# Extraterritoriality – Michigan PS – 1AC

## 1AC – Cartels

Advantage one is Cartels:

#### COVID halts cartel detection – incentivizes 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.

#### Circuit split over the definition of ‘direct’ is unresolved – the 7th circuit interpretation solves cartels.

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

IV. SHORTCOMINGS OF THE CURRENT JURISPRUDENCE

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

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

A. Problems Arising from the Circuit Split

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

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

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

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

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

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

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

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

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

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

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

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

Ryu ’16 [Jae; Fall; B.A., Yale University, New Haven, Connecticut. J.D. Candidate (2017), Washington University School of Law, St. Louis, Missouri; Wake Forest Journal of Business and Intellectual Property Law, “Deterring Foreign Component Cartels in the Age of Globalized Supply Chains,” <http://ipjournal.law.wfu.edu/files/2017/01/Ryu-V-17-I1.pdf>; KS]

Yet, that was under the traditional paradigm, which neatly divided economies by national boundaries, and manufacturing processes were more or less confined within the national boundaries.121 However, today’s economic reality is different.122The FTAIA serves to delineate the contours of the Sherman Act’s extraterritorial reach.123 Production chains have become global and largely foreign—component manufacturing and assembly into finished products all occur outside the United States.124 Few of these of components are actually imported into the United States directly.125 Nevertheless, because globalized supply chains are so prevalent in today’s world economy that the U.S. economy will inevitably be affected if foreign cartels price fix components; it would subsequently raise the prices of affected finished products as well.126 This kind of internationally interdependent economy of today’s scale was not envisioned when the FTAIA was drafted; therefore, the application of the statute should be updated to better reflect today’s context in which globalized supply chain reigns.127

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

C. The Purpose

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

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

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

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

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

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

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

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

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

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

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

#### American economic strength stops extinction from emerging tech and U.S.-Russia-China war.

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

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

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

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

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

Biggest Problem Is Domestic

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

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

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

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

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

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

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

And a Multipolar Financial Architecture, Too

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

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

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

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

Are There Alternative Visions to Western Order?

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

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

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

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

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

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

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

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

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

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

Need for a Second-Generation US and Western Leadership Model

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

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

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

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

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

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

#### Price-fixing shocks global battery markets

Umbach 18 [GIS Expert Dr. Frank Umbach is the research director of the European Centre for Energy and Resource Security (EUCERS) at King’s College, London; "Energy Security in a Digitalised World and its Geostrategic Implications." https://www.kas.de/documents/265079/265128/Energy+Security+in+a+Digitalised+World+and+its+Geostrategic+Implications+Final.pdf/07691140-d019-4f4c-5363-795d9aeea361?version=1.0&t=1541645390708]

The worldwide electrification of the transport and other industry sectors, the development of a new generation of batteries for electricity storage as well as the digitalization of the industries, including the spread of robotics and artificial intelligence systems in the industry (‘industry 4.0’) will further boost the worldwide demand for CRMs such as lithium, cobalt and others. As a result, it might create new and unprecedented challenges, including bottlenecks and supply shortages, for the global supply chains of the CRMs on each stage ranging from mining to processing, refining and manufacturing.

The production of CRMs is geopolitically - compared with the concentration of conventional oil and gas resources - more challenging and problematic as currently 50% of CRMs are located in fragile states or politically unstable regions. Moreover, security of supply risks are not just constrained to primary natural resources and CRMs but also to the import of semimanufactured and refined goods as well as finished products. Manipulated prices, restricted supplies and attempts at cartelization of CRM markets with wide-ranging negative economic consequences are not restricted just to producing and exporting countries. Powerful states and private companies have also been responsible for non-transparent pricing mechanisms for many precious CRMs. Global supply chains have become ever more complex due to the blurring of boundaries between physical and financial markets and weakly governed market platforms. These market imperfections lead to the manipulation of prices and threaten the stability of the future security of supply of CRMs.

Given China’s status as the world’s largest battery producer, and as the leading nation in the electrification of the national transport sector, it may increase the dependencies of the European and U.S. carmakers on China. The dependence on CRMs such as lithium, cobalt, graphite, rare earth and others will equally rise. Those geopolitical impacts have already been highlighted in 2010–2011, when China in the midst of escalating diplomatic conflict with Japan stopped all exports of Rare Earth Elements (REEs) to the world’s biggest importer and blackmailed Tokyo diplomatically by instrumentalising its status as the world’s largest producer and exporter of REEs. It has sent a troubling message to the world that the new rising Asian economic and military power might not respect international law, the existing global rules of the WTO and that Beijing may not politically be willing to accept the regional and global responsibilities that grow with its emerging superpower status. Over the last months, China has further strengthened its efforts to control the entire global supply chain of lithium, from owning international mines to the production of lithium up to manufacturing of batteries and EVs.

#### Next generation of batteries stabilize the grid.

Beall 18 [Abigail Beall is a journalist writing for Chinadialogue, citing Dr Emma Kendrick, a materials chemist at the University of Warwick. "The race to develop the next generation battery." https://www.chinadialogue.net/article/show/single/en/10808-The-race-to-develop-the-next-generation-battery]

Alongside electric cars, grid storage is another area where large-scale batteries will play an increasingly important role. The amount of renewable power from solar and wind at any given time depends on the weather, which makes it intermittent. Batteries can help stabilise grids by storing energy efficiently.

“Sodium-ion batteries could be an inexpensive alternative to lithium-ion in the grid storage market,” says Ms Cheng. Sodium-ion batteries work in a similar way to lithium-ion but use sodium instead, which is more readily available. Dr Emma Kendrick, a materials chemist at the University of Warwick, is looking into the sodium-ion battery. “This is a low-cost alternative to lithium-ion batteries,” she says. “It is still in its infancy but there are opportunities to perform research into the manufacturability and durability of the technology.” Flow batteries are another alternative.

“Flow batteries are also attractive options since they can be easily scaled up to provide high capacity," says Ms Cheng, adding: "They contain two chemical compounds that are separated by a membrane. The compounds can flow through the membrane, creating chemical energy, but they can also move back to where they started, which recharges the battery."

There are many other options. In February this year, scientists at the University of California Irvine created gold nanowire batteries that can withstand more recharging than ever before, hundreds of times within their lifetime. The team hopes this will one day lead to batteries that can last indefinitely.

Graphene may also be a component of the battery of the future. A Spanish company called Grabat says their graphene batteries can provide power for an electric vehicle to travel 500 miles on a single charge. For comparison, Tesla’s Model 3 can travel 215 miles on one charge.

While nobody can predict exactly what the next generation of batteries is going to look like, there is a huge amount of work going into solving the problem.

#### Extinction – risk is understated.

Greene 19 [Sherrell R. Greene Mr. Greene received his B.S. and M.S. degrees in Nuclear Engineering from the University of Tennessee. He is a recognized subject matter expert in nuclear reactor safety, nuclear fuel cycle technologies, and advanced reactor concept development. Mr. Greene is widely acclaimed for his systems analysis, team building, innovation, knowledge organization, presentation, and technical communication skills. Mr. Greene worked at the Oak Ridge National Laboratory (ORNL) for over three decades. During his career at ORNL, he served as Director of Research Reactor Development Programs and Director of Nuclear Technology Programs. . "Enhancing Electric Grid, Critical Infrastructure, and Societal Resilience with Resilient Nuclear Power Plants (rNPPs)." https://ans.tandfonline.com/doi/pdf/10.1080/00295450.2018.1505357?needAccess=true]

Societies and nations are examples of large-scale, complex social-physical systems. Thus, societal resilience can be defined as the ability of a nation, population, or society to anticipate and prepare for major stressors or calamities and then to absorb, adapt to, recover from, and restore normal functions in the wake of such events when they occur. A nation’s dependence on its Critical Infrastructure systems, and the resilience of those systems, are therefore major components of national and societal resilience.

There are a variety of events that could deal ~~crippling~~ blows to a nation’s Grid, Critical Infrastructure, and social fabric. The types of catastrophes under consideration here are “very bad day” scenarios that might result from severe GMDs induced by solar CMEs, HEMP attacks, cyber attacks, etc.5

As briefly discussed in Sec. III.C, the probability of a GMD of the magnitude of the 1859 Carrington Event is now believed to be on the order of 1%/year. The Earth narrowly missed (by only several days) intercepting a CME stream in July 2012 that would have created a GMD equal to or larger than the Carrington Event.41 Lloyd’s, in its 2013 report, “Solar Storm Risk to the North American Electric Grid,” 42 stated the following: “A Carrington-level, extreme geomagnetic storm is almost inevitable in the future…The total U.S. population at risk of extended power outage from a Carrington-level storm is between 20-40 million, with durations of 16 days to 1-2 years…The total economic cost for such a scenario is estimated at $0.6-2.6 trillion USD.” Analyses conducted subsequent to the Lloyd’s assessment indicated the geographical area impacted by the CME would be larger than that estimated in Lloyd’s analysis (extending farther northward along the New England coast of the United States and in the state of Minnesota),43 and that the actual consequences of such an event could actually be greater than estimated by Lloyd’s.

Based on “Report of the Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP) Attack: Critical National Infrastructures” to Congress in 2008 (Ref. 39), a HEMP attack over the Central U.S. could impact virtually the entire North American continent. The consequences of such an event are difficult to quantify with confidence. Experts affiliated with the aforementioned Commission and others familiar with the details of the Commission’s work have stated in Congressional testimony that such an event could “kill up to 90 percent of the national population through starvation, disease, and societal collapse.” 44,45 Most of these consequences are either direct or indirect impacts of the predicted collapse of virtually the entire U.S. Critical Infrastructure system in the wake of the attack.

Last, recent analyses by both the U.S. Department of Energy46 and the U.S. National Academies of Sciences, Engineering, and Medicine47 have concluded that cyber threats to the U.S. Grid from both state-level and substatelevel entities are likely to grow in number and sophistication in the coming years, posing a growing threat to the U.S. Grid.

These three “very bad day” scenarios are not creations of overzealous science fiction writers. A variety of mitigating actions to reduce both the vulnerability and the consequences of these events has been identified, and some are being implemented. However, the fact remains that events such as those described here have the potential to change life as we know it in the United States and other developed nations in the 21st century, whether the events occur individually, or simultaneously, and with or without coordinated physical attacks on Critical Infrastructure assets.

## 1AC – Indigenous Regimes

Advantage two is Indigenous Regimes:

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

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

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

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

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

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

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

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

#### Otherwise, poverty and income inequality end sustainable development.

Cheng 12 [Thomas, assistant professor at the Faculty of Law of the University of Hong Kong. "Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law." <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1362&context=cjil>]

Serious poverty and income inequality are prevalent in many developing economies. These phenomena present two main challenges to developing countries as far as competition law enforcement is concerned. One is the need to encourage entrepreneurship to promote inclusive growth; the other is the need to protect impoverished consumers from exploitative practices. A number of commentators, including Fox, have argued that developing countries must pursue inclusive growth that will alleviate poverty and reduce income inequality.162 Inclusive growth requires opportunities for upward economic mobility, an important avenue for which is entrepreneurship.'63 For those who are at the bottom of the economic ladder in a developing country, often the only way to break out of poverty is to start their own businesses, which are going to be, at least initially, SMEs. Therefore, encouragement of entrepreneurship and assistance to SMEs must be a central pillar in every inclusive growth strategy. If competition law is to complement an inclusive growth strategy, it must afford SMEs stronger protection than is customary in established jurisdictions and be particularly vigilant against abuse of dominance. This is especially so because dominant firms in developing countries are often former state monopolies that still benefit from official patronage or informal connections to the state. Their privileged positions make it even harder for new private firm rivals to compete with them.

The poorest in many developing countries live below the poverty line and often scrape by with no more than a dollar or two a day.'64 They are often malnourished, sick, and illiterate, which severely curtails their productivity and ability to improve their economic well-being. Therefore, an inclusive growth strategy must include policies to combat malnourishment, poor health, and illiteracy. While the bulk of the responsibility will fall on government programs that directly confront these problems, competition law has a role to play. Competition law enforcement may focus on goods that have the most direct impact on the nutritional, health, and educational needs of the poorest in developing countries. Anticompetitive conduct in these sectors should be dealt with harshly.

Beyond that, developing country competition authorities may consider taking a tougher stance on exploitative practices by dominant firms. This is despite the fact that most established jurisdictions, especially the US, have largely left exploitative practices out of the purview of competition law."' The usual justification for this stance is two-fold. First, there is a serious implementation problem of distinguishing between very high prices and excessive prices.'6 6 Such distinctions are notoriously difficult to draw. The inability to do so undermines effective enforcement and legal certainty for firms seeking to comply with the law. Second, there is the theoretical objection that the opportunity to reap temporary monopoly profit spurs firms to compete and innovate.'6 1 In the industrialized nations, the general view is that consumers are able to bear momentary high prices, which will be eroded once a new competitor enters the market. Short-run monopolistic prices are the price that consumers pay for the benefit of keener long-run competition and innovation. While consumers in developed nations may be in a position to withstand such high prices, the poorest consumers in developing countries are not. Any extra cost for a basic necessity will have a direct and severe impact on their overall standard of living. For example, 10 percent more spent on foodstuffs may require consumers to remove their children from school."' The plight of these consumers therefore may justify a more assertive stance on exploitative practices in markets for basic necessities.

#### SDGs prevent 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).

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

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

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

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

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

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

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

The Relationship Between Competition and Growth

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

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

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

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

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

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

#### Scenario One is Brazil:

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

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

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

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

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

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

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

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

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

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

#### Brazilian growth ends Amazon deforestation.

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

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

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

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

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

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

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

Rise and fall of deforestation

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

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

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

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

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

Of currencies and commodities

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

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

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

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

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

Economic crises are environmental crises

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

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

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

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

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

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

To end deforestation, fix Brazil’s economy

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

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

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

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

#### Amazon deforestation destroys biodiversity – extinction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Catastrophic climate change

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

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

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

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

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

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

#### Scenario Two is South Africa:

#### South Africa has few civil lawsuits – comity 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 sky-rockets prices and 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.

#### Food insecurity causes existential governance failures.

Rockström, et al, 20—Potsdam Institute for Climate Impact Research (Johan, with Ottmar Edenhofer, Juliana Gaertner, and Fabrice DeClerck, “Planet-proofing the global food system,” Nature Food, Vol. 1, January 2020, 3-5, dml)

Food security, social instability and conflicts. The human pressures put on the entire Earth system are causing a rise in frequency and amplitude of extreme weather events16 and a reduction in ecological resilience. Occurring simultaneously with decades of agricultural research and development that focussed on enhancing productivity over building resilience, this has resulted in heightened vulnerability as monocultures designed to operate efficiently under stable conditions are not adapted to handle shocks and stress amplified by global change. Food production is the first victim of environmental pressures arising in the Anthropocene. Our immediate scientific preoccupation with this worrying trajectory has been on mapping impacts on food production and seeking strategies to build food-system resilience. This may not be enough. Real world examples are providing evidence, while still debated, of the amplifying role of food-system collapse on social conflict and migration, ranging from the Arab Spring to the Syrian war, the Sudanese crisis and the Sahelian instabilities17–19. This is an area in need of integrated analyses that couple big data and qualitative insights on social movements (physical and political), livelihood conditions, food security, and biophysical trajectories and shocks.

A new paradigm for our food future. Planetary boundaries for the food system define thresholds for the critical overuse of global commons. In the Anthropocene, when we are at risk of destabilising the Earth system, the global commons need to be expanded from including only global externalities (high seas, atmosphere, polar ice sheets) to also include all major biomes and element cycles, which together contribute to regulate the state of the Earth system20. This puts the onus on food, and requires an urgent shift in mindset to recognize agricultural ecosystems as possibly the Earth’s largest biome — and the biome with the largest impact on the planet’s elemental cycles: nitrogen, phosphorus, water and carbon.

A second major shift is to look beyond carbon and climate. Building resilient food systems requires a systems-approach integrating carbon, nitrogen, phosphorus, water, soils, biodiversity and biome stability; and taking a truly inter-disciplinary planetary health approach by addressing food cultures, nutritional security and geopolitical stability, as well as the role of governance, trade and equity. In light of the significant lag time to drive global progress on climate mitigation, we cannot afford to have succeeded in tackling climate before moving on to other planetary boundaries. Approaches must be developed and tested at a scale that operationalises a global commons framework for the stewardship of all food-related planetary boundaries. The social costs of our current global food system are unprecedented in both inter-temporal and inter-regional scales15, providing crucial information for effective governance of the commons. Advanced methods of cost-benefit analysis and the application of the precautionary principle will allow the social costs of exceeding planetary boundaries for food to be used in the transition process of crafting and justifying government rules and interventions, such as agricultural subsidies and trade agreements, providing a new paradigm for navigating our ‘Common Food Future’.

Gone are the days when it was enough to ‘think global and act local’. All our actions aggregate and are interconnected with the global commons and the Earth system. The global food system transformation to a future where healthy, culturally appropriate and adequate diets are available for all, from food systems that operate within planetary boundaries, is one of the grand transformation challenges for humanity over the coming decades. We must act across scales and along the entire food value chain to enable a prosperous and equitable future for humanity on Earth.

## 1AC – Solvency

Finally, Solvency:

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

#### Plan develops foreign antitrust regimes.

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

In response to international criticism of the statute’s unbridled transnational application, the United States has curtailed the Sherman Act’s reach both judicially and legislatively.20 Judicially, courts looked to international comity, the practice of taking into account the interests of other nations.21 The Ninth Circuit was the first court to invoke international comity in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., which used an interest-balancing test to determine whether exercising jurisdiction was proper.22 Legislatively, Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), which attempts to delimit and define the cross-border reach of US antitrust laws by introducing an objective test under the effects doctrine.23 Powerful arguments can be advanced in the American interest for applying US antitrust laws beyond US borders, including adequately protecting American competition and consumers, deterring inimical foreign anticompetitive behavior affecting the United States, especially in an increasingly globalized economy, and providing remedial measures to US victims of such conduct.24 However, these interests in providing protection and redress are counterbalanced by equally important rationales for limiting the extraterritorial span of US antitrust law, such as costly overregulation, avoiding international disputes, allowing nascent worldwide antitrust regimes to develop to beget increased antitrust enforcement, and avoiding harmful interference with antitrust regulators’ amnesty programs.25

The aforementioned responses to these competing concerns have been ambiguous, inconsistent, and over-inclusive or under-inclusive.26 In particular, the poorly worded FTAIA has created more problems than it has solved, including inconsistent holdings, wrongly decided cases, and disagreements among the circuit courts over interpreting the statute’s language.27 The most recent interpretational difficulty involves determining what constitutes a “direct” domestic effect under the FTAIA. Some courts have held that “direct” takes on a broader meaning, where conduct causing domestic effect need only be an “immediate consequence.”28 In comparison, other courts have narrowly interpreted the statute’s “direct” domestic effect requirement as calling for “a reasonably proximate causal nexus,” drawing from tort law to exclude an injury that is too remote from the injury’s cause.29 The most recent appellate decision involving the FTAIA, Motorola Mobility LLC v. AU Optronics Corp., has contributed to the statute’s confusion.30 There, the Seventh Circuit held that a US parent company failed to show that it suffered direct injury as a result of foreign anticompetitive conduct, despite the fact that price-fixed component products were purchased by its majority-owned foreign subsidiaries to be incorporated into final products purchased by the US parent and sold to US customers.31

Nevertheless, various delineations already exist that suggest a solution to the inconsistency is attainable and may be designed to enhance global antitrust enforcement through greater availability of worldwide private redress. What is apparent from the succession of decisions from Hartford Fire Insurance Co. v. California32 to F. Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran)33 is that the FTAIA grey area has been sufficiently tapered to allow for the return of a comity balancing test to appropriately reconcile the conflicting interests at hand in the residual universe of cases.34 This Note argues that Hartford Fire, its progeny, and Empagran form confining parameters on the applicability of the FTAIA, namely that cases that do not involve a US party, domestic effect, and domestic injury arising from that effect will fail the FTAIA’s exemption test. Moreover, because the FTAIA’s “direct, substantial, and reasonably foreseeable” effect test can be construed as a proxy for the United States’ prescriptive jurisdiction interest, comity analysis is helpful in its interpretation.35 Thus, claims which are based on exclusively non-US conduct that questionably has a “direct effect” on US commerce resulting in the plaintiff’s injury are more properly decided not by the courts’ current focus on statutory interpretation, but rather by a Timberlane-style ad hoc fact-intensive balancing test that contemplates factors more suitable to the modern global economy and promoting international dialogue.36

In sum, this Note proposes the introduction of a new international comity balancing test into US antitrust jurisprudence with the aim of fostering and strengthening global antitrust enforcement and private redress. It does so in four parts. Following this introduction, Part II briefly summarizes the expansion of US antitrust extraterritorial application. Next, Part III discusses various developments undertaken to limit and demarcate the reach of US antitrust law. Part IV raises issues arising from those efforts that have resulted in inconsistent and questionable holdings. Finally in Part V, by analyzing and synthesizing the existing precedent, this Note contends that a judicial international comity balancing test would most appropriately determine the propriety of US antitrust extraterritoriality for particular types of private recompense cases that are problematic under the current framework.

#### Balancing test incorporates foreign interests into antitrust and stimulates global enforcement.

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

VI. CONCLUSION

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

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

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

#### A balancing test is goldilocks – harmonizes extraterritorial reach with international comity and generates global antitrust enforcement.

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

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

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

Footnote 201:

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

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

End of footnote 201.

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

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

Footnote 209:

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

End of footnote 209.

## 2AC

### T

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

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

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

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

A

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

Specifications for

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

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

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

And, it states on the first page,

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

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

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

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

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

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

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

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

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

B

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

#### ‘Prohibitions’ are laws forbidding actions.

Garner ’19 [Bryan A; Editor in Chief of Black’s Law Dictionary; Westlaw, Black's Law Dictionary, Eleventh Edition, “Prohibitions”]

prohibition (15c) 1. A law or order that forbids a certain action; PROSCRIPTION (1).

### Cap K – 2AC

#### Integrated and global supply chains solve every hotspot – material integration prevents war and encourages resolution – untangling risks the future of global stability.

Khanna '16 [Parag; 4/19/16; Senior Research Fellow in the Centre on Asia and Globalisation at the Lee Kuan Yew School of Public Policy at the National University of Singapore; "From War to Tug-of-War: The Global Fight for Connectivity," https://nationalinterest.org/feature/war-tug-war-the-global-fight-connectivity-15831]//GJ

Here is my prediction: Taiwan won’t cause World War III. Nor will Kashmir, nor the Senkaku Islands, nor the nonexistent Iranian nuclear bomb. We aren’t very good at predicting wars. The wars that have broken out in the recent past—the U.S. invasion of Afghanistan and Iraq after 9/11, Russia invading Ukraine, the proxy war under way in Syria—weren’t predicted by anyone.

Furthermore, applying ancient wisdom such as the “Thucydides trap” only gets us so far. In 2015, respected Harvard professor Graham Allison published a study covering five hundred years of geopolitical power transitions and found that war broke out between the “ruling” power and its “rising” challenger in twelve out of sixteen cases. Based on these historical odds, war between the United States and China is likely but not inevitable. The most important strategy to avoid sleepwalking into World War III, Allison’s brilliant paper urged, is a “long pause for reflection.” Let’s take that pause.

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This isn’t 1914. In our haste to make analogies to a century ago, we have neglected the differences. European nations traded heavily across each other prior to World War I, but they did so as vertically integrated mercantile empires drawing on raw materials from their own vast colonies. They traded in finished goods without outsourcing production to each other. We did not have today’s internationally distributed manufacturing networks in 1914. The nineteenth and twentieth centuries brought trade interdependence; in the twenty-first century, we have complex supply chain dispersal as well—including among rival superpowers.

Even more than trade, it is investment that determines the stability of relations. Under a Cold War geopolitical paradigm, rivals wouldn’t invest in each other either; the United States and the Soviet Union certainly didn’t. But today’s robust flows of global investment among friends and enemies—“frenemies”—highlight how we have shifted from a Westphalian world to a supply-chain world. This financial and investment integration comes in the form of the trillions of dollars of assets invested in each other’s currencies and equities, as well as the tangible, productive capital—factories, real estate, banks, agriculture—they have bought and built inside other’s territory to efficiently and profitably access their markets.

If the United States and China were to go to war, the most immediate casualty would be Walmart, America’s largest retailer, 70 percent of whose merchandise is imported from China. Walmart has also been buying e-commerce companies such as Yihaodian.com to boost sales in China. The world’s most valuable company, Apple (also American), would also see its stock plummet, with so much of the market sentiment around its potential linked to growth in China. Two other American technology giants, Google and Facebook, would have to give up their cherished dreams of equal access behind China’s “Great Firewall,” and Hollywood studios, already accused of self-censorship to gain investment such as Dalian Wanda’s recent purchase of Legendary Entertainment for $3.5 billion, would find themselves banned from the world’s fastest-growing film market.

Approximately 60 percent of the Fortune 500’s revenues come from overseas sales, and the recently ratified Trans-Pacific Partnership (TPP) agreement is an American-led effort to nudge Asia’s share of America’s exports up even higher—with the potential for China itself to eventually join the trade area. As of March 2016, China imports American shale oil supplies from Texas. Direct confrontation is thus not in anyone’s interest so long as China needs peace for growth, America needs China for its hardware and everyone relies on shipping through the South China Sea.

Supply chains thus diminish the incentives for conflict. Leaders think twice, and step back from the brink. The growing depth of global cross-border trade and investment make geopolitics much more complex than in previous eras. When Presidents Obama and Xi held a 2013 summit at Sunnylands in California and spoke of aspiring toward “a new kind of great power relationship,” that was a reflection of the current reality—not a future scenario.

The common-sense truth is that while leaders talk about “red lines” for public consumption, and navies come dangerously close to trading direct fire, global market integration churns forward, knowing that there are two kinds of mutually assured destruction at play: military and economic. Military maneuvers don’t tell us enough about what drives leverage among great powers nor what they are willing to fight over. The tangled complexities of today’s system force leaders to think beyond borders and make functional calculations about the cost-benefit utility of their strategies—knowing full well that supply-chain warfare involves not just an enemy “over there” but also one’s own deep interests “over there.”

Waiting for World War III thus recalls Samuel Beckett’s Waiting for Godot, in which Vladimir and Estragon resolve to hang themselves if Godot does not arrive—so they simply sit endlessly. Their would-be savior, of course, never comes, but the protagonists never actually commit suicide either.

It is well documented that the number and frequency of interstate wars has fallen to nearly zero. Equally important, but far less discussed, is our ability to ring-fence conflicts, containing them at the local or regional level rather than allowing them to spillover too widely or escalate too sharply. The one genuine international conflict of the past several years, between Russia and Ukraine, is an example of this. Russia has not invaded the Baltics, marched into Poland, shut off gas to Europe in the winter or otherwise cleaved the European Union. Russia lacks the capacity to do so, and knows the repercussions of overreach.

The Arab world also continues to seize daily headlines. Syria is undeniably a regional proxy war, meaning that chaos there will continue. But it is not likely that Sunni powers such as Turkey and Saudi Arabia will directly escalate against Russia and Iran, whose forces are backing Bashar al-Assad’s Alawite regime. Saudi Arabia and Iran are also jockeying in Iraq, marking yet another chapter in Iraq’s destruction that began with the 1980s Iran-Iraq War, the disastrous invasion of Kuwait in 1990, the U.S. invasion in 2003 and brutal insurgency ever since. But Iraq, too, will not become the flash point that triggers war among great powers. While all of these conflicts are tragic, none of them, civil or international, are of world-historical significance.

A far more important driver of the long-term geopolitical positioning among key powers is not their role in any of these minor wars, but how they play the great supply-chain tug-of-war that is a far more pervasive reality than international warfare. Tug-of-war is an apt metaphor for our times. The world’s oldest team sport, its rituals are recorded in ancient stone etchings from Egypt to Greece to China to Guinea. Often conducted in resplendent royal ceremonies, tug-of-war was used by the soldiers of great armies to build strength in preparation for combat. In the eighth century, the Tang dynasty emperor Xuanzong was known to pit over five hundred warriors on each side of a rope over 150 meters long.

The rope in today’s geopolitical tug-of-war is connectivity. States want to control the transportation, energy and communications infrastructures and markets that enable them to acquire resources, access markets and move up the value chain. We don’t fight over the borders that divide us, but rather pull and yank the supply chains that connect us. While very few societies are at war, all societies are caught in this global tug-of-war, competing over the flows of money, goods, resources, technology, knowledge and talent transpiring between them.

Wars of connectivity are won by economic master planning rather than military doctrine. Think about it: twenty-first-century China is not a superpower because of the size of its military arsenal, but because it has become the central hub for the world’s manufacturing and electronics supply chains, built a sizeable trade surplus and enormous currency reserves, and penetrated most of its neighbors through robust infrastructure networks and become their main foreign investor and export destination. Do you have any clue how many nuclear weapons China has? Exactly: It doesn’t matter. But you probably know a fair bit by now about how China builds special economic zones, buys and steals foreign technology, and capitalizes companies with billions of dollars to ramp up quickly and capture global markets that range from solar panels to mobile handsets.

Britain’s elite Royal Military Academy Sandhurst publishes a manual of strategies for success in tug-of-war, pointing out that a good team “synchronizes its movements to the point that their pull feels like it comes from a single, unified being.” Does America act like this? Do Washington politicians, the Fed, Wall Street bankers, Texas oil companies, Silicon Valley tech companies and the other players on America’s team act like a single, unified being? Or does China do it better? Tug-of-war is won slowly and carefully. Smart teams dig in their heels to hold ground and tire out opponents while collectively taking small steps to ultimately gain control.

Tug-of-war is still war without end, a marathon without a finish line. Winston Churchill once advised that it is always better to “jaw-jaw” than to “war-war,” meaning diplomacy is preferable to conflict. Today’s world is a hybrid of the two: It is an endless tug-tug.

The future of global stability hinges on whether great powers think and act in terms of sovereignty or supply chains—if they learn the benefits of fighting tug-of-war instead of the real thing. It is no doubt unwise to argue that World War III is a passé risk. However, as the French scholar Raymond Aron argued, nuclear deterrence and the benefits of hindsight are crucial in warding against the uncontrolled escalations of the twentieth century or even harrowing episodes such as the Cuban missile crisis. Furthermore, China’s neo-mercantilism today is quite different from the zero-sum European colonial mercantilism of centuries ago: It is the pursuit of catch-up modernization rather than global hegemony. China seeks foreign raw materials and technology, not foreign territory. The smoother the supply chains, the more satisfied China will be.

A hyperconnected, multipolar world is uncharted and dangerous territory, but the paradox of tug-of-war may be that the longer it goes on, the more everyone wins. If we play our cards right, North Korea will become a supply-chain condominium of China and South Korea and other investors variously exploiting its tremendous mineral and agricultural resources while modernizing its nascent manufacturing capacity. India and Pakistan will revive the historic Grand Trunk Road of trade linkages stretching from Afghanistan to Bangladesh, and complete the natural gas pipeline from Iran via Pakistan to India. China and Taiwan will deepen their supply chain linkages and accept the outstanding differences in political systems. And China and Japan will settle their historical grievances through generational change in leadership, and accept with maturity the obvious hierarchy of Asia’s future.

Today’s world is full of tension, strife and hostility: nuclear standoffs, terrorist insurgencies, collapsing states and tragic civil conflicts. It is healthy to remind ourselves that many of our ongoing flash points could potentially escalate through unpredictable chain reactions into global conflagration. But it is even more important to pay attention to what we are doing that prevents the unintended slide into disaster—and do more of it. The future of global stability hinges on whether we continue global supply-chain integration and content ourselves with waging tug-of-war rather than the real thing. The world’s oldest team sport has an admirable track record: almost nobody has ever died playing it.

#### Capitalism is sustainable.

Harford, 20—economics columnist for the Financial Times, citing Diane Coyle, Bennett Professor of Public Policy at the University of Cambridge, Vaclav Smil, Distinguished Professor Emeritus in the Faculty of Environment at the University of Manitoba, Chris Goodall, English businessman, author and expert on new energy technologies, alumnus of St Dunstan's College, University of Cambridge, and Harvard Business School, and Jesse Ausubel, Director and Senior Research Associate of the Program for the Human Environment of Rockefeller University (Tim, “Two cheers for the dematerialising economy,” <https://www.ft.com/content/04858216-322e-11ea-9703-eea0cae3f0de>, dml)

If past trends continue, the world’s gross domestic product will be about twice as big by 2040 as it is today. That’s the sort of growth rate that translates to 30-fold growth over a century, or by a factor of a thousand over two centuries.

Is that miraculous, or apocalyptic? In itself, neither. GDP is a synthetic statistic, invented to help us put a measuring rod up against the ordinary business of life. It measures neither the energy and resource consumption that might worry us, nor the things that really lead to human flourishing.

That disconnection from what matters might be a problem if politicians strove to maximise GDP, but they don’t — otherwise they would have hesitated before imposing austerity in the face of a financial crisis, launching trade wars or getting Brexit done. Economic policymaking has flaws, but an obsession with GDP is not one of them.

Nevertheless the exponential expansion of GDP is indirectly important, because GDP growth is correlated with things that do matter, good and bad. Economic growth has long been associated with unsustainable activities such as carbon dioxide emissions and the consumption of metals and minerals.

But GDP growth is also correlated with the good things in life: in the short run, an economy that is creating jobs; in the long run, more important things. GDP per capita is highly correlated with indicators such as the Social Progress Index. The SPI summarises a wide range of indicators from access to food, shelter, health and education to vital freedoms of choice and from discrimination. All the leading countries in the Social Progress database are rich. All the strugglers are desperately poor.

So the prospect of a doubling of world GDP matters, not for its own sake, but for what it implies — an expansion of human flourishing, and the risk of environmental disaster.

So here’s the good news: we might be able to enjoy all the good stuff while avoiding the unsustainable environmental impact. The link between economic activity and the use of material resources is not as obvious as one might think. There are several reasons for this.

The first is that for all our seemingly insatiable desires, sometimes enough is enough. If you live in a cold house for lack of money, a pay rise lets you take off the extra cardigan and turn up the radiators. But if you win the lottery, you are not going to celebrate by roasting yourself alive.

The third reason is a switch to digital products — a fact highlighted back in 1997 by Diane Coyle in her book The Weightless World. The trend has only continued since then. My music collection used to require a wall full of shelves. It is now on a network drive the size of a large hardback book. My phone contains the equivalent of a rucksack full of equipment.

Dematerialisation is not automatic, of course. As Vaclav Smil calculates in his new book, Growth, US houses are more than twice as large today as in 1950. The US’s bestselling vehicle in 2018, the Ford F-150, weighs almost four times as much as 1908’s bestseller, the Model T. Let’s not even talk about the number of cars; Mr Smil reckons the global mass of automobiles sold has increased 2,500-fold over the past century.

Still, there is reason for hope. Chris Goodall’s research paper “Peak Stuff” concluded that, in the UK, “both the weight of goods entering the economy and the amounts finally ending up as waste probably began to fall from sometime between 2001 and 2003”. That figure includes the impact of imported goods.

In the US, Jesse Ausubel’s article “The Return of Nature” found falling consumption of commodities such as iron ore, aluminium, copper, steel, and paper and many others. Agricultural land has become so productive that some of it is being allowed to return to nature.

In the EU, carbon dioxide emissions fell 22 per cent between 1990 and 2017, despite the economy growing by 58 per cent. Only some of this fall is explained by the offshoring of production. (For a good summary of all this research, try Andrew McAfee’s book More From Less.)

Can we, then, relax? No. To pick a single obvious problem, global carbon dioxide emissions may be rising more slowly than GDP — but they are rising nevertheless, and they need to fall rapidly.

Yet the fact that dematerialisation is occurring is heartening. We all know what the basic policies are that would tilt the playing field in favour of smaller, lighter, lower-emission products and activities. Adopting those policies means we might actually be able to save the planet, preserve human needs, rights and freedoms — and still have plenty of fun into the bargain.

#### Alt stops space colonization

Kovic '19 [Marko; March 2019; co--founder president of the Zurich Institute of Public Affairs Research; "The future of energy," https://osf.io/preprints/socarxiv/aswz9/download]

Ideally, the mitigation of climate risks will coincide with and contribute to the development of improved or even entirely novel sources of energy that will increase the long--term chances of humankind’s survival by means of space colonization. This is not an unrealistic expectation, given that the mitigation of climate risks consists, to a large degree, of replacing fossil fuels with other, less harmful sources of energy. However, some climate change mitigation strategies might actually harm the long--term prospects of humankind.

First, it is possible that dominant climate change mitigation strategies will actively exclude any form of nuclear energy from the repertoire of climate--friendly energy sources. Existing and experimental (molten salt) fission reactors could play a significant role in replacing carbon--heavy energy sources, but pro--environmental attitudes often overlap with anti--nuclear sentiments [65]. As a result, and in combination with other problems such as large--scale market failures of existing fission reactors (one of the reasons being that generating electricity from fossil fuels is cheaper) [66], nuclear fission does not currently have significant standing as a “cleantech” contribution to climate change mitigation. From a long--term perspective, an unfavorable view of nuclear energy in the context of climate change might mean that technological progress in the areas of nuclear fission and fusion might come to a halt (for example, due to explicit bans or implicit disincentives). If such a scenario came to be, our attempts at colonizing space would almost certainly fail: There are currently no alternatives to fission and fusion, and it is highly improbable that Solar power alone could suffice for sustaining extraterrestrial habitats.

Second, there is some probability that climate change mitigation strategies will change the social order towards a degrowth philosophy. Degrowth is a vague socio--economic concept and social movement that, in general, calls for a contraction of the global and national economies by means of lower production and consumption rates, and, to some degree, to more profound changes to the “capitalist” system of economic production [67]. Degrowth or degrowth--like approaches are being actively considered as climate risk mitigation strategies [68, 69], and degrowth would almost certainly be a highly effective measure for mitigating climate change. After all, if we were to drastically reduce or even completely eliminate the (industrial) sources of greenhouse gases, the amount of greenhouse gases that are being emitted would accordingly drastically sink. From the long--term perspective of humankind’s survival, degrowth is problematic in at least two ways. First, there is a risk that the general contraction of economic activity would also slow or eliminate progress in the domain of energy, which would, in turn, reduce the probability of successful space colonization due to an absence of suitable energy sources. Second, and more fundamental: If degrowth were to become a dominant societal paradigm, it is uncertain whether the long--term survival of humankind by means of space colonization would be regarded a desirable goal. In a literal sense, establishing extraterrestrial colonies would mean growth; the size of the total human population would grow, and the area of space--time that humans occupy would grow.

In a more philosophical sense, degrowth might even be antithetical to space colonization. Even though both degrowth and space colonization have a similar moral goal -- increasing wellbeing -- , the ends to that goal are very different. Within degrowth philosophy, the goal is, metaphorically speaking, not to “live beyond our means”: We should strive for “ecological balance”, and such a state should increase the average wellbeing. But the frame of reference is the status quo; Earth and humankind as we know it today. Space colonization, on the other hand, operates with a much larger frame of reference: All the future generations of humans (and other sentient beings) who could enjoy wellbeing if we succeed in colonizing space -- and who will categorically be denied that wellbeing if we fail to colonize space [70]. The goal of space colonization as a moral project is not to live beyond our means, but to actively redefine and expand what our means are through scientific and technological progress.

#### Extinction

Kovic '19 [Marko; March 2019; co--founder president of the Zurich Institute of Public Affairs Research; "The future of energy," https://osf.io/preprints/socarxiv/aswz9/download]

Existential risks are risks that might lead to the extinction of humankind [1]. Natural existential risks (such as asteroids that might crash into Earth) are basically constant. The risks of a giant asteroid crashing into Earth today is the same as it was 500 years ago. Anthropogenic, man--made existential risks, on the other hand, are growing in number and severity. They are a side--effect of technological progress: The more we develop technologically, the greater man--made existential risks become. Nuclear weapons, to name only one example, are a direct consequence of scientific and technological progress.

There are different approaches to existential risk mitigation. One approach is to develop targeted strategies for specific existential risks. If we want to reduce the existential risk posed by nuclear weapons, then we can and should develop specific strategies for that risk.

Another approach is to develop and pursue what can be called meta--strategies that target all existential risks at once. One of most effective meta--strategies for tackling existential risks in general is space colonization: If we manage to establish permanent and self--sustainable human habitats beyond Earth, then our proverbial existential eggs are not all in one basket anymore. For example, if disaster strikes on Earth, but there are billions of humans living on Venus and Mars, humankind would continue to exist even with Earth--humans gone.

Because of existential risks, a long--term future in which humankind still exists almost certainly has to be a future in which humankind has succeeded in colonizing space. Today, even though we regularly venture into space, we do not yet have space colonization capabilities. There are a number of technological challenges that we need to overcome in order to become capable of space colonization. One of those challenges is energy. There are several reasons why.

#### No mindset shift – they can’t achieve elite buy-in or societal consent for the transition.

**Buch-Hansen, 18**—Department of Business and Politics, Copenhagen Business School (Hubert, “The Prerequisites for a Degrowth Paradigm Shift: Insights from Critical Political Economy,” Ecological Economics Volume 146, April 2018, Pages 157-163, dml)

Political projects do not become hegemonic just because they embody good ideas. For a project to become hegemonic, (organic) intellectuals first need to develop the project and a constellation of social forces with sufficient power and resources to implement it then needs to find it appealing and struggle for it. In this context, it is worth noting that degrowth, as a social movement, has been gaining momentum for some time, not least in Southern Europe. Countless grassroots' initiatives (e.g., D'Alisa et al., 2013) are the most visible manifestations that degrowth is on the rise. Intellectuals – including founders of ecological economics such as Nicholas Georgescu-Roegen and Herman Daly, and more recently degrowth scholars such as Serge Latouche and Giorgos Kallis – have played a major role in developing and disseminating the ideas underpinning the project. A growing interest in degrowth in academia, as well as well-attended biennial international degrowth conferences, also indicate that an increasing number of people embrace such ideas.

Still, the degrowth project is nowhere near enjoying the degree and type of support it needs if its policies are to be implemented through democratic processes. The number of political parties, labour unions, business associations and international organisations that have so far embraced degrowth is modest to say the least. Economic and political elites, including social democratic parties and most of the trade union movement, are united in the belief that economic growth is necessary and desirable. This consensus finds support in the prevailing type of economic theory and underpins the main contenders in the neoliberal project, such as centre-left and nationalist projects. In spite of the world's multidimensional crisis, a pro-growth discourse in other words continues to be hegemonic: it is widely considered a matter of common sense that continued economic growth is required.

It is also noteworthy that economic and political elites, to a large extent, continue to support the neoliberal project, even in the face of its evident shortcomings. Indeed, the 2008 financial crisis did not result in the weakening of transnational financial capital that could have paved the way for a paradigm shift. Instead of coming to an end, neoliberal capitalism has arguably entered a more authoritarian phase (Bruff, 2014). The main reason the power of the pre-crisis coalition remains intact is that governments stepped in and saved the dominant fraction by means of massive bailouts. It is a foregone conclusion that this fraction and the wider coalition behind the neoliberal paradigm (transnational industrial capital, the middle classes and segments of organized labour) will consider the degrowth paradigm unattractive and that such social forces will vehemently oppose the implementation of degrowth policies (see also Rees, 2014: 97).

While degrowth advocates envision a future in which market forces play a less prominent role than they do today, degrowth is not an anti-market project. As such, it can attract support from certain types of market actors. In particular, it is worth noting that social enterprises, such as cooperatives (Restakis, 2010), play a major role in the degrowth vision. Such enterprises are defined by being ‘organisations involved at least to some extent in the market, with a clear social, cultural and/or environmental purpose, rooted in and serving primarily the local community and ideally having a local and/or democratic ownership structure’ (Johanisova et al., 2013: 11). Social enterprises currently exist at the margins of a system, in which the dominant type of business entity is profit-oriented, shareholder-owned corporations. The further dissemination of social enterprises, which is crucial to the transitions to degrowth societies, is – in many cases – blocked or delayed as a result of the centrifugal forces of global competition (Wigger and Buch-Hansen, 2013). Overall, social enterprises thus (still) constitute a social force with modest power.

Ougaard (2016: 467) notes that one of the major dividing lines in the contemporary transnational capitalist class is between capitalists who have a material interest in the carbon-based economy and capitalists who have a material interest in decarbonisation. The latter group, for instance, includes manufacturers of equipment for the production of renewable energy (ibid.: 467). As mentioned above, degrowth advocates have singled out renewable energy as one of the sectors that needs to grow in the future. As such, it seems likely that the owners of national and transnational companies operating in this sector would be more positively inclined towards the degrowth project than would capitalists with a stake in the carbon-based economy. Still, the prospect of the “green sector” emerging as a driving force behind degrowth currently appears meagre. Being under the control of transnational capital (Harris, 2010), such companies generally embrace the “green growth” discourse, which ‘is deeply embedded in neoliberal capitalism’ and indeed serves to adjust this form of capitalism ‘to crises arising from contradictions within itself’ (Wanner, 2015: 23).

In addition to support from the social forces engendered by the production process, a political project ‘also needs the political ability to mobilize majorities in parliamentary democracies, and a sufficient measure of at least passive consent’ (van Apeldoorn and Overbeek, 2012: 5–6) if it is to become hegemonic. As mentioned, degrowth enjoys little support in parliaments, and certainly the pro-growth discourse is hegemonic among parties in government.5 With capital accumulation being the most important driving force in capitalist societies, political decision-makers are generally eager to create conditions conducive to production and the accumulation of capital (Lindblom, 1977: 172). Capitalist states and international organisations are thus “programmed” to facilitate capital accumulation, and do as such constitute a strategically selective terrain that works to the disadvantage of the degrowth project.

The main advocates of the degrowth project are grassroots, small fractions of left-wing parties and labour unions as well as academics and other citizens who are concerned about social injustice and the environmentally unsustainable nature of societies in the rich parts of the world. The project is thus ideationally driven in the sense that support for it is not so much rooted in the material circumstances or short-term self-interests of specific groups or classes as it is rooted in the conviction that degrowth is necessary if current and future generations across the globe are to be able to lead a good life. While there is no shortage of enthusiasts and creative ideas in the degrowth movement, it has only modest resources compared to other political projects. To put it bluntly, the advocates of degrowth do not possess instruments that enable them to force political decision-makers to listen to – let alone comply with – their views. As such, they are in a weaker position than the labour union movement was in its heyday, and they are in a far weaker position than the owners and managers of large corporations are today (on the structural power of transnational corporations, see Gill and Law, 1989).

6. Consent

It is also safe to say that degrowth enjoys no “passive consent” from the majority of the population. For the time being, degrowth remains unknown to most people. Yet, if it were to become generally known, most people would probably not find the vision of a smaller economic system appealing. This is not just a matter of degrowth being ‘a missile word that backfires’ because it triggers negative feelings in people when they first hear it (Drews and Antal, 2016). It is also a matter of the actual content of the degrowth project.

Two issues in particular should be mentioned in this context. First, for many, the anti-capitalist sentiments embodied in the degrowth project will inevitably be a difficult pill to swallow. Today, the vast majority of people find it almost impossible to conceive of a world without capitalism. There is a ‘widespread sense that not only is capitalism the only viable political and economic system, but also that it is now impossible to even imagine a coherent alternative to it’ (Fisher, 2009: 2). As Jameson (2003) famously observed, it is, in a sense, easier to imagine the end of the world than it is to imagine the end of capitalism. However, not only is degrowth – like other anti-capitalist projects – up against the challenge that most people consider capitalism the only system that can function; it is also up against the additional challenge that it speaks against economic growth in a world where the desirability of growth is considered common sense.

Second, degrowth is incompatible with the lifestyles to which many of us who live in rich countries have become accustomed. Economic growth in the Western world is, to no small extent, premised on the existence of consumer societies and an associated consumer culture most of us find it difficult to completely escape. In this culture, social status, happiness, well-being and identity are linked to consumption (Jackson, 2009). Indeed, it is widely considered a natural right to lead an environmentally unsustainable lifestyle – a lifestyle that includes car ownership, air travel, spacious accommodations, fashionable clothing, an omnivorous diet and all sorts of electronic gadgets. This Western norm of consumption has increasingly been exported to other parts of the world, the result being that never before have so many people taken part in consumption patterns that used to be reserved for elites (Koch, 2012). If degrowth were to be institutionalised, many citizens in the rich countries would have to adapt to a materially lower standard of living. That is, while the basic needs of the global population can be met in a non-growing economy, not all wants and preferences can be fulfilled (Koch et al., 2017). Undoubtedly, many people in the rich countries would experience various limitations on their consumption opportunities as a violent encroachment on their personal freedom. Indeed, whereas many recognize that contemporary consumer societies are environmentally unsustainable, fewer are prepared to actually change their own lifestyles to reverse/address this.

At present, then, the degrowth project is in its “deconstructive phase”, i.e., the phase in which its advocates are able to present a powerful critique of the prevailing neoliberal project and point to alternative solutions to crisis. At this stage, not enough support has been mobilised behind the degrowth project for it to be elevated to the phases of “construction” and “consolidation”. It is conceivable that at some point, enough people will become sufficiently discontent with the existing economic system and push for something radically different. Reasons for doing so could be the failure of the system to satisfy human needs and/or its inability to resolve the multidimensional crisis confronting humanity. Yet, various material and ideational path-dependencies currently stand in the way of such a development, particularly in countries with large middle-classes. Even if it were to happen that the majority wanted a break with the current system, it is far from given that a system based on the ideas of degrowth is what they would demand.

### ITC CP – 2AC

#### Regulations cannot create private rights of action – Ryu says private rights of action create sufficient cartel deterrence.

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

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

#### Links more.

Shelanski ’11 [Howard; Deputy Director, Bureau of Economics, Federal Trade Commission; Professor of Law, Georgetown University; *Michigan Law Review,* “The Case for Rebalancing Antitrust and Regulation,” <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1160&context=mlr>; KS]

Contrary to the Court's presumption,17 in many cases regulation will be more costly than either antitrust enforcement or a combination of antitrust and regulation would be. In the words of Justice (then Judge) Breyer, "[A]ntitrust is not another form of regulation. Antitrust is an alternative to regulation and, where feasible, a better alternative."' Of course, if Congress requires an agency to regulate, policymakers cannot choose antitrust as an alternative. But antitrust might still be a beneficial supplement even if it is not a full substitute; and in the far more usual case where agencies have some discretion in the promulgation and enforcement of regulations, the comparative benefits of antitrust as a substitute become important. Even if regulators have authority to regulate, they may decide that forbearance from "gearing up the cumbersome, highly imperfect bureaucratic apparatus of classical regulation" in favor of antitrust enforcement will be the better policy choice.'"9 This will be a particularly important option as economic conditions in the regulated industry change. The case-by-case approach of antitrust enforcement, which targets specific instances of anticompetitive conduct as they arise, can usually deal with unique or unexpected factual situations better than can regulatory rulemaking, which depends more on specifying competitive obligations and prohibitions prospectively, in advance of actual conduct. After Trinko and Credit Suisse, however, statutory authority to regulate has become a greater potential barrier to antitrust law as a substitute for regulation.

#### Does not solve cartels – no monetary remedies, recovery, or private rights of action.

Martinez ’11 [Lindsey; June 10; Practice is concentrated in commercial litigation and international matters; *Snell & Wilmer,* “An Overview Of Remedies And Relief Under Section 337,” <https://www.swlaw.com/assets/pdf/news/2011/06/10/AnOverviewOfRemediesAndReliefUnderSection337_Martinez_WEB.pdf>; KS]

While fast-paced and often more cost effective in the long term than a U.S. district court proceeding, the ITC does not provide monetary remedies. There are only two remedies provided by the ITC in a Section 337 investigation: an ex- clusion order —general or limited — and a cease-and-desist order. These forms of relief may be either permanent or temporary in nature.

In general, costs and attorneys’ fees are not recoverable in a Section 337 action. Reasonable costs and attorneys’ fees may be imposed as monetary sanctions in appropriate cases. Other differences between ITC investigations and district court cases include the fact that the Office of Unfair Import Investigations assigns an independent, third-party attorney, representing the public interest, to most ITC matters.

In addition, ITC investigations are heard before an admin- istrative law judge, not a jury, and decisions by the judge are reviewable by a panel of commissioners. Further, although rarely invoked, the president has authority to overturn ITC remedies on policy grounds, and the Federal Circuit can hear appeals from the panel’s decision.

A complainant in an ITC action may institute a parallel district court case to obtain monetary damages in addition to the potential exclusion order, or file a district court action after the ITC matter has been heard. Parallel district court proceedings are generally stayed during the course of the ITC investigation.

#### Does not solve supply chains – import bans and business uncertainty**.**

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

Digital Revolution Brings Complexity

Since the onset of the digital revolution, products and patents have become much more complex, making it more difficult, and yet more necessary, to determine what products should be excluded and what products should not.

Unfortunately, ITC exclusion orders have become broader and broader resulting in very few products in any category found conclusively to infringe by the ITC during its investigations. This has put a huge burden on importers to prove to a completely different agency, U.S. Customs, that their non-infringing products, including redesigned products, should not be stopped at the border after ITC’s investigations have ended.

The ITC set a supposed policy of assessing redesigns that were presented during the initial 337 investigation, and clearing them for import where they did not infringe, to keep fair trade and innovation moving forward. This is a win-win policy. The IP holder gets infringement to cease, importers know what products can continue to be imported, and U.S. consumers get prompt access to newly redesigned products to ensure a fair and competitive marketplace.

However, the ITC’s lack of a consistent approach to reviewing redesigned products may generate presumptive import bans on non-infringing products to the detriment of importers and U.S. consumers. It also creates business uncertainty.

Whenever the ITC fails to assess a redesign, this just adds to the prevailing uncertainty regarding whether the ITC will assess redesigns the next time. Further, if the respondent cannot count on avoiding the effects of an exclusion with a redesign, this tilts the balance of power dramatically, perversely increasing complainants’ leverage to achieve an extortionate settlement

In the end, such results impair the ITC’s credibility and its execution of its mandate to protect free and fair trade.

#### CP gets watered down and takes too long.

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

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

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

#### Courts perma clogged.

Solomon '21 [Aron; 6/4/21; head of digital strategy for Esquire Digital and an adjunct professor of business management at the Desautels Faculty of Management at McGill University; "The Viral Court Backlog and How to Dig Out Post-Pandemic," https://www.law.com/thelegalintelligencer/2021/06/04/the-viral-court-backlog-and-how-to-dig-out-post-pandemic//]

Just over a year ago, if you would have asked an experienced judge or lawyer to imagine the litigation and jury trial backlog if a global pandemic were to sweep through the nation, they first would have probably told you that your morbid scenario wasn’t funny and that the courts would never be able to dig out.

This is precisely where we find ourselves today. Throughout state and federal courts, for both civil and criminal cases, we are in an infinitely worse position than we were when the pandemic began. The threshold issue today is how we dig ourselves out before the system implodes.

In New Jersey, the court system has a massive backlog that isn’t going to be cleared anytime soon. Michael J. Epstein, founder of New Jersey-based The Epstein Law Firm, has seen the dramatic effect the pandemic has had on the New Jersey court system.

“Earlier this year, the backlog in New Jersey courts was twice what it was before the pandemic. There is a better chance that the backlog will double once again before it improves, yet there is really no easy answer to get our courts out of the current situation. It’s not just civil cases— there is also a backlog in New Jersey for criminal cases as well.”

Part of the problem is that jurisdictions such as New Jersey that have already relaxed restrictions on court appearances are now dealing with an aggressive third wave of the virus, with a fourth wave has begun to take hold in some parts of the world. When its effects are felt in the court system, it could again grind things to a complete halt and make the backlog exponential.

There are ways technology can play an expanded role this time around, compared to the slow start we had in 2020. But, especially in criminal matters, technology is limited by what it can’t replicate—the guarantees afforded people to appear in person at a trial. Many jurisdictions (including parts of Texas and California) are neither technologically equipped to handle remote jury trials nor can make them happen without the consent of defendants.

While courts and judicial systems have improved over the past year at planning, training their staff, and even investing in the right technologies to keep things moving when and where possible, no courts are equipped with functional crystal balls. Yet the power of accurate foresight is what is needed most to get things back on track in our national system of functional and fair trials.

Perhaps there is no better national example of how the gears powering the court systems have ground to a halt than in the city of New York. The New York Times reported in December that there have been only nine criminal trials in nine months. If that seems like a very small number, it is—the norm would be around 800 trials.

The direct cost of this is obviously much more severe in criminal proceedings. As highlighted in the New York Times piece, there is a profound human cost to these delays:

“Is it fair for people to be languishing in pretrial detention and presumed innocent with no prospect of a trial in the future for them?” said New York’s chief administrative judge, Lawrence K. Marks. “A criminal justice system cannot be, in any sense of the word, fully functioning, if it is not conducting jury trials.”

The logistical nightmares aren’t going away soon and they are going to take the daily hard yards that attorney Epstein describes. “I know that New Jersey lawyers are able and willing to help in any way that we can and I would expect my colleagues in other states to feel exactly the same way. Our clients can’t afford further delays, as this deeply impacts justice.”

This is the case throughout the nation, as the same factors that have created the backlog persist. In both civil and criminal trials, the absence of critically important participants in the case because of lockdown and illness may get worse before it gets better.

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

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

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

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

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

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

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

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

#### Patent cases are heard by the ITC and the only the Federal Circuit – the CP links more.

Palmese ’18 [Maria Luisa; 7/1/18; Wuersch & Gering LLP; Westlaw; “Patent litigation in the United States: overview,” https://content.next.westlaw.com/6-623-0657?\_\_lrTS=20210930233632975&transitionType=Default&contextData=(sc.Default)&firstPage=true]

In addition, if infringing goods are being imported into the US and the patent owner can show existence of a domestic industry in the US relating to the articles protected by the patent, the patent owner can file a complaint with the US International Trade Commission (USITC). The USITC has 30 days to decide whether to institute an investigation. Although USITC proceedings are faster than court proceedings, the sole remedy is injunctive relief. If monetary damages are desired, the patentee must file a related litigation in the federal district courts.

Patent case appeals are heard by the Court of Appeals for the Federal Circuit (CAFC) (see Question 1, Order of precedence). The US Supreme Court hears appeals from the CAFC on a discretionary basis. The US has no district courts specialised in patent matters, although some district courts have more expertise with patent matters than others because patent matters arise more frequently in those jurisdictions. The level of expertise in patent matters varies widely from judge to judge.

#### The Fed Circuit fails at patents.

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

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

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

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

### States CP – 2AC

#### 1 – No authority to change the FTAIA.

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

State Indirect Purchaser Claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Politics DA – 2AC

#### Court shields.

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

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

Conclusion

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

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

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

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

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

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

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

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

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

#### Biden political capital has zero effect on passage of infrastructure legislation.

Mclaughlin ‘10/19 [Dan; 10/19/21; senior writer at the National Review, “Joe Biden Plays the ‘Inside Game’ Because He Doesn’t Have an Outside Game,” https://www.nationalreview.com/corner/joe-biden-plays-the-inside-game-because-he-doesnt-have-an-outside-game/]

This is, I suppose, the spin you need to cover over the problem: Public arguments by this president don’t help. They persuade nobody of anything. The bully pulpit has been reduced to a walker. Nine months into his tenure, Biden is already a spent force that nobody listens to. In terms of his influence, he went directly from honeymoon to lame duck. It is still likely that the Democrats will pass something this year — and whatever they pass, Biden will sign, and everybody knows it, so his actual leverage is zero. It would truly be a political catastrophe for Biden, having invested so much of his presidency in these spending packages and so much of his image in being a guy who can get deals done on the Hill, if he comes up completely empty. But regardless of what gets passed, it is already apparent that Biden talking to the voters or answering questions from reporters would only make things worse. About the only thing Biden accomplishes these days by appearing in public is convincing people he’s still alive.

## 1AR

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Or else it wouldn’t use the word expand!

Hatter ’90 [Terry J Jr; March 20; January District Court Judge at the Central District of California; Westlaw, “In re Eastport Assocs.,” 114 B.R. 686]

Second, Eastport asserts that the presumption against retroactivity does not apply because the amendment was intended only as a clarification of existing law. Where an amendment to a statute is remedial in nature and merely serves to clarify existing law, no question of retroactivity is involved and the law will be applied to pending cases. City of Redlands v. Sorensen, 176 Cal.App.3d 202, 211, 221 Cal.Rptr. 728, 732 (1985). The evidence in this case, however, does not support the conclusion that the amendment to section 66452.6(f) was simply a clarification of preexisting law. The Legislative Counsel's Digest specifically states that “[t]he bill would expand the definition of development moratorium.” Senate Bill 186, Stats.1988, ch. 1330, at 3375 (emphasis added). Since the Legislative Counsel is a state official required by law to analyze pending legislation, it is reasonable to presume that the Legislature amended the statute with the intent and meaning expressed in the Counsel's digest. People v. Martinez, 194 Cal.App.3d 15, 22, 239 Cal.Rptr. 272, 276 (1987). By its ordinary meaning, the term “expand” indicates a change in the law, rather than a restatement of existing law. In light of the Counsel's comment, Eastport's argument is unpersuasive.

#### All regulations prohibit all behavior which does not comply.

Stras ’21 [David R; June 9; Federal Court of Appeals Judge on the Eighth Circuit, former Minnesota Supreme Court Justice; Westlaw, “Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Parson,” 1 F.4th 552]

In any event, I think there is reason to doubt whether Rutledge was correctly decided, even if this panel has to follow it. See Mader v. United States, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.” (quotation marks omitted)); see also Preterm-Cleveland, 994 F.3d at 516, 535 (concluding that a challenge to a similar, but even more restrictive, law was not likely to succeed on the merits). It treated Arkansas's Down Syndrome Provision as a “complete prohibition o[n] abortions”—a “ban,” so to speak—not just a “regulation.” Rutledge, 984 F.3d at 688–90. This distinction is critical because, under our precedent, a pre-viability ban is categorically unconstitutional. See id. at 687–88; MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768, 772–73 (8th Cir. 2015); Edwards v. Beck, 786 F.3d 1113, 1117 (8th Cir. 2015) (per curiam). A pre-viability regulation, on the other hand, is only unconstitutional if it has the “purpose or effect” of “plac[ing] a substantial obstacle in the path of a woman seeking an abortion.” Gonzales v. Carhart, 550 U.S. 124, 146, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion)).

We have not made it easy to tell the difference between the two. In Edwards, we explained that a ban “prohibits women from making the ultimate decision to terminate a pregnancy.” 786 F.3d at 1117. A regulation, by contrast, has only an “incidental effect” on the decision by “making it more difficult or more expensive to procure an abortion.” Gonzales, 550 U.S. at 158, 127 S.Ct. 1610 (quoting Casey, 505 U.S. at 874, 112 S.Ct. 2791 (plurality opinion)). The distinction is only complicated by the fact that a regulation can easily be reframed as a ban: if its requirements are not met, then a woman will be “completely prohibited” from having an abortion. Ante at ––––.

#### This violation proves they have no clue how antitrust works.

Gavil ’17 [Andrew I, Jonathan B Baker, William Kovacic, and Joshua D Wright; Professor at the Howard University School of Law and Senior of Counsel at Crowell & Moring LLP; Professor at the George Mason University School of Law, a commissioner of the U.S. Federal Trade Commission from 2006 to 2011; Research Professor of Law at American University, former Director of the Bureau of Economics at the Federal Trade Commission; the Executive Director of the Global Antitrust Institute, professor of law at George Mason University, commissioner of the U.S. Federal Trade Commission from 2013 to 2015; third edition published 2017; Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy, “Defining Competition Policy for a Global Economy,” Ch. 1, p. 58]

These provisions contain the kernel of antitrust law. They are broadly phrased—almost constitutional in quality—embracing fundamental concepts with a simplicity virtually unknown in modern legislative enactments. In failing to provide more guidance, the framers of our antitrust laws did not abdicate their responsibility any more than did the Framers of the Constitution. The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that the detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage (and at times even permit) desirable conduct. To provide flexibility, Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.

### ITC

#### ITC links more to politics.

Aquilante ’18 [https://www.freit.org/WorkingPapers/Papers/PoliticalEconomy/FREIT1356.pdf; KS]

Antidumping (AD) is the most widely used non-tariff barrier. To deflect political pressure, in the United States, final decisions on AD are delegated to the International Trade Commis- sion (ITC), an independent agency composed of six non-elected commissioners. Using a newly collected dataset, I study the determinants of all final ITC votes on AD during the 1989-2010 period. I find that ITC commissioners decisions on AD crucially depend on which party has appointed them and on the trade policy interests of key senators in that party: whether commissioners vote in favor of AD depends heavily on whether the petitioning industry is key (in terms of employment) in the states represented by leading senators of the Republican and Democratic parties, indicating that commissioners are reactive to party-specific political pressure. Interestingly, pressure seems to be more effective when the case for voting in favor or against AD is less clear-cut, suggesting that ITC commissioners are more likely to vote in line with political parties’ interests when it matters more.

### Politics DA

#### No deal from either side. Haven’t even seen text of bills.

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

During the closed-door meeting with House Democrats, Biden laid out in person long-awaited details of his $1.75 trillion economic and climate package, trying to convince progressives who are skeptical of anything short of a fully written bill and commitments from all 50 members of the Senate Democratic caucus to back his framework.

But he came up short, with progressives still demanding that both bills move in tandem.

Phillips was critical of Biden because he did not explicitly say the infrastructure vote should occur on Thursday in the meeting; Pelosi is the one who pushed for the vote.

"I'm not afraid to say I wish he was more explicit. ... This is the commander in chief of the United States. When you spend political equity in front of a caucus two times in a month, I think it's got to be awfully explicit -- and be more forthright."

Phillips added: "If the President had led us down that hallway onto and on the House floor, I think it would have been close. .... I think with Republican votes, it would have passed."

The personal pitch to House Democrats marked a concerted effort by the President to wrest control of an unwieldy process that has led to significant revisions to Democratic goals in the effort to appease Sens. Joe Manchin Manchin and Kyrsten Sinema. While Biden's proposal isn't finalized in its entirety, days of negotiations have brought it to a place where the key elements are all locked in.

Not all Democrats have signed off on the framework that Biden announced Thursday morning, two people familiar with the plan cautioned, but the President believes it's a consensus all Democrats should be able to support.

Neither Manchin nor Sinema explicitly committed to backing the plan Thursday, though they both said they were continuing to negotiate after Biden's meeting with House Democrats.

Sinema reacted to the framework by saying in a statement, "We have made significant progress" and "I look forward to getting this done."

Manchin was noncommittal when asked by reporters whether he will support the framework agreement. Later on Thursday, he said, "We haven't seen the text yet. Everyone has to see it. I don't think anybody could say they could support it until they see the text."

#### Biden’s not key – bills failing because he’s ineffective and his approval is shot.

Lyons ‘10/26 [Gene; 10/27/21; nationally syndicated journalist for Harper’s the New York Times Magazine, Chicago Sun-Times, and more; "Democrats couldn't sell water in a desert," https://www.thecabin.net/opinion/democrats-couldnt-sell-water-in-a-desert/article\_690a11b0-bb4d-527f-b208-43a021a36075.html]

No wonder the bill’s on life support, along with, allegedly, the Biden presidency itself. No wonder, too, that the president’s overall approval numbers are seen as anemic — although recent polls from CNN and Fox News placed his favorability at 50%, higher than his predecessor ever achieved.

CNN, for its part, has downplayed its own favorable numbers. Correspondents cherry-pick weaker poll results to keep Wolf Blitzer fully apprised of Washington insider conventional wisdom.

And how has it come to this? Partly, it’s the habitual ignorance and inattention of the American public. People have only a vague idea of what they want, and no idea how to get it.

Partly, too, it’s the fault of congressional Republicans and the accursed Senate filibuster — so determined to wage political war against a Democratic president that the administration was forced to combine its entire legislative agenda into a single, one-size-fits-all reconciliation bill to have any chance of passing. (Reconciliation bills can’t be filibustered.)

Under “normal” political conditions, which we may never see again, Democrats could have passed a trillion-dollar bipartisan infrastructure plan rebuilding roads, bridges, water and sewer lines, and high-speed internet, and then considered the component parts of the Build Back Better plan one or two at a time — Medicare improvements in one bill, child tax credits in another, etc.

Instead, they decided that Mitch McConnell’s determination to prevent any and all Democratic bills from coming to a Senate vote made bundling them into a single reconciliation bill the only way to pass anything.

The Biden White House agreed.

Media critic Eric Boehlert blames the Beltway news media for failing to enlighten the public. Writing on his Press Run website, Boehlert argues that “as Democrats work to pass both a huge infrastructure bill and even bigger social spending bill, dubbed Build Back Better, the Beltway press continues to do a great job ignoring the contents of the historic effort. Focusing instead on its cost and obsessively documenting the vote-counting process, the press has walked away from its job of explaining legislation.”

Washington Post columnist E.J. Dionne agrees, writing, “the relentless focus on the single number of $3.5 trillion has left most Americans clueless about what Biden wants to do.”

Up to a point, I agree. Also with Dionne’s larger point that the Democratic party “needs to spend less time on cultural issues and more on fighting for direct benefits to the working and middle classes, a cause that unites voters across racial and regional lines.”

But the real fault here isn’t with the news media; it’s with the White House’s inexplicable failure to sell its plan. People don’t know what’s in the Build Back Better plan mainly because Biden hasn’t told them — simply, clearly and repeatedly. If you want the public to understand the legislation, you’ve got to tell them you’re going to tell them, tell them, and then remind them you told them. Over and over until it sinks in.

But the bully pulpit has been vacant. It’s incredible that Democrats have gotten suckered into talking about nothing but the 10-year price tag — as if $3.5 trillion were even comprehensible to people. It’s as tone-deaf and self-destructive as “Defund the Police.”

#### No agreement, bills aren’t finished, and Biden’s not key – he’s in Rome.

Greve ‘10/28 [Joan; 10/28/21; Guardian politics breaking news reporter; Maanvi Singh; political reporter for the Guardian; "House delays infrastructure bill vote as progressives dig in – as it happened," https://www.theguardian.com/us-news/live/2021/oct/28/biden-spending-package-democrats-europe-trip-us-politics-live?page=with:block-617b14948f08ea671ec0cca9/]

However, it remains unclear whether the framework can attract the support of the two Democratic holdouts in the Senate, Kyrsten Sinema and Joe Manchin. Sinema acknowledged that Democrats “have made significant progress” in their negotiations, but neither she nor Manchin have explicitly endorsed the framework. Biden will need all 50 Democratic senators on board to get the proposal passed.

The House delayed a vote on the bipartisan infrastructure bill following the framework’s release, following resistance from progressives. “Members of our Caucus will not vote for the infrastructure bill without the Build Back Better Act,” said Pramila Jayapal. “We will work immediately to finalize and pass both pieces of legislation through the House together.”

House Democrats released an updated version of the reconciliation bill, but the legislation is still expected to undergo significant revisions as negotiations continue to determine the specific details of the package.

Biden is now en route to Rome to kick off his week-long trip to Europe. As Democrats continue their negotiations, Biden will be overseas – meeting with Pope Francis in Vatican City, attending the G20 summit in Rome and participating in the Cop26 climate change conference in Glasgow. The White House has said the president will remain engaged in the negotiations while abroad.

#### Biden can’t close the deal – Thursday’s framework isn’t enough.

Glasser ‘10/28 [Susan; 10/28/21; staff writer at the New Yorker; "Biden Can’t Quite Close the Deal—with His Own Party," https://www.newyorker.com/news/letter-from-bidens-washington/biden-cant-quite-close-the-deal-with-his-own-party]

For months, Biden has been stuck negotiating with fellow-Democrats over the details of the bill. The negotiations remained so uncertain that, even as Biden headed to the House to make his pitch, the Senate Majority Whip, Dick Durbin, was telling reporters that he wasn’t sure Democratic senators would support the deal because they still didn’t know what was in it. “No, I wish I could say yes, but there’s a great deal of uncertainty within the caucus as to what’s contained in the deal,” Durbin said. Biden, nonetheless, tried to project an air of unrattled confidence in his Build Back Better bill, whose generic name conceals a wealth of possible meanings. “Everybody’s on board,” the President told reporters as he arrived on Capitol Hill. “Today’s a good day.” But as the day ended it was not entirely clear that either statement was accurate.

Biden needed Democratic unity in both chambers not only to support the social-spending bill but to finally allow the House to vote on a nearly trillion-dollar bipartisan infrastructure bill that passed the Senate earlier this year with the support of nineteen Republicans. The House vote has been held up since then because his party’s progressives refused to proceed with it until they got an agreement on the bigger social-spending package. At the House Democrats’ meeting Thursday morning, Speaker Nancy Pelosi told the caucus that they should take the infrastructure vote that very afternoon rather than “embarrass” Biden by forcing him to show up in Europe empty-handed.

The problem, as it has been for months, is that absolute party unanimity is almost impossible to achieve, and yet that unanimity is necessary for a Democratic President without congressional majorities large enough to enact transformational legislation. Kyrsten Sinema, one of the two Democratic holdouts in the Senate, released a statement soon after Biden’s, praising the “significant progress,” which was not the robust endorsement that the White House had been hoping for. “I look forward to getting this done,” she added. Whatever that means. The statement from Joe Manchin, the West Virginia Democrat and the other Senate holdout, was also less than unequivocal. “This is all in the hands of the House right now,” he said. “I’ve worked in good faith, and I look forward to continuing to work in good faith. And that is all I have to say today.” This, needless to say, did not go over well among House Democrats. Representative Dan Kildee, of Michigan, complained that it was just more “hieroglyphics” from Manchinema—or was that Sinemanchin? Either way, the statements weren’t enough to get progressives to relinquish their hold on the infrastructure bill. One leading progressive, Rashida Tlaib, asked whether she would vote to pass the infrastructure bill, said that she wasn’t just a no, she was a “hell no.” So was much of the rest of the hundred-member-strong Progressive Caucus. By midday Thursday, the framework agreement was looking less and less like an agreement and more and more like a squeeze play to finally get the deal done.

On Thursday afternoon, Pelosi spoke to reporters after the House Rules Committee released the 2,465-page text of the budget bill that progressives had been demanding to see. The Speaker was no longer mentioning a vote before Biden’s plane landed in Rome. “We’re on a path to get this done,” Pelosi said. “We’ll see what consensus emerges from that, but we’re really very much on a path. . . . We’re on a path to get this all done.” Pelosi was then asked whether she trusted the word of Manchin and Sinema enough to move ahead with both bills. “I trust the President of the United States,” Pelosi replied. As she left the press conference, Pelosi was asked one more time: Are you holding an infrastructure vote today? She did not answer.

By next week, this could be just another forgotten congressional dumpster fire. The agonizingly slow negotiations on Biden’s agenda over the last few months are not the first time and will not be the last that the legislative sausage-making process has left legislators feeling, as Representative Debbie Dingell put it, “sick to your stomach.” Biden and Pelosi are betting on some basic principles of politics to help smooth it all over. They are betting that the memories of the enervating process, like a painful childbirth, will fade with time. They are betting that delivering something is better than delivering nothing. And they are betting that the mechanics of passing the legislation are much less significant than the politically popular proposals, such as raising taxes on wealthy corporations and child-care tax credits, contained within the bills. The House progressives quickly put out a statement saying that, while they were balking at having an infrastructure vote on Thursday, they were, in fact, committed to supporting both that bill and the bigger social-spending bill—whenever they do come to the floor. Winning tends to erase the pain of getting there.

But what I keep coming back to is that Biden has struggled so much—and had to put so much of his personal prestige and political capital on the line—for a deal he can’t quite close with his own party. These are Democrats he is negotiating with. No Republicans—or Russians or Chinese, for that matter—were involved in the making of the deal, to the extent that there is a deal. And why, exactly, was it such a heavy lift that it took so long to get to the pretty inevitable top-line number? A month ago, the big breakthrough was the revelation that Manchin was for a $1.5-trillion bill and that Biden and the Democratic leadership wanted to get to approximately two trillion dollars. It did not take a negotiating genius to figure out that they were going to end up at $1.75 trillion. This is what practically broke Washington? You can’t blame that one on Donald Trump.

### AT: Chinese AI

#### 2 – No AI impacts – time, safeguards, and long internal links.

Shermer 17 Dr. Michael Shermer, Ph.D. from Claremont Graduate University in the history of science. [Why Artificial Intelligence is Not an Existential Threat, Altadena, 22(2), 29–35 (“i/s” is short for “if statements”)]

Pinker agrees that there is plenty of time to plan for all conceivable contingencies and build safeguards into our AI systems. "They would not need any ponderous 'rules of robotics' or some newfangled moral philosophy to do this, just the senne common sense that went into the design of food processors, table saws, space heaters, and automobiles." Sure, an ASI would be many orders of magnitude smarter than these machines, but Pinker reminds us of the AI hyperbole we've been fed for decades: "The worry that an AI system would be so clever at attaining one of the goals programmed into it (like commandeering energy) that it would run roughshod over the others (like human safety) assumes that AI will descend upon us faster than we can design fail-safe precautions. The reality is that progress in AI is hype-defyingly slow, and there will be plenty of time for feedback from incremental implementations, with humans wielding the screwdriver at every stage." 22 Former Google CEO Eric Schmidt agrees, responding to the fears expressed by Hawking and Musk this way: "Don't you think the humans would notice this, and start turning off the computers?" He also noted the irony in the fact that Musk has invested $1 billion into a company called OpenAI that is "promoting precisely AI of the kind we are describing."23 Google's own DeepMind has developed the concept of an AI off-switch, playfully described as a "big red button" to be pushed in the event of an attempted AI takeover. "We have proposed a framework to allow a human operator to repeatedly safely interrupt a reinforcement learning agent while making sure the agent will not learn to prevent or induce these interruptions," write the authors Laurent Orseau from DeepMind and Stuart Armstrong from the Future of Humanity Institute, in a paper titled "Safely Interruptible Agents." They even suggest a precautionary scheduled shutdown every night at 2 AM for an hour so that both humans and AI are accustomed to the idea. "Safe interruptibility can be useful to take control of a robot that is misbehaving and may lead to irreversible consequences, or to take it out of a delicate situation, or even to temporarily use it to achieve a task it did not learn to perform or would not normally receive rewards for this."24 As well, it is good to keep in mind that artificial intelligence is not the same as artificial consciousness. Thinking machines may not be sentient machines. Finally, Andrew Ng of Baidu responded to Elon Musk's ASI concerns by noting (in a jab at the entrepreneur's ambitions for colonizing the red planet) it would be "like worrying about overpopulation on Mars when we have not even set foot on the planet yet."25 Both utopian and dystopian visions of AI are based on a projection of the future quite unlike anything history has given us. Yet, even Ray Kurzweil's "law of accelerating returns," as remarkable as it has been has nevertheless advanced at a pace that has allowed for considerable ethical deliberation with appropriate checks and balances applied to various technologies along the way. With time, even if an unforeseen motive somehow began to emerge in an AI we would have the time to reprogram it before it got out of control. That is also the judgment of Alan Winfield, an engineering professor and co-author of the Principles of Robotics, a list of rules for regulating robots in the real world that goes far beyond Isaac Asimov's famous three laws of robotics (which were, in any case, designed to fail as plot devices for science fictional narratives).26 Winfield points out that all of these doomsday scenarios depend on a long sequence of big i/s to unroll sequentially: "If we succeed in building human equivalent AI and if that AI acquires a full understanding of how it works, and if it then succeeds in improving itself to produce super-intelligent AI, and if that super-AI, accidentally or maliciously, starts to consume resources, and if we fail to pull the plug, then, yes, we may well have a problem. The risk, while not impossible, is improbable." 27