## Murray Balancing Test v2

### Advantage 1

#### Advantage one is cartels

#### Circuit splits undermine international cartel deterrence

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IV. SHORTCOMINGS OF THE CURRENT JURISPRUDENCE

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

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

A. Problems Arising from the Circuit Split

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

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

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

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

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

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

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

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

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

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

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

#### Integration is the most reliable way to reduce warfare

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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.

#### Price-fixing imposes drastic burdens on the U.S. economy and trade.

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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.122The FTAIA serves to delineate the contours of the Sherman Act’s extraterritorial reach.123 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 chain 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

C. The Purpose

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

This is especially true in today’s internationally interconnected economy and globalized supply chains.134 Private suits constitute a significant part of the antitrust deterrence mechanism.135 In fact, scholars have noted that government enforcement alone fails to provide adequate deterrence against antitrust violations.136 When it comes to international cartels, the current deterrence mechanism—government enforcement combined with private suits—is largely ineffective in meeting the deterrence goal.137 In order to restore a meaningful level of deterrence, private suits need to be available even more widely, not barred or limited.138 However, if courts were to limit private suits only to direct purchaser plaintiffs (actual component importers,)139 the Sherman Act would be without teeth.140 As Justice Brennan wrote in his dissent in Illinois Brick, “from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation.”141 If the direct purchaser fails to bring a suit for whatever reason—attorney’s fees, power imbalance against the cartel that retains absolute control over the purchaser’s supply of the necessary component, to name a few—then there is effectively little deterrence against the cartel because “ultimate consumer individuals often suffer only minor damages and therefore have little incentive to bring suit.”142

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

#### Destroys innovation and efficiency with 40% price increases – antitrust benefits supply chains.

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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 stops extinction from emerging tech and U.S.-Russia-China war.

Burrows ’16 [Matthew; September 2016; Director of the Atlantic Council’s Strategic Foresight Initiative, PhD in European History from the University of Cambridge; Global Risks 2035, “The Difficult Transition to a Post-Western Order,” Ch. 8, http://espas.eu/orbis/sites/default/files/generated/document/en/Global\_Risks\_2035\_web\_0922.pdf]

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

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

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

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

Biggest Problem Is Domestic

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

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

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

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

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

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

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

And a Multipolar Financial Architecture, Too

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

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

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

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

Are There Alternative Visions to Western Order?

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

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

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

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

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

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

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

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

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

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

Need for a Second-Generation US and Western Leadership Model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Footnote 201:

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

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

End of footnote 201.

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

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

Footnote 209:

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

End of footnote 209.

### Advantage 2

#### Advantage two is Indigenous Regimes:

#### Lack of a balancing test undermines foreign antitrust enforcement.

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

Lastly, worldwide governments have expressed concern that US antitrust extraterritoriality stunts the growth of their own antitrust regimes due to the allure of treble damages.109 For example, competition authorities have argued that improper extraterritorial application of US antitrust law is likely to substantially undermine the effectiveness of other countries’ leniency programs, which are successful tools in discovering unlawful cartel activity, and thus will interfere with those countries’ overall antitrust enforcement, including private enforcement.110 Additionally, broad availability of US treble damage recovery to non-US litigants attracts away cases that might otherwise be litigated in non-US courts, thereby depriving those jurisdictions the development of the substantial body of jurisprudence that is necessary to facilitate the private enforcement of antitrust claims.111 An example of underdeveloped jurisprudence can be demonstrated in Israel, where the Israeli Supreme Court has not yet been required to decide whether Israel’s antitrust statute provides for indirect purchaser recovery.112 Other countries with underdeveloped private recovery doctrine, such as South Africa and Denmark, have seen little private litigation to fine-tune their private enforcement schemes, though activity is on the rise.113

#### Changing U.S. law is key.

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

In the past fifty years the world has experienced a marked increase in international trade. Global exports have exploded (in constant 2010 dollars) from US$1.6 trillion in 1965 to US$22.7 trillion in 2015.4 Total exports’ share of the global economic activity more than doubled in the same period, from twelve percent to twenty-nine percent in 2015.5 But while markets for goods and services transcend national borders, antitrust laws regulating these markets are national in scope.6 Historically, the United States has served as the primary enforcer of antitrust law for private litigants due to its early development of redress for these litigants, including the availability of treble damages and other plaintiff-friendly procedural mechanisms, as well as the progressively long extraterritorial reach of the Sherman Act.7 Its evolution as the world’s antitrust courtroom was, of course, grounded in the interest of protecting national commerce and allowing its citizens to recover from wrongful acts committed at home or abroad.8 Internationally, widespread antitrust law only began to emerge decades later when, for instance, the European Union (“EU”) introduced its own antitrust law in the form of Articles 85 and 86 (now 101 and 102 in the Treaty on the Functioning of the European Union (“TFEU”)) in the 1957 Treaty of Rome, which initially founded the European Economic Community.9 The private right to sue would wait until 2014, when the European Commission (“EC”) issued Directive 2014/104/EU (“the EC Directive”),10 requiring EU member states to legislatively facilitate private enforcement of competition law at the national level.11

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

#### Plan spurs growth in developing countries – decades of models and studies prove.

Cheng ’20 [Thomas; July 14; Associate professor in the Faculty of Law of the University of Hong Kong; Promarket, “Why Competition Law Is So Important for Developing Countries,” <https://promarket.org/2020/07/14/why-competition-law-is-so-important-for-developing-countries/>; KS]

Among the central issues in international competition law is the question of whether developing countries should make competition law enforcement a priority and, if so, how should they enforce it.

Regarding the first question, it must first be determined whether competition and competition enforcement contribute to economic growth and development. There is nothing more important for a developing country than achieving sustained growth and development, and every economic policy in a developing country should be geared toward promoting that.

Whether competition enforcement contributes to growth is highly pertinent for developing countries, as many developing countries have adopted competition law in recent years. About 30 jurisdictions had in place a competition law in the early 1980s. There are now more than 130 competition law regimes across the world. Many of these recent adopters of competition law are developing countries.

The second (and related) reason this question is so important is that having recently adopted competition law, many developing countries still need to decide how much resources they want to devote to its enforcement. Given the dearth of public funding, precious resources need to be deployed to maximize the prospects for growth and potential for development.

If competition law is found to make insignificant contributions to growth and development, it would be wise for developing countries to deploy their valuable resources to more worthwhile endeavors. If, however, it is determined that enforcing competition law is conducive to growth and development, it then needs to be decided whether developing countries should follow the established approaches of developed countries when applying their own competition laws, or whether they require a contextualized approach tailored to their domestic circumstances.

The Relationship Between Competition and Growth

Competition does contribute to economic growth, and thus promoting competition law enforcement will enhance the growth prospects of developing countries. Therefore, developing countries should take competition enforcement seriously.

While many competition law scholars in the past have asserted this as an article of faith, and the literature on competition law in developing countries has taken it as a fact, it is important to establish the relationship between competition and growth on a more rigorous basis, both theoretically and empirically.

From a theoretical perspective, the various growth models that have been proposed by economists over the last six decades indicate the main drivers of growth and allow us to examine whether competition has a role to play in it. Most of these economic models posit that innovation and productivity growth are the principal sources of economic growth. Therefore, to the extent that competition promotes innovation and productivity growth, fostering competition enhances economic growth.

Innovation, however, has to be understood differently in the context of most developing countries. Most of them are incapable of producing cutting-edge innovation along the global technological frontier. Instead, most of the innovation that takes place in these countries exists in the form of adapting foreign technologies.

Adaptation, however, does not mean mere copying. Economists have suggested that even adapting foreign technology requires R&D. Such innovation in the context of developing countries could be called laggard innovation, as opposed to frontier innovation, which refers to cutting-edge innovations that mostly hail from industrialized economies.

The question then becomes whether competition promotes laggard innovation, which includes acquiring tacit knowledge for the purposes of technological adaptation, imitation, and process innovation; this author contends that it does. This conclusion is bolstered by a wealth of empirical studies, which, by and large, have found a positive correlation between competition and economic growth.1 Therefore, it is in developing countries’ interest to devote resources to competition law enforcement.

#### Brazil is seeking to expand private enforcement.

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

Protection under antitrust law is principally realized through deterrence and redress objectives.71 Deterring anticompetitive conduct is achieved through criminalizing conduct and allowing for the recovery of treble damages in private litigation.72 In regard to private litigation, supporters of extraterritorial application highlight the powerful deterrent effect of treble damage recovery in removing the ability of international cartelists to subsidize US operations through foreign cartel profits even in the face of domestic liability.73

Indeed, antitrust regimes outside of the United States are increasingly recognizing that effective enforcement is costly and, thus, private actions for damages notwithstanding trebling bolsters enforcement without greater public expenditure.74 This recognition is underscored by the European Court of Justice (“ECJ”) in its 2001 Courage v Crehan decision:

The full effectiveness of Article [101] of the [TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1)] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreement or practices . . . which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.75

As a result, governments around the globe have increasingly initiated or bolstered the ability for private parties to recover from harms created by unlawful anticompetitive over the past ten years. The ECJ’s sentiments can most readily be associated with the EC’s decision in 2014 to issue Directive 2014/104/EU, which required EU member states to enact legislation providing for private rights of action at the national level within two years of the Directive’s promulgation.76 The EC Directive was the culmination of “wide spread support in Europe for the principle that legal and natural persons who suffered a loss as a result of an antitrust infringement should be entitled to recover damages to compensate them for that loss.”77

Brazil presents another example of a jurisdiction seeking to have an expanded private enforcement regime complement its public enforcement efforts.78 In lieu of treble damages or other incentives for pursuing private recovery, the Brazil’s Administrative Council of Economic Defence (“CADE”) has searched for new and more effective ways to encourage victims to claim damages collectively with the object to amplify the deterrent effect of CADE’s decisions.79 This has involved delivering agency judgments to trade confederations and associations so that any interested parties might be notified of the potential for pursuing recovery, drafting administrative bylaws that allows effective compensation of anticompetitive harms at lower costs to the aggrieved parties, and joining private litigation as an amicus curiae to provide its view of Brazil’s Competition Law in an effort to influence decisions.80

#### They face economic crisis, but antitrust revives their economy.

Ribeiro et al ’20 [Amadeu; December 9; Partners and Associate at Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados; Competition Policy International, “Brazilian Competition Law and M&A: Key Elements to Bear in the Current Context of the Global Economy,” <https://www.competitionpolicyinternational.com/brazilian-competition-law-and-ma-key-elements-to-bear-in-the-current-context-of-the-global-economy/>; KS]

The level of antitrust scrutiny of M&A transactions in Brazil has significantly increased over the past few years, with several transactions being subject to in-depth review, remedies, or even rejected by the Administrative Council for Economic Defense (“CADE”). This has made antitrust a key aspect in the negotiation of many M&A transactions. One must evaluate in advance the likelihood of a given transaction being unconditionally cleared by CADE, and what types of remedies might be imposed if there is a concrete probability of conditional clearance. This all of course also impacts the expected timeline of CADE’s merger review, and affects the substance of negotiations between parties, such as issues regarding price, investment exit strategies, as well as issues regarding the allocation of antitrust risk, bringing about discussions on break-up fees, hell-or-high water clauses, among other related contractual mechanisms. This discussion becomes even more relevant in times of crisis, when timing, flexibility and creativity to find reasonable solutions become critical for practitioners and enforcers alike. However soon the end of the current health crisis will come, its negative effects on the Brazilian economy are visible and will likely worsen. Against this background, we cover in this article a few key elements in Brazilian competition law and practice that may be of particular relevance during these times of economic crisis.

#### Brazilian growth ends Amazon deforestation.

Richards ’21 [Peter; April 19; Adjunct Professor, George Washington University; The Conversation, “Brazil’s Economic Crisis, Prolonged by COVID-19, Poses an Enormous Challenge to the Amazon,” <https://theconversation.com/brazils-economic-crisis-prolonged-by-covid-19-poses-an-enormous-challenge-to-the-amazon-157556>; KS]

Brazilian President Jair Bolsonaro confirmed his country’s participation in a virtual climate summit convened by the U.S. for April 22 and 23, vowing in a recent letter to U.S. President Joe Biden to end illegal deforestation in Brazil by 2030 – a striking about-face from a longtime adversary to the country’s environmental policies.

But Bolsonaro warned that Brazil will need “massive resources”, including considerable financial help, to protect the Amazon. Brazil is currently in the midst of a deadly wave of the COVID-19 pandemic, and its economy shrunk by a record 5.8% last year. The Biden administration, meanwhile, is considering paying Brazil to protect its environment.

But not so long ago, both Brazil’s economy and its Amazon were prospering.

In 2014, Brazil was closing out nearly a decade of continuous economic growth. Per capita GDP – the total value of the economy divided among the population – had grown by 400% in just 10 years and economic inequality was falling to record lows in a country that long had the world’s largest gap between rich and poor. Between 2004 and 2014, some 35 million Brazilians joined the ranks of the middle class.

As Brazil’s economy thrived, deforestation in the Amazon slowed. Deforestation levels in 2012 were one-sixth of what they were in 2004. Back then, falling deforestation rates were hailed as a testament to the country’s prowess in environmental policymaking.

But after nearly a decade of researching and writing about Amazon forest loss, I’ve become convinced that Brazil’s successes in reducing deforestation a decade earlier likely had just as much to do with basic economics as environmental policy.

Rise and fall of deforestation

Forest loss in the Amazon has long reflected Brazil’s economic health.

For much of the late 20th century, when Brazil’s economy boomed, the federal government redirected public investment to the Amazon. Many of these investments – the massive land distribution programs of the 1980s, road projects and the enormous public subsidies for farming and ranching – were closely associated with forest loss.

So, in the 20th century, when Brazil’s economy boomed, deforestation often followed.

Today, however, forest loss in Brazil’s Amazon tends to be more closely associated with international demand for commodities like soybeans, beef and gold than with government investments. And for farmers, prices for these commodities don’t just rise and fall with global demand. They also rise and fall inversely to Brazil’s economic health.

The underlying economic reasons for this connection are complicated. But in short, it has to do with how the value of Brazil’s currency, the real, affects farmers who grow animals or crops for export.

Of currencies and commodities

That’s because, historically, when Brazil’s economy struggles, its currency loses value against the U.S. dollar – the currency of international markets.

About 20% of Brazil’s beef and more than 80% of its soybeans are exported. For Brazilian farmers and ranchers who contribute to these export markets – including many who live or operate in the Amazon region – a struggling domestic economy and weak currency is actually a plus. It means that when foreign buyers purchase Brazilian exports in dollars, Brazilian farmers are being paid more in their local currency.

This gives them more money – money that can potentially be used for purchasing and clearing forested land. A lucrative export market is also a compelling reason to start purchasing and clearing new land.

Conversely, when the economy is strong, so is the Brazilian real. For Amazonian farmers in Brazil, that means less money earned, less to invest in clearing forests and less incentive to clear new land.

A decade ago, when Brazil’s economy was working well and the real was particularly strong, economic growth, nationally, was putting a brake on deforestation by suppressing farmers’ and ranchers’ profits.

Economic crises are environmental crises

The economic brakes that once guarded against Amazon deforestation have come off.

In 2015 Brazil entered a severe recession. Now in its sixth consecutive year of slow or even negative economic growth, the Brazilian economy remains beset by lower global commodity prices and a rising deficit. Poverty is rising. Per capita GDP today is now about US$1,000 less per person than it was a decade ago.

Meanwhile, Brazil is one of the countries worst hit by COVID-19, with 4,000 people dying on its worst days. The pandemic is prolonged and exacerbating the country’s economic crisis.

Today, valued at about 18 U.S. cents, the real sits at a record low. The last time the real was this low was in 2003 – another year, not coincidentally, that deforestation in the Amazon surged.

The weak Brazilian currency has pushed prices for soybeans, beef and gold to heights which, 10 years ago, would have astounded. Soybean prices are five times higher than they were 15 years ago. Beef and gold prices are more than triple. For the farmers, ranchers and prospectors who work in the Amazon or at its periphery, these are very profitable times.

Last year, deforestation in the Amazon reached its highest level in over a decade. Unless something changes, I expect more land-clearing forest fires this July and August, when the Amazon’s dry season reaches its apex.

To end deforestation, fix Brazil’s economy

In today’s globalized economic system, the fates of Brazil’s economy and the Amazon forest are linked.

Brazil’s current economic crisis rewards the Amazon’s ranchers, gold prospectors and farmers with higher profits, creating serious financial incentives to clear more land. By some estimates, such fires in Brazil account for 70% of the country’s total greenhouse gas emissions.

The global debate about how to best protect the Amazon has largely focused on concerns over the state of Brazilian environmental policy under President Bolsonaro. My research suggests the need to strengthen Brazil’s economy should be a critical part of these discussions.

When Brazil’s economy struggles, its farmers and ranchers will reap – and the Amazon will suffer.

#### Amazon deforestation destroys biodiversity – extinction.

Perez ’19 [Amanda M; August 28; Reporter for University of Miami News @The U; University of Miami, “The Amazon is On Fire—Here is Why It Matters,” <https://news.miami.edu/stories/2019/08/the-amazon-is-on-firehere-is-why-it-matters.html>; KS]

University of Miami experts share insights on the massive wildfires burning in the Amazon.

The Amazon rainforest is burning at a record rate. So far this year, almost 73,000 fires in Brazil have been detected—an 85 percent increase from last year. This could have major impacts on the global climate, environmentalists warn.

Kenneth Feeley, who is the Smathers Chair of Tropical Trees in the Department of Biology at the University of Miami College of Arts and Sciences, said the Amazon plays several vital roles for humans.

“The Amazon regulates the Earth’s climate. One way it does it is through carbon dioxide. The Amazon is a huge storehouse of carbon," said Feeley. “By burning the forests you release the stored carbon into the atmosphere, exacerbating the greenhouse effect and ultimately increasing how fast the Earth warms up.”

Roni Avissar, dean of the Rosenstiel School of Marine and Atmospheric Science, is a climatologist who has studied the Amazon and how deforestation affects precipitation patterns around the world.

“Continual deforestation could trigger the modification of rainfall almost all over the planet,” he said. “If we continue on this path, we are going to reach a tipping point where the damage may be irreversible.”

The Amazon is also home to thousands of species, making it one of the most biodiverse locations in the world.

“If the Amazon keeps burning, we will inevitably loose many forms of species. Most plants and animals depend on having intact ecosystems, but as we degrade and destroy the Amazon, we increase the risk of species going extinct,” Feeley said.

Professor José Maria Cardoso da Silva, chair of geography and regional studies in the College of Arts and Sciences mapped the distribution of narrowly distributed plant species in the Brazilian Amazon to estimate their extinction risks. He and his research team found that there are 298 species of seed plants in 168 areas that altogether cover 10% of the Brazilian Amazon. Among these species, almost 73% (216) are projected to be under high extinction risk by the end of the century due to habitat loss, climate change, or both, assuming that their areas will not lose any habitat in the future due to land use.

His research suggests that deforestation and climate change can lead to mass extinction of species in tropical ecosystems and that “tropical countries, such as Brazil, should integrate biodiversity conservation and climate change policies (both mitigation and adaptation) to achieve win-win social and environmental gains while halting species extinction.”

Farmers and cattle ranchers who are continually clearing land for crops and livestock are setting many of the wildfires burning today.

“It’s all based on supply and demand,” said Feeley. “Brazil has one of the least efficient cattle industries on the planet. They are raising just one or two cows per hectare of what used to be rainforest. Until we decrease the demand for beef and other products coming out of deforested lands, there’s no way to stop it.”

Cardoso da Silva, who is Brazilian, stated that the fires have also been caused as a result of anti-environmental attitudes that have been adopted by current Brazilian President Jair Bolsonaro.

“Brazil has made big progress in the last decades setting policies that have reduced the deforestation in the region. However, the current president’s rhetoric has sent the message to the society that the protection of the Amazon and other Brazilian ecosystems is not a priority in his government,” he said.

Bolsonaro is also facing criticism for the way his government has sought to take over indigenous lands. Tracy Devine Guzman, associate professor of Latin American studies at the University, said the situation of indigenous people in Brazil was dire long before the outset of this current tragedy. She said that the administration has failed to enact any policy to ensure indigenous wellbeing.

“The result of this disaster for indigenous peoples, alongside other residents of the Amazon whose social, economic, and cultural well-being is grounded in and derives from a respectful, sustainable co-existence with the natural world, is nothing short of an existential threat,” she said. “Indigenous people have promised to defend themselves and their lands till their last breath.”

Caleb Everett, professor and chair of the Department of Anthropology in the College of Arts and Sciences, said this is alarming because they are seeing some of their homelands go up in smoke.

“I’ve been in Amazonia with indigenous people during the burning seasons, and it certainly affects some of them in very negative ways, threatening some of their homelands. Among other things, it impacts their hunting,” he said.

Although the fires in the Amazon have recently been getting a lot of media attention, Feeley reminded people that the burning of the Amazon has been happening for decades.

“These kinds of fires happen all the time. What is surprising to me is how much media attention it is now getting, and that is a good thing. It shows the potential of what the media can do to raise awareness and hopefully to spur real change,” he said.

Feeley believes we as a global community have a choice to make.

“There are different paths that we can follow at this point. If people take their anger and turn it into action, then this tragedy can lead to a positive move forward,” said Feeley. “If we just let this pass with another news cycle and then forget about it, then the burning and deforestation is going to happen again next year and again the year after that. At some point the forest will not be able to regenerate or recover, and we will all have to face the consequences.”

#### Warming outweighs other risks by a trillion times.

Ng ’19 [Yew-Kwang; May 2019; Professor of Economics at Nanyang Technology University, Fellow of the Academy of Social Sciences in Australia and Member of the Advisory Board at the Global Priorities Institute at Oxford University, Ph.D. in Economics from Sydney University; Global Policy, “Keynote: Global Extinction and Animal Welfare: Two Priorities for Effective Altruism,” vol. 10, no. 2, p. 258-266]

Catastrophic climate change

Though by no means certain, CCC causing global extinction is possible due to interrelated factors of non‐linearity, cascading effects, positive feedbacks, multiplicative factors, critical thresholds and tipping points (e.g. Barnosky and Hadly, [2016](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0005); Belaia et al., [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0008); Buldyrev et al., [2010](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0016); Grainger, [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0027); Hansen and Sato, [2012](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0029); IPCC [2014](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0031); Kareiva and Carranza, [2018](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0033); Osmond and Klausmeier, [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0056); Rothman, [2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0066); Schuur et al., [2015](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0069); Sims and Finnoff, [2016](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0072); Van Aalst, [2006](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0079)).[7](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-note-1009_67)

A possibly imminent tipping point could be in the form of ‘an abrupt ice sheet collapse [that] could cause a rapid sea level rise’ (Baum et al., [2011](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0006), p. 399). There are many avenues for positive feedback in global warming, including:

* the replacement of an ice sea by a liquid ocean surface from melting reduces the reflection and increases the absorption of sunlight, leading to faster warming;
* the drying of forests from warming increases forest fires and the release of more carbon; and
* higher ocean temperatures may lead to the release of methane trapped under the ocean floor, producing runaway global warming.

Though there are also avenues for negative feedback, the scientific consensus is for an overall net positive feedback (Roe and Baker, [2007](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0065)). Thus, the Global Challenges Foundation ([2017](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0026), p. 25) concludes, ‘The world is currently completely unprepared to envisage, and even less deal with, the consequences of CCC’.

The threat of sea‐level rising from global warming is well known, but there are also other likely and more imminent threats to the survivability of mankind and other living things. For example, Sherwood and Huber ([2010](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0071)) emphasize the adaptability limit to climate change due to heat stress from high environmental wet‐bulb temperature. They show that ‘even modest global warming could … expose large fractions of the [world] population to unprecedented heat stress’ p. 9552 and that with substantial global warming, ‘the area of land rendered uninhabitable by heat stress would dwarf that affected by rising sea level’ p. 9555, making extinction much more likely and the relatively moderate damages estimated by most integrated assessment models unreliably low.

While imminent extinction is very unlikely and may not come for a long time even under business as usual, the main point is that we cannot rule it out. Annan and Hargreaves ([2011](https://onlinelibrary-wiley-com.proxy.lib.umich.edu/doi/full/10.1111/1758-5899.12647#gpol12647-bib-0004), pp. 434–435) may be right that there is ‘an upper 95 per cent probability limit for S [temperature increase] … to lie close to 4°C, and certainly well below 6°C’. However, probabilities of 5 per cent, 0.5 per cent, 0.05 per cent or even 0.005 per cent of excessive warming and the resulting extinction probabilities cannot be ruled out and are unacceptable. Even if there is only a 1 per cent probability that there is a time bomb in the airplane, you probably want to change your flight. Extinction of the whole world is more important to avoid by literally a trillion times.

#### Plan develops foreign antitrust regimes.

Murray ’17 [Sean; November 17; Fordham University School of Law (J.D.); Fordham International Law Journal; “With a Little Help from my Friends: How a US Judicial International Comity Balancing Test Can Foster Global Antitrust Redress,” <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2690&context=ilj>; KS]

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.