

ARTICLE

Revisiting Antitrust in the Age of Great-Powers Competition

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The Network Law Review is pleased to present a special issue on “Industrial Policy and Competitiveness,” prepared in collaboration with the International Center for Law & Economics (ICLE). This issue gathers leading scholars to explore a central question: What are the boundaries between competition and industrial policy?

Abstract. US antitrust law has traditionally paid little attention to global competitiveness and industrial policy objectives. This reflects a commitment to enabling the free play of competitive forces to determine market outcomes and an aversion to protectionist policies that may favor inefficient “national champions.” These assumptions are challenged in a global marketplace where China has pursued long-standing mercantilist policies to secure geopolitical objectives in strategically critical industries. When state-backed mercantilism distorts competitive conditions and international-trade institutions do not provide an effective deterrent, there may be grounds for targeted antitrust intervention. This essay proposes a two-prong framework that integrates global competitiveness concerns within US antitrust’s commitment to the market process, specifically through the treatment of market definition, scale economies, and state-backed predatory pricing, and identifies “escape hatches” that enable policymakers to address geopolitical and national-security concerns that fall outside the scope of antitrust law.

In 1982, a federal district judge approved a consent decree ordering the breakup of what was then the world’s largest telecommunications company: AT&T, which had held a monopoly for decades over nearly all local-exchange and long-distance

telephone service in the United States.¹ While the AT&T breakup opened up competition in the telecom market, the breakup delivered an "own goal" to US innovation leadership by placing at risk the viability of Bell Labs. This renowned research institution had relied on revenues generated within AT&T's vertically integrated system. Following disruption of this funding model as a result of the breakup, Bell Labs shrunk significantly in size and, especially after its spinoff in 1996, lost its position as a global leader in telecom development, placing the US at a potential disadvantage in the global race for technological leadership.²

The AT&T breakup, and accidental self-destruction of a crown jewel of the US innovation system, illustrates a potential tension between antitrust's focus on competitive domestic markets and industrial policy's focus on the global competitiveness of the national economy. These policy interests may not always align. While the decline of Bell Labs represented a policy "bad" for US technology leadership, expanding competition in the telecom market was a policy "good" from an antitrust perspective, resulting in lower prices and higher quality of long-distance telephone services and improved quality and variety of communications devices.³

Geopolitical considerations do not frequently appear in antitrust scholarship and policy commentary. In particular, scholars and policymakers have paid little attention to the potential synergies and tensions between antitrust's commitment to competitive domestic markets and industrial policy's commitment to the global competitiveness of the national economy. In this contribution, I explore the interaction between these policy objectives, identify circumstances where both objectives can be accommodated through existing antitrust concepts (in particular, through the treatment of market definition, economies of scale, and state-backed predatory pricing), and other circumstances where those objectives likely diverge. Just as antitrust law can reflect the interests of small businesses to the extent that doing so is consistent with preserving competitive markets, it may be feasible in some circumstances to adopt a similar approach toward global competitiveness objectives. When that is not possible, I explore how policymakers can employ "override" mechanisms when it is determined that antitrust concerns should defer to geopolitical concerns. This contribution solely addresses US antitrust policy, although the analysis is pertinent to other jurisdictions that seek to pursue

¹ *U.S. v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982). For the classic account, see Peter Temin & Louis Galambos, *The Fall of the Bell System: A Study in Prices and Politics* (1987).

² Robert D. Atkinson, *Who Lost Lucent? The Decline of America's Telecom Equipment Industry*, *American Affairs*, Vol. IV, No. 3 (Fall 2020), <https://americanaffairsjournal.org/2020/08/who-lost-lucent-the-decline-of-americas-telecom-equipment-industry/>; James A. Lewis, *Linking National Security and Innovation: Part 1*, CSIS (Apr. 7, 2021), <https://www.csis.org/analysis/linking-national-security-and-innovation-part-1>. On the role played by Bell Labs in U.S. technological leadership, see Jon Gertner, *The Idea Factory: Bell Labs and the Great Age of American Innovation* (2012).

³ Eli M. Noam, *Assessing the Impact of Divestiture and Deregulation in Telecommunications*, 59 *Southern Econ. J.* 438, 440-45 (1993); Lawrence J. White, *US telephone deregulation: lessons to be learned, mistakes to be avoided*, 12 *Japan and the World Economy* 173, 177 (2000).

industrial-policy and national-security objectives while maintaining a robust commitment to the competitive processes that support market economies.

1. Why Global Competitiveness Matters Now for Antitrust

It could fairly be questioned why antitrust law and policy should care at all about promoting the competitive position of any particular country in the global supply chain. Assuming that antitrust law and policy seek to maximize consumer welfare, then it would follow that consumers would be made best off by a global trading system in which goods and services are delivered by the firms that deliver those goods and services most efficiently, irrespective of geographic location. In a global marketplace where all countries conformed reasonably to free-trade principles, which is the vision that motivated the formation of the World Trade Organization (WTO) in 1995 and its antecedent, the GATT trading system in 1947, this would be a tenable position—as envisioned long ago by classical economists such as David Ricardo and Adam Smith. In that world, there is little tension between the pursuit of consumer welfare by national antitrust enforcers and the pursuit of comparative advantage by private companies in the global marketplace.

At least since the late 1970s, antitrust law has focused singularly on the protection of consumer welfare through the preservation of the competitive process. From that perspective, antitrust takes a skeptical view of industrial policy and global competitiveness interests or reserves those objectives for other bodies of law. This caution reflects an important concern that industrial policy can be misused as a pretext for protecting inefficient incumbents as national champions, resulting in increased prices, reduced quality, or delayed innovation. Yet, even as a matter of competition policy, this position risks being self-defeating for any national economy when two conditions are met: (1) foreign countries with significant global market share take measures to distort the rules of trade in a manner that harms domestic consumers, and (2) the WTO or other legal or diplomatic mechanisms do not effectively deter that conduct.

Both conditions are satisfied to some extent in the current global marketplace. An abundant academic and policy literature, together with government reports periodically issued by the U.S. Trade Representative and U.S.-China Economic and Security Review Commission, have documented that the People's Republic of China has implemented long-standing mercantilist policies to secure global leadership in strategically critical industries. As documented in publications dating from at least the early 2010s through the present, these policies include domestic subsidies, low-cost financing, market access limitations, barriers to foreign competitors, forced technology transfer, below-cost pricing practices, and the use of competition-law enforcement to favor local producers over foreign technology suppliers.⁴ These

⁴ For government reports, see U.S. Trade Representative, 2024 Report to Congress on China's WTO Compliance 1, 2-3 (2024) (noting "substantial artificial competitive advantages" and "massive and pervasive" non-transparent subsidization, market access limitations, forced technology transfer, and "state-sponsored theft of intellectual property"),

practices represent not only a geopolitical issue but a competition-policy issue since efforts by a large-country player—in this case, the second largest economy in the world as measured by gross domestic product⁵—to tilt the rules of trade, either to favor its national champions or to establish strategic “chokeholds” over critical technologies and industries, can lead to concentrated global markets that may in some cases distort pricing, quality, and innovation. If that outcome is achieved through means other than “competition on the merits,” that is precisely the conduct that antitrust law generally seeks to deter and hence, antitrust policy and industrial policy may surprisingly converge to some extent.

Indifference in antitrust policy to, or a reluctance to address, the impact of mercantilist interventions by foreign governments on domestic consumers reflects a reasonable concern about distorting the marketplace by favoring particular firms rather than preserving the competitive process. However, in the current geopolitical environment, this position can leave domestic consumers unprotected against anticompetitive conduct by firms that are backed or otherwise advantaged by the mercantilist policies of foreign governments.

An example is provided by an almost decade-long antitrust litigation in the Eastern District of New York, the Court of Appeals for the Second Circuit, and the Supreme Court in the late 2010s. The case involved what would otherwise be a per se violation of the Sherman Act: an export cartel among China-based vitamin C producers (including state-owned entities), which claimed a defense of “sovereign compulsion” on the ground that Chinese governmental authorities had allegedly mandated participation in the cartel through a trade organization.⁶ The class-action

<https://ustr.gov/sites/default/files/files/reports/2025/2024USTRReportCongressonChinaWTOCompliance.pdf>; U.S. Trade Representative, 2023 Report to Congress on China’s WTO Compliance 4, 18–21 (2023) (documenting forced technology transfer and “state-sponsored theft of intellectual property”), <https://ustr.gov/sites/default/files/USTR%20Report%20on%20China%27s%20WTO%20Compliance%20%28Final%29.pdf>; U.S.-China Economic and Security Commission, 2024 Report to Congress, at 1 (Nov. 19, 2024) (reporting that China is reinforcing “its longstanding, market-distorting approach of massive subsidies to targeted industries ... and traditional dumping approaches”), https://www.uscc.gov/sites/default/files/2024-11/2024_Executive_Summary.pdf; U.S.-China Economic and Security Commission, 2012 Annual Report 8, 48, 83–87 (2012) (describing mercantilist practices by Chinese authorities, including preferential credit and procurement policies, compelled technology transfer to joint-venture partners, and requirements that foreign licensors provide domestic licensees with exclusive rights over improvements). For scholarly analysis, see Usha C.V. Haley & George T. Haley, *Subsidies to Chinese Industry: State Capitalism, Business Strategy, and Trade Policy* 5–6, 45–79 (2013) (documenting China’s use of state subsidies, market access limitations, and coerced technology transfer to secure global market share in critical industries); Dan Prud’homme & Max von Zedtwitz, *Managing “Forced” Technology Transfer in Emerging Markets: The Case of China*, 25 J. Int’l Mgmt. 100679 (2019) (describing coerced technology transfer practices affecting foreign firms in China). On the use by Chinese authorities of competition law to favor domestic device producers over foreign chip suppliers, see Jonathan M. Barnett, *Antitrust Mercantilism: The Strategic Devaluation of Intellectual Property Rights in Wireless Markets*, 38 Berkeley Tech. L.J. 259 (2023).

⁵ World Bank Group, GDP (current US\$), <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD>

⁶ *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. ___ (2018).

plaintiffs initially prevailed in the district court, the appellate court then reversed on grounds of international comity, and the Supreme Court clarified that comity principles do not require automatic deference to a foreign government's interpretation of its own laws.⁷ Even under this standard, the appellate court on remand upheld the sovereign compulsion defense.⁸ As a result, US consumers were left defenseless under antitrust law against firms that had cartelized a dominant share (approximately 60%⁹ of the global vitamin C market. The same result arose in a subsequent cartel case against China-based minerals exporters, who again successfully raised the sovereign compulsion defense on the ground that the Chinese regulator had mandated prices and quotas.¹⁰

In a world in which mercantilist policies have distorted or suppressed competition in significant global markets and deterrent mechanisms through international trade law have been ineffectual in deterring those practices¹¹, it is necessary to reconsider whether US antitrust law should take into account policy interests in promoting the global competitiveness of the US economy and, if so, whether it can do so within existing antitrust concepts while preserving a meaningful commitment to preserving the competitive process that characterizes a market-driven economy.

2. Interaction Between Antitrust and Global Competitiveness Objectives

The interaction between policy interests in preserving competitive markets and policy interests in promoting global competitiveness can be illustrated through three concepts and doctrines in antitrust: market definition, economies of scale, and predatory pricing. In each case, it appears to be feasible in some circumstances to integrate global competitiveness considerations into antitrust's existing analytical

⁷ *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011); *In re Vitamin C Antitrust Litigation*, 837 F.3d 175 (2d Cir. 2016); *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. ___ (2018).

⁸ *In re Vitamin C Antitrust Litigation*, 8 F.4th 136 (2d Cir. 2021).

⁹ *In re Vitamin C Antitrust Litigation*, 810 F. Supp. 2d 522, 527 (E.D.N.Y. 2011).

¹⁰ *Resco Prods., Inc. v. Bosai Minerals Grp. Co.*, 158 F. Supp. 3d 406 (W.D. Pa. 2016). For completeness, I note that, in both cases, but for the evidence of sovereign compulsion, the defendants' actions would likely have been encompassed by the Sherman Act since, under the Foreign Trade Antitrust Improvements Act, the defendants' collusive behavior would likely have been found to have a "direct, substantial and reasonably foreseeable effect" on "trade or commerce" in the US market. For the statutory language, see 15 U.S.C. §6a.

¹¹ Robert D. Atkinson, Nigel Cory, and Stephen J. Ezell, *Stopping China's Mercantilism: A Doctrine of Constructive, Alliance-Backed Confrontation*, Information Technology & Innovation Foundation 18 (Mar. 2017) (noting that the lack of rule of law in China "makes enforcing actions against China in venues such as the WTO difficult"); U.S.-China Economic and Security Commission, 2024 Report to Congress, *supra* note 4, at 8 (noting China's "defiance of WTO and other international agreements"), U.S. Trade Representative, 2023 Report to Congress on China's WTO Compliance, *supra* note 4, at 21 ("In the United States, it is widely accepted that the existing WTO rules do not, and cannot, effectively discipline many of China's most harmful policies and practices").

framework, while maintaining a robust commitment to protecting the free play of competitive forces.

2.1. Market Definition

Market definition is a fulcrum concept in antitrust analysis since it can often determine whether a particular firm holds market power, as determined by proxy through market share and entry barriers that may protect market share. Typically, antitrust law considers a purportedly dominant firm’s share of the relevant domestic market; however, when entry barriers into the US market are sufficiently low, then foreign providers may be included as part of the relevant market. This possibility was taken into account in the landmark decision in *U.S. v. Alcoa*, where the court considered whether the ability of large European (mostly German) aluminum suppliers to expand capacity precluded attributing market power to Alcoa, which otherwise held an overwhelming share of the domestic aluminum market. The court ultimately excluded most foreign capacity from the relevant market due to shipping costs and tariff barriers, but did consider this factor in its market definition analysis.¹²

In digital markets, transportation costs are immaterial and hence, there may be a stronger case to take into account potential entry or expansion by foreign providers when defining the relevant geographic market. In *U.S. v. Oracle Corp.*, which involved a government challenge to Oracle’s acquisition of PeopleSoft, the court accepted Oracle’s argument that the relevant geographic market was worldwide and should therefore include SAP AG, a leading German-based software provider, rather than only its US subsidiary, SAP America, Inc.¹³ This determination reflected the fact that geographic barriers in software are largely irrelevant and SAP AG could easily enter or expand its share of the relevant US software market in response to anticompetitive pricing, output, or other conduct by the combined entity. This broad definition of the relevant geographic market, together with other factors, supported the court’s finding that the combined entity would lack a sufficiently protected market share to raise a significant risk of competitive harm.¹⁴

2.2. Economies of Scale

At least since the Supreme Court’s decision in *Continental TV Inc. v. GTE Sylvania Inc.* in 1977¹⁵ and the issuance of the 1982 Merger Guidelines,¹⁶ courts and agencies have recognized that rule-of-reason analysis requires balancing the competitive harms and gains that can be reasonably attributed to a contested practice or

¹² *U.S. v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 426-27 (2d Cir. 1945).

¹³ *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1065 (N.D. Cal. 2004).

¹⁴ *Id.*, at 1108-09.

¹⁵ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹⁶ U.S. Dept. of Justice, Merger Guidelines (1982), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf>.

transaction. In the context of vertical restraints and merger transactions, this exercise often requires taking into account the economies of scale that can result from increased firm size, which can lead to lower per-unit costs or other efficiencies that may then be passed on substantially to consumers in the form of lower prices.¹⁷ An antitrust approach that focused only on size—as illustrated by the structuralist “big is bad” approach that often characterized postwar antitrust¹⁸—could therefore prohibit conduct or mergers that would lower prices, increase output, or increase R&D investment.

The competitive implications of scale become even more complex once a domestic firm is situated in a global context where scale not only yields efficiencies but is a necessary predicate for economic survival. These considerations are especially salient in digital markets. First, these markets tend to exhibit high fixed costs and low marginal costs. For example, while it may cost hundreds of millions of dollars to develop an operating system, those up-front costs are amortized over hundreds of millions of downloads to push down per-unit costs. Subject to competitive forces, users enjoy some portion of those cost-savings as volume expands. Second, these markets tend to exhibit “winner-take-all” network effects that drive most users toward one or two providers, which favors platforms that can attract and retain the largest number of users. In those conditions, scale is not just a source of efficiency but necessary to remain competitive against other large and well-resourced platforms.

This also means that even platforms that have large market shares domestically may face latent competitive threats if large foreign competitors can easily enter, as is often the case in digital markets where transportation costs are irrelevant.¹⁹ From approximately 2010 through 2020, Facebook and its subsidiary, Instagram, held what appeared to be a virtually unchallenged position in the social networking market, following the decline or withdrawal of competitors such as MySpace. Yet this changed once TikTok, a subsidiary of ByteDance, a China-based firm, expanded in the US market and captured significant market share starting in the early 2020s.²⁰ Hence today it is no longer obvious that Meta (the parent of Facebook and Instagram) exerts durable market power in the social networking sector, in the face of

¹⁷ See, e.g., *GTE Sylvania Inc.*, 433 U.S., at 54–55 (recognizing that vertical restraints may “achieve certain efficiencies in the distribution of . . . products”); U.S. Dept. of Justice, 1984 Merger Guidelines, <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>, at 14 (“[E]ven in concentrated markets, it is desirable to allow firms some scope for merger activity in order to achieve economies of scale”) and 23 (identifying economies of scale among the efficiencies the Department will consider “in deciding whether to challenge a merger”).

¹⁸ See, e.g., *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 323–24 (1962) (“Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure”).

¹⁹ For extensive discussion, see Jonathan M. Barnett, *Illusions of Dominance: Revisiting the Market-Power Assumption in Platform Ecosystems*, 86 *Antitrust L.J.* 1 (2024).

²⁰ Nayden Tafradzhyski, *TikTok Revenue and Usage Statistics* (2025), *Business of Apps*, Sept. 2, 2025, <https://www.businessofapps.com/data/tik-tok-statistics/>

competitive threats posed by TikTok, X, YouTube, and other well-resourced providers of similar services.

Scale has taken on yet another competitive dimension in global tech markets as the transition to a cloud-based and AI-enabled digital economy has necessitated massive investment in physical infrastructure in the form of cloud-computing server farms and land-based and undersea transmission cables. Software-based markets typically feature high fixed costs and low to moderate variable costs, so scale lowers consumer prices by spreading fixed costs over larger output. By contrast, markets such as cloud computing that involve significant hardware and other infrastructural expenditures combine high fixed construction costs with significant ongoing operating costs, while still generating declining per-unit costs and hence lower prices (subject to competitive pressures) as scale increases.²¹ To give a sense of the magnitudes involved, McKinsey projects that, by 2030, global capital expenditure on data centers will total approximately \$6.7 trillion.²²

Here too large size is a predicate for competing in the market, which can explain why the leading cloud-computing suppliers are a handful of “hyperscalers” such as AWS (Amazon), Microsoft Azure, and Google Cloud (and recently, significant expansion by Oracle). A structuralist approach that focused on the size of these firms—a concern antitrust enforcers in the US, UK, and EU have raised concerning the cloud computing market²³—would overlook the fact that large size is necessary to support the infrastructural costs required to compete in this market at all. Relatedly, large size is necessary for these US-based firms to compete globally against China-based providers such as Alibaba, Tencent and Huawei, which pose competitive threats in “swing markets” in Southeast Asia and Middle East.²⁴ Hence, a “big is bad” approach adopted by antitrust enforcers in the US, the EU and other allied jurisdictions—an approach that has characterized some of those enforcers’ statements concerning the cloud-computing market²⁵ and investments by hyperscalers in AI model developers²⁶—would simply confer a global competitive advantage on China-based competitors, which, as discussed subsequently²⁷, typically

²¹ On this point, see Barnett, *supra* note 19.

²² McKinsey & Co., *The Cost of Compute: A \$7 Trillion Race to Scale Data Centers* (Apr. 28, 2025), <https://www.mckinsey.com/industries/technology-media-and-telecommunications/our-insights/the-cost-of-compute-a-7-trillion-race-to-scale-data-centers>. For data on the costs involved in cloud infrastructure, see Yuval Less, *Clouds of Competition—China’s Rise in the Middle East Cloud Market*, Institute for National Security Studies, May 26, 2025, [https://www.inss.org.il/publication/cloud-china/\(Middle East\)](https://www.inss.org.il/publication/cloud-china/(Middle%20East)).

²³ See Barnett, *supra* note 19.

²⁴ On this rivalry, see Less, *supra* note 22 (Middle East); Raffaele Huang, *American Cloud Companies Face Challenge from China in Southeast Asia*, *Wall St. J.*, Feb. 13, 2023 (Southeast Asia).

²⁵ Barnett, *supra* note 19.

²⁶ Jonathan M. Barnett, A “Minority Report” on Antitrust Policy in the Generative AI Ecosystem, *J. Corp. Law* (forthcoming 2026), <https://ssrn.com/abstract=4923465>; Jonathan M. Barnett, *The Case Against Preemptive Antitrust in the Generative Artificial Intelligence Ecosystem*, *Artificial Intelligence and Competition Policy* (eds. Alden Abbott & Thibault Schrepel, Concurrences 2024).

²⁷ See *infra* notes 31-36 and accompanying discussion.

enjoy a protected domestic market and various state subsidies when entering foreign markets.

2.3. Predatory Pricing

In *Matsushita Electric Industrial Co., Ltd. et al. v. Zenith Radio Corp.*, the Supreme Court addressed a predatory pricing claim by a US television manufacturer against several Japanese television manufacturers.²⁸ The case took place at the height of concerns in the 1980s that Japanese electronics producers were displacing US electronics producers and endangering US manufacturing more generally. Within an analytical framework that focuses on consumer welfare in domestic markets, and assumes the absence of mercantilist distortions in the global marketplace, these concerns are immaterial. If Japanese producers could provide US consumers with electronics devices at some superior price/quality combination, then this outcome should be welcomed from an antitrust perspective. Assuming Japanese producers were competing in conformity with free-trade principles²⁹, then, following the classical theory of comparative advantage, the shift of electronics manufacturing from the US to Japan in response to consumer preferences would represent an efficient reallocation of resources that benefits consumers, even if this has adverse distributive effects on some US workers (which could potentially be addressed through other policy instruments).

The plaintiffs argued that Japanese electronics producers had diverted market share from US producers not on the basis of superior efficiency but rather, due to coordination on high prices in the Japanese market, which then allegedly subsidized below-cost pricing in the US market. In a holding that still governs today, the Court required that the plaintiffs demonstrate that the defendants had a reasonable expectation of being able to recoup the losses from alleged below-cost pricing through above-cost pricing in the future.³⁰ The recoupment requirement can play a valuable function by enabling courts to avoid false-positive enforcement errors by distinguishing between aggressive pricing strategies that benefit consumers, and below-cost pricing strategies designed to exclude competitors and then shift to supracompetitive pricing in the future. Absent sufficient evidence that the defendant firms could reasonably expect to recoup current losses through future price increases (which in turn required demonstrating the ability to maintain coordinated pricing and entry barriers against other competitors), the Court found no basis for liability.

²⁸ 475 U.S. 574 (1986).

²⁹ For extensive evidence that challenges this assumption, see Kozo Yamamura and Jan Vandenberg, Japan's Rapid-Growth Policy on Trial: The Television Case, in Gary Saxonhouse and Kozo Yamamura (eds.), *Law and Trade Issues of the Japanese Economy* 238-281 (1986).

³⁰ 475 U.S., at 589-90. The requirement was reaffirmed in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

The *Matsushita* opinion relies on the standard assumption that firms act in conformity with business rationality and will therefore never “burn money” without an expectation of offsetting future monopoly rents. If that is the case, then predatory pricing claims must fail absent a reasonable expectation of recoupment. In the current geopolitical environment, the business rationality assumption may not always hold. Suppose a country takes measures for geopolitical purposes to support sustained below-cost pricing strategies by its firms when they enter strategically important foreign markets. In that case, the recoupment requirement may overlook predation strategies that depart from economic logic for geopolitical purposes. Specifically, if foreign firms are directed or encouraged by governmental authorities to secure leadership in export markets even at the cost of profitability, and receive governmental support to do so, then those firms may engage in below-cost pricing even without any reasonable expectation of being able to recoup those costs through future supracompetitive profits.

This strategy is consistent with China’s long-standing industrial policy to prioritize market share and production volume over profitability as part of a strategy to secure global leadership in strategically critical industries.³¹ As documented by the U.S. Trade Representative, the U.S.-China Economic and Security Commission, and the scholarly and policy literature, the Chinese government sometimes directs exporting firms to implement that strategy³² and provides firms with grants, tax exemptions, and low-interest financing to do so.³³ As Usha Haley and George Haley documented as early as 2013, China-based firms relied in part on state subsidies and below-cost pricing to secure leadership in solar panels, steel, glass, paper, and auto

³¹ Haley & Haley, *supra* note 7 (describing China’s policy to subsidize below-cost pricing by export firms to secure global leadership in solar panels, steel, paper, glass, and auto parts); Usha Haley & George T. Haley, *How Chinese Subsidies Changed the World*, *Harvard Bus. Rev.*, July 2013 (same); Lei Bian et al., *China’s Role in Accelerating the Global Energy Transition through Green Supply Chains and Trade* (Feb. 2024) (Grantham Research Institute on Climate Change and the Environment, LSE), at 4 (“Throughout the 2010s, China grew its dominance in the solar PV and wind turbine markets by producing increasingly higher-quality products and charging below-market prices”), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/02/Chinas-role-in-accelerating-the-global-energy-transition-through-green-supply-chains-and-trade.pdf>.

³² Office of the U.S. Trade Representative, *Section 301 Investigation: Report on China’s Targeting of the Maritime, Logistics, and Shipbuilding Sectors for Dominance: Determination*, Jan. 16, 2025, at 71 (“China’s control over economic actors enables China to direct and influence their commercial behavior in pursuit of its targeted dominance, in ways that run counter to fair competition and market-oriented principles”); U.S.-China Economic and Security Commission, *supra* note 4, at 14, 27 (describing Chinese government strategy to subsidize manufacturing and export excess output to foreign markets, in effort to drive domestic growth).

³³ Office of the U.S. Trade Representative, *Section 301 Investigation*, *supra* note 32, at 76-77 (identifying various forms of state support for shipbuilding firms, including low-interest financing, direct subsidies, debt forgiveness, equity investments, and other methods); Robert D. Atkinson, *Industry by Industry: More Chinese Mercantilism, Less Global Innovation*, *Information Technology & Innovation Foundation*, May 10, 2021, at 3-4 (identifying low-cost loans, grants, and tax exemptions to support firms in strategically critical industries).

parts.³⁴ Similar practices have been documented in the case of electric vehicles³⁵ and telecom equipment.³⁶

It may be objected that consumers in targeted foreign markets benefit from this low-price, high-volume strategy if China-based firms do not subsequently raise prices to supracompetitive levels once incumbents are displaced. Yet that is only true as a matter of static efficiency. Even if pricing remains at artificially low levels, consumers are nonetheless harmed to the extent that the absence of a pricing premium over marginal cost suppresses investment in research and development, resulting in dynamic efficiency losses over time.³⁷ Various studies have found evidence for this effect on R&D investment in product innovation following the entry of China-based producers into selected industries in Western markets, including telecom equipment, high-speed rail, and solar panels, although there are sometimes gains in process innovation.³⁸ In the context of merger review, the agencies have viewed reductions in R&D investment as an output distortion, and have generally treated harms to innovation, as effects that may fall within the purview of antitrust.³⁹

In light of these considerations, it may be appropriate for antitrust commentators and policymakers to consider whether the recoupment requirement for predatory pricing should be modified in cases involving a defendant firm that operates under state influence and subsidies that encourage and support artificially low pricing to secure market share for geopolitical purposes.

3. Managing Antitrust and Global Competitiveness Objectives

In the scenarios discussed above, which encompass a wide range of strategically critical industrial and technology markets, integrating concerns relating to global competitiveness can be integrated within the standard framework used to assess the net competitive effects of contested practices or transactions. It remains to consider whether there are circumstances where antitrust policy and global competitiveness considerations pursue divergent outcomes. In that case, it would be necessary to adopt a mechanism or principle under which global competitiveness and national-security concerns would potentially override antitrust determinations.

³⁴ Haley & Haley, *supra* note 6.

³⁵ Stephen Ezell, *How Innovative Is China in the Electric Vehicle and Battery Industries?*, Information Technology & Innovation Foundation (July 29, 2024), at 3 (China's electric vehicle industry has enjoyed over \$230 billion in state subsidies, mostly through buyers' rebates and sales tax exemptions).

³⁶ Atkinson, *supra* note 33, at 11-13.

³⁷ Ezell, *supra* note 35, at 5-7.

³⁸ *Id.*, at 2, 7-10.

³⁹ U.S. Dept. of Justice and Federal Trade Commission, *Horizontal Merger Guidelines 2* (2010) ("[a] merger enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation or otherwise harm consumers as a result of diminished competitive incentives").

This contingency already arises in the merger context, where the President has the right, through the Committee on Foreign Investment in the United States (CFIUS), to block mergers that are deemed to pose a threat to US national security interests.⁴⁰ That is: a merger that poses an insufficient competitive threat under the standard set forth in the Clayton Act may nonetheless be blocked on national security grounds. This is a case where Congress has adopted a regulatory "escape hatch" that operates concurrently with the antitrust process and can effectively preempt it when CFIUS moves to block a transaction. In some scenarios, CFIUS can act as a complement to antitrust enforcement when global competitiveness or national security considerations point toward an adjudicative outcome that could be independently supported under conventional antitrust doctrine. Harder cases arise when global competitiveness and antitrust considerations point in different directions, which may require that consumers pay a price to promote national-security or industrial-policy objectives.

To illustrate what is arguably an "easier" case, consider the litigation brought against Qualcomm by the Federal Trade Commission during 2017-2020 concerning certain of Qualcomm's licensing practices.⁴¹ For many commentators, the FTC's case was unpersuasive as a matter of antitrust law and economic evidence.⁴² These concerns surrounding the strength of the FTC's antitrust case were bolstered by geopolitical concerns given that Qualcomm represented the last major U.S.-based supplier of baseband chips in the mobile communications device market. In particular, the FTC's proposed remedies (largely adopted by the district court⁴³) placed at risk the licensing-based business model used by Qualcomm and a handful of European companies that had led the development of 3G and 4G/LTE wireless communications standards and, in doing so, had promoted global leadership of the US and its allies in a strategic technology market.⁴⁴

In the appellate court proceedings, several federal agencies brought these geopolitical considerations to the attention of the court, including unusual interventions by the Department of Justice, the Department of Energy, and the Department of Defense.⁴⁵ The Department of Energy stated these concerns sharply:

⁴⁰ 50 U.S.C. § 4565 (2020).

⁴¹ Complaint for Equitable Relief, *FTC v. Qualcomm Inc.*, No. 17-cv-00220-LHK (N.D. Cal. Jan. 17, 2017), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf

⁴² See, e.g., J. Gregory Sidak, *Monopoly, Innovation and Due Process: FTC v. Qualcomm and the Imperative to Destroy*, *Criterion J. Innovation* (2020); Jonathan M. Barnett, *Antitrust Overreach: Undoing Cooperative Standardization in the Digital Economy*, 25 *Michigan Tech. L. J.* 163 (2019).

⁴³ *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

⁴⁴ Jonathan M. Barnett, *How Regulators Endanger U.S. and EU Technology Leadership in the Global Wireless Marketplace* (Center for Strategic and International Studies, Feb. 8, 2024), <https://www.csis.org/blogs/perspectives-innovation/how-regulators-endanger-us-and-eu-technology-leadership-global-wireless-marketplace>; Jonathan M. Barnett and David J. Teece, *Is the West Giving Away the Game?*, *Network L. Rev.* (July 21, 2022).

⁴⁵ Statement of Interest of the United States, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK (N.D. Cal. May 2, 2019), <https://www.justice.gov/atr/case-document/file/1236026/dl?inline>; Statement of Interest of the United States, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. July 16, 2019),

“Any remedy that causes undue financial strain on Qualcomm may result in undermining Qualcomm’s position in the growing 5G market, ceding to foreign entities, in particular China, a dominant position in the development and expansion of 5G technology.”⁴⁶ These national-security considerations stand outside the purview of antitrust law and are not referenced in the appellate court’s opinion, but supported the outcome in this case, which the court reached under conventional antitrust doctrine.

It is possible to contemplate circumstances where a contested practice or transaction would not support antitrust intervention but would raise material concerns as a matter of global competitiveness in a strategically critical industry. In that case, a policymaking regime that sought to maintain antitrust law’s commitment to market-driven outcomes would be compelled to make recourse to “override” mechanisms provided by other legal sources of government authority. In the merger context, that scenario could sometimes be addressed through the CFIUS mechanism, especially following amendments made in 2018 that broadened CFIUS’ intervention criteria to encompass controlling and non-controlling investments by foreign entities in any “TID US business,” which includes businesses in Critical Technology, Critical Infrastructure, and Sensitive Personal Data.⁴⁷ Thibault Schrepel has identified avenues within the EU legal and regulatory apparatus through which regulators can incorporate industrial-policy and global-competitiveness objectives into the enforcement of competition law.⁴⁸

The combination of antitrust law, enriched by an understanding of the global dynamics of certain industries (especially in the tech sector), and an expansive exercise of CFIUS authority in merger transactions, could support a synergistic enforcement strategy that protects the competitiveness of both domestic markets and the US economy in the global marketplace. However, this approach does have inherent limitations that limit its scope of application. First, enabling policymakers to override antitrust determinations on industrial-policy grounds can distort the market process or elicit lobbying that leverages industrial-policy arguments for private advantage. Second, outside the merger context (which is addressed to some extent by the CFIUS mechanism), there may arise a “policy gap” when global competitiveness or national-security considerations recommend taking action against a business practice by state-backed foreign companies that does not give rise

[https://www.justice.gov/atr/case-document/file/1183936/dl?inline](https://www.justice.gov/atr/case-document/file/1183936/dl?inline;); Declaration of Under Secretary of Defense for Acquisition & Sustainment Ellen M. Lord, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. July 16, 2019), Exhibit to DOJ Statement of Interest, <https://www.justice.gov/atr/case-document/file/1183936/dl?inline=>; Decl. of Dept. of Energy Chief Information Officer Max Everett, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir. July 16, 2019), Exhibit to DOJ Statement of Interest, <https://www.justice.gov/atr/case-document/file/1183936/dl?inline=>

⁴⁶ Decl. of Dept. of Energy Chief Information Officer Max Everett, *supra* note 46, at 2.

⁴⁷ Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 2209 (codified at 50 U.S.C. § 4565 (2018); 31 C.F.R. § 800.248 (2020) (defining “TID U.S. business” as a U.S. business involved with critical technologies, critical infrastructure, or sensitive personal data).

⁴⁸ Thibault Schrepel, *The Expected Impact of “Great Power Competition” on Antitrust Policy*, *Network L. Rev.* (May 17, 2023).

to sufficiently demonstrated anticompetitive effects to support intervention under antitrust law. To address any such gap—which would reflect a policy determination that antitrust considerations in this context should defer to industrial-policy or national-security interests—it would be necessary to make recourse to existing or new policy tools that lie outside antitrust and fall beyond the scope of this contribution.

4. Concluding Thoughts

Generally speaking, antitrust scholarship, enforcement and adjudication have not taken into account global competitiveness and national-security concerns. This is for two principal reasons. First, at least since the late 1970s, antitrust scholars and enforcers have focused on anchoring antitrust in a single policy objective—namely, consumer welfare—to correct what was reasonably perceived to be “mission creep” when antitrust is deployed for multiple and potentially contradictory policy goals. Second, antitrust scholars and enforcers were concerned that taking into account global competitiveness or other industrial-policy concerns could provide a license to protect inefficient national champions against the free play of competitive forces. But global competitiveness and related national-security concerns have acquired renewed importance in an environment where international-trade law and other institutions have failed to deter mercantilist strategies that distort outcomes in strategically critical markets. In this environment, it is necessary to identify when global competitiveness concerns can be integrated into antitrust enforcement while preserving its core commitment to preserving the market process, and when policy overrides should be provided to address national-security and related concerns that fall outside the scope of antitrust. This contribution has outlined some preliminary steps in navigating this complex interaction between antitrust and industrial policy in a period of great-powers competition.

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