# Extraterritoriality – Michigan PS – 1AC

## 1AC – Cartels

Advantage one is Cartels:

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

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

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

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

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

IV. SHORTCOMINGS OF THE CURRENT JURISPRUDENCE

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

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

A. Problems Arising from the Circuit Split

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

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

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

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

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

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

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

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

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

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

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

#### Otherwise, cartels destroy innovation and productivity with 40% price increases – destabilize global supply chains.

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

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

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

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

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

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

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

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

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

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

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

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

C. The Purpose

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

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

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

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

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

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

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

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

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

Biggest Problem Is Domestic

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

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

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

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

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

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

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

And a Multipolar Financial Architecture, Too

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

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

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

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

Are There Alternative Visions to Western Order?

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

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

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

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

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

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

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

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

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

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

Need for a Second-Generation US and Western Leadership Model

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Historical and Modern Cartelization of the Global Chemical Industry

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

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

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

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

#### Extinction.

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

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

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

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

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

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

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

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

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

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

Responding to Dwindling Resources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Responding to a Changing Society

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Creating Coatings for the Future

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

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

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

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

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

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

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

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

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

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

So what developments can we expect in architectural coatings technology?

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

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

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

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

Reenvisioning What’s Possible

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

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

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

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

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

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

## 1AC – Regimes

Advantage two is Regimes:

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

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

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

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

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

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

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

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

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

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

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

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

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

#### SDGs prevent existential risks.

Cernev and Fenner, 20—Australian National University AND Centre for Sustainable Development, Cambridge University Engineering Department (Tom and Richard, “The importance of achieving foundational Sustainable Development Goals in reducing global risk,” Futures, Volume 115, January 2020, Article 102492, dml)

4. Risks from failure to meet the SDGs

4.1. Cascading failures

Fig. 3 demonstrates that cascade failures can be transmitted through the complex inter-relationships that link the Sustainable Development Goals. Randers, Rockstrom, Stoknes, Goluke, Collste, Cornell, Donges et al. (2018) have suggested that where meeting some SDGs impact negatively on others, this may lead to “crisis and conflict accelerators” and “threat multipliers” resulting in conflicts, instability and migrations. Ecosystem stresses are likely to disproportionately affect the security and social cohesion of fragile and poor communities, amplifying latent tensions which lead to political instabilities that spread far beyond their regions. The resulting “bad fate of the poor will end up affecting the whole global system” (Mastrojeni, 2018). Such possibilities are likely to go beyond incremental damage and lead to runaway collapse.

The World Economic Forums’ Global Risks Report for 2018 shows the top five global risks in terms of likelihood and impact have changed from being economic and social in 2008 to environmental and technological in 2018, and are closely aligned with many SDGs (World Economic Forum, 2018). The report notes “that we are much less competent when it comes to dealing with complex risks in systems characterised by feedback loops, tipping points and opaque cause-and-effect relationships that can make intervention problematic”. The most likely risks expected to have the greatest impact currently include extreme weather events natural disasters, cyber attacks, data fraud or theft, failure of climate change mitigation and water crises.

These are represented in Fig. 3 by the following exogenous variables. “Climate change” drives the need for Climate Action (SDG 13), “Cyber threat” may adversely impact technology implementation and advancement which will disrupt Sustainable Cities and Communities (SDG 11); Decent Work and Economic Growth (SDG 8) and the rate of introduction of Affordable and Clean Energy (SDG 7), with reductions in these goals having direct consequences in also reducing progress in the other goals which they are closely linked to. “Data Fraud or Threat” has the capacity to inhibit innovation and Industrial Performance (SDG 9), reducing competitiveness (and having the potential to erode societal confidence in governance processes). “Water Crises” (linked with climate change) have a direct impact on Human Health and Well Being (SDG 3) as well as reducing access to Clean Water and Sanitation (SDG 6) and reducing agricultural production which increases Hunger (SDG 2). The causal loop diagram also highlights “Conflict” as a variable (driven by multiple environmental-socio-economic factors) which together with regions most impacted by climate degradation will lead to an increase in migrant refugees enhancing the spread of disease and global pandemic risk, thus impacting directly on Human Health and Well Being (SDG 3)

4.2. Existential and catastrophic risk

The level and consequences of these risks may be severe. Existential Risks (ER) have a wide scope, with extreme danger, and are “a risk that threatens the premature extinction of humanity or the permanent and drastic destruction of its potential for desirable future development” (Farquhar et al., 2017,) essentially being an event or scenario that is “transgenerational in scope and terminal in intensity” (Baum & Handoh, 2014). With a smaller scope, and lower level of severity, global catastrophic risk is defined as a scenario or event that results in at least 10 million fatalities, or $10 trillion in damages (Bostrom & Ćirković, 2008). Global Catastrophic Risk (GCR) events are those which are global, but they are durable in that humanity is able to recover from them (Bostrom & Ćirković, 2008; Cotton-Barratt, Farquhar, Halstead, Schubert, & Snyder-Beattie, 2016) but which still have a long-term impact (Turchin & Denkenberger, 2018b).

Achieving the Sustainable Development Goals can be considered to be a means of reducing the long-term global catastrophic and existential risks for humanity. Conversely if the targets represented across the SDGs remain unachieved there is the potential for these forms of risk to develop. This association combined with the likely emergence of new challenges over the next decades (Cook, Inayatullah, Burgman, Sutherland, & Wintle, 2014) means that it is of great value to identify points within the systems representations of the Sustainable Development Goals that could both lead to global catastrophic risk and existential risk, and conversely that could act as prevention, or leverage points in order to avoid such outcomes. This identification in turn enables sensible policy responses to be constructed (Sutherland & Woodroof, 2009).

Whilst existential threats are unlikely, there is extensive peril in global catastrophic risks. Despite being lesser in severity than existential risks, they increase the likelihood of human extinction (Turchin & Denkenberger, 2018a) through chain reactions (Turchin & Denkenberger, 2018a), and inhibiting humanity’s response to other risks (Farquhar et al., 2017). It is necessary to consider risks that may seem small, as when acting together, they can have extensive consequences (Tonn, 2009). Furthermore, the high adaptability potential of humans, and society, means that for humanity to become extinct, it is most likely that there would be a series of events that culminate in extinction as opposed to one large scale event (Tonn & MacGregor, 2009; Tonn, 2009).

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

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

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

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

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

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

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

The Relationship Between Competition and Growth

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

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

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

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

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

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

#### Scenario One is Brazil:

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

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

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

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

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

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

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

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

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

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

#### Brazilian growth ends Amazon deforestation.

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

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

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

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

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

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

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

Rise and fall of deforestation

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

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

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

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

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

Of currencies and commodities

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

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

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

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

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

Economic crises are environmental crises

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

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

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

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

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

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

To end deforestation, fix Brazil’s economy

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

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

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

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

#### Amazon deforestation destroys biodiversity – extinction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Catastrophic climate change

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

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

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

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

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

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

#### Scenario Two is South Africa:

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

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

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

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

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

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

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

#### Market failures depress growth in ag.

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

Economic regulation, competitive outcomes and inclusive growth

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

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

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

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

#### Absence of antitrust raises prices and guarantees food insecurity.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### Food insecurity causes existential governance failures.

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

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

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

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

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

## 1AC – Solvency

Finally, Solvency:

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

#### Plan develops foreign antitrust regimes.

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

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

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

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

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

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

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

VI. CONCLUSION

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

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

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

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

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

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

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

Footnote 201:

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

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

End of footnote 201.

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

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

Footnote 209:

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

End of footnote 209.

## 2AC

### Econ

#### Cartel creep.

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

B. Foreign Conspiracies and Cartel Creep

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

### T

#### 4 – 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.

#### ‘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).

#### ‘Scope’ means the law’s reach.

Parsons ’14 [Honorable Donald F Jr; February 18; Vice Chancellor of the Court of Chancery of Delaware; Westlaw, “Vichi v. Koninklijke Philips Electronics, N.V.,” 85 A.3d 725]

As an initial matter, I reject the proposition that the determination of who can invoke a choice of law provision must precede the analysis of the provision's validity and scope. The “scope” of a choice of law provision refers to how broadly or narrowly that provision applies and includes the question of whether the provision created enforceable rights in third parties.310 The only case Philips N.V. cites in support of its assertion that Delaware law should govern whether it can invoke the choice of law clause merely stands for the proposition that a Delaware court will apply its own conflict of laws rules to determine which jurisdiction's substantive law will govern the claims before it.311 As noted previously, under Delaware conflict of laws rules, the scope of a valid choice of law provision is determined by the law of the selected jurisdiction—in this case, England.

#### ‘Scope’ refers to a general range.

Johnson ’89 [William R; April 7; Justice on the New Hampshire Supreme Court; Westlaw, “Appeal of Rehabilitation Associates of New England,” 131 N.H. 560]

Neither “nature” nor “scope” are defined in RSA chapter 151–C and we therefore give the words their plain and ordinary meaning. See Leavitt v. Hamelin, 126 N.H. 670, 671, 495 A.2d 1286, 1287 (1985). The ordinary meaning of “nature” in the context of the “nature ... of the project” is “essential character.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1507 (unabridged ed. 1961). The term “scope,” as in “scope ... of the project,” denotes the “general range or extent of ... activity.” Id. at 2035. In the instant case, the “nature” of the project thus refers to its character as a comprehensive rehabilitation facility, including the treatment of head injuries. The “scope” of the project includes factors such as the number of beds and the total capital expenditure of the project.

#### 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.

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

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. [...]

#### ‘Core antitrust laws’ includes the Big Three, amendments, and court interpretations.

FTC ’13 [Federal Trade Commission; first saved on the Wayback Machine’s Internet Archive on December 14, 2013; “The Antitrust Laws,” https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws]

Congress passed the first antitrust law, the Sherman Act, in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets, from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

Here is an overview of the three core federal antitrust laws.

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison. Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million.

The Federal Trade Commission Act bans "unfair methods of competition" and "unfair or deceptive acts or practices." The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies). Section 7 of the Clayton Act prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly." As amended by the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.

### Foucault K – 2AC

#### Current economic models are too entrenched to critique away—they should be responsible for proving alt solvency, not just a bigger impact.

Russi and Haskell, 15—Senior Lecturer in Sociology, Azim Premji University AND Assistant Professor, Mississippi College School of Law (Luigi and John, “Heterodox Challenges to Consumption-Oriented Models of Legislation,” Unbound: Harvard Journal of the Legal Left, 9:13, 2015, dml)

The difficulty of following these critiques from American Legal Realists and these other heterodox authors to any normative conclusion, however, seems two-fold. On the one hand, to think outside of consumption seems in some ways to border on a theological aspiration, to be ushered into the responsibility of remaking society according to some almost other-worldly dimensions: an economic order that conceives progress beyond growth, a socio-political structure that allows for systemic change without reducing the possibilities of human freedom, the normative agenda to substantiate egalitarian relationships, a global order that preserves the victories of industrial capitalism while simultaneously transcending its costs (ecological, human, etc.). On the other hand, critiques of consumption-led governance seem both anachronistic and violent. They are anachronistic because they either too readily rely on the possibilities of the Enlightenment assumption that there is a clear set of ‘truths’ that once disseminated to the population will enact meaningful change (e.g., if particular industries or products are demonstrated to be unsustainable to the environment, populations will demand alternatives) or they overly invest in the possibility of some benevolent, universalizing spirit that is capable of trumping the politico-economic exigencies of personal well-being (e.g., individuals are naturally willing to collectively do the right thing for the greatest amount of people even at personal cost in a consistent manner). They are violent because in calling for systemic change, such reversals would almost undoubtedly entail significant and most likely intensely hostile opposition from entrenched actors who benefit from the current economic legal arrangements. A liberal mode of economic management (e.g., consumerism) is itself undoubtedly more coercive and violent than its advocates tend to admit (e.g., it is part of the very problems it claims to address), but where the fundamental point of disagreement arises is over the question whether the current trajectory is occasioning a level of lost opportunity costs that warrant the effort and violence most likely necessary to enact an alternative mode of political life. Furthermore, if we accept the proposition of the necessity of coercive change, it still begs the question to what extent its proponents within intellectual circles are really willing to fully participate and accept the potential costs of radical struggle – they may, to put it vulgarly, simply have too much comfort to lose. To what extent, in short, are current left-oriented calls within academia and policy circles merely reflecting the more general postmodern crisis of identity versus the partisan militant residing at any revolutionary core? In giving normative bite to any alternative model, as the American Legal Realist Robert Hale pointed out, it seems undoubtedly the case that any future system would only find new constraints and forms of violence to sustain its cohesiveness.

[T]he systems advocated by professed upholders of laissez-faire are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of “equal opportunity” or of “preserving the equal rights of others.” Some sort of coercive restriction of individuals, it is believed, is absolutely unavoidable, and cannot be made to conform to any Spenserian formula.161

If fundamental reform to consumer-centric governance is inherently violent – in that it will necessarily create only new winners and losers, and not without potentially violent conflict and disruption – the challenge is therefore not just a question of ethics or political will (e.g., the current distribution of resources is unjust/violent), but the feasibility of re-conceptualizing efficiency, both in terms of strategy and tactics: in other words, upon what standard might we measure progress (or stated differently, what are the lost opportunity costs of continuing on the current trajectory versus an alternative economic model), and how might this be actually accomplished.162 To set out on such a task is exactly the stakes of future progressive scholarship, and upon which we wish to close our study with a brief reflection.

### ITC CP – 2AC

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

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

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

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

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

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

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

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

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

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

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

Digital Revolution Brings Complexity

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

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

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

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

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

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

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

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

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

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

### FTC/Section 5 CP (Michigan State) – 2AC

#### The Court will strike down the counterplan - There is zero reason to believe Congress intended FTC to define ‘unfair competition’ but not ‘unfair acts.’

Pierce ’21 [Richard; November 4; Law Professor at George Washington University; GWU Law School Public Law Research Paper No. 2021-42, “GWU Law School Public Law Research Paper No. 2021-42,” https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3933921]

If the FTC attempts to rely on the D.C. Circuit’s decision to support its effort to use rulemaking to transform antitrust law, the Supreme Court is likely to reject that attempt. The Supreme Court has shown no reluctance to overrule longstanding circuit precedents that are based on long-abandoned methods of statutory interpretation. Thus, for instance, in 2019 the Supreme Court unanimously overruled a 1974 D.C. Circuit precedent with the following statement: “National Parks’ contrary holding is a relic from a bygone era of statutory interpretation.”50 The Supreme Court is likely to use similar language in the process of overruling National Petroleum Refiners.

The Supreme Court is also likely to reject the argument that Congress implicitly ratified the D.C. Circuit’s decision by including a strangely worded provision in a 1975 statute that amended the FTC Act. It seems unlikely that Congress intended to make it clear that the FTC has the power to issue legislative rules that define “unfair methods of competition” in the same statute in which it made it nearly impossible for the FTC to issue legislative rules that define “unfair acts.” Moreover, the vast bulk of the circumstantial evidence of the intent of Congress supports the contrary view. For nearly half a century, Congress repeatedly acted on the basis of its belief that the FTC lacks the power to issue legislative rules to implement the FTC Act.

#### No follow on.

Baer ’20 [Bill; October 1; Visiting Fellow in Governance Studies, former Assistant Attorney General for Antitrust at the U.S. Department of Justice and Director of the Bureau of Competition at the Federal Trade Commission, J.D. from Stanford University; Testimony Before the United States House of Representatives, “Proposals to Strengthen the Antitrust Laws and Restore Competition Online,” <https://www.brookings.edu/wp-content/uploads/2020/05/Bill-Baer-10.1.20-Testimony-to-House-Antitrust-Subcommittee.pdf>]

So where do we go from here? One strategy has the antitrust enforcers developing new policy guidance in areas such as vertical mergers, standard essential patents, and high tech platforms to nudge the courts towards a less skeptical view of the need for assertive enforcement. The joint DOJ/FTC Horizontal Merger Guidelines have, as I noted earlier, over time increasingly been relied on by the courts as providing a framework for determining whether the combination of two rivals risks harm to consumers and to competition.

There are at least two reasons to doubt whether reliance on that strategy will be sufficient. First, it took years for the courts to embrace the soundness of the merger guidelines—indeed more than a decade. Can we afford to wait that long? Second, there is no guarantee that the courts will embrace that new guidance. The mindset that antitrust enforcers are more likely to be wrong than right, and that as a result, we should at all costs avoid the risk of over-enforcement, is pretty well-entrenched in antitrust jurisprudence. Absent some further direction from Congress, those biases are unlikely to change.

#### 1 – The Court explicitly found that there is no PROA in Section 5 of the FTCA – suits under the CP would get laughed out of court

DALJ 74 [I cannot find the actual author of this article but it was published in the Duke Administrative Law Journal; 1974; Duke Administrative Law Journal; “Judicial Refusal to Imply a Private Right Of Action under the FTCA,” vol. 1974, p. 506-525, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2490&context=dlj]

The District of Columbia and the Ninth Circuit Courts of Appeals have recently held in Holloway v. Bristol-Myers Corp.' and Carlson v. Coca-Cola Co.2 that private parties, be they individuals or consumer interest groups, cannot maintain actions to vindicate rights asserted under the Federal Trade Commission Act (FTCA).3 In Holloway, two individuals and two consumer groups brought a class action in federal' district court4 against Bristol-Myers, the manufacturer of Excedrin, a non-prescription analgesic compound. The plaintiffs' claim was based primarily5 on FTCA provisions which prohibit unfair or deceptive trade practices" and false advertising which induces or is likely to induce the purchase of drugs.7 Specifically, the plaintiffs alleged that Bristol-Myers had made false statements in claiming that Excedrin is more than twice as effective an analgesic as aspirin and that this claim had been substantiated by a study of pain among patients in a hospital. The district court dismissed the action, holding that the FTCA does not create a right of action for private parties.8 In affirming the lower court's decision, the court of appeals concluded that both the history and structure of the FTCA indicate that the right to enforce its provisions lies solely in the administrative agency created by that Act, the Federal Trade Commission (FTC).9 Carlson, the second of these cases, was a class action brought against Coca-Cola and Glendenning Companies, Inc., its advertising agency, alleging that a nationwide promotional game, Big Name Bingo, was deceptively structured so as to deprive many participants of prizes to which they were entitled under the published rules of the game.10 Plaintiffs' claim that the scheme therefore constituted a violation of section 5 of the FTCA was rebuffed by both the district court and a majority of the Court of Appeals for the Ninth Circuit, which held that since no private right of action exists under the FTCA, the plaintiffs had failed even to establish the requisite basis for federal jurisdiction." In a vigorous dissent, however, Judge Solomon argued that even though the Act does not expressly provide for a private right of action, the court should have implied such a right "based on the established principle that a party has a cause of action when damaged by conduct that violates a statute enacted for his protection. '12

#### 2 – Government enforcement alone fails – only private action can create sufficient deterrence

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

This is especially true in today's internationally interconnected economy and globalized supply chains.134 Private suits constitute a significant part of the antitrust deterrence mechanism.135 In fact, scholars have noted that government enforcement alone fails to provide adequate deterrence against antitrust violations.136 When it comes to international cartels, the current deterrence mechanism government enforcement combined with private suits-is largely ineffective in meeting the deterrence goal. 37 In order to restore a meaningful level of deterrence, private suits need to be available even more widely, not barred or limited.138 However, if courts were to limit private suits only to direct purchaser plaintiffs (actual component importers),139 the Sherman Act would be without teeth.140 As Justice Brennan wrote in his dissent in Illinois Brick, "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."141 If the direct purchaser fails to bring a suit for whatever reason-attorney’s fees, power imbalance against the cartel that retains absolute control over the purchaser's supply of the necessary component, to name a few-then there is effectively little deterrence against the cartel because "ultimate consumer individuals often suffer only minor damages and therefore have little incentive to bring suit." 142

#### 3 – Courts key to solve the circuit split

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

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

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

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

A.NEC Tokin: Misapplying Direct Effect Exception

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

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

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

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

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

### Error Rates

#### Tons of FTC enforcement thumps.

BRIAN BURKE et al. 10/29/21. Partner in Baker McKenzie’s Antitrust Practice Group, with JOHN FEDELE, TEISHA JOHNSON AND CREIGHTON MACY, “United States: Federal Trade Commission continues to signal heightened scrutiny for mergers.” https://www.globalcompliancenews.com/2021/10/29/united-states-federal-trade-commission-continues-to-signal-heightened-scrutiny-for-mergers-19102021/

In recent months, following the Biden Executive Order that set antitrust law enforcement priorities for the Federal Trade Commission (FTC) and the Department of Justice (DOJ) (among other federal agencies), the FTC has made a number of changes to its long-standing merger review policies and processes. In announcing those changes, the FTC has cited the “surge in merger filings” and the need to ensure that merger reviews are more “comprehensive and analytically rigorous.” We highlight below the most significant of these recent changes announced by the FTC and expect the DOJ’s Antitrust Division to adopt similar (if not identical) stances on these and related enforcement issues.

In more detail

Change in HSR threshold calculation

When calculating the acquisition price under the HSR Act, the calculation must now include the full or partial retirement of debt that is “part of the consideration of the deal” if selling shareholders benefit from the retirement of that debt. That represents a reversal of the position outlined in prior informal interpretations of the HSR Act regulations by the FTC’s Premerger Notification Office. Though the FTC acknowledged that not all debt retired as part of a proposed transaction is consideration, the agency offered no clear guidance on when the retirement of debt can be properly excluded because it does not benefit the selling shareholders.

In a blog post announcing the change, the FTC expressed concern that some merging parties have structured deals in ways they believe fall outside of the filing requirements, and that “(t)arget companies may be incentivized to take on debt just before an acquisition, so that the acquiring company can retire the debt as part of the deal,” leading to the deal not being reported to the antitrust authorities.

Withdrawal of the Vertical Merger Guidelines

The Vertical Merger Guidelines (VMGs), which the FTC adopted (jointly with the DOJ) in June 2020, describe the analytical framework and enforcement policies used by the agencies when reviewing non-horizontal mergers. Barely one year later, on 15 September 2021, the FTC voted along party lines to withdraw the VMGs. Specifically, the majority commented that the VMGs “had improperly contravened the Clayton Act’s language with its approach to efficiencies, which are not recognized by the statute as a defense to an unlawful merger.” The FTC’s withdrawal of the VMGs is consistent with the Majority Commissioners’ prior criticism that the VMGs overly credit claimed pro-competitive benefits of vertical mergers and undercounted a number of alleged harms. Moving forward, it is likely that the FTC, and perhaps the DOJ (which has not yet withdrawn the VMGs), will seek to provide new guidance. The FTC majority noted certain considerations to expect in future guidance, including information regarding (1) the characteristics of transactions that are likely unlawful, (2) “ineffective remedies” based on assessment of past settlements, and (3) an expanded list of harms specifically in digital and labor markets.

Issuance of warning letters

The FTC recently announced the use of “Pre-Consummation Warning Letters.” For deals that the FTC cannot fully investigate within the requisite review period set forth in the HSR Act (typically 30 days), the FTC will send letters stating that its “investigation remains open and ongoing” even though the HSR waiting period expired. At this time, it seems this practice is idiosyncratic to the FTC and has not been expanded to the DOJ’s review process. Notably, the warning letters do not prohibit the parties from closing and do not extend any gun-jumping concerns after the transaction has been cleared under the HSR Act.

Changes to second request process

On 28 September 2021, the FTC announced that it would make several changes to how it investigates mergers and acquisitions, including assessing the scope of its second requests and amending the manner in which it engages with parties subject to second requests. “Second requests” are issued in order to extend the initial waiting period under the HSR Act and to provide the DOJ or FTC with additional time to investigate a proposed transaction. Specifically:

The scope of second requests is likely to broaden. The FTC will consider additional areas that have not been involved in merger reviews — e.g., how a proposed merger will affect labor markets, the cross-market effects of a transaction, and how the involvement of investment firms may affect market incentives to compete. Such additional factors, the FTC contends, may help them better identify and challenge potentially illegal transactions.

Second request modifications will be considered only after information about the business and relevant personnel has been provided. Before the FTC will consider modifying the scope of a second request (which is typically expansive), each party under investigation must identify and describe the business responsibilities of employees and agents responsible for the relevant lines of business, along with those employees responsible for negotiating, analyzing, or recommending the transaction. The parties will also need to provide more information about how data is stored.

The FTC will seek additional information about the use of e-discovery tools. A company under investigation will be required to provide information about how it intends to use e-discovery tools before it applies those tools to identify responsive materials. Here, the FTC claims that the change will more closely align its model second request with that of the DOJ.

The option to submit partial privilege logs is discontinued. The FTC second request will no longer give parties the option to submit partial privilege logs, but will align with the DOJ’s practice with respect to privilege logs. The FTC asserted, however, that staff will remain open to modifications in appropriate circumstances.

Focus on Section 8/Interlocking directorates

The FTC accepted recommendations from its Bureau of Consumer Protection and Bureau of Competition regarding eight new compulsory process resolutions, one relating to Interlocking Directors & Officers and Common Ownership. The resolution directed use of all compulsory processes to investigate whether ownership stakes in competing companies may be anticompetitive, and whether interlocking directorates may violate Section 8 of the Clayton Act. “Interlocking directorates” occur when a person serves simultaneously as an officer or director of competing companies. The FTC noted that interlocking directorates and common ownership continue to raise significant competitive concerns.

Setting FTC merger review priorities

On 22 September 2021, FTC Chair Lina Khan issued an internal memo to staff regarding the FTC’s vision and enforcement priorities. The memo stressed that the FTC will strengthen its merger enforcement work notwithstanding what Chair Khan characterized as the “huge demands” being imposed on FTC staff as a result of current deal volume and filings. (As a reminder the consideration of requests for “early termination” of the applicable HSR waiting period remains suspended.)

Revising the merger guidelines. Chair Khan believes that current merger guidelines represent a “narrow and outdated framework” for assessing mergers and requires revision. Under her leadership, the FTC will take a more “holistic approach to identifying harms.” According to Khan, revising the guidelines is an opportunity to close gaps between theory and practice, which will set the foundation for more effective and empirically grounded enforcement work. Revision of the merger guidelines will be done in conjunction with the DOJ.

Additional approaches to reduce resources needed for merger reviews. The FTC chair noted that agency resources are heavily strained, compromising the FTCs ability to investigate significant mergers. The FTC will look to identify ways to “reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers.”

These varied and numerous developments are consistent with the decidedly “pro-enforcement” posture that the new leadership at the FTC has assumed, and signal a heightened level of scrutiny for strategic transactions as well as longer substantive investigations. Parties to such transactions should involve antitrust counsel early in the process and allow sufficient flexibility in the transaction schedule to accommodate this scrutiny.

#### False negatives likely.

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.

#### Otherwise, results in underdeterrence which is worse.

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.

### Politics DA – 2AC

#### Court shields.

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

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

Conclusion

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

#### Bill’s dead in the Senate---Manchin’s a ‘no’ and wants to delay.

Roche ‘11/11 [Darragh; 11/11/21; reporter for Newsweek; "Crippling Inflation Could Kill Joe Biden's Build Back Better Bill," <https://www.newsweek.com/crippling-inflation-kill-joe-biden-build-back-better-joe-manchin-1648356>]

President Joe Biden's proposed Build Back Better Act could be at risk amid concern Senator Joe Manchin (D-WV) won't back the bill with inflation already at its highest level in 30 years.

The Consumer Price Index for October recorded a 6.2 percent increase year on year in figures published by the Bureau of Labor Statistics on Wednesday, with notable rises in the price of food and energy.

Manchin, whose vote is crucial in passing the bill through the budget reconciliation process, has previously suggested he wouldn't support a major spending bill that might exacerbate inflation.

The senator, who is considered a moderate or conservative Democrat, tweeted about inflation on Wednesday.

"By all accounts, the threat posed by record inflation to the American people is not 'transitory' and is instead getting worse," Manchin wrote.

"From the grocery store to the gas pump, Americans know the inflation tax is real and DC can no longer ignore the economic pain Americans feel every day."

Manchin's recent comments may be a cause of concern for the White House in light of a statement he issued on November 1 that linked an expansion of social spending with rising inflation.

"Throughout the last three months, I have been straightforward about my concerns that I will not support a reconciliation package that expands social programs and irresponsibly adds to our nearly $29 trillion in national debt that no one else seems to care about. Nor will I support a package that risks hurting American families suffering from historic inflation," the statement said.

Manchin added that he wouldn't "support a multitrillion-dollar bill without greater clarity about why Congress chooses to ignore the serious effects inflation and debt have on our economy and existing government programs."

The original price tag for the Build Back Better Act was $3.5 trillion, but this was reduced to $1.75 trillion in large part because of opposition from Manchin and Senator Kyrsten Sinema (D-AZ).

Democrats are aiming to pass the bill without Republican support, but this will require all Senate Democrats to support the final measure, making Manchin's position crucial.

However, Democrats who support the bill say experts believe it won't worsen long-term inflation and any rise will be temporary. They hope to offset inflation by taxes on the richest Americans.

President Biden made the same point in a statement issued on Wednesday that addressed the inflation rate.

"17 Nobel Prize winners in economics have said that my plan will 'ease inflationary pressures,'" Biden's statement said. "And my plan does this without raising taxes on those making less than $400,000 or adding to the federal debt, by requiring the wealthiest and big corporations to start to pay their fair share in taxes."

Biden also acknowledged that current inflation levels are a problem.

"Inflation hurts Americans pocketbooks, and reversing this trend is a top priority for me," he said.

Speaking at the Port of Baltimore on Wednesday, Biden said people "remain unsettled about the economy" amid high prices and the administration was "tracking these issues and trying to figure out how to tackle them head on."

Axios reported on Wednesday that Manchin may delay the Build Back Better Act until next year given the limited number of legislative days left in 2021 and his concerns about inflation.

If the bill gets put back further, it could make reaching a deal more difficult.

Moderates and progressives in the Democratic Party have been in conflict over the bill and the separate $1.2 trillion bipartisan infrastructure bill, which has now passed both the House and Senate. Manchin voted in favor of that bill.

Progressives had tried to link the passage of the bipartisan bill with progress on Build Back Better and House Democrats finally passed the bipartisan legislation on November 5 while also voting on a procedural motion to advance the reconciliation bill.

Biden will sign the bill at a White House ceremony on Monday and has also said the bipartisan infrastructure bill would have a positive effect on inflation. In a tweet on Sunday, he said: "The bipartisan infrastructure deal will help ease inflationary pressures, lowering costs for working families."

While Biden has sought to frame the Build Back Better Act as a cure to inflationary ills, if Manchin isn't convinced then the bill could be dead on its arrival in the Senate.

#### Biden fails---Virginia, approval, inflation, health, immigration, Afghanistan, and COVID.

Gray ‘11/7 [Freddy; 11/7/21; deputy editor of The Spectator; "Joe Biden’s plummeting presidency," <https://thenationonlineng.net/joe-bidens-plummeting-presidency/>]

Who can blame President Biden for nodding off at the COP26 summit on Monday? It was an astronomically boring session — opening statement after opening statement, pompous speaker after pompous speaker, insisting that the time for words on climate change is over. Now is the time for… zzzzzzzzzzzz. It’s a miracle the jet-lagged, 78-year-old leader kept his eyes open for as long as he did.

Poor Joe. He has a lot on his addled mind. He’s been in office for less than a year and his presidency is already a catalogue of crises. On Tuesday, as the President stood on the COP stage in Glasgow, impotently lecturing China and Russia about their absence, another disaster was happening back home. His Democratic party lost the governorship of Virginia, an election widely seen as the first big test of the political temperature in the Biden era. Virginia is increasingly thought of as Democratic territory. This time last year, Biden beat Donald Trump by ten points in the state — so the result looks damning.

Last month, as the polls tightened, Biden decided to invest his own political capital in the race. He joined the Democratic candidate Terry McAuliffe on the campaign trail and tried to brand the Republican challenger, Glenn Youngkin, as a Trumpkin wolf in sheep’s clothing — ‘extremism… can come in a smile and a fleece vest,’ he said.

Biden’s intervention only made a bad situation for the Democrats worse. The fleece-wearing Youngkin was clearly not an extremist. He successfully disassociated himself from red-raw Trumpism. He also picked a culture-war fight and won. He turned education, and the Democrats’ apparent eagerness to brainwash children with critical race theory in schools, into a rallying cause. His opponent moronically said that teachers, not parents, should decide what children learn. Showing even less nous, the National School Boards Association then demanded that protesting parents should be investigated for ‘domestic terrorism’. The Virginia election thus became a ‘nationalised’ battle between American families and Biden’s hyper-progressivist elite. The families won.

It’s silly to read too much into the Virginia result, even if the Democrats also underperformed in other races. Looking ahead to the 2022 midterm elections and beyond, however, the picture for Biden and the Democrats is extremely grim.

America is a lot bigger than Virginia. Yet Biden’s polling has been tanking nationwide. His job approval rating has fallen fairly steadily since he took office, from 55 per cent in January to 43 per cent today. He isn’t quite as unpopular as his predecessor at the same stage in his presidency, but Trump’s popularity bounced off a low base throughout. Biden’s seems so far only to go down. And no postwar president has fallen faster.

The number of Americans who think their country is on the ‘wrong track’ is 71 per cent. The young are giving up on Biden: 43 per cent of 18- to 24-year-olds approve of his job performance, a drop of 20 points since June. Perhaps most alarmingly of all for Democrats, the latest NBC poll found that Republicans now hold an 18-point advantage over their rivals when it comes to ‘dealing with the economy’. That is the highest recorded gap since 1991, when the survey started asking the question.

Americans think a lot about money and are understandably worried about what Biden is doing to the financial universe. He came into power promising to ‘restore the soul’ of their nation through preposterous amounts of government spending. What could go wrong?

Various trillion dollar bills barrelled into Congress. Americans didn’t mind at first. People like receiving large stimulus cheques. Media sycophants hailed Biden’s Build Back Better agenda as the 21st-century answer to Franklin Delano Roosevelt’s New Deal. But Biden was conspicuously vague about how the government would pay for it all — aside from his insistence that the two million Americans who earn more than $400,000 a year might have to cough up. Now Build Back Better is Collapsing Very Quickly as political and fiscal realities catch up with the executive branch. A supply-chain crisis is causing bottlenecks across America and the world. Inflation is biting harder in America than in Britain, and institutions are panicking. The Federal Reserve is this week expected to ‘taper’ its enormous stimulatory bond-buying programme. The Biden administration hopes that once its $1.75 trillion infrastructure bill gets through Congress, the public mood will shift in their favour again. But spend, spend, spend is not always the most sensible political strategy. The Democrats have been squabbling over the bill and the Republicans have done a good job of presenting themselves as the voice of economic sanity.

Still, Biden’s strength is the weakness of his opposition. With notable exceptions such as Youngkin, the Republicans continue to be hopelessly divided over their identity. Are they post-Trump these days? Given that the 45th President seems almost certain to run for the party’s nomination in 2024 and is highly likely to win, who wants to steer the Grand Old Party in another new direction? Even if Trump magically disappeared, how can Republicans appeal to their Trumpist core, who believe the last presidential election was stolen, as well as to the less rabidly partisan voters they need to win? There’s a reason senior Democrats mention Trump as often as they can.

Yet all the talk of the dreaded orange man cannot conceal the Democrats’ problem-in-chief, which is their own Commander-in-Chief. It’s the senility, stupid. Democrats may still bat away talk of his advancing dementia as nasty gossip. But it’s not just right-wing news anchors who wonder aloud about his health. Everyone does. Biden is pushing 80, has had two brain aneurysms, and often seems to have no idea where he is or what he is doing. He can get through a speech, just about, but the way his press team shield him from difficult question-and-answer sessions has gone from running joke among frustrated Washington journos to a source of international concern.

Biden recently got through a ‘townhall event’ with CNN’s Anderson Cooper without any major mind malfunctions. There was, however, the legendary ‘jet-pack moment’. Asked about inflation, Biden suddenly adopted a bizarre pose, raising two clenched fists in front of himself and standing rock-still for about 15 seconds. He also performed his weird whispering routine, theatrically hushing his voice for no clear reason.

Most revealing, perhaps, is Team Biden’s desperate insistence that he’s raring to go. His spokespeople talk about how ‘laser-focused’ the President is on finer policy details, which suggests that he doesn’t have the foggiest what is going on. ‘When I saw the President yesterday, he wasn’t just wide awake,’ said White House national climate adviser Gina McCarthy on Tuesday, even though nobody had asked her about Biden’s Glasgow snooze. ‘He was really on fire.’

There’s a realisation all over the world that Biden is not OK. He has honesty issues on top of his memory issues, which blur his strategy. For instance, according to reports, the American, Australian and British governments had all agreed the Australians would break the bad news to France about the cancellation of the £45 billion French-Australian submarines deal on 16 September, the day the Aukus security pact was announced. Yet after meeting the French President Emmanuel Macron in Rome last weekend, Biden said he felt the diplomacy around Aukus had been ‘clumsy’. ‘I was under the impression France had been informed long before that the deal was not going through, honest to God,’ said Joe. Was Biden being devious or dopey — or both? Was he throwing Australia under the bus? Had he forgotten the agreement? Or had his national security advisers kept him in the dark?

Such ‘strategic amnesia’ could be useful in international relations. And American voters might be sanguine if they believed that behind the doddery frontman, the Biden administration was brilliant, switched-on and dynamic. The evidence increasingly points the other way. His Vice-President, Kamala Harris, who many assume will emerge as Biden’s replacement, seems to be less forgetful than Joe Biden but is equally barmy and much more disliked. She’s been put in charge of the immigration crisis at the southern border — a bum gig, no doubt. But she’s made countless gaffes and missteps. The administration is now falling back on Trump-era tactics to stop illegal entry into the US, while incentivising the lucky ones who make it through with large cash prizes.

Harris’s laugh, which she deploys a lot, is widely recognised as the most irritating noise in America. A video of her speaking with hysterical gaucheness to some child actors about the wonders of space went viral for all the wrong reasons. If she is the break-glass-in-case-Biden-stops-working option, the Democrats must be dreading 2024.

The brain rot spreading across the whole administration only started to become clear — to non-obsessives, at least — in August, when Biden pulled America out of Afghanistan. That was unfortunate, since a large majority supported bringing the 20-year conflict to an end. But Americans found the botched withdrawal humiliating. The establishment media, which had hitherto slavered over everything Biden did, suddenly turn on their hero. It’s been downhill ever since. From August, Covid began to spread again, the vaccination programme slowed, and the daily death toll rose again to almost 3,000. Meanwhile, the Biden administration’s coercive vaccine mandates triggered a backlash.

#### PC fails, probably backfires.

Nyhan ’21 [Brendan; March 19; Government Professor at Dartmouth University, interviewed by Brooke Gladstone; New York Public Radio, “Joe Biden and The Green Lantern Theory of The Presidency,” <https://www.wnycstudios.org/podcasts/otm/segments/joe-biden-and-green-lantern-theory-presidency-on-the-media>]

BROOKE GLADSTONE But according to Brendan Nyhan, a professor of government at Dartmouth College and the man who coined the term "the Green Lantern theory of the presidency," the idea overstates the power of the executive. He says that even when there's a will, there may not be a way.

BRENDAN NYHAN My understanding is the Green Lantern Corps have a ring whose powers are limited only by the wearer's willpower. Matt Iglesias is a blogger, he originally applied that idea to geopolitics. He was criticizing conservatives who said the failures of U.S. foreign policy in the post 9/11 era were attributable to a lack of will. And I saw that same idea as being applicable to domestic politics too, where the president's powers are actually quite limited.

BROOKE GLADSTONE And so all this brings us to the criticism currently directed at Joe Biden. Many progressives are upset by the failure to include the 15 dollar minimum wage, and argued that Biden could have done more to convince Democratic senators like Joe Manchin of West Virginia and Kyrsten Sinema of Arizona who voted against it. David Sirota wrote in The Guardian, he's a former speechwriter for Bernie Sanders, the famous example from Lyndon B. Johnson's fight for Medicare as proof that a tough president can strong arm members of Congress into adopting his goals.

BRENDAN NYHAN Yeah, I think that LBJ arm twisting myth has been a major contributor to Green Lantern style discourse around the president. That the president can, through the kind of cajoling described in these famous accounts, bring numerous votes to his side in Congress. It's very difficult for the president to move votes in Congress. Ask Barack Obama for most of his time in office. Ask Donald Trump, ask any occupant of the White House. LBJ came into office with huge Democratic majorities. Joe Biden has a margin of zero votes in the Senate. Joe Manchin represents a state where almost 70 percent of people voted for Donald Trump. I'm not sure what arm twisting could cause him to vote against his political interests. The Democrats are an anchor around his neck politically. Withdrawing their support from him is not some kind of a threat. It probably helps him.

BROOKE GLADSTONE Getting back to LBJ, you say that he is one of two main illustrations that would seem to support the Green Lantern theory. The other president is Ronald Reagan.

BRENDAN NYHAN Rather than LBJ style arm twisting. Activists say that the president could marshal public opinion, if they only made the case publicly, they could win over the public to their side and therefore rally Congress to support their priorities. This was a recurring theme in the Obama years because he was a quite skilled orator. The evidence, however, suggests that presidential speechmaking is often ineffective. Ronald Reagan wrote in his own diaries when he was president that his case for aid to the Contras in Latin America failed to rally support, and reportedly he was even told by his own pollster that the public comments he was offering on behalf of the cause were actually making it harder for him by rallying opposition. And that's the dilemma that presidents face. David Frum, the conservative commentator, has argued that one of the most effective communication strategies of the early Biden administration has been how little he has talked. Precisely because it avoids making him the focal point of a conversation, given that presidents are so polarizing in our current era. So, again, the idea here is it's not a case of the president failing to deploy their public communication powers, it's that those public communication powers are highly overrated. Once the president gets the issues where they don't have the votes, sometimes they will try. Barack Obama campaigned quite extensively on behalf of gun control and renewed those efforts after high profile mass shootings. But it was fruitless. He would campaign on behalf of it because maybe it could help move the needle, but it never was enough to successfully enact the legislation the administration was proposing.

#### Winners win.

Elving ’21 [Ron; April 10; Senior Editor and Correspondent, Washington Desk; National Public Radio, “Week In Politics: Biden's Pricey Plans For The Nation,” https://www.npr.org/2021/04/10/986042390/week-in-politics-bidens-pricey-plans-for-the-nation]

ELVING: Yes, that's right. And that's a good example. Political capital gets devalued pretty quickly if you don't use it. And when you've had some successes like the pandemic relief bill, the vaccination progress we've seen, that can build momentum for your next proposal, such as the infrastructure and jobs plan or the executive orders on guns, like the ban on guns assembled from kits that don't have serial numbers. That's a small step, but it is a step. So this is the Joe Biden who has learned lessons from the big Democratic movers and shakers of the 20th century like old FDR and LBJ.

### EU

#### EU influence fails.

Haar 13 (Louise van Schaik and Barend ter Haar, Clingendael Institute. “Why the EU is not promoting effective multilateralism.” Clingendael Policy Brief, No. 21; June 2013. https://www.jstor.org/stable/resrep05292?seq=1#metadata\_info\_tab\_contents)

According to the European Security Strategy in ‘a world of global threats, global markets and global media, our security and prosperity increasingly depend on an effective multilateral system’. Therefore the ‘development of a stronger international society, well functioning international institutions and a rule-based international order’ would be ‘our objective’. In other words, multilateralism means that international issues are preferably not dealt with case by case between individual states, but rather by building a general system of rules and institutions that is accepted by a wider number of states.

The precise meaning of ‘effective’ before ‘multilateralism’ has been the subject of discussion. We believe that in this political text it means that a multilateral approach is the EU’s preferred option, but that it might choose an other approach, e.g. unilateral or bilateral, when the multilateral approach is not effective.

Multilateralism is believed to be in the European DNA. The European integration project is the example par excellence of how states can address cross-border policy challenges by building a rule-based international order. It was therefore no surprise that in its European Security Strategy of 2003 the EU warmheartedly adopted An International Order Based on Effective Multilateralism as one of its three strategic objectives.

However, in the decade since 2003 the EU has become increasingly quiet about this objective. Paradoxically (but logical in view of the explanation given below) the only field where the EU has been partly successful is the field of classic security, a field where feelings of national sovereignty are usually strongest.

In other fields the support of the EU for effective multilateralism has, for the most part, been fragmented and weak. The experts who represented EU countries in international talks on issues such as the environment, health, food, water, education and transport, often seemed hardly aware of the existence of a European strategy to strengthen an effective multilateral system. And the diplomats who were aware of this strategy usually rather concentrated on the promotion of their national priorities.

This, in combination with the Eurocrisis and the threat of the UK to leave the EU reinforced the impression that the EU is a power in decline, better known for its rhetoric than for its action.

At the UN Climate Summit in Copenhagen in 2009 the EU was rudely confronted with a new world order in which emerging economies use their increased power to further their interests. Despite tenacious efforts to promote a new international climate treaty to succeed the Kyoto Protocol and a detailed ‘leadership by example’ strategy, the EU found itself sidelined, partly because of its inability to speak with a strong single voice. The case also illustrates the EU’s lack of sensitivity to its negotiating environment. Promoting effective multilateralism is not the same as simply expecting others to adopt European views and standards.

An ongoing study of the way the EU has operated in a large number of multilateral forums has led us to the conclusion that the fiasco at Copenhagen is not an exceptional case, but is symptomatic.1 We were struck by the lack of a European strategy in most forums.

We found some instances where the EU supported a multilateral approach, e.g. in the G20. However, in most cases the EU did not promote strategic goals, but concentrated instead on administrative reforms. In larger debates the EU was sometimes conspicuously absent due to its inability to come to a joint position, or because nobody felt responsible to cover the topic.

Furthermore, many of the representatives of the EU were unaware of the positions of EU member states and EU institutions in other relevant forums. This made issue linkage difficult and could lead to contradictory positions (e.g. on intellectual property rights).

## 1AR

### Econ Impact

#### Decline catalyzes global nuclear war.

Liu ’18 [Qian; November 13; PhD in Economics from Uppsala University, Former Visiting Researcher at the University of California, Berkeley, Managing Director for Greater China at The Economist Group, Guest Lecturer at New York University, Tsinghua University, the Chinese Academy of Social Sciences and Fudan University; World Economic Forum, “The Next Economic Crisis Could Cause a Global Conflict. Here's Why,” <https://www.weforum.org/agenda/2018/11/the-next-economic-crisis-could-cause-a-global-conflict-heres-why>]

The next economic crisis is closer than you think. But what you should really worry about is what comes after: in the current social, political, and technological landscape, a prolonged economic crisis, combined with rising income inequality, could well escalate into a major global military conflict.

The 2008-09 global financial crisis almost bankrupted governments and caused systemic collapse. Policymakers managed to pull the global economy back from the brink, using massive monetary stimulus, including quantitative easing and near-zero (or even negative) interest rates.

But monetary stimulus is like an adrenaline shot to jump-start an arrested heart; it can revive the patient, but it does nothing to cure the disease. Treating a sick economy requires structural reforms, which can cover everything from financial and labor markets to tax systems, fertility patterns, and education policies.

Policymakers have utterly failed to pursue such reforms, despite promising to do so. Instead, they have remained preoccupied with politics. From Italy to Germany, forming and sustaining governments now seems to take more time than actual governing. And Greece, for example, has relied on money from international creditors to keep its head (barely) above water, rather than genuinely reforming its pension system or improving its business environment.

The lack of structural reform has meant that the unprecedented excess liquidity that central banks injected into their economies was not allocated to its most efficient uses. Instead, it raised global asset prices to levels even higher than those prevailing before 2008.

In the United States, housing prices are now 8% higher than they were at the peak of the property bubble in 2006, according to the property website Zillow. The price-to-earnings (CAPE) ratio, which measures whether stock-market prices are within a reasonable range, is now higher than it was both in 2008 and at the start of the Great Depression in 1929.

As monetary tightening reveals the vulnerabilities in the real economy, the collapse of asset-price bubbles will trigger another economic crisis – one that could be even more severe than the last, because we have built up a tolerance to our strongest macroeconomic medications. A decade of regular adrenaline shots, in the form of ultra-low interest rates and unconventional monetary policies, has severely depleted their power to stabilize and stimulate the economy.

If history is any guide, the consequences of this mistake could extend far beyond the economy. According to Harvard’s Benjamin Friedman, prolonged periods of economic distress have been characterized also by public antipathy toward minority groups or foreign countries – attitudes that can help to fuel unrest, terrorism, or even war.

For example, during the Great Depression, US President Herbert Hoover signed the 1930 Smoot-Hawley Tariff Act, intended to protect American workers and farmers from foreign competition. In the subsequent five years, global trade shrank by two-thirds. Within a decade, World War II had begun.

To be sure, WWII, like World War I, was caused by a multitude of factors; there is no standard path to war. But there is reason to believe that high levels of inequality can play a significant role in stoking conflict.

According to research by the economist Thomas Piketty, a spike in income inequality is often followed by a great crisis. Income inequality then declines for a while, before rising again, until a new peak – and a new disaster. Though causality has yet to be proven, given the limited number of data points, this correlation should not be taken lightly, especially with wealth and income inequality at historically high levels.

This is all the more worrying in view of the numerous other factors stoking social unrest and diplomatic tension, including technological disruption, a record-breaking migration crisis, anxiety over globalization, political polarization, and rising nationalism. All are symptoms of failed policies that could turn out to be trigger points for a future crisis.

Voters have good reason to be frustrated, but the emotionally appealing populists to whom they are increasingly giving their support are offering ill-advised solutions that will only make matters worse. For example, despite the world’s unprecedented interconnectedness, multilateralism is increasingly being eschewed, as countries – most notably, Donald Trump’s US – pursue unilateral, isolationist policies. Meanwhile, proxy wars are raging in Syria and Yemen.

Against this background, we must take seriously the possibility that the next economic crisis could lead to a large-scale military confrontation. By the logic of the political scientist Samuel Huntington, considering such a scenario could help us avoid it, because it would force us to take action. In this case, the key will be for policymakers to pursue the structural reforms that they have long promised, while replacing finger-pointing and antagonism with a sensible and respectful global dialogue. The alternative may well be global conflagration.

### ITC Fails

#### Import bans fail.

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

Just like the Texas power grid, the U.S. system for protecting U.S. domestic industries and our economy from unfairly traded imports could use some attention. In particular, the International Trade Commission’s (ITC) adjudication of cases brought under Section 337 to block imports is functioning sub-optimally, inconsistently, and inefficiently.

It features an ever-increasing workload for the administrative law judges who handle Section 337 cases, as well as repeated misfires of the system by investigating complaints and issuing exclusions that harm U.S. interests. The system requires retuning in a number of areas if the ITC is to fulfill its mission.

### Private Rights of Action – 1AR

#### Regulations cannot create private rights of action when Congress has not.

Newcombe ’17 [Caroline; Visiting Associate of Professor of Administrative Law, Southwestern Law School; J.D., University of Virginia School of Law; LL.M, American University, Washington College of Law. For many years, the author was a civil litigation attorney with the firm of Lord, Bissell & Brook (now Locke Lord); *Loyola University Chicago Law Journal,* “Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute,” <https://www.luc.edu/media/lucedu/law/students/publications/llj/pdfs/vol-49/9_Newcombe%20(117-147).pdf>; KS]

25. Implied private rights of action can be based on federal regulations designed to implement a federal statute. For example, Rule 10b-5 (17 C.F.R. § 240.10b-5 (1951)) is a regulation designed to implement section 10b of the Securities Exchange Act. Private actions brought under Rule 10b- 5 have become “the most litigated segment of securities law.” ALFRED F. CONARD, ET AL., ENTERPRISE ORGANIZATION: CASES, STATUTES, AND ANALYSIS ON EMPLOYMENT, AGENCY, PARTNERSHIPS, ASSOCIATIONS, AND CORPORATIONS 935 (4th ed. 1987).

26. Of course, state statutes can provide the basis for state implied private rights of action. E.g., Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 848 (Or. 1981) (holding the state statute did not give rise to a claim for relief in private actions). However, as its title suggests, this Article is about federal statutes. It is beyond the scope of this Article to discuss state implied private rights of action.

27. Grundfest, supra note 5, at 963. (“Most private securities fraud litigation arises pursuant to statutory provisions . . . provisions for which the courts have implied private damage remedies that are not express in the statute.”) (emphasis added). One of the reasons statutes are the primary source of implied private rights of action is because courts have refused to extend private actions based on the Constitution (so-called Bivens actions) into new contexts. See, e.g., Ziglar v. Abbasi, 137 S. Ct. 1843, 1855 (2017). In addition, actions based on “limited common law” are rare. They are limited to unique situations such as the need for uniformity in a case involving an interstate move, an interstate bill of lading, and an interstate common carrier. See, e.g., Drucker, 745 F. Supp. at 623. Finally, implied private actions based on federal regulations are themselves a type of statutory- based private right of action. This is because the Supreme Court has declared that a private action cannot be based on a federal regulation which creates an entirely new prohibition different from the statute it was purporting to enforce. Alexander v. Sandoval, 532 U.S. 275, 291 (2001) (“Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.”).

### Treble Damages – 1AR

#### Private damages in the US are the only effective method to deter cartels – the Seventh Circuit eliminates them

Meriwether ‘15 [Ellen; Spring 2015; Litigation partner at Cafferty Clobes Meriwether & Sprengel LLP and concentrates her practice in antitrust class action litigation; Antitrust; “Motorola Mobility and the FTAIA: If Not Here, Then Where?” vol. 29, no. 2 p. 8-17)

The ease with which the Seventh Circuit dismisses concerns about the elimination of private enforcement may suggest an underlying assumption that criminal prosecution and fines here and abroad are sufficient to deter global cartel conduct. Yet successfully conducted global cartels have been highly profitable,109 and criminal fines, when issued at all, are small in comparison to profits earned by members of global cartels.110 The Sherman Act attempts to address this issue by imposing treble damages on violators, but in most other countries private actions lack this deterrent force.111Thus, the consequence of the panel decision is to remove any deterrent effect of private actions from the cost-benefit calculus of cartel members.

#### Otherwise cartels keep 50 cents of every dollar of overages

Barth ‘14 [David Barth; Sept. 2014; Ph.D, Principal at Bates White Economic Consulting LLC; CPI Antitrust Chronicle; “Deterrence and Efficiency Considerations Warrant an Expansive Reading of the FTAIA,” https://www.competitionpolicyinternational.com/assets/Uploads/BarthSEP-141.pdf]

Hard-core, or secret, cartels are undesirable. The Organisation for Economic Cooperation and Development describes such cartels as “the most egregious violations of competition law.”5 The OECD also notes that such cartels are “are condemned in all competition laws.”6 The International Competition Network describes such cartels as “a direct assault on the principles of competition.”7 Both the OECD and the ICN say such cartels are “universally recognised as the most harmful of all types of anticompetitive conduct.”8 In one of its Motorola amicus briefs, the U.S. Government stated, “a global effort against hard core cartels, like the LCD price-fixing cartel, has emerged.”9

Hence, potential cartels must be deterred from forming, or else cartels will continue to form and inflict harm on consumers.10 Focusing on deterrence of potential cartels is appropriate because some cartels will manage to escape detection and punishment, making their secret illegal actions profitable after the fact. Cartels will be deterred from forming in the first place if the product of the probability of catching the cartel and the penalties if caught outweigh the anticipated financial benefits. If potential cartel members will not find it profitable to form a cartel, then they will not do so, and cartels will be effectively deterred.11

Deterrence is a difficult issue when considering global markets. For a cartel to effectively fix prices in a global market, it must raise prices worldwide. If it failed to raise U.S. prices, product would flow out of the United States to constrain the rise in non-U.S. prices.12 This is notably an issue for cartels facing U.S.-based multinational buyers in a global market. U.S.-based multinational buyers have the information needed to resist attempts to increase non-U.S. prices relative to U.S. prices. Potential cartels facing this situation are likely to form and raise prices across the globe, including in the United States, or not form at all.

If non-U.S. competition authorities and legal systems fail to collectively impose adequate sanctions on international cartels operating in global markets, international cartels may decide to form and may operate profitably, even after considering the sanctions they expect to pay in the United States. The evidence shows this is more than a theoretical concern—actual sanctions are currently inadequate to deter the formation of international cartels. Connor studied 260 international cartels discovered between 1990 and mid-2005. While he reports the median U.S. sanctions on such cartels exceed overcharges in the United States, the median ratio of total global sanctions to global overcharges was 42.3 percent among cartels that fixed prices on two or more continents.13 More than half of detected global cartels kept more than 50 cents on every dollar of their overcharges, even after paying penalties. Eleanor Fox is right to be concerned that “global cartels’ profits from sales outside of America may overwhelm losses from damages on sales within.”14

Of course, not all cartels are caught and punished. Measured detection rates in the academic literature are well below 100 percent. 15 So the measurable financial rewards to cartel behavior are, by definition, understated, while the measurable financial penalties are correctly stated. Potential cartelists have an even stronger financial incentive to engage in illegal activity than that measured by Connor.

Further evidence that deterrence of international cartels is inadequate in practice is seen in corporate actions. Many companies caught participating in international cartels are serial offenders. These companies repeatedly form and participate in cartels, so they are apparently not deterred by current enforcement policy. For example, many of the LCDs cartel members are serial offenders, including Hitachi, LG, and Samsung.16

III. SUPPLY CHAINS SHOULD BE ORGANIZED TO MAXIMIZE EFFICIENCY, NOT LEGAL GAINS

Many goods are produced in geographically concentrated regions, and this concentration occurs for a number of beneficial reasons. For example, external economies of scale can lead production to efficiently concentrate in one region.17 In other cases, knowledge spillovers may tend to create incentives to geographically co-locate and capture synergies.18

International supply chains are organized in such as manner so as to capture these benefits. For instance, research has shown that foreign countries with lower costs and exportfriendly policies have greater exports to U.S. multinational parents via their foreign affiliates.19

IV. ECONOMIC CONSIDERATIONS PUSH FOR AN EXPANSIVE READING OF THE FTAIA

A policy that exempts purchases by foreign subsidiaries of U.S. multinational parents from the reach of private actions under U.S. antitrust law is likely to make U.S. consumers worse off.

First, such a policy would decrease deterrence of international cartels that affect U.S. consumers. International cartels are already inadequately deterred. In Motorola’s case, removing 99 percent of its purchases from the reach of private enforcement of U.S. antitrust laws would likely make the LCDs cartel’s decision to conspire against Motorola (and any similarly situated purchasers) financially beneficial. If Motorola proceeded to trial in the United States with only 1 percent of its purchases at issue, prevailed in totality, and received treble damages, the cartel would keep approximately 97 percent of the profits it made from conspiring against Motorola. Therefore, unless the cartel members paid government fines (or private damages in other venues) collectively equal to nearly all of their collusive gains, the cartel members would wind up benefitting from their conspiracy as far as sales to Motorola were concerned. As Connor’s numbers indicate, it is unlikely government fines and private damages in other venues would be this large.

Second, such a policy would create incentives to distort supply chains of U.S.-based multinational buyers. For legal reasons, a U.S.-based multinational purchaser would face a new incentive to reorganize its supply chain to change the purchaser to the U.S. multinational parent and the delivery location to the United States. This would result in the loss of benefits from locating near key foreign suppliers. U.S. companies would face a new incentive to keep production in the United States, even when it would otherwise be efficient to move it offshore.

Foreign countries would likewise face an incentive to permit cartel formation to attract business to that nation.20 These cartels would then be able to exploit any supply chains that had not changed by selling to foreign subsidiaries unable to pursue an antitrust claim in U.S. courts. Cartels would also have incentives to focus on making sales to counter-parties known to lack claims under U.S. antitrust law.

### Europe DA

#### Non-unique – treble damages are currently available under US antitrust laws.

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

The Seventh Circuit ruling also addressed policy arguments that are pertinent in today’s global economy. It held that foreign subsidiaries could bring suit to seek remedies under the laws of the country where they operated, and in light of this, the United States must not overextend its reach. Rather, it should allow foreign countries to govern conduct that occurs exclusively within their borders.343 However, the court failed to consider that allowing a private company to pursue claims under U.S. antitrust law would detect and deter the formation of cartels.344 Treble damages are available under U.S. antitrust law.345 The adversaries of this proposition argue that this would presume the inadequacy of the antitrust laws of foreign countries.346 They argue that foreign countries, with the help of the United States, set up their own antitrust laws and continue to improve these laws throughout the years; thus, these foreign laws must prevail in dealing with foreign anticompetitive conduct.347 While it is true that the United States has taken on a role to help foreign countries develop their own antitrust laws, the Seventh Circuit’s ruling presumes that fines and criminal prosecutions, both here and abroad, are sufficient to deter global cartels.348

The truth is, collective laws across the nations are still inadequate to protect U.S. companies and consumers, primarily because many nations still do not have laws against international price-fixing cartels.349 In fact, only a limited number of countries allow private companies to bring private antitrust claims for damages.350 On the other hand, existing antitrust laws in many other countries are insufficient because the penalties are significantly lower than those in the United States; therefore, this discrepancy fails to deter foreign companies from forming international price-fixing cartels.351 The financial gains from a conspiracy far outweigh the maximum criminal and civil fines imposed by other countries’ antitrust laws.352

The presence of price-fixing conspiracies for products such as LCDs, automotive parts, vitamins, and DRAM illustrate these ineffective antitrust laws.353 Companies engaged in these conspiracies know how the system works and will repeatedly participate in cartels without more rigid rules in place, such as that of the Ninth Circuit’s.354 The Seventh Circuit’s logic seems misplaced when focused on the availability (or the lack thereof) of the laws in foreign countries where the conduct occurred. The antitrust laws of the United States have nothing to do with the adequacy or inadequacy of other countries’ antitrust laws. Rather, they have everything to do with the fact that U.S. consumers were injured.

In Empagran, the U.S. Supreme Court held that extraterritorial application of U.S. antitrust law should be limited to balance the “legitimate sovereign interests of other nations.”355 One of the fears is that foreign plaintiffs with no relation to domestic commerce would flock to the United States to recover damages, which would be too costly given the already scarce judicial resources.356 The Seventh Circuit emphasized the principle of international comity and brought up the same concern in its Motorola opinion.357 However, the enactment of the FTAIA, particularly the “gives rise to” requirement, already accounts for this concern.358 This second requirement of the FTAIA ensures that all causes of action that have domestic effects to the United States are the proximate causes to those effects.359 Congress, therefore, made sure that unnecessary suits are not filed in U.S. jurisdictions, while not overstepping into another country’s interests.360 In Motorola, it is undisputed that the defendants’ conduct had domestic effects, as the inflated prices paid by the foreign purchases were ultimately passed on to U.S consumers.361 Motorola purchased over $5 billion worth of panels, over fifty percent of which eventually entered U.S. commerce.362 What seems to be a small increase in the price of the panels nonetheless would have a substantial effect on the market.363 Furthermore, the defendants were business executives engaged in global supply chains.364 If they did not already, they should have known that the artificially inflated price of these LCD panels targeted to reach the United States (as alleged by Motorola) would have an impact on the U.S. market.365

Moreover, it does not appear that these cases have raised serious comity concerns; despite the DOJ’s prosecution of the foreign companies and their employees, no foreign government has stepped forward expressing deep concerns about the overreaching enforcement of antitrust law.366 This is not to say that courts must forget about the importance of international comity when analyzing antitrust cases. International comity ensures that the United States does not overstep into foreign countries’ authority when extending the reach of U.S. antitrust laws.367 In fact, the United States has proactively assisted foreign countries in their efforts to capture more anticompetitive conduct.368 However, despite the need to “tread softly” in this arena, the United States must put down its foot and continue to litigate claims of anticompetitive conduct by foreign companies, so long as the foreign anticompetitive conduct satisfies the requirements of the FTAIA.369

#### EU demonstrates what other countries should avoid.

Kundnani ’19 [Hans; 6-12-2019; Senior Research Fellow at the Europe Programme of the Chatham House; “Don’t Overstretch on Regional Integration,” Chatham House, https://www.chathamhouse.org/2019/06/dont-overstretch-regional-integration]

The European Union is the ultimate ‘rules-based order’. Since the end of the Cold War, the world has become increasingly integrated, in a process that Dani Rodrik has called ‘hyper-globalization’ to distinguish this from the more moderate form of globalization that occurred during the Cold War period.

But Europe, which was already more integrated than the rest of the world, has gone even further in removing barriers to the internal movement of capital, goods and people. The consequence of this has been the need for a more developed system of rules to govern this deep integration.

For much of this period, many Europeans – and also many outside Europe who had a liberal view of international politics – believed that the EU was a kind of blueprint for global governance.

They believed that the rest of the world would simply catch up with the enlightened and apparently successful approach that Europeans had taken. In short, Europeans were showing the way forward for the world.

However, after a decade of crisis, it now seems as if Europe may have overreached. In particular with the creation of the single currency, European rules increasingly extended into areas of life in which member states had previously had relative autonomy.

Since the beginning of the euro crisis in 2010, there has been a backlash against EU rules, which has raised the difficult question of whether international rule-making can go too far.

What makes international rules problematic is that they depoliticize – that is, they take the policy areas they cover out of the realm of democratic contestation. This can be a good thing when applied to policy areas that we think should be non-negotiable, like human rights.

But since the 1980s, and especially since the end of the Cold War, international rules have increasingly applied to areas of policy that not only should be contested but that should be at the centre of contestation – in particular, economic policy areas that have distributional consequences (that is, they create winners and losers).

The EU’s rules constrain its member states even more than global rules – for example, those of the World Trade Organization (WTO) – or rules associated with other regional integration projects constrain nation states elsewhere in the world. In particular, the EU’s fiscal rules – created along with the euro – set strict limits on the ability of member states to run budget deficits and accumulate debt.

Since the beginning of the euro crisis, these fiscal rules have been further tightened, which in turn has magnified the political backlash against the EU system and fuelled tensions between member states.

In democratic nation states, rules are made through a process that gives them what is sometimes called ‘input legitimacy’. International rule-making, by contrast, is essentially the product of power relations between states and therefore lacks this specific kind of legitimacy.

Supporters of European integration as currently constituted – whom one might term ‘pro-Europeans’ – would argue that EU rules are more like domestic rules than international rules: after all, they are agreed through a process involving democratic institutions such as the European Parliament. But even within the EU, power matters – as notably illustrated by Germany’s prominent (and controversial) role in driving the development of fiscal rules since the beginning of the euro crisis.

In addition, because European integration is meant to be an irreversible process, it is extremely difficult to change or abolish rules that have already been agreed. To do so would be ‘disintegration’ in the sense that powers would be returned to member states.

For example, there are good economic and political arguments for abolishing the ‘debt brake’, based on a German model, that EU member states agreed to incorporate into their national constitutions as part of the Fiscal Compact in 2011. But anyone making those arguments is labelled as Eurosceptic or ‘anti-European’.

There is also insufficient differentiation between EU rules. Any decision taken at a European level – even those decisions, such as on the Fiscal Compact, that are outside the EU treaties – becomes part of the EU’s system of rules. To challenge such a decision is therefore to violate the rule of law and therefore the EU’s ‘values’.

As Dieter Grimm has shown, legislation that would normally have the status of secondary law in a nation state has constitutional status in EU law and is therefore ‘immunized against political correction’.[1]

Though European leaders still often speak of the EU as a model for the rest of the world, the reality is that it now illustrates what other regional integration projects should avoid as much as what they should emulate. Even before the euro crisis, few other regions were thinking of creating a common currency.