# 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.

#### Status quo antitrust laws 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.

#### That’s key to biotech

Hirschmann 12 [David Hirschmann, President and CEO of the U.S. Chamber of Commerce Center for Capital Markets Competitiveness, Former Legislative Director for Congressman Toby Roth, “Why is IP Important?”, Global Intellectual Property Center, http://www.theglobalipcenter.com/resources/why-is-ip-important/]

Intellectual property (IP) contributes enormously to our national and state economies. Dozens of industries across our economy rely on the adequate enforcement of their patents, trademarks, and copyrights, while consumers use IP to ensure they are purchasing safe, guaranteed products. We believe IP rights are worth protecting, both domestically and abroad. This is why: Intellectual Property Creates and Supports High-Paying Jobs IP-intensive industries employ over 55 million Americans, and hundreds of millions of people worldwide. Jobs in IP-intensive industries are expected to grow faster over the next decade than the national average. The average worker in an IP-intensive industry earned about 30% more than his counterpart in a non-IP industry The average salary in IP-intensive industries pay $50,576 per worker compared to the national average of $38,768. Intellectual Property Drives Economic Growth and Competitiveness America’s IP is worth $5.8 trillion, more than the nominal GDP of any other country in the world. IP-intensive industries account for over 1/3– or 38%– of total U.S. GDP. These industries also have 72.5% higher output per worker than the national average, valued at $136,556 per worker. IP accounts for 74% of all U.S. exports- which amounts to nearly $1 trillion. The direct and indirect economic impacts of innovation are overwhelming, accounting for more than 40% of U.S. economic growth and employment. Strong and Enforced Intellectual Property Rights Protect Consumers and Families Strong IP rights help consumers make an educated choice about the safety, reliability, and effectiveness of their purchases. Enforced IP rights ensure products are authentic, and of the high-quality that consumers recognize and expect. IP rights foster the confidence and ease of mind that consumers demand and markets rely on. Intellectual Property Helps Generate Breakthrough Solutions to Global Challenges Nearly all of the hundreds of products on the World Health Organization’s Essential Drug List, which are critical to saving or improving people’s lives around the globe, came from the R&D-intensive pharmaceutical industry that depends on patent protections. Innovative agricultural companies are creating new products to help farmers produce more and better products for the world’s hungry while reducing the environmental impact of agriculture. IP-driven discoveries in alternative energy and green technologies will help improve energy security and address climate change. Intellectual Property Rights Encourage Innovation and Reward Entrepreneurs Risk and occasional failure are the lifeblood of the innovation economy. IP rights incentivize entrepreneurs to keep pushing for new advances in the face of adversity. IP rights facilitate the free flow of information by sharing the protected know-how critical to the original, patented invention. In turn, this process leads to new innovations and improvements on existing ones. American’s Founding Fathers so recognized the importance of innovation and ensured that strong IP rights for authors and inventors are protected in the U.S. Constitution, thus making America the world’s entrepreneural leader— a fact borne out by the overwhelming number of patents, copyrights and trademarks filed by the U.S. annually.

#### Biotech innovation solves extinction

Bryden 17 [Bryden, Professor at the Norwegian Institute of Bioeconomy Research, “Inclusive Innovation in the Bioeconomy: Concepts and Directions for Research”, Innovation and Development, Volume 7, http://www.tandfonline.com/doi/full/10.1080/2157930X.2017.1281209]

In this introduction to the special issue on inclusive innovation in the bioeconomy, the authors highlight inclusive innovation’s significance to economies that provide the vital resources of food, water, and energy. Innovation in the bioeconomy raises questions of environmental sustainability, human survival, social justice, and human rights. This article thus emphasizes, especially, the roles that institutions play regarding innovation in the bioeconomy. The authors suggest that inclusive innovation be defined as new ways of improving the lives of the most needy. They outline research implications of this definition, and relate these implications to debates about the modes and ethics of innovation. They argue that innovation systems’ design affects these systems’ potential for inclusiveness as well as their value premises. Finally, the contributions to this special issue are introduced and discussed in light of the special issue’s overall purpose and framework.

1. The significance of inclusive innovation in the bioeconomy

This special issue is about inclusive innovation in the ‘bioeconomy’, generally conceived as an economy based on land and marine-based natural resources including eco-systems services and bio-waste. The bioeconomy produces the most vital goods: food, drinking water, breathable air, and energy. Increasingly, the bioeconomy is also seen as offering a green alternative to the fossil fuel-based economy that is largely responsible for climate change. The transition from the fossil fuel economy to the bioeconomy is a large and growing field for all forms of technical and institutional innovation. The cases discussed in this volume all deal with aspects of what is now termed the ‘bioeconomy’ and the related transitions to it.

In this introduction to the special issue we highlight inclusive innovation’s significance to the growing debate about the bioeconomy. We link our topic to the pathbreaking work that has been done by previous researchers on inclusive innovation, and we present our view on two much-debated topics in the inclusive innovation literature: the definition of ‘inclusive innovation’ and the definition’s implications for research. We also wish to stimulate discussion about innovation’s (often tacit) normative premises. It is argued in this special issue that normative premises guide both conventional and alternative notions of innovation, and that different modes of innovation have different normative implications regarding, for example, who’s interests and knowledge count as being significant. We thus wish to contribute in this special issue to the more general debates about innovation’s purposes, innovation’s actors, and the institutional preconditions for innovation’s ability to improve people’s lives. Finally, in the light of these general questions we introduce the papers in this special issue. Thereby, we hope to create useful pointers for future work on inclusive innovation and innovation in the bioeconomy or surrogate pricing (e.g. through environmental taxes) to make such choices. However, given the unequal distribution of purchasing power, market principles prioritize use of these resources for those with the greatest purchasing power, and leave the poorest with no, or short, supplies. Consequently, poor people’s access to vital natural resources can often be ensured only by institutional means. It is against this background that we devote this special issue to the topic of inclusive innovation in the bioeconomy. We wish to address, in particular, the roles that institutions play in securing innovation’s inclusiveness in the bioeconomy.

However, the bioeconomy, as a provider of vital subsistence resources, urges scholars and policy-makers, as argued by Bryden and Gezelius in this volume, to consider the fundamental institution of the human rights regime, which makes access to food, shelter, and clean water, among other things, a basic right. Ethical and legal issues are thus deeply enshrined in the choices to be made in the bioeconomy. Simultaneously, the bioeconomy, with its territorial nature, is deeply embedded in the communities and other social systems that inhabit its territories. These social systems are often very long standing and cannot be easily changed. They depend on natural resources that have many social and cultural uses, including subsistence, recreation, tourism, landscapes, biodiversity, carbon absorption, and others commonly summed up as ‘eco-system services’. Altering any or all of these social and biological systems to ‘grow the new bioeconomy’, therefore, has significant social and human implications that scientists and policy-makers will ignore at their peril, including, of course, the risk of fuelling popular opposition. Social scientists, therefore, have a key role to play in bringing implicit institutional preconditions and value premises to light, discussing them critically, and offering alternatives. Highlighting this role is one of the tasks in this special issue.

## 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.

#### Scenario One is Brazil:

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

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

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

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

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

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

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

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

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

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

#### Brazilian growth ends Amazon deforestation.

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

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

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

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

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

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

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

Rise and fall of deforestation

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

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

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

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

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

Of currencies and commodities

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

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

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

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

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

Economic crises are environmental crises

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

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

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

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

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

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

To end deforestation, fix Brazil’s economy

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

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

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

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

#### Amazon deforestation destroys biodiversity – extinction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Catastrophic climate change

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

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

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

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

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

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

#### Scenario Two is South Africa:

#### South Africa has few civil lawsuits – comity can resolve market failure.

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

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

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

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

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

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

#### Market failures depress growth in ag.

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

Economic regulation, competitive outcomes and inclusive growth

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

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

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

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

#### Absence of antitrust 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

### Econ – 2AC

#### Takes out the China DA – we defer to China inevitable – no cartel is about China.

Qingxiu Bu, Commercial Law @ University of Sussex, formerly professor of transnational business @ Georgetown Law Center, ’20, ‘“Respectful Consideration, but Not Deference: Chinese Sovereign Amici in the US Supreme Court Vitamin C Judgment” Journal of European Competition Law & Practice, Vol. 11, No. 5–6

1. Public actors vis-à-vis private actors

The act of state doctrine refers to a defence designed to avoid judicial inquiry into state officials’ conduct as opposed to private actors.86 The long-standing doctrine precludes courts from ruling on the validity of the public acts of a foreign sovereign within its own territory.87 In Vitamin C, the privately set price does not qualify as state action, and thus the doctrines of act of state should not bar plaintiffs’ suit. It may not meet the test of reasonableness, neither is the decision equitable. Otherwise, the effect would be to substantially impair antitrust enforcement and impose significant costs on US consumers.88 In the case of a foreign government ordering its firms to fix prices, the victims are at the will of the foreigners’ power and have no recourse.89 In order to apply the foreignstate compulsion defence, the Restatement (Fourth) 2018 clarifies that, the sanctions for failing to comply with the foreign law must be severe, and the person in question must have ‘acted in good faith to avoid the conflict’.90 The threshold is unlikely to be met given the intertwining of public and private actions inChina. In terms of the private actors’ price fixing, the defendants in Vitamin C had strong incentive to maximise their profits at the expense of US consumers, who have even benefited from the mandate.91 This happens when Chinese MNCs operating in a hybrid state capitalism pursue conduct in violation of the US antitrust laws.92 Such a scenario takes place more often in some key industries that the Chinese government firmly controls. It is rare in China for the government to use plausibly state-sanctioned coordination.93

Fromthe view of the Second Circuit, foreign sovereign briefs are likely a superior source on foreign law than the Court undertaking its own analysis.94 The overwhelming limitations on the court’s jurisdiction may create a substantial loophole in dealing with foreign deference. With the defendants’ conduct immunised, those Chinese firms’ interests have been outweighed over theirUS counterparts. 95 Requiring absolute deference would virtually allow MOFCOM to shield the Chinese defendants from the reach of US antitrust law.96 In this vein, a conclusive deference standardmakes it easier for defendants to prove foreign sovereign compulsion.97 It would be difficult for the US plaintiffs to gain remedies if a federal court stuck to a ‘bound to deference’ approach.98

### T – 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.

#### ‘Increase’ means adding extent.

Phillips ’2 [Louis M; May 1; Judge on the Bankruptcy Court of M.D. Maryland; Westlaw, “In re Goldberg,” 277 B.R. 251]

In determining the plain meaning of the phrase “increases the obligor's insolvency,” the Court initially notes that this phrase makes no reference whatsoever to a “reasonably equivalent value” test26 or even to the “fair consideration” test of the Section 3 of the UFCA.27 Instead, Article 2036 of the Civil Code merely uses the word “increases,” and the absence of “reasonably equivalent value” language or “fair consideration” language rings loudly in the Court's judicial ear. Accordingly, the Court will focus on the plain meaning of the term “increases.” Taking note from one of the dictionaries of choice of the United States Supreme Court,28 the Court finds that the definition of the word “increase” in Webster's Ninth New Collegiate Dictionary reads as follows:

\*270 [T]o become progressively greater (as in size, amount, number, or intensity) .... to make greater: AUGMENT .... INCREASE, ENLARGE, AUGMENT, MULTIPLY mean to make or become greater. INCREASE used intransitively implies progressive growth in size, amount, intensity; used transitively it may imply simple not necessarily progressive addition ... the act or process of increasing: as ... addition or enlargement in size, extent, quantity.

Webster's Ninth New Collegiate Dictionary 611 (1990) (emphasis added).

#### ‘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).

### Executive CP – 2AC

#### The three branches can govern the ‘scope’ of antitrust law.

Sagers ’15 [Christopher L; 2015; the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator; Handbook on the Scope of Antitrust, “Introduction,” Ch. 1, p. 9]

B. Sources of the Scope of Antitrust Law

The scope of federal antitrust law is governed by three separate authorities: (1) the U.S. Constitution, (2) the language of the antitrust statutes themselves, and (3) the language of other federal statutes and regulations.

#### Key to precision. No other definitions assume all antitrust law.

Sagers ’15 [Christopher L; 2015; the James A. Thomas Distinguished Professor of Law and Faculty Director of the Cleveland-Marshall Solo Practice Incubator; Handbook on the Scope of Antitrust, “Introduction,” Ch. 1, p. 2]

No prior work appears to have considered the entire law of the scope of antitrust as one body, in any comprehensive and integrated way. Integrated treatment poses certain benefits. A primary goal of this book is to aid practitioners, because several of the scope doctrines have become complex and uncertain, and their interrelationships can be especially challenging.

#### Does not solve:

#### 1 – Courts key to solve the circuit split.

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

Lack of clarity in the application of the FTAIA has bred, ironically, more uncertainty among courts and hurt businesses because of the uncertainty.66 Some of the confusion arises from different treatment of “conduct involving import trade or commerce.”67

Because of its less-than-natural drafting, the FTAIA has prompted some courts to view conduct involving import trade or commerce as an exception to the FTAIA though that conduct should not even enter the FTAIA analysis in the first place.68 By calling the FTAIA’s import commerce an “exception,” courts have sometimes wrongly used the “direct effect” test instead of the traditional effects test from Hartford Fire that is more applicable to conduct involving import trade or commerce.69 Perhaps reasoning that conduct involving import trade or commerce an exception, some courts have interpreted the conduct’s scope restrictively.70 This narrow reading is inconsistent with congressional intent71 and today’s economic reality.72

Determining whether the import inclusion or direct effect exception applies, matters because that determination implicates the applicable legal standard.73 The traditional Sherman Act test, like in Hartford Fire, may require a substantial effect in addition to the defendant’s intent to target the U.S. import market, but it does not require additional thresholds like directness or foreseeability.74 Thus, the direct effect test is a higher standard than the Hartford Fire effect test and thus can hamper the efficacy of antitrust enforcement.

A.NEC Tokin: Misapplying Direct Effect Exception

The uncertainty with import inclusion and misapplication of the standards is pronounced in a pending case that involves price-fixed components.75 In September 2015, NEC Tokin Corporation of Japan was charged with a violation of the Sherman Act for fixing the prices of its capacitors.76 According to the information submitted to the court by the United States, capacitors constitute “a fundamental component of electrical circuits.”77 Electrolytic capacitors are “ubiquitous,” incorporated into many commonly-used electronic devices we all use on a daily basis, including computers and televisions.78 NEC Tokin allegedly conspired with coconspirators to fix prices for their capacitors that were manufactured outside the United States.79 The capacitors were incorporated into finished products outside the United States before being imported into the United States.80 This, the United States claimed, had a “direct, substantial, [and] reasonably foreseeable effect on . . . U.S. import trade or commerce in these electrolytic capacitor-containing products,” in violation of the Sherman Act.82 The Department of Justice was relying on the FTAIA’s direct effect exception rather than the import inclusion, setting itself up to prove the more stringent standard under the direct effect exception.

B. Motorola Mobility: Unclear Contours of Conduct Involving Import Trade or Commerce

The second type of confusion involves the exact contours of conduct involving import trade or commerce, especially in today’s age of globalized supply chains. In Motorola Mobility LLC v. AU Optronics Corp.,83 AU Optronics, along with other likewise foreign LCD manufacturers, conspired to fix the price of LCD panels.84 Motorola purchased the price-fixed LCD panels from AU Optronics to incorporate them into their cellphones.85 Only one percent of Motorola’s purchase was directly delivered to the United States; the remaining ninety-nine percent was purchased through its foreign subsidiary outside the United States.86 Of the ninety-nine percent, forty-two percent was incorporated into Motorola’s cellphones outside the United States before being imported into the United States.87 The rest of the cellphones were shipped to other countries for sale.88 Ut was the price-fixed LCD panels incorporated into the forty-two percent that took the center stage in Motorola Mobility.89

Motorola contended that its importation of the finished products incorporating the price-fixed LCDs should be construed as part of conduct involving import trade or commerce.90 It also argued that even if conduct involving import trade or commerce is interpreted restrictively to apply exclusively to physical importers, Motorola and its foreign subsidiary that purchased the LCDs should be considered a single entity and thus the importer.91 In rejecting both contentions,92 the Seventh Circuit did not consider the importation of the finished cellphones with the price-fixed LCDs as part of import trade or commerce.93 Instead, the court focused on whether the importation would fit under the direct effect exception of the FTAIA.94 If Motorola satisfied the direct effect exception, its claim, though involving foreign non-import conduct,95 would have been swept back under the Sherman Act.96 In making that judgment call, the Seventh Circuit relied on a formalistic view of what constitutes conduct involving import trade or commerce, a view that is inconsistent with today’s economic realities in which supply chains are globalized and transcend national boundaries.97

Most notably and recently, the Supreme Court decided to forego a golden opportunity to clear confusion surrounding the FTAIA.98 The Court was asked to resolve differing court decisions that examined an identical set of facts involving an international cartel that fixed the prices of LCD panels used in electronics, such as phones and televisions.99 Many groups implored the Court to use this opportunity to elucidate the U.S. antitrust laws’ extraterritorial reach.100 In denying certiorari, the Court has prolonged the same confusion and uncertainty surrounding the application of the FTAIA101 and the Sherman Act.102

#### 2 – Deference to the Executive fails for comity.

Dodge ’15 [William S; Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law; *Columbia Law Review,* “INTERNATIONAL COMITY IN AMERICAN LAW,” <https://columbialawreview.org/content/international-comity-in-american-law/>; KS]

B. THE ROLE OF THE EXECUTIVE BRANCH

A second myth of international comity is the notion that the execu­tive branch enjoys a comparative advantage in making comity determina­tions. Posner and Sunstein have argued that “there are strong reasons, rooted in constitutional understandings and institutional competence, to allow the executive branch to resolve issues of international comity.”361 Because of its expertise in foreign relations, “the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary.”362 Posner and Sunstein, however, discuss only a limited number of international comity doctrines.363 When one looks at the full range, one sees quite a few with respect to which deference to the Executive seems completely inappro­priate: the conflict of laws, the enforcement of foreign judgments, forum non conveniens, antisuit injunctions, and questions of foreign discovery, to name a few. These doctrines undoubtedly implicate foreign relations, but they also fall within the core responsibility of the courts to manage their dockets and decide cases. With a number of these international comity doctrines, the Supreme Court has emphasized that the “determi­nation is committed to the sound discretion of the trial court.”364 The Executive rarely intervenes in such comity cases, and even when it does so, its views appear to receive no deference.365

With other comity doctrines, the question is more complicated, and it may be useful to draw some distinctions. As Curtis Bradley notes, “[s]ome forms of deference may be more defensible than others.”366 On the one hand, the executive branch plainly has authority to make some decisions that affect the application of international comity doctrines. The President may recognize a foreign government, for example, or an agency may interpret the geographic scope of a statute it administers. Such decisions tend to be made categorically, outside the context of liti­gation. On the other hand, one should be skeptical of doctrines that al­low the executive branch to dictate the outcomes of particular cases on foreign policy grounds. Such discretion invades the province of the judi­ciary and may harm, rather than advance, U.S. foreign relations.367

#### Empirics.

Briggs & Bitton ‘15 [John; Daniel; 2015; Antitrust and litigation counsel of choice for dozens of major companies in the United States, Asia, Europe and Scandinavia. Client demand for his work has focused on antitrust, M&A and complex civil litigation; An attorney who represents clients in the San Francisco, California area; "Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity." https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle\_Extraterritorialty%20and%20Comity.16TSCJ327.pdf]

Institutionally, DOJ is much better placed than private plaintiffs and their counsel to consider international comity in deciding what cases and targets to prosecute and what sentences to seek. As part of the Executive Branch, the impact of its enforcement efforts on international relations should matter in its exercise of prosecutorial discretion. Indeed, DOJ has long had in place Antitrust Enforcement Guidelines for International Operations, in which it explains that it considers international comity when enforcing the U.S. antitrust laws extraterritorially, among others, by determining whether enforcement objectives can be achieved by deferring to foreign governments instead.86 And there is, for example, an agreement between the U.S. and European Communities87 under which they basically have agreed that the DOJ and European Commission (EC) will normally defer or suspend their own enforcement efforts in favor of the other’s where the anticompetitive conduct may have an impact in its own territory but is primarily taking place in and directed at the other’s territory.88

In actual practice, however, there is little visible evidence that international comity is a significant consideration for DOJ. As the nation’s federal prosecutor, the DOJ—and especially its prosecuting staff—usually seems singularly focused on securing guilty pleas, convictions, and large fines, including in a great many cases from foreign corporations and citizens. Its aggressive enforcement against overseas conduct and its advocacy efforts before courts in favor of an expansive view of the extraterritorial reach of U.S. laws89 suggest that considerations of international comity typically take a backseat to enforcement and deterrence, if those considerations get a seat at all.

### WTO CP – 2AC

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

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

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

#### Both foreign nations and American say no.

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]

A. Failed Attempts at Establishing an International Body of Antitrust Governance or Harmonization

Formal international competition law attempts have failed, in large part, due to lack of support from the U.S.118 The first attempt was commissioned by the League of Nations, which explored whether an international system against cartel arrangements was within the realm of possibility.119 At the time, “Europeans looked at the cartel arrangements as an attempt to preserve economic stability,” and the reports praised some cartels as “instruments of peace, international cooperation, and prosperity.”120 As a result, the League did not adopt any measures against cartel activity, citing the greater good.

After World War II, it was again argued that there was a need for international governing authority over antitrust enforcement.121 World leaders and lawmakers sought a new, more cooperative world and discussed competition laws during the proposed International Trade Organization (“ITO”) Havana Charter in 1947.122 The notes from those discussions contained “detailed rules regarding the substance and enforcement of competition law,”123 indicating that it was heavily debated and discussed, but ultimately no competition rules were decided upon.124 The U.S. was among those countries which refused to ratify the contemplated competition rules.125

Shortly after the Havana Charter, nations enacted the General Agreement on Tariffs and Trade (“GATT”).126 The GATT, like the agreements that came before it, remained silent on international competition rules.127 This repeated failure to address international competition rules in national trade agreements suggests that centralized international competition laws may be a non-starter for years at come.

The World Trade Organization (“WTO”) was established in 1995 and is the closest entity to a central authority on international trade laws, despite the fact that no centralized law exists.128 Again, the DOHA Ministerial attempted to negotiate international competition rules and introduce them into the established authority of the WTO.129 By 2004, during the Doha Round of trade negotiations, the plans to adopt competition laws were foiled.130 Developing countries and the U.S. did not provide their support for the introduction of competition laws. 131

As a result, although the WTO was established to be a primary venue to litigate antitrust matters between countries, the WTO can argue only that a country unfairly applied their own country’s domestic laws.132 There is still no international set of laws promulgated by the WTO. Given that discrepancies exist even between the three major trade countries, the lack of internationally set authority is quite limiting.

Given these historically failed and haphazard attempts, it is not likely that a uniform antitrust law can be adopted globally. China, the U.S., and the E.U. all subscribe to varying versions of free trade and what constitutes an appropriate method of enforcement. Further still, the national values significantly differ between these countries. In China, national security terms and the promotion of national industry is paramount.133 Similarly, the U.S., while not allowing for the same breadth of application as China in its national security terms, seems determined to preserve its domestic laws despite the clear preference of other nations for E.U. competition laws.134

#### WTO weakens enforcement and imposes contracting costs.

Bradford ’11 [Anu; Assistant Professor, The University of Chicago Law School; *Cooperation, Comity, and Competition Policy,* “International Antitrust Cooperation and the Preference for Nonbinding Regimes,” <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2966&context=faculty_scholarship>; KS]

The United States has objected to the WTO antitrust agreement precisely on these grounds. It has argued that a binding international agreement would weaken antitrust laws throughout the world. Given the conflicting regulatory priorities, states could only reach a watered-down compromise.33 At worst, the prospective antitrust agreement would only codify the lowest common denominator among the broad WTO membership.34

As the United States predicted, the proposed antitrust agreement within the WTO grew weaker with every new attempt to agree on the negotiation mandate. In the end, states were forced to strip the agreement of any meaningful content in an effort to accommodate their divergent preferences. The most recent pro- posal for a WTO antitrust agreement forwent substantive antitrust rules alto- gether, proposing merely to extend the fundamental yet vague WTO principles of “transparency” or “national treatment” to antitrust matters. Such an agree- ment would accomplish little in terms of fostering international convergence and would leave states with limited benefits to offset the costs of negotiating the agreement.35

Some might argue that even weak antitrust commitments could deepen with time due to the gradual alignment of states’ preferences and alleviation of uncer- tainties surrounding cooperation.36 As states learn more about the effects of the agreement and gradually reach a consensus on a wider set of issues, they may incrementally adopt deeper obligations. However, even if states were will- ing to gradually expand their obligations, the WTO—the most likely venue for a binding international agreement—would not lend itself well to frequent revi- sions of obligations. New, deeper commitments would call for new negotiations, which are slow, cumbersome, and costly. Consequently, states are more likely to resort to the WTO when they are able to agree on meaningful substantive norms at the outset. When the necessary consensus is missing, however, non- binding agreements outside the WTO are more likely to accomplish effective cooperation.

#### Does not solve indigenous regimes – no adoption.

Hoekman & Holmes ’99 [Bernard and Peter; April; World Bank and CEPR; University of Sussex and College of Europe, Bruges; *IATP,* “Competition Policy, Developing Countries and the WTO,” <https://www.iatp.org/sites/default/files/Competition_Policy_Developing_Countries_and_th.htm>; KS]

Abstract

This paper discusses developing country interests regarding the inclusion of competition law disciplines in the WTO. Although developing countries have a great interest in pursuing an active domestic competition policy, this can and should be done independently of the WTO. Given the mercantilist basis of multilateral trade negotiations, the WTO is less likely to be a powerful instrument to encourage adoption of welfare-enhancing competition rules than it is as a forum for the abolition of border measures. Priority should therefore be given to pursuit of the traditional market access focus of the WTO--further reduction in direct barriers to trade in goods and services.

Non-technical summary

Competition policy has an important role to play in developing countries, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive policy stance by the government. Liberal trade and investment policies are a key element of a good competition policy, and priority should be given eliminating barriers to trade and FDI. However, in many sectors of the economy the threat of foreign competition will remain limited, and there is need to apply competition law to ensure that firms do not behave collusively and that market power is not exploited. This can and should be done independently of the WTO--no international disciplines are needed.

There are a number of potential rationales for international cooperation in the area of competition law, notably where multi-jurisdictional mergers take place and where welfare-reducing export cartels cannot be disciplined because the jurisdictions most able to collect evidence have no incentive to do so. This does not imply an international agreement that could improve global welfare can easily be negotiated. Given the mercantilist basis of multilateral trade negotiations, the WTO is less likely to be a powerful instrument to encourage adoption of welfare-enhancing competition rules than it is as a forum for the abolition of border measures.

The problem is that the agenda is likely to be dominated by market access issues more than international antitrust. That is to say that the typical dispute is about the interests of major producers in export markets, and not about ensuring the adoption of competition law that is in the interests of the economy as a whole. To oversimplify, trade officials from exporting countries want to force competition officials in importing countries to assist in opening markets. From a bureaucratic politics point of view, this can give rise to a conflict between competition or anti-monopoly authorities worldwide and trade officials. The competition officials are afraid that their main objective of defending economic efficiency may be made subordinate to trade officials whose aim is to promote exports.

Independent decisions and actions are required on the part of developing countries to ensure that competition policies are implemented that foster a liberal trade and investment regime, and that action can be taken under competition law statutes to ensure that markets are contestable. Multilateral surveillance and scrutiny of domestic competition policy may help in this regard, as it will support domestic "transparency" activities that focus attention on the competitive conditions that prevail in the economy. If there is a move to negotiate on competition law at the WTO, the challenge for developed as well as developing countries is to pull off the same trick that lies at the heart of the GATT, namely harnessing the interests of competing producers to promote the adoption of policies that are welfare enhancing.

#### Hurts SDGs and welfare.

Hoekman & Holmes ’99 [Bernard and Peter; April; World Bank and CEPR; University of Sussex and College of Europe, Bruges; *IATP,* “Competition Policy, Developing Countries and the WTO,” <https://www.iatp.org/sites/default/files/Competition_Policy_Developing_Countries_and_th.htm>; KS]

The political economy argument in favor of international competition disciplines is that external disciplines might prove helpful to overcome domestic opposition to the implementation of pro-competitive policies. As noted previously, the foundation of the GATT and the WTO is that in the pursuit of a market access agenda the national welfare is promoted. National antitrust has a very different focus from national trade policy in that the emphasis is (should be) on welfare and the competitive process. This implies that the economic rationale for putting it on the WTO agenda is much weaker than for trade policy--national authorities should already be engaged in combating anti-competitive business practices. The pursuit of a market access agenda may result in outcomes that are detrimental from a welfare point of view (the latter possibility is a major reason some competition authorities are leery of putting antitrust on the WTO agenda, see e.g., Marsden (1997)). For the WTO dynamic to "work" one must start from the presumption that competition law and policy in developing countries has been or will be captured by domestic producer lobbies, and therefore does not focus on welfare maximization. If so, and this may indeed be the case in some cases, there would be a rationale for pursuing international competition disciplines in the WTO. The problem remains, however, that the WTO process is driven by export interests (market access), not national welfare considerations, and there is no assurance that the rules that will proposed or agreed will be welfare enhancing. Increasing access to markets may have this effect, but there is no presumption that this will always be the result, especially in contexts where firms are actively seeking to create and defend rents. Doubts can therefore be expressed regarding the ability of a WTO-based process to play as constructive a role in the area of competition law as it does in the area of trade policy.

### Decoupling DA – 2AC

#### 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 protectionistmechanism** 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 underminescooperation – 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.

#### Expanding the effect to include comity concerns solves trade openness and cooperation.

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.

#### No Taiwan invasion – military risk and domestic costs.

**Roy 21** – Denny Roy, Political Science PhD at the University of Chicago. Professor at the Asia-Pacific Center for Security Studies. [Rumors of War in the Taiwan Strait, 3-12-2021, <https://thediplomat.com/2021/03/rumors-of-war-in-the-taiwan-strait/>]

For Taiwan and its friends, however, the situation is **not** as **dire** as portrayed by those warning that Beijing will soon opt for war even in the absence of a major provocation from Taiwan.

For domestic political reasons, China is **extremely unlikely** to embark on a war of choice against Taiwan in the next year. In February 2022 Beijing will have the opportunity to present itself in the best possible light to a massive international audience when it **host**s the Winter Olympics, in which **the Chinese government** has **invested lavishly**. A cross-strait war would ruin **this party**. In **October 2022**, the CCP will hold **its 20th National Party Congress**. Xi Jinping will be up **for a third term as CCP general secretary**. It is **hard to imagine** Xi starting an unnecessary war with Taiwan prior to his re-appointment because of **the high risk** that **war-related economic** and **even political turmoil** would **erode** Xi’s popularity.

Even with the PLA’s improved capabilities, **military action** against Taiwan is **an extremely risky proposition for China**. An attempted invasion across the strait would involve the largest and most complex amphibious operation in history, and this by a military with no significant combat experience since 1979, when it performed badly in a border war against Vietnam. China could more confidently capture one of the ROC’s smaller outlying islands or impose a blockade on Taiwan’s major ports, but neither of these approaches would guarantee Taipei’s surrender.

Chinese analyst Cui Lei of the China Institute of International Relations recently argued that **Chinese leaders** feel compelled to maintain **an image of toughness** toward Taiwan, but have **no intention** to launch **a military attack** in the foreseeable future. Cui argued that **military action** is **daunting** because Taiwan’s people will not submit **without a fight**; the United States would help defend Taiwan out of fear of losing U.S. leadership in the region; China is not **as militarily strong** as the United States; war would cause **discontent in China**; and **the international backlash** would derail **China’s progress toward modernization**.

As is required of any paramount leader in China, Xi affirms his commitment to unification. But how deeply Xi is committed to the objective of making Taiwan a province of the PRC during his tenure is unknown. There are other issue areas where he could strive for accomplishments to bolster his legacy, such as cleaning up and rejuvenating the CCP, presiding over successful restructuring of the Chinese economy, ushering China out of the “middle income trap,” and of course blessing humanity with Xi Jinping Thought.

The notion that Chinese aggressiveness on other fronts presages an attack on Taiwan is questionable. The consequence of that aggressiveness is that China simultaneously suffers from poor or damaged relations with India, Japan (due to the Senkaku-Diaoyu Islands dispute), Australia (economic coercion), some of the Southeast Asian states (the South China Sea dispute), and the United States (on several issues). On top of this, China is battling against **accelerated economic decoupling**, which could slow Chinese economic development. Already dealing with **multiple crises** in **its foreign relations** is **more likely** to give Beijing **pause** than to encourage the Chinese leadership to initiate an additional, larger crisis. The situations of **Hong Kong** and **Taiwan**, their relationships to Beijing, and the PRC’s policies toward them are **completely distinct**. The imposition of the National Security Law in Hong Kong is the culmination of political struggle that dates back to 2002 and is disconnected from PLA readiness to go to war with Taiwan.

### PQD DA – 2AC

#### PQD is dead

Tribe 17 [Def qualified. Laurence H. Tribe - Carl M. Loeb University Professor at the Harvard Law School in Harvard University. Tribe is a constitutional law scholar. and has argued before the United States Supreme Court 36 times. “FORUM: Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine” – The Yale Law Journal - VOLUME 126 – July - #CutWithRJ - https://www.yalelawjournal.org/forum/transcending-the-youngstown-triptych]

I would expect the Administration to assert that war-powers disputes are nonjusticiable political questions, and that Smith’s purported injury doesn’t create standing.89 But regardless of whether the war against ISIL is in fact unauthorized—a difficult interpretive question of concededly political moment lying at the heart of the separation of powers90—justiciability doctrines should not shut Smith out of the courthouse. For one, Chief Justice Roberts’s majority opinion in Zivotofsky I91 could be read as all but obliterating the political question doctrine when it comes to cases alleging that the executive is violating a statutory restriction like the War Powers Resolution.92 But even if Zivotofsky I does not support Captain Smith’s claim quite so categorically,93 the court should not ignore the gravity of his individual stake—avoiding the Catch 22 of either continuing to fight a possibly illegal war or disobeying orders and subjecting himself to military discipline—in deciding whether his claim is justiciable. To be sure, the political question doctrine is well suited to bar judicial resolution of some separation-of-powers disputes, especially those that request sprawling, unmanageable remedies,94 but here the Captain seeks to vindicate a vital personal interest through a simple yes-or-no judicial declaration resting firmly on classic principles of statutory interpretation. A court’s refusal to hear the case on political question grounds would leave Smith with an unacceptably difficult personal dilemma95 that, ironically, the political branches would likely never solve absent judicial intervention.96

#### The plan solves tradeoff.

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

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

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

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

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

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

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

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

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

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

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

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

#### No internal link – 1NC Bu does not say that it destroys WTO credibility. But, WTO credibility hinges on overfishing which isn’t going great.

Aljazeera ’21 [Aljazeera; July 14; *Aljazeera,* “WTO’s Reputation Rides on Upcoming Deal to Curb Overfishing,” <https://www.aljazeera.com/economy/2021/7/14/wtos-reputation-rides-on-upcoming-deal-to-curb-overfishing>; KS]

Negotiators are hoping the World Trade Organization will on Thursday not only deal a major blow to overfishing after 20 years of trying, but in doing so also dispel doubts about its own usefulness.

The global trade watchdog, whose 164 members are also at loggerheads over how it should settle disputes, has not clinched a significant trade deal for years, and analysts say it needs to land one this year to maintain its credibility.

The prize could be a sharp reduction of the widespread fishing subsidies that are generally held to be the single biggest factor in depleting the world’s fish stocks.

The WTO says it is “on the cusp” of a deal; Director-General Ngozi Okonjo-Iweala said the ministerial meeting, being held virtually, “should kick us along the path towards agreement”, before a November session intended to seal the deal.

Some delegates are privately more sceptical, saying there is still a gulf in views over the allocation of subsidies between wealthy members such as the European Union on one side and developing countries such as India on the other.

“Many members feel that the larger subsidisers should make larger cuts to their subsidies, given the worldwide impact of their fishing, both historical and current, whereas many developing countries feel the rules should be different for them,” said Alice Tipping from the International Institute for Sustainable Development.

A confidential proposal in May by African, Caribbean and Pacific countries, seen by Reuters news agency, seeks exemptions for members that take less than 2.5 percent of the global catch – which others say would undermine the whole deal.

## Econ

### Trade High Now

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

Swanson ’21 [Ana; 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.”

### Plan Solves

#### 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

## Executive CP

### Solvency Deficits

#### Executive fails – case-by-case, discretionary decisions harm foreign relations.

Dodge ’15 [William S; Martin Luther King, Jr. Professor of Law, University of California, Davis, School of Law; *Columbia Law Review,* “INTERNATIONAL COMITY IN AMERICAN LAW,” <https://columbialawreview.org/content/international-comity-in-american-law/>; KS]

Much more problematic is judicial deference to the Executive with re­spect to the outcomes of particular cases. Some international comity doc­trines have been interpreted to permit case-by-case discretion by the ex­ec­utive branch. The Second Circuit has held that the Executive may waive the act of state doctrine in a particular case under the so-called Bernstein exception.381

With respect to foreign official immunity, the executive branch has claimed authority to make binding determinations since the Supreme Court’s 2010 decision in Samantar.382 For status-based immunities, this au­thority derives from the President’s recognition power and is uncontro­versial, but there is no “equivalent constitutional basis” for determina­tions of status-based immunity.383 Nevertheless, the Fourth Circuit gives State Department determinations of conduct-based immunity “substantial weight,”384 while the Second Circuit considers them absolutely binding.385

As for foreign state immunity, the FSIA was passed in 1976 with the express purpose of shifting immunity determinations from the executive branch to the courts.386 In Republic of Austria v. Altmann, the Supreme Court refused to give any “special deference” to the Executive’s views about how the FSIA should be interpreted but suggested that “should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”387 This suggestion drew a sharp dissent from Justice Kennedy, who noted that “judicial independence . . . is compromised by case-by-case, se­lective determinations of jurisdiction by the Executive.”388

Finally, in the context of litigation under the Alien Tort Statute, the Supreme Court has raised the possibility of “case-specific deference to the political branches,” stating that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”389 Lower courts have tended to cabin this sug­gestion within the existing framework of the political question doctrine.390 But the Ninth Circuit in Mujica, applying its newly minted doctrine of in­ter­national comity abstention,391 gave substantial weight to a U.S. state­ment of interest suggesting “that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States.”392

Posner and Sunstein do not discuss any of these examples in de­tail,393 but they come down firmly on the side of case-specific deference to the executive branch. Even outside the Chevron context, they argue, courts should defer “if the executive branch argues that the court should dismiss the case rather than reach the merits.”394 “[T]he argument for deference to the executive is that it has more expertise than the courts in foreign relations and that the executive’s accountability for foreign rela­tions is more important than the courts’ independence from political pres­sure.”395 But Posner and Sunstein elide some key distinctions be­tween Chevron deference and case-specific deference and fail to respond to the two main normative arguments against a case-specific role for the execu­tive branch in administering the doctrines of international comity.

First, as Justice Kennedy pointed out in his Altmann dissent, “judicial independence” is compromised when the Executive has the power to make “case-by-case, selective determinations” that dictate the outcome of cases.396 Justice Douglas once made the point more colorfully in an act-of-state case, writing that such discretion makes the court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.”397 Testifying before Congress in favor of the proposed FSIA, State Department Legal Adviser Monroe Leigh said that the State Department’s “consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see es­tablished.”398 Deferring to an agency’s interpretation of the geographic scope of a statute under Chevron respects the established roles of Congress, the executive branch, and the courts.399 Allowing the Executive to tell courts which cases to dismiss does not. Thus, the Supreme Court properly re­jected the U.S. government’s argument in Kirkpatrick that the act of state doctrine should bar adjudication whenever the Executive determined that a case would cause too much embarrassment to a foreign government.400 “The short of the matter is this: Courts in the United States have the pow­er, and ordinarily the obligation, to decide cases and controversies pro­perly presented to them.”401

Second, the Executive’s ability to make case-by-case comity determi­nations may harm, rather than advance, the foreign relations of the United States. In Sabbatino, Justice Harlan observed that “[o]ften the State Department will wish to refrain from taking an official position, par­ticularly at a mo­ment that would be dictated by the development of pri­vate litigation but might be inopportune diplomatically.”402 Ironically, international comity doctrines that promise deference to the Executive put the Executive in the uncomfortable position of having to make deci­sions that may disap­point foreign governments.403

This was the U.S. experience with respect to foreign state immunity from the 1940s, when the Supreme Court adopted a rule of deferring to determinations of immunity by the State Department,404 until Congress passed the FSIA in 1976.405 As State Department Acting Legal Adviser Charles Brower testified, “We at the Department of State are now per­suaded . . . that the foreign relations interests of the United States . . . would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.”406 The problem was that “some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations” and that these states were “inclined to regard a de­cision by the State Department refusing to suggest immunity as a polit­ical decision unfavorable to them rather than a legal decision.”407 In their let­ter of transmittal to Congress, the Department of Justice and the Department of State explained:

The transfer of this function to the courts will also free the [State] Department from pressures by foreign states to suggest immun­ity and from any adverse consequences resulting from the un­willingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.408

Both the House and Senate Reports accompanying the FSIA empha­sized that “[a] principal purpose of this bill is to transfer the determina­tion of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity de­terminations” and freeing the State Department “from pressures from for­eign governments to recognize their immunity from suit and from any ad­verse consequences resulting from an unwillingness of the Department to support that immunity.”409 Over the past four decades, the “FSIA (with lit­tle or no deference to the executive branch) has not generated major for­eign policy problems.”410

As former State Department Legal Adviser John Bellinger has noted, the same dynamic is likely to play itself out in the context of foreign offi­cial immunity, where the State Department currently claims unreviewable discretion to make case-by-case immunity determinations:

I wonder whether, in a few years time, the Legal Adviser’s Office will be in that same situation again, seeking another kind of FOIA—a “Foreign Officials Immunities Act”—just as 40 years ago it sought the FSIA to relieve the burden and political pres­sure of having to file statements of sovereign immunity in every case.411

Other international comity doctrines that allow the Executive to dic­tate the outcome in specific cases—the Bernstein exception to the act of state doctrine, Altmann’s possibility of deference to statements of interest under the FSIA, and Sosa’s suggestion of case-specific deference in ATS cases—present the same dangers. Each opportunity for deference invites pressure from foreign governments and creates the possibility of diplo­matic backlash if the Executive decides not to support their positions.

Giving the executive branch authority to make case-by-case determi­nations under doctrines of international comity is a bad idea. It turns le­gal decisions into political ones, undermining not only the rule of law but also the foreign policy interests of the United States. The desirability of executive discretion over questions of international comity is not just a myth, it is a dangerous myth.

## PQD DA

#### PDQ dead – pending cases.

McCann 10-29 [<https://www.washingtonpost.com/politics/2021/10/29/supreme-court-just-took-case-epas-authority-its-decision-could-undo-most-major-federal-laws>; KS]

The Supreme Court on Friday agreed to hear a challenge to the Environmental Protection Agency’s authority to regulate power plant emissions, in a case that legal scholars say could undermine Congress’s constitutional authority to delegate power to federal agencies. Some argue that such regulation — not just by the EPA, but in President Biden’s vaccine mandate as well — is unconstitutional because of a somewhat arcane legal doctrine called the “nondelegation doctrine.” This theory holds that Congress cannot delegate broad policymaking authority to government agencies.

Why does this argument matter? Our research finds that if the Supreme Court were to invalidate either the EPA’s authority or the vaccine mandate under this doctrine, it might unravel nearly every major law Congress has passed since World War II. Nearly every one of these laws involves delegating authority to U.S. agencies.

#### No spill over – they won’t be enforced

Byrne, 2012 (J. Peter, Professor of Law, Georgetown University Law Center, “The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?”, University of California, Davis Law Review, Vol. 45:915, pp. 915-930)

Professor Mary Wood has articulated a theory of a planetary public trust in the atmosphere.46 Concerned that climate change will bring catastrophe and that environmental law will not adequately address it, she has urged a global effort to secure judicial enforcement of a public trust ordering carbon accountings and “enforceable carbon budgets.”47 Professor Wood admirably explains the doctrinal foundation by asserting that “it is no great leap to recognize the atmosphere as one of the crucial assets of the public trust.”48 One must respect the boldness of such an effort to counter looming disaster, based upon a plausible chain of legal reasoning. Yet, the initiative also exposes the public trust doctrine’s greatest weakness: it simply claims too much. The purpose of declaring the atmosphere a public trust is to empower judges to employ traditional legal tools, such as nuisance law, to order private entities to reduce harmful emissions and governments to introduce other mitigation measures. Thus, courts around the world would truly become the “Platonic guardians”49 of society, establishing basic environmental norms on the basis of a valuable yet unfamiliar legal doctrine. Such authority would lack political legitimacy. To respond to climate change, political majorities need to acknowledge the problem and authorize their institutions to take the difficult painful measures necessary to address it. Pressing for judicial recognition of a public trust in the atmosphere seems impractical in the short run and may be counterproductive in the long run. The Supreme Court’s recent decision in American Electric Power Co. v. Connecticut50 demonstrated that courts are unlikely to accept authority to order reductions in emissions without legislative direction and administrative support. The Court unanimously held that because Congress addressed carbon pollution through the Clean Air Act, it had displaced the federal common law of nuisance. As a result, courts were without authority to entertain federal nuisance actions against major emitters of greenhouse gases. Underlying the decision and mirrored in other climate nuisance decisions, Justice Ginsburg’s opinion for the unanimous Court expressed strong judgment that tackling climate change requires complex and coordinated judgments about science and economics beyond the judicial capacity: It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.51 Although the case dealt with displacement of federal common law, American Electric Power stands as a strong admonishment against employing judicial power to comprehensively address climate change. Even if judges felt confident enough to order emission reductions based upon a public trust in the atmosphere, such orders might undercut long-term efforts to reach environmental sustainability. There is no substitute for persuading U.S. citizens to support protection of the atmosphere through the democratic political process. Because implementation will require widespread and willing compliance, such measures require political legitimacy, which the courts lack. Reducing emissions substantially and adapting to inevitable climate change will require people to change their preferences and behavior. Political debate and messy compromises will more likely mobilize such change than the judicial extensions of legal principles, notwithstanding the current stalled state of national discussions of climate change. My disagreement with Professor Wood about which institutions should address climate change does not mean that I think the public trust doctrine cannot play a constructive role in the legal struggle. Legal recognition of public property rights in the atmosphere may improve political discourse and should reduce the threat that courts will find reasonable regulations — reducing emissions or lessening harms from climate change — to constitute regulatory takings. Reasonable legislative adjustment of competing property rights should be judged more generously than regulations that diminish property. In my approach, courts are asked to permit rather than command legislative action.

#### Court will ignore it

**Hunter 17** (Rob, PhD in political science, Princeton. February 1. <https://jacobinmag.com/2017/02/trump-gorsuch-supreme-court-nomination-garland>)

Judicial politics are contradictory like that. Any strategy for responding to the Gorsuch nomination and Trump’s judicial agenda more broadly must begin with an appreciation of these paradoxes, and a clear-eyed view of the Supreme Court’s conservative constitutional role. It is not a matter of opposing Gorsuch because of his originalism — still less of defending the judiciary fromcapture by conservative jurisprudence. It is a matter of resisting the judiciary itself as a reactionary institution. It is about focusing on the Court, not on Trump’s pick. A movement of mass opposition and disruption must target institutions rather than individuals, power rather than personalities. A filibuster by Senate Democrats would certainly be a welcome (and newfound) display of parliamentary intransigence. But it would be a mistake to stake all our hopes on the success of a campaign of protest aimed at holding the Democrats to account. There are few reasons to believe they will reprise the Republicans’ exercise of party discipline in denying a confirmation hearing to Merrick Garland, Barack Obama’s pick to succeed Scalia. Mass action against the reactionary Court must be part of a broader pattern of social unrest. It must look to Standing Rock, Baltimore, and Ferguson for guidance and instruction. It must not be corralled by the Democrats into a campaign of stage-managed protest (especially if the Democrats decline to filibuster Gorsuch for the sake of parliamentary norms no one else cares about). In short, it will have to look to a horizon more distant than the end of Gorsuch’s confirmation battle, keenly aware of the Court’s strange position in American politics. The Supreme Court is the site of multiple intersecting contradictions. As the capstone in the edifice of the federal judiciary, it is frequently celebrated as the final dispenser of justice. At the same time, it is an autonomous court controlling its own docket, with a self-conscious mission not of laying out philosophical accounts of justice but of resolving disparities in constitutional and statutory interpretation as they arise from lower courts. The Court is shrouded in the majesty of the law, cordoned off by the velvet ropes of judicial independence. Yet it often injects itself into political conflicts between other institutions and is a cherished prize in national politics. The highest bench in the land, it holds itself to be bound by precedent — until it doesn’t. The justices themselves are also ambiguous figures. They never seem to tire of repeating the sententious bromide that they are neutral arbiters — yet their interpretive philosophies frequently offer up divergent outcomes in similar cases. Most justices deny that their jurisprudence is colored by ideological commitments or partisan affiliations — but political scientists have no difficulty assigning them ideology scores on the basis of their voting patterns. No one who follows national politics has trouble discerning which justices share their views and which don’t. At times, Supreme Court justices appear to be ciphers — empty vessels into which the presidents who nominate them have decanted their preferred political views. At other moments, they are mysterious and oracular. Their involuted and gnomic utterances, it seems, can only be understood by arcane adepts skilled in the divination of such things. Exposing the Court’s contradictions underscores the limitations of the liberal vision of seeking political change through judicial review. Neil Gorsuch does indeed represent a threat to many things that both liberals and leftists cherish. His hostility to reproductive rights is plain. He is not, to put it mildly, an exponent of queer liberation. He is certain to be an enemy of the jurisprudential foundations of what’s left of the welfare state. But Gorsuch is not a threat to the purported dignity or democratic legitimacy of the Court. Historically, the Supreme Court has been one of the principal sites for elaborating andimplementing the traditions of white supremacy, capitalist labor relations, and social hierarchy that have characterized American political development. In this regard, Gorsuch is the perfect person for the job. The majesty of the law is one of the most stubbornly persistent myths in American public life. Most participants in US politics profess a faith in and respect for judicial independence. Liberals eagerly condemn conservatives for failing to respect current interpretations of constitutional principles, while conservatives happily respond by condemning liberals for distorting the historically received meaning of legal texts. This dialectical embrace mystifies the fact that both major parties seek to entrench their power and their policies by installing friendly judges in the federal and state judiciaries, and by seeking to maintain majorities of co-ideologues on the Supreme Court. The belief that the Supreme Court is a responsible guarantor of constitutional rights and liberties is particularly rife among liberals. For decades, they have both accepted and reiterated the narrative that the Constitution is a moral document that, when appropriately interpreted by jurists, restrains the state’s power over the individual. This narrative is grounded in the experience of the Warren Court, which in the 1950s and ’60s secured limited progressive victories in certain domains of the law — most notably antidiscrimination, criminal procedure, and civil liberties. The Warren Court’s judicial activism became a stencil for later liberal jurists seeking to use judicial review as a vehicle for social change. But the epoch in which liberal jurisprudence predominated at the Supreme Court turned out to be exceptional. The Warren Court could only pursue its progressive legal project as long as powerful social forces like the Civil Rights Movement placed severe limits on the state’s capacity to preserve the cultural logic of racial domination. When the reactionary backlash set in and the conservative legal movement advanced, the ideals of democratic citizenship and the equal dignity of persons — which often received their fullest expression not in the legislature but in the courts — took a hammering. The ideological terrain of struggle had shifted. Appeals to elites, no longer hemmed in by mass protest, went unheard. For all the pressure the Civil Rights Movement was able to bring on the federal government, many of its victories could only be secured through the intercession of the Court when other institutions failed to act. While the Civil Rights Act and the Voting Rights Act were important, if partial, legislative victories, many others were won only through judicial review. Similarly, reproductive rights, expansive individual civil liberties, and modern understandings of the federal government’s powers and responsibilities are all grounded in liberal jurisprudence. These and other progressive gains are now particularly vulnerable. A predominantly conservative Court could easily reverse them. But such a risk cannot be averted through a campaign to defend judicial gains that, by their very nature, have always been fragile. The Supreme Court’sbrief is inherently conservative. It exercises judicial review in order to patrol the state’s institutional boundaries — boundaries spelled out in the Constitution, an elite-drafted document that limits democratic power and was intended to maintain racial domination. Democracy requires the rejection of the legalization of politics, in favor of constant antagonism with powerful institutions like the Supreme Court. Robust protections for civil rights, civil liberties, and abortion access will never be safe in the hands of elite judicial guardians.