# 1ac

## 1AC – Balancing Test

### Cartels Adv

#### Glaring inconsistencies and bad decisions interpreting the FTAIA’s limit on the Sherman Act wreck the deterrent effect of US extraterritorial antitrust against global cartels

Murray ‘17 [Sean; 2017; J.D. Candidate and Stein Scholar, Fordham University School of Law; Fordham International Law Journal; “With A Little Help From My Friends: How A Us Judicial International Comity Balancing Test Can Foster Global Antitrust Private Redress.” vol 41, iss. 1 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj]

IV. SHORTCOMINGS OF THE CURRENT JURISPRUDENCE

Although clarity was one of Congress’ goals in enacting the FTAIA, the statute as drafted is anything but clear, and the FTAIA itself has contributed to the ill-defined boundaries of the effects doctrine. The FTAIA has produced a number of circuit splits, one of which was decided by Empagran.151 Other circuit splits currently exist, including one between the Seventh and Ninth circuits concerning the interpretation of the FTAIA’s requirement that anticompetitive behavior have a “direct, substantial, and reasonably foreseeable effect” on US commerce which the Supreme Court has so far abstained from resolving.152 As explained in Minn-Chem, Inc. v. Agrium Inc., the “substantial” and “reasonably foreseeable” prongs have produced little dispute and are relatively straightforward.153 Rather, what it takes to show “direct” is less clear.154 The Seventh Circuit took the position that, like in tort law, recovery should be cut off for injuries that are too remote from the cause of an injury and held that the term “direct” means only “a reasonably proximate causal nexus.”155

To the contrary, the Ninth Circuit in United States v. LSL Biotechnologies looked to the Supreme Court’s definition of “direct” from a different statute germane to international relations.156 Drawing from dictionary definitions and language in the Foreign Sovereign Immunities Act that is similar to that in the FTAIA, the court held that an effect is “direct” if “it follows the immediate consequence of the defendant’s activity.”157 This definition was subsequently utilized by the Ninth Circuit in its decision in United States v. Hsiung (the criminal prosecution of the defendants in Motorola Mobility), which expressly rejected Minn-Chem’s “reasonably proximate causal nexus” approach and reiterated instead the broader “immediate consequence” test.158

A. Problems Arising from the Circuit Split

Using Minn-Chem’s definition of “direct,” however, has produced a questionable holding in Motorola Mobility.159 In that case, a US company, Motorola, brought a claim under Section 1 of the Sherman Act, alleging that it was the victim of price-fixing among foreign manufacturers of liquid crystal display (“LCD”) panels used as components in the manufacture of cellphones.160 The LCD panel manufacturers had already been found guilty of participating in an illegal cartel, and those convictions were affirmed in Hsiung.161 Motorola was a major purchaser of LCD panels, but had purchased most of the price-fixed products through its majority-owned foreign subsidiaries.162 Only one percent of its purchases were made directly by Motorola in the United States and incorporated into cellphones also sold in the United States.163 The other ninety-nine percent of its purchases were made abroad.164 Of those purchases, forty-two percent were incorporated into phones destined for the United States, while the remainder were used to make phones sold abroad.165

In its first stab at the appeal of the lower court’s decision, the Seventh Circuit following Minn-Chem’s definition of “direct” held that anticompetitive behavior affecting intermediary products, rather than final products, could not have a “direct” effect on US commerce.166 After additional consideration likely influenced by the DOJ’s concern with the initial holding and its implications for international cartel enforcement, the court vacated the first opinion and opted for a different approach to the same conclusion.167 Summarizing that the case involved “components [that] were sold by their manufacturers to their foreign subsidiaries, which incorporated them into the finished product to Motorola for resale in the United States,” Judge Posner branded the wrongful conduct, effect, and injury as entirely extraterritorial because Motorola and its subsidiaries did not function as one enterprise.168 Therefore, the court construed Motorola as an indirect purchaser, barred from bringing a claim under the Sherman Act by virtue of the holding in Illinois Brick Co. v. Illinois,169 and concluded that the entire transaction falls outside of the FTAIA’s exception, though recognizing that the effect on US commerce may, perhaps, be “direct.”170

But, the court’s reliance on Illinois Brick was no better than its initial attempt to characterize the effect of the LCD cartel on US commerce. Several points suggest Motorola Mobility was wrongly decided, including inconsistencies with US precedent and statutes. In holding that Motorola and its subsidiaries did not function as one enterprise because they are governed by the different laws of the countries in which they are incorporated and operated, Judge Posner disregarded the Supreme Court’s central holding in Copperweld Corp. v. Independence Tube Corp.171 Copperweld’s progeny have found a corporation and its wholly owned subsidiaries to be a “single entity” with “complete unity of interest” and, similarly, have also found a lack of relevant differences between a corporation and its wholly owned subsidiary for Sherman Act analysis.172 Additionally, for non-wholly owned subsidiaries, courts relying on Copperweld have treated a parent and its non-wholly owned subsidiary as a single entity for antitrust purposes where the parent held a controlling majority of the subsidiary’s stock.173

In addition to precedent, other US antitrust statutes treat parents and subsidiaries as one entity. The Hart-Scott-Rodino Antitrust Improvement Act (“HSR”) requires a business acquiring another business in a transaction meeting certain thresholds to file a premerger notification with the government.174 If the acquiring business is controlled by a parent corporation, the HSR mandates that the “ultimate parent entity” file the notification regardless of the nationality of the acquired business.175 Furthermore, appearing to be influenced by Copperweld, the HSR does not require filing for the merger of two wholly owned subsidiaries with a common parent.176

Motorola also argued that it was the “target” of the illegal conduct or, alternatively, the direct victim because its subsidiary “passed on” the cartel-inflated portion of the original purchase price to Motorola.177 In Illinois Brick, which also contemplated the offensive use of the illfated pass-on theory in US antitrust jurisprudence, Justice White surmised that a situation in which the pass-on defense “might be permitted” is where the direct purchaser is owned or controlled by its customer.178 Posner, highlighting the semantic difference between “might be” and “is,” brushed this off as meaningless.179

The Motorola Mobility decision has negative consequences for US antitrust law, non-US subsidiaries of American parents relying on US law for potential recovery, US businesses operating internationally with international subsidiaries, and consumers. In essence, the Seventh Circuit announced a broad rule that eliminates private antitrust remedies where the first purchase of a price-fixed component occurs offshore, drastically mitigating the ability of US antitrust law to deter harmful foreign conduct targeting US markets.180 Is Posner really suggesting that American businesses are only protected by US antitrust law when the domestic parent itself engages in such wholly foreign transactions?181

Moreover, the Seventh Circuit’s decision creates a glaring inconsonance with the Ninth Circuit’s in what should be similar outcomes to similar cases. Despite justifying its second decision the Seventh Circuit by warning that “rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability to independently regulate its own affairs,’” the court did not delve into any meaningful comity analysis.182 Particularly troubling is that while concerned with the prospect of “rampant extraterritoriality,” the court gives no attention to whether Motorola would be able to recover abroad or, more importantly, whether the cartels’ host countries have any incentive to prosecute “when their nationals engage in hardcore cartel conduct directed at a huge U.S. consumer market” that caused harm in that, opposed to its own, market.183

B. Comity Analysis: A Possible Solution to Interpreting the FTAIA?

Ultimately, the Seventh Circuit may have initially reached a more reasonable conclusion in its first decision of Motorola Mobility had the court taken a different interpretational approach, such as one taken by the Supreme Court. Because the FTAIA’s effect test reflects an evaluation of a US jurisdictional claim, a possible method of aiding the courts’ construction of what a “direct” effect entails may be to follow Empagran’s example and in fact employ a comity analysis.184 The two most recent comity principle constructions, as discussed, are in Hartford Fire and Empagran. However, the different comity approaches the Supreme Court undertakes in both cases result in standards that are under-inclusive and over-inclusive, respectively.

The Supreme Court’s approach in Hartford Fire suggested the unhelpfulness, if not irrelevance, of comity if there was no true conflict of laws.185 Hartford Fire’s comity test is under-inclusive in the sense that comity considerations would rarely be triggered, perhaps only in cases where a foreign state established laws mandating anticompetitive behavior.186 Indeed, the First Circuit in Nippon Paper suggested that Hartford Fire had “stunted” the growth of comity in antitrust, and Professor Eleanor Fox proclaimed that “[the decision in Hartford Fire] gives U.S. jurists and enforcers license to disregard the interests of non- Americans.”187

Empagran’s comity analysis, on the other hand, may be rigidly over-inclusive to the point where important US antitrust law objectives, such as deterrence and remedy, may go unserved. Turning its back on the Supreme Court’s previous holdings in Continental Ore and Pfizer, the decision’s use of comity may in fact have created “a handicap going forward [that] would lead to under-deterrence as well as unfairness.”188 As Judge Higginbotham’s dissent in Den Norske v. HeereMac stresses, the FTAIA does not alter Pfizer’s affirmation of foreign plaintiffs’ ability to sue under the Sherman Act, which was expressly approved in the statute’s legislative history.189

#### Unrestrained cartel behavior makes global supply chains unstable and undermines domestic manufacturing

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 FTAIA was enacted to “clarify” the Sherman Act’s application to transactions that affect U.S. commerce, yet the circuit courts have not come to a consensus as to how it must be consistently interpreted.198 Similarly, despite the circuit splits that have overwhelmed the judicial system, the U.S. Supreme Court has only interpreted the FTAIA once, in Empagran. 199 The Court at that time, however, did not answer the critical question embodied in Hui Hsiung and Motorola: whether the FTAIA applies to transactions made outside of the United States but eventually have an impact upon U.S. competition, commerce, and consumers.200

The indistinguishable facts of Hui Hsiung and Motorola and the irreconcilable rulings call for a consistent rule across the circuit courts and intervention by the U.S. Supreme Court.201 Both cases involved the price-fixing of LCD panels by foreign entities, whose manufactured products eventually reached the United States.202 Yet, the Seventh and Ninth Circuits disagreed on what constitutes “import trade” or “import commerce.”203 The Seventh Circuit held that in order to be liable, a defendant must be engaged as an importer, who directly sells goods into the United States.204 Accordingly, it ruled that the one percent of LCDs sold directly to Motorola were too attenuated to become “import trade” under the Sherman Act;205 the remaining forty-two percent of LCDs, which Motorola’s foreign subsidiaries bought from the defendants, were too “remote” under FTAIA.206 In complete contrast, the Ninth Circuit held that any conduct consummated within an import market qualifies as either “import trade” or “import commerce.”207 This meant that the defendants did not have to import any goods themselves, but only needed to have engaged in conduct within the import business to satisfy both the Sherman Act and the FTAIA.208 Accordingly, the Ninth Circuit held that the defendants, although not the per se importers of the LCD panels, were liable under either the Sherman Act or the FTAIA for engaging in business that affected the finished products that were sold into the United States.209

These two contrasting rulings have placed not only the defendants—but also other foreign companies doing business with the United States—in a precarious position.210 These two cases represent the frequently recurring question of how to interpret the FTAIA.211 Foreign companies that do business, directly or indirectly, want clear guidance on how their business practices could be subjected to U.S. antitrust laws.212 No company will want to risk breaking the law in one jurisdiction, yet be absolved in the other.213 A clear ruling across all federal courts will be beneficial to international antitrust enforcement and the domestic economy, especially with the continuous expansion of global supply chains.214

A “supply chain” is defined as “a network between a company and its suppliers to produce and distribute a specific product, and the supply chain represents the steps it takes to get the product or service to the customer.”215 It essentially “encompasses each step from the supplier to the final consumer.”216 Establishing global supply chains across the world has become a strategy of companies in today’s globalized economy.217 Global supply chains have played an important role in the end-to-end production of goods sought by consumers across the world.218 In today’s globalized economy, companies use this practice to source, manufacture, transport, and distribute products internationally.219 For example, televisions are manufactured in China using displays from Taiwan and Korea.220 These televisions eventually find their way into various countries, including the United States.221 Due to this multi-step process, many businesses that utilize global supply chains become victims of anticompetitive activity by foreign cartels.222 In fact, price-fixing conspiracies have cost consumers more than $1 trillion over the last twenty-five years.223 Needless to say, the United States, holding a huge market share of these products, should protect these supply chains to some degree through the enactment and execution of an understandable U.S. antitrust law.224

The manufacturing industry, in particular, contributes more than $1.8 trillion annually to the U.S. economy and “employs nearly twelve million men and women.”225 The goods sold by foreign intermediaries eventually find their way into the United States, some of which may be used to further domestic manufacturing.226 For example, in 2014, approximately $2.8 trillion of goods were imported into the United States.227 This amount has more than doubled in the last fifteen years.228 Most of these imports act as intermediate inputs on productivity used for other businesses in the United States.229 For example, in 2006, over ten percent of intermediate inputs accounted for imported intermediaries used by private industries.230 Without a doubt, the question presented in these two cases is of tremendous economic significance to U.S. manufacturers and the United States as a whole. The harm of the price-fixing conspiracy from these two cases alone has affected well over $23.5 billion in sales of LCD panels imported into the United States, either as raw materials or as components of finished products.231 Manufacturers have had to absorb the artificially high costs of the LCD panels as they incorporate the component LCD panels into finished products, and they ultimately pass those artificially inflated costs on to U.S. consumers.232 Price-sensitive consumers, in return, may have refused to purchase these more expensive products, altering the demand-supply market and impacting the companies’ bottom lines.

#### 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.

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

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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.

#### 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.

#### Next gen batteries solve grid stability and blackouts

Beall ‘18 [Abigail Beall; 2018; Journalist writing for Chinadialogue, citing Dr Emma Kendrick, a materials chemist at the University of Warwick; "The race to develop the next generation battery," https://www.chinadialogue.net/article/show/single/en/10808-The-race-to-develop-the-next-generation-battery]

Alongside electric cars, grid storage is another area where large-scale batteries will play an increasingly important role. The amount of renewable power from solar and wind at any given time depends on the weather, which makes it intermittent. Batteries can help stabilise grids by storing energy efficiently.

“Sodium-ion batteries could be an inexpensive alternative to lithium-ion in the grid storage market,” says Ms Cheng. Sodium-ion batteries work in a similar way to lithium-ion but use sodium instead, which is more readily available. Dr Emma Kendrick, a materials chemist at the University of Warwick, is looking into the sodium-ion battery. “This is a low-cost alternative to lithium-ion batteries,” she says. “It is still in its infancy but there are opportunities to perform research into the manufacturability and durability of the technology.” Flow batteries are another alternative.

“Flow batteries are also attractive options since they can be easily scaled up to provide high capacity," says Ms Cheng, adding: "They contain two chemical compounds that are separated by a membrane. The compounds can flow through the membrane, creating chemical energy, but they can also move back to where they started, which recharges the battery."

There are many other options. In February this year, scientists at the University of California Irvine created gold nanowire batteries that can withstand more recharging than ever before, hundreds of times within their lifetime. The team hopes this will one day lead to batteries that can last indefinitely.

Graphene may also be a component of the battery of the future. A Spanish company called Grabat says their graphene batteries can provide power for an electric vehicle to travel 500 miles on a single charge. For comparison, Tesla’s Model 3 can travel 215 miles on one charge.

While nobody can predict exactly what the next generation of batteries is going to look like, there is a huge amount of work going into solving the problem.

#### They insulate the network from attacks and build in resilience that stops collapse

Urry ‘17 [Amelia; 2/22/17; Grist's associate editor of science and technology; "Inside the Race to Build the Battery of Tomorrow," https://www.wired.com/2017/02/researchers-racing-build-battery-future/]

And here’s what a better battery stands to win: a cleaner, more reliable power system, which doesn’t rely on fossil fuels and is more robust to boot.

Every time you flip a light switch, you tap into a gigantic invisible web, the electrical grid. Somewhere, at the other end of the high-voltage transmission lines carrying power to your house, there’s a power plant (likely burning coal or, increasingly, natural gas) churning out electricity to replace the electrons that you and everyone else are draining at that moment.

The amount of power in our grid at any one time is carefully maintained—too much or too little and things start to break. Grid operators make careful observations and predictions to determine how much electricity power plants should produce, minute by minute, hour by hour. But sometimes they’re wrong, and a plant has to power up in a hurry to make up the difference.

Lucky for us, it’s a big, interconnected system, so we rarely notice changes in the quality or quantity of electricity. Imagine the difference between stepping into a bucket of water versus stepping into the ocean. In a small system, any change in the balance between supply and demand is obvious — the bucket overflows. But because the grid is so big—ocean-like—fluctuations are usually imperceptible. Only when something goes very wrong do we notice, because the lights go out.

Renewable energy is less obedient than a coal- or gas-fired power plant—you can’t just fire up a solar farm if demand spikes suddenly. Solar power peaks during the day, varies as clouds move across the sun, and disappears at night, while wind power is even less predictable. Too much of that kind of intermittency on the grid could make it more difficult to balance supply and demand, which could lead to more blackouts. Storing energy is a safety valve. If you could dump extra energy somewhere, then draw from it when supply gets low again, you can power a whole lot more stuff with renewable energy, even when the sun isn’t shining and the wind isn’t blowing. What’s more, the grid itself becomes more stable and efficient, as batteries would allow communities and regions to manage their own power supply. Our aging and overtaxed power infrastructure would go a lot further. Instead of installing new transmission lines in places where existing lines are near capacity, you could draw power during off-peak times and stash it in batteries until you need it.

Just like that, the bucket can behave a lot more like the ocean. That would mean—at least in theory—more distributed power generation and storage, more renewables, and less reliance on giant fossil-fueled power plants.

#### Grid resilience solves extinction – it’s a threat buffer and the impact is understated

Greene ‘19 [Sherrell; 2019; He is a recognized subject matter expert in nuclear reactor safety, nuclear fuel cycle technologies, and advanced reactor concept development. Mr. Greene is widely acclaimed for his systems analysis, team building, innovation, knowledge organization, presentation, and technical communication skills. Mr. Greene worked at the Oak Ridge National Laboratory (ORNL) for over three decades. During his career at ORNL, he served as Director of Research Reactor Development Programs and Director of Nuclear Technology Programs; "Enhancing Electric Grid, Critical Infrastructure, and Societal Resilience with Resilient Nuclear Power Plants (rNPPs)," https://ans.tandfonline.com/doi/pdf/10.1080/00295450.2018.1505357?needAccess=true]

Societies and nations are examples of large-scale, complex social-physical systems. Thus, societal resilience can be defined as the ability of a nation, population, or society to anticipate and prepare for major stressors or calamities and then to absorb, adapt to, recover from, and restore normal functions in the wake of such events when they occur. A nation’s dependence on its Critical Infrastructure systems, and the resilience of those systems, are therefore major components of national and societal resilience.

There are a variety of events that could deal crippling blows to a nation’s Grid, Critical Infrastructure, and social fabric. The types of catastrophes under consideration here are “very bad day” scenarios that might result from severe GMDs induced by solar CMEs, HEMP attacks, cyber attacks, etc.5

As briefly discussed in Sec. III.C, the probability of a GMD of the magnitude of the 1859 Carrington Event is now believed to be on the order of 1%/year. The Earth narrowly missed (by only several days) intercepting a CME stream in July 2012 that would have created a GMD equal to or larger than the Carrington Event.41 Lloyd’s, in its 2013 report, “Solar Storm Risk to the North American Electric Grid,” 42 stated the following: “A Carrington-level, extreme geomagnetic storm is almost inevitable in the future…The total U.S. population at risk of extended power outage from a Carrington-level storm is between 20-40 million, with durations of 16 days to 1-2 years…The total economic cost for such a scenario is estimated at $0.6-2.6 trillion USD.” Analyses conducted subsequent to the Lloyd’s assessment indicated the geographical area impacted by the CME would be larger than that estimated in Lloyd’s analysis (extending farther northward along the New England coast of the United States and in the state of Minnesota),43 and that the actual consequences of such an event could actually be greater than estimated by Lloyd’s.

Based on “Report of the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack: Critical National Infrastructures” to Congress in 2008 (Ref. 39), a HEMP attack over the Central U.S. could impact virtually the entire North American continent. The consequences of such an event are difficult to quantify with confidence. Experts affiliated with the aforementioned Commission and others familiar with the details of the Commission’s work have stated in Congressional testimony that such an event could “kill up to 90 percent of the national population through starvation, disease, and societal collapse.” 44,45 Most of these consequences are either direct or indirect impacts of the predicted collapse of virtually the entire U.S. Critical Infrastructure system in the wake of the attack.

Last, recent analyses by both the U.S. Department of Energy46 and the U.S. National Academies of Sciences, Engineering, and Medicine47 have concluded that cyber threats to the U.S. Grid from both state-level and substatelevel entities are likely to grow in number and sophistication in the coming years, posing a growing threat to the U.S. Grid.

These three “very bad day” scenarios are not creations of overzealous science fiction writers. A variety of mitigating actions to reduce both the vulnerability and the consequences of these events has been identified, and some are being implemented. However, the fact remains that events such as those described here have the potential to change life as we know it in the United States and other developed nations in the 21st century, whether the events occur individually, or simultaneously, and with or without coordinated physical attacks on Critical Infrastructure assets.

#### The aff’s balancing test deters anticompetitive behavior while balancing comity and global antitrust development – solves both under- and over-inclusion

Murray ‘17 [Sean; 2017; J.D. Candidate and Stein Scholar, Fordham University School of Law; Fordham International Law Journal; “With A Little Help From My Friends: How A Us Judicial International Comity Balancing Test Can Foster Global Antitrust Private Redress.” vol 41, iss. 1 https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj]

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

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

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

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

#### And factoring in consideration of foreign penalties prevents over-enforcement and ensures global anti-cartel cohesion

Huizing ‘18 [Pieter Huizing; 2018; PhD student at Leiden University and a senior associate at the antitrust department of Allen & Overy LLP; "InnoLux v AU Optronics: comparing territorial limits to EU and US public enforcement of the LCD cartel," https://academic.oup.com/antitrust/article-abstract/6/2/231/4964994]

The LCD cases show that in respect of cartel conduct by multinational corporations involving their worldwide sales, the existence of a certain domestic connection to justify the exercise of jurisdiction is almost a given. It is therefore not surprising that a multitude of authorities will generally be able to assert jurisdiction over truly global cartel behaviour. Without any jurisdictional or territorial delineation between authorities on ‘who sanctions what and by how much’, domestic enforcement of international cartel conduct is bound to lead to potential or actual overlapping punishment. It is easy to see how the fining methodologies used by the Commission and the DOJ can result in the same sales being taken into account more than once for the purposes of sanctioning the same overall conduct. Such double-counting increases risks of over-enforcement and disproportionate overall punishment. To ensure that on an international level the overall penalty fits the severity of the crime, it is submitted that authorities targeting the same conduct in parallel should avoid unilaterally aiming for the maximum fine available without having any regard for the level of punishment and deterrence achieved by sanctions imposed elsewhere. This is necessary not only to safeguard overall proportionality of fines, but also with a view to comity considerations. Maintaining an isolated and expansive view on cartel enforcement may have been justifiable when antitrust laws were effectively enforced in only a few countries in the world. But with over 125 jurisdictions with active cartel enforcement, this may be the time for the European and American authorities to start adopting a more modest approach.132 As noted by Connor in the context of his support for the Motorola Mobility judgment: [h]aving invited the world to join the effort to prohibit and prosecute cartels, and that invitation having been enthusiastically accepted, it is good manners/ policy that the competition regimes set up around the globe—which continue to develop—be given due respect and that the views of our partners be given serious consideration.133 The need for international coordination of extraterritorial cartel enforcement is a hot topic in the global antitrust community. It is a recurring theme on antitrust conferences and a key focus of the advocacy efforts of international organizations such as the ICN, the OECD, and the International Bar Association (IBA). The focus of such efforts has often been on cooperation in respect of the investigation stages and less on coordination in respect of the scope and level of punishment.134 But there are more and more calls for authorities to also coordinate their cartel penalties. For example, during the OECD Roundtable on Cartels Involving Intermediate Goods in October 2015, several delegates highlighted ‘the importance of taking into account fines or sanctioning decisions already imposed by other competition agencies to minimise concerns about the fairness and proportionality of fines levied in multijurisdictional cases’.135 In June 2016, the Japanese Ministry of Economy, Trade and Industry (METI) published a report on its research into the enforcement of international cartels, in view of the ‘growing concern about overlapping application of competition laws or imposition of multiple surcharges by several countries’.136 Based on its research, the Ministry proposed increased coordination between authorities to take into account concurrent penalties. In December 2016, both the IBA and the American Bar Association (ABA) in their comments on the proposed new DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation called upon the US authorities to stress the need for cooperation regarding sanctioning of international cartel cases to avoid over-deterrence or double-jeopardy.137 Furthermore, also in December 2016, in one of the key submissions for the OECD’s 15th Global Forum on Competition, Hwang Lee specifically pressed for increased efforts by competition authorities to coordinate fining decisions in parallel proceedings.138 These examples indicate that—while moving slowly—progress is made in recognizing the need for commonly accepted principles for coordination between authorities in the sanctioning of international cartels.

Since internationally agreed principles on the coordination of cartel fines are yet to be developed, national self-restraint is currently required to limit the risks resulting from parallel enforcement of international cartels. Such self-restraint can be exercised in respect of any of the three elements assessed in this article: asserting jurisdiction, defining the territorial scope of punished conduct, and setting the fine.139 The Japan Fair Trade Commission (JFTC), for example, has explained that it cannot currently take into account sanctions imposed by other authorities in determining its own fine because it lacks the discretion to do so.140 However, in view of international comity, the JFTC does consider enforcement action elsewhere in respect of the same international cartel to decide whether it will also take action. Similarly, in Australia– where cartel fines are set by the court—the authority exercises prosecutorial discretion by considering whether it is more appropriate to leave enforcement activities to jurisdictions where the harm of a cartel was felt most immediately.141 In contrast, the Korean Fair Trade Commission does not consider sanctions imposed elsewhere for the decision whether or not to bring an enforcement action, but it does have the discretion to consider foreign fines in calculating the surcharge it imposes.142 The DOJ has indicated that when a sanction in respect of the same cartel is first imposed outside the USA, it may take this into account if the sanction accounts for the harm to businesses and consumers in the USA and therefore satisfies deterrent interests of the USA.143 Terzaken and Huizing have suggested altering this latter approach by focusing on whether there is any residual deterrence need following penalties already imposed elsewhere, not on whether specific national harm was considered in the fining methodology applied by a foreign authority.144

As an alternative to taking into account penalties imposed elsewhere, Bentley and Henry have proposed that authorities should solely take into account sales for the purposes of fine calculation if such sales meet the applicable jurisdictional tests.145 This seems a sensible proposal. While it is true that the basis for asserting jurisdiction can be separated from the basis for calculating a fine, as explicitly reasoned by the ECJ, it is hard to justify partly relating a penalty to conduct that in itself would not have a sufficient territorial nexus to trigger potential prosecution. In analogy to the Seventh Circuit’s assessment of Motorola’s damages claims, it is difficult to accept that foreign sales without such nexus can still be taken into account as part of domestic enforcement as long as they happened to take place alongside some import commerce. Internationally, it may not even be all that controversial to require authorities to calculate cartel fines on the basis of only those sales that create a sufficient jurisdictional link to their territory. A recent survey by the International Competition Network (ICN) already shows that many jurisdictions maintain the view that only the direct sales of cartelized products should form the basis of a cartel fine in all or most cases.146

Bentley and Henry consider their solution to be simpler than requiring authorities to take into account fines already imposed elsewhere. But it is submitted that this is still needed even if authorities only take into account sales that pass the applicable jurisdictional tests, as this does not avoid situations where more than one authority claims jurisdiction.147 This is especially the case where authorities apply a broad interpretation of a qualified effects test. In such situations, the same sales may still be taken into account more than once. And even if authorities avoid any double counting of sales, international alignment of sanctions may still be required to ensure overall proportionality and an optimal level of deterrence. A truly coordinated approach to international cartel enforcement should therefore more comprehensively focus on the ultimate outcome of the overall enforcement.

It goes beyond the scope of this article to discuss at what level cartel fines must be set to achieve both proportionality and optimal deterrence. And it must be noted that it has not been empirically tested whether overlapping cartel fines imposed in multiple jurisdictions actually create a problem of over-deterrence or whether global cartels are (still) more likely to benefit from under-deterrence.148 But it is clear that an optimal overall penalty for a global cartel is not automatically achieved by the accumulation of several national fines for the same cartel that were considered optimal by the respective authorities. First, such accumulation would likely mean that the overall fine amount increases in a certain proportion to the additional amount of affected sales in the sanctioning jurisdictions. However, proportionality and deterrence are complex principles that not necessarily (directly) related to the level of sales achieved with the cartelized products. Proportionality is typically linked to the elements of culpability of the offender and the harm caused by the offence.149 Optimal deterrence is typically linked to the expected gains from the offence and the probability of detection and punishment.150 So it is not obvious to see why in the pursuit of a proportionate and deterrent penalty, the fine amount should increase in direct proportion to the level of affected sales. It may well be that a proportionate and deterrent fine has already been achieved despite not covering all potentially affected sales. In this context, the Business and Industry Advisory Committee to the OECD reasoned that ‘once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance’.151 Second, several authorities may take the same factors into account in increasing a fine for deterrence purposes, such as the size of the undertaking. A single authority may determine that for a cartel fine to actually ‘hurt’, it should amount to at least 3 per cent of an undertaking’s total turnover. But if five authorities use this approach in respect of the same global cartel, the total fine amounting to 15 per cent of the total turnover may hurt much more than what was considered necessary by each individual authority.152 Thirdly, many authorities apply a maximum fine amount that is related to the total turnover of an undertaken (eg the cap of 10 per cent as applied by the Commission). Such a cap serves to ensure fines are not excessive or disproportionate153 and to limit the risks of undue financial difficulties and insolvency (and hence lessened competition) as a result of a fine. But if five authorities were to impose fines for the same global cartel up to a 10 per cent cap, the total fine amounting to 50 per cent of the undertaking’s turnover is still quite likely to jeopardize the viability of the undertaking and quite likely to be (perceived as) disproportionate in relation to the size of its economic activities.154

In AU Optronics, Judge Illston in her discretion decided that USD 500 million was sufficiently deterrent and not excessive, even though the fining guidelines had recommended a fine between USD 936 and 1872 million. Her decision was also based on the penalties and financial impact already incurred by AUO in other proceedings, something explicitly not taken into account in the DOJ sentencing recommendation. Rather than rigidly applying the domestic fining guidelines, she appears to have adopted a comprehensive approach that considered the overall proportionality of punishment for AUO’s cartel conduct and the residual deterrence need. While the EU and US authorities also seem willing to incidentally and on an ad hoc basis take a step back in view of foreign enforcement,155 sound enforcement policies that are aimed to achieving an overall appropriate fine by taking into account the international context of cartel sanctioning are still lacking.156 It is submitted that the development of such policies is necessary not only to ensure consistency in enforcement practices but also to increase legal certainty, predictability of sanctions, and confidence in the proportionality of international cartel enforcement.

#### Plan: The United States federal government should increase prohibitions on anticompetitive business practices by establishing a balancing test that expands the extraterritorial scope of its antitrust laws.

### Indigenous Development Adv

#### Ambiguous unreliable enforcement inhibits anti-cartel cohesion and undermines foreign regulatory institutions

Briggs & Bitton ‘15 [John; Daniel; 2015; Antitrust and litigation counsel of choice for dozens of major companies in the United States, Asia, Europe and Scandinavia. Client demand for his work has focused on antitrust, M&A and complex civil litigation; An attorney who represents clients in the San Francisco, California area; "Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity." https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf]

In a variety of settings foreign governments have expressed and are expressing concerns about the extraterritorial application of U.S. law. The United States occupies a unique position in global trade and finance. The United States also has enacted far-reaching legislation involving commerce, banking and finance, business conduct, mergers and acquisitions, foreign corrupt practices, and a variety of other matters. The extraterritorial application of laws in these areas challenges the sovereignty of other nations and is often viewed as offensive. In antitrust, the United States’ influence is the result of its status as the world’s largest importer of goods and services.18 In finance, this influence is the result of the U.S. dollar’s status as the international unit of account: “Pretty much any dollar transaction— even between two non-US entities—will go through New York City at some point, where it comes under the jurisdiction of US authorities.”19

The rampant extraterritorial application of U.S. laws has ruffled the feathers of foreign governments for a long time, beginning essentially with the cluster of private and government actions in the Uranium cartel cases back in the 1970’s and 1980’s. Close American allies, including Australia, Canada, France, South Africa, the UK, and others, reacted with hostility to the extraterritorial activism of the domestic judiciary by enacting “blocking” and “claw back” legislation.20 Such reactions included the enactment of laws by the United Kingdom and Canada that prohibit enforcement of foreign judgments awarding multiple damages21 and laws passed by the United Kingdom, France, Australia, and the Canadian provinces of Quebec and Ontario that limit or prohibit the removal of documents in response to a foreign order.22

More recently, a number of governments have expressed their concerns about the application of U.S. laws abroad through amicus briefs, including Australia, Belgium, Canada, China, France, Germany, Japan, the Netherlands, South Korea, Switzerland, Taiwan, and the United Kingdom:23 most of the United States’ top fifteen trading partners.

These foreign governments have expressed a fairly wide variety of concerns about the potential for extraterritorial application of U.S. laws to interfere with those governments’ policy decisions on such matters as liability, procedure, and damages. While most governments have regulatory regimes in place to police, for example, securities fraud and cartel behavior, these differ in many regards both from the American approach and also from each other, reflecting different cultural, social, and economic factors. These differences include the required showing for liability (e.g., definition of materiality in securities fraud cases),24 procedural protections (e.g., class-action formation and punitive) damages.26 Applying U.S. law to actors, conduct, and effects appropriately considered under a set of foreign laws undermines a foreign government’s ability to govern its own domain and, in the end, becomes an affront to its sovereignty.

Stepping on the toes of foreign governments’ regulatory regimes also risks stymying the international development of policies and regulations beneficial to the United States. Countries without well-developed regulatory apparatuses are less likely to develop them if the behavior is already policed by private plaintiffs in the United States or if the apparatuses would see their policy choices effectively overruled by U.S. policies.27

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

#### That cracks sustainable development and poverty relief.

Cheng ‘12 [Thomas; 2012; assistant professor at the Faculty of Law of the University of Hong Kong; "Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law." <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1362&context=cjil>]

SME = small to mid-sized enterprise

Serious poverty and income inequality are prevalent in many developing economies. These phenomena present two main challenges to developing countries as far as competition law enforcement is concerned. One is the need to encourage entrepreneurship to promote inclusive growth; the other is the need to protect impoverished consumers from exploitative practices. A number of commentators, including Fox, have argued that developing countries must pursue inclusive growth that will alleviate poverty and reduce income inequality.162 Inclusive growth requires opportunities for upward economic mobility, an important avenue for which is entrepreneurship.'63 For those who are at the bottom of the economic ladder in a developing country, often the only way to break out of poverty is to start their own businesses, which are going to be, at least initially, SMEs. Therefore, encouragement of entrepreneurship and assistance to SMEs must be a central pillar in every inclusive growth strategy. If competition law is to complement an inclusive growth strategy, it must afford SMEs stronger protection than is customary in established jurisdictions and be particularly vigilant against abuse of dominance. This is especially so because dominant firms in developing countries are often former state monopolies that still benefit from official patronage or informal connections to the state. Their privileged positions make it even harder for new private firm rivals to compete with them.

The poorest in many developing countries live below the poverty line and often scrape by with no more than a dollar or two a day.'64 They are often malnourished, sick, and illiterate, which severely curtails their productivity and ability to improve their economic well-being. Therefore, an inclusive growth strategy must include policies to combat malnourishment, poor health, and illiteracy. While the bulk of the responsibility will fall on government programs that directly confront these problems, competition law has a role to play. Competition law enforcement may focus on goods that have the most direct impact on the nutritional, health, and educational needs of the poorest in developing countries. Anticompetitive conduct in these sectors should be dealt with harshly.

Beyond that, developing country competition authorities may consider taking a tougher stance on exploitative practices by dominant firms. This is despite the fact that most established jurisdictions, especially the US, have largely left exploitative practices out of the purview of competition law."' The usual justification for this stance is two-fold. First, there is a serious implementation problem of distinguishing between very high prices and excessive prices.'6 6 Such distinctions are notoriously difficult to draw. The inability to do so undermines effective enforcement and legal certainty for firms seeking to comply with the law. Second, there is the theoretical objection that the opportunity to reap temporary monopoly profit spurs firms to compete and innovate.'6 1 In the industrialized nations, the general view is that consumers are able to bear momentary high prices, which will be eroded once a new competitor enters the market. Short-run monopolistic prices are the price that consumers pay for the benefit of keener long-run competition and innovation. While consumers in developed nations may be in a position to withstand such high prices, the poorest consumers in developing countries are not. Any extra cost for a basic necessity will have a direct and severe impact on their overall standard of living. For example, 10 percent more spent on foodstuffs may require consumers to remove their children from school."' The plight of these consumers therefore may justify a more assertive stance on exploitative practices in markets for basic necessities.

#### Development diffuses multiple existential risks -- d doesn’t assume the changing nature of conflict

UNSC ‘17 [United Nations Security Council; 12/20/17; “Prevention, Development Must Be at Centre of All Efforts Tackling Emerging Complex Threats to International Peace, Secretary-General Tells Security Council,” https://www.un.org/press/en/2017/sc13131.doc.htm]

Prevention and development must be at the centre of all efforts to address both the quantitative and qualitative changes that were emerging in threats around the world, the Secretary‑General of the United Nations told the Security Council today, as some 60 Member States participated in an all‑day debate tackling complex contemporary challenges to international peace and security.

António Guterres said the perils of nuclear weapons were once again front and centre, with tensions higher than those during the Cold War. Climate change was a threat multiplier and technology advances had made it easier for extremists to communicate. Conflicts were longer, with some lasting 20 years on average, and were more complex, with armed and extremist groups linked with each other and with the worldwide threat of terrorism. Transnational drug smugglers and human traffickers were perpetuating the chaos and preying on refugees and migrants.

The changing nature of conflict meant rethinking approaches that included integrated action, he said, stressing that prevention must be at the centre of all efforts. Development was one of the best instruments of prevention. The 2030 Agenda for Sustainable Development would help build peaceful societies. Respect for human rights was also essential and there was a need to invest in social cohesion so that all felt they had a stake in society.

He also emphasized that women’s participation was crucial to success, from conflict prevention to peacemaking and sustaining peace. Where women were in power, societies flourished, he pointed out. Sexual violence against women, therefore, must be addressed and justice pursued for perpetrators.

Prevention also included preventive diplomacy, he said, noting that the newly established High-level Advisory Board on Mediation had met for the first time. The concept of human security was a useful frame of reference for that work, as it was people‑centred and holistic and emphasized the need to act early and prioritize the most vulnerable.

“Let us work together to enhance the Council’s focus on emerging situations, expand the toolbox, increase resources for prevention, and be more systematic in avoiding conflict and sustaining peace,” he said, emphasizing the need for Council unity. Without it, he said, the parties to conflict might take more inflexible and intransigent positions, and the drivers of conflict might push situations to the point of no return.

Japan’s representative, Council President for December, spoke in his national capacity, noting that in the 25 years since the end of the Cold War, there had been a rise in complex contemporary challenges to international peace and security. That included the proliferation of weapons of mass destruction, the expansion of terrorism, and non‑traditional challenges such as non‑State actors and inter‑State criminal organizations.

#### SDGs are leverage points that solve extinction BUT failure causes cascading risks that cumulatively outweigh any single risk, causing extinction

Fenner and Cernev ‘20 [Richard Fenner; Jan. 2020; Director of the MPhil in Engineering for Sustainable Development at Cambridge; Australian National University, Canberra, Australia; “The importance of achieving foundational Sustainable Development Goals in reducing global risk,” Volume 115, https://www.sciencedirect.com/science/article/pii/S0016328719303544]

Fig. 3 demonstrates that cascade failures can be transmitted through the complex inter-relationships that link the Sustainable Development Goals. Randers, Rockstrom, Stoknes, Goluke, Collste, Cornell, Donges et al. (2018) have suggested that where meeting some SDGs impact negatively on others, this may lead to “crisis and conflict accelerators” and “threat multipliers” resulting in conflicts, instability and migrations. Ecosystem stresses are likely to disproportionately affect the security and social cohesion of fragile and poor communities, amplifying latent tensions which lead to political instabilities that spread far beyond their regions. The resulting “bad fate of the poor will end up affecting the whole global system"(Mastrojeni, 2018). Such possibilities are likely to go beyond incremental damage and lead to runaway collapse.

The World Economic Forums’ Global Risks Report for 2018 shows the top five global risks in terms of likelihood and impact have changed from being economic and social in 2008 to environmental and technological in 2018, and are closely aligned with many SDGs (World Economic Forum, 2018). The report notes “that we are much less competent when it comes to dealing with complex risks in systems characterised by feedback loops, tipping points and opaque cause-and-effect relationships that can make intervention problematic”. The most likely risks expected to have the greatest impact currently include extreme weather events natural disasters, cyber attacks, data fraud or theft, failure of climate change mitigation and water crises.

These are represented in Fig. 3 by the following exogenous variables. “Climate change” drives the need for Climate Action (SDG 13), “Cyber threat” may adversely impact technology implementation and advancement which will disrupt Sustainable Cities and Communities (SDG 11); Decent Work and Economic Growth (SDG 8) and the rate of introduction of Affordable and Clean Energy (SDG 7), with reductions in these goals having direct consequences in also reducing progress in the other goals which they are closely linked to. “Data Fraud or Threat” has the capacity to inhibit innovation and Industrial Performance (SDG 9), reducing competitiveness (and having the potential to erode societal confidence in governance processes). “Water Crises” (linked with climate change) have a direct impact on Human Health and Well Being (SDG 3) as well as reducing access to Clean Water and Sanitation (SDG 6) and reducing agricultural production which increases Hunger (SDG 2). The causal loop diagram also highlights “Conflict” as a variable (driven by multiple environmental-socio-economic factors) which together with regions most impacted by climate degradation will lead to an increase in migrant refugees enhancing the spread of disease and global pandemic risk, thus impacting directly on Human Health and Well Being (SDG 3)

4.2. Existential and catastrophic risk

The level and consequences of these risks may be severe. Existential Risks (ER) have a wide scope, with extreme danger, and are “a risk that threatens the premature extinction of humanity or the permanent and drastic destruction of its potential for desirable future development” (Farquhar et al., 2017,) essentially being an event or scenario that is “transgenerational in scope and terminal in intensity” (Baum & Handoh, 2014). With a smaller scope, and lower level of severity, global catastrophic risk is defined as a scenario or event that results in at least 10 million fatalities, or $10 trillion in damages (Bostrom & Ćirković, 2008). Global Catastrophic Risk (GCR) events are those which are global, but they are durable in that humanity is able to recover from them (Bostrom & Ćirković, 2008; Cotton-Barratt, Farquhar, Halstead, Schubert, & Snyder-Beattie, 2016) but which still have a long-term impact (Turchin & Denkenberger, 2018b).

Achieving the Sustainable Development Goals can be considered to be a means of reducing the long-term global catastrophic and existential risks for humanity. Conversely if the targets represented across the SDGs remain unachieved there is the potential for these forms of risk to develop. This association combined with the likely emergence of new challenges over the next decades (Cook, Inayatullah, Burgman, Sutherland, & Wintle, 2014) means that it is of great value to identify points within the systems representations of the Sustainable Development Goals that could both lead to global catastrophic risk and existential risk, and conversely that could act as prevention, or leverage points in order to avoid such outcomes. This identification in turn enables sensible policy responses to be constructed (Sutherland & Woodroof, 2009).

Whilst existential threats are unlikely, there is extensive peril in global catastrophic risks. Despite being lesser in severity than existential risks, they increase the likelihood of human extinction (Turchin & Denkenberger, 2018a) through chain reactions (Turchin & Denkenberger, 2018a), and inhibiting humanity’s response to other risks (Farquhar et al., 2017). It is necessary to consider risks that may seem small, as when acting together, they can have extensive consequences (Tonn, 2009). Furthermore, the high adaptability potential of humans, and society, means that for humanity to become extinct, it is most likely that there would be a series of events that culminate in extinction as opposed to one large scale event (Tonn & MacGregor, 2009; Tonn, 2009).

Whilst the prospect of existential risk, or global catastrophic risk can seem distant, the Stern Review on the Economics of Climate Change estimated the risk of extinction for humanity as 0.1 % annually, which accumulates to provide the risk of extinction over the next century as 9.5 % (Cotton-Barratt et al., 2016). With respect to identifying these risks, it is known that in particular, “positive feedback loops… represent the gravest existential risks” (Kareiva & Carranza, 2018), with pollution also having the potential to pose an existential risk.

#### A balancing test is goldilocks---harmonizes extraterritorial reach with international comity, generates global antitrust enforcement, AND it link-turns the Trade DA.

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

Chiefly, this balancing test would supplement the FTAIA. The underlying impetus for the FTAIA’s enactment – responding to international criticism of expansive US extraterritorial jurisdiction and to calls for recognizing foreign sovereignty where the basis for US prescriptive jurisdiction is weak – functions as this balancing test’s modus operandi. While the difficulty in interpreting “direct” has instigated its introduction, the balancing test does not attempt to shed any more light on the FTAIA’s contemplation of “direct.” Instead, it provides an alternative framework to properly apply the FTAIA where the statute’s language makes it impossible to do so.

As was the balancing test in Timberlane, a balancing test here may also be criticized as leaving too much discretion over political inquiries (i.e., foreign policy considerations) to the judiciary rather than to the executive and legislative branches, where such decisions may rightly belong.200 Professor William Dodge, while asserting that US courts should engage in judicial unilateralism rather than international comity considerations, points out that the judiciary plays an important complementary role to a country’s political branches by encouraging dialogue and negotiation between sovereigns.201 Though Congress and antitrust agencies may be better suited than courts to take account of the interest of other nations, courts are nonetheless faced with the task of weighing those interests when judging a party’s right to redress in private antitrust litigation.202

Footnote 201:

201. Dodge, supra note 2, at 106-07. American courts are also well-versed in taking into account foreign interests through allowing sovereign representatives to articulate official positions in litigation. See, e.g., Empagran, 542 U.S. at 167-68 (relying on non-US government amicus curiae briefs asserting national interests in considering international comity); In re Vitamin C Antitrust Litig., 837 F.3d at 179 (“When, as in this instance, we receive from a foreign government an official statement explicating its own laws and regulations, we are bound to extend that explication the deference long accorded such proffers received from foreign governments.”); BREYER, supra note 7, at 92 (“Since there is no Supreme Court of the World, national courts must act piecemeal, without direct coordination, in seeking interpretations that can dovetail rather than clash with the working of foreign statutes. And so our Court does, and should, listen to foreign voices, to those who understand and can illuminate relevant foreign laws and practices.” (emphasis added)).

“Judicial unilateralism,” as defined by Professor Dodge, implies that courts should only consider whether or not the forum’s legislature intended to regulate the conduct at issue without regard to foreign interests. See Dodge, supra note 2, at 104-05 (“[A] court should apply a statute extraterritorially whenever doing so appears to advance the purposes of the statute and should not worry about resolving conflicts of jurisdiction with other nations.”); see also supra note 16.

End of footnote 201.

The balancing test should be an exercise in both comity and cooperation, an attempt to harmonize counterpoints in the debate over antitrust extraterritoriality. As Professor Fox posits, the question is not “when should we defer to the inconsistent interests of other nations?” but rather “how can the antitrust jurisdictions of the world work together to maximize their shared interest in competitive markets, to the benefit of consumers and robust or potentially robust business?”203 Indeed, this comports with Supreme Court’s current approach to comity analysis of harmonization rather than avoiding conflict among laws.204 Accordingly, the test will have a slightly different focus than the one constructed by the Ninth Circuit in Timberlane, which reflects an outdated period of international antitrust regulation lacking potent modern enforcement tools such as amnesty programs. It will, however, encourage the growth of overall worldwide antitrust enforcement, both public and private, which ultimately contributes to properly functioning international markets.205

The challenge of achieving proper adjudication of an antitrust claim consisting of conduct and injury in two different jurisdictions is that national laws must conform to a market that ignores national borders.206 With this in mind, the goal should be to promote adjudication in the most efficient locale in an effort to maximize world welfare, foster growth of antitrust jurisdictions, and avoid overregulation.207 There are currently over 120 antitrust jurisdictions, many of which are new antitrust jurisdictions or have enacted fresh laws allowing for greater access to private redress, such as Israel (2006), China (2008), the European Union (2014), the United Kingdom (2015), and Hong Kong (2015).208 Letting the laws of these jurisdictions develop and inculcate international standards for antitrust enforcement strengthens the deterrence of anticompetitive behavior and the ability of injured parties to seek recompense.209 Achieving greater international involvement in turn would ostensibly mitigate some of the need behind extraterritorial application of US antitrust law.210

Footnote 209:

209. See, e.g., First, supra note 16, at 732-34 (arguing that international political consensus is integral to effective international antitrust enforcement and that the case-by-case common law process of law development is the optimal path to that consensus in the absence of a single system of or approach to market place regulation); Org. for Econ. Co-operation & Dev., Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 2 (May 1998), http://www.oecd.org/daf/competition/2350130.pdf [https://perma.cc/35HUTEWZ] (last visited Oct. 26, 2017) (“[C]loser co-operation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade.”). As noted above, while national recourse for compensating private loss is currently available in a minority of antitrust jurisdictions, it is increasingly acknowledged as a necessary tool for under-resourced national competition authorities. See Pheasant, supra note 11, at 59 (explaining that the European Commission “decided that it would be appropriate to enhance the role of private enforcement to support and supplement public enforcement of the competition rules” given insufficient resources for governmental competition authorities); Edward Cavanagh, Antitrust Remedies Revisited, 84 OR. L. REV. 147, 153-54 (2005) (“Congress created the private right of action to supplement public enforcement because it was aware that the government would not have the necessary resources to uncover, investigate, and prosecute all violations of antitrust laws.”); see also supra note 25.

End of footnote 209.

#### Adopting a balance test remedies inconsistent application of the FTAIA’s ‘direct effect’ criterion, incorporating foreign interests into U.S. antitrust law and stimulating global enforcement.

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

VI. Conclusion

This Note argues that in order to create a suitable environment for international private redress an international comity balancing test should be introduced into US jurisprudence through the opportunity provided by the FTAIA “direct effect” criterion. Though the United States has historically acted as the world’s courtroom for victimized private parties to seek recovering of antitrust injury, worldwide jurisdictions are beginning to develop their own legal regimes of antitrust enforcement, deterrence, and private recompense. To encourage this development, US courts should embrace the current Supreme Court’s approach to comity as one predicated upon global harmonization rather than conflict avoidance.

The recent efforts of resolving the “direct effect” definition dispute have been unfruitful and have ultimately produced puzzling decisions, including one in which foreign defendants were subject to criminal liability under the Sherman Act but not civil liability. The proposed balancing test responds to the current confusion stemming from these efforts by providing an alternative framework through which to realize the statute’s purpose. While the late Justice Scalia cautioned against using comity balancing tests to determine whether to properly subject foreign defendants to US antitrust law, limiting parameters provided by existing case law establish sufficient conditions to permit a balancing test.

This balancing test would guide courts in determining the propriety of extraterritorial application of US antitrust law for specific cases involving proscribed foreign anticompetitive conduct under the auspices of promoting the development of global antitrust enforcement and maximizing world economic welfare. However, instead of weighing traditional comity considerations as in Timberlane, the comity balancing test proposed in this Note would focus instead on these objectives, i.e., promoting the development of global antitrust enforcement and maximizing world economic welfare, as an extension of the Supreme Court’s harmonization approach. Ultimately, the balancing test would better allow the United States to contemplate and incorporate foreign interests in whether to apply US antitrust law, promoting international dialogue and encouraging growth of foreign private antitrust recourse.

# 2ac

## t core

### 2AC – AT: Core Antitrust Laws

#### The FTAIA is legally part of the Sherman Act

DOJ and FTC ‘17 [Department of Justice and Federal Trade Commission; 1/13/17; “Antitrust Guidelines for International Enforcement and Cooperation,” https://www.justice.gov/opa/press-release/file/926481/download]

The Sherman Antitrust Act (“Sherman Act”) sets forth general antitrust prohibitions.11 Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies that unreasonably restrain “trade or commerce among the several States, or with foreign nations.”12 Section 2 outlaws monopolization, attempts to monopolize, and conspiracies to monopolize “any part of the trade or commerce among the several States, or with foreign nations.”13 Section 6a, added by the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), clarifies the Sherman Act’s application to conduct involving only non-import foreign commerce.14

#### We meet – the aff adds a clarified version of the FTAIA’s language to the body of the Sherman Act – that’s 1AC Ryu

#### ‘Core antitrust laws’ has colloquial uses but zero formal definitions. ‘Core’ means essential.

Crawford ’89 [James D, James J Leyden, Frank C Sabatino, and Jack G Mancuso; October; J.D. at the University of Pennsylvania; J.D. at the University of Pennsylvania; J.D. at Notre Dame; J.D. at Pennsylvania State University; Westlaw, Brief on Writ of Certiorari to the United States Court of Appeals for the Third Circuit, “Fmc Corporation, Petitioner, v. Cynthia Ann Holliday, Respondent.,” No. 89-1048, WL 1128234]

The Third Circuit's decision springs from the conclusion that the deemer clause only shields “core” ERISA concerns. Perhaps the most vivid defect in this fallacy is the fact that the Third Circuit had to invent the term “core,” which is not used in ERISA, has no textual basis \*24 in the relevant legislative history, and does not even have an apparent definition in this context. Yet whatever “core” may mean, the Third Circuit certainly intended it to involve matters of critical importance. Any other definition would do violence to the English language.43 Judged by this standard, Pennsylvania's constraints upon subrogation clearly impair “core” ERISA concerns, arising from fiduciary obligations at the heart of the statute.’

Footnote 43.

The definitions of the adjective “core” are: “a: a basic, essential, or enduring part (as of an individual, a class, or an entity) b: the essential meaning: GIST ... c: the inmost or most intimate part.” Webster's New Collegiate Dictionary, 250 (1973).

#### Our interp preserves core aff ground – any interp that excludes amendments to the core antitrust laws

## t scope

### 2AC – Expand the Scope

#### We meet – the FTAIA limits the scope of the Sherman Act by exempting most extraterritorial action – the aff would reduce the exemption by adopting a more-encompassing definition of “directness” – that expands the Sherman Act to apply to more conduct

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]

The FTAIA is itself a major obstacle to realizing the potential of US private enforcement. Enacted in 1982, it provides authority for US institutions to apply US antitrust law to private conduct outside US territory.29 It incorporates the effects principle of public international law and interprets it for use in US law.30 There is widespread agreement that the statute is exceptionally opaque, and its opacity hampers both US enforcement and the potential influence of US law in other countries.31

The FTAIA’s relationship to other antitrust legislation creates one level of difficulty. The statute represents an exception to the coverage of the basic antitrust statute, the Sherman act.32 If the FTAIA applies to conduct, the Sherman Act does not apply. Moreover, the FTAIA contains exceptions to its general provisions.33 As a result, interpreting the statute typically involves dealing with double negatives—ie exceptions to exceptions.

The statute’s structure increases the difficulty of using it. It establishes three basic categories of commerce—domestic, import, and foreign—and bases conclusions regarding the legality of foreign conduct on whether the conduct falls within one or more of those categories. The basic idea is that conduct in domestic commerce is subject to US antitrust law; conduct wholly in foreign commerce is not subject to it unless it has a ‘direct, substantial, and reasonably foreseeable effect’ in the United States; and conduct in or affecting import commerce may be subject to US law. The boundaries of these categories remain highly contested, however, despite more than three decades of extensive litigation.34

These categories are used in conjunction with two main operative provisions— each of which has also generated controversy and uncertainty. The first incorporates the effects principle of public international law and interprets it for application of the US antitrust laws. It exempts from the antitrust laws anticompetitive conduct outside US territory unless such conduct causes a ‘direct, substantial, and reasonably foreseeable effect’ within the United States. This language has been interpreted in a large number of cases, but the opinions have not clarified the meaning of the terms. The second requires that the conduct ‘give rise to a claim’ under the Sherman Act. Again, there have been many interpretations of this provision, but the cases have exacerbated rather than reduced uncertainty.

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

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

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

#### We meet – the aff adds a clarified version of the FTAIA’s language to the body of the Sherman Act – that’s 1AC Ryu

#### We meet – zero civil suits in cases where a “direct effect” on US commerce happens along the supply chain outside of the US can happen now – the aff greenlights them

#### In ‘expand the scope,’ ‘expand’ means to increase and ‘the scope’ defines permissible behavior.

Collins ’21 [Collins English Dictionary; copyright updated 2021; Collins Cobuild, “Expand the Scope,” https://www.collinsdictionary.com/us/dictionary/english/expand-the-scope]

expand the scope

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I wanted to work internationally and expand the scope of my possibilities.

Times, Sunday Times

Labour has called for the government to expand the scope of the test to include consideration of the impact of any merger on research and development and science.

Times, Sunday Times

Most opponents are small-government conservatives who are outraged at any attempt to expand the scope of government, particularly when it involves their personal healthcare decisions.

Times, Sunday Times

The move was cited by the developer to be to expand the scope of indie videogames, and not as a market strategy.

Retrieved from Wikipedia CC BY-SA 3.0 https://creativecommons.org/licenses/by-sa/3.0/. Source URL: https://en.wikipedia.org/wiki/Afterfall: InSanity

Such results expand the scope of asymmetric hydroboration to more sterically demanding alkenes.

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Definition of 'expand'

expand

(ɪkspænd)

Explore 'expand' in the dictionary

VERB

If something expands or is expanded, it becomes larger. [...]

See full entry

COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers

Definition of 'scope'

scope

(skoʊp)

Explore 'scope' in the dictionary

UNCOUNTABLE NOUN [NOUN to-infinitive]

If there is scope for a particular kind of behaviour or activity, people have the opportunity to behave in this way or do that activity. [...]

#### Prefer our interp – any interp that excludes narrowing exemptions wrecks the topic by eliminating affs that have answers to core generics

#### No ground offense – their interp creates less predictable affs that link to less

#### Reasonability – substance crowd out outweighs norm-setting.

## pic

### 2AC---CP---DPA

#### Perm do both---it solves the net benefit by making all activity under the prohibition illegal, BUT not enforcing it against collusion that is critical to national defense

#### PDCP

#### 1---The perm prohibits without exception the subset of practices that aren’t crucial to national security

Stras ’21 [David R; June 9; Federal Court of Appeals Judge on the Eighth Circuit, former Minnesota Supreme Court Justice; Westlaw, “Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson,” 1 F.4th 552]

In any event, I think there is reason to doubt whether Rutledge was correctly decided, even if this panel has to follow it. See Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.” (quotation marks omitted)); see also Preterm-Cleveland, 994 F.3d at 516, 535 (concluding that a challenge to a similar, but even more restrictive, law was not likely to succeed on the merits). It treated Arkansas's Down Syndrome Provision as a “complete prohibition o[n] abortions”—a “ban,” so to speak—not just a “regulation.” Rutledge, 984 F.3d at 688–90. This distinction is critical because, under our precedent, a pre-viability ban is categorically unconstitutional. See id. at 687–88; MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 772–73 (8th Cir. 2015); Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam). A pre-viability regulation, on the other hand, is only unconstitutional if it has the “purpose or effect” of “plac[ing] a substantial obstacle in the path of a woman seeking an abortion.” Gonzales v. Carhart, 550 U.S. 124, 146, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion)).

We have not made it easy to tell the difference between the two. In Edwards, we explained that a ban “prohibits women from making the ultimate decision to terminate a pregnancy.” 786 F.3d at 1117. A regulation, by contrast, has only an “incidental effect” on the decision by “making it more difficult or more expensive to procure an abortion.” Gonzales, 550 U.S. at 158, 127 S.Ct. 1610 (quoting Casey, 505 U.S. at 874, 112 S.Ct. 2791 (plurality opinion)). The distinction is only complicated by the fact that a regulation can easily be reframed as a ban: if its requirements are not met, then a woman will be “completely prohibited” from having an abortion. Ante at ––––.

#### 2---Prohibitions include exemptions

Hadley ’9 [John Vestal; December 16, 1909; Justice on the Supreme Court of Indiana; Westlaw, “McPherson v. State,” 174 Ind. 60]

Furthermore, the word “prohibition” is close akin to “regulate, restrict, and control.” Its use in the body of the act is of little significance. To forbid the sale of liquor by those who have no license; to deny the licensee the right to sell on certain days, between certain hours, in certain places, in certain quantities—is, to some extent at least, qualified prohibition. It is prevention, interdiction. Such laws, however, are unquestionably regulations and restrictions of the liquor traffic. They operate as a check, as a restraint, upon the sale, not in absolute inhibition, and are in the strictest sense regulations. They regulate by prohibiting the sale at certain times, and to certain persons, and \*613 in certain places. Besides, to say the law prohibits the citizen from selling without a license, or that the law prohibits the licensed seller from selling on Sunday, is etymologically correct. In fact, the word was employed in this sense by the Legislature in framing section 4 of the Nicholson law (section 8327, Burns' Ann. St. 1908), which provides that obstructions to the street view shall not be set up in the selling room “during such days and hours when the sale of such liquors is prohibited by law.” So it is not so much the primary meaning of the word as sense in which it is popularly understood as applied to the manufacture and sale of spirituous liquors that must control.

Following are a few definitions of “prohibition” as specifically applied:

“Interdiction of the liberty of making and of selling, or giving away, intoxicating liquors for other than medicinal, scientific and religious purposes.” Anderson's L. Dict.; Bouvier, L. Dict. (Rawle's Rev.).

“The forbidding by law of the manufacturing and sale of alcoholic liquors.” English's L. Dict.

“The forbidding by law of the sale of alcoholic liquors as a beverage.” Webster's Int. Dict.

“The forbidding by legislative enactment of the sale of alcoholic liquors for use as a beverage.” Standard Dict.

The term has even a wider sweep than this. A prohibitory law, to be classed as such, must, at the same instant, in the same way, become effective to interdict the sale of liquors throughout all parts of the jurisdiction of the lawmaking power. Welsh v. State, 126 Ind. 71, 77, 25 N. E. 883, 9 L. R. A. 664; Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138; Paul v. Gloucester County, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86.

It seems absurd, because rationally inconceivable, that under the operation of a general prohibitory statute enacted by the General Assembly sales as a beverage may indefinitely continue to be lawfully made in many counties of the state. It is also equally incomprehensible how a law may be absolutely prohibitory and in itself provide the means and terms under which sales may be continued or resumed in any or all counties of the state. We are unable to perceive any distinction between the prohibition which results from remonstrance under former laws, which has uniformly been held to be regulation, and the prohibition arising under the act in question, with the sole exception as to the duration of the term of restriction, depending upon petition and election at the expiration of each biannual period. We therefore conclude that the object and purpose of the act before us is regulation, and not prohibition, of the liquor traffic, and that the subject is fairly deducible from the title, and not in conflict with section 19, art. 4, of the Constitution. Isenhour v. State, 157 Ind. 524, 62 N. E. 40, 87 Am. St. Rep. 228; Gustavel v. State, 153 Ind. 613, 54 N. E. 123; Burget v. Merritt, 155 Ind. 143, 57 N. E. 714; Clarke v. Darr, 156 Ind. 692, 60 N. E. 688; Republic Iron, etc., Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136; Maule Coal Co. v. Partenheimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710.

#### 3---“by at least” means the floor meets the ceiling, our only burden is to expand the scope of core antitrust law

#### Perm do the plan and “prevent conditions which may pose a direct threat to the national defense or its preparedness programs”

[PLAN]

The United States should prevent condition which may pose a direct threat to the national defense or its preparedness programs.

#### Exemptions undermine clarity, predictability, and deterrence

Khan ’19 [Lina; Chairperson @ Federal Trade Commission, JD @ Yale Law School; “The Separations of Platforms and Commerce,” *Columbia Law Review* 119(4), p. 973-1098; AS]

Prioritizing Administrability

A final functional justification for structural separations is that they are highly administrable. Issuing outright bans obviates the need to engage in lengthy rule-of-reason type analysis; structural limits prescribe rules instead of standards. Structural separations are sometimes criticized for being far-reaching, crude, and overly broad, prohibiting benign as well as pernicious activity.537 This criticism is fair, given that rules are “by nature both over- and under-inclusive.”538 They accept some degree of error in return for clarity and predictability.

In at least two instances, public officials introduced structural regimes by citing their administrability, noting the limits of the government’s capacity to consistently detect discrete acts of wrongdoing. The FCC, for example, stressed its inability to “monitor carefully” the types of activities it had prohibited, “since even the injured party *may* not be aware of them.”539 The Commission observed that “subtle forms of favoritism” are “numerous and difficult to detect,” and that it was unlikely that the agency would “be prompt in cracking down on discovered abuses.”540 Relying on the agency to track individual acts of injury would risk extensive harm to competition. Structural bans, the agency explained, could also aid “the deterrence of foreseeable abuse.”541

### 2AC---AT: Pandemic Response

#### No spillover---even if the plan’s prohibitions doesn’t have exemptions, it doesn’t repeal the DPA in the specific instance of vaccine corporate collusion---it’s not under the purview of the plan

#### DPA isn’t key---slew of exogenous factors effect pandemic preparedness, AND other countries and companies not colluding solve better

#### Pandemics won’t cause extinction

Sebastian Farquhar 17. Director at Oxford's Global Priorities Project, Owen Cotton-Barratt, a Lecturer in Mathematics at St Hugh’s College, Oxford, John Halstead, Stefan Schubert, Haydn Belfield, Andrew Snyder-Beattie, 01-23-17, "Existential Risk Diplomacy and Governance", GLOBAL PRIORITIES PROJECT 2017, https://www.fhi.ox.ac.uk/wp-content/uploads/Existential-Risks-2017-01-23.pdf

1.1.3 Engineered pandemics For most of human history, natural pandemics have posed the greatest risk of mass global fatalities.37 However, there are some reasons to believe that natural pandemics are very unlikely to cause human extinction. Analysis of the International Union for Conservation of Nature (IUCN) red list database has shown that of the 833 recorded plant and animal species extinctions known to have occurred since 1500, less than 4% (31 species) were ascribed to infectious disease.38 None of the mammals and amphibians on this list were globally dispersed, and other factors aside from infectious disease also contributed to their extinction. It therefore seems that our own species, which is very numerous, globally dispersed, and capable of a rational response to problems, is very unlikely to be killed off by a natural pandemic. One underlying explanation for this is that highly lethal pathogens can kill their hosts before they have a chance to spread, so there is a selective pressure for pathogens not to be highly lethal. Therefore, pathogens are likely to co-evolve with their hosts rather than kill all possible hosts.39

## regs cp

### 2AC

Perm do both

Perm do the counterplan – must be functionally and textually competitive – key to ground and education.

#### Does not solve:

#### 1 – Circuit Split – allows lawsuits to be brought under status quo antitrust laws – resolving the circuit split is required – that’s Murray and Ryu.

2 – Cartels – does not expand the definition of “direct” to include indirect price-fixed products – ensures exemptions which harm the economy.

#### 3 – Regulations cannot create private rights of action – Ryu says private rights of action create sufficient cartel deterrence.

DOJ ’21 [Department of Justice; February 3; Federal executive department of the United States government tasked with the enforcement of federal law and administration of justice in the United States; *Department of Justice,* “IX. PRIVATE RIGHTS OF ACTION AND INDIVIDUAL RELIEF THROUGH AGENCY ACTION,” <https://www.justice.gov/crt/fcs/T6Manual9>; KS]

The Supreme Court’s Sandoval decision left open the question whether an individual may bring an action under 42 U.S.C. § 1983 to enforce Section 602 regulations. Sandoval, 532 U.S. at 300–01 (Stevens, J., dissenting). A year later, the Supreme Court answered this question in a case brought under Section 1983 to enforce the Family Educational Rights and Privacy Act (FERPA), finding that there is no private cause of action via Section 1983. Gonzaga Univ. v. Doe, 536 U.S. 273, 290 (2002). The issue before the Court was whether a plaintiff could bring an action under Section 1983 to enforce FERPA, even though FERPA created no private right of action. Id. The Supreme Court explained that there is no private right of action: “We have held that ‘[t]he question whether Congress … intended to create a private right of action [is] definitively answered in the negative’ where a statute by its terms grants no private rights to any identifiable class.” Id. at 283-84 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 576 (1979)). Following Sandoval and Gonzaga, a majority of circuits have held that where a statute does not confer a private enforceable right, regulations promulgated under the statute cannot create a private right of action.[3] Therefore, the regulations promulgated under Section 602 are unenforceable via a private action under Section 1983.

#### 4 – The CP links more than the aff or the perm and doesn’t solve because it is too static

Shelanski ’11 [Howard; March 2011; Deputy Director, Bureau of Economics, Federal Trade Commission; Professor of Law, Georgetown University; Michigan Law Review; The Case For Rebalancing Antitrust and Regulation,” vol. 109]

Contrary to the Court's presumption,1 7 in many cases regulation will be more costly than either antitrust enforcement or a combination of antitrust and regulation would be. In the words of Justice (then Judge) Breyer, "[A]ntitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative.""' Of course, if Congress requires an agency to regulate, policymakers cannot choose antitrust as an alternative. But antitrust might still be a beneficial supplement even if it is not a full substitute; and in the far more usual case where agencies have some discretion in the promulgation and enforcement of regulations, the comparative benefits of antitrust as a substitute become important. Even if regulators have authority to regulate, they may decide that forbearance from "gearing up the cumbersome, highly imperfect bureaucratic apparatus of classical regulation" in favor of antitrust enforcement will be the better policy choice.'59 This will be a particularly important option as economic conditions in the regulated industry change. The case-by-case approach of antitrust enforcement, which targets specific instances of anticompetitive conduct as they arise, can usually deal with unique or unexpected factual situations better than can regulatory rulemaking, which depends more on specifying competitive obligations and prohibitions prospectively, in advance of actual conduct. After Trinko and Credit Suisse, however, statutory authority to regulate has become a greater potential barrier to antitrust law as a substitute for regulation.

#### conditionality is a voter—forces the aff to split time between flows and they collapse to whatever we undercover which puts us as a structural disadvantage.

## cap

### Top Level---2AC

#### Capitalist market forces are the best chance to solve climate change---we have time for transition which is occurring globally. The alternative is impossible condemns billions to suffering and starvation.

Hill ‘20 [Victor; 11/3/20; Financial Economist with the International Finance Corporation at the World Bank, lead writer for Master Investor, holds degrees from the University of Oxford, Institut Européen d'Administration des Affaires, and Canterbury Christ Church University; "Only capitalism will save the planet," https://masterinvestor.co.uk/economics/only-capitalism-will-save-the-planet/]

While the global coronavirus pandemic has diverted attention away from the fraught issue of climate change and what to do about it, the environmental activism of groups such as Extinction Rebellion (XR) has continued to simmer. In fact, this year XR has blended with the Black Lives Matter (BLM) movement such that explicitly anti-capitalist environmental protest and anti-patriarchal, anti-colonial wokery have become intimately entwined. The underlying message is: If you want to save the planet you have to change the system. In practice, all protest movements have many threads – just look at the two-year campaign of the gilets jaunes in France – but the unifying thread is always resentment.

The irony is that both aspects of this counterculture are out-of-date. Rapid advances in technology, facilitated by the free market, have transformed the climate conversation. Whatever Mr Trump’s rhetoric on the issue (and he may well be in the departure lounge by the time you read this), the big energy companies, backed by a raft of environmentally conscious investors, are already transitioning towards renewable and zero-fossil fuel energy precisely because it is now economically viable to do so. And in that process, they are making money. Win-win.

Outright climate change denial was always a marginal school of thought. Thinking people – of which the business and investment community – understand well that manmade carbon emissions increase the concentration of CO2 in the atmosphere and thus precipitate a greenhouse effect by which the Earth’s atmosphere and seas warm up. That said, there is a respectable scientific debate about how quickly that process is taking place and how quickly it will cause irreversible results such as desertification. And it is perfectly legitimate to question the climate models which climate scientists construct to estimate these outcomes, since many have questionable inputs and methodologies. Claims that we have ten years left to save the planet can and should be challenged, though that should not be an argument for further delay in taking action.

The global policy framework has been constructed by the ongoing work of the Intergovernmental Panel on Climate Change (IPCC), an agency of the United Nations (UN). This body laid down two years ago that our target should be to limit the rise in ambient temperature to no more than 1.5 Celsius above pre-industrial levels. That said, there are many climate rebels who believe that this level will itself be disastrous to human and animal life; and still others who claim that even this target is entirely unrealistic given the direction of travel.

Ms Thunberg and her disciples would have us shut down the carbon-based economy forthwith. That would cause unparalleled economic disruption, mass unemployment, poverty, adverse health outcomes and – let us be honest – starvation. No mainstream politician is going to get behind that.

Zion Lights is a writer who has been an environmental campaigner all her adult life. She doesn’t drive, fly or eat meat. In April 2018 she joined XR because she thought it was evidence-based. She soon found that many of its claims were indefensible. She wrote recently:

That is the single biggest problem with most environmental groups: they don’t offer realistic solutions to the very real climate change threat. What they offer, if you follow their arguments to their logical conclusion, is eco-austerity: that we should all use less energy, stop going on holiday, live in colder homes, and so on[i].

In the latest papal encyclical published on 04 October (the feast day of St. Francis of Assisi), Fratelli Tutti (Brothers All), Papa Francisco wrote that the Covid-19 pandemic had proven that the “magical theories” of market capitalism have failed and that the world needs a new type of politics that promotes dialogue and solidarity. (Perhaps the unjustified restrictionism pursued by First Minister Drakeford in Wales?)

In fact, much as I respect Catholic social teaching (having been brought up with it), the best chance we have to solve the immense challenge of climate change and other environmental problems (such as plastic waste in the oceans) is to harness market forces. In this way, the profit motives of finance and technology will re-engineer the global economy completely.

Big money already decided that the fossil fuel economy is doomed and that renewable energy is the future long before Dame Emma Thompson swept in from LA (business class, of course) to gesticulate on Oxford Street, in those languorous pre-Covid days. The billionaire Davos Boys have been preaching climate orthodoxy for years. And the Great Transition is already well underway.

Renewable profitability

The good news is (don’t tell XR) that the United Kingdom has managed to reduce its carbon emissions by over 40 percent since 1990 by all but phasing out coal and investing massively in renewable power generation. As I write this on a blustery day in late October, according to the GB National Grid Status website, coal powered generation is contributing precisely zero to UK power generation. The UK has the world’s largest offshore wind power market with capacity still increasing rapidly. Earlier this year the UK government effectively dropped the ban on onshore wind turbine arrays in the drive to reach net zero carbon emissions by 2050.

As the shift from carbon-heavy sources to carbon-free electricity generation has accelerated so economies of scale have kicked in and new technologies have come online. Recent data from Bloomberg New Energy Finance shows that the latest generation of solar and wind power plants can produce electricity cheaper than the most modern coal plants even without subsidy for two thirds of the global population. The price of solar panels has dropped by almost 90 percent over the past decade. By mid-decade, solar and wind power will outcompete all existing coal plants on price – at which point a swath of coal plants will be deemed uneconomic and closed.

The economics of energy storage – battery technology – are also improving. On 22 September Tesla (NASDAQ:TSLA) unveiled its new battery known as the 4680[ii]. This fuel cell reportedly offers six times the power of Tesla’s previous cells, and five times the energy capacity. The company confirmed that the new cell measures 46 millimetres by 80 millimetres – hence the name. The iconic automaker says that these new fuel cells will be able to increase the range of a vehicle by 16 percent – that could be up to about 500 miles for its latest models. That kind of range makes medium-distance travel without recharging (say, London to Edinburgh in a UK context) quite feasible.

Red China goes green

China currently has new coal plants under construction which will have a capacity of another 94 Gigawatts of electricity per annum. China already emits more CO2 than all of Europe and America combined. But China now has a target of going carbon neutral by 2060, and by so aspiring has upped the moral ante with Mr Trump’s America. Now, some analysts predict that China may abandon its programme of building coal-fired power stations as much on economic grounds as on environmental ones.

China might yet gain a strategic advantage from global warming. Last month the UK First Sea Lord, Admiral Tony Radakin (the military head of the Royal Navy), warned that the melting of ice in the Arctic would create new maritime trade routes across the top of the world – the Arctic Ocean – which would halve the transit time between East Asia and Western Europe. China already has, according to the Pentagon, the world’s largest navy with 350 warships and submarines. That opens the prospect of Chinese naval vessels being able to penetrate the North Atlantic rapidly, and possibly threatening the European and American undersea cable network.

Hydrogen in three colours

The downside with the current generation of electric vehicles is that they require batteries which use expensive rare earth minerals of which lithium, and which are costly and messy to recycle at the end of their economic life. The extraction of these rare earth minerals in countries such as the Democratic Republic of Congo (DRC) is itself a cause of environmental degradation and carbon emissions. That is why there is renewed focus of attention on hydrogen.

Hydrogen comes in three colours. Gray hydrogen is made using fossil fuels like oil and coal, which emit CO2 into the air as they combust. The blue variety is made in the same way, but carbon capture prevents CO2 being released, enabling the captured carbon to be safely stored deep underground or utilised in industry. BP (LON:BP.) is working on that. As its name suggests, green hydrogen is the cleanest variety, producing zero carbon emissions. It is produced by electrolysis powered by renewable energy i.e. offshore wind.

The holy grail in energy now is to extract hydrogen cheaply and cleanly from water by electrolysis (i.e. separating the hydrogen and carbon atoms). Hitherto the energy required to perform the electrolysis has been unequal to the energy value of the hydrogen thus produced. That could be about to change.

Bill Brown, founder of NET Power has claimed that his firm’s techniques can produce clean hydrogen at 0.57 cents a kilo. This is a developmental technology based on the Allam Cycle which has been around in theory for some time.

Hydrogen can power vehicles, trains, ships and even aeroplanes. When hydrogen is ignited the only by-product is water. Hydrogen could also be used to facilitate the manufacture of steel, cement, glass, chemicals and fertilisers. Goldman Sachs reckons that, if the efficiency of hydrogen electrolysis could be sufficiently improved, then about 45 percent of all global carbon emissions could be eliminated.

Electric cars

Some estimates suggest that electric battery-powered cars could compete on price with conventional cars powered by internal combustion engines (ICEs) as soon as 2024. That is one reason why Tesla shares have rocketed this year. But even if you are not a true believer in Tesla, consider that established automotive giants such as Volkswagen and Daimler-Benz are fully committed to the phase-out of ICEs. In Germany, sales of electric and hybrid cars overtook diesel cars for the first time last month.

I’ll have a lot more to say about the outlook for electric cars soon.

From coal to wind

Dalmellington in Ayrshire, Scotland, was once known as a coal-mining town. But in future it is likely to be known as the location of a 50-turbine wind farm. The new 240 Megawatt facility will be built and run by Vattenfall (owned by the Kingdom of Sweden). But the array will be owned by the infrastructure fund, Greencoat UK Wind PLC(LON:UKW), which has acquired the project for £320 million.

Greencoat has emerged as a growing renewables fund which is now included in the FTSE-250 index and which has a market capitalisation of around £2.5 billion – that’s more than the better-known UK energy company Centrica PLC (LON:CAN), the owner of British Gas. The fund has acquired 36 wind power sites which collectively produce enough electricity to power about one million homes – that’s about five percent of all wind power generated in the UK. Some of those arrays were acquired from Scottish & Southern Energy (LON:SSE). Wind power now accounts for about 20 percent of Britain’s total electricity consumption.

Greencoat’s strategy is to encourage energy giants to green up their portfolios by taking all the development risk. It then buys the asset from the generator and pockets the cash flow arising. Greencoat UK Wind is run by Greencoat Capital, a specialist investor in renewable energy which has £5 billion of assets under management across both wind and solar energy. Greencoat raised £375 million from investors in May 2019.

A report last year by the research firm, Hardman & Co. found that returns for listed renewable energy funds over five years approached 10 percent. Such funds often carry a share price premium over their net asset value. At a moment when the share prices of the oil majors are under pressure and when BP and Shell have slashed their dividends, Greencoat’s 4.8 percent dividend yield is pleasing.

Nuclear

The latest thinking is that carbon-free energy capacity could be ramped up quickly by means of a cluster of British designed and manufactured small modular reactors (SMRs) which have a footprint smaller than two football pitches. A consortium of Rolls Royce (LON:RR), WS Atkins (LON:ATK), Laing O’Rourke (LON:JLG) and the National Nuclear Laboratory is in the vanguard of this technology. Rolls-Royce has experience and expertise in building nuclear reactors to power Britain’s fleet of nuclear submarines, so this is not new technology. Reportedly, the UK government is considering the injection of up to £2 billion of state funds to invigorate the concept – assuming it is permitted to do so by the EU (if there is an agreement).

The idea is that by 2050 more than 12 of these SMRs will be operational in the UK, each with a capacity of about 440 Megawatts – so about one seventh of the conventional nuclear plant currently under construction at Hinkley Point, Somerset. Hinkley Point C is a project led by France’s EDF (EPA:EDF), the costs of which have spiralled up to an estimated £22.5 billion. Cost considerations have caused Toshiba (TYO:6502) and Hitachi (TYO:6501) to pull out of projects to build nuclear plants in Wales and Cumbria. In contrast, SMRs might have a price tag of around £2 billion each.

SMRs are easier to switch on and off than conventional large-scale reactors; thus, they can be held on standby for when wind and solar power wanes. Thereafter, the remaining gas turbine plants that are currently used for that purpose can be phased out. But it does not follow that the new roll-out of SMRs would entail the closure of Britain’s conventional large-scale nuclear reactors which, as I write, are supplying 17.2 percent of total power to the national grid.

A US consortium, NuScale, is also looking at SMRs with a capacity of 60 Megawatts.

The fate of the oil majors

I wrote in the February 2020 edition of the MI magazine that the oil majors are here to stay. I meant by that that there would still be continued demand for oil, if much attenuated, after the transition to a net-zero carbon economy, not least because of the need for oil in petroleum derivatives (of which plastic). I did not foresee even then that the economic case for renewables would advance quite as rapidly as it has done this year; nor was it then apparent how the coronavirus pandemic would reduce the global demand for oil, at least in the short-term.

Another reason why the oil majors may not go extinct quite yet is that they have embraced carbon capture and storage (CCS). Indeed, they have become advocates of high carbon pricing, calculating that it will mobilise technology to accelerate CCS. Under US legislation enacted under the auspices of the US Department for Energy, operators can claim $50 for each tonne of CO2 sequestered underground and $35 per tonne if pumped back into declining wells.

A number of large players, including Saudi Aramco (TADAWUL:2222), ExxonMobil (NYSE:XOM), BP (LON:BP.), Shell (LON:RDSA), Total (LON:TTA) and others, have jointly formed the Oil and Gas Climate Initiative(OGCI) to drive CCS projects. The OGCI is a consortium that aims to accelerate the industry response to climate change. OGCI member companies explicitly support the Paris Agreement and its goals.

Just as with wind power and solar, the costs of CCS are in free fall. ExxonMobil has teamed up with FuelCell Energy to extract CO2 using carbonate fuel cells. Total, Shell and Equinor (NYSE:EQNR) are part of the Longship project in Norway which is planning to take CO2 captured in Europe’s industrial heartlands and pipe it to storage caverns beneath the North Sea. It hopes to lock in eight million tonnes of CO2 per year by the middle of this decade, for which they will charge around €60 per tonne. Memoranda have already been signed with ArcelorMittal and Heidelberg Cement.

Cement is responsible for an estimated eight percent of global carbon emissions. Under the auspices of the OGCI, a venture with LafargeHolcim, the materials giant, uses CO2 rather than water to cure concrete at much lower temperatures than in conventional manufacture, thereby breaking down the CO2 molecules and turning carbon into a form of glue. This enables a 70 percent reduction in CO2 emissions and an 80 percent reduction in water use.

In terms of their market capitalisations, ExxonMobil, BP and Shell combined are now worth less than Tesla alone. Exxon was once the world’s largest company by market cap. As I write it is worth just $136 billion against Tesla’s $390 billion.

The oil price is down from around $53 a barrel 12 months ago to around $37 today. That is partly a function of reduced global demand arising from the lockdowns across the world; but one should not assume that it will rebound even if the pandemic is behind us one year from now. That means that a lot of new exploration and drilling activity will be regarded as uneconomic – and a lot of known reserves will remain beneath the Earth for evermore. But if the oil majors can really crack the challenge of CCS and prospectively begin to reduce the volume of CO2 in the atmosphere, they will succeed in reinventing themselves.

#### Capitalism's sustainable and comparatively preferable to alternatives.

Schrager **‘**20 [Allison; Winter 2020; Ph.D. in Economics from Columbia University, Senior Fellow at the Manhattan Institute; "Why Socialism Won't Work," https://foreignpolicy.com/2020/01/15/socialism-wont-work-capitalism-still-best/]

WITH INCREASINGLY UBIQUITOUS IPHONES, internet, central air conditioning, flat-screen TVs, and indoor plumbing, few in the developed world would want to go back to life 100, 30, or even 10 years ago. Indeed, around the world, the last two centuries have brought vast improvements in material living standards; billions of people have been lifted from poverty, and life expectancy across income levels has broadly risen. Most of that progress came from capitalist economies.

Yet those economies are not without their problems. In the United States and the United Kingdom, the gap between the rich and poor has become intolerably large as business owners and highly educated workers in urban areas have become richer while workers' wages in rural areas have stagnated. In most rich countries, more trade has brought a bigger, better variety of goods, but it has also displaced many jobs.

With social instability in the form of mass protests, Brexit, the rise of populism, and deep polarization knocking at the capitalist economies' doors, much of the progress of the last several decades is in peril. For some pundits and policymakers, the solution is clear: socialism, which tends to be cited as a method for addressing everything from inequality and injustice to climate change.

Yet the very ills that socialists identify are best addressed through innovation, productivity gains, and better rationing of risk. And capitalism is still far and away the best, if not only, way to generate those outcomes.

TODAY'S SOCIALISM IS DIFFICULT TO DEFINE. Traditionally, the term meant total state ownership of capital, as in the Soviet Union, North Korea, or Maoist China. Nowadays, most people don't take such an extreme view. In Europe, social democracy means the nationalization of many industries and very generous welfare states. And today's rising socialists are rebranding the idea to mean an economic system that delivers all the best parts of capitalism (growth and rising living standards) without the bad (inequality, economic cycles).

But no perfect economic system exists; there are always trade-offs--in the most extreme form between total state ownership of capital and unfettered markets without any regulation or welfare state. Today, few would opt for either pole; what modern socialists and capitalists really disagree on is the right level of government intervention.

Modern socialists want more, but not complete, state ownership.

They'd like to nationalize certain industries. In the United States, that's health care--a plan supported by Democratic presidential candidates Elizabeth Warren (who does not call herself a socialist) and Bernie Sanders (who wears the label proudly). In the United Kingdom, Labour Party leader Jeremy Corbyn, who was trounced at the polls in mid-December, has set his sights on a longer list of industries, including the water, energy, and internet providers.

Other items on the socialist wish list may include allowing the government to be the primary investor in the economy through massive infrastructure projects that aim to replace fossil fuels with renewables, as Green New Deal socialists have proposed. They've also floated plans that would make the government the employer of a majority of Americans by offering guaranteed well-paid jobs that people can't be fired from. And then there are more limited proposals, including installing more workers on the boards of private companies and instituting national rent controls and high minimum wages.

For their part, modern capitalists want some, but less, state intervention. They are skeptical of nationalization and price controls; they argue that today's economic problems are best addressed by harnessing private enterprise. In the United States, they've argued for more regulation and progressive taxation to help ease inequality, incentives to encourage private firms to use less carbon, and a more robust welfare state through tax credits. Over the past 15 years, meanwhile, capitalist Europeans have instituted reforms to improve labor market flexibility by making it easier to hire and fire people, and there have been attempts to reduce the size of pensions.

No economic system is perfect, and the exact right balance between markets and the state may never be found. But there are good reasons to believe that keeping capital in the hands of the private sector, and empowering its owners to make decisions in the pursuit of profit, is the best we've got.

ONE REASON TO TRUST MARKETS is that they are better at setting prices than people. If you set prices too high, many a socialist government has found, citizens will be needlessly deprived of goods. Set them too low, and there will be excessive demand and ensuing shortages. This is true for all goods, including health care and labor. And there is little reason to believe that the next batch of socialists in Washington or London would be any better at setting prices than their predecessors. In fact, government-run health care systems in Canada and European countries are plagued by long wait times. A 2018 Fraser Institute study cites a median wait time of 19.8 weeks to see a specialist physician in Canada. Socialists may argue that is a small price to pay for universal access, but a market-based approach can deliver both coverage and responsive service. A full government takeover isn't the only option, nor is it the best one.

Beyond that, markets are also good at rationing risk. Fundamentally, socialists would like to reduce risk--protect workers from any personal or economywide shock. That is a noble goal, and some reduction through better functioning safety nets is desirable. But getting rid of all uncertainty--as state ownership of most industries would imply--is a bad idea. Risk is what fuels growth. People who take more chances tend to reap bigger rewards; that's why the top nine names on the Forbes 400 list of the richest Americans are not heirs to family dynasties but are self-made entrepreneurs who took a leap to build new products and created many jobs in the process.

Some leftist economists like Mariana Mazzucato argue that governments might be able to step in and become laboratories for innovation. But that would be a historical anomaly; socialist-leaning governments have typically been less innovative than others. After all, bureaucrats and worker-corporate boards have little incentive to upset the status quo or compete to build a better widget. And even when government programs have spurred innovation--as in the case of the internet--it took the private sector to recognize the value and create a market.

And that brings us to a third reason to believe in markets; productivity. Some economists, such as Robert Gordon, have looked to today's economic problems and suggested that productivity growth--the engine that fueled so much of the progress of the last several decades--is over. In this telling, the resources, products, and systems that underpin the world's economy are all optimized, and little further progress is possible.

But that is hard to square with reality. Innovation helps economies do more with fewer resources--increasingly critical to addressing climate change, for example--which is a form of productivity growth. And likewise, many of the products and technologies people rely on every day did not exist a few years ago. These goods make inaccessible services more available and are changing the nature of work, often for the better. Such gains are made possible by capitalist systems that encourage invention and growing the pie, not by socialist systems that are more concerned with how the existing pie is cut. It is far too soon, in other words, to write off productivity.

Here, it is worth considering the lessons of a previous productivity boom: the Industrial Revolution. As the economist Joel Mokyr has shown, it took new innovations like the steam engine more than 100 years to appear in productivity estimates. The same could be happening today with smartphones and the internet. Meanwhile, even as that upheaval transformed the human experience, creating a more comfortable existence for most everyone, it was also messy and disruptive. The early part of that innovative cycle--like others since--displaced existing workers while the gains flowed to the owners of capital first, causing social instability.

### Alt Fails---AT: Rose 21---2AC

#### Rose cites Dardot and Laval's thesis of revolution---asserts revolution from "mass politicization" of society with zero warrant. [Michigan = Blue]

Nick Rose 21. PhD in Political Ecology from RMIT University. Executive Director of Sustain: The Australian Food Network. From the Cancer Stage of Capitalism to the Political Principle of the Common: The Social Immune Response of “Food as Commons.” Int J Health Policy Manag 2021. 3-31-21. DOI: 10.34172/ijhpm.2021.20 //shree

Silvia Federici provides a longer historical perspective, noting that ‘commoning is the principle by which human beings have organised their existence for thousands of years;’ and that to ‘speak of the principle of the common’ is to speak ‘not only of small-scale experiments [but] of large-scale social formations that in the past were continent-wide.’87 Hence a commons-based society is neither a utopia or reducible to fringe projects, and the commons have persisted despite the many and continuing enclosures, ‘feeding the radical imagination as well as the bodies of many commoners.’87 Federici acknowledges that commons and practices of commoning are diverse, that many are susceptible to cooptation and many are consistent with the persistence of capitalism; indeed some, such as charities providing social services (including foodbanks) during the years of austerity budgets in the United Kingdom (2010-2015), reinforce and stabilise capitalism.87 What matters to Federici is the character and intentionality of the commons as anti-capitalist, as ‘a means to the creation of an egalitarian and cooperative society…no longer built on a competitive principle, but on the principle of collective solidarity [and commitments] to the creation of collective subjects [and] fostering common interests in every aspect of our lives.’87

Federici’s analysis resonates with the political thought and proposals developed by Dardot and Laval in their 2018 work, ‘On Common: Revolution in the 21st century.’11 For Dardot and Laval, the common is likewise understood as a principle of political struggle, a demand for ‘real democracy’ and a major driving force behind the emerging articulation of a political vision and programme that transcends and overcomes the straitjacket logic of neoliberal ideological hegemony and its ‘policy grammar’ which appears to foreclose all alternatives and lock us forever into a capitalist realism in which ‘it is easier to imagine the end of the world than it is to imagine the end of capitalism.’89 Eschewing Bollier’s ‘triarchy’ of a market/state/ commons coexistence, Dardot and Laval argue for a politics of the common based on an engaged citizenry that directly participates and deliberates in all decisions which impact it, and in the process not merely transforms the institutions responsible for the management of services and allocation of resources, but creates new institutions and new ways of being in the world.11

Dardot and Laval describe this form of politics as ‘instituent praxis’: the common, they argue, is ‘not produced but instituted.’11 This acknowledges the conventional understanding of Ostrom, Bollier and others of ‘the commons’ as residing in the rules – the laws – that a community establishes for the collective management and use of shared resources, but extends it much further and in a more radical direction. The essence of the commons, they argue, is not in the goods per se such as land or a forest or a seed bank ‘held in common,’ but rather in the process of their establishment as well as the ongoing negotiation that will surround their use and governance. Hence, Dardot and Laval distinguish the commons from the ‘rights’ tradition of property, arguing that ‘the commons are above all else matters of institution and government…the use of the commons is inseparable from the right of deciding and governing. The practice that institutes the commons is the practice that maintains them and keeps them alive and takes full responsibility for their conflictuality through the coproduction of rules.’90 To ‘institute’ in this context should not be misunderstood as ‘to institutionalise [or] render official;’ rather it is ‘to recreate with, or on the basis of, what already exists.’ 90 This messy, conflictual and evolving process is what Dardot and Laval insist will ultimately bring about a revolution, not in the form of a violent uprising or insurrection, but rather through the ‘reinstitution of society’ via the transformation of politics and economy from its current state of ‘representative oligarchy’ to full participatory and deliberative democracy.11 Such a vision is premised on a mass politicisation of society; in effect a return of mass popular political contestation and a turn away from the postpolitical era of the neoliberal consumer.91-92

#### State obliterates that and their authors concede it fails.

Barker **‘**20 [Kye Anderson; January 2020; Ph.D. from the Department of Political Science at UCLA, Lecturer in political theory at UCLA; "A Revolution without Revolution: Dardot and Laval's Common," Theory & Event, Vol. 23, No. 1, p. 297-299]

Curiously, it is not until the postscript that this book—ostensibly on revolution—discusses its concept of revolution. Dardot and Laval define the concept as "the moment when instituent praxis, through a process of "self-instituting," becomes the institutional framework of society itself" (401).5 In other words, revolution to Dardot and Laval is the moment at which revolution becomes permanent and all solid, inert institutions melt into air. Yet, Dardot and Laval include in their book on revolution the following claim: "at the moment, there is simply no room for a full-fledged alternative to the market and the state" (344). The state will be necessary for public interventions which foster democratic associationism in and among firms. Shockingly, the alternative force of cooperative [End Page 298] firms organized by the principle of the common does not imply the "abolition of private property nor, a fortiori, the abolition of the market" (406). Rather, the principle of the common is meant to limit the excesses of private ownership of property. The revolution aims not at the seizure of state power, or of private property, but an endless generation of alternatives to them. But how does one physically pose an alternative to an institution with "a monopoly of legitimate physical violence?"6

This question returns us to the solution to the problem of power sought by revolutionaries of past generations. In the eighteenth century, the animating institution of revolution was the republic, which could only be achieved by the seizure of power by revolutionaries. This meant, for better and worse, violence—if not in the seizure of power, then at least in the defense of it. One thinks here of Niccolò Machiavelli's instructions regarding Lucius Junius Brutus's sons, who posed a threat to the new republican order of ancient Rome, or of Jacques-Louis David's solemn and sorrowful 1789 painting which followed the conclusion of Machiavelli's advice, The Lictors Bring to Brutus the Bodies of His Sons. Subsequently, the cry of the nineteenth century, according to Proud-hon, was for "the Democratic and Social Republic" (9).7 To Marx, the name "social republic" signaled the "general content of modern revolution."8 The revolution of the twenty-first century, however, is separated from the nineteenth by the rock of the twentieth, upon which the republican dreams of the Left capsized. The state terrors of "actually existing socialism" in the twentieth century have led some revolutionaries, such as the authors of the present book, to try to forget the mechanisms of power. But, if history has taught us anything, the mechanisms of power will not forget about them.

## ftc

### 2AC – No Link

#### Sherman Act violations can be prosecuted civilly or criminally – the aff solely affects civil prosecution, which is distinct from DOJ enforcement

Simmons ‘18 [Jay; 2018; Executive Senior Editor, Southern California Law Review, J.D. Candidate, University of Southern California Gould School of Law; Southern California Law Review; “What's in a Claim: Challenging Criminal Prosecutions under the FTAIA's Domestic Effects Exception,” vol. 92, p. 128-168]

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators' conception of the Sherman Act and its penalties, violations "may be prosecuted as civil or criminal offenses," and punishments for civil and criminal offenses vary. 153 For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may "obtain injunctive and treble damage relief for violations of the Sherman Act." 154 Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the "sole responsibility for the criminal enforcement" of criminal offenses and "criminally prosecutes traditional per se offenses of the law."1'55 In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations. 156

### 2AC – L/T

#### The aff solves any tradeoff link – private litigation takes cases off the government’s docket

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/]

Of greater relevance is the second reason for the lack of public enforcement, which is that the government suspects unlawful collusion but chooses not to litigate. The Antitrust Division of the U.S. Department of Justice (“DOJ”) has limited resources, which means all possible cases cannot be pursued. Furthermore, the presence of a resource constraint impacts the type of cases that are pursued. These days, the DOJ’s caseload is heavily oriented to cases involving the leniency program but not all forms of collusion lend themselves to a firm receiving amnesty. A member of a hard-core cartel engaged in a per se offense can expect to receive leniency if it is the first to come forward but there are many cases of collusion that do not involve behavior that is per se unlawful. Given the lower threshold for a conviction in a civil case, private litigation has been, and will continue to be, essential in prosecuting these less flagrant, but no less harmful, forms of collusion.  
While it is difficult to document case selection by the DOJ, there is certainly evidence consistent with it being a substantive factor. In noting that the DOJ obtained convictions in 92 percent of 699 cases filed over 1992 to 2008, Professors Robert Lande and Joshua Davis comment:17

The DOJ appears much more willing to tolerate a false negative (a failure to prosecute a violation of the antitrust laws) than a false positive (litigating a case when in fact there was no violation). In other words, it appears the DOJ chooses not to pursue litigation in many meritorious cases, perhaps at least in part because it lacks the necessary resources. This may well create a need for private litigation as a complement to government enforcement of the antitrust laws.

#### 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.

## clog

### 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.