# 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

## Indigenous Regimes

## Cartels

#### 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

#### “Cartel Creep” – successful cartels beget more successful cartels.

Leslie ’17 [Christopher; Chancellor's Professor of Law, University of California Irvine School of Law; *Duke Law Journal,* “FOREIGN PRICE-FIXING CONSPIRACIES,” <https://heinonline-org.proxy.lib.umich.edu/HOL/Page?handle=hein.journals/duklr67&id=761&collection=journals&index=>; KS]

4. Summary. In short, successful cartels beget more cartels. A first cartel can be difficult to form. A second cartel can be significantly easier to establish. Trust has already been established. The parties are aware that cooperation is possible and can significantly increase their profits. The parties have developed reliable enforcement mechanisms. If the major firms in an industry are fixing prices in one market, this increases the likelihood that the same firms are engaging in price fixing in another market. This heightened probability makes the fact of foreign price fixing a probative plus factor in litigation alleging a domestic conspiracy.

#### Rigorous empirical studies confirm the impact---insecurity increases the risk of war by 92%.

Koren ’16 [Ore and Benjamin Bagozzi; October 16; PhD Candidate at the University of Minnesota in Political Science and Former Jennings Randolph Peace Scholar at the United States Institute of Peace; Assistant Professor in the Department of Political Science and International Relations at the University of Delaware; Food Security, “From Global to Local, Food Insecurity is Associated with Contemporary Armed Conflicts,” vol. 8]

What do these findings indicate about the variation in the risk of conflict and civil conflict? Firstly, all four models support the argument that a significant relationship exists between food insecurity and conflict. More specifically, these findings suggest that, for an average country, the baseline risk of conflict and civil conflict increases in regions that provide at least some access to food – supporting the expectation that global demands for food should generally direct conflict towards agricultural areas. At the same time, within agricultural areas, conflict is intuitively more likely to arise in regions where the levels of food per capita are low – that is, where food supplies are scarce. Secondly, and in line with previous research (Burke et al. 2009; O’Loughlin et al. 2012; Hsiang and Meng 2014; Hendrix and Salehyan 2012), warmer regions and areas with lower precipitation were significantly more likely to experience conflict. This supports the argument that food scarcity can serve, to some extent, as a mediating factor for the effects of climate variables, in addition to the independent impact of food insecurity related concerns on conflict. Thirdly, as extant studies (e.g., Hegre and Sambanis 2006) suggest, poorer regions are more likely to experience conflict, as are more ethnically diverse regions, although it appears that higher levels of democracy do not translate into more peace once cell level characteristics are taken into account.3 Perhaps unsurprisingly, regions with larger populations are more likely to experience conflict, as are more rural regions, as some scholars have argued (Fearon and Laitin 2003; Kalyvas 2006; Buhaug et al. 2009).

In sum, four models involving different explanatory variables have been utilized to examine two conceptualizations of conflict as an outcome of interest. The results strongly support extant arguments that access to and availability of food are each associated with an increased occurrence of armed conflict. This evidence does not negate previous explanations of conflict that emphasize the importance of political and economic development or climactic variation. However, by highlighting the strong association between food access and availability on one hand, and local political violence on the other, the above findings do show that these past expositions (e.g. Miguel et al. 2004; Burke et al. 2009; Hsiang and Meng 2014) in and of themselves are insufficient to fully explain the likelihood of local level conflict. Simply put, the present study confirms that there exists a systematic, and global, relationship between food insecurity on one hand, and the occurrence and persistence of social conflict on the other.

Discussion

What do these findings imply about the effect of food insecurity and conflict? Naturally, even the most detailed and elaborate models are simplistic, especially when containing as diverse a range of observations as those examined above. Nevertheless, in terms of conditional probabilities, all models show a statistically significant first difference change of approximately +92% in the probability of conflict when a high risk scenario is simulated for an average cell.4

#### Wages low.

Khan ’19 [Amir; 2019; Livemint, “Why minimum wage won’t fix India’s woes,” <https://www.livemint.com/news/india/why-minimum-wage-won-t-fix-india-s-woes-1565619815429.html>]

It is widely acknowledged that India has a serious wages problem. According to the Periodic Labour Force Survey 2017-18, 45% of regular workers (those who are in the relatively stable, formal sector) are paid less than the minimum wage. The new law increases the prevailing minimum wage standard by a paltry ₹2 a day. The consternation this meagre increase has caused is natural, but the hope is that at least this norm will now be strictly imposed.

#### They have it backwards – rising food prices increase conflict and poverty.

PRB, 4-8-2011, [Population Reference Bureau – organization promoting action on population, health, and the environment., "Rising Global Food Prices Threaten to Increase Poverty – Population Reference Bureau", https://www.prb.org/rising-global-food-prices]

(April 2011) Global food prices have been rising, threatening to reach record levels in the coming months if current trends continue. Growing world demand due to increasing world population and shifting consumption patterns, and lower supplies partly due to bad weather raised the World Bank’s food price index by 15 percent between October 2010 and January 2011.1 The index increased by 29 percent overall between February 2010 and February 2011. In January, the Food Price Index of the United Nations Food and Agriculture Organization (FAO) was at its highest level since tracking began in 1990.2 While not all countries are affected equally, the recent volatility is particularly alarming in regions where people spend more than half of their income on food. GLOBAL FOOD PRICES SURGE TO RECORD LEVELS, HURTING THE POOR IN LOW- AND MIDDLE-INCOME COUNTRIES A combination of unfavorable weather patterns around the world and uncertainty in the quality of wheat harvests in China has affected the global food supply. Record heat and drought in 2010 in the former Soviet Union sharply reduced wheat production and dealt a shock to global wheat supplies. Extreme dry weather in Brazil—a major food exporter—contributed greatly to worldwide deficits of sugar, soybeans, and maize. Devastating rain and floods in Australia damaged wheat crops and reduced the yields of sugar harvests. Additionally, a severe drought in China threatens the harvest of the country’s wheat crop and has prompted the FAO to issue a special alert, characterizing the current situation as “potentially a serious problem.”3 For decades, China has relied mostly on its own domestic grain production and was absent from the global grain market. However, if the drought destroys a significant portion of the harvest and China has to import grain to fulfill domestic demand, the impact can shock the world market and cause even sharper increases in global prices. As a result of China’s buying power, it can outbid others in the global market, and secure supplies for its own population. An expanding world population, greater reliance on crops as biofuels, and shifting diets continue to increase the collective demand for food, making the gap between supply and demand even wider. Since price volatility and growing demand are likely to persist, “we need global action to ensure we do a better job of feeding the hungry before we face the future challenges of feeding the expected 9 billion people in the world in 2050,” said Robert Zoellick, World Bank president.4 According to the World Bank index, global sugar prices reached a 30-year high in the beginning of 2011, after increasing 12 percent since January 2010. Edible oil prices have risen 73 percent since June 2010. Among grains, the price of wheat has increased the most, more than doubling between June 2010 and January 2011. The price of maize has been affected by the surge in the wheat and oil markets and also jumped about 73 percent during the second half of 2010. Other food items that contribute to dietary diversity, such as vegetables and beans, have also experienced large price increases. Prices do not rise at the same rate in all countries; domestic markets are affected based on how well governments are able to shield their population from global price surges through the use of subsidies, import taxes, and increased domestic production. Although food prices had been increasing for seven consecutive months by February 2011, the price of all items had not grown at the same pace (see Figure 1). According to the World Bank’s Food Price Watch, this differentiates the current situation from the price surges of 2008, when food riots broke out across the developing world. Meat prices have stayed relatively stable over the past year. Following good harvests in exporting countries, the global price of rice was actually lower at the end of 2010 than in the beginning of the year, and it remains 70 percent below its 2008 peak. Therefore, rice provides a more affordable alternative grain to the poor and its accessibility has prevented more people from sinking into poverty and undernourishment. At the same time, some Asian economies have seen sharp increases in rice prices. In Vietnam, Bangladesh, and Indonesia—all high rice consumption countries—domestic rice prices increased over 30 percent in the past year.5 Soaring food prices disproportionately hurt the poor in developing countries. This is especially true in regions where people spend a majority of their income on food and rely on a specific food product. Although some farmers and food producers are benefitting from greater profits, the net effect of higher prices is a rise in the number of the poor. The World Bank estimates that an additional 44 million people have fallen into poverty in the developing world as a result of higher food prices. Overall, the number of chronically hungry people began to climb again after a brief decrease to 925 million in 2010 (see Figure 2). According to Zoellick, “the trends towards the 1 billion are worrisome. Global food prices are rising to dangerous levels and threaten tens of millions of poor people around the world.”6

#### Naxal insurgency is structurally dead.

Aastha Kaul, 3-11-2021, [Aastha Kaul is a South Asia Researcher at ACLED. She holds a BSc. in International Studies from the University of Surrey. Her previous experience includes work within the public policy sector. Her research interests focuses on gender-based violence, particularly in armed conflict. "Naxal-Maoist Insurgency Trends in India During the Coronavirus Pandemic", ACLED https://acleddata.com/2021/03/11/naxal-maoist-insurgency-trends-in-india-during-the-coronavirus-pandemic/ //DMcD \*\*\*Graphs omitted]

As countries continue to contend with the COVID-19 pandemic, it has become clear that its impact extends far beyond public health and safety, with the ability to shape political behavior and conflict. The interplay between disease and disorder is perhaps most visible in India, which has been one of the nations worst affected by the coronavirus. Following the onset of the pandemic, ACLED records an escalation of conflict in Jammu & Kashmir (for more see this spotlight infographic from ACLED’s COVID-19 Disorder Tracker) as well as a new wave of political unrest in the northeast (for more see this ACLED report on political violence in northeast India). In contrast, ACLED data show a decline in events in 2020 related to the Naxal-Maoist insurgency, one of India’s oldest post-independence conflicts. The restrictions surrounding the coronavirus pandemic impacted the Naxal-Maoist insurgency in two significant ways. First, the lockdown worsened already strained supply chains, preventing cadres from accessing vital resources such as rations and weaponry. Second, dwindling supplies subsequently affected operational capacity as insurgents were unable to effectively carry out their annual tactical counter-offensive campaign (TCOC). The combination of these factors has led to an overall decline of Naxal-Maoist activity in 2020, compared to the year prior. A comparative analysis of ACLED data for 2019 and 2020 reveals these trends and offer insights into the changing nature of the conflict. Decline in Active Locations The Naxal-Maoist insurgency, which has been active since 1967, seeks to overthrow the Indian government to establish communist rule within the country. The movement gained significant momentum with the establishment of the Communist Party of India-Maoist (CPI-Maoist) in 2004. At its peak, the insurgency was active in 40% of India’s land mass, with the ‘Red Corridor’ spanning eastern, central, and southern India (South Asia Terrorism Portal, March 2012). However, in its current form, Naxal-Maoist activity has been limited to around a dozen states. In 2019 and 2020, ACLED data indicate that 80% of all Naxal-Maoist activity was concentrated in just four states — Chhattisgarh, Jharkhand, Odisha, and Maharashtra (see map below). Decrease in Organized Political Violence1 India continues to have the second highest rate of coronavirus transmission, with over 10 million total cases by the end of January 2021 (World Health Organization, 10 February 2021). However, in March of last year, early projections were far higher, with some experts predicting up to 300 million cases (India Today, 21 March 2020). In response to these estimates, the Indian government enforced a strict lockdown beginning on 24 March, suspending all non-essential travel for 21 days, which was extended to three months with some minor relaxations (New York Times, 25 March 2020; Indian Express, 21 May 2020). While the socio-economic implications of these measures have been well documented, the impact of COVID-19 on India’s conflict landscape has received less attention. ACLED records a 20% decrease in organized political violence events involving Naxal-Maoist insurgents in 2020 compared to 2019. A total of 235 events were reported, compared to 295 events the year prior (see figure below). Explosions/remote violence events decreased by 35% and events of violence against civilians decreased by more than a quarter. Reported fatalities as a result of these events also decreased by nearly 30%, despite an event with 40 reported fatalities on 21 March 2020, when CPI-Maoist cadres ambushed security personnel in a forest area in Sukma district, Chhattisgarh (Hindustan Times, 12 September 2020). The decrease is particularly notable between the months of March and June, which is when Naxal-Maoist rebels have historically carried out their annual TCOC, which forms the core of Naxal-Maoist battle strategy. The TCOC involves carrying out a quick succession of small and large attacks, often luring security forces into the forests (Diplomat, 31 August 2020). The period coincided with the onset of coronavirus lockdown restrictions at the end of March 2020 and gradual reopening in June 2020. Between 24 March and 30 June 2020, ACLED records a more than 40% decrease in violent events compared to the same period in 2019 (see figure below). The nationwide lockdown significantly impacted already strained Maoist supply chains, which further weakened their strength and operational capacity (Print, 21 April 2020). Unlike other insurgent movements in India, the Naxal-Maoist movement is people-centric, with a heavy dependence on grassroots supply chains. In order to obtain essential commodities such as food and medicine, militia cadres typically take rations from local haat bazaars or village markets held in remote areas (Economic Times, 18 April 2020). The closure of these markets amid the pandemic lockdown has drained the Naxal-Maoist insurgency of key resources. This is best exemplified in the Maoist stronghold of Bastar district in Chhattisgarh state, where, due to the three-week forced closure of 480 haat bazaars in March and April, rebel forces were targeting the public distribution system meant for villagers to gain access to food supplies (New Indian Express, 15 April 2020). The heightened restrictions on movement also contributed to a lack of access to resources, specifically in terms of weapons procurement. Weapons and ammunition are typically sourced from a combination of manufacturing arms in factories within Naxal-Maoist strongholds, and procuring arms by bribing or coercing local security forces and villagers (OneIndia, 30 May 2018, Times of India, 28 September 2020). With increased internal checkpoints established by security forces at interstate and inter-district borders, as well as the subsequent suspension of movement of goods, it is likely that the insurgency’s operational capacity was impinged. This subsequently led to a loss of tactical momentum during the strict lockdown imposed in the first half of the year (Times of India, 12 September 2020). Regionally, Chhattisgarh remained the central stronghold for the Naxal-Maoist insurgency in 2019 and 2020 (see map above). Still, the state saw a 13% decrease in events in 2020 compared to the year prior. Similarly, the number of events in Maharashtra, Bihar, and Andhra Pradesh combined decreased by 55%. While these trends re-affirm aforementioned factors like disrupted supply chains and loss of tactical momentum, they may also point towards a gradual decline of Maoist influence in the region due to the regular loss of lower rung cadres and increased surrenders due to “disillusionment over a hollow ideology” (Times of India, 12 September 2020; Hindustan Times, 27 January 2021). During the lockdown period, it was also reported that rebels have been using the time to regroup in traditional strongholds such as Bastar district in Chhattisgarh, and recruit new cadres from neighboring states (Outlook, 16 April 2020).

#### Nuke terror has insurmountable barriers.

Mueller 18 John Mueller, Political Science Professor at Ohio State University. [Nuclear Weapons Don’t Matter but Nuclear Hysteria Does, Foreign Affairs, https://www.foreignaffairs.com/articles/2018-10-15/nuclear-weapons-dont-matter]

As for nuclear terrorism, ever since al Qaeda operatives used box cutters so effectively to hijack commercial airplanes, alarmists have warned that radical Islamist terrorists would soon apply equal talents in science and engineering to make and deliver nuclear weapons so as to destroy various so-called infidels. In practice, however, terrorist groups have exhibited only a limited desire to go nuclear and even less progress in doing so. Why? Probably because developing one’s own bomb from scratch requires a series of risky actions, all of which have to go right for the scheme to work. This includes trusting foreign collaborators and other criminals; acquiring and transporting highly guarded fissile material; establishing a sophisticated, professional machine shop; and moving a cumbersome, untested weapon into position for detonation. And all of this has to be done while hiding from a vast global surveillance net looking for and trying to disrupt such activities.

#### Accidental Indo-pak war is impossible.

Ganguly 19 – Sumit Ganguly, Political Science Professor at Indiana University. [Why the India-Pakistan Crisis Isn’t Likely to Turn Nuclear, March 15, 2019, https://www.foreignaffairs.com/articles/india/2019-03-05/why-india-pakistan-crisis-isnt-likely-turn-nuclear]

Analysts generally point to Pakistan’s acquisition of nuclear weapons the previous year as the cause of India’s restraint. Indian policymakers likely feared that crossing the line of control would trigger a wider conflagration, one that could turn nuclear. That history made it all the more surprising when last week, on February 26, Indian jets crossed not merely the line of control but the international border with Pakistan to strike an apparent terrorist camp in Balakot. Not since the war of 1971 had the Indian Air Force carried out a sortie within undisputed Pakistani territory. The strikes came in response to a terrorist attack on an Indian paramilitary convoy in Jammu and Kashmir earlier in February claimed by Jaish-e-Mohammed, a Pakistan-based terrorist group. The next day, the Pakistani Air Force hit back. The particulars remain murky, but it’s clear that Pakistani jets crossed the line of control. India scrambled aircraft in response, and each side lost at least one plane during the ensuing skirmish. Pakistan then announced that it had captured a downed Indian pilot. Worried analysts now fear that, since India and Pakistan have breached the informal norm against using air power across the border, they will be unable to prevent further escalation. Hawkish publics in both countries are calling for retaliation. Can the politicians exercise restraint? THE LESSONS OF HISTORY No one can say for sure, but history suggests that there is cause for optimism. During the Kargil War, India worked to contain the fighting to the regions around Pakistan’s original incursions and the war concluded with no real threat of nuclear escalation. Less than two years later, the two countries plunged into crisis once again. In December 2001, five terrorists from the Pakistan-based groups Lashkar-e-Tabia and Jaish-e-Mohammed attacked the parliament building in New Delhi with AK-47s, grenades, and homemade bombs, killing eight security guards and a gardener. In response, India launched a mass military mobilization designed to induce Pakistan to crack down on terrorist groups. As Indian troops deployed to the border, terrorists from Pakistan struck again. In May 2002, three men killed 34 people in the residential area of an Indian army camp in Kaluchak, in Jammu and Kashmir. Tensions spiked. India seemed poised to unleash a military assault on Pakistan. Several embassies in New Delhi and Islamabad withdrew their nonessential personnel and issued travel advisories. The standoff lasted for several months, but dissipated when it became apparent that India lacked viable military options and that the long mobilization was taking a toll on the Indian military’s men and materiel. The United States also helped ease tensions by urging both sides to start talking. India claimed victory, but it was a Pyrrhic one, as Pakistan failed to sever its ties with a range of terrorist organizations. Now that both sides have gone through the motions, neither is likely to escalate any further. Other nuclear states have also clashed without resorting to nuclear weapons. In 1969, China, then an incipient nuclear weapons state, and the Soviet Union, a full-fledged nuclear power, came to blows over islands in the Ussuri River, which runs along the border between the two countries. Several hundred Chinese and Soviet soldiers died in the confrontation. Making matters worse, Chinese leader Mao Zedong had a tendency to run risks and dismissed the significance of nuclear weapons, reportedly telling Indian Prime Minister Jawaharlal Nehru that even if half of mankind died in a nuclear war, the other half would survive and imperialism would have been razed to the ground. Yet despite Mao’s views, the crisis ended without going nuclear, thanks in part to the efforts of Soviet Prime Minister Alexei Kosygin, who took the first step by travelling to Beijing for talks. There’s reason to believe that the current situation is similar. Pakistan’s overweening military establishment undoubtedly harbors an extreme view of India and determines Pakistan’s policy toward its neighbor. The military, however, is not irrational. In India, although Prime Minister Narendra Modi has a jingoistic disposition, he, too, understands the risks of escalation, and he has a firm grip on the Indian military. Another source of optimism comes from what political scientists call the “nuclear revolution,” the idea that the invention of nuclear weapons fundamentally changed the nature of war. Many strategists argue that nuclear weapons’ destructive power is so great that states understand the awful consequences that would result from using them—and avoid doing so at all costs. Indian and Pakistani strategists are no different from their counterparts elsewhere. Even Pakistani Prime Minister Imran Khan, a political neophyte, underscored the dangers of nuclear weapons in his speech addressing the crisis last week. And Modi, for all his chauvinism, has scrupulously avoided referring to India’s nuclear capabilities. The decision by India and Pakistan to allow their jets to cross the border represents a major break with the past. Yet so far both countries have taken only limited action. Their principal aim, it appears, is what the political scientist Murray Edelman once referred to as “dramaturgy”—theatrical gestures designed to please domestic audiences. Now that both sides have gone through the motions, neither is likely to escalate any further. Peering into the nuclear abyss concentrates the mind remarkably.

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### 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. Function – *Empagran* limited the territorial scope of the Sherman Act through narrow interpretations of the FTAIA.

Popofsky 08, \*Mark S. Popofsky, Kaye Scholer LLP; (2008, “Extraterritoriality in U.S. Jurisprudence”, in 3 ISSUES IN COMPETITION LAW AND POLICY 2417 (ABA Section of Antitrust Law 2008)

In F. Hoffman-La Roche, Ltd. v. Empagran,135 the Supreme Court adopted the narrower reading of Subsection 2 but largely left open what type of nexus between in- U.S. detrimental effects and plaintiffs’ injury is required. Empagran involved class actions seeking recovery for a worldwide conspiracy to fix the price of vitamins. One class involved foreign purchasers: those who bought price-fixed vitamins for delivery in Ecuador, Ukraine, Australia, and Panama. The defendants argued that FTAIA Subsection 2 barred these claims, because, having purchased abroad, the in-U.S. anticompetitive effects of the scheme did not “give rise” to plaintiffs’ injuries.136 The plaintiffs, by contrast, advanced the broader reading of Subsection 2 and argued, inter alia, that the FTAIA imposed no such nexus requirement.137

The Supreme Court agreed with defendants that the FTAIA imposes a nexus requirement. The Court decided the case on the assumption that “the adverse foreign effect [the plaintiffs alleged] is independent of any adverse domestic effect.”138 In other words, the only link alleged between the in-U.S. effects that meet FTAIA Subsection 1 and the plaintiffs’ injury was that both flowed from the same conduct. The FTAIA, the Court held, could not be construed to extend the Sherman Act to redress such foreign injuries for two reasons.

First, permitting such treble damages actions defied international norms on the reasonable scope of the objective territorial principle.139 Finding Subsection 2 of the FTAIA ambiguous, the Court invoked the principle that the Sherman Act not be construed to violate customary principles of international law.140 The Court explained that, although applying the Sherman Act to condemn foreign conduct is “consistent with principles of prescriptive comity,” permitting treble damages actions to proceed where the only link between the foreign harm asserted and the requisite in-U.S. harm is that both flow from the same conduct is not.141 Such private enforcement in U.S. courts would “interfer[e] with a foreign nation’s ability independently to regulate its own commercial affairs.”142 The Court agreed with commentators observing that reading the FTAIA to impose no nexus requirement would effectively “provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provision for private antitrust enforcement.”143 “Congress,” the Court explained, cannot lightly be assumed to have engaged “in an act of legal imperialism.”144

The Court rejected the plaintiffs’ arguments that international comity concerns were better addressed on a case-by-case basis and that a contrary rule would threaten to undermine the Sherman Act’s goals of compensation and deterrence. The Court accepted the arguments of amici—the United States, the business community, and foreign enforcers—that permitting private damages actions for foreign injuries could “undermine foreign nations’ own antitrust enforcement policies by diminishing foreign firms’ incentive to cooperate with antitrust authorities in return for prosecutorial amnesty.”145

Second, the Court concluded that applying “the Sherman Act to redress foreign injuries” that are independent of in-U.S. effects would be unprecedented.146 This doomed the plaintiffs’ reading of the FTAIA because, according to the court, the FTAIA was designed to limit, not expand, the Sherman Act’s scope.147

#### 4. 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.

#### ‘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

#### ‘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”).

#### ‘Nontraditional’ exemptions and immunities are topical under their interpretation.

Kruse et al. 19, Layne E. Kruse, Co-Chair; Melissa H. Maxman, Co-Chair; Vittorio Cottafavi, Vice Chair; Stephen M. Medlock, Vice Chair; David Shaw, Vice Chair; Travis Wheeler, Vice Chair; Lisa Peterson, Young Lawyer Representative; all on the Exemptions and Immunities Committee of the ABA Antitrust Section, “Long Range Plan, 2018-19,” American Bar Association, 3/18/19, https://www.americanbar.org/content/dam/aba/administrative/antitrust\_law/lrps/2019/exemptions-immunities.pdf

The Committee’s current charter accurately characterizes its purview—that is, addressing the scope of the antitrust laws. That scope, of course, is defined primarily in terms of exemptions and immunities (both statutory and non-statutory). The Committee, however, has dealt with other doctrines, such as preemption and primary jurisdiction. These areas may not necessarily be viewed as traditional exemptions or immunities, but they nonetheless directly affect the application and extent of the antitrust laws. In addition, the Committee expends significant efforts to address international issues, including statutory exclusions from the U.S. antitrust laws, including the FTAIA; the related doctrines of act of state, sovereign immunity, and foreign sovereign compulsion; and industry-specific exemptions and exclusions from non-U.S. antitrust laws, including blocking exemptions.

#### ‘Scope’ refers to activity at the present time, not the abstract potential application of law.

Clement ’16 [Frank; March 3; Judge on the Tennessee Court of Appeals; Court of Appeals of Tennessee at Nashville, “Hamer v. Southeast Res. Group, Inc,” Lexis 176]

When interpreting a contract, ordinary words typically have their ordinary meanings unless there is evidence [\*13] that the parties intended for the words to have a special meaning. Madson v. Madson, 636 So. 2d 759, 761 (Fla. Dist. Ct. App. 1994). The ordinary meaning of a word is often described as its meaning in the dictionary. See Siegle v. Progressive Consumers Ins. Co., 788 So. 2d 355, 360 (Fla. Dist. Ct. App. 2001); Beans v. Chohonis, 740 So. 2d 65, 67 (Fla. Dist. Ct. App. 1999). The ordinary meaning of a word or phrase is also described as "a natural meaning or the meaning most commonly understood when considered in relation to the subject matter and circumstances." See J.N. Laliotis Eng'g Constr. v. Mastor, 558 So. 2d 67, 68 (Fla. Dist. Ct. App. 1990) (quoting Granados Quinones v. Swiss Bank Corp., 509 So. 2d 273, 275 (Fla. 1987)).

If parties wish to depart from the ordinary meaning of common words and assign uncommon meanings to them, they must do so explicitly. See Madson, 636 So. 2d at 761. "One who would ascribe an exotic meaning to a term in a contract which otherwise has perfectly ordinary connotations must take pains to define the term either expressly or by express reference." E. Ins. Co. v. Austin, 396 So. 2d 823, 825 (Fla. Dist. Ct. App. 1981); see Russ v. State, 832 So. 2d 901, 907 (Fla. Dist. Ct. App. 2002) ("[W]here a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." (alteration in original)); Koplowitz v. Imperial Towers Condo., Inc., 478 So. 2d 504, 505 (Fla. Dist. Ct. App. 1985) ("Whether they appear in a statute or in a declaration of condominium, words of common usage should be construed in their plain and ordinary sense.").

Here, this dispute exists because the parties' agreement does not define "scope" or "scope and purpose." Furthermore, the agreement does not identify the point in time when the "scope" of [\*14] Action's business is to be determined. Southeast contends that "scope and purpose" is ambiguous because it is susceptible to multiple reasonable interpretations. According to Southeast, "scope and purpose" means "at a minimum any business opportunity to be marketed to credit union members, including the telemedicine opportunity." However, the entirety of the parties' agreement and the "inconvenience, hardship, or absurdity" that would result from Southeast's proposed interpretation demonstrate that the agreement is not ambiguous and that the parties intended for the words "scope and purpose" to have their ordinary meanings. See Branscombe, 76 So. 3d at 948.

"Scope" and "purpose" are commonly-used words with commonly-understood meanings. Therefore, if the parties intended to ascribe an uncommon meaning to "scope" or "scope and purpose," they should have explicitly defined those terms. See E. Ins. Co., 396 So. 2d at 825. Instead of explicitly stating that these words have an uncommon definition, the agreement provides that its terms, covenants, and provisions "shall be construed simply and according to [their] fair meaning[s] . . . ." Consequently, the failure to specify a unique meaning for "scope and purpose" and the inclusion of the above-quoted section [\*15] indicate that the parties intended for these words to have their ordinary meanings. See id.; see also Russ, 832 So. 2d at 907; Koplowitz, 478 So. 2d at 505.

Under Southeast's interpretation, Plaintiff agreed to disclose and make available every business opportunity "to be marketed to credit union members." Such a broad definition appears to encompass every product or service imaginable, whether they have anything to do with Action or not. Under this interpretation, Plaintiff would be required to disclose an opportunity to sell cars to credit union members even though Action's business is not related to cars at all. The inconvenience, hardship, or absurdity that would result are weighty evidence that the parties did not intend for "scope and purpose" to have this meaning, especially when interpreting the agreement based on the ordinary meaning of "scope" avoids these difficulties. See Branscombe, 76 So. 3d at 948 HN9 ("The inconvenience, hardship, or absurdity of one interpretation of a contract or its contradiction of the general purpose is weighty evidence that such meaning was not intended when the language is open to an interpretation which is neither absurd nor frivolous and is in agreement with the general purpose of the parties.").

HN10 The ordinary meaning of words is found in the dictionary and is the most commonly understood meaning in relation to the subject matter of the parties' agreement. See Siegle, 788 So.2d at 360; Beans, 740 So. 2d at 67; J.N. Laliotis, 558 So. 2d at 68. According to one dictionary, "scope" means "1. The range of one's perceptions, thoughts, or actions. 2. Breath or opportunity to function. 3. The area covered by a given activity or subject." The American Heritage College Dictionary 1222 (3d ed. 1997). The operating agreement is concerned with the relationship of Action's members to each other and to Action, and the subject matter of section 6.6 is the duty to make certain business opportunities available to Action in order to avoid competition between Action and its members. [\*18] Based on the dictionary and the subject matter of the parties' agreement, "scope" most naturally refers to the range or breadth of the business that Action is engaged in at the relevant time.

Southeast contends this interpretation renders "purpose" redundant because "by definition, scope would always be within the purpose." We respectfully disagree. Contrary to Southeast's contentions, "scope" and "purpose" refer to different concepts. "Purpose" is aspirational and refers to what Action is capable of doing in the future (i.e. all lawful business for limited liability companies). In contrast, "scope" refers to what Action actually is doing or has done at the relevant point in time. Thus, an opportunity might be within Action's scope but not its purpose if, for example, Action had been organized for a limited purpose (e.g. to acquire real estate in Florida) but was in fact also engaged in the business of selling disposable mobile phones to college students. In this example, a business opportunity to sell mobile phones to college students would be within Action's scope but not its purpose.

Therefore, under the ordinary meaning of "scope," a member is required to disclose a business opportunity [\*19] if that opportunity (1) is within Action's aspirational goal — its purpose; and (2) is within the area that Action's business has or is actually covering at the relevant point in time. As a result, interpreting "scope" according to its ordinary meaning does not render any part of the agreement redundant.

Having concluded that "scope" refers to the breadth of the business Action is or has engaged in, we must turn our attention to determining when Action's "scope" should be assessed. The agreement does not specify whether Action's scope is to be determined as of the date of the agreement, the date of the discovery of an opportunity, or some other date. After reviewing the agreement, we conclude that the parties intended for Action's scope to be determined at the time when a member seeks to pursue the business opportunity in question.

#### ‘Expanding the scope of its antitrust laws’ means modifying whether the law applies to activities.

Carpenter ’3 [David W. Carpenter and Richard D. Klingler; July 23; Partner at Sidley Austin Brown LLP, Law Clerk to Supreme Court Justice William Brennan; Partner at Sidley Austin Brown LLP, Law Clerk to Supreme Court Justice Sandra Day O'Connor, Rhodes Scholar; Westlaw, “Brief of AT&T Corp., Cavalier Telephone, and Competitive Telecommunications Association as Amici Curiae in Support of Respondent” in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, p. 22-23]

First, the language and history of the savings clause foreclose these claims. Even if consideration of the duties imposed by the 1996 Act would expand the “standards” and “scope of the antitrust laws” (DOJ Br. 11, 24) - which it \*23 would not - the savings clause does not say that the Act is to have no effect on the scope of antitrust laws. Rather, it says that “nothing in this Act … shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.” 47 U.S.C. § 152 note. As the legislative history makes explicit, this clause is designed to prevent claims that antitrust law is inapplicable to conduct regulated by the 1996 Act,16 and Congress adopted this clause because it understood - based on the experience of introducing competition into long distance and equipment markets - that antitrust enforcement is an essential supplement to efforts to open telecommunications markets to competition through access regulations.

### K

#### Perm do both---it expands antitrust to leverage the benefits of capitalism while moving towards the alternative.

Meagher ‘20 [Michelle; 9/10/20; Senior Policy Fellow at the Centre for Law, Economics and Society at the University College of London, LL.M. in Antitrust Law from Georgetown University; “Stakeholder Antitrust,” in Competition is Killing Us: How Big Business is Harming Our Society and Planet - and What to Do About It, eBook]

With these realities in hand, the primordial blind spot of free market competition can be seen more clearly: competition is a race to power, and companies compete in part by producing social and environmental spillovers they do not have to pay for. Our models of competition minimize or ignore these aspects of competition, and it is on this basis that the antitrust regime does not, after all is said and done, produce markets that could genuinely be called ‘competitive’ or ‘efficient’. Markets are instead highly concentrated and replete with social and environmental harms. Competition by itself will not spread power and make everyone better off; instead, we must actively contain any power that arises from market distortions and share out the residual corporate power that we cannot contain to stakeholders so that they may be empowered to protect their own interests.

But these realities do not yet take up the same space that the myths, with their decades of augmentation, have come to occupy – they need their own accompanying narrative and logic to bind them to the structure of twenty-first-century capitalism.

Corporate capitalism currently operates completely untethered from the state that supports it, almost in an attempt to be as much the opposite of command and control, state-governed socialism as possible. But it turns out that, in order to have the best of both worlds – the progress and industry of capitalism, and the socialization of competition and markets – we can take a middle ground. Private corporations can remain in private hands, guided not by the central arm of the state but by the decentralized will of stakeholders embedded within companies.

The aim is to attempt to reap the benefits of fruitful competition by aligning companies to the public interest whilst avoiding the entropic inequality, injustice and negative spillovers that otherwise suffuse and overwhelm the economic system. The free-flowing flood of money and power could be replaced with a controlled irrigation system, directing the creative ability of capitalism towards the cultivation of desired and desirable projects and enterprises.

This can be achieved through a structural change in corporate capitalism, designed to dissipate power through a much more broadly conceived system of antitrust, striking at both the heart and periphery of corporate power. Whatever power cannot be dispersed should be shared, through participatory mechanisms empowering people to engage actively in the stewarding of the markets.

#### Stopping at a rigid conception of markets guts solvency. Antitrust reform of corporate power harnesses legal power to transform corporate behavior.

Paul ‘20 [Sanjukta; 1/24/20; Assistant Professor of Law at Wayne State University, J.D. from Yale Law School; "How Bernie Sanders’ Radical Plan to Fix Markets Could Save Capitalism," <https://www.barrons.com/articles/can-bernie-sanders-save-capitalism-antitrust-expert-weighs-in-51579877760>]

Markets are constructed by law. They can take as many forms as the set of background legal rules that constitute them. They aren’t a Platonic form instantiated in law, but a range of possibilities constituted by law. That said, we often think of “textbook” markets as populated by firms driven by shareholder wealth maximization, and characterized by strong property rights and enforcement of private contracts, with few other legally recognized forms of economic coordination. People across the political spectrum frequently essentialize this particular type of market as “the market” or as the “market solution.”

This rigidity makes no sense. Markets are always characterized by background coordination rights, determined by law, which decide who—Wall Street, corporate managers, workers, the public, or some combination—has the authority to manage economic activity. These coordination rights, allocated by law, have numerous permutations.

Imagine, for example, a market characterized by legal rules disfavoring corporate consolidation and the domination of smaller players by more powerful ones, while favoring horizontal cooperation among small players, including in the form of labor unions. Consider also some changes to corporate law, which allocates coordination rights within firms. No law of nature compels corporate managers to run their organizations for the benefit of shareholders to the exclusion of their workers and the communities where they do business. Corporations were once thought of as quasi-public entities required to justify their special legal privileges by serving the public interest. Imagine, then, legal reforms that give workers a voice in corporate governance, and that modify the fiduciary duties of corporate directors so they run not only to shareholders but also to other stakeholders, including workers. This is also a market.

And it’s very much the sort of market that Sanders favors, judging by his detailed plan on antitrust and corporate law reform, together with his decades-long support of labor organizing. The central, unifying theme of this plan is to expand democratic participation in the economy while breaking up the consolidation of economic power and control. Its underlying goal is to disperse rather than concentrate economic coordination rights: allowing consumers, workers, and small firms to participate more fully in economic coordination.

The current permissive landscape of corporate mergers and acquisitions too often results only in short-term shareholder profits, and fees for investment bankers and lawyers, while undermining workers, re-investment in the business, research and development, and communities. The Sanders plan targets this problem. It would “institute bright-line merger guidelines that set caps for vertical mergers, horizontal mergers, and total market share.” It also promises to undo recent mergers that have caused harm, and to unwind companies that have acquired dominant positions in their markets, if they have wielded that power in harmful ways. Sanders specifically cites consolidation in agribusiness, the hospital sector, and telecommunications for social and economic harms to workers and the public.

The plan also aims to “end institutional deference to the consumer welfare standard.” The legal standard, distilled by conservative jurist Robert Bork in the 1970s and adopted widely thereafter, operates across antitrust law as a kind of meta-rule that bends legal doctrine and government agency practice toward using speculative consumer benefits to justify corporate power. In the context of mergers, it serves as a smoke screen for productive “efficiencies” that frequently consist of mass layoffs and in shutting down operations in favor of on-paper, short-term economic gains to a few. Sanders would direct antitrust regulators to consider factors beyond cost savings—which frequently don’t reach or benefit consumers anyway—with a focus upon preserving fair competition.

The Sanders plan also emphasizes the executive branch’s authority to make meaningful enforcement choices and to define the rules of fair competition. It begins with a stark assessment: “The Federal Trade Commission has failed its mission...Even as it has handled monopolists with kid gloves, it has attacked the organizing efforts of workers and professionals, including in the gig economy.” In addition to reversing these enforcement choices, Sanders says the FTC should more aggressively define the rules of fair competition. The agency already has considerable rule-making authority it isn’t using. The plan would ban mandatory arbitration clauses, noncompete clauses, and certain other facially unfair contractual provisions, while empowering the FTC to do more.

Sanders’ proposal would also change the character of corporations themselves. Corporations are creatures of the state; their behavior is already driven and constrained by legal norms. It was a judge who ruled that Jim Buckmaster and Craig Newmark, the creators of Craigslist, were not permitted to protect their community-oriented approach to running their successful business, forcing them to accommodate their powerful, monetization-minded shareholder, eBay, in a joust for corporate control. Sanders’ plan would institute federal corporate charters, using them to modify the shareholder primacy norm, including workers and other stakeholders’ interests in corporate decision-making. It would also provide directly for a worker role in corporate governance, through the election of corporate directors.

Sanders’ plan shows he is willing to radically reconstruct markets—and his team knows the details well enough to do so. It also avoids the orthodoxy that largely suffuses economic policy thinking. Even a progressive version of that orthodoxy—one that disregards the ground-up legal creation of markets and conceptualizes any changes to the existing rules in terms of discrete “market failures”—is likely to seriously limit real changes. If instead she or he recognizes that both real-world markets and economists’ theoretical models are deeply constituted by the background legal rules that create them, then a president will have removed the most powerful internal obstacles to creating an economy that truly works for all.

#### Mission-oriented approach is bad. We should ask what problem in the market needs to be fixed, rather than what kind of markets we want!

Beardsworth, 10—Head of the School of Politics and International Studies and Professor of International Politics at the University of Leeds (Richard, “Technology and Politics: A Response to Bernard Stiegler,” Cultural Politics (2010) 6 (2): 181–199, dml)

Now, for Stiegler, the question of technics is a Greek question because the relation between the human and the technical is explicitly posed by the Greeks, and any thinking on technology necessarily works within this Greek framework.5 Whatever one makes of this thesis technologically speaking, the question of the modern and contemporary autonomy of the economic from the social whole is nevertheless not Greek. With the end of the Cold War, with increasing trans-border activity of capital, goods, and, to a much lesser extent, labor, capital comes to determine the terms in which the allocation of scarce resources is made. Capital becomes, that is, general, and there is for the foreseeable future no alternative to it.6 All human beings live within the system of capital, whatever the particular node they live on, or conjunction they make with it. This system is highly unstable and dissymmetrical with immense imbalances in equality, natural resource distribution, financial assets, and terms of trade. With no alternative to capital, a revolutionary politics is no longer tenable. The ethical question driving political innovation has, consequently, to be worked out in terms of universally coordinated, but locally determined equilibriums between growth, sustainability, and equity. Given economic interdependence and the necessity of large transfers of technology and wealth from the developed world to the developing world in the context of climate change, effective financial regulation, economic coordination, and staggered development present the right strategies to tame the excesses of neoliberal global capitalism. Whether these strategies are feasible or not is at present an open question given recent government failure to regulate risk-taking and the evident dilemma, for developing countries, between the need for curtailed energy use, on the one hand, and industrialization and exit from poverty, on the other.

Now, whatever our answers to these large questions, the political question today—‘who are we?’—can only be appraised if the political economy of a globalized world becomes the direct object of critical attention. Only by foregrounding this object and its dilemmas will one have any chance of critical purchase on the political challenges ahead. In this context, Stiegler's foregrounding of technology to promote a new critique of political economy is decisive in purpose and tone, important in detail, but misplaced in general intent. Stiegler is right to stress again the pertinence of the economy for critical thought after “the supposed economism of Marxism” (2009: 29). His technologically trained focus on the alienated consumer is important within the cognitive dimension of contemporary capitalism and debt-led growth. But, if he is concerned to show, as a philosopher, the general lines of a re-invented critical political economy, his object and attention need to be much larger than his “Greek” framework affords. Since there is no systemic alternative to capitalism at this moment in history, the question of political economy is one of whether effective regulation of capitalism is possible or not for the world as a whole.

In this regard, I fear that Stiegler's rhetorical logic of excess testifies to a straightforward shift of Marxist terminology (from producer to consumer) rather than a reinvention of Marxism's object (political economy). I say this despite the deep interest in understanding cognitive capitalism and consumerism through Stiegler's categories. To take a few examples from only the last pages of Pour une nouvelle critique de l'économie politique: we are witnessing the “extreme disenchantment of the world” (2009: 88), a “generalized proletariat [of consumption]” (89), the “disappearance of the middle classes” (89), the “destruction” of social association (87), and “lawless and faithless” elites of capitalism (88). This logic of excess ignores the need today to make small distinctions, under the canopy of political regulation, within the world as a whole. The art of politics today is the prudential art of making critical distinctions within an economy of the same. “Critical philosophy” may wish to eschew such distinctions, but it does so at its practical peril when there is no alternative to capitalism, and when, just as importantly, the mid-term horizon is global coordination of a world economy under circumstances of economic imbalance, energy-crisis, and poverty.

The political questions today are therefore: “what kind of regulation of capitalism is ethically and empirically appropriate?”; “at what level is it appropriate?”; and “what instance should and can decide?”. These are vast and difficult questions for philosophy, political science, and economics: they will occupy minds and bodies for a long time to come. It is my belief that, within these questions and their distinctions, an engaged philosophy (which Stiegler rightly advocates) has an important role to play. A generalized technological reading of Marx creates in this context important cultural work; but it does not give itself the terms of a contemporary critique of political economy.

I end this section with one example of what kinds of matter need to be “adopted,” and how. There has been much talk recently of the regulation of financial offshore centers. Such talk, when coming from elite bodies in power, can serve as a smoke-screen to evade the major issue of imbalances within the world economy as a whole (particularly the northwestern problem of public and private debt). Worldwide coordinated investment in the real economy remains in this context an outstanding question. That said, the political regulation of these tax havens forms part of the ongoing struggle against international and national neoliberal practices, since it was financial offshore centers, starting with the Eurodollar markets, which helped promote capital mobility at the end of the 1970s.7 It is this capital mobility that ended the “social democratic contract” between capital and labor at the level of the nation-state and in the framework of the Bretton Woods international system of fixed exchange rates. It consequently paved the way for “disembedded” global capitalism, widespread debt-led growth, and, under worldwide conditions of financial contagion, massive social disorientation.8 The financial and economic crises of 2007–09 resulted from “de-regulation” of domestic and global assets (from mortgages to complex financial tools like swaps and derivatives). This de-regulation enabled financial capital accumulation from the 1970s onwards. It is now generally accepted that 60 percent of profits in the corporate sector have been finance-based in the last ten years (Brenner 2006: 293). To regulate offshore accounts in this context is therefore ideologically and structurally crucial for the political “adoption” of contemporary capitalism. For, owners of these accounts have fed the recent spiral of risk-taking (a half of global capital is estimated to lie in such accounts!), but they have continued to refuse the social costs of (their) national public life. The object of concern for critical political economy is consequently less the credit-card-consumer (and profits based on the capitalization of his or her external memory supports) than effective regulation of their economic causes.

That said, how, in today's world economy, can one regulate these capital accounts? This is the urgent political question. To stop the businesses of nations moving large amounts of their capital offshore to avoid domestic taxation suggests either the necessity of global taxation or renewed domestic regulation of capital outflow (as in the 1960s and 1970s in “embedded” liberal states). The political cosmopolitan response—global regulations of all international capital flows—is certainly the best response theoretically since capital competition thrives on exceptions to legal norms. It is however institutionally impractical given the weak status of international rule. Nation-state fiscal policy is practical since it can block capital displacement to more competitive national markets. National monetary policy requires, however, clear leadership, democratic example, and effective bureaucratic surveillance (and in the case of the EU it is already not possible given the monetary sovereignty of the European Central Bank). And so forth. My point is this.

These kinds of dilemmas immediately face any progressive thinking of political economy today: they require careful ethical and empirical exposition before one can make general critical claims. The regulation of financial offshore centers is actually one of the more simple problems of global cooperation to solve, although its structural effects will be deep concerning finance-led growth. How much more conceptual and empirical thinking is needed to work out market and government motivation for effective climate change mitigation; or to work out long-term the global imbalance between Chinese savings and US debt … Regarding these political dilemmas concerning effective regulation of global capital flows, I remain unconvinced that Stiegler's philosophico-technical reading of the economy can (1) properly delimit the economic problems that need to be adopted; and (2) tease out the differences of approach required to adopt contemporary economic conditions effectively. Under the general conditions of a capitalist world economy, however, these differences constitute the very condition of more local social re-motivation (Stiegler's very concern).

### Comity CP

#### Technical assistance fails.

Gal ’10 [Michal; 2010; LL.B., LL.M., S.J.D. Associate Professor and Co-Director of the Forum for Law and Markets, Haifa University School of Law; Virginia Journal of International Law, “Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance,” vol. 57; KP]

Another approach is to enhance the technical abilities of antitrust agencies in developing countries. Technical assistance and capacity-building programs, which are often sponsored by large, established jurisdictions or by international bodies, are designed to create a cadre of domestic enforcers. Those enforcers are capable of applying local antitrust laws, assisting domestic agencies in confronting and dealing with business practices and providing educational and public consulting to staff and officials making difficult decisions about competition policy implementation. 76 Such programs, while enhancing human capital, often do not lead the newly trained local authority to pursue international cartel cases." Often, such programs are limited in scale and scope. And, as elaborated above, it might still be more cost effective for the authority to use its resources to prosecute several domestic cartels instead. Thus, technical assistance programs also have limited effects on the prosecution of international cartels.

In sum, conventional wisdom dictates that little can currently be done to increase enforcement of domestic antitrust laws against international cartels. Current solutions are limited in their ability to solve international antitrust enforcement problems. The obstacles to optimal enforcement of small jurisdictions are unlikely to disappear with time, whereas those of developing jurisdictions will likely disappear only when their level of development changes significantly. Given the short- comings of the current system, the next Part analyzes the ability of the Recognition-of-Judgments Mechanism to increase deterrence and welfare.

#### The use of avoidance doctrines to limit transnational litigation makes Court meaningless.

Bookman ’15 [Pamela; May 2015; Academic Fellow, Columbia Law School; Stanford Law Review; "Litigation Isolationism," vol. 67, p. 1081-1144]

Avoidance doctrines strive to prevent federal courts from interfering with foreign relations policies that should be controlled by the political branches and from disrupting international comity in the process. But, as judicially driven developments mostly uninformed by international law or practice, they are simply ill equipped to do so. A signature feature of avoidance doctrines is the lack of political branch input and the domination of the area by courts. U.S. courts were long criticized for expanding transnational litigation. Today, courts have gone too far in the opposite direction.

Entertaining "too little" transnational litigation can raise the same separation of powers concerns as entertaining too much. In articulating the costs to U.S. democracy of international human rights litigation, Curtis Bradley has noted that the separation of powers problems that come from courts "invent[ing]" procedures to facilitate that kind of litigation (such as holding that customary international law has the status of federal common law) are likewise apparent in judicially created doctrines designed to limit such litigation (such as the political question doctrine and international comity).270 The same can be said of similar judicially driven developments in areas of transnational litigation more generally. Cabining transnational overreach through judicially created avoidance doctrines does little to ameliorate the separation of powers problem the overreach created. The problem is a result of court (as opposed to political branch) control over these issues. Avoidance has not made that go away. Instead, it has flipped the question to whether the federal courts are now excluding (rather than including) transnational litigation out of keeping with political branch prerogatives and in a manner that interferes with the executive branch's conduct of foreign affairs. 2 71

#### The impact is 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.

### Public CP

#### PROA solves – 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.

#### Only international, private antitrust enforcement solves.

Schmidt 6, \*Jonathan T. Schmidt. Antitrust lawyer. Master’s in Public Affairs from the Princeton School of Public and International Affairs. JD from Yale Law School. Former Fulbright Fellow in Peru, where he studied micro-enterprise lending; (2006, “Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels.” <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1266&context=yjil>)

II. BACKGROUND

A core aspect of America's antitrust regime is its encouragement of private litigation as an enforcement device. Private litigation is thought to be particularly effective against cartels, as the consumers in a cartel market may often be among the first entities to detect the cartel's damaging collusive behavior, and awarding damages-particularly a multiple of the cartel's profits-may make the illegal conduct cost-prohibitive. Thus, private litigation is viewed as an important mechanism for achieving one of the fundamental goals of the antitrust acts: the maximum deterrence of cartels.26

Initially, the application of America's antitrust regime was contained within its borders. But as commerce became increasingly international after World War II, U.S. courts applied the antitrust laws extraterritorially. America's extraterritorial application of its antitrust laws created tension with its trading partners, who disagreed with the American approach of relying on private litigation and treble damages as an enforcement device. They viewed the extraterritorial application of U.S. law as an anticompetitive maneuver aimed at furthering U.S. trade objectives. In the late 1970s and early 1980s, many of these countries passed legislation to frustrate the extraterritorial application of America's antitrust laws. The U.S. Congress responded by passing the FTAIA. This law barred foreigners from using America's laws against American companies when American consumers were not harmed. The Empagran decision-and the governments' amici briefs-must be understood within this context of antitrust policy as trade policy.

A. The Sherman and Clayton Acts

The Sherman and Clayton Acts are the statutory foundation for private antitrust litigation in the United States. The Sherman Antitrust Act outlaws "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations., 27 Violations are felonies, with corporations and individuals facing civil and criminal penalties, including imprisonment.29

To expand the enforcement of the antitrust laws and to facilitate the compensation of the victims of antitrust harms, Congress adopted the Clayton Act. Section 4 of the Clayton Act creates a private cause of action for individuals and companies harmed by antitrust violations, 30 and section 12 grants jurisdiction over these lawsuits to any district in which the defendant does business.3' Plaintiffs in such lawsuits act as "private attorneys general, 32 who help alert authorities to violations of the antitrust laws while also punishing those violations. The Clayton Act allows private litigants to sue for treble damages. Treble damages enhance deterrence in two ways-they encourage private suits, which raise the probability the cartel will be detected,33 and they increase the penalty imposed on defendants found guilty of violating the acts.34 The Clayton Act has succeeded in encouraging such suits. 35

B. Cartels-An Introduction

Cartels are "unambiguously bad' 36 and "the most egregious violations of competition law."3 7 The collusion they engage in the "supreme evil of antitrust. ' '3s A cartel is a group of firms in an industry that should be competitors but have instead agreed to coordinate their activities so that they can raise prices and earn profits above competitive market levels. Cartels utilize a number of mechanisms to coordinate their activities, including horizontal price fixing,39 bid rigging, territorial division,40 non-territorial customer division, and market-share agreements. In addition to harming the consumers of their products by charging supra-competitive prices, cartels also reduce economic efficiency by causing consumers to purchase less of a product than they otherwise would buy and by reducing the competitive pressures that member firms face to control costs and to innovate.41

A cartel must overcome four challenges to operate successfully. First, the cartel's members must reach agreement to restrict the supply of a product and increase its price. A cartel restricts supply so that the loss from the lower quantity of sales is more than offset by the increase in the price of each remaining sale. The optimal cartel quantity and price is that of a monopoly producer, but cartels rarely achieve that optimal level because cheating by members and market entry by new producers increases market supply. Thus, a second challenge for a cartel is to ensure that its members follow the agreed course of action. Each cartel member has an incentive-to sell more than the agreed quantity of the product-at the cartel price or one slightly below it-to gain even more profit.42 Because cheating threatens the cartel's viability, cartels must monitor their members and punish cheating.4 3 But monitoring is difficult because of the third challenge inherent to cartels: their illegal actions force them to operate in secrecy to avoid detection.44 Yet even if, while operating in secret, cartels are able to monitor and punish cheaters, they still must prevent entry by other firms into the market. Entrants will be enticed by the opportunity to earn profits due to the extra-competitive cartel prices, and their entry will drive down the cartel's profits. To maintain its hold on the market, the cartel must prevent new entry, again without making the cartel visible. The complexity of addressing these four challenges leads many economists to conclude that cartels are "inherently unstable."43

Certain market characteristics are conducive to collusive activity. Cartels often operate in concentrated markets with few firms, permitting easier coordination and more reliable confidentiality.46 Markets with high initial investment costs are also conducive to cartel activity. These costs deter other firms from quickly entering the market to take advantage of the cartel's artificially high prices.47 Products that are homogenous and fungible also facilitate cartel activity. a Such products are usually uniformly priced, making it easier for cartels to monitor member prices. Finally, market structures, such as public disclosure laws regarding prices and quantities, can help cartels monitor their members' activities.

Market characteristics alone cannot sustain a cartel; cartel members must adopt a variety of practices to avoid detection and to enforce compliance. Cartels avoid detection by holding secret meetings, using code names, and creating legitimate-appearing trade associations to share information.49 Generally, cartel members meet periodically to review public and private sales and price figures from prior periods. They also force members who exceed their quotas to compensate the other members.50 Thus, cartels overcome their inherent instability by successfully providing supra-competitive profits to their members while maintaining the secrecy of their collusion and punishing any deviations. Indeed, based on the fact that twenty-four of the forty international cartels prosecuted in the 1990s had operated for at least four years, one study concluded, "market forces alone may be unable to quickly undermine attempts to fix prices, rig bids, allocate quotas, and market shares; perhaps implying a potential role for national anti-cartel enforcement." 51

C. International Cartels

Certain characteristics of the global marketplace increase the ability of international cartels to monitor their members and maintain secrecy. The publication of official import and export data facilitates the cartel's monitoring of its members. National differences in accounting, reporting requirements, and other legal mandates help cartels to hide their activities and profits. 53 National borders mask agreements to divide a product market among competitors,54 and they can facilitate the punishment of cheaters.55 Cartel members also frustrate the efforts of effective policing authorities by meeting and retaining records outside their jurisdictions.56

Almost invariably, any international cartel harms consumers in all of the countries in which its product is sold. If an international cartel does not raise prices everywhere, a product sold at a cheaper price in one country can be resold in another country where the price is higher. This arbitrage threat exists as long as transaction costs, including transportation costs, are low and the product is undifferentiated across the various countries. If the cartel's product is sold in the United States, the cartel must raise its price in the United States sufficiently so that it is not profitable to buy the product in the United States, ship it to another market, and sell it at or below the cartel price. Thus, because cartels must address the arbitrage threat by raising prices in all of the markets in which they operate, the harms caused by the cartels in those markets are interconnected.

To effectively deter cartels, the total expected penalty must at least equal the supra-competitive profits from participating in the cartel.57 Because an international cartel enjoys supra-competitive profits from its sales in other countries, "[tihe relevant expected penalty depends on the sum of the expected penalties in each nation., 58 According to the OECD, sanctions against cartels "are, on the whole, still inadequate" 59 in most countries. Therefore, cartels will raise their prices in the United States even though doing so increases the likelihood of the cartel's detection due to the United States's more rigorous antitrust regime. The international cartel will still harm American consumers because it can offset its expected American losses with its supra-competitive profits from countries where it has little fear of penalty. As a result, "the deterrent required to prevent a global cartel from including the United States is generally larger than the deterrent required to prevent a purely domestic cartel from forming." 60

#### Public enforcement alone fails.

Lande 17, \*Robert H. Lande is the Secretary of the American Antitrust Institute’s Board of Directors. He was the AAI’s first Senior Fellow and a co-founding Director of the AAI and has served the AAI on a full-time basis during three different periods. He is the Venable Professor of Law at the University of Baltimore; \*Joshua P. Davis is Professor of Law and Director of the Center for Law and Ethics at the University of San Francisco; (January 1st, 2017, “Restoring the Legitimacy of Private Antitrust Enforcement”, <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2017&amp;context=all_fac>)

As has been observed, “government cannot be expected to do all or even most of the necessary enforcement” for numerous reasons – in addition to budgetary constraints – including “undue fear of losing cases; lack of awareness of industry conditions; overly suspicious views about complaints by ‘losers’ that they were in fact victims of anticompetitive behavior; higher turnover among government attorneys; and the unfortunate, but undeniable, reality that government enforcement (or non-enforcement) decisions are, at times, politically motivated.”7

#### Overdeterrence is a myth – cartels are massively underdeterred

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]

C. There is No Evidence of Overdeterrence by The Combination of Private and Public Enforcement

Some critics assert that “treble damages, along with other remedies, can overdeter conduct that may not be anticompetitive….”41 Yet, despite the request by the Antitrust Modernization for evidence on this issue,42 “[n]o actual cases or evidence of systematic overdeterrence were presented to the Commission . . . .”43

A recent study, moreover, demonstrates the opposite. This study demonstrates that the combined level of current United States cartel sanctions – the total of private and public remedies - is only 9% to 21% as large as it should be to protect potential victims of cartelization optimally.44 Consequently, the average level of United States anti- cartel sanctions should be increased: there certainly is no overdeterrence.

The United States imposes a diverse arsenal of sanctions against collusion: criminal fines and restitution payments for the firms involved and prison, house arrest and fines for the corporate officials involved. Both direct and indirect victims can sue for mandatory treble damages and attorney's fees. This multiplicity of sanctions has helped give rise to the strongly held - but until this study never seriously examined - conventional wisdom in the antitrust field that these sanctions are not just adequate to deter collusion, but that they are actually excessive.45

The study analyzes this issue using the standard optimal deterrence approach.46 This is predicated upon the belief that corporations and individuals contemplating illegal collusion will be deterred only if expected rewards are less than expected costs, adjusted by the probability the illegal activity will be detected and sanctioned. To undertake this analysis the study first calculates the expected rewards from cartelization using a unique database containing information 75 cartel cases. The study surveys the literature to ascertain the probability cartels are detected and the probability detected cartels are sanctioned. It calculates the size of the sanctions involved for each case in our sample. These include corporate fines, individual fines, payouts in private damage actions, and the equivalent value (or disvalue) of imprisonment or house arrest for the individuals convicted (at $6 million per year).47

The analysis shows that, overall, United States' cartel sanctions are only 9% to 21% as large as they should be to protect potential victims of cartelization optimally.48 This means that, despite the existing public and private sanctions, collusion remains a rational business strategy. Cartelization is a crime that on average pays. In fact, it pays very well.49 Accordingly, the study concludes by proposing a number of ways to strengthen the existing array anti-cartel sanctions and to thereby help deter anticompetitive behavior and save consumers many billions of dollars each year. 50

As noted, there is a myth in the antitrust world that the current overall level of antitrust sanctions is too high. The next administration should work energetically to help rebut this “conventional wisdom” by the use of speeches, testimony white papers, and appropriate amicus briefs. Private enforcement should be given its due as an important complement to public enforcement.

#### Empirical studies are aff.

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]

II. The Current Level of Private Enforcement Is Not Excessive

Notwithstanding the benefits of vigorous private enforcement, critics maintain that private antitrust enforcement in the United States is excessive, that it leads to overdeterrence, and that it promotes widespread frivolous antitrust litigation.31 These are myths.

A. The Number of Antitrust Cases is Modest

The number of new private federal antitrust cases has declined significantly during the last 30 years.32 The number of cases filed peaked in 1977 at 1611, dropped steadily in the 1980s to a low of 452 in 1990, averaged 600 cases per year in the 1990s, and has increased modestly to an average of 760 cases per year since 2008. The number of private federal antitrust actions filed as a percentage of the total number of civil cases filed in the federal district courts has fallen by approximately 75% from 1.2 % in 1977 to 0.26% in 2014.

[Table 1 omitted].

B. There is No Evidence of Overcompensation or Duplicative Recoveries

Some claim that private enforcement could result in overcompensation of victims, or duplicative recoveries, when direct purchasers sue under the Sherman Act and indirect purchasers sue under state laws.33 Some claim that this combination could result in a total of sixfold or more damages for antitrust violations.34 Yet, no evidence of even a single example where victims have received more than treble damages has ever been presented.35

A recent AAI study analyzed the overcompensation/duplication issue empirically by assembling a sample of every completed private U.S. cartel case since 1990 for which the authors could find the necessary information.36 For each of these 71 cases, the study collected neutral scholarly estimates of affected commerce and overcharges. It compared these to the damages secured in the private cases filed against these cartels.

### Blockchain DA (Georgetown) – 2AC

#### 1 – 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.

#### 2 – Shipping enforcement thumps.

**Gallagher ’3-1** [John; 2022; reporter; FreightWaves, “New legislation would strip ocean carrier antitrust protections,” https://www.freightwaves.com/news/new-legislation-would-strip-ocean-carrier-antitrust-protections]

The proposal comes as the Federal Maritime Commission and the Department of Justice attempt to bolster enforcement of U.S. competition laws. Last week they announced an initiative, building on a memorandum of understanding signed last year, whereby the two agencies will share lawyers and economists to “aggressively enforce” Shipping Act violations.

“The attorney general and I share both the priority of a competitive marketplace and a commitment to pursue enforcement actions when necessary,” said FMC Chairman Daniel Maffei. “Our agencies have a history of cooperating to the benefit of the American consumer and this new support will help ensure that the working relationship will help both government entities in our shared goal of fair competition.”

The White House on Monday published a fact sheet promoting the agreement as a way to loosen container carrier control over the market.

#### 3 – Changes to the law are frequent.

Salop ’21 [Steven, Daniel Francis, Lauren Sillman, and Michaela Spero Amadeus; Professor of Economics & Law, Georgetown University Law Center; Climenko Fellow and Lecturer in Law, Harvard Law School; Associate, Clifford Chance LLP; Legal Counsel Regulatory Affairs, Amadeus; Georgetown University Law Center, “Rebuilding Platform Antitrust: Moving on from Ohio v. American Express,” https://scholarship.law.georgetown.edu/facpub/2414]

The hope of such a clean fix is possible, though it may take some time. The Court has often made substantial course corrections in its 130-year exposition of the Sherman Act. Perhaps the most famous was the overarching Section 1 rule of reason standard itself, created when Standard Oil overruled Trans-Missouri Freight. Other dramatic reversals have included the multiple revisions of the law of non-price intrabrand vertical restraints, the law of minimum resale price maintenance, the law of maximum resale price maintenance, the market-power presumption in patent cases, and the predatory pricing standard. More generally, in both antitrust and non- antitrust cases, the Court has shown a pragmatic willingness to correct errors when they are important enough, when they are sufficiently clear, and when the threat of harm is obvious.

#### Fintech can’t replace the dollar – Federal Reserve proves.

Light ’21 [Larry, Experienced finance editor and writer with a demonstrated history of working in the online media industry. Skilled in Journalism, Magazines, Newspapers, AP Stylebook, and Non-fiction, as well as CMSs ranging from Wordpress to Prism. “So … Is Bitcoin Going to Replace the Dollar?,” Chief Investment Officer, 2-18-2021, https://www.ai-cio.com/news/bitcoin-going-replace-dollar/

All this has buoyed talk that someday Bitcoin in particular, or cryptocurrency in general, will replace the buck. Well, forget about that, argues St. Louis Federal Reserve President James Bullard, invoking the lessons of pre-Civil War days to warn about the chaos brought by a world of nonuniform currencies—that would be one where the buck isn’t king.

Appearing on CNBC Wednesday, he predicted that “it’s going to be a dollar economy as far as the eye can see—a dollar global economy really as far as the eye can see—and whether the gold price goes up or down, or the Bitcoin price goes up or down, doesn’t really affect that.”

The basis of his fretting: As the premier crypto denomination, Bitcoin is gaining rapid acceptance in the financial world. Numerous institutional investors are getting into Bitcoin. BlackRock, the world’s biggest asset manager, is deepening its involvement in the digital currency. Tesla just announced it would accept payment in Bitcoin for its cars.

But Bullard, invoking history, voiced concern that nongovernment-issued currencies could make monetary transactions chaotic. “Dollars can be traded electronically already, so I’m not sure that’s really the issue here,” he stated. “The issue is privately issued currency.”

Before the Civil War, he said, many US banks issued their own currencies, so the public had no idea what things cost. He compared the situation to Bank of America, JPMorgan Chase, and Wells Fargo producing their own varieties of dollars. In the early 1800s, he said, “they were all trading around and they traded at different discounts to each other, and people did not like it at all.”

A proliferation of crypto would bring the same mess today, he admonished. “You don’t want to go to a nonuniform currency where you’re walking into Starbucks,” he said, “and maybe you’ll pay with Ethereum, maybe you’ll pay with Ripple, maybe you’ll pay with Bitcoin, maybe you’ll pay with a dollar. That isn’t how we do this. We have a uniform currency that came in at the Civil War time.”

The concept of the dollar as the basis of international and domestic commerce works best from a practical standpoint, he argued. Alluding to Bitcoin’s infamous volatility, he declared, “investors want a safe haven. They want a stable store of value, and then they want to conduct their investments in that currency.”

Certainly, Bullard allowed, the euro and the yen are solid currencies. Still, “neither of those is going to replace the dollar,” he said. “It’d be very hard to get a private currency that’s really more like gold to play that role, so I don’t think we’re going to see any changes in the future.”

#### No fintech impact. It’s a grift, which is why their cards are from techno-bloggers.

Robinson 21 [Nathan James Robinson is an English-American journalist, political commentator, and editor-in-chief of Current Affairs magazine, which he founded in 2015. "Why Cryptocurrency Is A Giant Fraud." https://www.currentaffairs.org/2021/04/why-cryptocurrency-is-a-giant-fraud]

Many discussions of Bitcoin and cryptocurrency—I am going to use “Bitcoin” and “cryptocurrency” interchangeably for convenience, even though Bitcoin is just a specific cryptocurrency—begin with a long explanation of the blockchain technology that makes it possible. I think for the purposes of talking about what Bitcoin means and does, this is a mistake and a distraction—like having a discussion about the social effects of air travel by talking about how ailerons work. What matters for the purposes of our discussion is that it’s a made-up alternate system of money that, because it’s built on blockchain technology, can be transferred from one person to another without having to go through a bank or a payment processor. Because you don’t have to use a bank, and can easily transfer bitcoin from person to person, it is also “private,” in the sense that you don’t have to give anyone your credit card information or even your name to transfer funds. This makes it particularly attractive to criminals, because it’s sort of like the digital equivalent of cash: easy to hide, tough to trace. And because it’s not tied to a national government, Bitcoin can be used around the world without having to convert currency.

There are many who see this as revolutionary and important. “The popularity of this form of currency is expected to grow exponentially, as it is decentralized, safe, and anonymous,” reads one analysis. “The fact that a huge section of technology-savvy individuals and companies are favoring the decision of using different form of encrypted currencies clearly indicates that the future of Bitcoin or cryptocurrencies as a whole is going to be bright.” Across the internet, you can find blog posts and explainers that tout the benefits and possibilities of this new form of currency. Some people in positions of power agree: “This is the revolution,” said Rep. David Schweikert, a Republican member of the Congressional Blockchain Caucus. “We just have to sell it.”

I’ve been among those who have ignored cryptocurrency for a long time, but Vox has told me I am no longer allowed to, so I’ve read up on it. And I have to say, Schweikert is partly right: “selling it as a revolution” is a hugely important part of why cryptocurrency is succeeding. But as is generally the case when someone is trying to sell you something, the whole thing should seem extremely fishy. In fact, much of the cryptocurrency pitch is worse than fishy. It’s downright fraudulent, promising people benefits that they will not get and trying to trick them into believing in and spreading something that will not do them any good. When you examine the actual arguments made for using cryptocurrencies as currency, rather than just being wowed by the complex underlying system and words like “autonomy,” “global,” and “seamless,” the case for their use by most people collapses utterly. Many believe in it because they have swallowed libertarian dogmas that do not reflect how the world actually works.

Let’s start with the basic promise, that of being “decentralized, safe, and anonymous.” People like the word decentralized. I like it a lot myself. Nobody likes centralized authority. You know who liked things centralized? Stalin. But what does the word actually mean? In this instance, it means that financial transactions are peer to peer, rather than going through your bank or a processor like PayPal, and that there is no central bank altering the money supply, as there is with the U.S. dollar. Many of the pitches for Bitcoin begin by emphasizing its decentralized nature.

“Unlike services like Venmo and PayPal, which rely on the traditional financial system for permission to transfer money and on existing debit/credit accounts, bitcoin is decentralized: any two people, anywhere in the world, can send bitcoin to each other without the involvement of a bank, government, or other institution.” — CoinBase

“You Are in the Driver’s Seat — One of the best things about cryptocurrency is that, unlike virtually any other type of money retaining system (save for a wall safe or your wallet) you totally own it. Think about it: most traditional liquid asset systems – banks, credit unions, brokerage houses, or even high tech ones like PayPal – take control of your funds and leave you subject to their terms of service. If they decide that you have violated those terms, they can suspend your account. They can change their terms of service, and cause you to have to pay more or receive fewer funds for important transactions. With cryptocurrency, you retain all of the funds on hand, so to speak, digitally, with no third party involvement; the only one who can change the terms of your cryptocurrency use is YOU.” — Nasdaq

“[Cryptocurrencies] enable financial transactions quickly, inexpensively, and more securely. Decentralized crypto does everything that traditional fiat money does— and far more—because it is global and not subject to totalitarian government controls or any third-party interference.” — “How Does Cryptocurrency have Value and Why Should I Care?”

There are recurring themes and bits of rhetoric in the pro-crypto propaganda. (A term whose use is more than justified.) It’s about freedom. It’s about getting the government off your back. It’s about getting middlemen and third parties out of your transactions. It’s about control, autonomy, empowerment.

But if we get past the rhetoric and think about the implications for the average person, it’s not clear that we are actually meaningfully improving “freedom” in any but the most abstract, theoretical way. For the average currency user, why is it so important to get rid of banks and the government and these suspicious-sounding “third parties?” Yes, we all hate bankers, but is the tyranny of Venmo so oppressive that we should shed the U.S. dollar entirely and begin trading in an alternative currency? Yes, it’s true that if you bank with a credit union, you can think of it as “surrendering control of your assets to a credit union.” The crypto-enthusiasts raise the specter of violating the Terms of Service and having your account suspended. I don’t know about you, but this has not happened to me, ever. I’ve gone overdrawn and had to pay stupid fees (fees they hilariously euphemize as “overdraft protection”). I’ve had my debit card stop working because the bank thought a purchase was fraudulent and it wasn’t. But the main problems that people have with their banks and credit unions do not have to do with the bare fact that an institution is holding their money.

In fact, when we examine whether Bitcoin can function usefully as an alternative currency for the average person, we see that all of the grand claims for it fail entirely. Using it does not create greater security or safety for one’s finances. It does not free one from the oversight of the government. It is not convenient or free. Its volatility makes it functionally useless as a currency. Furthermore, these drawbacks are not fixable; they are products of the very concept itself. There is a reason that you are not using Bitcoin for transactions, even though it has been around since 2008. It is that while Bitcoin is based on an interesting technological innovation (blockchain), it is not a good idea for an alternate money system, due to its dependence on several libertarian illusions.

#### **No threats to financial stability.**

Tankus ’20 [Published by Nathan Tankus. He is Research director of the Modern Money Network.Bylines in the Financial Times,Business Insider, The Guardian & American Prospect. "Is There Really A "Looming Bank Collapse?" https://nathantankus.substack.com/p/is-there-really-a-looming-bank-collapse]

One of the issues that I haven’t really touched on, despite writing about the Federal Reserve Coronavirus response at length, is the extent to which this crisis threatens the banking system of the United States. Partially this is because there has been so much to cover, and partially I haven’t felt that there are any immediate threats to the banking system. In “A Payments Holiday is More Realistic Than You Think”, I wrote about how a payments holiday would eventually affect the banking system but that was a hypothetical more than anything else. The popular financial press has also not shown much concern about the immediate stability of the banking system. It is worth commenting on this topic at length now because law professor Frank Partnoy has a dire piece in the Atlantic entitled “The Looming Bank Collapse: The U.S. financial system could be on the cusp of calamity. This time, we might not be able to save it.” Don’t you feel terrified just reading that headline and subtitle?

At the Center of Professor Partnoy’s piece are Collateralized Loan Obligations (CLOs). These bear some similarities to the confusing similarly named instruments Collateralized Debt Obligations which were at the center of the 2007-2008 crisis. CDOs were securities made up of risky mortgage backed securities, themselves made up of individual mortgages. collateralized loan obligations meanwhile are made up of individual loans to corporations which already have large amounts of debt. The parallel is obvious and extremely attractive to journalistic accounts of financial markets looking to repeat the drama and intrigue of 2008. Could the banking system collapse in a similar fashion to the way it did in 2008?

Under the surface however, this narrative cracks. One of the early signs that something is off is Partnoy’s claim that

Unless you work in finance, you probably haven’t heard of CLOs, but according to many estimates, the CLO market is bigger than the subprime-mortgage CDO market was in its heyday

This claim has layers of problems in it. Remember that collateralized loan obligations are simpler instruments than collateralized debt obligations. There is one layer between individual loans to corporations and CLOs whereas CDOs were two layers away from individual mortgages. Second, because CDOs were made up of mortgage backed securities, what mortgage backed securities were in them mattered. It's important in this context to know what the purpose of CDOs were. They were the equivalent of kitchen leftovers thrown into a lunch special the next day and cooked in such a way as to hide that they aren’t fresh. CDOs generally took the riskier and lower rated portions of mortgage backed securities and made up entire securities out of them. These “tranches” were designed to retain their value if losses kept below the high single digits and be 100% wiped out if loses went beyond the low double digits. Comparing these irresponsible (and often fraudulent) securities that were made out of securities which were engineered to lose all their value in adverse circumstances to the default risk on conventionally risky loans is a textbook apples to oranges comparison.

The point is, a proper comparison between mortgage securities and syndicated corporate loan securities would compare the value of outstanding “subprime” Mortgage Backed Securities to outstanding Collateralized Loan Obligations, not to Collateralized Debt Obligations. When you do so, you find that CLOs are significantly smaller than the “subprime” MBS market in the run up to the Great Financial Crisis. As Yves Smith at Naked Capitalism says (her whole post on CLOs is itself worth reading and overlaps with much of what I’m saying here):

But should we even care about CLOs? First, the market isn’t all that large. S&P in early 2020 pegged it at $675 billion. By contrast, the subprime market, depending on whether or not you included Alt-As, was estimated back in the day at $1.3 trillion to a bit over $2 trillion

In other words, in nominal dollar terms the current CLO market is ⅓ of the size of the subprime mortgage backed securities market then. This actually understates how relatively paltry Collateralized Loan Obligations are. Gross Domestic Product (or total nominal income) was ⅔ then what is today. If we divide the numbers above by the relevant GDP it emerges that subprime Mortgage Backed Securities were 13.8% of GDP then whereas Collateral Loan Obligations were 3.1% of GDP in 2020. Thus, relative to total nominal income, CLOs outstanding are roughly 22.5% of what mortgage backed securities were then. Partnoy’s article comparing and contrasting today and 2008 never makes this remotely clear.

Let's return to collateralized debt obligation. A skeptical reader may be inclined to say “well, Mortgage Backed Securities may be the proper comparison for collateralized loan obligations, but that doesn’t take away the fact that collateralized debt obligations were central to the Global Financial Crisis. Why is it okay to ignore these securities?”. The key here is to understand that the problems with CDOs were not because of losses on the underlying mortgages. They were dynamite, engineered to explode. The nitroglycerin was not the mortgages but credit default swaps, a type of unregulated insurance that let purchasers bet on whether a specific security was going to fail or not. Many of these collateralized debt obligations were filled with credit default swaps tied to the riskier and lower rated tranches of Mortgage Backed Securities which I discussed earlier, which were guaranteed to fail. In addition, financial market players would bet that the CDOs they just engineered to fail would fail. Their gain was, by definition, someone else’s loss. So they engineered a set of financial transactions which would create explosive losses throughout the financial system. Imagine if the restaurant in my metaphor had rigged an entire city to explode if the rotten food they fed customers gave customers diarrhea.

Partnoy is completely misleading on this point because he completely fails to distinguish these instruments that were engineered to fail- and explode when they failed- from Collateralized Loan Obligations which are structured like Mortgage Backed Securities and have no such self-destruct mechanisms. He is worth quoting at length on this point:

Congress also tried to reform the credit-rating agencies, which were widely blamed for enabling the meltdown by giving high marks to dubious CDOs, many of which were larded with subprime loans given to unqualified borrowers. Over the course of the crisis, more than 13,000 CDO investments that were rated AAA—the highest possible rating—defaulted. The reforms were well intentioned, but, as we’ll see, they haven’t kept the banks from falling back into old, bad habits

There are many things one can criticize Wall Street for, but it is simply not true that there has been anything going on that remotely resembles the fraudulent explosive devices that were Credit Default Swap fueled Collateralized Debt Obligations made out of the leftover dreck of Mortgage Backed Securities during the Great Financial Crisis. One way of recognizing how fundamentally different circumstances are is by examining what happened to AAA rated mortgage backed securities. If, as Partnoy implies, the losses on CDOs were simply a matter of defaults on the underlying mortgages, triple A rated Residential Mortgage backed Securities should have taken losses comparable to CDOs. No such thing occurred. Yves Smith usefully points out, AAA rated mortgage backed securities ended up averaging roughly 0.5% of losses by 2013. This is more loss than triple A rated securities should have taken, but it is not the kind of loss one would expect if the underlying mortgages were the dominant factor leading to problems with CDOs.

### Protectionism DA – 2AC

#### Protectionism now.

McDaniel ’22 [Christine; January 7; Senior research fellow with the Mercatus Center at George Mason University; *The Hill,* “The China tightrope — and other trade developments that will define 2022,” <https://thehill.com/opinion/international/588783-the-china-tightrope-and-other-trade-developments-that-will-define-2022>; KS]

The second year of the Biden presidency opens with a widening realization that a Democrat-run White House is keeping Donald Trump’s protectionist trade policies: tariffs on steel, aluminum and Chinese imports; domestic content requirements; and dim prospects for trade talks.

Three trends are emerging for the new year. First, countries are increasingly flouting the longstanding international trade regime. Second, trade professional services are being unleashed by the pandemic’s remote-work revolution. Third, multinational corporations are walking an increasingly unsteady tightrope with China.

First, watch for more countries going rogue on trade. Recent U.S. tariffs, India’s sugar program and the European Union’s (EU) carbon border adjustment mechanism are good candidates for a World Trade Organization (WTO) challenge. But with that threat defanged by a ~~crippled~~ [incompetent] WTO appellate body, governments are pursuing domestic agendas without enforcement worries.

A functioning WTO dispute settlement mechanism means deterrence. WTO members agree to pursue domestic policy goals in the least trade-restrictive way. With some exceptions, that means treating domestic goods as you treat imported goods, and that the market access you give to one country must extend to all WTO members. For instance, want to make your cars more energy efficient? Sure, as long as it applies to domestic and imported autos. The mere threat of WTO litigation has required countries to think carefully on policy design to honor these requirements.

Second, cross-border trade in professional services could soon be booming in the wake of the pandemic’s remote-work breakthrough. Thanks to technology and a growing share of the workforce being forced to innovate and adapt, we have expanded the frontiers of what can be done remotely. Today, workers can do more from home, and some even do it better than before.

In a recent interview about his research, Stanford economist Nicholas Bloom said hybrid work is here to stay, and firms see some jobs that can be done completely away from the office. Bloom characterizes these as non-managerial, medium-skill jobs like graphic design, payroll, HR, IT support and editing. If a job does not involve managing a team or immersion in a collaborative process, some firms question if the employee ever needs to come back to the office, or even be in the country at all.

This is not, however, the same as moving a factory to Mexico or China, where wages are a fraction of what they are here. This kind of trade may only happen on the margins, in countries with reliable internet connectivity and the right workforces. Cost savings will be modest. Still, given the tight labor market and 10.6 million job openings, this could help U.S. businesses that desperately need to hire in order to compete and expand. The good news is that this kind of trade is resistant to government protectionism.

Policymakers appear aware of the potential. In her recent visit to the United States in an effort to strengthen cross-border commerce, UK Minister of State for Trade Penny Mordaunt highlighted the “talent, creativity and entrepreneurial spirit” and a shared ambition to level up.

Third, multinationals will continue to walk a tightrope with China. Corporate social responsibility is not just about saving the planet anymore. It also includes U.S.-China culture wars over freedom of speech and forced labor. Social media today puts every CEO in the spotlight on these issues, with corporate sponsors of next month’s Beijing Olympics as the latest example. A company press release meant to appease concerned U.S. citizens and politicians can end up inflaming China (or vice versa).

Some organizations, such as the Women’s Tennis Association, have decided to stand for free speech. Others, like the NBA, have tried to backtrack from controversy for fear of Chinese retribution.

Multinationals must thread the needle. Nike recently came under fire for using a factory that was forcing hundreds of young Chinese Uyghur women to produce sneakers. Nike conducted an audit through a third party, and decided it was fine to continue with the supplier. But Amelia Pang, the investigative journalist and author of “Made in China,” questions the authenticity of that audit, describing the ease with which Chinese auditors can create fake accounting books and irregular attendance records.

These reports suggest it may be impossible to conduct a meaningful audit in China. If that is the case, then all imports from China arrive at our ports with a big question mark. That should make every CEO squirm as we head into the new year.

The international economy continues to change quickly. There will be a lot to unpack in 2022.

#### Slew of other policies murder free trade.

Alden ’21 [Edward; July 20; A columnist at Foreign Policy, a visiting professor at Western Washington University, and a senior fellow at the Council on Foreign Relations; *Foreign Policy, “*Free Trade Is Dead. Risky ‘Managed Trade’ Is Here,” <https://foreignpolicy.com/2021/07/20/free-trade-dead-managed-carbon-border-tax-climate-tariffs-trade-war-protectionism-esg-biden-trump-eu-china/>; KS]

But the nondiscrimination principle is now under the most sustained assault it has ever faced. On issues from national security to labor rights to the environment, the world’s largest economies are deciding that nondiscrimination—the bedrock principle of free trade and globalization—must take a back seat to more pressing concerns. The most dramatic abandonment is about to hit: Last week, the European Union unveiled its “Fit for 55” plan to reduce carbon emissions by 55 percent from 1990 levels by the end of this decade and to reach carbon neutrality by 2050—which will require the most sustained economic upheaval since the Industrial Revolution. Central to the EU’s plan is a carbon border tax, under which Europe plans to charge higher tariffs on imports of products made in ways that generate higher emissions than European producers will be permitted to generate for the same goods. The scheme will start by targeting carbon-intensive sectors such as concrete, steel, aluminum, and fertilizer. The U.S. Congress is developing a similar plan to tax carbon-intensive imports as part of the coming budget reconciliation package—although the details are still murky. Other new trade restrictions being imposed or considered on both sides of the Atlantic Ocean are based on compliance with labor protections, human rights, and other criteria. For many traded goods, nondiscrimination will become a quaint relic.

Most of these measures are eminently defensible, perhaps even critically necessary, but together, they are leading to an increasingly balkanized global economy—one divided by ideology, social values, and environmental commitments. It will be a less efficient world, one in which companies will need to tailor both investments and production decisions to the values of the countries they wish to sell to. And it will cause more economic conflict. The more these exceptions to the principle of nondiscrimination become entrenched, the easier it becomes to expand those exceptions in the future. As the world moves down this road to closely managed trade, it will need to step cautiously to avoid going too far—and slide back into damaging protectionism.

Nondiscrimination has been the foundation of global trade since the 1947 creation of the General Agreement on Tariffs and Trade (GATT), the forerunner of the World Trade Organization (WTO). Article 1.1 of the GATT agreement—the founding constitution for modern trade—directs that “any advantage, favour, privilege or immunity” given to the products of any GATT member “shall be accorded immediately and unconditionally” to the same products from any other member. In those years, of course, much of the world remained outside the system, in particular the Soviet bloc of communist countries; China withdrew in 1950. But for GATT members, which, by the mid-1990s, included most of the world, there were very few exceptions to nondiscrimination. Having learned from the wreckage of the 1930s, when high tariff walls killed off much of the world’s trade and deepened the global depression, the founders of the GATT wanted nondiscrimination to be a largely inviolate principle, a bulwark against the descent back into senseless trade wars.

Unfortunately, the exceptions were still large enough to erode that bedrock commitment. Decades of preferential trade agreements and regional trade zones, from the original European Community to the North American Free Trade Agreement (NAFTA) and beyond, offered favorable treatment for countries inside those arrangements at the expense of nonmembers. Some of these arrangements gave preferences to certain outside countries but not others—for decades, the European Community gave special privileges to France’s former colonies. Mexico’s proximity to the large U.S. consumer market and its special access under NAFTA turned it into a manufacturing powerhouse. The GATT system also permits countries to slap tariffs on goods deemed “unfairly traded” due to government subsidies or predatory pricing. Many global steelmakers especially have faced such duties for decades. Critics argue “unfair” and “predatory” can be squishy criteria, subjectively applied to ward off competition.

Recently, these exceptions have mushroomed. Former U.S. President Donald Trump cited national security—a narrow but permitted GATT exception—to raise taxes on imports of steel and aluminum from some countries. U.S. President Joe Biden is making similar arguments when he insists goods like semiconductors, advanced electric batteries, pharmaceuticals, and critical minerals be produced primarily in the United States. Washington has threatened to block goods deemed environmentally damaging and is currently pursuing a case against Vietnam over its exports of furniture and other wood products made from timber alleged to have been illegally harvested. The European Union, the United States, Britain, and Canada recently imposed trade sanctions targeted at imports from China’s Xinjiang region to protest Beijing’s treatment of the region’s Uyghur Muslims.

Each exception to the nondiscrimination principle has many defenders. No country, quite reasonably, would let its desire for open global trade threaten its national security. Defenders of U.S. trade restrictions on China argue China’s admission to the WTO and the explosion in trade and investment that followed allowed Beijing to grow richer and advance technologically to the point that it poses a significant security threat. A correction was long overdue. Countries, quite understandably, want their economic policies to reflect their values—who would now argue that trade policies should be blind to deforestation in the Amazon or the exploitation of workers? And climate change is now an existential threat to the planet.

The dilemma with each of these measures is the line between legitimate humanitarianism or environmentalism and selfish protectionism can be vanishingly thin. The goals of the EU carbon tax are twofold. First, to encourage other countries to make similarly ambitious climate commitments by threatening the loss of European market access while also equalizing competitive conditions for the EU producers who will pay higher costs for switching to clean energy. The latter goal is dauntingly complex. The EU fears what it calls “carbon leakage,” in which companies would increasingly abandon the EU and shift production abroad to take advantage of looser rules in other countries. The new border tax is intended to “equalise the price of carbon between domestic products and imports.”

The EU has worked hard to try to ensure the new mechanism does not violate WTO rules, but implementation will be messy at best. The means for assessing the carbon content of imports remain unclear, and EU firms are certain to lobby for the highest possible tariffs to protect their competitive edge. In the United States, which has not set a domestic price for carbon, the danger of protectionist discrimination through import tariffs may be even higher. It’s easy to imagine the next step: Targeted countries and companies will complain they’re being treated unfairly, retaliatory tariffs will ensue, and a trade conflict will start that will be difficult to control given the intensity of the societal and political convictions involved.

The same dynamics are in play on other measures, such as labor rights. For decades, U.S. administrations have pushed for tougher labor standards in trade agreements, partly motivated by the desire to see working conditions improve abroad but mostly in response to domestic labor unions that fear being undercut by cheaper foreign workers. The debate over whether lower wages are an integral part of the competitive advantage of developing economies or a pernicious feature of a global race to the bottom remains unresolved. But the advanced economies have become more aggressive in blocking imports over labor rights. The new United States-Mexico-Canada Agreement, for example, allows for import tariffs to be targeted at a single company’s products if that company is deemed to be wrongly impeding union organizing.

There is much to support in all of this. For too long, trade has been blind to most values other than maximizing wealth and corporate profits. However important the pursuit of profit has been in lifting hundreds of millions of people out of misery and destitution in the developing world, there are other values that matter as much, not least the survival of the planet in the face of climate change.

But as they abandon the old trade order in pursuit of these laudable goals, the EU and the United States, in particular, would be wise to remind themselves repeatedly of another standard enshrined in the WTO: the “less trade-restrictive” principle. Trade negotiators have grappled for decades with the trade implications of national regulations designed to protect human health and safety, from car crash testing standards to drug and food quality regulations. Such regulations are the proper sovereign authority of nations—but they’re also easily abused to keep out foreign competition or applied for political reasons alone, such as Europe’s fears of certain U.S. food exports.

#### No link:

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

First and Bush ’19 [Harry First; Darren Bush; 2019; Charles L. Denison Professor of Law, New York University School of Law; Leonard B. Rosenberg Professor of Law, University of Houston Law Center; “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.

#### Blocking statutes are all posturing with no impact – foreign states don’t enforce them, and U.S. courts don’t care.

Hoda 18, \*M.J. Hoda, J.D. 2017, University of California, Berkeley, School of Law; (2018, “The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It”, http://www.californialawreview.org/wp-content/uploads/2018/02/6Hoda-34.pdf)

My most notable finding was that, in at least twenty-one instances, U.S. courts have held that foreign states’ failure to enforce their blocking statutes (a) showed that no serious foreign state interest would be undermined by ordering violations of those statutes, or (b) undermined litigants’ claims that compelling violation would constitute a hardship.103 In other words, when foreign entities have raised the blocking-statute excuse, U.S. courts have often looked to the enforcement histories of the statutes, and, where the relevant statute had not been actively enforced, the courts held that the lack of enforcement weighed in favor of ordering their violation. These holdings have created what I call the ‘Aérospatiale Dilemma.’ If foreign states are to protect their citizens and companies from U.S. discovery using blocking statutes, they must first use those statutes to prosecute and punish those very same entities.

Until now, no academic work has quantified the rise of the Aérospatiale Dilemma. As part of my effort to provide strategic advice to foreign states, I set out to measure the effect of the Aérospatiale Dilemma using the fifty-six opinions collected in Geoffrey Sant’s “Court-Ordered Law Breaking.” I began by narrowing the fifty-six cases compiled in Sant’s article to match my inquiry. Because I wanted to investigate only those cases where U.S. federal judges considered whether to order violations of foreign blocking statutes, I excluded all state-court cases, and all cases where courts considered whether to violate foreign injunctions or court orders rather than foreign statutes. I then excluded cases where courts considered litigants’ arguments that a discovery order would violate foreign law, but did not proceed with a full Aérospatiale analysis because they found that there was no actual conflict of laws.

Many of the remaining cases involved multiple foreign defendants or statutes, and courts often considered whether to order violations of multiple foreign laws in a single opinion. I thus further divided opinions in Sant’s dataset to reflect the number of individual blocking-statutes violations that U.S. courts considered. I found that the federal courts have considered whether to order at least forty-two individual violations of foreign blocking statutes since Aérospatiale.i An analysis of those forty-two contemplated orders follows.

Courts compelled foreign parties to produce discovery in violation of foreign law in thirty-seven of those forty-two contemplated orders, and refused to order violations of foreign law in only five. ii Thus, when faced with conflict between motions to compel and foreign blocking statutes, U.S. federal courts ordered violations of foreign law 88 percent of the time.

Of the forty-two instances where federal courts considered the blocking- statute excuse, twenty-six explicitly considered the enforcement histories of the foreign laws at issue.104 In twenty-three of those twenty-six instances, courts found either (a) that there was evidence that the blocking statute had not been enforced in similar situations, or (b) that the objecting entity had offered no evidence as to the statute’s enforcement history. iii In all twenty-three of those instances, the courts went on to order production in violation of foreign law.105 In contrast, of those twenty-six instances where courts considered the enforcement histories of foreign laws, those courts found evidence that the relevant statute had been actively enforced in only three.iv In all three of those instances, the courts ultimately refused to order production.106

These data provide three important insights. First, when courts have faced conflicts between motions to compel and blocking statutes, they have explicitly considered blocking statutes’ enforcement histories in 63 percent of all instances. Second, in those instances where courts have considered blocking statutes’ enforcement histories, the presence or absence of active enforcement has always been a bellwether for the ultimate disposition. When courts have explicitly found that a relevant blocking statute has not been enforced in similar cases, they have always ordered production. But in the very few cases where courts found that a relevant blocking statute had been enforced in cases like the one at bar, they have always refused to order production. The lesson is that, while courts have not considered enforcement history in every case, it has been an unfailing indicator of the ultimate outcome in cases where they have.

Before moving to consider the strategic import of these findings, it is useful to breathe some life into the numbers with an illustrative case. The case discussed in this Note’s Introduction—Motorola Corp. v. Uzan —brings the enforcement-history inquiry into focus.107 As discussed above, blocking-statute conflicts arose in Uzan after Motorola filed ex parte discovery requests against banks in France, Jordan, the United Arab Emirates, and Switzerland.108 Each bank raised its home-country blocking statute as an excuse to not produce the requested discovery.109 In considering whether to order violations of the four blocking statutes, the court wrote:

[S]everal of the nations whose laws are here involved have enacted legislation prohibiting the release of . . . the information here sought, sometimes on pain of criminal prosecution, thereby suggesting a strong competing interest. But is this for real? If a given country truly values its national policy of, say, criminalizing compliance with a U.S. court subpoena, it will prosecute its citizens for so complying. . . . [T]he extent to which the relevant country has actually enforced the prohibition is a strong indicator of the strength of the state interest.110

#### Empirically – countries tear down blocking statutes in response to U.S. pressure.

Zhang 21, \*Angela Huyue Zhang is an associate professor at the Faculty of Law at the University of Hong Kong; (February 1st, 2021, “The dangerous legal war posing a new threat to China-US relations”, https://asia.nikkei.com/Opinion/The-dangerous-legal-war-posing-a-new-threat-to-China-US-relations)

The United States and China are now locked in a dangerous legal war.

On Jan. 9, China's Ministry of Commerce issued [new rules](https://asia.nikkei.com/Economy/Trade-war/China-takes-aim-at-foreign-companies-swayed-by-US-sanctions) to block its companies and citizens from having to comply with "unjustified" foreign laws and measures in an attempt to counter increasingly aggressive U.S. sanctions against Chinese businesses and individuals.

The purpose of this blocking statute, similar to other countermeasures such as the "unreliable entity list" that China implemented last year, is more bark than bite.

It is hardly a surprise that China has adopted such a law. A long list of countries have implemented measures designed to block the applications of U.S. sanctions within their jurisdictions, including some of America's closest allies such as Canada and the United Kingdom. What is more surprising, however, is that it has taken China so long to react.

There has been a similar delay regarding the unreliable entity list. The Ministry of Commerce first announced its intention to publicize a list of unreliable foreign entities and individuals that have imposed bans on supplying Chinese companies in May 2019, but so far no foreign entity has been explicitly named. What is holding China back?

For one thing, these types of countermeasures have severe limitations. Take the example of the blocking statute. China can only invalidate the effects of U.S. law within its domestic jurisdiction. And although businesses are promised protection in China, they are still subject to penalties for noncompliance with U.S. sanctions in other overseas jurisdictions.

More importantly, the penalty for violating U.S. sanctions not only includes hefty fines and restricted access to the U.S. market, but also potential criminal liability for business executives. Thus, for many global companies, succumbing to U.S. pressure -- no matter how difficult -- is probably the only rational choice of action.

This was what happened to European businesses when the European Union amended its blocking statute in response to the U.S. reimposing sanctions on Iran in 2019. Having no choice but to quietly concede, many European companies complied with the U.S. sanctions law by winding down operations in Iran without explicit reference to the U.S. sanctions. This will likely be the approach that foreign multinationals with a significant presence in China will adopt in trying to fulfill demands under both U.S. and Chinese.

#### 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.

#### No impact to trade.

Sadeh ’20 [Tal and Nizan Feldman; 2020; senior lecturer at the School of Political Science, Government and International Affairs of Tel Aviv University; Assisant Professor School of Political Science, University of Haifa; Cooperation and Conflict, “Globalization and wartime trade,” vol. 55 no. 2; KP]

In the past few decades, the Liberal school in studies of conflicts and peace has gained influence, arguing classically that trade and globalization promote peace because trading states pay high opportunity costs by engaging in trade-obstructing hostilities against each other. Efforts to examine this proposition have produced a large number of quantitative studies, which mostly found that international trade and investments pacify relations between the partners.1 Other studies maintain that trade and other forms of economic interaction enable states to send costly signals – actions through which they demonstrate their resolve to assume the costs and use force without the need to actually use it (Gartzke et al., 2001; Gartzke and Li, 2003b; Kinne, 2014).2 In addition, social networks form, in which trade rerouted through third-party states (those that are not directly engaged in the conflict) makes conflicts less likely (Dorussen and Ward, 2010; Gartzke and Westerwinter, 2016; Kinne, 2012; Lupu and Tragg, 2013; Maoz, 2009; Poast, 2010).3

Whether by opportunity cost, signaling or networks, all of these studies associate more trade or trade links (as an independent variable) with a smaller likelihood, or fre- quency of armed conflict (as a dependent variable).4 This proposition has motivated research into the effects that war (as an independent variable) may in turn have on trade (as a dependent variable). A negative relationship would validate the opportunity cost argument (stopping the conflict may revive trade), as well as the network mechanism (stopping the conflict is in the interest of many third-party states). Indeed, a number of studies document a decline in trade between opposite sides in Militarized Interstate Disputes (MIDs).5 In contrast, evidence on the effects of conflicts on trade with third- party states, which in aggregate may be greater by value than trade between opponents, is mixed. Some studies document an overall decline in wartime trade with third-party states,6 while other studies emphasize the resilience of trade with third parties to conflict, because of substitution for lost trade with enemy states and third parties (Martin et al., 2008),7 and strategic interests (Feldman and Sadeh, 2018; Gowa and Hicks, 2017). However, no study has so far examined how the externalities that globalization generates may affect the trade of even relatively less globalized participants in armed conflict.8

This study contributes to the literature by arguing in the next section that while some effects of economic globalization increase the opportunity cost of MIDs to trade (between combatant states as well as with third-party states), other effects create an environment that reduces the costs of conflict, in addition to but also independently of the belligerent states’ particular policies. In brief, economic globalization makes it easier for states to substitute trade partners and obtain credit during conflict, and harder to employ trade sanctions. The declining frequency of interstate wars in recent decades may be due to a rise in other costs, such as the costs and destructive power of military technology, and the opportunity cost of trade in services (which may not be sensitive to the effects of globali- zation discussed in this article). Clearly, non-economic aspects of globalization connect people by making them and their ideas more mobile, promoting social communication and mutual understanding, and making values more compatible across borders (Dorussen and Ward, 2010; Russett and Oneal, 2001). Alternatively, change in the international power structure may account for recent infrequency of wars. However, if our results are correct, economic globalization’s contribution to peace is diminishing.

### Jurisprudence – 2AC

#### Antitrust is incoherently steered now.

Crane 21 [Daniel A Crane. Frederick Paul Furth, Sr. Professor of Law, University of Michigan. I am very grateful for many helpful comments from Tom Arthur, Jonathan Baker, Steve Calkins, Dale Collins, Eleanor Fox, Rebecca Haw, Hiba Hafiz, Jack Kirkwood, Bob Lande, Christopher Leslie, Alan Meese, Steve Ross, Danny Sokol, and other participants at the University of Florida Summer Antitrust Workshop. "ANTITRUST ANTITEXTUALISM." https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4952&context=ndlr]

That it has been this way since the beginning does not mean that it must continue to be this way forever. At this moment of growing political and social interest in antitrust and revival of antimonopoly sentiment, the balance could tip decisively in favor of Brandeisianism and against the “Curse of Bigness.” Judges could be trained (or retrained) to begin taking the antitrust statutes seriously as statutory texts and begin applying them faithfully using the (contested) methodologies they use as to other statutes. But if judges began taking the texts of antitrust statutes seriously, query whether Congress would continue to write such broad statutes, or whether hydraulic pressures would induce a more sparing approach to antitrust legislation.

Then again, for all we know, the impulse to antitrust antitextualism may have a long tail. Words enacted today, in the fervor of another political moment for antitrust, may take on new meaning to the judges that examine them in a few years’ time. Old habits die hard, and the habit of antitrust antitextualism grows from the very roots of antitrust history.

#### Deregulation unlikely and impossible.

Raso ’18 [Conor; October 25; JD at Yale Law School, Counsel for the SEC; Brookings Institution, “Trump’s deregulatory efforts keep losing in court—and the losses could make it harder for future administrations to deregulate,” https://www.brookings.edu/research/trumps-deregulatory-efforts-keep-losing-in-court-and-the-losses-could-make-it-harder-for-future-administrations-to-deregulate/]

Trump era deregulation has prompted a number of legal challenges, largely on the grounds that agencies have not followed the procedures required to change rules. Most but not all of these challenges have been to EPA deregulatory efforts. Analysts on both the left and right ends of the political spectrum have agreed that the administration has fared poorly in the courts. This conventional wisdom is correct. According to a running tally of court challenges to Trump-era deregulatory rules, the administration has prevailed in one case and either lost or abandoned its position in 18 cases.[1] This 5 percent “win rate” is far below the normal agency win rate, which averages 69 percent across eleven studies.[2]

#### No administrative state impact---it structurally fails

Demuth ’16 [Christopher; Spring; Distinguished Fellow at the Hudson Institute; Journal of Legal Analysis 8(1), “Can the Administrative State be Tamed?,”, pp. 121-190]

Specialization in government produces another kind of excess, excessive quantity. The inherent conflicts and cumbersomeness of legislative decision-making are a bulwark of limited government. Unconstrained lawmaking—the removal of limits on Congress’s legislative powers and on its ability to delegate those powers to specialized agencies—produces too much law. This is not to say that Congress is more inclined than agencies to adhere to the teachings of classical liberalism; rather, the sheer pertinacity of the modern administrative state inevitably penetrates and politicizes many areas of life better left to economic markets, social norms, private institutions, and personal judgments. Excessive law, litigation, and regulation is “the American illness.” 29 The objective performance of the federal government in domestic policy, especially regulatory policy, is consistently poor. 30 Government failure results in part from the problems of public monopoly and political decision making, and in part from the government’s simply doing many more things than can be done well. The tendency of specialized lawmaking to expand the range and detail of legal obligations weakens the rule of law in two ways: first, by subjecting citizens to excessive coercion, which weakens allegiance to law in circumstances where coercion is necessary, and, second, by producing ineffective and counterproductive law, which leads to justified popular disillusionment. Public trust in the federal government and its institutions (other than the military) has fallen dramatically during the past several decades of all-pervading government ( Pew Research Center 2014 ).

Executive government, especially in its current freewheeling unilateralism, also undermines the stability and predictability that are essential virtues of the rule of law. Legislation, because it is costly to produce, tends to be durable and slow to change. That permits business firms and individuals to organize their affairs, from legal compliance to business and personal plans, with relative confidence, and to economize on keeping up-to-date with the law’s commands. Over time even bad laws become less harmful, as citizens learn how to live with and work around them and the costs of doing so fade into “sunk costs.” Administrative law, even when it follows notice-and-comment rulemaking that may take years to complete, is more dynamic, expansionist, and unpredictable than statutory law. It requires greater expenditures on information gathering and lobbying and more frequent adjustments to private activities in response to new rules. Policy uncertainty and ever-looming change are enemies of private investment, causing firms to hoard cash and postpone hiring and capital projects. 31 And extra-statutory executive improvisation makes the problems worse by adding the element of surprise—of shifting legal obligations that cannot be anticipated even probabilistically from statutes, judicial precedents, speeches, agency notices, and other public information (“unknown unknowns”). Beyond discouraging saving and investment, legal instability encourages short-term thinking and action and compromises liberty by introducing additional contingencies into formal rights and practical expectations.

There is also a dynamic element to administrative law and uncertainty. The prolificacy of administrative law means that agencies have a large stock of old rules to draw upon as new contingencies arise over time. Health and environmental regulation is replete with discoveries of surprising new applications of old rules and statutes; the use of EPA stationary source permits to jerry-rig a program of greenhouse-gas controls, endorsed by the Supreme Court in its UARG decision, is one example. During the 2008 financial collapse, Treasury and FRB lawyers ransacked the Code of Federal Regulations and United States Code for plausible authorities for novel actions political officials were determined to pursue ( Wallach 2013 ; 2015 , ch. 3). In general, extemporaneous lawmaking creates incentives for business firms to become compliant insiders in programs that fuse regulation with collaboration, such as the ObamaCare insurance exchanges and the Dodd-Frank club of systemically important financial firms.

Finally, the modern administrative state is a regime of concentrated power. The combination of lawmaking, interpretation, surveillance, and enforcement, buttressed by opportunities for public-private partnering, creates abundant opportunities for the abuse of power, from personal corruption to policy favoritism to suppression of political and program opponents. In the American scheme, the separation of powers and competition among the three branches is a key mechanism for policing abuse. The consolidation of executive power and weakening of judicial and legislative checks will, to a certainty—as prescribed by Acton’s Axiom—lead to greater political and financial corruption. There are many plausible examples in recent years—Internal Revenue Service harassment of conservative political groups, abuse of patients at Veterans hospitals, political favoritism in the “managed bankruptcies” of General Motors and Chrysler. Beyond the headlines, highly discretionary regulation of valuable, time-sensitive corporate transactions features routine political preferment and abuse of elementary rights. Examples include the FDA’s threatened and actual criminal prosecution of pharmaceutical firms for providing doctors with truthful information about effective off-label uses of their products, 32 and the FCC’s use of its merger authority to force parties to accept “voluntary” non-germane obligations that the commission could not obtain through regular process ( Barkow & Huber 2000 , pp. 51–54; Koutsky & Spiwak 2010 , pp. 341–347; Yoo 2014 ). A particularly unsettling recent instance is the CFPB’s forcing Ally Financial to accept a $98 million settlement of flimsy charges of racial discrimination in making auto loans—the federal government was at the time a majority owner Ally as a result of TARP investments in its corporate predecessor GMAC, and the settlement was a tacit condition of Ally’s receiving urgent, unrelated regulatory approvals from the FRB and FDIC. 33

#### And West Virginia will kill it anyway.

Stoner ’2-15 [Rebecca and Jason Mark; 2022; the Sierra Club's Associate Communications Specialist; the editor of Sierra, citing Michael Gerrard, founder of the Sabin Center for Climate Change Law at Columbia Law School; the Sierra Club, “The Supreme Court v. A Livable Planet,” <https://www.sierraclub.org/sierra/supreme-court-v-livable-planet>]

Which brings us to the present, and to one of the weirdest elements of this legal saga. The Supreme Court is poised to consider a challenge to a federal regulation that never went into effect, and which the current Biden administration has no intent to revive. For environmental law experts, the court’s openness to hear the West Virginia and coal company challenge is worrisome, as it suggests that a majority of justices are willing to entertain this sweeping challenge to federal authority.

“The court went out of its way to take this case at this time, as it did in 2016,” Michael Gerrard, founder of the Sabin Center for Climate Change Law at Columbia Law School, told Sierra. “It’s extremely unusual to take a case at this procedural stage.… It’s a bad omen, I’ll say that.”

In their written arguments, the Biden administration and environmental groups have focused on the oddity of the court hearing a case in which none of the petitioners can demonstrate suffering any harm—since there’s no regulation in place at this time. “Petitioners lack standing to invoke this Court’s jurisdiction because they are not injured,” the Biden administration argues in its brief, and then goes on to state, “Petitioners' real concern is not with any extant EPA regulation, but with measures that the agency might adopt.”

In their brief, environmental and other public interest groups (including the Sierra Club), agree with the Biden administration that the court’s review of this case violates Article III of the Constitution, which states that US courts can only weigh in on actual “cases” or “controversies.” “The only truly dramatic feature of this proceeding is a conspicuous absence of Article III jurisdiction,” the public interest groups argue. “Petitioners’ primary complaints, then, are about how EPA might exercise its authority in future rulemaking. But such anticipatory claims are unripe.”

The claims by West Virginia and the coal companies may be procedurally “unripe” and therefore constitutionally dubious. But, politically, the petitioners’ arguments reflect the over-ripe culmination of a decades-long ideological campaign to dismantle the legal foundations of modern government.

“What the fossil fuel industry, as well as the red states, would ideally like [the court majority] to do is really just dispense with the EPA’s authority to regulate greenhouse gases,” Sokol said. “And if the court takes the bait, then that calls into question, not just can EPA regulate outside the fence line but also will it retain its greenhouse gas authority, period.… Taken to its logical conclusion, their argument effectively hobbles any sort of meaningful agency authority to respond to the greatest public health and safety threat we’ve ever faced."

Such talk isn’t just lawyers jumping at shadows. In their official arguments, the coal companies, Republican-controlled states, and conservative think tanks make plain that their ultimate goal is to take down what they pejoratively refer to as “the administrative state.”

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West Virginia attorney general Patrick Morrisey and his co-petitioners want the Supreme Court to place extreme limits on the federal government’s power through a radical reconsideration of the “major questions” doctrine, which, they claim, prohibits federal agencies from issuing rules of a “vast economic and political significance” unless Congress provides laser-precise statutory language authorizing them to do so. In other words, the petitioners want to stop federal agencies from having the authority to do much at all. And they want to do so via “judicial diktat” (to borrow a phrase from the dissent from Justices Breyer, Kagan, and Sotomayor in the recent case about federal COVID-related mandates). “Their petition is a bait-and-switch,” Sokol argues.

If the Supreme Court accepts the petitioners’ arguments about limits on the powers of federal agencies, every agency’s ability to do its job could be diminished. The Food and Drug Administration would have less capacity to protect us from contaminated food and drugs, the Consumer Protection Financial Bureau to crack down on fraud, and the Securities and Exchanges Commission to shield us from the consequences of Wall Street’s risky bets.

This latest conservative legal gambit is the result of nearly five decades of organizing by the extreme Right and their allies in the fossil fuel industry. The beginning of the ultra-Right’s focus on the courts was the 1971 Powell Memo, written by soon-to-be Supreme Court Associate Justice Lewis Powell. He argued that to protect American capitalism from “broad attack,” corporations had to work to gain influence over the courts. In the ensuing decades, wealthy right-wing ideologues like the Koch brothers ramped up their investments in attorneys general elections through a shadowy network of PACs and astroturf groups. In 2020, for example, Koch-funded organizations and PACs contributed a whopping $8,754,057 to Morrisey’s campaign for attorney general.

The Kochs and other wealthy free-market fundamentalists have also funded a network of academic institutes and think tanks that have brought their fringe libertarian beliefs into the mainstream—a strategy that has certainly borne fruit in West Virginia. In an amicus brief filed in this case, Democratic senators Richard Blumenthal, Bernie Sanders, Elizabeth Warren, and Sheldon Whitehouse make this point forcefully: “Almost everything about these cases … is an industrial byproduct manufactured in an effort to return to an era free from oversight by the government. The theories and arguments were incubated, grown, propagated, and distributed by a well-funded apparatus that has selfish and destructive goals.”