# 1AC Empagran

## Plan – 1AC

#### The United States federal government should prohibit anticompetitive business practices by increasing the scope of its core antitrust laws to include extraterritorial jurisdiction over private sector cross-border cartels.

## Indigenous Regimes – 1AC

#### Advantage One is Indigenous Regimes:

#### *Empagran* adheres to the presumption against extraterritoriality – that’s problematic given that cartels transcend territorial borders.

Michaels ’10 [Ralf; October 10; Arthur Larson Professor of Law, Duke University School of Law; “Empagran’s Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1609705>; KS]

How did we get from a “highly interdependent commercial world” to “independent foreign harm” and “a foreign nation’s ability independently to regulate its own commercial affairs”? By way of an assumption so crucial that Justice Breyer numerous times. Here is the most elaborate formulation of the fiction: “We reemphasize that we base our decision upon the following: the price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect.”41 This assumption is a fiction. In a “highly interdependent commercial world,” effects on one nation’s markets are never independent from effects on another nation’s markets.42 The vitamins cartel, in order to avoid arbitrage, had to keep prices roughly the same in all geographically close markets. Justice Breyer knows this, but he faces a challenge: the globalization he invokes comes back to haunt him. The doctrines which the Court has at its disposal were made for a nineteenth-century world defined by territorial states. These doctrines do not fit globalization and the transcendence of territorial borders. Perhaps new doctrines are needed; perhaps the old doctrine must be deteritorialized.43 The Court, however, finds another way. Instead of deterritorializing existing rules, it reterritorializes the phenomena to which these rules are applied. Rather than adapt the doctrines to globalization, it adapts globalization to the doctrines. If the nineteenth-century rules do not fit the twenty-first-century world, too bad for the latter – the Court turns it, by fiction, into a nineteenth-century world.

This result, of course, does not require all the globalization talk, as Justice Scalia’s concurrence makes clear

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.44

This concurrence links the decision to another venerated canon of international law, the presumption against extraterritorial application of statutes, as formulated by Justice Story in The Apollon.45 That presumption, however, has become problematic, because territoriality has changed both its social and legal meaning. In 1825, jurisdiction was thought to be largely confined to national territory. Consequently, the presumption against extraterritoriality was almost equivalent to a presumption against violations of international law. Roger Alford neatly explains how this idea withered away in U.S. law in the twentieth century.46 Today, international law no longer poses such extensive restrictions on domestic jurisdiction over foreign conduct. The presumption against extraterritoriality has survived this shift, but it has lost its grounding in international law.47

Moreover, this decline of territoriality as a limit in international law has gone hand-in- hand with the declining importance of territoriality in society. Modern transportation has made crossing boundaries much easier; new modes of communication make territorial boundaries meaningless for many important endeavors; globalized markets pay little respect to national boundaries. The conduct of important actors, which is the object of most statutory regulation, is trans-territorial. A canon of interpretation that insists on territoriality stands in odd contrast to these developments.

Prior to the shift, Congress was presumed not to legislate beyond territorial boundaries because that would be unusual and would violate international law. Now that the canon has lost its legal foundation in international law and its teleological foundation in a presumed predominantly local character of regulated behavior, it is unclear what justifies it. One suggestion is that courts should avoid extraterritorial application to avoid subjecting the United States to foreign criticism without participation by the political branches,48 but this does not explain why limits of scope should be those of territorial boundaries. Another justification is “the commonsense notion that Congress generally legislates with domestic concerns in mind.”49 This justification is weak where, as in Empagran, the statute at hand is one aimed at determining the scope of extraterritorial application (though the justification has been used in such contexts, too.)50 More importantly, the justification begs the very question of what exactly are “domestic concerns.”51 In choice of law, such insights have led in the twentieth century to the development of interest analysis, whereby courts determine the scope of application on the basis of governmental interest and then resolve resulting conflicts with the regulatory interests of other states. If the presumption against extraterritoriality was once a presumption against the violation of choice-of-law rules, as has been argued,52 one might expect it to change along with the choice-of-law rules, as many authors have suggested it should. Empagran suggests the powerful grip that ideas of territoriality still hold even over a Justice who claims to be above it.

Territorial limits to jurisdiction present normative problems when applied to phenomena that do not respect territorial boundaries. If the effects of certain conduct transcend boundaries, while congressional statutes are presumed to remain within territorial boundaries, then the effects outside the borders remain unregulated. This has led some to conclude that the presumption against extraterritoriality, revived under the Rehnquist Court,54 is merely a fig leaf for judicial dislike of congressional regulation. Justice Holmes’ decision in American Banan has been explained by his aversion to the Sherman Act.”56 Justice Breyer, after deciding Empagran, has been praised as “the go-to guy for American business in regulatory and economic cases.”57

Such crude realist speculations on the Justices’ real intentions must remain somewhat speculative even for individual decisions; for the law at large, they have limited explanatory value. In Empagran, especially, the suggestion that the real goal is underregulation may not fully hold. The Court emphasizes that other countries have antitrust laws, too. Presumably, therefore, regulation of the cartel would not stop at U.S. borders. Instead, other nations would regulate, even if they did so by different means. This suggests that today the presumption against extraterritoriality is not merely a policy decision in favor of multinational corporations. The Court refused to concentrate all claims concerning the global cartel in one nation’s courts,58 but it does not reject the idea that all these claims should be heard somewhere. Instead, the presumption against extraterritoriality establishes a checkerboard map of regulatory authorities, in which each country is responsible for regulating its own territory. This checkerboard map resembles that of the nineteenth century, but the resemblance is superficial. Then, it represented the reality of most social relations and of international law. Today, territorial borders are an arbitrary and formalist device in a globalized world, but one that helps to avoid overlapping regulatory claims precisely because of its formal character. The nineteenth-century checkerboard view of the world survives in the twenty-first century, but it changes its character: it has become a formal-technical device for the allocation of regulatory authority.

IV. A Hegemonialist Reading:

The Absence of the Developing World.

A problem remains. The idea of decentralized regulation – each regulates its own markets, so all the world is regulated – can succeed only if regulatory authority exists everywhere on the checkerboard. This is a problem in antitrust law. Although the United States is no longer the only country with effective antitrust enforcement, many countries still lack the capacity or political will (or both) to crack down on cartels. None of these considerations, however, can be found in the Empagran decision. The most striking passage in the opinion is one in which Justice Breyer suggests such a checkerboard world of regulation: “Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct...?”60

This is a strange way of putting the problem. In Empagran, the named plaintiffs were not “Canadian, or British or Japanese customers”– they came from Ukraine, Ecuador, and Panama. Yet throughout the opinion, Justice Breyer never addresses the sovereign interests of those countries. When he states that application of U.S. law “would undermine foreign nations' own antitrust enforcement policies,”61 he is not speaking of Ecuador (which may be quite happy if the United States cracks down on cartels impacting that country).62 Instead, he speaks of Germany and Canada. When he fears that “to apply our remedies would unjustifiably permit [foreign nations’] citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody,”63 the balance of competing considerations he has in mind is that of Germany, Canada, and Japan, not that of Ukraine. In the end, Justice Breyer is not allowing Canada, Great Britain, or Japan to determine how best to protect their consumers as he proclaims. Instead, he is protecting Canadian, British, and Japanese corporations against their overcharged customers abroad.64 All named plaintiffs come from developing countries; all defendants and all amicus briefs come from developed countries. The court will apparently listen to the latter, and ignore the former.

In doing so, the Court adopts not only the nineteenth century idea of neatly distinguished territorial entities; it also adopts the old idea of an international law limited to European and North American countries.65 Developed countries regulate their markets, and the rest of the world remains unregulated – with the consequence that European and American defendants can retrieve the money they lose to American and European plaintiffs and regulators. Justice Breyer’s harmony among countries creates quite an exclusive club. In the name of avoiding U.S. hegemony over other developed countries, the Supreme Court endorses hegemony of developed over undeveloped countries. It avoids the imperialism of imposing U.S. law on others, but it endorses the imperialism of restricting access to U.S. law.

#### Developing countries fail at enforcement.

Michaels ’16 [Ralf; 2016; Arthur Larson Professor of Law, Duke University School of Law; “Supplanting Foreign Antitrust,” <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4808&context=lcp>; KS]

A. Challenges

Once, establishing antitrust regimes was thought not to benefit developing countries.8 That view is no longer prevalent. Today, more than half of the developing countries in the world have antitrust regimes.9

Having laws on the books represents, however, only a first step. A greater problem for many developing countries lies in building institutions10 and enforcing existing antitrust laws. Here, the data are somewhat unclear. Levenstein and Suslow found in 2004 that actual enforcement of existing antitrust law was widely lacking.11 Waked, by contrast, suggests that developing countries do allocate resources to the enforcement of antitrust laws, though the degree depends on, amongst others, general macroeconomic development, openness to trade and imports, and level of corruption.12 Buthe and Aydin identify several factors that constrain developing countries: limits in financial resources and expertise, unsupportive or hostile political-legal environments, limitations to legal culture, a lack of competition culture, and underdeveloped markets13

The enforcement problem is exacerbated for transboundary cartels with actors from outside the developing countries targeting the country's markets.14 Often, less developed countries do not even appear to recognize the impact these cartels have on their economies.15 If cartel members act outside the country, agencies have difficulties detecting and scrutinizing the cartel.16 Where they do, the global market power of firms is often badly matched by the antitrust regimes of developing countries.17 Even if developing countries have the resources and expertise to regulate small and midsize local cartels, they may well be unable to regulate bigger and transnational or multinational cartels.18 It may often be preferable for them to allocate scarce resources to the regulation of domestic cartels.

B. Disentangling Regulation And Regulator

The result of the previous section is ambivalent. On the one hand, developing countries would benefit from antitrust regimes. On the other hand, some of these countries have difficulty building and using the necessary institutions, particularly ones strong enough to take on large, multinational cartels.

The most obvious way to deal with these problems is for developing countries to build effective antitrust regimes. This is the focus of the other contributions in this issue. However, this does not resolve situations that occur while such institutions do not exist, and it does not resolve situations that are too big for developing countries to handle. Does that mean that, until and unless they find the resources to build such institutions, regulation of their markets will necessarily be deficient? This is so only if one assumes, like most do, that regulation has to happen in and by these countries themselves.

But this assumption is not necessary. It merges two questions that are analytically separable. Even if one assumes that developing countries would benefit from antitrust regimes, this assumption does not reveal who should be charged with developing and enforcing antitrust law. One might think the answer obvious: the underdeveloped country itself. This would be plausible if markets were completely national. In this case, only the affected state itself would be interested in regulation, and only that state would seem justified in making decisions.19 But markets transcend borders; global cartels are among the most forceful reminders of this. The same is true for laws; their impact is not strictly territorial and can cross borders.20 Consequently the market of one country could well be regulated by the antitrust regime of another. The question is not whether this is theoretically possible but rather under what conditions it is feasible, desirable, and legally permissible.

Can the domestic authorities of a developed country fill the gap of regulation in a developing country? The idea of enforcing someone else's antitrust regime is not as outlandish as it may seem. 21 E.U. antitrust law is to a large part enforced not by E.U. agencies but by national institutions.22 Something similar is true for the Andean Community, which provides its General Secretariat with investigative powers but relies on domestic agencies for enforcement.23 The idea that transboundary cartels should be regulated by domestic agencies is therefore not per se anomalous.

The question is whether such mechanisms can also operate between states. If the domestic agencies of a developing country cannot effectively regulate certain anti-competitive conduct, and no supranational institutions exist to fill the gap, a remaining possibility is what is here called "supplanting antitrust." Concretely, the question is whether a developed economy can use its antitrust regime for the regulation of cartels that affect developing countries. And if so, what are the circumstances under which this would be justifiable?

#### Developing countries rely on trickle-down enforcement from developed countries due to regulatory patchworks – only private enforcement offers adequate compensation and deterrence.

Martyniszyn ’21 [Marek; Senior Lecturer in Law, Queen’s University Belfast (Northern Ireland); January 14;

“Competitive Harm Crossing Borders: Regulatory Gaps And A Way Forward,”

https://academic.oup.com/jcle/article/17/3/686/6095856?login=true

The current regulatory patchwork works relatively well for the key developed countries. The established competition agencies could overcome the hurdles of transnational cases if they so choose.48 They have the necessary financial and human resources and expertise. This state of affairs may explain why the developed world stopped investing efforts in finding a multilateral solution to the problem of transnational anticompetitive conduct such as international cartels.

Even when foreign violators do not have assets in the developed states, they are unlikely to react to unfavourable enforcement outcomes by exiting the market because such markets are too important. The economic weight of a market helps to realize the potential of extraterritoriality. Economies that are less important from the violators’ perspective face a particularly uphill and unequal battle when challenging anticompetitive conduct.

In this regulatory context, the smaller and less developed countries are advised to focus their enforcement on domestic violations.49 When it comes to transnational violations, such as international cartels, they are often recommended to rely on the enforcement efforts of developed regimes.50 That is, they are to depend on what can be called ‘trickle-down enforcement’. The implicit argument is: should an international cartel be investigated and sanctioned by one or more developed agencies, it will be disbanded and cause no further competitive harm. In other words, enforcement by more developed agencies can generate positive externalities, or spill-over effects for other regimes. Hence, there is an opportunity for enforcement free-riding. While this certainly happens, this proposition assumes that transnational violations affect developed and developing countries in a similar manner. This may be true when it comes to violations affecting virtually all world markets; in such casesprosecution effectively deals with the totality of the underlying anticompetitive conduct. For example, in the case of the Southeast Asian cartel of LCD screen manufacturers, enforcement by a number of agencies led to the restoration of competition.51 Similarly, the operation of the vitamins cartel was global and attracted significant attention of enforcers in several jurisdictions.52 However, not all transnational violations are omnipresent with sufficient impact on key economies to provoke vigorous enforcement and a complete discontinuation of the harmful practice. For example, the American Soda Ash Export Cartel (ANSAC), a U.S.-based export cartel, was found in breach of EU competition law in 1990.53 However, this decision did not lead to its abandonment. ANSAC reorganized its activities in relation to the EU and continued operating in a business-as-usual manner in other markets. In 1996 it was challenged in India. The case failed due to the lack of an explicit textual basis in Indian law allowing for extraterritoriality. The judgment was rendered under severe pressure exerted by the United States. In 1999 the same cartel was challenged in South Africa, where—after nearly ten years of litigation—ANSAC settled.

Enforcement in the EU, India and South Africa did not lead to the break-up of ANSAC, which continues operating in various markets. This case underlines the gaps in the current regulatory framework. It shows that enforcement free-riding will not necessarily work. There may be no trickle down benefit to countries that forego domestic enforcement.

Moreover, reliance on enforcement activities of developed countries by other states is not always an option. While some transnational violations are truly global, many types of anticompetitive conduct are more limited in scope, depending on the nature and characteristic of the goods or services involved. There may be regional arrangements (for example, a regional cement cartel) or arrangements that affect only a specific group of countries (for example, a cartel concerning a good which is no longer sold in the developed economies, but which is still offered in developing countries). In such cases there would be no enforcement by developed agencies to piggy-back on and therefore no trickle-down benefit, given that markets in developed economies would not be affected.

Due to the existing gaps in the regulatory framework, the recommendation to focus on domestic violations has had perhaps unintended, and somewhat perverse, consequences. Domestic infringements—which typically do not lead to transfer of wealth abroad—are pursued while transnational violations escape scrutiny, despite generally causing much greater harm54 and often leading to outflow of wealth from the domestic economy. Even in cases of successful reliance on enforcement by agencies of other states (for example, in cases of truly global cartels) the transfer of wealth is not remedied. The rents extracted through supra-competitive prices are not even partially remedied by fines imposed on the violators, given that no sanctions are imposed in relation to the harm to the domestic market. Rather, the benefit is the prevention of future harm. This is only a partial success, but even this is not present in cases in which the foreign enforcement is either not robust enough to lead to discontinuation of the anticompetitive conduct in question or when such enforcement is simply missing. Hence, passive reliance on trickle-down enforcement is unsatisfactory.

Furthermore, even if free-riding on enforcement by other states can prevent future harm, this setup provides no deterrence, which is considered crucial in modern competition law. Transnational violators can feel safe and act with impunity. Any sanctions they may face will relate only to harm caused in the enforcing jurisdictions. Hence, there is no reason for them not to continue with existing—and not to create new—anticompetitive arrangements that extract wealth from markets in states that do not challenge transnational violations.55 The situation is particularly grim in the case of anticompetitive practices that do not affect any major jurisdiction enforcing competition law robustly, since there will be no agency to piggy-back on and no possibility of a trickle-down benefit. The violation may remain completely off the radar should domestic agencies focus solely on domestic conduct. Moreover, even if the viability of a particular anticompetitive arrangement requires it to be global in scope, prospective violators may still find it profitable, even after taking into account any sanctions they may face in the key jurisdictions that actively challenge such transnational violations. Profits extracted from the non-enforcing jurisdictions may offset ‘related’ costs, that is sanctions imposed in the relatively few jurisdictions which do pursue such cases. This argument was made before the US Supreme Court in Empagran.56 Such sanctions—especially if only financial in nature—can be seen as no more than just a selectively imposed tax on transnational anticompetitive activities. The availability of individual criminal sanctions in the form of imprisonment in some countries changes that dynamic, but does not fundamentally resolve the problem.

Therefore, reliance on trickle-down enforcement should not be readily accepted as a solution to the problem presented by transnational anticompetitive practices. Public enforcement of competition law typically aims to: (1) deal with the prohibited conduct in question so that it does not continue (prevention of further harm); (2) punish violators in the instant case; (3) deter other entities from engaging in any prohibited conduct (general deterrence). Trickle-down enforcement can, in some cases, help to prevent further harm, but under the current regulatory patchwork, violators are neither adequately punished nor deterred. Private enforcement is aimed at: (1) compensating the victims and (2) strengthening deterrence. Trickle-down enforcement does not contribute to these two goals. Moreover, transnational violations lead to transfer of wealth and, without any domestic enforcement, this phenomenon is not remedied in any manner. Therefore, trickle-down enforcement provides limited positive externality.

#### Supplanting antitrust in developing countries solves.

Michaels ’16 [Ralf; 2016; Arthur Larson Professor of Law, Duke University School of Law; “Supplanting Foreign Antitrust,” <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4808&context=lcp>; KS]

While actual supplanting antitrust as such appears like a novel idea,24 the use of developed country antitrust expertise and actors for developing countries is not unusual. Developed countries offer their regimes as models, and many antitrust regimes in developed countries around the world are the results of such modeling.25 They provide technical assistance in the form of expertise and manpower.26 They provide investigative assistance to concrete antitrust inquiries.27 And they provide enforcement assistance by enforcing decisions, especially court decisions, made in developing countries.

Recently, Michal Gal has made a proposal that goes further.2 8 She suggests that small and developing countries could save on antitrust enforcement costs by recognizing decisions made in developed countries with regard to the same cartel.29 In her proposal, after a decision has been made in a developed country, a local plaintiff in the developing country need not prove existence of the cartel but only the local elements of the offense, as well as some procedural requirements concerning the recognized decision.3 0

All these assistance mechanisms differ from supplanting in a crucial way: they leave implementation to the developing country. This is different from another form of assistance that is more akin to supplanting, namely positive comity.31 The OECD defines this as an instrument "whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of that request.32 Positive comity is regulated in several international agreements.33 It is a version of supplanting in the sense that one country regulates the market of another. Here, the decision that enforcement should take place is still taken by the affected country (through a request), but an actual enforcement is left to the other country.

Supplanting antitrust builds on these ideas but goes further. The idea is that a developed country's antitrust agencies and courts assert jurisdiction over cartels that have some or even all of their effect in a less developed country, even in the absence of a treaty that allows for it, and even in the absence of a request by the developing country.

#### Competition is key to development strategies.

NYU ’14 [NYU School of Law; October 24; Conference Program featuring numerous speakers; *NYU School of Law, “*ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES FEATURING CHINA, INDIA, MEXICO, BRAZIL, SOUTH AFRICA...” <https://www.law.nyu.edu/sites/default/files/upload_documents/conference%20summary.pdf>; KS]

ANTITRUST POLICY IN EMERGING AND DEVELOPING COUNTRIES

Dr. Santiago Levy Algazi illustrated that development and long-term growth is about productivity rather than a country’s labor force and capital investment by comparing South Korea and Latin America. In the 1970s through the 1990s, South Korea succeeded in narrowing the gap of per capita income with the United States, by increasing its level of productivity. Analyzing the same parameters in Latin America, despite high capital investments, a large labor force, and high rates of savings, per capita income in Latin America lagged behind the United States and South Korea. Dr. Levy identified low productivity as the reason behind the lack of economic growth and income disparity.

Economic models in the 1990s related productivity and GDP to the technology available to the economy and factors of production (including education, human capital, and the stock of capital goods available). Subsequent research added another factor to understanding economic growth and productivity – the environment. An enabling environment, described by Dr. Levy as the context in which economic activity takes place, plays a key role in increasing productivity. Aspects of environment include how workers and firms interact, labor regulation, social insurance, access to credit, tax policies, and competition and regulation in the markets for goods, services, and inputs. Environment is largely the factor dividing the developed countries and developing countries in terms of efficiently utilizing labor and capital. In his view, development is not about accumulating capital and educating workers. Instead, development depends on how a country constructs its competition policy and other institutions, how it regulates its workers, and how they interact in creating output.b

Dr. Levy then demonstrated how the absence of competition policy in a country often will lead to monopolies – driving employment and productivity down – and in some cases will concentrate political power in the hands of a few. The concentration of economic and political power, in turn, can generate policies that are inefficient and anticompetitive. One example he provided was credit – where there is limited collateral, credit may be allocated to inefficient projects championed by the rich, whereas other efficient projects may go unfunded. Competition policy plays a key role in preventing this concentration of economic and political power and supports efficient markets and democracy.

Competition policy was identified by Dr. Levy as an important component of a development strategy for emerging and developing countries because of its impact on the environment. Its absence can limit productivity. A vigorous competition policy, on the other hand, can make the difference between “crony capitalism” and healthy institutions and markets.

#### Development strategies improve agriculture, health, and tech markets – overcome poverty and inequality.

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

Bhattarcharjea, drawing on the broader notion of human (rather than “just” economic) development, suggests that competition law enforcement and policy in developing countries should focus on “sectors that directly impinge on the well-being of the poor, in particular essential consumer goods, agriculture [and its inputs] and health care.”23 And he argues that developing country agencies should initially focus on disclosing and alleviating concrete local impediments to the operation of competitive markets. Such a strategy is promising because it: allows new agencies to build technical capacity by solving relatively tractable problems; enables them to build popular support for competition policy through actions that yield clear benefits for domestic market participants; and gives the agency time to develop transgovernmental linkages with their counterparts in other countries before going after the transnational cartels that often ruthlessly target developing countries.24 These arguments suggest that the sectoral composition and geographic distribution of implementation and enforcement efforts may serve as initial measures of success, until it becomes possible to assess whether reductions in local distortions and benefits for the poor are indeed materializing.

Fox goes further, both in conceptualizing development as an operational goal of competition policy and in suggesting specific foci for competition policy implementation. Pointing out that severe inequalities in education and access to capital create highly consequential barriers to entry, she suggests that a competition policy that seeks to foster equality of opportunity to partake in the market and share in its benefits must include measures to overcome such inequality or at least its effects.25 From this perspective, competition law and policy are successful if they contribute to actual increases in market participation from previously marginalized or excluded segments of the population, and could be considered at least partly successful to the extent that they measurably reduce the barriers to entry.

#### SDGs solve existential risks.

Cernev and Fenner, 20—Australian National University AND Centre for Sustainable Development, Cambridge University Engineering Department (Tom and Richard, “The importance of achieving foundational Sustainable Development Goals in reducing global risk,” Futures, Volume 115, January 2020, Article 102492, dml)

4. Risks from failure to meet the SDGs

4.1. Cascading failures

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

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

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

4.2. Existential and catastrophic risk

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

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

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

#### Competition guarantees growth in developing countries – decades of models confirm.

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]

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.

#### Developing economies are on the brink – economic collapse results in global state failure.

Brown et al. ‘20 [Frances et al.; April 6; Senior fellow and co-director of Carnegie’s Democracy, Conflict, and Governance Program, who previously worked at the White House, USAID, and in nongovernmental organizations; Carnegie Endowment for International Peace; *Carnegie Endowment,* "How Will the Coronavirus Reshape Democracy and Governance Globally?" <https://carnegieendowment.org/2020/04/06/how-will-coronavirus-reshape-democracy-and-governance-globally-pub-81470>]

BROADER GOVERNANCE IMPLICATIONS

Beyond the pandemic’s effects on democracy, a range of governance ramifications may emerge in the months ahead.

BASIC GOVERNANCE VIABILITY AND REGIME STABILITY

The pandemic will exert enormous pressures on governance institutions in heavily affected countries—especially on health systems, but also on many other essential government functions, from education and food supply chains to law enforcement and border control. Even in comparatively wealthy states, like Italy, Spain, and the United States, health systems in the worst-affected areas have already cracked under the weight of the pandemic. Crisis responses will inevitably require triage well beyond the health sector, diverting government attention and resources from other vital functions and challenges. This problem will be exacerbated as more and more politicians, government leaders, and civil servants test positive for the virus, rendering governments less able to operate just when they need to be working overtime. The specter of the pandemic has also forced legislatures and government agencies to curtail operations or work remotely, resulting in inevitable losses of efficiency.

As the virus spreads more widely in weak states, these governance challenges will be even more pronounced. The acute public health emergency will be on a collision course with an abject lack of government capacity, frail institutions, limited government reach, and low citizen trust in leaders (and corresponding reluctance to heed public health directives). Social distancing will be difficult to observe in crowded settlements, especially if residents are reliant on informal work to survive. At the same time, governments in many developing countries will struggle to mobilize adequate resources to ease the effects of an economic recession. Robust international assistance efforts will be essential, but insufficient implementation capacity may hinder their effectiveness. In countries already suffering from protracted conflict or instability, the pressures of the pandemic and resultant cascade of governance failures could lead to at least partial state collapse.

PRESSURE ON SOCIOPOLITICAL COHESION

The pandemic will strain basic sociopolitical cohesion in many states. The differential effects of the health crisis along key axes—rich vs. poor, urban vs. rural, region vs. region, and citizen vs. migrant—may sharpen existing sociopolitical divides. The pandemic may compound those strains by exacerbating political polarization where it already exists. From India and Bolivia to Poland and the United States, many democracies are already suffering from rising animosity and tensions between contending political camps. As the crisis worsens, opposing sides may disagree about the gravity of the pandemic or about appropriate government responses—a dynamic that could be intensified by people’s greater reliance on online communication while they remain mostly isolated in their homes, and by governments using the crisis to advance partisan agendas. In the United States, for example, partisanship has heavily shaped perceptions of the severity of the crisis and individuals’ trust in the government’s response. In Brazil, President Jair Bolsonaro’s dismissal of the seriousness of the crisis has inflamed an already fierce political divide.

At the same time, the “wartime” imperative to combat the pandemic could invoke feelings of shared sacrifice and collective mission that heal rather than aggravate societal and political divisions. But such a rallying effect likely requires political leaders to rise to the challenge and take a unifying approach, which goes against the populist playbook in use in many countries. Tracking leadership styles and messages will be key to understanding the longer-term effects of the pandemic on sociopolitical cohesion.

HEIGHTENED CORRUPTION

Government responses to the pandemic are likely to exacerbate graft and corruption in many countries. Crises involving urgent medical needs and scarce supplies inevitably present opportunities for smuggling, graft, price-gouging, and fraud.

Corruption undermines the effectiveness of public health responses, particularly if valuable resources are diverted from high-need areas or citizens are denied treatment if they refuse to pay bribes. Both domestic actors and international partners assisting with public health responses should anticipate these risks and avoid the tendency to adopt an “anything goes in an emergency” attitude. In the medium term, the perception and reality of heightened corruption may increase popular discontent with governments.

However, the crisis could also end up spurring new anticorruption measures. If corruption spikes rapidly when governments implement crisis measures, widespread public outrage may catalyze reforms that improve health governance and public accountability. More immediately, the prospect of high-stakes corruption may also mobilize civil society, governments, and international actors to take preventive steps, especially in places that are still less affected by the pandemic. In the United States, for example, legislators heeded calls for increased oversight in the new economic stimulus package. Civil society groups in Nigeria are urging government authorities to institute corruption safeguards as the country braces for the coronavirus. Possible additional measures may include concerted diplomatic pressure for greater oversight over aid flows or increased adoption of recommendations already developed by advocacy groups.

LOCAL-NATIONAL DISCONNECT

The virus may reshape dynamics between national and regional or local government actors. Local officials are on the front lines of the crisis response, sometimes reinforcing and sometimes competing with messages from national leaders. In Afghanistan, where the central government’s presence in the periphery is limited, some provincial governors have been shoring up its policies and bolstering its response efforts. The governor of Nangarhar Province quickly set up an emergency aid fund and publicly dispelled myths about curing the virus, while other governors have supplied basic food packages to encourage infected men to stay home from work.

Elsewhere, the virus response has exacerbated friction between local and national officials. In Hungary, where the opposition party controls several major cities, the central government unveiled a measure that would dilute mayors’ decisionmaking authority during an emergency. Local leaders quickly attacked the plan as one that would undermine the coronavirus response, and the government eventually walked it back. In Turkey, the pandemic has renewed long-standing tensions between President Recep Tayyip Erdoğan and the opposition-party mayor of Istanbul. Contrary to Erdoğan’s directives, the mayor has advocated a lockdown of Istanbul and launched his own fundraising campaign to galvanize the response, prompting national leaders to block the effort. In the United States, the pandemic response has intensified frictions between Trump and several Democratic state governors critical of his administration’s response.

These trends could change internal power relations in various places, whether by enhancing local-level leaders’ legitimacy at the expense of national officials or worsening governance fragmentation. Where friction between national governments and opposition-party local leadership tracks ideological, regional, and rural-urban lines, it may exacerbate preexisting political polarization.

ENHANCED ROLES OF NONSTATE ACTORS

The virus may also reshape relationships between nonstate actors and governments, with important implications for government legitimacy and claims to sovereignty. Where governments enjoy low levels of citizen trust, cooperating with nonstate systems of governance may be essential to ensuring an effective crisis response. In Sierra Leone, for example, local chiefs were highly influential in containing the spread of Ebola. The Taliban in Afghanistan are already committing themselves to cooperating with health officials from international organizations like the World Health Organization that typically collaborate with sovereign governments. Arab governments are mobilizing official Islamic institutions and authorities to help them manage the crisis, which may help them compensate for low levels of public trust in official communications and directives—while potentially also reinforcing government control over the religious domain.

However, nonstate actors’ enhanced role in implementing crisis responses may also strengthen their legitimacy and authority in the eyes of local communities, thereby entrenching their political influence. In Rio de Janeiro, for example, drug trafficking gangs have imposed a coronavirus curfew in the city’s favelas and handed out soap to local residents, while condemning the Brazilian government’s lack of action. In Lebanon, the paramilitary organization Hezbollah has reportedly mobilized a remarkable 25,000 people, including medics, to combat the virus, in addition to organizing new testing centers and ambulances and repurposing an entire hospital for the crisis. Although the group insists that its efforts are meant to “complement the government apparatus”—Hezbollah is part of the government coalition—the response stands in notable contrast to the struggles of the official Lebanese administration. In Afghanistan, the Taliban have launched a coronavirus awareness campaign in areas of the country under their sway; whereas the Kurdish-led region of northeast Syria, which maintains autonomy from the regime of President Bashar al-Assad, has initiated curfews, coordinated aid delivery, and stood up isolation wards to combat the virus.

As in many situations of acute crisis, rapid and effective efforts by nonstate actors to enforce order or deliver services can foster or reinforce alternative systems of governance, particularly if the government is seen as absent, ineffective, or divisive. On the other hand, different regimes may try to use the crisis to shore up their control over nonstate entities. It will be important to monitor these: in fragile or low-income states, nonstate actors’ heightened roles in crisis response—or, alternatively, their efforts to impede effective responses—will likely reshape citizens’ perceptions of state legitimacy and their expectations of the state.

TIME TO PREPARE

Looking ahead, all domestic and transnational actors concerned with democracy’s future must closely monitor the wide-ranging, fast-moving political effects of the pandemic, rapidly devise responses to lessen potential harm, and seize any positive opportunities the crisis may present. Coming soon is a second, perhaps even bigger wave of political disruption that will be caused by the unfolding global economic crisis. Potentially devastating increases in economic inequality, unemployment, debt, and poverty, as well as pressures on the stability of financial institutions, will put enormous strains on governance systems of all types. After the global financial crisis that erupted in 2008, few foresaw the very long tail of negative political consequences. Yet that crisis ultimately ushered in the rise and spread of illiberal populism, fragmentation of party systems, and consolidation of several authoritarian regimes—long after economic recovery was under way.

Amid a new crisis even more daunting in scale, there is a natural tendency for governments and individuals alike to be consumed by the urgency of near-term domestic fallout from the pandemic. But just as the virus’s contagion respects no borders, its political effects will inevitably sweep across boundaries and continue to echo long after the health emergency has eased. Now is the time to get ready.

#### It’s existential – causes disease, terror, and great power war.

Krasner 18 (Stephen D. Krasner, Fellow of the American Academy, Senior Fellow at the Freeman Spogli Institute for International Studies, Graham H. Stuart Professor of International Relations, and Senior Fellow at the Hoover Institution at Stanford University, Karl Eikenberry, Fellow of the American Academy, Oksenberg-Rohlen Fellow and Director of the U.S.-Asia Security Initiative at Stanford University’s Asia-Pacific Research Center, Conclusion, Daedalus, Conclusion, Journal of the American Academy of Arts & Sciences, Volume 147, Issue 1, Winter 2018 Pages 197-211, MIT Press Journals, doi:10.1162/DAED\_a\_00484)

Civil wars can impact the wealthiest and most powerful countries in the world. The most consequential potential impacts are transnational terrorism and pandemic diseases, global crises that could be caused by intrastate conflict. Civil wars might also lead to large-scale migration, regional instability, and potential great-power conflict. And high levels of intrastate violence and loss of government control can often give rise to massive criminality, though this is most effectively addressed through domestic law enforcement rather than international initiatives.

The nature of civil wars varies. The most important distinction is between civil strife that is caused by the material or political interests of the protagonists and civil strife that is caused by transnational ideological movements. The latter, if successful, might threaten regional stability and even the stability of the contemporary international system that is based on sovereign statehood. Transnational ideological movements, which in the contemporary world are almost all associated with particular versions of Islam, base legitimacy on the divine and reject both existing boundaries and secular authority. While transnational movements claiming divine authority are more threatening to the existing international order, it is very difficult for such movements to secure material resources. Institutions that control these resources, primarily states but also international organizations, ngos, and multinational corporations, are manifestations of the extant global order. When combatants in civil wars are motivated by material incentives and accept the principles of the existing international order, then the “standard treatment” for addressing civil strife–un peacekeeping plus some foreign assistance–is the most effective option if combatants believe that they are in a hurting stalemate, and if there is agreement among the major powers. If, however, combatants reject the existing order, then the standard treatment will not work.

Finally, based on most, but not all of the essays in these two issues of Dædalus, the opportunities for external interveners are limited. Countries afflicted by civil strife cannot become Denmark or be placed on the road to Denmark; they cannot be transformed into prosperous democratic states. The best that external actors can hope for is adequate governance in which there is security, the provision of some services especially related to health and possibly education, and some limited economic growth. This is true whether the standard treatment is applied or if one side can win decisively. More ambitious projects aimed at consolidated democracy, sustained economic growth, and the elimination of corruption are mostly doomed to fail and can be counterproductive regardless of whether the combatants are interested in seizing control of an existing state or are motivated by some alternative, divine vision of how political life might be ordered. National political elites in countries afflicted with civil strife will be operating in limited-access, rent-seeking political orders in which staying in power is their primary objective. National elites will not accept accountability, legal-rational bureaucracies, or free and fair elections, all of which would threaten their power.

The essays in these two issues of Dædalus and the literature more broadly identify six threats from civil strife that might directly impact the wealthy and more powerful polities of the world, or the nature of the postwar liberal international order. The first two–pandemic diseases and transnational terrorism–are potentially the most consequential, although neither poses the kind of existential threat presented by war among nuclear armed states.

Pandemic diseases. As the essay by Paul Wise and Michele Barry points out, since 1940, some four hundred new diseases have emerged among human populations.2 Most of these diseases have been zoonoses: disease vectors that have jumped from animal populations, in which they may be benign, to human populations, in which they might cause serious illness. Most of these outbreaks have occurred in a belt near the equator, where human beings intermingle more closely with animals, such as bats and monkeys. The main impact of civil wars is, however, not in increasing the number of new diseases, but rather diminishing the capacities of health monitoring systems that could identify, isolate, and possibly treat new diseases. Effective detection requires constant monitoring, which is extremely difficult in areas that are afflicted by civil war. Epidemics, or at least disease outbreaks, are inevitable given the ways in which human beings impinge more and more on animal habitats, but allowing an epidemic to evolve into a pandemic is optional. If effective detection and monitoring are in place, a disease outbreak will not turn into a pandemic that could kill millions. So far, the world’s population has been spared such an outbreak. If, however, a disease can be transmitted through the air, and if civil strife or something else prevents effective monitoring, the likelihood of a pandemic increases.

Transnational terrorism. Terrorism, which in recent years has primarily, but not exclusively, been associated with Islamic jihadism, can arise in many different environments. At the time of the September 11 attacks, Al Qaeda and its leader Osama bin Laden were resident in Afghanistan, a very poor, land-locked country. Before that, Bin Laden had found refuge in Sudan. Most of the participants in the September 11 attack, however, were born in the heart of the Arab world, namely in Saudi Arabia, and had resided for a number of years in Germany. The perpetrators of the July 7 attacks on the mass transit system in London were Muslims of Somali and Eritrean origin, raised and schooled in the United Kingdom. The bomber, whose efforts to bring down an airliner headed for Detroit were frustrated by a courageous and alert passenger, was a Nigerian citizen who had spent time with jihadi ideologues in the Middle East. The attacks in Paris and Nice in 2015–2016 were carried out by individuals born in North Africa, but who had lived for many years in Western Europe. The murders of fourteen peo- ple in San Bernardino, California, were perpetrated by a U.S. citizen born in Chicago, whose parents were from Pakistan and who was educated at California State University, San Bernardino, and his wife, who was born in Pakistan but spent many years in Saudi Arabia. The massacre at the Orlando, Florida, night club in 2016 was carried out by the American-born son of a man who had emigrated from Afghanistan and had lived for many years in the United States.

While terrorism associated with Islamic jihadism is hardly an exclusive product of safe havens in countries afflicted by civil strife or poor governance, the existence of such safe havens does, as Martha Crenshaw argues, exacerbate the problem.3 Safe havens are environments within which would-be terrorists can train over an extended period of time. A number of terrorists, even those raised in Western, industrialized countries, have taken advantage of such training. Transnational terrorist organizations might or might not secure weapons of mass destruction; they might or might not develop more effective training; their operatives might or might not be discovered by intelligence services in advanced industrialized democracies. Civil war and weak governance, however, increase the likelihood that transnational terrorist groups will find safe havens, and safe havens increase the likelihood of attacks that could kill large numbers of people.

Global pandemics and transnational terrorism are the two most serious threats presented by civil wars. The probability that either will significantly undermine the security of materially well-off states is uncertain, but both are distinct sources of danger. Civil wars and weak governance increase the likelihood that large numbers of people could be killed by either threat. Neither is an existential threat, but both could have grave consequences for advanced industrialized democratic states. Hundreds of thousands or millions of people could die from a pandemic outbreak resulting from an easily transmissible disease vector or from a transnational terrorist attack that could involve dirty nuclear weapons, an actual nuclear weapon (still quite hard to obtain), or artificial biologics (increasingly easy to produce).

Either a global pandemic or terrorist attack, possibly using weapons of mass destruction, would almost certainly lead to some constraints on the traditional freedoms that have been associated with liberal democratic societies.

Migration, regional instability, and greatpower conflict. Civil wars are also dangerous because they could lead to greater refugee flows, regional destabilization, and great-power conflict. Not every civil war has the potential for generating these global crises, but if generated, they would be a product not just of civil strife but also of policy choices that were made by advanced industrialized countries. In this regard, they should be contrasted with possible pandemics and transnational terrorism that, arguably, would occur regardless of the policies adopted by wealthy democratic states.

As Sarah Lischer’s essay shows, the number of migrants–especially people displaced by civil wars–has increased dramatically in recent years.4 Most of these migrants have been generated by three conflicts, those in Afghanistan, Syria, and Somalia. The wave of migrants entering Western Europe has destabilized traditional politics and contributed to the success of Brexit in the uk, the increased share of votes secured by right-wing parties in a number of Western European countries, and the electoral gains of a number of right-wing parties in Eastern Europe. Anxiety about immigration contributed to Donald Trump’s victory in the United States. European countries, even those on the left like Sweden, have responded to rising numbers of refugees by tightening the rules for potential migrants. The European Union reached a deal with Turkey in 2016 to provide financial resources in exchange–among other things–for an increase in acceptance of refugees. At the same time, the sheer number of refugees in Jordan and Lebanon can potentially undermine government control in those countries.

The impact of civil wars in one country can spread to surrounding areas. isil’s ambitious campaigns have afflicted Syria and Iraq. Civil strife in Somalia has, as Seyoum Mesfin and Abdeta Beyene write, influenced the policies of Ethiopia.5 The farc insurgency in Colombia impacted Venezuela and Ecuador. Conflict in the Democratic Republic of the Congo (drc) drew in several neighboring states. Some regional conflicts have resulted in millions of deaths, most notably the war in the drc, with limited impact on and attention from wealthy industrialized countries. Wars in the Middle East, however, have been more consequential because they have led to the involvement of Russia and the United States, they are closer to Europe and have therefore generated more refugees, and Middle Eastern oil is a global commodity on which much of the world depends. Regional destabilization in the Middle East does matter for the West; regional destabilization in Central Africa may only matter for those who live in the neighborhood.

Direct confrontation between major powers has not occurred since the end of World War II. In well-governed areas, where civil wars are absent, the likelihood of great-power conflict is small. Territorial conquest has been delegitimized (though Russia’s annexation of Crimea stands as a recent exception to this norm). The existence of nuclear weapons has removed uncertainty about the costs of a confrontation between nuclear-armed states with assured second-strike capability. Great-power confrontations are, however, more likely in areas that are afflicted by civil strife, because instability and appeals from local actors could draw in major state actors with vested interests. This is especially true for the Middle East. Moreover, in countries on the periphery of Russia that were formerly part of the Soviet Union, especially those with sizeable Russian ethnic populations, the government in Moscow has demonstrated that it can increase the level of internal unrest. There is no guarantee of stability, even in countries that might have been stable absent external support for dissident groups that would otherwise have remained quiescent.

## Cartels – 1AC

#### Advantage Two is Cartels:

#### *Empagran* created circuit splits that prevent PROA.

Balde ’16 [Alen; January 2016; Submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy School of Law College of Social Sciences University of Glasgow; *University of Glasgow,* “Private Antitrust Law Enforcement in Cases with International Elements;” KS]

The U.S. Supreme Court in the Empagran case opened a door to private plaintiffs being able to litigate their foreign antitrust injuries before the U.S. courts. Unfortunately, the Supreme Court did not show the path through this door, but referred the case back to the second Court of Appeals for a decision. The second Court of Appeals did not accept the Supreme Court’s invitation to walk through the door, but placed an unexpected obstacle before the door. This thesis submits that private litigants have been left without instructions1 as to how to overcome this obstacle and successfully enter through the door opened by the Supreme Court.

The Empagran case is considered to be the first antitrust litigation where the Supreme Court of the U.S. was asked to decide on the permissibility of foreign antitrust injury to be litigated before the U.S. courts.2 It is submitted that the Supreme Court’s Empagran decision opened wide the doors of the U.S. courts and thus permitted private plaintiffs who suffer antitrust harm outside the U.S. to bring private antitrust claims before the U.S. courts and seek compensation for their suffered antitrust injury.3 At this point, a reminder is necessary that particular caution is required to understand correctly the extent of the issues decided through Empagran, and the significance of the Supreme Court’s decision in particular for future antitrust litigation.4 This means that the outcome of Empagran cannot be considered as guidance on its own for private litigants and adjudicating courts on how to conduct adjudication in future litigation. The arguments brought before the courts through Empagran and the reasoning that the courts used in formulating their decisions enable us to understand that Empagran does not provide guidance for private antitrust litigation, in particular and most importantly, with regard to how to establish the existence of a relevant type of connection between litigated (foreign) private antitrust injury and anticompetitive effect (and antitrust injury) in the U.S. in order to have this antitrust injury litigated before the U.S. courts and obtain compensation.5

The Empagran litigation is not the last private antitrust litigation where private plaintiffs litigated their (foreign) private antitrust injury before the U.S. courts. Irrespective of confusions present in the reasoning of the adjudicating courts throughout Empagran and the questions these courts did not answer, private plaintiffs were not reluctant to continue to litigate their foreign antitrust injury before the U.S. courts. This antitrust litigation that private plaintiffs initiated after the Empagran litigation resulted in cases (i.e. post-Empagran cases) that will be analysed in this chapter.6

The metaphor offered at the beginning of this chapter included some colloquial words, i.e. doors, path, obstacle. Such words were used merely to illustrate in a simple way the legal issues, arguments, rulings, analysis and conclusions presented in detail and in a comprehensive manner in the previous chapter (i.e. chapter 2). As mentioned above, the analysis in this chapter (i.e. chapter 3) would not be possible without the existence of post-Empagran cases. Nevertheless, it is important to explain that the legal (i.e. primary) reason for conducting analysis in this chapter is not the existence of post-Empagran litigation itself, but the need to explore the relationship between the Empagran litigation and post-Empagran cases.

This chapter will analyse the nature of the relationship between Empagran and post-Empagran cases by providing answers to the following questions:

• Whether Empagran (i.e. decisions reached by the adjudicating courts) has influenced the adjudication process in post-Empagran litigation and to what extent;

• Whether post-Empagran courts perceive the decisions in the Empagran case as binding, undisputed legal precedents, or merely as advisory statements subject to further development and review;

• Whether post-Empagran litigation has provided encouragement and support to private litigants to walk through the door opened by the Supreme Court.

The question of the relationship between the Empagran litigation and subsequent cases is also of great practical value. It is important that adjudicating courts in post-Empagran litigation do not misinterpret the extent, reasoning, and nature of the decisions reached by the adjudicating courts in the Empagran saga. If there is misinterpretation then private antitrust law enforcement may take a questionable direction and, consequently, affect the rights of private plaintiffs who suffer foreign antitrust injury.

Therefore, it is important to be reminded of the analysis undertaken in chapter 2, which can be summarized as follows: the decisions in the Empagran litigation were based on several assumptions; the Empagran litigation raised more questions than it answered; the Empagran litigation did not provide guidance for future private antitrust litigation, and there exists an unresolved relationship between the Supreme Court’s acceptance of the possibility that the private plaintiffs litigate their foreign antitrust injury claim on the basis of the alternative theory (as long as the facts support the existence of the alternative theory7) and the position of the Second Court of Appeals with regard to proximate causation between anticompetitive effect (antitrust injury) in the U.S. and litigated (foreign) private antitrust injury being the legal standard under which private plaintiffs who suffer antitrust harm outside the U.S. can bring their private antitrust claims before the U.S. courts.

The analysis of how the Empagran decision was applied in subsequent litigation provides a practical opportunity to review how adjudicating courts are asked to consider problematic situations when they have only one, binding but unclear decision that can be classified as the only relevant precedent on the legal issue under adjudication.8 The law in this area is not definitively established9 and is not even sufficiently developed.10 Therefore, this chapter provides a critical evaluation of the existing approach that adjudicating courts have adopted in deciding whether foreign private antitrust injury can be compensated. The chapter also identifies the issues through post-Empagran cases which, according to this thesis, were correctly decided, and those which were not and, therefore, need to be changed in any future litigation.

2 TheSignificanceofthisChapter

A crucial proposition of this thesis is the submission that the Empagran litigation is a starting point for a new type of private antitrust law litigation. The Empagran litigation provided some analysis and decisions, but it has not definitively framed the area of private antitrust law enforcement within the international context. The Empagran litigation has raised a number of issues, some of which were decided (correctly/appropriately or not), but some were left open.11

#### Plaintiffs have no guidance on what conditions permit PROA – stalls suits.

Balde ’16 [Alen; January 2016; Submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy School of Law College of Social Sciences University of Glasgow; *University of Glasgow,* “Private Antitrust Law Enforcement in Cases with International Elements;” KS]

Not all post-Empagran cases provide orientation (guidance) on the conditions that have to be fulfilled for having (foreign) private antitrust injury litigated before the U.S. courts. These cases are of serious concern for two reasons. Firstly, they do not provide any explanation on why certain types of factual allegations are not sufficient to sustain the litigation of (foreign) private antitrust injury. Secondly, they do not provide any guidance to potential future private plaintiffs and courts on what factual allegations have to be brought before the adjudicating courts to have (foreign) private antitrust injury successfully adjudicated by the U.S. courts.

There are many examples of post-Empagran decisions that can be considered as conclusory statements with no additional explanation, and consequently without any practical value. This means that all that the adjudicating courts stated was that the injury did not arise out of effects in the U.S.,585 or that the plaintiffs failed to demonstrate that either exception was applicable to this case,586 or that the allegations are insufficient to establish the requisite direct causal relationship between the domestic effect of the defendants' alleged anticompetitive behaviour and the foreign injury587.

The same is true for the statement that plaintiffs are required to allege plausible facts showing that the U.S. effect in question also gives rise to a Sherman Act claim,588 or that higher prices in the U.S. caused by the defendants' conduct proximately caused the plaintiff to pay higher prices outside the U.S.,589 without the adjudicating courts providing any indication of what type of facts can be considered plausible. There are similar problems with an adjudicating court stating that plaintiffs must demonstrate by a preponderance of the evidence that the domestic effects of the defendants' antitrust conduct proximately caused their foreign injuries,590 and that but-for causation is insufficient,591 as the adjudicating court did not make any attempt to explain what kind of facts and allegations can support such causation.

A post-Empagran court also made it clear that in a situation where private plaintiffs merely allege that a worldwide conspiracy is necessary for the conspiracy's overall success, i.e. that it is a single, unified, global price-fixing conspiracy that could not be maintained without price-fixing in the U.S., this does not satisfy the FATIA’s requirement that the conspiracy's domestic effect should give rise to the plaintiff’s claim.592 At the same time, this statement does not provide any guidance on what private plaintiffs have to allege in addition to a global conspiracy to have their private antitrust claim litigated before the U.S. courts. Nevertheless, private plaintiffs can still extract guidance out of this statement, i.e. that merely alleging antitrust violation (even if this is in the form of a global conspiracy) is not sufficient.

Particularly challenging are those statements in post-Empagran cases where the adjudicating court only states that prices in the U.S. may have been a necessary part of the conspirators’ conduct, but merely one link in the causal chain and consequently not significant enough to constitute the direct cause of the plaintiffs’ injuries.593 Similarly problematic is the statement by an adjudicating court that alleging arbitrage theory (i.e. a relationship between prices in the U.S. and outside the U.S.) is not enough;594 or that prices in the U.S. having facilitated the defendants’ scheme to charge super-competitive prices outside the U.S. is not sufficient595 to show a direct causal relationship between prices in the U.S. and prices outside the U.S.;596 or that simultaneous effects in the U.S. and outside the U.S. do not constitute proximate cause;597 or that a global conspiracy simultaneously and independently injuring purchasers of products in the U.S. and outside the U.S. as they had to pay supra-competitive prices, even if the prices were the same, does not establish the required type of causation;598 or that bound prices in the U.S. and outside the U.S. of products that are not fungible do not establish proximate causation.599

This analysis shows that post-Empagran courts took an approach where they stated what was insufficient to sustain a private antitrust claim before the U.S. courts. Therefore, private plaintiffs and courts are left on their own to grasp under what conditions it is permitted to litigate (foreign) private antitrust injury before the U.S. courts.n

It would seem that post-Empagran courts are aware of the problem they caused by being clear on what proximate causation in the FTAIA context does not mean, and not articulating clearly what proximate causation does mean in the FTAIA context.600

At the same time, post-Empagran courts admitted that proximate causation is a notoriously slippery doctrine which has taken various forms over the years and which is not easy to define.601

It is beyond the scope of this thesis to undertake analysis to understand why post-Empagran courts took this passive (non-constructive) approach to determining the substance of the required type of relationship between anticompetitive effects and the litigated (foreign) private antitrust injury and despite knowing that what they are expecting that private litigants will present before the U.S. courts can be assessed in very questionable manner.

This thesis submits that the requirement for foreign private antitrust injury to be litigated before the U.S. courts is not proximate causation but dependency between anticompetitive effects (antitrust injury) in the U.S. and litigated foreign private antitrust injury.602

This is why it is even more surprising to note that post-Empagran courts never tried to give some guidance on what is expected in order to sustain the requirement of dependency. This is something that the Supreme Courts in the Empagran litigation left unanswered.603 Again, there are statements that do not provide any guidance (explanation) at all. These statements are the following: the plaintiffs cannot sufficiently allege that their foreign injury was dependent upon, or somehow directly linked to, the domestic effect at issue;604 plaintiffs are unable to allege that their injury was directly linked to acts that caused injury to U.S. commerce;605 the correlation or interdependence of markets does not suffice to show that the effect in the U.S. gives rise to the plaintiff’s claims.606

#### Plan spurs cartel deterrence – solves under- and over- regulation.

Michaels ’16 [Ralf; 2016; Arthur Larson Professor of Law, Duke University School of Law; “Supplanting Foreign Antitrust,” <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4808&context=lcp>; KS]

The developing country may have a genuine interest in such supplanting – especially if the cartel is too powerful or too complex for the country's own authorities. A further interest in such supplanting is shared by developed and developing countries alike: the global interest in centralized regulation of a cartel.66 When a cartel transcends boundaries, separate regulation within each affected market is inefficient because multiple agencies are required to engage in similar regulation. This duplicates regulation costs for agencies and raises costs for both plaintiffs and defendants in antitrust litigation." Moreover, without coordination, such parallel and duplicative regulation can, in theory, lead to either over- or under-regulation.68 In practice it will more likely lead to underregulation, because no state would go above what is necessary for its own market, but some may not find it worthwhile to regulate the cartel.69 Transgovernmental coordination of antitrust regulation, the main alternative to centralized regulation, can lead to considerable costs, because agreements must be reached between different states. Thus, the most efficient way to regulate a multinational cartel is centralized regulation.

If centralized regulation is attractive, the most attractive regulator would appear to be a supranational institution. Such an institution does not exist, however. Hopes for a world antitrust court, for example within the WTO, have not materialized. Regional courts like the courts of the European Union are of little help for cases outside or beyond Europe. Thus, in the absence of such an institution, the question remains whether centralization can take place through the institutions of one of the affected countries, in particular of a developed country. Central regulation of the entire cartel by one developed country could be viewed as a stark example of positive comity.

Centralized enforcement by a developed country is not only based on a mutual interest, however. In addition, developed countries have a genuine interest in taking into account worldwide effects of a multinational cartel. As the U.S. Supreme Court argued in a somewhat different context "[P]ersons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home."70

This can be demonstrated with a simple thought experiment. Imagine a cartel makes supra-competitive profits of $1 billion worldwide, of which $100 million is made in the United States. If a U.S. court assigns treble damages to the class of U.S. purchasers, the cartel faces costs of $300 million, which leaves it with an overall profit of $700 million. As a consequence, the threat of treble damages in the United States alone is not a sufficient deterrent for the cartel. Importantly, the cartel is not even deterred from fixing prices in the U.S. market. Allowing only purchasers from the U.S. market to sue for treble damages thus leads to under-regulation, even for the U.S. market.71

Note that this assessment does not change when the cartel affects multiple countries with effective antitrust regimes. Even if multiple agencies around the world assess fines and damages with regard to the effect the cartel has on their markets, the cartel may remain under-regulated, because not all countries affected by the cartel will actually regulate. Imagine, in the hypothetical example above, that the global cartel makes sixty percent of its profits in developed countries and forty percent in developing countries without effective antitrust institutions. If, in this case, each of the countries that do regulate confined itself to the effect on its own market, the cartel would be regulated only with regard to sixty percent of its profits-it would, in other words, remain under-deterred.

Such under-regulation is not required by the restrictions international law places on extraterritoriality: Where foreign corporations are injuring foreign purchasers in a foreign market, one could argue that the United States lacks a sufficient connection to take those foreign purchases into account. But this argument is erroneous. As long as the regulating country is affected, it has jurisdiction to regulate the cartel, even if some of the effects are felt elsewhere. International law does not require that such regulation must be confined to the effects within the regulating country. Although effects create the basis for jurisdiction, what is being regulated is the conduct.

Indeed, the same result could be reached without direct regulation of foreign markets. Imagine the United States provided a remedy only to the U.S. purchasers, but that remedy was tenfold rather than threefold damages, because that was calculated as necessary to achieve deterrence. In this case, the cartel would be as effectively deterred as it would be by granting treble damages to foreign purchaser, but there would be no problem of extraterritoriality.7 2 If $1 billion is the amount necessary to deter the cartel from fixing prices on a global market that includes the United States, then the United States can legitimately assess this amount in order to protect its interests. As a matter of fact, public authorities regularly assess their fines on the basis of the cartel members' worldwide turnover.73

Moreover, even in a situation with existing antitrust regulation in various countries, it would be in every country's interest that the cartel be regulated also with regard to effects on those markets that have no effective enforcement regimes.74 If a supranational institution existed, it could appoint the country that should regulate the anti-competitive conduct.75 In the absence of such an institution, determining the appropriate regulator is harder but not impossible. Principles of positive comity, combined with conflict-of-laws rules, should make it possible for them to defer to the best-equipped country.76 This may often be the country in which most of the defendants are situated, or the country that was most affected by the cartel.

Regulation may thus be in the interest of the developed country. It is also in the interest of the developing country if enough of the previously discussed conditions are met. If a cartel affects a country without an effective antitrust regime, that country will, under most circumstances, benefit from effective regulation of the cartel, even if that regulation is performed by the institutions of a developed country. Under-regulation of the cartel would be worse for the developing country. These considerations are relevant under international law, too. Extraterritoriality is a problem for sovereignty: regulating events taking place in a foreign country threatens to impede that country's sovereignty. If a developing country raises a protest-a diplomatic protest, an amicus curiae brief, or even an informal complaint-this is relevant under international law. Even if the developed country has jurisdiction, the protest, as an expression of strong countervailing foreign interests, may make its exercise unreasonable.77 If the country does not raise such a protest, however, this will often mean that it does not perceive regulation by the developed country as an intrusion into its sovereignty. An explicit request, as provided under positive comity, should not be required.

#### Scenario One is Africa:

#### International ag cartels dominate the food chain.

ETC 13, \*ETC, Action Group on Erosion, Technology and Concentration, staff and board members come from a variety of backgrounds, including community and regional planning, ecology and evolutionary biology, and political science; (September 2013, “Putting the Cartel before the Horse ...and Farm, Seeds, Soil, Peasants, etc.”, https://www.etcgroup.org/sites/www.etcgroup.org/files/CartelBeforeHorse11Sep2013.pdf)

Introduction: 3 Messages

ETC Group has been monitoring the power and global reach of agro-industrial corporations for several decades – including the increasingly consolidated control of agricultural inputs for the industrial food chain: proprietary seeds and livestock genetics, chemical pesticides and fertilizers and animal pharmaceuticals. Collectively, these inputs are the chemical and biological engines that drive industrial agriculture.

This update documents the continuing concentration (surprise, surprise), but it also brings us to three conclusions important to both peasant producers and policymakers…

1. Cartels are commonplace. Regulators have lost sight of the well-accepted economic principle that the market is neither free nor healthy whenever 4 companies control more than 50% of sales in any commercial sector. In this report, we show that the 4 firms / 50% line in the sand has been substantially surpassed by all but the complex fertilizer sector. Four firms control 58.2% of seeds; 61.9% of agrochemicals; 24.3% of fertilizers; 53.4% of animal pharmaceuticals; and, in livestock genetics, 97% of poultry and two-thirds of swine and cattle research. More disturbingly, the oligopoly paradigm has moved beyond individual sectors to the entire food system: the same six multinationals control 75% of all private sector plant breeding research; 60% of the commercial seed market and 76% of global agrochemical sales.1 Some also have links to animal pharmaceuticals. This creates a vulnerability in the world food system that we have not seen since the founding of the UN Food and Agriculture Organization. It’s time to dust off national competition / anti-combines policies and to consider international measures to defend global food security.

2. The “invisible hold” of the market is growing. For all the talk of the invisible hand of the free market, the market is evermore opaque and far from “free.” As the concentration grows, companies are more guarded with their information. Further, the investment companies that analyze markets have also become more concentrated and more proprietary (and their information is more expensive). As the “invisible hold” tightens, it is harder and harder for governments – and more so, peasants – to understand the level of food system control exercised by a handful of multinational enterprises. As a result, ETC’s data – in order to be accurate – is dependent upon 2011 figures. Be assured that corporate concentration in these sectors is not receding. Agribusiness must be legally obliged to provide full and timely data on sales and market share.

3. Climate research shows that we don’t know (that) we don’t know our food system: One positive outcome since our last update is that society in general – and governments in particular – are more aware of the threat posed by climate change to global food security. There is now a popular mantra (but not much movement) emphasizing the central importance of smallholder producers in meeting global food requirements in the decades ahead. We couldn’t agree more. To help policymakers move from mantra to marching orders, this Communiqué is accompanied by a poster contrasting the capacity of the Industrial Food Chain and the Peasant Food Web to address climate chaos. The poster raises 20 genuine questions. It is a work-in-progress. There may be more than one answer to the questions, but the data provides a basis for a fundamental change of mind and shift in policy direction. For some of the reasons cited already, the data policymakers need to make decisions are not always available (or accurate). As the United Nations Framework Convention on Climate Change prepares to receive the fifth assessment report of the Intergovernmental Panel on Climate Change over the coming months, we hope this report and accompanying poster will encourage a much needed constructive debate and complementary research on all of the issues we are raising.

Over the past half-century, the corporations that dominate the industrial food system have wrested control of the agricultural R&D agenda while concentrating power and influencing trade, aid and agricultural policies to fuel their own growth. There was cautious hope in the United States that a new era was dawning when, in 2009 – the first year of President Obama’s first term – the US Department of Agriculture and the Antitrust Division of the Department of Justice (DOJ) announced a joint investigation into anticompetitive practices in agriculture. The news that Monsanto specifically had been required to turn over internal documents related to seed prices raised the level of optimism. But when the DOJ dropped the Monsanto investigation almost 3 years later without explanation, it was clear that antitrust fervour had fizzled, despite the breathless claims2 (which happen to be true) that anticompetitive practices in agriculture pose a threat to public health and security.

#### Africa has few civil lawsuits – the plan can resolve market failure.

Jenny ’20 [Frederic; January 22; Professor of Economics, ESSEC Business School, Paris, France; Chair OECD Competition Committee; The Antitrust Bulletin, “An Essay: Can Competition Law and Policy Be Made Relevant for Inclusive Growth of Developing Countries?” <https://journals.sagepub.com/doi/full/10.1177/0003603X19898621>; KS]

On closer scrutiny, the competition experience of South Africa, which is by far the most advanced of the African countries reviewed and has a strong judiciary, so far at least, is not entirely encouraging.3 There have been a few civil lawsuits based on the claims of competition violations and those have been introduced not by “outsiders” or poor victims of anticompetitive abuses but by already fairly established competitors or institutional customers. One plaintiff was South African Airline Nationwide, which brought a claim against national carrier South African Airways (SAA); another was the City of Capetown (which brought a suit against a number of construction companies for civil damages arising from their agreement to rig bids in relation to the construction of the Green Point Stadium in Cape Town).

Section 38(c) of the South African Constitution allows for class actions for an infringement of any fundamental right in the Bill of Rights and this applies to competition law. There have been two class action cases against bakers (The Trustees for the Time Being for the Children’s Resource Centre Trust and Others v. Pioneer Foods (Pty) Ltd and Others, and Mukaddam and Others v. Pioneer Foods (Pty) Ltd and Others) following the prosecution of the bread price-fixing cartel by the Competition Commission in 2010. The Pioneer case was the first of its kind and was brought by five individuals together with several NGOs against Tiger Brands, Pioneer Foods, and Premier Foods for their participation in the bread cartel. It allowed the Supreme Appeals Court of South Africa to clarify a number of issues, particularly those pertaining to the certification of the class. There is some hope that these precisions will lead to an increase in the number of class actions in general. Those cases are still pending, however, nine years after the Competition Tribunal decision.4

Finally, the authors also propose a pro-development agenda with respect to the advocacy function of competition authorities in African countries. This agenda targets both domestic public restraints to competition and transnational anticompetitive practices.

With respect to domestic public restraints to competition, the authors suggest that the advocacy function of competition authorities (and their market investigation powers) should be aimed at regulatory laws that unnecessarily restrict competition; at state-owned monopoly boards, prevalent in African countries, trading in various commodities (including agricultural commodities) with poor results; and at restrictive national trade laws which often protect domestic lobbies to the detriment of consumers and also of newcomers.

With respect to transnational anticompetitive practices that often target developing countries where competition law enforcement is weak and victimize the consumers and the firms of these countries through a combination of exploitative and exclusionary practices, the authors call on the international community to renew efforts to tackle the vexing issue of export cartels by finding inspiration in innovative mechanisms inspired by the spirit of positive comity which has been adopted in other areas such as the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal.

#### Market failures depress growth in ag.

Nair ’19 [Gaylor Montmasson-Clair and Reena; Senior economist at Trade and Industrial Policy Strategies (TIPS), a South Africa based economic policy think-tank, where he leads work on sustainable growth. He has done extensive research on the transition to a sustainable development pathway from a developing country perspective; Founding director of and principal consultant at Optimal Competition and Compliance Solutions based in Lusaka, Zambia. He served as CEO of the Competition Authority in Botswana from 2011 to 2016 and as Executive Director of of the Competition and Consumer Protection Commission of Zambia during the period 2008–2011; Competition Law and Economic Regulation Addressing Market Power in Southern Africa, “Cartel Enforcement in the Southern Africa Neighborhood,” pg. 191-192; KS]

Economic regulation, competitive outcomes and inclusive growth

The presence and persistence of a range of market failures is the most prominent justification for economic regulation. Market failures arise when resources are not allocated or priced efficiently, and when a more optimal outcome would result from reallocating resources and altering prices. Market failures, along with other constraints, impede the poor and marginalised from accessing markets and benefiting from growth, thereby perpetuating inequality and non-inclusive growth (Ali and Son, 2007; Ianchovichina and Lundstrom, 2009; see also chapter 5, this volume).

One type of market failure, and a persuasive justification for regulation, is the presence of natural monopolies. Typical industries that have natural monopoly characteristics and that are commonly subject to regulation include electricity transmission, liquid fuel pipelines, telecommunication infrastructure and water supply systems. In South Africa, economic regulation has focused on regulating the natural monopoly parts of these value chains, which were formerly stateowned and subsequently privatised (Roberts and Mondliwa, 2014).

Another type of market failure arises from non-competitive markets. This can occur when a single firm or groups of firms possess persistent market power which results in less than optimal output being produced with higher resultant prices. The lack of effective competition could result in dominant firms abusing their market power or engaging in collusive behaviour, obtaining rents at the expense of consumers and potential competitors. This has negative implications for productivity and job creation. Uncompetitive markets also result in lower levels of innovation, reduced choice for consumers and poorer quality of goods or services. Not only are direct consumers harmed, but the viability of downstream industries is affected if the product in question is an intermediate input. Furthermore, firms with market power that control essential facilities that cannot easily be replicated or that control key inputs could abuse their dominance by limiting access to their facilities, thereby creating barriers to entry. Regulation can be a way to curb excesses in market power by regulating access to infrastructure as well as other market outcomes, including prices (Viscusi et al., 2000, in Roberts and Mondliwa, 2014).

South Africa’s history and economic policies under apartheid created markets that are highly concentrated, with a few firms in strategic industries possessing considerable market power. Economic opportunity only catered to the interests of minority groups. The state owned and controlled several strategic sectors, such as energy, telecommunications, mining, agriculture and several intermediate industrial product markets. Even following the liberalisation and privatisation trends of the 1990s, most of these industries continue to be highly concentrated while some remain state-owned (Makhaya and Roberts, 2013). Participation by new entrants has typically been constrained through structural or strategic barriers to entry (or both).

#### Absence of antitrust raises prices and guarantees food insecurity.

Nwuneli ’18 [Ndidi; August 7; Co-Founder of AACE Food Processing & Distribution, Managing Partner of Sahel Consulting Agriculture & Nutrition, Founder of LEAP Africa, and a 2018 Aspen Institute New Voices fellow; Project Syndicate, “The High Cost of Food Monopolies in Africa,” <https://www.project-syndicate.org/commentary/africa-monopoly-food-prices-by-ndidi-okonkwo-nwuneli-2018-08>; KS]

Many consumers in Africa spend a disproportionate percentage of their household income on food. One of the biggest reasons is the failure of regional governments to ensure competition in the food sector, which has led to higher prices and made local agriculture less competitive.

LAGOS – In May, global food prices increased 1.2%, reaching their highest level since October 2017. This upward trajectory is having a disproportionate impact in Africa, where the share of household income spent on food is also rising. To ensure food security, governments must work quickly to reverse these trends, and one place to start is by policing the producers who are feeding the frenzy.

According to data compiled by the World Economic Forum, four of the world’s top five countries in terms of food expenditure are in Africa. Nigeria leads the list, with a staggering 56.4% of household income in 2015 spent on food, followed by Kenya (46.7%), Cameroon (45.6%), and Algeria (42.5%). By comparison, consumers in the United States spend the least globally (6.4%), far less than people in emerging economies like Brazil (16%) and India (30%).

One reason for the distortion is the price of food relative to income. As Africa urbanizes, people are buying more imported semi- or fully processed foods, which cost more than locally produced foods. And in most countries, wages have not kept pace with inflation.

But the primary cause is poor public policy: African governments have failed to curb the power of agribusinesses and large food producers, a lack of oversight that has made local agriculture less competitive. In turn, prices for most commodities have risen.

The absence of antitrust laws, combined with weak consumer protection, means that in many countries, only two or three major companies control markets for items like salt, sugar, flour, milk, oil, and tea . The impact is most pronounced in African cities, where prices for white rice, frozen chicken, bread, butter, eggs, and even carbonated soft drinks are at least 24% higher than in other cities around the world. These prices hit consumers both directly and indirectly (owing to pass-through of higher input costs by food conglomerates and service providers).

The Food and Agriculture Organization of the United Nations (FAO) has long argued that food security and fair pricing depends on markets that are free from monopolistic tendencies. The OECD concurs, and has frequently called on authorities to address “anti-competitive mergers, abuse of dominance, cartels and price fixing, vertical restraints, and exclusive practices” in the food sector. And yet, in many African countries, this advice has rarely been heeded.

To be sure, this is not a new problem. Between 1997 and 2004, for example, the FAO counted 122 allegations of “anti-competitive practices” in 23 countries in Sub-Saharan Africa. Violations included a “vertical monopoly” in the Malawi sugar sector, price fixing in Kenya’s fertilizer industry, and a “buyer cartel” in the Zimbabwean cotton industry. And, despite the considerable attention such cases have received, the underlying problems persist.

According to the World Bank, more than 70% of African countries rank in the bottom half globally for efforts to protect “market-based competition.” While 27 African countries and five regional blocs do have antitrust laws on the books, enforcement is rare. The remaining countries have no regulations at all and have made little progress in drafting them.

There is one notable exception: South Africa. Since 1998, the country’s Competition Act has prohibited any company controlling at least 45% of the market from excluding other firms or seeking to exercise control over pricing. Violators face penalties of up to 10% of their earnings, and during the last two decades, some of the biggest companies in the country – including Tiger Brands, Pioneer Foods, and Sime Darby – have been penalized. As Tembinkosi Bonakele, head of South Africa’s Competition Commission, noted last year, the government is “determined to root out exploitation of consumers by cartels,” especially in the food industry.

Other countries should follow South Africa’s lead. Companies and special-interest groups will always seek to benefit from the absence of regulation. The need for reform is greatest in countries like Nigeria and Ghana, where food expenditures are high and food-industry pressure is most pronounced. Fortunately, there is growing recognition of the need to address these challenges. Babatunde Irukera, Director General of the Consumer Protection Council in Nigeria, recently asserted that, “In a large vibrant and loyal market such as Nigeria, the absence of broad competition regulation is tragic. Unregulated markets in competition context constitute the otherwise ‘legitimate’ vehicle for both financial and social extortion.”

Reducing the prices of staple food by even a modest 10% (far below the average premium cartels around the world charge) by tackling anticompetitive behavior in these sectors, or by reforming regulations that shield them from competition, could lift 270,000 people in Kenya, 200,000 in South Africa, and 20,000 in Zambia out of poverty. Such a policy would save households in these countries over $700 million (2015 US dollars) a year, with poor households gaining disproportionately more than rich ones.

Ultimately, it is the responsibility of political leaders to protect consumers from collusion and price-fixing. There is no question that Africa’s businesses need space to innovate and grow, but their success should never come at the cost of someone else’s next meal.

#### Goes nuclear.

Cribb 19, \*Julian Cribb, Principal of Julian Cribb & Associates, Fellow of the Australian Academy of Technological Sciences and Engineering, former Director of National Awareness at the Commonwealth Scientific and Industrial Research Organisation; (August 23rd, 2019, “FOOD AS AN EXISTENTIAL RISK”, https://www.cambridge.org/core/books/abs/food-or-war/food-as-an-existential-risk/8C45279588CD572FE805B7E240DE7368)

Although actual numbers of warheads have continued to fall from its peak of 70,000 weapons in the mid 1980s, scientists argue the danger of nuclear conflict in fact increased in the first two decades of the twentyfirst century. This was due to the modernisation of existing stockpiles, the adoption of dangerous new technologies such as robot delivery systems, hypersonic missiles, artificial intelligence and electronic warfare, and the continuing leakage of nuclear materials and knowhow to non- nuclear nations and potential terrorist organisations.

In early 2018 the hands of the ‘Doomsday Clock’, maintained by the Bulletin of the Atomic Scientists, were re-set at two minutes to midnight, the highest risk to humanity that it has ever shown since the clock was introduced in 1953. This was due not only to the state of the world’s nuclear arsenal, but also to irresponsible language by world leaders, the growing use of social media to destabilise rival regimes, and to the rising threat of uncontrolled climate change (see below).12

In an historic moment on 17 July 2017, 122 nations voted in the UN for the first time ever in favour of a treaty banning all nuclear weapons. This called for comprehensive prohibition of “a full range of nuclear-weapon-related activities, such as under- taking to develop, test, produce, manufacture, acquire, possess or stockpile nuclear weapons or other nuclear explosive devices, as well as the use or threat of use of these weapons.”13 However, 71 other countries – including all the nuclear states – either opposed the ban, abstained or declined to vote. The Treaty vote was nonetheless interpreted by some as a promising first step towards abolishing the nuclear nightmare that hangs over the entire human species.

In contrast, 192 countries had signed up to the Chemical Weapons Convention to ban the use of chemical weapons, and 180 to the Biological Weapons Convention. As of 2018, 96 per cent of previous world stocks of chemical weapons had been destroyed – but their continued use in the Syrian conflict and in alleged assassination attempts by Russia indicated the world remains at risk.14

As things stand, the only entities that can afford to own nuclear weapons are nations – and if humanity is to be wiped out, it will most likely be as a result of an atomic conflict between nations. It follows from this that, if the world is to be made safe from such a fate it will need to get rid of nations as a structure of human self-organisation and replace them with wiser, less aggressive forms of self-governance. After all, the nation state really only began in the early nineteenth century and is by no means a permanent feature of self-governance, any more than monarchies, feudal systems or priest states. Although many people still tend to assume it is. Between them, nations have butchered more than 200 million people in the past 150 years and it is increasingly clear the world would be a far safer, more peaceable place without either nations or national- ism. The question is what to replace them with.

Although there may at first glance appear to be no close linkage between weapons of mass destruction and food, in the twentyfirst century with world resources of food, land and water under growing stress, nothing can be ruled out. Indeed, chemical weapons have frequently been deployed in the Syrian civil war, which had drought, agricultural failure and hunger among its early drivers. And nuclear conflict remains a distinct possibility in South Asia and the Middle East, especially, as these regions are already stressed in terms of food, land and water, and their nuclear firepower or access to nuclear materials is multiplying.

It remains an open question whether panicking regimes in Russia, the USA or even France would be ruthless enough to deploy atomic weapons in an attempt to quell invasion by tens of millions of desperate refugees, fleeing famine and climate chaos in their own homelands – but the possibility ought not to be ignored.

That nuclear war is at least a possible outcome of food and climate crises was first flagged in the report The Age of Consequences by Kurt Campbell and the US-based Centre for Strategic and International Studies, which stated ‘it is clear that even nuclear war cannot be excluded as a political consequence of global warming’.15 Food insecurity is therefore a driver in the preconditions for the use of nuclear weapons, whether limited or unlimited.

#### Food is a likely and proven trigger.

Elliot ‘18 [Charles; February 11; JD from University of Pittsburgh; *Buddhist Global Relief,* “Winning the Peace: Hunger and Instability,” <https://buddhistglobalrelief.me/2018/02/11/winning-the-peace-hunger-and-instability>]

An increasingly hungry world is increasingly unstable. A new report issued by the World Food Program USA—Winning the Peace: Hunger and Instability—presents an unprecedented view into the dynamics of the relationship between hunger and social instability.[1]

Based on exhaustive interdisciplinary queries of a database of 90,000,000 peer-reviewed journal articles, the report explores the underpinnings and drivers of humanitarian crises involving food insecurity and conflict.

The dominant driver of today’s humanitarian crises is armed conflict. Ten of the World Food Program’s thirteen “largest and most complex emergencies are driven by conflict”, and “responding to war and instability represents 80 percent of all humanitarian spending today … stretching humanitarian organizations beyond their limits.”[2] Ongoing conflict not only drives humanitarian crises, but complicates the ability of humanitarian organizations to reach those in need and to provide assistance.

Violence, conflict, and persecution have resulted in the displacement of 65,000,000 people, more than any other time since World War II.[3] The average length of displacement is seventeen years. In such circumstances, measures of food insecurity are nearly triple that found in other developing country settings.[4]

The current humanitarian situation confronts these stark realities:

* For the first time in a decade, the number of hungry people in the world is on the rise. In 2016, 815 million people were undernourished, an increase of 38 million people from 2015. Almost 500 million of the world’s hungry live in countries affected by conflict.
* The number of people who are acutely food-insecure (in need of emergency assistance) rose from 80 million in 2016 to 108 million in 2017—a 35 percent increase in a single year.
* Over 65 million people are currently displaced because of violence, conflict and persecution—more than any other time since World War II.
* For the first time in history, the world faces the prospect of four simultaneous famines in northeast Nigeria, Somalia, South Sudan and Yemen. Each of these crises is driven by conflict.
* Increased migration and the spilling of conflicts beyond borders has led to a proliferation of “fragile states”—states defined by “the absence or breakdown of a social contract between people and their government.”
* By 2030, between half and two-thirds of the world’s poor are expected to live in states classified as fragile. While a decade ago most fragile states were low-income countries, today almost half are middle-income countries.

At the same time, the nature of conflict and the global system of governance are undergoing transitions that undermine the international community’s ability to address and reduce conflict. The report highlights the rise of non-state actors as powerful participants in armed conflict while also recognizing the significance of activities such as the weaponizing of information to undermine the legitimacy of traditional nation-state institutions.

The report also describes how threats such as food insecurity can drive recruitment for terrorists and rebels, worsening destabilization. (Report, p.7) Military strength cannot adequately address these kinds of threats. Rather, appropriate responses to such threats must address their actual nature. Kalashnikovs and rocket-propelled grenades will never be a long-term solution to food insecurity-driven instability. Recognition of this basic reality drives the use of so-called “smart power” in the form of foreign assistance, especially food assistance and agricultural development, to address the underlying causes of this instability.

“If you don’t fund the State Department fully, then I need to buy more ammunition.” U.S. Secretary of Defense, General James Mattis, Congressional testimony in 2013, when he was serving as Commander of U.S. Central Command.

“Show me a nation that cannot feed itself and I’ll show you a nation in chaos.” Senator Pat Roberts (R-KS).

The report supports the use of this kind of smart power by empirically examining the relationship between food insecurity and conflict-driven instability. Because food insecurity is also related to other forms of poverty and disruption, it is difficult to rigorously establish that causal relationship. Thus, it often rests upon anecdotal evidence. Examples include: failed government responses to drought as contributing to regime change in Ethiopia; the contribution of food price riots to the overthrow of governments in Haiti and Madagascar in 2007-2008 and violent protests in dozens of other nations across the globe; food production and price shocks as drivers of the unrest in the Arab Spring (e.g., food strikes nearly every week in Algeria in 2007-2008); and the prolonged drought in Syria reducing agricultural yields and food supplies as a factor in its ongoing crisis. More recently, the world’s attention is drawn to the “four looming famines in northeast Nigeria, Somalia, South Sudan and Yemen” (Report, p. 7), each of which is torn by civil war and ethnic conflict. As World Food Program officer Challis McDonough observed, “Almost all famines, at least in our modern era, are manmade. Fundamentally, conflict is at the root of it[.]”

While these are powerful examples of the connections between food insecurity and instability, efforts to identify and understand the important linkages require a broader base of evidence. WFP drew from a body of over 3,000 peer-reviewed journal articles, finding the clear weight of evidence to establish the link between food insecurity and instability.

The Drivers of Food insecurity and the Manifestations of Social Unrest

WFP identified eleven unique drivers of food insecurity—from land competition and food price spikes to rainfall variability—and nine separate manifestations of social unrest, ranging from peaceful protest to violent interstate conflict.

The eleven unique drivers of food insecurity were “linked to at least nine separate types of instability ranging from peaceful protest to interstate conflict, with riots and civil war in between.” (Report, p. 24). Such conflicts are usually caused by multiple factors. For example, it found that natural disasters can rapidly catalyze manmade crises due to the failure of governing institutions to mount an effective or appropriate response.

Unique, situation-specific combinations of these drivers and individual motivators characterize each instance of food-related instability. Individual motivators for involvement in unrest and violence vary between contexts, but generally fall into three categories: “grievance”, “governance”, and “greed” (economic).

“Grievance” is perceived injustice, which is especially relevant where food insecurity arises within a context of existing social fault lines, causing society to break apart along existing lines of division.

The factor of “governance” is the failure of the state to prevent food insecurity, and its inability to respond to shocks, provide political inclusivity or to suppress uprising. Additionally, where the rule of law is compromised, economic or grievance-motivated individuals can more easily decide to engage in conflict without fear of punishment.

The motivation of “greed” or economic advantage arises where participants in conflict resort to violence because they believe they will derive a higher social or economic advantage from doing so. As the report notes, “extreme poverty provides a low baseline status quo that can be exploited by violent groups” (Report, p. 29).

The drivers of food-related instability fall into three interrelated categories:

(1) Competition for limited agricultural resources (e.g. land and water) that are inadequate to sustain agricultural livelihoods. This manifests in conflicts between communities that rely on livestock and those that rely on growing crops. Such competition also manifests in land grabs, forced land redistribution, and other sources of conflict. Increased migration, especially between ethnically diverse communities, and displacement increase the risk of competition-driven conflict. The U.N.’s Food and Agriculture Association (FAO) estimates that in the last half century, “some 40% of civil wars have been linked to natural resource competition.”[5]

(2) Market failure: Spikes, volatility, and uncertainty in food prices are linked to social unrest, often manifesting in riots and demonstrations, particularly in urban areas. The intensity and duration of food riots are significantly affected by the overall context, including the type of food commodity, the nature of the governing regime, and the perceived cause of the food price rise.

(3) Extreme weather (e.g. drought): Market failure and agricultural resource competition are often caused or exacerbated by changes in weather conditions and climate, which can create desperate conditions for families and communities that are primarily engaged in smallholder farming.

Social and political instability caused by food insecurity has obvious national security implications for the United States and other major world powers. Hunger, insecurity, and hopelessness drive extremism. But diplomacy and development can establish and strengthen the foundations for food security in areas at risk.

#### Scenario Two is Latin America:

#### Mexico fails at antitrust in the status quo.

McKenzie ’21 [Baker; 2021; Baker McKenzie’s unique culture, developed over 70 years, enables their 13,000 people to understand local markets and navigate multiple jurisdictions, working together as trusted colleagues and friends to instill confidence in their clients.In Latin America we offer broader market, industry and legal know-how than any other law firm. With more than 850 lawyers across 15 offices in seven countries, we advise on some of the most significant transactions and legal matters in the region; *Baker McKenzie,* “4 Key Antitrust Insights in Latin America,” <https://www.bakermckenzie.com/-/media/files/insight/publications/2021/12/key-antitrust-insights-in-latin-america-2021.pdf>; KS]

A triple challenge

Broadly speaking, the digital economy throws up three key challenges for competition authorities:

1. Merger oversight

Data is the lifeblood of many digital offerings. Authorities worry that the scale and scope of significant data holdings will give some firms excessive market strength, creating a barrier to competition. As such, regulators are increasingly bringing data into their merger reviews, whether or not it is the core driver behind a deal.

That said, market power could be less clear-cut in digital markets, for several reasons:

• Digital business models are different. Many are platform-based, multisided, and/or free of charge to end-users (or partly so). Evaluating the effects of the non-price dimensions of such offerings is a challenge for regulators, whose analytical tools are not always designed for this.

• Deals may go under the radar. Acquisition targets may be pre-revenue, or offer some of their services free of charge. As a result, the deal value is unlikely to hit regulators’ turnover or market share thresholds. Given the interconnections and overlaps between digital products and services, digital markets (and therefore market share) can be difficult to define.

• Given the “borderless” nature of digital platforms, it can be difficult to pin a transaction to any particular jurisdiction, and so apply that market’s notification rules.

2. Killer acquisitions

So-called ‘killer’ deals are hard to spot in the digital space. When a dominant tech player buys a smaller firm, is it looking to foster innovation and produce better products and services for consumers? Is it just out to eliminate a potential competitor — or might that be the outcome, even if it is not the acquirer’s motive?

Most deals will surely be prompted by the desire to enhance market offerings; but regulators have a responsibility to catch those aimed at restricting competition.

This is a challenge, as the distinction between the two strategies is not always clear. Many digital acquisitions will go unnoticed, as they fall below merger control thresholds.

It is an issue that has elicited some fairly radical responses. Some jurisdictions have considered lowering their notification thresholds. Some commentators have suggested reversing the burden of proof in such cases.20 That seems unlikely, but it reflects the unease that the prospect of killer acquisitions is causing in some quarters.

3. Anticompetitive agreements

Inadvertently or otherwise, digital technology can enable collusion and price-fixing.

Platforms may act as hubs, coordinating competitors’ strategies and pricing decisions. Algorithms, bots and artificial intelligence can automate collusive activity, without explicit instructions from human beings. Such infringements can be difficult to detect if carried out by technology rather than people.

These issues have sparked a debate over the effectiveness of antitrust measures around the world. Are the tools and resources available to competition authorities still adequate? Do they need overhauling given the demands of the digital economy?

Some commentators feel they are unsuited to assessing digital models’ impact on competition, and need rethinking as a result. Others believe this is unwarranted, as current rules, procedures and enforcement powers have the flexibility to be applied to unconventional business models.

Business as usual

Like almost everything in the digital age, the future of antitrust is evolving.

There is not yet a consensus among the community on how to adapt its methods and measures to the realities of the digital economy. As such, it is too early to speculate on the approach agencies will take to protecting competition in tech markets.

Nonetheless, we can be sure that there will be changes and challenges along the way, for businesses and regulators alike.

For organizations, the challenge will be much as before; to vigilantly navigate an evolving regulatory landscape.

This will require:

• Robust digital compliance capabilities and processes.

• Global compliance strategies and coordination, given that digital platforms typically have global reach.

• Reminders to employees that conduct which is illegal offline is also illegal online.

• An understanding of your data and technology, and their impact in the marketplace.

• Up-to-date knowledge of enforcement rulings, and their implications and limitations – so that commercial opportunities are not sidelined unnecessarily.

For their part, authorities will continue to examine their mechanisms for defining markets, assessing influence, identifying illegality, and investigating new forms of anticompetitive behavior. Over time, landmark cases will provide much-needed clarity on how they intend to intervene in the digital domain.

All the same, change is unlikely to be sweeping. Existing antitrust frameworks will, in some areas at least, prove malleable enough to adapt to the digital world.

As of present date, while the Mexico’s antitrust authority, Comisión Federal de Competencia Económica, COFECE, is investigating possible relative monopolistic practices in the market for digital advertisement services,1 it has not announced fines or judgments against digital market companies for violation of antitrust or merger laws. Instead, the most recent developments with digital market companies in Mexico have focused on its scope of authority.

#### U.S. antitrust fills in for lack of Mexican antitrust enforcement – spurs tech innovation.

Romero ’22 [Bryan; Investment and Policy Editor at Nearshore Americas. He also contributes to other publications with analysis on political risk, society and the entrepreneurial ecosystems of Cuba and the Latin American region. Originally from Cuba, Bryan holds a Bachelor’s degree in Philosophy (Licenciatura en Filosofía) from the University of Havana; *Nearshore Americas,* “Internet Regulation in Latin America: Will Governments Screw Up a Good Thing?,” <https://nearshoreamericas.com/internet-regulation-2022-battlefield-latin-america/>; KS]

In other countries such as Mexico, innovation has disappeared from the agenda at the top of the political class, explained Elisa Munoz, a Mexico City-based management consultant and IT outsourcing expert.

“With the past administration we saw an attempt to move legislation at the same rhythm that technological developments. Today, the federal government doesn’t seem interested in these processes. The current administration abandoned the innovation issue and it is now basically outsourcing it to the private sector. The private sector should lead in these issues, however there is a role that the government should play and they are not fulfilling that at this point,” she said.

For Fabro Steibel, Executive Director of Rio de Janeiro’s Society and Technology Institute, regulating technology in Latin America needs to take into account that this is the most unequal region in the world.

“Big tech can be part of the solution, when you look at the great products and services that these large companies offer is amazing. However, we need to think about regulation for these companies, not because we want to punish them but because we have to think in terms of the development agenda,” said Steibel.

“In our countries, often 20% of the population doesn’t have access to the internet. People don’t have a bank account, or access to running water. We need to take this into account because Big Tech doesn’t have a policy agenda for Brazil, Argentina or Mexico. They have a global plan and then translate it to the local reality,” he added.

Without a coherent and regional legislative effort Latin America risks falling behind on important global trends. The region’s political leaders should understand these larger geopolitical movements as well as new approaches to concepts like sovereignty.

“Politicians like to talk about state sovereignty but they forget about the sovereignty of an individual or a company to interact in the digital space. Reproaching these issues from a different perspective will serve the region’s development,” concluded Jolías.

#### Mexican economic growth and tech innovation reduces drug cartel influence and ensures stability.

Cowen ’21 [Tyler; October 19; professor of economics at George Mason University; Bloomberg, “Could Mexico Be the Next Denmark?” <https://www.bloomberg.com/opinion/articles/2021-10-19/mexico-could-be-the-next-denmark-unspectacular-but-stable>; KP]

There, I said it. I realize that many people view Mexico as dangerous and corrupt, but the more basic facts are the more important ones, especially for investors and economists: Mexico has one of the higher per capita incomes of the emerging economies, it draws upon many vibrant cultures, and it is located right next to the U.S.

If my enthusiasm isn’t enough to make you bullish on Mexico, listen to the many Central Americans who say Mexico is becoming too similar to the U.S., particularly in terms of excess commercialization. This criticism is itself evidence of progress. The debate about Mexico in the U.S. tends to focus on the differences between the two countries. A broader perspective is more insightful.

Now, about that crime and corruption: By some estimates 20% of Mexican territory is controlled by drug gangs, and the country has a high murder rate. These issues won’t go away entirely, if only because they reflect demand for drugs in Mexico’s northern neighbor.

But they are likely to become more manageable. As Mexico grows wealthier, the central and state governments will be able to establish greater control over their territory. And though the U.S. cannot usefully control many events in Mexico, its financial support of the Mexican government provides stability.

Mexico’s government is also notoriously corrupt, and currently it has populist and especially irresponsible leaders. That too is likely to improve with greater state capacity. Mexico now has a middle class that votes, and it expects something in return for the taxes it pays.

In the meantime, there are reasons to be bullish on Mexico right now. One is that economic globalization has been somewhat halted, and in some areas even reversed. To the extent Americans do not trust Chinese supply chains, the Mexican economy will pick up some of the slack. Mexico is also the natural lower-wage supplier to North American industry. (Its main problem in this regard is that its wages are no longer so low, but that too reflects its progress.)

And if tourism in Asia and Europe remains difficult or inconvenient, Americans will visit Mexico more and grow accustomed to holidaying in locales other than Cancun. Some of those habits are likely to stick.

Mexico, like much of Latin America, also has a burgeoning startup scene, especially in ecommerce and fintech. Mexico City might end up as the technology capital of Latin America. That would help with one of Mexico’s chronic economic problems, namely that small firms decide to stay small to escape regulations and taxes. Successful tech startups, in contrast, can scale more easily and face fewer regulations on average than manufacturing firms.

Another reason to be bullish on Mexico: Recent data show that Latino immigrants to the U.S. assimilate remarkably well. Many of them have Mexican heritage, and may be a source of business capital and collaborations for Mexico proper. They also provide a steady reminder that prosperity is possible, and not just for Americans of Anglo heritage.

I have been traveling to Mexico for almost 40 years, and each time I visit the country seems to be doing better. The prosperity seems broader-based, which lowers the degree of de facto racial and skin-color-based segregation in the country.

And unlike much of the world, Mexico does not face national security issues from potentially invading or attacking rivals. That advantage may assume increasing importance, as competitors to Mexico have to deal with problems from China, Russia or other sources.

Many investors and economists have been unduly pessimistic about Mexico because it has not grown at the pace of China. At this point, it’s best to concede that it probably never will. Yet many of the world’s more successful countries, such as Denmark, never had major growth spurts as China did. Instead, they managed a steady pace of growth with a few big dips.

Mexico, with its strong connections to the U.S., is well-positioned to achieve that kind of growth stability over the coming decades. Unlike in the 1980s, the Mexican central bank is run by well-educated technocrats. Even during the pandemic, which hit the Mexican economy very hard, credit ratings remained acceptable.

“Mexico is the next Denmark” sounds like another one of my deliberately contrarian utterances. As implausible as it seems, however, it’s a statement that may finally be coming true.

#### Otherwise, the US is drawn into global proxy conflicts.

Metz 14 [Steven, Director of Research at the Strategic Studies Institute, Ph.D. from the Johns Hopkins University, “Strategic Horizons: All Options Bad If Mexico’s Drug Violence Expands to U.S.,” Feb 19, 2014, http://www.worldpoliticsreview.com/articles/13576/strategic-horizons-all-options-bad-if-mexico-s-drug-violence-expands-to-u-s]

Over the past few decades, violence in Mexico has reached horrific levels, claiming the lives of 70,000 as criminal organizations fight each other for control of the drug trade and wage war on the Mexican police, military, government officials and anyone else unlucky enough to get caught in the crossfire. The chaos has spread southward, engulfing Guatemala, Honduras and Belize. Americans must face the possibility that the conflict may also expand northward, with intergang warfare, assassinations of government officials and outright terrorism in the United States. If so, this will force Americans to undertake a fundamental reassessment of the threat, possibly redefining it as a security issue demanding the use of U.S. military power. One way that large-scale drug violence might move to the United States is if the cartels miscalculate and think they can intimidate the U.S. government or strike at American targets safely from a Mexican sanctuary. The most likely candidate would be the group known as the Zetas. They were created when elite government anti-drug commandos switched sides in the drug war, first serving as mercenaries for the Gulf Cartel and then becoming a powerful cartel in their own right. The Zetas used to recruit mostly ex-military and ex-law enforcement members in large part to maintain discipline and control. But the pool of soldiers and policemen willing to join the narcotraffickers was inadequate to fuel the group’s ambition. Now the Zetas are tapping a very different, much larger, but less disciplined pool of recruits in U.S. prisons and street gangs. This is an ominous turn of events. Since intimidation through extreme violence is a trademark of the Zetas, its spread to the United States raises the possibility of large-scale violence on American soil. As George Grayson of the College of William and Mary put it, “The Zetas are determined to gain the reputation of being the most sadistic, cruel and beastly organization that ever existed.” And without concern for extradition, which helped break the back of the Colombian drug cartels, the Zetas show little fear of the United States government, already having ordered direct violence against American law enforcement. Like the Zetas, most of the other Mexican cartels are expanding their operations inside the United States. Only a handful of U.S. states are free of them today. So far the cartels don’t appear directly responsible for large numbers of killings in the United States, but as expansion and reliance on undisciplined recruits looking to make a name for themselves through ferocity continue, the chances of miscalculation or violent freelancing by a cartel affiliate mount. This could potentially move beyond intergang warfare to the killing of U.S. officials or outright terrorism like the car bombs that drug cartels used in Mexico and Colombia. In an assessment for the U.S. Army War College Strategic Studies Institute, Robert Bunker and John Sullivan considered narcotrafficker car bombs inside the United States to be unlikely but not impossible. A second way that Mexico’s violence could spread north is via the partnership between the narcotraffickers and ideologically motivated terrorist groups. The Zetas already have a substantial connection to Hezbollah, based on collaborative narcotrafficking and arms smuggling. Hezbollah has relied on terrorism since its founding and has few qualms about conducting attacks far from its home turf in southern Lebanon. Since Hezbollah is a close ally or proxy of Iran, it might some day attempt to strike the United States in retribution for American action against Tehran. If so, it would likely attempt to exploit its connection with the Zetas, pulling the narcotraffickers into a transnational proxy war. The foundation for this scenario is already in place: Security analysts like Douglas Farah have warned of a “tier-one security threat for the United States” from an “improbable alliance” between narcotraffickers and anti-American states like Iran and the “Bolivarian” regime in Venezuela. The longer this relationship continues and the more it expands, the greater the chances of dangerous miscalculation. No matter how violence from the Mexican cartels came to the United States, the key issue would be Washington’s response. If the Zetas, another Mexican cartel or someone acting in their stead launched a campaign of assassinations or bombings in the United States or helped Hezbollah or some other transnational terrorist organization with a mass casualty attack, and the Mexican government proved unwilling or unable to respond in a way that Washington considered adequate, the United States would have to consider military action. While the United States has deep cultural and economic ties to Mexico and works closely with Mexican law enforcement on the narcotrafficking problem, the security relationship between the two has always been difficult—understandably so given the long history of U.S. military intervention in Mexico. Mexico would be unlikely to allow the U.S. military or other government agencies free rein to strike at narcotrafficking cartels in its territory, even if those organizations were tied to assassinations, bombings or terrorism in the United States. But any U.S. president would face immense political pressure to strike at America’s enemies if the Mexican government could not or would not do so itself. Failing to act firmly and decisively would weaken the president and encourage the Mexican cartels to believe that they could attack U.S. targets with impunity. After all, the primary lesson from Sept. 11 was that playing only defense and allowing groups that attack the United States undisturbed foreign sanctuary does not work. But using the U.S. military against the cartels on Mexican soil could weaken the Mexican government or even cause its collapse, end further security cooperation between Mexico and the United States and damage one of the most important and intimate bilateral economic relationships in the world. Quite simply, every available strategic option would be disastrous. Hopefully, cooperation between Mexican and U.S. security and intelligence services will be able to forestall such a crisis. No one wants to see U.S. drones over Mexico. But so long as the core dynamic of narcotrafficking—massive demand for drugs in the United States combined with their prohibition—persists, the utter ruthlessness, lack of restraint and unlimited ambition of the narcotraffickers raises the possibility of violent miscalculation and the political and economic calamity that would follow.

#### Lax cartel enforcement devastates Latin American development – supplanting competition law solves.

World Bank 21, \*World Bank is an international financial institution that provides loans and grants to the governments of low- and middle-income countries for the purpose of pursuing capital projects; (2021, “FIXING MARKETS, NOT PRICES”, https://openknowledge.worldbank.org/bitstream/handle/10986/35985/Fixing-Markets-Not-Prices-Policy-Options-to-Tackle-Economic-Cartels-in-Latin-America-and-the-Caribbean.pdf?sequence=1&isAllowed=y)

Cartels in LAC have affected hundreds of markets and the large majority went undetected22

Over the last 4 decades, more than 300 economic cartels have been revealed - mostly in markets that provide key inputs to firms or essential goods to families. Between 1980 and 2020, in over 300 incidences, firms supplying markets as critical as milk, sugar, poultry, transport, energy and medicines chose to jointly fix higher prices, restrict total production, divide or share markets, rig bids, or obstruct the entry of new competitors – that is, to create economic cartels. Instead of vying for consumers with better deals and higher quality, more than 2,500 firms and 153 trade associations engaged in these agreements in 19 different sectors.

Cartels affect important markets with large market players. Previous evidence of international cartels from 1990 to 2007 suggests that between USD 150 and 200 billion worth of sales in LAC were affected by discovered cartels, and consumers in this region paid overcharges of at least USD 35 billion from 1990 to 2007 (Ivaldi, Julien, Rey, Seabright, & Tirole, 2003).23 Based on newly available information, 89 of the firms that formed cartels in LAC had total revenues of USD 81 billion in 2019, equivalent to what would constitute the 8th largest GDP in LAC.24

The cartel activity revealed so far affects a significant share of the economy. Evidence based on a selected number of cartels in developing economies between 1995 and 2013 shows that affected sales of cartel members related to GDP at a given point in time reaches up to 6.4 percent. As much as 3.4-8.4 percent of imports in developing countries may be affected by cartel agreements (Levenstein, Suslow, & Oswald, 2003). New evidence for LAC now reveals that the Competition Watchdog in El Salvador, even with limited cartel enforcement trajectory, has detected 7 cartels that affected sales in the amount to 0.4 to 0.8 percent of GDP between 2006 and 2011. This does not even take into account that some of the cartel agreements occurred at the upstream level and may have also affected the downstream industries (such as in the case of wheat and bread).

The true pervasiveness of economic cartel activity is at least tenfold. While over 300 cartels have been detected and dismantled by respective authorities in LAC, studies from advanced economies show that even mature competition authorities only detect between 10 and 20 percent of cartel activity (See Box 1). Given the incipient status or even entire lack of cartel enforcement in most parts of LAC, the extent to which consumers and businesses are affected is likely manifold. For example, of at least 84 large global cartels that were shown to fix prices in LAC at some point between 1990 and 2007, only four were investigated by authorities in this region (Connor, 2008).

Detection rates of cartel activity in LAC may be particularly low in some sectors, such as the financial sector. In the European Union (EU), 28 percent of cases against anti-competitive practices between 2013 and 2017 targeted the financial sector and revealed several high-profile price-fixing agreements in markets such as financial derivative products linked to the Euro Interbank Offered Rate (EURIBOR), Japanese Yen LIBOR, Swiss Franc IRDs and future Swiss Franc LIBOR. However, only one of seven mature competition authorities in LAC have opened antitrust investigations in the banking sector, and only one of them related to cartel activity: Mexico detected and fined agreements to manipulate sovereign bond prices (WBG, 2020). In Colombia, 2 banking associations, 14 banks and 2 payment systems network providers entered into commitments with the competition authority to end an investigation regarding an agreement among banks to fix interchange fees.2

Cartels hurt the poor, stifle growth and limit policy effectiveness

Cartels are particularly harmful for economic development objectives: By eliminating competition among firms, they lose incentives to innovate, and charge higher prices. These consequences disproportionately and directly affect the poorest households. Cartels limit growth by affecting productivity and competitiveness. Finally, cartels undermine effectiveness of public policies. Benefits of trade liberalization do not materialize when firms collude across borders or agree to block imports. Governments can procure fewer public goods and services (medicine, public works, school supplies, etc.) when procurement processes are rigged. The following section will briefly discuss the existing evidence and new insights from the novel data on LAC.

Economic cartels affect the poor. Cartels disproportionally affect poor households because they are common in markets affecting products in the basic consumption basket. At least 21 percent of the cartels detected involved basic consumption products such as sugar, toilet paper, wheat, poultry, milk, and medicines.26 Global estimates suggest consumers pay on average 49 percent more when buying from cartels, and 80 percent more when cartels are stronger.27 In LAC, in 65 percent of cartels detected over the last decades with information available on prices charged, consumers experienced overcharges ranging between 5-25 percent and in at least 4 percent of the cases, consumers had to pay as much as twice for the products and services. A simple comparison of public expenditure efficiency from South Africa suggests that public resources spent on cartel enforcement would be 38 times more effective in tackling poverty than cash transfers, when considering that part of the cash transferred to eligible household is spent on overcharges for basic food items (Purfield, et al., 2016).

Collusive agreements lower economic growth prospects by depressing productivity growth and reducing competitiveness. First, agreements among competitors to limit competition affect productivity. The introduction of anti-cartel policy is related to higher labor productivity growth in industries affected by collusive behavior, which otherwise record a 20 to 30 p.p. lower labor productivity growth (than industries without cartels) (OECD, 2014). Evidence from a 40-year long cartel in the United States suggests that quantity-productivity declined by 22 percent (Bridgman, Qi, & Schmitz Jr, 2009). Systematically allowing for cartel activity can further curb total productivity growth across the economy (Petit, Kemp, & Van Sinderen, 2015). Second, cartels distort important markets in LAC’s value chains. 34 percent of collusive agreements detected occurred in the manufacturing sector (Figure 1). Another 15 percent of cartels affected wholesale and retail trade activities transportation activities, respectively.28 Within the manufacturing sector, cartels across LAC region are particularly frequent in the meat processing activity in Brazil, Chile, and Panama, and in the manufacturing of basic chemicals in Argentina, Brazil, Colombia, Panama, and Peru.29 Within the wholesale and retail trade sector, trade of pharmaceutical goods are also found in Brazil, Chile, Honduras and El Salvador. In the transport sector, Chile fined six shipping lines with USD 95 million for colluding in multiple tender processes for providing maritime transport services to manufacturers and consignees of various car brands imported to Chile beginning in 2000. Mexico sanctioned seven shipping lines for engaging in nine collusive agreements and segmenting the car transport market into different routes between 2009 and 2012. Some of the sanctioned firms were also investigated in Chile and Peru (WBG-USAID, 2018) .

Cartel agreements undermine the benefits of trade opening and liberalization. In the Pacific Alliance30 – the group of countries with the lowest trade barriers in the region – at least 67 cartels were detected in sectors generally considered tradable, and a third of those operated in the market for more than 5 years. Even though Colombia is an open market economy, sugar traders from the region were able to sell in Colombian markets only after a decade-long cartel agreement by domestic sugar mills was broken up in 2015: 12 mills had been explicitly coordinating to obstruct sugar imports.31 Import competition does not preclude the formation of cartels in tradable goods. Such agreements can operate at the regional or even global level: In Chile, Peru, and Colombia, three international firms jointly raised prices for toilet paper by up to 30 percent for over 10 years (Dinamo, 2015). In smaller LAC economies, where connectivity issues are central to economic growth, such as those of the Caribbean Community (CARICOM), cartels have also been uncovered, for example in shipping services.32

When cartels raise prices, the state can provide fewer public goods and services and cartels can even distort the market of government bonds. At least one in four cartels formed among firms participating in government procurement process. In such cases, taxpayers bear the burden of the overcharges. In Peru, between 2010 and 2012, 31 providers of hemodialysis services rigged the bids by abstaining from participating in public tenders called by one of the Peruvian public healthcare administrators with the objective of increasing reference prices in subsequent tenders. This led to overcharges in each tender of approximately over USD 10 million.33 Similarly in 2014, Peru sanctioned an engineer’s cartel that affected public-construction contracts worth USD50 million which had been designated for the expansion of the public highway network34 (Martinez Licetti & Goodwin, 2015). In Mexico, seven banks entered into at least 142 agreements to manipulate the price of the Mexican sovereign bond market between 2010 and 2013 by limiting sales and acquisitions of bonds with losses to the market of over USD 1.443 million.35 In Colombia, the government and ultimately the taxpayers incurred in losses of at least USD 11 million for the overcharges paid in the construction of a major highway (Ruta del Sol II), due to an anticompetitive agreement that favored a particular group of firms in the concession process.36

Recent developments in LAC also suggest that economic cartels undermine public trust in market economies. In 2016, 73 percent of the population in Chile considered collusion to be a reproachable conduct, even more reproachable than violations of labor laws.37 This sentiment was preceded by several years of successful breakups of cartels, and a historic confirmation by the Supreme Court of the decision to fine a group of poultry producers for having agreed to limit output. The protests in 2019 were partly motivated by discontent with the private sector (Freire, 2020) . As part of the government’s response in form of an “anti-abuse agenda”, the executive submitted four bills to Congress in March 2020 aiming at increased enforcement of the laws against white collar crimes, including cartels.

On the upside, consumers and businesses benefit from effective anti-cartel enforcement. For example, so-called leniency programs – which offer firms the possibility to come clean about their involvement in cartel conduct in exchange for immunity or reduction of financial penalties - (and as we will see later) render any agreement less stable, because any member of the cartel has incentives to break out and report the cartel. Thus, these programs shorten the duration of harmful cartels and can even reduce the level of anti-competitive overcharges by cartels.38 Miller (2009) finds empirical support for these effects: the leniency program in the United States increased the rate of cartel detection by 62 percent and reduced the rate of cartel formation by 59 percent. Yusupova (2013) also finds that the 2009 revision of the Russian leniency program was effective in reducing the size and duration of cartels. Choi & Hahn (2014) show that the leniency program in Korea shortened cartel duration. Leniency programs can also speed up the process of breaking up cartels. Brener (2009) demonstrates how leniency reduces the average sanctioning process by 1.5 years on average. In Europe, nearly 60 percent of detected cartels are discovered through leniency (Jaspers, 2020). Overall, leniency programs can have significant effects on competition intensity. Klein (2011) revises data from 23 OECD countries and finds that leniency policies were associated with a decrease in the industry-level price-cost margin of 3 to 5 percent.

However, many LAC countries do not have any tools to deter and prevent economic cartels. 28 percent of countries in the region do not have an operational competition legal framework. In only 5 out of 15 countries where the legal framework is in place, there are effective anti-cartel enforcement tools.

#### LAC economic volatility enables democratic backsliding.

Merke et al. 21, \*Federico Merke is an associate professor of international relations at the Universidad de San Andrés, Argentina. He is also a researcher for the National Council for Scientific Research; \*Oliver Stuenkel is an associate professor at the School of International Relations at Fundação Getulio Vargas (FGV) in São Paulo, Brazil. He is also a nonresident scholar affiliated with the Democracy, Conflict, and Governance Program at the Carnegie Endowment for International Peace. \*Andreas E. Feldmann is an associate professor in the departments of Latin American and Latino Studies and Political Science at the University of Illinois at Chicago; (June 24th, 2021, “Reimagining Regional Governance in Latin America”, https://carnegieendowment.org/2021/06/24/reimagining-regional-governance-in-latin-america-pub-84813)

Introduction

Latin America is experiencing one of the most difficult moments in its recent history as it confronts three overlapping crises: the coronavirus pandemic, a steep economic contraction, and high levels of political polarization and democratic erosion. No region has been more impacted by COVID-19, the disease caused by the coronavirus, than Latin America, both in human and economic terms.1 As of April 30, 2021, Latin America had a total of 28 million confirmed cases (out of a world total of 150 million) and just over 900,000 deaths (out of a world total of just over 3 million). With around 8 percent of the world’s population, the region has almost 19 percent of confirmed cases and 28 percent of total deaths. Also, as of April 30, Latin America had administered only 8 percent of the total vaccines.2

The economic impact has been equally devastating. The World Bank estimates that in 2020, 53 million Latin Americans saw their income fall below the region’s poverty line of $5.50 per day, pushing up the percentage of those living in poverty to an estimated 37.7 percent—a level not seen since 2006.3 According to the United Nations (UN) Economic Commission for Latin America and the Caribbean, Latin America is suffering its worst economic crisis in 120 years, with gross domestic product (GDP) having declined by a staggering 9.1 percent in 2020, eliminating most of the progress made during the commodity boom years (2003–2013). As might be expected, governments across the region are grappling with serious fiscal limitations and seem hard pressed to offer even basic responses to their population’s significant needs.4 All the while, a toxic mix of insecurity and pervasive social turmoil is undermining ~~[crippling]~~ most countries. As if this were not enough, the region faces what is arguably the most acute migration crisis of its history, with the exodus in recent years of more than 5 million Venezuelans.5

Several reasons explain why the region was hit so hard by the pandemic. First, even before the pandemic began, Latin America was economically vulnerable. Between 2014 and 2019, the region’s GDP per capita shrank 4 percent, largely as a result of significant declines in commodity prices.6 As part of these economic difficulties, chronic underinvestment in public health limited most countries’ capacity to treat COVID-19 patients, especially during the most acute periods of the disease. In addition, fiscal constraints limited governments’ ability to provide emergency cash-transfer payments to the poorest in their societies. Labor productivity and the job market were also hit hard by lockdown orders and workplace closures: only about 20 percent of existing jobs in Latin America could be performed remotely, compared to 40 percent in advanced economies and 26 percent in the rest of the emerging world.7

Second, the region entered the pandemic in a politically vulnerable condition. Throughout 2019, large-scale protests rocked Bolivia, Chile, Colombia, Ecuador, Haiti, and Venezuela, creating one of the most politically volatile years in memory.8 In most cases, social turmoil stemmed from popular frustration with low-quality public services, socioeconomic inequality, and detached political elites. Many people who joined Latin America’s new middle class during the commodity boom of the 2000s slid back into poverty during the 2010s, and faced the realization that both they and their children are unlikely to escape poverty for many years to come. Popular demands for economic justice and support became more intense and difficult for governments to satisfy, creating openings for radical antiestablishment figures to come to power, like President Jair Bolsonaro in Brazil or President Nayib Bukele in El Salvador.

Finally, the region is beset by severe political polarization and democratic backsliding.9 In Mexico, President Andrés Manuel López Obrador is undermining democracy by seeking to concentrate power in an already strong executive.10 In Nicaragua, the increasingly authoritarian administration of President Daniel Ortega has pushed through new laws to name “traitors” and to pressure media and human rights groups opposing his grip on power. At the time of writing, there have been twelve opponents detained since June 2.11 In El Salvador, Bukele has enacted a series of controversial policies that many observers believe represent a serious threat to democracy. Neighboring Honduras is not faring much better, as an inflammable mix of corruption, violence, and authoritarianism under President Orlando Hernández is generating massive outmigration. Ecuador recently has seen widespread discontent, while Peru witnessed massive protests and instability following the legislature’s ousting of caretaker President Martín Vizcarra in 2020.

Another regional trend, present in both Ecuador and Peru as well as in other countries, has been the acute fragmentation of political parties, which has made governance exceedingly difficult.12 Colombia is in the midst of a serious crisis with widespread protests and a resurgence of politically driven violence, with one social leader killed every forty-one hours.13 Argentina’s economy has hit rock bottom as its government aims to reach a deal with the International Monetary Fund while tackling high inflation rates. Following former U.S. president Donald Trump’s playbook, Brazil’s right-wing Bolsonaro continuously glorifies dictatorship and tests the resilience of Brazil’s democratic institutions. In May 2020, for instance, Bolsonaro, while facing allegations that he tried to meddle with law enforcement for personal reasons, had to be convinced by generals to not ask soldiers to close the Supreme Court.14 Chile, once regarded as one of the region’s few bright spots due to its economic growth and political stability, also has witnessed massive demonstrations and violent riots against the establishment. It now has the daunting task of attempting to design a new constitution even as it struggles to respond to the pandemic and undertake a rapid vaccination program to protect its citizens.

Given this complex set of interlinked social, economic, and political crises, Latin American governments and nongovernmental actors urgently need to work together to address collective challenges. The events of recent decades have shown that unless better regional mechanisms can be found, transnational and even domestic problems—from organized crime and environmental degradation to migration and lackluster economic growth—will become even more difficult to address, with potentially devastating long-term consequences. Yet traditional regional governance mechanisms seem paralyzed, lacking even the capacity to discuss the current untenable situation, let alone address it. The popular narrative is that regional cooperation across Latin America is practically nonexistent because its heads of states have insurmountable ideological differences and because the region’s dominant diplomatic institutions have failed to fulfill their purpose. In addition, domestic turmoil is fueling rising isolationism and “antiglobalism,” most prominently in Brazil. Such a pessimistic view, however, stifles any capacity to reimagine regional cooperation. The dramatic crisis in Latin America requires more creative thinking, not less, about ways to promote renewed channels for regional cooperation.15

#### Latin American democratic backsliding and instability escalates.

**Berg & Brands ’21** [Ryan; Hal; June; Senior fellow in the Americas Program and head of the Future of Venezuela Initiative at the Center for Strategic and International Studies; Henry A. Kissinger Distinguished Professor of Global Affairs at the Johns Hopkins School of Advanced International Studies (SAIS); “The Return of Geopolitics: Latin America and the Caribbean in a Era of Strategic Competition,” <https://gordoninstitute.fiu.edu/research/publications/the-return-of-geopolitics.pdf>; KS]

The post-Cold War era also revived another less salubrious tradition in U.S. policy—the Latin America paradox. That paradox resides in the fact that Latin America is perhaps the most critical region for the United States, in the sense that pervasive insecurity or danger could pose a more direct threat to America than an equivalent disorder in any other region. The Mexican Revolution, for example, elicited not one but two U.S. military interventions for just this reason. But Latin America has traditionally received considerably less foreign policy attention than other regions because American influence there—while periodically challenged—has long been so preeminent.

This paradox is not new: It is one reason why, even during the Cold War, Washington went through periods of intermittent engagement with the region (the Eisenhower era) followed by periods of intense concern bordering on panic (the Kennedy years). This spasmatic history is now repeating itself: Over the last three decades, the U.S. tendency to treat Latin America as a tertiary concern has created a ~~blind spot~~ [gap] in U.S. strategy, making it harder to spot threats as they emerge.

Since the 1990s, this [gap] ~~blind spot~~ has been exacerbated by several other factors. First, although there have been serious security challenges in the region, most have taken the form of drug-related violence and out-of- control criminality, domestic challenges often viewed as law enforcement matters that lack an obvious geopolitical salience. Compare, for instance, the remarkably scant attention that ongoing state failure and rampant violence in Mexico have received over the last 15 years to the attention those phenomena would have received had they been caused by a communist insurgency with links to the Kremlin during the Cold War. “Law enforcement problems” are, by their nature, unsexy in the foreign policy world.

Second, the largely democratic nature—or perhaps the democratic patina—of the region has masked the severity of underlying challenges. Since the early 1990s, the vast majority of Latin American and Caribbean governments have been democracies in the sense that they have regular, contested elections. After Mexico’s transition in 2000, Cuba was the only fully authoritarian regime in the hemisphere. Yet the existence of democratic procedures, consolidated in regional diplomatic accords such as the Inter- American Democratic Charter, has obscured concerning levels of political backsliding in countries from Central America to the Southern Cone, in addition to the emergence of violently repressive authoritarianism in Venezuela. It has also dulled the U.S. response to the creeping accumulation of extra-hemispheric influence in hemispheric affairs, in many cases through the same countries experiencing a rapid decline in the quality of democratic governance.

Finally, ~~blind spots~~ [weaknesses] in Latin America have been exacerbated by the intensity and number of challenges the United States has confronted elsewhere. Prior to 9/11, the George W. Bush administration had signaled it would make relations with Latin America a top priority. That subsequently changed dramatically. The 9/11 attacks led to a heightened focus on Colombia because its guerrilla insurgency could be viewed through a counterterrorism prism. But in most cases, the “war on terror” diverted focus from the region. More recently, U.S. resources and attention have been consumed by a remarkably full foreign policy agenda—ongoing instability in the Middle East and Africa, a resurgent and revisionist Russia, periodic North Korean nuclear crises, the rise of China as a regional and increasingly global power, along with the pressing problems posed by climate change, pandemics, and other transnational challenges. Even as the situation has deteriorated in Latin America and the Caribbean, the region has had to compete with a remarkably crowded and challenging foreign policy panorama.

For much of the post-Cold War era, the near- term costs of inattention were limited because serious challenges to strategic denial remained far over the horizon. Yet the costs are rising as that horizon approaches, and a great-power rivalry once again intensifies. During the Trump years, U.S. officials such as Secretary of State Rex Tillerson and National Security Advisor John Bolton went so far as to restate the Monroe Doctrine in response to the growth of Chinese influence in the Western Hemisphere. Yet those warnings simply obscured the fact that America’s rivals are once again competing vigorously in its shared neighborhood. Their strategies are far better developed than the U.S. response.

CONTEMPORARY CHALLENGES: CHINA

The primary threat to U.S. interests in Latin America comes from China because Beijing is the most significant global challenge for U.S. statecraft and its presence in the Western Hemisphere is multifaceted and widespread. Whereas Russia and Iran are malign actors whose capabilities remain limited, the People’s Republic of China (PRC) has the resources, capacity, and—increasingly—the desire to shift the overall climate of hemispheric relations in decidedly adverse ways. As part of a strategy to increase its influence and options in the region while creating potential problems for the United States close to home, China engages governments and supports political models in the region that are hostile to U.S. interests while also courting traditional U.S. allies.

#### Chinese hegemony in Latin America results in war.

Dario and Mearsheimer ’20 [Leandro, interviewing John; January 8; Distinguished Professor of Political Science at the University of Chicago; BA Times, “John Mearsheimer: ‘A war between the United States and China in 2021 is possible,’” <https://www.batimes.com.ar/news/world/john-mearsheimer-a-war-between-the-united-states-and-china-in-2021-is-possible.phtml>]

“China has an interest in causing security problems for the US in the Western Hemisphere, in order to force it to focus on its own backyard and be unable to fix all its attention on Asia or China itself,” he assures, seated at home in front of his bookshelves along with a miniature Napoleon, a matryoshka doll and lots and lots of books.

In an interview with Nikkei Asian Review you said that China will try to dominate East Asia in a similar way to the US in the Western Hemisphere. Will Beijing try and undermine Washington’s hegemony in the Americas?

I think China’s principal goal will be to establish hegemony in Asia and having done so, it will wander into the Western Hemisphere in a serious way. Most people never ask why the US wanders all over the planet, interfering in the policies of countries everywhere. The reply is that its superiority in the Western Hemisphere is so clear and safe that it is free to interfere in the policies of other countries all over the globe. That’s something China does not want. What China wants is the US having to focus plenty of its attention on South and Central America so that it cannot do the same with Chinese politics.

In which South and Central American countries will China try to interfere?

China has an open mind regarding its relations with Western Hemisphere countries. Obviously Venezuela and Cuba are their natural partners. But I imagine they’ll go to great lengths to have a good relationship with Canada, Mexico, Brazil and Argentina.

Do you think the competition between the US and China could culminate in a war?

It’s a real possibility but I don’t think it’s certain. One should recall that the security interests of the US and the Soviet Union competed intensely for 45 years during the Cold War and came close to confrontation in the Cuban missile crisis but were never directly involved in any hot war, waging war by proxy. It’s possible that the US and Chinese will have a security competition for decades without war. We hope so.

#### Biden just supported tech reform.

**Ghaffary ’3-1** [Shirin; 2022; Vox, “Biden threatens Big Tech over its "national experiment" on children,” https://www.vox.com/recode/2022/3/1/22957507/biden-state-of-the-union-social-media-mental-health-children-accountability-frances-haugen]

The president’s mentions of social media show how regulating the tech industry is a real priority for his administration, at a time when nearly 70 percent of Americans think tech companies hold too much power, and 56 percent believe more government regulation is needed. Biden has been more supportive of tech reform than some initially expected — he’s notably appointed Big Tech critics to key leadership positions, like Tim Wu in the White House and Lina Khan at the Federal Trade Commission. But Tuesday’s speech marked one of the first times that Biden has described how he wants to rein in tech’s power. To do so, he focused on a popular topic — protecting teens and children online — that politicians on both sides of the aisle are concerned about. It’s worth noting that is a narrower focus than broader bipartisan calls to break up certain tech companies under antitrust laws, or regulate how social media companies deal with moderating content on their platforms.

“This is really the first time that Biden has come out and made a major policy statement about [social media],” Jim Steyer, founder and CEO of nonprofit Common Sense Media, a nonprofit that promotes safe technology use for children, told Recode. “And I think the fact that he’s framing it through the lens of kids and teens and families is terrific.”

#### Privacy legislation will pass and regulate big tech.

**Lima ’3-2** [Cristiano; 2022; Washington Post, “Biden’s endorsement could be a game-changer for kids’ privacy legislation”; https://www.washingtonpost.com/politics/2022/03/02/bidens-endorsement-could-be-game-changer-kids-privacy-legislation/]

While Biden endorsing legislation on kids’ privacy during a prime time address could have a major ripple effect in Congress, it’s not entirely surprising.

One of Biden’s top advisers, Bruce Reed, and some of his closest allies on tech issues have long championed greater data privacy protections and safeguards for children.

Still, with Biden now decisively throwing his support behind privacy legislation, and particularly to protect children’s data — it may finally help clear the logjam on Capitol Hill.

# 2AC Kansas OR

## Indigenous Regimes

### AT: Verbeke

#### COVID halted cartel detection – incentivized cartelization.

World Bank Group ’21 [The World Bank Group; “FIXING MARKETS, NOT PRICES Policy Options to Tackle Economic Cartels in Latin America and the Caribbean,” <https://openknowledge.worldbank.org/bitstream/handle/10986/35985/Fixing-Markets-Not-Prices-Policy-Options-to-Tackle-Economic-Cartels-in-Latin-America-and-the-Caribbean.pdf?sequence=1&isAllowed=y>; KS]

And yet, cartels are common across many markets, mostly undetected and likely on the rise in the context of the COVID-19 pandemic. Cartels affect hundreds of markets from milk and poultry to oxygen and cement. Only a fraction of such secretive agreements is detected each year. In the aftermath of the COVID-19 crisis, the corporate sector is consolidating, and governments are intervening more in markets. Increasing corporate market power is associated with lower business dynamism.1 More concentrated and less dynamic markets create fertile ground for even more cartels. All the while, cartel detection has come to a virtual halt since the start of the COVID-19 pandemic.

#### Crisis cartels are increasing and uniquely unpredictable – cartel deterrence is essential.

Maximiano & Volpin ‘20 [Ruben and Cristina; OECD Competition Division; *OECD,* “The Role of Competition Policy in Promoting Economic Recovery,” <https://www.oecd.org/daf/competition/the-role-of-competition-policy-in-promoting-economic-recovery-2020.pdf>; KS]

Co-operation agreements and crisis cartels

Co-operation between private firms has been seen as one of the ways to provide quick solutions to the demand and supply shocks triggered by the Covid-19 crisis. Although the best way to address problems of scarcity and excess capacity are typically competitive forces, negative consequences may impact the economy and all economic actors in the meantime (Jenny, 2020[67]).

Competition authorities have made it clear that they will be watchful that co-operation does not spill over into hard-core restrictions, such as price fixing cartels. They also clearly stated that any co-operation involving co-ordination or discussion on future prices, costs and wages was unlikely to be lawful or justified by pro-competitive effects (OECD, 2020[61]).

Competition authorities maintaining vigorous competition law enforcement does not mean that their analysis will abstract from current market conditions. In applying the traditional analytical framework of competition law enforcement, agencies take due account of the difficult market circumstances arising from the economy in the pandemic, and consider potential efficiencies that such agreements may generate.

Many competition authorities have identified analogous common key criteria of lawful co-operation between competitors during Covid-19 (OECD, 2020[61]). These included, in particular: i) the necessity and indispensability of the co-operation agreement to address a specific market disruption due to the Covid-19 crisis; ii) a positive impact of the co-operation on consumers; and iii) a strict time limit.

While this guidance has been valuable in the midst of the crisis, similar criteria may also be important for the purposes of driving the economic recovery.

Competition authorities need to remain watchful of unwanted spill-overs from allowed crisis co-operation. Anticompetitive concerns arising from ramifications of co-operation agreements seem to have been limited so far, but it is too early to say. The closer the co-operation, the higher the risk of its abuse by competitors, including when the circumstances that justified the co-operation will not be present anymore (Alexander, 2020[63]; Rose, 2020, p. 6[12]).

An increase in calls for crisis cartels to reduce overcapacity can be expected. Such claims were made in the aftermath of the global financial crisis, for example in the context of the Irish beef processing sector. In that context, the European Commission has indicated that, in exceptional circumstances, such arrangements, whilst by object infringing its anti-competitive agreement provision, may be accepted if they are indispensable to achieve pro-competitive benefits.29

Acceptance of crisis cartels should met with scepticism and caution (OECD, 2011[68]). Only when a number of very strict conditions are met can such claims be considered. The first condition is that the pro- competitive benefits (efficiency gains) outweigh the harm to competition.30 The second condition is one of indispensability of the agreement to achieve the benefits, in particular whether market forces cannot remove the long-term and structural excess overcapacity.31 There must also not be any other less anti- competitive means to achieve that same efficiency, namely, for example, a merger that would involve a smaller share of the market than that of the industrial restructuring agreement. Thirdly, the parties to the agreement would have to demonstrate that consumers receive a fair share of the benefits, and that these outweigh the harm caused by the restriction to competition. The greater the reduction in competition, the greater the efficiencies need to be.

Exchange of information between competitors during the crisis should be kept to the strict minimum necessary to reach the desired objective, both in terms of scope and duration (OECD, 2010[69]). An example in the Covid-19 crisis has been that of the German Bundeskartellamt, which granted an exemption to co-operation in the automotive industry, but limited the scope of the information exchanged to the data indispensable for restructuring the industry for approximately one year Box 11.

To deal with the uncertainty of structural changes to markets post-crisis, competition agencies may opt for limiting the timeframe of the exemption and monitor the situation on a regular basis. This approach has been adopted by the UK competition authority in the Atlantic Joint Business Agreement concerning UK- US air routes, given that “The CMA cannot be confident that its assessment of competition concerns, and any remedies that might address them, would adequately reflect the post-pandemic state of competition in the longer term”.32

The tools for cartel detection need to continue to be bolstered to face the added risk of cartels in times of crisis and following on from the crisis in the recovery phase. Given the economic damage ensuing from cartels, tools for cartel deterrence and detection are key to ensure competitive markets. Among these, resources could be invested, for instance, in tools like leniency and whistleblowing to strengthen their effectiveness. Whilst many jurisdictions already have leniency whistleblowing programmes are still not so widespread and are good complementary way of obtaining information from insiders.33

### Developing Countries Fail

#### Developing countries will not create their own regimes.

Michaels ’16 [Ralf; 2016; Arthur Larson Professor of Law, Duke University School of Law; “Supplanting Foreign Antitrust,” <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4808&context=lcp>; KS]

Although it might be beneficial in theory for developing countries to develop their own idiosyncratic antitrust regimes, it seems unlikely that this will happen to a significant degree. This is so for at least four reasons.' First, developing countries often do not even develop such preferences, for lack of democratic representation or for lack of economic expertise. Second, legal and economic advisers often bring with them their own preferences, even if they aspire not to. Third, countries have incentives to match their antitrust laws to a global consensus in order to assure investors. And fourth, when international financial institutions like the International Monetary Fund and the World Bank make loans conditional on the adoption of antitrust laws, there is significant pressure for these laws to comply with a U.S.-E.U. model.6 5 Therefore, even if an antitrust law is formally a sovereign legislative act of an underdeveloped country, substantively it often reflects global and foreign preferences more than domestic preferences.

## OFF

### T-Per Se – 2AC

#### 2. No bright line – ‘per se’ and ‘rule of reason’ is a false distinction.

Souter ’99 [David H, joined by William Rehnquist, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas; May 24; Justice on the Supreme Court of the United States, writing for the majority; Westlaw, “California Dental Ass'n v. F.T.C.,” 526 U.S. 756]

Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. Although we have said that a challenge to a “naked restraint on price and output” need not be supported by “a detailed market analysis” in order to “requir[e] some competitive justification,” National Collegiate Athletic Assn., 468 U.S., at 110, 104 S.Ct. 2948, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like “per se,” “quick look,” and “rule of reason” tend to make them appear. We have recognized, for example, that “there is often no bright line separating per se from Rule of Reason analysis,” since “considerable inquiry into market conditions” may be required before the application of any so-called “per se” condemnation is justified. Id., at 104, n. 26, 104 S.Ct. 2948. “[W]hether the ultimate finding is the product of a presumption or actual \*780 market analysis, the essential inquiry remains the same-whether or not the challenged restraint enhances competition.” Id., at 104, 104 S.Ct. 2948. Indeed, the scholar who enriched antitrust law with the metaphor of “the twinkling of an eye” for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a “spectrum” of adequate reasonableness analysis for passing upon antitrust claims: “There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for.... Nevertheless, the quality of proof required should vary with the circumstances.” P. Areeda, Antitrust Law 1507, p. 402 (1986).15 At the same time, Professor Areeda also emphasized the necessity, particularly great in the quasi-common-law realm of antitrust, that courts explain the logic of their conclusions. “By exposing their reasoning, judges ... are subjected to others' critical analyses, which in turn can lead to better understanding for the future.” Id., 1500, at 364. As \*\*1618 the circumstances here demonstrate, there is generally no categorical line to be drawn between \*781 restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

#### 3. The floor – ‘by at least expanding’ automatically meets.

Andrew ’18 [Andrew; January 25; instructor; Crown Academy of English, “Preposition BY – Meaning and use,” <https://www.crownacademyenglish.com/preposition-by-meaning-use/>]

by + ING form of verb

This describes how to do something. It describes the method for achieving a particular result.

#### Counter-interpretation:

#### ‘Antitrust law’ and ‘prohibitions’ both include the Rule of Reason.

Light ’19 [Sarah; 2019; Legal Studies Professor in the Wharton School at the University of Pennsylvania, Stanford Law Review, “The Law of the Corporation as Environmental Law,” vol. 71]

While antitrust law can serve as an environmental mandate by prohibiting collusive behavior that keeps environmentally preferable goods from the market, there is also conflict between antitrust law’s goals of promoting competition and environmental law’s goals of promoting conservation.192 Because antitrust law's per se rule and rule of reason operate on a somewhat fluid continuum, 193 this Subpart discusses the two doctrines together. The per se rule operates as a prohibition, whereas the rule of reason operates as both a prohibition and a disincentive.

As noted above, antitrust law generally prohibits certain types of market activity - price fixing, horizontal boycotts, and output limitations - as illegal per se, and harm to competition is presumed. 194 For example, if an industry association declines to award a seal of approval necessary for a product's sale without any good faith attempt to test the product's performance, but rather simply because that product is manufactured by a competitor, such an action would be illegal per se. 195 Under this Article's framework, a per se violation is thus a prohibition.

The more fact-intensive inquiry under the rule of reason tests "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 196 While this extremely broad statement might suggest that any fact is relevant to the inquiry, the salient facts under the rule of reason are "those that tend to establish whether a restraint increases or decreases output, or decreases or increases prices." 197 If an anticompetitive effect is found, then the action is illegal and the rule of reason operates, like the per se rule, as a prohibition. 198 The rule of reason can also operate as a disincentive, even if no court finds an anticompetitive effect, as uncertainty and litigation risk may discourage firms from undertaking legally permissible, environmentally positive industry collaborations. 199

#### ‘Anticompetitive business practices’ are horizontal or vertical restraints on competition.

OECD ’3 [Organization for Economic Cooperation and Development, April 24; Glossary of Statistical Terms, “Anticompetitive Practices,” https://stats.oecd.org/glossary/detail.asp?ID=3145]

Definition:

Anticompetitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality.

Context:

The essence of competition entails attempts by firm(s) to gain advantage over rivals. However, the boundary of acceptable business practices may be crossed if firms contrive to artificially limit competition by not building so much on their advantages but on exploiting their market position to the disadvantage or detriment of competitors, customers and suppliers such that higher prices, reduced output, less consumer choice, loss of economic efficiency and misallocation of resources (or combinations thereof) are likely to result.

Which types of business practices are likely to be construed as being anticompetitive and, if that, as violating competition law, will vary by jurisdiction and on a case by case basis. Certain practices may be viewed as per se illegal while others may be subject to rule of reason. Resale price maintenance, for example, is viewed in most jurisdictions as being per se illegal whereas exclusive dealing may be subject to rule of reason. The standards for determining whether or not a business practice is illegal may also differ. In the United States, price fixing agreements are per se illegal whereas in Canada the agreement must cover a substantial part of the market. With these caveats in mind, competition laws in a large number of countries examine and generally seek to prevent a wide range of business practices which restrict competition. These practices are broadly classified into two groups: horizontal and vertical restraints on competition. The first group includes specific practices such as cartels, collusion, conspiracy, mergers, predatory pricing, price discrimination and price fixing agreements. The second group includes practices such as exclusive dealing, geographic market restrictions, refusal to deal/sell, resale price maintenance and tied selling.

Generally speaking, horizontal restraints on competition primarily entail other competitors in the market whereas vertical restraints entail supplier-distributor relationships. However, it should be noted that the distinction between horizontal and vertical restraints on competition is not always clear cut and practices of one type may impact on the other. For example, firms may adopt strategic behaviour to foreclose competition. They may attempt to do so by pre-empting facilities through acquisition of important sources of raw material supply or distribution channels, enter into long term contracts to purchase available inputs or capacity and engage in exclusive dealing and other practices. These practices may raise barriers to entry and entrench the market position of existing firms and/or facilitate anticompetitive arrangements.

#### They include single acts.

Corradino ‘3 [Dolph; 2003; Attorney in Little Falls, former judge of the New Jersey Municipal Court; Lexis, “TMK Assocs. v. Landmark Dev.,” 2003 Conn. Super. LEXIS 2464]

They argue that "in order to successfully allege a violation of CUTPA, the plaintiff must allege more than a singular occurrence"; "there must be a pattern of unfair or deceptive trade practices"; "the plaintiff failed to plead more than a single act (of) unfair or deceptive business practices." This argument was laid to rest in Johnson Electric Co. v. Salce Contracting Assocs., 72 Conn. App. 342, 805 A.2d 735 (2002). There, "the trial court held that, because the plaintiff did not prove that the defendant had engaged in a repeated course of misconduct, the plaintiff did not establish that the defendant violated CUTPA." Id. page 349. The court disagreed, ruling that, 'The trial court improperly declined relief to the plaintiff on the ground that it had alleged and proven only a single act of misconduct." Id. page 353.

#### ‘Prohibitions’ disallow specific actions.

Blackmun ’92 [Harry Andrew, Anthony McLeod Kennedy, and David H Souter; Justices on the Supreme Court of the United States; Lexis, “Cipollone v. Liggett Group,” 505 U.S. 504]

Although the plurality flatly states that the phrase “no requirement or prohibition” “sweeps broadly” and “easily encompass[es] obligations that take the form of common-law rules,” ante, at 2620, those words are in reality far from unambiguous and cannot be said clearly to evidence a congressional mandate to pre-empt state common-law damages actions. The dictionary definitions of these terms suggest, if \*536 anything, specific actions mandated or disallowed by a formal governing authority. See, e.g., Webster's Third New International Dictionary 1929 (1981) (defining “require” as “to ask for authoritatively or imperatively: claim by right and authority” and “to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)”); Black's Law Dictionary 1212 (6th ed. 1990) (defining “prohibition” as an “[a]ct or law prohibiting something”; an “interdiction”).

### Reg CP – 2AC

#### 1 – Circuit splits – Clarifying *Empagran* and resolving the circuit splits is key – revitalizes PROA and cartel deterrence.

Balde ’16 [Alen; January 2016; Submitted in fulfilment of the requirements for the Degree of Doctor of Philosophy School of Law College of Social Sciences University of Glasgow; *University of Glasgow,* “Private Antitrust Law Enforcement in Cases with International Elements;” KS]

This overview of post-Empagran judgments reveals that, in general, District Courts and Courts of Appeals do refer to the Supreme Court’s47 and second Court of Appeals’48 judgment in the Empagran litigation in explaining their reasoning. Post-Empagran case law can be divided into seven categories of judgments depending on the extent to which they refer to the Empagran litigation. Among these categories, the most challenging post-Empagran judgments are those where adjudicating courts refer separately, sometimes even exclusively, to post- Empagran District Courts’ and post-Empagran Courts of Appeals’ judgments. It is submitted that these post-Empagran cases that use as precedents only post- Empagran judgments raise concerns as to whether the post-Empagran development of antitrust law in this field is moving in a justifiable direction. If post-Empagran case law develops without resolving the questions that were left open and/or issues that were problematic throughout the Empagran litigation,49 and if such ‘poisoned’ post-Empagran case law is used on its own50 as precedents in further antitrust litigation, the results may be twofold. Firstly, private litigants may unjustifiably be deprived of their right to get compensation for their foreign private antitrust injury. Secondly, antitrust cartels that operate on an international level may continue to exist and cause anticompetitive effects in the U.S. and non-US countries. Therefore, this thesis submits that it is important to understand the Empagran litigation correctly51 and if post-Empagran case law develops in a questionable direction, it is important to notice these problems promptly and act accordingly.

#### 2 – Regulations cannot create private rights of action.

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

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

#### PROA key – maximizes deterrence and makes operation cost prohibitive.

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

IV. THE POTENTIAL HARM CREATED BY THE SEVENTH CIRCUIT’S DECISION

Public and private antitrust enforcement can shut down existing cartels and deter future cartels from forming by influencing both the likelihood that a cartel is discovered and convicted and the extent of penalties brought to bear on convicted cartels. The higher is that likelihood, the more likely is the spigot of harm to be shut off. The higher is that likelihood and the more severe are the penalties, the more likely that firms will be deterred from ever turning the spigot on. If we take private damages out of the equation, how much is the disabling and deterring of cartels impacted?

In addressing that question, let us first consider the scenario in which, if there is a cartel, the government were to prosecute it. Presuming that they obtain a conviction, the cartel will be shut down and thus serve the objective of disabling cartels. However, the lack of private suits weakens the objective of deterring cartels as penalties are limited to jail time and government fines and lack potentially sizable private damages. It is well-recognized that current penalties— even with private damages—are very likely to be insufficient to deter. As this point is well-argued in a recent Amicus Curiae Brief16 and the point is not new, I will not dwell on it. Suffice it to say that the Court’s decision to prohibit companies like Motorola to sue will undoubtedly reduce the penalties levied on cartels and, because the full array of penalties are currently inadequate to deter many cartels, will contribute to antitrust enforcement further falling short of what is require to achieve the goal of deterrence.

The preceding analysis was predicated on the critical assumption that the government prosecutes the cartel, but this may not occur for two reasons. First, the government may be unaware of the cartel’s existence. Lacking the right to bring a private case, cartels are less likely to be discovered because those harmed have weaker incentives to monitor for collusion. Nevertheless, they still do have some incentive to monitor and report a suspected cartel to the government in order to disrupt the harm that is being inflicted upon them. It is then unclear whether the loss of antitrust standing will substantively weaken the incentive to monitor to the point that it warrants interfering with comity.

### States CP – 2AC

#### 1 – No authority to regulate commerce involving foreign nations.

Greenfield et al ‘15 [Leon B; Spring; Partner in the Washington, D.C. office of WilmerHale; *Antitrust,* “Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach,” <http://awa2016.concurrences.com/IMG/pdf/foreign-component-cartels-and-the-us-antitrust-laws.pdf>; KS]

State Indirect Purchaser Claims

Given that the Illinois Brick doctrine bars most indirect pur- chaser claims under federal antitrust laws, the question of whether U.S. antitrust laws should apply to component sales in wholly foreign markets will often arise in the context of indirect purchaser suits under state antitrust laws that recog- nize such claims. For instance, as described above, in the TFT-LCD Panel MDL, a class of self-styled indirect pur- chasers of TFT-LCD panels brought claims based on their purchases of finished products containing price-fixed panels. These private actions were brought under various state antitrust laws. Although the FTAIA is a creature of federal, not state law, we believe that its underlying principles dictate that cartel conduct in foreign component markets is not actionable under state antitrust law either.

When the court in the TFT-LCD Panel MDL addressed the indirect purchaser claims before it (discussed above), it held that the claims met the FTAIA’s domestic effects test.54 It, therefore, did not reach the question of whether these state law claims could reach foreign conduct that the Sherman Act could not.55 In our view, the fundamental analysis does not change regardless of whether component indirect purchaser actions are brought under state law, including Illinois Brick repealer statutes.

First, on their own terms, state antitrust laws—similar to federal antitrust statutes—regulate conduct that distorts the competitive process in markets that are within the state’s regulatory reach, not price levels within its borders standing alone.56 That being so, Illinois Brick repealer laws cannot properly be read to authorize suits by state residents claiming pass-on injuries derived from distortion of foreign markets that the state’s antitrust laws do not reach.57 Repealer statutes merely allow indirect purchasers to recover if they can prove that—as a result of pass-on—they were actual economic vic-tims of conduct that violates the state’s antitrust laws.58 They do not make wholly foreign conduct a violation of state law or provide redress for purely downstream effects, in and of themselves.59

Moreover, the principle that U.S. antitrust laws regulate only U.S. markets should apply even more strongly to state antitrust laws because the states do not have any role in reg- ulating commerce involving foreign nations, much less the wholly foreign commerce involved in many component car- tels.60 If state antitrust laws were permitted to reach into for- eign markets when federal laws do not, that would circum- vent national policy regarding the appropriate bounds of U.S. antitrust laws established by Congress and the President, which have exclusive authority over foreign commerce and U.S. foreign policy.61 Allowing the antitrust laws of the 50 states, the District of Columbia, and U.S. territories to reg- ulate purely domestic conduct within other countries’ economies would result in a cacophony of uncertainty to the application of U.S. antitrust laws overseas, precisely the problem that Congress enacted the FTAIA to address.62

#### 2 – Preemption – Sherman Act and Commerce Clause exclude state action.

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

States also have considerable authority by virtue of state antitrust laws, and considering the relationship between that authority and the federal enforcement of antitrust law dem- onstrates the inevitably precarious nature of jurisdictional restraints-domestic or foreign. State law claims usually wind up in federal court,581 seemingly positioning the federal judiciary to rationalize antitrust comity,582 but congruity in a federal system may be more difficult to ensure than that. If customary inter- national law is directly binding federal law, equivalent to treaties and statutes, then states must of course conform their state laws to it.583 If, on the other hand, custom merely influences the inter- pretation of the federal antitrust statutes, it arguably has little purchase on state law, no matter where it is applied.

At the very least, the consensus on Charming Betsy fractures on this question.584 One may still infer preemptive limits from federal law, particularly in the service of international norms,585 but the Supreme Court lately envisions a more limited role for federal courts in generating such rules.586 Where state antitrust law differs from federal law, at least-and does not differ so distinctly as to raise preemption issues-local international law may fail to authoritatively constraint state law enforcement not constrained of its own accord.587

The history of state antitrust law reminds us, however, how illusory jurisdictional limits may prove, and provides a useful account concerning the potential for judicial enforcement of international norms. Federal enactments have traditionally posed little preemptive constraint.588 Over half the existing states had antitrust laws when the Sherman Act was adopted,589 Congress appears to have desired to supplement those laws,59 and the Supreme Court employs the presumption against preemption in areas traditionally regulated by the states.591

The Sherman Act originally was adopted, however, largely out of the perception that the states lacked constitutional authority to regulate interstate or foreign commerce.592 At the time, even nondiscriminatory state antitrust legislation was reviewed for consistency with the territorial limits on state authority imposed by the Commerce Clause 593 and with due process limits on legislative jurisdiction.594 In short, as Professor Hovenkamp has observed,595 the Supreme Court's contemporaneous view likely resembled Justice Holmes's opinion on the extraterritorial application of the Sherman Act: namely, that it would be "startling" to evaluate the legality of an act by any standard other than that of the place where it was committed.596 Territorial limits protected against unjustified encroachments by a state against other states and their citizens, while Commerce Clause limits served to preserve a domain for regulation, if at all, on the federal plane.597

Just as judicial attempts to restrict federal authority to interstate matters faded as the century wore on,598 so did the limits on state authority. The Supreme Court has never squarely held that state antitrust statutes may apply freely to interstate commerce,599 and state courts developed interpretive practices designed to avoid potential conflicts,600 but there has been little attempt to hold any line.601 Despite a continued insistence on substantial contacts between a regulating state and an out-of-state activity over which it seeks control,602 due process limits on the territorial reach of states have likewise eroded.603

The solution, instead, has been enlightened self-restraint, encouraged by the federal government. In the area of criminal antitrust, for example, a relatively meager program to deputize state attorneys general to assist in federal criminal prosecutions604 evolved into a more significant protocol providing for the occasional transfer to states of responsibility for potential offenses having a "particularly local impact."605 The NAAG's efforts at coordinating state enforcement in important areas like merger control has also attempted to maintain some consistency with federal enforce- ment,"606 and federal and state officials subsequently agreed on a protocol designed to facilitate joint investigations and settlement discussions.607 Federal and state officials also formed an Executive Working Group for Antitrust to provide for broader coordination of efforts.608

These efforts have scarcely obviated the need for a more formal protocol on international matters, one encompassing state enforce- ment of both federal and state laws; some state representatives, indeed, have indicated something like jealousy concerning the working relationship between the federal agencies and foreign authorities.609 But the similarities to the course of international cooperation are striking. While interstate enforcement of state law was originally thought to exceed ironclad constitutional delim- itations, and potentially to conflict with the Sherman Act, neither argument won the day-just as statutory and international law objections to extraterritoriality ultimately subsided. In their stead, cooperative agreements have prevailed, without entirely resolving the potential for conflict.

The difference, facially, is that while domestic cooperation on interstate matters is not legally binding, the theory of local international law suggests that international cooperation, in the form of antitrust comity, is. Even that difference may be somewhat overstated. Where subnational cooperation is inconsistent with domestic arrangements, it too has been regarded as sufficiently concrete to warrant legal intervention.610 Just so, federal arrange- ments on the international plane may require the protection afforded by custom against both national and subnational breach. In the case of antitrust comity, at least, the domestic imple- mentation of that custom as local international law requires the national supervision of state restraint, if only as an alternative to more decisive jurisdictional limits. If it is not forthcoming, the United States may be forced to confront awkward questions regarding the significance of subnational sovereignty in an international system,611 as well as the tenability of maintaining interstate cooperation that potentially threatens federal supremacy in foreign affairs.612

### CIL CP

#### 1 – Cross apply everything from the antitrust flow – no treble damages.

#### 2---enforcement.

Walt 13, American professor of international affairs at Harvard University's John F. Kennedy School of Government (Steven Walt, February 2013, “Why Jurisprudence Doesn’t Matter for Customary International Law, William & Mary Law Review, Vol. 54 (2012-2013), Issue 3 (Law Without a Lawmaker Symposium), Article 10)

For the same reason, custom has no necessary priority over other norms. While customary law, unlike simple custom, creates legal obligations, those obligations may not be superior to other legal obligations. Whether customary law operates only at the state level or also domestically can depend on the content of the particular custom. Although customary international law does not require recognition by a domestic legal system to create legal obligations, these obligations need not have priority over domestic law or automatic effect domestically. There is nothing in the bare notion of customary international law that gives it priority over inconsistent domestic law or makes customary international law applicable in domestic law without domestic implementation. The mere fact that international and domestic law are part of the same or different legal orders does not by itself give international law priority over domestic law or make it self-executing. Put another way, even if customary international law and domestic law are parts of a single legal order, international law might give priority to domestic law over customary international law, or domestic law might give priority to customary international law over domestic law. The priority or effect of customary international law depends on particular facts: facts about the priority or effect international law gives it. This is a contingent matter. Finally, if customary international law is not self-executing, so that its domestic application requires incorporation into domestic law, domestic law controls the recognition of customary international law. Erie’s limit on federal judicial law making extends to customary international law, requiring a source of authority in federal or state law for its application. Customary international law might be federal law for purposes of the Supremacy Clause in Article VI of the Constitution. Alternatively, its recognition might be authorized by legislation.127 In both cases, the limits on the judicial recognition of customary international law are constitutional or statutory, not jurisprudential.

#### 3---credibility.

Joyner 19, Elton B. Stephens Professor of Law, University of Alabama School of Law (Daniel H. Joyner, 2019, “Why I stopped believing in Customary International Law,” Asian Journal of International Law, Vol. 9, Issue 1, pp. 14-15)

Conclusion

So again, I think there is a big problem here. The problem is that the agencies that are looked to as identifiers of CIL – international courts, the ILC, and academics - have been demonstrated to typically go about that exercise in methodologically bankrupt ways. And we don’t just do it because we are lazy or incompetent, we do it so that we can use the resulting assertions of CIL obligations in instrumentalist ways, typically to expand international law to apply in areas where states have not given their explicit consent to be bound through agreed treaty text. The asserted rules of CIL which the shortcut methodologies of identification creates, are therefore of low credibility in the ~~eyes~~ of states, who are understandably reluctant to have judges and academics creating new legal obligations for them. This problem is so difficult to address because it is so institutionally entrenched. Courts and the ILC and many academics have every reason to continue to support the orthodox approach to CIL identification, which is so susceptible to this methodological mischief, because it serves their instrumentalist purposes. The ILC’s ongoing study on this topic, which will almost certainly provide yet another reaffirmation of the orthodox approach, will only further institutionalize the problem. Again, my problem is not with CIL itself as a source of law. In a theoretical sense, I have no problem with the idea that states can collectively make law that governs their interactions with each other, through an evolving process that is not necessarily written down in one lawmaking moment. Particularly under the modern approach that places emphasis and priority upon opinio juris, states can manifest their recognition of an obligation, and their consent to be bound thereby, through their subjective statements of legal understanding. The problem is that we simply do not currently have a structural framework within the international legal system that can support this methodological approach to law creation in a manner that satisfies concerns about objectivity and empirical verifiability of that positivistic manifestation of affirmation and consent. And without this institutional structure, the black magic that stands in for identification of CIL in practice undermines the credibility of every assertion of CIL. It also, by extension, undermines the credibility of the international legal system itself. In order for CIL to survive as a supportable source of international legal obligation, we need to create such a system structure for the objective manifestation and empirical verifiability of positive manifestations of affirmation and consent to be bound by states, resulting in the identification of CIL obligations. This structure must have in place an agreed set of rules and procedures for how this is to happen. Exactly what this institutional structure should look like, I don’t know. The conceptually easy proposal would be to create some sort of legislative body for the international legal system. Perhaps by amending the U.N. Charter to build on the existence and functions of the U.N. General Assembly. But frankly, this prospect is so unlikely, it hardly seems deserving of serious consideration.

#### No impact---CIL lacks coordination, support, enforcement, and allows for auto-interpretation; treaties solve their internal link

Alford 14, general editor of Kluwer Arbitration Blog and on the Executive Committee of the Institute for Transnational Arbitration, Concurrent Professor at the Keough School of Global Affairs, Faculty Fellow at the Kellogg Institute for International Studies, Faculty Fellow at the Nanovic Institute for European Studies, served as the Deputy Assistant Attorney General for International Affairs with the Antitrust Division of the U.S. Department of Justice from 2017-2019 (Roger Alford, 11-29-2014, "Customary International Law is Obsolete," OpinioJuris, in association with the International Commission of Jurists, http://opiniojuris.org/2014/11/29/customary-international-law-obsolete/)

Trachtman examined 300 different CIL rules and found that only 13 (4.33%) have not been either incorporated in treaties or codified. Trachtman argues that the move toward treaties is because CIL cannot respond effectively to the great modern challenges of international society: global environmental protection, international public health, cybersecurity, financial cataclysm, and liberalization of movement of goods, services, and people. Trachtman also argues that CIL is incapable of addressing enduring challenges of regulating war, protecting human rights, and reducing poverty. According to Trachtman, the reasons for CIL’s obsolescence are manifold. CIL (1) cannot be made in a coordinated manner; (2) cannot be made with sufficient detail; (3) cannot be made with sufficiently heterogeneous reciprocity; (4) cannot be made with specifically-designed organization support; (5) is not subject to national parliamentary control; (6) purports to bind states that did not consent but failed to object to its formation, and (7) provides excessive space for auto-interpretation by states or undisciplined judges. For Trachtman, the obsolescence of CIL should lead states to stop arguing about CIL and start legislating mutually beneficial transactions. It should also lead NGOs and advocates to stop trying to “bootstrap a desired CIL past a target state” and instead engage with those states in treatymaking. Academics should “focus our analysis on the politically immanent, interdisciplinary, work of developing proposed rules that are administratively workable and effective, and that achieve actual social goals.” He suggests that the international legal system could survive just fine without CIL. So stop worrying about custom and learn to love treaties.

### Court Clog DA – 2AC

#### Litigation flood now.

Gaivin ’9-10 [Kathleen; September 10; Columnist; McKnight’s, “‘Rough couple of months ahead’: Increasing COVID-19 litigation could mean trouble for employers,” <https://www.mcknightsseniorliving.com/home/news/business-daily-news/rough-couple-of-months-ahead-increasing-covid-19-litigation-could-mean-trouble-for-employers/>]

An increase in litigation this summer could foreshadow a rough few months ahead for employers, especially in the healthcare sector, according to a report from employment and labor law firm Fisher Phillips.

Employment lawsuits have nearly doubled from last year, and healthcare employers are more than 20% likely to be sued than other types of employers, the company  said.

“We typically see a slowdown in new lawsuit filings over the summer for a number of obvious reasons,” [said](https://www.fisherphillips.com/news-insights/fp-tracker-reveals-hot-covid-litigation-summer.html) Jay Glunt, a Pittsburgh-based Fisher Phillips partner. “But the fact that we didn’t see much of a lull in employment-related COVID litigation — and in fact saw an uptick — sends a clear signal that we could be in for a rough couple of months ahead.”

Employers saw 715 COVID-19 workplace lawsuits from June to August, a number that was significantly higher than last year’s record of 444 lawsuits, according to the law firm’s [Employment Litigation Tracker](https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights.html). The first eight months of 2021 have seen a monthly average of 253 new claims filed, which represents a 59% increase in lawsuits from the last eight months of 2020.

The authors opine that the number of lawsuits may be tied to the surge of COVID-19 cases across the country.

“TheFP Tracker shows a sharp increase in lawsuits filed from July 2021 (209 claims) to August 2021 (246 claims). And that 18% jump could be just the start of a lawsuit wave that follows the delta-fueled surge, matching what we saw earlier this year,” according to the report.

#### The plan solves tradeoff.

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

Of greater relevance is the second reason for the lack of public enforcement, which is that the government suspects unlawful collusion but chooses not to litigate. The Antitrust Division of the U.S. Department of Justice (“DOJ”) has limited resources, which means all possible cases cannot be pursued. Furthermore, the presence of a resource constraint impacts the type of cases that are pursued. These days, the DOJ’s caseload is heavily oriented to cases involving the leniency program but not all forms of collusion lend themselves to a firm receiving amnesty. A member of a hard-core cartel engaged in a per se offense can expect to receive leniency if it is the first to come forward but there are many cases of collusion that do not involve behavior that is per se unlawful. Given the lower threshold for a conviction in a civil case, private litigation has been, and will continue to be, essential in prosecuting these less flagrant, but no less harmful, forms of collusion.

While it is difficult to document case selection by the DOJ, there is certainly evidence consistent with it being a substantive factor. In noting that the DOJ obtained convictions in 92 percent of 699 cases filed over 1992 to 2008, Professors Robert Lande and Joshua Davis comment:17

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

#### No case flood – the hurdle is high to plead a case – but if there are case floods, the case definitely outweighs.

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

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

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

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

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

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

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

#### There is zero basis for clog.

Davis ’17 [Joshua and Robert Lande; 2017; Professor and Director of Center for Law and Ethics at the University of San Francisco; Venerable Professor of Law at the University of Baltimore, M.P.P. and J.D. from Harvard University; Scholar Works, “Restoring the Legitimacy of Private Antitrust Enforcement,” Ch. 6]

Beyond the flawed theory, the claim of widespread frivolous antitrust litigation is unsupported in fact.71 It is not simply that there are no empirical studies to support the claim; there are apparently no good examples of settlements of frivolous antitrust suits. And absent such settlements, class action plaintiffs have nothing to gain by bringing such suits. The evidence suggests that if there is a problem with class action settlements in antitrust cases, it is that plaintiffs sometimes settle strong cases for too little, not weak cases for too much.72

Footnote 71:

71 See Edward Cavanagh, Pleading Rules in Antitrust Cases: A Return to Fact Pleading?, 21 REV. LITIG. 1, 19 – 20 (2002) (noting that in contrast to the evidence of abusive securities class actions that supported enactment of the Private Securities Litigation Reform Act of 1995, there is an “absence of similar claims of widespread abuse in antitrust cases . . . .”). With respect to frivolous litigation in general, legal scholars have concluded that “[r]eliable empirical data is extremely limited . . . .” Bone, supra note 58, at 520; see Silver, supra note 56, at 1395 n.164 (“There is little empirical evidence supporting the theory that frivolous lawsuits are common.”); Arthur Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 996 (2003) (showing that “the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition”).

End of Footnote 71.

Every one of these indicators is evidence, but not proof, that these private antitrust cases involved anticompetitive behavior. But ultimately there is no obvious way to prove or fully refute assertions that many or most private cases are unmeritorious and are tantamount to extortion. We submit, however, that the above analysis should at a minimum give rise to a presumption—likely a strong presumption—that the cases involved legitimate claims. We know of no reason, moreover, to believe the opposite. In sum, there is simply no basis to believe that frivolous antitrust class actions are a significant problem.73

73 See William Kolasky, Reinvigorating Antitrust Enforcement in the United States: A Proposal, ANTITRUST, Spring 2008, 85, 86 (“Recent experience shows that the courts know how to use . . . tools to dispose of non-meritorious claims either at the pleadings stage or through summary judgment, and that most judges manage discovery more effectively than the Supreme Court seems to acknowledge.”); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1988 (2007) (Stevens, J., dissenting) (“The Court vastly underestimates a district court's case-management arsenal.”).

#### Court clog inevitable, new Biden regulations thump, and patent disputes are decided in specialized venues that aren’t affected by the plan

Karp ’22 [Jack; January 4; senior reporter; Law360, “COVID's Impact On Litigation To Persist In 2022,” https://www.lw.com/mediaCoverage/covid-impact-litigation-persist-2022]

For many companies, their intellectual property is their most valuable asset. The past decade has seen a dramatic transformation in IP litigation, driven by changes to patent law and venue rules as well as the practical difficulties of enforcing patent protections across international boundaries, according to Klapow.

So IP litigation, which used to consist largely of patent infringement cases heard in district courts, has evolved into multifaceted disputes that also involve copyrights and trade secrets, Klapow said.

The inter partes review process at the Patent Trial and Appeal Board will continue to play a significant role in these disputes in 2022. So will the International Trade Commission, a patent dispute venue that "is hot and will continue to be," Klapow added.

Battles over software copyrights and biotechnology patents are especially likely, said Johnson. The pandemic could play a role here, with litigation over COVID-19 treatments and vaccines.

Meanwhile, white collar and other regulatory enforcement litigation is also likely to see an uptick.

The Trump administration presided over "historic lows" in federal law enforcement action, according to Wood at Foley Hoag.

But the Biden administration has a very different approach.

The U.S. Securities and Exchange Commission has already previewed increased regulation of cryptocurrency trading, according to Johnson.

The administration is also likely to be more aggressive in the realms of antitrust, environmental and white collar regulation, said Klapow.

"The regulatory litigation, or litigation that is sort of adjacent to regulation, can be up or down depending on the administration," said Klapow. "I think obviously right now we're clearly up." Continued Backlogs

Courts still face a substantial backlog as a result of the pandemic, and it could take them 18 more months to work through the glut of trials, Klapow said.

Virtual alternatives are helping courts catch up, and calenders are starting to resemble pre-pandemic schedules. Litigators will see "an unprecedented number of trials" teed up in the next 12 months, Johnson predicted.

It's not just attorneys who will have to deal with backlogs. Judges are also feeling stressed by the number of cases on their dockets and will be ordering attorneys to move quickly, whether they want to or not, said Wood.

So in 2022, litigators should be prepared, write short briefs and refrain from filing unnecessary motions.

"There'll be just a lot of pressure to get things done," Wood said.

#### Patent law is a disaster.

Quinn ’19 [Gene; July 9; Patent Attorney and Editor and President & CEO of IPWatchdog, Inc.; IPWatchdog, “It May Be Time to Abolish the Federal Circuit,” https://www.ipwatchdog.com/2019/07/09/may-time-abolish-federal-circuit/id=111122/]

The state of patent law in America is this: You might as well appeal because if you get lucky and draw the right panel you will win. And like it or not, that is precisely what our patent justice system has become under the Federal Circuit. A crapshoot. And we all know it to be true.

The current state of utter disarray at the Federal Circuit, with panels doing whatever they want, judges not agreeing on anything, and ignoring en banc decisions as if they never happened isn’t what the Federal Circuit is meant to have become. The Federal Circuit is a disaster and the collective unwillingness of the judges to come together is making a mockery of an institution that is a critical piece in the U.S. innovation system. Indeed, the fact that the Federal Circuit is absent and unwilling to provide predictability and certainty, which literally was their only job, is why so many people are turning to Congress to solve the problems of the patent system.

The Federal Circuit is the entity within our system that the patent community has turned to for help since 1982, but they are not present currently. The Federal Circuit is so afraid of being overturned by the Supreme Court that they have lost their ability to distinguish even easily distinguishable cases. After all, Mayo dealt with an exceptionally poor claim where the Supreme Court took a shortcut using 101 instead of using 102 or 103. In Alice, they were told by the patentee’s attorney it was a trivial piece of software that could be coded over a weekend by a college student. These cases are easily distinguishable from any life sciences innovation of consequence or something like artificial intelligence or autonomous driving, for example. Yet, the Federal Circuit has expansively read these cases despite the explicit language of the Supreme Court telling them to narrowly read the cases lest all of patent law would be swallowed.

### DOJ DA – 2AC

#### No link – likely actor could be courts or congress AND the enforcers of the plan are private plaintiffs, not the DOJ.

Simmons ’18 [Jay; November; Executive Senior Editor, Southern California Law Review, Volume 92; J.D. Candidate 2019, University of Southern California Gould School of Law; B.S., summa cum laude, Political Science and Economics 2016, Bradley University; *Southern California Law Review,* “What’s in a Claim? Challenging Criminal Prosecutions Under the FTAIA’s Domestic Effects Exception – Note by Jay Kemper Simmons,” <https://southerncalifornialawreview.com/2018/11/02/whats-in-a-claim-challenging-criminal-prosecutions-under-the-ftaias-domestic-effects-exception-note-by-jay-kemper-simmons/>; KS]

A final consideration concerns the distinct remedies that the overall statutory scheme envisions for civil and criminal antitrust violations. According to regulators’ conception of the Sherman Act and its penalties, violations “may be prosecuted as civil or criminal offenses,” and punishments for civil and criminal offenses vary.[153] For example, available relief under the law encompasses penalties and custodial sentences for criminal offenses, whereas civil plaintiffs may “obtain injunctive and treble damage relief for violations of the Sherman Act.”[154] Regulators also recognize that the law envisions distinct means of enforcing criminal and civil offenses under the Sherman Act. For example, the DOJ retains the “sole responsibility for the criminal enforcement” of criminal offenses and “criminally prosecutes traditional per se offenses of the law.”[155] In civil proceedings, private plaintiffs and the federal government may seek equitable relief and treble damage relief for Sherman Act violations.[156]

#### No resources.

Vedoca 9/28/21 [Holly Vedova, Bureau of Competition. "Making the Second Request Process Both More Streamlined and More Rigorous During this Unprecedented Merger Wave." https://www.ftc.gov/news-events/blogs/competition-matters/2021/09/making-second-request-process-both-more-streamlined?page=1]

Given the recent surge in merger filings and the Commission’s obligation to protect Americans from illegal transactions, the Bureau of Competition is instituting new process reforms to best to use its limited resources. These reforms build on other enhancements the Bureau announced in an August blog post.

The Hart-Scott-Rodino (HSR) Act requires that companies provide the FTC and Department of Justice with advance notice of certain transactions above a certain threshold, to provide the agencies 30 days to pursue an initial investigation and to determine whether additional information is needed to assess the legality of the transaction. If the FTC or DOJ seeks additional information through what is known as a “second request,” the law forbids merging firms from consummating a transaction until the companies have substantially complied with the additional investigatory request. When the FTC issues a second request, FTC staff typically engage in negotiations (sometimes quite extensive) with merging companies to tailor the scope of search to meet the specific needs of our investigation, and to consider modifications requested by the companies under investigation.

Mergers and acquisitions have hit an all-time high. Mergers filed with the antitrust agencies have doubled from 2010 to 2020 to nearly 2,000 deals a year. In the first eight months of 2021 alone, 2,436 acquisitions have already been filed with the agencies, meaning that right now these eight months have already seen many more filings than most other years. Based on the trend in these numbers, we project that we may hit 3,500 merger filings before the end of the year. There is no question now that this is going to be a record-setting year. This merger wave – which includes anticompetitive transactions that should have never been contemplated – has taxed federal antitrust agencies. Between 2010 and 2016, FTC and DOJ funding stagnated in nominal terms, and, in real terms, effectively declined. In 2017 and 2018, the FTC’s full-time employee headcount declined, and it remains roughly two-thirds of what it was 40 years ago. And, since the 1990’s, the scope of investigation and litigation discovery has expanded exponentially, with voluminous electronic submissions demanding substantial staff resources.

#### Thumpers.

Kendall 10-9 [Brent; October 9; Legal affairs reporter in the Washington bureau of The Wall Street Journal, where he covers the Justice Department, the Federal Trade Commission and the federal courts, including the Supreme Court; *The Wall Street Journal,* “Justice Department Makes Quiet Push on Antitrust Enforcement,” <https://www.wsj.com/articles/justice-department-makes-quiet-push-on-antitrust-enforcement-11633800598>; KS]

WASHINGTON—The Justice Department has been quietly ramping up antitrust enforcement under the Biden administration, despite not having a politically confirmed official to serve as antitrust chief.

The department shares antitrust authority with the Federal Trade Commission, whose new liberal leadership has drawn much of the early spotlight. Yet in recent months the DOJ has blocked a major insurance-industry merger between Aon PLC and rival Willis Towers Watson PLC; filed an aggressive challenge to a partnership between American Airlines Group Inc. and JetBlue Airways Corp. ; and withdrawn from a real-estate industry settlement in order to take a deeper look at whether industry practices keep some broker commissions artificially high.

Antitrust staffers are advancing investigations of business practices at Apple Inc., Alphabet Inc.’s Google (which already is facing one Justice Department antitrust lawsuit) and Visa Inc. The department’s antitrust division also is deep into scrutinizing some high-profile pending mergers. Those include a publishing industry deal in which Penguin Random House’s parent company is seeking to buy Simon & Schuster, and UnitedHealth Group Inc.’s planned acquisition of health-care technology company Change Healthcare.

Attorney General Merrick Garland, speaking at the New Yorker Festival on Monday, described the antitrust division as “energized and eager to go forward,” saying the department had ongoing matters “involving everything from agriculture, to banking, to real estate.”

“We do think that ensuring fair competition is an essential element of our obligation to ensure that justice is done,” he said.

The department’s work comes at a time when President Biden has made promoting economic competition—and checking corporate dominance—a priority. He signed an executive order in July that encouraged U.S. agencies to adopt policies that push back industry consolidation and business practices that might stifle competition in ways that harm consumers and workers.

#### Private suits turn the link.

Waller ’19 [Spencer; February 2019; John Paul Stevens Chair in Competition Law, Director, Institute for Consumer Antitrust Studies, Professor, Loyola University Chicago School of Law; Competition Policy Antitrust Chronicle, “In Praise of Private Antitrust Litigation,” p. 2-9]

There is no textual or historical basis to prioritize either public or private enforcement of antitrust laws. Rather they were intended to work as equal partners.

The Kinter treatise notes the importance of private treble damage remedies:

Although the treble damage provision is now found in the Clayton Act, the original Sherman Act already provided for the mechanism of monetary relief, including costs and attorney’s fees, for injured private parties. Three principal reasons animated the adoption of this device. First and primarily, it was deemed important to compensate persons who were injured by an antitrust violation, with much the same concern as is given to victims of other unlawful conduct. Second, it was hoped that the imposition of substantial monetary penalties would act as a deterrence to anticompetitive activity. Third, providing for private lawsuits would increase the number of potential plaintiffs, thereby offsetting the limited enforcement resources available to the government and giving the opportunity to attack misconduct to the very persons most likely to have information thereof.

#### Funding is normal means AND boosts coming.

Dylan Byers 21, Senior Media Reporter for NBC News; Internally Citing George Washington University Professor and Former FTC Chair William Kovacic; “Is Facebook Untouchable? It's Complicated,” NBC News, 7-1-2021, https://www.nbcnews.com/tech/tech-news/facebook-untouchable-complicated-rcna1323)

The House Judiciary Committee recently advanced six bills that would bolster the government's ability to regulate Big Tech. They range from simple budgeting measures — one would give more funding to the FTC and the Department of Justice for their antitrust enforcement efforts — to profound reforms — one that would stop platform companies from preferencing their products over those of their competitors and another that would make it illegal for companies to eliminate competitors through acquisitions.

This legislative package faces an arduous road ahead. House Majority Leader Steny Hoyer, who sets the House floor schedule, has said none of the six bills are ready for a vote, which suggests they don't have broad bipartisan support. If and when they do make it through the House, they face an even harder battle in the Senate.

"It's hard to imagine that the larger legislative package is accomplished this year," Kovacic said, though he predicted a few of the less-threatening bills — budgeting, for example — are likely to pass on their own.

"The funding for the FTC and DOJ antitrust divisions, it's nearly 100 percent likely that Congress will pass that law," he said. He said another bill, which would block the tech firms from moving court hearings to more favorable states, was also likely to pass.

#### Prices are low – their studies mismeasure.

Zinberg ’21 [Joel; December 26; senior fellow at the Competitive Enterprise Institute, director of Paragon Health Institute’s Public Health and American Well-being Initiative; Wallstreet Journal, “Drug Prices Haven’t Been Going Up,” <https://www.wsj.com/articles/drug-prices-havent-been-going-up-generics-inflation-caps-biden-costs-innovation-11640533671>; KP]

Mr. Biden and other pharmaceutical critics have mistakenly focused on increases in the list prices set by companies. But the actual prices consumers pay, after various discounts and rebates, are considerably lower than list prices, and changes in the two measures differ substantially. Insulin, with large increases in list prices over the past few decades, has become the poster child for unreasonable price increases. Yet net prices have increased much more slowly or not at all.

The best measure is the consumer-price index for prescription drugs, or CPI-Rx, which measures price changes in a large basket of drugs over time, accounting for discounts and most rebates. Another strength of the CPI-Rx is that it accounts for price declines that occur when consumers substitute cheaper generic versions for brand-name drugs. Too often, Mr. Biden and others focus on a few high-priced drugs and fail to consider the entire market.

Prices for brand-name prescription drugs are higher in the U.S. than in other countries. But U.S. regulatory, legal and incentive structures encourage aggressive price competition and switching from branded drugs to generics. As a result, Americans use more generics (accounting for 9 out of 10 prescriptions) and pay less for them (16% lower on average) than in other developed countries. Nearly all European countries impose price controls on generics, which results in delayed market entry and availability, less competition and higher prices

CPI-Rx has been negative for much of the past three years. The decline stems largely from increased drug approvals by the Food and Drug Administration since 2017. When new brand-name drugs enter the market, they compete with other drugs that treat the same condition. When generic versions are approved, prices fall rapidly as patients switch, especially as multiple generic versions enter the market.

An analysis of per-unit prices of 27 types of insulin by GoodRx, a healthcare company that tracks drug prices and provides discount coupons, found that overall retail prices declined by nearly 6% since 2019 because of recent approvals of generics and biosimilar drugs.

Mr. Biden’s proposed price controls aren’t merely superfluous. They risk lowering the number of innovative new drugs that improve health and eventually become the low-priced generics used by most Americans. Pharmaceutical companies invest in research in anticipation of future profit. Unlike most industries, they primarily finance it out of current revenues. University of Chicago economist Tomas Philipson estimates Mr. Biden’s proposed price controls could lead to a 29% to 60% reduction in research and development, resulting in 167 to 342 fewer new drug approvals over the next 20 years.

The rapid development of Covid vaccines and therapeutics confirmed the importance of preserving our innovative pharmaceutical industry. The pandemic also confirmed that the FDA is capable of safely shortening approval times. Speeding approvals and increasing competition are a far better prescription than price controls that would strangle future innovation.

### Bipart DA (Kansas)

#### U.S. credibility on Ukraine is already killed.

Vindman ‘2-24 [Alexander; 2022; retired U.S. Army lieutenant colonel and the former director for European affairs for the National Security Council; The Atlantic, “America Could Have Done So Much More to Protect Ukraine,” <https://www.theatlantic.com/ideas/archive/2022/02/ukraine-russia-war-nato-biden-deterrence/622873/>; KP]

For instance, early in December, President Biden openly acknowledged that he would not send American troops to fight in Ukraine, thus removing any possibility of strategic ambiguity. The U.S. could have refused to elucidate its security commitments to Ukraine, much as it has done vis-à-vis Taiwan for decades. The implicit threat of U.S. and NATO intervention would have forced Putin to contend with the risks of further escalation. Instead, Biden granted Putin a free hand.

The U.S. also refused to provide advanced weapon systems to Ukraine, such as Patriot anti-aircraft missiles or Harpoon anti-ship missiles, because it determined that Ukraine’s armed forces were not sophisticated enough to handle them. Although Ukraine would have struggled to realize the full potential of these systems, they could nonetheless have affected Russia’s calculus for military operations. And for those who might argue that Russia would have preempted the shipment of weaponry by invading, I would contend that if invasion was already the predicted outcome, what was there to lose?

All the while, the Biden administration failed to pair diplomatic overtures with sufficiently powerful, credible military pressure, perhaps over fears of a bilateral conflict with Russia. These fears were misplaced. I can say from my significant experience dealing with the highest levels of Russia’s military leadership that it has no interest in a bilateral confrontation with the U.S. Russian leaders have zero desire for nuclear war, and they understand that they would inevitably lose in a conventional war. However, Russia excels at compelling the U.S. to self-deter.

Besides military pressure, the U.S. also failed to consider graduated response options once Putin’s preferred course of action had been established. The U.S. could have imposed targeted sanctions on Russian leadership or introduced long-overdue anti-corruption legislation to signal the impending costs of reinvasion to the Kremlin. By choosing to view these options through an all-or-nothing lens, the U.S. unnecessarily constrained its response. Biden’s administration was reactive when it should have been proactive. Over and over, the president’s longtime senior advisers seem to have recommended narrow, low-risk policy options, and these backfired.

Unlike during the Cold War, when the U.S. successfully deterred the Soviets for decades, the U.S. has now implicitly recognized Russia’s sphere of influence and perhaps undermined its own role as the most powerful global protector of democracy. This war marks the single biggest reversal of trends in the Western liberal order in the 21st century. Long-term tremors have culminated in a seismic shift that has injured both Western credibility and the foundations of international treaties. Overnight, the geopolitical outlook has become significantly worse for U.S. national-security interests, and now the U.S. must manage the fallout accordingly.

#### Executive action solves

Gould '2/26 [Joe, "Biden to send $350M in military aid to Ukraine," https://www.defensenews.com/pentagon/2022/02/26/biden-to-send-350m-in-military-aid-to-ukraine/]

U.S. President Joe Biden has authorized the State Department to send another $350 million in weapons, including Javelin anti-tank weapons, to help Ukrainian forces fight back the ongoing Russian invasion.

With Ukraine struggling to repel Russia’s tanks, bombers, helicopters and missiles, the new tranche would supply Ukrainian forces with anti-armor and anti-aircraft systems, ammunition for firearms and body armor, according to the State Department.

This marks the third time Biden has used his presidential drawdown authority to send emergency security assistance from U.S. stockpiles to Ukraine, and it brings the total commitment of U.S. security assistance to $1 billion for this year.

“It is another clear signal that the United States stands with the people of Ukraine as they defend their sovereign, courageous, and proud nation,” Secretary of State Antony Blinken said in a statement.

Previous tranches of U.S. aid have arrived by aircraft, and although Ukrainian airspace is now contested, U.S. aid will continue to flow to Ukraine, a senior U.S. defense official said Saturday.

#### Courts shield.

Mazzone ’18 [Jason; August 9; Professor of Law at the University of Illinois at Urbana-Champaign; Chicago-Kent Law Review, “Above Politics: Congress and the Supreme Court in 2017,” [vol.](https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=4207&context=cklawreview) 93]

Absent, too, in the modern Congress is any real sense that the Supreme Court can be brought to heel: say, by constitutional amendment, by stripping the Court of funding, by hauling in members of the Court to justify their rulings before congressional investigatory committees, by appointing special counsels to review and report back on what the Court does, by impeaching the Justices (or locking them up), or by simply ignoring or defying judicial rulings. Perhaps the Court does not rule in ways that offend enough members of Congress (or their constituents) for them to invest the energy—and political capital—required to generate these sorts of measures. Perhaps, instead, members of Congress do not consider such measures appropriate in our constitutional system. In either case, modesty on the part of Congress is the result, even in an era when a single party controls both the Congress and the White House. The lesson for the Court is that so long as it continues doing—more or less—what is has done in recent years, it has very little to fear from the Congress.

Conclusion

After President Trump nominated Neil Gorsuch to fill the vacancy on the Supreme Court left by the death of Justice Scalia, fifteen House Republicans sponsored a Resolution that “the House firmly supports the nomination of Neil Gorsuch to the Supreme Court” and “the Senate should hold a swift confirmation of this nomination.”229 The proposed resolution died, without further action, in the Committee on the Judiciary. While Gorsuch was, of course, confirmed, the failure of the Republican-controlled House to pass a simple resolution supporting the nomination is telling. After an election season in which the Supreme Court figured very prominently, aside from the Senate’s confirmation of a new Justice, Congress in 2017 accomplished nothing with respect to the Supreme Court. Various bills and resolutions—some sponsored by Republicans, others by Democrats, and some garnering bipartisan support—targeted statutory and constitutional rulings by the Court and sought also to impose new regulations upon the Court’s activities. Even the most modest of these proposals failed to advance through the legislative process and become law. We like to think that the Supreme Court, guided solely by the rule of law, is above politics. The experience of 2017 suggests that the Court may also be above politics in the quite different sense that its rulings and activities are largely immune to political response and redress.

#### Empagran’s territorialization of markets collapses globalization and reinforces isolationism

Michaels ’11 [Ralf Michaels; 2011; Professor of Law, Duke University School of Law; International Law in the U.S. Supreme Court; “Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century,” Part V, Section D. p. 533-546]

What are the consequences of this transnationalist, post-territorial, “work together in harmomy” jurisprudence for Empagran? The answer is, to put it mildly, surprising:

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. … But why is it reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?37

This is quite a striking move. Justice Breyer starts with the recognition that both regulated events and regulatory instruments transcend territorial boundaries: we are interdependent because actions in and by one state have impacts on other states. He ends with the conclusion that we must confine application of our laws to strictly territorial boundaries. Because the world has become deterritorialized, we must apply our laws in a strictly territorial fashion. Because the world has become interdependent, we must allow for independent regulation by different regulators. In order to “work together in harmony,” each nation must act in isolation for itself: the U.S. regulates the U.S. market; Japan regulates the Japanese market, and so on. And the real trigger lies not in the valid sovereignty interests of foreign nations, but in the lack of sovereign interests of the United States. Suddenly, we have moved away from the twenty-first century world of interdependence and cooperation into the nineteenth-century U.S. role of isolationism and the desire to keep exclusive territorial competences strictly separate.

It follows as a matter of course that, in such a world, extraterritorial application of U.S. law is unavailable. All that we can hope for is persuasion:

Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.38

Justice Marshall expressed a similar idea in The Antelope when he suggested that “[t]he parties to the modern law of nations do not propagate their principles by force.”39 Still, it is not clear what exactly Justice Breyer has in mind. America’s antitrust policies have, in fact, won much of their own way in the international marketplace for ideas40 – including the idea of private enforcement, which is being actively discussed in the European Union, and including leniency for whistleblowers. If anything, the difference is not in the substantive antitrust laws but in the procedure for their enforcement, but procedure has traditionally been a matter for lex fori.

How did we get from a “highly interdependent commercial world” to “independent foreign harm” and “a foreign nation’s ability independently to regulate its own commercial affairs”? By way of an assumption so crucial that Justice Breyer numerous times. Here is the most elaborate formulation of the fiction: “We reemphasize that we base our decision upon the following: the price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect.”41 This assumption is a fiction. In a “highly interdependent commercial world,” effects on one nation’s markets are never independent from effects on another nation’s markets.42 The vitamins cartel, in order to avoid arbitrage, had to keep prices roughly the same in all geographically close markets. Justice Breyer knows this, but he faces a challenge: the globalization he invokes comes back to haunt him. The doctrines which the Court has at its disposal were made for a nineteenth-century world defined by territorial states. These doctrines do not fit globalization and the transcendence of territorial borders. Perhaps new doctrines are needed; perhaps the old doctrine must be deterritorialized.43 The Court, however, finds another way. Instead of deterritorializing existing rules, it reterritorializes the phenomena to which these rules are applied. Rather than adapt the doctrines to globalization, it adapts globalization to the doctrines. If the nineteenth-century rules do not fit the twenty-first-century world, too bad for the latter – the Court turns it, by fiction, into a nineteenth-century world.

This result, of course, does not require all the globalization talk, as Justice Scalia’s concurrence makes clear

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.44

This concurrence links the decision to another venerated canon of international law, the presumption against extraterritorial application of statutes, as formulated by Justice Story in The Apollon. 45 That presumption, however, has become problematic, because territoriality has changed both its social and legal meaning. In 1825, jurisdiction was thought to be largely confined to national territory. Consequently, the presumption against extraterritoriality was almost equivalent to a presumption against violations of international law. Roger Alford neatly explains how this idea withered away in U.S. law in the twentieth century.46Today, international law no longer poses such extensive restrictions on domestic jurisdiction over foreign conduct. The presumption against extraterritoriality has survived this shift, but it has lost its grounding in international law.47

Moreover, this decline of territoriality as a limit in international law has gone hand-inhand with the declining importance of territoriality in society. Modern transportation has made crossing boundaries much easier; new modes of communication make territorial boundaries meaningless for many important endeavors; globalized markets pay little respect to national boundaries. The conduct of important actors, which is the object of most statutory regulation, is trans-territorial. A canon of interpretation that insists on territoriality stands in odd contrast to these developments.

Prior to the shift, Congress was presumed not to legislate beyond territorial boundaries because that would be unusual and would violate international law. Now that the canon has lost its legal foundation in international law and its teleological foundation in a presumed predominantly local character of regulated behavior, it is unclear what justifies it. One suggestion is that courts should avoid extraterritorial application to avoid subjecting the United States to foreign criticism without participation by the political branches,48 but this does not explain why limits of scope should be those of territorial boundaries. Another justification is “the commonsense notion that Congress generally legislates with domestic concerns in mind.”49 This justification is weak where, as in Empagran, the statute at hand is one aimed at determining the scope of extraterritorial application (though the justification has been used in such contexts, too.)50 More importantly, the justification begs the very question of what exactly are “domestic concerns.”51 In choice of law, such insights have led in the twentieth century to the development of interest analysis, whereby courts determine the scope of application on the basis of governmental interest and then resolve resulting conflicts with the regulatory interests of other states. If the presumption against extraterritoriality was once a presumption against the violation of choice-of-law rules, as has been argued,52 one might expect it to change along with choice-oflaw rules, as many authors have suggested it should.53 Empagran suggests the powerful grip that ideas of territoriality still hold even over a Justice who claims to be above it.

Territorial limits to jurisdiction present normative problems when applied to phenomena that do not respect territorial boundaries. If the effects of certain conduct transcend boundaries, while congressional statutes are presumed to remain within territorial boundaries, then the effects outside the borders remain unregulated. This has led some to conclude that the presumption against extraterritoriality, revived under the Rehnquist Court,54 is merely a fig leaf for judicial dislike of congressional regulation.55 Justice Holmes’ decision in American Banana has been explained by his aversion to the Sherman Act.”56 Justice Breyer, after deciding Empagran, has been praised as “the go-to guy for American business in regulatory and economic cases.”57

Such crude realist speculations on the Justices’ real intentions must remain somewhat speculative even for individual decisions; for the law at large, they have limited explanatory value. In Empagran, especially, the suggestion that the real goal is underregulation may not fully hold. The Court emphasizes that other countries have antitrust laws, too. Presumably, therefore, regulation of the cartel would not stop at U.S. borders. Instead, other nations would regulate, even if they did so by different means. This suggests that today the presumption against extraterritoriality is not merely a policy decision in favor of multinational corporations. The Court refuses to concentrate all claims concerning the global cartel in one nation’s courts,58 but it does not reject the idea that all these claims should be heard somewhere. Instead, the presumption against extraterritoriality establishes a checkerboard map of regulatory authorities, in which each country is responsible for regulating its own territory. This checkerboard map resembles that of the nineteenth century, but the resemblance is superficial. Then, it represented the reality of most social relations and of international law. Today, territorial borders are an arbitrary and formalist device in a globalized world, but one that helps to avoid overlapping regulatory claims precisely because of its formal character.59 The nineteenth-century checkerboard view of the world survives in the twenty-first century, but it changes its character: it has become a formal-technical device for the allocation of regulatory authority.

#### Refusing to hear foreign plaintiffs is worse for comity

Gardner ’19 [Maggie; March 2019; Assistant Professor of Law, Cornell Law School; Virginia Law Review; “Abstention at the Border,” vol. 105, p. 63-126]

Comity—the idea that U.S. courts should recognize the interests of foreign sovereigns in expectation that other nations will do the same128—does not require a broad power to abstain in transnational cases, either. As the Court has noted, comity indicates that there must be a limit on the geographic scope of U.S. laws and litigation in order not to alienate other countries, on whose good graces U.S. parties must often depend in turn.129

[start footnote 129]

129 See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 164–65 (2004) (emphasizing the need to help “the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world”); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (noting that the presumption against extraterritoriality “serves to protect against unintended clashes between our laws and those of other nations that could result in international discord”); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972) (“We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.”)

[end footnote 129]

This facet of comity has motivated some of the Justices—particularly Justices Breyer and Ginsburg—in their decisions limiting transnational litigation in U.S. courts.130 But comity is not a unitary doctrine that always calls for forbearance.131 Sometimes what comity requires is not restraint, but the accommodation of foreign litigants,132 foreign law,133 and foreign judgments.134 If U.S. courts exclude too many transnational cases, then, they may end up undermining a different set of comity commitments.135 As Justice Ginsburg recently explained, an overly strict presumption against extraterritoriality “might spark, rather than quell, international strife,” for “[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests.”136 In short, comity and the presumption of jurisdictional obligation may at times point in the same direction: towards exercising the jurisdiction set by Congress and expected by allies.

#### Countries embrace and coordinate enforcement, even if it targets their own companies.

First and Bush 19, \*Harry First, Charles L. Denison Professor of Law, New York University School of Law, and \*Darren Bush, Leonard B. Rosenberg Professor of Law, University of Houston Law Center; (2019, “Antitrust Analysis of NOPEC Legislation”, https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=2044&context=lclr)

In the past, foreign countries have not always been happy about the United States applying its antitrust laws to cartels formed or operated in their countries. Early efforts to resist that enforcement, however, have largely given way to foreign countries embracing competition, engaging in law enforcement against international cartels, and even accepting the imprisonment of their nationals in U.S. jails. While asymmetric retaliation from foreign countries outside the competition law system is certainly possible, there is no history of such retaliation against U.S. antitrust enforcement, even in the context of the private litigation brought directly against OPEC and state-owned oil companies. Consequently, concerns with retaliation as a result of antitrust action by the United States are misplaced.

#### Conflict won’t go nuclear.

Bokat-Lindell '3/2 [Spencer, 3/2/22, "Putin Is Brandishing the Nuclear Option. How Serious Is the Threat?," https://www.nytimes.com/2022/03/02/opinion/ukraine-putin-nuclear-war.html]

History is full of instances in which nuclear powers publicly threatened to use their arsenals. Matthew Kroenig, a professor of government and foreign service at Georgetown, pointed to the Cuban missile crisis of 1962, the 1969 border war between the Soviet Union and China, and the 1999 war between India and Pakistan, among other examples. (More recently, President Donald Trump threatened North Korea with “fire and fury like the world has never seen” after it conducted long-range missile tests.)

Perhaps one of the closest precedents to the current moment occurred during the Yom Kippur War of 1973, when Arab states, then allied with the Soviet Union, launched attacks on Israel. As Nichols recounts, the Nixon administration responded by raising the United States’ nuclear alert level, albeit with no formal announcement.

From a strategic standpoint, many experts say that there is no reason for Putin to use nuclear weapons: His goal, according to Paul Hare, a senior lecturer in global studies at Boston University, is to “swallow Ukraine” and restore the historical power of imperial Russia — not to instigate a nuclear exchange, which, if it did not bring about civilization’s end, would make him a pariah not just to the world’s democracies but also to China.

Among those who see Putin’s order as incongruous with that goal, the move has raised questions about his state of mind. “It makes no sense,” said Graham Allison, a Harvard political scientist who worked on the project to decommission thousands of nuclear weapons that once belonged to the Soviet Union. He noted that the incident is “adding to the worry that Putin’s grasp on reality may be loosening.”

Other experts, though, are skeptical of such conjecture. “I don’t fully subscribe to this view that Putin’s lost it completely,” Stephen Walt, a professor of international affairs at Harvard, told Yahoo News. “I always like to remind people, and occasionally remind my students, that plenty of leaders that we regarded as fairly smart and fairly sensible did dumb things in the past.”

It’s also possible to see the alert as an attempt by Putin to guard against the threat of overthrow that he may see as the ultimate goal of the countries issuing sanctions. In the view of Pavel Podvig, an expert on Russia’s nuclear forces at the United Nations Institute for Disarmament Research, Putin’s announcement could make his government less vulnerable to decapitation.

Still, some experts and military officials warn that the risk for mistakes in a heightened state of alert is worrisome. “What would happen if the Russian warning system had a false alarm in the middle of a crisis like this?” Jeffrey Lewis, a senior scholar at the Middlebury Institute of International Studies, said on NPR. “Would Putin know it was a false alarm? Or would he jump to the wrong conclusion?”

“I don’t think we should look at this as a threat by Putin to use nuclear weapons against the United States, against Europe, against NATO,” said Kimball. But, he added, “it’s a point in which both sides need to back down and move the word ‘nuclear’ from this equation.”

The United States seems to be doing just that. The Biden administration could have countered Putin’s order by putting its bombers, nuclear silos and submarines on a higher alert level. Instead, the White House made clear that it had not changed. The U.S. ambassador to the United Nations also told the Security Council on Sunday that Russia was “under no threat” and chided Putin for “another escalatory and unnecessary step that threatens us all.”