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### 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.

# 2ac

## cartels

### certainty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## indigenous development

### uq

#### Young competition jurisdictions exist, but further improvements are necessary.

Aydin & Büthe ’16 [Umit and Tim; Associate Professor at the Instituto de Ciencia Política, Pontificia Universidad Católica de Chile and George C. Lamb, Jr. Fellow at the Kenan Institute for Ethics at Duke University; Professor of Political Science and Public Policy at the Hochschule für Politik (Bavarian School of Public Policy) at the Technical University of Munich, Germany, where he holds the Chair in International Relations, as well as a senior fellow of the Kenan Institute for Ethics and a founding member of the Rethinking Regulation Initiative at Duke University; *Law and Contemporary Problems,* “Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits,” <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4801&context=lcp>; KS]

Many of today’s 130 plus competition law jurisdictions are newcomers—more than two thirds of them enacted their first competition laws within the past twenty-five years.3 Most of these new competition law jurisdictions are developing countries, where conditions are hardly conducive to the successful implementation of pro-market legislation. A large number of them are poor or even very poor countries with few resources to support even the most promising public policies. Most exhibit high levels of both economic and political inequality; some still have autocratic regimes in which insiders use their political power to extract economic rents by restricting market entry; others have leaders who for their political survival depend upon the support of entrenched economic insiders. These conditions ensure powerful opposition to the meaningful implementation of any competition law. And many jurisdictions have enacted their first competition law or established a regulatory agency for its implementation while also attempting the difficult task of democratizing their political systems or liberalizing their economies.

Additional challenges arise from economic structures or expectations, held by elites and sometimes large parts of the population, that are antithetical to a market economy: In many of the new competition law jurisdictions, the state retains a large ownership stake in many industries or is still expected to guide outputs and inputs of the private sector. Moreover, in a number of these jurisdictions, corruption is rampant in the executive branch, and the judiciary is far from independent, contributing to generally poor rule of law and limited access to justice. And even before adding the regulation of market competition to the tasks assigned to their public administrations, many of the recent competition law adopters suffered from weak bureaucratic capacity.

Recent scholarship has called attention to many of these conditions. It has advanced our understanding of the serious challenges they present to the effectiveness of competition law and policy in developing countries.4

Some young competition jurisdictions in the developing world, however, appear to have overcome these challenges. Though their records so far are short, some agencies seem to have succeeded in building substantial analytical capacity and establishing considerable autonomy. And in a number of cases, they appear to have become highly effective in dismantling private and public barriers to competition in their countries, contributing to development and other goals of these societies.5

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### 2AC

#### We meet:

#### 1 – Prohibits price-fixing that affects US commerce indirectly:

a – activities – price-fixing is ongoing by multiple participants.

b – prohibitions – courts allow indirect price-fixing now – post-plan, all activities that don’t meet the balancing test are prohibited.

#### 2 – Plan text in a vacuum – most objective standard – otherwise neg teams generate competition for garbage CPs.

#### ‘Anticompetitive business practices’ refer to actions that harm the competitive process.

Breyer ’88 [Stephen; June 30; Federal Court of Appeals Judge on the First Circuit and later a Supreme Court Justice; Westlaw, Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478]

“Anticompetitive”, too, has a special meaning. It refers not to actions that merely injure individual competitors, but rather to actions that harm the competitive process. Brown Shoe Co. v. United States, 370 U.S. 294, 319–20, 328–34, 82 S.Ct. 1502, 1521, 1525–29, 8 L.Ed.2d 510 (1962); see Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 488–89, 97 S.Ct. 690, 697–98, 50 L.Ed.2d 701 (1977). And, the law assesses both harms and benefits in light of the Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods. See Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9, 11–12 (1st Cir.1987); 7 Areeda & Turner ¶ 1502.

The joint practices and agreements that appellant attacks here are not per se unreasonable. Thus, appellant must show that the likely anticompetitive effects of these practices outweigh their business justifications, or at least that the defendants might achieve any legitimate business objectives in a significantly less restrictive way. 7 Areeda & Turner ¶ 1505b.

A

Clamp–All's major attack concerns CISPI's promulgation of a standard called the 310 Designation. That standard is entitled

Specifications for

CAST IRON SOIL PIPE INSTITUTE'S APPROVED COUPLING FOR USE IN CONNECTION WITH HUBLESS CAST IRON SOIL PIPE AND FITTINGS FOR SANITARY STORM DRAIN, WASTE AND VENT PIPING APPLICATIONS

The specification consists of several pages of detail. It also states,

Several different types of hubless joints or couplings are available for use in hubless cast iron systems.... It is the purpose of this specification ... to furnish \*487 information as to the approved characteristics of one of such type couplings which is approved by the Institute [CISPI].

And, it states on the first page,

Members of the Institute who are licensed to use the Institute's Collective MarkNO –HUB and who sell hubless couplings manufactured by or for them which conform fully to this Specification may indicate their membership in the Institute and their conformance with this Specification by marking such couplings with the Institute's Collective Mark NO–HUB.

CISPI successfully persuaded various private standard-setting bodies, as well as state and local plumbing code authorities, to make reference to the 310 Designation as the kind of coupling that would meet their respective standards.

8 a. Appellants seem to say that CISPI's very promulgation of this standard and its efforts to secure its adoption by certifying authorities amounts to an unreasonable restraint of trade. We do not see how that can be so. The standard, in specifying what counts as a CISPI coupling, provides a relatively cheap and effective way for a manufacturer or a buyer to determine whether a particular coupling is, in fact, (generically considered) a CISPI coupling. The adoption by certifiers helps users quickly and effectively determine that a particular coupling (which meets CISPI standards) also meets state, local, or private certifiers' standards of acceptability. The joint specification development, promulgation, and adoption efforts would seem less expensive than having each member of CISPI make duplicative efforts. On its face, the joint development and promulgation of the specification would seem to save money by providing information to makers and to buyers less expensively and more effectively than without the standard. It may also help to assure product quality. If such activity, in and of itself, were to hurt Clamp–All by making it more difficult for Clamp–All to compete, Clamp–All would suffer injury only as a result of the defendants' joint efforts having lowered information costs or created a better product. See George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 558 & n. 19 (1st Cir.1974). And, that kind of harm is not “unreasonably anticompetitive.” It brings about the very benefits that the antitrust laws seek to promote. That is to say, activity that harms competitors because it lowers production or distribution costs or provides a better product carries with it an overriding justification.

Of course, what we have just written is true of ‘legitimate’ standard-setting activity. See Whitten, 508 F.2d at 558 n. 19. There could be special circumstances, showing, in an individual case, that the standard setting at issue serves no legitimate purpose, or that it is unnecessarily harmful. Id. (antitrust claim stated if market participant who establishes proprietary specifications coerces a standard-setting organization or conspires with it to get the specification officially adopted, or if it prevents competitors from competing for approval). But the plaintiff would have to show the existence of such circumstances; and, the plaintiff has not done so here. The best it can do is point to the word “approved” in the specification (“it is the purpose of this specification ... to furnish information as to the approved characteristics of one of such type couplings which is approved by the Institute.”) and to argue that that single word might mislead users into thinking that CISPI is a disinterested certifying organization, providing “approvals” for all hubless couplings, thereby hurting Clamp–All, unless, as Clamp–All seems to argue, CISPI considered Clamp–All's coupling for “approval” as well, see Radiant Burners, Inc. v. Peoples Gas Light & Coke, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961); 2 J. von Kalinowski, Antitrust Laws and Trade Regulation, § 6I.01 (1988); Wachtel, “Products Standards and Certification Programs,” 13 Antitrust Bull. 1, 13 (1968).

9 The dispositive answer to this argument is that the record contains no significant evidence that the word “approved” misled anyone. The specification itself makes clear what it is, a specification that applies to CISPI-type hubless couplings, \*488 not to all hubless couplings. It contains no other language that might make one think that CISPI was some kind of general certifying organization. Buyers of hubless couplings are builders, plumbers, or contractors—reasonably sophisticated users—and there is no testimony that any of them was fooled. Plaintiff's best evidence consists of a comment by its expert that “people who normally use these things ... could easily be misled,” but, on cross examination, that same expert conceded that he had not talked to normal coupling users in forming that particular opinion. In our view, that opinion alone, so lacking in foundation, cannot take the issue of “being fooled” to the jury. And, if CISPI was not (or at least was not thought to be) a general certifying organization, why must it develop a specification for, or somehow “certify,” a competitor's quite different product? After all, General Motors need not certify the quality of a Toyota, nor need a group of film producers certify the quality of competing live television programs.

b. Clamp–All argues that CISPI defendants prevented an important “standard-setting and approval-granting” organization, the American Society of Sanitary Engineers (“ASSE”), from approving a hubless coupling performance standard that would have benefitted Clamp–All. In theory, one can understand how joint activity of the kind Clamp–All alleges could be unreasonably anticompetitive. Suppose, for example, the ASSE was about to adopt a performance standard that both CISPI and Clamp–All could have met; suppose further that ASSE's adoption of such a standard would have led to the adoption of a similar standard by hosts of local and state regulatory, and private certifying authorities. Then Clamp–All simply could have pointed to the standard (and its compliance) to show a contractor that its product was approved, just as CISPI does in states that have referenced the 310 Designation. If CISPI prevented the adoption of such a standard, it may have acted unreasonably.

10 The key word here, however, is “may.” Certifiers may reasonably believe that they can do their job properly (a job that benefits consumers) only if all interested parties are allowed to present proposals, frankly present their views, and vote. Thus, we do not see how plaintiff could succeed on its antitrust claim unless (at a minimum) CISPI both prevented ASSE from adopting a national performance standard that would have benefitted Clamp–All and did so through the use of unfair, or improper practices or procedures. See Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938 (2nd Cir.) (antitrust claim stated where defendant conspired with other steel companies to block the approval of plaintiff's product by a national certifying organization; defendant acted within the letter of the organization's rules, but violated their spirit by paying for and packing a meeting with voters who had little to no professional interest in the subject matter), aff'd, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (affirming denial of Noerr–Pennington immunity for defendant's effort to influence private standard-setting organization; dismissing certiorari in respect to whether defendant's conduct was an unreasonable restraint of trade). In deciding whether this is so, courts must take account of the importance of permitting parties to express their views freely before regulatory authorities. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965) (“Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition” (emphasis added)); cf. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (efforts to influence private standard-setting organizations may violate antitrust laws).

11 The record here does not contain evidence sufficient to warrant presenting Clamp–All's claim to the jury. It shows that in 1979, at Clamp–All's request, the ASSE formed a subcommittee to write a hubless coupling standard. Clamp-All proposed a four-tier standard (rating couplings by their ability to withstand varying levels \*489 of water pressure). Initially, when only one CISPI representative was present, the subcommittee recommended a three-tier standard (which was also beneficial to Clamp–All). CISPI then decided to offer a single tier standard, which both the CISPI and Clamp–All couplings would have met. It wrote its members and urged them to attend the next meeting. At that next meeting, with six CISPI members attending out of a total of sixteen, the subcommittee changed its mind and voted for CISPI's proposed standard. The ASSE eventually decided not to accept its subcommittee's recommendation, and it took no further action.

We can find no concrete evidence in the record that CISPI acted improperly. The record here is unlike that in Indian Head, where the defendant “packed” the meeting by hiring lay voters in numbers that unfairly gave it overrepresentation. Nor is there concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's decision not to adopt any standard. Clamp–All points to a single statement by CISPI's general counsel that the CISPI one-tier proposal was “not really a performance standard.” We do not see how that statement shows a significant abuse of ASSE's procedural standards or practices. Rather, as far as the record is concerned, CISPI acted within the letter and the spirit of the ASSE rules in presenting its proposal and urging its members to attend the meeting.

B

Clamp–All claims that the defendants have jointly engaged in several unreasonably anticompetitive “business practices.” For the most part these claims amount to charges of state-law business torts, not violations of the federal antitrust laws. Whitten, 508 F.2d 560–62. We assume that point aside, however, for the sake of argument, and because of appellant's later Lanham Act claim, see pp. 491–492 infra. We have examined the evidence in respect to each alleged act, and we conclude that no reasonable jury could find a significant, unreasonably anticompetitive business practice that harmed Clamp–All.

#### Prohibition includes per se and rule of reason.

Anu Bradford and Adam S. Chilton 18. Anu Bradford Henry L. Moses Professor of Law and International Organization, Columbia Law School. Adam S. Chilton. Assistant Professor of Law and Walter Mander Research Scholar.

Before discussing our data and the coding of the CLI, it is important to recognize that there are limitations to any index that attempts to quantify competition regulation. This is because it is difficult to produce a single metric that tells the comprehensive story of country’s competition regime. For example, if a specific type of conduct is prohibited, is it prohibited always (per se) or sometimes (rule of reason)? This seems like a relevant distinction to code, but it turns out to be difficult to capture systematically in many jurisdictions. For instance, Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) seems to regulate anticompetitive agreements under the rule of reason standard in the European Union, but, in practice, cartels are per se prohibited. This highlights the challenge of coding even just the law in books, let alone accounting for all the nuances of a country’s competition policies.20

#### Increase means to expand the existence of an already existing policy

Buckley ’6 [Jeremiah S, Joseph M. Kolar; November 13; partners at Buckley Kolar LLP; Westlaw, Brief of Amici Curiae for “Mortgage Insurance Companies of America and Consumer Mortgage Coalition,” WL 3309503]

First, the court said that the ordinary meaning of the word “increase” is “to make something greater,” which it believed should not “be limited to cases in which a company raises the rate that an individual has previously been charged.” 435 F.3d at 1091. Yet the definition offered by the Ninth Circuit compels the opposite conclusion. Because “increase” means “to make something greater,” there must necessarily have been an existing premium, to which Edo's actual premium may be compared, to determine whether an \*26 “increase” occurred. Congress could have provided that “adverse action” in the insurance context means charging an amount greater than the optimal premium, but instead chose to define adverse action in terms of an “increase.” That definitional choice must be respected, not ignored. See Colautti v. Franklin, 439 U.S. 379, 392-93 n.10 (1979) (“[a] definition which declares what a term ‘means' … excludes any meaning that is not stated”).

Next, the Ninth Circuit reasoned that because the Insurance Prong includes the words “existing or applied for,” Congress intended that an “increase in any charge” for insurance must “apply to all insurance transactions - from an initial policy of insurance to a renewal of a long-held policy.” 435 F.3d at 1091. This interpretation reads the words “existing or applied for” in isolation. Other types of adverse action described in the Insurance Prong apply only to situations where a consumer had an existing policy of insurance, such as a “cancellation,” “reduction,” or “change” in insurance. Each of these forms of adverse action presupposes an already-existing policy, and under usual canons of statutory construction the term “increase” also should be construed to apply to increases of an already-existing policy. See Hibbs v. Winn, 542 U.S. 88, 101 (2004) (“a phrase gathers meaning from the words around it”) (citation omitted).

#### Prohibitions can be partial

Clopton ’85 [David; December 1, 1885; Justice on the Supreme Court of Alabama; Westlaw, “Miller v. Jones,” 80 Ala. 89]

The title of the act is, “An act to regulate the sale, giving away, or otherwise disposing of spirituous, vinous or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base, in Talladega County.” But one subject is expressed in the title--the regulation of the sale, giving away or otherwise disposing of liquors--and the enquiry is, does the title express the subject contained in the enactment: in other words, are regulation and prohibition the same or distinct subjects? Regulate and prohibit have different and distinct meanings, whether understood in their ordinary and common signification, or as defined by the courts in construing statutes. Power granted to a municipal corporation to grant licenses to retailers of liquors, and to regulate them, does not confer power to prohibit, either directly or by a prohibitory charge for a license. Town of Marion v. Chandler, 6 Ala. 899; Ex parte Burnett, 30 Ala. 461; In Joseph v. Randolph, 71 Ala. 499, it is said: “A constitutional right, though subject to regulation, can not be impaired or destroyed, under the devise or guise of being regulated.” To regulate the sale of liquor implies, ex vi ter \*97 mini, that the business may be engaged in or carried on, subject to established rules or methods. Prohibition is to prevent the business being engaged in or carried on, entirely or partially. The two purposes are incongruous. A title which expresses a purpose to regulate, gives no indication of a purpose to absolutely prohibit. We are constrained to hold the act unconstitutional.

## cap

## itc

### solvency

#### Antitrust issues cannot be resolved by trade.

Swaine ‘1 [Edward T; December; Reporter for the American Law Institute’s Restatement of the Law (Fourth), Foreign Relations Law of the United States, and an elected member of the American Law Institute. He is a member of the Advisory Committee on Public International Law for the U.S. State Department, a past member of the Executive Council of the American Society of International Law, and former co-chair of the International Law in Domestic Groups interest group. At GW, Professor Swaine has served as the Senior Associate Dean for Academic Affairs and Director of the Competition Law Center; *William & Mary Law Review,* “The Local Law of Global Antitrust,” https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1438&context=wmlr; KS]

One premise for these objections is that there is presently a discrete community of antitrust enforcers, and that these nations ,are already cooperating formally and informally. Those espousing the WTO solution do not entirely disagree.158 EU officials, for example, clearly acknowledge the relative strength of cooperation taking place among nations with similar philosophies and resources; at the same time, they and others express concern about the slow pace of proceeding bilaterally, and about the likelihood that many will simply be left behind.159

A second premise is that antitrust issues are distinctive and not amenable to resolution by trade regimes. Again, advocates for WTO competition rules are not unsympathetic, and are at least inclined to exclude the application of certain familiar trade remedies.160 Third, and finally, there is general agreement that national laws on antitrust would not be displaced absent certain blatant flaws, such as discrimination on the basis of nationality, 161 and that the discretion of national authorities over individual enforcement decisions would be preserved-including by recognizing that positive comity could not be compelled to any degree greater than at present.162 Assuming that the discretion to enforce antitrust laws is not simply inimical to international authority,163 the general consensus is that it should not in fact be curbed.

#### CP gets watered down and delay.

Rizzolo et al ’18 [Matthew; May 15; Counsel at Ropes & Gray LLP; *Law360, “*The Future Of Antitrust Claims At The ITC,” <https://www.law360.com/articles/1042215/the-future-of-antitrust-claims-at-the-itc>; KS]

Of course, given the length of time it took to decide Certain Carbon and Alloy Steel Products and the fact that there was a dissent, it is possible that a change in the composition of the commission would have led to a different result.[15] A new commissioner, Jason E. Kearns, was recently sworn in, and several others have been nominated to fill vacant positions or expiring terms; new commissioners may take different views on the role antitrust claims and antitrust injury are supposed to play, if any, at the ITC. After all, the dissent made a passionate argument that Section 337(a)(1)(A) is intended to be used broadly as a sword and shield to attack and defend against the sort of geopolitical forces that warp markets, harm private companies, and threaten free-market economies. And there is also the possibility that the law will change through the courts: U.S. Steel might seek to appeal the ITC's dismissal of its complaint to the U.S. Court of Appeals for the Federal Circuit, who could weigh in on whether the ITC's requirement of antitrust standing was appropriate.

And finally, it's worth noting that Radwell has simply gotten past the institution stage of its proceeding — it is possible that its claim fails on the merits, or that the respondents identify a different factual or legal flaw. While the ITC rejected Rockwell's request to use the Early Disposition Program, this only allows one to conclude — as the ITC noted — that Radwell's complaint is too complex to be decided within 100 days of institution. At the end of the day, Radwell might find itself in the same situation as U.S. Steel. This much is certain, however: for those interested in the intersection of antitrust and trade issues, Certain Programmable Logic Controllers will be a case to watch.

#### Inconsistent, inefficient applications undermines enforcement.

Meyer ’21 [Charles; June 14; Registered patent attorney, is a Texas-based tech lawyer with over 30 years’ experience in international and domestic intellectual property law; *Bloomberg Law,* “ITC Protections Are Broken—It’s Time to Fix Them,” <https://news.bloomberglaw.com/ip-law/itc-protections-are-broken-its-time-to-fix-them>; KS]

Just like the Texas power grid, the U.S. system for protecting U.S. domestic industries and our economy from unfairly traded imports could use some attention. In particular, the International Trade Commission’s (ITC) adjudication of cases brought under Section 337 to block imports is functioning sub-optimally, inconsistently, and inefficiently.

It features an ever-increasing workload for the administrative law judges who handle Section 337 cases, as well as repeated misfires of the system by investigating complaints and issuing exclusions that harm U.S. interests. The system requires retuning in a number of areas if the ITC is to fulfill its mission.

## states

### preemption

#### CP is certainly preempted

O’Rourke ‘10 [Ken; 3/3/10; Senior Partner, O'Melveny & Myers LLP, an international law firm specializing in antitrust; “United States: The FTAIA In State Court: A Defense Perspective,” https://www.mondaq.com/unitedstates/trade-regulation-practices/95030/the-ftaia-in-state-court-a-defense-perspective?utm\_source=pocket\_mylist]

As federal courts tighten the reins on private antitrust actions, some antitrust plaintiffs are focusing their attention on litigating in state court. And they are being creative about how to avoid removal to federal court.1 Yet, as antitrust plaintiffs turn to state court and state law, they are likely to face some of the same federal doctrines they would prefer to avoid.

One federal doctrine sure to arise in state court antitrust actions when there are allegations or damages based on cross-border conduct is the Foreign Trade Antitrust Improvements Act ("FTAIA").2 The FTAIA defines the limits on the reach of the Sherman Act in cases involving foreign trade and commerce.

The FTAIA's parameters continue to evolve as litigants and the courts wrestle with new variations of the basic allegation that international price-fixing or overseas monopolistic conduct "caused" domestic injury on which a Sherman Act claim is based.

Congress enacted the FTAIA in 1982, some 92 years after the enactment of the Sherman Act. The FTAIA operates by "removing" anticompetitive conduct in foreign trade or commerce (other than import trade or import commerce) "from the Sherman Act's reach," unless that same conduct also causes direct, foreseeable and substantial injury to domestic trade or commerce within the United States, U.S. import commerce, or exporting activities of American exporters.3

A threshold question is whether these limitations similarly restrict the extraterritorial application of state antitrust laws. Defendants will argue that the state antitrust laws cannot permissibly extend to reach conduct or give rise to damages that Congress has placed beyond the reach of federal antitrust law under the FTAIA.

The defendants' argument goes like this. First, under the Supremacy Clause of the U.S. Constitution,4 federal law preempts state law even in the absence of an express preemption provision when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."5

Second, the FTAIA's legislative history establishes that Congress had multiple objectives when enacting the statute. One objective was to ensure that the risk of Sherman Act liability did not prevent American exporters and other firms doing business abroad from entering into advantageous "business arrangements (such as joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."6

Another objective was to eliminate "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."7

Congress sought to adopt a "clear benchmark ... for businessmen, attorneys and judges as well as [U.S.] trading partners"8 with the "ultimate purpose" of "promot[ing] certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions."9

A third objective was to promote international comity by acknowledging and respecting the prerogatives of other nations to establish and apply their own standards for regulating and remediating alleged restraints of trade in their own markets.10

Congress believed that respecting such foreign sovereign regulatory prerogatives would ultimately best serve U.S. interests by "encourage[ing] our trading partners to take more effective steps to protect competition in their markets."11

Applying state antitrust laws to regulate foreign trade or commerce excluded from federal antitrust jurisdiction by the FTAIA arguably would frustrate every one of these objectives.

American exporters and other businesses engaged in foreign trade or commerce could have no confidence that restraints exempted from federal antitrust attack would not be subject to alternative antitrust attack under the laws of one or more U.S. states. Businesses, therefore, would be deterred from entering into arrangements that Congress intended to enable.

Likewise, ambiguity in the "standard to be employed" for assessing the extraterritorial application of "American antitrust law" would not only persist, but would be multiplied fifty times.

And the imposition of as many as 50 states' antitrust laws on foreign trade or commerce clearly would negate the federal objectives of international comity and respect for foreign regulation of foreign markets.

At every level then, the application of state antitrust laws to foreign trade or commerce exempted by the FTAIA from federal antitrust regulation would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FTAIA.12

Plaintiffs likely will counter these preemption arguments by pointing out that there is a presumption against preemption and that Congress did not expressly overrule any state antitrust law when enacting the FTAIA.

True, Congress did not address the reach of state antitrust laws, one way or the other, when it enacted the FTAIA. However, the Sherman Act has always extended to "commerce with foreign nations,"13 and was subject to a large body of pre-FTAIA case law addressing the limitations on its extraterritorial reach.14

By contrast, state antitrust laws such as California's Cartwright Act do not expressly reference foreign commerce and have no comparable history of being applied to it.

Congress, therefore, had no cause to be concerned that states would attempt to apply state antitrust laws to foreign trade or commerce exempted from federal regulation by the FTAIA.

Even if there had been such a concern, Congress would have been amply justified in anticipating that the doctrine of implied obstacle preemption — well established when the FTAIA was enacted in 198215 — would resolve any conflict.16

#### All empirical case law agrees

O’Rourke ‘10 [Ken; 3/3/10; Senior Partner, O'Melveny & Myers LLP, an international law firm specializing in antitrust; “United States: The FTAIA In State Court: A Defense Perspective,” https://www.mondaq.com/unitedstates/trade-regulation-practices/95030/the-ftaia-in-state-court-a-defense-perspective?utm\_source=pocket\_mylist]

Take California as a specific example. There is a "strong presumption" against preemption, particularly in fields that have been the subject of California's "historic police powers."17 Antitrust plaintiffs would argue that California's "historic police powers" include the authority to regulate competition in California.

On the other hand, the U.S. Supreme Court has consistently held that the power of states to regulate commercial activity outside their borders is necessarily circumscribed.18 That principle applies a fortiori when states attempt to regulate foreign trade or commerce.19

Even in cases involving traditional regulation of conduct within state borders, the California Supreme Court has declined to apply a presumption against preemption where the regulation in question also implicates foreign affairs.20

When the area of regulation encompasses not only foreign trade and commerce but also international relations — that is to say, areas in which federal rather than state interests traditionally predominate — the case for preemption is even stronger.21

Extending the foreign extraterritorial reach of state antitrust laws beyond the limits of the Sherman Act would infringe not only the Supremacy Clause but several additional constitutional provisions establishing federal primacy in the areas of foreign trade, foreign commerce and international relations.22

This allocation of power is intended to ensure that only one entity — the federal government — represents American interests in foreign trade and commerce and foreign affairs.23

In recognition of these principles, courts have repeatedly invalidated state laws that undermine, or threaten to undermine, federal policies and prerogatives in the areas of foreign trade and commerce or foreign affairs.24

These decisions support a conclusion that states cannot constitutionally apply state antitrust laws such as the Cartwright Act to remediate alleged harm from restraints of trade in foreign markets having no direct, substantial and foreseeable anti-competitive effects on trade or commerce in the United States (as would be required for federal antitrust jurisdiction under the FTAIA).

There are policy reasons for this result as well. Claims arising from international cartel conduct or overseas monopolistic behavior arguably seek to apply state antitrust law to decide the legality of foreign conduct (e.g., communications between English and Japanese manufacturers about industry standards, or discussions between Chinese and Korean buyers, or joint ventures in Singapore investing in South America) regardless of whether such conduct was legal when and where it occurred.

Such claims threaten much more than an "incidental or indirect effect" on foreign trade and the internal affairs of foreign countries exercising their sovereign rights to regulate their own markets.25

To assert a state's antitrust law as an all-encompassing international antitrust statute available to police alleged restraints of trade in every country would contravene the federal policy, reflected in the FTAIA, of promoting international comity in this area.26

And allowing one state to apply its antitrust laws to foreign transactions paves the way for every other state to apply its antitrust statutes beyond the limits of the FTAIA.27

Exposure to a thicket of state antitrust regimes would drive foreign companies to avoid doing business that even tangentially affects U.S. commerce.

Finally, such an outcome would conflict with the reported decisions considering this specific issue. One federal court, in In re Intel Corp. Microprocessor Antitrust Litig. ("Intel II"),28 held that California Cartwright Act claims are "limited by the reach of their applicable federal counterparts."29

Intel II analyzed the question as follows:

"Plaintiffs have ... not demonstrated that their state law claims should be applied beyond the boundaries set by the FTAIA ... As the Supreme Court has recognized, '[f]oreign commerce is pre-eminently a matter of national concern,' and therefore, it is important for the Federal Government to speak with a single, unified voice.

"Here, Congress has spoken under the FTAIA with the 'direct, substantial and reasonably foreseeable effects' test, and the Court is persuaded that Congress' intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not."30

The only published California appellate decision on the issue, Amarel v. Connell, similarly holds that the Cartwright Act should not be construed to allow prosecution of extraterritorial antitrust claims that the FTAIA would not.31

The Amarel court observed that "[t]he legislative history of [the FTAIA] discloses it was intended to establish a uniform standard, in the face of conflicting judicial formulations, of the domestic effects necessary to trigger the jurisdiction of American antitrust laws,"32 and that "the proper approach to a preemption analysis is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'"33

The court concluded that the plaintiffs' state law antitrust claims were "not preempted" because, as pleaded, the claims did not seek to apply state antitrust laws in a manner inconsistent with the FTAIA.

Rather, they sought damages for anti-competitive practices "alleged to have had an adverse effect on the relevant markets in this state ..."34

According to the court:

"So long as the anticompetitive conduct in question has a direct, substantial and reasonably foreseeable effect within the state, prosecution of the conduct under state law is not precluded."35

In sum, there are strong reasons for a state court evaluating a state law antitrust claim involving foreign trade or commerce to limit the reach of that state law co-extensively with the reach of the Sherman Act as defined by the FTAIA.

To do otherwise contravenes constitutional clauses, rules of statutory construction and federal policies.

#### Coordinated state action is more likely to be preempted

Swaine ‘01 [Edward; Dec. 2001; Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania. A.B., Harvard; J.D., Yale; William & Mary Law Review; “The Local Law of Global Antitrust,” vol. 43, iss 2. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1438&context=wmlr]

One might yet find some basis in the international law of antitrust comity for distinguishing the states, but it would be slender. Unlike private plaintiffs, states have not been singled out for distinct treatment in any bilateral cooperation,531 and the inference that they are directly subject to the terms of those agreements seems weak. The failure to address their function directly is unsurprising. The U.S. system of antitrust enforcement is unique in the degree to which it permits redundant enforcement of national law by subnational authorities, let alone in the degree to which it permits them to reach international matters."2 Even within the transnational European enforcement scheme, Commission supremacy over transnational matters is maintained by pre-emptive jurisdictional rules,33 relatively clear protocols, 53 4 and constitutional principle.5 5 The Commission itself is advocating devolutionary reforms, but at pains to maintain the principles of uniformity and supremacy, and criticisms of the proposal suggest that still greater precautions may be in order.3 6 Particularly where adherence to an international agreement is at issue, Commission efforts at implementation-including cooperation with foreign authorities-appear to preclude interference by any national competition authority.3 7

The key to understanding the states' unique role, instead, involves their standing under more general precepts of international law-as determined in large part by the U.S. Constitution. International law is ordinarily agnostic as to a nation's legal order, and accordingly leaves to U.S. law the question of whether states may exercise national regulatory jurisdiction.538 But the federal government retains ultimate responsibility for state compliance with international law unless it has specifically been discharged.539 The federal agencies cannot, in short, shirk their responsibility for abiding by comity through the simple expedient of relegating enforcement responsibility to the states.

That the federal government retains responsibility is not, as it develops, due to some immutable characteristic of international law-subnational governments do occasionally enjoy the authority to conduct international relations--but instead stems from the U.S. Constitution, which purposefully deprives the states of any authority to conduct foreign relations.5" The scope of this exclusive federal authority is controversial.542 It has been intimated, for example, that state activities are barred whenever they adversely affect foreign relations,543 though that principle has routinely been ignored.5" It is particularly difficult to imagine its application to state invocation of Sherman Act jurisdiction: unlike typical state activities touching on foreign affairs, state attorneys general prosecuting international matters are acting in a fashion facially licensed by Congress, making their function objectionable less in federalism terms than as a matter of the separation of powers."

The core of the problem, rather, lies in the inability of states to practice antitrust comity in their own stead. Private plaintiffs (and defendants) may freely negotiate with foreign antitrust authorities, assuming that no one resuscitates the Logan Act.546 But states cannot do likewise. Relevant constitutional text,57 case law,548 and political practices 49 indicate that state bargaining with foreign powers is constitutionally preempted.55 There are, to be sure, exceptions, as suggested by the authority of states to enter into compacts with foreign powers;55' state diplomacy may be permitted, for example, where it is unlikely to impact the national interest or the authority of the other states.552 This makes it plausible, for example, that information sharing would not ordinarily be implicated. 553 But the coordination of investigations and enforcement actions, as we have seen, runs a substantially greater risk of compromising the collective interest.5 " As a constitutional matter, moreover, attempts to ameliorate the risk of conflicting state activities through NAAG coordination simply enhances the risk of undermining or displacing federal authority.5"

The more plausible defense of state antitrust authority, instead, is that it has been sanctioned by federal law. Antitrust comity, it should be recalled, is a species of customary international law, and custom may be overridden.556 As a matter of constitutional law, too, otherwise suspect state foreign relations activities should be regarded as permissible where congressionally licensed, or where authorized by the president pursuant to delegated or independent constitutional authority.55 7

The question then becomes what federal law provides. The arguments under Charming Betsy for limiting the potential reach of federal antitrust authority are redoubled under Ashwander in light of the constitutional defects of state participation in antitrust comity.558 Even were one inclined to favor the presumption against preempting state authorities, 59 the underlying values tend to backfire in the instant context. The privileges and immunities the states enjoy within a federal system make them, if anything, less acceptable participants under international law: if a state can defend itself against injunctive relief by a foreign nation on Eleventh Amendment grounds, the only domestic recourse for compelling compliance with antitrust comity would vanish.560

### solvency

#### Consistent application in federal courts is key to deterring cartel practices internationally

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

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

#### State action wrecks international comity

Swaine ‘01 [Edward; Dec. 2001; Assistant Professor, Legal Studies Department, The Wharton School, University of Pennsylvania. A.B., Harvard; J.D., Yale; William & Mary Law Review; “The Local Law of Global Antitrust,” vol. 43, iss 2. https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1438&context=wmlr]

Apart from these cumulative and incremental concerns, the distinctive nature of state enforcement policies also makes heeding legitimate foreign interests more difficult. The states' sharpest critics accuse them of being motivated by treble damages" 5 or even craven political opportunism.1 6 Viewed more benignly, states are certainly attuned to public policy considerations other than consumer welfare, such as local employment and local competitors." 11 Even where this happens to coincide with foreign enforcement philosophies, state promotion of such values is unlikely to spill over to foreign jurisdictions, and neither are any innovations state-based experimentation may generate in the administration of U.S. antitrust law; foreign parties, for their part, may feel particularly vulnerable to the more subjective elements of state antitrust analysis.51 s Finally, even where state and foreign enforcers agree that particular conduct or a particular transaction poses antitrust concerns, conflicts may arise over state cherrypicking. 19

The Hartford Fire case hints at some of the problems. The lawsuit arose after local governments, experiencing difficulties in obtaining liability coverage, complained to their state attorneys general, who filed suit when the federal government declined to take action.520 According to the states, the federal government's inaction was due to its flawed analysis of the prospects for collusion in the insurance industry.21 To the foreign insurers and their governments, on the other hand, the states' intervention was politically tinged, and observers considered the lawsuit as one part of the tort reform movement.5 22 The result, in any event, was that the domestic and foreign insurers paid the states $36 million to settle the claims after the Supreme Court decision, including the costs of the states' legal action.5"

Particularly in the wake of Hartford Fire, state authority seems likely to make national compliance with antitrust comity more difficult. Cooperative investigations and information sharing may pose some difficulties.5 2' Conflicts seem more likely regarding enforcement and remedial matters. Because states have different visions of the public interest and different constituencies, they may find it difficult to coordinate with the federal government and its foreign counterparts-even assuming that they can cooperate among themselves. The conflict is inherent. States tend to enhance the total stability of U.S. enforcement policy over time, thus making it more predictable for foreign firms and antitrust authorities alike.52 But this is of diminished benefit in international matters, as the proliferation of foreign antitrust authorities, and expanded notions of foreign antitrust jurisdiction, make it likely that global practices and transactions will be caught by more than one national authority. More to the point, this internal complementarity, which tends to ensure a constant level of American antitrust enforcement, diminishes the ability of the U.S. government to ensure external complementarity, such as by suspending antitrust enforcement in deference to foreign authorities tendering a request for traditional comity. 27 Even if that has not measurably slowed bilateral agreements and the development of a comity principle, it may retard deeper efforts at cooperation, 2 ' and even endanger continued observance of already precarious norms.

## politics

### uq

#### Bill won’t pass and Biden fails---second delay is a huge setback.

Foran et al. ‘10/28 [Clare; 10/28/21; congressional reporter for CNN Politics; et al.; "House Democrats again delay infrastructure vote amid party divisions," https://www.cnn.com/2021/10/28/politics/biden-agenda-deal-democrats/index.html]

House Democratic leaders on Thursday were once again forced to push back the timeline for a vote on a $1 trillion infrastructure bill, a sign of ongoing divisions within the party and a major blow to President Joe Biden and party leaders eager to show they can deliver on their agenda.

The decision to delay the vote came just hours after Biden appealed directly to House Democrats in a closed-door meeting on Capitol Hill, pitching them on a framework for a separate, larger climate and economic package.

The problem for party leaders is that progressives made clear they would not vote for the infrastructure bill unless the larger bill moves in tandem and said a framework was not enough to win their votes. That bill has not yet been finalized or publicly signed off on by all Senate Democrats.

Delaying the infrastructure vote is a significant setback for Democrats with Biden making clear privately for more than a week he wanted an agreement and passage of the bipartisan measure before he arrives at a UN Climate Conference on November 1. Biden departed for his foreign trip later in the day on Thursday.

Speaker Nancy Pelosi had told House Democrats earlier Thursday not to "embarrass" Biden by voting down the infrastructure bill during Biden's trip overseas.

This is the second time in two months that House leadership has had to delay the infrastructure vote after a similar scenario played out at the end of September. For now, it's unclear how long the vote on the bipartisan infrastructure bill will be delayed.

#### It won’t pass and Biden has zero PC

Collinson ‘10/29 [Stephen, "Democrats fight one another in Washington as Americans struggle," https://www.cnn.com/2021/10/29/politics/congress-spending-bill-president-joe-biden-italy-g20-democrats/index.html]

As Democrats battle one another in Washington, cost-of-living spikes and a slowing economy are putting growing pressures on Americans and worsening the political environment that will decide the party's fate in the midterm elections.

Another day of busted deadlines, political malpractice and drained presidential authority on Capitol Hill ended with Joe Biden's one-two-punch on infrastructure and social spending stalled yet again. Even after Biden said his presidency was on the line and House Speaker Nancy Pelosi warned lawmakers not to "embarrass" him as he left on a big foreign trip, progressives still refused to back a bipartisan infrastructure bill they are using as leverage to secure the best possible terms in a watered down but still huge social spending plan.

While the President whom Americans elected to fix their problems struggles to squeeze a massive agenda through minuscule governing majorities, the challenging situation out in the country -- which contributed to a drop in his approval ratings over the summer -- continues to deteriorate.

New official data released Thursday showed that the recovery has hit a major roadblock, with growth stuck at an annualized rate of only 2% in the third quarter. The pandemic surge fueled by the Delta variant, along with supply chain crunches, worker shortages, slow job growth and rising inflation hampered an economy that Biden had hoped would now be roaring in a post-Covid-19 boom.

Gasoline prices, one of the most visceral indicators of prosperity for Americans, hit an average of $3.40 a gallon, according to the American Automobile Association, and are much higher in some states. Not all of these problems are Biden's fault and some are brought on by unique factors germane to the pandemic and its impact on the global economy. But there are few signs the President has quick answers for these chronic economic problems as he struggles to enact a more fundamental overhaul of the economy to help working people.

At a CNN town hall last week, for instance, Biden admitted that high gas prices wouldn't start easing off until next year. Transportation Secretary Pete Buttigieg recently told CNN the supply chain problems that could spoil Christmas shopping and are prodding prices higher will also linger into 2022.

This split screen moment threatens to give Republicans an opening -- and an opportunity to shape a political message that can get them off the defensive over ex-President Donald's Trump's bellyaching about the 2020 election.

### link

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

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

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

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

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

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

#### Antitrust is bipartisan.

Baer ’20 [Bill; October 1; Visiting Fellow in Governance Studies, former Assistant Attorney General for Antitrust at the U.S. Department of Justice and Director of the Bureau of Competition at the Federal Trade Commission, J.D. from Stanford University; Testimony Before the United States House of Representatives, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online,” <https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-10.1.20-Testimony-to-House-Antitrust-Subcommittee.pdf>]

What resulted was more rigor in antitrust analysis, enforcement, and judicial decision-making. Enforcers and the courts disciplined themselves to make sure that each enforcement action told a credible story of economic harm from the behavior being challenged. The antitrust agencies developed enforcement guidelines for mergers, intellectual property licensing, defense industry consolation, competitor collaborations, innovation, among others, that explained when certain behaviors and mergers caused or risked injury to competition and consumers. 4 And over time, the courts welcomed at least the merger guidelines as providing helpful explanations of how our antitrust laws should be applied in a late 20th and early 21st century economy.

The executive and legislative branches, whether led by Republicans or Democrats, were mostly on the same page. As a result, for the last 30 years or so, antitrust enforcement has been largely nonpartisan, driven by the widely shared view that harm to consumers and competition should be the predicate for challenging conduct. And that is a good thing. Analytically sound and fact-based antitrust enforcement, as I testified at my nomination hearing before the Senate Judiciary Committee in 2012, provides the public, the business community, the courts, and the legislative branch with some assurance that it is the merits that count—not political ideology, whim, or the desire to pick winners and losers in the economy.5 And it helps explain why there have been only modest pendulum swings in competition enforcement over the last few decades. Consistency and predictability enhance the credibility of antitrust enforcement.

### impact

#### The climate provisions are being removed

Davenport'10/15 [Coral, "Key to Biden’s Climate Agenda Likely to Be Cut Because of Manchin Opposition], https://www.nytimes.com/2021/10/15/climate/biden-clean-energy-manchin.html?searchResultPosition=3]

WASHINGTON — The most powerful part of President Biden’s climate agenda — a program to rapidly replace the nation’s coal- and gas-fired power plants with wind, solar and nuclear energy — will likely be dropped from the massive budget bill pending in Congress, according to congressional staffers and lobbyists familiar with the matter.

Senator Joe Manchin III, the Democrat from coal-rich West Virginia whose vote is crucial to passage of the bill, has told the White House that he strongly opposes the clean electricity program, according to three of those people. As a result, White House staffers are now rewriting the legislation without that climate provision, and are trying to cobble together a mix of other policies that could also cut emissions.

A White House spokesman, Vedant Patel, declined to comment on the specifics of the bill, saying, “the White House is laser focused on advancing the president’s climate goals and positioning the United States to meet its emission targets in a way that grows domestic industries and good jobs.”

A spokeswoman for Mr. Manchin, Sam Runyon, wrote in an email, “Senator Manchin has clearly expressed his concerns about using taxpayer dollars to pay private companies to do things they’re already doing. He continues to support efforts to combat climate change while protecting American energy independence and ensuring our energy reliability.”

West Virginia’s other senator, Republican Shelley Moore Capito, said she was “vehemently opposed” to the clean electricity program because it is “designed to ultimately eliminate coal and natural gas from our electricity mix, and would be absolutely devastating for my state.”

The $150 billion clean electricity program was the muscle behind Mr. Biden’s ambitious climate agenda. It would reward utilities that switched from burning fossil fuels to renewable energy sources, and penalize those that do not.

Experts have said that the policy over the next decade would drastically reduce the greenhouse gases that are heating the planet and that it would be the strongest climate change policy ever enacted by the United States.

## ftc

### 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

#### 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.

## protectionism

### 2ac

#### The aff is in line with international trade agreements and encourages cross-border investment

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]

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

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

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

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

#### The aff solves the whole DA – establishes a balancing test that explicitly integrates comity in the consideration for whether cases should go through – that’s every piece of Murray evidence in the 1AC

#### Expanding extraterritoriality is the norm – and EU action thumps

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

V. COMMON CONCERNS ARE MITIGATED

Common concerns, such as international comity, the indirect purchaser doctrine, endless plaintiffs, and over-deterrence, do not sufficiently justify not analyzing the importation of finished products incorporating price-fixed components under import inclusion. First, international comity concerns are minimal because the international norm is expanding extraterritoriality, other countries having already taken an expansive approach based on anticompetitive conduct's effects on its domestic market. For one, imports necessarily affect the U.S. economy-an area that the United States is more than justified to protect. As analyzed above, the FTAIA's drafters assumed that import commerce by definition would influence the U.S. domestic commerce.184 Anticompetitive conduct, even if it happens outsides the United States, would necessarily affect domestic commerce because its influx would affect all other parts of the market.

Empagran, the last Supreme Court case that squarely considered the issue of the extraterritorial reach of U.S. antitrust laws, based its holding primarily on the concerns of international comity.185 Yet, international comity is not unilateral because the doctrine is based on mutuality between the United States and other countries; it is based on the silent agreement between sovereign nations not to interfere with each other's sovereign authority.186 When other countries are more willing to punish foreign component cartels when finished products incorporating price-fixed components are imported,187 there is little reason why the United States should sit on the sidelines and not protect the interests of its consumers and businesses. Moreover, the trend of the convergence of international regulations188 suggests that the United States would be more than justified in following the European Union's steps in expanding the extraterritorial reach of U.S. antitrust laws.

The European Commission's decision to fine companies for importing finished products manufactured outside the EEAl89 and the Court of Justice upholding the expansive enforcement power 190 support that a similarly expansive reading of the FTAIA would not invoke international comity concerns. International comity is predicated on not infringing the sovereign regulatory and enforcement powers of other countries.191 However, when other countries are similarly expansively regulating conduct outside its borders on the basis of effects felt within its borders, there is hardly any infringement on their sovereign authority to do the same. 92 In fact, this convergence of perspectives on the proper scope of the competitions laws focusing on the actual effects of allegedly anticompetitive conduct comports with the globalization of the world economy in which many corporations act across the borders and jurisdictions.193

# 1ar

## ptx

### uq overwhelms

#### Framework already exists and is agreed apon

Michael D. 1NC Shear & Jim Tankersley 10/30, Shear is a veteran White House correspondent and two-time Pulitzer Prize winner who was a member of team that won the Public Service Medal for Covid coverage in 2020; Tankersley is a White House correspondent with a focus on economic policy, “Biden Implores Democrats to Support His Transformative Agenda,” New York Times, 10/30/2021, https://www.nytimes.com/2021/10/28/us/politics/infrastructure-bill-spending-plan.html

President Biden was blunt. Democrats had to rally behind his $1.85 trillion economic and environmental spending bill, he told them on Thursday, because nothing less than his presidency was at stake.

“I don’t think it’s hyperbole,” he said as he unveiled a revised proposal and pleaded with Democratic lawmakers to support it during a last-minute morning meeting at the Capitol, hours before he left for a six-day trip to Europe to meet with world leaders.

“The House and Senate majorities and my presidency will be determined by what happens in the next week,” Mr. Biden told the lawmakers during the hourlong session, according to a person who was at the meeting.

The president’s proposals, while about half as costly as his original plan, still amount to a transformative agenda that would touch the lives of millions of Americans and serve as the core of his party’s argument to stay in power through the 2022 midterm elections and the 2024 presidential contest.

And even as party members have engaged in a fierce, ideological debate among themselves, the monthslong negotiation has thrown into stark relief the differences between Democrats and Republicans, almost all of whom have refused to back spending on child care, climate change, preschool, expanded Medicare services, free community college or higher taxes on corporations and the wealthy.

Mr. Biden and his aides gambled on Thursday, effectively calling for a final decision on his economic and environmental agenda and daring holdout Democrats not to back it. Senior administration officials said that the decision to go all-in was a product of the president’s belief that he had exhausted all avenues in the talks and secured the best possible package he could — and, crucially, that the package could command support from all corners of a fickle Democratic caucus.

But as he prepared to land in Rome, Mr. Biden’s bet had not yet paid off. He had not ended months of intraparty squabbling that has dragged down his poll ratings, jeopardized Democratic candidates and raised deep doubts among Americans that his presidency can deliver on the promises of a vast social and economic agenda.

In the closed-door session on Thursday, Speaker Nancy Pelosi told Democratic lawmakers that “when the president gets off that plane, we want him to have a vote of confidence from this Congress.” She urged them to vote on Thursday on a separate, bipartisan $1 trillion infrastructure measure that progressives have seen as their best leverage to ensure passage of the rest of Mr. Biden’s agenda.

Instead, for the second time in a month, Ms. Pelosi pulled back from plans on that vote after progressive Democrats objected again. They ignored the president’s entreaties, signaling their continued mistrust of moderate Democratic senators, whom they fear will not back Mr. Biden’s larger social spending bill when it finally comes to a vote.

Senior White House officials shrugged off the setback, saying the president’s formal request on Thursday set in motion the final act of a monthslong political drama. They expressed confidence that votes on both bills would happen soon. The bickering among Democrats would fade, one senior official said, when Americans started seeing the benefits of Mr. Biden’s plans, like when the administration breaks ground next year on new electric vehicle charging stations. The official asked for anonymity to speak about closed-door negotiations.

Administration officials also said they were not surprised by the public comments from Senators Joe Manchin III of West Virginia and Kyrsten Sinema of Arizona, moderate Democrats who had forced the original $3.5 trillion proposal to be halved. The two delivered halfhearted statements that pointedly did not promise that they would support the president’s new framework for a deal on the spending bill.

But White House officials concluded that it was time for Mr. Biden to put down his final marker, explicitly asking Democratic lawmakers for their support on a specific proposal. Having the president leave for a week on his trip without doing so would have left the process in limbo, administration officials said.

And yet, the legislative disarray of the moment had the potential to leave Mr. Biden no better off than he had been 24 hours earlier. He was set to arrive in Rome without tangible evidence that he could break the political logjam that has stalled progress on his promises. He had only the outlines of an agreement, with no firm proof that it would pass. It will fall to him in several days of meetings this weekend to persuade world leaders that he will prevail with his plans for corporate taxation, climate change and more.

The president’s agenda might eventually make its way to his desk. Lawmakers said they planned to continue working throughout the weekend toward votes on both bills. But in the meantime, Mr. Biden is left without a concrete plan that has the support of Congress to present at the G20 gathering or the climate change summit next week.

Still, he appeared to reach a critical juncture on Thursday on the strategy for his agenda, which he has pursued for months. The president initially proposed trillions in spending to overhaul the government’s role in the economy, but he has consistently said he is willing to compromise.

That challenge has required a delicate balance in his own party, which controls Congress by razor-thin margins. Mr. Biden first had to negotiate with Republicans on an infrastructure bill, largely to unlock support from Senate centrists on a larger spending bill that was meant to carry the portions of his agenda that could not win bipartisan support. He then had to balance the concerns of centrists, who worried about spending and taxing too much in the larger bill, with the complaints of progressives who wanted him to spend trillions more than he was ultimately able to get.

Bringing the Democratic Party together took months. Mr. Biden pushed centrists to come up from their original demands that the bill cost $1.5 trillion or less. He also pushed progressives to compromise for far less than they had hoped, and to jettison programs that Mr. Manchin and Ms. Sinema opposed.

Officials suggested that shortly before leaving for Europe, Mr. Biden had reached a natural conclusion of those discussions: He had pushed the centrists to come up as far as they could, they said, and was making the case to progressives that there would not be a better possible deal.

Mr. Biden started Thursday by unveiling what White House officials said was a detailed outline for the spending bill, telling reporters that the administration was “confident that this historic framework will earn the support of every Democratic senator and pass the House.” Even as the president pitched the plan to lawmakers, his chief of staff was hailing it as “transformational,” and interest groups were congratulating Mr. Biden.

#### Framework exists already

Greg 1NC Sargent 10/29, staff writer at the Washington Post, “Inside Biden’s surprising confidence that he’s on the cusp of a big victory,” Washington Post, 10/29/21, https://www.washingtonpost.com/opinions/2021/10/29/biden-framework-reconciliation-pathway/?tid=pm\_opinions\_pop

Looked at in one way, the failure of the House to pass the bipartisan infrastructure bill on Thursday was a major setback for President Biden. It means he heads into the international climate conference without being able to say the United States took a big leap toward delivering on its climate agenda, which could complicate his ability to lead.

That is obviously something we’d hoped to avoid. And let’s be clear: It’s still very uncertain whether Biden’s agenda will ultimately succeed or implode.

But the White House seems strangely, eerily confident about what’s happening right now. If you read between the lines of the doomscrolling coverage, what emerges is this: Improbably, Biden and his advisers seem to think the latest events have placed them on the brink of securing his agenda.

This is despite the fact that this week, in some ways, things went badly awry. When Biden introduced his framework for the Build Back Better reconciliation bill Thursday, Sens. Joe Manchin III (D-W.Va.) and Kyrsten Sinema (D-Ariz.) conspicuously failed to endorse it. That raised questions about whether the White House seriously miscalculated.

Then, when House Speaker Nancy Pelosi (D-Calif.) tried to hold a vote on the bipartisan infrastructure bill that already passed the Senate — to deliver Biden a victory before going abroad — progressives refused to support it, fearing Manchin and Sinema would ultimately renege on the reconciliation bill. Then everyone left to regroup, raising more questions about who’s running the show.

That looks like a big legislative mess and a spectacular failure at managing the Democratic coalition, right? Well, the White House sees it differently. Punchbowl News explains why:

Administration officials argue that no one will care in the end that the infrastructure bill got pushed back again. They say they are closer than ever to passing two transformative pieces of legislation. That’s mostly true.

That’s mostly true, and it’s pretty important!

Let’s also note that something big happened because of the release of this framework. It made it official that major progressive priorities — such as paid leave, the billionaires’ tax, the Medicare expansion to dental and vision — will be jettisoned. Yet the Congressional Progressive Caucus overwhelmingly and strongly endorsed it, anyway.

That locks in the left’s willingness to accept those concessions while enthusiastically backing the package. As Politico Playbook correctly noted, Rep. Pramila Jayapal (D-Wash.) provided the key quote revealing this: “We wanted a $3.5 trillion package, but we understand the reality of the situation.”

And don’t overlook this: Putting out the framework was the hook for numerous progressive and environmental groups to put out statements hailing its transformative potential, which further shores up the left flank behind it.

The trouble here is that highly visible speed bumps and glitches — like Manchin and Sinema not yet endorsing the framework — get magnified in day-to-day coverage into the latest sign of doom. That’s because everyone is training microscopes on every detail to divine where things are going.

Indeed, when various factions and players make such feints to increase leverage or realize some other goal — such as not wanting to appear jammed to preserve the aura of independence — it might magnify the impression of messiness and chaos. But as Jonathan Bernstein points out, this is how the legislative process works: Legislating inherently involves reconciling a lot of complicated moving parts. That’s messy and chaotic.

Which is why, from the White House perspective, the fact that the progressive caucus and a range of liberal groups are rallying behind the package shows that we’re seeing big general movement in the right direction. The left is one of those big moving parts — and it moved pretty dramatically.

“Every corner of the Democratic Party is coalescing around a vision that would be transformative and overwhelmingly popular right now,” one White House official tells me. “And it’s within reach.”