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THE ROLE OF TRANSNATIONAL LEGAL PROCESS IN ENFORCING WTO LAW AND COMPETITION POLICY

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I. INTRODUCTION

"Export cartel" refers to a collusive behavior between exporting firms "to charge a specified export price or to divide export markets among themselves."[1] The purpose is often to enhance domestic firms' welfare at the expense of foreign consumers.[2] Antitrust and the World Trade Organization ("WTO") are mutually exclusive remedies when dealing with an export cartel. The difference is that a successful antitrust proceeding depends on showing the absence of government involvement. In contrast, a WTO proceeding's success depends on showing the State's participation in export restraints. Lately, the lines have blurred when certain export cartels wind their way through U.S. courts. In such cases, the extent to which U.S. courts should enforce antitrust laws against foreign export cartels has been controversial, as defendants often invoke foreign-sovereignty-related defenses. This issue has become more prominent than ever with involved litigants who are at times unable to apply their antitrust laws extraterritorially to international cartels because of the difficulty of obtaining evidence that is located outside of their jurisdiction. Similarly, litigants at the WTO complained about the government's role in the administrative and judicial system, including the use of verbal demands and informal notices on export cartels. This intervention undermines the ability to show that a WTO-inconsistent measure exists. Several recent U.S. antitrust litigations involving Chinese export cartels highlight this challenge.

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1. *See* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 393 (2007).
2. *Id.*

In *In re* Vitamin C Antitrust Litigation ("Vitamin C"), [3] the Chinese defendants moved to dismiss the complaint of price-fixing on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, shielding them from liability under U.S. antitrust law. The defendants invoked comity, sovereign compulsion, and the act of state doctrines.[4] The Chinese Ministry of Commerce ("Ministry") took the unprecedented step of intervening as *amicus curiae* in the proceeding. The Ministry explained that the China Chamber of Commerce of Medicines & Health Products Importers & Exporters ("CCCMHPIE") is a "[m]inistry-supervised entity authorized by the Ministry to regulate vitamin C export prices and output levels." [5] Thus, the Chinese defendants were compelled under Chinese law to collectively set a price for vitamin C exports.[6]

Two similar antitrust cases were brought in the U.S. courts against Chinese export cartels. In Resco Products, Inc. v. Bosai Minerals Group,[7] private litigants alleged price-fixing and other anti-competitive behavior by certain Chinese exporters of bauxite. As the members of the China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCCMC"), the Chinese defendants relied on the amicus brief filed by the Ministry in Vitamin C and argued that CCCMC was a government entity that directed them to coordinate their price.[8] Similarly, in Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp,[9] private litigants alleged price-fixing and other anti-competitive behavior by certain Chinese exporters of magnesite in a separate U.S. court proceeding. The defendants asserted that their trade chamber, CCCMC, was an instrument of the Chinese government to regulate export trade.[10]

On June 23, 2009, with the blessings of the Obama Administration, the U.S. government requested WTO consultations with China regarding China's export restraints

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3. *In re* Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546, 552 (E.D.N.Y. 2008).
4. *Id.* at 550.
5. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 837 F.3d 175, 180 (2d Cir. 2016).
6. *Id.* at 554.
7. Resco Prods., Inc. v. Bosai Minerals Grp. Co., Ltd., Civil Action No. 06-235 (W.D. Pa. June 4, 2010).
8. *Id.* at 6 (This case has stayed pending the release of a final report in a then-pending WTO proceeding).
9. Animal Sci. Prods. v. China Nat'l Metals, 702 F. Supp. 2d 320, 413 (D.N.J. 2010), *vacated sub nom.* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462 (3d Cir. 2011).
10. *Id.* at 395.

on several raw materials.[11] In its first written submission, the U.S. government cited the above three cases, arguing that based upon representations already made by the Chinese Ministry, "the European understands that the CCCMC's export-price related functions and responsibilities . . . are attributable to China."[12] On December 21, 2009, the Dispute Settlement Body ("DSB") established a single panel to examine the complaints.[13]

The above cases fostered a perception that antitrust and WTO meet when private anticompetitive conduct is mixed with state conduct. Emblematic of this viewpoint is Professor Eleanor M. Fox and Professor Merit E. Janow's argument that "[t]rade and competition rules sympathetic to markets are important in today's world of deep economic globalization."[14] Both of the scholars were astonished by the opportunities for nations to play one system (trade) against the other (competition). They also cautioned that U.S. courts involved with foreign export cartels need to flexibly interact with the international regime to form a coherent approach to legal challenges over foreign regulatory systems.[15]

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11. The raw materials in this dispute, including magnesite and bauxite, and various forms of coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. *See* First Written Submission of the United States of America, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 208, WTO Doc. WT/DS394 (June 1, 2010) [hereinafter U.S. First Written Submission, *China – Measures Related to the Exportation of Various Raw Materials*] (The Ministry's amicus brief reflected the official views that the Chamber of Commerce is "the instrumentality through which [the Ministry] oversees and regulates the business of importing and exporting [] products in China."); *see also* Request for Consultations by the United States, *China - Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/1 (June 25, 2009).

12. First Written Submission of the European Union, *China – Measures Related to the Exportation of Various Raw Materials*, ¶ 172, DS395 (June 1, 2010).

13. Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 21 December 2009*, WTO Doc. WT/DSB/M/277 (Mar. 1, 2010).

14. *See* Eleanor M. Fox & Merit E. Janow, *China, the WTO, and State-Sponsored Export Cartels: Where Trade and Competition Ought to Meet*, CONCURRENCES, N° 4-2012, at 4 (2012). Other scholarships on the subject, for example, Dingding Tina Wang argued the legal interests of U.S. industry litigants and the U.S. government have starkly diverged. As a result, U.S. private parties and the U.S. Trade Representative are making contradictory claims about China's export practices in parallel forums—U.S. domestic courts and the WTO dispute resolution system. "U.S. courts should utilize parallel WTO proceedings to inform their analysis in domestic antitrust cases involving foreign governments, for the purpose of interpreting foreign law and understanding foreign circumstances in order to apply U.S. law." *See* Dingding Tina Wang, *When Antitrust Met WTO: Why U.S. Courts Should Consider U.S.-China WTO Disputes in Deciding Antitrust Cases Involving Chinese Exports*, 112 COLUM. L. REV. 1096 (2012). Angela Huyue Zhang argued the relationship between the importing and exporting country is dynamic. The United States' best response, what she calls "strategic comity," to dealing with comity-related defenses in state-led export cartels should not only turn on "a calculation of its own payoffs from competition, trade, and politics, but also on a careful assessment of the strategic moves of the exporting country." *See* Angela Huyue Zhang, *Strategic Comity*, 44 YALE J. INT'L L. 281 (2019) [hereinafter Zhang, *Strategic Comity*].

15. Under export restraints either by the State or by State-controlled firms, Professor Eleanor M. Fox and Professor Merit E. Janow suggested three notes for bringing the trade and competition systems and their fact-finding into greater coherence. They are: "[F]irst, to

What academics and other commentators have missed is that the involved U.S. courts and the executive branch's stance in the above litigations perfectly illustrates a pervasive Transnational Legal Process. The U.S. not only represents all antitrust nations' interests when it is anti-cartel. The transnational actors generated interactions that led to WTO law and competition policy interpretations that become internalized, thereby binding under domestic law (in this Article, China law).

This Article assesses the roles of Transnational Legal Process by examining transnational actors engaged in antitrust litigation and evaluating their relationship to transnational actors participating in the WTO litigation. My central thesis is that essential synergies exist between trade and competition, in which Transnational Legal Process will largely prove a positive role in constraining state-sponsored export cartels and international cartels. To avert gaming by the litigants due to ambiguous factual evidence in cartel cases, U.S. courts and the executive branch should become active transnational actors. They therefore stimulate each other to participate in a dynamic process of Transnational Legal Process. Under the condition that cartel action is attributable to State in the antitrust proceeding, as defendants invoke foreign-sovereignty-related defenses, transnational actors in the competition system promote WTO obedience by sending a strong signal to the executive branch. Under the condition that cartel action is attributable to private parties in the WTO proceeding, transnational actors in the competition system should perform a gap-filling role that the WTO system precludes. [16] The resulting tendency is to suggest a synergistic relationship between transnational actors to play by rules of free trade (not to restrain exports) and competition (not to cartelize). Having described the most basic features of Transnational Legal Process, my Article partly confirms that Transnational Legal Process could somewhat fix the potentially worrying issue of nations' opportunities to play one system (trade) against the other (competition).

This Article is organized as follows: Part II explores the treatment of cartels and important synergies that exist between WTO law and competition law. Part III details the theory of Transnational Legal Process and explores its potential role where

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raise the consciousness of and detection of gaming; second, to light a fire beneath the debate on perspective (rules of interpretation preferring markets, or preferring state autonomy to adopt export restraints and export cartels); and third, to open the door to evidentiary coordination." *See* Fox & Janow, *supra* note 14.

16. For example, Animal Science Products, Inc. and Resco Products, Inc., see infra Chapter IV.C.1.

the antitrust system and the WTO system meet. Part IV examines the role of Transnational Legal Process in enforcing WTO law and competition policy in the Chinese context.[17] I examine the chief factors behind China's economic transition that have shaped its current antitrust economic conditions. I then discuss the relationship between trade associations and the government under the hybrid nature of China's regulatory environment. Part V explores relevant cases, focusing on U.S. transnational actor involvement. These cases support the basic premises that U.S. courts as part of Transnational Legal Process have successfully stimulated other participants (in this Article, the United States Trade Representative ("USTR"). The key point is that Transnational Legal Process is active and significantly affected China's WTO internalization and competition policy convergence.[18] The last Chapter stresses the future of Transnational Legal Process, free trade, and competition. I suggest that the WTO plays a central role in framing the issues at play in the U.S.-China trade dispute. Meanwhile, I argue Transnational Legal Process needs to discern the means to champion transformation in other facets, such as human rights, before internalizing international trade laws. Or, given the high stakes, it needs to learn how to leverage trade cooperation to internalize other domains of laws and regulations as a part of Transnational Legal Process.

On the surface, it may appear that faith in Transnational Legal Process has collapsed in the domain of international trade. Critics argued that the world is experiencing a new situation where there is no international law to apply, or the existing WTO law may not precisely cover this new situation. I contend, however, that the influence of Transnational Legal Process is still at work, even as the world experiences its longest-ever trade tensions. Transnational Legal Process remains standing in good faith among the opportunities for the United States to strengthen free trade and competition—by translating the spirit and intent of existing law to govern it.

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17. To be clear, my study need not be limited to the Chinese context. Thus, even without China as a litigant or respondent, Transnational Legal Process is supposed to act as well.

18. For a similar discussion regarding convergence of competition laws, see generally Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002) [hereinafter Raustiala, *The Architecture of International Cooperation*] (arguing that governments are increasingly working together through transnational networks, and favoring gradual convergence of competition laws through such cooperation).

II. THE TREATMENT OF CARTELS: IMPORTANT SYNERGIES EXIST BETWEEN WTO LAW AND COMPETITION LAW

Competition policy is an essential element of the legal and institutional framework for the global economy today. Whereas decades ago, anti-competitive practices tended to be viewed mainly as domestic phenomena, most competition law enforcement facets now have a significant international dimension. To date, efforts to establish a general agreement on competition policy within the international trading system's framework have been unsuccessful. But multiple specific provisions concerning competition are incorporated in the WTO. This Chapter reviews and reflects related developments. It proceeds from the premise that essential synergies exist between trade and competition dealing with cartels. It is reasonable to acknowledge this and explore whether additional steps are desirable to ensure the full realization of the relevant synergies.

A. Export Cartels: Existing Elements in the WTO

While export cartels are consistently outlawed in established competition law regimes, virtually every state with a meaningful competition law acknowledges export cartels either explicitly or implicitly.[19] The rules of the General Agreement on Tariffs and Trade ("GATT") generally prohibit quantitative restrictions on exports and recognize that quantitative restrictions must not be imposed through direct government action and purchases of state trading enterprises ("STEs").[20] Notably, WTO rules do not prevent these entities from exerting market power in export markets through the prices they charge abroad.[21] In that regard,

19. *See* Margaret C. Levenstein & Valerie Y Suslow, *The Changing International Status of Export Cartels*, 20 AM. U. INT'L L. R.E.V. 785, 800 (2005); D. Daniel Sokol, *What Do We Really Know About Export Cartels and What is the Appropriate Solution?*, 4 J. COMP. L. & ECON. 967, 970 (2008) ("Previous work identifies that 51 countries allow for export cartels either explicitly or implicitly in their antitrust regimes. Seventeen countries, including the United States, maintain explicit exemptions. An additional 34 countries lack an explicit exemption. However, they maintain an implicit exemption because their domestic antitrust legislation limits the law's reach to the domestic market. In these settings, antitrust law implicitly allows for anticompetitive conduct entirely outside of the country's borders. Among this group of countries with implicit export cartel exemptions are nearly all EU member states.").

20. *See* the Interpretative Note to Article XI, XII, XIII, XIV, and XVIII of the GATT. Reference is also made in footnote 1 to Article 4.2 of the Agreement on Agriculture.

21. Of course, export duties could also restrict exports. But this could theoretically be subject to a tariff binding in respect of export duties.

government-sponsored export cartels might potentially breach the GATT rules generally prohibiting quantitative export restrictions.

Further guidance concerning export restraints is provided in Article 11.1(b), the WTO Agreement on Safeguards, which requires WTO Members to "not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side."[22] These include actions taken by a single Member as well as actions under agreements, arrangements, and understandings entered into by two or more Members.[23] In the same Article, it further requires Members not to encourage or support the adoption or maintenance by public and private enterprises of equivalent non-governmental measures, recognizing that it is sometimes difficult to establish the degree of government involvement in such measures.[24]

For purely private export cartels, WTO rules only play a limited role. In Argentina – Hides and Leather,[25] the European Communities alleged that Argentina issued Resolution No. 2235/96 that permitted the tanners' association in Argentina, the Association of Industrial Producers of Leather, Leather Manufacturers and Related Products ("ADICMA"), composed of representatives from Argentine leather producers and leather goods producers, to participate in customs inspections of bovine hides designated for export, constituted a de facto export restriction on bovine hides under Article XI:1 and Article X:3(a) of the GATT.[26]

The Panel concluded that there was insufficient evidence of an export restriction made effective by the measure in question within

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22. *See* Article 11.1 (b) and footnote 4 of the Agreement on Safeguards. Examples of similar measures include export moderation, export price monitoring systems, export surveillance, and discretionary export licensing schemes, where they afford protection to the importing country.

23. *Id.*

24. *See* Article 11.3 of the Agreement on Safeguards.

25. *See* Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc. WT/DS155/R, ¶ 3.1 (Dec. 19, 2000).

26. *Id.* at ¶¶ 2.41, 3.2. The European Communities presented three different arguments to contest the Resolution as violating Article XI:1. First, the presence of ADICMA representatives constituted an export restriction on bovine hides. Second, the representatives and access to confidential information on slaughterhouses implied an export restriction. Third, the representative's access to confidential information by a cartel in the tanning industry operated as an export restriction of bovine hides. Argentina argued the reason for the presence of ADICMA representatives in the export process of bovine hides was to make sure that the tariff heading corresponded with the description of the goods and that the duties and charges proposed were correct. Therefore, the Resolution did not provide the representatives with the right to stop or delay shipments of bovine hides. *See also* Alberto Alvarez-Jimenez, *Emerging WTO Competition Jurisprudence and its Possibilities for Future Development*, 24 NW. J. INT'L L. & BUS. 441, 470 (2004).
The European Community also attacked the Resolution by alleging that it was an unreasonable and partial administration of customs law and regulations and thereby violated Article X:3(a) of the GATT 1994. I omit this part of the discussion in this Chapter.

the meaning of Article XI of the GATT 1994.[27] More importantly, the Panel set the standard of proof that the European Community had to meet to demonstrate a prima facie violation of Article XI:1. The European Community had to show that: there was a private restrictive practice; the existence of this practice was attributed to the defendant Member's direct involvement; there was an export restraint; and there was a causal link between the practice and the export restriction, in this case, operating through the Resolution.[28]

Indeed, the Panel stressed that the proof of the Argentinean government's involvement with the cartel's existence was necessary. The Panel concluded that the causal link between the cartel, the Resolution, and any export restriction should be demonstrated.[29] The Panel further argued that Article XI itself does not impose a duty on the member states to prevent the existence of private practices restraining exports. It commented: "there is no obligation under Article XI for a Member (Argentina in this instance) to assume a full 'due diligence' burden to investigate and prevent cartels from functioning as private export restrictions."[30]

Overall, the Panel narrowed the likelihood of using Article XI:1 when deciding the antitrust claim. The antitrust claim had limited chances of success. Indeed, even if the Panel had declared a cartel's existence, such a declaration would not have altered the decision rejecting the antitrust claim. So far, nothing prevents WTO Members from addressing such restrictions if relevant anti-competitive arrangements are established within or affect their jurisdiction and markets.

B. Antitrust Policy Towards International Cartels: Current Challenges for Policy Makers

Firms form a cartel when they agree to restrict output or set prices, so that competition is limited, prices are restricted, and markets are allocated for firms' private benefits. International cartels are distinguished by the fact that the cartel members are comprised of firms from more than one country. The legal treatment of international cartels has varied over time, with increasing limitations in the post-WWII period, and even more

27. *Id.* at ¶ 11.29 ("This evidence simply does not lead to the conclusion that there is a restriction on exports by reason of the mere presence of ADICMA personnel.").

28. *Id.* at ¶¶ 11.42, 11.51.

29. *Id.*

30. *Id.* at ¶ 11.52. Although the Panel did not declare the cartel's existence in the tanning industry, it did believe that the existence of such a cartel was probable.

since 1990s globalization.[31] Even in the United States, where strong anti-cartel laws have existed since the Sherman Act in 1890, international cartels were rarely prosecuted before the 1990s.[32]

The first instance in which the United States prosecuted an international cartel was in 1926. A U.S. congressional committee found the German-French potash combination to be an illegal cartel. In 1927, the Department of Justice ("DOJ") indicted sixteen defendants in the international potash cartel.[33] Many international cartels were prosecuted immediately after WWII, but activity diminished in the following decades due to political and economic reasons.[34] In some cases, international cartels had the active support or participation of sovereign states, making prosecution politically sensitive.[35] In other cases, international cartels are the source of supply for critical raw materials, which makes prosecution risky for the entire economy.[36] In the late 1970s and 1980s, at the peak of the Chicago School approach to antitrust, the Supreme Court began to uproot interventionist antitrust precedents and replace them with more permissive rules.[37] Domestic cartels with limited local effects were severely prosecuted, which provides evidence that U.S. policy is not consciously aimed at avoiding cartel prosecution. The DOJ, however, did not file an international cartel case "because we didn't have any evidence that international cartels continued to be a problem."[38]

In 1992, the Department of Justice announced a Chicago federal grand jury indicted three former top Archer Daniels Midland Co. executives and one Japanese executive for conspiring

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31. *See* Margaret C. Levenstein & Valerie Y. Suslow, *International Cartels*, *in* 2 ISSUES IN COMPETITION LAW AND POLICY 1107, 1111 (Wayne Dale Collins ed., 2008).

32. *Id.*

33. *See* MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES, 1914-1945, at 224-25 (Thomas K. McCraw ed., 2004) ("In 1923, the Potash Importing Corporation (PIC) was incorporated in Delaware to serve as agent for German potash imports. In August 1924, the German Kali (Potash) Syndicate and the French Société Commerciale des Potasses d'Alsace (SCPA) formed a cartel to share world markets, including the U.S. one. When in 1925 the German Potash Syndicate sought to raise money in the United States, the U.S. State and Commerce Departments objected, fearing that the support of the German syndicate would mean higher prices to U.S. farmers.").

34. *See Levenstein & Suslow, supra* note 31, at 1111.

35. *Id.*

36. *Id.*

37. *See also* Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911 (2009) (reviewing Robert Pitofsky, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST POLICY (Robert Pitofsky ed., 2008)).

38. *See* Joel Klein, Assistant Attorney Gen., Antitrust Div., Address at Fordham Corporate Law Institute, 26th Annual Conference on International Antitrust Law & Policy: The War Against International Cartels: Lessons from the Battlefront (Oct. 14, 1999).

to fix prices and allocate sales in the lysine market worldwide.[39] The subsequent investigations and prosecutions led to changes in antitrust law and the prosecutorial tools against international cartels. One of the most significant changes occurred in 1993 when the DOJ's Antitrust Division developed a Corporate Leniency Program ("Amnesty Program").[40] The Amnesty Program provides the ultimate prize for companies that choose to confess—no criminal conviction, no criminal fine, and non-prosecution protection for all officers, directors, and employees—as long as there was no preexisting investigation of collusion in the industry.[41] The Division strengthens the motivation of companies and their managers to confess to price-fixing activities. In the early 1990s, the number of corporations coming forward and seeking amnesty increased from approximately one per year to one per month.[42] By the early 2000s, the number of amnesty applications increased to an average of two per month.[43] Fines imposed against international cartels have significantly increased over the past decade, covering many industries.[44]

Moreover, the U.S. vigorously exercised extraterritorial jurisdiction in the area of antitrust law. Judge Learned Hand of the Second Circuit crafted the "effects test" from the Sherman Antitrust Act in the *United States v. Aluminum Co. of America* (*Aluminum Co.*).[45] This test authorizes U.S. jurisdiction in an antitrust claim against a foreign defendant who engages in activity "intended to affect imports or exports" and where "its performance is shown actually to have had some effect upon them."[46] In addition, this decision rejected the implications of an earlier Supreme Court opinion, *American Banana Co. v.*

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39. *See* Press Release, Dep't of Justice, Former Top ADM Executives Japanese Executive, Indicated in Lysine Price Fixing Conspiracy (Dec. 3, 1996), https://www.justice.gov/archive/atr/public/press_releases/1996/1030.htm.

40. *See* Scott D. Hammond, Dir. of Criminal Enf't, Antitrust Div., U.S. Dep't of Justice, Presented at Fifteenth Annual National Institute on White Collar Crime: "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?" (Mar. 8, 2001).

41. *Id.*

42. *See Levenstein & Suslow*, *supra* note 31, at 1111-12.

43. *Id.* at 1112 n.22 (quoting R. Hewitt Pate, The DOJ International Antitrust Program—Maintaining Momentum, Address Before the ABA Section of Antitrust Law 6 (Feb. 6, 2003). "The Division's leniency program has played a major role in cracking the majority of the international cartels that the Division has prosecuted. The application rate has surged over the last year to better than two per month.").

44. *Id.* at 1112-14 fig.1, tbl.1.

45. U.S. v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (holding that an agreement between a Canadian corporation and European aluminum manufacturers violated section 1 of the Sherman Act for its intended and actual effect on U.S. commerce). *See also* 15 U.S.C.A. § 1-7 (2004).

46. Aluminum Co. of Am., 148 F.2d at 444.

United Fruit Co., that jurisdiction is permissible only where anticompetitive conduct touches U.S. territory.[47]

The initial reaction of U.S. trading partners to increased international cartel prosecutions was to resist such extraterritorial prosecution.[48] For example, "European legislators have reacted angrily to perceived U.S. extraterritorial antitrust prosecutions and have adopted "blocking" legislation in order to protect their nationals from litigation in the United States."[49] Further, "Japan argued that these prosecutions violated international law" and infringed on Japan's sovereignty.[50] However, these objections dissipated as Europeans realized that these international cartels also harmed their consumers.[51] "It was also recognized that international cartels operating in Europe often organized their output allocation by dividing markets along geographic lines."[52]

Lately, there are a surprising number of firms that have, in recent years, reached across national, linguistic, and cultural divides to cooperate with their competitors in the interest of higher profits. In the meantime, the trend toward more forceful prosecution of international cartels extends well beyond the United States and the European Union. For example, Japan's Fair Trade Commission ("FTC"), "one of the oldest and largest competition law agencies in the world," eliminated its cartel exemptions, especially in traditional industrial and distribution sectors.[53] Similarly, in 1999, South Korea passed the Omnibus Cartel Repeal Act ("Cartel Act"), revising around twenty regulations that impeded market competition.[54] The passage of this legislation indicated that South Korea formally began to exercise its competition advocacy role. Three years later, South Korea became the first developing country to fine members of an international cartel when it issued $8.5 million in fines against the

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47. Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (holding that the Supreme Court did not have jurisdiction over acts by the Costa Rican government on foreign land).

48. *See Levenstein & Suslow*, *supra* note 31, at 1115.

49. *Id.* at 1115 n.28 (quoting from James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289, 289 n.5, 293–94 (1991)).

50. *Id.* (quoting Steven L. Snell, *Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity*, 33 STAN. J. INT'L L. 215, 217–18 (1997)).

51. *Id.* For example, Case C-89/85, Ahlstrom v. Comm'n, 1988, EUR-Lex (Sept. 27, 1988).

52. *Id.*

53. *See* OECD, REGULATORY REFORM IN JAPAN: THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM 5 (1999).

54. *See* Youngjin Jung & Seung Wha Chang, *Korea's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries*, 26 NW. J. INT'L L. & BUS. 687 (2006).

members of the graphite electrodes cartel.[55] Countries in Asia, Latin America, and Africa have begun revising their antitrust laws and stepping up investigations and prosecutions.[56] "Other countries with no history of international cartel prosecutions, such as Mexico and Brazil, have become active in this area, against lysine, vitamins, and citric acid cartels."[57]

In addition to increased independent enforcement by national antitrust agencies, there has also been an increase in collaborative enforcement across national boundaries. The essential contribution of the International Competition Network ("ICN") was launched in 2001, providing a venue where senior antitrust officials from developed and developing countries work to reach consensus on proposals for procedural and substantive convergence in antitrust enforcement.[58] The ICN's membership has grown to 140 members and hundreds of non-governmental experts, which collectively represent nearly all of the world's jurisdictions with competition laws.[59]

Concerns, however, may arise in the case of export cartels with similar effects. For example, suppose authorities in these importing jurisdictions are unable to cooperate effectively in investigating cartels. In that case, their investigative efforts may not easily yield necessary evidence on the producers' conduct in exporting jurisdictions.[60] Multiple jurisdictions may repeat the same investigative steps, resulting in extra costs for business subject to investigations.[61] Meanwhile, cooperation with the authorities of those jurisdictions may be hampered by the fact that they may not perceive an immediate interest in tackling the cartel if it does not create harmful effects for the national economy.[62] Some countries specifically exempt "export cartels" from competition law, while many others will only investigate cartels if

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55. *See Levenstein & Suslow, supra* note 31, at 1116.

56. *Id.*

57. *Id.*

58. *See* Press Release, U.S. Dep't of Justice, U.S. and Foreign Antitrust Officials Launch International Competition Network (Oct. 25, 2001), https://www.justice.gov/archive/opa/pr/2001/October/01_at_553.htm.

59. *See* Maria Coppola et al., *(Nearly) A Century with the ICN,* COMPETITION POL'Y INT'L (2020).

60. Robert D. Anderson et al., *Competition policy, trade and the global economy: Existing WTO elements, commitments in regional trade agreements, current challenges and issues for reflection* 40 (World Trade Org., Staff Working Paper No. ERSD-2018-12, 2018) [hereinafter Competition Policy, Trade and the Global Economy]. *See also* OECD, CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 46 (2014), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

61. OECD, CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 46 (2014), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

62. *Id.*

there are adverse effects within their jurisdictions. [63] Some international cartels may be beyond the effective reach of the laws in the countries where they have their most pernicious effects.[64] According to the Organization for Economic Co-operation and Development ("OECD") report, most countries in which violations occur may not have access to the evidence necessary to determine the guilt or innocence of the parties involved.[65] Therefore, cartels may at times remain undiscovered due to lack of cooperation. Harmful cartel activity could go unpunished in these importing jurisdictions when enforcing national competition law against such cartels.

Also, the extraterritorial reach of competition law, the "effect doctrine," is a sensitive issue and jurisdictional conflicts may occur. For example, two different countries may assert their own jurisdiction in the same case, leading to potential divergent assessments.[66] In such circumstances, "positive comity" provisions are now included in many bilateral cooperation agreements between countries, whereby competition authorities can request another jurisdiction to address anti-competitive conduct that might best be fixed with an enforcement action in the country that is the recipient of the request.[67] However, as I will illustrated in the following Chapter, international cartels could in theory be carried out either by the State or by State controlled firms. In examining their legitimacy both under WTO treaty obligations and under antitrust laws, there could be opportunities for nations to play one system against the other.

In sum, numerous changes in enforcement activity against international cartels have occurred over the past two decades: the adoption of antitrust policies prohibiting hardcore cartels by countries around the globe, vastly increased enforcement against international cartels by antitrust authorities, increased use of leniency policies, application of extraterritoriality, and a slow but

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63. *Id.*

64. *Id.* ("A striking example . . . [is] provided by the beer market in Africa. In several deals, large beer producers effectively agreed to divide the continent up, with each given a near-monopoly in its own set of countries.").

65. *Id.*

66. *Id.*

67. Under the concept of positive comity, cases involving anti-competitive practices originating in one country but affecting another can be referred to the competition agency of the country where such practices have originated for appropriate action. The OECD Recommendations identify "investigative assistance" as a tool to strengthen enforcement in one jurisdiction with the help of enforcers in other jurisdictions. *See generally* OECD, *supra* note 61, at 13. The bilateral cooperation agreements between countries include a positive comity provision. *See* OECD, COMPETITION CO-OPERATION AND ENFORCEMENT: INVENTORY OF CO-OPERATION AGREEMENTS (2015), https://www.oecd.org/daf/competition/competition-inventory-provisions-positive-comity.pdf.

growing trend toward criminalization of price-fixing. The net effect of these changes is that numerous competition policy agencies now vigorously pursue and successfully prosecute international cartels, levying increasingly large fines. However, even where international cartel activity can be tackled effectively by national competition laws, inefficiencies may occur during the investigation of international cartels and lead to under-enforcement of competition policy and laws. In the absence of well-functioning and institutionalized cooperation mechanisms, multiple jurisdictions may repeat the same investigative steps, resulting in extra costs related to the investigations for business and costs to competition authorities from unnecessary duplication. As a result, harmful cartel activity could go unpunished, consumers would be harmed, and future harmful behavior will not be deterred.

III. TRANSNATIONAL LEGAL PROCESS AND CARTELS

This Part details Transnational Legal Process theory and explores its potential role between antitrust and WTO. Section A lays out Transnational Legal Process theory. Section B examines international cartels and their legitimacy both under WTO treaty obligations and under antitrust laws. Section B also explores How Transnational Legal Process could more fruitfully link the WTO and antitrust system and promote fact-finding into greater coherence. Having described the most basic features of Transnational Legal Process, this Chapter partly confirms that Transnational Legal Process could somewhat fix the potentially worrying issue of cartel cases—the opportunities for nations to play one system (trade) against the other (competition).

A. Transnational Legal Process in Theoretical Context

The theory of Transnational Legal Process, developed primarily by Professor Harold Hongju Koh, focuses on the vertical incorporation of international law into domestic legal systems.[68]

68. Transnational Legal Problems was first captured by Henry Steiner and Detlev Vagts in a casebook that, in turn, grew out of a 1960 casebook on the Law of International Transactions and Relations authored by Milton Katz and then-Professor Kingman Brewster. The theory of Transnational Legal Process came from the concept of Transnational Law—coined by Phillip Jessup in his Storrs Lectures at Yale in 1956 and International Legal Process—developed by Abram Chayes, Tom Ehrlich, and Andreas Lowenfeld, but it was overlooked initially. *See* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV.

This theory emphasizes that nations obey international law not merely because of interest and identity.[69] None of them fully account for the importance of the "transmission belt," that is, the interaction, interpretation, and internalization within Transnational Legal Process as determinants of why nations obey.[70] Transnational Legal Process posits a three-phase process—*interactions* that promote *interpretations* of the law that lead to the *internalization* of international law into domestic law.[71] According to Koh, transnational actors which catalyze this process are not just nation-states, but also multinational entrepreneurs, international organizations, non-governmental organizations ("NGOs"), courts, and individual sponsors, etc.[72] Then, through the work of transnational actors' repeated cycles of "interaction-

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186 (1996) [hereinafter Koh, *Transnational Legal Process*]. Transnational Legal Process theory is established based on the question of: why do nation-states and other transnational actors obey international law, and why do they sometimes disobey it? Koh offered five cumulative explanations to answer the question: "(1) reasons of power and coercion, (2) reasons of self-interest, (3) reasons of liberal theory-both rule legitimacy and political identity, (4) communitarian reasons, and (5) reasons of legal process." *See* Harold Hongju Koh, *Jefferson Memorial Lecture -Transnational Legal Process after September 11th*, 22 BERKELEY J. INT'L L. 337, 338 (2004). Transnational Legal Process also distinguished four kinds of relationships between stated norms and the observed conduct: coincidence, conformity, compliance, and obedience, and argued that Transnational Legal Process aids State obedience to international law. *See* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 627–633 (1998) [hereinafter Koh, *Bringing International Law Home*].

69. *See* Harold H. Koh, *Why Do Nations Obey International Law?* 106. YALE L.J. 2599, 2632-2634 (1997) [hereinafter Koh, *Why Do Nations Obey International Law?*]. The compliance literature has three strands in modern international law: (1) the rationalistic instrumentalist "views international rules as instruments whereby states seek to attain their interests in wealth, power, and the like."; (2) the Kantian liberal vein which divides into two strands—Franck's rule-legitimacy argument and national identity, namely, liberal internationalism; (3) the constructivist stand which has "long argued that states and their interests are socially constructed by 'commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.'"). *Id.*

70. *Id.* at 2651–52 (discussing issues of conventional International Legal Theory: instrumentalist interest theories have shown little explanatory power in areas of human rights, environmental law, debt restructuring, or international commercial transactions, where nonstate actors abound, pursue multiple goals in complex nonzero-sum games, and interact repeatedly within informal regimes; "liberal" identity theory does not answer the question, that is "to what extent does compliance with international law itself help constitute the identity of a state as a law-abiding state, and hence, as a 'liberal' state?"; a constructivist, the international society theorists discount for the importance of process factors that arise).

71. *See* Koh, *Transnational Legal Process*, *supra* note 68, at 183-84 ("Transnational legal process describes the theory and practice of how public and private actors-nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals-interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.").

72. Professor Koh suggested six agents in the Transnational Legal Process: "(1) transnational norm entrepreneurs; (2) governmental norm sponsors; (3) transnational issue networks; (4) interpretive communities and law-declaring fora; (5) bureaucratic compliance procedures; and (6) issue linkages." *See* Koh, *Bringing International Law Home*, *supra* note 68, at 647.

interpretation-internalization," international laws trickle down from the international level and are domesticated into states' internal legal systems.[73] Throughout Transnational Legal Process, state and non-state actors interact in a variety of domestic and international forums to encourage violators to incorporate international law into their internal value sets.[74] As Koh set out: "If most compliance comes from obedience, and most obedience comes from norm internalization, then most norm internalization comes from such *interactions*, which have led to *interpretations* that have led to *internalizations*."[75] Koh refers to the process of "Interaction-Interpretation-Internalization" as an "outside strategy."[76]

The scope of Transnational Legal Process not only applies to treaty rules but also applies to international norms and customary norms.[77] Koh further explored an "inside strategy" based upon Transnational Legal Process, namely, "Engage-Translate-Leverage" to embed and preserve respect for international law within governmental bureaucracies.[78] Specifically, the "inside strategy" seeks to capture the spirit of the law and blends international law within government bureaucracies to gain legitimacy from espousing international law and values to generate a policy that is both effective and in compliance with the existing legal structure.[79] It highlights that states should choose engagement over unilateralism wherever possible, select a persuasive legal translation over denying the applicability of law altogether, and commit to leveraging international law as smart power.[80] The "outside strategy" in conjunction with the "inside strategy" contribute a powerful "default pattern" of national obedience with international law.[81]"Interaction promotes engagement; interpretation generates

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73. Law-declaring fora mean that "transnational actors seek governmental and nongovernmental fora competent to declare both general norms of international law (e.g., treaties) and specific interpretation of those norms in a particular circumstance (e.g., particular interpretations of treaties and customary international law rules)." Law-declaring fora include "treaty regimes; domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; international publicists; and nongovernmental organizations: law-declaring fora that create an 'interpretive community' that is capable of defining, elaborating and testing the definition of particular norms and their violation." *See* Harold Hongju Koh, *How Is International Human Rights Law Enforced*," IND. 74 L. J. 1397, 1410 (1998).

74. *See generally* Koh, *Transnational Legal Process*, *supra* note 68.

75. Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 416 (2017).

76. *Id.* at 416–17.

77. *See* Koh, *Transnational Legal Process*, *supra* note 68, at 184.

78. *See* Koh, *supra* note 75, at 417–19.

79. *Id.*

80. *Id.* at 417–18.

81. *Id.* at 419.

translations; and norm internalization ensures and enables lawful options to be leveraged with other policy tools into broader, more creative, and more durable policies."[82]

In short, it is a process that can be viewed as having three phases: "[o]ne or more transnational actors provokes an *interaction* (or series of interactions) with another, which forces an *interpretation* or enunciation of the global norm applicable to the situation." [83] Transnational actors seek to internalize the new interpretation of the international norm into the other party's internal normative system.[84] Through repeated participation in the process, habitual obedience becomes part of its internal interests and identities. Transnational Legal Process not only promotes internalized compliance but also develops a legal rule which will guide future transnational interaction between the parties. In the Chapter that follows, the background of the vitamin C litigation and related trade and antitrust cases are introduced before applying this theory. The pervasive Transnational Legal Process creates "default patterns" of WTO law-observant behavior for all participants in the process. Those default patterns become routinized and thus difficult to deviate from without sustained effort.[85]

B. The Role of Transnational Legal Process in Examining State-sponsored Export Cartels and International Cartels

As discussed above, most facets of competition law enforcement today have an important international dimension. For example, a large proportion of anti-cartel prosecutions, the most "hardcore" aspect of competition law enforcement, concerns price-fixing and market sharing arrangements that often spill across national borders and, in important instances, span the globe. [86] Left unchecked, these hold the potential to directly undermine the gains from trade. Therefore, in cases involving export cartels, competition policy is often entangled with trade liberalization. Consider the three following scenarios: 1) "[exporting] producers could coordinate to lower prices to gain increased global market share;" 2) "export markets already dominated by [exporting]

82. *Id.*

83. Koh, *Why Do Nations Obey International Law?*, *supra* note 69, at 2646.

84. *Id.*

85. *See* Koh, *supra* note 75 at 416 ("Just as boats sail between riverbanks established by decades of flowing water, and travelers tend to observe established traffic lanes, human and institutional behavior tends to follow default patterns set by internalized norms.").

86. *See infra* Chapter IV.C.1.

producers . . . could [further] coordinate to raise export prices to increase profits;" and 3) "[exporting] producers could agree to divide overseas markets between themselves . . . [to downsize] unnecessary competition."[87]

Obviously, this does not mean that the judicial framework of the DSB will transform private companies into subjects of the WTO.[88] Instead, the WTO will remain a regime that creates rights and obligations only for states. On the one hand, the WTO is a government-to-government organization. It has already handled precedents of state-coordinated economic actions, which is well-positioned to address export restrictions, both by the State and by State-controlled companies.[89] For this class of actions, the subject complainant must obtain proof of the states' trade-restrictive behaviors before the WTO system can intervene. The challenges arises from the fact that the exporting States would likely step in with subtler mechanisms and methods, and its coordination usually does not take on an overt form.[90] Also, the State could step in to assist the formation of such cartels, even without explicit de jure authority. Therefore, the challenge is always evidentiary, not legal.[91]

On the other hand, the same vexing issue is the difficulty for domestic courts in drawing the line between voluntary and compulsory conduct.[92] When cartel cases went to the domestic courts, defendants in such cases have often argued that foreign governments compelled their conduct, invoking comity-based defenses.[93] Thus, domestic courts and agencies face the additional task of understanding foreign laws and legal practices while being

87. *See* Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 295 (2016).

88. See *supra* note 25, at Chapter II.A. (Panel Report, Argentina—Measures Affecting the Export of Bovine Hides and the Import of Finished Leather).

89. *Id. See also* Mark Wu, *supra* note 87, at 295. ("In the *Japan—Semi-conductors* case, a GATT panel held that a government could violate trade law by issuing administrative guidance and fining firms for not notifying the government of their actual practices. This is the case, even if the guidance provided was noncompulsory and simply suggestive. Twelve years later, in the *Argentina—Bovine Hides* case, the WTO further ruled that a government violates WTO law by simply facilitating an industry association's monitoring of exporters' actions if such facilitation leads to the creation of a *de facto* trade restriction.").

90. *See* Mark Wu, *supra* note 87, at 295. (Professor Mark's argument that the distinctive structure of China, Inc. presents the Chinese government with various mechanisms to advantage Chinese firms over their foreign competitors).) Also, one possible mechanism is discussed intensively *infra* Chapter IV. B. (discussing the functions of China's trade associations).

91. *Id.*

92. For a similar argument regarding the judicial challenge with export cartels, see Zhang, *Strategic Comity*, *supra* note 14, at 304–11.

93. *Id.* at 282.

unable to obtain necessary evidence from other jurisdictions.[94] As Professor Eleanor M. Fox and Professor Merit E. Janow stressed: "[U.S.] courts need to develop expertise on how to analyze and evaluate information regarding what is attributable to the state, especially in transition economies."[95]

My study of the synergistic effects in enforcing trade liberalization initiatives and the application of measures to suppress anti-competitive practices or arrangements is trying to answer the following question. Did the State order the cartel within the range of the antitrust foreign sovereign compulsion defense, or did the State adopt a governmental measure ordering the cartel within the meaning of its WTO undertakings? In other words, what if a State were exonerated in the WTO proceeding on the ground that the evidence was too ambiguous to conclude the government itself ordered the export cartels, and if the State's exporting firms were exonerated in the domestic court proceedings on the ground that the government did order the restrictions?[96] What might be done to avert gaming by the litigants?

I observed that Transnational Legal Process has four distinctive features that led me to predict that transnational actors in antitrust regimes involving international cartels will largely prove a positive force for WTO treaty law in constraining state-coordinated export cartels.[97] First, Transnational Legal Process is "nontraditional" in the sense that "it breaks down two traditional dichotomies" [98] between domestic and international law and between public and private law, which have long characterized international legal scholarship. Second, it is "non-statist." [99] Nation-states are not the only transnational actors who make and enforce international laws, but non-state actors must be

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94. *Id.* at 304.

95. Fox & Janow, *supra* note 14, at n.13.

96. *Id.* at 7. "In a recent WTO case, a Panel found the Chinese government responsible for enforcing minimum export prices on a number of raw material exports and held that a coordinated minimum export price constituted a restriction on exportation inconsistent with Article XI.1. Further, with respect to the Chinese measures at issue, the Panel found that the government required enterprises to export at set or coordinated export prices or face penalties and that this requirement constituted a 'restriction on exportation or sale for export of any product' . . . . However, the Appellate Body found these aspects of the Panel's findings to be moot and of no legal effect because, in essence, the complainant had failed to provide the legal basis for its complaint, i.e., to provide with sufficient clarity the basis on which the Panel and China could determine what problems were alleged to have been caused by what governmental measures." *See id.* at 6 n.7 (quoting Panel Report, *China – Measures Related to the Exportation of Various Raw Materials,* ¶ 7.1103, WTO Doc. WT/DS394/R (adopted July 5, 2011)). *See also* Appellate Body Report, *China–Measures Related to the Exportation of Various Raw Materials,* ¶¶ 226–35, 362–63, WTO Doc. WT/DS394/AB/R (adopted Jan. 30, 2012).

97. Koh, *Transnational Legal Process*, *supra* note 68, at 184.

98. *Id.*

99. *Id.*

included.[100] Third, it is "dynamic," that is, transnational law transforms from private to public, from domestic to international and back down again.[101] Fourth, it is "normative."[102] Transnational Legal Process not only creates rules of law, but also creates strategies for transnational actors to interpret, internalize, and enforce international law.[103] Together, this theory breaks down many of the barriers that have sometimes limited international legal scholarship, while also attempting to answer the question "why nations obey" international law.[104]

The appropriate perspective when dealing with cartel cases is to understand the potential ways transnational actors engage in antitrust regimes, which might strengthen transnational actors' engagement in the WTO system. First, competition law is domestic, which generally targets private conduct; WTO law is international, which targets state conduct.[105] Yet the effect at issue cannot be neatly characterized as domestic or international, or as public or private.[106] Second, nation-states are not the only key actors. Non-state actors, such as private firms between the countries, also play a crucial role as potential plaintiffs and potential defendants under the dispute.[107] Third, it is dynamic by beginning with the claims of private parties against private cartel conduct.[108] Involved transnational actors transform those claims to an international level by one governmental party against another.[109] WTO law, in the end, is internalized into the domestic (Chinese) legal system.[110]

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See* Koh, *Why Do Nations Obey International Law?*, *supra* note 69, at 2645-58 (discussing obedience derives from a process of interaction, leading to an interpretation of international law norms and ultimately to internalizing those norms).

105. *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 3 (1997) (discussing business is more and more global, and "[] patchwork quilts of national rules have become [] an annoyance to international business.").

106. *Id.*

107. *See* Anu Bradford, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 207, 208 (2003). (assessing three forms of global governance in the antitrust realm: intergovernmental, transgovernmental, and transnational models. In the intergovernmental model, states as key actors cooperate and bargain within international regimes. In the transgovernmental model, lower-level government officials as key actors interact with one another. In this context, the focus is on the substate level, with an emphasis on cooperation among national antitrust agencies. In the transnational model, global nongovernmental organizations and other nonstate actors play important roles in the construction of an international antitrust regime).

108. *See* Fox, *supra* note 105, at 3 ("An emerging international consensus supports the need for, and legitimacy of, an effects doctrine, at least where a cartel is purely private and harm to buyers in the regulating nation is direct.").

109. For example, *infra* Chapter IV.C.1.a., the vitamin C case (The availability of various state-related defenses significantly limits antitrust enforcement).

110. *Id.*

Fourth and finally, normative transnational actors engage in the competition system to bring other transnational actors to play by the rules of competition (not to cartelize) gradually.[111]

As I illustrate in the next Chapter, my research certainly bears out the observation that China's economic structure involves a complex web of overlapping networks and relationships—some formal and others informal—between the state and private enterprises, through trade associations. There is no international law of competition, but there is one principle of antitrust law that can be found in all national antitrust regimes—no cartels. Therefore, active transnational actors are in a synergistic relationship where trade and competition meet. With full respect for confidentiality requirements, transnational actors in each system should have access to the relevant testimony and filings in the other system, and access to the findings of fact. Further, transnational actors should be aware to use the testimony, findings, and documents as they see appropriate, not as binding, but for what they are worth, consistent with the rules of evidence and due process.[112]

IV. CASE STUDY: CARTELS IN CHINA'S ECONOMIC STRUCTURE

The U.S. initially viewed China's rapid growth and integration into the global economy with optimism.[113] The hope was that when working within the international trade system, China would come to see its self-interest and develop a more law-abiding identity.[114]

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111. *See generally* Bradford, *Assessing Theories of Global Governance, supra* note 107; Raustiala, *The Architecture of International Cooperation*, *supra* note 18.

112. *See* Wang, *supra* note 14, at 1138–40.

113. According to the Jackson-Vanik amendment, this 1975 provision intended to affect U.S. trade relations with countries with non-market economies that restrict freedom of emigration and human rights. 19 U.S.C. § 2432. The US President is required to conduct an annual review of China's most-favored-nation (M.F.N.) status and make a formal determination, based on the statute. *See id.* In May 1994, President Clinton announced that he was decoupling human rights from trade policy and renewing M.F.N. trading status for China. This political decision was issued because President Clinton believed that advances in China's human rights were far more likely under improved relations and when they were not under pressure on M.F.N. review. The decoupling of trade and human rights meant a change in the US government's China policy. Economic and trade relations have become the central axis in U.S.-China relations. The U.S.-China trade agreement reached in November 1999 paved the way for China's entry into the WTO. In 2000, Congress considered and passed a bill to grant permanent normal trade relations (N.T.R.) to China. Shortly thereafter, the United States supported China's entry into the WTO. *But see* U.S. TRADE REPRESENTATIVE, 2018 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE (2019).

114. *See* Robert Zoellick, Deputy Secretary of State, keynote address at the National Committee on US-China Relations (Sept. 21, 2005) ("Tonight I have suggested that the U.S. response should be to help foster constructive action by transforming our thirty-year policy of integration: We now need to encourage China to become a responsible stakeholder in the international system. As a responsible stakeholder, China would be more than just a

As a result, China would come to internalize international law into its internal value set.[115] In 2001, the US enmeshed China into the WTO framework, in which 164 members would engage China diplomatically with the message: if China opens its market, the WTO system will give China, in return, involvement in the international community and the expansion of cultural and economic links.[116] According to Bill Clinton, China's WTO access was "the most significant opportunity . . . to create positive change in China since the 1970's."[117]

However, deeper interaction into the world economy does not necessarily enhance more profound convergence. China has been either non-compliant or extremely slow to obey the WTO law since the WTO accession.[118] This Chapter discusses the intertwined nature of private enterprises and the Chinese government, which exacerbated the uncertainty surrounding the identity of China's trade associations between WTO disputes and antitrust litigations and generated parallel forums when dealing with the cartel cases.

A. The Hybrid Nature of China's Economic Structure and the Establishment of Trade Associations

China's economy has evolved from its socialist past. Conventional Chinese economic reforms began in 1978 when the Third Plenum of the 11th Party Congress announced that planning and markets could be compatible for the first time.[119]

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member – it would work with us to sustain the international system that has enabled its success.").

115. *Id.*

116. *Id.*

117. William J. Clinton, Remarks at the Paul H. Nitze School of Advanced International Studies (Mar. 8, 2000), *in* 1 PUB. PAPERS 404, 404 (2000). President Clinton said, "The WTO agreement will move China in the right direction. It will advance the goals America has worked for in China for the past three decades. And of course, it will advance our own economic interests. Economically, this agreement is the equivalent of a one-way street. It requires China to open its markets—with a fifth of the world's population, potentially the biggest markets in the world—to both our products and services in unprecedented new ways. All we do is to agree to maintain the present access which China enjoys." *Id.* at 405.

118. *See generally* Mark Wu, *China's Export Restrictions and the Limits of WTO Law*, 16 WORLD TRADE REV. 673 (2017) (discussing China is able to breach its WTO obligations temporarily with minimal consequence, in order to foster the development of strategic emerging industries downstream).

119. ANJALI KUMAR, CHINA: INTERNAL MARKET DEVELOPMENT AND REGULATION 1, 1 (The World Bank 1994) ("The 13th Congress of 1987 adopted the goal of letting the state regulate the market, and letting the market guide the enterprises."). The November 1993 decision is a historical document because it represents a strategic shift in the course of China's reforms. For the first time and in essence, the government decided to abolish the planning system altogether and set the goal of reform to establish a modern market system. *See* China Today, *The 13th National Congress of The communist Party of China (CPC)*, http://www.chinatoday.com/org/cpc/cpc_13th_congress_standing_polibureau.htm.

Since then, China started the "responsibility system," by which households held ownership of their product for the first time.[120] In 1979, diplomatic relations between the US and China normalized.[121] In 1980, Southern city Shenzhen was made the first "special economic zone" to experiment with more flexible market policies.[122] China opened its primary stock market, the Shanghai Stock Exchange, in Shanghai in 1990.[123] In 1992, Deng Xiaoping's southern tours hastened economic reforms and sparked a fresh wave of market growth.[124] The landmark event was the historic decision of 1993—The "Decision on Issues Concerning the Establishment of a Socialist Market Economic Structure" adopted at the Third Plenum of the 14th CPC.[125] This pointed out the goal to speed up the process of establishing a socialist market economic system. In 1996, the government allowed Yuan (the Chinese base unit of currency) to be convertible to the current account, enabling the free flow of money for imports and exports.[126] In 2001, China joined the World Trade Organization, which directly led to China becoming the third-largest exporter and importer in world merchandise trade in 2004.[127] In 2006, China's foreign currency reserves increased to one trillion US dollars.[128] "China has thus surpassed Japan to become the world's largest holder of foreign

120. *See generally* Justin Yifu Lin, *The Household Responsibility System in China's Agricultural Reform: A Theoretical and Empirical Study,* 36 ECON. DEV. & CULTURAL CHANGE S199 (1988) (noting the Household Responsibility System reallocated collective agricultural land to individual rural households, giving them relative autonomy over land-use decisions and crop selection).

121. *See generally* Brian Hilton, *"Maximum Flexibility for Peaceful Change": Jimmy Carter, Taiwan, and the Recognition of the People's Republic of China*, 33 Diplomatic History 595–613 (2009).

122. *See* Douglas Zhihua Zeng, *Global Experiences of Special Economic Zones with Focus on China and Africa*: Policy Insights, 7 J. INT. COM., ECON. & POL'Y (2016).

123. *See* China Internet Information Center, *1990: The establishment of stock exchanges*, http://www.china.org.cn/features/60years/2009-09/16/content_18535248.htm.

124. *See generally* EZRA F. VOGEL, DENG XIAOPING AND THE TRANSFORMATION OF CHINA (Belknap Press of Harvard University Press 2011) (stating that Deng Xiaoping launched his southern tour and called for "to get rich is glorious," inspired a wave of entrepreneurialism that still grips China today).

125. YINGYI QIAN & JINGLIAN WU, *China's Transition to a Market Economy: How Far Across the River?, in* HOW FAR ACROSS THE RIVER?: CHINESE POLICY REFORM AT THE MILLENNIUM 1, 31 (Nicholas C. Hope et al. eds., 2003) [hereinafter *China's Transition to a Market Economy*]. *See generally id.* (evaluating China's economic transition progress made during 1994-98 based upon three necessary tasks: transforming state-owned enterprises; promoting private enterprises; and establishing the rule of law, to establish a free and competitive enterprise system by changing the government-business relationship to an arm's-length type).

126. *See* Barry Naughton, *China's Emergence and Prospects as a Trading Nation*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 273, 297 (1996).

127. *See* Press Release, World Trade Org., Developing countries' goods trade share surges to 50-year peak (April 14, 2005) (on file with author).

128. *See China's foreign reserves—Who wants to be a trillionaire?*, THE ECONOMIST, (Oct. 26, 2006), https://www.economist.com/finance-and-economics/2006/10/26/who-wants-to-be-a-trillionaire.

exchange."[129] Although the economic reforms have transformed the country from centrally planned to market-oriented, China's economic liberalization is by no means complete.

Between 1997 and 2003, China began implementing a series of regulatory reforms that involved privatizing former government entities to establish independent regulators.[130] As Premier Zhu Rongji expressed, the government should focus only on supporting critical sectors and that even in those sectors, it should subject State-owned Enterprises ("SOEs") to market discipline.[131] While the government "holds vast control levers," in the meantime, "it allows market forces to play out in huge swaths of the economy."[132] The implicit recognition of such arrangements is complicated by the establishment of trade associations and their roles in China.

Indeed, the government had a goal to gradually reduce its role in "competitive industries" "that the government believes should be opened up to market competition," "through numerous rounds of government restructuring" programs. [133] "Those industries . . . generally include[d] . . . coal, machinery, metallurgy, chemical, light, textile, building materials, and nonferrous metal industries." [134] "In the massive restructuring of the central government agencies . . . [around] 1998, the overseeing ministries for those competitive industries were downgraded to [nine] 'national bureaus' under the State Economic and Trade Commission" ("SETC"). [135] Hereafter, the formal regulatory functions of the central government ministries of those industries were abolished in 2001 when the government revoked those "national bureaus" from SETC. [136] However, many of "the

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129. *See* Yongnian Zheng and Jingtao Yi, *China's Rapid Accumulation of Foreign Exchange Reserves and Its Policy Implications,* 15 CHINA & WORLD ECONOMY 14–25 (2007).

130. *See* Jane Lee, *Vitamin "C" is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense*, 50 VA. J. INT'L L. 757, 773–74 (2010).

131. *See generally* ZHU RONGJI, ZHU RONGJI ON THE RECORD: THE ROAD TO REFORM 1991–1997 (June Y. Mei trans., 2013).

132. Wu, *supra* note 87, at 282.

133. Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 667 (2010) [hereinafter Zheng, *Transplanting Antitrust in China*]. In fact, the government "responded by using different strategies for different industries." *Id.* at 667 (discussing China's path of transition toward a market economy and its impact on China's Antitrust law). For a detailed discussion of China's governmental reforms from 1978 to 2008, see OECD, OECD REVIEWS OF REGULATORY REFORM: CHINA: DEFINING THE BOUNDARY BETWEEN THE MARKET AND THE STATE, 92-95 (2009).

134. *Id.* at 667.

135. *Id.* at n.108.

136. *Id.* The revoked "national bureaus," included the "National Domestic Trade Bureau, National Coal Industry Bureau, National Machinery Industry Bureau, National Metallurgical Industry Bureau, National Petroleum and Chemical Industry Bureau, National Light Industry Bureau, National Textile Industry Bureau, National Building Materials Industry Bureau, National Nonferrous Metals Industry Bureau." *See* Dangshi de

industrial associations that were converted from former national bureaus under the . . . [SETC] are now officially affiliated with" the Administration Commission of the State Council ("SASAC").[137] What sets SASAC apart is that it controlled more than a hundred SOEs at the central government level.[138] Each government level has its own SASAC, "reporting up to the central government's SASAC, and these local agencies serve as the controlling shareholders of the critical SOEs in their regions."[139] Therefore, the SASAC is known to be "one of the most powerful economic actors in the world today," controlling "more than half of the Chinese companies on the Fortune Global 500 list of the world's largest corporations."[140]

Further, a number of industrial associations, which the U.S. refers to as trade associations, in the export and import sectors are affiliated with the Ministry of Commerce ("Ministry").[141] Notably, CCCMHPIE and CCCMC—both discussed extensively in this Article and confirmed by US courts—are associations that sometimes carry out mandates for the Chinese government by functioning as intermediaries between the government and the wholly private sector.[142] They are very active in formulating and implementing government policies.[143] For example, China remains at the top of the list of countries subject to anti-dumping investigations by WTO. The governmental functions of the

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Jintian [Today in Party History (Feb. 19)], State Council of the People's Republic of China (Sept. 6, 2007), http://www.gov.cn/ztzl/17da/content_739690.htm.

137. *Id.* at 669 n.115. Those associations include: China Petroleum and Chemical Industry Federation, China Iron & Steel Association, China Light Industry Federation, China Machinery Industry Federation, China Textile Industry Association, China Federation of Logistics & Purchasing, China Coal Industry Association, and China Non-Ferrous Metals Industry Association. *Id.*

138. Wu, *supra* note 87 at 271. The SASAC is one of the elements that render China's current economic structure distinct. *Id.* at 270. "SASAC today controls more than half of the Chinese companies on the Fortune Global 500 list of the world's largest corporations. Examples include China Mobile, Sinochem, Dongfeng Motors, and Baosteel . . . . By having them fight with each other for market share, the state ensures that SOEs are subject to market forces and stay competitive." *Id.* at 271.

139. *Id.* at 272.

140. *Id.* at 271.

141. *See* Zheng, *Transplanting Antitrust in China*, *supra* note 133, n.115.

142. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (*In re* Vitamin C Antitrust Litig.), 837 F.3d 175, 181 (2d Cir. 2016) ("According to the Ministry, the Chamber was an instrumentality of the State that was required to implement the Ministry's administrative rules and regulations with respect to the vitamin C trade."); *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 526 (E.D.N.Y. 2011) ("The Chambers were given both governmental functions, which had previously been performed by the Ministry, and private functions. The governmental functions included, inter alia, responding to foreign anti-dumping charges and industry 'coordination.' The private functions of the Chambers included organizing trade fairs, conducting market research and 'mediating' trade disputes.").

143. *Id.*

Chambers were part of China's "important national policy which requires Chinese exporting companies to 'unite and act in unison in foreign trade.'"[144]

In this way, China's economy mixes both market-oriented and command-oriented features and has been termed by the Chinese government as a "socialist market economy."[145] While the government is not the dominant shareholder, it does not mean that the government does not have a role. Many trade associations in China are essentially quasi-governmental entities that represent and coordinate various interests in those industries.[146] As Professor Wentong Zheng observed, "they are staffed by former government officials from the industries' former supervising ministries, and have the same organizational structures and functions as the defunct supervising ministries."[147]

Indeed, state-coordinated actions across private enterprises to the detriment of foreign competitors arise constantly in China's economic structure. It provides ample opportunities for export actions, which could be carried out either by the State or by State-coordinated private bodies. This structure is also difficult to distinguish between a public body and private body, thereby making it unclear whether there is a rule or regulation issued by a public entity that is subject to WTO rules. As Professor Mark Wu indicates, the current international trade regime is not structured to account for the unique issues of China's economic structure.[148]

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144. *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 526 (E.D.N.Y. 2011) (defendants' Chinese law expert, Professor Shen Sibao).

145. The Ministry's amicus brief describes the Chamber as follows: "To meet the need of building the socialist market economy and deepening the reform of foreign economic and trade management system, the China Chamber of Commerce of Medicines & Health Products Importers & Exporters was established in May 1989 in an effort to boost the sound development of foreign trade in medicinal products." *See* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (*In re* Vitamin C Antitrust Litig.), 837 F.3d 175, 180 (2d Cir. 2016).

146. Another example is that the national and local lawyers' associations in China are under the guidance of the Ministry of Justice of the People's Republic of China and its bureau. The major control mechanism is to recruit the chairmen of lawyers' associations from among existing or former leading officials of the justice bureau. *See* Carlos Wing-Hung Lo & Ed Snape, *Lawyers in the People's Republic of China: A Study of Commitment and Professionalization*, 53 AM. J. COMP. L. 433, 444 (2005).

147. *See* Zheng, *Transplanting Antitrust in China*, *supra* note 133, at 669.

148. *See* Wu, *supra* note 87, at 270–84. Professor Mark Wu suggests six characteristics are essential for understanding the Chinese economic structure and refers to this unique economic structure as "China, Inc." These include the state's role as a corporate holding company; the state's control over financial institutions; the state's control over planning and input; distinct Chinese corporate groups and affiliated networks; the Communist Party's involvement in economic affairs; and the intertwined nature of private enterprises and the Party-state. His view is that the six characteristics generally explain how underlying the Chinese economy is a complex web of connections between business, the State, and the ruling Party. Wu concluded:

Contradictions pervade the Chinese economy today. While one might think of the economy as state-dominated, private enterprises drive much of China's dynamic growth . . . economic intervention does not always flow through the state . . . the Chinese Communist Party . . .

The WTO system works but only up to a point.[149] To many outsiders, China's economic transition is perplexing because it may not be formally memorialized in China's statutory law, but instead in informal customary practices familiar to regular participants in the Chinese market. Also, outsiders believe a myth regarding Chinese economic reform; that private shareholders now control many of China's leading global multinational companies. They do not.

B. The Impetus for Export Cartels: China's Preemptive Measure Against Antidumping Investigation

One of the main goals of antitrust is to maintain a competitive market through which socio-economic resources are allocated among competing uses. Companies compete independently with each other to make production and sales decisions, so competition rises, prices decrease, and volumes of production reach socially optimal levels. However, suppose competitors could enforce an agreement among themselves—i.e., form a "cartel"—regarding certain areas of competition such as price. The resulting constraints on competition will disrupt market discipline and cause losses to consumer and social welfare.

Since cartels are considered a threat to the operation of market mechanisms that are essential to resource allocation, antitrust law in most countries is particularly harsh on cartels, subjecting many of them to a per se illegality standard. Cartels, however, have not always been treated unanimously under antitrust law. Despite the generally rigorous antitrust enforcement against cartels in Western countries, cartels have historically been tolerated and even actively encouraged by governments during times of depressed business conditions as a means of dealing with overcapacity and falling prices.

Professor Andrew Guzman argued States attempt to "externalize the costs and internalize the benefits of the exercise

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plays an active role in the management of state-owned enterprises . . . The economy embraces market-oriented dynamics, yet it is not strictly a free-market capitalist system. Networked hierarchies and embedded relationships exist among businesses, but not necessarily in the way they operate elsewhere in the world.

Id. at 264–265. Those characteristics also mean that China's economic structure is organized differently from other WTO members.

149. Some scholars noted that China is not the first country with an economic structure "premised on state control and coordination between the government and business on economic and trade priorities." All these elements were, and continue to be, present in countries like South Korea and Japan. What makes China's structure different from others is its sheer size. *See* MELTZER, JOSHUA P AND SHENAI, NEENA, THE US-CHINA ECONOMIC RELATIONSHIP: A COMPREHENSIVE APPROACH 13 (Feb. 22, 2019).

of market power across borders" to maximize their national interest.[150] States have the incentive to either under-enforce or over-enforce their antitrust laws depending on trade flows.[151] That is, if a State is a net importer, it has a motivation to employ stricter antitrust standards than what would be globally optimal as it fails to internalize costs generated by foreign producers; if a state is a net exporter, it has a motivation to adopt relatively permissive antitrust laws rather than in a closed economy, externalizing costs to foreign consumers.[152] As Professor Guzman concluded, each country adjusts its antitrust laws strategically, based upon its trade flows. Therefore, domestic antitrust regimes are characterized by a statutory bias that manifests itself in the form of export cartels and industry exemptions, and enforcement bias toward domestic corporations through selective enforcement.[153]

In fact, in many—if not most—of China's industries, structural problems caused by the government's distortive roles in both capacity formation and capacity elimination have led to chronic excess capacity.[154] The tremendous competitive pressures resulting from excess capacity in those industries have, in turn, largely tied China's hands in formulating its cartel policy.[155] Beginning in the early 1980s, China gradually moved away from price controls to expand the role of markets in determining prices. Private firms were allowed to sell their product that was more than government-set targets at market prices.[156] Progressive price decontrols in the subsequent years gradually reduced the gaps between state-controlled and market prices. By 1985, retail goods and agricultural goods subject to fixed prices had fallen to 47 percent and 37 percent, compared with the 97 percent and 93 percent of each in 1987.[157] By 1991, over 90 percent of prices were market-set.[158]

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150. *See* Andrew Guzman, *The Case for International Antitrust*, 22 Berkeley J. Int'l L. 355, 357 (2004).

151. *Id.* at 108–09.

152. *Id.*

153. *Id.; see* also Bradford, *supra* note 1, at 387.

154. *See* Zheng, *Transplanting Antitrust in China*, *supra* note 133, at 675.

155. *Id.*

156. *See* ANJALI KUMAR, CHINA: INTERNAL MARKET DEVELOPMENT AND REGULATION 1, at Executive Summary (The World Bank 1994) (The development of the internal market was fostered by a series of mechanisms, including: "dual track" pricing; the allocation of goods moved progressively out of the mandatory plan; the distribution system gradually expanded; a sophisticated form of commodities markets; and a major program of legislative change that established a framework for a market economy).

157. *Id.* at 31.

158. *Id.* For further discussion about China's price liberalization, see also Zheng, *Transplanting Antitrust in China*, *supra* note 133, at 652–54.

During the transaction, many of China's industries had suffered excess capacity during the transition period.[159] In the mid-1990s, of the ninety-four major categories of industrial products in China, there was excess capacity in sixty-one, and the capacity utilization rate was below fifty percent in thirty-five of them.[160] As expected, excess capacity led to excessive competition.[161] Fears about excessive competition also extended to China's export sector, which sparked accusations that Chinese exporting companies were dumping their goods into foreign markets.[162] To take measures to rein in excessive competition, therefore, the Chinese government is utilizing cartels "as a means of reinstating some sort of price control that was abolished in the price reforms."[163]

Most of these cartels involved what is called "industrial self-discipline."[164] This means the major companies consulted with each other "to reach consensus on coordinated activities for the purpose of reaching the objectives . . . set forth under Chinese laws and policies."[165] As quasi-governmental entities, of course, trade associations were charged to "coordinate action within a given

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159. *Id.* at 677. Zheng discussed structural distortions behind China's excess capacity: There are several reasons for China's chronic excess capacity. The primary culprit, as it is often argued, is China's abnormally high savings and investment rates . . . . However, China's high investment rate is only part of the explanation why excess capacity is so widespread and persistent in China. When it comes to excess capacity, what matters is not just the total amount of investment, but how investment is made. In China, the investment-making process is predominantly a government-driven one . . . . Until very recently, all fixed-asset investment, even investment by private enterprises, was subject to government-imposed quotas and required approvals by the government . . . . In addition to having the authority to approve investment, the central and local governments are the largest investors themselves. Governments at various levels in China make investment either in their own capacity or through SOEs directly under their supervision, with the line between the two often blurred. In 2006, the most recent year for which statistics on investment by ownership type are available, investment made by state entities (including SOEs and entities that are majority-controlled by the state) accounted for about forty-eight percent of all investment in urban areas.
Id. at 677-79.

160. *Id.*

161. *Id.* Of course, the vitamin C industry also suffered extensive excessive competition.

162. *See* YANLIN SUN & JOHN WHALLEY, CHINA'S ANTI-DUMPING PROBLEMS AND MITIGATION THROUGH REGIONAL TRADE AGREEMENTS 2 tbl.1 (2015) (During 1995 to 2013, China is the largest recipient of both anti-dumping initiations and anti-dumping measures—the anti-dumping initiations against China contributed to 21.89 percent of total anti-dumping filings worldwide, the anti-dumping measures against China account for 24.78 percent of total measures worldwide).

163. *Id.* at 687.

164. *See* Zheng, *Transplanting Antitrust in China*, *supra* note 133, at 688.

165. Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 249 (2008) (discussing fundamental issues in China's economy that give rise to the challenges facing China's antitrust policymakers in enacting the new antitrust law, for instance, the role of state-owned enterprises, perceived excessive competition in China's economy, mergers and acquisitions by foreign companies, the treatment of administrative monopolies, and the enforcement of the antitrust law, etc.); see also the Ministry's statements concerning "self-discipline." *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 532 (E.D.N.Y. 2011).

sector and/or region and to assist with trade disputes."[166] Many of them also have played important roles in the adoption of the "industrial self-discipline."[167]

In the vitamin C industry, due to intense competition and challenges from the international market, in 1997, the Chamber ("CCCMHPIE") created a vitamin C Subcommittee ("the Subcommittee") to strictly control vitamin C products via an "export quota license."[168] Under this regime, only companies that were members of the Subcommittee and therefore also qualified for an "export quota license" were allowed to export vitamin C.[169] To join the WTO system, China undertook extensive market-opening accession commitments.[170] These commitments included China's undertaking to allow the market to set prices "in every sector" except in areas specified.[171] Vitamin C was not among the reserved items. The Chamber thus abandoned the "export quota license" regime shortly after the WTO accession, [172] and subsequently implemented the "Price Verification and Chop" ("PVC") system.[173] In 2003, the government imposed a new system of mandatory "advance approval" for the export of thirty-six goods.[174] Vitamin C

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166. *See* Wu, *supra* note 87, at 283 (quoting Henry Gao, *Public-private Partnership*, 48 J. WORLD TRADE 983, 987–89, 997–1001 (2014)).

167. Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 527 (E.D.N.Y. 2011) (discussing Chinese government imposed new administrative controls, which involved the establishment of the various China Chambers of Commerce for Import and Export ("Chambers"), as part of new administrative controls to improve aggressive forms of competition at the mid-1980s). *See also* Zheng, *Transplanting Antitrust in China*, *supra* note 133, at 688 ("The SETC opinion required industrial associations to determine, in consultation with the national bureaus, 'industrial self-discipline prices' based on social average costs of production.") (quoting State Economic and Trade Commission, *Guanyu Bufen Gongye Chanpin Shixing Hangye Zili Jia De Yijian* [*Opinion on the Implementation of Industrial Self-Discipline Price for Certain Industrial Products*], art. 2(1)-(2), Aug. 17, 1998).

168. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 837 F.3d 175, 181 (2d Cir. 2016). *See also* Bruce M. Owen et al., *supra* note 165, at 249, n.53 ("In the face of widespread claims of excessive competition, some of China's policy makers even questioned whether China needs to have an antitrust law when the competition in most sectors of China's economy is already excessive." Also, "[t]he antitrust problems associated with those competition-limiting policies were perhaps first brought to the attention of the Chinese policy makers by three antitrust lawsuits filed in the United States in 2005 and 2006 alleging price fixing by Chinese exporters of Vitamin C, magnesite, and bauxite.").

169. *Id.*

170. *See* The White house, *Summary of U.S.-China Bilateral WTO Agreement* (Nov. 16, 1999), https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-006.html.

171. *See* Report, Working Party on the Accession of China, ¶ 50, WTO Doc. WT/ACC/CHN/49 (Nov. 10, 2001).

172. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 837 F.3d 175, 181 (2d Cir. 2016).

173. *Id.*

174. *See* MOFCOM and Customs Authority Circular 36 of 2003, Advance Approval Requirement for the Export of Thirty-Six Goods (Nov. 29, 2003), http://www.customs.gov.cn/customs/302249/302266/302267/356678/index.html.

is one of such goods, "whereby trade associations must sign off on export contracts before goods can be released for export."[175] Under the PVC system, vitamin C exporters were required to submit documentation to the Chamber indicating both the amount and price of vitamin C they intended to export. The Chamber verified both the amount and price before putting a "chop" that permitted the exports to be shipped out.[176]

In sum, China's economic problem is not that there is too little competition, but that there is too much. As a preemptive measure against anti-dumping investigations, China's policymakers see a positive role in its trade associations regulating market order. Policies like "industrial self-discipline" and "advance approval" imposed restrictions on competition and functioned as price cartels reflecting the government's concerns with perceived excessive competition problems. Equally importantly, this government-agencies-turned-trade associations model demonstrated that "the boundary between state and private ownership of enterprise is often blurred in contemporary China."[177] It also provides ample opportunity for state-led coordination of international trade action. When examining their legitimacy, both under WTO treaty obligations and under domestic antitrust law, related fact-finding are usually uncertain and difficult to discern.[178] States could in theory engage in the opportunities to play one system against the other.

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175. *Id. See also* Zheng, *Transplanting Antitrust in China*, *supra* note 14, n.127.

176. *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d, at 529.

177. Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 666, 671 (2015). Another example of the type of quasi-governmental entity is China's large-size SOEs. In 1997, the government promoted an experimental reform of one hundred large state-owned enterprises. The original purpose was to corporatize these SOEs by introducing several investors in each of them, but it ended up with more than eighty of them remaining solely state-owned. Meanwhile, many corporatized SOEs, including those already listed on China's two stock exchanges, suffered from the conflict between the so-called "three old committees" (the Party committee, the employee representative committee, and the workers union) and "three new committees" (meetings of the shareholders, meetings of the board of directors, and meetings of the supervisory committee). In some cases, the conflict between the Party secretary and the top manager (such as Board Chairman) was so severe that it interfered with the enterprise's normal operation. In response, some enterprises opted to place the same person in both the positions of Party Secretary and Board Chairman. To address this problem, starting in 1998, hundreds of external "special inspectors" were sent by the central government to large SOEs to supervise their operation. However, these inspectors were mostly retired high-level bureaucrats who did not know about business operations and financial accounting. Not surprisingly, they could not play any constructive role in addressing the corporate governance problem. After abolishing "special inspectors," the government came up with another solution—setting up "Large Enterprise Working Committees" inside the Party's Central Committee responsible for making appointments of top managers in large SOEs directly (in collaboration with the Ministry of Personnel). Ironically, after so many years of reform of large SOEs, China went full circle and almost returned to where it had started. *See China's Transition to a Market Economy*, *supra* note 125, at 16.

178. For a similar argument, see Zhang, *Strategic Comity*, *supra* note 14, at 304–309.

C. Transnational Legal Process in Action

In this Chapter, I discuss related antitrust and WTO proceedings. I utilize a Transnational Legal Process lens to examine how U.S. courts involved in this "domestic-international" parallel forum have successfully stimulated the U.S. executive branch in the process of interaction-interpretation-internalization. The goal is improving the government's commitment to playing by rules of free trade and private firms' commitment to playing by competition rules. As I illustrate in this Chapter, transnational actors are active in each forum.

1. Domestic Courts as Transnational Actors in Domestic Antitrust Litigations

This Section describes U.S. courts' potential as rule enforcers. My study of U.S. courts as transnational actors in enforcing WTO law and antitrust law is highly relevant to Transnational Judicial Dialogue, developed principally by Professor Melissa A. Waters. Her theory coined the twin concepts of norm export and norm convergence to refer to the features of domestic courts participating in Transnational Judicial Dialogue. [179] Domestic courts serve as norm exporters who participate in the co-constitutive process of international law creation and internalization. [180] It then follows that norm convergence occurs

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179. *See, e.g.*, Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 490–91 (2005) (considering the rules in which domestic court decisions become a part of Transnational Judicial Dialogue) [hereinafter Waters, *Mediating Norms and Identity*]; Melissa A. Waters, *Normativity in the New Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 458 (2007) (discussing courts' emerging roles as transnational actors, the "legitimacy" of norms created through transnational judicial dialogue); Melissa A. Watters, *Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 650–52 (2007) (discussing international human rights norms and practices became increasingly influential for domestic judges led to a diagnosis of a "creeping monism" in many common law countries); *see also* Melissa A. Waters, *Getting Beyond the Crossfire Phenomenon: A Militant Moderate's Take on the Role of Foreign Authority in Constitutional Interpretation*, 77 FORDHAM L. REV. 635, 637 (2008) (emphasizing American judges' growing participation in transnational judicial dialogue of various kinds and arguing an appropriate use of foreign authority in constitutional interpretation).

180. *See* Waters, *Mediating Norms and Identity*, *supra* note 179, at 503–04 ("Norm export occurs when domestic courts and other domestic law-declaring fora articulate or champion a particular domestic norm at the transnational level. The norm is then picked up by other transnational actors, thus being diffused around the world and becoming part of the international legal discourse."). What's more, Professor Waters indicated that in the process of norm export, domestic courts could be able to excise of "soft power." She argued, "[i]f the norm becomes sufficiently embedded in a large number of other domestic or international legal regimes, it becomes the dominant normative standard on a given issue."

when other courts use comparative law, and modify, interpret, and internalize these foreign norms into their domestic legal systems, thus promoting convergence toward a worldwide normative standard of the norms in question.[181] Therefore, the domestic courts participating in Transnational Judicial Dialogue not only establish the norms that become part of the fabric of emerging international society, but they also help ensure that these norms penetrate, are internalized, and become entrenched in foreign legal and cultural processes.[182] Transnational Judicial Dialogue builds the U.S. courts' central theoretical framework in enforcing WTO law and competition policy convergence.

a. The Vitamin C Case

In 2005, a group of U.S. purchasers filed claims against Chinese manufactures of vitamin C, alleging them of unlawfully price-fixing and limiting the number of sales to the U.S., in violation of §1 of the Sherman Act and sections 4 and 16 of the Clayton Act.[183] The Chinese defendants did not deny the allegations but argued their conduct was required by Chinese regulations on export pricing and should not result in liability, invoking the act of state doctrine, foreign sovereign compulsion doctrine, and international comity.[184] To prove the existence of the compulsory requirement of the Chinese law, the Ministry filed an *amicus* brief in 2006 in support of the defendants' motion.[185] In its submission, the Ministry declared that unlike trade associations in the United States, the Chinese government, through an affiliated trade association, CCCMHPIE, directed defendants to coordinate export price floors among themselves.[186] The penalty for non-compliance with the Chamber's mandate is severe. According to the Ministry's brief, the Chamber could provide "warning, open

181. *Id.* at 504.

182. *Id.* at 505.

183. *In re* Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546, 547–48, 554 (E.D.N.Y. 2008). (More precisely, the U.S. purchasers argued that from Dec. 2001 to the time the complaint was filed, the Chinese sellers had colluded with the Chamber—CCCMHPIE to limit the production of vitamin C and increase its prices to create a supply shortage in the international market).

184. *Id.* at 550–51 (The defendants moved to dismiss the claims based upon 1) the act of state doctrine, under which courts should refrain from judging the acts of a foreign state; 2) the foreign sovereign compulsion defense, under which courts should abstain from exercising jurisdiction in cases in which the defendants' conduct is compelled by the government; and 3) the international comity doctrine, under which courts should decline from exercising jurisdiction in cases that might influence the working relationships among nations).

185. *Id.* at 552–54.

186. *Id.* at 552–53.

criticism and even revocation of . . . membership," and may even advise the relevant government department to suspend or cancel the producers' export rights.[187]

The plaintiffs pointed to publicly available records of the Chamber and its Vitamin C Subcommittee.[188] They argued the price agreements were "self-regulated" agreements restricting the prices and quantity of exports voluntarily.[189] In response, The Ministry argued that such documents should not be taken at face value and that "many of the terms appearing in defendants' and the Chamber's documents have meanings in the context of China's government and economic policy that are quite different from their literal translations."[190]

The District Court's decision held that the statements submitted by the Ministry were entitled to "substantial deference," but will not be taken as conclusive evidence of compulsion because "the plain language of the documentary evidence submitted by plaintiffs directly contradicts the Ministry's position."[191] The court then denied the defendants' motion to dismiss.

In 2009, the Ministry filed its second statement with the court, emphasizing that its 2006 *amicus* brief, rather than the past public statements, represented the Ministry's official position.[192] The Ministry appealed to respect for sovereignty and reliance on diplomacy. Meanwhile, the Ministry further argued that the system of self-discipline does not mean complete voluntariness or self-conduct, but instead means a system of agency supervision on

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187. *Id.* at 553.

188. *Id.* at 554.

189. *Id.* (The plaintiffs pointed to the records: "In December 2001, efforts by the Vitamin C Sub-Committee of China Chamber of Commerce of Medicines and Health Products Importers and Exporters, each domestic manufacturers were able to reach a self-regulated agreement successfully, whereby they would voluntarily control the quantity and pace of exports, to achieve the goal of stabilization while raising export prices. Such self-restraint measures, mainly based on 'restricting quantity to safeguard prices, export in a balanced and orderly manner and adjust dynamically' have been completely implemented by each enterprises' own decisions and self-restraint, without any government intervention.").

190. *Id.* at 560.

191. *Id.* at 555, 557 (The documentary evidence including publicly available records of the Chamber and its Vitamin C Subcommittee in support of their position that defendants' price agreements were voluntary, an export in Chinese law, Professor James V. Feinerman, who concluded that based upon a review of the Ministry's brief and its exhibits that defendants' conduct was not compelled by Chinese law. "[T]he authenticity of many of the Ministry's exhibits, on the basis that they do not contain a chop, that they are not governmental laws or regulations, that they are not specific to vitamin C, or that they are mis-translated . . . [T]he Ministry's 1998 approval of a request to establish the Vitamin C Sub-Committee . . . merely 'authorizes the creation of the entity.").

192. *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 532–33 (E.D.N.Y. 2011) (citing the statement of the Ministry of Commerce of the People's Republic of China).

behalf of the Chinese government.[193] The court concluded that the Chinese government merely encouraged the cartel as a policy preference and that the Ministry's conduct did not rise to the level of compelling the vitamin C manufacturers to fix prices.[194] Thus, the Chinese sellers were not forced by the Chinese government or Chinese law to enter into such agreements.[195] In particular, the court emphasized that the Ministry's assertion of compulsion reflected a "carefully crafted and phrased litigation position" that was a "post-hoc" attempt to shield the exporters from liability, rather than a straightforward interpretation of Chinese law during the relevant period in question.[196] Accordingly, the district court entered a judgment in favor of the U.S. purchasers.

The Second Circuit reversed, holding that the District Court erred by denying the Chinese sellers' motion to dismiss the complaint. The court cited the unique and complex nature of the Chinese legal and economic regulatory system and found it reasonable to view the PVC system as a decentralized means by which the Ministry, through the Chamber, regulated the export of vitamin C by deferring to the manufacturers and adopting their agreed-upon price as the minimum export price.[197] The court concluded, when a foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, U.S. courts are "bound to defer" to the foreign government's construction of its law, whenever that construction is "reasonable."[198]

In Transnational Legal Process terms, the legal transition occurs when interaction among transnational actors in various law-declaring forums generates an interpretation of a legal rule that, through prospective internalization into domestic law, guides future interaction between the parties.[199] U.S. courts were part of

193. *Id.* at 533, 535, 567. Specifically, the plaintiffs argued, the trade association's documents, including its public website portrayed a "self-regulated agreement" in which the exporters would "voluntarily control" the price and quantity of exports and take "self-restraint measures." However, according to the Ministry brief, the terms such as exporters' "voluntary self-restraint" and "self-discipline" used in the documents should not be taken at their literal translations but should be placed in the context of China's regulatory system).

194. *Id.* at 525, 550, 552.

195. *Id.* at 545, 552 (The court also stressed even if some compulsion existed, the court emphasized, the Chinese government only compelled exporters to avoid below-cost pricing and foreign anti-dumping charges, not to set specific price levels that were above those necessary to achieve the government's goals).

196. *Id.* at 552.

197. *In re* Vitamin C Antitrust Litig., 837 F.3d 175, 190 (2d Cir. 2016).

198. *Id.* at 189-90 ("China's legal system is distinct from ours in that '[r]ather than codifying its statutes, the Chinese government [ ] frequently governs by regulations promulgated by various ministries.... [and] private citizens or companies may be authorized under Chinese regulations to act in certain circumstances as government agents.'").

199. *See* Koh, *Bringing International Law Home*, *supra* note 68 at 645.

the Transnational Legal Process, by which both private and public parties can start the debates and litigation that can lead to WTO obedience and internalization. In April 2017, the plaintiffs filed a petition for certiorari to the Supreme Court, asking to clarify two important issues: 1) the level of deference given to a foreign government's interpretation of its law-specifically, that is, whether a U.S. court should give conclusive deference to a foreign government's interpretation of its law if the government has appeared in court; and 2) the longstanding split among circuit courts in how to apply the international comity doctrine.[200]

As described above, the Chinese government showed great interest throughout the vitamin C proceeding, with the Ministry submitting *amicus* briefs stating that Chinese law required the defendants' export cartel and that the Ministry accurately "described China's compulsory requirements concerning vitamin C exports."[201] The Chinese embassy in the United States also sent a diplomatic note to the U.S. Department of State that "China has attached great importance to this case."[202] It commented:

> The U.S. Federal District Court stated, however, that it would not defer to the statements of the Chinese Ministry of Commerce and would instead make its own independent assessment of Chinese law. Based on this independent assessment, the U.S. Federal District Court determined, incorrectly, that defendants' conduct was voluntary . . . China calls upon the U.S. Administration to take note that the Chinese Ministry of Commerce will file an amicus brief to the Court of Appeals once more to reiterate the positions it stated regarding this litigation and to assist the Court of Appeals' consideration of the case. The Chinese Government urges the U.S. Administration also to file a brief in the Court of Appeals in support of China's positions. U.S. counsel for the Chinese ministry of Commerce, located in Washington D.C., also has prepared a memorandum to assist the U.S. Administration in its consideration of this case.[203]

In November 2017, the Supreme Court asked the Solicitor General to file an *amicus* brief expressing the views of the United

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200. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1872 (2018).

201. Joint Appendix at 782, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (No. 16-1220), https://www.supremecourt.gov/DocketPDF/16/16-1220/36711/20180226192522246_Appendix.pdf.

202. *Id.*

203. *Id.* at 783.

States regarding the vitamin C case.[204] The Solicitor General answered that the Second Circuit had erred by treating the Ministry's statement as conclusive and by disregarding other relevant materials, including China's representation to the WTO that it had given up export administration of vitamin C.[205] Indeed, the reasoning and arguments in the Supreme Court's final ruling were strikingly in line with the Solicitor General's brief. The Court ruled that even during a time of domestic antitrust litigation between private parties, China's defendants and the Ministry have to revisit its decision at the WTO. It noted:

> [T]he Court of Appeals erred in deeming the Ministry's submission binding, so long as facially reasonable . . . . [T]he Court of Appeals riveted its attention on the Ministry's submission, it did not address other evidence, including, for example, China's statement to the WTO that China had 'g[i]ve[n] up export administration ... of vitamin C' at the end of 2001.[206]

The United States Supreme Court released its decision in 2018.[207] In a unanimous opinion delivered by Justice Ginsburg, the Supreme Court vacated the judgment of the Second Circuit, concluding that the "spirit of international comity" requires a federal court to "carefully consider" a foreign government's submission, and the appropriate weight of deference will "depend upon the circumstances."[208] As the

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204. *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *In re* Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2016) [hereinafter United States' Amicus Brief in Vitamin C Case], https://www.justice.gov/atr/case-document/file/1011391/download.

205. *Id.* at 8–9 (The executive branch then enumerated a list of factors that courts should consider when weighing a foreign government's statements, including "the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence.").

206. Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1869 (2018).

207. *Id.* at 1865.

208. *Id.* at 1873–75. The Supreme Court explored the historical evolution of Rule 44.1 of the Federal Rules of Civil Procedure. The rules were amended, transforming the determination of foreign law from a "question of fact" to a "question of law." The Court argued to make ". . . the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so." Thus, although Rule 44.1 does not address the weight a federal court should give to a statement by a foreign government when determining foreign law, it should be treated with the same method as domestic law considering "any relevant material or source." Therefore, the Court rejected the Court of Appeals' notion that a foreign government's word required strict adoption and conclusive weight, and instead adopted a case-by-case analysis and scrutiny of all relevant materials.

Supreme Court acknowledges, "no single formula or rule will fit all cases in which a foreign government describes its own law."[209]

b. Animal Science Products, Inc. and Resco Products, Inc.

While the Vitamin C case was ongoing, two similar antitrust cases were brought in the U.S. courts against Chinese export cartels. In a federal case that began in 2005 in New Jersey, Animal Science Products, Inc. v. China National Metals & Minerals Import & Export Corp., several U.S. companies filed suit against seventeen Chinese companies exporting magnesite-based products for alleged price-fixing in violation of the Sherman Act.[210] None of the Chinese defendants responded to the complaint and in 2007, the plaintiffs filed numerous motions for entries of default. In 2008, seven of the companies responded with a motion to compel arbitration.[211]

The court researched evidence from other proceedings that might bear on the compulsion defense raised by the defendants, including the Vitamin C case.[212] The District Court found that they faced a very similar problem to the one in the Vitamin C case, that is, that the relevant trade association, China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters ("CCCMC"), was involved in setting the minimum prices for the exported products.[213] In a remarkably comprehensive opinion, the court gave much greater weight to the Chinese government's representations than did the Vitamin C court. [214] The court observed that the government compulsion lasted for a long time and was achieved not by a particular act, but was rather created by a legal regime, such as "[E]mploy[ing] various regulatory

209. *Id.* at 1873–75. The Court downplayed the importance of Pink, in essence, holding that its precedential value was limited to the facts of that case. The Court added that Pink was handed down before the promulgation of Rule 44.1 and was in any event distinguishable from the case at hand. It furthermore refused to extend the determination of conclusiveness found in the Pink case to "suggests that all submissions by a foreign government are entitled to the same weight." The court ruled that U.S. courts must consequently consider a range of factors when assessing a foreign state's description of its law, including

the . . . clarity, thoroughness, and support [underlying a foreign government's description of its law]; [the] context and purpose [of the foreign government's statement]; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Id. at 1873–1874.

210. Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 596 F. Supp. 2d 842 (D.N.J. 2008).

211. *Id.* at 847–48.

212. Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp., 702 F. Supp. 2d 320, 391 (D.N.J. 2010).

213. *Id.* at 394.

214. *Id.* at 429.

mechanisms producing a composite effect of a never-ceasing correlation between the minimum price requirement and punitive measures for non-compliance with it."[215]

Moreover, the court "distill[ed]" from *Mannington* a three-points test whereby the defendant invoking compulsion should be able to prove: 1) the existence of an entity in the defendant's state-qualifying as an arm of the state by enjoying governmental or quasi-governmental powers that are either uniquely peculiar to sovereigns or of essentially sovereign nature; 2) a direct link between the entity's powers and the defendant, allowing the entity to compel the defendant, subject to significant negative repercussions for non-compliance; and 3) the compulsion is the fundamental force causing the defendant's act, challenged as a violation of U.S. law.[216] The court argued that unless there was a Chinese legal provision or an alternative Ministry's statement that "clearly and convincingly" establishes the incorrectness of these interpretations, a foreign sovereign's admission of legal compulsion could warrant a nearly binding-degree of deference, even if the admitted compulsion was based on a form of "unwritten law." [217] Before any of the motions were resolved, the case was administratively closed.[218]

In 2006, Resco Products, Inc., v. Bosai Minerals Group, the U.S. company Resco Products sued Chinese bauxite exporters for their alleged price-fixing in violation of the Sherman Act.[219] Likewise, the defendants brought a motion to dismiss the complaint on the foreign state compulsion defense basis. In June 2010, a federal district court in Pennsylvania decided to stay the proceedings

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215. *Id.* at 449.

216. *Id.* at 394.

217. *Id.* at 424, 426, 429. Besides, the court underlined that defendants' participation in "coining" of the governmental prescript does not render such participant exempt from compulsion. Thus, the court basically confirmed the availability of the defense even if a party participated in the creation of the compelling act. *See id.* Later the court in Vitamin C explicitly disagreed with this holding.

218. *See* 702 F. Supp. 2d 320, 464. Notably, this case was reopened in August 2011. The plaintiffs declined the District Court's invitation to amend their complaint a second time and filed a timely notice of appeal. The Third Circuit vacated and remanded while they determined the appropriate standard for analyzing whether the district court had jurisdiction to hear the case under the Foreign Trade Antitrust Improvements Act. *See* Animal Sci. Prods. v. China Minmetals, Corp., 654 F.3d 462 (3d Cir. 2011). On July 24, 2014, the court found that the direct purchaser, the plaintiff, Resco, in its amended complaint did not plausibly plead facts to establish antitrust standing as a direct purchaser. The analysis was complicated by the fact that Resco inherited its claim from an assignor, Possehl, but the amended complaint contained no facts supporting the allegation that Possehl made direct purchases from the Chinese defendants. The court thus recommended amending the complaint to identify specific transactions and the governing agreements for those purchases. Animal Sci. Prods., Inc. v. China Minmetals Corp., 34 F. Supp. 3d 465 (D.N.J. 2014).

219. Resco Prods., Inc. v. Bosai Minerals Grp. Co., Ltd., No. 06-235, 2010 WL 2331069, (W.D. Pa. Jun. 4, 2010).

in the anticipation of the outcome of the WTO trade dispute brought by the U.S. against China, concerning export restrictions on various raw materials, including bauxite.[220] The stay was lifted on July 26, 2011, when the court upheld the foreign sovereign compulsion defense and granted summary judgment in the defendants' favor.[221]

Viewed through a Transnational Legal Process lens, both magnesite and bauxite are raw materials involved in the WTO proceeding. As such, the watershed event in the WTO proceeding to consider China's trade associations-led export cartels was based on the above three antitrust litigations. While the outcomes of the WTO disputes are not binding upon U.S. courts, the *Resco* court was reluctant to duplicate fact-finding efforts between the court and the USTR, and expressed that "findings of fact and conclusions of law made by the WTO panel may at the very least simplify the analysis of the act of state doctrine here."[222] Further, the court claimed that if the WTO panel agreed with the United States, "that finding may favor the defendants' arguments in this case," and a "contrary holding likewise could impact whether the act of state doctrine applies."[223]

Similarly, in *Animal Science Products*, the court expressed its attention to the ongoing U.S.-China WTO dispute.[224] The court relied on *Resco*'s record to reference USTR's WTO request, citing the "strikingly similar" arguments before the two courts. The court found that the only distinction between the New Jersey action and the Pennsylvania action was that the former challenged Chinese bauxite exporters (members of the bauxite division of CCCMC) and the latter challenged Chinese magnesite exporters (members of the magnesite division of CCCMC).[225] The three antitrust actions

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220. *Id.*

221. In Feb. 2016, the plaintiff appealed the district court's decision to the United States Court of Appeals for the Third Circuit, another appellate court in the United States' federal judicial system that is on par with the Second Circuit. The plaintiff argued "[t]here is both direct and circumstantial evidence that [d]efendants conspired to increase prices of Chinese bauxite beginning in 2003." The appellate court granted the defendants' motion for summary judgment and held the plaintiff failed to adduce sufficient direct or circumstantial evidence of a conspiracy. *See* Resco Prods., Inc. v. Bosai Minerals Grp. Co., 158 F. Supp. 3d 406, 416, 419 (W.D. Pa. 2016).

222. Resco Prods., Inc. v. Bosai Minerals Grp. Co., Ltd., No. 06-235, 2010 WL 2331069, at *7, (W.D. Pa. June 4, 2010).

223. *Id.* at *7.

224. *See* Animal Sci. Prods. v. China Nat. Metals, 702 F. Supp. 2d 320 (D.N.J. 2010).

225. *Id.* at 411–412 ("All other aspects are effectively the same, *i.e.*, Resco asserted that the bauxite section of the CCCMC was a democratic and voluntary association of Chinese exporters of bauxite-based products that joined the CCCMC as a voluntary trade association and were free not to comply with any minimum price their section of CCCMC was setting but, nonetheless, somehow elected to enter into collusive agreements producing their own 'cartel(s),' which were operating in a succession largely similar of the chain of 'Cartels' alleged in this matter. . . Peculiarly enough, the Resco . . . defendants asserted —

demonstrated that the U.S. courts launched other transnational actors' participation in the Transnational Legal Process.

2. The Trilogy of WTO cases on China's Export Restrictions: The U.S. Government as Transnational Actor

a. Raw Materials I

Article 3.3 of the Dispute Settlement Understanding ("DSU") allows WTO Members to resort to the dispute settlement system of the WTO in situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.[226] That is, the WTO does not regulate the actions of companies. A member country cannot sue private actors at the WTO.[227]

In 2009, the USTR observed the ongoing antitrust litigations and filed a complaint at the WTO, alleging that the Chinese government had imposed export restraints on multiple raw materials and violated several provisions of the GATT, including Articles XI:1 and Article X:3(a), as well as China's Accession Protocol, including Paragraph 11.3.[228] A crucial foundation for the United States' position was whether China's Chambers of Commerce, which includes the CCCMC, "[F]unction as entities under MOFCOM's [the Ministry's] direct and active supervision and, accordingly, play a central role in regulating the trade of China's industries."[229] The USTR used the Ministry's *amicus* brief as evidence of the subject WTO trade violations. It argued that China described its authority over these entities as "plenary" and described the Chamber of Commerce as "the instrumentality through which [the Ministry] oversees and regulates the business

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in response to Resco's . . . claims — a governmental regulatory scheme of the MOFCOM and CCCMC substantively identical to the scheme asserted by Defendants in this matter.").

226. See Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.1004, WTO Doc. WT/DS394/R (adopted July 5, 2011) (Article 3.3 of the DSU refers to "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member.").

227. *See* Bradford, *Assessing Theories of Global Governance*, *supra* note 107, at 233 (quoting from Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 479-480 (2000)).

228. *See* First Written Submission of the United States of America, *China-Measures Related to the Exportation of Various Raw Materials*, ¶ 216, DS394 (June 1, 2010), https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/DS394.US_.Sub1_.fin_.pdf.

229. *Id.; See also* Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.1002, WTO Doc. WT/DS394/R (adopted July 5, 2011).

of importing and exporting [] products in China."[230] On this basis, the U.S. emphasized, China should not argue otherwise from what it had already represented in the U.S. courts, that is, the CCCMC's export-price related functions and responsibilities should be attributable to China.[231]

Unsurprisingly, China asserted in its response to panel questioning that the measures are not "sources of Chinese law."[232] Meanwhile, China admitted that its Ministry delegated certain implementing authority to the CCCMC to coordinate export prices, but implementation authority granted to CCCMC terminated with the repeal of the PVC system in 2008.[233]

The Panel released its report on July 2011. In the section discussing whether the measures at issue may be subject to WTO dispute settlement, the Panel held that evidence presented-by China's MOFCOM ("Ministry") in the context of U.S. domestic court proceedings appeared to confirm the fact that China acknowledges that through the Ministry, it delegated certain implementing authority to the CCCMC to coordinate export prices. [234] According to the Panel, this confirmed that actions undertaken by the CCCMC are therefore measures that can be challenged under the WTO dispute settlement proceedings. [235] Accordingly, the United States won the raw materials case in the WTO proceeding even though the Appellate Body voided the findings of the Ministry's *amicus* brief and decided the case based upon other evidence.[236]

Through a Transnational Legal Process lens, the "vertical internalization" happened when the U.S. government provided a

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230. *Id.* at ¶ 208.

231. *Id.*

232. *See* Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.1008, WTO Doc. WT/DS394/R (adopted July 5, 2011) (quoting China's response to panel question No. 1, para. 14 following the first substantive meeting). China's defense was that although it had agreed to eliminate export duties for the raw materials in question in its accession protocol, the export duties on four of the nine raw materials—non-ferrous metal scrap of zinc, magnesium metal, manganese metal, and coke—could be justified by the exceptions found in GATT Article XX (b) and (g).

233. *Id.* at ¶ 7.1003.

234. *Id.* at ¶ 7.1005.

235. *Id.*

236. Specifically, the Appellate Body concluded that China's system of export duties and quotas on nine industrial raw materials, including certain forms of bauxite and magnesium, violated China's Accession Protocol and the GATT. However, the Appellate Body vacated the panel's findings that China's minimum export price requirements, export quota administration, and export licensing system were WTO inconsistent based on an insufficient demonstration of the specific connection between each of the group of diverse, disparate export regulatory measures and China's different types of WTO commitments. *See* Appellate Body Report, *China-Measures Related to the Exportation of Various Raw Materials*, ¶¶ 226-35, 362-63, WTO Doc. WT/DS394/AB/R (adopted Jan. 30, 2012) [hereinafter WTO Appellate Body Report].

lawful response under international law.[237] As the U.S.-China WTO dispute unfolded, the European Union and Mexico joined in the proceeding.[238] In conjunction with the E.U., Mexico, and thirteen other WTO members who asserted their third-party rights to the case, the U.S. generated interactions with China.[239] The WTO system then became a platform of interpretations that promoted "vertical internalization" of WTO law.[240] Through the WTO dispute settlement and appellate body, China was ordered to dismantle a series of illegal export restrictions.[241] At the meeting of the WTO Dispute Settlement Body on 28 January 2013, China informed the WTO membership that its Ministry and General Administration of Customs had issued a new set of notices removing the problematic export restrictions on the set of raw materials at issue in the litigation.

b. Rare Earths

The United States applied Transnational Legal Process and expanded this victory in the same way. On 13 March 2012, the United States requested consultations with China regarding China's restrictions on the export of various forms of rare earth elements, tungsten, and molybdenum.[242] The USTR cited several of China's published and unpublished measures (including certain quota administration measures) that imposed export

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237. *See* Raustiala, *The Architecture of International Cooperation, supra* note 18, at 80–81 ("States comply with international rules because of variations in this process of 'vertical internalization'-vertical because rules that are articulated at the international level are incorporated and internalized at the national level.").

238. Request for Consultations by the United States, *China Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/1 (June 25, 2009); Request for Consultations by the European Communities, *China Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS395/1 (June 25, 2009); *see also* Request for Consultations by Mexico, *China Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS398/1 (Aug. 21, 2009).

239. Ron Kirk announced that the United States has requested WTO dispute settlement consultations with China regarding its export restraints on numerous important raw materials. He declared, "We are going to the WTO today to enforce our rights, so we can provide American manufacturers with a fair competitive environment and put more American workers back on the job." He added, "[d]ialogue is our preferred course of action, but despite raising this issue with China repeatedly, China has not changed its policies... We are committed to enforcing our rights using all of the resources at our disposal, including the WTO." *See* Press Release, U.S. Trade Representative, United States Files WTO Case Against China Over Export Restraints on Raw Materials (June 23, 2009), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/june/united-states-files-wto-case-against-china-over-expor.

240. *See* Raustiala, *The Architecture of International Cooperation*, *supra* note 18, at 80–81.

241. *Id. See also* WTO Appellate Body Report, *supra* note 236.

242. *See* Panel Report, *Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R (adopted Mar. 26, 2014) [hereinafter WTO Panel Report, *Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*].

restrictions.[243] The U.S. argued that such export quotas, in themselves and also in the manner in which they are administered, are inconsistent with China's obligations under Article XI:1 and X:3(a) of the GATT 1994 and China's Protocol of Accession.[244] On 22 March 2012, the European Union and Japan requested to join the consultations.[245] On 26 March 2012, Canada requested to join the consultations. Subsequently, on 23 July 2012, sixteen other WTO members asserted their third-party rights by establishing a single WTO panel.[246] Once more, China lost this case at both the Panel and the Appellate.[247] At the DSB meeting in May 2015, China informed the WTO that it had removed the challenged export duties, quotas, and restrictions on trading rights.[248]

c. Raw Materials II

Furthermore, the preceding U.S. disputes led to yet a third complaint raised by the U.S. in July 2016 against the third set of export restrictions on raw materials.[249] Again, the United States was not alone. As a co-complainant in both China-Raw Materials and China-Rare Earths, the U.S. and the EU have simultaneously accused China again of violation of Paragraphs 2(A)(2), 5.1, 11.3 of Part I of China's Accession Protocol, as well as paragraph 1.2 of

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243. *See* First Written Submission of the United States of America, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶ 10, DS431 (Oct. 30, 2012) [hereinafter U.S. First Written Submission, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*], https://ustr.gov/sites/default/files/US.Sub1_.fin_.pdf.

244. *Id.* at ¶ 11.

245. United States Trade Representative, *Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes-1 (last visited Nov. 9, 2020).

246. *Id.*

247. During the course of the argument, China acknowledged that the export duties at issue were not included in the relevant Annex to its Protocol of Accession but invoked GATT Article XX(b) arguing the exception allowing for measures necessary to protect human, animal, and plant life and health. In March 2014, the Panel ruled against China, finding China's export restrictions to be inconsistent with China's WTO legal obligations as stipulated in Paragraph 11.3 of China's Protocol of Accession, GATT Article XI, and several paragraphs of China's Working Party Report to its Protocol of Accession. *See* WTO Panel Report, *Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, *supra* note 242, at ¶ 8.3.3. On appeal, the Appellate Body found that the Panel had erred in its evaluation of GATT Article XX(g). *See* Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶ 6.2, WTO Doc. WT/DS431/AB/R, (adopted Aug. 7, 2014).

248. *Id.* Moreover, China stated that it would need a reasonable amount of time in which to do so. The United States, the European Union, Japan, and China agreed that China would have until May 2, 2015, to comply with the rulings and recommendations.

249. Request for Consultations by the United States, *China Export Duties on Certain Raw Materials*, WTO Doc. WT/DS508/1 (July 14, 2016), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/508-1.pdf&Open=True.

the Accession Protocol (to the extent that it incorporates paragraphs 83, 84, 162 and 165 of the Report of the Working Party on the Accession of China), and Articles X:3(a) and XI:1 of the GATT 1994, regarding China's export duties on various forms of antimony, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin.[250] Through this new WTO action, the United States sought to extend and reinforce the important victories obtained by the United States in the two previous WTO challenges, while the consultations requested by the US and the EU were running in parallel. On 8 November 2016, The DSB established a panel to hear the challenge raised by the United States. Fourteen WTO members reserved their third-party rights in that case. Similarly, on 23 November 2016, the DSB established a panel to hear the challenge raised by the European Union. Seventeen WTO members reserved their third-party rights.

From a Transnational Legal Process perspective, the U.S. had the goal of obtaining an interpretation that China was violating WTO law, which it hoped to internalize into China's domestic law. As discussed above, the U.S. successfully won a provisional measures order when the "normative" feature of Transnational Legal Process occurred.[251] Additionally, this theory predicts that States will comply with international law if other transnational actors trigger Transnational Legal Processes. Trade negotiation is more likely to be successful when the United States is co-working with other like-minded States and is building a sustainable process. Overall, Transnational Legal Process is an essential phenomenon that international legal scholars should not ignore. Transnational actors are actively collaborating in peer-to-peer information sharing and enforcement, as well as in technical and legal assistance. They are doing so without employing economic and trade conflict. In the final section of this Article, we see WTO law obedience that happened via involved transnational actors interacting around lawful conduct and a law-abiding arrangement.

V. THE IMPLICATIONS OF TRANSNATIONAL LEGAL PROCESS FOR TRADE AND COMPETITION

There are potential implications of Transnational Legal Process for WTO compliance. Suppose a WTO member country

250. *See id.*; *see also* Request for Consultations by the European Union, *China Duties and Other Measures Concerning the Exportation of Certain Raw Materials*, WTO Doc. WT/DS509/1 (July 25, 2016).

251. *See supra* Chapter III.B. (discussing features of Transnational Legal Process).

moves in a legally noncompliant direction. In that case, other member countries can legally challenge that country in a WTO dispute and generate an interaction that yields a settlement (interpretation) that the government defendant must then obey as a matter of domestic law (internalization).[252] I already discussed how US courts and both governmental and non-governmental actors were part of the Transnational Legal Process. In this Chapter, I examine important normative questions via Transnational Legal Process. I argue that Transnational Legal Process has laid the groundwork for China's economic transition. What is at stake is that the international trade regime's success did not replicate itself in other international law domains. The appropriate solution, in my view, remains Transnational Legal Process. I then apply Transnational Legal Process to current international trade, focusing particularly on the trade war rages between the US and China. As we shall see, Transnational Legal Process remains alive and significant opportunities exist for US transnational actors if they remain active participants.

A. The Fruits of Transnational Legal Process

There are at least three practical reasons that Transnational Legal Process can be robust, even in a place where judicial institutions are weak and governmental openness limited.[253] First, the heart of effective internalization depends on the degree to which particular rules are or are not internalized into the domestic legal structure, instead of the particular domestic legal system in question.[254] Second, Transnational Legal Process is a constructivist process by which it serves to reorder not just national interests but even national identity. [255] Third, Transnational Legal Process actually could help to explain why nations obey and why nations do not obey.[256]

The United States has encouraged the Chinese agencies to enforce the Anti-monopoly Law ("AML") to work with Chinese regulatory agencies with sectoral responsibilities to emphasize the

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252. *See* Koh, *supra* note 75, at 417.

253. *See* Koh, *Bringing International Law Home*, *supra* note 68, at 674–77.

254. *Id.*

255. *Id.* Professor Koh also applied the example of China signed the International Covenant of Civil and Political Rights (ICCPR) on Oct. 5, 1998.

[T]he transnational process . . . will begin to put pressure upon China—with the assistance of both governmental and nongovernmental actors—in various international fora to comply with various norms associated with that treaty. As international sanctions begin to attach to those norms, a process of vertical internalization will predictably commence, however slowly.

Id. at 676.

256. *Id.*

importance of trade associations refraining from engaging in conduct that would violate antitrust law.[257] On 30 August 2007, China promulgated the AML, shortly after antitrust class actions brought against Chinese defendants.[258] The AML delineates the legal framework for the prohibition of cartels. Article 11, for example, stated that "[t]rade associations shall tighten their self-discipline, give guidance to the undertakings in their respective trades in lawful competition, and maintain the market order in competition."[259] Article 16 makes explicit that trade associations may not make arrangements for undertakings within their respective trades to engage in monopolistic practices.[260] Article 46 increases the maximum fines imposable on trade associations from 500,000 yuan to 5 million yuan.[261] The same article also stated that if the circumstances are serious, the administrative department for the registration of public organizations may cancel the registration of the trade association per the law.[262] Since the initial implementation of the AML in 2008, several price-related investigations involving trade associations were conducted by the country's antitrust agencies, including fields of papermaking, sea sand, gold jewelry, construction equipment, insurance, brick manufacturing, tourism and so on.[263]

Action accompanied the commitment that China will implement its DSB rulings and recommendations on May 2, 2015.[264] According to State Councilor Wang Yong: "The separation

257. *Id.*

258. *See Anti-monopoly Law of the People's Republic of China*, MINISTRY OF COMMERCE PEOPLE'S REPUBLIC OF CHINA (Aug. 3, 2008) [hereinafter *Anti-monopoly Law*], http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml.

259. *Id.* at art. 11.

260. *Id.* at art. 16. What's more, it is important to note that on January 2, 2020, one of China's state antitrust agencies, the State Administration for Market Regulation (SAMR), released a draft revision to the Anti-Monopoly Law for public comment. [hereinafter the 2020 AML Draft]. A substantive change in the 2020 AML Draft about Article 16 is that a definition of "monopoly agreements" is now placed in Article 14, before the prohibition on horizontal agreements (Article 15) and vertical agreements (Article 16), as opposed to only appearing in the horizontal provision in the 2008 AML. This re-location of the definition would likely help reduce the confusion surrounding how agreements in a vertical setting (trade associations) are defined and whether they are assessed similarly to horizontal agreements. *See* the 2020 AML draft, https://www.uschina.org/sites/default/files/uscbc_comments_on_draft_revision_of_the_anti-monopoly_law_-_en.pdf.

261. *See Anti-monopoly Law, supra* note 258, at art. 46. Notably, the new revision of the 2020 AML draft increase increases the maximum fines imposable on trade associations from 500,000 yuan to 5 million yuan. 1 US dollar is about 7.1 yuan (last updated on June 1, 2020). *Id.*

262. *Id.*

263. *See* THE US-CHINA BUS. COUNCIL (USCBC), UPDATE: COMPETITION POLICY & ENFORCEMENT IN CHINA 18-33 (2015), https://www.uschina.org/sites/default/files/2015.05%20USCBC%20Update%20on%20Competition%20Enforcement%20in%20%20China.pdf.

264. *World Trade Org., DS433: China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/

of industry associations and chambers of commerce from the government represents a major reform measure that China is currently carrying out."[265] On July 8, 2015, the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council released the "Overall Plan for the Decoupling of Chambers of Commerce of Industry Associations and Administrative Organs" to promote the decoupling of industry associations from administrative agencies. [266] The plan is considered to be a first step for the Chinese government to formally clarify the functional boundaries between administrative agencies and industry association chambers of commerce.[267] It includes 1) cancellation of the sponsorship, supervisory, and affiliation relationship between the administrative organ (including subordinate units) and the industry associations and the chamber of commerce; 2) clarification of the functions of the industry associations and the chamber of commerce, including removing the existing administrative functions of the industry associations and the chamber of commerce, except as otherwise provided by laws and regulations; 3) separation of assets and finance, and standardization of property relations; and 4) separation the personnel management of these industry associations and the chamber of commerce from the government, and define their relationship regarding personnel; and 5) separation Communist Party of China affairs and international exchanges of these organizations from the government and define their relationship regarding administration.[268] By the end of 2018, 422 national-based industry associations had been decoupled from administrative agencies, which exceeded 50% of the total

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ds433_e.htm (last visited _____) *("At the DSB meeting on 20 May 2015, China informed the DSB that, according to notices by the Ministry of Commerce and the General Administration of Customs of China, the application of export duties and export quotas to rare earths, tungsten and molybdenum as well as restriction on trading rights of enterprises exporting rare earths and molybdenum which were found to be inconsistent with WTO rules, had been removed. In that regard, China had fully implemented the DSB's recommendations and rulings.").*

265. *See* Wang Yong, *Separating Industry Associations and Chambers of Commerce from the Government*, QIUSHI (June 7, 2016), http://english.qstheory.cn/2016-06/07/c_1118888251.htm.

266. *Id.*

267. *Id.*

268. *Id.*

number.[269] On June 14, 2019, the Central Office announced the decoupling of the remaining 373 national-based industry associations.[270]

All the above changes show that the government delineated a robust enforcement system against protectionist and other abusive government restraints. In fact, the fruits of Transnational Legal Process are visible on the streets of any major Chinese metropolis. With the WTO accession and Transnational Legal Process application, thousands of Chinese laws and regulations were rewritten.[271] Chinese legal scholars, international lawyers, law students, and government officers acquired knowledge about the rules necessary for their country to reengage with the global trade regime. They, in turn, widely disseminated this knowledge internally.[272]

Yet it would be incorrect to assume that Transnational Legal Process is always perfect. As many scholars argued, the enforcement powers of the AML are so weak as to nearly undermine the effort.[273] Nevertheless, it is essential to step back

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269. Among the 795 national-based industry associations, the remaining 373 national industry associations are subject to be decoupled according to the Opinions. *See* No. 1063 (2019) of the National Development and Reform Commission, *Implementation Opinions on the Comprehensively Promoting* Comprehensive Promotion *of the Decoupling Reform of Industry Associations, Chambers of Commerce and Administrative Authorities* (June 17, 2019) (including *Annex: List of National Industry Associations and Chambers of Commerce for the Decoupling Reform*). The English version available at https://pkulaw.com/en_law/eed51ad78fa816a3bdfb.html

270. *Id.*

271. For example, as a consequence of accession to the WTO, China revised Foreign Trade Law (FTL) in 2004. The law replaced the previous examination and approval procedures with a registration system under which enterprises and individuals could engage in trade business after registering with the foreign trade authorities. Other changes include 1) extending the scope of foreign trade dealers to cover individuals lawfully engaged in foreign trade activities; 2) adding provisions allowing the state to exercise state trading administration over the import and export of some goods; 3) adding provisions on automatic import and export licensing administration based on the need for state monitoring; 4) specifying regulations on the protection of trade-related aspects of Intellectual Property Rights (IPRs); and 5) revising provisions related to legal liabilities, to increase punishment for illegal behavior, including IPR infringement in international trade.

272. Several law schools in China established the WTO research center, including Peking University Centre for WTO Law Study PKU Law & Development Academy, Nankai University Department of International Economics and Trade, China University of Political Science and Law WTO Legal Research Center, WTO Research Center of China University of Political Science and Law, and China Institute for WTO Studies at University of International Business and Economics (UIBE).

273. Professor Fox argued that China attempts to integrate control of abusive public and private power. "The new law does not exclude from its coverage state-owned enterprises, but the most important and dominant SOEs are in strategic sectors. Enterprises in strategic sectors remain. These enterprises under the supervision of the Chinese state and they may be immune from enforcement by the antitrust authorities." *See* Eleanor M. Fox, *An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173, 173 (2008); For a similar argument, *see also*, Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 232-33 (2008) ("Indeed, the AML was drafted during a period in which

and be clear that China is currently the United States' largest merchandise trading partner, its third-largest export market, and its most significant source of imports. The economic costs of the bilateral economic relationship are genuine. Meanwhile, the WTO is the only international body dealing with trade rules between the U.S. and China that reflect core U.S. values. It "form[s] a baseline . . . to build global support to critique and push back against Chinese economic practices."[274] In the context of comprehensively addressing China's challenges, the WTO is still a central system, and subject to the strong leadership of the U.S.

Viewed through the optic of a Transnational Legal Process, legal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, judicial interpretation, legislative action, or some combination of the three.[275] That is, the U.S. should take a comprehensive approach to the negotiations based on market-oriented solutions, strengthening the global trading system and the rule of law. Progressing on China's WTO commitments will be most effective where the U.S. is also complying with its WTO commitments.

From this perspective, I have already argued that transnational actors (in this Article, U.S. courts and the USTR) preserved international law by participating in Transnational Legal Process by working together and encouraging each other through a complex norm internalization. They were not only spurred by self-interest; more importantly, these transnational actors also promoted WTO law compliance and competition policy convergence. In the next section, I propose transnational actors' suggestions that together would constitute positive next steps for this critical economic relationship. The core is to avoid fostering a relationship shaped only by competition and identifying where mutually beneficial outcomes are possible. As the U.S. Department of Defense has pointed out, while China is a critical long-term

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China was trying to consolidate its powerful SOEs in important sectors, there was widespread perception of 'excessive' competition, mergers and acquisitions of domestic companies by foreign investors increased concerns, government agencies were responsible for the most significant restrictions on competition, and it was uncertain how the proposed antitrust law would be enforced . . . . The AML reflects many compromises on these issues made to facilitate enactment, and did not resolve the most controversial issues surrounding the earlier drafts.").

274. *See* Joshua P. Meltzer & Neena Shenai, *The US-China Economic Relationship: A Comprehensive Approach*, BROOKINGS, Feb. 2019, at 16.

275. *See* Koh, *Bringing International Law Home*, *supra* note 68, at 642-43.

strategic competitor, "competition does not mean conflict is inevitable, or preclude cooperation with China on areas of mutual interest."[276]

B. What's at Stake: Transnational Legal Process, Free Trade, and Competition

The cooperation of the 21st century was dominated by international organizations created by formally negotiated and legally binding treaties.[277] To maintain this structure of global cooperation, the United States supported the creation of an elaborate legal framework to constrain illiberal actions and encourage the notion of using global collaboration to solve global problems, such as war crimes, trade imbalances, climate change, immigration, and refugees. As the primary pioneer of liberal internationalism, this approach adopted by the United States was simple: more diplomacy, more human rights, more democracy, and more legal process.[278]

For example, the Paris Deal about climate change was negotiated under the auspices of the United Nations Framework Convention on Climate Change ("UNFCCC"), a treaty with 196 state parties to which the U.S. Senate gave its consent in 1992. Indeed, the evolution of the Paris Deal "graphically illustrated the engage-translate-leverage framework." [279] This deal also allows the U.S. to engage with countries around the world, such as G-20 members, members of the Major Economies Forum

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276. *See* U.S. DEPARTMENT OF DEFENSE, ASSESSMENT ON U.S. DEFENSE IMPLICATIONS OF CHINA'S EXPANDING GLOBAL ACCESS, at Executive Summary (Dec. 2018), *https://media.defense.gov/2019/*Jan/14/2002079292/-1/-1/1/EXPANDING-GLOBAL-ACCESS-REPORT-FINAL.PDF.

277. *See* Raustiala, *The Architecture of International Cooperation*, *supra* note 18. Professor Raustiala discussed the dominant contemporary paradigm for international cooperation and its challenges. He argued:

It is undisputed that the dominant contemporary paradigm for international cooperation is liberal internationalism. The postwar story of cooperation is one of an ever-increasing number of international institutions, constituted by a legally binding treaty, with expanding powers of governance. The paradigmatic case is the United Nations system: an international organization, constituted by treaty, which, in turn, has generated many other organizations and treaties. While still robust, liberal internationalism is increasingly facing challenges. The deepest may be the persistent unwillingness of states to yield further power. The most recent is the growing clamor against unaccountable and undemocratic international bureaucrats. The slow pace, formal procedures, and high bargaining costs of multilateral institutions-compounded by the dramatic increase in the number of states in recent decades-also may discourage the negotiation of new treaties and institutions, though the evidence of this is mixed.

Id.

278. *Id.* at 17-19.

279. *See* Koh, *supra* note 75, at 435.

("MEF"), and members of BASIC (Brazil, South Africa, India, and China) to frame the global deal. As Professor Koh commented:

> Instead of treating climate change as an area without law, the United States *translated* from norms inchoate in the rigid, legally binding, top-down Kyoto architecture, which specified internationally negotiated emissions targets that applied only to developed countries, to a much more informal, politically binding, bottom-up Copenhagen blueprint infused with stronger norms and with greater symmetry between the duties of developed and developing nations.[280]

Likewise, the theory of Transnational Legal Process is significant in trade domains as well.[281] The world is in a system of international commercial transactions that operates mostly with the hope of more and more market opening and less governmental intervention. The WTO is the only multilateral set of agreed-upon rules and norms of behavior to evaluate the Chinese economic structure's impact on the international level. Seeing the WTO in this way grants the U.S. authority to confirm where China fails to comply with existing commitments and indicate where WTO laws are unable to discipline China on unfair trade practices and where bilateral or unilateral action may be necessary.

Some critics argued that even though China has a history of honoring WTO rulings by changing its regulations and laws, China has not always followed the spirit of these rulings. Rare earths are a frequently cited example.[282] As the WTO case worked its way through the system, the Chinese government arranged the rapid consolidation of the Chinese industry, previously largely private, under a handful of SOEs.[283] These enterprises thus dominated

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280. *Id.*

281. For a similar argument, see Mark Wu, *Trump vs. International Law: Trade Unilateralism in Pursuit of What?,* OPINIOJURIS (Oct. 10, 2018), http://opiniojuris.org/2018/10/10/trump-vs-international-law-trade-unilateralism-in-pursuit-of-what/.

282. *See supra* Chapter IV.C.2. (China-Rare Earths cases).

283. In May 2011, the State Council issued Guidelines on Promoting the Sustainable and Healthy Development of the Rare Earth Industry (hereinafter referred to as the "Guidelines"), which proposed that within one to two years, a pattern of rare earth industries dominated by large state-own enterprises should be formed. Indeed, six Chinese companies were authorized to lead mergers and acquisitions in the rare earth industry and establish large-scale rare earth enterprise groups, including Baotou Steel Group, China Minmetals, Chinalco, Guangdong Rare Earth, Ganzhou Rare Earth, and Xiamen Tungsten. *See* Keith Bradsher, *China Consolidates Grip on Rare Earths,* THE NEW YORK TIMES (Sept. 15, 2011), https://www.nytimes.com/2011/09/16/business/global/china-consolidates-control-of-rare-earth-industry.html; *see also* WAYNE M. MORRISON & RACHEL TANG, CHINA'S RARE EARTH INDUSTRY AND EXPORT REGIME: ECONOMIC AND TRADE IMPLICATIONS FOR THE UNITED STATES, 13-15, CRS Report R42510 (Washington, DC: Office of Congressional Information and Publishing, April 30, 2012).

world production of rare earths, and any decision by them to restrict exports could prove difficult to challenge at the WTO.

Critics also fear that China undertakes antitrust investigations selectively to implement the government's overall economic plans. This worry stems from the notion that China's AML stipulated additional objectives, including the amorphous aim of "promoting the healthy development of a socialist market economy."[284] Also, the National Development and Reform Commission ("NDRC") serves as one of the key enforcement agencies for price-related violations of the AML and sets the overall economic strategy in China.[285] No other major economy allows the entities that enforce antitrust laws to direct the state's overall economic strategy.

Ironically, those who have complained the loudest about the global trade system's abuses have abandoned the most promising set of rules to prevent those abuses—withdrawal from the Trans-Pacific Partnership Agreement ("TPP"). This classic piece of Transnational Legal Process embeds the most substantial regime on SOEs and competition policy.[286] This treaty was also considered a comprehensive multinational trade agreement that had been initially issued to tether the United States more closely to East Asia and create an economic bloc capable of strengthening US global governance.[287]

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284. *See Anti-monopoly Law*, *supra* note 258, at art. 1.

285. *See* Wu, *supra* note 87, at 275-76 (discussing six elements that render China's current economic structure distinct, including the NDRC, in charge of State control over planning and inputs. "The NRDC stands out because of the extensive range of resources that it has at its disposal to drive economic policymaking . . . . The NDRC is in charge of pricing commodities that are not yet completely set by the market. Examples include electricity, oil, natural gas, and water . . . . In addition, whenever a large infrastructure project or investment requires government approval, the NDRC is the final authority, regardless of whether the entity seeking approval is an SOE, private company, foreign company, or joint venture. Examples include new bridges, factories, and even a Disneyland theme park. This oversight provides the NDRC with broad power to affect market supply and capacity. It also gives the NDRC an important role in deciding how to allocate the state's investment funds.").

286. The TPP rules prohibit providing subsidies to SOEs in many cases; require the disclosure of all SOEs on a public website, the percentage of government shares held in SOEs, the titles of government officials serving as officers or on the boards of SOEs, the annual revenues of SOEs, and information on any policy or program that provides subsidies; and mandate that commercial sales and purchases be made based on commercial considerations (defined as price, quality, availability, transportation, and marketability). This means government contracts go to the lowest bidder without discrimination in favor of domestic companies. For competition laws, TPP members agree to adopt or maintain national competition laws that prohibit anticompetitive business conduct and work to apply these laws to all commercial activities in their States. What's more, to ensure that such laws are effectively implemented, TPP members establish or maintain authorities responsible for enforcing national competition laws. For more detail SOEs and Competition Policy in TPP, see *State-Owned Enterprises and Competition Policy*, U.S. TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-chapter-chapter-negotiating-7.

287. *See* Press Release, The White House, Office of the Press Sec'y, Statement by the President Barack Obama on the Trans-Pacific Partnership (Oct. 5, 2015),

Indeed, China's economic structure is unique and controversial. The resulting structure "embraces the benefits of market competition without relinquishing political oversight over capital and other key economic elements." [288] This is also a risky environment that has caused continuous complaints and disadvantaged foreign companies. However, the difficulties arising from China's interactions and the international trade regime are not necessarily entirely fatal to the current international regime and collection of rules. Instead, the U.S. needs to stay true to its values; that is, traditional structures have to become more efficacious as more areas become simultaneously unregulated and more economically significant. Recently, a trade war launched between the U.S. and China, and the economic consensus is that sustaining open trade is breaking down. Global trade tensions and their aftermath have increased States' tendencies to disengage and be attracted to self-interested measures hoping that nationalism might solve their problems. Meanwhile, other countries have stepped up their efforts to fill the leadership void. On the surface, it may appear that faith in the utility of Transnational Legal Process has collapsed in today's international trade domain.

In this respect, I argue that any outcome, even though it achieves short-term wins, such as a trade deal with China agreeing to buy more, but does so in ways that undermine WTO legitimacy, would come at an enormous strategic cost. Instead, a positive, long-term outcome for the U.S.-China relationship should strengthen the WTO and the rules-based system. I propose transnational actors as part of Transnational Legal Process should accomplish the following goals as a comprehensive approach between the US-China economic relationship.

First, transnational actors should encourage WTO reform, such as improving dispute settlement proceedings and potential injunctive relief for unfair trade practices, expanding the rules on forced technology transfer, clarifying the application of "public body" rules and SOEs, and addressing barriers to digital trade.[289]

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https://obamawhitehouse.archives.gov/the-press-office/2015/10/05/statement-president-trans-pacific-partnership. It stated:
Democrats and Republicans in Congress came together to help the United States negotiate agreements for free and fair trade that would support our workers, our businesses, and our economy as a whole. When more than 95% of our potential customers live outside our borders, we can't let countries like China write the rules of the global economy. We should write those rules, opening new markets to American products while setting high standards for protecting workers and preserving our environment.

288. *See* Wu, *supra* note 281.

289. Some scholars argued that the WTO might face greater challenges because of existing mega-regional agreements, and other mega-regional trade agreements coming to fruition in the future. Alternatively, FTAs may serve as a "building block" for future multilateral trade deals since there is no mega-regional agreement and FTAs between the

In fact, the influence of Transnational Legal Process is apparent at the eleventh WTO Ministerial Conference in Buenos Aires, Argentina, where trade ministers for the United States, the E.U., and Japan initiated a process to develop approaches to reform the organization. They issued a joint statement condemning

> severe excess capacity in key sectors exacerbated by government-financed and supported capacity expansion, unfair competitive conditions caused by large market-distorting subsidies and state-owned enterprises, forced technology transfer, and local content requirements and preferences [as] serious concerns for the proper functioning of international trade, the creation of innovative technologies and the sustainable growth of the global economy.[290]

To address these concerns, the U.S. working with its allies vowed to "enhance trilateral cooperation in the WTO and in other forums."[291] Since then, the trilateral group has intensified its work with six more joint statements.[292] In turn, these statements have transformed into WTO reform proposals, with the key players all making contributions to the issue.

Second, as recommended by the U.S. Chamber of Commerce and the American Chamber of Commerce in China, transnational actors should promote a bilateral investment deal ("BIT") between the U.S. and China.[293] The U.S.-China BIT has gone more than 30

U.S. and China. In this context, the WTO remains the core system between the US-China economic relationship. *See* JAGDISH BAGHWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE 1, 1 (Oxford Univ. Press, 2008); *see also* Jagdish Bhagwati & Arvind Panagariya, *The Theory of Preferential Trade Agreements: Historical Evolution and Current Trends*, 86 AMER. ECON. REV. 82, 83-84 (1996); Arvind Panagariya, *The Regionalism Debate: An Overview*, 22 WORLD ECON. 455, 477 (1999); Richard Baldwin & Caroline Freund, *Preferential Trade Agreements and Multilateral Liberalization*, *in* PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT 121 (Jean-Pierre Chauffour & Jean-Christophe Maur, eds., 2011).

290. Press Release, U.S. Trade Representative, Joint Statement by the United States, European Union and Japan at MC11 (Dec. 12, 2017), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/december/joint-statement-united-states.

291. *Id.*

292. In addition to the six statements, for example, see Press Release, Eur. Comm'n, European Commission presents comprehensive approach for the modernization of the World Trade Organisation (Sept. 18, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5786; *Strengthening and Modernizing the World Trade Organization,* WORLD TRADE INST. (Mar. 6, 2019), https://www.wti.org/outreach/events/685/strengthening-and-modernizing-the-world-trade-organization/; Press Release, U.S. Trade Representative, Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan and the European Union (May 31, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/may/joint-statement-trilateral-meeting.

293. *See* U.S. CHAMBER OF COMMERCE & AMCHAM CHINA, PRIORITY RECOMMENDATIONS FOR U.S. CHINA TRADE NEGOTIATIONS (Jan. 16, 2019), https://www.wsj.com/public/resources/documents/tradereport.pdf.

rounds of negotiations, which would provide the U.S. with an opportunity to shape rules that could address China's trade and investment practices the U.S. finds so offensive.[294] In the meantime, it would develop another mechanism for the U.S. to hold China accountable through enforcement measures, as a BIT could include a state-to-state and an investor-state dispute settlement mechanism.[295]

Third, the TPP went into effect without the U.S. as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"). Most of the rules for addressing U.S. concerns with Chinese trade practices remain. Transnational actors should encourage the U.S. to reconsider the CPTPP and develop other free trade agreements ("FTAs") with its strategic allies in the Asia-Pacific region. On the one hand, an essential part of the U.S. strategy in dealing with China's economic structure should be to have a forward-looking trade policy. Such agreements would raise the trade standards and, in the meantime, provide a basis for the U.S. to ensure that its partners reform their economies and trade practices in ways consistent with U.S. interests and values. On the other hand, apart from the economic benefits for the U.S. and its partners, China's income losses due to absence will be significant. Should China wish to join the CPTPP, the government must undertake the reforms that the agreement would require.[296] Therefore, this could encourage China to reform its economy and trade practices.

Fourth and last, U.S. courts should be able to raise gaming detection, coordinating the specific steps the executive branch has undertaken concerning the cartel issue. In other words, U.S. courts should engage in interpretation and evidentiary coordination that promotes WTO enforcement and refrain from reaching a ruling undermining the U.S. executive branch's efforts if the government tried to persuade the foreign sovereign to abandon export cartels through the WTO system.[297] Conversely, if the executive branch has failed at the WTO, U.S. courts as transnational actors should perform a gap-filling role that the WTO precludes. The resulting tendency is to suggest a synergistic relationship in enforcing WTO law and antitrust law. In this regard, the Supreme Court made the

294. *See* Joshua P. Meltzer & Neena Shenai, *supra* note 274, at 18.

295. *Id.*

296. For example, countries are using mega-regional trade agreements to forge new rules regulating state-owned enterprises and digital trade. The TPP contains specific requirements for procedural fairness in competition law. *See* Wu, *supra* note 87, at 314–20.

297. For a similar argument, *see* Eleanor M. Fox & Merit E. Janow, *supra* note 14.

right move in Vitamin C precisely by proactively soliciting opinions from the executive branch before making its final decision.[298]

Nevertheless, the influence of Transnational Legal Process is still very much at work, even as the world is experiencing its worst "slowbalisation."[299] What is at stake is that the success experienced in the international trade regime did not replicate itself in other international law domains. In particular, when this theory comes to human rights, the government would block them out. As such, having secured the legal certainty and economic benefits of most-favored-nation treatment through WTO accession, the failed internalization parts embarked on a mission to ensure that the economic transformation would not upend its political control.

V. CONCLUSION

This article seeks to explore the roles of Transnational Legal Process in the realm of trade and competition systems. It is mainly focused on how US courts and the executive branch in a synergistic relationship enforce WTO obedience and competition policy convergence as part of Transnational Legal Process. I have given concrete examples of Transnational Legal Process actively working and reforming China's industry to comply with rules of free trade and competition. Transnational Legal Process is a wise strategy to negotiate with China through a combination of self-interest and legal process, which could contribute to long-term national obedience with international law.

A spirit of openness and regard for the broader community is likely to promote economic welfare as a whole, create more harmony, and take an edge off the world's conflicts. Time will tell whether Transnational Legal Process can meet this challenge. What is certain, though, is that the unique nature of the Chinese economy creates new tensions for interpreting WTO law and the roles of Transnational Legal Process. In the future, Transnational Legal Process may need to discern the means to champion transformation in other facets, such as human rights, before internalizing international trade laws. Or, given the high stakes, it may need to learn how to leverage trade cooperation to internalize

298. *See supra* Chapter IV.C.1. (the Vitamin C case).

299. *See* Luca D'Urbino, *Slowbalisation: The steam has gone out of globalization*, THE ECONOMIST (Jan. 24, 2019), https://www.economist.com/leaders/2019/01/24/the-steam-has-gone-out-of-globalisation (Slowbalisation is a term coined by Adjiedj Bakas, in 2015 which describes trade, cross-border investment, bank loans, and supply chains have all been shrinking or stagnating relative to world GDP. "Globalisation has given way to a new era of sluggishness.").

other domains of laws and regulations in the process of Transnational Legal Process. In any event, the U.S. is not the only proponent of Transnational Legal Process. All allies should support the system of global governance and address the real problems of the world.