# 1AC – Comity Balancing

## Plan – 1AC

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

## Cartels – 1AC

Advantage One is Cartels.

#### Lateral energy regimes cause extinction.

Koranyi ’16 [David; 2016; Chief Advisor of City Diplomacy for the Mayor of Budapest, former Director of the Atlantic Council's Eurasian Energy Futures Initiative; Atlantic Council Strategy Paper, “A US Strategy for Sustainable Energy Security,” <https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/AC_SP_Energy.pdf>]

The United States should work toward a global energy system that is characterized by the reduction of excessive price volatility on global energy markets and the minimization of the impact of geopolitical upheavals. This requires the introduction of more competition, transparency, liquidity, better rules and regulations for energy trade, and the stabilization of global energy trading routes in concert with other key stakeholders. The liberalized global energy trade would be coupled with transparent and efficiently functioning global and regional markets. This necessitates energy market integration and interconnections in Europe, Asia, Africa, and Latin America alike to enhance regional synergies and create markets. This integration process should be supported by US experience and technical assistance.

It is of utmost importance to ensure that competition is not distorted, with special regard to cartelization in the regional and global gas markets. The United States should promote global principles for competition in the energy markets to reduce the risk of cartelization and price setting, cripple the disruptive ability of irresponsible players on the market, enhance security of supplies, and promote open and efficiently functioning markets.

Monitoring the implementation of global and regional climate agreements; promoting dialogue and cooperation between consumer and producer countries; introducing and enhancing dispute resolution mechanisms; increasing transparency and reducing volatility on the international energy markets; and devising international standards of physical and cyber energy infrastructure protection will be at the center of the US international energy governance agenda. Therefore, international institutions that serve US national interests need to be strengthened further with special regard to the International Energy Agency (IEA), the United Nations Sustainable Energy for All Initiative (SE4All,) the International Renewable Energy Agency (IRENA), and the Energy Charter Treaty. In particular, the IEA’s mandate, organization, and budget should be reinforced to allow the organization to conduct a global energy dialogue with all key stakeholders, and to play a robust role in facilitating the exchange of best practices in green technology deployment, energy efficiency, and other key issues in the context of the Paris Climate Agreement.

As the energy sector undergoes a fundamental transformation, new global actors emerge and play a decisive role in how to produce and consume energy and control the climate. The new ‘lateral energy regime’ vastly widens the circle of interested and invested actors and influencers.58 This new paradigm requires a fundamentally different approach to governance on all levels: local, national, and international. The United States should invest in the empowerment and inclusion of constructive new actors to co-govern the energy space, while depowering spoiler actors, such as terrorist organizations that target energy infrastructure. Designing a new model for public-private-people-partnerships (PPPP) is essential to managing the complex interplay between the traditional and new producers, transporters, and consumers of energy—municipal and regional governments and civil society actors.

Conclusion

The first of the Atlantic Council Strategy Paper Series, Dynamic Stability: US Strategy for a World in Transition, identified the protection of global commons by the United States as critically important for both material and moral reasons. It rightly argued that “it is important to include climate in the definition of global commons.”59 That paper defined ‘dynamic stability’ as the key conceptual framework to deal with a fast-changing ‘Westphalian-Plus’ world and argued for “harnessing change to preserve the liberal international order.”60

Harnessing change in the energy sector expeditiously is an existential issue for all humanity. Dynamic stability in the US energy sector would mean leveraging the unique natural bounty and technological prowess of the United States and using the very momentum created by the unconventional hydrocarbon revolution to gradually pivot away from fossil fuels. Leaving the current system unreformed and unmodernized will threaten the security and well-being of American citizens, hurt the US economy at home, and isolate the United States internationally. By compromising on market-friendly public policy measures and leveraging the low oil price environment, the United States can introduce the right incentives into the energy system to shepherd an accelerated energy transition into a more modern, low-carbon energy era that still relies heavily on natural gas—particularly during the transition—and nuclear power to provide baseload generation and counter seasonal intermittency.

#### Energy wars go global – extinction.

Klare ‘11 [Michael; June 28; professor at Hampshire College; “Prepare for a world energy war,” https://grist.org/climate-energy/2011-06-28-prepare-for-a-world-energy-war/]

Think of us today as embarking on a new Thirty Years’ War. It may not result in as much bloodshed as that of the 1600s, though bloodshed there will be, but it will prove no less momentous for the future of the planet. Over the coming decades, we will be embroiled at a global level in a succeed-or-perish contest among the major forms of energy, the corporations which supply them, and the countries that run on them. The question will be: Which will dominate the world’s energy supply in the second half of the 21st century? The winners will determine how — and how badly — we live, work, and play in those not-so-distant decades, and will profit enormously as a result. The losers will be cast aside and dismembered.

Why 30 years? Because that’s how long it will take for experimental energy systems like hydrogen power, cellulosic ethanol, wave power, algae fuel, and advanced nuclear reactors to make it from the laboratory to full-scale industrial development. Some of these systems (as well, undoubtedly, as others not yet on our radar screens) will survive the winnowing process. Some will not. And there is little way to predict how it will go at this stage in the game. At the same time, the use of existing fuels like oil and coal, which spew carbon dioxide into the atmosphere, is likely to plummet, thanks both to diminished supplies and rising concerns over the growing dangers of carbon emissions.

This will be a war because the future profitability, or even survival, of many of the world’s most powerful and wealthy corporations will be at risk, and because every nation has a potentially life-or-death stake in the contest. For giant oil companies like BP, Chevron, ExxonMobil, and Royal Dutch Shell, an eventual shift away from petroleum will have massive economic consequences. They will be forced to adopt new economic models and attempt to corner new markets, based on the production of alternative energy products, or risk collapse or absorption by more powerful competitors. In these same decades, new companies will arise, some undoubtedly coming to rival the oil giants in wealth and importance.

The fate of nations, too, will be at stake as they place their bets on competing technologies, cling to their existing energy patterns, or compete for global energy sources, markets, and reserves. Because the acquisition of adequate supplies of energy is as basic a matter of national security as can be imagined, struggles over vital resources — oil and natural gas now, perhaps lithium or nickel (for electric-powered vehicles) in the future — will trigger armed violence.

#### Globalized supply chains are hyper-vulnerable to anticompetitive conduct – it’ll shock battery markets.

Umbach ’18 [Frank; September 2018; Ph.D. and Research director of the European Centre for Energy and Resource Security; Konrad Adenauer Foundation, “Energy Security in a Digitalised World and its Geostrategic Implications,” p. 15-16]

Rising Dependencies on Raw Material Supply Security

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

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

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

#### Risk is increasing – supply disruptions cascade.

O’Sullivan ’17 [Meghan; 2017; Harvard Kennedy School of Government and Indra Overland Norwegian Institute of International Affairs; Columbia Center on Global Energy Policy, “The Geopolitics of Renewable Energy,” <https://energypolicy.columbia.edu/sites/default/files/CGEPTheGeopoliticsOfRenewables.pdf>]

As the transition to renewable energy accelerates, cartels could develop around materials critical to renewable energy technologies. Even if these cartels were unable to generate as much impact as OPEC did with oil in years past, they might be able to exert influence over consumers of these materials. Some materials critical for renewable energy technologies are also critical in other sectors, such as consumer products and weaponry, raising the potential for competition between sectors as well.

Rare earth elements (including dysprosium, neodymium, terbium, europium and yttrium) are often considered to be critical components of renewable energy hardware.7 Ironically, rare earth elements are not rare. They are found in many countries, including China, Russia, Australia, the United States, Brazil, India, Malaysia and Thailand. However, two countries—China and Russia—together hold 57% of global reserves, while the largest remaining country, Australia, holds a mere 2.4% of global reserves.8 Furthermore, rare earths are found in dilute concentrations and are often difficult to separate, making mining, production and processing difficult and capital intensive. Today almost all mining, production and processing of rare earths is in China. Rare earths mined elsewhere generally must be exported to China for processing and then re-imported.9 As demand for renewable energy technologies continues to increase, countries may be inclined to hold rare earth elements in reserve for themselves and compete over these resources.

#### Next gen batteries solve grid stability and blackouts.

Beall ‘18 [Abigail; 2018; Journalist, citing Dr Emma Kendrick, a materials chemist at the University of Warwick; China Dialogue, "The race to develop the next generation battery," https://www.chinadialogue.net/article/show/single/en/10808-The-race-to-develop-the-next-generation-battery]

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

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

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

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

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

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

#### They insulate networks through resilience measures.

Urry ‘17 [Amelia; February 22; Associate editor of science and technology; Wired, "Inside the Race to Build the Battery of Tomorrow," https://www.wired.com/2017/02/researchers-racing-build-battery-future/]

And here’s what a better battery stands to win: a cleaner, more reliable power system, which doesn’t rely on fossil fuels and is more robust to boot.

Every time you flip a light switch, you tap into a gigantic invisible web, the electrical grid. Somewhere, at the other end of the high-voltage transmission lines carrying power to your house, there’s a power plant (likely burning coal or, increasingly, natural gas) churning out electricity to replace the electrons that you and everyone else are draining at that moment.

The amount of power in our grid at any one time is carefully maintained—too much or too little and things start to break. Grid operators make careful observations and predictions to determine how much electricity power plants should produce, minute by minute, hour by hour. But sometimes they’re wrong, and a plant has to power up in a hurry to make up the difference.

Lucky for us, it’s a big, interconnected system, so we rarely notice changes in the quality or quantity of electricity. Imagine the difference between stepping into a bucket of water versus stepping into the ocean. In a small system, any change in the balance between supply and demand is obvious — the bucket overflows. But because the grid is so big—ocean-like—fluctuations are usually imperceptible. Only when something goes very wrong do we notice, because the lights go out.

Renewable energy is less obedient than a coal- or gas-fired power plant—you can’t just fire up a solar farm if demand spikes suddenly. Solar power peaks during the day, varies as clouds move across the sun, and disappears at night, while wind power is even less predictable. Too much of that kind of intermittency on the grid could make it more difficult to balance supply and demand, which could lead to more blackouts. Storing energy is a safety valve. If you could dump extra energy somewhere, then draw from it when supply gets low again, you can power a whole lot more stuff with renewable energy, even when the sun isn’t shining and the wind isn’t blowing. What’s more, the grid itself becomes more stable and efficient, as batteries would allow communities and regions to manage their own power supply. Our aging and overtaxed power infrastructure would go a lot further. Instead of installing new transmission lines in places where existing lines are near capacity, you could draw power during off-peak times and stash it in batteries until you need it.

Just like that, the bucket can behave a lot more like the ocean. That would mean—at least in theory—more distributed power generation and storage, more renewables, and less reliance on giant fossil-fueled power plants.

#### Solar storms and EMP strikes are inevitable and outweigh nuclear war – batteries solve.

MM ’15 [Microgrid Media; September 15; Energy media source, citing the former Director of the CIA; Microgrid Media, “Grid Will Not Survive Inevitable Geomagnetic Storm or EMP Attack,” microgridmedia.com/grid-will-not-survive-geomagnetic-storm-or-emp-attack/]

But as former Director of Central Intelligence James Woolsey warned in his recent congressional testimony, “The EMP threat is as real as the Sun and as inevitable as a solar flare.”

The Congressional EMP Commission, called it “one of a small number of threats that has the potential to hold our society seriously at risk” and “is capable of causing catastrophe for the nation.” These are not one commissions findings, but represent a consensus from studies by the Congressional Strategic Posture Commission, the National Academy of Sciences, the Department of Energy, the National Intelligence Council, a U.S. Federal Energy Regulatory Commission report coordinated with the Department of Defense and Oak Ridge National Laboratory, and numerous other reports.

With such overwhelming political and scientific consensus, it may come as a shock that nothing has been done to protect America from a power outage that could last several years. You may also be surprised that your energy bill could be paying the lobby efforts to keep it that way.

The Hundred Year Geomagnetic Solar Storm The worst disasters are often the result of natural events which occur less than every hundred years. The hundred year earthquake doesn’t remind us to build away from fault lines. The hundred year tsunami doesn’t remind us to build nuclear reactors above the inundation zone. Likewise, the hundred year solar storm did not remind us to build an electric grid capable of surviving it. Solar storms, or Geomagnetic Disturbances (GMD) are the result of a solar wind shock wave or a magnetic cloud interacting with the earth’s magnetic field. While solar storms happen as frequently as northern lights, experts are most concerned about a rare solar super-storm, like the 1921 Railroad Storm. The National Academy of Sciences estimates that if the Railroad Storm were to occur today, there would be a nationwide blackout for 4-10 years. The most powerful geomagnetic storm on record is the 1859 Carrington Event. Estimates are that Carrington was about 10 times more powerful than the 1921 Railroad Storm and 100 times more powerful than anything the modern grid has experienced. The Carrington Event was a worldwide phenomenon, causing forest fires from flaring telegraph lines, burning telegraph stations, and destroying the freshly laid telegraph cable at the bottom of the Atlantic Ocean.

According to Woolsey, a solar super-storm like the Carrington Event today would “collapse electric grids and life-sustaining critical infrastructures worldwide, putting at risk the lives of billions.”

A Close Call

In July 2014, NASA reported that Earth narrowly escaped another Carrington Event. Indeed, a Carrington-class coronal mass ejection crossed the path of the Earth, missing our planet by just three days. NASA assessment is that the resulting storm would have been catastrophic.

We are overdue for a hundred-year solar storm like the Carrington Event. NASA puts the likelihood of such a geomagnetic super-storm at 12 percent per decade, virtually guaranteeing that if we don’t experience a catastrophic geomagnetic super-storm, our children will. In his congressional testimony, Dr. Richard Garwin of the IBM Thomas J. Watson Research Center emphasized that “a once-per-century event could occur next week,” urging action to reduce the impact on the bulk power system.

Weaponized Electromagnetic Pulse (EMP)

If the threat of a natural geomagnetic super-storm wasn’t enough, the electric grid is equally fragile to an electromagnetic pulse attack. There are ways in which an EMP threat is more serious than a conventional nuke threat. Deterrence may not work at all because we may not know where the pulse came from. If everything goes dark, it could be a solar event or it could be North Korea. It could be launched from a freighter off one of our coasts or from a northern satellite designed to go unnoticed. We may never know.

“An EMP attack is one of a small number of threats that has the potential to hold our society seriously at risk” and “Is capable of causing catastrophe for the nation.” — Congressional EMP Commission

“We talk a lot about a Nuclear Bomb in Manhattan, and we talk about a cyber-security threat to the grid in the Northeast. All these things would probably pale in comparison to the devastation that an EMP attack could put on Americans” — James Woolsey, Former Director of Central Intelligence

How Likely is an Electromagnetic Pulse Attack?

EMP nuclear attacks are an open part of cyber warfare doctrine in several countries.

Russian General Vladimir Slipchenko, in his military textbook ‘No Contact Wars’ describes the combined use of cyber viruses and hacking, physical attacks, non-nuclear EMP weapons, and ultimately nuclear EMP attack against electric grids and critical infrastructures as a new way of warfare that is the greatest Revolution in Military Affairs (RMA) in history. Like Nazi Germany’s Blitzkrieg (“Lightning War”) Strategy that coordinated airpower, armor, and mobile infantry to achieve strategic and technological surprise that nearly defeated the Allies in World War II, the New Blitzkrieg is, literally and figuratively an electronic “Lightning War” so potentially decisive in its effects that an entire civilization could be overthrown in hours. According to Slipchenko, EMP and the new RMA renders obsolete modern armies, navies and air forces. For the first time in history, small nations or even non-state actors can humble the most advanced nations on Earth.

China’s military doctrine sounds an identical theme. According to People’s Liberation Army textbook World War, the Third World War–Total Information Warfare, written by Shen Weiguang (allegedly the inventor of Information Warfare), “Therefore, China should focus on measures to counter computer viruses, nuclear electromagnetic pulse…and quickly achieve breakthroughs in those technologies…”

Iran in a recently translated military textbook endorses the theories of Russian General Slipchenko and the potentially decisive effects of nuclear EMP attack some 20 times. An Iranian political-military journal, in an article entitled “Electronics To Determine Fate Of Future Wars,” states that the key to defeating the United States is EMP attack and that, “If the world’s industrial countries fail to devise effective ways to defend themselves against dangerous electronic assaults, then they will disintegrate within a few years… American soldiers would not be able to find food to eat nor would they be able to fire a single shot.”

North Korea appears to have practiced the military doctrines described above against the United States–including by simulating a nuclear EMP attack against the U.S. mainland. Following North Korea’s third illegal nuclear test in February 2013, North Korean dictator Kim Jong-Un repeatedly threatened to make nuclear missile strikes against the U.S. and its allies. In what was the worst ever nuclear crisis with North Korea, that lasted months, the U.S. responded by beefing-up National Missile Defenses and flying B-2 bombers in exercises just outside the Demilitarized Zone to deter North Korea. On April 9, 2013, North Korea’s KSM-3 satellite orbited over the U.S. from a south polar trajectory, that evades U.S. early warning radars and National Missile Defenses, at the near optimum altitude and location to place an EMP field over all 48 contiguous United States.

Recently, a North Korean vessel was disrupted in Panama carrying missiles that would have been capable of carrying out an EMP attack off the coast of America. When approached out of suspicion of drug smuggling, they resisted and the captain attempted suicide. Why Hasn’t Anything Been Done? At least five US Government studies have concluded that the threat of an EMP attack is real and needs to be acted upon, but alarmingly little has been done. NERC has prevented states from taking action and kept acts bottled up and not able to be passed by congress. Texas State Senator Bob Hall, a former USAF Colonel and himself an EMP expert, has called the lobby efforts of the electric utilities in this matter as “equivalent to treason.” “As a Texas State Senator who tried in the 2015 legislative session to get a bill passed to harden the Texas grid against an EMP attack or nature’s GMD, I learned first hand the strong control the electric power company lobby has on elected officials.” What Can Be Done To Protect Critical Infrastructure?

There is a lot that can be done to harden the grid, ranging from fast warning systems to hardening the trains that deliver coal. The grid may become more secure by trends already happening with distributed renewable energy and microgrids. Long run lines, such as the electric grid are the most vulnerable to an EMP or geomagnetic storm. “Microgrids are an important part of the solution,” said Dr. George H Baker of Resilient Societies. Reminding us that microgrids can be relatively large.

For example, my own city, Harrisonburg, has the capability to isolate itself from the grid and run critical services on local gas-turbine generators.

The bulk power system in the United States is reliable but not resilient. Like most systems, the way to be resilient is by having a robust, decentralized network with built in flexibility. Although it’s not what electric utilities want to hear, Americans will remain at risk until communities can meet all critical loads without the bulk power system.

#### Grid resilience stops civilizational collapse.

Weiss and Weiss ’19 [Matthew and Martin; May 29; National Sales Director at United Medical Instruments, UMI and Research assistant at the American Jewish University; Neurosurgeon at UCLA-Olive View Medical Center; Energy, Sustainability, and Society, “An assessment of threats to the American power grid,” vol. 9]

Consequences of a sustained power outage

The EMP Commission states “Should significant parts of the electrical power infrastructure be lost for any substantial period of time, the Commission believes that the consequences are likely to be catastrophic, and many people will die for the lack of the basic elements necessary to sustain life in dense urban and suburban communities.” [67].

Space constraints preclude discussion on how the loss of the grid would render synthesis and distribution of oil and gas inoperative. Telecommunications would collapse, as would finance and banking. Virtually all technology, infrastructure, and services require electricity.

An EMP attack that collapses the electric power grid will collapse the water infrastructure—the delivery and purification of water and the removal and treatment of wastewater and sewage. Outbreaks that would result from the failure of these systems include cholera. It is problematic if fuel will be available to boil water. Lack of water will cause death in 3 to 4 days [68].

Food production would also collapse. Crops and livestock require water delivered by electronically powered pumps. Tractors, harvesters, and other farm equipment run on petroleum products supplied by an infrastructure (pumps, pipelines) that require electricity. The plants that make fertilizer, insecticides, and feed also require electricity. Gas pumps that fuel the trucks that distribute food require electricity. Food processing requires electricity.

In 1900, nearly 40% of the population lived on farms. That percentage is now less than 2% [69]. It is through technology that 2% of the population can feed the other 98% [68]. The acreage under cultivation today is only 6% more than in 1900, yet productivity has increased 50 fold [69].

As stated by Dr. Lowell L Wood in Congressional testimony:

“If we were no longer able to fuel our agricultural machine in the country, the food production of the country would simply stop, because we do not have the horses and mules that used to tow agricultural gear around in the 1880s and 1890s”. “So the situation would be exceedingly adverse if both electricity and the fuel that electricity moves around the country……… stayed away for a substantial period of time, we would miss the harvest, and we would starve the following winter” [70].

People can live for 1–2 months without food, but after 5 days, they have difficulty thinking and at 2 weeks they are incapacitated [68]. There is typically a 30-day perishable food supply at regional warehouses but most would be destroyed with the loss of refrigeration [69]. The EMP Commission has suggested food be stockpiled for a possible EMP event.

A prescription for failure

Even if all the recommendations of the Congressional EMP Commission were implemented, there is no guarantee that the grid will not sustain a prolonged collapse. There should therefore be contingency plans for such a failure.

There is also another consideration. The foundational pillars of prior American nuclear defense policy, in today’s climate, are of uncertain validity. Mutual assured destruction is the Maginot line of the 21st century. Nonproliferation will prove difficult to resurrect.

The consequences of a widespread nuclear attack have been positioned to the public as massive deaths from blast effects, and then further lingering deaths from the effects of radiation. We suspect there will be no electricity, and there will be no electricity for a very long time.

There should be an actionable plan in anticipation of a possible prolonged collapse of the grid—a retro-structure and a skill set to provide a framework for survival. Our sense is there is no plan.

#### Current interpretations of FTAIA undermine global deterrence against cartels.

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]

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 illfated 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

#### Accounting for foreign penalties prevents over-enforcement and ensures global anti-cartel cohesion.

Huizing ‘18 [Pieter Huizing; 2018; PhD student at Leiden University and a senior associate at the antitrust department of Allen & Overy LLP; "InnoLux v AU Optronics: comparing territorial limits to EU and US public enforcement of the LCD cartel," https://academic.oup.com/antitrust/article-abstract/6/2/231/4964994]

The LCD cases show that in respect of cartel conduct by multinational corporations involving their worldwide sales, the existence of a certain domestic connection to justify the exercise of jurisdiction is almost a given. It is therefore not surprising that a multitude of authorities will generally be able to assert jurisdiction over truly global cartel behaviour. Without any jurisdictional or territorial delineation between authorities on ‘who sanctions what and by how much’, domestic enforcement of international cartel conduct is bound to lead to potential or actual overlapping punishment. It is easy to see how the fining methodologies used by the Commission and the DOJ can result in the same sales being taken into account more than once for the purposes of sanctioning the same overall conduct. Such double-counting increases risks of over-enforcement and disproportionate overall punishment. To ensure that on an international level the overall penalty fits the severity of the crime, it is submitted that authorities targeting the same conduct in parallel should avoid unilaterally aiming for the maximum fine available without having any regard for the level of punishment and deterrence achieved by sanctions imposed elsewhere. This is necessary not only to safeguard overall proportionality of fines, but also with a view to comity considerations. Maintaining an isolated and expansive view on cartel enforcement may have been justifiable when antitrust laws were effectively enforced in only a few countries in the world. But with over 125 jurisdictions with active cartel enforcement, this may be the time for the European and American authorities to start adopting a more modest approach.132 As noted by Connor in the context of his support for the Motorola Mobility judgment: [h]aving invited the world to join the effort to prohibit and prosecute cartels, and that invitation having been enthusiastically accepted, it is good manners/ policy that the competition regimes set up around the globe—which continue to develop—be given due respect and that the views of our partners be given serious consideration.133 The need for international coordination of extraterritorial cartel enforcement is a hot topic in the global antitrust community. It is a recurring theme on antitrust conferences and a key focus of the advocacy efforts of international organizations such as the ICN, the OECD, and the International Bar Association (IBA). The focus of such efforts has often been on cooperation in respect of the investigation stages and less on coordination in respect of the scope and level of punishment.134 But there are more and more calls for authorities to also coordinate their cartel penalties. For example, during the OECD Roundtable on Cartels Involving Intermediate Goods in October 2015, several delegates highlighted ‘the importance of taking into account fines or sanctioning decisions already imposed by other competition agencies to minimise concerns about the fairness and proportionality of fines levied in multijurisdictional cases’.135 In June 2016, the Japanese Ministry of Economy, Trade and Industry (METI) published a report on its research into the enforcement of international cartels, in view of the ‘growing concern about overlapping application of competition laws or imposition of multiple surcharges by several countries’.136 Based on its research, the Ministry proposed increased coordination between authorities to take into account concurrent penalties. In December 2016, both the IBA and the American Bar Association (ABA) in their comments on the proposed new DOJ and FTC Antitrust Guidelines for International Enforcement and Cooperation called upon the US authorities to stress the need for cooperation regarding sanctioning of international cartel cases to avoid over-deterrence or double-jeopardy.137 Furthermore, also in December 2016, in one of the key submissions for the OECD’s 15th Global Forum on Competition, Hwang Lee specifically pressed for increased efforts by competition authorities to coordinate fining decisions in parallel proceedings.138 These examples indicate that—while moving slowly—progress is made in recognizing the need for commonly accepted principles for coordination between authorities in the sanctioning of international cartels.

Since internationally agreed principles on the coordination of cartel fines are yet to be developed, national self-restraint is currently required to limit the risks resulting from parallel enforcement of international cartels. Such self-restraint can be exercised in respect of any of the three elements assessed in this article: asserting jurisdiction, defining the territorial scope of punished conduct, and setting the fine.139 The Japan Fair Trade Commission (JFTC), for example, has explained that it cannot currently take into account sanctions imposed by other authorities in determining its own fine because it lacks the discretion to do so.140 However, in view of international comity, the JFTC does consider enforcement action elsewhere in respect of the same international cartel to decide whether it will also take action. Similarly, in Australia– where cartel fines are set by the court—the authority exercises prosecutorial discretion by considering whether it is more appropriate to leave enforcement activities to jurisdictions where the harm of a cartel was felt most immediately.141 In contrast, the Korean Fair Trade Commission does not consider sanctions imposed elsewhere for the decision whether or not to bring an enforcement action, but it does have the discretion to consider foreign fines in calculating the surcharge it imposes.142 The DOJ has indicated that when a sanction in respect of the same cartel is first imposed outside the USA, it may take this into account if the sanction accounts for the harm to businesses and consumers in the USA and therefore satisfies deterrent interests of the USA.143 Terzaken and Huizing have suggested altering this latter approach by focusing on whether there is any residual deterrence need following penalties already imposed elsewhere, not on whether specific national harm was considered in the fining methodology applied by a foreign authority.144

As an alternative to taking into account penalties imposed elsewhere, Bentley and Henry have proposed that authorities should solely take into account sales for the purposes of fine calculation if such sales meet the applicable jurisdictional tests.145 This seems a sensible proposal. While it is true that the basis for asserting jurisdiction can be separated from the basis for calculating a fine, as explicitly reasoned by the ECJ, it is hard to justify partly relating a penalty to conduct that in itself would not have a sufficient territorial nexus to trigger potential prosecution. In analogy to the Seventh Circuit’s assessment of Motorola’s damages claims, it is difficult to accept that foreign sales without such nexus can still be taken into account as part of domestic enforcement as long as they happened to take place alongside some import commerce. Internationally, it may not even be all that controversial to require authorities to calculate cartel fines on the basis of only those sales that create a sufficient jurisdictional link to their territory. A recent survey by the International Competition Network (ICN) already shows that many jurisdictions maintain the view that only the direct sales of cartelized products should form the basis of a cartel fine in all or most cases.146

Bentley and Henry consider their solution to be simpler than requiring authorities to take into account fines already imposed elsewhere. But it is submitted that this is still needed even if authorities only take into account sales that pass the applicable jurisdictional tests, as this does not avoid situations where more than one authority claims jurisdiction.147 This is especially the case where authorities apply a broad interpretation of a qualified effects test. In such situations, the same sales may still be taken into account more than once. And even if authorities avoid any double counting of sales, international alignment of sanctions may still be required to ensure overall proportionality and an optimal level of deterrence. A truly coordinated approach to international cartel enforcement should therefore more comprehensively focus on the ultimate outcome of the overall enforcement.

It goes beyond the scope of this article to discuss at what level cartel fines must be set to achieve both proportionality and optimal deterrence. And it must be noted that it has not been empirically tested whether overlapping cartel fines imposed in multiple jurisdictions actually create a problem of over-deterrence or whether global cartels are (still) more likely to benefit from under-deterrence.148 But it is clear that an optimal overall penalty for a global cartel is not automatically achieved by the accumulation of several national fines for the same cartel that were considered optimal by the respective authorities. First, such accumulation would likely mean that the overall fine amount increases in a certain proportion to the additional amount of affected sales in the sanctioning jurisdictions. However, proportionality and deterrence are complex principles that not necessarily (directly) related to the level of sales achieved with the cartelized products. Proportionality is typically linked to the elements of culpability of the offender and the harm caused by the offence.149 Optimal deterrence is typically linked to the expected gains from the offence and the probability of detection and punishment.150 So it is not obvious to see why in the pursuit of a proportionate and deterrent penalty, the fine amount should increase in direct proportion to the level of affected sales. It may well be that a proportionate and deterrent fine has already been achieved despite not covering all potentially affected sales. In this context, the Business and Industry Advisory Committee to the OECD reasoned that ‘once any jurisdiction sets a fine at an appropriate and proportionate level, another jurisdiction imposing penalties on top of that needs to strike a proper balance’.151 Second, several authorities may take the same factors into account in increasing a fine for deterrence purposes, such as the size of the undertaking. A single authority may determine that for a cartel fine to actually ‘hurt’, it should amount to at least 3 per cent of an undertaking’s total turnover. But if five authorities use this approach in respect of the same global cartel, the total fine amounting to 15 per cent of the total turnover may hurt much more than what was considered necessary by each individual authority.152 Thirdly, many authorities apply a maximum fine amount that is related to the total turnover of an undertaken (eg the cap of 10 per cent as applied by the Commission). Such a cap serves to ensure fines are not excessive or disproportionate153 and to limit the risks of undue financial difficulties and insolvency (and hence lessened competition) as a result of a fine. But if five authorities were to impose fines for the same global cartel up to a 10 per cent cap, the total fine amounting to 50 per cent of the undertaking’s turnover is still quite likely to jeopardize the viability of the undertaking and quite likely to be (perceived as) disproportionate in relation to the size of its economic activities.154

In AU Optronics, Judge Illston in her discretion decided that USD 500 million was sufficiently deterrent and not excessive, even though the fining guidelines had recommended a fine between USD 936 and 1872 million. Her decision was also based on the penalties and financial impact already incurred by AUO in other proceedings, something explicitly not taken into account in the DOJ sentencing recommendation. Rather than rigidly applying the domestic fining guidelines, she appears to have adopted a comprehensive approach that considered the overall proportionality of punishment for AUO’s cartel conduct and the residual deterrence need. While the EU and US authorities also seem willing to incidentally and on an ad hoc basis take a step back in view of foreign enforcement,155 sound enforcement policies that are aimed to achieving an overall appropriate fine by taking into account the international context of cartel sanctioning are still lacking.156 It is submitted that the development of such policies is necessary not only to ensure consistency in enforcement practices but also to increase legal certainty, predictability of sanctions, and confidence in the proportionality of international cartel enforcement.

#### Coordination is key to insulate global supply chain disruptions.

Alford 18 [ROGER ALFORD Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice. "Antitrust Enforcement in an Interconnected World." https://www.justice.gov/opa/speech/file/1029821/download]

Today, I would like to speak at more length about the third principle—recognizing the global impact of antitrust enforcement. Just as Korea and the world have fundamentally changed since the 1988 Seoul Olympics, so too has global antitrust enforcement. In 1988 there was no International Competition Network, and only a handful of competition agencies were active, as much of the world continued to embrace highly-regulated or command economies. As President Ronald Reagan put it, the attitude of governments at the time was “if it moves, tax it, if it keeps moving, regulate it, and if it stops moving, subsidize it.”7 But as companies competed on an ever more global scale, countries became ever more committed to market-based economies and to enforcing competition laws. Today there are more than 130 different jurisdictions with antitrust agencies. A merger of two multinational firms can trigger merger filings and reviews in a dozen or more jurisdictions. Cartels affecting the global supply chain may involve companies engaged in illegal activity in countries separated by thousands of miles, numerous time zones, and multiple languages. Unilateral conduct enforcement in one jurisdiction has the potential to affect marketing and licensing practices not just in that jurisdiction, but around the world.

For antitrust enforcers, this means that international coordination and cooperation are more important than ever. Without these tools, the uncertainty associated with divergent approaches to enforcement has potentially significant costs for globally active companies, and the risks of inconsistent and potentially conflicting remedies are high. Antitrust enforcers who do not consider the global impact of their enforcement decisions can create inefficiencies that ultimately harm consumers throughout our interconnected world.

#### Global integration is under siege from foreign conduct – targeting international cartels is key.

Ryu ‘16 [Jae Hyung; Fall 2016; 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,” vol. 17, no. 1, https://heinonline.org/hol-cgi-bin/get\_pdf.cgi?handle=hein.journals/wakfinp17&section=6]

The context of the antitrust statutes requires that the importation of finished products incorporating price-fixed components be treated as part of the import inclusion. The FTAIA's legislative history suggests that the drafters assumed that import commerce had a direct and substantial effect on U.S. commerce-the very kind of effect that the antitrust statutes were designed to regulate and deter. 1 One of the drafters sought to ensure that anticompetitive conduct in import commerce would remain subject to the Sherman Act because its effect would invariably reach American consumers. 1 16 Hence, the FTAIA came with a caveat that the statute would affect non-import foreign conduct. 1 Furthermore, the drafters wanted to impress upon the public that foreign non-import conduct may be subject to the Sherman Act only if it had a direct, substantial, and foreseeable effect on U.S. commerce.H8 By equating import commerce with non-import conduct that has a direct, substantial, and foreseeable effect on U.S. commerce, the drafters evinced an understanding that import commerce already had that similar requisite direct effect to be subject to the Sherman Act.119 Even under the paradigm in 1982 when the FTAIA was drafted, import trade or commerce was presumed to have a direct effect on U.S. commerce and thus be deserving of broad protection. 1 2 0

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. 122 The FTAIA serves to delineate the contours of the Sherman Act's extraterritorial reach. 1 2 3 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 chains 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

#### Integrated supply chains deescalate great-power war – isolation tips every flashpoint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## Indigenous Regimes – 1AC

Advantage Two is Indigenous Regimes.

#### Ambiguous unreliable enforcement inhibits anti-cartel cohesion and undermines foreign regulatory institutions.

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]

In a variety of settings foreign governments have expressed and are expressing concerns about the extraterritorial application of U.S. law. The United States occupies a unique position in global trade and finance. The United States also has enacted far-reaching legislation involving commerce, banking and finance, business conduct, mergers and acquisitions, foreign corrupt practices, and a variety of other matters. The extraterritorial application of laws in these areas challenges the sovereignty of other nations and is often viewed as offensive. In antitrust, the United States’ influence is the result of its status as the world’s largest importer of goods and services.18 In finance, this influence is the result of the U.S. dollar’s status as the international unit of account: “Pretty much any dollar transaction— even between two non-US entities—will go through New York City at some point, where it comes under the jurisdiction of US authorities.”19

The rampant extraterritorial application of U.S. laws has ruffled the feathers of foreign governments for a long time, beginning essentially with the cluster of private and government actions in the Uranium cartel cases back in the 1970’s and 1980’s. Close American allies, including Australia, Canada, France, South Africa, the UK, and others, reacted with hostility to the extraterritorial activism of the domestic judiciary by enacting “blocking” and “claw back” legislation.20 Such reactions included the enactment of laws by the United Kingdom and Canada that prohibit enforcement of foreign judgments awarding multiple damages21 and laws passed by the United Kingdom, France, Australia, and the Canadian provinces of Quebec and Ontario that limit or prohibit the removal of documents in response to a foreign order.22

More recently, a number of governments have expressed their concerns about the application of U.S. laws abroad through amicus briefs, including Australia, Belgium, Canada, China, France, Germany, Japan, the Netherlands, South Korea, Switzerland, Taiwan, and the United Kingdom:23 most of the United States’ top fifteen trading partners.

These foreign governments have expressed a fairly wide variety of concerns about the potential for extraterritorial application of U.S. laws to interfere with those governments’ policy decisions on such matters as liability, procedure, and damages. While most governments have regulatory regimes in place to police, for example, securities fraud and cartel behavior, these differ in many regards both from the American approach and also from each other, reflecting different cultural, social, and economic factors. These differences include the required showing for liability (e.g., definition of materiality in securities fraud cases),24 procedural protections (e.g., class-action formation and punitive) damages.26 Applying U.S. law to actors, conduct, and effects appropriately considered under a set of foreign laws undermines a foreign government’s ability to govern its own domain and, in the end, becomes an affront to its sovereignty.

Stepping on the toes of foreign governments’ regulatory regimes also risks stymying the international development of policies and regulations beneficial to the United States. Countries without well-developed regulatory apparatuses are less likely to develop them if the behavior is already policed by private plaintiffs in the United States or if the apparatuses would see their policy choices effectively overruled by U.S. policies.27

Foreign governments have also taken the view that extraterritorial application of treble damages threatens to undermine their own enforcement efforts. For example, they claim availability of private treble damages in the United States against their national companies for local conduct may have a detrimental effect on foreign leniency programs. These programs are a key tool for them in rooting out cartel activity, which has traditionally proven difficult to detect and prosecute.28 “These leniency policies seek to balance the interests of disclosure, deterrence, and punishment,” but “disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy.”29 When that reach is expanded outside of U.S. consumers in a U.S. court, “the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.”30 And as Germany and Belgium informed the Supreme Court in Empagran,31 “[h]istorically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty.”32

#### That cracks sustainable development and poverty relief.

Cheng ‘12 [Thomas; 2012; 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 are leverage points that solve extinction BUT failure causes cascading risks that cumulatively outweigh any single risk, causing extinction.

Fenner and Cernev ‘20 [Richard Fenner; Jan. 2020; Director of the MPhil in Engineering for Sustainable Development at Cambridge; Australian National University, Canberra, Australia; “The importance of achieving foundational Sustainable Development Goals in reducing global risk,” Volume 115, https://www.sciencedirect.com/science/article/pii/S0016328719303544]

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).

Whilst the prospect of existential risk, or global catastrophic risk can seem distant, the Stern Review on the Economics of Climate Change estimated the risk of extinction for humanity as 0.1 % annually, which accumulates to provide the risk of extinction over the next century as 9.5 % (Cotton-Barratt et al., 2016). With respect to identifying these risks, it is known that in particular, “positive feedback loops… represent the gravest existential risks” (Kareiva & Carranza, 2018), with pollution also having the potential to pose an existential risk.

#### Particularly in Africa – solves famine.

Nwuneli ‘18 [Ndidi Okonkwo Nwuneli; 2018; 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]

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.

#### It's existential – state collapse, refugees, terror, and Chinese spheres of influence, only institutional barriers solve.

Perez ‘18 [Alexandra; 2018; Pepperdine University, School of Public Policy. Masters in Public Policy at Pepperdine. Project Manager, Health Policy at Cato Institute; "Food Security as U.S. National Security: Why Fragile States in Africa Matter." https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1169&context=ppr]

The United States’ role in foreign affairs is guided by an interest to keep the general peace around the world while protecting national security and economic interests. Stability in regions such as sub-Saharan Africa is crucial to national security, and one way to keep peace is by supplying the basic human need of food. According to the Fund for Peace, the three most fragile states in 2017 were in Africa— the Central African Republic, South Sudan, and Somalia. 1 Several other African countries are fragile, suffering from standard measures of instability, such as widespread corruption, weak institutions, and resource scarcity. Together, these problems create displacement, human-rights violations, and power vacuums where non-state actors can flourish. These issues should concern the United States not only for moral reasons, but also because they negatively affect American interests. Food aid and agricultural systems must be used as a tool to promote peace in Africa to decrease the region’s burden on the United States and to help stabilize a region that is often referred to as a lost continent.

With bipartisan support, the Global Food Security Act became law in July of 2016. It requires the President and appropriate agencies—including USAID, State Department, and the Office of US Trade—to formulate a plan to address food-insecure countries and report on that plan annually.2 The bill cited the Worldwide Threat Assessment of the US Intelligence Community (2014): “[l]ack of adequate food will be a destabilizing factor in countries important to US national security that do not have the financial or technical abilities to solve their internal food security problems.”3 Though it is uncertain whether annual reports will continue under the Trump administration, the US has demonstrated (at least through the Global Food Security Act) that it views food security as a matter of national security. According to the most recent Worldwide Threat Assessment, Africa is among the regions most susceptible to terrorism, especially in Somalia and South Sudan.4 This paper explores the ways in which food insecurity can enable conflict, how the US can improve the ways it offers food aid, and why African food security is in America’s national security interest.

Consequences of Food Insecurity

Enforcing and communicating a universal conception of human rights by any party is difficult. Nevertheless, US national security strategy has placed an emphasis on human rights in recent years. The former Secretary of State under President George W. Bush, Condoleezza Rice, once remarked that: “[f]or the United States, supporting international development is a vital investment in the free, prosperous, and peaceful international order that fundamentally serves our national interest.”5 Fragile regimes in Africa cannot successfully maintain themselves, let alone pose an immediate threat to the United States. However, these regimes are likely to seek alliances with adversaries that may pose a threat, such as China, creating a region of the world adverse to American interests and values.

Secondly, migrant and refugee flows are concerns for the United States due to their economic and social consequences. While many of the most serious cases of refugee crises today are nowhere near the US, they do affect some of the United States’ key allies around the globe. A clear example of this is Syrian migration into NATO member countries. In addition to military conflict, bipartisan research has shown that climate can also contribute to mass migrations by impacting harvest yields in regions still reliant on subsistence agriculture. For example, the famines in Somalia and Yemen have sparked emigration caused by food insecurity. Such crises may not be front page news compared to violent conflicts in surrounding states, but they present just as real a threat.

The third reason why the US should care about weak states is that terrorist organizations thrive in such environments. Since September 11, 2001, US national security policy has been primarily driven by the war on terror. While the fear of a repeat attack on American soil has calmed since 2001, the threat of terrorism is still present, and the United States must be proactive to stay ahead of terrorist threats. Terrorists thrive in weak state environments because either the lack of rule of law inhibits the host state’s ability to act against them, or because corrupt governments refuse to act, such as when Sudan provided refuge to Osama bin Laden in the 1990s.6 As a developing region, Africa is full of potential, and the United States will have to decide whether it will help it stabilize or allow it to become a refuge and breeding ground for terrorism.

Africa can potentially threaten or support American interests. As stated above, food insecurity in Africa creates problems for the US. The potential to politically align with other major powers, the destabilizing effect of refugees on the US and its allies, and the propensity to breed terrorism are all reasons to take Africa seriously as a national security concern. US interests include promoting international market economies that it can easily access, so to increase economic power at home. If the US ignores stability measures in Africa, this could negatively affect both American security interests and global economic growth, 7 which are both American priorities. The US needs a strategy that promotes food security in fragile states to address these concerns.

Food prices in Africa are expected to rise in the next few years due to famine,8 which means there is a risk that instability will grow, heightening the security concern to the United States. Food insecurity, like any social ailment, does not necessarily cause instability, but the two do reinforce each other. Obviously, American food assistance by itself cannot solve every problem in these fragile states. Success will ultimately depend on these countries establishing and enforcing the rule of law and shoring up government legitimacy. That said, nation building is not a viable option in this region, as the US has already committed itself to this in the Middle East and largely failed. The US can, however, provide developmental aid to help promote stability and provide a foundation for future institutional growth. Therefore, it is important that the US not only maintain food security efforts in weak states but also incentivize recipient behavior that will make such aid more effective.

#### Food shocks and refugee waves cause extinction.

Cribb ’19 [Julian; October 3; Principal of Julian Cribb & Associates, Fellow of the Australian Academy of Technological Sciences and Engineering, former Director of National Awareness at the Commonwealth Scientific and Industrial Research Organisation; Food or War, “Food as an Existential Risk,” Ch. 6]

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

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

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

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

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

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

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

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

A global famine is a likely outcome of limited use of nuclear weapons by any country or countries – and would be unavoidable in the event of an unlimited nuclear war between America and Russia, making it unwinnable for either. And that, as the mute hands of the ‘Doomsday Clock’ so eloquently admonish, is also the most likely scenario for the premature termination of the human species.

Such a grim scenario can be alleviated by two measures: the voluntary banning by the whole of humanity of nuclear weapons, their technology, materials and stocks – and by a global effort to secure food against future insecurity by diverting the funds now wasted on nuclear armaments into building the sustainable food and water systems of the future (see Chapters 8 and 9).

#### African instability causes nuclear war – AND terror.

Mead ‘13 [Walter; 12/15/13; James Clarke Chace Professor of Foreign Affairs and Humanities, Bard College; The American Interest; “Peace in The Congo? Why the World Should Care,” <https://www.the-american-interest.com/2013/12/15/peace-in-the-congo-why-the-world-should-care/>]

One of the biggest questions of the 21st century is whether this destructive dynamic can be contained, or whether the demand for ethnic, cultural and/or religious homogeneity will continue to convulse world politics, drive new generations of conflict, and create millions more victims. The Congo conflict is a disturbing piece of evidence suggesting that, in Africa at least, there is potential for this kind of conflict. The Congo war (and the long Hutu-Tutsi conflict in neighboring countries) is not, unfortunately alone. The secession of South Sudan from Sudan proper, the wars in what remains of that unhappy country, the secession of Eritrea from Ethiopia and the rise of Christian-Muslim tension right across Africa (where religious conflict often is fed by and intensifies “tribal”—in Europe we would say “ethnic” or “national”—conflicts) are strong indications that the potential for huge and destructive conflict across Africa is very real.

But one must look beyond Africa. The Middle East of course is aflame in religious and ethnic conflict. The old British Raj including India, Pakistan, Bangladesh, Burma and Sri Lanka offers countless examples of ethnic and religious conflict that sometimes is contained, and sometimes boils to the surface in horrendous acts of violence.

Beyond that, rival nationalisms in East and Southeast Asia are keeping the world awake at night.

The Congo war should be a reminder to us all that the foundations of our world are dynamite, and that the potential for new conflicts on the scale of the horrific wars of the 20th century is very much with us today.

The second lesson from this conflict stems from the realization of how much patience and commitment from the international community (which in this case included the Atlantic democracies and a coalition of African states working as individual countries and through various international institutions) it has taken to get this far towards peace. Particularly at a time when many Americans want the US to turn inwards, there are people who make the argument that it is really none of America’s business to invest time and energy in the often thankless task of solving these conflicts.

That might be an ugly but defensible position if we didn’t live in such a tinderbox world. Someone could rationally say, yes, it’s terrible that a million plus people are being killed overseas in a horrific conflict, but the war is really very far away and America has urgent needs at home and we should husband the resources we have available for foreign policy on things that have more power to affect us directly.

The problem is that these wars spread. They may start in places that we don’t care much about (most Americans didn’t give a rat’s patootie about whether Germany controlled the Sudetenland in 1938 or Danzig in 1939) but they tend to spread to places that we do care very much about. This can be because a revisionist great power like Germany in 1938-39 needs to overturn the balance of power in Europe to achieve its goals, or it can be because instability in a very remote place triggers problems in places that we care about very much. Out of Afghanistan in 2001 came both 9/11 and the waves of insurgency and instability that threaten to rip nuclear-armed Pakistan apart or with trigger wider conflict India. Out of the mess in Syria a witches’ brew of terrorism and religious conflict looks set to complicate the security of our allies in Europe and the Middle East and even the security of the oil supply on which the world economy so profoundly depends.

Africa, and the potential for upheaval there, is of more importance to American security than many people may understand. The line between Africa and the Middle East is a soft one. The weak states that straddle the southern approaches of the Sahara are ideal petri dishes for Al Qaeda type groups to form and attract local support. There are networks of funding and religious contact that give groups in these countries potential access to funds, fighters, training and weapons from the Middle East. A war in the eastern Congo might not directly trigger these other conflicts, but it helps to create the swirling underworld of arms trading, money transfers, illegal commerce and the rise of a generation of young men who become experienced fighters—and know no other way to make a living. It destabilizes the environment for neighboring states (like Uganda and Kenya) that play much more direct role in potential crises of greater concern to us.

#### Plan solves underdevelopment of foreign antitrust regimes – that balances sovereignty with consumer welfare while encouraging the development of nascent regimes abroad.

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]

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

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.

#### A balancing test is goldilocks – harmonizes extraterritorial reach with international comity, generates global antitrust enforcement, AND it link-turns the Trade DA.

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.

#### Adopting a balance test remedies inconsistent application of the FTAIA’s ‘direct effect’ criterion, incorporating foreign interests into U.S. antitrust law and stimulating global 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]

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.

### If Time

#### Development diffuses multiple existential risks – does not assume the changing nature of conflict.

UNSC ‘17 [United Nations Security Council; 12/20/17; “Prevention, Development Must Be at Centre of All Efforts Tackling Emerging Complex Threats to International Peace, Secretary-General Tells Security Council,” https://www.un.org/press/en/2017/sc13131.doc.htm]

Prevention and development must be at the centre of all efforts to address both the quantitative and qualitative changes that were emerging in threats around the world, the Secretary‑General of the United Nations told the Security Council today, as some 60 Member States participated in an all‑day debate tackling complex contemporary challenges to international peace and security.

António Guterres said the perils of nuclear weapons were once again front and centre, with tensions higher than those during the Cold War. Climate change was a threat multiplier and technology advances had made it easier for extremists to communicate. Conflicts were longer, with some lasting 20 years on average, and were more complex, with armed and extremist groups linked with each other and with the worldwide threat of terrorism. Transnational drug smugglers and human traffickers were perpetuating the chaos and preying on refugees and migrants.

The changing nature of conflict meant rethinking approaches that included integrated action, he said, stressing that prevention must be at the centre of all efforts. Development was one of the best instruments of prevention. The 2030 Agenda for Sustainable Development would help build peaceful societies. Respect for human rights was also essential and there was a need to invest in social cohesion so that all felt they had a stake in society.

He also emphasized that women’s participation was crucial to success, from conflict prevention to peacemaking and sustaining peace. Where women were in power, societies flourished, he pointed out. Sexual violence against women, therefore, must be addressed and justice pursued for perpetrators.

Prevention also included preventive diplomacy, he said, noting that the newly established High-level Advisory Board on Mediation had met for the first time. The concept of human security was a useful frame of reference for that work, as it was people‑centred and holistic and emphasized the need to act early and prioritize the most vulnerable.

“Let us work together to enhance the Council’s focus on emerging situations, expand the toolbox, increase resources for prevention, and be more systematic in avoiding conflict and sustaining peace,” he said, emphasizing the need for Council unity. Without it, he said, the parties to conflict might take more inflexible and intransigent positions, and the drivers of conflict might push situations to the point of no return.

Japan’s representative, Council President for December, spoke in his national capacity, noting that in the 25 years since the end of the Cold War, there had been a rise in complex contemporary challenges to international peace and security. That included the proliferation of weapons of mass destruction, the expansion of terrorism, and non‑traditional challenges such as non‑State actors and inter‑State criminal organizations.

## 2AC

### T-Core

#### Functionally – the FTAIA limits the scope of the Sherman Act by exempting most extraterritorial action – the aff would reduce the exemption by adopting by adopting a more expansion definition of ‘directness’ – that expands the scope of the Sherman Act.

Gerber ‘17 [David J. Gerber; Sept. 2017; University Distinguished Professor, Illinois Institute of Technology, Chicago-Kent College of Law. Journal of Antitrust Enforcement; “Competitive harm in global supply chains: assessing current responses and identifying potential future responses,” vol. 6, p. 5–24, https://academic.oup.com/antitrust/article-pdf/6/1/5/24149036/jnx015.pdf]

The FTAIA is itself a major obstacle to realizing the potential of US private enforcement. Enacted in 1982, it provides authority for US institutions to apply US antitrust law to private conduct outside US territory.29 It incorporates the effects principle of public international law and interprets it for use in US law.30 There is widespread agreement that the statute is exceptionally opaque, and its opacity hampers both US enforcement and the potential influence of US law in other countries.31

The FTAIA’s relationship to other antitrust legislation creates one level of difficulty. The statute represents an exception to the coverage of the basic antitrust statute, the Sherman act.32 If the FTAIA applies to conduct, the Sherman Act does not apply. Moreover, the FTAIA contains exceptions to its general provisions.33 As a result, interpreting the statute typically involves dealing with double negatives—ie exceptions to exceptions.

The statute’s structure increases the difficulty of using it. It establishes three basic categories of commerce—domestic, import, and foreign—and bases conclusions regarding the legality of foreign conduct on whether the conduct falls within one or more of those categories. The basic idea is that conduct in domestic commerce is subject to US antitrust law; conduct wholly in foreign commerce is not subject to it unless it has a ‘direct, substantial, and reasonably foreseeable effect’ in the United States; and conduct in or affecting import commerce may be subject to US law. The boundaries of these categories remain highly contested, however, despite more than three decades of extensive litigation.34

These categories are used in conjunction with two main operative provisions— each of which has also generated controversy and uncertainty. The first incorporates the effects principle of public international law and interprets it for application of the US antitrust laws. It exempts from the antitrust laws anticompetitive conduct outside US territory unless such conduct causes a ‘direct, substantial, and reasonably foreseeable effect’ within the United States. This language has been interpreted in a large number of cases, but the opinions have not clarified the meaning of the terms. The second requires that the conduct ‘give rise to a claim’ under the Sherman Act. Again, there have been many interpretations of this provision, but the cases have exacerbated rather than reduced uncertainty.

The history behind the statute reveals some of the factors that shaped it and that have contributed to the confusion surrounding it.35 When the United States articulated and supported the effects principle after the Second World War, many outside the United States viewed its claim to expanded jurisdiction as a vehicle through which it sought to impose its form of economic organization on other countries. For decades, several major European countries (particularly the UK) protested the validity of the effects principle under international law.36

This led US courts to develop the so-called ‘comity’ principle, according to which US courts would refrain from applying US law in situations where the US interest in such application was less than the interest of the states in which the conduct occurred. These responses to foreign concerns about US jurisdictional assertions did not implicate the authority itself, but rather the use of that authority. By the late 1970s, the courts had produced long lists of factors to be considered in applying the law extraterritorially.37 There was, however, much criticism among US commentators and judges about the viability of this effort.38

The confusion and uncertainty created by this comity approach encouraged Congress to pass the FTAIA and shaped its content. The basic objective was to clarify and limit the scope of the effects principle as incorporated in US antitrust law while assuring that the law could not be used by others to interfere with the activities of US businesses overseas.39 The statute also represents an attempt by Congress to reduce the potential for applying US law to foreign conduct and thereby to reduce criticism and resistance to US law. Defining the scope of the effects principle was seen as preferable to the failed efforts to achieve this end by relying on judicial use of the amorphous comity principle. The statute dramatically changed analysis of the issue and moved toward a potentially more effective solution. Unfortunately, however, it has not provided the clarity needed to make the solution effective.

#### No effects T – the FTAIA is legally part of the Sherman Act

DOJ and FTC ‘17 [Department of Justice and Federal Trade Commission; 1/13/17; “Antitrust Guidelines for International Enforcement and Cooperation,” https://www.justice.gov/opa/press-release/file/926481/download]

The Sherman Antitrust Act (“Sherman Act”) sets forth general antitrust prohibitions.11 Section 1 of the Sherman Act outlaws contracts, combinations, and conspiracies that unreasonably restrain “trade or commerce among the several States, or with foreign nations.”12 Section 2 outlaws monopolization, attempts to monopolize, and conspiracies to monopolize “any part of the trade or commerce among the several States, or with foreign nations.”13 Section 6a, added by the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), clarifies the Sherman Act’s application to conduct involving only non-import foreign commerce.14

#### ‘Core antitrust laws’ has colloquial uses but zero formal definitions. ‘Core’ means essential.

Crawford ’89 [James D, James J Leyden, Frank C Sabatino, and Jack G Mancuso; October; J.D. at the University of Pennsylvania; J.D. at the University of Pennsylvania; J.D. at Notre Dame; J.D. at Pennsylvania State University; Westlaw, Brief on Writ of Certiorari to the United States Court of Appeals for the Third Circuit, “Fmc Corporation, Petitioner, v. Cynthia Ann Holliday, Respondent.,” No. 89-1048, WL 1128234]

The Third Circuit's decision springs from the conclusion that the deemer clause only shields “core” ERISA concerns. Perhaps the most vivid defect in this fallacy is the fact that the Third Circuit had to invent the term “core,” which is not used in ERISA, has no textual basis \*24 in the relevant legislative history, and does not even have an apparent definition in this context. Yet whatever “core” may mean, the Third Circuit certainly intended it to involve matters of critical importance. Any other definition would do violence to the English language.43 Judged by this standard, Pennsylvania's constraints upon subrogation clearly impair “core” ERISA concerns, arising from fiduciary obligations at the heart of the statute.’

Footnote 43.

The definitions of the adjective “core” are: “a: a basic, essential, or enduring part (as of an individual, a class, or an entity) b: the essential meaning: GIST ... c: the inmost or most intimate part.” Webster's New Collegiate Dictionary, 250 (1973).

#### In ‘expand the scope,’ ‘expand’ means to increase and ‘the scope’ defines permissible behavior.

Collins ’21 [Collins English Dictionary; copyright updated 2021; Collins Cobuild, “Expand the Scope,” https://www.collinsdictionary.com/us/dictionary/english/expand-the-scope]

expand the scope

These examples have been automatically selected and may contain sensitive content that does not reflect the opinions or policies of Collins, or its parent company HarperCollins.

I wanted to work internationally and expand the scope of my possibilities.

Times, Sunday Times

Labour has called for the government to expand the scope of the test to include consideration of the impact of any merger on research and development and science.

Times, Sunday Times

Most opponents are small-government conservatives who are outraged at any attempt to expand the scope of government, particularly when it involves their personal healthcare decisions.

Times, Sunday Times

The move was cited by the developer to be to expand the scope of indie videogames, and not as a market strategy.

Retrieved from Wikipedia CC BY-SA 3.0 https://creativecommons.org/licenses/by-sa/3.0/. Source URL: https://en.wikipedia.org/wiki/Afterfall: InSanity

Such results expand the scope of asymmetric hydroboration to more sterically demanding alkenes.

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Definition of 'expand'

expand

(ɪkspænd)

Explore 'expand' in the dictionary

VERB

If something expands or is expanded, it becomes larger. [...]

See full entry

COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers

Definition of 'scope'

scope

(skoʊp)

Explore 'scope' in the dictionary

UNCOUNTABLE NOUN [NOUN to-infinitive]

If there is scope for a particular kind of behaviour or activity, people have the opportunity to behave in this way or do that activity. [...]

### T Per Se

All prohibitions could be *per se* – violations prove how arbitrary the interpretation is.

Manne ’21 [Geoffrey; 2021; President and Founder of the International Center for Law and Economics and Distinguished Fellow at the Northwestern University Center on Law, Business, and Economics, “The Rule of Reason as a Discovery Procedure: A Response to Ramsi Woodcock's Hidden Rules of a Modest Antitrust,” 105 Minn. L. Rev. Headnotes 422, 448-453]

D. THE OVERSTATED DIFFERENCE BETWEEN RULE OF REASON AND PER SE

It is also inaccurate to frame per se rules as entailing no indeterminacy whatsoever. There will always be procedural, theoretical, and/or evidentiary predicates for legal liability. Per se rules are triggered by factors that can be subject to significant interpretation. And rules of reason may be designed to provide firms with safe harbors. Accordingly, the distinction between these standards is often overblown.

For example, a great deal of the enforcement activity characterized by Woodcock as movement toward a rule of reason could better be characterized as the creation of bright-line safe harbors for large swaths of conduct. There are--or were--a great number of antitrust safe harbors beginning in the 1980s and coinciding with a number of per se to rule of reason shifts. Copperweld established a safe harbor for within-firm conduct. 75 Brooke Group introduced a safe harbor in predatory pricing cases for above-cost pricing. 76 Trinko created a safe harbor for monopoly pricing (and a presumption of legality for unilateral refusals to deal). 77The Court also adopted safe harbors for [\*449] product innovation by dominant firms. 78There are numerous other examples. 79

Significantly, many of these shifts are described by Woodcock as moves toward the rule of reason from per se illegality--but they needn't be. Where Woodcock describes Jefferson Parish as having the net result that an exemption for "exclusive dealing that forecloses more than 30% of the market is subject to rule of reason treatment on the model of Tampa Electric" 80Edwards and Wright describe it as "a bright line foreclosure safe harbor to analyze the reasonableness of exclusive dealing contracts." 81

Woodcock goes on to interpret the rule set out in Jefferson Parish by noting that:

Justice O'Connor's observation in her celebrated Jefferson Parish concurrence that exclusive dealing contracts "of narrow scope pose no threat of adverse economic consequences" and "may be substantially procompetitive" referred to the character of those contracts that foreclose up to 30% of the market and are effectively per se legal today. Of the ambiguous conduct that forecloses more than that amount, Justice O'Connor expressed no opinion regarding the likelihood of harm. 82

The key language from Justice O'Connor is the following:

Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied-product market or that abet the harmful exercise of market power that the seller possesses in the tying product market. Under the rule of reason tying arrangements should be disapproved only in such instances . . . . In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question -- the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. 83

The presence of an indeterminate term like "significant fraction" does not render the rule inherently indeterminate (if that word is to have any meaning). And under this enunciated rule, exclusive dealing is unreasonable (illegal) only when it entails "significant" foreclosure. That [\*450] is a bright line, even if "significant" is indeterminate. Conduct that does not foreclose a significant fraction of buyers or sellers is per se legal. In this case, because the conduct in question foreclosed 30% of the market, a figure of 30% to 40% has been interpreted by numerous courts as the boundary of effective per se legality. 84

This may seem like a semantic distinction--but that is somewhat the point. Whether a rule is a bright-line safe harbor embedded in a rule of reason or a rule of per se legality is in the eye of the beholder. Woodcock is aware of this, but unduly dismissive of it. The prior case law did not establish per se rules that were always appreciably distinct from rule of reason analysis; they simply imposed different safe harbors or spheres of per se liability, the boundaries of which inevitably require detailed analysis, at times little different than that entailed by the later rules. 85By the same token, the rule of reason is not monolithic, either, and "[a]pplication of the rule of reason is not a rule of per se legality." 86Indeed, while "[i]n some instances, rule of reason treatment approaches per se legality; in others, the rule amounts to a rule of presumptive condemnation." 87

#### ‘Prohibition’ means disallowing specific actions by the government.

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

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

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

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

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

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

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

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

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

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

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

A

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

Specifications for

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

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

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

And, it states on the first page,

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

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

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

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

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

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

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

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

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

B

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

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

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

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

### States CP – 2AC

#### No authority to limit the FTAIA.

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

State Indirect Purchaser Claims

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

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

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

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

#### CP ruins federal supremacy in foreign commerce – Sherman Act and Commerce Clause exclude state action.

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

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

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

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

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

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

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

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

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

#### State action wrecks international norms.

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

3. State Enforcement of Federal Law

State attorneys general suing under the federal antitrust laws are often described as private plaintiffs,495 and it may be wondered why they would be treated any differently. Like private actors, states are not ordinarily the subjects of international obligations, nor are they addressed by the sources giving rise to the specific norm of antitrust comity. Two differences may be relevant. First, precisely because they are more public-oriented, states may prove even more disruptive to antitrust comity. Second, unlike private behavior, conduct by state governments is generally attributed to the United States under international and foreign relations law; for related reasons, states are legally incapacitated from engaging in effective self-regulation, warranting different treatment in the domestic implementation of antitrust comity.

a. The Potential Risk to Comity

State antitrust enforcers are often drawn to precisely the sort of matters in which they offer the greatest added value: that is, local matters unlikely to be scrutinized by federal officials or private-party plaintiffs.486 But attempts to confine the states to those matters, or even to distinguish between federal and local matters, failed long ago, and the borders were largely erased in the 1980s. Spurred by an infusion of federal funds and a decline in federal enforcement,497 state enforcement activities increased dramat- ically, including as to interstate matters.498 Desiring to coordinate efforts and husband resources,499 the states formed the Multistate Antitrust Task Force of the National Association of Attorneys General (NAAG) to coordinate multistate investigations and litigation500 and issue joint guidelines.501 By 1990, according to one analysis, "the sovereign states, acting voluntarily through the Antitrust Committee and the Antitrust Task Force of NAAG, function as a de facto third national antitrust enforcement agency.”502

This is hyperbole, of course; the states lack the unity, expertise, and resources of the federal agencies.503 But their authority under federal antitrust law indeed has a public dimension with evident international implications. States have the privilege of representing natural residents,504 and enjoy substantially enhanced standing to challenge mergers,505 arguably the most significant and problematic context for international cooperation.506 Although state officials lack the overriding profit motives of private plaintiffs, they are by the same token relatively free to pursue judgments without financial incentive,507 and enjoy their own immunity from antitrust claims.508 Such authority will increasingly be exercised with respect to international matters, broadly construed. Like interstate commerce before it, globalization is effective at reducing the significance of borders, and state attorneys general may legitimately perceive that foreign conduct has local effect; in addition, their involvement with local or interstate matters will increasingly touch on matters of interest to foreign sovereigns, perhaps by dint of these governments' own extraterritorial authority.509

One may fairly assume that state enforcers pay some heed to international comity,510 but their participation makes it more difficult to observe just the same. The problem is not just that state enforcement will catch additional anticompetitive transactions or conduct;511 reduced barriers to competition presumably benefit foreign companies and consumers as well, and one might discount any interest in protecting foreign companies from the application of federal antitrust law. The additional scrutiny, however, comes at a price. State enforcement is criticized domestically for imposing additional administrative costs and delay, and for undermining legal certainty by creating divergent or inconsistent legal stan- dards.512 Such problems are only magnified for multinationals that must increasingly comply with foreign antitrust regimes as well.513 Variations between the federal and state interpretations of federal law (as well as state-by-state differences) mean that after Hartford Fire, transnational businesses will be compelled not only to conform to the most restrictive national regime, but also to "the levels set by the most restrictive state interpretation of federal law."514

Apart from these cumulative and incremental concerns, the distinctive nature of state enforcement policies also makes heeding legitimate foreign interests more difficult. The states' sharpest critics accuse them of being motivated by treble damages515 or even craven political opportunism.516 Viewed more benignly, states are certainly attuned to public policy considerations other than consumer welfare, such as local employment and local com- petitors.517 Even where this happens to coincide with foreign enforcement philosophies, state promotion of such values is unlikely to spill over to foreign jurisdictions, and neither are any innovations state-based experimentation may generate in the administration of U.S. antitrust law; foreign parties, for their part, may feel particularly vulnerable to the more subjective elements of state antitrust analysis.518 Finally, even where state and foreign enforcers agree that particular conduct or a particular transaction poses antitrust concerns, conflicts may arise over state cherry- picking.519

The Hartford Fire case hints at some of the problems. The lawsuit arose after local governments, experiencing difficulties in obtaining liability coverage, complained to their state attorneys general, who filed suit when the federal government declined to take action.520 According to the states, the federal government's inaction was due to its flawed analysis of the prospects for collusion in the insurance industry.521 To the foreign insurers and their governments, on the other hand, the states' intervention was politically tinged, and observers considered the lawsuit as one part of the tort reform movement.5 22 The result, in any event, was that the domestic and foreign insurers paid the states $36 million to settle the claims after the Supreme Court decision, including the costs of the states’ legal action.523

Particularly in the wake of Hartford Fire, state authority seems likely to make national compliance with antitrust comity more difficult. Cooperative investigations and information sharing may pose some difficulties.524 Conflicts seem more likely regarding enforcement and remedial matters. Because states have different visions of the public interest and different constituencies, they may find it difficult to coordinate with the federal government and its foreign counterparts – even assuming that they can cooperate among themselves.525 The conflict is inherent. States tend to enhance the total stability of U.S. enforcement policy over time, thus making it more predictable for foreign firms and antitrust authorities alike.526 But this is of diminished benefit in international matters, as the proliferation of foreign antitrust authorities, and expanded notions of foreign antitrust jurisdiction, make it likely that global practices and transactions will be caught by more than one national authority. More to the point, this internal complementarity, which tends to ensure a constant level of American antitrust enforcement, diminishes the ability of the U.S. government to ensure external complementarity, such as by suspending antitrust enforcement in deference to foreign authorities tendering a request for traditional comity.527 Even if that has not measurably slowed bilateral agreements and the development of a comity principle, it may [prevent] ~~retard~~ deeper efforts at cooperation,528 and even endanger continued observance of already precarious norms.

#### They read a DA to the CP. If we win the CP is certainly preempted, it collapses federalism and turns their DA.

O’Rourke ‘10 [Ken; 3/3/10; Senior Partner, O'Melveny & Myers LLP, an international law firm specializing in antitrust; “United States: The FTAIA In State Court: A Defense Perspective,” https://www.mondaq.com/unitedstates/trade-regulation-practices/95030/the-ftaia-in-state-court-a-defense-perspective?utm\_source=pocket\_mylist]

As federal courts tighten the reins on private antitrust actions, some antitrust plaintiffs are focusing their attention on litigating in state court. And they are being creative about how to avoid removal to federal court.1 Yet, as antitrust plaintiffs turn to state court and state law, they are likely to face some of the same federal doctrines they would prefer to avoid.

One federal doctrine sure to arise in state court antitrust actions when there are allegations or damages based on cross-border conduct is the Foreign Trade Antitrust Improvements Act ("FTAIA").2 The FTAIA defines the limits on the reach of the Sherman Act in cases involving foreign trade and commerce.

The FTAIA's parameters continue to evolve as litigants and the courts wrestle with new variations of the basic allegation that international price-fixing or overseas monopolistic conduct "caused" domestic injury on which a Sherman Act claim is based.

Congress enacted the FTAIA in 1982, some 92 years after the enactment of the Sherman Act. The FTAIA operates by "removing" anticompetitive conduct in foreign trade or commerce (other than import trade or import commerce) "from the Sherman Act's reach," unless that same conduct also causes direct, foreseeable and substantial injury to domestic trade or commerce within the United States, U.S. import commerce, or exporting activities of American exporters.3

A threshold question is whether these limitations similarly restrict the extraterritorial application of state antitrust laws. Defendants will argue that the state antitrust laws cannot permissibly extend to reach conduct or give rise to damages that Congress has placed beyond the reach of federal antitrust law under the FTAIA.

The defendants' argument goes like this. First, under the Supremacy Clause of the U.S. Constitution,4 federal law preempts state law even in the absence of an express preemption provision when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."5

Second, the FTAIA's legislative history establishes that Congress had multiple objectives when enacting the statute. One objective was to ensure that the risk of Sherman Act liability did not prevent American exporters and other firms doing business abroad from entering into advantageous "business arrangements (such as joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."6

Another objective was to eliminate "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction."7

Congress sought to adopt a "clear benchmark ... for businessmen, attorneys and judges as well as [U.S.] trading partners"8 with the "ultimate purpose" of "promot[ing] certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions."9

A third objective was to promote international comity by acknowledging and respecting the prerogatives of other nations to establish and apply their own standards for regulating and remediating alleged restraints of trade in their own markets.10

Congress believed that respecting such foreign sovereign regulatory prerogatives would ultimately best serve U.S. interests by "encourage[ing] our trading partners to take more effective steps to protect competition in their markets."11

Applying state antitrust laws to regulate foreign trade or commerce excluded from federal antitrust jurisdiction by the FTAIA arguably would frustrate every one of these objectives.

American exporters and other businesses engaged in foreign trade or commerce could have no confidence that restraints exempted from federal antitrust attack would not be subject to alternative antitrust attack under the laws of one or more U.S. states. Businesses, therefore, would be deterred from entering into arrangements that Congress intended to enable.

Likewise, ambiguity in the "standard to be employed" for assessing the extraterritorial application of "American antitrust law" would not only persist, but would be multiplied fifty times.

And the imposition of as many as 50 states' antitrust laws on foreign trade or commerce clearly would negate the federal objectives of international comity and respect for foreign regulation of foreign markets.

At every level then, the application of state antitrust laws to foreign trade or commerce exempted by the FTAIA from federal antitrust regulation would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FTAIA.12

Plaintiffs likely will counter these preemption arguments by pointing out that there is a presumption against preemption and that Congress did not expressly overrule any state antitrust law when enacting the FTAIA.

True, Congress did not address the reach of state antitrust laws, one way or the other, when it enacted the FTAIA. However, the Sherman Act has always extended to "commerce with foreign nations,"13 and was subject to a large body of pre-FTAIA case law addressing the limitations on its extraterritorial reach.14

By contrast, state antitrust laws such as California's Cartwright Act do not expressly reference foreign commerce and have no comparable history of being applied to it.

Congress, therefore, had no cause to be concerned that states would attempt to apply state antitrust laws to foreign trade or commerce exempted from federal regulation by the FTAIA.

Even if there had been such a concern, Congress would have been amply justified in anticipating that the doctrine of implied obstacle preemption — well established when the FTAIA was enacted in 198215 — would resolve any conflict.16

### Debt Ceiling DA – 2AC

#### Court shields.

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

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

Conclusion

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

#### Thumpers overwhelming Biden's efforts.

Tankersley et al. ‘10/1 [Jim; 10/1/21; White House correspondent for the New York Times; et al.; "Live Updates: Biden Meets With Feuding Democrats and Expresses Confidence in a Deal," https://www.nytimes.com/live/2021/10/01/us/infrastructure-bill-house/biden-negotiate-deal-congress#biden-negotiate-deal-congress/]

Mr. Biden and his team entered the week with a clear objective. They hoped to persuade holdout centrist Senators Kyrsten Sinema of Arizona and Joe Manchin III of West Virginia to endorse a framework agreement, including a maximum amount of new spending programs, for a sweeping bill that Democrats are pushing through the fast-track budget reconciliation process and hope to pass with a simple majority.

As of Friday afternoon, the deal remained elusive, despite late-night efforts on Thursday at the Capitol by members of Mr. Biden’s policy team. The president’s efforts have been hampered, some administration officials concede privately, by distrust among factions in his party and by his own falling poll numbers, which slumped this summer as the United States suffered another wave of Covid-19 infections and deaths and as the administration staged a chaotic troop withdrawal from Afghanistan.

#### Won’t pass---neither party will budge.

Tankersley ‘10/1 [Jim; 10/1/21; White House correspondent for The New York Times; "America’s Need to Pay Its Bills Has Spawned a Political Game," <https://www.nytimes.com/2021/09/26/business/economy/america-debt-limit-political-game.html/>]

Republicans in Congress have refused to help raise the nation’s debt limit, even though the need to borrow stems from the bipartisan practice of running large budget deficits. Republicans agree the U.S. must pay its bills, but on Monday they are expected to block a measure in the Senate that would enable the government to do so. Democrats, insistent that Republicans help pay for past decisions to boost spending and cut taxes, have so far refused to use a special process to raise the limit on their own.

Observers inside and outside Washington are worried neither side will budge in time, roiling financial markets and capsizing the economy’s nascent recovery from the pandemic downturn.

If the limit is not raised or suspended, officials at the Treasury Department warn, the government will soon exhaust its ability to borrow money, forcing officials to choose between missing payments on military salaries, Social Security benefits and the interest it owes to investors who have financed America’s spending spree.

Yet Republicans have threatened to filibuster any attempt by Senate Democrats to pass a simple bill to increase borrowing. Party leaders like Senator Mitch McConnell of Kentucky want to force Democrats to raise the limit on their own, through a fast-track congressional process that bypasses a Republican filibuster. That could take weeks to come to fruition, raising the stakes every day that Democratic leaders decline to pursue that option.

The problem is further compounded by the fact that no one is quite sure when the government will run out of money. The Covid-19 pandemic continues to ravage the United States in waves, frequently disrupting economic activity and the taxes the government collects, complicating Treasury’s ability to gauge its cash flow. Estimates for what’s known as the “X-date” range from as early as Oct. 15 to mid-November.

Amid that uncertainty, congressional leaders and President Biden aren’t even attempting to negotiate a resolution. Instead, they are sparring over who should be saddled with a vote that could be used against them, raising the odds that partisan stubbornness will propel the country into a fiscal unknown.

It all adds up to an impasse rooted in political messaging, midterm campaign advertising and a desire by Republican leaders to do whatever they can to protest Mr. Biden’s economic agenda, including the $3.5 trillion spending bill that Democrats hope to pass along party lines using a fast-track budget process.

Republicans say they will not supply any votes to lift the debt cap, despite having run up trillions in new debt to pay for the 2017 tax cuts, additional government spending and pandemic aid during the Trump administration. Democrats, in contrast, helped President Donald J. Trump increase borrowing in 2017 and 2019.

“If they want to tax, borrow, and spend historic sums of money without our input,” Mr. McConnell said on the Senate floor this week, “they will have to raise the debt limit without our help.”

Thus far, Mr. Biden and Democratic leaders in Congress have declined to do so, even though employing that process would end the threat of default.

#### Uniqueness overwhelms.

Cillizza '9/16 [Chris; 9/16/21; CNN Politics Reporter and Editor-at-Large; "The dirty little secret no one is telling you about the debt limit," https://www.cnn.com/2021/09/16/politics/debt-ceiling-mcconnell-schumer-biden/index.html/]

Every few years, the most Washington possible debate engulfs the nation's capitol: Whether or not to raise the debt ceiling.

The issue is whether or not to increase the amount that the US government can borrow against itself before a certain date when it runs out of money. It's all massive numbers and misunderstandings: Increasing the debt ceiling isn't really about allowing the government to spend more money going forward. It's about paying for the more money the government has already spent.

Think of the debt limit like a credit card. What raising the debt ceiling does is pay off the things you've already bought. It doesn't allow you to go on a spending spree going forward.

And yet, Congress fights over it almost every single time it comes up.

The latest fight features Senate Minority Leader Mitch McConnell insisting that no Republican senator will vote to increase the debt limit, a move that would force Democrats to keep all 50 of their own senators in line to pass the increase on a purely partisan vote. McConnell wants to do this so that, when Democrats seek to push through their $3.5 trillion budget bill sometime soon, Republicans on the campaign trail can say they voted unanimously to stop that sort of out-of-control spending. (Again, worth noting here: Increasing the debt limit is about paying bills we've already incurred, not bills that we may incur going forward.)

"They are just going to have to reconcile themselves and recognize they are going to have to own it," said Texas Sen. John Cornyn, a close ally of McConnell.

Democrats -- led by Senate Majority Leader Chuck Schumer -- are doing the damndest to force Republicans into breaking with McConnell by, among other things, considering packaging the debt ceiling increase with legislation that would keep the government financed -- and open -- beyond the end of the month. The thinking there is that Republicans wouldn't be willing to be part of a government shutdown solely to avoid raising the debt limit.

Democrats also make the case that the current debt limit -- around $28.5 trillion as of August -- is the result of former President Donald Trump's massive tax cuts. "This is for Trump debt," Sen. Dick Durbin told CNN. "You would think they would at least stand up and pay for the administration of that last Republican President."

And here's the little secret about raising the debt ceiling: Congress has never not done it. Why? Because the consequences of not doing it are far too dire for the country: The Treasury Department would default on its debts, badly damaging the country's economic credibility around the world. In 2011, even the prospect that Congress would not raise the debt ceiling -- spolier alert: They did! -- led Standard & Poor's to downgrade its ratings on US debt for the first time in 7 decades.

This then is a decidedly dumb debate. Members of Congress are engaging in its usual brinksmanship over a) whether to pay bills they've already rung up and b) knowing they will, eventually, find a way to raise the debt ceiling. Because they always do.

#### Doesn't matter---Biden and Yellen can and should ignore it.

Sloan '9/15 [Allan; 9/15/21; columnist for The Washington Post; "The debt-ceiling debate is out of control. Here’s how to stop the madness.," https://www.washingtonpost.com/business/2021/09/15/debt-ceiling-partisan-fighting/]

After a two-year pause, U.S. lawmakers are once again engaged in a high-stakes, high-profile debate about raising the limit on how much money the Treasury can borrow to cover the costs of Congressionally-approved spending programs and interest on the national debt.

Although the battle over the debt ceiling, as this limit is called, sounds like something out of Accounting 101, it’s actually a partisan political fight. And a dangerous one, should the government run out of borrowing power to fund its programs and interest payments.

The Biden administration has been warning (and warning and warning) that debt defaults and cutbacks for vital programs are at hand if the debt ceiling isn’t raised soon, and Republicans — who approved three debt ceiling increases and a 2019 debt ceiling suspension during Donald Trump’s four-year presidency — are refusing to raise the ceiling because they claim to be concerned about our nation’s debt burden.

The deadlock over the ceiling, whose suspension ended on July 31, poses all sorts of problems for our country and consumes an inordinate amount of political and journalistic oxygen.

So let me propose a suggestion that combines heresy with common sense.

President Biden and Treasury Secretary Janet Yellen should ignore the debt ceiling and have the Treasury borrow $100 billion by selling a private issue of 10-year Treasury IOUs to the government of Qatar or Saudi Arabia or some other U.S.-friendly country that’s sitting on tons of cash.

To attract a buyer for this unconventional security, which could end up in legal wrangles, Biden and Yellen should offer to pay double the current 10-year Treasury interest rate. That would be about 2.7 percent.

They shouldn’t ask political consultants about this, they shouldn’t ask Democratic Congressional leaders Nancy Pelosi (Calif.) or Charles E. Schumer (N.Y.) about it, and they certainly shouldn’t ask any Republicans about it.

They should follow the Nike slogan: Just do it.

After it’s done, Yellen, who’s much better than Biden at explaining numbers, should tell people at every opportunity that the $1.35 billion a year of extra interest expense incurred by taxpayers is the fault of Republican Congressional leaders Mitch McConnell (Ky.) and Kevin McCarthy (Calif.) for being so obstructive.

If Yellen presents the world with a done deal, as I suggest, the debate is transformed. Instead of Yellen and Biden needing McConnell’s and McCarthy’s permission for the government to pay its bills and avoid defaulting on its debts, the Republican leadership would have to overturn a fait accompli. Good luck with that.

This would end destructive debt ceiling blackmail, which Democrats have engaged in occasionally but now seems to have become a Republican staple when a Democrat happens to be in office.

The original purpose of the debt ceiling when it was created in 1917 was to simplify things so that Congress didn’t need to approve every single Treasury borrowing, which had previously been the case.

The debt ceiling served a useful purpose in its early years, making it easier for the government to sell Liberty Bonds to finance our World War I expenditures.

There have been more than 100 debt ceiling increases and suspensions since 1917; the Treasury counts 85 just since 1940. But over the past decade, raising the debt ceiling has turned from an annoying anachronism into partisan political theater. Ever since 2011 — when the Republicans’ brinkmanship drove the government to the brink of default and drove even a fiscal conservative like me out of the GOP — things have been getting crazier and crazier.

#### Laundry list of issues thump debt ceiling fight

Barrón-López and Cadelago 9/9 (Laura Barrón-López is a White House Correspondent for POLITICO. Christopher is a White House Correspondent. “Biden wants to force Republicans to vote on the debt ceiling, sensing they’ll cave.” Politico. https://www.politico.com/news/2021/09/09/biden-mcconnell-debt-limit-threats-510922)

Learning from his former boss, President Barack Obama — who vowed not to negotiate over the debt ceiling after doing it once — Biden is essentially daring Republicans to vote down a debt limit suspension or increase. Since Republicans led by Senate Minority Leader Mitch McConnell announced publicly that his party members wouldn’t support an increase in the debt limit, the Biden administration has not had any additional talks with him on the issue. McConnell’s office pointed to the senator’s past comments on the debt ceiling but did not address whether the two sides had talked.

A White House official said the administration is largely deferring to congressional leaders on the procedural aspects of how to pursue a debt limit increase or suspension. Whether Democrats are pursuing a long- or short-term increase remains unclear. In public and private conversations and briefings with Hill aides, the White House has two main positions: Don’t negotiate with Republicans over what should be a routine vote and clearly message that the debt limit addresses past, not future, spending, seeking to avoid confusion and rebuff GOP attacks over a complex topic.

“The debt limit is a function of bills that Congress has already passed, already wrapped up,” said Brian Deese, director of the White House National Economic Council. “Even if Congress took no future action ever, did nothing else in the future, Congress would have to raise or suspend the debt limit because it’s a reflection of actions already taken.”

The showdown comes as Biden faces a grueling month that will determine the fate of his signature economic items: the bipartisan infrastructure bill and social spending package. On top of that, government funding runs out Sept. 30, the coronavirus pandemic continues to rage and parts of the country are struggling to rebuild after devastating hurricanes and wildfires.

### FTC DA – 2AC

#### The plan solves the tradeoff link – private litigation takes cases off the government’s docket.

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 – and 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.

#### CFPB fills in.

Parker ’21 [Wilson; April 27; J.D. at the University of Virginia; Cov Financial Services, “Supreme Court Ruling Complicates FTC's Ability to Obtain Consumer Redress,” https://www.covfinancialservices.com/2021/04/supreme-court-ruling-complicates-ftcs-ability-to-obtain-consumer-redress/]

In the short term, this decision may also prompt the Consumer Financial Protection Bureau (“CFPB”) to be more assertive in areas where the two agencies share jurisdiction, such as regulating the debt collection industry. The CFPB has broad power to seek consumer relief. As long as the FTC’s ability to seek consumer relief is complicated by AMG Capital Management, the CFPB may take the lead in more cases where it can use its power to pursue consumer relief directly.

### Japan DA – 2AC

#### Asian alliances are dead now

Manning and Burrows ’19 [Robert; December 20; Resident Senior Fellow in the Scowcroft Center for Strategy and Security at the Atlantic Council; Director of the Foresight, Strategy, and Risks Initiative at the Atlantic Council; Atlantic Council, “Top Ten Risks of 2020,” <https://www.atlanticcouncil.org/blogs/new-atlanticist/top-ten-risks-of-2020/>]

Demise of US traditional alliances: The global leadership deficit grows in a fragmenting world order. Ad-hoc regional security networks are taking shape by key partners in Asia and Europe. With his impulses unchecked, Trump’s narrow transactional view of alliances may lead him in 2020 to “bring the boys home,” withdrawing at least 6,000 troops and unwinding the US-Republic of Korea alliance. A similar dynamic threatens the US-Japan alliance, with Tokyo building ties to new economic and security partners. The European Union, in the wake of the perceived success of its data privacy protection legislation, Trump’s ceaseless disparaging, and Beijing’s efforts to use economic enticements to split off eastern Europe, will accelerate moves to protect its economic and political sovereignty against the United States and China. End of US-ROK alliance, probability 50-50 (strong Department of Defense and Congressional pushback).

Nuclear proliferation. North Korea is making new strides toward becoming like accepted de facto nuclear states Israel and Pakistan, reflecting a growing pattern of US retreat and unreliability. This will lead US allies and partners to rethink US security guarantees. The Republic of Korea and Australia, already pondering nukes, may move to the next stage of actively considering them in 2020, as may Japan. If the Iran nuclear crisis is not resolved, expect the Saudis to buy or rent a nuke from Pakistan. Active moves toward Asian & Middle East proliferation: 40-60;

#### Japanese leaders already perceive unreliability

Smith, 19—Senior Fellow for Japan Studies, Council on Foreign Relations (Sheila, “Introduction,” *Japan Rearmed*, Kindle, dml)

Unlike other U.S. alliances, such as the North Atlantic Treaty Organization or the U.S.-South Korea alliance, formal contingency planning that commits military force to combined operations has not been part of the U.S.-Japan alliance. As Japan considers the possibility that it might have to fight a war, its leaders will have to decide whether it will integrate its forces into a combined command with the forces of the United States or whether it will seek to build its capacity to deter or repel an aggressor without U.S. help. To date, Tokyo’s answer has been clear: Japanese threat perception has driven it closer to the United States as Asia has become more uncertain; and yet, Washington seems somewhat at odds about the future of its alliances. An unpredictable president, who seems disinterested in using American power for the defense of others, could easily upend Japanese expectations. The reliability of the United States, more than the military capabilities of its neighbors, will in the end decide the future of Japan’s approach to military power.

While Tokyo has increasingly embraced the SDF as an instrument of statecraft, Japanese leaders must now question their longstanding assumption that the United States will defend Japan. Throughout the Cold War and in the decades since, the United States and Japan have adjusted their military responsibilities in the alliance, but the core strategic bargain that the United States would provide the military capability to strike offensively from Japanese bases while Japan’s military would maintain the capability to defend its home islands is shifting. As American political leaders openly debate their commitment to allied defenses, Japanese politicians are beginning to argue for greater military capability, including limited strike capability, to ensure potential adversaries do not miscalculate SDF readiness.

#### Japan won’t prolif

Satoh, 17—vice chairman of the Japan Institute of International Affairs, previously served as the permanent representative of Japan to the United Nations (Yukio, “U.S. Extended Deterrence and Japan’s Security,” Livermore Papers on Global Security No. 2, October 2017, dml)

As the preceding analysis implies, challenges to Japan’s deterrence strategy are not over whether or not it should possess an independent nuclear deterrent. Japan has chosen a different course and remains strongly wedded to it. But it is important to address the question of Japan’s nuclear option before discussing the optimal deterrence strategy that the country has opted to pursue. The discussion of Japan’s nuclear option would also help to understand what would be required for the effective deterrence of emerging threats and how Japan could best improve its security.

Japan’s Nuclear Option

Foreign pundits often warily discuss the possibility that Japan might opt for nuclear armament. Given that Japan has the technological and financial capabilities necessary to develop nuclear weapons and missiles, such speculation is not unwarranted. Moreover, in Japan there are some conservative politicians and pundits who advocate to change the Three Non-Nuclear Principles for the purposes of either possessing nuclear weapons or permitting introduction of American nuclear weapons. But their impact should not be exaggerated, for they remain a small minority among the public and political opinion. Moreover, the strong opposition to nuclear weapons among the Japanese public and political opinion is deeply embedded. For the foreseeable future, these political factors will endure.

There are additional reasons that Japan is highly unlikely to consider a nuclear option. First, there is the financial factor. Japan lacks strategic depth, as its population is heavily concentrated in a few major cities along the coasts. Thus, the only credible deterrent it might consider would be one deployed at sea—nuclear submarines carrying nuclear-tipped ballistic missiles. This would be hugely expensive. It would also take many years to create such a force, during which time its security position would likely erode considerably—especially if it were to seek such a capability over Washington’s objections. Given Japan’s need for a credible conventional defense posture—and the rising costs of fielding advanced defensive systems—it makes far more sense for Japan to invest toward that end. A related objective, as discussed further below, should be to help strengthen the capacity of the Southeast Asian countries for maritime security.

There is also a diplomatic factor. A Japanese decision to embark upon nuclear weapons development would no doubt deal a shattering blow to the nonproliferation regime and the Nuclear Non-Proliferation Treaty, which would likely result in the emergence of additional threats to Japan. It would also lead immediately to the country’s political isolation. Among the many consequences of this would be the damaging effects on the country’s economy.

Strategically, a Japanese decision to create an independent nuclear deterrent would make the Americans question the continued value to the United States of the Japan–U.S. Security Treaty. After all, from a U.S. perspective, such a Japanese decision would reflect a loss of Japanese confidence in the willingness and/or ability of the United States to make good on its promise to defend Japan.

Despite these drawbacks, debates about Japan’s nuclear option will continue in and outside the country, particularly given a changing security environment and rising questions about the U.S. world role. But the possibility for Japan to seek an independent nuclear deterrence over Washington’s objection or at the expense of alliance with the United States will remain inconceivable in the foreseeable future. Although some advocate to change the Three Non-Nuclear Principles for the purpose of enhancing the credibility of the U.S. nuclear umbrella, it is also inconceivable for the Japanese public to accept the deployment of U.S. nuclear weapons into the country.

## 1AR

### Case

#### Young competition jurisdictions exist, but further improvements are necessary.

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

Many of today’s 130 plus competition law jurisdictions are newcomers—more than two thirds of them enacted their first competition laws within the past twenty-five years.3 Most of these new competition law jurisdictions are developing countries, where conditions are hardly conducive to the successful implementation of pro-market legislation. A large number of them are poor or even very poor countries with few resources to support even the most promising public policies. Most exhibit high levels of both economic and political inequality; some still have autocratic regimes in which insiders use their political power to extract economic rents by restricting market entry; others have leaders who for their political survival depend upon the support of entrenched economic insiders. These conditions ensure powerful opposition to the meaningful implementation of any competition law. And many jurisdictions have enacted their first competition law or established a regulatory agency for its implementation while also attempting the difficult task of democratizing their political systems or liberalizing their economies.

Additional challenges arise from economic structures or expectations, held by elites and sometimes large parts of the population, that are antithetical to a market economy: In many of the new competition law jurisdictions, the state retains a large ownership stake in many industries or is still expected to guide outputs and inputs of the private sector. Moreover, in a number of these jurisdictions, corruption is rampant in the executive branch, and the judiciary is far from independent, contributing to generally poor rule of law and limited access to justice. And even before adding the regulation of market competition to the tasks assigned to their public administrations, many of the recent competition law adopters suffered from weak bureaucratic capacity.

Recent scholarship has called attention to many of these conditions. It has advanced our understanding of the serious challenges they present to the effectiveness of competition law and policy in developing countries.4

Some young competition jurisdictions in the developing world, however, appear to have overcome these challenges. Though their records so far are short, some agencies seem to have succeeded in building substantial analytical capacity and establishing considerable autonomy. And in a number of cases, they appear to have become highly effective in dismantling private and public barriers to competition in their countries, contributing to development and other goals of these societies.5

### Japan DA

#### Alliance failure is inevitable—lack of contingency planning

Smith, 19—Senior Fellow for Japan Studies, Council on Foreign Relations (Sheila, “Relying on Borrowed Power,” *Japan Rearmed*, Chapter 5, Kindle, dml)

But dealing with the heightened threats that Japan faces today will require more than assurances of the United States’ commitment. It will necessitate contingency planning that involves both militaries, so as to anticipate when and how each military might initiate the use of force and to what end. If a conflict were to break out on the Korean Peninsula, U.S., Japanese, and South Korean forces would all be involved in a response. Yet there is no integrated command for all three allied militaries, nor is there a common understanding of how a conflict could be fought now that Japan is vulnerable to North Korea’s missiles. The United States has largely been responsible for a strategic response against the North’s growing nuclear capabilities. South Korea has also developed its own military response should North Korea attack, and since the 2010 sinking of the South Korean naval vessel, the Cheonan, and the shelling of Yeonpyeong Island, this has been organized independently from the UN Command’s long-standing combined operational plans. Now if Japan decides to acquire conventional strike capability, when and how it will use that capability should be part of a U.S.-Japan alliance conversation. Sooner or later, the two militaries may have to fight together, and despite all the changes that have been made to the alliance over the years, Tokyo and Washington have yet to consider how they would organize for such a conflict.

The abandonment dilemma is not only about what might happen in a crisis or military conflict. It also affects expectations of continued cooperation in securing the interests of each ally in shaping the balance of power. Thus Japan’s expectations of U.S. disarmament efforts are equally important when it comes to North Korea. Japan’s leaders cannot be sanguine about the future of the alliance between the United States and Japan if a U.S. president begins to advocate for dismantling the global order that has sustained its security strategy. President Trump has cast doubt on the notion that the United States remains interested in a global leadership role similar to the one it undertook in the Cold War or even in the decades after the Cold War ended when U.S. power was the harnessed to a vision of global governance that reflected the norms and interests of the liberal democracies. Japan too embraced this vision of a global order and has been an active participant in the economic and political institutions designed to support it.

At the core of Japan’s relationship with the United States, however, is a strategic bargain that trades American willingness to use military force on Japan’s behalf for Japan’s willingness to support American dominance in Asia. China is challenging the latter while the United States itself may be reconsidering its appetite for the former. Japanese leaders will be hard pressed to use the alliance as an instrument of their national strategy in the years ahead. Keeping China at bay while holding the United States close will be a difficult diplomatic strategy. But it will also require Tokyo to reexamine its own military power and decide whether it can—and should—play a greater role in shaping Japan’s strategic options.

#### Asian alliances low – economics, BMD cancellation, Trump.

Green and Hornung ’20 [Michael and Jeffrey; July 17; Senior Vice President for Asia and Japan Chair at the Center for Strategic and International Studies and Director of Asian Studies at the Edmund A. Walsh School of Foreign Service at Georgetown University; Political Scientist at the RAND Corporation; The Hill, “Are US-Japan relations on the rocks?” <https://thehill.com/opinion/international/507880-are-us-japanese-relations-on-the-rocks>]

There are structural and ideological reasons for the Japanese government’s readiness to work closely with the Trump administration. But it’s Abe’s patience and personal diplomacy with Trump that have likely impressed European diplomats incapable of getting their leaders to do the same. Though perhaps not as personal as some of the criticisms against European leaders, Abe has had to weather his own list of issues with Trump, including: [Steel tariffs](https://www.ft.com/content/c7fc9ae0-37e4-11e8-8b98-2f31af407cc8); unilateral withdrawal from the Trans-Pacific Partnership (TPP), which is a cornerstone of Japanese trade strategy in Asia; reported demands for a four-fold increase in payment for hosting U.S. bases in Japan; casual threats to [withdraw](https://www.cnn.com/2018/03/15/politics/trump-us-troops-south-korea/index.html) U.S. forces from South Korea, which would leave Japan exposed to the ongoing North Korean threat; the president’s lack of interest in multilateral meetings such as the East Asia Summit and the [G-7](https://www.politico.com/story/2018/06/07/trump-g7-trudeau-macron-632988) that are crucial to Japan’s diplomacy.

Yet Abe has never criticized Trump publicly as his European and Canadian counterparts have. Instead, he has patiently tutored the president on [diplomatic and security issues](https://www.bbc.com/news/world-us-canada-38934469) during long golf games; tried to bridge his European and American counterparts at sometimes contentious G-7 meetings; [worked](http://www.theasanforum.org/how-and-why-japan-has-saved-the-tpp-from-trump-tower-to-davos/) with member states in the TPP to keep a place at the table for the United States while they moved ahead with the new Comprehensive and Progressive Trans-Pacific Partnership; and brushed aside opposition criticism of the United States in the Diet. This “yosh yosh” (“now now…”) diplomacy has been good for Japan, the United States and even Europe.

But suddenly, in the span of only a few months, the alliance appears weaker in ways that no one anticipated. In June, Japan suspended, then cancelled, its planned deployment of two Aegis Ashore systems, a ballistic missile defense system. The surprise cancellation rocked an alliance used to close coordination, particularly one that carries operational benefits to both American and Japanese national security interests alike.

Then, the Japanese Defense Ministry announced that it would produce its next jet fighter indigenously, rejecting plans by U.S. firms in order to benefit Japanese industry, ensuring higher costs and longer production times. In the economic domain, [reports](https://www.wsj.com/articles/u-s-allies-capture-china-tech-business-despite-washingtons-curbs-11593425397) surfaced that Japanese firms have been helping China build out its 5G network in China with Japanese equipment, despite years of close U.S. and Japanese government cooperation designed to stop Huawei’s predatory policies. And most recently, a respected Japanese scholar and pro-alliance national security analyst who is close to Abe, Yuichi Hosoya, [said](https://asia.nikkei.com/Editor-s-Picks/Interview/Japan-must-rethink-excessive-reliance-on-US-security-says-expert) in an interview that the time had come for Japan to reassess its overreliance on the United States and build its own defense capabilities, questioning whether the U.S. would remain committed to Japan’s defense. Hosoya’s comments struck a nerve because he vocalized what many Japan watchers have been increasingly hearing in private about Japan’s concerns with the United States.

By themselves, these events would not be worrying; collectively, they may form a problematic trend. We can at best speculate on the reasons why. One factor may be both [Abe’s](https://www.japantimes.co.jp/news/2020/06/01/national/80-say-government-coronavirus-economic-aid-slow-kyodo-poll/) and [Trump’s](https://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx) falling political polls in the wake of COVID-19, leading Japan to consider hedging strategies. Another factor could be a growing concern in Tokyo that the more reliable checks on Trump’s excesses were lost when Secretary of Defense [James Mattis](https://thehill.com/people/james-mattis) and National Security Adviser [John Bolton](https://thehill.com/people/john-bolton) left their jobs. We suspect that the Trump administration’s poor performance in responding to the pandemic is also a factor in how Japanese leaders judge American reliability. And in private, some officials speak of fatigue at managing a disruptive president who shows no signs of steadying or becoming more reliable.

#### Backchannels and consultation solves

**Tsuruoka 16** [Michito, PhD in War Studies, Senior Research Fellow, National Institute for Defense Studies (NIDS), Japan, “The NATO vs. East Asian Models of Extended Nuclear Deterrence? Seeking a Synergy beyond Dichotomy”, 7/30/16, http://www.theasanforum.org/the-nato-vs-east-asian-models-of-extended-nuclear-deterrence-seeking-a-synergy-beyond-dichotomy/]

Japan and South Korea have been making more efforts to maintain and enhance the credibility of US extended deterrence, facing what they perceive as a deteriorating security environment, most notably due to China and North Korea.∂ Common to the two allies is to start and strengthen consultations with Washington on nuclear deterrence and extended deterrence. Such consultations on nuclear issues with Japan and South Korea among other allies and partners in 2009 began in the context of a new US Nuclear Posture Review (NPR), which was released in April 2010. Following the initial success of such consultations, the United States and Japan established the “Extended Deterrence Dialogue (EDD)” and the United States and South Korea the “Extended Deterrence Policy Committee (EDPC),” both in 2010.18 The US-Korean one was renamed in 2015 the “Deterrence Strategy Committee (DSC).”19∂ These dialogue frameworks have quickly become a premier venue to discuss extended deterrence issues between the allies and an “assurance tool” by fostering a “sense of inclusion” for Japanese and Koreans. The dialogues now include table top exercises based on high-intensity contingencies and onsite visits to US nuclear facilities.20 The Obama administration has shown greater willingness to institutionalize and expand these dialogues, indicating that the United States accepts the fact that it is not in the US interest to leave allies ill-informed about US intentions (policies) and capabilities and questioning the US commitment. Keeping the allies well informed and updated is now seen as one of the surest ways to reassure them, i.e., “educating” the allies from the US point of view.

#### No Indo-Pak war – new ceasefire and old checks on conflict.

Gupta 3-20 – Shekar Gupta, an Indian journalist and author. [Why distrust-but-verify is a prudent response to Pakistan Gen Bajwa's call to bury the past, 3-20-2021, https://theprint.in/national-interest/why-distrust-but-verify-is-a-prudent-response-to-pakistan-gen-bajwas-call-to-bury-the-past/625108/]

Militarily, diplomatically, politically or economically, achieving anything by force is out of the question. As former Army chief General V.P. Malik said in a conversation with me earlier this month on ThePrint’s ‘Off The Cuff’, it isn’t possible today to achieve any of our territorial objectives, PoK or Aksai Chin, by military force. Besides the capability question, any such adventure would immediately run into global disapproval and force a ceasefire earlier than you can advance a few miles. For clarity, these are my words, not his.

Where do we go from here then? And how did we get here in the first place?

Suddenly, one morning last month, we saw coordinated statements by the directors general of military operations (DGMOs) on both sides that they had solemnly agreed to once again abide by the 2003 agreement on maintaining peace on the Line of Control. What that means is a stop to those madcap, aimless spells of firing heavy ordnance at each other’s posts and villages. It achieved nothing, except take out some bhadaas (frustration).

Besides, it made great pictures and TV for commando comic channels on either side, which could then, with the help of angry grey moustaches, declare victory for their respective armies. But the armies know the truth. As do their governments. At some point, they knew they needed to move on.

Anybody who thinks that both DGMOs woke up one morning with the same thought of peacemaking has to be drinking something very potent, maybe gifted Maotai from the Chinese, and too much of it. Similarly, anybody who believes Gen. Bajwa’s speech came serendipitously has to be drinking on the next bar stool. Something has gone on between the two sides for several weeks, if not months, behind the scenes.

Strong words of caution have come from the rugged old intelligence/strategic/military establishment.

What does one more Pakistani general mean when he says bury the past and move on? It means India should bury the past and move on while Pakistan subverts us. For people who’ve dedicated their lives to fighting the same adversary, this sentiment is easy to appreciate.

But then, as we argued earlier, it isn’t possible in 2021 for one nation to pulverise another to achieve anything. Especially when we live in a neighbourhood with strong, competing nationalism and robust, nuclear-armed militaries. Nobody is ever going to be like Armenia to Azerbaijan or Ukraine to Russia here. We need to think creatively.

In negotiations to end the Cold War, Ronald Reagan had famously used a line with Mikhail Gorbachev: ‘Trust, but verify’. While dealing with Pakistan, we could turn it inside out: ‘Distrust, but verify’. What that means is, while you view every new move coming from Rawalpindi (my preferring this over Islamabad is deliberate) with the highest degree of suspicion, you check it out nevertheless.

That’s why, while we hold our deep scepticism close to our hearts, we apply our minds to read between the general’s lines, spoken as these were in the most delightful, pucca Punjabi pronunciation familiar on both sides of the border.

Two things stand out in that written speech. One, a commitment of non-interference in the internal affairs of any country in the neighbourhood or the region. You might say it’s a mere platitude. But be cautious and verify. Nobody’s in a rush to invite the Pakistani Northern Areas commander to a game of golf in Srinagar’s Badami Bagh cantonment.

Second, he did not leave out the mention of Kashmir. But there was a nuance. He said progress in relations of course depends on India creating a ‘conducive environment’ on its side of Kashmir. The customary mention would’ve reminded India of the need to restore the pre-5 August 2019 status to Jammu and Kashmir forthwith, and prepare for self-determination as laid down in the UN Security Council Resolutions, blah blah blah.

Does it mean the Pakistani Army has given up its insistence on the restoration of the pre-5 August 2019 status quo ante? Don’t jump to that conclusion. But check it out. Because, if we think we are caught in this awful two-front situation, the picture only looks worse from where Bajwa sits.

He sees a domineering India to the east, an unravelling Afghanistan and a complex Iran to the west, an overbearing China to the north and a US which is no longer an ally. We are at that juncture of history where US and India are allies and their embrace is getting tighter in the Quad. Like all the most important members of the Pakistani elite, Bajwa has to make a call.

Either make peace with India, or continue fighting it and become a military protectorate and economic colony of China.

Remember, that all of the Pakistani elite have their children, money and assets in the West. If they weren’t driven by such hatred of India, they would see little in common with China. Further, this comes at a time when the Gulf countries are alienated from Pakistan and are recalling their loans. Peace with India is a way ahead.

Within India, we have to admit that the Modi government is much too successful in keeping its mind to itself. Anybody except a few in the government, who claims to have an insight into its thinking, is lying. But, we have enough evidence by now to know that this is not a dispensation that looks forward to any conflict.

In seven years, and across eight budgets, the allocation for defence has remained the same or marginally declined. They are not preparing for war. Similarly, Pathankot, Uri, Pulwama, Galwan all tell us they are also not about to be knee-jerked into a conflict.

Let’s conclude this with a view that will provoke, even trigger (since that’s the word millennials prefer), many. The Modi government can build on a no-war policy because it is strong enough to do so. A weaker government would’ve been under much greater pressure in east Ladakh, and earlier with Pakistan, to do something more adventurous. Many taunted Modi for not going to war with China, unlike Nehru who “at least fought, even if he lost”. Nehru’s was a much weaker government in 1962 than Modi’s now. He had no choice but to go down fighting, Modi is too strong to fall in that trap. He would prefer peace, not war.

### FTC DA

#### FTC overload now.

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

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

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

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

#### No resources AND thumpers.

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

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

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

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

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

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

#### Private suits save government resources

O’Connor et al 10 [Kevin; Hannah Renfro; Adam Briggs; 11/30/10; Shareholder with Godfrey & Kahn, S.C., and chairs the firm’s Antitrust and Trade Regulation Practice Group; Attorneys with Godfrey & Kahn, S.C. and members of the firm’s Antitrust and Trade Regulation Practice Group; The International Handbook on Private Enforcement of Competition Law; “Interaction of public and private enforcement,” p. 240-263]

In many cases, however, private plaintiffs have superior or timelier information by virtue of being direct market participants. ‘Private parties have superior information about potential violations and the resulting harm’ thanks to their crucial possession of ‘decentralized knowledge’ unavailable to the government.55 Because they are sometimes better positioned to uncover antitrust violations, private plaintiff s are not always relegated to follow on status. As recent research has demonstrated, private plaintiff s have led the way more frequently than previously realized. Professors Robert Lande and Joshua Davis discovered in their 2008 research that more than one third of the largest 40 privately- initiated antitrust suits studied were not preceded by government action.56 While ‘piggybacking’ remains common, it is far from the only type of private action that is brought.

Indeed, in some cases it may be the government itself ‘piggybacking’ on private investigative and enforcement efforts. As Lande, Davis, and other commentators have noted, the Visa/MasterMoney case involved private- plaintiff eff orts upon which government enforcers subsequently relied.57

Advantages of private enforcement

Whether subsequently used by the government or not, these private actions represent a sizeable component of US government enforcement policy. Focusing on the 40 largest antitrust actions between 1998 and 2008, Lande and Davis found that private plaintiffs recovered between $7.631 and $8.981 billion from the 15 cases that did not follow or arise simultaneously with a government action.58 Instead, the government followed the private plaintiff s’ suit or the government did not commence an action at all. By enabling these actions to proceed from inception to completion, federal and state governments effectively achieved billions of dollars in recovery in just a ten year period, along with some measure of accompanying deterrence, without spending any taxpayer dollars.59 By including a ‘private’ component, US antitrust policy effectively outsourced a portion of its enforcement role and gave taxpayers a massive return on essentially no investment. As Lande and Davis assert, these cases ‘have saved the United States taxpayer tremendous sums in enforcement costs by shifting the enormous burdens and risks of litigating against sophisticated, well- financed lawbreakers to private plaintiffs’ counsel.’60 Moreover, the authors found that fines resulting from private actions are a greater deterrent than fines or criminal prosecutions imposed by the US DOJ.61

#### Private antitrust enforcement requires zero government resources

Land and Davis ’11 [Robert; Joshua; 5/1/11; Venable Professor of Law, University of Baltimore School of Law, and a Director of the American Antitrust Institute; Associate Dean for Faculty Scholarship, Professor of Law, and Director, Center for Law and Ethics, University of San Francisco School of Law, and member of the Advisory Board of the American Antitrust Institute; BYU Law Review; “Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws,” vol. 2011, iss. 2]

Our primary conclusion is that the benefits of private antitrust enforcement are substantial and underappreciated. The importance of private enforcement to compensation perhaps requires little elaboration because there is no meaningful alternative means for victims of anticompetitive behavior to recover for the harm they suffered as a result of antitrust violations. Perhaps more surprisingly, there is evidence that private antitrust enforcement does more than DOJ criminal enforcement to deter anticompetitive behavior.

It is, of course, extremely difficult to isolate successes in the antitrust world. Even if a particular private case succeeded in forcing violators to surrender $100 million or more to their victims, it often would be reasonable to credit many parties in addition to the victims and their counsel. A case could rely in whole or in part on a conspiracy uncovered or partly uncovered by an earlier DOJ investigation, as well as on a legal precedent established by a State Attorney General in an unrelated case; and the case itself could have been financed by private counsel who was able to do so only because of success in a prior private litigation. As always, success has many parents. Rather than enter into fruitless arguments about which type of enforcement is entitled to what percentage of the credit, and, regardless of whether it is viewed from a deterrence or compensation perspective, perhaps the safest conclusion is that private enforcement is an important complement to government enforcement.

Moreover, the cost to the taxpayer of the deterrence and compensation that arises from private enforcement is practically nonexistent. The only cost to the taxpayer is the cost of maintaining some portion of the judicial system. This amounts to only a tiny fraction of the benefits of private enforcement and would be incurred even if all these cases were brought by government enforcers.