# Extraterritoriality – Michigan PS – 1AC

## 1AC – Econ

#### Advantage one is Econ.

Scenario one is Cartels:

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

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

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

#### Circuit split over the definition of ‘direct’ is unresolved – the 9th circuit interpretation solves.

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

#### Otherwise, cartels destroy innovation and efficiency with 40% price increases – destabilize global 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

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

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

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

C. The Purpose

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

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

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

#### 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.

#### Serial collusion devastates innovation in the chemical sector.

Kovacic et al. ’21 [William, Robert Marshall, and Michael Meurer; 2021; Global Competition Professor of Law and Policy at George Washington University Law School; Distinguished Professor of Economics at Pennsylvania State University; Professor of Law at Boston University; Boston University School of Law Research Paper Series, “Patents and Price Fixing by Serial Colluders,” No. 21]

In a recent article on price fixing, we coined the term “serial colluder” to designate multi-product firms that have participated in many cartels, involving a range of participants, and initiated at different dates.15 Several chemical firms meet this definition because of their participation in at least thirty different chemical cartels spanning at least three decades.16 Our earlier article also addressed the business model of serial colluders and the failure of anti-cartel law to deter such behavior. In some cases, weak monitoring and high-powered incentive payments to product division managers may have fostered multiple cartels without encouragement from, or even contrary to the instructions of, upper management. This “rogue manager” explanation of serial collusion is often invoked by corporate directors seeking a story that deflects blame away from them. A more troubling explanation for serial collusion is that price fixing is an integral part of the business model of certain firms, and high-level managers advocate for and assist with collusion throughout the firm. We believe serial colluders in certain industries have run “portfolios of cartels.” In support of this “business model” explanation, in previous work we presented various kinds of indirect evidence that serial colluders in the chemical industry have indeed run a portfolio of cartels.17 Unaddressed in that previous work is an examination of how serial colluders may use patents and patent licensing schemes to initiate or maintain a cartel.

In Section I of this paper, we find that serial colluders increased patenting during the duration of their cartels, which is consistent with the theory that these firms use new patents to support cartelization. The magnitude of this increase is above and beyond incremental increases in patenting over time. We also find that “core” serial colluders (but not other major serial colluding chemical firms) increased patenting on products that they did not produce but that were being cartelized by their fellow colluders, which is consistent with the view that serial colluders engage in reciprocal practices across distinct markets.18 On the whole, our analysis of patenting practices for serial colluders in the chemical space suggests ongoing use of patents to initiate or maintain cartels, a practice that may apply to other industries with serial colluders as well.

Finding that the empirical data support our hypothesis of serial colluders using patents to create and maintain cartels, we next probe in Sections II and III reasons for why this conduct might evade agency enforcement and effectively help to coordinate cartels. Unlike the older cartels that openly used patents to directly restrain output, modern serial colluders running a portfolio of cartels potentially use patents in ways that are indirect and less likely to be noticed by private plaintiffs and government enforcers. We then explore how cartel participants in the modern era (excepting pay-for-delay cases like Actavis) appear to use patents to deter entry into cartelized markets, facilitate intrafirm communications and actions in support of collusive conduct, and communicate with other serial colluders about their portfolio of cartels under the guise of discussing their portfolio of patent licenses.

For the remainder of the Article, we discuss how the existing antitrust jurisprudence regarding patents and price fixing requires major upgrades to account for the dramatic modern improvements in our understanding of the economics of collusion. In older cases, judges recognized that firms could use patent licenses directly to restrict output, raise prices, or boost competitors’ marginal costs, 19 but they may not have appreciated the many indirect ways that patents can increase cartel stability and profitability. As discussed in greater detail below, patents provide an avenue for ongoing communication among rivals about output and pricing. Patent pools and cross-licensing arrangements are especially useful for organizing cartels across product types. Furthermore, licensing regimes may permit a firm to organize supportive resources within the firm without raising legal compliance concerns.

Anticipating these benefits to cartel formation and maintenance, this Article goes on to suggest that serial colluders may engage in strategic patenting. That is, they procure patents to advance cartel goals rather than to promote innovation. We present data on global patent procurement by price fixers in the chemical industry that is consistent with this view. Importantly, firms managing a portfolio of cartels can use patents in a reciprocal way to stabilize cartels across markets where not all firms participate as producers in each market. Within the network of chemical cartels, for example, we see evidence that certain firms use patents to promote cartels in markets for products they do not produce. Firms may use the threat of a patent lawsuit to punish deviators and discourage outsiders from attempting to enter a cartelized market. They may also use patent licenses to audit licensee sales and monitor compliance with cartel rules. One firm might perform such a service for other firms in the collusive network with the expectation that the non-participant would get similar help managing their own portfolio of cartels from other serial colluders in the future.

Further, in this Article, we probe deeply into the ways serial colluders can coordinate their patent practices to enhance cartel profits and stabilize their cartels. Our previous work on serial collusion documented that modern anti-collusion enforcement has not adequately deterred massive, prolonged multi-market price-fixing schemes.20 We also explained how various forms of reciprocity among serial colluders increased their cartel profits and made cartels more resilient.21 We expand on this topic with respect to the use of patents for cartelization, which we touched on only briefly in previous work.

This Article also describes gaps in existing antitrust enforcement and scholarly analysis of patenting practices. Recognition of serial collusion helps us to identify further flaws in the conventional treatment of patent licenses that allegedly facilitate price fixing. As one example, case law favors vertical patent licenses by applying rule of reason analysis to restrictions that could earn per se condemnation if organized as horizontal licenses.22 Such deference stems partly from worries that anti-collusion enforcement could weaken returns to patents and discourage research and innovation, as well as concerns that there may be legitimate reasons for suppliers, manufacturers, retailers to coordinate some activities. Yet, past practice of serial colluders show that firms can and do evade per se condemnation by simply organizing a middle man to stand as an upstream patent pool organizer. Thus, we reject such deference for vertically organized patent licenses in the context of serial colluders that are managing a portfolio of cartels, because what appears to be a vertical relationship is often part of the network of connections among serial colluders. Similarly, the leading scholarly commentary on patents and price fixing suggests that socially desirable licenses can be sorted from socially harmful licenses by determining whether significant rents flow to the licensor.23 This test may be effective in the context of an isolated cartel affecting a single market.24 As we explain in Section IV, this test has little or no value in the context of serial collusion where the firms are managing a portfolio of cartels.

Finally, in this Article, we provide additional policy recommendations tailored to the abuse of patents by serial colluders. Our earlier work lays out various reforms to anti-collusion policy that could mitigate the harms of serial collusion. In Section V, we go further and explain how certain patent-related behaviors by firms that do not participate directly in cartelizing a particular market can be used to infer collusion in that market (when the outsider is part of a network of serial colluders). We also discuss penalties and liability that antitrust and patent agencies should impose on firms that use their patents to facilitate collusion by others. Specifically, we argue for generous application of the patent misuse defense to render unenforceable patents used to facilitate price fixing.25 Entry would be easier and patent-based cartel punishments would be eliminated if cartel patents are left unenforceable. Finally, we identify possible adjustments in the institutional arrangements by which the federal antitrust enforcement agencies address the use of patents and patent licensing to facilitate collusion.

This Article is organized as follows. Section I presents empirical evidence that serial collusion is a serious problem, that serial colluders in the chemical industry use the patent system intensively in ways that suggest strategic patenting, and that their patenting behavior is consistent with their use of patents to enhance multi-market price fixing. Section II considers the evolution of antitrust doctrine and policy related to patent assertion and licensing as collusive devices. Notwithstanding existing strictures, this section reviews how patent practices can facilitate cartelization. Section III turns to the role that patents can play in supporting serial collusion. Section IV discusses the modernization of doctrines related to patents and price fixing in response to the threat of serial collusion. Section V offers policy recommendations and additional concluding comments.

I. Serial Collusion and Patents: Case Study in the Global Chemical Industry

Serial collusion in the chemical industry dates back to the 1880s and has reappeared in most decades since then.26 German chemical firms have been prominent price-fixers and often cartel ring-leaders, but they have been joined by chemical firms from the United States, England, France, Belgium, the Netherlands, Canada, Switzerland, South Korea, and Japan.27 Dozens of different chemical products have been affected by price fixing at some point.28 Historically, some of these collusive agreements were regional; others were global. Some were short-lived; others spanned decades. This history, and the specific role of patents to instituting and maintaining cartels in the global chemicals market, is described below.

A. Historical and Modern Cartelization of the Global Chemical Industry

Patents played a significant role in chemical cartels during the first half of the twentieth century. 29 Margaret Levenstein observes that “[d]uring most of the 30 years preceding World War I, bromine producers in the United States and Europe colluded, pooling output, dividing up markets, and raising prices.”30 In the period leading up to World War II, German chemical firms engaged in a variety of practices that Heinrich Kronstein has called “monopolizing by patents.” 31 One technique employed by the “combine” of chemical companies was to direct the research arm of each participant to procure as many patents as possible, to use them for strategic ends.32 From his study of patents and cartelization in 1920s Germany, Kronstein reported that “[m]ore and more the chemical industry began to apply for patents on practically everything. The research laboratories of the few remaining chemical works, connected among themselves by cartel and working agreements, systematically studied entire fields and closed them by a large number of patents.”33 In fields such as plastics and pharmaceuticals, “[e]ach publication in any chemical review or each patent application of any applicant in any country was given to the staff of the research laboratory to find anything that could be patented, no matter if the patent was a patent of evasion or supplement or protection against other inventors.”34 This phenomenon Kronstein described resembles the pattern of recent patenting behavior in the chemical sector we document below—where patenting activity by cartel participants increases dramatically during the period of illegal collaboration for the purpose of consolidating market share for existing firms and keeping out entrants.35

A second method documented by Kronstein and other researchers involves the extensive use of patent licensing agreements among major U.S. and foreign chemical producers and their subsidiaries to establish effective networks for global cartelization.36 Kronstein reports that in the decades leading up to World War II, “[t]he participation of an American enterprise in a world cartel chiefly through the device of patent exchange became very common.”37 In 1946, George Stocking and Myron Watkins reported “that a division of market territories for products coming within the scope of [cartel] patents and secret processes in a given field usually entail[ed] a complete division of territories for all related products.”38

A third method of cartelization involved the use of multiple licensing arrangements to cartelize entire domestic markets. In the late 1930s, the DOJ successfully challenged Ethyl Gasoline Company for creating an elaborate system of licensing arrangements for the production and use of tetra-ethyl lead to stabilize prices for motor fuel. 39 In another prominent American example of the technique applied outside the chemical sector, in the 1940s, the DOJ prosecuted United States Gypsum for using minimum price terms in patent licenses to cartelize the gypsum wallboard industry.40 For about a decade, Gypsum had granted licenses with largely identical price restrictions to nearly all of the industry’s numerous firms.41 In upholding the government’s challenge to Gypsum’s licensing terms, the Supreme Court observed, “the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.”42

The rash of chemical industry cartelization has continued to modern times. In the three decades since 1980, the European Commission (EC) prosecuted chemical producers for collusion in 32 separate markets. 43 Notable American antitrust cases brought against chemical producers during this period ended cartels in the markets for lysine, citric acid, and vitamin C. 44 Since 2010, the Korean Fair Trade Commission (KFTC) fined participants in a chemical additives cartel. 45 Today, the EC is investigating an ethylene cartel, 46 and a massive investigation of serial collusion by generic drug companies is ongoing in the United States.47 Whereas the scope of these investigations has not focused on what role patents may have played in helping to facilitate these cartels, we suspect that patents did play a role.48 We explore this conjecture by examining the patenting behavior of colluding firms before, during, and after agency enforcement to explore whether these firms may have pursued patents for strategic ends.

#### Extinction.

Danielpour ’14 [Steven; April 2014; Director of Specifications at HOK, Professor at the Pratt Institute; PaintSquare, “Sustainable Coatings: Shifting the Paradigm,” https://www.paintsquare.com/archive/?fuseaction=view&articleid=5271]

New technologies and processes will help deliver the innovations needed to respond to mankind’s greatest challenges, says HOK’s firmwide director of specifications.

Whether you’re an architect or facility owner interested in ensuring healthy buildings and communities, a contractor navigating the many shades of “green” coatings or a supplier responding to market demand for these coatings, sustainability matters.

But what makes a coating “sustainable” in the built environment, and why should we care?

Wikipedia defines sustainability as “a characteristic of a process or state that can be maintained at a certain level indefinitely.” Production, distribution and application of sustainable coatings must meet current needs without compromising our ecosystems’ ability to sustain future populations.

Continuing to build the way we have built, using the materials we have used for centuries, is no longer viable in light of diminishing energy, water and other resources. Key megatrends, including population growth, climate change and a proliferation of information, make sustainable coatings all the more critical.

So it’s exciting to see the industry responding with advanced technologies that are healthier for building occupants and the environment, while achieving high performance and durability. We see it in such innovations as the newest generation of PVDF (polyvinylidene fluoride) coatings, polysiloxane coating systems, advanced anti-microbials and more.

And just ahead we can expect to see phase-changing coatings that will respond chemically to cooler or warmer conditions, for instance, to improve energy efficiency in the building envelope. We may see roofing materials that reflect and absorb heat as appropriate, using phase-changing materials and nanotechnology.

Such cutting-edge technologies, along with processes that reduce waste, reuse byproducts and allow reformulation into new products, promise game-changing improvements for coatings.

Let’s take a closer look at the drivers that will make sustainable coatings increasingly important, and the processes and technologies on the horizon.

Responding to Dwindling Resources

The logic is simple: If we continue to consume natural resources faster than they can be replenished, and if we produce wastes for future generations to deal with, we’ll have a harder and harder time maintaining life on Earth as we know it.

Scientific research on species extinction makes it clear that human survival depends on maintaining our ecological cycle, as well as those of other species and their habitats. Yet we’re barreling like a runaway train toward depleting some key resources.

Petroleum: Petrochemicals, a necessary feedstock for high-performance coatings, derive from fossil fuels that took millions of years to create; they are not readily replenished. Sustainable resource management requires that we conserve irreplaceable resources through closed-loop manufacturing, reusing manufacturing byproducts and recycling waste into new products.

Water Resources: Only 3 percent of the Earth’s water is potable, and most of this supply is locked in the polar ice cap. Just 0.003 percent of the world’s water is readily available for human consumption, and 16 percent of that is used to manufacture building materials and construct buildings. Worse yet, due to pollution, 40 percent of streams, 45 percent of lakes and 50 percent of estuaries in the United States were deemed not clean enough to support fishing and swimming in a 2000 Environmental Protection Agency study. The Index of Watershed Indicators reports that only 15 percent of our watershed has relatively good water quality.

Forests: Rain forests play an important role in maintaining Earth’s air quality, absorbing carbon dioxide emissions and VOCs (volatile organic compounds), while replenishing the air with oxygen. Statistics show that the annual rate of global deforestation is equal to an area the size of the state of Georgia. This is critical, because it has been estimated that when more than 70 percent of an ecosystem is lost, the remainder may be unable to sustain the environment needed for survival.

Waste: The United States generates enough garbage daily to fill 63,000 garbage trucks, which, lined up, would stretch 400 miles from Los Angeles to San Francisco. The building industry accounts for 20 percent of this waste stream.

Energy: The U.S. Department of Energy estimates that improvements in U.S. building energy efficiency using existing technology could save $20 billion. Forty percent of the world’s energy is used to construct and operate buildings.

The numbers are grim, but designers and suppliers have real options for countering these trends. We can employ what I like to call the Seven Principles of Sustainable Design:

Use Low-Impact Materials: Select non-toxic, sustainably produced or recycled materials that require little energy to process.

Promote Energy efficiency: Use less energy to manufacture more efficient products.

Select for Quality and Durability: Use durable, longer-lasting and better-functioning products to minimize replacement frequency.

Design for Reuse and Recycling: Design products, processes and systems for performance in a commercial “afterlife.”

Employ Bio-Mimicry: Use scientific data to redesign industrial systems along biological lines, enabling the constant reuse of materials in continuous closed cycles.

Substitute for High-Use Service: Shift modes of consumption from single ownership to public/shared ownership (e.g., private automobile to car-sharing service). Promote minimal resource use per unit of consumption.

Choose Renewable Sources: Use materials extracted from nearby (local or bioregional), sustainably managed renewable sources that can be composted (or fed to livestock) when usefulness has been exhausted.

Responding to a Changing Society

Beyond the challenges we face in conserving scarce resources, a few key megatrends underscore the importance of sustainable coatings.

Population Growth: World population doubled from 2.5 billion in 1950 to 5 billion in 1990; it is projected to reach 9.8 billion in 2050. The population is also shifting from rural areas to major metropolitan areas, with people migrating for better employment, commerce and quality of life. New construction will be required to support growth and urbanization. We’ll need to replace, upgrade, repurpose and conserve existing structures and infrastructures.

Climate Change: Once mislabeled “global warming,” the significant, lasting change from relatively mild, predictable weather patterns to more unpredictable patterns increasingly will affect industrialized farming and dense urban populations. We’ll see more pressure to produce materials, products and assemblies that can withstand extreme variances in weather. Basic code-compliant solutions that are “good enough” today will no longer be acceptable.

We’re now designing disaster-mitigation plans and hardening essential facilities and infrastructure, as new codes require mitigation of rising water levels and storms we once saw every 100 years.

We can expect to see carbon dioxide emissions regulated, promoting net-zero buildings whose every feature is designed to reduce energy use and associated carbon emissions.

Greater emphasis will be placed on energy efficiency and energy recovery, as well as water-resource management and conservation.

Information Explosion: Information is growing exponentially, and a corollary increase in access to this information through the Internet means that people are more informed than ever about optimum human health and the risks associated with exposure to chemicals. We pore over studies seeking to define the “tipping point” for toxemia in terms of parts per billion of key compounds. We worry about information that links exposure to changes of DNA affecting future generations.

These health concerns are driving changes that have tremendous implications for building materials.

* New Regulations: States increasingly introduce regulations designed to control exposure and assure public health. The International Green Construction Code is now used for baseline sustainability in regular building codes.
* VOC Limits: VOCs are regulated on the West Coast via the South Coast Air Quality Management District, and on the East Coast via the Ozone Transport Commission. Recent changes in California have lowered VOC limits to a maximum of 50 grams per liter in coatings.
* New Organizations: The Living Building Challenge introduced a chemical “Red List” banning hazardous chemicals from use on projects.
* More Transparency: As a result of requirements in LEED v4 for product transparency, manufacturers of products used on LEED projects must detail the chemical content of the products in HPDs (health product declarations) and EPDs (environmental protection declarations).
* New Social Contract: Major petroleum chemical companies are forced to address the population’s desire to shift from oil and coal to natural gas and to renewable energy and biomass materials.

Technology Explosion: The last 20 years of mergers and acquisitions led to large chemical plants manufacturing single resins. The future lies in small batch processing of custom chemicals and new processing technologies. These include nano-technology, micron-level changes to alter product performance; phase-changing materials, capable of storing and releasing large amounts of energy; and regenerative chemicals that respond to environmental changes.

What do these megatrends mean for the chemical industry? They portend a shift in processes, standardization and approach.

Closed-Loop Processes: Manufacturing closed loops are economically advantageous, reduce/ eliminate waste, reuse byproducts and allow reformulation into new products without downcycling. Shaw Carpet is one success story, creating nylon 6 fibers that can be recycled 100 percent into new carpet. Shaw’s activity resulted in record profits, as producing carpet with nylon 6 requires no new petrochemicals.

Tightening of Standards/LCA: Life-cycle costing is the true measure of value instead of traditional first-cost thinking. That is important where better products require less maintenance. Tightening standards will help designers maintain quality through specifications.

In fact, as coatings technologies advance, our reliance on standards increases. Standards organizations whose certifications for sustainable offerings fail to keep up with national programs, or whose certifications don’t perform as intended, will be bypassed. For coatings specific standard groups to survive, they must align with national standards and address high performance and durability.

Stricter Guidelines: In the healthcare and science laboratory industries, stricter guidelines will be required to combat hospital-acquired infections and address the harsh chemicals/disinfectants necessary to stem infections.

Alchemizing Toxic Chemicals: The storage of large quantities of toxic chemicals at various waste sites necessitates that we incorporate toxic chemicals in ways that alchemize them, creating non-toxic, stable, safe products that can be reused and recycled, without toxicity. For example, LEED supports the use of fly ash, the byproduct of coal manufacturing, as cement replacement in concrete production. This activity will decrease chemical reservoirs of fly ash so that they no longer pose a health hazard.

Creating Coatings for the Future

Coatings technology has evolved as manufacturers respond to market needs and awareness.

Getting the Lead Out: For decades lead was added to paints and coatings to improve durability and color retention. Research into the hazards of lead paint, and lead dust, made the industry move from lead to safer alkyd formulations. Recent awareness of the high VOC content has led manufacturers to replace alkyds with lower-VOC acrylic latex systems.

Where initial productions met market skepticism regarding performance and durability, formulation improvements now offer paint coatings with low VOCs and better performance, durability, color retention and color-hiding capability than older technologies.

Improving Corrosion-Resistant Coatings: Corrosion-resistant coatings for architecturally exposed structural steel have been three-coat systems consisting of organic or inorganic zincrich primers, epoxy intermediate and aliphatic polyurethane topcoats as the most durable high-performance coatings. Advances in the last 20 years have led to two-coat polysiloxane coating systems that, for mild to moderate atmospheric exposure, provide excellent corrosion resistance along with color and gloss retention said to surpass that of polyurethanes.

Improving Coatings to Protect Aluminum: Coatings to protect aluminum required chromate pretreatment for surface preparation and bonding of PVDF resin coatings. Awareness of the toxicity of hexavalent chromate prewashes led to development of coatings that do not need chromate prewashes but offer the same service life and durability.

In addition, the EPA introduced a significant new use rule (SNUR) last September to limit/eliminate perfluorinated compounds (PFCs) in PVDF coatings in response to overwhelming evidence that these chemicals are persistent bioaccumulative toxicants. PFCs were used as surfactants to improve the bond between coatings and metals. Producers of PVDF coatings altered the chemistry to remove perfluorooctanoic acids. Combining PVDF coatings with acrylics, coatings companies created low-VOC, water-based PVDF coatings with the same performance as the solvent-based PVDFs and that can be applied in the field, making initial application and long-term maintenance easy. Other chemical companies altered the chemistry of PVDF coatings further, developing powder coatings that can be applied in the field or in the shop with the same performance as 20-year warrantable fluid-applied systems.

Advancing Anti-Microbials: In high-performance interior coatings for laboratories and hospital facilities, epoxy paints and coatings recently have been replaced with two-component waterborne polyurethane systems based on advancements in polyurea technology. These systems provide high-durability coatings that can contain anti-microbial additives. They have great color retention and durability, while reducing dry time in shop preparations.

Controlling Moisture in Buildings: Rain screen design and energy regulations led to improvement in the building energy envelope through creation of air barrier systems. Controlling the movement of moisture through the building envelope increases the durability and life of the thermal envelope. Fluid-applied air barriers face new challenges as IBC 2012 adopts NFPA 285, mandating assembly fire testing of the exterior envelope. Companies must alter formulations to respond to new requirements for fire test performance.

Overcoming Issues of Fire-Resistant Chemicals: In the last year, fire-resistant coatings came under attack due to studies linking halogenated products to human health issues. Early formulations migrated, leaching chemicals in the environment. Independent research studies showed fire-retardant coatings to be carcinogenic and endocrine disruptors.

Recent formulations provide more durability and intimate bond chemicals in chemical composition of insulation products to prevent leaching and the related hazards. However, the public damage sustained as a result of published reports has led makers of children’s clothing, bedding and toys to remove fire-resistant chemicals from their products. Some design professionals are pushing for building code legislation to remove the requirement that building insulation be fire resistant.

So what developments can we expect in architectural coatings technology?

Phase-Changing Technology: Phase-changing materials will become more mainstream to address changes in environmental conditions. Coatings will change chemistry in response to environmental changes. These coatings will improve the energy efficiency of the building envelope, while minimizing unwanted effects.

Cool Roofing: Some debate surrounds cool roof technology. Reflective roof coatings help reduce energy demand during cooling cycles by reflecting heat from solar radiation. LEED points are available for use of cool roof coatings that help limit the heat island effect in urban environments. Recent research indicates that cool roofs are most effective in reducing the building energy use where the number of cooling days exceeds the number of heating days. Darker roofs may provide better energy performance in colder regions. However, water runoff from black roofs increases the temperature of water in rain and water runoff, and may be harmful to downstream biomes. Cool roof systems not only reduce the heat island effect locally, but also minimize this damage to ecosystems miles away.

Titanium Dioxide Coatings: TiO2 coatings clean surfaces through photocatalytic action, using UV light to activate coatings to bond with carbon dioxide. They produce hydrocarbon runoff and oxygen and clean the environment. Here are some examples.

* As a concrete additive, titanium dioxide maintains white concrete surfaces, minimizing maintenance, by de-bonding with carbon and dirt. It cleans the air by cycling and capturing carbon particles and VOCs.
* In healthcare environments, TiO2 coatings may stimulate antimicrobial action. Operating rooms can “self-clean,” eliminating bacteria between operations by activating enzymatic action through exposure to UV, infrared or other spectral light.
* In another application of TiO2 used as a photocatalyst, the technology is used to coat “self-cleaning glass.” While relatively expensive, such technologies may be valuable in polluted areas like China, where rains pose a durability threat to building materials that self-cleaning chemicals can mitigate.
* Data reveal that indoor air quality is 10 times more toxic than exterior air. Tightening the building envelope has exacerbated this issue. Manufacturers have produced TiO2- based surface treatments that are activated by UV light to actively purify air when applied to interior and exterior surfaces.

Reenvisioning What’s Possible

These are exciting developments, but they’re just the beginning. Here are but a few innovations to look for in coming years.

Regenerative Coatings. Such coatings alter their chemistry to respond to the environment in ways that are regenerative. For example, cool roof coatings will be developed to respond to hot days by reflecting light and to cold days by absorbing heat. This technology will be available through integration of phase-changing materials and nanotechnology.

Better Insulation. Thinner, lighter, more efficient insulations will come down in price, become more mainstream and be adopted by building codes to increase thermal control of the interior environment.

Inherently Fire-Resistant Coatings. These coatings will use nano-technology to produce products that are inherently flame and fire resistant, so fire retardants are not necessary.

More broadly, we can expect the product transparency requirements in LEED v4 and chemical bans from groups like the Living Building Challenge to fundamentally change our approach to materials development and selection. The industry will produce healthier, environmentally sustainable chemicals and products that mitigate problems while maintaining performance and long life.

This effort will depend on greater cooperation among design professionals, chemical companies, manufacturers and fabricators. It will take communication on individual projects, as well as collaboration through cross-industry channels. The challenges and stakes we face are unprecedented in human history, but so are the opportunities.

#### Scenario two is Protectionism:

#### Proliferation of protectionist rhetoric is the new norm – antitrust law forms subtle trade barriers – abuse destroys international free trade.

Murray ’19 [Allison; February 28; Loyola Law School, Los Angeles, Juris Doctor, May 2019; *Loyola of Los Angeles International and Comparative Law Review,* “Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?” <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr>; KS]

Given the anticipated continuation of cooperative trade agreements and the proliferation of protectionist rhetoric as the new norm of public opinion, leaders will be forced to rely on existing avenues to meet protectionist aims. Again, we find ourselves relying squarely on antitrust law, the more subtle and widely accepted mechanism of restricting trade, to address perceived inequities. In the words of the World Trade Organization (“WTO”), “once formal trade barriers come down, other issues become more important.”7 Among the important issues lies antitrust law. Antitrust and competition laws can form a subtle trade barrier resulting in the imposition of tariff-like measures.

Antitrust law can be enforced to reach protectionist aims and to combat them. It is a tool that allows nations to achieve individual protectionist aims without undermining the future of trade between countries and the cooperative framework underpinning the relatively delicate global free trade enjoyed today. However, the perception of enforcement of antitrust laws as an abusive and solely protectionist mechanism may cause the death of even the smallest semblance of international free trade that remains in the international marketplace today.

#### Perception of unfair, unilateral antitrust enforcement thwarts antitrust and undermines cooperation – comity solves.

Murray ’19 [Allison; February 28; Loyola Law School, Los Angeles, Juris Doctor, May 2019; *Loyola of Los Angeles International and Comparative Law Review,* “Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?” <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr>; KS]

V. CURRENT POLITICAL CLIMATE AND RISING PROTECTIONISM RHETORIC

Our current political climate reveals a return to protectionist rhetoric and policies. Today, the bulk of protectionism is accomplished through non-tariff barriers, such as domestic content legislation and other restrictive measures.149 Antitrust is another one of the these measures that will, at least for the foreseeable future, be a growing and pivotal force on the world stage.

A. Perception of Unfair Enforcement

As mentioned earlier in this paper, there is a widespread perception that domestic countries unfairly apply antitrust laws to foreign firms through “unequal enforcement in order to create favorable market conditions” for their domestic industries and firms.150 A systematic bias against foreign companies would thwart the goal of antitrust and undermine countries’ cooperative efforts.151 In nearly equal measure, the E.U., U.S., and China have been the accused and the accuser of claims of unfair antitrust enforcement.152

#### Absent comity considerations, trade openness and cooperation drastically declines.

Wu & Wang ’19 [Qianlan and Xiaoye; Assistant Professor, School of Law University of Nottingham; Chinese Academy of Social Sciences; “US-EU-China Bilateral Competition Enforcement Cooperation and Trade Openness,” <https://law.haifa.ac.il/images/ASCOLA16/QianlanWu.pdf>; KS]

Trade openness has a closely intertwined relationship with competition law. Some scholars argue that competition laws are redundant, as open trade is sufficient to regulate and deter anti-competitive conduct.2 Others argue that antitrust laws are necessary to ensure that trade liberalization is not distorted by private anti-competitive conduct.3 Nonetheless, positive correlation has been established between greater antitrust enforcement on the one hand and trade openness on the other for both early and late adopters of competition regimes. 4

In this context, the world has seen increasingly stringent unilateral regulation against international cartels by competition regimes based on the effects doctrine -- a jurisdictional principle developed by the US and the EU courts.5 New competition regimes have rapidly followed suit, feeling that they could be disadvantaged in protecting their domestic market from transnational harm, if they fail to do so.6 The effects doctrine, thrusted into the transnational sphere by the US and EU courts, has been referred by new competition regimes to legitimize their regulation against international cartels.7 For example, Art. 2 of China’s Antimonopoly Law (2007) states that the law is applicable to monopolistic conducts outside the territory of China, provided the conduct has the effect of eliminating or restricting competition in the domestic market of China.8

However, competition authorities face challenges in investigating and enforcing domestic competition rules against international cartels. Potential divergence among individual authorities’ decisions, can undermine the effectiveness of regulation.9 Globally, competition-specific bilateral cooperation has, increasingly, become the tool used by competition regimes to seek greater enforcement.10 From 1991 to 2019, the US, the EU and China, three global trade powers, have entered bilateral arrangements with each other for greater competition enforcement.

The US and the EU have established state-level and treaty-based bilateral competition enforcement cooperation11 The US and China have established competition-authority-level, MOU-based cooperation in 2011.12 The European Commission and the Ministry of Commerce of China (MOFCOM) established the permanent EU-China Competition dialogue in 2004. 13 The Commission established MOU-based bilateral cooperation with China’s by then competition authorities in 2012.14 In 2019, the European Commission and China’s State Administration of Market Regulation (SAMR, the incumbent competition authority) renewed terms of reference for competition policy dialogue.15 Based on this, both sides adopted the practical guidance for cooperation on Investigating Anti-Monopoly Cases, a non-binding instrument for cooperation in international antitrust investigation and enforcement.16

The US and EU’s engagement with China in bilateral competition cooperation are significant steps forward aiming at greater antitrust enforcement. However, the impact of bilateral competition cooperation on trade openness has remained underexamined. The paper makes contribution to this field from a law and policy perspective. It argues that the US-EU-China bilateral competition cooperation frameworks show optimum and minimum levels of cooperation, however, share convergence in substance, which include information sharing, comity-based assistance and the respect for independence in decision making. It then examines the US, EU and China’s first multiple investigations on the international LCD panel cartel as a case study. It illustrates that the stringent unilateral regulation by mature competition regimes make them less reliant on bilateral cooperation with new regimes, the three competition regimes converge to uphold legal doctrines restricting the application of comity and the consultation mechanism plays a limited role in holding sides accountable in the cooperation. Hence despite closer bilateral cooperation between the US, EU and China, the international cartel regulation remains fragmented, posing public and private restraints to trade openness. The study argues that new policy tools should be devised to guarantee minimum information exchange among authorities based on mutually accepted confidentiality protection and that the effects doctrine should be reconsidered, as part of the transnational normative repertoire shaping international cartel regulation.

#### Trade solves nuclear war – no system with nuclear weapons is stable without it.

Jackson 15 [Matthew O. Jackson and Stephen Nei, Department of Economics, Stanford University. Networks of military alliances, wars, and international trade. 2015. www.pnas.org/content/pnas/112/50/15277.full.pdf]

We investigate the role of networks of alliances in preventing (multilateral) interstate wars. We first show that, in the absence of international trade, no network of alliances is peaceful and stable. We then show that international trade induces peaceful and stable networks: Trade increases the density of alliances so that countries are less vulnerable to attack and also reduces countries’ incentives to attack an ally. We present historical data on wars and trade showing that the dramatic drop in interstate wars since 1950 is paralleled by a densification and stabilization of trading relationships and alliances. Based on the model we also examine some specific relationships, finding that countries with high levels of trade with their allies are less likely to be involved in wars with any other countries (including allies and nonallies), and that an increase in trade between two countries correlates with a lower chance that they will go to war with each other.

The enormous costs of war make it imperative to understand the conditions under which wars can be prevented. Although much is known about bilateral conflicts, there is no formal theory of how networks of multilateral international relationships foster and deter interstate wars. We introduce a model of networks of military alliances and international trade that can serve as a foundation for study of international alliance structure and conflict. The idea of arranging multiple alliances to ensure world peace found perhaps it most famous proponent in Otto von Bismarck and his belief that the European states could be allied in ways that would maintain a peaceful balance of power (e.g., see ref. 3). The alliances that emerged were briefly stable following the unification and expansion of Germany that took place up through the early 1870s but were ultimately unable to prevent World War I. Indeed, many world conflicts involve multiple countries allied together in defensive and offensive groups, from the shifting alliances of the Peloponnesian and Corinthian wars of ancient Greece to the Axis and Allies of World War II, and so studying the fabric of alliances is necessary for understanding international (in)stability.

Between 1823 and 2003, 40% of wars with more than 1,000 casualties involved more than two countries, and many of the most destructive (e.g., the World Wars, Korean War, Vietnam, First and Second Congo Wars, etc.) involved multilateral conflicts.\* Most importantly, this is really a network problem. Multilateral wars never involved cliques (fully allied coalitions of more than two countries) against cliques. Out of the 23 wars between 1823 and 2003 that qualify as having at least one side with three or more countries, none of them involved a clique versus a clique. Thus, an approach of modeling networks of alliances, rather than coalitions (in which countries are partitioned into allied groups), is warranted. Also, a network approach meshes well with patterns of international trade, which are critical in determining which countries have incentives to attack or defend which others.

The history of interstate alliances between the early 1800s and the present can be broken into two periods. The early period (pre-1950) involved relatively sparse, very dynamic, and unstable networks, with more than 30% of alliances turning over every 5 years, and many wars. The later period (post-1950) involves networks that are more than four times as dense, and with high stability— with only 5% of alliances turning over every 5 years (see Data on Trade and Wars). These differences also correspond to the dramatic drop in wars seen in Fig. 1 as well as a parallel increase in the density of trading partnerships.

To gain insight into the relationship between networks of alliances and the incidence of wars, we model the incentives of countries to attack each other, to form alliances, and to trade with each other. We first define a concept of networks that are stable against wars from a military point of view, when trade is ignored. We show that there are no (nonempty) networks of alliances that are stable, where stability requires that no country be vulnerable to defeat accounting for offensive and defensive alliances, and no country wants to add or drop alliances. This instability is suggestive of the shifting alliances and recurring wars of the 19th and first half of the 20th centuries. Wars, however, have greatly subsided in parallel with the huge increase of trade, trends that we discuss in detail below. We thus enrich the base model to include international trade, introducing a concept of a network of alliances being war-and-trade-stable, which allows countries to form alliances for either economic or military considerations. This enables the existence of networks of alliances that are stable against conflict and the addition or deletion of alliances. Trade helps in two ways: First, it provides economic motivations to maintain alliances, and the resulting denser network has a deterrent effect; second, it reduces the incentives of a country to attack trading partners. This reduces the potential set of conflicts and allows for a rich family of stable networks that can exhibit structures similar to modern trade and alliance networks. In examining the data, we find that an increase in the number of a country’s allies correlates with a lower frequency with which it is attacked, and increasing trade between two countries correlates with a lower frequency of conflict between them.

We discuss below how the model fits with, and sheds light on, other data and theories, such as the advent of nuclear weapons, the Cold War, and the increase in the number of democracies.

Our analysis fits firmly into the “rationalist” tradition based on cost and benefit analyses, with roots in ref. 5.† To our knowledge, there are no previous models of conflict that game-theoretically model networks of alliances between multiple agents/countries based on costs and benefits of wars.‡ There are previous models of coalitions in conflict settings (e.g., see ref. 12 for a survey). Here, network structures add several things to the picture. Our model examines group conflict (e.g., ref. 13) but enriches it to admit network structures of alliances and of international trade. This allows us to admit patterns that are consistent with the networks of alliances that are actually observed, which are far from being partitions, moving the models toward matching observed patterns of wars, trade, and alliances. Moreover, as we see below both empirically and theoretically, the patterns and number of partners of a given country matter beyond group membership or overall levels of interaction. Finally, our model illuminates the relationships between international trade, stable network structures, and peace, something not appearing in the previous literature—because the previous literature that involves international trade and conflict generally revolves around bilateral reasoning or focuses on instability and armament (e.g., ref. 14) and does not address the questions that we address here. The complex relationship between trade and conflict is also the subject of an active empirical literature (e.g., refs. 15–19). The complex correlations between conflict and trade are illuminated by a model that provides structure with which to interpret some of the observations.

Data on Trade and Wars Trends in Military Alliance Networks. Marked differences occur between the military alliances we see in the Alliance Treaty Obligation and Provisions Project data at different points in time.§ There are two major changes that we see comparing the period before to that after 1950 (see also SI Appendix). The first major change is that large turnover in alliances, which constantly shift in the period from 1816 to 1950, drops substantially. Specifically, consider an alliance between two countries that is present in year t, and calculate the frequency with which those two countries are still allied in year t+5. Doing this for each year from 1816 to 1950, we find the frequency to be 0.695. When doing this for each year from 1950 to 2003 the frequency becomes 0.949. Thus, there is an almost onethird chance that any given alliance disappears in the next 5 years in the pre-WWII period, and then only a 5% chance that any given alliance at any given time will disappear within the next 5 years in the post-WWII period. The second major change is that the network of alliances greatly densities. Between 1816 and 1950 a country had on average 2.525 alliances (SD 3.809).1 During the period of 1951-2003 this grows by a factor of more than four to 10.523 (SD of 1.918). Thus, there are significantly more alliances per country in the post-1950 than the pre-1950 period. To summarize, in the pre-WWII period countries have just a couple of alliances on average and those alliances rapidly changed; in contrast, in the post-WWII period countries form on average more than 10 alliances and change much more rarely. Trends of Wars and Conflicts. Another trend is that the number of wars per country has decreased dramatically post-WWII, even though the number of countries has increased—so there are many more pairs of countries that could go to war. For example, the average number of wars per pair of countries per year from 1820 to 1949 was 0.00059, whereas from 1950 to 2000 it was 0.00006, roughly a 10th of what it was in the previous period. We see this in Fig. 1 (SI Appendix shows that this is robust across a variety of methods of measurement). Also, with the exceptions of the anomalous Falklands War, and the Korean and Vietnam Wars—which had Cold War considerations with major protagonists on both sides, including nations outside of Korea and Vietnam—the 24 other Militarized Interstate Disputes (MID) 5s since 1950 involved lesser-developed (lower-trade) countries as the major protagonist on at least one (and often both) sides of the dispute. Moreover, major trading partners at the time do not appear on opposite sides of the dispute. Trade and Wars. International trade has had two major periods of growth over the last two centuries. The first was from the 1870s through 1913, during which world merchandise exports as a percent of gross domestic product (GDP) grew from 5% to nearly 12%, disrupted by the First World War, and then picking up again after the Second World War, during which exports grew from 7% in 1950 to over 25% by 2012. Putting this trend together with that of wars, we see that the decrease in wars is mirrored by an increase in trade (see SI Appendix for more background on trade and war). Moreover, trade has become less concentrated: In the late 19th century most of the world’s trade was concentrated among a small portion of countries, and not all of them traded extensively with each other. Trade is more balanced, and in our model that enables conflict-free networks, and such trade has emerged both in scale and scope mostly in the past six decades. This answers an important puzzle from the data: Export levels in 1913 are similar to those in 1973, and yet the drop in wars occurs from the 1950s onward, and not in the early 20th century. In this regard, our model below is helpful in suggesting a different measure to use than export levels. In our analysis, conflict ends up related not simply to the level of trade, but the patterns of trade partnerships. The numbers of trading partners paint a clearer picture between trade and wars, and a different pattern than the overall level of trade, which turns out to be concentrated among a smaller number of countries before WWI. In particular, as we see in Table 1, the number of trading partners per country is higher in 1950 than in 1913, and the number roughly doubles by 1973, depending on which threshold one uses to define “partner”.# These numbers do not imply causation because there are many confounding variables that make it difficult to test any theory directly. Nonetheless, this motivates developing a model that predicts which factors matter and how they relate to each other. A Model of Networks of Alliances Countries and Networks. N = {1, ... ,n} is a set of countries. Countries are linked through alliances, represented by a network of alliances, g cJV2, with the interpretation that if ij Eg countries /' and j are allies. So, for instance, the network g = {12,23,45} on a set of countries N = {1,2,3,4,5} represents situations where country 2 is allied to both 1 and 3, and 4 is allied with 5, and where no other alliances are present. Alliances represent channels through which countries can coordinate military actions, either offensively or defensively. The presence of alliances does not require countries to come to each other’s aid, because that will have to be incentive-compatible, as embodied in our definitions below. The operative part of the assumption is that countries either need to have an alliance or add one to coordinate their military activities. Nj(g) = {j:ijeg} are the allies of i. For a given alliance ij£g, let g + ij denote the network obtained by adding the alliance ij to g, and for ij eg, let g-ij denote the network obtained by deleting the alliance ij fromg. In a slight abuse of notation, let g-i denote the network obtained by deleting all alliances of the form ik, k e/V, from g. Military Strengths and Wars. Each group of countries CcN has a collective military strength M(C). Let M, denote A/({/’})- A prominent example is with M(C) = If there is a war between sets of countries C and C', with C being the aggressor, then C “wins” if M (C) > y(C, C')M(C'). The parameter y(C, C') > 0 is the defensive advantage (of C' over C if y(C, C')>1) or offensive advantage (of C over C' if y(C, C‘) < 1) advantage in the war. The dependence of the parameter y(C,C') on the groups of countries in question allows the model to incorporate various geographic and technological considerations (e.g., land and sea accessibility between countries, nuclear versus conventional capabilities, troop locations, etc.).\*\* We maintain weak monotonicity conditions on the functions:++ • M(C") > M(C) whenever C C C": bigger groups of countries in terms of set inclusion are at least as strong as smaller groups. y{C", C”) <y(C,C') whenever CcC" and C" cC': adding countries to the attacking group and/or subtracting them from the defending group does not increase the defensive advantage. Vulnerable Countries and Networks. A country i is said to be vulnerable at a network g if there exists j and CcNjig) u {/} such that jeC,i£C and M (C) > y(C, C')Af(C'), where C' = /u (/V,(g) nCc) and Cc is the complement of C. In this case, country j is a potential aggressor at a network g.\*\* Vulnerability is illustrated in Fig. 2, Left. Note that country 5 cannot join countries 2, 3, and 4 in attacking country 1 because it is not allied with any of them, and countries 2 and 3 can attack 1 despite being allies with 1. For a group of countries to attack they must coordinate via some country j, and then the target country i can be defended by its neigh bo rs.ss Vulnerability just defines the technology of war. If country 1 was vulnerable to attack by 2, 3, and 4, then 5 might have no interest in actually defending 1, which might also give up with minimal resistance. Vulnerability identifies when it is that there is an instability and some country could be attacked successfully. Incentives and War-Stable Networks. We now introduce the concept of war stability that accounts for countries’ incentives to conquer other countries and to add or delete alliances. We first present the definition that does not include trade. The motivation for attacking another country comes from the economic spoils.111 Netted from this arc expected damages and other costs of war. The expected net gain from winning a war is then represented as Eik(g,C), which arc the total economic gains that accrue to country k if country i is conquered by a coalition C with k 6 C when the network is g and i is defended by the coalition C' = {/} U (Ni(g) n Cc).\*\* For example, these include natural resources or other potential spoils of war. Finally, there are costs to alliances. The cost of country i’s having an alliance with country j is some c,y(g) > 0. This could include costs of opening diplomatic, military and communication channels, coordinating military operations or intelligence, or other related costs. We generally take costs of alliances to be small relative to the potential spoils of winning a war, because otherwise the analysis is degenerate.\*\*\* The costs are also sufficiently small that any country i is willing to pay c,j(g + ij) to add an alliance with j, provided that the addition of the alliance would change /' from being vulnerable to not vulnerable. Define a network g to be war-stable if three conditions are met: 51 no country is vulnerable at g; 52 no two countries both benefit by adding an alliance to g; and 53 no country has an incentive to delete any of its alliances. Implicit in this definition (in SI) is that if some country were vulnerable, then a group that could defeat the country and its remaining allies would have an incentive to attack and defeat the country—and so that would be unstable. Also, implicit in the definition is that if the country and its allies could be successful in fending off an attack, then they would do so and so things would be stable. For now, we simply assume that winning a war (or successfully aiding an ally in defense) is desired and losing a war is not. When we model trade, we are more explicit about gains and losses. Given our assumptions on the relative sizes of the spoils of war and the costs of alliances, and that alliances are costly, S2 is equivalent to S2 Ijk £g, no country is vulnerable at g + jk, and S3 is equivalent to S3 'ijk eg, both j and k are vulnerable at g - jk. This definition is similar to that of pairwise stability (26) in that we consider changes in the network one alliance at a time, and both additions or deletions—requiring two countries to benefit to form an alliance, but only one country to benefit to break an alliance. Given that there is already a large literature on possible variations on definitions of network formation, we focus on this basic definition here.+++ Nonexistence of War-Stable Networks. For the case of two countries, it is direct to check that the only possible stable network is the empty network and it is war-stable only if each country has a sufficient defensive advantage. Thus, we consider the more interesting case with n > 3. Before presenting the results on lack of existence of war-stable networks, let us illustrate some of the main insights. Consider a network like that pictured in Fig. 2, Right, the ring network with five countries. In order for 1 not to be vulnerable under the addition of the link 53, it must be that y({2,3,4,5}, {1 })M[ >M( { 2,3,4,5}) (because it must not be vulnerable to 3 and its allies 2,4, and 5). However, this implies that 1 is not vulnerable in the original network if it deletes an alliance regardless of the attacking coalition, and so this contradicts war stability. The following theorem shows that these arguments extend. Theorem 1. Let n> 3. There are no nonempty war-stable networks. The empty network is war-stable if and only if M({j,k})< y({j,k), {i\)M, for alt distinct i,j,k. War-stable networks only exist in the extreme case in which the defensive parameter is so high that the weakest country can withstand an attack by the two strongest countries in the world, in which case the empty network is stable. Outside of that case, there are no war-stable networks. The intuition behind this theorem is similar to that of the example: Outside of the extreme case, requiring that a country not be vulnerable, nor vulnerable to the addition of any alliances, implies that a country has extraneous alliances.

The nonexistence of war-stable networks extends to other definitions of vulnerability, with some interesting variations, as we discuss in the SI Appendix.

Nuclear Weapons. An obvious difference post WWII is the presence of nuclear weapons, leading to dramatic changes in the technology of war. Although rarely used, nuclear weapons change the technology.\*\*\* However, we emphasize that their existence alone does not lead to stability: Our model (when attacking countries can be joined by their neighbors) allows for completely arbitrary asymmetries in military strengths and in offensive/defensive advantages. There is no way for countries to ally themselves, as a function of their strengths and nuclear capabilities, to produce a stable and nonempty network. The only way in which nuclear weapons could stabilize things would be for all countries to have them and for the empty network to ensue. This is clearly not the case.

Therefore, one needs to add trade, or some other consideration, to the model to explain why we see denser networks that are stable and why many nonnuclear countries also live in relative peace. Thus, we turn to the analysis of the stability when there are substantial trade considerations.

#### Status quo antitrust laws causes backdoor protectionism and splinters global IP.

Ginsburg & Taladay ’18 [Douglas and John; September 28; Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the Global Antitrust Institute’s International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice; Partner and Co-Chair of the Antitrust and Competition Law Practice at Baker Botts LLP, Chair of the Business and Industry Advisory Committee to the OECD’s Competition Com- mittee, Chair of the United States Council for International Business Competition Committee, and Co- Chair of the ABA Section of Antitrust Law’s Procedural Transparency Task Force; *George Mason Law Review,* “THE ENDURING VITALITY OF COMITY IN A GLOBALIZED WORLD,” <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3257019>; KS]

IV. COMITY IN ACTION

Strong comity principles localize the enforcement of competition laws. They allow nations to regulate their economies as they see fit and in accordance with local culture and custom. When applied, comity reduces the likelihood that one country would enforce its laws in a manner that greatly disrupted (whether intentionally or not) another country’s economy.96

Where there is a direct conflict of laws, the cases make clear that comity has an important role to play in respecting the policy decisions reflected in the laws, actions, and pronouncements of other jurisdictions.97 In these cases, U.S. courts have taken action to retract the reach of the U.S. antitrust laws in order to ensure that foreign governments’ interests are respected.98 But there is an equally important application of comity that requires antitrust enforcement authorities to apply comity out of respect for the interests of foreign governments. That application lies in declining to enforce competition laws, and avoiding the application of remedies beyond the borders of an agency’s own jurisdiction, when a foreign jurisdiction affirmatively has chosen a less restrictive application of its competition laws. In these cases, where “Jurisdiction A” has affirmatively decided and declared that it will not enforce its competition laws against certain commercial activity, “Jurisdiction B” should not only respect that approach, but take pains to ensure that its application of its competition laws does not overtake the non-enforcement decision of Jurisdiction A.

For this and other reasons, U.S. enforcement agencies have explicitly included comity considerations in their guidance concerning prosecutorial discretion: “The U.S. enforcement agencies recognize that concepts of international comity must play a role in antitrust enforcement. Accordingly, even when jurisdiction exists, the Department of Justice will consider ‘whether significant interests of any foreign sovereign would be affected.’”99 It is not clear, however, that foreign competition authorities have comparable positions.

Without this recognition of comity by competition authorities, the international competition community faces the potential for a “most restrictive means” approach to competition law enforcement, with those jurisdictions having the lowest tolerance dictating the outcome for other jurisdictions globally. This type of approach would allow a single jurisdiction to act as the ‘global competition police’ according to whatever competition standard it enforces. This creates the potential, and indeed the incentive, for jurisdictions to use competition law enforcement as an aggressive tool of industrial policy.100

A good example of the application of a domestic antitrust law that is in conflict with foreign antitrust laws, with arguable industrial policy objectives, is the recent decision of the Korea Fair Trade Commission (“KFTC”) against Qualcomm, which seeks to impose a global remedy based upon Korean antitrust standards that are not applicable elsewhere.101 In that case, the KFTC concluded that Qualcomm’s licensing practices violated Korean competition law because the company refused to license its standard essential patents, and “coerced” licensees to pay “unilaterally determined royalty rates,” in circumvention of its FRAND commitments.102 Both the “refusal to license” theory and the “coercion” theory, which is a thinly veiled excessive pricing claim, would not be recognized theories of antitrust harm in the United States.

Nonetheless, the KFTC imposed a “global remedy” that would force Qualcomm to change its licensing practices worldwide. It reasoned that: [T]he illegal conduct of [Qualcomm has] been carried out not only against the Korean enterprises and the Korea-registered patents in the territory of Korea, but also in the remaining parts of the world, in the same way and at the same time. The effects of the illegal conduct influence overseas markets as well as the domestic market. . . . [I]t is reasonable not to limit the [remedial measures] and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anti-competitive effects influencing the Korean market.103

But the KFTC wrongly assesses the need for the application of comity. It considers comity only in the case of affirmative conflict stemming from an application of another country’s laws: The issue of international comity related to a law enforcement of other countries is to be considered in cases where there is any conflict between the [remedial orders] issued by KFTC and any law enforcement of another country, etc. The issue of international comity does not arise simply because a conduct carried out of the country is included in the matters subject to a [remedial order].104

Thus, the KFTC ignores completely situations in which the antitrust laws of other countries would permit, or even endorse, the actions it is prohibiting Qualcomm from taking in those countries.105 For example, the KFTC condemns as per se unlawful Qualcomm’s use of so-called portfolio licensing,106 but the policies of many other jurisdictions not to preclude portfolio licensing suggests it can be viewed as harmless or efficiency enhancing. The KFTC’s order nonetheless would seek to preclude portfolio licensing globally, ignoring the approach of other jurisdictions as to what constitutes permissible conduct.

In short, the KFTC would respect comity only if, as is the case in most instances of cooperation, the foreign jurisdiction has a parallel enforcement proceeding on the same substantive basis. In all other circumstances, other countries are forced to abide by the KFTC’s rules on how the commercial market should function. This is evident from the KFTC’s determination of when comity might require different action: “[Qualcomm] may request the Korea Fair Trade Commission to re-review this [remedial order] if the final and binding judgment, measure or order of a foreign court or competition authorit[y] . . . conflicts with this [remedial order], making it impossible to comply with both of them at the same time.”107

This would result in Korea exercising direct control over the licensing of U.S. and other jurisdictions’ patents, despite the fact that those other jurisdictions clearly have a greater interest in the protection of the intellectual property rights they have granted than does Korea. By contrast, the U.S. generally does not use compulsory licensing as a remedy in non-merger cases.108 Comity directly addresses this condition, requiring a jurisdiction to balance its own enforcement priorities against the interests of the foreign jurisdiction(s) in which the enforcement action would have effects.

The KFTC decision can be contrasted with the decision of China’s National Development and Reform Commission (“NDRC”) in an investigation of the same conduct. In February 2015, the NDRC found Qualcomm guilty of abuse of market dominance and engaging in monopolistic activities that eliminated and restricted competition, namely: “(1) charging unfairly excessive patent royalties; (2) tying patents that are not standard-essential patents in the telecom industry without a legitimate reason; and (3) imposing unreasonable conditions in the sale of baseband chips.”109 Qualcomm was ordered to cease its infringing activities and was fined $975 million, which represented about eight percent of its 2013 revenue in China.110 The NDRC expressly kept its decision and remedy, however, territorial in nature. The NDRC focused on: (1) licensing of Chinese standard essential patents (2) to Chinese manufacturers (3) for use in China.111

The NDRC decision applies comity far more conscientiously than does the KFTC decision. Even though the substantive competition laws of China differ significantly from the laws of the United States and many other jurisdictions, China’s remedial measures are appropriately limited to ensure that the commercial result is not forced upon other jurisdictions that might have a significant, indeed greater, interest in regulating the use and licensing of intellectual property.

Intellectual property, along with other technology products and services, may be among the interests particularly subject to adverse effects from the lack of comity. These and other products and services commonly transited across borders, such as energy, commercial banking, natural resources, and electronics, differ from traditional products and services that are typically local or regional in scope. Therefore, jurisdictions should be particularly vigilant in these sectors to respect the legitimate interests of other sovereigns with different competition laws.

CONCLUSION

Traditional comity requires more than avoidance of conflicting outcomes and remedies; it also requires respect for differences in the scope and commercial effect of the laws of foreign sovereigns. If competition agencies do not apply comity in the application of their laws and in limiting the extraterritorial scope of their remedies, then international competition enforcement will quickly devolve into a “race to the bottom,” in which the country with the most restrictive competition laws will regulate commercial conduct for the entire world. The effects doctrine is a legitimate basis upon which to apply competition laws and impose remedies but, just as an agency considers how foreign conduct affects its domestic consumers, it likewise should ensure that its remedy does not unnecessarily affect foreign governments, agencies, business interests, or consumers. Comity should be invoked to prevent the effects doctrine from becoming a way for one jurisdiction to impose its domestic commercial policy on the conduct of businesses outside its borders. Otherwise competition enforcement turns from a policy to protect consumers into a slightly disguised way of implementing industrial policy.

#### IP diffuses global existential risks – maintaining consensus on enforcement is key

Ezell & Cory 19 [Stephen Ezell is vice president, global innovation policy, at the Information Technology and Innovation Foundation (ITIF). He focuses on science and technology policy, international competitiveness, trade, manufacturing, and services issues. Nigel Cory is an associate director covering trade policy at the Information Technology and Innovation Foundation. He focuses on cross-border data flows, data governance, intellectual property, and how they each relate to digital trade and the broader digital economy. Cory has provided in-person testimony and written submissions and has published reports and op-eds relating to these issues in the United States, the European Union, Australia, China, India, and New Zealand, among other countries and regions, and he has completed research projects for international bodies such as the Asia Pacific Economic Cooperation and the World Trade Organization. "The Way Forward for Intellectual Property Internationally." https://itif.org/publications/2019/04/25/way-forward-intellectual-property-internationally]

The global economy, including developed and developing nations alike, is becoming more innovation-driven—powered by knowledge, creativity, and technology, each of which is fundamentally supported by intellectual property (IP) and intellectual property rights (IPR) protections. And yet, over the past two decades, the policy debate over IP’s role has come under an increasingly active and coordinated attack, driven by IPR skeptics and opponents hailing from a variety of academic and multilateral institutions, nongovernmental organizations (NGOs), and some developing nations and policymakers therein. They have done much to advance a false narrative that strong and effective IP is a win-lose, buy-sell proposition, which only helps the developed “North” (as opposed to the underdeveloped “South”).

Yet if the international community is going to maximize global innovation—something that is critical if we are to make faster progress on commonly shared global challenges such as climate change, disease prevention and treatment, and economic growth—we will need a stronger and more wide-ranging consensus on the importance of IP to every country throughout the world. To maximize the role intellectual property can play in enabling innovation across the world, the countries that best recognize the essential link between the two—including the United States, Commonwealth nations, European Union members, Japan, Korea, Singapore, and others—need to revise and amplify efforts to build out and strengthen the international framework of intellectual property rules, norms, and cooperation. A new way ahead is needed to overcome and move beyond the status quo stalemate that defines the intellectual debate over IP in the global economy, which remains starkly and deeply divided along developed-developing country lines that were largely set 20 years ago with the signing of the Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement at the World Trade Organization (WTO).

Despite tremendous changes in technologies and business practices, as well as the need for greater global innovation to help address global policy challenges, the international framework and debate around IP largely pivots around the positions of IPR opponents who favor weak or nonexistent protections and enforcement, and who view IP as enabling monopolistic rents imposed by wealthy multinationals and rich nations. Playing the victim card, they seek to portray IPR as exploitative and favoring the rich North at the expense of the poor South. Opponents of stronger IP rights further advance the view that weak protection and forced redistribution of IP are shortcuts to economic development or paths to address important international challenges such as global warming and human health. But this framing—which is increasingly reflected in global dialogues—is fundamentally misguided and fails to recognize the long-term negative impacts such a policy framing would have on global innovation and productivity, while distracting attention and resources from far-preferable domestic policies that could genuinely support the development, deployment, adoption, and absorption of new technologies by emerging economies.

This report begins by establishing the essential link between IP and innovation (and trade and innovation), examining the scholarly literature documenting how robust IPRs benefit all nations (developed and developing alike), and by explaining why robust IPRs are essential to maximize the output of innovation globally, thus making IP a legitimate and fundamental component of trade agreements and global trade governance. It then conceptualizes and characterizes opponents’ ideological opposition to robust intellectual property rights, catalogs the different types of groups and organizations opposed to IPR, and shows how the debate over IP played out in recent negotiations over the Trans-Pacific Partnership (TPP) trade agreement. Finally, the report provides recommendations for the world’s leading innovation nations to achieve a more robust intellectual property regime, and ultimately greater levels of innovation, internationally.

The report recommends that advocates of innovation and robust IPRs do the following:

Reframe the debate to make the case that global trade is about maximizing global innovation and that ensuring robust intellectual property rights and protections are key to this;

Directly rebut the most egregious anti-intellectual property assertions of IP opponents;

Implement new strategies to advance a stronger global IPR regime, including an “all-points” strategy;

Engage more like-minded allies; and

Proactively assist developing nations with their efforts to become more innovation-driven economies, in part by increasing funding for targeted technical assistance and capacity building around IPR.

THE GROWTH OF INNOVATION AND INTELLECTUAL PROPERTY

Innovation represents the creation of new value for the world, whether that “value” is created through new technologies, new business models, new products and services, or new forms of social entrepreneurship. Innovation should be at the top of policymakers’ agenda, as it is the principal driver of both long-term economic growth and improvements in quality of life. For instance, the U.S. Department of Commerce reported in 2010 that technological innovation can be linked to three-quarters of the U.S. growth rate since the end of World War II.1 Similarly, two-thirds of United Kingdom private-sector productivity growth between 2000 and 2007 resulted from innovation.2

Intellectual property plays a key role in driving innovation and economic growth.3 Everywhere we go, we are surrounded by intellectual property. Trademarks signal the origin of products to consumers. Designs specify how products look. Copyrights enable artistic creations, such as books, music, paintings, photos, and films. Patents protect technical inventions in all fields of technology. Intellectual property’s role has evolved into a force that influences a wide swath of demand and sectors, making it an increasingly influential framework condition that affects not only innovation, but also trade, competition, taxes, and other areas.4 The reality is intellectual property is mainstream and pervasive. In today’s economy, the generation and management of knowledge plays a predominant role in wealth creation, particularly when compared with traditional factors of production such as land, labor, and capital.5

IP plays a key role in driving innovation and economic growth.

Intellectual property represents the main value component of many trade transactions.6 Indeed, global trade flows are increasingly dominated by knowledge-intensive goods and services, which are growing faster than capital- and labor-intensive flows.7 Global cross-border exports of commercial knowledge- and technology-intensive goods and services reached an estimated $4 trillion in 2014, consisting of $1.6 trillion of commercial knowledge-intensive services and $2.4 trillion of exports of high-tech products.8 In fact, knowledge—rather than labor, capital, or resource-intensive components—represents about one-half of current global trade flows; and this knowledge-intensive component is growing faster, at about 1.3 times the rate of labor-intensive flows.9 This is partly due to the rise of knowledge-intensive business services—such as computer-related services (e.g., software and information processing), research and development (R&D) services, and business services (e.g., legal, accounting, and advertising)—which provide critical intermediate inputs into other economic activity. Research estimates that while services account for just 20 percent of gross exports worldwide, the share more than doubles to 41 percent when considering value-added exports.10.

#### Tech innovation prevents an array of threats---extinction

Matthews 18 [Dylan. Co-Founder of Vox, citing Nick Beckstead @ Rutgers University. 10-26-2018. "How To Help People Millions Of Years From Now." Vox. https://www.vox.com/future-perfect/2018/10/26/18023366/far-future-effective-altruism-existential-risk-doing-good]

If you care about improving human lives, you should overwhelmingly care about those quadrillions of lives rather than the comparatively small number of people alive today. The 7.6 billion people now living, after all, amount to less than 0.003 percent of the population that will live in the future. It’s reasonable to suggest that those quadrillions of future people have, accordingly, hundreds of thousands of times more moral weight than those of us living here today do. That’s the basic argument behind Nick Beckstead’s 2013 Rutgers philosophy dissertation, “On the overwhelming importance of shaping the far future.” It’s a glorious mindfuck of a thesis, not least because Beckstead shows very convincingly that this is a conclusion any plausible moral view would reach. It’s not just something that weird utilitarians have to deal with. And Beckstead, to his considerable credit, walks the walk on this. He works at the Open Philanthropy Project on grants relating to the far future and runs a charitable fund for donors who want to prioritize the far future. And arguments from him and others have turned “long-termism” into a very vibrant, important strand of the effective altruism community. But what does prioritizing the far future even mean? The most literal thing it could mean is preventing human extinction, to ensure that the species persists as long as possible. For the long-term-focused effective altruists I know, that typically means identifying concrete threats to humanity’s continued existence — like unfriendly artificial intelligence, or a pandemic, or global warming/out of control geoengineering — and engaging in activities to prevent that specific eventuality. But in a set of slides he made in 2013, Beckstead makes a compelling case that while that’s certainly part of what caring about the far future entails, approaches that address specific threats to humanity (which he calls “targeted” approaches to the far future) have to complement “broad” approaches, where instead of trying to predict what’s going to kill us all, you just generally try to keep civilization running as best it can, so that it is, as a whole, well-equipped to deal with potential extinction events in the future, not just in 2030 or 2040 but in 3500 or 95000 or even 37 million. In other words, caring about the far future doesn’t mean just paying attention to low-probability risks of total annihilation; it also means acting on pressing needs now. For example: We’re going to be better prepared to prevent extinction from AI or a supervirus or global warming if society as a whole makes a lot of scientific progress. And a significant bottleneck there is that the vast majority of humanity doesn’t get high-enough-quality education to engage in scientific research, if they want to, which reduces the odds that we have enough trained scientists to come up with the breakthroughs we need as a civilization to survive and thrive. So maybe one of the best things we can do for the far future is to improve school systems — here and now — to harness the group economist Raj Chetty calls “lost Einsteins” (potential innovators who are thwarted by poverty and inequality in rich countries) and, more importantly, the hundreds of millions of kids in developing countries dealing with even worse education systems than those in depressed communities in the rich world.

## 1AC – 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.

#### The scenario 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 raises prices and guarantees food insecurity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 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 utilizing 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

### Cartels

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

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

Co-operation agreements and crisis cartels

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

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

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

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

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

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

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

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

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

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

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

#### Cartel creep.

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

B. Foreign Conspiracies and Cartel Creep

Participating in a cartel that fixes prices in foreign markets makes it easier to create a cartel in the United States. Historically, small cartels grow into larger cartels as they expand geographically and into new product lines. For example, the American-based heavy equipment cartel of the 1950s began by rigging bids for a limited range of products and then eventually grew into a significantly larger conspiracy across twenty different major product lines.120 The multibillion-dollar international vitamin cartel of the 1990s expanded both geographically and across product lines.'21 Starting with a few vitamin categories in the European market, the cartel eventually swelled to encompass over twenty product lines across the globe, including in the United States. This cartel creep-by which successful cartels extend their reach until they encircle the globe-is common.

#### 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.

#### Extinction.

**Klare ’20** [Michael; 2020; Professor Emeritus of Peace and World Security Studies Hampshire College, Senior Visiting Fellow at the Arms Control Association, Ph.D. from the Graduate School of the Union Institute; All Hell Breaking Loose: The Pentagon's Perspective on Climate Change, “A World Besieged,” Ch. 1]

Mass Migration Events

Whenever U.S. security analysts have considered the risks of climate change, a perpetual concern has been that extreme events and prolonged droughts could trigger a massive flight of desperate people seeking refuge in other locales, provoking **chaos** and **hostility**wherever they travel. This anxiety was evident in some of the analysts’ earliest public statements on the national security implications of warming, and it has remained a major theme to the present day. In its initial 2007 report on climate change, for example, the CNA Corporation warned that severe climate effects “can fuel migrations in less developed countries, and these migrations can lead to **international political conflict**.”59 Defense Secretary Hagel sounded a similar note in his 2014 address to the Conference of the Defense Ministers of the Americas. “Drought and crop failures can leave millions of people without any lifeline, and trigger waves of mass migration,” he declared.60

In talking about the risk of mass migrations, U.S. security analysts are typically discussing long-term pressures—such as prolonged drought and coastal erosion—that deprive people of their livelihoods and force them to move elsewhere in search of jobs and income. “When water or food supplies shift or when conditions otherwise deteriorate (as from sea level rise, for example), people will likely move to find more favorable conditions,” the CNA explained.61 The ongoing relocation of impoverished farmers from scorched inland areas to urban centers, for instance, fits this pattern. But American analysts also worry about sudden-onset climate events that would spark rapid, large-scale movements of people from one country to another, setting off a political firestorm. Such destabilizing events, which could become more frequent as global warming advances, are akin to the other types of climate shock waves discussed in this chapter.

A **migratory shock wave** of this type could be **ignite**d by various kinds of climate events, such as a cluster of severe hurricanes or crop failures. If, under these circumstances, local governments prove unable to provide adequate emergency assistance or collapse entirely, vast numbers of people may simultaneously choose to move to adjacent (or even distant) countries in search of refuge and a new start in life. Some environmentalists are predicting that the numbers of such “climate refugees,” as they have sometimes been termed, could reach into the hundreds of millions as global warming advances; others have cautioned against such predictions, saying the evidence for them is still inconclusive. Whatever the exact numbers, the arrival of large groups of outsiders—many, if not most, in need of substantial assistance—is bound to generate unease and, in all likelihood, hostility in the destination countries. The fact that the newcomers often differ in their race and religion from the natives only adds to the risk of antagonism.62

A foretaste of what this might look like was provided by the migratory surges from North Africa and the Middle East into southern Europe following the Arab Spring of 2011, as desperate residents of battleground countries such as Libya and Syria sought to escape the fighting and accompanying decline in economic conditions. The situation in Libya was particularly fraught for migrant workers from the Sahel region and sub-Saharan Africa, who made up as much as 10 percent of Libya’s population prior to the revolt against Gadhafi. Those workers (mostly young men) had already fled their own countries because of drought, desertification, and joblessness, seeking low-level positions in various state-backed enterprises in Libya under the old regime. After Gadhafi’s removal, they lost their jobs and faced intense hostility from native Libyans, who viewed them as interlopers and Gadhafi loyalists. Reluctant to return to their own impoverished countries, huge numbers of these migrant workers sought to move farther north, fleeing in rickety ships across the Mediterranean to Europe—where, if they survived the journey, they usually encountered fresh animosity.63

An even greater number of people sought to flee the fighting and abysmal living conditions in Syria. Beginning in 2012, and reaching a flood tide in 2015, vast multitudes of desperate Syrians sought to reach the relative security of Europe, mostly by traveling by raft from southwestern Turkey to Lesbos and other Greek islands in the Aegean Sea; from there they sought passage to wealthier European countries farther north, especially Germany, Austria, and Norway. Although welcomed at first by sympathetic Europeans (most notably German chancellor Angela Merkel), the Syrian refugees started arriving in such massive numbers that many residents of the receiving nations turned hostile, embracing measures such as fencing off their borders and using armed police to repel the migrants—steps taken by Hungary in 2015 as hundreds of thousands of refugees moved north from Greece.64 With anti-refugee sentiment growing throughout the region, European officials were forced to adopt ever more stringent means to stem the flow, including mobilizing NATO’s naval fleets to patrol waters of the Aegean Sea and assist the Greek coast guard in blocking migrant vessels from Turkey.65

When examining the causes of the massive migrant flood that overwhelmed Europe in 2015, most analysts have concluded that the principal driving forces were the ongoing violence in Syria and the lack of meaningful economic opportunities both there and in transit countries such as Jordan, Lebanon, and Turkey. Nevertheless, some analysts believe that climate change had a contributing role in sparking the migratory shock wave, largely by causing a severe drought in 2007–10 that decimated Syrian agriculture and drove impoverished farmers into overcrowded urban centers, where they helped launch the anti-Assad rebellion.66 “Syria’s drought has destroyed crops, killed livestock and displaced as many as 1.5 million Syrian farmers,” observed John Wendle in Scientific American. “In the process, it touched off the social turmoil that burst into civil war,” impelling millions of people to flee.67 Other analysts discount the role of climate change in provoking the Syrian civil war and resulting migratory impulse, insisting on the primarily political nature of the conflict.68 But even if warming’s role was relatively modest in this case, the events of 2012–15 provide an indication of what we might expect from future migratory shock waves as temperatures rise, farming becomes untenable in vast areas of the planet, and masses of people move about in search of new ways to survive.

While Europe—given its proximity to climate-sensitive areas of Africa and the Middle East—is expected to prove the principal objective of many of these migratory surges, North America is also considered a likely destination for future mass migrations. The CNA Corporation, for example, has suggested that the greatest climate-related threat to American security—other than its direct impacts on the U.S. homeland itself—would arise from the migratory implications of climate disasters occurring in nearby countries, especially in Central America and the Caribbean. As warming advances, it noted, severe climate events will afflict many of these areas, destroying entire habitats and impelling millions of people to head north in search of refuge and employment opportunities.69

General John F. Kelly, while serving as commander of the U.S. Southern Command, spoke of such occurrences as “mass migration events,” and emphasized the importance of taking steps to prevent future climate refugees from entering the United States. With that goal in mind, he told the Senate Armed Services Committee in 2014, “We regularly exercise our rapid response capabilities in a variety of scenarios, including responding to a natural disaster [and a] mass migration event.”70 In one such exercise, Southcom revealed, Kelly’s staff established a Joint Task Force-Migrant Operations (JTF-MIGOPS) at Naval Station Guantánamo Bay to oversee a mock crisis-response mission. According to Rear Admiral Jon G. Matheson, deputy Joint Task Force commander of JTF-MIGOPS in 2013, this allowed Southcom to “flesh-out some of the processes and resources we would need if a mass migration were to occur.”71

Southcom conducted another iteration of these exercises two years later, with Fort Sam Houston, Texas, serving as the host of a reconstituted JTF-MIGOPS. The 2015 exercise, a Pentagon reporter noted, “anticipated the mass migration of people from multiple Caribbean islands after a series of hurricanes devastate the area.” With this in mind, “the goal of the exercise scenario was to effectively interdict and repatriate the migrants at sea who were attempting to enter the United States.” In other words, the military services are practicing to do whatever might be needed to prevent large numbers of disaster-driven refugees from gaining access to U.S. territory.72 As participants in the exercise explained, this means stopping migrant-laden ships at sea and transporting the migrants to the U.S. Navy base at Guantánamo, where they would be detained in giant tent camps until they can be ferried back to their home country.73

Whether originating in Africa, the Middle East, Latin America, or the Caribbean, mass migration events are destined to become more common in the years ahead as global warming takes an ever greater toll on the livelihoods and living conditions of people in highly exposed areas. As the European migrant crisis of 2015 demonstrates, moreover, such events are likely to prove highly disruptive and to trigger military-type responses. The construction of fortified border walls and fences is one expression of this, as are the preparations being undertaken by Southcom to house vast numbers of detained migrants at Guantánamo Bay. Wherever and whenever such events occur, the outcome is almost certain to prove wrenching and violent.

When Systems Collapse

For American military and intelligence analysts, the implications of all this are hard to escape: as global warming advances, one climate shock after another will **ricochet across the planet**, leaving **chaos** and misery in their wake. Try to picture a **food-price crisis** occurring at more or less the same time as a major pandemic and a **mass migration** event: the resulting chaos, distress, and contention are almost **unimaginable**. The most likely consequence of such a multi-shock calamity would be the **failure of fragile states** and **resulting anarchy**—with the failures occurring not one at a time, as in some less fearsome scenarios, but one right after another, as during the Arab Spring. But it will not be just fragile states in the developing world that will suffer from the impacts of these shocks, but **all nations**, as the **global networks** on which we all rely for essential goods and services begin to **break down**.

The potential for **systemic collapse** of this sort was given close attention by the Fourth National Climate Assessment, released in November 2018. Like the NRC study before it, the Fourth Assessment highlights the world’s growing reliance on global networks and the ways these systems have become inextricably linked—and so have become vulnerable to unexpected shocks. “A long history of research on complex systems,” it noted, “has shown that systems that depend on one another are subject to new and often complex behaviors.… These behaviors, in turn, raise the prospect of unanticipated, and potentially **catastrophic risks**. For example, failures can **cascade** from one system to another.” Climate change, it observed, is likely to provide exactly the sort of external jolt that could trigger such a cascade of failures, sowing havoc across the planet.74

### Regimes

### T Per Se – 2AC

#### ‘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).

### Con Con CP – 2AC

#### It obliterates certainty, spurs legal challenges from the Courts, Congress, and Executive, and triggers a runaway of special interest assaults that shut down the government – links harder.

Riestenberg ’18 [Jay; March 21; M.A. in Political Management from George Washington University, citing three Supreme Court Justices, two U.S. Solicitor Generals, one U.S. Attorney General, and thirty-one Professors of Law; Common Cause, “U.S. Constitution Threatened as Article V Convention Movement Nears Success,” <https://www.commoncause.org/resource/u-s-constitution-threatened-as-article-v-convention-movement-nears-success/>]

Why the Article V Convention Process is a Threat

As outlined in Common Cause’s 2015 report, The Dangerous Path: Big Money’s Plan to Shred the Constitution, a constitutional convention is open to many problems, including:

* Threat of a Runaway Convention: There is nothing in the Constitution to prevent a constitutional convention from being expanded in scope to issues not raised in convention calls passed by the state legislatures, and therefore could lead to a runaway convention.
* Influence of Special Interests: An Article V convention would open the Constitution to revisions at a time of extreme gerrymandering and polarization amid unlimited political spending. It could allow special interests and the wealthiest to re-write the rules governing our system of government.
* Lack of Convention Rules: There are no rules governing constitutional conventions. A convention would be an unpredictable Pandora’s Box; the last one, in 1787, resulted in a brand-new Constitution. One group advocating for a “Convention of States” openly discusses the possibility of using the process to undo hard-won civil rights and civil liberties advances and undermine basic rights extended throughout history as our nation strove to deliver on the promise of a democracy that works for everyone.
* Threat of Legal Disputes: No judicial, legislative, or executive body would have clear authority to settle disputes about a convention, opening the process to chaos and protracted legal battles that would threaten the functioning of our democracy and economy.
* Application Process Uncertainty: There is no clear process on how Congress or any other governmental body would count and add up Article V applications, or if Congress and the states could restrain the convention’s mandate based on those applications.
* Possibility of Unequal Representation: It is unclear how states would choose delegates to a convention, how states and citizens would be represented in a convention, and who would ultimately get to vote on items raised in a convention.

### EU Relations DA – 2AC

#### Circuit splits.

Leonardo ’16 [Lizl; Fall; Associate Attorney at Armstrong Teasdale LLP with experience representing domestic and international clients on various legal matters involving equity transactions, acquisitions, franchise matters, other corporate matters and related transactions; *DePaul Law Review;”* A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce,” <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4008&context=law-review>; KS]

The lack of an established rule—highlighted by the circuit split in interpreting the FTAIA—has effectively made it burdensome for companies to develop transactions for goods intended for eventual import into the United States. This issue does not apply only to the manufacturing industry.233 Companies engaging in transactions with the United States, whether directly or indirectly, need to know the possible effects of their decisions.234 Given that corporations engage in multitudinous transactions, it is highly important and necessary for companies to know precisely how these transactions could create financial and legal risks/consequences.235 The costs associated with the uncertainty create a burden to producers, causing them to increase product prices to offset the risks.236 These higher prices could then be passed on to U.S. consumers, which would negatively impact the U.S. economy.237

#### Antitrust inequitable application achieves protectionist aims.

Murray ’19 [Allison; February 28; Loyola Law School, Los Angeles, Juris Doctor, May 2019; *Loyola of Los Angeles International and Comparative Law Review,* “Given Today's New Wave of Protectionism, is Antitrust Law the Last Hope for Preserving a Free Global Economy or Another Nail in Free Trade's Coffin?” <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1785&context=ilr>; KS]

Protectionism did not end when the age of overbearing tariff policies did, despite then-leaders’ best efforts to vilify it. Rather, the end of the tariff era forced nations to achieve protectionist goals through more subtle trade vehicles, like antitrust law.3 So, the recent resurgence of protectionist rhetoric should mean that these subtle trade vehicles, including antitrust law, will be relied on more heavily. It is a fear of many that antitrust law may become overused and inequitably applied to achieve and combat protectionist aims.

#### “Murky” protectionism – ends trade.

Ikejiaku & Dayao ’21 [Brian and Corneilia; March 16; Coventry Law School; CTPSR, GB; Coventry Law School, GB; *Utrecht Journal of International and European Law,* “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US,” <https://utrechtjournal.org/articles/10.5334/ujiel.513/>; KS]

Part II

Protectionism

Protectionism is a kind of trade policy aimed at impeding foreign trade access to the domestic market and preserving, if not improving, the position of domestic producers in contrast to foreign producers.83 With the decline of classic protectionism, i.e. the imposition of tariffs and other visible barriers to trade, comes the rise of ‘murky’ protectionism, also known as new protectionism, which is characterised by seemingly innocuous and subtle measures designed to distort free trade without constituting as violations of the WTO rules or trade agreements.84 More aptly, murky protectionism has been defined as ‘abuses of legitimate discretion which are used to discriminate against foreign goods, companies, workers and investors’.85 Examples of murky protectionism are the imposition of regulatory and licensing requirements, tightening of product standards, limitation of ports of entry, introduction of bailout packages and initiation of disguised ‘green’ protectionism.86

Academic literature provides conflicting arguments regarding protectionism. Economic theory under the classic utility model establishes that any benefit that may result from protectionism is outweighed by its costs in terms of losses to consumer welfare and decline of economic growth.87 Another argument against protectionism is the moral argument which provides that protectionism is akin to stealing, i.e. producers and rent-seeking individuals induce the government to pursue their interests and benefit at the expense of consumers, in effect taking away what is due.88 On the other hand, the most notable arguments in favour of protectionism are national defence, infant industry and strategic trade theory.89

#### The plan solves blocking statutes.

Wu & Wang ’19 [Qianlan and Xiaoye; Assistant Professor, School of Law University of Nottingham; Chinese Academy of Social Sciences; “US-EU-China Bilateral Competition Enforcement Cooperation and Trade Openness,” <https://law.haifa.ac.il/images/ASCOLA16/QianlanWu.pdf>; KS]

Globally, bilateral competition cooperation has been the main instrument used by competition regimes to seek for greater enforcement. The bilateral cooperation ranges from the optimum model comprising compulsory and comprehensive information exchange, positive-comity-based assistance, and institutionalized consultation, to the minimum model comprising voluntary and limited information exchange, thin or non-assistance and loosely provided discussion. The paper shows that bilateral cooperation is a dynamic process, where normative tools used in cooperation between OECD economies as the US and EU, flow to cooperation with developing economy as China, in line with the trust building between sides. Furthermore, the development of the EU-China competition enforcement cooperation from a minimum mode in 2004 to a strengthened mode with confidentiality waiver and mutual assistance in 2019, indicates bilateral cooperation’s increasingly indispensable role in facilitating international antitrust.

However, the the LCD panel cartel case study shows that, despite the bilateral cooperation among the US, EU and China, the international cartel regulation remains fragmented. To protect domestic market from transnational conduct causing harmful effect on the market continues to justify unilateral stringent enforcement against international cartel. The bilateral arrangements serve more to protect respective overriding interest and facilitate individual side’s investigation and enforcement, than to establish a common ground for cooperated efforts addressing cartel in a global context.

To understand and tackle the challenges arising from the fragmented international cartel regulation to trade openness, we need a new normative basis for bilateral competition cooperation. The effects doctrine should be reconsidered, because it focuses exclusively on protecting domestic market from transnational harm. A set of innovative policy tools should be developed which can facilitate minimum but guaranteed exchange of information, especially on authority-held non-publicly available information or internal documents, based on mutually accepted confidentiality standards. This consequently calls for strengthened and institutionalized peer review and should create more room for competition authorities to coordinate actions and remedies.

#### Import price-fixing inhibits supply chain operations – disrupts trade.

Leonardo ’16 [Lizl; Fall; Associate Attorney at Armstrong Teasdale LLP with experience representing domestic and international clients on various legal matters involving equity transactions, acquisitions, franchise matters, other corporate matters and related transactions; *DePaul Law Review;”* A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce,” <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4008&context=law-review>; KS]

C. The Ninth Circuit Must Prevail: Apply the Broad Rule

International supply chains have benefits in today’s modern world. Raw materials, parts, and labor costs are generally cheaper in Asia.291 Companies have more flexibility to look for other companies to transact with, given the advancement in technology and the volatility of the marketplace.292 Efficiency and effectiveness increase over time as these companies collaborate and integrate their efforts to achieve optimal returns.293 Customers, generally, want cheap but quality-made products.294 When companies meet these demands, customers are more likely to buy the products, and as a result, other companies enter the market with the intention of delivering the same goods at a lower price.295 Companies, then, both cooperate and compete against each other, finding ways to come up with final products that are more efficient, eventually leading to market growth.296 However, despite these described benefits, price-fixing cartels still find a way to impose higher costs of products to consumers.297

A price-fixing cartel considers the product flow among regions in order to establish the price it will charge for a particular product.298 The conspiracy, generally, will not work if the price of the product is only increased in one region because market forces will essentially reallocate the sales to other regions that sell the product at lower prices.299 For example, if the LCD conspirators focused their price increase on regions outside of the United States, U.S. companies would have a strong inclination towards limiting their purchases to LCD panels sold in the United States at lower prices and then exporting these panels to foreign subsidiaries themselves, thus effectively avoiding the cartel’s products.300 However, conspirators are savvy enough to avoid being cut out of certain markets, particularly as the United States is one of the largest consumer markets in the world.301

To avoid this problem, the LCD conspirators (or any international cartel) have an incentive to raise the prices of the products in all regions that have multinational operations, including the United States.302 This action will disrupt the efficient and organized processes that help lower production costs, primarily because the United States has higher than usual labor costs compared to other countries.303 With insufficient rules curtailing price-fixing cartels, U.S. companies could limit the use of international supply chains.304 Moreover, they will be discouraged from conducting business or moving some businesses offshore where it will be more beneficial.305 As a result, the total price of U.S. consumer goods will be higher than it would have been had they been created in countries that have lower production and labor costs.306 This kind of uncertainty makes it difficult for both producers and consumers to manage the volatility of the market.

In light of the increasing demand for international business transactions, it is more important than ever that U.S. consumers are continuously protected from companies’ wrongful conduct, whether or not these companies engage in these transactions while outside of the United States’ jurisdiction.307 The Seventh Circuit’s ruling undermines this protection. It focused its analysis on technicalities of the statute, and it placed more weight on international comity concerns than on the protection of U.S. consumers, whom the legislators intended to protect when it enacted the statute.308 On the contrary, the Ninth Circuit’s interpretation of the FTAIA is aligned more closely with the canons of statutory interpretation.

The Seventh Circuit’s holding that “it was Motorola, rather than the defendants, that imported these panels into the United States”309 is inconsistent with the legislative intent of the FTAIA.310 Congress plainly intended to read the import-commerce exclusion broadly when it enacted the FTAIA.311 In Hartford Fire, the U.S. Supreme Court recognized that the “FTAIA was intended to exempt from the Sherman Act [1] export transactions that [2] did not injure the United States economy.”312 The court reiterated this in Empagran when it held that the “FTAIA seeks to make clear to American exporters . . . that the Sherman Act does not prevent them from entering into business arrangements . . . , however anticompetitive, as long as those arrangements adversely affect only foreign markets.”313 The language of the Sherman Act neither implies nor explicitly states that it should only be applied when commercial transactions occurred in the United States, and not abroad.314 This is a strained interpretation of the Act given that Congress could have explicitly stated such a rule.315 The Ninth Circuit, therefore, correctly dismissed the defendants’ suggestion that because they were not the importers, they should not be held liable.316

Other Federal Circuit Courts of Appeal have held in accordance with the Ninth Circuit, suggesting that some federal courts are in agreement with this reading of the FTAIA’s legislative intent. In Animal Science, the Third Circuit held that in order to find liability, the anticompetitive behavior of the defendant must have been “directed at an import market.”317 Thus, in holding this, the defendants needed only to “function as the physical importers of goods.”318 This meant that there was not a “necessary prerequisite” that the defendants are the importers per se before antitrust laws could apply;319 “[f]unctioning as a physical importer” will be sufficient.320 Here, even though the defendants did not import the LCD panels into the United States per se, the panels’ incorporation into the electronics that were subsequently imported into the United States was sufficient to pass the test.321 The defendants knew that these panels could not stand alone, but rather must be combined with other parts to manufacture a final product.322 That knowledge, the foreseeability of the effect to the United States, and the intentional inflation of the price to an artificially high level meant that the defendants “functioned as a physical importer,” falling squarely under the Sherman Act.323

With regard to the first requirement of the FTAIA, Judge Posner for the Seventh Circuit, wrote that the domestic effect was too “remote” to satisfy the “direct effects” test because the conduct occurred abroad and then passed through a multi-step process before causing “a few ripples in the United States.”324 However, this reasoning assumes the presence of a complicated process to import the LCDs when, in fact, there was none.325 The LCDs were purchased at a high price, incorporated into electronics, and almost instantly shipped to the United States.326 The process was limited to purchasing, manufacturing, and distribution,327 and the LCD panels have no utility without being incorporated in various consumer products, such as mobile phones.328 The artificially high price of the panels was the exclusive factor that adversely impacted U.S. commerce.329 Assuming relatively flat labor costs, the price of the final product would not have increased had it not been for the defendants’ anticompetitive conspiracy to increase the panels’ price. The Ninth Circuit’s interpretation of “direct effects” is therefore proper. The United States market was directly impacted as a result of the “immediate consequence” of the defendants’ price-fixing conspiracy.330

With regard to the “gives rise to” requirement of the FTAIA, the Seventh Circuit’s opinion was sparse, despite consensus among the other circuits.331 The Seventh Circuit relied on the argument that Motorola could not recover because the injury “occurred entirely in foreign commerce.”332 By concluding that the defendants’ conduct did not give rise to Motorola’s claim, the court misread the holding in Empagran, 333 in which the U.S. Supreme Court highlighted the importance of our nation’s “ability . . . to regulate its own commercial affairs.”334 However, it also held that antitrust laws may be applied to foreign anticompetitive conduct so long as it is “reasonable” and it reflects “legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.”335 That is exactly the issue in Motorola. The Seventh Circuit held that Motorola’s overcharge claims as a result of defendants’ inflated price did not give rise to those claims.336 It reasoned that the harm happened abroad when Motorola purchased the price-fixed panels, independent of the increased cell phone prices.337 But as stated above, the artificially high price of the LCD panels was the reason Motorola was seeking a remedy.338 Had the defendants not conspired to fix the price of these components, the final product price of the mobile phones would not have increased; Motorola would not have been forced to pass on the artificial price increase to U.S. consumers.339 Instead of focusing on the linguistics the U.S. Supreme Court employed in Empagran, the Seventh Circuit should have applied a “more natural” reading by focusing on the basic purpose of the FTAIA and the Sherman Act— protection of U.S. consumers.340 After all, it has been widely recognized that, in a global economy, anticompetitive conduct can negatively impact domestic markets by inflating prices paid by U.S. commerce.341 This is an outcome that U.S. antitrust laws were created to combat.342

#### Plan makes international trade effective.

Leonardo ’16 [Lizl; Fall; Associate Attorney at Armstrong Teasdale LLP with experience representing domestic and international clients on various legal matters involving equity transactions, acquisitions, franchise matters, other corporate matters and related transactions; *DePaul Law Review;”* A Proposal to the Seventh and Ninth Circuit Split: Expand the Reach of the U.S. Antitrust Laws to Extraterritorial Conduct that Impacts U.S. Commerce,” <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=4008&context=law-review>; KS]

Moreover, having a more consistent approach in cases like this will strengthen and harmonize the partnership across nations. Needless to say, the cooperation between these countries can play a significant role in attaining this objective. Bilateral agreements between the countries have proven that, though challenging, implementing this stricter rule is not impossible.423 International trade rules, such as the General Agreement on Tariffs and Trade (GATT), World Trade Or- ganization (WTO), Organization for Economic Cooperation and De- velopment (OECD), and agreements between countries, imply the general acceptance of this proposal.424 The rapid growth in globaliza- tion has forced governments to institute and enforce policies that both protect domestic products from multinational firms and encourage the domestic firms to compete internationally, in furtherance of interna- tional trade.425

One of the partnerships the European Union (EU) and the U.S. governments are currently working on is called the Transatlantic Trade and Investment Partnership (T-TIP).426 Its aim is to further de- velop the strong relationship nations have and leverage that relation- ship to boost economic growth and international competitiveness.427 The agreement purports to provide greater transparency around trade and investment regulation while ensuring the quality of the prod- ucts.428 As part of the agreement, the governments seek to eliminate all tariffs, other duties, and charges on trade in various products be- tween the United States and the European Union.429

The proponents of T-TIP point out that the elimination of tariffs and quotas will, among other things, entail lower costs of import to each of the regions, put products from one area “on equal footing” with the products from another, create more jobs, lower the unem- ployment rate, increase competitiveness, and improve the overall growth of members of the agreement.430 Although the agreement seems ambitious at this time, it intends to link two of the world’s larg- est economies to generate a third of the world’s GDP.431 Critics ar- gue, however, that the deregulation of several national laws—possibly resulting in lower consumer standards, as well as compromised laws covering intellectual property, food safety, privacy and data collection, and democratic legitimacy—are all steps in the wrong direction.432

Having an established rule that foreign companies’ non-import trade conduct can be subjected to U.S. antitrust laws, as long as the conduct had an “immediate consequence” on U.S. commerce, could mitigate the risks associated with the opening of U.S. and EU mar- kets. Foreign companies that will be encouraged to invest in the United States as a result of T-TIP will have an understanding of the laws and the possible repercussions of any business transaction in which they take part. These companies do not need to determine if and how any of their strategic decisions can be subjected to either the Seventh or Ninth Circuit rulings before securing deals or signing agreements. The certainty will provide companies with notice and un- derstanding of how the law affects their decisions, thereby making their investments less risky. In return, investments could become safer, eventually having a favorable impact on the continued develop- ment of the world economy.

### Trade-off DA – 2AC

#### No link – the plan is civil remedies.

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

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

#### No 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.

#### Overload now.

Goolsbee ’20 [Austan; September 30; Professor of economics at the University of Chicago’s Booth School of Business, has been a Department of Justice antitrust consultant, and was an adviser to President Barack Obama; *The New York Times,* “Big Companies Are Starting to Swallow the World,” <https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html>; KS]

First, the enforcement budget for antitrust actions was already stretched way too thin even before the current crisis began. That budget has been falling for years and is lower now than it was two decades ago. The entire antitrust division of the Justice Department and the F.T.C. are being forced to operate on less than a single company like Facebook brings in over a few days. In the last 10 years, the number of merger filings (which notify the authorities of an intended merger) has almost doubled, but the number of enforcement actions taken by the government has actually fallen.

#### No resources.

Kantrowitz ’20 [Alex; September 17; Writer at BigTechnology; *Big Technology,* “‘It’s Ridiculous.’ Underfunded FTC and DOJ Can’t Keep Fighting the Tech Giants Like This,” <https://bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators?utm_campaign=post&utm_medium=email&utm_source=twitter>; KS]

As politicians, the press, and the public scrutinize the tech giants and grow wary of their power, the most important organizations tasked with restraining them — the U.S. regulatory agencies — aren’t getting enough funding to do the job.

“The agencies are severely resource-constrained,” Michael Kades, an-ex FTC trial lawyer who spent 11 years at the agency, told Big Technology.

The Federal Trade Commission and Department of Justice’s antitrust division have a combined annual budget below what Facebook makes in three days. The FTC runs on less than $350 million per year, the DOJ’s antitrust division on less than $200 million. Facebook made $18 billion last quarter alone.

The funding disparity between the tech giants and their regulators leads to an unbalanced fight, current and ex-staffers said: The agencies can’t investigate the tech giants to the extent they’d like. They might shy away from complex cases fearing a resource-draining battle. And when they investigate the tech giants, they often see former colleagues with intricate knowledge of their strategy and ability to act (or lack thereof) representing these companies. Without significant budget increases, the tech giants may well continue to act unrestrained with little fear of repercussions.

“DOJ is under-resourced, FTC it’s ridiculous,” one ex DOJ-staffer told Big Technology.

#### Plan increases funding – it’s a virtuous cycle.

Evenett et al ’16 [Simon; July; Professor of International Trade and Economic Development, University of St. Gallen, Switzerland; Coordinator, Global Trade Alert; and a former nonresident Senior Fellow, Economic Studies, Brookings; Alexander Lehmann; German citizen, joined Bruegel in 2016 and is now a non-resident fellow. His work at Bruegel focuses on EU banking sectors and how private debt and non-performing loans can be addressed in the aftermath of recessions; Benn Steil; Senior Fellow and Director of International Economics at the Council on Foreign Relations; *Brookings,* “Antitrust Policy in An Evolving Global Marketplace,” <https://www.brookings.edu/wp-content/uploads/2016/07/antitrust_global_chapter.pdf>; KS]

Finally, holding constant factors such as the general level of economic activity and agency caseloads, there is a positive relationship between for- eign competition and funding for the Federal Trade Commission and the Antitrust Division of the Justice Department.\*® This would appear to indi- cate that antitrust, rather than being solely driven by consumer welfare con- siderations, is at the service of domestic firms adversely affected by imports. If trade stimulates antitrust, particularly targeted at foreign firms, the po- tential for direct conflict of laws and lobbying interests across borders can only grow as economic globalization progresses.

#### No bioterrorism.

Blum & Neumann ’20 [Marc-Michael and Peter; June 22; Former Head of Laboratory at the Organisation for the Prohibition of Chemical Weapons. He holds a PhD in Biochemistry from the University of Frankfurt; Professor of Security Studies at King’s College London, and served as Director of its International Centre for the Study of Radicalisation from 2008-18. *War on the Rocks,* “CORONA AND BIOTERRORISM: HOW SERIOUS IS THE THREAT?” <https://warontherocks.com/2020/06/corona-and-bioterrorism-how-serious-is-the-threat/>] KS

The novel coronavirus pandemic has put the threat of bioterrorism back in the spotlight. White supremacist chat rooms are teeming with talk about “biological warfare.” ISIL even called the virus “one of Allah’s soldiers” because of its devastating effect on Western countries. According to a recent memo by the U.S. Department of Homeland Security, terrorists are “[making] bioterrorism a popular topic among themselves.” Both the United Nations and the Council of Europe have warned of bioterrorist attacks.

How serious is the threat? There is a long history of terrorists being fascinated by biological weapons, but it is also one of failures. For the vast majority, the technical challenges associated with weaponizing biological agents have proven insurmountable. The only reason this could change is if terrorists were to receive support from a state. Rather than panic about terrorists engaging in biological warfare, governments should be vigilant, secure their own facilities, and focus on strengthening international diplomacy.

A History of Failures

Biological warfare, which uses organisms and pathogens to cause disease, is nearly as old as war itself. The first known use of biological agents as a weapon dates back to 600 B.C., when an ancient Greek leader poisoned his enemies’ water supply. Throughout the Middle Ages, especially during the time of the Black Death, it was common to hurl infected corpses into besieged cities. And during the two world wars, all major powers maintained biological weapons programs (although only Japan used them in combat).

Among terrorists, however, the use of biological weapons has been rarer, although groups from nearly all ideological persuasions have contemplated it. Recent examples include a plot to contaminate Chicago’s water supply in the 1970s; food poisoning by a religious cult in Oregon in the 1980s; and the stockpiling of ricin by members of the Minnesota Patriot Council during the 1990s. No one died in any of these instances.

The same is true for the biological warfare programs of al-Qaeda and the Islamic State group. Both groups have sought to buy, steal, or develop biological agents. For al-Qaeda, this seems to have been a priority in the 1990s, when its program was overseen by (then) deputy leader Ayman al-Zawahiri, a trained physician. With the Islamic State, evidence dates back to 2014, when Iraqi forces discovered thousands of files related to biological warfare on a detainee’s laptop.

Yet none of these efforts succeeded. The only al-Qaeda plot in which bioterrorism featured prominently — the so-called “ricin plot” in England in 2002 — was interrupted at such an early stage that none of the toxin had actually been produced. The Islamic State’s most serious attempt, in 2017, involved a small amount of ricin, whose only fatality was the hamster on which it was tested. Of the tens of thousands of people that jihadists have murdered, not a single one has died from biological agents.

It may be no accident that the most lethal bioterrorist attack in recent decades was perpetrated by a scientist and government employee. In late 2001, the offices of several U.S. senators and news organizations received so-called “anthrax letters,” which killed five people and injured 17. Following years of investigation, the FBI identified the sender as Bruce Ivins, a PhD microbiologist and senior researcher at the U.S. Army’s Medical Research Institute of Infectious Diseases. Unlike the others, he was no amateur or hoaxer, but a trained expert with years of experience and full access to the world’s largest repository of lethal biological agents.

Technical Challenges

Ivins’ case helps to explain why so many would-be bioterrorists have failed. At a technical level, launching a sophisticated, large-scale bioterrorist attack involves a toxin or a pathogen — generally a bacterium or a virus — which needs to be isolated and disseminated. But this is more difficult than it seems. As well as advanced training in biology or chemistry, isolating the agent requires significant experience. It also has to be done in a safe, contained environment, to stop it from spreading within the terrorist group. Contrary to what al-Qaeda said in one of its online magazines, you can’t just make a (biological) weapon “in the kitchen of your mom!”

In addition, there is the challenge of dissemination. Unless the agent is super-contagious, a powerful biological attack relies on a large number of initial infections in perfect conditions. In the case of the bacterium anthrax, for example, only spores of a particular size are likely to be effective in certain kinds of weather. State-sponsored programs often needed years of testing and experimentation to understand how their weapons could be used. Though not impossible, it is unlikely that terrorist groups possess the resources, stable environment, and patience to do likewise.

Doomsday Scenarios

Even if terrorists somehow succeeded, it is nearly inconceivable that the resulting “weapon” would be as powerful as the recent coronavirus, SARS-CoV-2. One of its uniquely devastating features has been that people are infectious while experiencing no symptoms. As it spread across the globe, there was no treatment, no vaccine, an incomplete understanding of its pathological modes of action, and no easy, cheap and widely available testing. It was the viral equivalent of a “zero-day exploit” — a cyber-attack that happens before any patch is available.

None of the viruses on the U.S. Centers for Disease Control and Prevention’s list of the most dangerous biological agents could be easily “weaponized” or would have the same, devastating effects as SARS-CoV-2. Pathogenic viruses such as smallpox, Ebola, Marburg, and Lassa are extremely hard to find, isolate, and spread. Botulinum and ricin are dangerous toxins, but not contagious, while Tularemia cannot be transmitted from human to human. The plague is, of course, capable of causing pandemics, but most countries are nowadays well prepared for this particular virus, and will be able to limit — and cope with — localized outbreaks.

This leaves only anthrax, a soil bacterium which is relatively easy to obtain. Even so, isolating a highly pathogenic strain is difficult. More importantly, anthrax is not contagious, and while its spores are durable and affected areas can be hard to de-contaminate, it is unable to spread on its own.

Regarding SARS-CoV-2, it is important to distinguish between the possibility that the virus occurred naturally and escaped from a laboratory, and the idea that it was engineered for maximum infectiousness and deliberately released. The first remains a possibility, although other explanations are equally — if not more — plausible, while the second has been debunked by a comprehensive examination in the journal Nature Medicine, which concluded that SARS-CoV-2 was “not a laboratory construct or a purposefully manipulated virus.”

The chances that terrorists would be capable of engineering a virus such as SARS-CoV-2 without access to a state’s resources are virtually zero. If anything, the possibility of a lab escape — however remote — highlights the importance of biosafety. While governments have paid much attention to laboratories with the highest biosafety level (level 4), work on bat-born coronaviruses is regularly performed at lower levels (level 3, and even level 2), and should instead be subject to similar safety requirements.

In sum, small-scale attacks using anthrax or other agents may be possible, but the risk of a highly advanced, weaponized pathogen that spreads among large populations — a terrorist-initiated biological doomsday — is very low. The only exception, of course, is if terrorists received support from a state, acted as its proxies, or were able to draw on its resources — as in Ivins’ case.

## 1AR

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#### There is no bright line separating per se and rule of reason

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

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

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

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

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

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

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

#### Arbitrariness---all regulations eliminate.

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 ––––.

#### Even if ‘prohibitions’ ban, that doesn’t mean entirely.

Clopton ’85 [David; December 1, 1885; Justice on the Supreme Court of Alabama; Westlaw, “Miller v. Jones,” 80 Ala. 89]

The title of the act is, “An act to regulate the sale, giving away, or otherwise disposing of spirituous, vinous or malt liquors, or intoxicating bitters, or patent medicines having alcohol as a base, in Talladega County.” But one subject is expressed in the title--the regulation of the sale, giving away or otherwise disposing of liquors--and the enquiry is, does the title express the subject contained in the enactment: in other words, are regulation and prohibition the same or distinct subjects? Regulate and prohibit have different and distinct meanings, whether understood in their ordinary and common signification, or as defined by the courts in construing statutes. Power granted to a municipal corporation to grant licenses to retailers of liquors, and to regulate them, does not confer power to prohibit, either directly or by a prohibitory charge for a license. Town of Marion v. Chandler, 6 Ala. 899; Ex parte Burnett, 30 Ala. 461; In Joseph v. Randolph, 71 Ala. 499, it is said: “A constitutional right, though subject to regulation, can not be impaired or destroyed, under the devise or guise of being regulated.” To regulate the sale of liquor implies, ex vi ter \*97 mini, that the business may be engaged in or carried on, subject to established rules or methods. Prohibition is to prevent the business being engaged in or carried on, entirely or partially. The two purposes are incongruous. A title which expresses a purpose to regulate, gives no indication of a purpose to absolutely prohibit. We are constrained to hold the act unconstitutional.

#### **Incomprehensible to distinguish between regulation and prohibition.**

Hadley ’9 [John Vestal; December 16, 1909; Justice on the Supreme Court of Indiana; Westlaw, “McPherson v. State,” 174 Ind. 60]

Furthermore, the word “prohibition” is close akin to “regulate, restrict, and control.” Its use in the body of the act is of little significance. To forbid the sale of liquor by those who have no license; to deny the licensee the right to sell on certain days, between certain hours, in certain places, in certain quantities—is, to some extent at least, qualified prohibition. It is prevention, interdiction. Such laws, however, are unquestionably regulations and restrictions of the liquor traffic. They operate as a check, as a restraint, upon the sale, not in absolute inhibition, and are in the strictest sense regulations. They regulate by prohibiting the sale at certain times, and to certain persons, and \*613 in certain places. Besides, to say the law prohibits the citizen from selling without a license, or that the law prohibits the licensed seller from selling on Sunday, is etymologically correct. In fact, the word was employed in this sense by the Legislature in framing section 4 of the Nicholson law (section 8327, Burns' Ann. St. 1908), which provides that obstructions to the street view shall not be set up in the selling room “during such days and hours when the sale of such liquors is prohibited by law.” So it is not so much the primary meaning of the word as sense in which it is popularly understood as applied to the manufacture and sale of spirituous liquors that must control.

Following are a few definitions of “prohibition” as specifically applied:

“Interdiction of the liberty of making and of selling, or giving away, intoxicating liquors for other than medicinal, scientific and religious purposes.” Anderson's L. Dict.; Bouvier, L. Dict. (Rawle's Rev.).

“The forbidding by law of the manufacturing and sale of alcoholic liquors.” English's L. Dict.

“The forbidding by law of the sale of alcoholic liquors as a beverage.” Webster's Int. Dict.

“The forbidding by legislative enactment of the sale of alcoholic liquors for use as a beverage.” Standard Dict.

The term has even a wider sweep than this. A prohibitory law, to be classed as such, must, at the same instant, in the same way, become effective to interdict the sale of liquors throughout all parts of the jurisdiction of the lawmaking power. Welsh v. State, 126 Ind. 71, 77, 25 N. E. 883, 9 L. R. A. 664; Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138; Paul v. Gloucester County, 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86.

It seems absurd, because rationally inconceivable, that under the operation of a general prohibitory statute enacted by the General Assembly sales as a beverage may indefinitely continue to be lawfully made in many counties of the state. It is also equally incomprehensible how a law may be absolutely prohibitory and in itself provide the means and terms under which sales may be continued or resumed in any or all counties of the state. We are unable to perceive any distinction between the prohibition which results from remonstrance under former laws, which has uniformly been held to be regulation, and the prohibition arising under the act in question, with the sole exception as to the duration of the term of restriction, depending upon petition and election at the expiration of each biannual period. We therefore conclude that the object and purpose of the act before us is regulation, and not prohibition, of the liquor traffic, and that the subject is fairly deducible from the title, and not in conflict with section 19, art. 4, of the Constitution. Isenhour v. State, 157 Ind. 524, 62 N. E. 40, 87 Am. St. Rep. 228; Gustavel v. State, 153 Ind. 613, 54 N. E. 123; Burget v. Merritt, 155 Ind. 143, 57 N. E. 714; Clarke v. Darr, 156 Ind. 692, 60 N. E. 688; Republic Iron, etc., Co. v. State, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 136; Maule Coal Co. v. Partenheimer, 155 Ind. 100, 55 N. E. 751, 57 N. E. 710.

#### Proven by ‘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.

#### Toss out exclusive definitions.

Smith ’10 [D Brooks; November 29; Federal Circuit Judge on the Third Circuit; Westlaw, “W. Penn Allegheny Health Sys., Inc. v. UPMC,” 627 F.3d 85]

Broadly speaking, a firm engages in anticompetitive conduct when it attempts “to exclude rivals on some basis other than efficiency,” Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) (internal quotation marks omitted), or when it competes “on some basis other than the merits,” LePage's, 324 F.3d at 147. “Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive.” Broadcom, 501 F.3d at 308. The line between anticompetitive conduct and vigorous competition is sometimes blurry, but distinguishing between the two is critical, because the Sherman Act “directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.” McQuillan, 506 U.S. at 458, 113 S.Ct. 884; United \*109 States v. Aluminum Co. of Am., 148 F.2d 416, 429–30 (2d Cir.1945).

“ ‘Anticompetitive conduct’ can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.” LePage's, 324 F.3d at 152 (quoting Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C.Cir.1998)). For present purposes, it is sufficient to note that anticompetitive conduct can include a conspiracy to exclude a rival, Areeda & Hovenkamp, supra, ¶ 806f3, at 428; see LePage's, 324 F.3d at 157, hiring a rival's employees not to use them but to deny them to the rival, Universal Analytics, Inc. v. MacNeal–Schwendler Corp., 914 F.2d 1256, 1258 (9th Cir.1990) (per curiam); Areeda & Hovenkamp, supra, ¶ 702, at 205, a hospital's coercing providers not to refer patients to a rival, Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 576–77, 580 (6th Cir.1986); see M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp., 981 F.2d 160, 166–67 (4th Cir.1992) (en banc), and making false statements about a rival to potential investors and customers, see LePage's, 324 F.3d at 153 (citing Int'l Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir.1980)); Caribbean, 148 F.3d at 1087; see generally Maurice E. Stucke, Symposium, When a Monopolist Deceives, 76 Antitrust L.J. 823 (2010).14

#### Refers to a wide variety of activities.

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

Definition:

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

Context:

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

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

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

#### Zero basis to their ground claims

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.

#### Rule of reason is key to aff ground

de la Cruz ’18 [Peter; 9/26/18; Partner at Keller and Heckman LLP and former attorney in the Antitrust Division at the Department of Justice; The National Law Review; “Trinko Doesn’t Mean That Any More,” https://www.natlawreview.com/article/trinko-doesn-t-mean-any-more]

Most antitrust claims are evaluated under the “rule of reason,” which is a case-by-case inquiry into all the circumstances to assess whether a particular activity or arrangement lessens competition. Typically, plaintiffs need to demonstrate that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is “reasonable” means it survives antitrust scrutiny, in contrast to a “per se” offense for which the activity is presumed to be anticompetitive and illegal, as with price fixing. The rule of reason assessment permits a defendant to justify allegedly anti-competitive practices by demonstrating valid procompetitive justifications.[7]

### EU DA

#### **Trade low due to lack of consulation.**

Swanson ’21 [https://www.nytimes.com/2021/10/01/business/economy/us-europe-trade.html; KS]

WASHINGTON — The United States and the European Union took a step this week toward a closer alliance by announcing a new partnership for trade and technology, but tensions over a variety of strategic and economic issues are still simmering in the background.

The establishment of the Trade and Technology Council, which aims to establish a united front on trade practices and sophisticated technologies, is a significant test of whether President Biden can fulfill his pledge to mitigate trans-Atlantic tensions that soared under President Donald J. Trump. The Biden administration has long described Europe as a natural partner in a broader economic and political confrontation with China, and it criticized the Trump administration for picking trade fights that alienated European governments.

But while officials on both sides say trans-Atlantic relations have been improving, the U.S.-Europe reset has been rockier than anticipated.

The inaugural meeting of the Trade and Technology Council in Pittsburgh this week was nearly scuttled after the Biden administration said it would share advanced submarine technology with Australia, a deal that enraged the French government.

Europeans say they have been frustrated by a lack of consultation with the Biden administration on a range of issues, including the U.S. withdrawal from Afghanistan. And officials face a difficult negotiation in the coming weeks over metal tariffs that Mr. Trump imposed globally in 2018.

Europeans have said they will impose retaliatory tariffs on other U.S. products as of Dec. 1 unless Mr. Biden rolls back a 25 percent tax on European steel and a 10 percent duty on aluminum.

“The E.U. initially viewed the Biden administration as a ‘breath of fresh air’ but is now increasingly wondering how much Biden will differ from Trump,” Stephen Olson, a senior research fellow at the Hinrich Foundation and a former U.S. trade negotiator, wrote in a recent analysis. “Prospects for a U.S.-E.U. ‘united front’ have been overblown from the start.”

#### Absent solving the circuit split, discretion in decision making furthers protectionist policies.

Ikejiaku & Dayao ’21 [Brian and Corneilia; March 16; Coventry Law School; CTPSR, GB; Coventry Law School, GB; *Utrecht Journal of International and European Law,* “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US,” <https://utrechtjournal.org/articles/10.5334/ujiel.513/>; KS]

The lack of consensus on the nexus of competition and trade policy creates a gap which is exploited in order to pursue various motives such as promoting industrial policy, protectionism or nationalism.

(ii) Competition law and protectionism

In the United States, some scholars claim that antitrust law is rooted in protectionist institutions.113 Evidence reveals that the political impetus for antitrust law originated from lobbying farmers of several agricultural states;114 however, the majority views of scholars differs on this.115 Inefficient businesses misused antitrust laws by suing their efficient competitors for lower prices, increase in output and product or process innovation116 Today, the use of antitrust law for protectionism is no longer limited to the protection of an industry from another within the domestic sphere; it extends to the international level and transcends international trade. Similarly, in the European Union, remnants of industrial policy abound in the EC competition law.117 The European Commission has been attacked on the ground of ‘disguised protectionism’, protecting EU-based competitors and furthering the single market objective rather than seeking to uphold competition in strict terms.118 This is clearly demonstrated in the proposed Siemens-Alstom merger. In prohibiting the proposed consolidation of Siemens and Alstom, the European Commission unleashed a turmoil of political discontent; arguably, this is more the manifestation of longstanding frustration with certain underlying asymmetries within merger regulation which impede the ascendancy of the European industry on the world stage than an issue with the Commission’s decision itself.119

Competition law, as a political creation, is inherently susceptible to ‘instrumentalisation’ for protectionist ends. Competition law is at risk of being misused to advance industrial policies, political agendas and protectionist policies in the guise of competition enforcement, thus bypassing the scrutiny of international trade agreements.120 The existing legislative framework of competition law enhances this risk, as it provides for greater discretion in decision making and political involvement in the enforcement of competition law.121 While open-ended discretionary standards are laudable because economic analysis cannot be put into rigid standards as each competition case is unique, it also creates opportunities for abuse. Discretion may be abused to allow regulators to pursue their own private interests, shirk unpleasant duties, augment their regulatory authority in hopes of increasing monopoly rents which they can trade to interest groups in return for personal benefits, and act in other ways that are contrary to the public good.122 In the context of merger law, for instance, discretion may incentivise regulators to pursue protectionism – in particular, new protectionism. Trade agreements and institutions such as the WTO have made traditional protectionism through open trade discrimination challenging. Yet, the underlying political dynamic driving protectionism has not gone away. Hence, while jurisdictions do not forbid certain mergers, they can still discriminate against them. For instance, regulators can require more onerous ‘fixes’ for mergers that threaten local producers such as requiring the merging parties to divest assets in a way that benefits the domestic competitor.123

Indeed, the argument that competition law may be a tool to pursue a protectionist end is commonly premised upon the possibility that competition law – especially through selective, discriminatory enforcement – might actually be abused as a trade barrier.124 National protectionism is often demanded by certain industries or interest groups.125 However, a competition regime that favours domestic firms such as local producers hurt not only the producers and consumers of other countries, but also the domestic consumers.

#### Plan solves.

Ikejiaku & Dayao ’21 [Brian and Corneilia; March 16; Coventry Law School; CTPSR, GB; Coventry Law School, GB; *Utrecht Journal of International and European Law,* “Competition Law as an Instrument of Protectionist Policy: Comparative Analysis of the EU and the US,” <https://utrechtjournal.org/articles/10.5334/ujiel.513/>; KS]

Today, there is a growing fear of rising protectionism, from the United States (US) under the Trump administration’s imposition of tariffs and a trade war with China, to the United Kingdom’s Brexit, to the less known trade-restricting measures adopted by other countries all over the world.1

The neoclassical economic model suggests the desirability of free trade over protectionism because free trade lowers prices, allows a flow of goods with little restrictions and improves the quality of products, resulting in overall welfare gain.2 On the other hand, protectionism results in welfare losses, increased prices and a decline in innovation, thus harming consumers and economic efficiency.3

The natural inclination of states to engage in protectionism is as old as time and, until today, has never been diminished.4 The General Agreement on Trade & Tariff (GATT),5 superseded by World Trade Organisation (WTO) since 1995, rendered the classical forms of protectionism such as tariffs obsolete. However, it did not defeat protectionism; instead, protectionism has evolved through its protean capacity to adapt into new and often undetectable forms,6 now labelled as ‘murky’ protectionism.7

Competition law enforcement is suspected as one of the forms of this murky protectionism. There are two ways (among others) considered in this article in which States can utilise competition law to impair free trade and restrict access of foreign firms to domestic market. First is the exemption under national competition law such as export cartel exemptions; second is the strategic application of domestic competition law, e.g. alleged discriminatory and selective enforcement of merger regulation.8

It appears that States use their competition law as invincible trade barriers to further their protectionist bids such as national security and environmental protection.9 In recent years, States have been accused of using their competition law to pursue protectionism. For instance, the US has criticised the EU’s merger regulation as protecting competitors and not competition, particularly in the technology industry in mergers involving non-EU firms – even when those same acquisitions are approved by other competition authorities. A good example is the Commission’s 2001 decision to block the $42 billion acquisition of Honeywell by General Electric.10 Similarly, the US is being encouraged to change their stance on leniency towards export cartels due to its beggar-thy-neighbour effect.11 Investigating the controversy around the use of competition law for protectionist ends is particularly relevant today to protect and uphold free trade and liberalisation. There is a gap between competition and trade policies which national competition law fails to address and the WTO rules fail to regulate. Merger regulation and export cartel exemptions appear to be used as tools for protectionist ends to exploit the gap. This article, therefore, examines whether States use their competition law to pursue protectionist policy in the EU and the US. In this context, the article specifically focuses on analysing how merger regulation and treatment of export cartel further protectionism.12

### FTC DA

#### Merger activity ramping up.

Graham 9-16 [Jed; September 16; Author at Investor’s Business Daily; *Investor’s Business Daily,* “FTC, Biden Antitrust Enforcement Push Takes On Amazon, Google — And The Supreme Court,” <https://www.investors.com/news/antitrust-enforcement-push-by-ftc-biden-takes-on-amazon-google-supreme-court/>; KS]

Wall Street's early reaction to the Biden administration's attempt to stiff-arm M&A activity has been to step on the gas. The FTC said in August that it's struggling to stay abreast of a "tidal wave" of mergers. The 2,436 deal filings through August have already blown past the elevated annual totals from 2017-2019.

Despite a skeptical, if not hostile, attitude among antitrust enforcers, the vast majority of these deals are likely to go through.

While Congress may increase funding for merger enforcement, the FTC and DOJ are already devoting significant resources to the Facebook and Google antitrust cases. "They can only fight so many battles," Kovacic said.

Khan Uses Bully Pulpit, Bulls Like Big Tech

That's not to say the Biden team won't create major headaches for merging parties. More mergers will face reviews and the probes will last several months longer. And where concerns arise, the agencies will be less likely to negotiate a fix.

To make deals approvable, regulators have long consented to divestitures. Sometimes regulators settle for behavioral remedies. To seal the T-Mobile-Sprint merger, the Justice Department relied on Dish Network's commitment to build out a national wireless network. But Khan says the track record of both types of fixes isn't great.

"The antitrust agencies should more frequently consider opposing problematic deals outright," Khan wrote Aug. 6. She was responding to a letter from Sen. Elizabeth Warren, who had raised concerns about defense mergers. The news added to doubts that the FTC will clear the pending Lockheed Martin (LMT) acquisition of rocket engine manufacturer Aerojet Rocketdyne (AJRD).

When regulators do decide to negotiate, "expansive divestiture demands could result in a remedy that frustrates the purpose of the deal," warned antitrust attorneys at tech-focused law firm Wilson Sosini.

Khan is clearly using her bully pulpit to the utmost, trying to dissuade merger talks from reaching fruition.

#### FTC overload now.

Burke ’21 [Henry and Andrea; May 28; B.A. in Political Science and Labor Studies from the University of California at Los Angeles; Research Assistant, B.A. in Economics from the University of Maryland; Revolving Door Project, “Hobbled FTC Lacks Budget to Combat Corporate Buying Spree,” <https://therevolvingdoorproject.org/hobbled-ftc-lacks-budget-to-combat-corporate-buying-spree/>]

Even if the will to stop it exists, the FTC doesn’t have the funding to stop this boom. In fact, it hasn’t had the funding to keep up with a steady uptick in mergers in years. Aside from the recent spike, the total number of premerger filings [increased](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf) by 80 percent over the last 10 years. In 2010, corporations filed 1166 premerger notifications. By 2019, yearly filings almost doubled to 2089.

While the number of transactions the FTC is charged with regulating has increased steadily, the number of enforcement actions — challenges to anticompetitive mergers or conduct — has stagnated.  A 2020 paper from Equitable Growth showed that while the number of [enforcement actions](https://equitablegrowth.org/wp-content/uploads/2020/11/111920-antitrust-report.pdf) from both the FTC and DOJ hovered at about 40 challenges per year from 2010 to 2019, even as the number of corporations seeking merger approval grew. The FTC’s enforcement actions over the past ten years show the agency hasn’t kept up with increased HSR filings: while FY 2010 saw 22 enforcement actions for 1166 reported mergers, a ratio of approximately one enforcement action for every 53 mergers, FY 2019 saw a mere 21 enforcement actions for 2089 mergers, meaning there was only one FTC enforcement action for every 99 mergers.

Overall funding and staffing levels at the FTC have similarly stagnated. Then-FTC commissioner Rebecca Slaughter said in 2020 that it is an “[indisputable](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf)” fact that FTC funding has not kept up with market demands; according to Slaughter, the FTC budget has only increased by 13% since 2010 and the employee headcount decreased. This budget increase has not come from increased discretionary appropriations from Congress however, but from a massive increase in merger filings and their accompanying fees. Startlingly, Slaughter notes that “the FTC had roughly 50% more full-time employees at the beginning of the Reagan Administration than it does today.” The situation has become so dire that increased budgets for the enforcement agencies has become a rare [bipartisan](https://www.law360.com/articles/1368496/klobuchar-says-congress-has-rare-shot-at-antitrust-overhaul) issue in the Senate.

#### No resources and thumpers.

Kades ‘7-28 [Michael; July 28; Director of Markets and Competition Policy, former attorney at the Federal Trade Commission; Equitable Growth Foundation, “Competitive Edge: Congress needs to restore the Federal Trade Commission’s authority to seek monetary remedies when companies break the law,” <https://equitablegrowth.org/competitive-edge-congress-needs-to-restore-the-federal-trade-commissions-authority-to-seek-monetary-remedies-when-companies-break-the-law/>]

As the report explains, “Rather than deter anticompetitive behavior, current legal standards do the opposite: They encourage it because such conduct is likely to escape condemnation, and the benefits of violating the law far exceed the potential penalties.” In the face of such warnings, it is a particularly bad time for the Supreme Court to unanimously reject 40 years of lower court rulings and conclude that the Federal Trade Commission can neither force companies to give up the profits they earned by violating the law nor compensate the victims of those violations. (The first remedy is called disgorgement, and the second remedy is called restitution.)

Whether the Supreme Court in April correctly interpreted the statute at issue in the case, AMG Capital Management LLC v. Federal Trade Commission, is less important than its implications. Professor [Andy Gavil discusses a potential silver lining](https://equitablegrowth.org/competitive-edge-the-silver-lining-for-antitrust-enforcement-in-the-supreme-courts-embrace-of-textualism/) in the Supreme Court’s decision—the glass-half-full approach. He argues that if the Supreme Court faithfully applies its approach to statutory interpretation, then it could open the door to broader application of the antitrust laws.

I look at the direct impact of the decision—the glass-half-empty approach. I argue that the decision deprives the antitrust agency of a critical, albeit imperfect, weapon that has deterred anticompetitive conduct particularly in the pharmaceutical industry. Although it has used disgorgement in competition cases sparingly, those awards have deterred the entire industry from engaging in the challenged conduct.

Before the recent Supreme Court decision, the disgorgement awards in competition cases went far beyond the impact in a single case. The savings include benefits from the conduct that did not occur. If the commission cannot seek monetary remedies, then companies will keep the rewards of their illegal conduct. Perversely, the companies causing the greatest harm will benefit the most from April’s decision.

The impact reaches even further. Without the threat of a disgorgement award, companies are more likely to drag out litigation and tax the FTC’s limited resources. Because the commission will spend more resources on egregious cases to reach weaker results, it will have fewer resources to challenge anticompetitive conduct in other areas and, for example, could affect enforcement in merger cases or in the high-tech industry.