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## Cartels Adv

#### The Seventh Circuit’s *Motorola* decision used an unclear and amorphous interpretation of comity to limit the scope of the Sherman Act extraterritorially – it created uncertainty that SCOTUS chose not to act on

Rogers ‘16 [Paul; 2016; Professor of Law and Former Dean, SMU Dedman School of Law; Of Counsel, Locke Lord, Dallas, Texas; Competition Law Chronicle; “A Current Look at Foreign Cartels and the United States Foreign Trade Antitrust Improvements Act,” vol. 2, https://scholar.smu.edu/cgi/viewcontent.cgi?article=1791&context=law\_faculty]

The United States‘ Foreign Trade Antitrust Improvement Act (FTAIA), enacted in 1982, is designed to set the framework for determining if and when U.S. antitrust laws have jurisdiction over anticompetitive conduct involving commerce foreign to the United States.1 While excluding U.S. import commerce from its reach, it seeks to both clarify and limit the extraterritorial application of U.S. antitrust laws, perhaps in partial deference to foreign concerns about the reach of those laws to competitive conduct abroad. It is far, however, from an example of clarity in drafting.2 The U.S. Court of Appeals for the Ninth Circuit has described it as a ―web of words‖3 while the Third Circuit noted that it was ―inelegantly phrased.‖4

The U.S. Supreme Court has considered the applicability of the FTAIA only in its 2004 F. Hoffman-LaRoche Ltd. v. Empagran S.A. decision.5 The case involved a world-wide vitamin price fixing scheme which, it was alleged, caused higher vitamin prices in the U.S. as well as other countries such as Ecuador. The Court ruled that U.S. purchasers could bring a Sherman Act claim under the FTAIA but that buyers in other countries could not since their harm was foreign to the United States. In interpreting the statute, the Court held that the act sets forth a general rule placing all non-import activity involving foreign commerce outside of the reach of the Sherman Act. But, the Court noted, the act ―brings such conduct back within the Sherman Act‘s reach if the restraint at issue has a ―direct, substantial, and reasonably foreseeable‖ anticompetitive impact on U.S. commerce.6

Litigation involving the FTAIA has spiked in the last decade or so as the U.S. Department of Justice (DOJ) has increasingly prosecuted foreign-based cartels, spurring many coattail civil lawsuits in addition. In a number of investigations, the DOJ has targeted foreign suppliers of component parts that were incorporated by other companies into finished products assembled overseas but later imported for sale to U.S. customers. Leading examples include TFT-LCD panels for finished products such as televisions, notebook computers, and cell phones and various parts assemblies used to make automobiles.

Often at issue is whether the foreign component cartel had the required ―direct, substantial, and reasonably foreseeable effect‖ on US commerce.7 The DOJ‘s position in those cases is typically that U.S. consumers were harmed because inflated cartel prices for the components paid for abroad were incorporated into higher prices for the finished products that were sold in the United States.8 It is concerned, however, that interpretations of the FTAIA that preclude the Sherman Act from reaching foreign component part cartels unduly limit its ability to protect U.S. consumers from competitive harm.9

Although lower courts have been mindful of the Supreme Court‘s admonition that Congress intended that the FTAIA ―clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act‘s scope as applied to foreign commerce,‖10 they have applied the statute inconsistently. For example, the Ninth Circuit has held that ―direct‖ under the statute means ―as an immediate consequence‖ with no ―intervening developments.‖11 In contrast, the Second and Seventh Circuits have rejected the Ninth Circuit‘s test, instead defining direct as having a ―reasonable proximate cause nexus.‖12

The nexus test has proven difficult to apply and one group of commentators has argued that in practice it often devolves ―into subjective metaphysical analysis.‖13 But with respect to component part cartels, there is always the argument that effects on U.S. Commerce are not direct where a price fixed component is incorporated overseas into a finished product that is eventually imported into the United States. Thus, under either test, a U.S. plaintiff suing a foreign component part cartel cannot be assured that it can meet FTAIA requirements.

The FTAIA‘s seemingly intractability is perhaps best illustrated by the recent Motorola litigation before the Seventh Circuit. It involved claims based on foreign sales of price-fixed LCD panels incorporated into cellphones that were then imported into the United States. In earlier litigation the DOJ had alleged that the overcharges on those panels entering the U.S. exceeded $500 million.14

In Motorola I the court first held that the targeted conduct did not have a direct effect on U.S. commerce, but subsequently vacated the opinion.15 Then in Motorola II the same panel reversed itself on the direct effect test, holding that if prices of the components were fixed, the effect on U.S. commerce would meet the test for purposes of the FTAIA.16 But it focused additionally on the second domestic effects question under the statute – whether, assuming a direct effect on U.S. commerce, those effects give rise ―to an antitrust cause of action under the Sherman Act.‖17 In doing so, it held that the FTAIA precluded plaintiff ‘s claims because the domestic effect of a conspiracy to fix component part prices did not ―give rise‖ to a Sherman Act claim. The court reasoned that although the domestic effect of the conspiracy was increased cell phone prices in the U.S., that is not what harmed the plaintiff, which was a wholly owned foreign subsidiary of the American parent company.18 It had purchased the price fixed components directly from the conspirators abroad. According to the court, its harm was suffered abroad when it purchased the price-fixed panels abroad, but that harm was not dependent on the domestic effect of increased cell phone prices.19

In support of its holding, the Motorola II court referenced the Supreme Court‘s concern expressed in Empagran about the risk of excessive extraterritorial application of U.S. law interfering ―with a foreign nation‘s ability independently to regulate its own affairs.‖20 Of course, that concern for international comity is a prime motivation for the FTAIA itself.21 The proof is in the pudding, however. That is, it is the American courts which are left with the task of interpreting and applying an admittedly poorly drafted and confusing statute. As such, it seems that they are the ultimate purveyors of comity.

Part of the judicial function of course is to provide guidance and predictability. But with the circuit split after Motorola II, there is currently little of either for cases involving component part price-fixing abroad. Motorola II certainly restricts the reach of U.S. antitrust laws to those conspiracies and adds additional hurdles for the DOJ and private plaintiffs seeking relief for domestic harms. In addition to the direct and substantial effects requirement, plaintiffs must be prepared to meet a narrow, restrictive ―domestic effects‖ test to satisfy the FTAIA.22

But before one asserts that Motorola II has effectively swept away all U.S. antitrust claims against foreign component part price-fixers, it is important to remember the Supreme Court‘s admonition in Empagran that it matters who the plaintiff is.23 For example, if Motorola had made its purchase decisions and executed purchase orders in the U.S. rather than abroad through a foreign subsidiary, the result might have been different.24 Further, the DOJ, while is concerned about the effect of cases like Motorola II on its ability to criminally prosecute foreign based component part cartels, has typically asserted jurisdiction through the FTAIA‘s import commerce exception.25

Nonetheless Motorola II has limited the reach of Sherman Act claims to foreign component part cartels. But that case may have created a circuit split and it is far from clear how other circuits might handle the same type of claim. On June 15, 2015, the Supreme Court denied certiorari in both Motorola II and the Ninth Circuit‘s Hsiung case, so we are not going to get a definitive answer anytime soon.

Motorola II may have shifted the focus to the domestic effects analysis and away from the direct effects requirement, which could perhaps soften the supposed circuit spit since the FTAIA requires both. As a result, it may be that in declining to hear the case, the Supreme Court did not see a circuit split.26

In any event, judicial application of the FTAIA seems to have produced more questions than answers. While ideally the law should create certainty, the combination of an unartfully drafted statute, differing judicial interpretations of that statute, and the somewhat amorphous concept of comity all combine to produce a great deal of uncertainty about the application of the FTAIA to foreign component part cartels.

#### International cartels wreck US economic growth – the aff ensures growth and innovation across industries

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Anticompetitive activity of cartels and the globalization of commerce have exponentially accelerated the gap between buyers and sellers.374 Collectively, increasing poverty, the decline in median income, and the collusion of companies to sell products at a certain price put buyers at the mercy of these cartels.375 Sometimes, because the products are inelastic, consumers have no choice but to accept the inflated purchase price.376 As global supply chains continue to expand, business transactions become a source of potential victims by perpetrators of consumer fraud.377 This raises the need for stricter rules to protect the consumers who are more likely in a worse financial position than that of companies taking advantage of these consumers. Expanding the reach of the FTAIA to include transactions made outside of the United States but nonetheless have an impact to U.S. commerce, as held by the Ninth Circuit, will reduce this prevalent issue.378 This Part discusses the effects of this proposal to the protection of U.S. consumers and the international business community.

In today’s global economy, it is difficult to distinguish and separate foreign from domestic effects.379 Global supply chains have made it easier for products to move rapidly and with ease. The United States, holding twenty-one percent of the worldwide Gross Domestic Product (GDP), is most susceptible to cartel targeting.380 With twenty-nine percent market share, it is the largest consumer in the world.381 Any impact of collusion in the international market is intertwined with a harm to customers in the United States.382 Measures must be taken to ensure that markets remain open and competitive; no company should able to dominate and restrict the supply of products sold. With a rigid rule in place, formation of domestic and international cartels would decline, further strengthening competition.383 After all, the protection of consumers through the preservation of deterrence is one of the main focuses of antitrust laws.384

Courts, as well as scholars, have commented that cartel deterrence should be the primary concern over international comity issues in analyzing the FTAIA.385 In United States v. Nippon Paper Indus. Co., 386 the First Circuit concluded that principles of comity should not “shield” a defendant from any intentional wrongdoings, especially if a substantial effect occurred in U.S. markets.387 Otherwise, because cartel members are more likely to engage in anticompetitive conduct, a decision that is based more heavily on the international comity principle would make company transactions, domestic and abroad, confusing and ultimately increase the burden on consumers.388

Cartels, more often than not, operate in secrecy. Members can coordinate and collude to fix prices outside of U.S. jurisdiction, making it much more difficult for the U.S. government to detect and prosecute them.389 To achieve deterrence, a rule that will dissuade companies from engaging in anticompetitive conduct from the very beginning will allow antitrust enforcement to be more manageable.390 A cartel will most likely weigh the potential damages engaging in anticompetitive activities with the potential benefits of those anticompetitive activities.391 A study conducted in the United Kingdom showed that labor productivity declined when industries are characterized by collusion or when competition is low.392 The study showed, however, that once a strict antitrust law was enforced, the gap declined, if not disappeared.393

The presence of competition drives productivity by incentivizing companies to be more efficient.394 Studies have revealed that competition boosts product innovation and creativity, all while firms strive to reduce their costs, by encouraging them to produce higher-quality and more diverse goods and services at more competitive prices.395 Consumers will gain more access to markets they had not previously been exposed to as a result of commercial competition.396

Cartels limit the presence of competition in the economy.397 Once producers work together to protect their own interests, to the detriment of consumers, competition is eliminated.398 Cartel members either agree on a fixed price at which to sell certain products or restrict the quantity of output of the product released into the market.399 By deliberately restricting the output released into the market, without a natural shift in the consumers’ demand, the supply decreases, thereby increasing the price of the product.400 When most of the producers in an industry are part of a cartel, consumers will have no means to find a substitute, and they will have no choice but to accept the inflated price.401 For example, when AU Optronics and other defendants colluded to artificially set the price of the LCD panels, Motorola and other plaintiffs had no choice but to subsequently increase the price of their own products that used these LCD panels.402 Without the cartelpriced LCD panels, Motorola’s foreign subsidiaries would have been able to buy them at the market price and charge U.S. consumers less than they ultimately did.403

Extending the reach of the FTAIA to foreign conduct with an impact on U.S. commerce makes economic sense.404 Judge Higginbotham’s dissent in Den Norske was correct: Emphasizing the role of deterrence protects market efficiency.405 He argued that a broad interpretation of the FTAIA would aid the DOJ’s efforts in curtailing international cartels.406 A cartel’s overall profitability is favorably impacted by anticompetitive conduct, and this may lead cartel members to either further restrict the output or increase the price of the product.407 A decrease in competition could potentially move market share away from these efficient producers.408 Thus, a consistent application of the Ninth Circuit ruling across all U.S. jurisdictions will limit both this unacceptable behavior and the foreign companies’ incentive to form cartels. Foreign companies will be deterred from price-fixing knowing that they could be liable for anticompetitive conspiracies, even for transactions that occurred outside of the United States.409 Studies have already shown that antitrust enforcement increases productivity growth.410 In fact, a study has concluded that the price of products tends to drop approximately twenty to forty percent after cartels are broken up.411 The price-fixing issue is not only prevalent in the manufacturing industry, but also in the industries at issue in Hui Hsiung and Motorola. 412 Studies show that increased competition also benefits the agricultural, telecommunications, transport, and professional services industries.413 Moreover, even though competition usually starts at a domestic level, a ruling against cartel formation will positively affect the competitiveness of the domestic products as they compete in the international community.414 Companies typically acquire their production inputs from local markets and industries.415 If these industries lack competition, product prices in these markets may not be priced competitively, which affects the finished products’ competitiveness with foreign rivals.416

#### American economic growth prevents US-China-Russia war, baby-proofs emerging tech, and makes international cooperation great again.

Burrows ’16 [Matthew; September 2016; Director of the Atlantic Council’s Strategic Foresight Initiative, PhD in European History from the University of Cambridge; Global Risks 2035, “The Difficult Transition to a Post-Western Order,” Ch. 8, http://espas.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 Western-dominated 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.

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 planetary-scale 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.

#### Ag innovation is societal insurance against any existential threat

Meyer ‘16 [Robinson; 2016; associate editor at The Atlantic, citing a report by the Global Challenges Foundation; The Atlantic; “Human Extinction Isn't That Unlikely,” <http://www.theatlantic.com/technology/archive/2016/04/a-human-extinction-isnt-that-unlikely/480444/>]

Nuclear war. Climate change. Pandemics that kill tens of millions.

These are the most viable threats to globally organized civilization. They’re the stuff of nightmares and blockbusters—but unlike sea monsters or zombie viruses, they’re real, part of the calculus that political leaders consider everyday. And according to a new report from the U.K.-based Global Challenges Foundation, they’re much more likely than we might think.

In its annual report on “global catastrophic risk,” the nonprofit debuted a startling statistic: Across the span of their lives, the average American is more than five times likelier to die during a human-extinction event than in a car crash.

Partly that’s because the average person will probably not die in an automobile accident. Every year, one in 9,395 people die in a crash; that translates to about a 0.01 percent chance per year. But that chance compounds over the course of a lifetime. At life-long scales, one in 120 Americans die in an accident.

The risk of human extinction due to climate change—or an accidental nuclear war—is much higher than that. The Stern Review, the U.K. government’s premier report on the economics of climate change, estimated a 0.1 percent risk of human extinction every year. That may sound low, but it also adds up when extrapolated to century-scale. The Global Challenges Foundation estimates a 9.5 percent chance of human extinction within the next hundred years.

And that number probably underestimates the risk of dying in any global cataclysm. The Stern Review, whose math suggests the 9.5-percent number, only calculated the danger of species-wide extinction. The Global Challenges Foundation’s report is concerned with all events that would wipe out more than 10 percent of Earth’s human population.

“We don’t expect any of the events that we describe to happen in any 10-year period. They might—but, on balance, they probably won’t,” Sebastian Farquhar, the director of the Global Priorities Project, told me. “But there’s lots of events that we think are unlikely that we still prepare for.”

For instance, most people demand working airbags in their cars and they strap in their seat-belts whenever they go for a drive, he said. We may know that the risk of an accident on any individual car ride is low, but we still believe that it makes sense to reduce possible harm.

So what kind of human-level extinction events are these? The report holds catastrophic climate change and nuclear war far above the rest, and for good reason. On the latter front, it cites multiple occasions when the world stood on the brink of atomic annihilation. While most of these occurred during the Cold War, another took place during the 1990s, the most peaceful decade in recent memory:

In 1995, Russian systems mistook a Norwegian weather rocket for a potential nuclear attack. Russian President Boris Yeltsin retrieved launch codes and had the nuclear suitcase open in front of him. Thankfully, Russian leaders decided the incident was a false alarm.

Climate change also poses its own risks. As I’ve written about before, serious veterans of climate science now suggest that global warming will spawn continent-sized superstorms by the end of the century. Farquhar said that even more conservative estimates can be alarming: UN-approved climate models estimate that the risk of six to ten degrees Celsius of warming exceeds 3 percent, even if the world tamps down carbon emissions at a fast pace. “On a more plausible emissions scenario, we’re looking at a 10-percent risk,” Farquhar said. Few climate adaption scenarios account for swings in global temperature this enormous.

Other risks won’t stem from technological hubris. Any year, there’s always some chance of a super-volcano erupting or an asteroid careening into the planet. Both would of course devastate the areas around ground zero—but they would also kick up dust into the atmosphere, blocking sunlight and sending global temperatures plunging. (Most climate scientists agree that the same phenomenon would follow any major nuclear exchange.)

Yet natural pandemics may pose the most serious risks of all. In fact, in the past two millennia, the only two events that experts can certify as global catastrophes of this scale were plagues. The Black Death of the 1340s felled more than 10 percent of the world population. Eight centuries prior, another epidemic of the Yersinia pestis bacterium—the “Great Plague of Justinian” in 541 and 542—killed between 25 and 33 million people, or between 13 and 17 percent of the global population at that time.

No event approached these totals in the 20th century. The twin wars did not come close: About 1 percent of the global population perished in the Great War, about 3 percent in World War II. Only the Spanish flu epidemic of the late 1910s, which killed between 2.5 and 5 percent of the world’s people, approached the medieval plagues. Farquhar said there’s some evidence that the First World War and Spanish influenza were the same catastrophic global event—but even then, the death toll only came to about 6 percent of humanity.

The report briefly explores other possible risks: a genetically engineered pandemic, geo-engineering gone awry, an all-seeing artificial intelligence. Unlike nuclear war or global warming, though, the report clarifies that these remain mostly notional threats, even as it cautions:

[N]early all of the most threatening global catastrophic risks were unforeseeable a few decades before they became apparent. Forty years before the discovery of the nuclear bomb, few could have predicted that nuclear weapons would come to be one of the leading global catastrophic risks. Immediately after the Second World War, few could have known that catastrophic climate change, biotechnology, and artificial intelligence would come to pose such a significant threat.

So what’s the societal version of an airbag and seatbelt? Farquhar conceded that many existential risks were best handled by policies catered to the specific issue, like reducing stockpiles of warheads or cutting greenhouse-gas emissions. But civilization could generally increase its resilience if it developed technology to rapidly accelerate food production. If technical society had the power to ramp-up less sunlight-dependent food sources, especially, there would be a “lower chance that a particulate winter [from a volcano or nuclear war] would have catastrophic consequences.”

#### Telecom competition and innovation are critical to beat China in the 5G race

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Major economies around the world—particularly those in Asia—are working aggressively to develop 5G networks. The Chinese government, for example, is actively pushing for 5G amid a broader effort to strengthen its digital economy, including through its “Made in China 2025” initiative. South Korea used the occasion of the 2018 Olympics to demonstrate its 5G prowess. A drone connected to a 5G network even carried the Olympic torch. And Japan is expected to use the 2020 Olympic Games to do the same. Australia, the United Kingdom, and others will also test 5G networks in the coming months and years.

CTIA forecasts that US telecoms will invest $275 billion in 5G technology, including fiber-optic cables, small cells, and other 5G network infrastructure. All the major US telecoms are planning 5G trials in 2018 and 2019 across dozens of cities—with 2020 as the consensus tipping point for 5G across major urban centers—fostered by strong competition among them to be the first to deliver 5G to customers. Indeed, a key stated goal of the proposed merger between T-Mobile and Sprint is to utilize their combined assets to become the first nationwide 5G carrier. Such a development would push other telecoms to accelerate their 5G rollouts in order to compete in the marketplace, improving mobile access for consumers and businesses throughout the country. For their part, AT&T and Verizon have both discussed how 5G is creating new opportunities for all the top US telecoms, with each one implementing a different strategy to develop and deploy its capabilities. At the same time, the rollout of 5G will allow telecoms to retire some of the capacity dedicated to 2G and 3G networks, enabling important cost savings and reinvestment of resources, as well.

US telecoms may also use the deployment of 5G to capture a previously untapped and underserved customer base—rural America. In this effort, public and private sector interests would be aligned. The US Federal Communications Commission has identified 5G investment as integral to closing the digital divide that still persists today. Opportunities may therefore emerge for public-private partnerships between telecoms and governments at the local, state, and federal levels to roll out 5G coverage, particularly to underserved areas. This is important, as concerns regarding the social impact of technology are growing, including whether the 4IR will reduce or exacerbate inequality. Such questions will in large part determine the long-term outlook for the United States, as explored in our America@250 effort to assess the outlook for the country our to its 250th anniversary in 2026 and beyond.

What will it take to win the 5G race?

The future center of global technological change will shift as a result of who wins the 5G race. To be sure, not every country is a perfect candidate for aggressive 5G investments given variations in market size, level of technological penetration, the size of the rural market, and other factors. Additionally, questions remain regarding the business case for large-scale 5G investments, as the average consumer may yet be unwilling to pay a premium for low latency or high-speed connections.

But national competitiveness, particularly for the world’s major economies, will increasingly be determined by the level of 4IR technological adoption and innovation, which in turn will depend on the quality of national 5G wireless networks. Winning the 5G race requires ensuring that coverage is both broad and deep across a given market. Only then will the impacts of massive infrastructure investments, job creation, and broader economic growth be realized.

To upgrade its digital infrastructure quickly and efficiently, the United States must ensure that the proper incentives are in place to foster massive investments by—and healthy competition among—the country’s telecom companies. These companies also need the space to innovate and experiment with new business models in collaboration with the wide variety of industries expected to leverage 5G. America’s future competitiveness depends on it.

#### China will leverage 5G for global leadership---poisons tech standards and independently goes nuclear

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The Promise of 5G

Today’s advances in fifth-generation telecommunications (5G) promise a transformational technology critical to enabling the next industrial revolution. This new generation of mobile communications constitutes a vital platform and digital backbone for massive increases in connectivity that will have far-reaching implications.1 5G is far more than simply a faster iteration of 4G; it represents a paradigm change.2 The benefits of 5G include its very high speed, low latency, and high throughput. While the jump from 3G to 4G enabled the current mobile economy, the leap from 4G to 5G will open up entirely new economic opportunities and applications. 5G will enable data flows at vastly greater speed and volume than today’s 4G networks, perhaps 100 or more times faster.3 Future smart cities will rely on 5G, autonomous vehicles will depend on this increased connectivity, future manufacturing will leverage 5G for improved automation, and even agriculture could benefit from these advances.4 The development and deployment of 5G are rapidly progressing, with a growing number of 5G pilots worldwide, including 92 pilots expected to launch in the United States by the end of 2019.5 5G technologies are on track for widespread commercialization in the 2020s and could generate great value across multiple industries.6 American policymakers must recognize the imperative of leading in and embracing the potential of 5G to ensure future American competitiveness.

5G has emerged as a new frontier for U.S.-China rivalry. Today, China seems poised to become a global leader in 5G deployment and could succeed in seizing a key first-mover advantage in this industry.7 The United States may be situated in a position of relative disadvantage, by some assessments.8 However, the state of play in 5G is highly complex, and assessments of who is leading can vary,9 depending upon the metrics considered.10 The Trump administration has claimed, “America is now leading the global race to deploy secure and reliable 5G.”11 Typically, national competitiveness in 5G can be evaluated based on a number of factors, including the availability of spectrum, robustness of the overall industry players, investments in the construction of the requisite infrastructure for 5G, and commercial deployments of 5G networks.12 U.S. carriers are moving more quickly to deploy “nonstandalone” 5G networks that build upon existing 4G infrastructure.13 There has also been recent progress in making greater amounts of spectrum available in the United States, primarily in the high-band, namely mmWave, range.14 By contrast, China has invested more heavily in the fiber and physical infrastructure required for standalone 5G, which could require intense capital expenditures. Chinese companies are primarily pursuing options for 5G involving midband spectrum, which might prove more promising for large-scale realization of 5G.15 In 5G, the first movers and early adopters may benefit from being able to promote an industrial and commercial ecosystem designed to build upon their 5G networks.16

The question of who develops and controls the core technologies that are foundational for 5G has great significance for its future trajectory. Today, 5G remains at a fairly nascent stage in its development.17 5G is continuing to progress through groundbreaking research and inventions that resolve complex scientific issues involving speed, capacity, security, and reliability. The technical standards that will enable interoperability and facilitate the widespread commercialization of these technologies are still taking shape through the global standards-setting process known as the 3rd Generation Partnership Project (3GPP), a consortium of telecom associations and other organizations.18 When it comes to the foundation of critical technology standards through which 5G is being defined, only a small subset of companies can be considered among the leading contributors to these standards based on the capabilities of their technologies, which involve technical documents that establish new technology requirements and design solutions to meet those requirements. 5G standards establish the blueprint of this future communications infrastructure. Currently, in this process, key leaders include U.S.-based Qualcomm; China’s champion, Huawei;19 Nokia, headquartered in Finland; Ericsson, a Swedish company; and Samsung, a South Korean conglomerate, which are the major contributors to patents and standards. However, few American companies rank at present among the primary players in the construction of certain requisite equipment for 5G, particularly radio access networks.20 The current degree of consolidation exacerbates the risks of market failure.21 There are reasons for serious concern about the long-term viability and diversity of supply chains in this industry.

5G has the potential to provide benefits for future economic development. The advent of 5G may contribute trillions to the world economy over the next several decades,22 setting the stage for new advances in productivity and innovation.23 The hitherto unparalleled connectivity that 5G will provide is integral to realizing the full potential of the “internet of things” (IoT) and artificial intelligence (AI) technologies in the real world. 5G can enable new industries and contribute to a dynamic digital economy.24 Moreover, 5G networks also possess promising military applications.25 Such increases in speed and connectivity could facilitate data fusion and improved situational awareness to enhance command and control,26 providing significant operational advantages on the future battlefield.27 Given the importance of 5G for national competitiveness, it is hardly surprising that 5G is often characterized as a “race,” even an “arms race,” between China and the United States. However, 5G is more of a marathon, rather than a sprint, insofar as its operationalization will play out over at least a decade to come. In the process, security will be more important than speed in establishing a durable foundation for 5G’s future. While the development and deployment of 5G are endeavors that involve intense rivalries among countries and companies, the realization of 5G equally requires cooperation and interoperability. U.S. strategy should concentrate on promoting the security, collaboration, and healthy competition that are so vital to the future of 5G.

The China Challenge in 5G

The Chinese government has been actively mobilizing to contest global leadership in 5G, while rapidly progressing in the nationwide deployment of this foundational technology. While the U.S. government has only recently started to concentrate on 5G,28 the origins of China’s efforts can be traced to as early as 2007, when the State Council approved a “major special project” on next-generation telecommunications,29 pursuant to the National Medium-and Long-Term Science and Technology Plan Outline (2006-2020).30 The United States had been relatively dominant in 4G, and China initially lagged behind and struggled more in 3G and 4G. Chinese leaders have been determined to leapfrog ahead in 5G through pursuing, and since arguably achieving, a first-mover advantage.31 Concurrently, the Chinese government has undertaken significant investments in building up a more robust digital infrastructure of fiber optic networks that are important to facilitate the large-scale deployment of 5G.32 China’s science and technology plans and research initiatives, from the 863 Plan to “Internet Plus” and the National Strategic Emerging Industries Development Plan,33 have supported advances in 4G and 5G. In China today, robust activities in research, development, and commercialization extend across universities, companies, and even a number of defense industry conglomerates.34 Meanwhile, the IMT-2020 promotion group, established by the Chinese government in 2013, has coordinated efforts among state agencies and industry stakeholders to support research and development, as well as testing and standards, for 5G.35 The Chinese government has also undertaken a proactive and coordinated approach to spectrum management and reallocation, involving military and industry stakeholders, to prepare for widespread 5G deployment through licensing and deconfliction of the requisite spectrum.36 There are not only no comparable efforts in the United States but also no existing mechanisms to replicate and implement such a strategy.

China’s efforts in 5G are estimated to amount to hundreds of billions of dollars across a combination of government funding and commercial investments.37 Since 2015, China has outspent the United States by over $24 billion overall, according to one estimate.38 This massive mobilization of resources has enabled rapid construction of the requisite infrastructure for standalone 5G, such as base stations, in which China Tower has proved to be a key player.39 For 2019, China is planning to accelerate efforts in 5G and to dedicate 57 percent (or about $146 billion) of $256 billion planned spending on technology to 5G.40 China is also launching a number of pilot projects to explore its potential across various industries, such as smart transport, industrial internet, and health care. As of 2019, 5G is already entering widespread precommercial deployment in a number of cities, including Beijing and Shanghai. For instance, the city of Shenzhen, which is home to Huawei, has become a major center for 5G development, intending to fully deploy 5G by late 2019.41 By 2020, full commercial deployment is on track to launch.42 Seemingly in response to U.S. pressures on Huawei and seeking to bolster its progress in 5G, the Chinese government has accelerated its timetable for issuing official licenses to China Mobile, China Unicom, and China Telecom, as well as China Broadcasting Network Corp.,for mid-band spectrum.43 Moreover, the Chinese government has provided carriers with low-cost spectrum and cheap land to facilitate deployment.44

The Chinese government and leading Chinese enterprises are actively promoting commercial deployment and experimentation with new applications of 5G. By 2025, an estimated 430 million people in China will have access to 5G, accounting for one-third of the world’s total 5G users.45 China is also developing early applications of AI and 5G applications in health care. In March 2019, the People’s Liberation Army (PLA) General Hospital, in collaboration with China Mobile and Huawei, engaged in the world’s first remote brain surgery using 5G.46 The precise, real-time control that 5G provides can facilitate telemedicine at greater distances, which enables world-class surgeons to reach patients in rural or remote regions that lack the requisite medical services.47 The Chinese government is also concentrating on applications of AI in industrial internet, including for advanced manufacturing.48

China’s attempts to advance 5G still confront certain challenges, notably the discrepancy between the high expectations for 5G relative to the current maturity of the technology. For instance, despite the tremendous enthusiasm for its potential, 5G requires significant investments in the near term, but the future business models that will enable 5G to become profitable for operators remain unclear. For the 2020 to 2030 time frame, expenditures of Chinese network operators on 5G could reach $411 billion, according to an authoritative estimate from China’s Ministry of Industry and Information Technology.49 China’s 5G era may be well underway, but the long-term trajectory of this state-driven approach to 5G remains to be seen. These sizable investments may be inefficient but could prove effective in driving development and establishing market predominance nonetheless.50 The United States has yet to commit to any funding or national initiatives in 5G that are close to comparable in scope and scale.51

For China, Huawei is a national champion that has been at the heart of the 5G agenda from the start. Although it claims to be a private company, an assertion that has been challenged because its structure of ownership is opaque and contested,52 Huawei has a history of strong state support and apparent linkages to the Chinese military and intelligence that start with its founder and persist to the present.53 Since 2009, Huawei has invested massively in research and development of next-generation telecommunications.54 The company plans to sustain and increase its investments in 5G with an annual R&D budget that may exceed $15 billion and could reach $20 billion in the years to come.55 Huawei seems and claims to be on course to become dominant in 5G, establishing new pilots and partnerships around the world, from Asia to Africa and across much of Europe.56 The company is building upon its established presence in 4G networks, which already amounts to nearly a third of the global telecommunications market.57 Huawei is one of the few players for now that can provide mature, cost-effective equipment and systems integration for 5G, such as radio access networks and base stations. Huawei has shipped over 150,000 5G base stations worldwide as of June 2019.58 Despite persistent security concerns, Huawei has continued to expand its reach, currently boasting a total of 50 commercial 5G contracts that span at least 30 countries, particularly a significant proportion in Europe.59 Huawei has also signed a deal to develop 5G in Russia as of June 2019.60 In addition, Huawei commands the greatest number of patents in 5G,61 which amount to 1,529 in total as of late 2018, with the closest contender, Nokia, holding 1,397 patents.62 However, estimates vary.63 Of course, although these numbers are significant indicators of Huawei’s prominence in 5G, pure patent counts should not be interpreted as an indication that Huawei is the clear leader, despite the company’s claims to the contrary.64 In this regard, although Huawei should be recognized as a formidable contender, its apparent leadership is hardly unassailable.

China may possess certain systemic advantages in 5G development and particularly deployment. The Chinese government has facilitated active and highly coordinated engagement in the establishment of global 5G standards, particularly through the IMT-2020 promotion group.65 Huawei has clearly exerted a strong influence in the adoption of standards for 5G,66 including those that benefit its own technologies. For example, Huawei particularly advocated for the adoption of Polar Code, a technique for the channel coding that is necessary to ensure accuracy, efficiency, and redundancy for data in digital communications.67 Huawei has made 11,423 contributions to 5G standards,68 while its wholly owned subsidiary HiSilicon has added 7,248 contributions, according to estimates from December 2018.69 This compares with 10,351 from Ericsson, 6,878 from Nokia, and 4,493 contributions from Qualcomm.70 It is important to remember that quantity is not always synonymous with quality or relative impact.71 However, these numbers are certainly indicative of very forceful Chinese participation in the process, which has involved high-level representation from Chinese companies, their involvement in positions of leadership, and apparent coordination in promoting certain options.72 By some accounts, Huawei is seen as a constructive contributor in a process that has been fairly collaborative.73 Yet there have also been persistent concerns that Huawei has been attempting to “flood” the process,74 including by taking on a high share of positions in decision-making on 3GPP panels, to establish unique sway.75

The Chinese government recognizes technical standards as a matter of strategic importance and has prioritized the promotion of Chinese intellectual property (IP) in the 3GPP 5G standards. This strong emphasis on shaping standards could facilitate successful deployment and commercialization of 5G technologies by Chinese companies that then might be poised to capture a sizable share of the profits and revenues in this critical industry. Moreover, progress in standardization is important to facilitate interoperability, including the full leveraging of the potential of 5G to create related products and services. Meanwhile, there are efforts underway to formulate a new initiative, “China Standards 2035” (中国标准2035),76 which could formally launch in 2020 and is intended to contribute to China’s emergence as a “standards superpower” (标准强国).77 This focus on standardization, from high-speed rail to artificial intelligence, is intended to increase the overall quality of China’s economic development while facilitating the “going out” of Chinese companies and technologies.78 An oft-quoted saying emphasizes, “First-class companies make standards, second-class companies do services, and third-class companies make products.”79 This contestation of standards continues China’s quest to improve its “discourse power” (话语权) to exercise a “right to speak” and global influence commensurate with its growing economic and technological capabilities.80 In particular, promotion of the “Digital Silk Road” could place Chinese companies, standards, and infrastructure at the center of the international information technology ecosystem, while perhaps serving as a vector for Beijing’s global influence.81

Chinese advances in 5G also contribute to military innovation. The PLA aims to leverage emerging technologies to achieve an advantage in future military competition. In his capacity as as commander-in-chief, Xi Jinping has called upon the PLA to become a “world-class” military (世界一流军队) by midcentury.82 5G will be vital to the process of military “intelligentization” (智能化), which involves the realization of AI in support of a range of applications and capabilities.83 5G could be critical to information support,84 creating improvements in data sharing, new mechanisms for command and control, and enhanced system construction to fulfill future operational requirements,85 such as the military internet of things.86 5G is anticipated to enable machine-to-machine communication among sensors, drones,87 or even swarms on the battlefield, as well as improvements in human-machine interaction.88 The potential for rapid integration of information and improved communications could provide key advantages for situational awareness. As China looks to construct a more integrated information and communications architecture across space-and ground-based systems, 5G could be incorporated.89 For instance, there are plans to integrate 5G with BeiDou, China’s dual-purpose competitor to GPS, to improve position, navigation, and timing capabilities.90 Beyond the battlefield, deployment of 5G could facilitate China’s model of national defense mobilization, providing for more “intelligent” approaches to coordinate resources and logistical support to fulfill the demands of wartime contingencies.91 For instance, when Jilin Province carried out a drill for national defense mobilization, 5G was used to support emergency communications.92 Already, some units in Chinese military and paramilitary forces have started to employ 5G for pilot programs, such as border security.93

China’s development of 5G will be shaped by the implementation of a national strategy of military-civil fusion (军民融合).94 There are certain synergies between military and commercial technologies, including advanced electronics in which elements of the Chinese defense industry, such as the China Electronics Technology Group Corp. (CETC), have particular proficiency.95 Even some military academic institutions, such as the PLA Strategic Support Force’s Information Engineering University, have noteworthy proficiency in relevant technological components, especially chips and advanced antennas.96 The Information Engineering University, which contributes to the Chinese military’s education and capabilities for information operations, is engaged in research on 5G network security, seemingly in collaboration with Huawei.97 Increasingly, a growing number of companies, including Shenzhen Kingsignal (金信诺),98 are pursuing opportunities for expansion into the military 5G market, including working on military projects.99 In November 2018, a number of industry players established the 5G Technology Military-Civil Fusion Applications Industry Alliance (5G技术军民融合应用产业联盟), including ZTE, China Unicom, and the China Aerospace Science and Industry Corp. (CASIC), a major defense conglomerate.100 This new partnership aims to foster collaboration and integration in military and civilian development of 5G.101 Some Chinese telecom companies are already supporting 5G pilot projects that appear to be intended for dual-use or military employment.102

5G Risks and Security Concerns

The U.S. government has actively sounded the alarm over the risks that Huawei may present, urging allies and partners to impose a ban against it in order to mitigate the threats of disruption or espionage through 5G networks.103 Huawei has faced pushback and scrutiny, and a growing number of countries have considered — or undertaken in the case of Japan, Australia, and the United States, among others — a ban or de facto exclusion of Huawei on the basis of varying rationales and mechanisms, which have predated U.S. action in some cases.104 There are also valid concerns that the outright exclusion of Huawei may slow and increase the costs of 5G deployment.105 What has often been characterized as an American “campaign” targeting Huawei risks backfiring if continued on its current trajectory, in which U.S. rationales have been perceived as shifting and inconsistent.106 However, a growing number of concerning incidents involving Huawei, including indicators of the insecurity of its equipment, accusations regarding its theft of intellectual property, and its involvement in providing surveillance capabilities to governments, continue to be exposed.107

China’s quest for 5G dominance has played out within a complex technological and geopolitical landscape.108 Indeed, different countries have their own security concerns and considerations, but not all share American assessments of the severity of these risks. Insofar as American policymakers see China as a great power rival and strategic competitor, allowing Chinese companies to play a key role in American critical infrastructure, or that of U.S. allies and partners, presents grave threats that are untenable and unacceptable for the United States, not only espionage but also outright subversion of this critical infrastructure.109 Yet Huawei has continued to expand its global presence, and the U.S. government has yet to present a viable and attractive alternative to working with Huawei. Many countries may have sunk costs and be “locked in” already to this choice based on earlier decisions, which raises concerns about not only security but also fair competition.110 However, it is encouraging to see emerging consensus among like-minded countries about potential principles and shared approaches to 5G security, particularly through the progress of a recent conference on 5G security in Prague.111

The age of 5G will present new risks and novel threats of disruption or exploitation. 5G involves far more than just new and faster wireless networks; it will be a vital component of future critical infrastructure. Consequently, the cybersecurity of 5G networks could prove uniquely challenging, considering the high levels of complexity and much greater potential for damage in the case of an attack. Not only the confidentiality of data on 5G networks but also questions of integrity and assurance will become urgent challenges. Whereas most cyberattacks to date have involved only data theft, an attack against future 5G networks could cause massive damage that might threaten public safety and critical industries in future smart cities.112 The often subpar security of IoT devices, of which there are an estimated 20 billion globally and growing, also presents serious reasons for concern. A high proportion of devices on the U.S. market have been made in China by companies with very poor track records on security.113 While vulnerabilities have been and remain a major concern in the telecom industry for 3G and 4G, the stakes will be even higher for securing 5G networks at all stages of their life cycles.114 In some cases, supply chains could be weaponized deliberately by adversaries that may prefer to “win without fighting.”115 The exclusion of high-risk vendors is an important measure to mitigate risk but does not constitute a complete solution.

5G must be designed and implemented with a holistic approach to security in mind from the start. The development of secure networks must entail more than simply excluding high-risk vendors, requiring rigorous, ongoing testing and screening. Indeed, careful scrutiny should be extended to all aspects of the production, construction, and management of these networks, involving screening of the security of all vendors and carriers. If an end-to-end approach to security is effectively implemented, 5G could prove more secure than our existing networks and critical infrastructure, but the consequences of insecurity would be far graver. In public debates on 5G security, the call and search for a “smoking gun” has been problematic. This framing of the issue has often distracted policymakers from thinking about the greater challenge of mitigating vulnerabilities that tend to be pervasive. Bugs can be just as problematic as backdoors. It is inherently challenging to differentiate an accidental vulnerability from one that is deliberately introduced. The primary difference is intent, which cannot be discerned from code alone. It is encouraging that the 3GPP’s SA3 working group is focusing on security, seeking to ensure that such security concerns will shape the development of standards.116 However, industry and government are just starting to grapple with the full range of issues in play.

Given the gravity of these security challenges, the apparent centrality of Chinese companies in the global development of 5G has raised intense concerns. There is a very real risk that vulnerabilities in networks, whether the result of poor security practices or deliberate introduction of backdoors, could be weaponized for leverage or coercive purposes, particularly in a crisis or conflict scenario. Considering China’s history of IP theft and cyberespionage, there is also a real risk such networks could be exploited for purposes of espionage.117 As a Chinese company, Huawei also would be subject to a number of legal demands, regulatory requirements, and mechanisms of coercion that are often ambiguous and expansive.118 Regardless of whether Huawei’s leadership may wish to disregard an order from the Chinese government, China lacks an independent judiciary system for company leaders to plead their case against the government, as Apple did in the United States when it fought an FBI order to unlock an iPhone. Huawei’s claims that it would “say no” to the Chinese government are not credible without indications of the company’s actual ability to do so.

Even if Huawei is given the full benefit of the doubt, despite its history and apparent involvement with the Chinese military and intelligence organizations, Huawei’s products and services have been assessed to be highly insecure, with a much greater prevalence of vulnerabilities relative to their primary competitors.119 Moreover, there are reasons to question whether knowledge of any bugs in its equipment could be shared more readily with China’s Ministry of State Security (MSS). This risk may be heightened given the influence of MSS in China’s vulnerabilities database, not to mention Huawei’s historical and continued linkages to the Chinese People’s Liberation Army, including military intelligence.120 For the United States, these risks and security concerns are inextricable from today’s geopolitical exigencies, insofar as the U.S.-China rivalry encompasses scenarios for which there is a nonzero probability of conflict, including over Taiwan. Consistently, Chinese military writings have highlighted the potential for cyberattacks on critical infrastructure as a prelude to outright warfare.121 The presence of equipment from high-risk vendors, such as Huawei, even in rural telecoms is concerning, considering that some of these networks are near military bases, which raises risks of espionage or exploitation.

#### And *Motorola* is reshaping global supply chains in a way that undermines the effectiveness of the US private enforcement regime

Note – GSCs = Global Supply Chains

Gerber ‘17 [David J. Gerber; Sept. 2017; University Distinguished Professor, Illinois Institute of Technology, Chicago-Kent College of Law. Journal of Antitrust Enforcement; “Competitive harm in global supply chains: assessing current responses and identifying potential future responses,” vol. 6, p. 5–24, https://academic.oup.com/antitrust/article-pdf/6/1/5/24149036/jnx015.pdf]

VII. THE MOTOROLA-MOBILITY CASE: SHOWCASING THE OBSTACLES

The 2015 Motorola-Mobility case of the Seventh Circuit highlights the obstacles.47 It is a major case that has drawn much attention in relation to the shaping of GSCs.48 This fact not only underscores the potential for constructive influence of the US private enforcement regime in the evolution of GSCs, but it also reflects many of the factors that we have identified as obstacles to realizing that potential. The US Supreme Court declined to review the case,49 and it may therefore remain an important component of US law relating to extraterritoriality, in general, and GSCs, in particular.50

The opinion

The basic fact pattern is typical of global supply chains. The plaintiff, MotorolaMobility, Inc., is a large US electronics manufacturer. It incorporates LCD screens in many of its products, purchasing most in Asia through a global supply chain. In this case, a small percentage of the component sales were made directly to the US parent (ca 1 per cent), but most were made to its wholly owned foreign subsidiaries. These units then sold some of the products to the parent and others to buyers outside the United States. On discovering that some suppliers that were part of the supply chain had agreed among themselves to increase the prices they charged for such screens, Motorola filed suit in US court for compensation for the losses incurred as a result of the agreements.

The appeals court upheld the lower court ruling that the plaintiff was not entitled to sue. At issue was the harm caused to the parent company as a result of purchases it made through its overseas subsidiaries. The opinion by Judge Posner did not treat that portion of the FTAIA that specifically deals with the extraterritorial reach of the statute (the effects principle). A criminal proceeding on the same basic facts had found that the effects of the foreign conduct on US commerce were ‘direct, substantial and reasonably foreseeable’ and, therefore, that the statute did apply to the conduct. Judge Posner accepted this finding.

The opinion focused instead on the issue of the plaintiff’s standing to sue. It analysed the issue by reference to the statute’s ‘arising under’ language. In Judge Posner’s view, the effect of the cartel agreements on US commerce occurred outside the United States and therefore did not ‘arise under’ US law. Accordingly, the plaintiff was barred from bringing suit in the United States because the losses were suffered by Motorola’s foreign subsidiaries rather than Motorola itself.

In reaching this conclusion, the Court rejected the plaintiff’s argument that the harm was suffered by the parent, because the foreign subsidiaries were completely owned and controlled by the parent and functionally part of the parent. According the opinion, this claim was a ‘fatal flaw’ in the plaintiff’s case. Judge Posner apparently did not consider total ownership and control of the subsidiaries as a sound basis for identifying them as functionally part of the parent.

He buttressed the denial of standing by referring to a US domestic antitrust law doctrine referred to as the indirect purchaser rule, which denies indirect purchasers the right to sue for harm suffered as a result of antitrust violations. This so-called ‘Illinois Brick’ rule was specifically crafted to achieve policy objectives—specifically, to increase enforcement of the antitrust laws by increasing the incentives for private actions.51 By assuring that at least the direct seller suffered sufficient harm to justify litigation, it sought to provide this incentive. The rule has been heavily criticized, and numerous states have contravened it in their own antitrust laws.52

Obstacles to a constructive role for US private enforcement

The opinion reflects some of the obstacles that impede US law from performing a constructive role in shaping responses to GSC-based harms. It applies the statute in ways that provide little guidance for future cases, uses the confused case law in ways that further contribute to the confusion, and inappropriately applies domestic doctrine to a transnational context.

Struggling with the statute

The Court struggles to make sense of the statute. First, it turns the ‘arising under’ language into a test of standing to sue, despite the fact that the statutory language has been understood to refer to other issues and that the legislative history does not support that interpretation. Second, it uses this language to define, in effect, the extraterritorial reach of the US antitrust laws in private enforcement cases. And third, the opinion applies the statute formalistically despite the fact that it is being applied to new circumstances that call for careful analysis of the consequences of its application. In particular, it claims that the Motorola’s wholly owned subsidiaries were not functionally part of Motorola, although they were completely owned and controlled by Motorola and, therefore, functioned as part of it.

Confused by the confused case law?

The opinion also reflects the confusion of the case law. Judge Posner injects issues from earlier cases that have little if any relevance to the case at hand and are likely to exacerbate the uncertainty and inconsistency of the case law. For example, the opinion inserts language about ‘comity’ from earlier cases, but uses it in ways that are misleading in relation to the cases from which the language is taken and which tend to obfuscate the issues relating to GSCs.

Missing the transnational: applying domestic doctrine to transborder contexts

The opinion’s ‘domestic blinders’ represent a third obstacle to the development of antitrust law relating to GSCs. The Court applies domestic rules to the transnational context without accounting for the changed context in which they are being applied. The result is an outcome that directly contravenes the policy on which the domestic rules were based.

Judge Posner’s application of the ‘indirect purchaser rule’ provides a particularly poignant example.53 According to this rule, only direct purchasers may sue for damages for harm caused by anticompetitive conduct. The rule was established in the Illinois Brick decision and based on ‘the longstanding policy of encouraging vigorous private enforcement of antitrust laws’. According to Illinois Brick, this policy called for ‘concentrating the full recovery for the overcharge in the direct purchasers’.54 Otherwise, there was a risk that ‘those who violate the antitrust laws by price fixing ... would retain the fruits of their illegality because no one was available who would bring suit against them’.55 The policy behind the rule was to encourage private enforcement.

In the GSC context, the application of the indirect-purchaser doctrine has precisely the opposite effect. It discourages private enforcement, because it all but precludes recovery by the victims of anticompetitive conduct. Except in unlikely cases, it virtually ensures that foreign cartels will ‘retain the fruits of their illegality’. Barring parent companies from bringing suit where they make purchases through their wholly owned foreign subsidiaries means that price-fixing within the supply chain will escape liability for such purchases, because the subsidiaries are unlikely to have a remedy under foreign antitrust laws. Judge acknowledges that ‘foreign antitrust laws rarely authorize private damages actions’, but ignores the consequences of this fact.56

#### More aggressive enforcement against foreign component cartels is key to protect global supply chains

Ryu ‘16 [Jae Hyung; Fall 2016; J.D. Candidate (2017), Washington University School of Law, St. Louis, Missouri; Wake Forest Journal of Business and Intellectual Property Law; “Deterring Foreign Component Cartels in the Age of Globalized Supply Chains,” vol. 17, no. 1, https://heinonline.org/hol-cgi-bin/get\_pdf.cgi?handle=hein.journals/wakfinp17&section=6]

The context of the antitrust statutes requires that the importation of finished products incorporating price-fixed components be treated as part of the import inclusion. The FTAIA's legislative history suggests that the drafters assumed that import commerce had a direct and substantial effect on U.S. commerce-the very kind of effect that the antitrust statutes were designed to regulate and deter. 1 One of the drafters sought to ensure that anticompetitive conduct in import commerce would remain subject to the Sherman Act because its effect would invariably reach American consumers. 1 16 Hence, the FTAIA came with a caveat that the statute would affect non-import foreign conduct. 1 Furthermore, the drafters wanted to impress upon the public that foreign non-import conduct may be subject to the Sherman Act only if it had a direct, substantial, and foreseeable effect on U.S. commerce.H8 By equating import commerce with non-import conduct that has a direct, substantial, and foreseeable effect on U.S. commerce, the drafters evinced an understanding that import commerce already had that similar requisite direct effect to be subject to the Sherman Act.119 Even under the paradigm in 1982 when the FTAIA was drafted, import trade or commerce was presumed to have a direct effect on U.S. commerce and thus be deserving of broad protection. 1 2 0

Yet, that was under the traditional paradigm, which neatly divided economies by national boundaries, and manufacturing processes were more or less confined within the national boundaries.121 However, today's economic reality is different. 122 The FTAIA serves to delineate the contours of the Sherman Act's extraterritorial reach. 1 2 3 Production chains have become global and largely foreign component manufacturing and assembly into finished products all occur outside the United States.124 Few of these of components are actually imported into the United States directly. 125 Nevertheless, because globalized supply chains are so prevalent in today's world economy that the U.S. economy will inevitably be affected if foreign cartels price fix components; it would subsequently raise the prices of affected finished products as well.126 This kind of internationally interdependent economy of today's scale was not envisioned when the FTAIA was drafted; therefore, the application of the statute should be updated to better reflect today's context in which globalized supply chains reigns.127

Moreover, trade has become a much more important component of the U.S. economy. Since 1982, merchandise trade's portion in the United States' gross domestic product ("GDP") has increased by more than fifty percent to reach nearly a quarter of the GDP.128 Therefore, undue influence on U.S. imports will have a much more significant impact on the U.S. economy than it could have had when the FTAIA was enacted.129 The health of the U.S. economy depends more on trade than before, and when components are manufactured and incorporated into finished products largely outside the United States, foreign cartel activities over component prices will have a significant amount of sway on the U.S. economy. This, in turn, provides grounds for the United States to be more vigilant and aggressively enforce the U.S. antitrust laws against foreign component cartel activities.130

#### Integrated and global supply chains solve every hotspot for conflict – material integration prevents war and encourages resolution – untangling risks the future of global stability.

Khanna '16 [Parag; 4/19/16; Senior Research Fellow in the Centre on Asia and Globalisation at the Lee Kuan Yew School of Public Policy at the National University of Singapore; "From War to Tug-of-War: The Global Fight for Connectivity," https://nationalinterest.org/feature/war-tug-war-the-global-fight-connectivity-15831]//GJ

Here is my prediction: Taiwan won’t cause World War III. Nor will Kashmir, nor the Senkaku Islands, nor the nonexistent Iranian nuclear bomb. We aren’t very good at predicting wars. The wars that have broken out in the recent past—the U.S. invasion of Afghanistan and Iraq after 9/11, Russia invading Ukraine, the proxy war under way in Syria—weren’t predicted by anyone.

Furthermore, applying ancient wisdom such as the “Thucydides trap” only gets us so far. In 2015, respected Harvard professor Graham Allison published a study covering five hundred years of geopolitical power transitions and found that war broke out between the “ruling” power and its “rising” challenger in twelve out of sixteen cases. Based on these historical odds, war between the United States and China is likely but not inevitable. The most important strategy to avoid sleepwalking into World War III, Allison’s brilliant paper urged, is a “long pause for reflection.” Let’s take that pause.

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This isn’t 1914. In our haste to make analogies to a century ago, we have neglected the differences. European nations traded heavily across each other prior to World War I, but they did so as vertically integrated mercantile empires drawing on raw materials from their own vast colonies. They traded in finished goods without outsourcing production to each other. We did not have today’s internationally distributed manufacturing networks in 1914. The nineteenth and twentieth centuries brought trade interdependence; in the twenty-first century, we have complex supply chain dispersal as well—including among rival superpowers.

Even more than trade, it is investment that determines the stability of relations. Under a Cold War geopolitical paradigm, rivals wouldn’t invest in each other either; the United States and the Soviet Union certainly didn’t. But today’s robust flows of global investment among friends and enemies—“frenemies”—highlight how we have shifted from a Westphalian world to a supply-chain world. This financial and investment integration comes in the form of the trillions of dollars of assets invested in each other’s currencies and equities, as well as the tangible, productive capital—factories, real estate, banks, agriculture—they have bought and built inside other’s territory to efficiently and profitably access their markets.

If the United States and China were to go to war, the most immediate casualty would be Walmart, America’s largest retailer, 70 percent of whose merchandise is imported from China. Walmart has also been buying e-commerce companies such as Yihaodian.com to boost sales in China. The world’s most valuable company, Apple (also American), would also see its stock plummet, with so much of the market sentiment around its potential linked to growth in China. Two other American technology giants, Google and Facebook, would have to give up their cherished dreams of equal access behind China’s “Great Firewall,” and Hollywood studios, already accused of self-censorship to gain investment such as Dalian Wanda’s recent purchase of Legendary Entertainment for $3.5 billion, would find themselves banned from the world’s fastest-growing film market.

Approximately 60 percent of the Fortune 500’s revenues come from overseas sales, and the recently ratified Trans-Pacific Partnership (TPP) agreement is an American-led effort to nudge Asia’s share of America’s exports up even higher—with the potential for China itself to eventually join the trade area. As of March 2016, China imports American shale oil supplies from Texas. Direct confrontation is thus not in anyone’s interest so long as China needs peace for growth, America needs China for its hardware and everyone relies on shipping through the South China Sea.

Supply chains thus diminish the incentives for conflict. Leaders think twice, and step back from the brink. The growing depth of global cross-border trade and investment make geopolitics much more complex than in previous eras. When Presidents Obama and Xi held a 2013 summit at Sunnylands in California and spoke of aspiring toward “a new kind of great power relationship,” that was a reflection of the current reality—not a future scenario.

The common-sense truth is that while leaders talk about “red lines” for public consumption, and navies come dangerously close to trading direct fire, global market integration churns forward, knowing that there are two kinds of mutually assured destruction at play: military and economic. Military maneuvers don’t tell us enough about what drives leverage among great powers nor what they are willing to fight over. The tangled complexities of today’s system force leaders to think beyond borders and make functional calculations about the cost-benefit utility of their strategies—knowing full well that supply-chain warfare involves not just an enemy “over there” but also one’s own deep interests “over there.”

Waiting for World War III thus recalls Samuel Beckett’s Waiting for Godot, in which Vladimir and Estragon resolve to hang themselves if Godot does not arrive—so they simply sit endlessly. Their would-be savior, of course, never comes, but the protagonists never actually commit suicide either.

It is well documented that the number and frequency of interstate wars has fallen to nearly zero. Equally important, but far less discussed, is our ability to ring-fence conflicts, containing them at the local or regional level rather than allowing them to spillover too widely or escalate too sharply. The one genuine international conflict of the past several years, between Russia and Ukraine, is an example of this. Russia has not invaded the Baltics, marched into Poland, shut off gas to Europe in the winter or otherwise cleaved the European Union. Russia lacks the capacity to do so, and knows the repercussions of overreach.

The Arab world also continues to seize daily headlines. Syria is undeniably a regional proxy war, meaning that chaos there will continue. But it is not likely that Sunni powers such as Turkey and Saudi Arabia will directly escalate against Russia and Iran, whose forces are backing Bashar al-Assad’s Alawite regime. Saudi Arabia and Iran are also jockeying in Iraq, marking yet another chapter in Iraq’s destruction that began with the 1980s Iran-Iraq War, the disastrous invasion of Kuwait in 1990, the U.S. invasion in 2003 and brutal insurgency ever since. But Iraq, too, will not become the flash point that triggers war among great powers. While all of these conflicts are tragic, none of them, civil or international, are of world-historical significance.

A far more important driver of the long-term geopolitical positioning among key powers is not their role in any of these minor wars, but how they play the great supply-chain tug-of-war that is a far more pervasive reality than international warfare. Tug-of-war is an apt metaphor for our times. The world’s oldest team sport, its rituals are recorded in ancient stone etchings from Egypt to Greece to China to Guinea. Often conducted in resplendent royal ceremonies, tug-of-war was used by the soldiers of great armies to build strength in preparation for combat. In the eighth century, the Tang dynasty emperor Xuanzong was known to pit over five hundred warriors on each side of a rope over 150 meters long.

The rope in today’s geopolitical tug-of-war is connectivity. States want to control the transportation, energy and communications infrastructures and markets that enable them to acquire resources, access markets and move up the value chain. We don’t fight over the borders that divide us, but rather pull and yank the supply chains that connect us. While very few societies are at war, all societies are caught in this global tug-of-war, competing over the flows of money, goods, resources, technology, knowledge and talent transpiring between them.

Wars of connectivity are won by economic master planning rather than military doctrine. Think about it: twenty-first-century China is not a superpower because of the size of its military arsenal, but because it has become the central hub for the world’s manufacturing and electronics supply chains, built a sizeable trade surplus and enormous currency reserves, and penetrated most of its neighbors through robust infrastructure networks and become their main foreign investor and export destination. Do you have any clue how many nuclear weapons China has? Exactly: It doesn’t matter. But you probably know a fair bit by now about how China builds special economic zones, buys and steals foreign technology, and capitalizes companies with billions of dollars to ramp up quickly and capture global markets that range from solar panels to mobile handsets.

Britain’s elite Royal Military Academy Sandhurst publishes a manual of strategies for success in tug-of-war, pointing out that a good team “synchronizes its movements to the point that their pull feels like it comes from a single, unified being.” Does America act like this? Do Washington politicians, the Fed, Wall Street bankers, Texas oil companies, Silicon Valley tech companies and the other players on America’s team act like a single, unified being? Or does China do it better? Tug-of-war is won slowly and carefully. Smart teams dig in their heels to hold ground and tire out opponents while collectively taking small steps to ultimately gain control.

Tug-of-war is still war without end, a marathon without a finish line. Winston Churchill once advised that it is always better to “jaw-jaw” than to “war-war,” meaning diplomacy is preferable to conflict. Today’s world is a hybrid of the two: It is an endless tug-tug.

The future of global stability hinges on whether great powers think and act in terms of sovereignty or supply chains—if they learn the benefits of fighting tug-of-war instead of the real thing. It is no doubt unwise to argue that World War III is a passé risk. However, as the French scholar Raymond Aron argued, nuclear deterrence and the benefits of hindsight are crucial in warding against the uncontrolled escalations of the twentieth century or even harrowing episodes such as the Cuban missile crisis. Furthermore, China’s neo-mercantilism today is quite different from the zero-sum European colonial mercantilism of centuries ago: It is the pursuit of catch-up modernization rather than global hegemony. China seeks foreign raw materials and technology, not foreign territory. The smoother the supply chains, the more satisfied China will be.

A hyperconnected, multipolar world is uncharted and dangerous territory, but the paradox of tug-of-war may be that the longer it goes on, the more everyone wins. If we play our cards right, North Korea will become a supply-chain condominium of China and South Korea and other investors variously exploiting its tremendous mineral and agricultural resources while modernizing its nascent manufacturing capacity. India and Pakistan will revive the historic Grand Trunk Road of trade linkages stretching from Afghanistan to Bangladesh, and complete the natural gas pipeline from Iran via Pakistan to India. China and Taiwan will deepen their supply chain linkages and accept the outstanding differences in political systems. And China and Japan will settle their historical grievances through generational change in leadership, and accept with maturity the obvious hierarchy of Asia’s future.

Today’s world is full of tension, strife and hostility: nuclear standoffs, terrorist insurgencies, collapsing states and tragic civil conflicts. It is healthy to remind ourselves that many of our ongoing flash points could potentially escalate through unpredictable chain reactions into global conflagration. But it is even more important to pay attention to what we are doing that prevents the unintended slide into disaster—and do more of it. The future of global stability hinges on whether we continue global supply-chain integration and content ourselves with waging tug-of-war rather than the real thing. The world’s oldest team sport has an admirable track record: almost nobody has ever died playing it.

#### *Motorola* creates a vertical disintegration loophole that shields cartels from liability – the aff resolves it

Harrington ‘14 [Joseph; September 2014; Patrick T. Harker Professor, Department of Business Economics & Public Policy, The Wharton School, University of Pennsylvania; CPI Antitrust Chronicle; “Motorola Mobility and the FTAIA: A Deterrence-Based Definition of “Direct” Effect,” https://www.competitionpolicyinternational.com/assets/Uploads/HarringtonSEP-121.pdf]

What is necessary to deter companies from engaging in anticompetitive conduct that causes harm to commerce? The first condition is that a company must know which actions create harm so that it knows to avoid such actions. Of course, deterrence also requires a company believe that by acting in a manner that creates harm, the chances of it being held liable (and penalized) are greater than if it were not to take a harm-creating action. This leads to the second condition, which is that a company must believe that it is more likely to be found liable if its conduct causes harm than when it does not. Deterrence then requires that liability be closely tied to the presence of a causal relationship between a company’s conduct and harm. If companies are found liable too frequently (e.g., they are liable whether or not the conduct caused harm) or too infrequently (e.g., they are not liable whether or not the conduct caused harm) then behavior will not be deterred because a company’s action has little effect on the legal consequences.

Through the lens of deterrence, let us determine what it means for conduct to have an effect on U.S. commerce that is “reasonably foreseeable” and “direct.” That the effect must be “reasonably foreseeable” is to require that it is reasonable to expect a company to be aware that its conduct would cause harm. A foreign company cannot be deterred from harming U.S. commerce if it does not realize that its actions would have such an effect. At the same time, a foreign company should not be incentivized to engage in conscious neglect of how their actions may impact U.S. commerce. Hence, it is not required that a foreign company be actually aware that its actions would create harm, but rather that it should be aware that its actions would create harm. The requirement that the effect is “reasonably foreseeable” satisfies the first necessary condition for deterrence.

Now we come to the source of contention; what it means for an effect to be “direct.” In applying the second necessary condition for deterrence, I propose that an effect is “direct” if it can be determined that the observed harm was caused by the actions of the company. That is, there is a clear path from conduct to harm that one can confidently conclude that the harm was caused by that conduct. This interpretation is consistent with that suggested by Judge Ruggero Aldisert in his dissenting opinion in LSL Biotechs, 9 which is that “direct” is “characterized by or giving evidence of a close especially logical, causal, or consequential relationship.” This definition serves the objective of deterrence because if foreign companies anticipate that they will be held liable when it is established that their conduct caused harm, then they will be less inclined to pursue conduct that causes harm.

That conduct has a “reasonably foreseeable” effect in producing harm is an ex ante criterion: A company should have anticipated that its action would cause harm. That conduct has a “direct” effect in producing harm is an ex post criterion: It can be determined that the measured harm was caused by the company’s conduct.

To draw out the distinction, consider the following situation: If the foreign manufacturers of LCD panels could not have known that the purchasers would install those panels in devices that would be sold in the United States then they could not reasonably have foreseen that their conduct would affect U.S. commerce. At the same time, an ex post analysis could determine that higher prices for LCD panels paid by Motorola’s foreign subsidiaries resulted in higher prices for mobile phones sold in the United States. In this scenario, a cartel among LCD panel manufacturers would have had a direct, but not reasonably foreseeable, harmful effect on U.S. commerce.

C. The Motorola Mobility Decision Does Not Deter

By comparison to the above scenario, the definition of “direct” used by the Seventh Circuit in Motorola Mobility does not satisfy the goal of deterrence. Consider the following two scenarios: In scenario I, there is a high pass-through rate of the price paid for inputs by the foreign subsidiaries to the final price for mobile phones sold by Motorola in the U.S. market, and the causal mechanism by which pass-through occurs can be identified. In scenario II, the passthrough rate is low (because the foreign subsidiaries or Motorola absorb most of the cost) and/or the pass-through mechanism cannot be clearly established.

According to the ruling of the Seventh Circuit, the effect is “indirect” in both scenarios and, therefore, the LCD panel manufacturers are not liable under the FTAIA. However, if the FTAIA is intended to balance comity with the prevention of harm to U.S. commerce then the two scenarios should be treated differently. The conduct in scenario I should be deterred, while that in scenario II does not warrant intervention. In scenario I, the conduct of foreign LCD panel manufacturers has a causal effect in creating substantial harm on U.S. commerce and, therefore, it serves the goal of deterrence if those manufacturers know they would be held liable under such circumstances. Interpreting an effect as “direct” when it can be established that there is a causal relationship between conduct and harm will then hold firms liable under scenario I while not under scenario II, and that is consistent with the goals of the FTAIA.

D. Creating a Liability Loophole

Potentially even more detrimental to the cause of preventing harm to U.S. commerce, the Seventh Circuit’s definition of “direct” effect would seem to provide a vertical disintegration loophole for avoiding liability. Consider a cartel of foreign manufacturers, each of whom has created a company for exporting their products to the United States. The manufacturers sell the products at collusive prices to the exporting companies who then sell them in the United States. The exporting companies are not liable as they are not coordinating on price and, by the interpretation of the Seventh Circuit, the manufacturers are not liable either. As long as there is an unspoken understanding that an exporting company does not sue the manufacturer that created it, the cartel has succeeded in colluding and creating harm in the U.S. market without creating liability. As it is difficult to believe the FTAIA intended to exempt that sort of behavior, again the Seventh Circuit’s definition of “direct” effect runs counter to the objective of the FTAIA.

#### And globalized CRM supply chains are hyper-vulnerable to anticompetitive conduct that shocks global battery markets – the entire market is at risk

CRM = critical raw material

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The worldwide electrification of the transport and other industry sectors, the development of a new generation of batteries for electricity storage as well as the digitalization of the industries, including the spread of robotics and artificial intelligence systems in the industry (‘industry 4.0’) will further boost the worldwide demand for CRMs such as lithium, cobalt and others. As a result, it might create new and unprecedented challenges, including bottlenecks and supply shortages, for the global supply chains of the CRMs on each stage ranging from mining to processing, refining and manufacturing.

The production of CRMs is geopolitically - compared with the concentration of conventional oil and gas resources - more challenging and problematic as currently 50% of CRMs are located in fragile states or politically unstable regions. Moreover, security of supply risks are not just constrained to primary natural resources and CRMs but also to the import of semimanufactured and refined goods as well as finished products. Manipulated prices, restricted supplies and attempts at cartelization of CRM markets with wide-ranging negative economic consequences are not restricted just to producing and exporting countries. Powerful states and private companies have also been responsible for non-transparent pricing mechanisms for many precious CRMs. Global supply chains have become ever more complex due to the blurring of boundaries between physical and financial markets and weakly governed market platforms. These market imperfections lead to the manipulation of prices and threaten the stability of the future security of supply of CRMs.

Given China’s status as the world’s largest battery producer, and as the leading nation in the electrification of the national transport sector, it may increase the dependencies of the European and U.S. carmakers on China. The dependence on CRMs such as lithium, cobalt, graphite, rare earth and others will equally rise. Those geopolitical impacts have already been highlighted in 2010–2011, when China in the midst of escalating diplomatic conflict with Japan stopped all exports of Rare Earth Elements (REEs) to the world’s biggest importer and blackmailed Tokyo diplomatically by instrumentalising its status as the world’s largest producer and exporter of REEs. It has sent a troubling message to the world that the new rising Asian economic and military power might not respect international law, the existing global rules of the WTO and that Beijing may not politically be willing to accept the regional and global responsibilities that grow with its emerging superpower status. Over the last months, China has further strengthened its efforts to control the entire global supply chain of lithium, from owning international mines to the production of lithium up to manufacturing of batteries and EVs.

#### The risk is increasing – supply chain disruptions cascade across key industries

O'Sullivan et al ‘17 [Meghan O’Sullivan; 2017; Harvard Kennedy School of Government Indra Overland Norwegian Institute of International Affairs—NUPI David Sandalow Columbia Center on Global Energy Policy; "The Geopolitics of Renewable Energy," https://energypolicy.columbia.edu/sites/default/files/CGEPTheGeopoliticsOfRenewables.pdf]

As the transition to renewable energy accelerates, cartels could develop around materials critical to renewable energy technologies. Even if these cartels were unable to generate as much impact as OPEC did with oil in years past, they might be able to exert influence over consumers of these materials. Some materials critical for renewable energy technologies are also critical in other sectors, such as consumer products and weaponry, raising the potential for competition between sectors as well.

Rare earth elements (including dysprosium, neodymium, terbium, europium and yttrium) are often considered to be critical components of renewable energy hardware.7 Ironically, rare earth elements are not rare. They are found in many countries, including China, Russia, Australia, the United States, Brazil, India, Malaysia and Thailand. However, two countries—China and Russia—together hold 57% of global reserves, while the largest remaining country, Australia, holds a mere 2.4% of global reserves.8 Furthermore, rare earths are found in dilute concentrations and are often difficult to separate, making mining, production and processing difficult and capital intensive. Today almost all mining, production and processing of rare earths is in China. Rare earths mined elsewhere generally must be exported to China for processing and then re-imported.9 As demand for renewable energy technologies continues to increase, countries may be inclined to hold rare earth elements in reserve for themselves and compete over these resources.

#### Advanced batteries are key tolasers – they’re key to missile defense and prevent a NoKo first strike

Daniels ‘17 [Jeff Daniels is a reporter for CNBC.com. Previously, he was a coordinating producer for CNBC, based at the network's Los Angeles Bureau. He joined the network in 1999. "Laser weapons developers ‘riding the wave’ created by Tesla, other battery innovators." https://www.cnbc.com/2017/11/17/laser-weapons-riding-the-wave-created-by-tesla-battery-innovators.html]

Advances made in automotive battery technology by Tesla and others are now being borrowed to help the Pentagon get high-power laser weapons that can kill everything from enemy drones to missiles.

The work on laser weapons underway includes an Air Force Research Laboratory contract awarded to Lockheed Martin last week to develop high-power fiber lasers that will be tested on a tactical fighter jet by 2021. The fighter jet demonstration project is part of the Air Force lab’s so-called SHiELD or Self-protect High Energy Laser Demonstrator program.

“You can power the laser like you can power the car off a battery system,” said Rob Afzal, senior fellow of laser weapon systems at Lockheed, the nation’s largest defense company. “We would use the same type of battery technology ... and the reason is you need to be able to deliver a lot of energy in a short period of time.”

Indeed, efficient lithium-ion battery technology commonly found in electric cars is now getting leveraged to drive power generation and storage solutions for military laser applications. It allows lasers to achieve significant bursts of energy very quickly for incinerating enemy targets, just as a Tesla Model S driver could accelerate from 0 to 60 miles per hour in a matter of a few seconds.

“As the batteries get smaller, cheaper, have more power density, more reliable, we’re just going to just have better power systems for the laser,” said Afzal. “The battery technology is ahead of the laser weapon technology.”

Some experts credit Tesla for helping bring a revolution in electric cars and lithium-ion battery technology, while also driving down battery costs and expanding the power storage market beyond cars. Even so, the Tesla brand competes with other lithium-ion battery suppliers, and research firm Technavio last year predicted the Chinese would surpass the U.S. in research and development spending on laser systems by 2022.

“It’s funny how a lot of things that happened in the auto industry can filter over into new capabilities on most other technologies, and lasers is one of them,” said Air Force lab’s SHiELD’s program manager Richard Bagnell.

Dan Goure, a former Pentagon official and now senior vice president of Virginia think-tank Lexington Institute, said the Lockheed contract to develop a laser for a fighter jet shows how far the research has come in terms of making laser weapons smaller.

In a release, Lockheed said this month its team will be “focused on developing a compact, high efficiency laser within challenging size, weight and power constraints.” It also said the laser system would be “pod mounted on the tactical fighter jet.”

‘Elon Musk in camouflage’

Yet the challenge comes from the fact that directed-energy weapons — lasers — tend to draw significantly more power than an automotive battery would require. The airborne laser weapons are designed to store power to fire off dozens of shots but can also include a power recharge system much like a hybrid electric car.

“You may literally not have to be generating power per se on the airplane [for laser weapons],” said Goure. “You can have battery storage, kind of like Elon Musk in camouflage. ”

It’s unclear if Musk’s Tesla or its suppliers are providing battery storage systems to the defense contractors for laser weapons. Tesla declined comment for this story.

For its part, Lockheed says it doesn’t use its own specialized battery technology for the lasers but one that’s being developed for automobiles, aircraft and other applications.

‘Riding the wave’

“We’re riding the wave,” said Afzal. “The battery advances are remarkable. We’re going to utilize that.”

Regardless, the military has been researching lethal lasers since the 1960s but in the past decade development has intensified with the focus on technologies that have more power, accuracy and reliability.

“One of the things we find in a lot of our systems — land, sea and air — is that we run out of shots particularly on the defense,” said Goure. “You just run out of bullets or missiles. And if you have laser, it avoids having to reload.”

For the Navy, a drone-killing laser weapon system was deployed a few years ago aboard the amphibious transport ship USS Ponce in the Persian Gulf, although the laser was removed from the ship last summer. In 2018, the Navy is expected to test a 150-kilowatt electric laser weapon. The high-energy laser weapon is being developed by Northrop Grumman to protect ships from drones, boats and enemy missiles.

The Army recently took delivery of a 60-kilowatt laser system from Lockheed that will be put on combat vehicles. Also, in August Lockheed did tests for the Army on a 30-kilowatt Advanced Test High Energy Asset (ATHENA) laser weapon system that shot down five drones. ATHENA is so powerful it can burn a hole in truck from a mile away.

Experts point out that a decade ago, the solid-state laser technology was bigger than many of the combat vehicles. “What’s happened is a new type of electrically-driven laser technology has evolved in the last 10 years where we can build very high power lasers that are very electrically efficient,” said Afzal. “The more efficient the laser you have, the less power you need to drive it.”

Killing missiles

At the same time, automotive industry innovation means laser weapons today are lighter and more portable than legacy chemical iodine lasers that were once tested aboard Boeing’s 747-400 jets for the Air Force.

Chemical lasers can pack a big punch in terms of firepower and shoot down ballistic missiles but are considered impractical and rely on large chemical tanks that can be hazardous in accidents.

Back in 2002, Boeing began testing chemical laser weapons on 747s in a program known as the YAL-1 Airborne Laser Testbed. The flying laser system was designed to shoot down enemy missiles but had mixed success, and the Pentagon pulled the plug on the $5 billion program in 2011. “One of the problems with the chemical laser is that first of all they’re too big and too heavy — and you have to carry the chemicals with you,” said Afzal. “With an electric laser, your platform which is driving, sailing, flying around, usually has a power system that can recharge your battery back. But in a chemical laser, once the chemicals are gone you have to go back to the depot.”

More recently, the U.S. Missile Defense Agency has indicated it wants to take another look at airborne laser weapons to kill enemy missiles but rather than use chemical lasers it plans to focus on electric solid-state laser technology.

In June, the agency put out a request for information with defense contractors for a drone equipped with a high-energy laser weapon system would be compact and designed to intercept missiles in the boost phase. That means the technology could one day possibly be used to bring down ballistic missiles fired by North Korea that are a threat to the U.S. or its allies.

#### NoKo first strike causes extinction

Dempsey ‘18 [Michael; 2/21/18; National intelligence fellow at the Council on Foreign Relations, a fellowship sponsored by the U.S. government. He is the former acting director of national intelligence; War on the Rocks; “What If Kim Jong Un Decides to Bloody America’s Nose First?" https://warontherocks.com/2018/02/kim-decides-bloody-americas-nose-first/]

For the past several decades, North Korea has weathered periodic spikes in U.S. diplomatic and economic pressure while continuing to make steady progress with its weapons programs. North Korean leaders correctly calculated for years that U.S. policymakers would find the cost of an actual conflict on the Peninsula too high for serious consideration, and that China would be a safety valve if economic sanctions became too painful.

From Kim’s vantage point, however, there are reasons to question whether those assumptions are still valid. Over the past year, the public rhetoric from U.S. leaders threatening his regime has reached an unprecedented level, with some statements indicating that the United States is “locked and loaded” for a conflict, and others even hinting at the idea of a nuclear strike against North Korea. At the same time, the United States has quietly increased its military footprint in the region, including more regular B-1 bomber flights over the Korean Peninsula and — for the first time in a decade — the deployment late last year of three U.S. aircraft carriers off the Peninsula. This stepped-up military activity has undoubtedly not been lost on Kim or his generals and has likely sparked internal discussion about potential U.S. offensive military operations.

On the economic front, meanwhile, China has become intensely frustrated by both Kim’s behavior and constant U.S. demands to get tougher on the North, and has gradually imposed increasingly punishing sanctions, agreeing to limit oil supplies and stop importing steel and various food products. This is particularly worrisome to Kim because China accounts for about 90 percent of North Korea’s foreign trade. Taken in combination these actions might convince Kim that the established playbook has fundamentally changed, and that he is now in real danger.

So, how might this realization alter North Korea’s actions? It’s plausible that, contrary to the logic that maximum pressure will force concessions, the North’s new constraints could persuade Kim that he needs to demonstrate his own resolve and preemptively remind the United States and its allies just how costly an attempt at forced denuclearization or regime change would be. Indeed, Pyongyang’s track record suggests a willingness to raise the stakes during periods of tension and to take lethal action — from the seizure of the USS Pueblo in 1968 to the artillery bombardment of Yeonpyeong Island in 2010 — when it believes it necessary.

If Kim reaches this conclusion, there are a few options that his regime could consider which U.S. policymakers should prepare now to counter. First, there is the strong possibility of additional missile testing, potentially involving more sophisticated delivery systems and warheads — a standard tactic Kim has employed in recent months to demonstrate his resolve and showcase the North’s newfound technical prowess. I believe the regime is also likely to engage in proportional actions: Recall that when North Korea objected to the release of a Sony film in 2014 that portrayed an assassination attempt on Kim, it responded with a cyberattack on that specific studio. Today, Pyongyang could calculate that it needs to similarly target business interests in South Korea and the U.S. to force an easing of economic sanctions. This would likely be done through a series of cyberattacks against vulnerable commercial targets in both the United States and South Korea, especially banks and key economic infrastructure, but could also involve physical sabotage operations.

Second, if Kim believes that military pressure against the North is reaching an unacceptable level, he could try to intimidate Seoul and undermine its cooperation with Washington. This option could involve using North Korean special forces to trigger a series of isolated explosions in major cities in the South (North Korean special forces have operated in the South in the past) or even another incident similar to the sinking of a South Korean corvette in 2010 (the Cheonan), which the North has repeatedly denied despite overwhelming evidence to the contrary. Along these lines, Kim could also enlist a “sympathizer group” rather than his own special forces to attack a U.S. or South Korean military installation, calculating this would send the intended message while maintaining some degree of deniability.

And third, if confronted with the threat of a major U.S. military buildup on the Peninsula later this year, Kim may well decide in desperation that his best option is to preemptively target (including with mines) the ports and airfields that the U.S. military would rely on to transport troops into South Korea. If he pursues this option, Kim would almost certainly expect a strong U.S. retaliation, but might calculate that delaying America’s ability to deploy significant ground forces onto the Peninsula is his only remaining option to buy time and is therefore his best military play. Kim has undoubtedly learned the lesson of Desert Storm, and is unlikely to allow the U.S. military to mass hundreds of thousands of troops in the South for an offensive at the time and place of its choosing.

Understanding North Korea’s internal decision-making process and the various influences on Kim’s calculations is perhaps the hardest intelligence challenge on the planet. As is well documented, North Korea is among the most isolated countries in the world, with a young leader with almost no international expertise and only a few years of actual leadership experience. Therefore, it’s quite plausible that Kim himself has yet to decide on a course of action for the current standoff with Washington, and that his decisions will be shaped almost entirely by his superficial perception of U.S. intentions and the perceived threat. Sadly, my experience working on this issue while in government also causes me to believe that Kim is surrounded by advisers who, based on the last quarter-century of U.S.-North Korea relations, may be overconfident that the United States will shy away from conflict in the face of aggressive actions by North Korea. These advisers are unlikely to tell Kim anything he doesn’t want to hear for fear of their own personal safety. In other words, it’s a situation ripe for miscalculation by both sides.

Given the stakes — a potential conflict involving nuclear weapons — a miscalculation leading to a broader conflict simply cannot be allowed to occur. So in the coming months U.S. policymakers will want to exercise prudence in and carefully weigh their public statements, think deeply about how Kim and other critical actors might misperceive and overreact to U.S. actions and rhetoric, work in the closest possible consultation with key regional allies (especially South Korea), and prepare U.S. military, intelligence, and diplomatic responses to the full range of potential North Korean preemptive actions and counter-actions. It would be nice if the current showdown with North Korea could be resolved through diplomacy and follow a logical, predictable script of American design, but the two countries’ painful shared history suggests that we shouldn’t bank on that occurring.

#### The aff protects international supply chains and allows for rapid economic growth – US antitrust policy is key to ensure private plaintiffs can seek treble damages – any alternative penalty is insufficient because the benefits of price-fixing outweigh the risks

Leonardo ‘16 [Lizl Leonardo; 2016; J.D. Candidate, DePaul University College of Law, 2018; B.S., 2011, De La Salle University-Manila, Philippines; DePaul Law Review; “A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce.” vol. 66, https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4008&context=law-review]

The Seventh Circuit ruling also addressed policy arguments that are pertinent in today’s global economy. It held that foreign subsidiaries could bring suit to seek remedies under the laws of the country where they operated, and in light of this, the United States must not overextend its reach. Rather, it should allow foreign countries to govern conduct that occurs exclusively within their borders.343 However, the court failed to consider that allowing a private company to pursue claims under U.S. antitrust law would detect and deter the formation of cartels.344 Treble damages are available under U.S. antitrust law.345 The adversaries of this proposition argue that this would presume the inadequacy of the antitrust laws of foreign countries.346 They argue that foreign countries, with the help of the United States, set up their own antitrust laws and continue to improve these laws throughout the years; thus, these foreign laws must prevail in dealing with foreign anticompetitive conduct.347 While it is true that the United States has taken on a role to help foreign countries develop their own antitrust laws, the Seventh Circuit’s ruling presumes that fines and criminal prosecutions, both here and abroad, are sufficient to deter global cartels.348

The truth is, collective laws across the nations are still inadequate to protect U.S. companies and consumers, primarily because many nations still do not have laws against international price-fixing cartels.349 In fact, only a limited number of countries allow private companies to bring private antitrust claims for damages.350 On the other hand, existing antitrust laws in many other countries are insufficient because the penalties are significantly lower than those in the United States; therefore, this discrepancy fails to deter foreign companies from forming international price-fixing cartels.351 The financial gains from a conspiracy far outweigh the maximum criminal and civil fines imposed by other countries’ antitrust laws.352

The presence of price-fixing conspiracies for products such as LCDs, automotive parts, vitamins, and DRAM illustrate these ineffective antitrust laws.353 Companies engaged in these conspiracies know how the system works and will repeatedly participate in cartels without more rigid rules in place, such as that of the Ninth Circuit’s.354 The Seventh Circuit’s logic seems misplaced when focused on the availability (or the lack thereof) of the laws in foreign countries where the conduct occurred. The antitrust laws of the United States have nothing to do with the adequacy or inadequacy of other countries’ antitrust laws. Rather, they have everything to do with the fact that U.S. consumers were injured.

In Empagran, the U.S. Supreme Court held that extraterritorial application of U.S. antitrust law should be limited to balance the “legitimate sovereign interests of other nations.”355 One of the fears is that foreign plaintiffs with no relation to domestic commerce would flock to the United States to recover damages, which would be too costly given the already scarce judicial resources.356 The Seventh Circuit emphasized the principle of international comity and brought up the same concern in its Motorola opinion.357 However, the enactment of the FTAIA, particularly the “gives rise to” requirement, already accounts for this concern.358 This second requirement of the FTAIA ensures that all causes of action that have domestic effects to the United States are the proximate causes to those effects.359 Congress, therefore, made sure that unnecessary suits are not filed in U.S. jurisdictions, while not overstepping into another country’s interests.360 In Motorola, it is undisputed that the defendants’ conduct had domestic effects, as the inflated prices paid by the foreign purchases were ultimately passed on to U.S consumers.361 Motorola purchased over $5 billion worth of panels, over fifty percent of which eventually entered U.S. commerce.362 What seems to be a small increase in the price of the panels nonetheless would have a substantial effect on the market.363 Furthermore, the defendants were business executives engaged in global supply chains.364 If they did not already, they should have known that the artificially inflated price of these LCD panels targeted to reach the United States (as alleged by Motorola) would have an impact on the U.S. market.365

Moreover, it does not appear that these cases have raised serious comity concerns; despite the DOJ’s prosecution of the foreign companies and their employees, no foreign government has stepped forward expressing deep concerns about the overreaching enforcement of antitrust law.366 This is not to say that courts must forget about the importance of international comity when analyzing antitrust cases. International comity ensures that the United States does not overstep into foreign countries’ authority when extending the reach of U.S. antitrust laws.367 In fact, the United States has proactively assisted foreign countries in their efforts to capture more anticompetitive conduct.368 However, despite the need to “tread softly” in this arena, the United States must put down its foot and continue to litigate claims of anticompetitive conduct by foreign companies, so long as the foreign anticompetitive conduct satisfies the requirements of the FTAIA.369

Limiting the extent of the FTAIA, as the defendants contended and the Seventh Circuit ruled, would significantly destabilize the enforcement of antitrust law—“a central safeguard for the Nation’s free market structures,” which “is ‘as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.’”370 The Seventh Circuit, in ruling that a “component” is not “direct” enough to provide sufficient basis for liability under the statute, precluded any claim that involved components of finished goods imported into the United States from being brought under the Sherman Act.371 In effect, the court has made a per se rule that claims based on foreign conduct regarding a component of finished goods that eventually reach the United States have no place in the United States’ jurisdiction.372 This sweeping decision has negative ramifications in the detection of cartels, the protection of U.S. consumers, and the development of the international business community.373

The Ninth Circuit’s logic and reasoning should prevail in subsequent cases. It allows for a more rigid, yet necessary, rule in the rapid growth of the economy. By the Ninth Circuit’s logic, foreign cartels that harm U.S. commerce will be reached by U.S. antitrust laws. Treble damages will disincentivize these foreign companies from pursuing anticompetitive conduct; products will not be overpriced as a result of cartels’ price-fixing; transactions among domestic and/or foreign producers will be much smoother because both parties are at ease. U.S. Supreme Court involvement, interpreting how the FTAIA applies to non-import trade, would provide answers to questions that federal courts have been struggling to answer for many years, and it would reverberate the United States’ firm position against conspiracies that adversely impact U.S. consumers and the U.S. economy.

#### The aff solves by clarifying the language of the Sherman Act and giving courts guidance on interpreting the FTAIA’s language

Ryu ‘16 [Jae Hyung; Fall 2016; J.D. Candidate (2017), Washington University School of Law, St. Louis, Missouri; Wake Forest Journal of Business and Intellectual Property Law; “Deterring Foreign Component Cartels in the Age of Globalized Supply Chains,” vol. 17, no. 1, https://heinonline.org/hol-cgi-bin/get\_pdf.cgi?handle=hein.journals/wakfinp17&section=6]

Resolving these conflicting ideas will be a difficult task because import commerce encompasses a complex web of transactions and implicates multiple aspects of economic policy-making.166 Therefore, Congress, which has not made major amendments to the Sherman Act or the FTAIA since their enactments,167 should clarify the statutes' scopes. As the above mentioned trade data suggest, the world economy is much more interconnected, and other countries have already begun to flex their antitrust muscles outside their borders in the context of price-fixed components.168 Moreover, because many corporations are multinational and thus subject to the corresponding jurisdictions' competitions laws, competition laws are starting to converge, mostly to resemble those of the United States.169 Congress, through its committees, research commissions, and hearings that will elicit expert testimonies, is in the best position to examine in detail which form of antitrust law would best serve the needs of American consumers and businesses.

In doing so, Congress should consider combining the Sherman Act and the FTAIA to clarify the interaction between the two statutes. 1 7 0 Because the FTAIA modifies the Sherman Act, instead of having a distinct section, the FTAIA's language can simply be added to the Sherman Act to make the Sherman Act more self-contained and easily understandable. In revising the statutes, Congress should define the contours of import commerce to provide courts with clearer guidance. Furthermore, considering that one of the major concerns involving a broad reading of the FTAIA is international comity, 172 it is more appropriate for Congress to consider complex foreign relation concerns than for the judiciary. Congress could update U.S. antitrust law in the face of increasing cross-border antitrust collaborations and other countries' practices of expanding extraterritorial applications of antitrust law. 17 3

#### Plan: The United States federal government should increase its prohibitions on anticompetitive business practices by expanding the extraterritorial scope of its antitrust laws.

## Harmonization Adv

#### Strengthening cartel responses mitigates the risks of regulatory harmonization – that offsets the costs of globalization and shields consumers

Leonardo ’16 [Lizl Leonardo, J.D. Candidate, DePaul University College of Law, 2018; B.S., 2011, De La Salle University-Manila, Philippines. "A Proposal t oposal to the Se o the Seventh and Ninth Cir enth and Ninth Circuit Split: Expand the cuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce." https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4008&context=law-review]

A U.S. Supreme Court ruling in favor of the Seventh Circuit will also prevent companies from potentially leaving the United States to avoid compliance with antitrust laws.417 Domestic companies with foreign subsidiaries that seek to increase their market share by colluding to fix the prices of products will be deterred from engaging in illegal conduct, but they will also be incentivized to keep their businesses in the country.418 Mere knowledge that companies can be liable in the United States for engaging in illegal, extraterritorial conduct that indirectly affects U.S. consumers could in itself discourage the companies from pursuing such conduct.419 Likewise, without the benefit of being exculpated from any extraterritorial conduct, companies will rather stay in the United States than incur expensive costs of moving overseas. This is a win-win situation; prices of products remain controlled by the natural forces of supply and demand, and small and local companies are able to compete with the bigger and international companies. On the contrary, a ruling that limits the extraterritorial reach of the FTAIA to non-import commerce, similar to what the Seventh Circuit held, will encourage companies to move their operations overseas and strategically only deal with the United States in instances they are certain will not subject them to either the Sherman Act or FTAIA.420

Arguably, ruling in favor of the Ninth Circuit could hurt companies that trade with the United States indirectly. These companies have legitimate reasons for incorporating as “foreign subsidiaries,” and subjecting them to U.S. jurisdiction would in effect deplete some of these purposes.421 Although domestic legal remedies are available in some foreign countries, as mentioned above, they are unlikely to deter price-fixing by international cartels.422

Moreover, having a more consistent approach in cases like this will strengthen and harmonize the partnership across nations. Needless to say, the cooperation between these countries can play a significant role in attaining this objective. Bilateral agreements between the countries have proven that, though challenging, implementing this stricter rule is not impossible.423 International trade rules, such as the General Agreement on Tariffs and Trade (GATT), World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), and agreements between countries, imply the general acceptance of this proposal.424 The rapid growth in globalization has forced governments to institute and enforce policies that both protect domestic products from multinational firms and encourage the domestic firms to compete internationally, in furtherance of international trade.425

One of the partnerships the European Union (EU) and the U.S. governments are currently working on is called the Transatlantic Trade and Investment Partnership (T-TIP).426 Its aim is to further develop the strong relationship nations have and leverage that relationship to boost economic growth and international competitiveness.427 The agreement purports to provide greater transparency around trade and investment regulation while ensuring the quality of the products.428 As part of the agreement, the governments seek to eliminate all tariffs, other duties, and charges on trade in various products between the United States and the European Union.429

The proponents of T-TIP point out that the elimination of tariffs and quotas will, among other things, entail lower costs of import to each of the regions, put products from one area “on equal footing” with the products from another, create more jobs, lower the unemployment rate, increase competitiveness, and improve the overall growth of members of the agreement.430 Although the agreement seems ambitious at this time, it intends to link two of the world’s larg est economies to generate a third of the world’s GDP.431 Critics argue, however, that the deregulation of several national laws—possibly resulting in lower consumer standards, as well as compromised laws covering intellectual property, food safety, privacy and data collection, and democratic legitimacy—are all steps in the wrong direction.432

Having an established rule that foreign companies’ non-import trade conduct can be subjected to U.S. antitrust laws, as long as the conduct had an “immediate consequence” on U.S. commerce, could mitigate the risks associated with the opening of U.S. and EU markets. Foreign companies that will be encouraged to invest in the United States as a result of T-TIP will have an understanding of the laws and the possible repercussions of any business transaction in which they take part. These companies do not need to determine if and how any of their strategic decisions can be subjected to either the Seventh or Ninth Circuit rulings before securing deals or signing agreements. The certainty will provide companies with notice and understanding of how the law affects their decisions, thereby making their investments less risky. In return, investments could become safer, eventually having a favorable impact on the continued development of the world economy.

V. CONCLUSION

International commerce has expanded over time. Accordingly, the U.S. courts’ interpretation of antitrust laws must keep up with this rapid growth. It is time to apply a consistent rule that will solve the convoluted body of law and conflicting application of that body of law by the courts. U.S. courts must be able to reach foreign companies’ extraterritorial conduct that have wrongfully affected the U.S. economy. Though international comity may have been a concern in years past, deterrence should bear a greater weight in determining whether a foreign company is subject to the United States’ jurisdiction. After all, antitrust laws are geared towards protecting consumers. Ex panding the reach of the FTAIA to include transactions that occurred outside of the United States, but still have direct and significant effects in the United States, will allow for a more rigid yet necessary rule in the age of increasing international commerce. Consistency across all federal courts will provide foreign companies greater transparency with regard to the laws that govern both their import and non-import trade transactions; formation of cartels will be minimized; price-fixing of products will be easily detected and stopped; innovation and creativity will be encouraged; competition will increase; and prices of goods will likely decrease. Consequently, the United States and the global economy will be favorably impacted.

#### Now is key – regulatory harmonization is around the corner

Moens & Scott 9/9/21 [Barbara Moens, Reporter @POLITICOEurope covering trade and Belgian politics. Mark Scott, Chief Technology Correspondent at POLITICO. "Transatlantic trade deal rises from the grave to fight China." https://www.politico.eu/article/ttip-rises-from-the-grave-to-fight-china/]

Activists may have thought the politically explosive Transatlantic Trade and Investment Partnership (TTIP) negotiations between Europe and America were dead and buried.

But one of the most important elements of those talks, which collapsed in 2016, is back from the grave: regulatory alignment between Washington and Brussels.

The first meeting of the Trade and Tech Council (TTC) in Pittsburgh on September 29 is intended to build a diplomatic platform for the European Union and the United States to work together on industrial and tech standards to counter China's rise in sectors ranging from microchips and robots to artificial intelligence and the alleged antitrust abuses of Google and Amazon.

The attempt to build a common U.S.-EU front could hardly come at a more sensitive moment politically, as the American retreat from Afghanistan has blown a hole in European faith in the administration of U.S. President Joe Biden. Many in Brussels feel let down by Washington's retreat from that country, while many in the U.S. capital believe EU countries did not pull their weight during the 20-year war.

“You can not discuss the Trade and Tech Council, and transatlantic trade relations overall, without Afghanistan in the back of your mind,” said one EU trade diplomat who spoke on the condition of anonymity because the ongoing talks are private. “The trust is gone, and that has to be rebuilt one step at a time.”

The two sides may not find themselves perfectly aligned against the common Chinese foe, however.

Brussels had originally hoped to pressure the Americans into following Brussels’ regulatory line on tech and trade, building on more than a decade of digital policymaking that spanned competition enforcement to global privacy rules. But now, the big fear among European officials is that the EU could well come off second best in this process and cede power to the U.S. after Washington flexed its muscles in early-stage talks around the upcoming trade and tech summit to focus on priorities for Biden's administration.

TTIP through the back door?

The TTIP negotiations are mostly remembered for protests about hormone-treated beef and chemically-rinsed poultry but the major benefits of TTIP lay precisely in bringing together conflicting EU-U.S. regulations. At the time, Brussels described this part of TTIP as a "regulatory cooperation body" and said that it could look at sectors such as data and cybersecurity.

Washington and Brussels now want to target those regulatory benefits again. “That sounds extremely boring and technical, but there’s a lot of money in having different standards. So this has the support from business from both sides,” former EU trade chief Cecilia Malmström told POLITICO earlier this year. Ten working groups — on everything from global trade standards to how to deal with online platforms — are expected to hammer out how such joint transatlantic policymaking could work in practice.

This time around, it’s not just car seatbelts or pharmaceuticals. The discussions focus on critical emerging technologies like artificial intelligence, semiconductors and data governance.

#### Unchecked globalization causes rising inequality and right-wing populism – that causes slow growth, polarization, and war

Flaherty & Rogowski 21 [Thomas M. Flaherty is a PhD candidate and NSF Graduate Fellow at the University of California, San Diego. He can be reached at t1flaher@ucsd.edu. Ronald Rogowski is Distinguished Professor of Political Science at the University of California, Los Angeles, and Weatherhead Scholar at Harvard University (2019–2021). "Rising Inequality As a Threat to the Liberal International Order." https://www.cambridge.org/core/journals/international-organization/article/rising-inequality-as-a-threat-to-the-liberal-international-order/4CDE05DEB3AB076CE338E1AA4A9C8087]

The openness to trade in goods, services, and factors of production the LIO has so effectively advanced over decades has concentrated real income growth in a very thin layer of workers. While this rise in top-heavy inequality doubtless has other causes, chief among them skill-biased technological innovation, trade openness has contributed mightily, particularly since the “China shock” of 2001;96 and certainly the populist movements that reject the LIO cast openness to trade and migration as the chief villain.

The ways in which rising inequality has threatened the LIO expose lacunae in international political economy's intellectual apparatus—“blind spots” that require remediation. Most importantly, our basic economics are, if not wrong, at least outdated. The field's adherence to classical trade models blinds us to the distributional effects revealed by top-heavy inequality: far more people lost from globalization, and fewer gained, than traditional theories (factor proportions and specific factors) suggested. While economists rapidly updated their trade models to account for the emerging reality of extreme inequality, political science largely stayed the course—and ran the danger, now realized, of misapprehending the domestic politics of globalization.

The trade literature offers three explanations for top-heavy inequality. The “enriched” Heckscher-Ohlin model of Haskel and colleagues shows how only a thin layer of extraordinarily talented individuals within the larger set of high-skill workers unambiguously benefits from a rise in the relative price of a skill-intensive product; the wages of both the less talented high-skill and the low-skill workers stagnate or fall.97 New new trade theory shows how a similarly narrow subset of very large and productive firms, and their employees, absorb the bulk of trade's gains at the expense of all other firms. Finally, economic geography suggests that trade concentrates economic growth in a few large metropolitan regions while inflicting stagnation and decline elsewhere. Each offers a pessimistic view of the politics of globalization in which variously defined superstars gain a far larger share than the society at large.

We validate these theories of top-heavy inequality with data on local election outcomes from as many as twenty-eight countries over twenty-six years. We find that public support for right-populist parties rises dramatically with exposure to imports and immigration, but only in those countries with high top-heavy inequality. The fact that the huge gains from trade and technology have flowed to such a small elite, while earnings in other categories have stagnated, may go far to explain why the antiglobalization movements blame not only crucial elements of the LIO, but increasingly a small and nefarious global elite, for what one politician luridly portrayed as the “carnage” among many regions and sectors of the advanced economies.

That these movements, with rare exceptions, seek relief in restrictions on trade and migration from populist movements of the Right, rather than in redistribution or training, probably owes much to the failure of the political Left to redistribute sufficiently.98 That so much of these parties’ electoral support, both in Europe and in the US, comes from manual workers and former supporters of the political Left lends credence to this conjecture.

The ill effects of rising inequality, however, extend well beyond the rising tide of antiglobalization movements and politicians. They extend to slower economic growth (bound to exacerbate existing resentments), increased political polarization, and even a heightened risk of international conflict.

#### Polarization causes extinction

Lugar and Hamilton 20 [Former Indiana Sen. Richard Lugar (1977–2013) and former Indiana Rep. Lee Hamilton (1965–1999) are distinguished professors of practice at the Hamilton Lugar School of Global & International Studies at Indiana University, A national security imperative: Bipartisan cooperation, https://thehill.com/blogs/congress-blog/foreign-policy/410146-a-national-security-imperative-bipartisan-cooperation]

Today, while a single existential threat may be gone, the challenges we face now are just as grave and complicated. China and Russia are revisionist powers, looking to overtake the U.S. and set the rules of the road. North Korea has developed a nuclear weapon and missiles to deliver it. Iran may soon decide it needs to restart its nuclear program and continues to sponsor terror throughout the region. The Middle East is a hodgepodge of civil wars and proxy fights between regional and world powers. The European alliance is fraying and democratic freedoms in formerly “safe” democracies are being rolled back. Countries like Venezuela are on the verge of collapse, and allies like Turkey and Hungary are sliding toward dictatorship.

Yet the bipartisan approach to national security has evaporated, boiled away by the same raging political fires that have consumed so many of our domestic issues. The world needs America to present a united front, where our political factions understand we’re better off working together than undercutting each other.

Historically, bipartisan cooperation has improved national security. Returning to that cooperative spirit would make America safer. Sen. Lugar, for instance, worked with his Democratic colleague Sen. Sam Nunn (Ga.) to secure and dismantle the recently-collapsed Soviet Union’s weapons of mass destruction, thereby leaving far fewer of these powerful weapons available to despots and terrorists. Similarly, Rep. Hamilton served with Republican Thomas Keane as Vice Chair and Chair, respectively of the 9/11 Commission, whose findings have helped prevent any other mass terrorist events in the U.S. since that horrible September morning 17 years ago.

#### Growing economic inequality drives diversionary nationalism and sparks international conflict due to greater military intervention

Solt 11 – Frederick Solt, Ph.D. in Political Science from University of North Carolina at Chapel Hill, currently Associate Professor of Political Science at the University of Iowa, Assistant Professor, Departments of Political Science and Sociology, Southern Illinois at the time of publication (“Diversionary Nationalism: Economic Inequality and the Formation of National Pride,” *The Journal of Politics*, Vol. 73, No. 3, pgs. 821-830, July 2011, Available to Subscribing Institutions)

One of the oldest theories of nationalism is that states instill the nationalist myth in their citizens to divert their attention from great economic inequality and so forestall pervasive unrest. Because the very concept of nationalism obscures the extent of inequality and is a potent tool for delegitimizing calls for redistribution, it is a perfect diversion, and states should be expected to engage in more nationalist mythmaking when inequality increases. The evidence presented by this study supports this theory: across the countries and over time, where economic inequality is greater, nationalist sentiments are substantially more widespread.

This result adds considerably to our understanding of nationalism. To date, many scholars have focused on the international environment as the principal source of threats that prompt states to generate nationalism; the importance of the domestic threat posed by economic inequality has been largely overlooked. However, at least in recent years, domestic inequality is a far more important stimulus for the generation of nationalist sentiments than the international context. Given that nuclear weapons—either their own or their allies’—rather than the mass army now serve as the primary defense of many countries against being overrun by their enemies, perhaps this is not surprising: nationalism-inspired mass mobilization is simply no longer as necessary for protection as it once was (see Mearsheimer 1990, 21; Posen 1993, 122–24).

Another important implication of the analyses presented above is that growing economic inequality may increase ethnic conflict. States may foment national pride to stem discontent with increasing inequality, but this pride can also lead to more hostility towards immigrants and minorities. Though pride in the nation is distinct from chauvinism and outgroup hostility, it is nevertheless closely related to these phenomena, and recent experimental research has shown that members of majority groups who express high levels of national pride can be nudged into intolerant and xenophobic responses quite easily (Li and Brewer 2004). This finding suggests that, by leading to the creation of more national pride, higher levels of inequality produce environments favorable to those who would inflame ethnic animosities.

Another and perhaps even more worrisome implication regards the likelihood of war. Nationalism is frequently suggested as a cause of war, and more national pride has been found to result in a much greater demand for national security even at the expense of civil liberties (Davis and Silver 2004, 36–37) as well as preferences for “a more militaristic foreign affairs posture and a more interventionist role in world politics” (Conover and Feldman 1987, 3). To the extent that these preferences influence policymaking, the growth in economic inequality over the last quarter century should be expected to lead to more aggressive foreign policies and more international conflict. If economic inequality prompts states to generate diversionary nationalism as the results presented above suggest, then rising inequality could make for a more dangerous world.

#### U.S. populism prevents effective liberal internationalism -- that makes the entire system more prone to erupt and escalates every major hotspot.

Lavin 17 [Frank Lavin is the Chairman of Export Now. He served in the White House, National Security Council, State Department, and Commerce Department during the Reagan, Bush (41) and Bush (43) Administrations. Things Fall Apart: Populism and Foreign Policy. Georgetown Journal of International Affairs. October 20, 2017. https://www.georgetownjournalofinternationalaffairs.org/online-edition/2017/10/20/things-fall-apart-populism-and-foreign-policy]

Trump does indeed have guiding principles, but they are process principles and not the substantive principles that we are used to seeing in a president. What shapes his foreign policy is that which shaped his singular triumph in public life: his campaign. Indeed, Trump abjured several of the policies that have guided Republican campaigns of the modern era: entitlement reform, trade agreements, and international leadership. A long-time supporter of both Bill and Hillary Clinton, President Trump’s political success was drawn not from conservatism nor an intellectual architecture—though he has some conservative impulses—but from political populism. His worldview in many ways is an extension of that belief.

What is Populism?

This populism has four characteristics. First, it is grievance-based. It focuses on problems rather than solutions. This has the extraordinary advantage of giving the message potency because negative statements can motivate more effectively than positive ones, but it makes it difficult to form a governing coalition, since constituencies that have a problem with a particular policy might have even greater differences among its alternatives. Indeed, as a candidate, Trump avoided articulating a positive vision regarding even central pillars of his campaign such as health care. Notably, Trump’s main foreign policy pronouncements in the campaign were grievance-based: terrorism, trade and immigration. Equally noteworthy, they were all essentially domestic issues with a foreign genesis. The traditional foreign policy questions were largely absent from his discussions: What is America’s role in the world? What is the value of an alliance? To what extent should we promote democracy and human rights, or should the U.S. focus on national interest calculations?

Second, the populist must establish emotional connectivity with the audience. Trump tends to evaluate people largely based on how they connect with him. The rally format suits him well; he loves the audience and the audience loves him. There are no questions and answers, nor any discussion, nor does there have to be new information, but there is plenty of emotional connectivity. Importantly, this emotional connectivity has little to do with economic class, a point that can befuddle Trump’s domestic political opponents, who underestimate his working-class appeal on the basis that he personally has little in common with them or that his policies supposedly would not help them. To a populist, the first point is broadly irrelevant and the second point is highly debatable. Might many a construction worker welcome a construction boom, and many a restaurant worker welcome an expansion of the business, if it meant job security and a larger paycheck, even if it would create disproportionate returns to the construction company and restaurant owner? For many working men and women, a growth in inequality is not inherently troubling. Thomas Piketty might be right, but it might not matter to most Americans if returns to capital outpace returns to labor. In addition, when establishment elites mock Trump, from his grammar to his boorishness, a portion of non-elites see this as condescension.

Third, populism is exculpatory: Every problem the United States faces was caused by others and the target audience is blameless. So if a company wanted to relocate some activity to Mexico, it must have been to exploit wage differences. No discussion as to whether wage increases at the U.S. facility have outpaced productivity increases. No discussion as to whether union rules impede flexibility and productivity. No discussion of the fact that Mexico might be a better production platform because it has more free trade agreements. Management is to blame, with Mexico in connivance. This is frequently expressed in themes of anti-establishment or alienation, which can have a corrosive effect when anchored in grievances.

Fourth, policy choices are cost-free and without trade-offs. Cost-benefit analysis, transition costs, the challenges in administering a government agency, underperforming programs, secondary effects and unintended consequences – these are all incidental to the victory of the policy choice itself. As such, populists might as well berate NATO leadership into burden-sharing, ignoring the downside to publicly hectoring leaders of sovereign nations. They, too, might as well call for a physical wall on the U.S. border with Mexico since it will be, by self-declaration, cost free.

To be fair, others in public life exhibit some of these elements. President Obama’s healthcare plan was historically grandiose in scope, cost and complexity, yet it was ballyhooed to save money. Similarly, Obama’s eight-year effort to reduce U.S. commitments to NATO was to have no costs in terms of force projection, alliance cohesion, or deterrence. And, Obama was the only President in the modern era to have run against trade as a candidate, an approach Trump followed. What Went Wrong? How could the bipartisan consensus on U.S. international leadership fade so quickly, particularly at a moment when the combination of market economics and alliances of democracies had resulted in perhaps the most prosperous and most liberal moment in human history? There are four contributors to the rise of populism: societal transformation, grievance economics, international leadership, and elite limitations. First, societal transformation – meaning both globalization and automation— has two profound socio-political effects. It produces an extraordinary degree of prosperity; and it carries with it a distribution effect. The bell curve of income distribution does not shift as much as it elongates. Few people are worse off, but many people are not better off. There is not necessarily the creation of a large number of winners and losers, but there is certainly the perception people getting left behind. Trump understands the message: The globalization club is having a party, and you are not invited. Silicon Valley is drinking champagne and your role is to pick the grapes. These trends also feed into the narrative of alienation because it decreases people’s control over their lives even as their overall prosperity increases. Globalization and automation have created economic anxiety in electorates around the world, and not just among steelworkers and coal miners. Realtors, bank tellers, school teachers, and cab drivers are all seeing competitive pressure and the prospect of job elimination. To many Americans, comparative advantage and creative destruction create a more prosperous society, but accompanying it is job insecurity. David Ricardo and Joseph Schumpeter might be right, but so what? Second, over several decades we have seen a shift from growth economics to grievance economics. This represents a break with the recovery policies that guided the leading economies through the 1950s and 1960s (and that economic rationalists such as Macron tilt toward today). In the current view, the primary purpose of economic policy is not to foment prosperity, but to redress grievances. Indeed, regardless of absolute improvements in well-being, reducing economic inequality is deemed to be a basis for policy. The premise of growth economics is that a system is fundamentally fair, so the main challenge is how fast we can go. The premise of grievance economics is that the system is fundamentally unfair, so going faster merely exacerbates the unfairness. This cult of inequality incentivizes interest-group politics and rent-seeking, leading to slower growth. If you focus on growth policies, you get growth. If you focus on grievance policies, you get grievances. A third cause is the shift in the U.S. international posture. We have seen a growing fatigue in the United States over the cost of international leadership. The U.S. entered the post-Cold War era with the institutions and the cohesion of the Cold War era largely intact, even though the end of the Soviet Union removed what political scientists term a “negative integrator.” Now we are deep into the post-post-Cold War era, with faded cohesion and institutions. For the first time since Harding and Coolidge we have two presidents in a row who have no international military or policy pedigree. Beyond the direct costs of international leadership in defense budgets and personnel, Americans seem more sensitive to the indirect costs of public opinion and anti-Americanism. Relationships can be expensive. Friendships can be complicated. If there is no immediate threat, and if no one likes us anyhow, then what is the point of foreign policy?

To sum up this point, imagine international Presidential leadership as a decision between whether to be a minute early or a minute late. Do you deter or do you react? Being a minute early requires leadership, because it carries with it the possibility of error and the cost of action without a consensus. “Left of Boom,” the British call it. Being a minute late and waiting until the problem has metastasized has the considerable benefit of allowing public consensus to build, and it is the less politically expensive approach. President Obama’s instinct is that foreign policy is better managed by being a minute late, such as responding after-the-fact to the Chinese build-out in the South China Sea, not confronting Russia on its intervention in U.S. elections, and perhaps in the cases of Aleppo or ISIS, Obama was more than a minute late. President Bush’s instinct was to be a minute early, foolishly so to his critics. Presidents have spent some 75 years since Pearl Harbor trying to be a minute early, with all the costs and mistakes that entailed, yet now we have two presidents in a row who believe we are better off being a minute late.

Finally, the appeal of populism has been driven by their perception of the limitations of the U.S. leadership class: insular, rigid, and sometimes simply mediocre. Additionally, over-engineered solutions and the appearance of being self-serving, if not corrupt, help the appeal of populism. Sometimes it comes from the declining marginal effectiveness of government programs as society becomes more affluent and complicated. Indeed, the Obama administration seemed to regularly play into the hands of populists, sometimes passively so, as with the refusal to challenge even the more exotic of the sanctuary city movement. Sometimes, it was by design as with the painstaking construction not to label Islamic terrorism as such. If responsible leaders appear to be playing favorites or not accurately describing a phenomenon, they abandon the issue to their opponents — a phenomenon Trump witnessed through his hesitation in characterizing the Charlottesville protests. If populists rely too heavily on emotional connectivity, which establishment politicians have any emotional connectivity? Does there exist an aspirant for President, other than Donald Trump, who can have a friendly discussion with a Walmart cashier? How many of the possible 2020 presidential candidates have worked in the “real” economy, working for an institution that needed to turn a profit? Sam Rayburn’s wish to Lyndon Johnson, after LBJ had related how bright was his brain trust, was that he wished one of them had run for county sheriff. Can we today wish that one of the 2020 presidential candidates will have run a diner, which would have required them to hire teenagers, train high school dropouts, deal with single parents, lay-off workers from failed projects and negotiate wages, all while paying taxes and dealing with various government agencies? Maybe this is why a restaurant worker might respect an owner, or even a New York real estate developer, but not a career politician. If the elites cannot maintain that connectivity, they give an opening to populists. Attaining political maturity contemporaneous with the Bush 43 invasion of Iraq, Obama was wary of American over-reach and committed to a foreign policy pullback. He embedded that withdrawal in a denial of American exceptionalism, a pillar of U.S foreign policy since Pearl Harbor. If you stop believing in yourself, it is difficult to ask others to believe in you. The rejection of America’s special role in the world helped set the stage for “Make America Great Again.” Was Barack Obama the ultimate Donald Trump enabler? There other contributing factors beyond the above four. The rise of identity politics probably played into Trump’s hands, as did the digital communications revolution. News clutter rewards pugnacity and sensationalism and allows for cocoons and even tribalism. It is also worth noting that Trump is a man of unusual presentation strengths, and he can effectively project personality. Simply put, Trump was an exemplary grievance candidate in a grievance year. Trump articulated a vision; Hillary Clinton did not. We are in a communications era. For Secretary Clinton, communications is a means to an end. For Trump it is an end. She believes in her in-box; He, in his out-box. Hillary campaigned as the functionary; Donald as the visionary. Is internationalism doomed? America is now in the middle of a twelve and possibly sixteen year reign of two presidents who challenge the Cold War view that America is better off with a leading international presence, with being a minute early. It is too expensive, argued President Obama, and it leads us into unwinnable conflicts, draining our reputation and our purse. It is too expensive, echoes President Trump, and foreigners abuse and cheat us. Obama argues for minimalism because the United States is a problem for the world, and Trump argues for minimalism because the world is a problem for the United States. Even as President, Trump is easy to underestimate. Appealingly so. Many critics derive amusement, even a sense of superiority, from his foibles. His factual errors and even spelling mistakes provide an opportunity for mockery, but the lazy epiphany of error-spotting is a poor substitute for a substantive rebuttal. And a significant portion of the criticism is either ad hominem or an over-reach, either of which helps Trump. Those who are serious about policy should look at the direction in which he is taking the country, rather than fixate on these errors. To be even-handed, if President Trump’s distinctive success in the public space was his astonishing 2016 victory, in 2008 the distinctive success of Senator Obama was his astonishing election. Obama wisely chose not to run on his government record but marshaled his formidable stage skills and personal charisma to direct criticism toward Hillary Clinton and John McCain. So if Trump’s foreign policy approach stems from his success as “Ranter-in-Chief,” does Obama’s approach stem from his success as “Charmer-in-Chief?” Radically different styles, but with policy similarities.

The deterioration in U.S. foreign policy will likely continue for the near term. On any given day, the Obama/Trump approach may make sense. We should be a minute late. It makes sense to skimp, to cut defense expenditures, to reduce international good-will and connectivity, to save money all around. Relationships can be expensive and even harmful – this is the seduction of the minimalist school. But there is a countervailing argument.

The main argument against this minimalist approach will be events themselves. The minimalist approach might work in a static environment, but that stasis in itself incentivizes a destabilizer. At some point, history presents the bill. Only then will we be reminded, perhaps cruelly, that although on any given day it might be less expensive to be a minute late, as a matter of national policy we need to be a minute early. If we are not willing to pay the price to be left of boom, then we must pay the price for the boom itself. Worse than the expense and bother of having friends would be the expense and bother of not having friends.

#### Trade that doesn’t account for distributional effects drives mass inequality and populism – perceived unfairness outweighs alt causes

Rodrik 17 [Dani Rodrik, John F. Kennedy School of Government, Harvard University. "Populism and the Economics of Globalization." The National Bureau of Economic Research Working Paper No. 23559. July 2017. http://www.nber.org/papers/w23559.pdf]

Globalization had a big upside. It greatly expanded opportunities for exporters, multinational companies, investors, and international banks, as well the managerial and professional classes who could take advantage of larger markets. It helped some poor countries – China in particular – rapidly transform farmers into workers in manufacturing operations for export markets, thereby spurring growth and reducing poverty. But the decline in global inequality was accompanied by an increase in domestic inequality and cleavages. Globalization drove multiple, partially overlapping wedges in society: between capital and labor, skilled and unskilled workers, employers and employees, globally mobile professionals and local producers, industries/regions with comparative advantage and those without, cities and the countryside, cosmopolitans versus communitarians, elites and ordinary people. It left many countries ravaged by financial crises and their aftermath of austerity.

Globalization was hardly the only shock which gutted established social contracts. By all accounts, automation and new digital technologies played a quantitatively greater role in de-industrialization and in spatial and income inequalities. But globalization became tainted with a stigma of unfairness that technology evaded. People thought they were losing ground not because they had taken an unkind draw from the lottery of market competition, but because the rules were unfair and others – financiers, large corporations, foreigners – were taking advantage of a rigged playing field.

Many of these consequences were predictable and are not a surprise. The same can be said about the political backlash as well. A number of empirical papers have linked the rise of populist movements – Trump and the right-wing Republicans in the U.S., Brexit in Britain, far-right groups in Europe – to forces associated with globalization, such as the China trade shock, rising import penetration levels, de-industrialization, and immigration.

Analyzing electoral results across U.S. congressional districts, Autor et al. (2016) have shown that the China trade shock aggravated political polarization: districts affected by the shock moved further to the right or the left, depending which way they were leaning in the first place. Elected Republicans became more conservative, while elected Democrats became more liberal. For Britain, Becker et al. (2016) find that austerity and immigration impacts both played a role in increasing the Brexit vote, in addition to demographic variables and industrial composition. Also analyzing Brexit, Colantone and Stanig (2016) find a much more direct role for globalization. Using an Autor et al. (2013)- type China trade shock variable, they show regions with larger import penetration from China had a higher Leave vote share. They also corroborate this finding with individuallevel data from the British Election Survey that shows individuals in regions more affected by the import shock were more likely to vote for Leave, conditional on education and other characteristics.

A second paper by Colantone and Stanig (2017) undertakes a similar analysis for fifteen European countries over the 1988-2007 period. It finds that the China trade shock played a statistically (and quantitatively) significant role across regions and at the individual level. A larger import shock is associated with support for nationalist parties and a shift towards radical right-wing parties. Finally Guiso et al. (2017) look at European survey data on individual voting behavior and find an important role for economic insecurity – including exposure to competition from imports and immigrants – in driving populist parties’ growth. The same variables also affect voter turnout: individuals who experience greater economic insecurity are also less likely to show up at the polls. As Guiso et al. (2017) indicate, the latter result suggests that studies that focus on vote shares alone underestimate the importance of these economic drivers, including globalization shocks.

A question that has attracted little interest to date is why the backlash has taken the particular form it has in different countries. Most (but not all) populist movements in the current wave are of the right-wing variety. These emphasize a cultural cleavage, the national, ethnic, religious, or cultural identity of the “people” against outside groups who allegedly pose a threat to the popular will. In the U.S., Donald Trump has demonized at various times the Mexicans, Chinese and Muslims. In Europe, right-wing populists portray Muslim immigrants, minority groups (gypsies or Jews), and the faceless bureaucrats of Brussels as the “other.” An alternative variety of populism revolves around a largely economic cleavage, the wealthy groups who control the economy and define its rules versus the lower income groups without access to power. The original American populism of the late 19th century was of this variety, focusing its opposition on the railroad barons and the Northeastern financial elite. Bernie Sanders’ presidential campaign in 2016 took a similar form. In Europe, there are a few left-wing populist movements, of which Greece’s Syriza and Spain’s Podemos are the best known. In Latin America, by contrast, populism has long taken mostly a left-wing form. In Figure 5 I provide some systematic evidence on the dynamics of support for populist parties around the world since the 1960s. The figure shows the aggregate vote shares of populist parties in countries with at least one populist party. I distinguish between leftwing and right-wing populists and between Europe and Latin America. (The U.S. presidential election of 2016 is not included.) The appendix discusses data sources and parties/countries covered. What jumps out of Figure 5 is the sharp contrast between the patterns of populism in Europe and Latin America. In Europe, the rise of populism is very recent and swift – from below 5 percent of the vote in the late 1980s to more than 20 percent by 2011-2015. Moreover, this increase is driven exclusively by right-wing parties. The left-wing populist vote share remains throughout well below 5 percent of the aggregate electorate in the countries included. By contrast, left-wing populism has always been strong in Latin America, with vote totals between 15-30 percent. It also has experienced a recent, if less marked, rise. Right-wing populism has remained at very low levels in Latin America. What explains the predominance of right-wing populism in Europe today, compared to the predominance of its left-wing variant in Latin America? To shed some light on this question, it helps to think of the rise of populism as the product of both demand- and supply-side factors at work. On the demand side, the distributional and other economic fault lines created or deepened by globalization generate potential public support for movements that position themselves outside the political mainstream and oppose established rules of the game. But the economic anxiety, discontent, loss of legitimacy, fairness concerns that are generated as a by-product of globalization rarely come with obvious solutions or policy perspectives. They tend to be inchoate and need to be channeled in a particular programmatic direction through narratives that provide meaning and explanation to the groups in question. That is where the supply-side of politics comes in. Populist movements supply the narratives required for political mobilization around common concerns. They present a story that is meant to resonate with their base, the demand side: here is what is happening, this is why, and these are the people who are doing it to you. In Mukand and Rodrik (2017) we provide a model where political conflict can revolve around different axes. There are three different groups in society: the elite, the majority, and the minority. The elite are separated from the rest of society by their wealth. The minority is separated by particular identity markers (ethnicity, religion, immigrant status). Hence there are two cleavages: an ethno-national/cultural cleavage and an income/social class cleavage. These cleavages can be orthogonal or overlapping, producing different patterns of alliances and political outcomes. With some simplification, we can say that populist politicians mobilize support by exploiting one or the other of these two cleavages. The “enemies of the people” are different in each case. Populist who emphasize the identity cleavage target foreigners or minorities, and this produces right-wing populism. Those who emphasize the income cleavage target the wealthy and large corporations, producing left-wing populism. It is reasonable to suppose that the relative ease with which one or the other of these cleavages can be targeted depends on their salience in the everyday experience of voters. In particular, it may be easier to mobilize along the ethno-national/cultural cleavage when society is experiencing an influx of immigrants and refugees with dissimilar cultural and religious identities. Then economic anxiety can be channeled into opposition to these groups. Immigrants and refugees can be presented as competing for jobs, making demands on public services, and reducing public resources available for natives. Indeed, a major source of support for far-right parties in Europe has been the fear that immigration will erode welfare state benefits, a fear that is heightened in countries experiencing austerity and recession (see for example Hatton 2016). Cavaille and Ferwerda (2017) find that support for right-wing populist parties is very responsive to perceived competition with immigrants for in-kind benefits, in their case public housing.

An important implication of this reasoning is that even when the underlying shock is fundamentally economic the political manifestations can be cultural and nativist. What may look like a racist or xenophobic backlash may have its roots in economic anxieties and dislocations.20 The supply-side of politics – the narrative on offer -- matters a great deal. This is a point that is often overlooked in current diagnoses. For example, it is not easy to know whether Trump’s victory represents an economic or cultural phenomenon without disentangling the demand and supply sides – the underlying grievances, on the one hand, and his narrative, on the other.

What about Latin America? The reason that populism took a divergent path in Latin America may be related to the fact that the salient shocks associated with globalization took different forms there. Latin Americans who were affected negatively by globalization experienced it not as immigration or rule by Brussels/Frankfurt, but as rapid trade opening, financial crises, IMF programs, and entry by foreign corporations in sensitive domestic sectors such as mining or public utilities. The anger to be mobilized was against these forces and the domestic groups that supported them. This lent itself to left-wing (economic) populism rather than right-wing (cultural) populism.21 The European exceptions to right-wing populism provide further support to this argument. The two European countries that grew substantial left-wing populist movements – Greece and Spain – bear a certain similarity to Latin America. They were major recipients of capital inflows under the European model of financial globalization, the euro. Once the sudden stop took place, their economies went into a tailspin and unemployment skyrocketed. The shock was then intensified by the presence of a common currency and austerity policies imposed from the outside – a troika made up of the IMF, the European Central Bank, and the European Commission. Although all countries in Europe were affected by the euro crisis, Greece and Spain were among the most adversely hit. Greece has yet to recover, and unemployment remains very high in both countries. All this is reminiscent of Latin American boom-and-bust cycles, going back at least to the 1970s. So it is not surprising that the financial crisis and its aftermath in Spain and Greece provided fertile ground for left-wing populists, for similar reasons. The relative weakness of cultural/religious cleavages to be exploited may also play a part in favoring left-wing over right-wing populist movements. In Latin America, the bulk of immigration has been from other Latin American countries or from culturally similar European countries. Within Europe, Spain and Greece once again provide instructive counter-examples. Compare the immigration experience of Spain with that of France, for example (Table 2). Even though Spain has a somewhat larger migrant stock in relation to its population, the majority of Spain’s immigrants come from either Latin America or from advanced European countries.22 In France, by contrast, the largest share (more than 40 percent) of migrants are from Moslem countries (Algeria, Morocco, Tunisia, Turkey) and an additional 10 percent come from Sub-Saharan Africa. A rightwing populist party (i.e., the National Front) has much more fertile ground in France than in Spain. The U.S. presents a mixed case, combining characteristics of both of these paths. Unlike Europe which had opened up to trade and reached a political settlement supporting it long ago – extensive safety nets in exchange for trade openness – the U.S. experienced increased exposure to imports comparatively recently. And it did so without systematic compensation. So imports (especially from China) and trade agreements (with Mexico, Asian countries) were politically salient issues, around which large number of voters could be mobilized. The financial crisis and the differing fates of large banks versus lowincome homeowners – one bailed out, the other not – engendered anger at the financial elites. At the same time, immigration from Mexico, the threat of radical Muslim terrorism, and lingering racial divides were ripe for political manipulation. In other words, the U.S. presented ample ground for both types of cleavage. Correspondingly, the 2016 presidential elections were contested by major populist movements on both the left and the right, led by Bernie Sanders and Donald Turmp, respectively.

8. Concluding remarks

One conclusion from the preceding discussion is that the simple economics of globalization is not particularly auspicious with respect its political sustainability. This is especially true of the advanced phases of globalization – what I have called elsewhere “hyperglobalization” (Rodrik 2011) – in which the ratio of political/distributive costs to net economic gains is particularly unfavorable. Historically, the unification of national markets has required an unequivocal political project led by a strong central executive. Nothing comparable exists globally, and the European experience provides ample reason to be skeptical that something like that can be achieved even regionally. In a world divided politically, markets face strong centrifugal forces as well.

The global economic arrangements of the immediate post-war era were built around John Maynard Keynes’ insight that sustaining a world economy reasonably hospitable to international trade and investment would require carving up space for domestic macroeconomic management. For Keynes, this meant capital controls in particular, which he viewed not as a temporary expedient but as a permanent feature of the international economic order. The same principle was followed in other domains as well. The GATT regime entailed a thin model of trade integration, not reaching beyond direct border barriers or manufactured imports in advanced economies. It left plenty of room for countries to design their own regulations and industrial policies – and indeed protect “sensitive” sectors (such as agriculture or garments).

The resulting system -- variably called the Bretton Woods compromise or embedded liberalism23 – was a great success. It fostered a large increase in global trade and investment and saw rapid economic development in both the advanced and developing economies. Perhaps it was too successful for its own good. By the late 1980s, policy makers and economists thought they could make it work even better by pushing for deeper economic integration. Trade agreements became more ambitious and reached beyond the border into domestic regulations. The removal of restrictions on capital mobility became the norm rather than the exception. In the process, the “embedding “ or “compromise” that had made the earlier regime such a success was overlooked.

The rise of populism forces a necessary reality check. Today the big challenge facing policy makers is to rebalance globalization so to maintain a reasonably open world economy while curbing its excesses.

#### The plan removes immunity for international cartels and stabilizes global supply chains while sheltering consumers from excess costs

Cognetti ‘16 [Catherine; 2016; J.D. Candidate, 2017, Fordham University School of Law; B.A., 2012, College of William and Mary; Fordham Journal of Corporate and Financial Law; “Single Call: The Need to Amend the Parent-Subsidiary Relationship under the FTAIA in View of Motorola Mobility,” vol. 9]

The primary focus of the United States antitrust laws is to deter behaviors that harm United States commerce 80 The Seventh Circuit's decision fails to consider the adverse effects it would have on two economic policy goals: deterrence of cartels and promotion of the efficient use of international supply chains relied upon by American companies and consumers. 21 The facts of Motorola Mobility are increasingly common in today's interconnected global economy.28 2 It is not unusual that an American company, which owns and controls foreign subsidiaries as part of its supply chain, finds itself victimized by a global cartel 8 3 In the last twenty-five years, international price-fixing conspiracies have cost consumers around the globe more than $1 trillion.2 84 The particular price-fixing conspiracy in Motorola Mobility affected well over $23.5 billion in sales of LCD panels imported into the United States and enabled conspirators to impose overcharges of more than $2 billion on those imports. 285 Consequently, both effective cartel deterrence and the efficient use of international supply chains are policy goals of exceptional public importance that have been hindered by the Seventh Circuit's decision.286

A number of prominent economists and academic organizations submitted an amicus brief on behalf of Motorola.28 They argued that as a matter of economic policy, purchases by foreign affiliates of American companies "should be permitted to seek treble damages in U.S. courts to deter the formation of cartels that harm U.S. consumers and businesses., 288 The American Antitrust Institute ("AAI") echoed these policy concerns, arguing that the Seventh Circuit panel's decision undermines deterrence of foreign cartels that harm American businesses and consumers. 289 The AAI further criticized the panel's decision "for adopting a 'super Illinois Brick rule' that would preclude indirect purchasers in the United States from recovery for injury caused by foreign cartels." 290 In this manner, they argued, the panel was determined to combat an "explosion of litigation against international cartels," based on its belief that American consumers were harmed so often that to permit recovery would open the floodgates. 291

Congress designed the FTAIA to strike a balance between protecting commerce and consumers while "avoiding unreasonable interference with the regulation of foreign markets by other countries" in respect of comity.292 In the FTAIA context, comity is "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws. 293 While there is a strong presumption that federal statutes are to be construed to avoid interference with the sovereign interests of other nations, the increasingly global economic and multilayered supply chains have made the protection of United States commerce that much more important. 94 There is no reason to believe that Congress would have intended the FTAIA to depart from longsettled precedent that applies the Sherman Act to cartels that harm the United States, but to instead largely immunize foreign cartels from liability for the damage they cause American companies and consumers.295

Furthermore, antitrust penalties imposed on international cartels "are collectively inadequate to deter international cartels, in part because many nations do not even have laws against international price-fixing cartels." 296 The Seventh Circuit's ruling creates an incentive to inefficiently reorganize a supply chain to change the purchaser to the American parent company and the delivery location to the Untied States for legal reasons. 29' This would result in the loss of benefits a corporation would otherwise stand to gain from locating near key foreign suppliers. 298 It would likewise force American companies to forgo potential benefits from moving production offshore.299 Consider this: it would be efficient for Motorola to purchase LCD panels delivered in the United States, but not for LCD panels delivered abroad to Motorola's foreign subsidiaries. Therefore, in response to the legal rule crafted by Seventh Circuit barring an antitrust claim based on LCD panels delivered abroad, "Motorola would be incentivized to switch its purchasing behavior to have its parent company, and not its foreign subsidiaries, make future purchases and take delivery in the United States."300 The outcome from the Seventh Circuit's decision thus creates economic inefficiencies that leave American consumers worse off.

Moreover, there is a chance that the Seventh Circuit's ruling has the unintended consequence of encouraging the creation of cartels by foreign countries to attract business. 3"' The rule would allow such countries to permit the exploitation of American parent companies' supply chains by selling to foreign subsidiaries barred from pursuing an antitrust claim in United States courts, as was the case in Motorola Mobility.30 2 The result would lead to increased production costs and, ultimately, higher prices of final United States consumer goods.303

Regardless of where the LCD panels were purchased or delivered, this price-fixing conduct resulted in the elevation of the price of LCD panels, which in turn elevated the price of the finished cellphones by the exact same amount. 304 This is where the example provided in the beginning of this Note rears its head.30 5 It does not matter whether an LCD panel was sent to the United States and then manufactured into a Motorola phone, manufactured into a Motorola phone in Asia and then sent to the United States, or manufactured into a Motorola phone in Asia and sold into the United States, because the substance of these transactions is all the same.306 Rather, the only thing that should matter is the substance of the actions: a price-fixed commodity was placed in a product and shipped to the United States, effectively harming American consumers. 30 7

#### An effective test case in consumer protections offsets antitrust populism – that flips every DA

Delrahim 19 [MAKAN DELRAHIM Assistant Attorney General Antitrust Division U.S. Department of Justice. "Ensuring The Legacy of the Consumer Welfare Standard."https://www.justice.gov/opa/speech/file/1222866/download]

No policy—no matter how sound—is immune to calls for change. Throughout history, when reformers fail in the legislative arena, they will turn to existing laws and regulations and try to manipulate them in ways never previously seen. I won’t mention specific examples, but we have seen this playbook when federal courts “interpret”—or more accurately, rewrite—the law in head-scratching ways, and when agencies issue new regulations that strain the statutory text.

Some reformers now seek to bring this playbook to the domain of antitrust law, which if read broadly could wield tremendous power over the economy. Unbridled, this power could do significant damage to the economic impulses that drive innovation, gains in efficiency, and other procompetitive outcomes for consumers. Antitrust law may be particularly vulnerable to hasty change given its “common law” status and evolution in light of advancements in economic thinking. We will see in our lifetimes whether the pendulum will swing back and unravel the progress the field has made.

What can practitioners, academics, and enforcers do if they want to preserve the consumer welfare standard? First and foremost, we should not be complacent. Many deride the latest reform movement as “Hipster Antitrust,” because advocates for abandoning the consumer welfare standard invoke a decades-old trust-busting era that we now consider antiquated and economically misguided. Labeling one’s opponents only goes so far. Winning an economic debate goes further, but not far enough: the modern antitrust reform movement is less concerned about economic soundness than it is about results.

That means we must demonstrate to observers that we will pursue effective results whenever we find anticompetitive conduct. We must be vigilant to ensure that the biggest companies are minding the guardrails of competition. If we don’t act swiftly and certainly, then we risk looking impotent next to those who would punish monopolists just for being big. That approach, of course, is an axe where a scalpel is needed. If we don’t use our scalpel, we shouldn’t be surprised to see the reformers sharpening their axes.

Second, and more importantly, I believe that the consumer welfare standard will survive the winds of change if we prove that it works. Antitrust law must live up to its promise of protecting competition and consumers. That requires enforcers to think creatively and act vigorously.

In particular, enforcers must answer critics of the consumer welfare standard who wrongly assert that it is concerned only with price effects. That has never been the case. For decades, courts interpreting the Sherman and Clayton Acts have recognized harms to competition in the form of lower output, decreased innovation, and reductions in quality and consumer choice.

Indeed, the harm asserted by the government in the Microsoft case took the form of reduced innovation and consumer choice. The D.C. Circuit recently affirmed this innovation-centric approach in its AT&T/Time Warner opinion. Despite the district court’s factual findings in that case, the circuit court’s opinion was favorable to future enforcement actions in several respects. Among others, the court recognized that harm to competition extends “beyond higher prices for consumers, including decreased product quality and reduced innovation.”4 The court’s legal analysis will help us when we bring our next case alleging non-price effects as competitive harm.

To be sure, price effects are easiest to quantify and may be an effective way to appeal to a skeptical judge or jury. They are not, however, the exhaustive means of proving an antitrust violation. Instead, we should focus our energy on understanding the broader set of effects that may result from anticompetitive behavior or transactions.

Ultimately, I believe that antitrust law and the consumer welfare standard will survive the winds of proposed reform, in much the same way Judge Bork envisioned it. It is up to us, however, to keep the foundation steady through vigorous action to protect competition and the American consumer.

# 2ac

## cartels

#### Government enforcement alone fails – only private action can create sufficient deterrence

Ryu ‘16 [Jae Hyung; Fall 2016; J.D. Candidate (2017), Washington University School of Law, St. Louis, Missouri; Wake Forest Journal of Business and Intellectual Property Law; “Deterring Foreign Component Cartels in the Age of Globalized Supply Chains,” vol. 17, no. 1, https://heinonline.org/hol-cgi-bin/get\_pdf.cgi?handle=hein.journals/wakfinp17&section=6]

The purpose of the antitrust statutes is better served if the importation of finished products incorporating price-fixed components is treated as part of the import inclusion.131 At the outset and in the abstract, if the goal is to deter anticompetitive conduct because it leads to unfairness and inefficiency, who brings the suit hardly matters as long as the defendant in violation of the law must pay for the transgression-the plaintiff is merely the vehicle to mete out the punishment.132 Courts have approved this notion, emphasizing that antitrust suits are about the defendant's conduct, not the plaintiff s.133

This is especially true in today's internationally interconnected economy and globalized supply chains.134 Private suits constitute a significant part of the antitrust deterrence mechanism.135 In fact, scholars have noted that government enforcement alone fails to provide adequate deterrence against antitrust violations.136 When it comes to international cartels, the current deterrence mechanism government enforcement combined with private suits-is largely ineffective in meeting the deterrence goal. 37 In order to restore a meaningful level of deterrence, private suits need to be available even more widely, not barred or limited.138 However, if courts were to limit private suits only to direct purchaser plaintiffs (actual component importers),139 the Sherman Act would be without teeth.140 As Justice Brennan wrote in his dissent in Illinois Brick, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."141 If the direct purchaser fails to bring a suit for whatever reason-attorney’s fees, power imbalance against the cartel that retains absolute control over the purchaser's supply of the necessary component, to name a few-then there is effectively little deterrence against the cartel because "ultimate consumer individuals often suffer only minor damages and therefore have little incentive to bring suit." 142

This deterrence gap is even more pronounced when one considers that a large portion of finished products are assembled outside the United States.143 When finished products incorporate the price-fixed components, the increased price will be passed on to the finished products and affect the economy.144 The restrictive reading of what constitutes conduct involving import trade or commerce in the context of price-fixed components would render the Sherman Act powerless to defend the U.S. economy against an influx of price-fixed components. 145 The Seventh Circuit in Motorola justified barring private damages for price-fixed components and distinguished its seeming conflict with Hui Hsiung by reasoning that Hui Hsiung's prosecutorial context minimized the international comity concerns because the government presumably takes them into account. 146

Yet, the European counterpart is already expansively employing its antitrust laws in the context of import commerce. In 2010, the European Commission, facing the same cartel faced by the Motorola court, fined the LCD manufacturer cartel for fixing prices.147 These panels were manufactured and incorporated into televisions, computer monitors, and notebooks in Asia. 14 8

The finished products were then imported into the European Economic Area ("EEA"). 149 The European Commission found significant that the cartel was "aware" of its violation and that it harmed European buyers of finished products that use the LCDs.15 0 Innolux, one of the fined defendants, appealed to the European Union's Court of Justice ("Court of Justice") and challenged the European Commission's jurisdiction over their conduct. The Court of Justice, noting that the issue did not involve the actual cartelized components but rather finished products incorporating the components, nevertheless held the cartel's activities were subject to the European Union's competition laws.152 The court reasoned that failing to punish the cartel would overlook the adverse economic effects in the EEA.153 The Court of Justice identified two potential advantages a cartel that price-fixed components would have over competitors.154 The first advantage is passing the increased price to finished products and consumers, who take the brunt of increased prices. 155 Second is the cartel member achieving a relative cost advantage against its competitors when the component purchaser does not raise the price and forego partial revenue. 1 5 6 Either way, unless punished, the cartel would get away with the price-fix despite the adverse effects on domestic commerce. This case serves as further evidence that achieving the anticompetitive statutes' purpose requires extending their reach to the importation of finished products 157 incorporating price-fixed components.

The current pending case 8 and related guilty plea,159 involving an international cartel that price-fixed capacitors, provides a good case study of the potential economic ramifications of not enforcing the Sherman Act against the importation of finished products incorporating price-fixed components. Capacitors form an integral component in most electronic devices.160 A number of capacitors are manufactured and incorporated into electronic devices outside the United States before the finished products are sold in or delivered throughout the United States. 161 When capacitors' prices-while individually cheap, "typically under a penny," 1 6 2 -are artificially fixed higher by a cartel of global manufacturers, the increase will invariably raise the finished products' prices.163 When the finished products incorporating the price-fixed capacitors are imported into the United States, they are involved in import commerce. To resolve the uncertainty and better deter international cartel activities adversely affecting U.S. commerce, the importation of finished products incorporating price-fixed components should be treated as part of the import inclusion. If the direct effect test is applied, it may result in the same decision as Motorola.164 The failure to deter international cartels and protect the U.S. economy from the cartel's harmful effects is universally felt because capacitors are ubiquitous. 165

#### Private damages in the US are the only effective method to deter cartels – the Seventh Circuit eliminates them

Meriwether ‘15 [Ellen; Spring 2015; Litigation partner at Cafferty Clobes Meriwether & Sprengel LLP and concentrates her practice in antitrust class action litigation; Antitrust; “Motorola Mobility and the FTAIA: If Not Here, Then Where?” vol. 29, no. 2 p. 8-17)

Elimination of Private Enforcement Under Federal Law

The Seventh Circuit repeatedly stated that Motorola must seek its remedies abroad, under the laws of the country in which its subsidiaries are incorporated.105 Yet only a few Asian countries even allow for recovery of private antitrust damages, and these countries generally disallow class actions and require plaintiffs to pay all court costs.106 Moreover, in Motorola’s case, the evidence suggests that none of the injury arising from panels shipped into the United States was suffered overseas; rather, the inflated prices paid by the purchasers abroad were passed through to the United States and ultimately paid by U.S. consumers.107 It is not likely that foreign purchasers, even if they have private rights of action in their home countries, can recover without proving actual damages.108

The ease with which the Seventh Circuit dismisses concerns about the elimination of private enforcement may suggest an underlying assumption that criminal prosecution and fines here and abroad are sufficient to deter global cartel conduct. Yet successfully conducted global cartels have been highly profitable,109 and criminal fines, when issued at all, are small in comparison to profits earned by members of global cartels.110 The Sherman Act attempts to address this issue by imposing treble damages on violators, but in most other countries private actions lack this deterrent force.111Thus, the consequence of the panel decision is to remove any deterrent effect of private actions from the cost-benefit calculus of cartel members.

Given the dearth of effective private damages remedies in many foreign jurisdictions and the inability of government enforcement to adequately deter global cartel activity, private plaintiffs may be expected to argue (1) that the application of the FTAIA in Motorola II should not be accepted by other courts outside the Seventh Circuit, and (2) that the bar to indirect purchaser claims under federal antitrust law should be changed (presumably by the Supreme Court) to allow indirect purchasers to assert damages claims as the DOJ proposed.

## harmonization

#### Inequality causes protectionism and undermines global multilaterlism

**Adeyemo 17** (Wally, Senior adviser at the Center for Strategic and International Studies and previously served as deputy national security adviser for international economics during the Obama administration, “Protectionism is rising the world over. Our best defense is fighting inequality,” 4/21, https://www.theguardian.com/commentisfree/2017/apr/21/protectionism-is-rising-the-world-over-our-best-defense-is-fighting-inequality)

Globalization and the international rules-based order that underpins it are under siege. Bunkering down and hoping the flames of populism burn out as economic growth picks up is not a winning strategy. The crisis of confidence in the benefits of globalization and multilateralism likely will persist as long as rates of social and economic inequality remain stubbornly high. The best defense of multilateralism and the rules-based order *is a good offense*. Addressing inequality and updating the rules of the global economy to reflect the needs of the 21st century must guide the agenda for this week’s International Monetary Fund (IMF) and World Bank spring meetings. The finance ministers and central bank governors gathered for the spring meetings should focus on new approaches to reduce inequality and increase resilience, not just on new language for press releases and other official statements. A number of steps to restore faith in the system should be considered, including improving the rules shaping international trade, developing a shared vision for effective regulation of technology, and ensuring the IMF and multilateral development banks (MDBs) are prepared to help prevent and respond to crisis. The post-second world war period has produced the greatest economic expansion in world history, including a dramatic reduction in extreme poverty. Yet the institutions, norms and rules that form the backbone of the economic order have proven remarkably slow to change. The most prominent example was the inability of global financial regulation to keep pace with the innovation and evolution of the financial system, contributing to the most severe global recession since the Great Depression. The rise of a global populist strand that seeks to draw economies apart rather than bring them together also represents an existential threat to multilateralism and the rules-based order. While protectionism makes for good political soundbites, history is littered with examples of the failure of these policies. Yet it is true that changes to the international trading system are needed, especially non-tariff barriers to trade that harm fair competition. All credible ideas should be on the table, including potential penalties for countries with persistently large current account surpluses, particularly those that intervene in the foreign exchange market. While global supply chains may reduce the impact exchange rates have on trade, it is still critical we find new ways to address the unfair advantage some derive from manipulating their currency. The IMF can and should do more to hold countries accountable. A multilateral approach to addressing imbalances will be far more effective and less draconian than any unilateral or regional solution. And additional reforms to the international trading system are needed, including faster resolution of disputes between countries, increased transparency, and improved technical assistance to developing countries. Advances in technology are radically transforming the global economy. The lack of global policy coordination to address technologies that often live outside the borders of any one jurisdiction is already having a negative impact on innovation and regulation. While issues related to taxation have dominated the discussion at previous spring meetings, there are several other subjects deserving of attention. Reducing data localization – the requirement that data is stored, managed and handled within a country’s borders – especially as it pertains to financial data, needs to be addressed. Maintaining information in unnecessary jurisdictions creates a barrier to entry for many smaller firms and slows innovation by way of machine learning with the ability to transform fields like financial inclusion which are central to reducing inequality. A major hurdle to reducing data localization is formulating a global framework for managing data privacy issues. The EU–US Privacy Shield is already providing a structure for the United States and Europe, but officials need to focus on building a framework that includes far more of the global economy. As the memory of the global financial crisis fades, it is critical that the lessons we learned from facing the abyss continue to impact our policy choices. While post-crisis reforms have made the global financial system more resilient, in many ways governments have fewer tools today to protect the system from another crisis. This is one of many reasons it is essential the MDBs and IMF are well resourced. The World Bank’s ability to lend during the Great recession helped ensure it did not become a depression. Those leading the justified efforts to optimize MDB balance sheets should carefully consider how resources can be stretched while maintaining the ability to lend during a crisis. The IMF lending toolkit should not be overly constrained by inflexible requirements that limit its ability to prevent and respond to a crisis. Fears that all but the most rigid standards will put taxpayer money at risk are significantly exaggerated. The IMF has never lost a dollar of taxpayer money, and should maintain the flexibility needed to protect the global economy. After nearly a decade responding to the financial crisis and its economic aftershocks, officials must now devote the same level of creativity and ambition to addressing the crisis of confidence in the international economic order. Protectionism and a retreat from international cooperation is clearly not the answer, but policy makers minimize the underlying mistrust of globalization and multilateralism at their peril. In order to promote sustainable and inclusive growth, policymakers must focus on tangible changes that are responsive to the challenges we face.

#### EVERY IMPACT

Linn 17, (Distinguished Resident Fellow, Emerging Markets Forum, September, Current and Future Threats to Multilateralism: Causes and Possible Remedies, http://www.emergingmarketsforum.org/wp-content/uploads/2017/09/Multilateralism-1.pdf)

Introduction Multilateralism and the multilateral institutions face serious threats. This in turn threatens the continuing progress in solving critical global economic and social challenges: slowing global economic growth and recurring global financial crises; growing inequality and – despite significant improvements in living conditions worldwide in recent decades – persistent deprivation due to poverty, hunger, conflict and fragility, esp. in Africa; rising challenges to an open global trading regime; and the pervasive risks of pandemics, natural disasters, and climate change.1 If this statement sounds excessively gloomy, consider Mohamed El-Arian’s opening paragraph for his op-ed in the Guardian on September 20, 2017: “Next month, when finance ministers and central bank governors from more than 180 countries gather in Washington, DC for the annual meetings of the International Monetary Fund and the World Bank, they will confront a global economic order under increasing strain. Having failed to deliver the inclusive economic prosperity of which it is capable, that order is subject to growing doubts – and mounting challenges. Barring a course correction, the risks that today’s order will yield to a world economic non-order will only intensify.” On the other side, David Bosco believes in the “durability of multilateralism” when he writes in the Journal of International Affairs that “we’ve been here before” and that “[President] Trump’s challenge to the slow march of multilateralism may be even less consequential than de Gaulle’s.”2 This paper aims to assess the threats faced by multilateralism and multilateral institutions and to develop some ideas on how they might be addressed. Just to be clear, though, multilateralism is not just about the financing of investments. It is very importantly also about developing and maintaining rules-based and fair global economic and social relations among countries and peoples, about setting widely accepted norms and monitoring their adherence, about establishing networks to create, collect, and exchange knowledge and data, and about resolving potential conflicts among partners and competitors for global resources, markets, and influence. There are two countervailing trends over the last seven decades:3 After World War II (WWII) globalization and globalism took hold, reinforced after the fall of the Bamboo and Iron Curtains by the integration of China and the Former Soviet Block into the world economy. This was reflected in rapid global connectivity and economic integration, the development of a rules-based international order supported by the rise of the global and regional multilateral institutions, drastic declines in extreme poverty and increases in living standards across the world, and a growing recognition of continuing and new global challenges, and far-reaching agreement on the emerging global development and climate change agendas. The approval of the Agenda 2030, the Addis Agenda, and the Paris Agreement of COP21 in 2015 represented a high point in this trend towards a global agenda underpinned by multilateralist approaches. However, recent years also have shown increasing stresses in the multilateral system, which appear to have intensified since about 2014. In the geoeconomic and geopolitical arena, the dramatic shift of the economic balance from the G7 countries towards the emerging market economies has meant that what used to be a bipolar world (US-USSR, 1950-1990) and briefly a unipolar world (US, in the 1990s) is now rapidly becoming a multipolar world (China, Europe, India, Russia, US, and perhaps others).4 While in many ways a welcome development, and indeed a sign of the spectacular success of multilateralism over the last 70 years, the convergence in economic and political power has also been a contributing factor to the revival of East-West tension, perhaps even a “new” or “second cold war.” 5 Historians have observed the historical preva - lence of the so-called “Thucydides Trap,” where the “trap” refers to the supposedly inevitable tension between an established power and a rising power, eventually leading to war (as between Sparta and Athens in Ancient Greece). The potential for tensions and possibly conflict between today’s established and rising powers, and especially between China and the US, is therefore seen by some astute observers as serious.

## opec

### link

#### No link – OPEC is a public cartel protected by sovereign immunity and the act of state doctrine – the aff doesn’t affect those

Udin 2001 - American University Washington College of Law [Andrew, "Slaying Goliath: The Extraterritorial Application of U.S. Antitrust Law to OPEC." American University Law Review 50, no.5 (2001): 1321-1374]

In 1979, the International Association of Machinists and Aerospace Workers (“IAM”), an American labor union, brought an antitrust action in the U.S. District Court for the Central District of California challenging the price-fixing activities235 of OPEC and its then thirteen member nations, naming each nation and OPEC as defendants.236 IAM sought monetary and injunctive relief for alleged price fixing of crude oil in violation of the Sherman Act.237 The actual injury plaintiffs alleged was the payment of exorbitant prices for gasoline at station pumps, by virtue of the anti-competitive actions taken by OPEC and the antitrust violations involved.238 The district court, however, denied jurisdiction on the grounds that the suit against OPEC and its member nations was barred by sovereign immunity.239

Central to the district court’s judgment was its finding that OPEC’s alleged price fixing was a governmental rather than commercial act.240 The court held that OPEC’s purpose in setting oil prices was to ensure control of the member nations’ natural resources, a sovereign function.241 On appeal, the Ninth Circuit Court of Appeals affirmed dismissal of the suit but on different grounds.242 While not deciding the issue of whether OPEC enjoys sovereign immunity, the Ninth Circuit instead held the act of state doctrine barred jurisdiction.243 The court noted its holding was motivated by an unwillingness to rule on delicate matters of foreign policy, especially where the executive and legislative branches have chosen to approach a given case with restraint.

### thumpers

#### Either Covid, Chinese debt, and Iran thump OR winter weather determines the market

Paraskova '9/13 [Tsvetana, "Why Bank Of America Thinks Oil Prices Are Heading To $100," https://oilprice.com/Energy/Oil-Prices/Why-Bank-Of-America-Thinks-Oil-Prices-Are-Heading-To-100.html]

Oil prices could hit $100 per barrel over the next six months if we have a colder-than-usual winter, which could be the most important driver of global energy markets in the coming months, Bank of America says.

Oil Prices Could Climb Above $100

If winter temperatures in the northern hemisphere turn out to be below seasonal norms, oil demand would spike and could lead to oil shooting up to the $100 mark, Bank of America Global Research said in a recent note carried by Reuters.

BofA Global Research said in June that expectations of a strong demand recovery that outpaces supply in the coming months could lead to oil prices briefly hitting $100 per barrel in 2022.

“We believe that the robust global oil demand recovery will outpace supply growth over the next 18 months, further draining inventories and setting the stage for higher oil prices,” analysts at BofA wrote in June, in which they significantly raised their price forecasts for next year’s average Brent Crude prices.

Nearly three months later, BofA still sees the upside for oil prices amid modest market deficits in the next few months. It also sees potential for oil to hit $100 a barrel earlier than its mid-2022 call in June if the winter is colder than normal.

In the latest note, Bank of America analysts wrote:

“Downside risks include a new COVID-19 wave, taper tantrum, a China debt crisis, and the return of Iranian crude barrels. Having said all of that, winter weather risk is quickly becoming the most important driver of energy markets.”

#### China SPR sales thump

Aizhu '9/15 [Chen and Florence Tan, "China tests oil clout, battles inflation with first oil reserve auction," https://www.reuters.com/world/china/china-tests-oil-clout-battles-inflation-with-first-oil-reserve-auction-2021-09-15/]

China's first crude oil reserve auction could have an outsized impact on market sentiment, signalling the top oil importer remains committed to reining in inflation by controlling commodity prices, analysts and trading executives said.

The initial sale from its strategic petroleum reserves (SPR) will be small - 7.38 million barrels, or about a half-day's usage in China - barely registering in a global market that consumes nearly 100 million barrels every day.

Even so, it demonstrates Beijing is prepared to sell off stockpiles that have previously been considered off limits, and that it intends to become more active in domestic oil markets whenever high prices threaten to undermine the economy.

"With the kind of market power China has, the release has huge symbolic significance as the first SPR public sale, as just about three years ago the debate was still about how China's SPR functions and how it will be regulated," said Michal Meidan, director for China at the Oxford Institute of Energy Studies.

China, the world's second-largest oil refiner and a major consumer of most other commodities, has also held sales from the strategic reserves of metals, coal and corn to help tame factory inflation that hit a 13-year high in August. read more

"I see it very much a test, both in terms of internal mechanism and the impact on market ... for containing inflation and ... learning how to use the SPR like the U.S. does," Meidan said.

Other market watchers said the timing of the sale - just as global oil prices hover near $75 a barrel, up roughly 40% this year - indicates Beijing hopes to guide oil costs lower.

### internal

#### No impact – negative oil prices in 2020 prove this DA is just hyperbolic garbage.

Saefong '21 [Myra, Apr 19, "Oil prices went negative a year ago: Here’s what traders have learned since," https://www.marketwatch.com/story/oil-prices-went-negative-a-year-ago-heres-what-traders-have-learned-since-11618863839]

Negative prices were a result of “the market itself postponing an action plan, thinking that the problem will go away on its own,” he said.

Producers did not want to halt production, hoping that the low prices wouldn’t last long and OPEC+ could not immediately agree on policy, said Tonhaugen. At the same time, “oil storage was filling up quickly, forcing oil tankers to become floating storage.”

“When that bubble was about to break, panic took over and traders who couldn’t take on and store any more product they wouldn’t be able to sell,” he said. They “tried to offload their excess commitments, but nobody wanted to buy.:

Overall, the negative prices were the result of the market “not being experienced and prepared for what was coming,” since pandemics don’t usually happen more than once per generation or less, said Tonhaugen. But a pandemic could happen again, he said, and if oil demand “goes to the red again, now oil producers, OPEC and governments have the experience to deal with it.”

## ptx

### link

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

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

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

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

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

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

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

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

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

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

#### Lawmakers forget and compartmentalize.

Everett and Schor 18 [Burgess Everett and Elana Schor, congressional reporter for POLITICO. He previously was a transportation reporter for POLITICO Pro, Web producer, helping run POLITICO’s Twitter and Facebook accounts, and a contributor to the On Media blog; congressional reporter for POLITICO; “Congress driven to distraction”, Politico, March 12 2018, <https://www.politico.com/story/2018/03/12/congress-republicans-attention-deficit-452221>]

Even in peak form, Congress struggles to focus on any one issue for more than a few days. But its short attention span has taken on new meaning in the era of Donald Trump. “We kind of have attention deficit disorder,” as Sen. John Kennedy (R-La.) put it. Every time it seems the president has zeroed in on an issue, and appears determined to see it through — guns and immigration are just the two latest examples — he moves on to something else. And Congress, which isn’t designed to respond swiftly to national events and the wishes of the White House even in the least distracted of circumstances, simply can’t keep up. The constant whiplash of priorities is getting on lawmakers’ nerves. “It’s unbelievable to me,” said Sen. Susan Collins (R-Maine). “The attention span just seems to be ... it’s a real problem.” The hyperactive mind-set of the Oval Office has had the effect, whether by design or not, of quickly diverting attention from topics big or small. After a bout of attention on gun control in the wake of the Florida school massacre last month, Congress has seemingly moved on already. Before that, it was the plight of Dreamers facing deportation. In the end, nothing gets done on the issue of the day. The president “is all over the place — 15 tweets in 19 hours,” said Senate Minority Whip Dick Durbin (D-Ill.), who invested months of his time in the immigration debate only to watch the effort fall apart. “Trying to keep up with where his mind lights from day to day is hard." Trump’s March 5 deadline to extend expiring protections for some young immigrants briefly trained the Senate on that topic, though the chamber failed to pass anything. Then the president flirted with Democrats on gun control after the Florida school massacre, seemingly building momentum for a rare breakthrough. But before anything happened on the Hill, Trump had moved on tariffs — causing a genuine GOP freak-out and a movement to rein in Trump. When the White House might try to refocus the Capitol’s attention back on gun violence or immigration is anyone’s guess.

### uq

#### Dems don’t have the votes to raise the debt ceiling and multiple issues thump

Carney and Lane 9/8 (Jordain Carney and Sylvan Lane, The Hill. “Yellen triggers alarm bells over debt ceiling cliff.” https://thehill.com/homenews/senate/571413-yellen-triggers-alarm-bells-over-debt-ceiling-cliff?rl=1)

Democrats could need 10 GOP votes to raise the debt ceiling if Republicans filibuster the measure. Democrats have only 50 votes in the Senate, and GOP leaders have indicated they will not help raise the borrowing limit.

Including a debt ceiling hike in the budget reconciliation measure that Democrats are now drafting would be one way around the GOP. The budget rules prevent a GOP filibuster.

Democratic leaders have signaled they don’t want the debt ceiling to be a part of that package.

“We won't be putting it in reconciliation,” Speaker Nancy Pelosi (D-Calif.) told reporters on Wednesday.

It’s also unclear whether the package will be finished in time to meet the debt deadline. Yellen on Wednesday said the limit would be breached in October.

“The time for Congress to act is now to make sure the U.S. does not come close to defaulting on some of its obligations,” said Rachel Snyderman, associate director at the Bipartisan Policy Center, a nonpartisan think tank that closely tracks the debt limit. “But what's concerning right now is that there are so many important priorities at play,” she continued.

GOP lawmakers helped suspend the debt ceiling under former President Trump, who added to the debt by signing a huge tax cut bill and several major spending bills.

But the GOP has vowed not to provide votes for President Biden as Republicans fume over Democrats’ plan to pass the $3.5 trillion spending package under budget reconciliation rules.

The GOP wants to make Democrats own both the spending measures and the debt vote, with the view it will help Republicans retake majorities in the House and Senate in next year’s midterm elections.

Senate Minority Leader Mitch McConnell (R-Ky.) jabbed last month as the fight ramped up that if Democrats were going to greenlight the spending, shouldn't they “be proud to own all the debt it requires?” And 46 GOP senators signed a letter vowing that they won’t support raising the debt ceiling, leaving Democrats short of the votes.

Doug Andres, a spokesman for McConnell, said on Wednesday that flirting with a debt default would be a “crisis” of Democrats' “own making.”

“Democrats control Washington now. They can raise the debt limit on their own,” he said.

Senate Majority Leader Charles Schumer (D-N.Y.) blasted Republicans on Wednesday during a conference call with reporters, saying that opposing a debt hike would be a “horrible” and “despicable act.”

“It would be just the height of irresponsibility for Republicans to play games to take the debt limit hostage,” he said.

Allowing the nation to default would be unthinkable, but it’s not entirely clear how Biden and Democrats will deal with the issue.

The increasingly partisan fight comes as Congress deals with a full plate of legislative issues, including funding the government by month’s end and the sweeping $3.5 trillion spending package.

Yellen tried to drive home the stakes in a letter to lawmakers warning that amid a pandemic, which rocked the global economy, “it would be particularly irresponsible to put the full faith and credit of the United States at risk.”

The debt ceiling kicked back in on Aug. 1 after a suspension included in a 2019 budget deal expired without action from Congress. The Treasury Department has been using “extraordinary measures” to keep the U.S. solvent since then, but they will run out next month, Yellen warned Wednesday.

“Once all available measures and cash on hand are fully exhausted, the United States of America would be unable to meet its obligations for the first time in our history,” Yellen said.

“Given this uncertainty, the Treasury Department is not able to provide a specific estimate of how long the extraordinary measures will last. However, based on our best and most recent information, the most likely outcome is that cash and extraordinary measures will be exhausted during the month of October,” she continued.

The federal debt limit is a legal cap on how much debt the U.S. can take on to pay obligations already approved by the president and Congress for several years. Raising the ceiling does not erase or create any new debt but instead gives the federal government more room to pay off its bills.

Wall Street and the banking system have grown accustomed to high-stakes fights over the debt ceiling in Washington.

Credit ratings firm Standard & Poor's downgraded the county’s credit rating during a 2011 showdown over the debt limit, and the 2013 debt limit fight likely added tens of millions of dollars to the national debt through higher borrowing costs, according to a Government Accountability Office report.

But until the deadline gets much closer, market reaction seems unlikely to put much pressure on lawmakers and the administration.

Still, Synderman noted that yields on short-term Treasury bonds have risen in recent weeks as investors become increasingly concerned about the risk of a default, particularly as the impact of the pandemic limits the ability to nail down when it may happen.

The general dynamics of the fight have been brewing for months: Senate Republicans previously got nonbinding language into their conference rules recommending that any hike in the debt ceiling is contracted by spending reforms or cuts.

And Democrats have warned that they won’t negotiate on the debt ceiling, noting that Republicans had helped put up the votes under Trump.

### Internal

#### The Fed will do anything to avoid a default

Saphir 19 (Ann, Reuters. “If U.S. again risks default, Fed has 'loathsome' playbook.” 1/11, https://www.reuters.com/article/usa-fed-2013-default/if-us-again-risks-default-fed-has-loathsome-playbook-idUSL1N1ZB1D5)

Should political deadlock in Washington again bring the world’s biggest economy to the brink of a debt default, the U.S. central bank has a playbook that includes options one policymaker once labeled “loathsome,” but, perhaps, necessary.

The policymaker was Jerome Powell, now the Federal Reserve chairman and a Fed governor in October 2013 when a political debate over federal spending brought the country to the verge of reneging on trillions of dollars of financial obligations.

To prepare for that possibility, two Fed staffers penned a memo outlining nine actions the Fed could take if failure to raise the U.S. debt ceiling triggered a debt default.

Fed Chairman Ben Bernanke then convened a videoconference with fellow policymakers, a transcript of which was among a trove of Fed documents from that year published Friday, the 21st day of a partial government shutdown that has revived memories of 2013, when government funding lapsed for more than two weeks amid a protracted debt crisis.

Options included several that policymakers readily supported, including expanding ongoing bond purchases and providing emergency lending.

Two were far more controversial: purchasing Treasuries with delayed coupons in an effort to take them out of the market, and swapping Treasuries that weren’t in default for those that were.

Those actions, Powell warned, would carry huge “institutional risk.”

“The economics of it are right, but you’d be stepping into this difficult political world and looking like you are making the problem go away,” he said.

Several policymakers, including the future Fed chief Janet Yellen and current New York Fed chief John Williams, argued the fallout of a default would be so terrible that the Fed would need to take all possible action, however “repugnant,” in the words of Boston Fed President Eric Rosengren.

Powell ultimately agreed the options should remain on the table.

But the very idea that such tools were being considered was deemed such a bombshell that when the Fed published minutes of the meeting a few weeks later, after the immediate threat of default had been averted, the specifics of the most controversial options were omitted.

Even some five years later, the full memo has not been released. (Reporting by Ann Saphir; Editing by Andrea Ricci)

### imapct

#### Decline doesn’t cause war.

Walt ’20 [Stephen; May 13; International Relations Professor at Harvard University; Foreign Policy, “Will a Global Depression Trigger Another World War?” <https://foreignpolicy.com/2020/05/13/coronavirus-pandemic-depression-economy-world-war/>]

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

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

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

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

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

## court clog

### link

#### No case flood – the hurdle is high to plead a case – and if there is one, the case massively outweighs

Harrington ‘15 [Joseph; 1/29/15; Patrick T. Harker Professor, Department of Business Economics & Public Policy, at The Wharton School, University of Pennsylvania; CPI Antitrust Chronicle; “The Comity-Deterrence Tradeoff and the FTAIA: Motorola Mobility Revisited,” https://www.competitionpolicyinternational.com/the-comity-deterrence-trade-off-and-the-ftaia-motorola-mobility-revisited/]

In their analysis of 60 recent large private antitrust suits, Professors Lande and Davis documented that 40 percent of them were initiated by the plaintiffs (that is, they did not follow a government case).18 By way of example, the current prosecution of the vitamin C cartel, which is composed of Chinese manufacturers, has been exclusively conducted by customers (who have antitrust standing under the FTAIA exception of “import commerce”). After eight years of private litigation, the government has yet to bring a case. In early 2013, the U.S. District Court for the Eastern District of New York found the defendants guilty and assessed damages of $54 million, which were then trebled to $162 million. As reported in The New York Times:19

James T. Southwick, a lawyer at Susman Godfrey who represented the plaintiffs in the case, said he hoped the judgment would encourage the Justice Department to investigate Chinese cartels “and begin treating Chinese cartels the same as they treat cartels from the rest of the world.”

That a cartel may be prosecuted by customers but not the government has occurred and will continue to occur.

Once private litigation is eliminated as an option, a most troubling scenario may then arise: Suspected collusion continues without interruption because the government chooses not to bring a case and, by virtue of the Seventh Circuit’s decision, U.S. consumers are prohibited from bringing a case. The Seventh Circuit seems to have missed this possibility and instead focused on the contrary concern that giving Motorola standing would cause a flood of cases:20

The mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers of their prolific foreign subsidiaries if Motorola had its way.

This prognostication misses the mark in two ways. First, there will be a mind-boggling number of antitrust suits only if there is a mind-boggling number of cartels, in which case it is quite appropriate that our minds are boggled with litigation. Of course, plaintiffs can pursue suits lacking merit but that would not seem to be a serious concern in a post-Twombly world where the hurdle is high to plead a case. Second, as I have sought to argue, there is a very real concern of too few cases which not only means that cartels are less deterred but also that uncovered cartels are allowed to continue unabashed.

#### Winners win -- Biden refills his capital with policy wins.

Barrow, 1/17/2021 (Bill, “Joe Biden’s long political evolution leads to his biggest test; The president-elect will inherit stewardship of a nation wrenched by pandemic and seismic cultural fissures,” <https://www.denverpost.com/2021/01/17/joe-biden-political-evolution/>, accessed on 1/19/2021, JMP)

While Biden aides argue his shifts don’t involve changes in principle or fundamental values, some other observers say the point is moot. The question, said Maurice Mitchell, who leads the progressive Working Families Party, is simply whether Biden will **continue to evolve** and **leverage** his **p**olitical **c**apital into both post-Trump stability and **big policy wins**.

“We can’t control people’s convictions but we can shift the politics of the possible,” Mitchell said, noting that Johnson signed **seminal civil rights laws** less than a decade after quashing such measures as Senate majority leader.

Barber, the minister, pointed to other historical figures whom Biden sometimes mentioned while campaigning: Roosevelt and Abraham Lincoln. Both, Barber noted, were **savvy, even ruthless** politicians who reached for their **biggest achievements** only after winning the nation’s highest office — and they did so **against vicious opposition** and during times of existential national threats.

#### President Biden investing political capital in antitrust/competition

Vaala et al. '21 [Lindsey; 7/16/21; Member of Vinson & Elkins Global Cartel Defense and Coordination Team; "Labor, Defense, and Rail Services Among Top Competition Concerns Targeted in President Biden’s Executive Order," <https://www.velaw.com/insights/labor-defense-and-rail-services-among-top-competition-concerns-targeted-in-president-bidens-executive-order/>]

As has been well-publicized, on July 9, 2021, President Biden issued an “Executive Order on Promoting Competition in the American Economy” (the “EO” or “Order”).1 As the preamble articulates, the EO’s focus is to “promote the interests of American workers, businesses, and consumers.” The **lengthy** and **detailed** Order is sweeping in its breadth, aiming to enhance competition across dozens of industries, and sets forth federal agency-specific instructions as to how particular goals should be carried out.

We focus on several areas of particular interest that we have been closely monitoring: heightened antitrust scrutiny in labor markets, defense, and railroad freight services.

A Rallying Cry to the “Whole-of-Government”

The EO seeks to harness the coordinated power of the full federal government, emphasizing “that a whole-of-government approach is necessary to address” competition concerns in the U.S. economy.2 To that end, the Order establishes a White House Competition Council, to be led by the Director of the National Economic Council (“NEC”).3 An integral part of the Office of White House Policy, the general bailiwick of the NEC is to advise the president on economic policy matters. By embedding the new council within the White House, President Biden is sending the strong message that competition is a focus area over which he intends to keep **close tabs** and invest his personal **political capital**.

#### Biden's antitrust executive order thumps.

NYT '21 [New York Times; 7/24/21; "Biden’s Antitrust Team Signals a Big Swing at Corporate Titans," <https://www.nytimes.com/2021/07/24/business/biden-antitrust-amazon-google.html/>]

The appointments show both the Democratic Party’s **renewed antitrust activism** and the Biden administration’s growing concern that the concentration of power in technology, as well as other industries like pharmaceuticals, agriculture, health care and finance, has hurt consumers and workers and stunted economic growth.

They also underscore that Mr. Biden is willing to use the **power of his office** and **not wait** for the tougher grind of congressional action, an approach that is both faster and potentially riskier. This month, he issued an executive order stuffed with 72 initiatives meant to stoke competition in a variety of industries, increase scrutiny of mergers and restrict the widespread practice of forcing workers to sign noncompete agreements.

### uq

#### Courts perma clogged.

Solomon '21 [Aron; 6/4/21; head of digital strategy for Esquire Digital and an adjunct professor of business management at the Desautels Faculty of Management at McGill University; "The Viral Court Backlog and How to Dig Out Post-Pandemic," https://www.law.com/thelegalintelligencer/2021/06/04/the-viral-court-backlog-and-how-to-dig-out-post-pandemic//]

Just over a year ago, if you would have asked an experienced judge or lawyer to imagine the litigation and jury trial backlog if a global pandemic were to sweep through the nation, they first would have probably told you that your morbid scenario wasn’t funny and that the courts would never be able to dig out.

This is precisely where we find ourselves today. Throughout state and federal courts, for both civil and criminal cases, we are in an infinitely worse position than we were when the pandemic began. The threshold issue today is how we dig ourselves out before the system implodes.

In New Jersey, the court system has a massive backlog that isn’t going to be cleared anytime soon. Michael J. Epstein, founder of New Jersey-based The Epstein Law Firm, has seen the dramatic effect the pandemic has had on the New Jersey court system.

“Earlier this year, the backlog in New Jersey courts was twice what it was before the pandemic. There is a better chance that the backlog will double once again before it improves, yet there is really no easy answer to get our courts out of the current situation. It’s not just civil cases— there is also a backlog in New Jersey for criminal cases as well.”

Part of the problem is that jurisdictions such as New Jersey that have already relaxed restrictions on court appearances are now dealing with an aggressive third wave of the virus, with a fourth wave has begun to take hold in some parts of the world. When its effects are felt in the court system, it could again grind things to a complete halt and make the backlog exponential.

There are ways technology can play an expanded role this time around, compared to the slow start we had in 2020. But, especially in criminal matters, technology is limited by what it can’t replicate—the guarantees afforded people to appear in person at a trial. Many jurisdictions (including parts of Texas and California) are neither technologically equipped to handle remote jury trials nor can make them happen without the consent of defendants.

While courts and judicial systems have improved over the past year at planning, training their staff, and even investing in the right technologies to keep things moving when and where possible, no courts are equipped with functional crystal balls. Yet the power of accurate foresight is what is needed most to get things back on track in our national system of functional and fair trials.

Perhaps there is no better national example of how the gears powering the court systems have ground to a halt than in the city of New York. The New York Times reported in December that there have been only nine criminal trials in nine months. If that seems like a very small number, it is—the norm would be around 800 trials.

The direct cost of this is obviously much more severe in criminal proceedings. As highlighted in the New York Times piece, there is a profound human cost to these delays:

“Is it fair for people to be languishing in pretrial detention and presumed innocent with no prospect of a trial in the future for them?” said New York’s chief administrative judge, Lawrence K. Marks. “A criminal justice system cannot be, in any sense of the word, fully functioning, if it is not conducting jury trials.”

The logistical nightmares aren’t going away soon and they are going to take the daily hard yards that attorney Epstein describes. “I know that New Jersey lawyers are able and willing to help in any way that we can and I would expect my colleagues in other states to feel exactly the same way. Our clients can’t afford further delays, as this deeply impacts justice.”

This is the case throughout the nation, as the same factors that have created the backlog persist. In both civil and criminal trials, the absence of critically important participants in the case because of lockdown and illness may get worse before it gets better.

#### Courts clogged now---judicial vacancies, backlogs, and pandemic delays.

Davis '21 [Kristina; 2/25/21; writer for the San Diego Tribune; "Overwhelmed federal courts ask Congress for more judges," https://www.sandiegouniontribune.com/news/courts/story/2021-02-25/federal-courts-congress-relief/]

“For 20 years-plus we’ve been in a judicial emergency,” Chief District Judge Kimberly Mueller of the Eastern District of California testified to the Subcommittee on Courts, Intellectual Property, and the Internet.

The Judicial Conference of the United States — the policymaking body of the federal courts — has proposed that Congress create 65 new permanent judgeships across certain district courts to provide relief to 663 existing positions, as well as convert eight temporary seats to permanent. California should get 23, the conference said, including four in the Southern District of California, which encompasses San Diego and Imperial counties.

The proposal, backed by progressive legal organizations, is not as controversial as the idea of expanding the U.S. Supreme Court and appears to have some bipartisan support — including from subcommittee member Rep. Darrell Issa, R-Vista, who sponsored a similar bill in 2018 that would have added 52 new judgeships.

However, he and other Republicans stressed that backing such a measure would likely come with a compromise that would perhaps spread the appointments over current and future presidential election cycles so as not to flood the courts with President Joe Biden appointees.

The last major boost to the federal bench came with legislation in 1990. Since then, the number of case filings has swelled while the number of district judges assigned to hear them has remained relatively stagnant.

The situation is no different in San Diego, which has authorization for 13 active judges, bolstered by 14 magistrate judges, nine senior judges and the occasional visiting judge.

Since 2003, the last time Congress added judgeships locally, case filings have risen by 17 percent, testified District Judge Larry Burns, who recently stepped down as chief to assume senior status in the district.

When considering weighted caseloads — an assessment that determines the amount of time each case type takes to complete — the Southern District in 2019 handled well above the national average, 634 cases per judge versus 535. The goal is around 430.

The crushing caseloads have been exacerbated by vacancies on the bench — Biden currently has five to fill locally — and a considerable backlog of civil cases stalled by the COVID-19 pandemic.

“Our criminal caseload is absolutely staggering here,” Burns explained to the subcommittee, noting the district’s nexus to the U.S.-Mexico border. From 2017 to 2019, criminal filings rose 30 percent, much of it stemming from the Trump administration’s push to prosecute misdemeanor illegal entries into the U.S.

“The effects of the increase in our caseload have been profound and have inexorably led to delay in the handling of cases — particularly civil cases,” Burns said.

#### Especially true for civil cases.

Land '21 [Greg; 7/30/21; staff reporter at Law.com; "Can We Talk? Eyeing COVID-Clogged Dockets, Judges Push Civil Cases to Settle," <https://www.law.com/2021/07/30/can-we-talk-eyeing-covid-clogged-dockets-judges-push-civil-cases-to-settle/>]

As judges around the country gingerly reopen their courtrooms and invite lawyers, litigants and jurors back for business—sometimes as usual, but often still far from the normal routines of years past—they’re being confronted by an array of pitfalls, real and potential.

Will a surge of COVID-19 cases among the unvaccinated and forceful advance of the delta variant force renewed shutdowns? Will jurors and staffers be willing to risk a return? Are mask mandates and vaccine passports in the offing?

But one very real dilemma is already on their minds: Backlogs of criminal, civil and domestic cases that have piled up, exacerbating already crowded dockets where litigants and lawyers jostle to get motions filed, rulings issued and, toughest of all, cases tried.

Richard Clifton, a senior judge on the U.S. Court of Appeals for the Ninth Circuit, who serves as president of the Federal Judges Association, said that court backlogs are a big topic for judges, although not all are as impacted as others.

“At least one judge in a very busy district didn’t think the backlog had turned out as high as it turned out to be,” he said. “Other judges have commented, unspecifically, they’re just piling up.”

He said the most frequent comment is that the civil calendar “is just sitting there” because judges are spending all their time dealing with criminal caseloads.

He hasn’t heard about judges suggesting settlement as an option to those with civil cases but, he said, “I would be shocked if it weren’t happening.”

“The reality is that most cases get settled, we all know that—it’s not a good or a bad thing, it’s just a fact,” he said. And, while judges don’t actively get involved in settlements, their goal is to resolve cases. “And if it’s realistic to say to parties, ‘look, you won’t get a trial date anytime soon,’ I’m sure that’s something judges are saying to parties in those cases.”

That’s exactly what happened to Ryan Baker, of Waymaker in Los Angeles.

“It absolutely is the case that, especially in the federal courts, civil trials are at the end of the line,” he said. Baker represents the defendant in a trademark case filed in 2017.

#### Federal court clog now – it’s been a crisis for decades

Davis 2/25/21 (Kristina, staff @ San Diego Union-Tribune, "Overwhelmed federal courts ask Congress for more judges," https://www.sandiegouniontribune.com/news/courts/story/2021-02-25/federal-courts-congress-relief)

Overwhelming caseloads, substantial litigation delays and spiraling costs have prompted Congress to take a fresh look at expanding the number of judges sitting on lower federal courts.

In a hearing Wednesday held by the House Committee on the Judiciary, both congress members and witnesses, including those from San Diego, characterized the situation as a crisis that has been decades in the making.

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The last major boost to the federal bench came with legislation in 1990. Since then, the number of case filings has swelled while the number of district judges assigned to hear them has remained relatively stagnant.

#### Antitrust litigation in federal courts increasing now – Epic v Apple ruling

Robertson 9/12/21 (Adi, staff @ The Verge, "A COMPREHENSIVE BREAKDOWN OF THE EPIC V. APPLE RULING," https://www.theverge.com/2021/9/12/22667694/epic-v-apple-trial-fortnite-judge-yvonne-gonzalez-rogers-final-ruling-injunction-breakdown)

Mobile games are a huge part of Apple’s App Store revenue — approximately 70 percent, according to the ruling — and Apple has outsized power in mobile gaming. Gonzalez Rogers concludes iOS and Android hold a near-duopoly, although she considers the Nintendo Switch and cloud gaming services potential near-future competitors. The ruling estimates that Apple has a share of around 55 percent in the mobile game transactions market, alongside “extraordinarily high profit margins,” which can be a sign of monopoly power.

But despite Apple’s “considerable” power and profit margins, “these factors alone do not show antitrust conduct. Success is not illegal,” Gonzalez Rogers concludes. While Epic argued that iMessage and other factors deliberately lock users into iOS, Gonzalez Rogers wasn’t convinced by this line of reasoning.

The ruling leaves the door open for future antitrust complaints. “The evidence does suggest that Apple is near the precipice of substantial market power, or monopoly power, with its considerable market share,” Gonzalez Rogers writes. “Apple is only saved by the fact that its share is not higher, that competitors from related submarkets are making inroads into the mobile gaming submarket, and, perhaps, because [Epic] did not focus on this topic.”

#### Big antitrust rulings now – Epic v Apple

Keenan and Howley 9/10/21 (Alexis and Daniel, staff @ Yahoo Finance, "Epic v. Apple ruling: Judge finds Apple has to let developers offer third-party payments," https://finance.yahoo.com/news/epic-apple-antitrust-ruling-160722962.html)

“Fortnite” developer Epic Game’s antitrust lawsuit against Apple (AAPL) has upended the mobile device maker’s tightly protected and booming App Store. In a decision issued Friday, a federal California judge largely sided with Epic by issuing a permanent injunction against Apple’s App Store policies, and opening the door for developers to offer customers third-party payment options in apps.

The company's stock was down more than 2% following the ruling.

“Epic Games failed in its burden to demonstrate Apple is an illegal monopolist,” Judge Yvonne Gonzalez Rogers wrote in an order. “Nonetheless, the trial did show that Apple is engaging in anticompetitive conduct under California’s competition laws.”

Apple’s so-called anti-steering policy limits the ability of Apps to inform customers of payment options outside of the App Store. This is problematic for apps, Epic argued, because Apple’s App Store charges a 30% commission. “A remedy to eliminate those provisions is appropriate,” Judge Gonzalez Rogers ruled.

The judge issued a permanent injunction prohibiting Apple from stopping developers from directing customers to in-app purchasing methods. It also forbids Apple from barring apps from communicating directly with customers who have voluntarily given the app their contact information.

According to Sensor Tower estimates, consumers spent an estimated $72.3 billion via the App Store in 2020. A blow to the amount the store is able to pull in would be a major issue for Apple.

In response to the ruling, Apple issued a statement saying, "Today the court has affirmed what we’ve known all along: the App Store is not in violation of antitrust law. As the court recognized ‘success is not illegal.’ We remain committed to ensuring the App Store is a safe and trusted marketplace that supports a thriving developer community and more than 2.1 million U.S. jobs, and where the rules apply equally to everyone."

Epic Games CEO Tim Sweeney issued his own response:

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For its part, Epic Games was ordered to pay Apple's 30% fee on the roughly $12 million in revenue it earned from "Fortnite" between August 2020 and October 2020 when the game maker circumvented Apple's anti-steering policy. The damages stem from the judge's ruling in favor of Apple on its counterclaim that Epic had breached its contract with Apple by offering payment outside of the App Store.

The ruling doesn’t end the fight between the two companies, as Apple is expected to appeal the decision. However, the case moves forward a hotly contentious issue over how much control dominant mobile device makers can exert over third party developers that design software to sell on their platforms.