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## Assessing the Strategic Situation Underlying International Antitrust Cooperation

Weimin Shen

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# ASSESSING THE STRATEGIC SITUATION UNDERLYING INTERNATIONAL ANTITRUST COOPERATION

*Weimin Shen\**

## ABSTRACT

*This Article disputes the widely held view that the strategic situations underlying antitrust cooperation among developed antitrust regimes and developing antitrust regimes are similar, particularly the conclusion that the current set of policy options to address private and hybrid public-private restraints of trade is feasible in all situations. This Article utilizes an empirical inquiry into trade flows that affect the general level of antitrust regulations in open economies (here, Japan and China). Based on this empirical foundation, the current set of policy options are explored, including the extraterritoriality of U.S. antitrust law, Section 301's competition-related clause, the World Trade Organization dispute settlement, and bilateral cooperation mechanisms. This Article contends that each policy option is feasible only to address competition-related trade concerns in developed antitrust regimes, but is ill-equipped to address competition-related trade concerns in emerging market economies that are in the process of developing antitrust regimes. Thus, when one compares the successful cooperation and convergence in developed antitrust regimes with the failed attempts to increase cooperation and convergence in emerging market economies, it indicates that the existing paradigm in antitrust cooperation is less likely to preempt the need to resort to a multilateral framework. The comparison further suggests that the optimal antitrust regime for a global integrated economy is to strengthen a network of bilateral agreements, supplemented by efforts toward a multilateral agreement.*

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## INTRODUCTION

Antitrust laws shape the market order and define the power that large companies should have in society and the extent to which the state is active in regulating economic participants.<sup>1</sup> This task has become increasingly difficult in the wake of globalization and economic interdependence.<sup>2</sup> There is ample

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<sup>1</sup> See Anu Bradford, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT'L L. 222 (2003).

<sup>2</sup> While this challenge is not new, it has led to the development of extraterritorial application of domestic

evidence that private barriers to trade are replacing the progress made by the World Trade Organization (WTO) in eliminating government-sponsored barriers to trade.<sup>3</sup> Entrenched businesses and states themselves face perverse motivations to rebuild barriers for private and national purposes.<sup>4</sup> Some critics argue that trade liberalization has laid the foundation for private and mixed abuse.<sup>5</sup> Other critics of globalization claim that countries have lowered their regulatory standards to improve their relative competitive position in the global economy.<sup>6</sup>

International organizations such as the WTO, the Organization for Economic Cooperation and Development (OECD), and bilateral intergovernmental groups have actively debated the appropriate national or international policy responses.<sup>7</sup> At the European Union's request, the WTO established the Working Group on Interaction between Trade and Competition Policy at its WTO Ministerial

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competition law. *See* *American Banana v. United Fruit Co.*, 213 U.S. 347 (1909); *see also* *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945).

<sup>3</sup> *See* Eleanor M. Fox & Janusz Ordovery, *The Harmonization of Competition and Trade Law: The Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 WORLD COMPETITION L. & ECON. REV. 5 (1995) (discussing factors which inspired initiatives to harmonize nations' antitrust laws and link antitrust and trade law); Merit Janow, *Private and Public Restraints that Limit Access to Markets*, in ORG. FOR ECON. COOP. & DEV. [OECD], MARKET ACCESS AFTER THE URUGUAY ROUND: INVESTMENT, COMPETITION AND TECHNOLOGY PERSPECTIVES, ch. 5 (1996) (reviewing the landscape of global problems that implicate international trade concerns about access to markets, and competition policy concerns about anticompetitive practices which inhibit the operation of markets).

<sup>4</sup> *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 3–4 (1997).

<sup>5</sup> *See, e.g.*, James D. Southwick, *Addressing Market Access Barriers in Japan Through the WTO: A Survey of Typical Japan Market Access Issues and the Possibility to Address Them Through WTO Dispute Resolution Procedures*, 31 LAW & POL'Y INT'L BUS. 923, 963–64 (2000) (stating attempts to treat anticompetitive practices and market structures in Japan through GATT/WTO mechanisms have been unsuccessful).

<sup>6</sup> *See, e.g.*, Ralph Nader, *Preface* to LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION?: CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY, at ix, xi (1999) (arguing WTO decisions on trade issue are anti-democratic and thus lack legitimacy); ALAN TONELSON, THE RACE TO THE BOTTOM: WHY A WORLDWIDE WORKER SURPLUS AND UNCONTROLLED FREE TRADE ARE SINKING AMERICAN LIVING STANDARDS 14–15 (2002) (arguing the United States has entered a global competition without a winner where countries with the lowest wages, weakest workplace safety laws, and toughest repression of unions have won investments from the United States and Europe.); DALE D. MURPHY, THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY pts. I, II, V (2004) (discussing the role of powerful firms in shaping public policies).

<sup>7</sup> *See* Merit E. Janow, *The Work of the International Competition Policy Advisory Committee to the Attorney General and the Assistant Attorney General for Antitrust*, 2 J. INT'L ECON. L. 441, 442 (1999); Andrew T. Guzman, *Introduction - International Regulatory Harmonization*, 3 CHI. J. INT'L L. 271, 273 (2002) (discussing three levels of international cooperation: unilateral choice of law rules, harmonization, and supranational regulation); Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 KAN. L. REV. 557, 558–59 (1994) (noting at least five efforts [the League of Nations, International Trade Organization, UN. Economic and Social Council, OECD, and U.N. Conference on Trade and Development] have tried to harmonize antitrust law at the international level, but none have been successful).

Conference in Singapore to discuss the interaction between trade and competition policy.<sup>8</sup> The tasks of the Working Group, which were analytical and exploratory, did not produce any definite agreement.<sup>9</sup>

The Fourth Session of the Ministerial Conference held in Doha initially included antitrust on its negotiating agenda.<sup>10</sup> However, at the 2003 Cancun Ministerial Meeting, WTO Members failed to reach an explicit consensus for two notable reasons.<sup>11</sup> First, many developing countries asserted that they were not ready to negotiate the WTO antitrust agreement due to insufficient resources or legal and economic expertise to enforce antitrust laws.<sup>12</sup> They also raised concerns about whether a multilateral framework agreement for antitrust is beneficial to their national interests.<sup>13</sup> Second, and more importantly, the United States took a pessimistic stance on further incorporating antitrust issues into the WTO agenda.<sup>14</sup> The United States was especially worried about the inability to overcome existing national differences in antitrust regimes.<sup>15</sup> The United States

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<sup>8</sup> See World Trade Organization, Singapore Ministerial Declaration of 18 December 1996, WTO Doc. WT/MIN(96)/DEC, ¶ 20 (1996); see also Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and Its Member States*, WTO Doc. W/WGTCP/W/115 (1999) [hereinafter *Communication from the European Community*] (noting Japan, Korea, Switzerland, Norway, Canada, and Hungary supported the European Union's position); Bradford, *supra* note 1, at 230 ("The proposal of the European Commission requires WTO member states to (1) enact national antitrust laws that would entail at least core antitrust provisions, (2) establish an effective enforcement mechanism for substantive antitrust laws respecting principles of nondiscrimination and transparency, (3) set up cooperation devices among antitrust authorities, and (4) provide for the gradual convergence of national practices.").

<sup>9</sup> *Communication from the European Community*, *supra* note 8.

<sup>10</sup> See World Trade Organization, Ministerial Declaration of 20 November 2001, WTO Doc. WT/MIN(01)/DEC/1, ¶ 23 (2001) [hereinafter *Doha Ministerial Declaration*] ("Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area . . . , we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.").

<sup>11</sup> See *Day 5: Conference Ends Without Consensus*, WTO (Sept. 14, 2003), [https://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm).

<sup>12</sup> See, e.g., Taimoon Stewart, *The Fate of Competition Policy in Cancun: Politics or Substance?*, 31 LEGAL ISSUES ECON. INTEGRATION 7, 7–8 (2004); Seung Wha Chang, *Interaction between Trade and Competition: Why a Multilateral Approach for the United States?*, 14 DUKE J. COMP. & INT'L L. 1, 4 (2004); Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT'L L. 1, 24 (2010).

<sup>13</sup> Chang, *supra* note 12.

<sup>14</sup> *Id.*

<sup>15</sup> See Joel I. Klein, *A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust*, in OECD, TRADE AND COMPETITION POLICIES: EXPLORING THE WAYS FORWARD 37, 41–42 (1999) (discussing what role governments should assign the WTO and/or other international institutions to deal with international antitrust issues). For a generalized argument opposing international cooperation, see generally Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999). Stephan argues the expert groups that produce international conventions and model laws are likely to produce either vague norms that impose no significant constraint on domestic decisionmakers, or precise rules that benefit discrete interest groups. *Id.*; see also Paul B.

was also concerned that this possible future role of the WTO would lead to a weak and ineffective regime.<sup>16</sup>

Such failures to negotiate an agreement on antitrust and other Singapore Conference issues resulted in the collapse of the Cancun Ministerial Conference.<sup>17</sup> Following the collapse of negotiations in Cancun, the WTO General Council decided to drop antitrust policy from the Doha Development Agenda.<sup>18</sup> Few have suggested that WTO antitrust negotiations will be revived soon.<sup>19</sup>

The United States traditionally considers both trade and antitrust policy options to overcome anticompetitive practices around the world that inhibit access to markets and trade.<sup>20</sup> Such alternative policy tools include extraterritoriality of U.S. antitrust law, Section 301's competition-related clause, and the WTO dispute settlement process.<sup>21</sup> These policy options have been suggested in response to the claims of many American companies that their access to and expansion into Japanese markets have been blocked by both public and private restraints of trade which might at least partially boost the U.S. trade

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Stephan, *The Political Economy of Choice of Law*, 90 GEO. L. J. 957 (2002) (responding to Professor Andrew Guzman's *Choice of Law: New Foundations*, 90 Geo L. J. 333 (2002), and arguing that Guzman's normative analysis may place too great confidence in the ability of multilateral, multi-tasked organizations such as the WTO to coordinate the allocation of regulatory jurisdiction); Paul B. Stephan, *Accountability and International Lawmaking: Rules, Rents, and Legitimacy*, 17 NW. J. INT'L L. & BUS. 681 (1996-97) (arguing that citizens face higher costs monitoring international rules than domestic rules).

<sup>16</sup> See Merit E. Janow, *Public, Private, and Hybrid Public/Private Restraints of Trade: What Role for the WTO*, 31 L. & POL'Y INT'L BUS. 977, 979-80 (2000) (arguing those competition policy undertakings likely to be agreed upon at the international level are likely to be very general and therefore not truly justifiable if they are subject to WTO dispute settlement).

<sup>17</sup> See *Doha Ministerial Declaration*, *supra* note 10; see also Bradford, *supra* note 12, at 24 n.104 ("Developing countries have also kept off the table issues including labor rights, which the United States has demanded, and environmental issues, which the European Union has endorsed.").

<sup>18</sup> See World Trade Organization General Council, *Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579 (Aug. 2, 2004).

<sup>19</sup> See, e.g., Bradford, *supra* note 12, at 18 (arguing an international legal framework like the WTO failed to negotiate an antitrust agreement due to: (1) disagreement between the great economic powers on the need to negotiate a WTO antitrust agreement; (2) little support by these great powers of the international antitrust agreement; (3) ex ante uncertainty regarding winners and losers under the prospective antitrust agreement which obstructed states' ability to devise these types of issue linkages and, as a result, compromised their ability to solve distributional conflict; (4) the likelihood of defection and need for an enforcement mechanism was a lesser concern in antitrust negotiations, diminishing the need to pursue cooperation within the WTO; (5) little benefits of antitrust cooperation in the WTO).

<sup>20</sup> See Chang, *supra* note 12, at 9, 25-30; Fox, *supra* note 4, at 11; Angela Huyue Zhang, *Strategic Comity*, 44 YALE J. INT'L L. 281, 288-97 (2019).

<sup>21</sup> Fox, *supra* note 4, at 11.

deficit.<sup>22</sup> The United States has implemented these policy tools in the Japanese context, however, without much success.<sup>23</sup>

For these reasons, positive comity is a substantial development. The United States decided to seek strategies that require as little cooperation as possible while still achieving a reasonably efficient regulatory outcome.<sup>24</sup> The U.S. antitrust authorities made efforts to enter into bilateral antitrust cooperation agreements with foreign counterparts, calling for day-to-day enforcement relationships of trust to benefit both parties.<sup>25</sup> The United States has also taken initiative by leading discussions on positive comity within the OECD to build consensus on an international agreement on positive comity.<sup>26</sup> The general U.S. position is that cooperative arrangements among antitrust authorities are superior solutions to initiating a WTO action.<sup>27</sup>

All the above policy options have been considered in response to the recent restraints on trade—both private and a hybrid of public and private—applied in China.<sup>28</sup> With respect to Section 301, aggressive unilateralism has not been a viable option since China joined the WTO in 2001.<sup>29</sup> The pursuit of trade sanctions could lead to counter-suits against the United States.<sup>30</sup> With respect to

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<sup>22</sup> *Id.* at 9.

<sup>23</sup> See discussion *infra* Section III.A.

<sup>24</sup> See Joel I. Klein, Acting Assistant Att’y Gen., U.S. Dep’t of Just., A Note of Caution with Respect to a WTO Agenda on Competition Policy (Nov. 18, 1996), in *The Remarks Before the Royal Institute of International Affairs*, DEP’T OF JUST., <https://www.justice.gov/atr/speech/note-caution-respect-wto-agenda-competition-policy> (stating that “positive comity” agreements are the best way to ensure effective antitrust enforcement in cases involving market access problems).

<sup>25</sup> See Klein, *supra* note 15, at 39.

<sup>26</sup> See generally OECD Comm. on Competition Law and Pol’y, *CLP Report on Positive Comity*, OECD Doc. DAFFE/CLP(99)19 (June 14, 1999) [hereinafter *Report on Positive Comity*] (discussing the policy context and historical background of positive comity, the relationship between positive and negative comity, the relationship between positive comity and other forms of cooperation, the development and use of positive comity, and positive comity’s potential contribution to improved competition enforcement and to the avoidance of jurisdictional disputes); REPORT ON THE INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE, 1999 A.B.A. SEC. ANTITRUST L. & INT’L L. & PRAC. (reviewing efforts to develop international competition law rules or guidelines in which the United States has participated, including OECD Multinational Guidelines in the 1970s and 1980s, and the OECD Recommendation on Hard Core Cartels in the 1990s).

<sup>27</sup> See, e.g., Chang, *supra* note 12, at 11–12, 31; Bradford, *supra* note 1, at 240–42; Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002) (stating governments are increasingly working together through transnational networks, and favoring gradual convergence of competition laws through such cooperation).

<sup>28</sup> See discussion *infra* Parts III and IV.

<sup>29</sup> See Anu Bradford, *Chinese Antitrust Law: The New Face of Protectionism?*, HUFFPOST (Aug. 9, 2008), [https://www.huffpost.com/entry/chinese-antitrust-law-the\\_b\\_116422](https://www.huffpost.com/entry/chinese-antitrust-law-the_b_116422).

<sup>30</sup> *Id.*; see also Angela Huyue Zhang, *The U.S.-China Trade Negotiation: A Contract Theory Perspective*, 51 GEO. J. INT’L L. 809, 840 (2020).

the WTO, the current rules offer only fragmentary coverage of competition-type concerns.<sup>31</sup> The WTO can at most examine trade effects of a few antitrust violations, with only uncertain prospects of success.<sup>32</sup>

The concept of extraterritoriality has always been a highly controversial issue.<sup>33</sup> In particular, three similar antitrust cases were brought before U.S. courts against Chinese export cartels.<sup>34</sup> These cases are unusual because the Chinese defendants did not deny they fixed prices and limited output; instead they moved to dismiss the suits on the basis that they should be exempt from antitrust liability since the Chinese government had compelled them to do so.<sup>35</sup> As all three cases were progressing in U.S. district courts, China received another blow on the trade front.<sup>36</sup>

The decisions flowing from these parallel proceedings have created glaring contradictions in their findings of the relationship between the Chinese government and its exporters, leading to conflicting positions expressed by the U.S. executive and judicial branches.<sup>37</sup> These decisions triggered even larger controversy because three district courts have responded to the tension between domestic antitrust law and WTO law in three different ways.<sup>38</sup> In addition, these cases indicate that there are inherent limitations of bilateral cooperation mechanisms between antitrust authorities from developed market economies

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<sup>31</sup> See Janow, *supra* note 16, at 979.

<sup>32</sup> See Bradford, *supra* note 29.

<sup>33</sup> See, e.g., P.M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests"*, 41 INT'L & COMP. L.Q. 245, 251–52 (1992) (discussing the contradictory nature of extraterritoriality); Chang, *supra* note 12, at 22–24 (“There arise serious theoretical and practical problems when extraterritorial application is to be undertaken with the purpose of safeguarding the interests of U.S. exporting companies rather than U.S. consumers.”).

<sup>34</sup> *In re Vitamin C Antitrust Litigation (Vitamin C I)*, 584 F. Supp. 2d 546 (E.D.N.Y. 2008); *Resco Prods., Inc. v. Bosai Minerals Grp.*, 2010 U.S. Dist. LEXIS 54949, at \*18 (W.D. Pa. June 4, 2010); *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).

<sup>35</sup> See discussion *infra* Section III.B.1.

<sup>36</sup> First Written Submission of the United States of America, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394 (June 1, 2010) [hereinafter First Written Submission, *Various Raw Materials*].

<sup>37</sup> See, e.g., 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) (arguing 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); Zhang, *supra* note 20, at 314 (“[M]uch of the judicial response to State-led export cartels has been static, and judges have failed to appreciate the dynamic features of these cases.”).

<sup>38</sup> For a detail discussion of this argument, see *infra* Section III.B.1.



and their counterparts in developing countries or emerging market economies that are in the process of adopting antitrust regimes.<sup>39</sup>

The problems that have been identified are not random. The accession of developing countries and countries with economies in transition to the WTO may create even more tensions among countries reflecting the mixed practices of government and private restrictions.<sup>40</sup> The international community will face a world where opportunistic behavior is still a characteristic of many areas of antitrust cooperation.<sup>41</sup> Consequently, the subject of extensive debate and controversy is whether there is a need to create an international antitrust regime that could better respond to the ongoing changes in the economic and political landscape.

This Article departs from the existing scholarly debate on whether there should be an international competition policy; instead, it focuses on the capacity of the current set of policy options. This Article examines when it works and when it does not, given the characteristics of the underlying issue of cooperation and constraints from the domestic political economy. The goal is to define whether the current system is better than what might otherwise exist in dealing with competition-related trade concerns.

This Article disputes the widely held view that the strategic situations underlying antitrust cooperation among developed and developing antitrust regimes are similar, particularly the conclusion that the current set of policy options to address private and hybrid public-private restraints of trade is feasible in all situations. The central thesis is that the current set of policy options that the United States has relied upon to address competition-related trade concerns is attainable only between developed antitrust regimes with highly similar antitrust laws and legal cultures. The promise of regulatory cooperation and convergence has culminated through the growing economic integration between

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<sup>39</sup> See, e.g., Bradford, *supra* note 1, at 239 (“[C]ooperation between antitrust authorities from developed market economies and those from developing countries or emerging market economies that are in the process of adopting antitrust regimes . . . faces very different challenges by reason of the inequality of knowledge, experience, resources, and the differences in the economic environments in which the regulators operate.”); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 ANTITRUST BULL. 973, 991–93 (2003) (arguing there are few antitrust dialogues between developed and developing countries or between large and small countries).

<sup>40</sup> See Janow, *supra* note 16, at 978.

<sup>41</sup> *Id.*; see also Eleanor M. Fox & Merit E. Janow, *China, the WTO, and State-Sponsored Export Cartels: Where Trade and Competition Ought to Meet*, CONCURRENCES (Dec. 2012), <https://www.concurrences.com/en/review/issues/no-4-2012/foreword/china-the-wto-and-state-sponsored-export-cartels-where-trade-and-competition>.

developed antitrust regimes.<sup>42</sup> Ongoing economic and political landscape changes make it necessary for these antitrust authorities to cooperate and exchange views on common antitrust concerns. The similarity of institutional structures further facilitates cooperation. Hence, achieving bilateral and regional cooperation among developed antitrust regimes has been more successful than efforts at the international level among nations with divergent antitrust regimes. The existing bilateral cooperation mechanisms, including provisions on information-sharing and positive comity, as well as the new Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC), fit this description.<sup>43</sup>

By comparison, the current set of policy options are ill-equipped to address private and hybrid public-private restraints of trade in emerging open economies, many of which are only now creating competition laws as they liberalize their economies. This empirical study suggests that no policy tool is sufficient to prevent local favoritism and trade-induced distortions in antitrust.<sup>44</sup> While a consensus at some level could be reached, antitrust protectionism remains a feature of multijurisdictional antitrust enforcement.<sup>45</sup> These protectionist pressures can turn antitrust laws into instruments of industrial policy tools, seriously undermining the gains of trade liberalization.

This Article proceeds in two stages. First, it provides an empirical inquiry into trade flows that affect the general level of antitrust laws and competition policies in open economies (in this Article, Japan and China); then it assesses the desirability and the capacity of the current set of policy options to address the public, private, and hybrid private–public restraints of trade in the Japanese context and the Chinese context. Part II discusses how globalization and trade

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<sup>42</sup> See discussion *infra* Part IV.

<sup>43</sup> See *infra* Part IV.

<sup>44</sup> See *infra* Parts II and III.

<sup>45</sup> See Recommendation of the Council for Cooperation between Member Countries in Areas of Potential Conflict, OECD Doc. C(86)65/Final (1986); Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors, OECD Doc. C(79)155/Final (1979); 1998 OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD Doc. C(98)35/Final (1998) (noting a certain degree of consensus can be reached regarding how to deal with price-fixing, market division, and bid-rigging); see also Anu Bradford, *Antitrust Law in Global Markets*, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW (2012) (“Antitrust protectionism can take several forms: states may engage in systematic under or overenforcement of antitrust laws depending on their terms of trade [‘trade-flow bias’]. States may also exempt domestic firms from antitrust scrutiny altogether [‘statutory bias’]. Similarly, antitrust agencies may engage in selective enforcement practices, disproportionately targeting foreign firms at the expense of domestic firms in their investigations [‘enforcement bias’]. Yet the key assumption behind all forms of alleged antitrust protectionism is the same: each antitrust jurisdiction internalizes the costs and the benefits incurred by its domestic producers and consumers, while externalizing the costs and the benefits sustained by producers and consumers in another jurisdiction.”).

interact with domestic antitrust laws and competition policies, using Japan and China as examples. Part III examines how U.S. trade and competition policy have interacted throughout its historical development during its trade frictions with Japan and China, and assesses the desirability and the capacity of these policy options individually in addressing anticompetitive private restraints of trade in foreign markets. Part IV assesses the desirability and the capacity of bilateral antitrust cooperation agreements, including provisions on information-sharing and positive comity; and why such arrangements may not produce positive results between antitrust authorities from developed market economies and those from developing countries or emerging market economies that are in the process of adopting antitrust regimes. The Conclusion summarizes the argument and outlines some possible normative implications that follow from the discussion.

## I. THE THEORETICAL AND EMPIRICAL FOUNDATION OF TRADE FLOW BIAS IN DOMESTIC ANTITRUST LAWS

This Section examines how globalization and trade interact with domestic antitrust laws and competition policies. Following the WTO accession, some degree of trade flow bias characterized Japan and China's doctrines and enforcement in antitrust. Both countries have pursued export-oriented growth strategies and applied antitrust laws and competition policies depending on changes in foreign trade flows. Both countries' doctrines and enforcement changes in antitrust are related to their prevailing market conditions and domestic political economy considerations.

### *A. Reasons for Seeking Increased Cooperation and Convergence*

The General Agreement on Tariffs and Trade (GATT) was signed in 1947 with the purpose of "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce[.]"<sup>46</sup> The GATT successfully fulfilled its mission and entrusted it to the WTO, which has made a significant contribution to reducing or eliminating public trade barriers.<sup>47</sup> Since then, multilateral corporations' activities spanned global markets.<sup>48</sup> It is increasingly common to find a company headquartered in

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<sup>46</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, at 1 [hereinafter GATT].

<sup>47</sup> Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, 1867 U.N.T.S. 154.

<sup>48</sup> See ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21<sup>ST</sup> CENTURY CAPITALISM ch. 14 (1991).

the United States but with design and research spread over Europe, Japan, and North America; production facilities in Latin America and Southeast Asia; marketing and distribution centers on any of the continents; and investors and lenders in Japan, Taiwan, “West Germany,” and the United States.<sup>49</sup> As Professor Robert Reich pointed out, businesses’ production facilities are so extensive that in many cases, one cannot distinguish “who is us” and “who is them.”<sup>50</sup>

While business activities cross national borders, antitrust laws have remained domestic.<sup>51</sup> “[T]here are no supranational rules for choice of law, jurisdictional priority, or proportionality to restrict enforcement.”<sup>52</sup> Under this *laissez-faire* system, each jurisdiction proceeds according to its own interests without concern for the policies of other jurisdictions.<sup>53</sup> This underscores a basic challenge: the differences between domestic antitrust regimes almost always lead to “system friction.”<sup>54</sup> Put differently, one country’s antitrust laws and competition policies may permit conduct that another country’s policies prohibit.

Emblematic of this viewpoint is Professor Andrew Guzman’s scholarship, which discusses how trade flow across countries can impact the type of antitrust laws and competition policies a country adopts.<sup>55</sup> Guzman argues that net-importer countries<sup>56</sup> have an incentive to adopt “stricter-than-optimal antitrust standards” as they fail to internalize costs produced by foreign exporters.<sup>57</sup> Conversely, net-exporter countries<sup>58</sup> have an incentive to enact laxer-than-optimal antitrust standards to externalize costs to foreign consumers.<sup>59</sup> This behavior rests on the idea that, as rational actors who seek to maximize their

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* chs. 10, 25.

<sup>51</sup> See Bradford, *supra* note 1, at 224 (noting there are no supranational rules for choice of law, jurisdictional priority, or proportionality to restrict enforcement in antitrust).

<sup>52</sup> *Id.*

<sup>53</sup> See Guzman, *supra* note 7, at 271 (arguing a system of no international cooperation in antitrust will almost always lead to overlapping jurisdictions, conflicting legal regimes, and over-regulation).

<sup>54</sup> See Sylvia Ostry, *Policy Approaches to System Friction: Convergence Plus*, in NATIONAL DIVERSITY AND GLOBAL CAPITALISM 333, 333 (Suzanne Berger & Ronald Dore eds., 1996) (arguing the priority target for harmonization is competition policy, which affects both trade and innovation).

<sup>55</sup> See Andrew Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT’L L. 355, 356–63 (2004).

<sup>56</sup> Meaning their share of global production is lower than their share of consumption.

<sup>57</sup> Guzman, *supra* note 55.

<sup>58</sup> Meaning their share of global production exceeds their share of consumption.

<sup>59</sup> Guzman, *supra* note 55.

national interest, each state will adjust its antitrust laws and competition policies strategically to take trade flows into account.<sup>60</sup>

The argument of “statutory bias” is manifested in most export cartels and industry exemptions.<sup>61</sup> Guzman acutely observed:

Several strategies are available to governments that wish to favor firms over consumers. The easiest of these, the . . . export cartel exemption, is a relatively crude instrument because it applies only if all of a firm’s production is exported. A more nuanced strategy is to change the state’s substantive laws. This benefits all firms, including those that sell some of their goods domestically. Returning to the example of a country that exports most but not all of its production in imperfectly competitive industries, the government could react to the pattern of trade by weakening its competition laws. This strategy opens the door to more anticompetitive activity by local firms than would be the case in the absence of trade, yet it retains some limits on conduct to protect local consumers.<sup>62</sup>

Even if double standards are not explicitly called for on the surface, there is a risk that foreign firms may encounter an unfavorable ruling at the administrative level (enforcement bias).<sup>63</sup> This is because the regulators themselves have a more favorable view of local firms, or political leaders have pressured the regulators to pursue foreign firms.<sup>64</sup> In these situations, local firms doing business benefit and enjoy an advantage over foreign competitors.<sup>65</sup>

Using an empirical inquiry into trade flow bias, statutory bias, and enforcement bias, the following sections discuss the causal relationship between the changes in net-exporter countries’ trade flow, and their antitrust laws and competition policies. This empirical study suggests that the optimal antitrust rules might differ between net-exporting countries and net-importing countries.

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 358.

<sup>63</sup> *Id.* at 356. Bias enforcers may resort to excessively rigid enforcement of foreign corporations. *Id.* Examples of this argument in the Chinese context are discussed in Section III.B.3.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

*B. Linkages Between Changes in Trade Flows and Changes in Domestic Antitrust Laws*

Japan joined GATT in 1955 with the strong support of the United States.<sup>66</sup> Fearing that Japan's low wages would lead to import competition, fourteen other GATT parties initially invoked Article XXXV to restrict their liberalization commitments.<sup>67</sup> Consequently, Japan's GATT accession left the United States with a heavy burden of accepting massive exports.<sup>68</sup> Since then, Japan and the United States have had a series of trade frictions that peaked in the mid-1980s.<sup>69</sup>

The United States enticed China to comply with the WTO framework in 2001.<sup>70</sup> The other WTO members would engage China diplomatically with a message: if China opened its market, the WTO system would allow China's involvement in the international community and the expansion of cultural and economic links.<sup>71</sup> The WTO accession directly led to China becoming the third-largest exporter in world merchandise trade in 2004.<sup>72</sup>

The most salient common element in the above two events is the size of the bilateral trade imbalances. Figure 1 shows that the bilateral trade deficit with Japan and China accounted for a large proportion of the total U.S. trade deficit. From the mid-1980s to the mid-1990s, Japan's share fluctuated between thirty-five percent and sixty-five percent.<sup>73</sup> Japan's share began to decline in the 1990s and reached about ten percent in the late 2000s. Since then, it has remained below ten percent. As shown in Figure 1, the opposite pattern was observed in China. By the end of the 1980s, China's share was less than ten percent. Since the early 1990s, it has continued to grow, reaching thirty-one percent in 2008. In recent years, China's share has reached nearly fifty percent.

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<sup>66</sup> Chad P. Bown & Rachel McCulloch, *U.S.-Japan and U.S.-China Trade Conflict: Export Growth, Reciprocity, and the International Trading System* 6 (World Bank, Working Paper No. WPS 5102, 2009) (discussing how both Japan in the 1950s through the 1990s and China since the late-1970s have followed similar strategies of promoting economic growth through rapid acquisition of advanced foreign technology and expansion of manufactured exports).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; see also Shujiro Urata, *US-Japan Trade Frictions: The Past, the Present, and Implications for the US-China Trade War*, 15 *ASIAN ECON. POL'Y REV.* 141, 145 (2020).

<sup>69</sup> Urata, *supra* note 68, at 144.

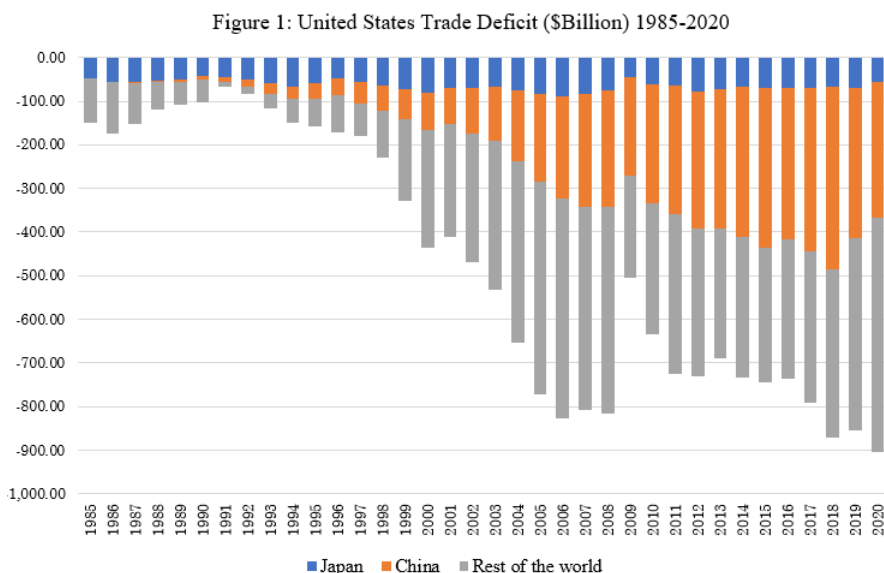
<sup>70</sup> See Robert Zoellick, Deputy Secretary of State, Keynote Address to the National Committee on U.S.-China Relations (Sept. 21, 2005).

<sup>71</sup> *Id.*

<sup>72</sup> See Press Release, WTO, Developing Countries' Goods Trade Share Surges to 50-Year Peak (Apr. 14, 2005), [https://www.wto.org/english/news\\_e/pres05\\_e/pr401\\_e.htm](https://www.wto.org/english/news_e/pres05_e/pr401_e.htm).

<sup>73</sup> See *infra* Figure 1. A color-coded version of Figure 1 can be found online at <https://scholarlycommons.law.emory.edu/eilr>.

In terms of gross domestic product (GDP), the relationship between the United States, Japan, and China changed notably from the 1980s to the 2010s.<sup>74</sup> Figure 2 shows the United States has retained its position of being the world's largest economy. The period between roughly 1985 and 1990 was a time of unparalleled prosperity in Japan. During the economic boom, Japan rapidly became the world's second-largest economy, but Japan's GDP stopped growing after the bubble economy burst in the early 1990s. The ratio of Japan's GDP to the United States' GDP increased sharply from less than forty percent in the early 1980s to seventy percent in 1995, and then dropped sharply to a level of twenty-five percent in 2017. Figure 2 makes clear that the situation in China is the opposite. By 1995, the ratio of China's GDP to that of the United States was about ten percent, but then it grew rapidly, reaching more than sixty percent in 2017.<sup>75</sup> In short, the last fifty years have seen some remarkable changes in the economic environment surrounding the United States, Japan, and China, with the latter two countries exporting a large percentage of their goods to the United States.<sup>76</sup>



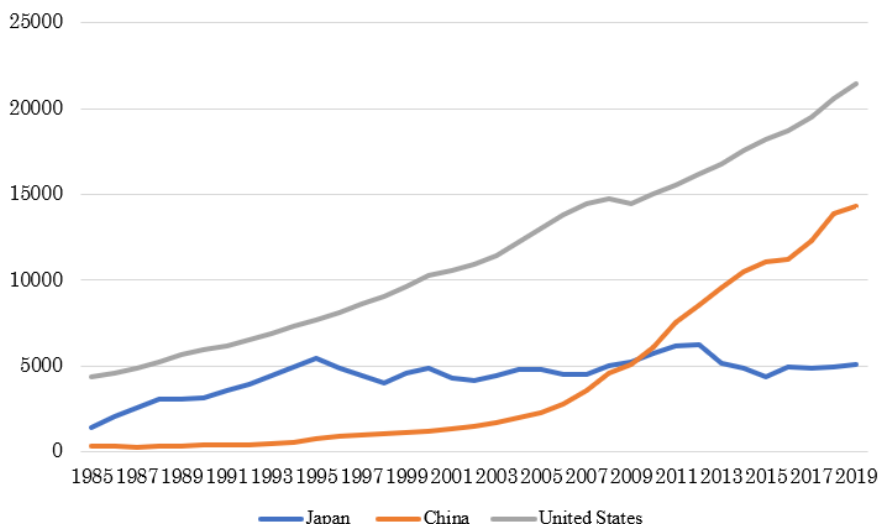
Source: *U.S. Trade in Goods by Country*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/index.html> (last accessed May 15, 2021).

<sup>74</sup> See *infra* Figure 2. A color-coded version of Figure 2 can be found online at <https://scholarlycommons.law.emory.edu/eilr>.

<sup>75</sup> *Id.*

<sup>76</sup> See Bown & McCulloch, *supra* note 66, at 3–6.

Figure 2: Gross Domestic Product (\$Billion)-Japan, China, and the United States



Source: *GDP (Current US\$) - United States, Japan, China*, WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US-JP-CN> (last accessed May 15, 2021).

Trade law has been liberalized. As trade barriers fell, Japan and China suffered excess capacity. Both states believed that cartels were an effective way to eliminate excess capacity by allowing troubled companies to solve their mutual problems.<sup>77</sup> In Japan, inflation stoked by rising oil prices around 1973 and 1979 legitimized cartels.<sup>78</sup> In 1977, eighty-six officially-registered export cartels accounted for twenty to thirty percent of all exports from Japan.<sup>79</sup> In 1978, the Japanese government adopted a program of adjustment assistance to remedy excess capacity problems.<sup>80</sup> One of its main adjustment tools (in use since 1953) was the cartelization of basic industries.<sup>81</sup> A famous example is the Japanese treatment of their Keiretsu.<sup>82</sup> The United States has accused Japan of

<sup>77</sup> See Zhang, *supra* note 20, at 287.

<sup>78</sup> See Akinori Uesugi, *Japan's Cartel System and Its Impact on International Trade*, 27 HARV. INT'L L. J. 389, 389 (1986). Oil shocks drastically changed the relative competitiveness of different Japanese industry sectors. *Id.* Japan's manufacturing industries, particularly automobiles and electronics, remained highly competitive while its basic industries suffered from increased import competition and excess capacity. *Id.*

<sup>79</sup> See Marek Martyniszyn, *Export Cartel: Is It Legal to Target Your Neighbour? Analysis in Light of Recent Case Law*, 15 J. INT'L ECON. L. 181, 217 (2012).

<sup>80</sup> See Uesugi, *supra* note 78, at 389.

<sup>81</sup> *Id.* at 390. Japan has had depression cartel systems and rationalization cartel systems as important policy tools for adjustment since 1953. *Id.*

<sup>82</sup> See Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT'L LAW. 117, 124 (1995); see also Julian Epstein, *The Other Side of Harmony: Can Trade and Competition Laws*



being excessively tolerant to arrangements that deprive outside companies of economic opportunity.<sup>83</sup> The Japanese government denies these accusations and permits such associations.<sup>84</sup> The differing national views of antitrust led to varying opinions regarding the Japanese treatment of Keiretsu. This caused antitrust agencies on both sides to be unwilling to help each other prosecute certain types of conduct.<sup>85</sup>

More recently, many of China's industries have suffered excess capacity from the transition of China's previous planned economy to a socialist market economy.<sup>86</sup> In the mid-1990s, of the ninety-four significant categories of industrial products in China, there was excess capacity in sixty-one.<sup>87</sup> The capacity utilization rate was below fifty percent in thirty-five of them.<sup>88</sup> As expected, excess capacity led to excessive competition.<sup>89</sup> Fears about excessive competition spread to China's export sector, which sparked accusations that Chinese exporting companies were dumping their goods into foreign markets.<sup>90</sup> To rein in excessive competition, the Chinese government exempted cartels as a means to restore certain price controls that had been abolished in price reform.<sup>91</sup>

Returning to the theory of trade flow bias, the combination of trade and consumption patterns shows how the competition policies of net exporting countries and net importing countries will differ.<sup>92</sup> According to Guzman, trade's net effect depends on the ratio of a country's global share of production

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*Work Together in the International Marketplace?*, 17 AM. U. INT'L L. REV. 343, 361 (2002) (noting the Japanese distribution system is largely controlled by "[i]nterlocking vertical relationships—often referred to as Keiretsus" which "are an important part of the economic fabric in Japan but might be considered verboten" by U.S. and European rules).

<sup>83</sup> See Hachigian, *supra* note 82, at 124 (citing *Seminar Examines Operation and Impact of Keiretsu System*, 61 ANTITRUST & TRADE REG. REP. (BL) 616, 617 (1991)); Robert L. Cuts, *Capitalism in Japan: Cartels and Keiretsu*, HARV. BUS. REV., July 1, 1992, at 48.

<sup>84</sup> See Hachigian, *supra* note 82, at 124.

<sup>85</sup> *Id.*

<sup>86</sup> See Wentong Zheng, *Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control*, 32 U. PA. J. INT'L L. 643, 667–79 (2010) (discussing structural distortions behind China's excess capacity).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Yanlin Sun & John Whalley, *China's Anti-Dumping Problems and Mitigation Through Regional Trade Agreements*, 24 CHINA & WORLD ECON. 87, 92–93 (2016). From 1995 to 2013, China was the largest recipient of both anti-dumping initiations and anti-dumping measures. *Id.* at 89. The anti-dumping initiations against China contributed to 21.89% of total anti-dumping filings worldwide, while anti-dumping measures against China account for 24.78% of total measures worldwide. *Id.*

<sup>91</sup> See Zheng, *supra* note 86, at 687.

<sup>92</sup> See Guzman, *supra* note 55, at 358.

to its global share of consumption of imperfectly competitive goods.<sup>93</sup> In looking at the U.S. bilateral trade imbalances with Japan and China, both China and Japan are net exporter countries. Therefore, the two countries tend to consider a larger portion of the policies' impact on producers rather than on consumers, resulting in a more permissive competition policy regime to benefit producers' interests.

The resulting antitrust laws and competition policies represent attempts by both countries to externalize costs while internalizing benefits. This is domestically optimal, but is suboptimal from a global perspective because some costs and benefits are ignored.<sup>94</sup> Considering China and Japan's political economies, trade has caused their antitrust doctrines to deviate from their pre-WTO ones, representing a move away from the optimal global policies. Viewed in this context, the alleged trade flow bias can be plausible in both cases.

Importantly, this argument does not mean that the antitrust systems in Japan and China are the same. They are quite different. Japan's Antimonopoly Law was enacted in 1947 under the strong influence of U.S. antitrust laws.<sup>95</sup> Although antitrust laws and policies in the Japan and the United States continue to share many fundamental similarities, considerable differences have developed due to each country's cultural, social, economic, and legal backgrounds.<sup>96</sup> These differences have led to differing competitive environments.<sup>97</sup> In turn, this has surfaced as a structural issue in U.S.–Japan trade relations.<sup>98</sup> From the U.S. perspective, Japan's exclusionary business practices—such as the Keiretsu and government interventions in the form of industrial policy spread across economic activities—made the entry of foreign firms and imports difficult.<sup>99</sup>

In the case of China, government intervention is pervasive, and in particular, important industries are dominated by state-owned enterprises (SOEs).<sup>100</sup> SOEs that are financially supported by the government do not compete with other firms

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<sup>93</sup> *Id.* at 359.

<sup>94</sup> *See infra* Section III.A.B.

<sup>95</sup> *See* Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM L. & POL'Y J. 59, 61 (1995).

<sup>96</sup> *Id.* at 90.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See* Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 270–73 (2016) (stating China's SOEs are controlled by the State-owned Assets Supervision and Administration Commission of the State Council, developing a different model for state economic oversight and deployment of state assets).

(such as foreign firms) on a level playing field.<sup>101</sup> In addition, the widespread structural distortions, caused by the roles of the government in the investment process and exit barriers erected by the government, have prevented China from pursuing a rigorous anti-cartel policy during its transitional stage.<sup>102</sup> In recent years, antitrust scholars raised the concern that China's Antimonopoly Law reflects the resurgence of protectionist sentiments in China following the increase in foreign acquisitions of Chinese corporations.<sup>103</sup> "An antitrust law that on its face is designed to open markets can be a powerful tool to close them."<sup>104</sup>

Several export restraint cases—what trade officials would call market access cases—illustrate that changes in trade flows have distorted the two countries' substantive laws and competition policies. They also highlight the fact that the U.S. trade deficit might partially result from foreign exporters' wrongdoings within their territories. The current policy options to address these concerns, however, are quite modest, as elaborated below.

## II. THE DESIRABILITY AND THE CAPACITY OF THE CURRENT POLICY OPTIONS

This Section traces the evolution of the current policy options in response to trade flow bias in antitrust. It proceeds from the premise that the United States has considered both trade and antitrust policy options when breaking down Japanese markets that have been blocked by private and hybrid public-private restraints of trade. Involved policy tools include extraterritoriality of U.S. antitrust law, Section 301's competition-related clause, and the WTO dispute settlement process. All the policy tools have also been considered in response to anti-competition practices in China. This Article examines each policy option and its capacity in the context of Japan and China.

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<sup>101</sup> *Id.*

<sup>102</sup> Professor Wentong Zheng argued that three major forces shape antitrust law and competition policy in China: China's current transitional stage, China's market structures, and pervasive state control in China's economy. *See* Zheng, *supra* note 86. These forces have further limited the applicability of Western antitrust models to China in three major areas of antitrust: cartels, abuse of dominant market position, and merger review. *Id.* Zheng also detailed how these forces have (1) prevented China from pursuing a rigorous anti-cartel policy, (2) led to a mismatch between monopoly abuses that are prohibited under the Anti-Monopoly Law of the People's Republic of China (AML) and monopoly abuses that are most prevalent in China's economy, and (3) prevented the merger review process under the AML from being meaningfully applied to domestic firms. *Id.*

<sup>103</sup> *See, e.g.*, Bradford, *supra* note 29.

<sup>104</sup> *Id.* at 2.

A. *A Historical Dimension: Weighing Trade and Antitrust*

1. *The Japanese Export Cartels and Extraterritorial Application of U.S. Antitrust Law*

“[U]ntil the 1970s, U.S. antitrust law was mainly regarded as domestic law, and the antitrust authorities normally did not seek an international application of antitrust laws.”<sup>105</sup> This can be evidenced by the fact that Congress had not taken any legislative action for an international application of antitrust law until it enacted the Foreign Trade Antitrust Improvement Act (FTAIA) in 1982.<sup>106</sup> As part of a plan to free business from excessive government regulation, the 1982 FTAIA focused on output-limiting conduct that provably raises prices to U.S. consumers.<sup>107</sup> FTAIA also made clear that U.S. law does not follow U.S. firms into foreign markets.<sup>108</sup>

The new paradigm was put into operation by a variety of Department of Justice (DOJ) guidelines. These included the 1982 DOJ Merger Guidelines,<sup>109</sup> the 1985 DOJ Vertical Restraint Guidelines,<sup>110</sup> and the 1988 DOJ Antitrust Enforcement Guidelines for International Operations (1988 Guidelines).<sup>111</sup> In particular, the 1988 Guidelines contained the famous footnote 159, which stated: “The Department is concerned only with adverse effects on competition that would harm US consumers by reducing output or raising prices.”<sup>112</sup>

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<sup>105</sup> See Chang, *supra* note 12, at 9.

<sup>106</sup> Foreign Trade Antitrust Improvement Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3).

<sup>107</sup> See, e.g., Fox, *supra* note 4, at 10; Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716 (2016). Khan argues a structure-based view of competition has been replaced by price theory in the 1970s and 1980s. *Id.* Antitrust law now assesses competition largely with an eye to the short-term interests of consumers, not producers or the health of the market as a whole. *Id.* Antitrust doctrine views low consumer prices, alone, to be evidence of sound competition. *Id.*

<sup>108</sup> See Fox, *supra* note 4, at 10.

<sup>109</sup> 1982 Merger Guidelines, U.S. Dep't of Just. Archives, <https://www.justice.gov/archives/atr/1982-merger-guidelines#:~:text=The%20unifying%20theme%20of%20the,if%20the%20market%20were%20competitive> (last accessed Feb. 23, 2022).

<sup>110</sup> The federal guidelines were withdrawn by Anne Bingaman early in her tenure as President Clinton's first Assistant Attorney General of the Antitrust Division of the DOJ. See Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Antitrust Enforcement, Some Initial Thoughts and Actions, Address Before the Antitrust Section of the American Bar Association (Aug. 10, 1993), <https://www.justice.gov/atr/speech/antitrust-enforcement-some-initial-thoughts-and-actions> (rescinding the DOJ Vertical Restraint Guidelines).

<sup>111</sup> See Fox, *supra* note 4, at 10; see also Donald I. Baker & Bennett Rushkoff, *The 1988 Justice Department International Guidelines: Searching for Legal Standards and Reassurance*, 23 CORNELL INT'L L.J. 406, 410–11.

<sup>112</sup> See Fox, *supra* note 4, at 10; see also Press Release, U.S. Dep't of Just., Just. Dep't Will Challenge Foreign Restraints on U.S. Exports Under Antitrust L. (Apr. 3, 1992), [https://www.justice.gov/archive/atr/public/press\\_releases/1992/211137.htm](https://www.justice.gov/archive/atr/public/press_releases/1992/211137.htm).

With the sudden increase of Japanese exports into U.S. markets, a perceived need for U.S. antitrust authorities against foreign activities emerged.<sup>113</sup> “This was due to then rising concerns that the U.S. trade deficit might be . . . a result of the wrongdoings of foreign exporters within their own territories.”<sup>114</sup> For example, certain U.S. firms claimed that their entry and expansion into Japanese markets had been blocked by private and hybrid public–private restraints of trade.<sup>115</sup> Many also assumed that Japanese exporters colluded in price-fixing within Japan, and such collusive price-fixing hurt the U.S. market.<sup>116</sup>

Considering these mixed governmental and private problems in the Japanese context, the U.S. antitrust authorities recognize their cases increasingly require engagement with competition authorities in other jurisdictions on issues that benefit from being considered in a broader, cross-border context. “The U.S. antitrust and trade officials had an idea: the synergistic use of trade and antitrust obligations” to deal with such problems.<sup>117</sup> As it happened, however, the famous footnote 159 impeded U.S. antitrust authorities from enforcing their own antitrust law against such foreign activities.<sup>118</sup> Congress and the DOJ therefore had to grapple with the question of whether the extraterritorial application of the law would be possible in cases where an anticompetitive activity harms U.S. exporters’ interests, not just U.S. consumers’ interests.<sup>119</sup>

“In 1992, the Bush Administration formally declared an end to the requirement of direct harm to U.S. consumers as a condition for the application of antitrust laws abroad.”<sup>120</sup> The Clinton Administration endorsed this position and announced that the DOJ would continue to shift policy from solely consumer protection to greater emphasis on domestic exporter protection in the extraterritorial application of antitrust law.<sup>121</sup> In the same vein, the DOJ announced the withdrawal of footnote 159, noting that “extraterritorial application would also be possible in cases where an anticompetitive activity

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<sup>113</sup> See Chang, *supra* note 12, at 9 (arguing this perceived need for U.S. antitrust authorities coincides with the legislative background for Section 301 of the Trade Act of 1974).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*; see also Fox, *supra* note 4, at 1.

<sup>116</sup> See Chang, *supra* note 12, at 9.

<sup>117</sup> See Fox, *supra* note 4, at 11.

<sup>118</sup> *Id.*

<sup>119</sup> See Epstein, *supra* note 82, at 349 (citing James S. McNeill, Comment, *Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction*, 28 CAL. W. INT’L L.J. 425, 448–52 (1998)).

<sup>120</sup> *Id.* at 351 (citing U.S. Dep’t of Just., ANTITRUST ENFORCEMENT POLICY (1992), *reprinted in* 62 ANTITRUST & TRADE REG. REP. (BNA) No. 1560, at 483–84).

<sup>121</sup> *Id.* (citing Press Release, U.S. Dep’t of Just., Foreign Business Conduct that Harms American Exports (Apr. 2, 1993), *reprinted in* 7 TRADE REG. REP. (CCH) ¶¶ 50, 84).

harms U.S. exporters' interests, for example, when the activity functions as a private trade barrier to U.S. exports into a foreign market, whether or not there is direct harm to U.S. consumers."<sup>122</sup>

In sum, this is a classic feature of the extraterritorial application of antitrust law involving export activities traditionally covered by trade law and policy.<sup>123</sup> The wording of the DOJ's statement made it clear that the U.S. antitrust authorities are willing to use antitrust legislation to promote U.S. trade interests to complement Section 301 of the 1974 Trade Act.<sup>124</sup>

This policy option gained significant ground in *Matsushita Electric*.<sup>125</sup> Zenith, an American manufacturer of consumer electronics, brought suit against several Japanese firms for creating a cartel to drive U.S. competitors out of the U.S. market.<sup>126</sup> The Third Circuit ignored the request of the U.S. Executive Branch and was caught in a complicated factual inquiry of whether any compulsion existed in this case.<sup>127</sup> Throughout many years of discovery, the two sides produced thousands of documents and were deposed hundreds of times.<sup>128</sup> In the end, the Third Circuit was still unable to determine whether the cartel was compelled by the Japanese government or initiated by the companies.<sup>129</sup> The case was appealed to the Supreme Court. The Supreme Court reversed and

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<sup>122</sup> See Chang, *supra* note 12, at 21 (citing Press Release, Dep't of Just., Department of Justice Policy Statement Regarding Anticompetitive Conduct that Restricts U.S. Exports: Statement of Antitrust Policy (Apr. 3, 1992), reprinted in 4 TRADE REG. REP. (CCH) ¶¶ 13, 108).

<sup>123</sup> *Id.* at 9, 21–22. The FTAIA deals with jurisdictional matters only, not the substantive rules for determining the illegality of contested activities. *Id.* However, the 1995 DOJ/FTC Guidelines do not make a distinction between jurisdictional rules and substantive rules. *Id.* Therefore, when extraterritorial application is undertaken to safeguard the interests of U.S. exporting companies rather than U.S. consumers, serious theoretical and practical problems tend to arise. This is because such position is not consistent with the objective of U.S. antitrust laws to preserve and foster competition and thereby promote consumers' interests. *Id.*

<sup>124</sup> *Id.* at 10; Fox, *supra* note 4, at 11.

<sup>125</sup> *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 251 (3d Cir. 1983), *rev'd sub nom.* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>126</sup> *Id.*

<sup>127</sup> Brief for the Government of Japan as Amicus Curiae in Support of Petitioners at 4, *Matsushita Elec. Indus. Co.*, 475 U.S. 574; Brief for the United States as Amicus Curiae Supporting Petitioners at 22, *Matsushita Elec. Indus. Co.*, 475 U.S. 574 (No. 83-2004); see also Ali Ganjaei, *Matsushita Electric Industrial Co., Ltd. V. Zenith Radio Corp.: The Death Knell for Predatory Price Fixing and the Avoidance of a Standard for the Foreign Sovereign Compulsion Defense*, 15 DENV. J. INT'L L. & POL'Y 395, 403 (1987) (discussing how the U.S. Executive Branch filed an amicus brief to support the Japanese government's position, stating that the defendants' conduct should be immune from antitrust liability due to the fact that the Ministry of International Trade and Industry [MITI] admitted it had directed the Japanese cartel).

<sup>128</sup> *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 505 F. Supp. 1125, 1137 (E.D. Pa. 1980).

<sup>129</sup> *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d at 315 (concluding the defendants' conduct had violated Japanese domestic law).

remanded, therefore bypassing the opportunity to grapple with the scope of compulsion in its final ruling.<sup>130</sup>

At least some U.S. exporters suspected the capacity of the extraterritorial application of U.S. antitrust laws that led to the Kodak–Fuji Film dispute and the Japan–U.S. Auto Parts case. They resorted to Section 301 of the 1974 Trade Act and the WTO dispute settlement system to address market-restraint concerns, examined below.

## 2. *Competition Clause of Section 301*

The United States has been a member of GATT since 1947 and therefore has certain rights to access foreign markets.<sup>131</sup> Due to the longstanding concern that other member states will not comply with GATT's obligations, Congress has delegated Section 301 of the Trade Act of 1974 as the United States' most powerful weapon for addressing market-blocking restraints in foreign markets.<sup>132</sup>

The wording related to competition policy in Section 301 is “unreasonable” foreign actions, policies, or practices.<sup>133</sup> The 1988 amendment expanded the definition of “unreasonable practices,” attempting to supplement antitrust law to eliminate restrictive business practices and thereby open foreign markets.<sup>134</sup> The definition now states that a government may be found to be acting unreasonably if it (1) tolerates systematic anticompetitive activities by state-owned enterprises and/or private firms, (2) denies market access for U.S. firms, or (3) restricts the sales of U.S. goods or services to a foreign market.<sup>135</sup>

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<sup>130</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>131</sup> GATT, *supra* note 46.

<sup>132</sup> *See* 19 U.S.C. § 2411.

<sup>133</sup> *Id.*; *see* Chang, *supra* note 12, at 25.

<sup>134</sup> 19 U.S.C. § 2411.

(B) Acts, policies and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which

(i) denies fair and equitable

....

(IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market.

*Id.*

<sup>135</sup> *Id.*

The Competition Clause of Section 301 was initially invoked in the 1994 Japan–U.S. Auto Parts case.<sup>136</sup> The Office of the United States Trade Representative (USTR) initiated an investigation, arguing that the Japanese government tolerated the Keiretsu, and allowed a market setup that shut out U.S. auto parts.<sup>137</sup> The USTR requested public comment and held a public hearing on a proposed determination that the appropriate response would be to impose a 100% percent tariff on luxury motor vehicles from Japan.<sup>138</sup>

Japan immediately filed a request for consultations, which was its first WTO complaint.<sup>139</sup> Japan argued the threatened U.S. retaliation would violate GATT Articles I (General Most-Favoured-Nation Treatment) and II (Tariff Binding) if imposed.<sup>140</sup> Japan claimed the announcement and implementation of the Section 301 determination was “inconsistent with the obligations of the Government of the United States under Article 23 of the [Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),] which seeks [to] strengthen[] the multilateral system by specifically prohibiting recourse to unilateral actions.”<sup>141</sup> The two countries settled on July 19, 1995.<sup>142</sup> The United States withdrew its threat, and Japan dropped the WTO dispute.<sup>143</sup> Shortly after the settlement, the USTR initiated another Section 301 investigation on the grounds that the Japanese government had tolerated Fuji’s anticompetitive actions, such as restricting distribution channels, thereby limiting the opportunity for Kodak film to be exported to the Japanese market.<sup>144</sup> This investigation was frustrated following the Japanese government’s refusal to negotiate with the United States under Section 301 procedures.<sup>145</sup> Japan’s

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<sup>136</sup> See Initiation of Section 302 Investigation and Request for Public Comment: Barriers to Access to the Auto Parts Replacement Market in Japan, 59 Fed. Reg. 52,034 (Oct. 13, 1994) (initiation) [hereinafter Barriers to Access to the Auto Parts]; Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: Barriers to Access to the Auto Parts Replacement Market in Japan, 60 Fed. Reg. 26,745 (May 18, 1995) (determination).

<sup>137</sup> Barriers to Access to the Auto Parts, *supra* note 136.

<sup>138</sup> *Id.*

<sup>139</sup> Request for Consultations by Japan, *United States—Imposition of Import Duties on Automobiles from Japan Under Sections 301 and 304 of the Trade Act of 1974*, WTO Doc. WT/DS6/1 (May 22, 1995).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quotation omitted).

<sup>142</sup> *Id.*; see also C. Taylor O’Neal, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT’L L. 309, 385 (2007) (noting that Japan offered pledges of liberalization that the two countries would review bi-annually).

<sup>143</sup> O’Neal, *supra* note 142, at 385.

<sup>144</sup> See Initiation of Investigation Pursuant to Section 302 Concerning Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 60 Fed. Reg. 35,447 (July 7, 1995) (initiation); Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg. 30,929 (June 18, 1996) (determination).

<sup>145</sup> O’Neal, *supra* note 142, at 385 (citing *Japanese Refusal to Negotiate on Film, Chips Causes Concern*,



position was that any complaints should be submitted to the Japan Fair Trade Commission (JFTC), because the alleged case concerned Japan's failure to enforce its own antitrust laws.<sup>146</sup> It said, "if Japan had accepted USTR's jurisdiction in the Japanese film case, it would have ceded JFTC's authority to USTR to enforce its competition laws[.]"<sup>147</sup>

The fact the Japanese government initiated antitrust investigation procedures in accordance with its own antitrust law is especially noteworthy.<sup>148</sup> The Japanese government concluded that no violation of Japanese antitrust law existed after a formal investigation.<sup>149</sup> From the U.S. position, it was difficult to interpret "toleration" following the Japanese government's conclusion that no violation of Japanese antitrust law existed.<sup>150</sup> This is because the definition of the Competition Clause of Section 301 stated it could be invoked only when there is "toleration" by the foreign government of activities in violation of the foreign country's antitrust law.<sup>151</sup> The United States thus turned to another policy option to get at these mixed governmental and private problems in the Japanese context—the WTO dispute settlement procedures.

### 3. *WTO Dispute Settlement and Competition Issues*

In 1995, Kodak successfully persuaded the USTR to utilize the WTO dispute settlement system against what were mostly private, vertical, non-price restraints on market access whereby Fuji established distribution channels and prevented entry by Kodak into the Japanese market.<sup>152</sup> The most critical issue in this case was whether a "non-violation complaint" under GATT Article XXIII:1(b) could be a valid channel for subjecting competition-related governmental measures to WTO dispute settlement in general.<sup>153</sup>

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13 INT'L TRADE REP. (BNA) 165 (Jan. 31, 1996)); Andrew Pollack, *Japan's Tack on Trade: No More 1-on-1*, N.Y. TIMES, July 30, 1996, at D1.

<sup>146</sup> See Epstein, *supra* note 82, at 353.

<sup>147</sup> *Id.* at 353–54 n.41 (citing William Barringer, *Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.–Japan Film Dispute*, 6 GEO. MASON L. REV. 459, 464 (1997)).

<sup>148</sup> See *JFTC Report Finds Japan Film Market Free of Anticompetitive Practices*, INSIDE U.S. TRADE (July 25, 1997), <https://insidetrad.com/inside-us-trade/jftc-report-finds-japan-film-market-free-anticompetitive-practices>.

<sup>149</sup> *Id.*

<sup>150</sup> See Chang, *supra* note 12, at 26.

<sup>151</sup> *Id.* at 27.

<sup>152</sup> See Epstein, *supra* note 82, at 352–53.

<sup>153</sup> Report of the Panel, *Japan—Measures Affecting Consumer Photographic Film and Paper*, WTO Doc. WT/DS44/R (Mar. 31, 1998), reprinted in 5 BERNAN'S ANN. REP. 27 (1999) [hereinafter *Japan—Film and Paper*].

The text of Article XXIII:1(b) requires a complaining party to demonstrate three elements to prevail on non-violation claims: (1) the application of the measure is attributable to a WTO Member,<sup>154</sup> (2) “the existence of a benefit accruing . . . under the relevant agreement,”<sup>155</sup> and (3) “the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is nullified or impaired as the result of the application of a measure by another WTO Member.”<sup>156</sup> Each element will be discussed to explore whether the WTO dispute settlement process might be a potential or available policy tool to get at mixed governmental and private problems in the Japanese context.

For the first element, the complaining party is required to prove the “measures” in dispute are attributable to the Government of Japan.<sup>157</sup> For this reason, the United States pointed out three types of policies characteristic of the Japanese film market: (1) the distribution system between government and industry,<sup>158</sup> (2) the Large Store Law, which upsets the competitive relationship between domestic and imported film and paper,<sup>159</sup> and (3) the sales restriction measures.<sup>160</sup> The United States argued these anticompetitive activities originated from government measures or that the government intervened in such activities, thereby nullifying or impairing benefits accruing to the United States under Article XXIII:1(b).<sup>161</sup>

Although the panel tried to envision some objective criteria for this determination while endorsing the Japan-Semiconductor panel’s ruling, it ultimately held that it was difficult to establish bright-line rules to prove whether there was a governmental intervention.<sup>162</sup> The panel thus recommended a case-by-case basis examination in this context.<sup>163</sup> However, the case-by-case

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<sup>154</sup> *Id.* ¶ 10.42.

<sup>155</sup> *Id.* ¶ 10.61.

<sup>156</sup> *Id.* ¶ 10.82 (emphasis omitted).

<sup>157</sup> *Id.* ¶ 10.39.

<sup>158</sup> *Id.* ¶¶ 10.90, 92. The report argued that MITI and Japanese industry recognized the superiority of foreign firms following the liberalization of international trade, which may bring serious competition to Japanese manufacturers and their products. *Id.* MITI and Japanese manufacturers, therefore, devised a plan to strengthen vertical distribution channels that would handle the products of a particular domestic manufacturer exclusively. *Id.*

<sup>159</sup> *Id.* ¶¶ 10.209, 10.214–33.

<sup>160</sup> *Id.* ¶ 10.234.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* ¶ 10.56; *see also* Report of the Panel, *Japan—Trade in Semi-Conductors*, ¶ 117, L/6309 (May 4, 1988), GATT BISD (35th Supp.) (1989) (confirming a government measure exists if an anticompetitive activity of a private entity depends upon a governmental decision, and the government provided an incentive for a private entity to carry out such activities).

<sup>163</sup> *Id.* ¶¶ 10.54–60.

approach resulted in the United States' failure to demonstrate that the alleged measures were attributable to the Japanese government.<sup>164</sup>

As difficult as these mixed governmental and private problems have been in the Japanese context, the textual language of Article XXIII:1(b) makes it clear that a purely private measure is not subject to the WTO dispute settlement procedures.<sup>165</sup> In many cases, anticompetitive restraints of trade may occur without any visible governmental intervention at all.<sup>166</sup> The "governmental measure" requirement of Article XXIII:1(b) seems to indicate that the WTO is an imperfect venue to litigate antitrust matters.

The second required element which must be considered to establish a non-violation complaint is the existence of a benefit accruing to a WTO Member under the relevant agreement.<sup>167</sup> As with the first element, the complaining party has the burden of demonstrating the "benefit accruing."<sup>168</sup> Usually, the claimed benefits are those of "legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions."<sup>169</sup> This element was successfully satisfied but was complicated because the United States claimed to have had expectations of improved market access benefits regarding four different products granted during three successive rounds of multilateral trade negotiations.<sup>170</sup>

As to the third element, causality, the United States is required to demonstrate a clear correlation between the governmental measures that it cited and the adverse effect on the relevant competitive relationships.<sup>171</sup> The panel considered this element as "one of the more factually complex areas of [their] examination."<sup>172</sup> Not surprisingly, the United States failed in its efforts to establish the necessary causal connection between the alleged "measures,"

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<sup>164</sup> *Id.* ¶¶ 10.121–23 (discussing the alleged measure as not binding law or regulation).

<sup>165</sup> *See* Janow, *supra* note 16, at 978–80.

<sup>166</sup> *See* Chang, *supra* note 12, at 29.

<sup>167</sup> *See* *Japan—Film and Paper*, *supra* note 153, ¶ 10.61.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* ¶ 10.62. This claim raises two general issues. First, may the benefits legitimately expected by a Member be derived from successive rounds of tariff negotiations? Second, what factors should be considered to determine if a Member should have reasonably anticipated measures that it claims nullified or impaired benefits?

<sup>171</sup> *Id.* ¶ 10.82.

<sup>172</sup> *Id.* n.1242; *see also* ¶¶ 10.83–89 (citing Report of the Panel, *Uruguayan Recourse to Article XXIII*, ¶ 15, L/1923 (Nov. 15, 1962), GATT BISD, at 100; Report of the Panel, *Japan—Trade in Semi-Conductors*, *supra* note 162, at 161; Report of the Panel, *US—Agricultural Waiver*, ¶¶ 5.20–23, L/6631 (Nov. 7, 1990), GATT BISD, at 261–62) (noting all complaining parties failed to provide a detailed justification to support their claims because of a lack of evidence of causality).

individually or collectively, and any unfavorable competitive conditions for imported film and paper.<sup>173</sup>

Ultimately, the United States lost this case by failing to demonstrate that the alleged Japanese measures nullified or impaired benefits accruing to the United States within the meaning of GATT Article XXIII:1(b).<sup>174</sup> Arguably, such practices or measures could be violations of required WTO obligations “if there is sufficient government involvement[.]”<sup>175</sup> In practice, however, as the WTO panel in the Kodak–Fuji Film dispute illustrates, there are still many obstacles to satisfy the other two elements.<sup>176</sup> In short, the uncertainty of its success, coupled with the “governmental measure” requirement in Article XXIII:1(b), made the WTO dispute settlement process an unappealing—and therefore highly unlikely—policy option.

The fact that the United States did not appeal is especially noteworthy. The Appellate Body, therefore, did not have an opportunity to review the legal rulings of the panel, particularly on non-violation complaints. In this sense, it is hard to predict whether and to what extent this panel’s rulings will serve as a precedent for future cases involving competition-related measures.<sup>177</sup> In addition, the remedies for this non-violation complaint differ from those for violation complaints.<sup>178</sup> There would be no obligation for the defending party to withdraw the measure at issue even if the complaining party prevails on a non-violation claim.<sup>179</sup>

Having already discussed the practical challenges underlying the United States’ extraterritorial application of antitrust law, Section 301’s competition-related clause, and the WTO dispute settlement process in the Japanese context, this Article now turns to several recent U.S. antitrust litigations. Spanning over

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<sup>173</sup> *Id.* (discussing four issues related to causation: 1) the degree of causation that must be shown—“but for” or less; 2) the relevance of the origin-neutral nature of a measure to causation of nullification or impairment; 3) the relevance of intent to causality; and 4) the extent to which measures may be considered collectively in an analysis of causation).

<sup>174</sup> *Id.*

<sup>175</sup> See *Japan—Film and Paper*, *supra* note 153, ¶ 10.56 (confirming that actions by private parties could be deemed governmental if there is “sufficient government involvement”); *id.* ¶ 10.52 (confirming that when the government, while providing the incentive to carry out anticompetitive activities, endorses such activities or the activities are attributable to the government, a “government measure” would be deemed to exist).

<sup>176</sup> See Chang, *supra* note 12, at 30.

<sup>177</sup> *Id.* n.136.

<sup>178</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization art. XXVI.1(b), 1869 U.N.T.S. 401 [hereinafter DSU].

<sup>179</sup> *Id.*

a decade, these cases linked to recent WTO disputes involved Chinese export cartels and eventually reached the U.S. Supreme Court.

*B. Why the Current Set of Policy Options is Likely to be Limited*

This Section explores the desirability and the capacity of the extraterritorial application of U.S. antitrust law. Three Chinese export cartel cases will be discussed: the Vitamin C cartel case, the Raw Materials case, and the Rare Earths case. This Article contends that at least two results are plausible—first, judicial frustrations with facts; second, the executive’s contrasting stance, indicating that this policy option for addressing anticompetitive private restraints of trade is likely to remain limited. This Article also explores essential linkages between these export cartel litigations and the recent WTO disputes. It further proposes that U.S. courts accord a high degree of synergism to trade officials when factual evidence is ambiguous. Following this, this Article examines the inherent weakness of the competition clause of Section 301 in addressing China’s unfair trade and competition practices.

*1. The Chinese Export Cartels and Extraterritorial Application of U.S. Antitrust Law*

Extraterritorial application of antitrust law occurs in cases where anticompetitive practices within foreign jurisdictions adversely affect domestic markets. The existence of the “effects doctrine” as a basis for antitrust jurisdiction affirms that no state retains exclusive jurisdiction over an antitrust case.<sup>180</sup> Today, international consensus supports the necessity and legitimacy of the “effects doctrine,” at least where a cartel is purely private and harm to buyers in the regulating nation is direct.<sup>181</sup> However, several recent U.S. antitrust litigations involving Chinese export cartels indicate we should be realistic about the utility of this policy option.

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<sup>180</sup> Both the United States and the European Union have applied their antitrust laws to the conduct of foreign corporations as long the conduct has had an “effect” on their domestic markets. *See, e.g.,* United States v. Aluminum Co. of America, 148 F.2d 416, 443–44 (2d Cir. 1945); Case T-102/96, Gencor Ltd. v. Commission, 1999 E.C.R. 11-753, 89–92.

<sup>181</sup> *See* Fox, *supra* note 4, at 3; Eleanor M. Fox, *National Law, Global Markets, and Hartford: Eyes Wide Shut*, 68 ANTITRUST L.J. 73, 79–86 (2000) (describing cases of extraterritorial assertions of antitrust jurisdiction of both the European Union and United States); Bradford, *supra* note 12, at 41–42, note 182 (“[M]any other nations recognize the legitimacy of applying their antitrust laws to the conduct of foreign firms as long as some anticompetitive effect is felt on the market of the country willing to exercise jurisdiction.”) (citing Restatement (Third) of Foreign Relations Law of the United States § 415 reporters’ note 9 (1987)).

In *In re Vitamin C Antitrust Litigation*, a group of U.S. purchasers of Chinese-manufactured Vitamin C alleged that the Chinese manufacturers' rise to dominance in the global Vitamin C market had been facilitated by collusion among manufacturers.<sup>182</sup> The plaintiffs claimed that the defendants had colluded with the Chamber of Commerce of Medicines and Health Products Importers and Exporters (CCCMHPIE) and agreed to limit Vitamin C production and increase its prices to create a supply shortage in the international market.<sup>183</sup>

The Chinese defendants did not deny the allegations. Instead, they moved to dismiss the suit on the basis that they should be exempt from antitrust liability since the Chinese government had compelled them to fix prices and limit output.<sup>184</sup> To prove the existence of the compulsory requirement of the Chinese law, the Chinese Ministry of Commerce (Ministry) filed an amicus brief *acknowledging that the Chinese government had compelled the cartel's activities*.<sup>185</sup> In particular, the Ministry explained that the CCCMHPIE is "an entity under the Ministry's direct and active supervision that plays a central role in regulating China's Vitamin C industry."<sup>186</sup> Following lengthy pre-trial discovery, the district court refused to defer to the Ministry's interpretation of Chinese law.<sup>187</sup>

The case went to trial and the jury subsequently decided that the Chinese defendants had violated U.S. antitrust law and awarded the plaintiff more than fifty million U.S. dollars in damages.<sup>188</sup> The Court of Appeals for the Second Circuit reversed the judgment entered on the verdict and remanded the case with instructions to dismiss, stating that China's word on compulsion should have been conclusive for the court; thus, the Chinese government compelled the price-fixing.<sup>189</sup>

The Second Circuit stated that Chinese manufacturers faced a true conflict between the U.S. law—not fixing prices in the United States—and the Chinese law—fixing prices in the United States.<sup>190</sup> China's interest in protecting its firms from U.S. law clearly outbalanced the United States' interests in enforcing its

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<sup>182</sup> *Vitamin C I*, 584 F. Supp. 2d 546, 548–50 (E.D.N.Y. 2008).

<sup>183</sup> *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.) (Vitamin C II)*, 837 F.3d 175, 180 (2d Cir. 2016).

<sup>184</sup> *Vitamin C I*, 584 F. Supp. 2d at 550.

<sup>185</sup> *Id.* at 552.

<sup>186</sup> *Id.* at 552 (citing Brief for the Chinese Ministry of Commerce as Amici Curiae Supporting Respondents).

<sup>187</sup> *Id.* at 557.

<sup>188</sup> *Vitamin C II*, 837 F.3d at 178.

<sup>189</sup> *Id.* at 194.

<sup>190</sup> *Id.* at 186.

law, so that the district court abused its discretion as a matter of law in deciding not to abstain on comity grounds.<sup>191</sup> The court concluded that 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.”<sup>192</sup>

In the *Animal Science* case, several U.S. consumers of magnesite products filed an antitrust suit against certain Chinese business entities.<sup>193</sup> The U.S. plaintiffs asserted that these entities conspired to keep prices on certain magnesite products artificially inflated worldwide, including in the United States.<sup>194</sup> The Chinese defendants asserted the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters (CCCMC) was a state actor and brought a motion to dismiss the complaint on the foreign state compulsion defense basis.<sup>195</sup> In this way, the District Court for the Eastern District of New York faced a very similar problem to the court in the *Vitamin C* case—whether the relevant trade chambers were involved setting the minimum prices for the exported products.<sup>196</sup>

In a remarkably comprehensive opinion, the court gave much greater weight to the Chinese government’s representations than the *Vitamin C* court.<sup>197</sup> The court observed that the government compulsion lasted a long time and was achieved not by a particular act, but was rather created by a legal regime, such as “employ[ing] various regulatory mechanisms producing a composite effect of a never-ceasing correlation between the minimum price requirement and punitive measures for non-compliance . . . .”<sup>198</sup> Moreover, the court stated that unless there was a Chinese legal provision or an alternative Ministry statement that “clearly and convincingly” established the incorrectness of these interpretations, a foreign sovereign’s admission of legal compulsion could

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 189.

<sup>193</sup> *Animal Sci. Prods., Inc. v. China Nat’l Metals & Mins. Imp. & Exp. Corp.*, 596 F. Supp. 2d 842 (D.N.J. 2008).

<sup>194</sup> *Id.* at 851–852.

<sup>195</sup> *Animal Sci. Prods., Inc. v. China Nat’l Metals & Mins. Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 393 (D.N.J. 2010) (discussing evidence from other proceedings that might bear on the compulsion defense raised by the defendants, including the *Vitamin C* case).

<sup>196</sup> *Id.* at 394.

<sup>197</sup> *Id.* at 429.

<sup>198</sup> *Id.* at 449.

warrant a nearly binding degree of deference, even if the admitted compulsion was based on a form of “unwritten law.”<sup>199</sup>

In Resco Products, the U.S. company sued Chinese bauxite exporters for price-fixing, controlling the supply of refractory grade bauxite, and committing other unlawful practices designed to inflate the prices of refractory grade bauxite sold to the plaintiff and other purchasers in the United States and elsewhere.<sup>200</sup> Likewise, the defendants brought a motion to dismiss the complaint on the foreign state compulsion defense basis.<sup>201</sup> This case was stayed until the release of a final report in a then-pending WTO proceeding with potential implications on the applicability of the “act of state” and “foreign sovereign compulsion” doctrines to the instant matter.<sup>202</sup> The District Court for the Western District of Pennsylvania highlighted the striking similarity of factual and legal inquiries between its case and the WTO proceedings and exhibited considerable deference to separation of powers and sovereignty considerations.<sup>203</sup> The stay was lifted on July 26, 2011, following the WTO decision against China for violation of its WTO commitments in imposing export restraints on certain raw materials.<sup>204</sup>

The most salient common element behind these cases is a country’s trade status’s influence on its general level of antitrust regulation.<sup>205</sup> The Chinese government changed antitrust doctrine based upon its trade status, protecting the newly vulnerable national advantage.<sup>206</sup> The exemption of export cartels from domestic antitrust law constitutes a notable exception to otherwise neutral antitrust statutes.<sup>207</sup> In the eyes of the U.S. government, Chinese firms engaged in activities that might be considered anticompetitive in the United States.<sup>208</sup>

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<sup>199</sup> *Id.* at 426, 429.

<sup>200</sup> Resco Prods., Inc. v. Bosai Mins. Grp, Co., No. 06-235, 2010 WL 2331069, at \*1 (W.D. Pa. June 4, 2010).

<sup>201</sup> *Id.* at \*4.

<sup>202</sup> *Id.* at \*2, \*8.

<sup>203</sup> *Id.* at \*6.

<sup>204</sup> See *infra* Section III.B.2. As a related matter, the plaintiff appealed the district court’s decision to the U.S. Court of Appeals for the Third Circuit in February 2016. See Resco Prods., Inc. v. Bosai Mins. Grp. Co., 158 F. Supp. 3d 406, 416, 419, 427 (W.D. Pa. 2016). The plaintiff argued, “[t]here is both direct and circumstantial evidence that [d]efendants conspired to increase prices of Chinese bauxite beginning in 2003.” *Id.* at 419. 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. *Id.*

<sup>205</sup> Andrew Guzman has developed the most detailed argument on how a country’s trade status influences its general level of antitrust regulation. See *supra* Section II.B.

<sup>206</sup> See Weimin Shen, *The Role of Transnational Legal Process in Enforcing WTO Law and Competition Policy*, 30 J. TRANSNAT’L L. & POL’Y 59 (2020–2021).

<sup>207</sup> *Id.*

<sup>208</sup> See William E. Perry, *U.S. Antidumping Law and the Vitamin C Case: An Important but Forgotten Issue*, 2 CHINA L. CONNECT 47 (2018) (suggesting it is important to understand the motivation of governments



The great majority of the harm is felt by foreigners (U.S. purchasers), while local firms (Chinese firms) feel the benefits.<sup>209</sup>

What, then, might be the potential or available policy tools to address these types of problems? At least two plausible results can be pointed out, suggesting that the extraterritorial application of antitrust law is not an effective tool in the Chinese context.

First, foreign defendants in export cartel cases have often argued that their conduct was compelled by foreign governments, which frequently poses a significant challenge for U.S. courts.<sup>210</sup> Specifically, U.S. courts' decisions in this regard often followed one of two paths.<sup>211</sup> One is to give a conclusive governmental statement, thereby invoking the defense without discussion. The other path is to "pierce" the governmental statement and initiate fact-specific inquiries into foreign sovereign involvement in the cartels.<sup>212</sup>

The Court of Appeals for the Second Circuit in *Vitamin C* followed the first path which was heavily criticized in the United States' amicus brief.<sup>213</sup> In a unanimous opinion delivered by Justice Ginsburg, the Supreme Court vacated the judgment of the Second Circuit and concluded that the Second Circuit is not "precluded from considering other relevant sources."<sup>214</sup> The Supreme Court acknowledges that "the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials."<sup>215</sup>

A closer look at this case reveals the vital challenges faced in understanding the basic workings and structure of foreign legal systems. For example, Justice Alito inquired at oral argument whether the Supreme People's Court could take up the issue of the requirements of China's export administration system, and if

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like China in establishing allegedly unfair trade practices in the first place, as this perspective can highlight areas of U.S. policy requiring further consideration and possible reform to incentivize other countries to operate in accordance with fair trade norms).

<sup>209</sup> *Id.*

<sup>210</sup> See Jane Lee, Note, *Vitamin "C" is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense*, 50 VA. J. INT'L L. 757, 758–59 (2010).

<sup>211</sup> See Ganjaei, *supra* note 125, at 413–14.

<sup>212</sup> *Id.*

<sup>213</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners at 8, *Vitamin C II*, 837 F.3d 175 (2d Cir. 2016) (No. 16-1220), 2017 WL 5479477, at \*8.

<sup>214</sup> *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018).

<sup>215</sup> *Id.* at 1873.

so, whether it would defer to the Ministry's interpretation.<sup>216</sup> Justice Ginsburg further questioned whether it is even common practice for Chinese courts to rule on commercial matters.<sup>217</sup>

In addition, foreign judges who rarely deal with foreign laws face a high bar when trying to place them within the context of domestic practice and to deal with the challenges of working in translation.<sup>218</sup> At the lower court level, both the district court and the Second Circuit pointed out that there are inherent difficulties in relying on translations when determining foreign law, especially where the foreign legal system bears little resemblance to that of the United States.<sup>219</sup>

As to the second path, the contours of the foreign sovereign compulsion defense, as understood by the U.S. antitrust agencies, are stated in the 2017 Antitrust Guidelines for International Enforcement and Cooperation.<sup>220</sup> The Guidelines state:

Because U.S. antitrust laws can extend to foreign persons and conduct with a sufficient connection to the United States, some persons may find themselves subject to foreign legal requirements that conflict with the laws of the United States. In these circumstances, courts have recognized a limited defense against application of the U.S. antitrust laws when a foreign sovereign compels the very conduct that the U.S. antitrust law would prohibit. If it is possible, however, for a party to comply with both the foreign law and the U.S. antitrust laws, the existence of the foreign law does not provide any legal excuse for actions that do not comply with U.S. law. Similarly, that conduct may be lawful, approved, or encouraged in a foreign jurisdiction does not, in and of itself, bar application of the U.S. antitrust laws—even when the foreign jurisdiction has a strong policy in favor of the conduct in question.<sup>221</sup>

Practically, the complex factual circumstances of the Vitamin C case offer a good illustration of how this path frequently poses a significant challenge for

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<sup>216</sup> See Jordan Corrente Beck, Jeremy Schlosser & Ke James Yuan, *Experts Connect™: In re Vitamin C Antitrust Litigation*, 2 CHINA L. CONNECT 27 (2018).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Vitamin C I*, 584 F. Supp. 2d 546, 554 n.7 (E.D.N.Y. 2008); *Vitamin C II*, 837 F.3d 175, 190–91 (2d Cir. 2016).

<sup>220</sup> U.S. DEP'T. OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR INTERNATIONAL ENFORCEMENT AND COOPERATION (Jan. 13, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1049863/international\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf).

<sup>221</sup> *Id.* § 4.2.2.

U.S. courts.<sup>222</sup> Following the European Union's intent to take anti-dumping actions against Chinese Vitamin C producers in 2001, the court observed that the Ministry issued specific instructions to the CCCMHPIE, requiring it to organize the alleged firms to avoid potential anti-dumping challenges.<sup>223</sup> The CCCMHPIE then coordinated a meeting with the defendants.<sup>224</sup> However, there is no indication in the minutes of the meetings that the CCCMHPIE had compelled the defendants to comply with the minimum export price.<sup>225</sup> According to the court's findings, the minutes of the meetings indicated the agreement between the defendants was voluntary.<sup>226</sup>

There was further confusion about whether the CCCMHPIE successfully executed its price scheme given the lack of clear penalties or other mechanisms compelling defendants to reach price and output agreements.<sup>227</sup> There was evidence that some manufacturers who had deviated from the agreed minimum price had not been punished.<sup>228</sup> Meanwhile, the district court observed that at a meeting held by the CCCMHPIE, a representative of the Ministry expressed that the government's regulation of the Vitamin C industry had not been very successful and that there was confusion about the scope of compulsion when a party significantly exceeded the quoted price.<sup>229</sup> According to the district court, the CCCMHPIE is responsible for coordinating export prices to avoid anti-dumping lawsuits and lower-cost pricing.<sup>230</sup> However, the firms themselves enjoy significant discretion in determining profit margins, and the Ministry has not interfered.<sup>231</sup> As Eleanor M. Fox commented: "Characterization of China's behavior and the manufacturers' response under all of the circumstances would seem to be a question involving mixed questions of fact and law under the Sherman Act."<sup>232</sup>

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<sup>222</sup> See Zhang, *supra* note 20, at 304–09; Eleanor M. Fox, *China, Export Cartels and Vitamin C: American Second?*, COMPETITION POL'Y INT'L (Mar. 13, 2018), <https://www.competitionpolicyinternational.com/china-export-cartels-and-vitamin-c-american-second> (noting the Supreme Court has never grappled with the parameters of the sovereign compulsion defense, that the lower court cases are of old vintage, and that there is much room for shaping this doctrine to modern needs).

<sup>223</sup> *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 534 (E.D.N.Y. 2011).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 533 n.11.

<sup>226</sup> *Id.* at 534.

<sup>227</sup> *Id.* at 536–37.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 534, 560–61.

<sup>230</sup> *Id.* at 528–29.

<sup>231</sup> *Id.* at 550.

<sup>232</sup> See Fox, *supra* note 222.

Another downside to extraterritorial application of antitrust law as a policy option for trade-related competition concerns is that it is inadequate in promoting coherence among different, interdependent policy fields.<sup>233</sup> Put differently, the legal interests of the U.S. government and U.S.-industry litigants often diverge, and the latter may not focus on the broader goals of globalization and trade liberalization.<sup>234</sup> In this sense, simply focusing on the antitrust case at issue risks missing coherence in antitrust and trade policies.<sup>235</sup>

For example, the United States Trade Representative (USTR) observed the ongoing antitrust litigations and filed a complaint at the WTO in 2009.<sup>236</sup> The USTR alleged 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), and China's Accession Protocol, including Paragraph 11.3.<sup>237</sup> A crucial foundation of the U.S. position was whether China's Chambers of Commerce, which includes the CCCMC, "function[s] as entities under [the Ministry's] direct and active supervision and, accordingly, play[s] a central role in regulating the trade of China's industries."<sup>238</sup> The USTR used the Ministry's amicus brief as evidence of the suspected WTO trade violations.<sup>239</sup> 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 of importing and exporting [] products in China."<sup>240</sup> On this basis, the United States emphasized, China should not argue differently from what it had already represented in the U.S. courts. The CCCMC's export-price related functions and responsibilities should be attributable to China.<sup>241</sup>

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<sup>233</sup> See Zhang, *supra* note 20, at 296–97, 312–13. The executive branch has taken a fluid stance with regard to the export cartels, depending on the cost and benefits of using either trade or antitrust remedies. *Id.* Therefore, U.S. courts' optimal responses should not be static. *Id.* Rather, they should take into account the specific steps the executive branch has undertaken with regard to the export cartels. *Id.* See generally Wang, *supra* note 37 (arguing U.S. court decisions in domestic antitrust cases may undermine the executive branch's conduct of WTO litigation and foreign trade policy).

<sup>234</sup> Wang, *supra* note 37.

<sup>235</sup> *Id.*

<sup>236</sup> First Written Submission, *Various Raw Materials*, *supra* note 36.

<sup>237</sup> See *id.* ¶¶ 8–17, 216.

<sup>238</sup> *Id.* ¶ 207; see Panel Report, *China—Measures Related to the Exportation of Various Raw Materials*, ¶ 7.1002, WTO Doc. WT/DS394/R (adopted July 5, 2011).

<sup>239</sup> See First Written Submission, *Various Raw Materials*, *supra* note 36.

<sup>240</sup> *Id.* ¶ 208 (quoting Brief for the Chinese Ministry of Commerce as Amici Curiae Supporting Respondents, *supra* note 185, at 9).

<sup>241</sup> *Id.*

The United States won the raw materials in the end.<sup>242</sup> China and the United States notified the Dispute Settlement Body (DSB) that they had agreed the reasonable period of time for China to implement the DSB recommendations and rulings shall be ten months and nine days.<sup>243</sup> However, it is important to note that U.S. private parties and the USTR have made contradictory claims about the relationship between China's government and exporters in these parallel proceedings.<sup>244</sup>

As a consequence of conflict between the positions expressed by the U.S. executive and judicial branches, three district courts have responded to the tension between U.S. antitrust law and WTO law in three different ways: (1) by mostly ignoring the USTR position in the United States–China WTO dispute settlement process, (2) by taking into account the USTR position in the WTO dispute settlement process, and (3) by treating WTO findings as potentially informative or persuasive.<sup>245</sup> Such departures from the courts' decisions have caused confusion about the different approaches that U.S. courts apply in dealing with export cartel cases.<sup>246</sup> Many commentators criticized the district court's decision in the Vitamin C case for its failure to consider its implications for U.S. trade policy.<sup>247</sup>

## 2. Other WTO Cases on China's Export Restrictions

While proceeding with the China–Raw Materials litigation, a collision between a Chinese trawler and several Japanese Coast Guard boats in disputed waters off the East China Sea triggered a major diplomatic crisis.<sup>248</sup> The crisis led China to ban the loading of rare earth onto ships destined for Japan, putting

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<sup>242</sup> See Appellate Body Reports, *China—Measures Related to the Exportation of Various Raw Materials*, ¶¶ 226–35, 362–63, WTO Docs. WT/394/AB/R, WT/395/AB/R, WT/398/AB/R (adopted Jan. 30, 2012).

<sup>243</sup> *China—Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/20 (Jan. 23, 2013), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/394-20.pdf&Open=True>.

<sup>244</sup> See, e.g., Wang, *supra* note 37.

<sup>245</sup> *Id.* at 1097.

<sup>246</sup> See Zhang, *supra* note 20, at 301 (arguing the district court's decision in the Vitamin C Case represents a clear departure from the more deferential approach taken by the courts in the raw material cases, giving rise to confusion about the standards that courts apply in deciding how to deal with comity-related defense).

<sup>247</sup> See Michael N. Sohn & Jesse Solomon, *Lingering Questions on Foreign Sovereignty and Separation of Powers After the Vitamin C Price-Fixing Verdict*, 28 ANTITRUST ABA 78, 83 (2013). In the view of both the Ministry and the USTR, there may be a conflict between U.S. antitrust law and Chinese regulations that mandate that vitamin C manufacturers coordinate a price and enforce it, on penalty of losing their export licenses. *Id.* However, the district court found China's similar regulatory regime in the Vitamin C litigation not to be sufficiently mandatory to apply international comity principles. *Id.*

<sup>248</sup> See Mark Wu, *China's Export Restrictions and the Limits of WTO Law*, 16 WORLD TRADE REV. 673, 678 (2017).

pressure on Japanese high-tech companies who rely on rare earth imports.<sup>249</sup> This incident also brought attention to a series of export restrictions by China on rare earth minerals.<sup>250</sup> China has been restructuring its domestic rare earth industry while putting more restrictions on rare earth exports, which has dramatically affected the price and quantity of rare earths available in the global market.<sup>251</sup> In particular, China is a major global producer of many raw materials and, in some cases, the dominant producer. The government has made the development of its rare earth resources a top priority since the 1980s.<sup>252</sup> By 2011, China accounted for over ninety-seven percent of rare earth global production.<sup>253</sup>

On March 13, 2012, the United States requested consultations with China regarding China's restrictions on exporting various forms of rare earth elements tungsten and molybdenum.<sup>254</sup> The USTR cited several of China's published and unpublished measures (including certain quota administration measures) that imposed export restrictions.<sup>255</sup> The United States asserted that such export quotas themselves, and the manner in which they are administered, are inconsistent with China's obligations under Articles XI:1 and X:3(a) of GATT and China's Protocol of Accession.<sup>256</sup> On March 22, 2012, the European Union and Japan requested to join the consultations.<sup>257</sup> On March 26, 2012, Canada requested to join the consultations. Subsequently, on July 23, 2012, sixteen other WTO members asserted their third-party rights by establishing a single WTO

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> For example, the Chinese government prohibits foreign companies from mining rare earths in China. *Id.* at 679. Meanwhile, foreign companies can only export rare earths through joint ventures established with Chinese counterparts that have export licenses. *Id.* The Chinese government also began to levy export duties, and both the level of the duty and the number of products were subject to it increased. *Id.* In addition, the Chinese government issued annual export quotas to domestic and joint-venture firms for particular rare earth minerals. *Id.*

<sup>252</sup> For a comprehensive discussion of China's rare earth industry and export regime, see WAYNE M. MORRISON & RACHEL TANG, CONG. RSCH. SERV., R42510, CHINA'S RARE EARTH INDUSTRY AND EXPORT REGIME: ECONOMIC AND TRADE IMPLICATIONS FOR THE UNITED STATES (2012).

<sup>253</sup> *Id.*

<sup>254</sup> See Panel Report, *Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/R (adopted Mar. 26, 2014).

<sup>255</sup> See First Written Submission of the United States of America, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶ 10, WT/DS431 (Oct. 30, 2012), [https://ustr.gov/sites/default/files/US.Sub1\\_fin\\_.pdf](https://ustr.gov/sites/default/files/US.Sub1_fin_.pdf).

<sup>256</sup> *Id.* ¶ 11.

<sup>257</sup> *Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/issue-areas/enforcement/dispute-settlement-proceedings/wto-dispute-settlement/pending-wto-disputes-1> (last visited May 5, 2022).

panel.<sup>258</sup> China lost this case before both the panel and appellate bodies.<sup>259</sup> 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.<sup>260</sup>

The preceding U.S. disputes led to another complaint raised by the United States in July 2016 against a set of export restrictions on raw materials.<sup>261</sup> As a co-complainant in both *China–Raw Materials* and *China–Rare Earths*, the United States and the European Union simultaneously accused China of a number of violations. These include violating (1) Paragraphs 2(A)(2), 5.1, and 11.3 of Part I of China’s Accession Protocol; (2) Paragraph 1.2 of 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 (3) Articles X:3(a) and XI:1 of GATT, regarding China’s export duties on various forms of antimony, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin.<sup>262</sup> On November 8, 2016, the DSB established a panel to hear the challenge raised by the United States.<sup>263</sup> Fourteen WTO members reserved their third-party rights in that case.<sup>264</sup> Similarly, on November 23, 2016, the DSB established a panel to hear the challenge raised by the European Union.<sup>265</sup> Seventeen WTO members reserved their third-party rights.<sup>266</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> 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).

<sup>260</sup> *Id.* China stated that it would need a reasonable amount of time in which to do so. *Id.* 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. *Id.*

<sup>261</sup> 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); Request for Consultations by the United States, *China Export Duties on Certain Raw Materials*, WTO Doc. WT/DS508/1 (July 14, 2016).

<sup>262</sup> 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).

<sup>263</sup> See *DS508: China—Export Duties on Certain Raw Materials*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds508\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds508_e.htm).

<sup>264</sup> *Id.* Third parties to a WTO dispute are Members that have a “substantial interest” in the matter at issue and wish to comment on the factual claims or legal arguments made by the parties to the dispute. Third parties are not directly affected by the decision: it is not their measure which has been found to breach WTO law or to nullify or impair benefits, nor is it their challenge of the measure which has been rejected. Third parties therefore cannot appeal a panel report. However, third parties that have been third parties at the panel stage may also participate in the appeal as a so-called “third participant”. Article 17.4 of the DSU provides that third parties may make written submissions to, and be given an opportunity to be heard by, the Appellate Body. See *The Process—Stages in a Typical WTO Dispute Settlement Case*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s5p2\\_e.htm#fnt1](https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p2_e.htm#fnt1) (last visited Apr. 4, 2022).

<sup>265</sup> See *DS509: China—Duties and other Measures Concerning the Exportation of Certain Raw Materials*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds509\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds509_e.htm).

<sup>266</sup> *Id.*

Notably, the United States won these cases because each private export cartel had transformed to being State-led.<sup>267</sup> They follow a similar pattern: (1) one or more Chinese government agencies imposed an export restriction on a set of raw materials in the form of an outright ban, quota, or tax; (2) a WTO Panel later found the restriction to contravene China's WTO treaty obligation, which (3) the WTO Appellate Body then upheld.<sup>268</sup> For competition-type matters, the WTO is an imperfect venue.<sup>269</sup> It can examine the trade effects of a few antitrust violations, with only uncertain prospects of success.<sup>270</sup>

### 3. Section 301 and China's Anti-Monopoly Law

In August 2017, the USTR initiated an investigation under Section 301 of the Trade Act of 1974 into the government of China's acts, policies, and practices related to technology transfer, intellectual property, and innovation.<sup>271</sup> A report by the USTR in March 2018 detailed the survey results.<sup>272</sup> Shortly afterward, the United States and China were involved in a trade war triggered by the United States imposing additional tariffs on its imports from China in July 2018.<sup>273</sup>

The objectives of the U.S. action were twofold.<sup>274</sup> One was to reduce its trade imbalance vis-à-vis China to save employment in the United States.<sup>275</sup> The other was to deal with China's unfair trade and competition practices, such as forcing foreign businesses to share their technology in exchange for market access.<sup>276</sup> According to the 301 Report, China uses its Anti-Monopoly Law of the People's Republic of China (AML) to obtain U.S. intellectual property.<sup>277</sup>

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<sup>267</sup> See Shen, *supra* note 206. A dialogue between U.S. courts and the executive branch could be beneficial when dealing with state-led export cartel cases. *Id.* In this way, the unilateral nature of the extraterritoriality is likely to bolster the WTO dispute settlement process rather than undermine it. *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> See *supra* Section III.A.3.

<sup>270</sup> *Id.*

<sup>271</sup> OFF. OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) [hereinafter SECTION 301 REPORT], <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

<sup>272</sup> *Id.*

<sup>273</sup> For details of tariffs levied during the trade war, see Chad Bown & Melina Kolb, *Trump's Trade War Timeline: An Up-to-Date Guide*, PETERSON INST. FOR INT'L ECON. (Feb. 8, 2022), <https://www.piie.com/blogs/trade-investment-policy-watch/trump-trade-war-china-date-guide>.

<sup>274</sup> See Urata, *supra* note 68, at 155–56.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* (arguing the chances of achieving the second objective would increase if the United States cooperates with countries such as Japan and the European Union, which are faced with similar problems).

<sup>277</sup> See SECTION 301 REPORT, *supra* note 271, at 180 (citing as examples the AML agencies' multiple draft



The Report also accused Chinese antitrust authorities of using the AML to advance industrial policy rather than to protect competition.<sup>278</sup> In terms of enforcement, the United States also raised concerns regarding transparency, due process, and discriminatory enforcement against certain foreign companies.<sup>279</sup>

For the first time since the AML came into force in 2008, the government is proposing major changes to its centerpiece antitrust legislation.<sup>280</sup> China's new market regulator, the State Administration for Market Regulation (SAMR), released a draft revision to the AML for public comment on January 2, 2020 (AML Draft).<sup>281</sup> If adopted as law, the AML Draft would provide SAMR with more powerful procedural and substantive enforcement tools.<sup>282</sup>

Despite these efforts, the United States appears to take the position that China's AML enforcement is still biased in practice and focuses on foreign companies.<sup>283</sup> As some foreign businesses have noted, China's competition authorities continue to use AML enforcement to extend China's industrial policies, particularly for companies operating in strategic sectors.<sup>284</sup> China's competition authorities may continue to target foreign patent holders and use the threat of enforcement to pressure U.S. patent holders to license to Chinese parties at lower rates, according to the 2020 Special 301 Report.<sup>285</sup>

It is worth noting that Section 301 is too costly for the United States to pursue as a policy tool.<sup>286</sup> China is not as vulnerable to trade retaliation as developing

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guidelines).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 181.

<sup>280</sup> State Admin. for Market Regul., Announcement on Public Comments on the Revised Draft of the Anti-Monopoly Law (Jan. 2, 2020), [http://www.samr.gov.cn/hd/zjdc/202001/t20200102\\_310120.html](http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html) (China).

<sup>281</sup> *Id.* For a summary of the 2020 AML Draft, including some significant substantive and procedural changes, see *China Set to Revise Its Anti-Monopoly Law with More Aggressive Provisions*, WINSTON & STRAWN (Jan. 10, 2020), <https://www.winston.com/en/competition-corner/china-set-to-revise-its-anti-monopoly-law-with-more-aggressive-provisions.html#!/en>.

<sup>282</sup> *Id.*

<sup>283</sup> OFF. OF THE U.S. TRADE REP., EXEC. OFF. OF THE PRESIDENT, 2020 SPECIAL 301 REPORT 45–46 (2020) [hereinafter 2020 SPECIAL 301 REPORT], [https://ustr.gov/sites/default/files/2020\\_Special\\_301\\_Report.pdf](https://ustr.gov/sites/default/files/2020_Special_301_Report.pdf).

<sup>284</sup> U.S. DEP'T OF STATE, E817e8193b, BUREAU OF DEMOCRACY, BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, CUSTOM REPORT EXCERPTS: CHINA, INDIA, MACAU, TAIWAN (2020), <https://www.state.gov/report/custom/e817e8193b>.

<sup>285</sup> See 2020 SPECIAL 301 REPORT, *supra* note 283, at 45–46.

<sup>286</sup> See, e.g., Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1, 51 (2012) (discussing past antitrust enforcement conflicts between the United States and the European Union). The United States threatened the European Union with trade sanctions unless the European Union backed down. *Id.* Yet, notwithstanding the escalated rhetoric of retaliation, antitrust controversies led the U.S. government to concede that “[w]e have no power to change EU law.” *Id.* (citing Deborah Platt Majoras, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks on GE-Honeywell: The U.S. Decision, Before the Antitrust Law Section, State Bar of

countries with small domestic markets and fewer export opportunities. Instead, the trade retaliation more than tripled the average of U.S. import tariffs from 1.6% to more than 5%.<sup>287</sup> Since foreign companies usually did not cut prices to compensate, about 100% of these import taxes have been passed on to U.S. importers and consumers.<sup>288</sup>

Another complicating factor to limit this policy option is that the economic and trade complementarities between the two countries undermine the U.S. capacity to impose sustained tariff sanctions on China.<sup>289</sup> Abundant natural resources and high productivity fuel the U.S. economy.<sup>290</sup> China's comparative advantage lies in its massive labor surplus.<sup>291</sup> The two countries are also at different stages of development—the United States has been a mature and highly developed economy for over a century while China is still a developing country in terms of real GDP per capita.<sup>292</sup> The United States is far ahead of China in scientific and technological capabilities, and China is eager to continue to rely on significant technological support from the United States.<sup>293</sup> Put differently, the two countries' complementarities imply a low elasticity of demand for each other's products and high costs in case of a disruption in trade.<sup>294</sup>

The pursuit of trade sanctions could lead to further countersuits against the United States.<sup>295</sup> The DSU, part of the WTO rules, explicitly prohibits a

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Georgia 16 (Nov. 29, 2001)).

<sup>287</sup> See Mary Amiti, Stephen J. Redding & David E. Weinstein, *Who's Paying for the US Tariffs? A Longer-Term Perspective*, 110 AM. ECON. ASS'N PAPERS & PROC. 541, 541 (2020).

<sup>288</sup> *Id.*; see also Zhang, *supra* note 30. More than 600 representatives appeared in a hearing on Trump's proposed tariffs on China. Zhang, *supra* note 30, at 847. Most of them opposed tariffs because importers would bear most of the costs, while some would be passed down to consumers who would pay higher prices. *Id.*

<sup>289</sup> See Zhang, *supra* note 30, at 846 (citing KE ZENG, TRADE THREATS, TRADE WARS: BARGAINING, RETALIATION, AND AMERICAN COERCIVE DIPLOMACY 238 (2004); JOHN A.C. CONYBEARE, TRADE WARS: THE THEORY AND PRACTICE OF INTERNATIONAL COMMERCIAL RIVALRY (1987)).

<sup>290</sup> See also Zhang, *supra* note 30, at 845–846 (citing LAWRENCE J. LAU, THE CHINA-US TRADE WAR AND FUTURE ECONOMIC RELATIONS 117–18 (2018)). By the measure of average productivity across sectors, China's economy is only thirty percent as productive as the world's best-performing economies, like the United States, Japan, or Germany. See Press Release, Staff Report, and Statement, IMF, People's Republic of China: 2020 Article IV Consultation by the Executive Director for the People's Republic of China, No. 2021/006 (Jan. 8, 2021), <https://www.imf.org/en/Publications/CR/Issues/2021/01/06/Peoples-Republic-of-China-2020-Article-IV-Consultation-Press-Release-Staff-Report-and-49992>.

<sup>291</sup> Zhang, *supra* note 30, at 846.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* (citing CONYBEARE, *supra* note 289).

<sup>295</sup> The WTO provisions at issue include GATT Articles I (General Most-Favoured-Nation Treatment) and II (Schedules of Concessions), and DSU Article 23 (Strengthening of the Multilateral System). See Request for Consultations by China, *United States–Tariff Measures on Certain Goods from China*, WTO Doc. WT/DS543/1 (Apr. 5, 2018) [hereinafter *Tariff Measures I*]; Request for Consultations by China, *United States–Tariff Measures on Certain Goods from China II*, WTO Doc. WT/DS565/1 (Aug. 27, 2018) [hereinafter *Tariff*

unilateral determination or retaliation against another WTO member for WTO violations.<sup>296</sup> A WTO panel ruling in 1999 concluded that unilateral actions under Section 301 are inconsistent with WTO obligations except under limited circumstances.<sup>297</sup> China has filed three requests for consultation at the WTO on the impending tariff sanctions that the U.S. government has threatened to impose on certain Chinese goods.<sup>298</sup>

Overall, it can be concluded that the Competition Clause of Section 301 may not be a workable policy option for the United States to achieve greater convergence and cooperation in antitrust and to mitigate existing competition-related trade frictions. By imposing tariff sanctions, the United States cannot simply inflict harm on China without also injuring itself. Since China joined the WTO in 2001, any trade retaliation would require the WTO's authorization. The chances of improving China's unfair trade and competition practices would increase if the United States cooperated with countries and blocs such as Japan and the European Union, which face similar problems.<sup>299</sup>

Three policy options have been assessed: the extraterritorial application of antitrust law, the Competition Clause of Section 301, and the WTO dispute settlement process. No tool offers complete solutions to address competition-related trade concerns in foreign markets, particularly to the problems of hybrid public-private restraints of trade. For these reasons, the United States was forced to seek another policy option: It increased regulatory cooperation by forming direct contacts among antitrust authorities in other jurisdictions. This allowed the United States to negotiate bilateral antitrust-cooperation agreements, including provisions on information-sharing and positive comity. These efforts will be discussed in the following Section.

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*Measures II*].

<sup>296</sup> DSU annex 2; see also Susana Hernandez Puente, *Section 301 and the New WTO Dispute Settlement Understanding*, 2 ILSA J. INT'L & COMP. L. 213, 221–23 (1995).

<sup>297</sup> See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, ¶¶ 7.71–7.92, WTO Doc. WT/DS152/R (adopted Jan. 25, 2000); see also Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 256–59 (2006).

<sup>298</sup> In these suits, China claimed that the impending tariff would violate the most-favored-nation treatment obligation under GATT 1994 and the U.S. Schedule of Concessions and Commitments. *Tariff Measures I*, *supra* note 295; *Tariff Measures II*, *supra* note 295; Request for Consultations by China, *United States—Tariff Measures on Certain Goods from China III*, WT/DS587/1 (Sept. 4, 2019) [hereinafter *Tariff Measures III*]. In addition, China claimed that the United States' unilateral action had violated DSU Article 23. *Tariff Measures I*, *supra* note 295; *Tariff Measures II*, *supra* note 295; *Tariff Measures III*, *supra*.

<sup>299</sup> See Urata, *supra* note 68, at 155–58; Mark Wu, *Trump vs. International Law: Trade Unilateralism in Pursuit of What?*, OPINIO JURIS (Oct. 10, 2018), <http://opiniojuris.org/2018/10/10/trump-vs-international-law-trade-unilateralism-in-pursuit-of-what>.

### III. WHAT WORK IS LEFT FOR BILATERAL COOPERATION MECHANISMS?

The cooperation between antitrust authorities is not new, but its increasing importance is driving the new arrangements. The United States appears to have advocated for networks of bilateral cooperation mechanisms to create a “fast, flexible, and effective” network among antitrust authorities.<sup>300</sup> A traditional reason for the U.S. position is that a direct connection between antitrust authorities can most fundamentally enhance states’ ability to cooperate in antitrust without the need for “centralized bureaucracy and burdensome procedures of formal international institutions.”<sup>301</sup>

This Section focuses on two aspects of regulatory cooperation among the networks of national antitrust authorities. First, the cooperation between antitrust authorities with relatively similar regulatory laws and cultures in a developed antitrust system will be discussed. Second, this regulatory cooperation at the international level among nations with divergent antitrust regimes will be addressed. Cooperative efforts in the latter case face challenges that differ from state to state.

#### A. Information Sharing

Many studies have emphasized the need for international antitrust cooperation agreements to improve information sharing.<sup>302</sup> Without at least some sharing of information among national agencies, it is often challenging “to evaluate the effects or legality of commercial activities.”<sup>303</sup> U.S. antitrust agencies have made efforts to enter into bilateral antitrust cooperation agreements with their foreign counterparts. As of this writing, the United States

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<sup>300</sup> See Bradford, *supra* note 1, at 213 (citing Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFFS. 183, 193 (1997)).

<sup>301</sup> *Id.* at 238. There are several reasons why countries enter into bilateral cooperation arrangements: they 1) aim to avoid problems arising from the exercise of extraterritorial jurisdiction; 2) facilitate the investigation and enforcement of international antitrust cases by providing access to essential evidence that often located beyond the reach of the national antitrust enforcement officials and can only be obtained with the help of foreign authorities; 3) can prevent conflicts when drawing conclusions and assessing remedies; and 4) help avoid unnecessary duplication of work, thereby saving transaction costs. *Id.* at 239.

<sup>302</sup> See, e.g., Hachigian, *supra* note 82, at 117–22; Klein, *supra* note 15, at 37–45; Laraine L. Laudati & Todd J. Friedbacher, *Trading Secrets—The International Antitrust Enforcement Assistance Act*, 16 NW. J. INT’L L. & BUS. 478 (1995–1996).

<sup>303</sup> Hachigian, *supra* note 82, at 122 (quoting ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPETITION LAW ENFORCEMENT: INTERNATIONAL COOPERATION IN THE COLLECTION OF INFORMATION 73 (1984)) (noting that current information exchanges among antitrust enforcement agencies “are at present restricted to non-confidential information [which] greatly limits the potential utility of these exchanges, since much of the truly pertinent information will have been received in confidence from the parties themselves or third parties.”).

currently has such cooperation agreements with Australia, Brazil, Canada, Chile, Colombia, the European Union, Germany, Israel, Japan, and Mexico.<sup>304</sup> By allowing different countries' antitrust offices to share information, bilateral cooperation mechanisms have enjoyed moderate success in encouraging countries to communicate.<sup>305</sup>

The downside of bilateral agreements is that they generally do not provide for antitrust authorities' exchange of confidential business information, which is essential for international antitrust enforcement and cooperation.<sup>306</sup> The agreements do not call for a modification of domestic confidentiality laws, so that antitrust agencies could share this information with one another.<sup>307</sup> In addition, the antitrust authorities cooperating in this framework "cannot use their compulsory powers of evidence gathering on one another's behalf."<sup>308</sup> By relying exclusively on bilateral agreements, parties in export cartel cases have nothing to gain from a sound investigation. As a result, they are often reluctant to aid antitrust authorities in the process of agency investigations.<sup>309</sup>

The U.S. government has recognized that the exchange of confidential information is crucial to an effective antitrust enforcement program.<sup>310</sup> The United States is a party to Mutual Legal Assistance Treaties (MLATs) which allow generally for the exchange of evidence and information in criminal matters, including international cartel cases.<sup>311</sup> For antitrust-specific matters, the

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<sup>304</sup> See U.S. Dep't of Just., *Antitrust Cooperation Agreements* (2021), <https://www.justice.gov/atr/antitrust-cooperation-agreements>.

<sup>305</sup> See Bradford, *supra* note 1, at 241 n.187 (citing Youri Devuyt, *Transatlantic Competition Relations: A New World Order?*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 127, 148 (Mark A. Pollack & Gregory C. Shaffer eds., 2001)) ("A total of 473 cases of cooperation concerned transatlantic mergers. Strategic alliances and monopolization resulted in cooperation in 216 cases. The figures illustrate that the cooperation is based on well-balanced mutual notification practice. The European Commission notified the United States in 358 cases, whereas the notifications by the United States were almost as frequent, numbering 331.").

<sup>306</sup> See, e.g., Hachigian, *supra* note 82, at 139–40; Laudati & Friedbacher, *supra* note 302, at 481–90.

<sup>307</sup> Hachigian, *supra* note 82, at 127 ("The most concrete obstacle to the sharing of antitrust information is that of national confidentiality laws[, which] still prevent the exchange of much vital information and remain a barrier that future efforts toward antitrust cooperation must address.").

<sup>308</sup> *Id.* at 139 (noting none of the civil antitrust arrangements allow one authority to collect information on another's behalf using their compulsory powers).

<sup>309</sup> See Bradford, *supra* note 1, at 240 (citing Youri Devuyt, *supra* note 305 (referencing the case of Microsoft in 1994, in which the company consented to an exchange of confidential information between EU and U.S. antitrust agencies so that the two competition authorities could negotiate a settlement with Microsoft)) (noting bilateral agreements generally do not require antitrust agencies to exchange confidential business information unless parties under investigation explicitly permit authorities to do so).

<sup>310</sup> *Id.*

<sup>311</sup> See Hachigian, *supra* note 82, at 140–41 (discussing the Canada–U.S. MLAT, which has been used successfully by both countries to obtain information for criminal antitrust proceedings).

U.S. Congress passed the International Antitrust Enforcement Assistance Act in 1994 (IAEAA).<sup>312</sup> The Act authorizes the DOJ and Federal Trade Commission (FTC) to negotiate MLAT-like mutual assistance agreements with foreign antitrust authorities to exchange confidential and other information.<sup>313</sup> The U.S. agencies already have an IAEAA agreement with Australia from 1999.

Recently, the United States advocated a new MMAC between the DOJ, FTC, and competition agencies in Australia, Canada, New Zealand, and the United Kingdom.<sup>314</sup> The new MMAC includes a Memorandum of Understanding that enables member states to reinforce and improve existing cooperation on specific investigations.<sup>315</sup> For example, the parties are expected to share case-related information that is not in the public domain, coordinate investigative activities, facilitate voluntary witness interviews, and provide copies of publicly available records.<sup>316</sup> The framework also contains a model agreement that the individual agencies can use as the foundation for information-sharing and investigative assistance agreements.<sup>317</sup> The MMAC is not legally binding—existing laws and protections are unchanged. However, the new framework “sets a new standard for enforcement cooperation, strengthening our tools for international assistance and evidence gathering in the increasingly digital and global economy.”<sup>318</sup>

Developing countries or emerging market economies that are in the process of adopting antitrust regimes face very different challenges to cooperation. This is because “[t]he majority of bilateral information-sharing agreements to date have been either Memoranda of Understanding or Agreements and not binding

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<sup>312</sup> See generally International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 46.

<sup>313</sup> See generally Laudati & Friedbacher, *supra* note 302 (discussing whether the United States can offer acceptable levels of confidentiality and whether the IAEAA expresses the United States’ readiness to offer truly reciprocal assistance).

<sup>314</sup> See generally Memorandum from the U.S. Dep’t of Just., Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (Sept. 2020), <https://www.justice.gov/atr/page/file/1311291/download>.

<sup>315</sup> See *id.* ¶ 6. More general cooperation is envisaged under the memorandum of understanding regarding the development of competition issues, policies and laws, competition advocacy (including to consumers, industry, and government), best practices, and advice, training, and collaboration on areas of mutual interest (including working groups on specific issues). *Id.* ¶ 3.1.

<sup>316</sup> *Id.* ¶ 3.2.

<sup>317</sup> *Id.* ¶ 4.2. While the parties can adapt the model as appropriate, it sets out some substantive matters, including the nature of assistance that can be requested, the process for requesting assistance, confidentiality protections, and the scope of permitted use of information that is shared. *Id.*

<sup>318</sup> Press Release, U.S. Dep’t of Just., Assistant Attorney General Makan Delrahim Signs Antitrust Cooperation Framework with Australia, Canada, New Zealand, And United Kingdom (Sept. 2, 2020), <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-signs-antitrust-cooperation-framework-australia>.

treaties.”<sup>319</sup> Developing countries are likely to continually follow this route in the antitrust field given the sensitive nature of some of the information at stake.<sup>320</sup> Their national antitrust agencies may not be expected to immediately enter any new bilateral agreements. They calculate that the risks of harming state-owned enterprises and import-competing industries will outweigh the benefits of greater enforcement power.<sup>321</sup> Additionally, developing countries fail to see the agreement on antitrust as a development priority in light of more pressing socio-economic problems that need to be addressed.<sup>322</sup>

Nevertheless, it is in the interest of both developed and developing countries to create stable and efficient antitrust regimes all over the world. Developing countries’ calculus would likely change as commerce becomes increasingly international and escapes their regulations. Therefore, the United States should strive for firm binding commitments with developing countries, many of whom are the country’s major trading partners. As in the case of MLATs, a binding treaty with an adequate exception clause can represent a more substantial commitment while still retaining flexibility.

#### *B. Positive Comity*

The heart of positive comity is that one jurisdiction refers a matter to another, in the hope that the referred jurisdiction will investigate the claim and be able to conduct investigations better. The referring jurisdiction therefore will stay its hand, either by choice or because it in fact has no other alternative.<sup>323</sup>

This is because national antitrust authorities “may find it impossible to remedy anticompetitive foreign conduct that is seriously harming their economies.”<sup>324</sup> There can also be situations in which no antitrust authority in any injured country is able on its own to halt such conduct.”<sup>325</sup>

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<sup>319</sup> See Hachigian, *supra* note 82, at 151.

<sup>320</sup> *Id.*

<sup>321</sup> William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT’L L. 403, 404–05 (1997) (noting the implementation of antitrust regimes in developing countries has been obstructed by political opposition from state-owned enterprises and import-competing industries lobbying for continued protection); see Bradford, *supra* note 12, at 18 n.57 (citing Editorial, *The Real Lesson of the Cancun Failure: The Answer is New Negotiating Geometries, Not WTO Reform*, FIN. TIMES, Sept. 23, 2003, at 16.).

<sup>322</sup> *Id.*

<sup>323</sup> See Janow, *supra* note 16, at 979.

<sup>324</sup> *Report on Positive Comity*, *supra* note 26, at 2.

<sup>325</sup> *Id.*

The United States took the initiative by leading discussions of positive comity inside the OECD and has tried to build consensus for an international agreement on positive comity.<sup>326</sup> These efforts culminated in adopting the OECD recommendation for cooperation on the international application of antitrust law.<sup>327</sup> The recommendations have undoubtedly partially facilitated international consensus on comity and served as a model for bilateral cooperation agreements between countries with similar antitrust laws and legal cultures.<sup>328</sup>

A bilateral agreement between the European Union and the United States was signed in 1991 (1991 Agreement).<sup>329</sup> The 1991 Agreement provides for a “positive comity” procedure by virtue of which either party can invite the other party to take, based on the latter’s legislation, appropriate enforcement activities regarding anticompetitive behavior implemented within its territory and which affects the requesting party’s important interests.<sup>330</sup> The requested party is required to “consider” the matter and to inform the requesting party of its decision and the relevant investigation results.<sup>331</sup> The use of this process does not preclude the requesting party from taking its own enforcement action.<sup>332</sup>

In June 1998, the United States entered into a supplement agreement to the above 1991 bilateral agreement.<sup>333</sup>

The core substance of this supplement agreement is that, under certain conditions, the requesting party would refrain from enforcing its own

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<sup>326</sup> See generally *Report on Positive Comity*, *supra* note 26; Klein, *supra* note 24.

<sup>327</sup> Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, OECD Doc. C(95)130/Final (July 28, 1995). Earlier recommendations include: OECD Doc. C(56)753/Final (Oct. 5, 1967); OECD Doc. C(73)99/Final (July 3, 1973); OECD Doc. C(79)154/Final (Sept. 25, 1979); and OECD Doc. C(86)44/Final (May 21, 1986).

<sup>328</sup> Such bilateral agreements were signed by the United States with Australia, Brazil, Canada, the European Commission, Germany, Israel, Japan, and Mexico. Bradford, *supra* note 1, at 228 (noting a comprehensive agreement between Australia and New Zealand is built on OECD recommendations; it has taken place in the context of an extensive trade agreement between countries with highly similar antitrust laws and legal cultures); see *Competition Co-operation and Enforcement: Inventory of Co-operation Agreements*, OECD (2021), <https://www.oecd.org/daf/competition/competition-inventory-list-of-cooperation-agreements.pdf>.

<sup>329</sup> See Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491 (1991) [hereinafter Competition Laws Agreement]; *accord* Decision of the Council and Commission 98/386/EC, 1998 O.J. (L 173) 26.

<sup>330</sup> See Competition Laws Agreement, *supra* note 329, art. V. The term positive comity is not used in the agreement, but the concept is contained in Article V. See *id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> See Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 1998 O.J. (L 173) 28.



competition laws and would agree to request the requested party to apply its domestic laws. In such instances, the requesting party consents not to use its domestic laws extraterritorially—if it wishes to do so, it is required to explain the reasons for such action. The requested party must thoroughly investigate the matter and report the results to the other party, and also comply with the other party's request to the extent reasonable.<sup>334</sup>

In the eyes of the United States, this is a policy tool that needs to develop further.<sup>335</sup> In some cases, hopefully, it can develop into a mechanism for addressing cartel exports and abuse of dominance/monopolization cases.<sup>336</sup> Nevertheless, the United States rarely engages in bilateral cooperation on positive comity with developing countries or emerging market economies that are adopting antitrust regimes. Suppose a bilateral agreement on positive comity is signed between a net importing country and a net exporting country. A few of limitations are worth considering here.<sup>337</sup>

### 1. *Illegality in the Requested Country*

Positive comity is generally only applicable in cases where there is a violation of the antitrust law of the requested party. Thus, if the anticompetitive activity at issue was exempt from the laws of the requested party, or if it fell under exceptions under such laws, positive comity would fail.<sup>338</sup> As discussed, emerging open economies, whose firms export a high percentage of their goods

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<sup>334</sup> Chang, *supra* note 12, at 31.

<sup>335</sup> See Janow, *supra* note 16, at 979.

<sup>336</sup> Abuse of dominance/monopolization cases are those in which parties under investigation face potentially significant fines and other sanctions. See *Report on Positive Comity*, *supra* note 26, ¶ 60. U.S. Assistant Attorney General Joel Klein commented that positive comity has several benefits:

First, competition authorities tend to have a stake in taking such complaints seriously, even if they do involve foreign access, because they also involve alleged harm to consumers in the country where the conduct is occurring. Second, such a process makes it much more likely that the evidence required to decide such cases properly can be obtained, since the conduct is occurring in the requested country, and jurisdictional and practical limitations may limit the ability of the requesting country to obtain the evidence. Finally, the positive comity approach should increase the credibility of competition laws and competition authorities, since this approach can address at least some market access issues through a systematic competition law-based approach.

Joel Klein, Assistant Att'y Gen., U.S. Dep't of Just., Antitrust Div., *Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century* (Oct. 16, 1997), in *Fordham Corporate Law Institute's 24th Annual Conference on International Law and Policy*, at 14.

<sup>337</sup> See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563, 570 (2000) (arguing U.S. courts have proved incapable of applying a full comity interest balancing approach in a consistent and principled manner, and that courts use comity in these cases more sparingly).

<sup>338</sup> See *Report on Positive Comity*, *supra* note 26, ¶ 51.

and whose consumers import a high percentage of their consumption, either do not have effective competition laws or do not apply their competition laws to conduct beyond their borders.<sup>339</sup> If the requested party is a developing country, a certain practice may be legal. That is, firms engaging in such practices may be exempted from national antitrust in their home market if they have no detrimental effect on home consumers.<sup>340</sup> In contrast, a developed country as the requesting party may view such a practice as being anticompetitive, and therefore it might once again have incentive to apply its own laws extraterritorially.<sup>341</sup>

Even if export cartels produced trade-restrictive effects, the importing country's antitrust authority may still determine that the rule of reason justifies non-regulation of such practices. This determination is based on the finding that procompetitive effects outweigh anticompetitive effects.<sup>342</sup> Put another way, certain activity may harm foreign traders' interests, but it is still considered "procompetitive" under the importing market's antitrust law.<sup>343</sup> If the exporting country requested that the importing country regulate such activities in accordance with a positive comity agreement, such a request would not normally be served because such activities may not be violations of the requested country's antitrust law.<sup>344</sup> Indeed, it is difficult to expect one foreign competition authority to take resources away from cases that benefit its own economy to bring cases with more substantial worldwide benefit but less benefit to its own economy.<sup>345</sup>

In the Vitamin C Case, for example, the Chinese Government believed an export cartel was an effective way to address overcapacity problems.<sup>346</sup> If one reaches the general comity issue, the question will be: Does U.S. antitrust law, in this application, unduly interfere with China's choices in regulating its own economy, thus outweighing the U.S. interest in freeing its economy of price-fixing and compensating victims? If so, positive comity in this context has failed. In turn, there would be a good case for expanding the foreign-sovereign compulsion defense and turning the issue into one of foreign law and

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<sup>339</sup> See Guzman, *supra* note 55, at 360.

<sup>340</sup> See Chang, *supra* note 12, at 32; see also, *Report on Positive Comity*, *supra* note 26, ¶ 61.

<sup>341</sup> *Id.*

<sup>342</sup> Comity as a doctrine of limitation was first proposed as the "jurisdictional rule of reason" by Kingman Brewster. Waller, *supra* note 337, at 564; see also Chang, *supra* note 12, at 33.

<sup>343</sup> Chang, *supra* note 12, at 33 (citing Joint Group on Trade and Competition, *Competition and Trade Effects of Vertical Restraints*, OECD Doc. COM/DAFFE/CLP/TD(99)54 (May 23, 1999)).

<sup>344</sup> *Id.*

<sup>345</sup> See *Report on Positive Comity*, *supra* note 26, ¶ 66.

<sup>346</sup> For a discussion of the Vitamin C Case, see Section III.B.1.

interpretation of the defense. This has posed a perennial challenge to U.S. courts deciding such cases under its own antitrust law.<sup>347</sup>

## 2. *Confidence among Competition Authorities*

Positive comity requires a certain degree of trust and confidence by the referring agency that the referred jurisdiction has and will undertake a serious investigation.<sup>348</sup> In this regard, the referral process can introduce some accountability into the investigation.<sup>349</sup> However, it will not change the fundamental nature of the agency that is the recipient of the referral.<sup>350</sup> Hence, if the antitrust agency that receives the referral is a weak one with no compulsory powers, no tradition of enforcement, no independent authority, etc., it will not gain power by relying on the referral.<sup>351</sup>

It is unlikely that many states have the trust and confidence needed for this positive comity.<sup>352</sup> In particular, only imperfectly competitive industries in emerging open economies are of concern here because firms in competitive industries are not problematic from an antitrust perspective. In these cases, one party might request another to investigate a matter despite worries about the latter's ability to remedy the situation.<sup>353</sup> The requesting party foregoes its best opportunity to remedy the conduct.<sup>354</sup> However, unless the requesting party has continuing confidence in the requested party's legal tools, commitment, and independence, it is unlikely to defer or suspend its own proceedings during any proceeding by the requested party.<sup>355</sup> In other words, if the requesting party does not trust the competence, willingness, and enforcement level of the requested party's competition authorities, it would seem logically difficult to rely on the requested party's diligence in investigation and regulation in this context.<sup>356</sup> As a result, the requesting party would potentially be tempted to engage in the extraterritorial application of its own antitrust law.<sup>357</sup>

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<sup>347</sup> *Id.*

<sup>348</sup> See Janow, *supra* note 16, at 979 (arguing positive comity can be a useful tool under certain circumstances).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> See *Report on Positive Comity*, *supra* note 26, at 23.

<sup>353</sup> *Id.* ¶ 53.

<sup>354</sup> *Id.* at 23.

<sup>355</sup> *Id.*

<sup>356</sup> See Chang, *supra* note 12, at 32.

<sup>357</sup> *Id.*

It is unclear to what extent the experience of other forms of enforcement cooperation has established the kind of trust and confidence needed for this cooperation.<sup>358</sup> In a word, positive comity is likely to work best when jurisdictions look at a problem in the same way.

### 3. *The Reciprocity Problem*

The ultimate impact of positive comity will largely depend on whether competition authorities are willing and able to establish a culture of cooperation “in which agencies can justify bringing some cases for the primary benefit of others on the basis of the benefits they expect to receive from cases brought by others.”<sup>359</sup> In this sense, when a bilateral agreement concerning positive comity was to be entered between a net importer country and a net exporter country, the former would often be the requesting party. The latter would serve as the requested party, which may lead to difficulties of reciprocity.<sup>360</sup>

For example, the China’s National Development and Reform Commission concluded its antitrust investigations against Qualcomm and issued an administrative sanction on February 10, 2015.<sup>361</sup> The anti-monopoly enforcement agency concluded that Qualcomm had abused its dominant market position and that the firm’s practices “restricted and excluded market competition, hampered innovation and technology development, harmed consumers’ rights and interests,” and thus had violated the Chinese AML.<sup>362</sup> Now it is assumed that the United States emphatically urges or even compels Qualcomm and a competing intellectual property owner to fix royalty rates on patents used in China’s mobile phone market. The United States does so by ensuring that its firms realize the actual value of their intellectual property to preserve the integrity of U.S. intellectual property, thereby maintaining the firms’ and the nation’s competitiveness in the world. Suppose that U.S. courts favor China’s choices in regulating its own economy, applying the principle of “positive comity” in the Vitamin C Case. In response, would the courts of China reciprocally withhold antitrust enforcement against Qualcomm and its competitor?

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<sup>358</sup> *Id.* at 32–33.

<sup>359</sup> *See Report on Positive Comity*, *supra* note 26, ¶ 66.

<sup>360</sup> *See, e.g.*, Fox, *supra* note 222; Chang, *supra* note 12, at 33–34.

<sup>361</sup> Joe Zhang, *China’s Antitrust Crackdown Hits Qualcomm with US \$975 Million Fine: What Can Other Host States Learn from the Story?*, INV. TREATY NEWS (May 21, 2015) <https://www.iisd.org/itn/en/2015/05/21/chinas-antitrust-crackdown-hits-qualcomm-with-us975-million-fine-what-can-other-host-states-learn-from-the-story>.

<sup>362</sup> *Id.*

Put another way, because net importers' and exporters' interests diverge, they have often found themselves in opposing alliances. Developed economies often demand a "level playing field" and need better access to developing countries' markets.<sup>363</sup> Developed economies accuse developing countries of failing to provide effective market access to foreign suppliers because they did not exercise control over local companies' anticompetitive practices.<sup>364</sup> In contrast, developing countries pay less attention to market access and transaction costs.<sup>365</sup> They are more worried about their inability to control the anticompetitive behaviors of multinational corporations (MNCs) due to the global merger wave and the growing presence of MNCs in developing countries.<sup>366</sup> They also tend to use their antitrust laws to advance domestic industry attendants rather than protect competition in world markets. It is therefore not difficult to predict that even if comity vastly expanded, it has smaller potential benefits in a wider range of cases.<sup>367</sup> As the International Competition Policy Advisory Committee report concluded: "While it is apparent that government representatives still maintain visible support for positive comity, the emphasis now has shifted to the 'limited role' it can achieve in international cooperation."<sup>368</sup>

Taken together, there are sound reasons to ask whether an overall program involving expanded and deepened cooperative enforcement efforts solely on a bilateral basis is a risky option. This policy option requires a certain degree of trust and confidence, particularly given the U.S. tendency to import goods from emerging open markets. Additionally, coherence in antitrust and trade policies relying solely on bilateral cooperation mechanisms has not adequately advanced.

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<sup>363</sup> See Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L.J. 383, 419 (2007).

<sup>364</sup> *Id.* (citing Bernard M. Hoekman & Kamal Saggi, *International Cooperation on Domestic Policies: Lessons from the WTO Competition Policy Debate*, in ECONOMIC DEVELOPMENT AND MULTILATERAL TRADE COOPERATION 439, 446 (Simon J. Evenett & Bernard M. Hoekman eds., 2006)).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* (citing Ross C. Singleton, *Competition Policy for Developing Countries: A Long-Run, Entry-Based Approach*, 15 CONTEMP. ECON. POL. 1, 5 (1997); Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in WHAT GLOBAL ECONOMIC CRISIS? 122 (Philip Arestis, Michelle Baddeley & John McCombie eds., 2001)).

<sup>367</sup> See *Report on Positive Comity*, *supra* note 26, ¶ 67.

<sup>368</sup> See *ICPAC REPORT*, *supra* note 5, at 235.

## CONCLUSION

This Article begins with an empirical inquiry into the conflict between trade and competition law and policy that has arisen due to different substantive standards. It reveals a problematic situation where certain activities have trade-restrictive effects but favor competition in importing markets. Many transition economies in this globalizing world are likely to produce more tensions between nations about practices that reflect a mixture of governmental and private restraints. The specific problems that have recently surfaced—China now has a considerable trade surplus vis-à-vis the United States; and anticompetitive actions in China injured U.S. exporters—belong to the same family as the Japanese issues of yesterday.

This Article then assesses the desirability and the capacity of the current set of policy options to get at these competition-related trade concerns. This Article disputes the widely-held view that the strategic situations underlying antitrust cooperation among developed antitrust regimes and developing antitrust regimes are similar. In particular, this Article disputes the conclusion that the current set of policy options to address private and hybrid public-private restraints of trade are feasible in all situations. Instead, the current set of policy options are feasible only to address competition-related trade concerns in developed antitrust regimes but are ill-equipped to address competition-related trade concerns in emerging market economies that are in the process of adopting antitrust regimes.

Despite the dangers explored above, the ideal vision of a global antitrust policy is subject to intense dispute. The conflicting ideas of international and national regulatory frameworks have yet to find a satisfactory equilibrium. This Article concludes that the existing policy options will not preempt the need to resort to a multilateral framework. Instead, both have a place in international antitrust law. Given the ongoing changes in the economic and political landscape, it seems prudent to start with a relatively modest agenda, but without foreclosing greater cooperation in the future. Ideally, the gains available through the existing paradigm do not make the concrete proposals for a multilateral agreement obsolete. Both mechanisms compliment and constrain one another to find a satisfactory equilibrium.<sup>369</sup> Future negotiations on the interaction should at least include the following items:

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<sup>369</sup> This Article's possible normative implications certainly support Professor Bradford's view that a workable global governance regime in international antitrust law must incorporate aspects of three models—intergovernmental, transgovernmental, and transnational models—and the downsides of each. For a detailed discussion of all three models of global governance, see Bradford, *supra* note 1. This Article's possible

(1) In 2019, the WTO Appellate Body clarified its approach to more respect the challenges faced by investigating authorities in defining the term “public agency.”<sup>370</sup> The Appellate Body found that the investigating authority does not need to establish a connection between a state-owned enterprise and the government in terms of “conduct” related to a specific transaction, but only as an “entity” in general.<sup>371</sup> The Appellate Body also found that even private entities could operate as public bodies where the entity has close ties with the government involving particular conduct.<sup>372</sup> In addition, the United States successfully had the term “public body” defined in terms of ownership in the Trans-Pacific Partnership and the United States–Mexico–Canada Agreement.<sup>373</sup> From these norm clarifications and development records, diplomacy and trade may be nimbler and more efficient than antitrust litigation in resolving conflicts between exporting and importing countries. Therefore, this Article proposes that when dealing with export cartel cases, U.S. courts should refrain from reaching a ruling that might undermine the efforts of the U.S. executive branch.

(2) One of the most appealing arguments for international antitrust rules has been the recognized linkages between antitrust and trade policies.<sup>374</sup> The intertwined relationship between trade liberalization and antitrust, and the need to limit trade-interfering national industrial policies, may explain why the trade officials at the USTR and the EU’s Directorate-General for Trade have equally supported the inclusion of antitrust within the WTO.<sup>375</sup> Indeed, reaching an international agreement on antitrust law and incorporating it into the WTO would ensure that antitrust laws do not offset the liberalization commitments they have negotiated in the trade domain.<sup>376</sup> Reforming the WTO to hear a broader set of antitrust suits remains a possibility. When faced with the prospect

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normative implications also confirm Professor Kal Raustiala’s view that regulatory networks will make treaties more effective by making governments more effective. See Raustiala, *supra* note 27, at 35–43.

<sup>370</sup> See Gregory C. Shaffer, *Governing the Interface of US-China Trade Relations*, 115 Am. J. Int’l Law 622, 641 (2021) (citing Appellate Body Report, United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China, ¶ 5.100, WT/DS437/AB/RW, add.1 (adopted Aug. 15, 2019)).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 25.

<sup>374</sup> See Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. INT’L ECON. L. 665, 666, 674–75 (1999) (suggesting trade-related antitrust issues, such as private market access restrictions, should be negotiated within the WTO, while other antitrust issues should be addressed in an independent forum); see also Andrew T. Guzman, *Global Governance and the WTO*, 76 N.Y.U. L. REV. 1142, 1142 (2001) (arguing the WTO represents the best forum for negotiations in addressing local favoritism and trade-induced distortions of national substantive policies).

<sup>375</sup> See Fox, *supra* note 4, at 12.

<sup>376</sup> See Bradford, *supra* note 12, at 32.

of certain transition economies, producing more tensions between nations about practices that reflect a mixture of governmental and private restraints, the United States and the European Union might set aside their longstanding differences in international antitrust cooperation. The WTO is likely to remain a valuable forum to negotiate enforceable commitments among many states after first considering remedies available in the bilateral agreements. In fact, in an increasingly complex economic and political landscape, states have few alternatives that may serve their future needs.

(3) As discussed, the experience so far acquired with unilateral efforts is limited, especially when dealing with the distortions to antitrust between net exporter states and net importer states. There is a growing consensus that the optimal antitrust regime should develop a culture of genuine cooperation with sincere efforts to address common goals and shared concerns.<sup>377</sup> In this sense, the United States should negotiate a firm bilateral antitrust agreement with its major trading partners, particularly developing countries or emerging market economies that are in the process of adopting antitrust regimes. While bilateral cooperation arrangements would not eliminate potential enforcement conflicts, such conflicts could be predicted and mitigated through the standard mechanisms of information exchange, consultation, and comity. Any such agreement could also lay a foundation for future antitrust dialogue that would allow the United States' sound enforcement practices to, over time, become well-established in these developing countries, many of whom are in the process of adopting antitrust regimes. They are much more likely to listen if the tone is that of cooperation rather than confrontation.

(4) Lastly, and most importantly, any workable antitrust regime for the integrated economy should promote greater global economic efficiency and prosperity, thereby benefiting a more comprehensive range of consumers. In this sense, perhaps the best solution, for now, is to strengthen a network of bilateral agreements supplemented by efforts toward a multilateral agreement. Put differently, the existing bilateral cooperative arrangements should lay the foundation for a multilateral agreement and prepare countries for more sophisticated international cooperation. If more formal cooperation is necessary, the negotiations will proceed more smoothly due to the existing integration and history of mutual trust. The relationship is complex, but the most plausible prediction is that the gains available through bilateral cooperation in antitrust do

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<sup>377</sup> See Raustiala, *supra* note 27, at 35–43. Governments are increasingly working together through transnational networks and favoring gradual convergence of competition laws through such cooperation. *Id.* Such cooperation is likely to supplement, rather than supplant, the traditional tools of international law. *Id.*



not make any possible multilateral system obsolete. The result would be greater room for bilateral bargaining, but it would be conducted within the umbrella of the multilateral framework resulting in more substantive convergence and perhaps even an international antitrust authority. As Assistant Attorney General Makan Delrahim emphasized: “We hope that [the MMAC] will provide a model for agencies around the world interested in enhancing international cooperation. DOJ looks forward to continuing this important work through the negotiation of the bilateral agreements contemplated in the Framework.”<sup>378</sup> The extent to which additional antitrust authorities seek to join or replicate this new framework will also be a development to keep an eye on.

The economic and business worlds embraced globalization long ago, and the legal world is still catching up. The journey of reaching an optimal antitrust regime will not take place in a honeymoon manner. The ongoing changes in the economic and political landscape have made the feasibility of establishing a multilateral antitrust agreement within an international institution even more challenging. The discussion above provides a starting point for if, how, and which type of cooperation might serve states’ future needs in an increasingly complex economic and political landscape. The optimal antitrust regime should consider both informal and substantive aspects to avoid the downsides of each and promote human welfare both at home and abroad.

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<sup>378</sup> See Press Release, Dept. of Just., Assistant Attorney General Makan Delrahim Signs Antitrust Cooperation Framework With Australia, Canada, New Zealand, And United Kingdom (Sept. 2, 2020).