 were successfully concluded, and the Agreement was initialled by the Chief Negotiators in July 2014.

2.Multilateral cooperation

The Commission also continued to participate actively in international fora such as the Competition Committee of OECD, International Competition Network (ICN) and the United Nations Conference on Trade and Development (UNCTAD). In relation to ICN, in 2014 DG Competition continued co-chairing the Mergers Working Group of ICN and one of the Sub-Groups of the Cartel Working Group. It was also, together with US Federal Trade Commission (FTC), the project leader for the Steering Group project on investigative processes in competition enforcement activities and on the Merger Working Group International Merger Enforcement Cooperation Project.

In OECD, DG Competition maintained its leading role together with the US DoJ and US FTC in setting the agenda of the OECD Competition Committee, contributed to the long term strategic OECD projects on evaluation and international cooperation, leading to the adoption of a Recommendation on International Cooperation and manuals on ex ante and ex post evaluation in 2014. In addition, DG Competition continued to submit written submissions for OECD Roundtable discussions on a wide variety of competition related issues and actively participate in OECD discussions on other competition related or multidisciplinary topics.

In UNCTAD, DG Competition will continue to participate actively in competition related activities by sharing its experience with other delegates (by means of written contributions and its participation in oral discussions) and by being actively involved in country peer reviews.

II.SECTORAL OVERVIEW

This section provides an overview of policy developments and enforcement activities in a number of selected sectors, which the Commission particularly focused on in 2013: energy and environment, ICT and media, financial services, manufacturing, the agri-food industry, pharmaceutical and health services and transport.

1. Energy & Environment

Overview of key challenges in the sector

In its Political Guidelines, the Commission President called for a reform of EU energy policy into a new European Energy Union 94 . Competition is part of the policy mix that can address this challenge. The EU energy policy pursues the triple objective of sustainability, competitiveness and security of supply. These objectives have been once more reiterated in the Commission's Communication A policy framework for climate and energy in the period from 2020 to 2030 95 . This framework has been endorsed in the Council conclusions 96 , which include a political commitment to a binding Union target of at least 40% reduction of greenhouse gas emissions, a Union target of at least 27% share of renewable energy in final gross energy consumption and the completion of the internal market, including an objective to reach 15% level of interconnection by 2030. As energy is a key input across all economic sectors, affordable energy prices and security of supply are vital for a competitive European industry.

General challenges to reach the pillars of competitiveness, sustainability and security of supply

Reducing greenhouse gas emissions to combat climate change, maintaining secure and reliable provision of energy at competitive prices and improving interconnection between European gas and electricity grids remain a challenge also for the coming years. Given the Union's growing dependence on energy imports and the lack of sufficient diversification of supplies in particular for gas in certain areas of the Union, in 2014, a particular emphasis was put on energy security. The Commission’s Communication European Energy Security Strategy 97 provided a comprehensive plan for the reduction of EU energy dependence and highlighted the need to perform risk assessments at regional and at Union level, to strengthen solidarity mechanisms, deepen market integration and improve diversification among others by accelerating the construction of key infrastructure projects and to increasingly focus on indigenous resources. Energy efficiency remains a cornerstone of the Union's energy and climate policy. The 2014 Energy Efficiency Communication took stock of the effectiveness of measures to reach the 20% reduction objective by 2020 98 .

Contribution of EU competition policy to tackling the challenges

The main challenges identified in 2014 are increasing energy prices 99 , the slow pace of investment in the energy sector and security of supply concerns which result from a lack of competition and in particular the insufficient diversification of gas supplies in Eastern Europe, as highlighted in the "stress tests" 100 . 2014 has seen a substantial progress in the integration of the electricity market, as sixteen Member States have adopted the so-called "day-ahead market coupling" which provides for the most efficient use of cross-border infrastructures and facilitates price convergence. Nevertheless, more investment in cross-border infrastructures is needed to fully exploit the benefits of market integration.

In 2014, EU competition policy contributed to tackling those challenges in several ways. Antitrust and mergers enforcement have notably contributed by lifting obstacles to competition and barriers to trade between Member States and by ensuring that investments in the energy sector do not impede competition. In State aid, the new Guidelines on State aid for environmental protection and energy 101 (EEAG) foresee new assessment criteria aiming at bringing renewable energy electricity generation into the market and at preventing the fragmentation of the internal market by nationally conceived, uncoordinated generation adequacy measures. At the same time, the EEAG as well as the General Block Exemption Regulation also introduce new categories to facilitate and accelerate investment in the field of energy efficiency and energy infrastructures, making thus a concrete contribution to the energy and climate agenda.

Enhancing competitiveness across the energy sector

Competition enforcement and advocacy contribute to competitiveness of EU industry and the integration of the internal market by opening markets, creating a level playing field between competitors, preventing collusion and abuses of dominant positions, ensuring that mergers do not impede effective competition and creating a framework for investment that avoids distortions and ensures the efficient allocation of public resources. In 2014, antitrust enforcement actions have contributed to tackling this by combatting segmentation of markets and abusive or collusive behaviour, which all contribute to high energy prices.

On 5 March, the Commission adopted two decisions concerning power exchanges: a decision under Article 101 TFEU fining two electricity power exchanges for agreeing not to compete with each other and allocating European territories amongst themselves 102 , and a decision under Article 102 TFEU fining the Romanian power exchange OPCOM for discriminating against electricity traders based in other EU Member States 103 . On 12 August, the Commission issued a Statement of Objections against the Bulgarian energy company BEH relating to territorial restrictions on the resale of electricity in Bulgaria 104 .

On the State aid side, the new EEAG makes it possible to safeguard a sufficient financing base for support to energy from renewable sources to reach the EU targets while maintaining the competitiveness of electro-intensive users, some targeted reductions from the financing of renewable energy support may be given for energy-intensive industries. During 2014, the Commission has approved three such schemes 105 .

Contributing to sustainability

Sustainable development is the long term use of resources to meet human needs for energy, while preserving the environment. With the rising share of energy from renewable sources within the energy mix, it becomes more and more important that it gradually integrates the market with a view to functioning on a normal market basis. The new EEAG therefore requires direct selling of electricity from renewable sources in the market, on top of which Member States may grant a premium to cover for the extra-costs where the technologies are not yet competitive towards conventional generation. Furthermore, energy from renewable sources will underlie standard balancing responsibilities and its production should not be incentivised when wholesale prices turn negative. The Commission approved several support schemes which follow already these market-based assessment criteria 106 . Actions for sustainability are also reflected in on-going anti-trust investigation in relation to Austrian waste management markets 107 .

Contributing to security of supply

In the gas sector, lack of diversification and consequently competition in sources of supply is a concern for the security of supply in the EU, which is increasingly dependent on imports. Some Member States continue to rely on one single supplier and often on one single supply route for 80%-100% of their gas consumption 108 , whereas those Member States with a diverse portfolio of gas suppliers and supply routes and with well-developed gas markets reap the benefit of paying less for imports. In the electricity sector, there are increasing concerns about generation adequacy. The new provisions under the State aid General Block Exemption Regulation (GBER) and the Environmental and Energy State Aid Guidelines (EEAG) greatly contribute to encourage investment in gas and electricity infrastructure in a manner which minimises market distortions. In the electricity sector Member States are considering measures to ensure medium and long-term security of supply. The EEAG assessment criteria on generation adequacy strive to ensure a level playing field between different generation technologies, including interconnectors or cross-border generation, as well as the demand-side. A first decision in this field was the approval of the UK capacity market 109 . Furthermore, the Commission positively concluded the formal investigation into the aid destined to the construction of the new Hinkley point nuclear power generation 110 .

In the field of merger control, the trend towards investments into European energy infrastructure by investment companies persisted 111 . Moreover, in 2014 a number of companies invested into "green" electricity such as wind parks 112 , solar parks 113 , pellet production 114 as well as in energy saving measures 115 and the marketing of green electricity 116 . The Commission will also continue to ensure that input products for the energy sector will be sold on competitive markets 117 .

In addition, the Commission is conducting an in-depth investigation into the proposed acquisition of DESFA, the Greek transmission system operator in charge of the high-pressure pipeline grid and the only Greek LNG Terminal, by SOCAR, the Azeri State-owned gas producer. SOCAR is also a member of the Shah Deniz consortium that will sell natural gas to Europe as of 2019/2020. Due to this potential combination of a gas supplier and infrastructure operator, the investigation focuses on the possibility of network foreclosure, which would distort competition and ultimately lead to higher natural gas prices for Greek consumers.

Similarly, the Commission's antitrust enforcement can help to resolve security of supply issues by facilitating access to the market and encouraging investment. Ongoing Commission investigations under Article 102 TFEU include the potential abuse by Gazprom of its dominant position in the supply of natural gas in Central and Eastern Europe 118 and the possible foreclosure of gas markets in Bulgaria by the Bulgarian incumbent BEH as a result of obstacles to access to gas transport and storage infrastructure 119 . The Commission also continued its investigation into potential distortions of price reporting in relation to oil and biofuels products price benchmarks established by a Price Reporting Agency, where inspections were carried out in 2013 and 2014 120 .