# 1AC Extraterritoriality

## 1AC – Plan

The United States federal government should substantially increase prohibitions on anticompetitive business practices by the private sector by at least expanding the scope of its core antitrust laws in accordance with a comity balancing test.

## 1AC – Cartels

Advantage one is Cartels:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### International cartels crush US economic growth – massive losses in efficiency and productivities with price rises by 40% – increased competition benefits numerous sectors.

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

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

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

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

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

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

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

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

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The multilateralist global system that the United States and the West built after the end of the Second World War was premised on an economically strong United States and West. In 1945, the United States was the only victor that was not completely devastated. World War II had brought the country out of the Great Depression, and the US GDP constituted more than 50 percent of the world’s total. Into the twenty-first century, the members of the Group of Seven (G7) were the world’s political and economic heavyweights. It has only been in the past several years that the collective GDP of the developing world—led by China—has surpassed the developed world’s. Even as non-Western powers grow, it is psychologically hard for the West to think about relinquishing its reins.

Demographically, the West has, for a long time, been in the minority. What’s more recent is the aging of the Western population (analyzed in chapter 2), which is already occurring in Japan and Europe, beginning to squeeze the availability of resources for anything but health, social security, and interest payments on debt. Unless healthcare becomes far more efficient, the US economy will be overburdened with healthcare and pension costs as the “baby boomer” generation ages. Healthcare constitutes a whopping 18 percent of the US GDP—significantly more than is the case for other industrialized countries—without necessarily providing better results.

With more going to health and pensions, there will be less capacity for defense and military spending. The United States is the biggest military spender, but China is increasing its portion of worldwide military spending, while the worldwide share of European NATO members is diminishing.

China’s military probably will not rival the United States’ power-projection capabilities even by 2035, but it will have greater anti-access and denial powers. In a military contest, China may never be able to deliver a knockout blow, but it could tarnish the US image of military invincibility in a conventional state-on-state contest held in its region. Equally, a confrontation that results in a Chinese humiliation could set back China’s aspirations for regional leadership, if not trigger a domestic legitimacy crisis for the Communist Party leadership.

Biggest Problem Is Domestic

The biggest psychological blow to ordinary Western citizens has been their sagging standard of living (more analysis in chapter 1). Despite a much better record of overall growth in the United States since the 2008 financial crisis, those with median incomes have taken a hit.

Worrisome for future US growth potential has been the drop in the labor-participation rate, from the 67 percent range before the 2008 financial crisis to 62-63 percent in the years since. The labor-participation rate was destined to drop due to a growing numbers of retirees, but much of the current sharp decrease comes from unskilled males in their prime working years—forties and early fifties—dropping out. Additionally, many younger women are not entering or staying in the job market. Global Trends 2030 looked at two scenarios for future US growth—one in which the United States maintained or slightly increased its average 2.5 percent pre-2008 growth rate, or one in which growth would slow to an average of 1.5 percent a year. In the first, there would still be the global economic shift to China. On the other hand, the 2.5 percent average growth would help boost average living standards, engendering a “feel-good” factor, which would make more Americans interested in reengaging with world issues.91

Given the record of slower growth and labor-force decline since the 2008 financial crisis, the likelihood of the second scenario is increasing. That scenario anticipated lower growth rates—which accelerated declines in average living standards—making it harder to continue trade-liberalization efforts. Indeed, the IMF warned in June 2016 that the United States faces potentially significant longer-term challenges to strong and sustained growth, saying, “concerted policy actions are warranted, sooner rather than later… focusing on the causes and consequences of falling labor force participation, an increasingly polarized income distribution, high levels of poverty, and weak productivity.”92

Moreover, it is not as if traditional US partners—Europe and Japan—are doing much better. Japan and many European countries are aging faster than the United States, eliminating labor-force growth as a driver of future economic growth. Europe’s and Japan’s economic performances have been declining since the 1990s.

In Europe, the public discontent with high unemployment and declining incomes has helped to spur the rise of antiestablishment far-right and populist parties that want to weaken the EU and transatlantic ties. Even in richer European countries, such as Germany, a backlash has been growing against the Transatlantic Trade and Investment Partnership (TTIP), out of fear that Europe’s rewards would be meager and European standards would be diluted. McKinsey Global Institute, for example, believes a “return to sustained growth of 2-to-3 percent” is possible for Europe, but would require many politically difficult reforms.93 These include: reducing dependence on imports (much coming from Russia) for crude oil and natural gas; fostering a more vibrant digital economy; increasing workforce participation by the elderly, women, and migrants; and promoting flexibility in labor markets. China now spends a greater share of its GDP on research and development than does Europe. The latest OECD figures show that Europe now spends even less than the rest of the OECD.94

In both the United States and Europe, there is increasing anti-immigrant sentiment despite documented economic benefits from immigration. According to EU Commission Employment Analyst Dr. Jorg Peschner, productivity, by itself, will not be enough to reverse the negative employment trend absent more immigration: “EU’s productivity growth would have to double in order to keep the EU’s economy growing at the same pace as it did before the crisis started.” For employment growth to remain positive as long as possible, improving the labor participation of women, low-educated people, and migrants will also have to be a priority. In the United States, many of the new businesses started every year are started by first- or second-generation immigrants.95

Politically, there has been a large rise in support for right-wing and populist parties in the United States and Europe, undermining traditional parties. The gaps, for example, between the leadership and supporters in the US Republican and UK Tory and Labor Parties have been particularly evident in the selection of Donald Trump as presidential candidate and the June 2016 victory of the “Leave” vote in Britain. Unfortunately, there is no end of economic disruption. The job churn will continue as more and more skills and professions are automated, also increasing the potential for more “losers” from globalization, greater political polarization, and inequality. The increased competitiveness of the developing world with the West is a particular morale buster for Western middle classes who got used to ever-increasing prosperity for themselves and succeeding generations. Adapting to a new norm of economic turbulence—more prevalent in other eras—may be one of the biggest mental hurdles for Westerners. The West is used to thinking of the “Third World,” not home, as the place where economic turmoil happens.

And a Multipolar Financial Architecture, Too

Historically, US and Western power has rested on having a monopoly on reserve currencies and a Western-dominated financial system. In 2035, the dollar will be the biggest reserve currency, but its share of global financial transactions is expected to drop from 60 percent today to 45 percent. The euro will probably remain the second reserve currency, while the Chinese yuan or RMB—which became a part of the IMF benchmark-currency basket in 2015—will become a third reserve currency, accounting for 10 to 15 percent of global finance in two decades’ time.96

The financial architecture will also become more regionalized. The central role played by the financial centers of New York and London will also diminish, and a multitiered financial architecture will develop. Following the UK Brexit, those centers’ share in financial intermediation will decrease, as a second pole of global finance forms in the Eurozone. A third pole will develop in East Asia and Southeast Asia.

Gradually, a growing share of global financial resources will be concentrated in those regional clusters. As with the growth of regional trade, the regional clusters will be more self-encapsulated, spurred by rising domestic demand in China and other developing countries with growing middle classes. With the role of electronic money likely to grow, the traditional banking system will probably also undergo major revision, with potential impacts on governmental powers.

A more multipolar reserve system and regionalized financial architecture should lessen risks and contribute to greater stability. But the large-scale technological innovations—some of which contributed to the 2008 breakdown—will continue, making global finance still volatile. Emerging-market countries with fragmentary regulatory regimes will be particularly prone to suffering financial crises. The aging-population factor also increases risks to public finances. This report anticipates modestly increased volatility, lower than what occurred in the global economy during the 1890s through the 1940s, but higher than in the 1950s and 1960s—more of a continuation of what has been the trend line since the mid-1980s.

Are There Alternative Visions to Western Order?

Four years ago, when Global Trends 2030 was published, the answer was largely no.97 Increasingly, the facts on the ground would suggest otherwise. They do not add up to a cohesive plan to substitute wholesale all Western institutions and practices. However, they clearly indicate that there are some no-go areas, particularly those connected to regime change, democracy promotion, state control over NGOs, and maintaining sovereignty. Russia and China, in particular, see themselves as great powers and, as such, believe they have special rights to dominance in their regions. However, as other powers like India develop, it is likely that they will see themselves as regional powers with inherent prerogatives. It is worth recalling the United States’ expansive Manifest Destiny and nineteenth-century Monroe Doctrine, claiming special rights to determine the future of the Western Hemisphere.

The Mercator Institute for China Studies (MERICS) has been closely following Beijing’s efforts to build a network of parallel structures to existing international organizations. It has concluded that China “is not seeking to demolish or exit from current international organizations…It is constructing supplementary— in part complementary, in part competitive—channels for shaping the international order beyond Western claims to leadership.”98

As the accompanying chart indicates, China’s shadow network of alternative international structures encompasses everything from financial and economic partnerships (the Silk Road Economic Belt and the Asian Infrastructure Investment Bank) to full-blown political groupings like the Shanghai Cooperation Organization, Conference on Interaction and Confidence Building Measures in Asia (CICA), and the BRICS association of Brazil, Russia, India, China, and South Africa.99

Moreover, there is increasing cooperation among many of the emerging powers—beyond just authoritarians—to not just limit what they see as Western meddling in domestic affairs, but to go on the attack globally. According to a recent academic study, the “Big Five” authoritarian states of China, Russia, Iran, Saudi Arabia, and Venezuela “have taken more coordinated and decisive action to contain democracy on the global level.” They have sought to “alter the democracy and human-rights mechanisms of key rulesbased institutions, including the Organization of American States, the Council of Europe, the Organization for Security and Cooperation in Europe, and international bodies concerned with the governance of the Internet.”100

How durable are these preferences for nondemocracy and state control? By 2035, if not sooner (in the case of Venezuela), some of the now-authoritarian states could be liberalized, and the perceived threat posed by Western civil-society NGOs may ease. However, China and Russia are more likely than not to want to dominate their regions. Nationalism and democracy have been shown to be highly compatible. It is not clear that an even more powerful China or India would defer to Western leadership of the global order, even if both sides’ values in other areas begin to converge.

What Kind of Post-Western World? Clearly, there is a need to plan for a world that will not have the West as its big economic powerhouse—a prospect hard for Western elites and publics to conceive of, despite a decade or more of publicity about the “rise of the rest.” According to a recent survey, Europeans and Americans are more comfortable with each other than they are with anybody else. Although a majority of Europeans said, in the most recent German Marshall Fund transatlantic-trends polling, that they would like to see their country take an approach more independent from the United States, both Americans and Europeans still prefer each other over more Russian or Chinese leadership in the world.

The Obama administration—considered among the most multilateralist of recent administrations— campaigned hard in 2015 to convince Europeans not to join China’s proposed Asian Infrastructure and Investment Bank (AIIB). It was as if the United States was against any governance structure not “made in the USA,” even when those running the AIIB have made clear their intentions of operating with the World Bank and the Asian Development Bank.

More and more, the talk among Western elites is about locking in as much as possible the status quo, which favors the West, so that it will be harder for the newcomers to overcome. The TPP was sold as a way to set the rules before China gains much more power. A former Obama administration official advised that now might be the best time to undertake UN Security Council reform, before China and other uncooperative powers become more powerful. “A new US administration may be able to advance a proposal to address the Security Council’s anachronistic makeup while perpetuating a council that Washington can work with.”101

For Westerners, the challenge will be to plan for a future that will not be solely run by them, but which they can live with. Handovers have been historically difficult and fraught—more often than not, decided by bloody contests. One could envisage different scenarios, some already described in the earlier chapter on conflict, of military contests between the United States and China, or the United States and China with Russia, or the United States with NATO against Russia. Without delivering a knockout blow by one side or the other, these contests would most likely pit West against East, creating something akin to a new Cold War. Even if there were a knockout blow by the United States against China, it is hard to imagine a defeated China deferring permanently to the West. Its population has been imbued with such a narrative about the injustices by the West against China that any defeat or setback would be confirmation that the United States and West are dead set against a rising China.

Perhaps the most harmful effect of such a contest would be to convince both sides that neither is trustworthy. For the non-West, it would confirm the suspicion that the West does not want to relinquish its leadership position. For the West, it would make it harder to ever reach out and help establish a truly global system.

Need for a Second-Generation US and Western Leadership Model

War is not, and should not be, inevitable as the West struggles with the growing clout of China and other developing states on the world stage. Unlike during other transitions, the tools exist for ensuring more peaceful outcomes. They will require Western acquiescence to greater roles for the developing world to set and implement new rules of the road for the international order. A key feature of the post-1945 US design for the world order is its multilateralist structures. Many of these operate below most people’s radar. This plumbing of the international system has enabled the daily functioning of globalization. To keep it viable, China, as well as other developing countries, must be accorded more representation. There are too many long-term risks involved, for example, in China having only the equivalent of France’s voting rights in the IMF, when it is the first or second economic power in the world. This is how resentments are nurtured—all the more dangerous in China’s case because of its underlying “century of humiliation” mental complex.

As emerging technologies come online, the lack of a truly global institutional framework could be particularly dangerous. Assuring the future security of the Internet is particularly important in this regard, because all the new emerging technologies—bio, 3D printing, robotics, big data—take for granted a secure, global Internet. Everyone loses if cyber crime and cyber terrorism undermine the Internet. In the worstcase scenarios, in which cyber crime proliferates or strong national borders fragment the Internet, an Atlantic Council study, as mentioned, found that the economic costs could be as much as $90 trillion out to 2030, in addition to the risk of open conflict.102

Besides bringing the emerging powers into leadership roles in the panoply of multilateral institutions, the United States will need to temper its often “exemptionalist” stance to ensure the survival of the multilateralist order. According to the Council on Foreign Relations’ Patrick Stewart, a prominent scholar of global governance, one of the persistent paradoxes of the post-1945 decades has been that the “United States is at once the world’s most vocal champion of a rules-based international order and the power most insistent on opting out of the constraints that it hopes to see binding on others.”103 No country has the networks and connections that the United States does, but the system is now polycentric, rather than unipolar, and others resent the “exceptional” privileges that the United States claims. The Global Trends works have talked about the need for a new model of US global leadership. The United States needs to be guiding the international system as a “first among equals,” and willing to play by its own rules. Paradoxically, there is likely to be no vibrant global-governance system without US and Western leadership, but too much domineering behavior could doom it.

Even if the United States adapted its global role, this is not to say that the tensions and differences with many emerging powers would all disappear, or that the governance system would function seamlessly. In addition to the growing number of new state actors, the increasing importance of nonstate actors adds a new complexity to the functioning of global institutions. Moreover, there are clear-cut differences between the West and emerging powers on values-based issues, such as democracy promotion and the responsibility to protect. Many developing-country publics still resent Western colonialism and equate any intrusion with past historical wrong. They point to the 2011 humanitarian intervention in Libya, for example, as cover for the Western goal of regime change. Hence, the UN Security Council failure to stop the fighting in Syria, with more than two hundred thousand killed and 7.6 million displaced. Russia and China want to make a stand against the United States and the West getting their way and ousting the Assad regime. On the other hand, the lack of a solution smacks more of anarchy than global governance. Certainly, it shows one of the gaps that remains, and likely will remain, limiting global governance because of differences in values.

The speed with which new technologies are coming online and becoming an important political, military, and economic tool—for both good and bad—carries big risks for global governance. Stewart Patrick lists four potential new technologies that “cry out for regulation”: geoengineering, drones, synthetic biology, and nanotechnology. Without some setting of rules for their operation, there is the risk of major disruptions, if not catastrophes, stemming from their abuse. The recent advances in synthetic biology lower the bar to abuse by amateurs and terrorists alike, forever affecting human DNA. Geoengineering involves planetary-scale interventions that could interfere with complex climatic systems.

However cumbersome, politically unpopular, and ineffective at times, there is little alternative to increased global cooperation if one does not want to see higher risks of conflict and economic degradation. Without some sort of bolstered global governance, the West would end up with less sovereignty in a “dog-eat-dog” world, in which it was increasingly in the minority. But can the United States and the West rise to the challenge of investing in a global-governance system that will not always favor their interests on every issue? Historically, the United States could be especially generous because it was on top of the world in about everything after the Second World War. Europeans came to truly believe in pooling sovereignty and joint governance after centuries of internecine conflict. The tough economic times at home have seen US and European publics become distrustful of overarching multilateral institutions, believing the will of the United States or individual European countries will not be served. It is oftentimes easier for political leaders to fall in with the public mood rather than display leadership that might appear to work against it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### AND *Motorola* is negatively reshaping global supply chains

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

VII. THE MOTOROLA-MOBILITY CASE: SHOWCASING THE OBSTACLES

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

The opinion

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

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

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

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

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

Obstacles to a constructive role for US private enforcement

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

Struggling with the statute

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

Confused by the confused case law?

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

Missing the transnational: applying domestic doctrine to transborder contexts

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

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

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

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

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

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

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

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

#### Global supply chains solve global hotspots – material integration prevents war and spurs 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]

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.

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

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

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

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

#### Advanced batteries are key tolasers – they’re necessary for missile defense and prevent a North Korean first strike

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

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

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

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

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

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

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

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

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

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

‘Elon Musk in camouflage’

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

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

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

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

‘Riding the wave’

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

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

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

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

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

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

Killing missiles

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

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

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

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

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

#### North Korean first strike ensures extinction

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

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

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

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

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

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

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

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

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

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

#### The aff rapidly grows the economy and protects international supply chains – post plan, private plaintiffs seek treble damages which outweigh the benefits from price-fixing.

Leonardo ’16 [Lizl; Fall; Associate Attorney at Armstrong Teasdale LLP with experience representing domestic and international clients on various legal matters involving equity transactions, acquisitions, franchise matters, other corporate matters and related transactions; *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,” <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4008&context=law-review>; KS]

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

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

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

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

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

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

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

## 1AC – Indigenous Regimes

Advantage Two is Indigenous Regimes.

#### 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]

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---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.

#### Plan solves underdevelopment of foreign antitrust regimes---that balances sovereignty with consumer welfare while encouraging the development of nascent regimes abroad.

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]

With nowhere else to go, private litigants have naturally flocked to the United States for remedial assistance, creating an issue for developing antitrust regimes.12 Several implications attend foreign plaintiffs seeking recovery in the United States. American courts have recognized the importance of allowing foreign plaintiffs to bring claims in the United States under the Sherman Act.13 Before 2004, there was a significant chance that parties injured abroad by global cartels that directly harmed the United States would be able to sue in US courts to recover their losses.14 But, as illustrated above, private litigants applying US antitrust law for redressing harm that occurred abroad create tensions over sovereignty with other countries.15

Moreover, bringing claims to the United States strips valuable opportunities for young foreign antitrust regimes to develop their own jurisprudence, depressing the effectiveness of global antitrust enforcement and stalling the emergence of private redress.16 Worldwide jurisdictions are increasingly recognizing the importance of private rights of action to enforcement efforts.17 Within the past ten years several countries have expanded private parties’ ability to recover harm from unlawful anticompetitive behavior by allowing collective action.18 However, private actions remain rare in many developing antitrust jurisdictions with little, if any, precedent establishing the basis for compensatory damages or discovery.19

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.

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

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

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

Footnote 201:

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

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

End of footnote 201.

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

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

Footnote 209:

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

End of footnote 209.

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

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VI. Conclusion

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

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

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