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Yujia Wei

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# INTERNATIONALIZING DOMESTIC DISPUTES? TRANSNATIONAL PUBLIC–PRIVATE PARTNERSHIP IN WTO LITIGATION

*Yujia Wei**

For approximately two decades, commentators have extensively investigated the production of World Trade Organization (WTO) cases.[1] The WTO Dispute Settlement Body has been the central pillar of the WTO system since its establishment, because it is the institution within the system that can authorize sanctions for violations of the WTO agreements, but also plays a critical role in shaping and developing WTO law.[2] On the other hand, trade negotiations in the WTO have almost been paralyzed, and the WTO agreements – as a result of conference diplomacy – contain significant ambiguity leaving ample room for judicial interpretation.[3] Thus, the cases brought before the WTO court structure the development of WTO law and influence the international economic order.[4] Motivated by these concerns, scholars have probed into the process behind WTO proceedings, unearthing the players that have driven the legal actions.[5] Scholars have documented that governmental agencies often rely on the assistance of the private sec-

* Yujia Wei, who holds a Doctor of Juridical Science (S.J.D.) from University of Wisconsin Law School and an LLM in International Law from Xiamen University (China), is practicing securities and corporate law. The author is indebted to Professor Alexandra Huneeus, Professor Joe Conti, Professor Congyan Cai, Eric Klemm, and Amy Free for their invaluable comments.

1. Lindsay Prior, *Following in Foucault's Footsteps: Text and Context in Qualitative Research*, in APPROACHES TO QUALITATIVE RESEARCH: A READER ON THEORY AND PRACTICE 324–29 (Sharlene Nagy Hesse-Biber & Patricia Leavy eds., 2004).

2. *Understanding the WTO: Settling Disputes*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Oct. 21, 2019).

3. Appellate Body, *"Unprecedented Challenges" Confront Appellate Body, Chair Warns*, WORLD TRADE ORGANIZATION (June 22, 2018), https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm.

4. *Understanding the WTO: Settling Disputes*, *supra* note 2.

5. *See, e.g.*, GREGORY SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003) [hereinafter Shaffer, Defending Interests]. *See also* DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010) [hereinafter Dispute Settlement at the WTO]; Gregory Shaffer & Henry Gao, *China's Rise: How It Took on the U.S. at the WTO*, 1 U. ILLINOIS L. REV. 115, 115-184 (forthcoming 2018), *available at* https://ssrn.com/abstract=2937965; James J. Dedumpara, '*Naming, Shaming and Filing': Harnessing Indian Capacity for WTO Dispute Settlement*, 5 TRADE L. & DEV. 68 (2013); Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383 (2008); Jeffrey L. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, 1 J. INT'L ECON. L. 433, 442 (1998).

tor to cope with demanding WTO dispute procedures.[6] Despite the fact that only WTO members have standing to participate in WTO actions, private interests infuse the initiation, development, and implementation of WTO cases.[7]

The collaborative efforts between public agencies and the private sector to advance their interests through WTO litigation is often termed "Public Private Partnership" ("P-P partnership").[8] The private side of these partnerships can be companies, trade associations, environmental groups, or labor unions, but business interests account for a lion's share of such collaborations.[9] Though a wealth of research has been dedicated to studying *internal* public-private coalitions in WTO legal actions, there is only brief discussion about the *transnational* type of these coalitions.[10]

Transnational P-P partnership in WTO litigation does more than merely change the nationality of the private party in the partnership. In many cases, its origin, nature, and purpose are strikingly different from domestic P-P partnerships, and consequently, represent a distinct production pattern of WTO cases that have different impacts on the development of WTO law as well as the development of the international legal order.[11] While domestic P-P partnerships arise from mobilization, cooperation, and alliance among domestic forces, the transnational type tends to spring from internal conflict, rivalry, and struggle. A remarkable example of domestic P-P partnership in WTO litigation is the high-profile, long-lasting WTO disputes between the U.S. and EU regarding U.S. subsidies to Boeing and EU subsidies to Airbus, where each side working with its commercial aircraft industry contested that the other's industry had received illegal governmental subsidies.[12] By contrast, the case studies below show that transnational P-P partnerships are often related to failures or barriers in domestic political and judicial process-

6. *See, e.g.* DISPUTE SETTLEMENT AT THE WTO, *supra* note 5 at 15.

7. *Introduction to the WTO Dispute Settlement System,* WORLD TRADE ORGANIZATION, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s4p1_e.htm. (last visited Oct. 17, 2019).

8. *See, e.g.*, SHAFFER, DEFENDING INTERESTS, *supra* note 5. (Professor Gregory Shaffer seems to be the first person to coin the phrase—"public private partnership in WTO litigation.").

9. *See* Marco Schäferhoff et al., *Transnational Public-Private Partnerships in Int'l Relations*, COLLABORATE RES. CTR. WORKING PAPER SERIES 1, 10 (Aug. 2007).

10. Shaffer, Defending Interests, *supra* note 5, at 139–42.

11. *Id.* at 5-6.

12. *See* Request for Authorization by the Dispute Settlement Body, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/42 (Oct. 6, 2019); Request for Panel to Suspend Work by the United States, *European Communities—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS347/1 (July 20, 2006); Request for Consultations by the European Committees, *United States—Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS317/1 (Oct. 12, 2004); Request for Consultations by the European Committees, *Unites States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint),* WTO Doc. WT/DS353 (Dec. 4, 2006); Panel Report, *United States—Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/11 (Sep. 26, 2017).

es—they often occur when corporate interests want to leverage international pressures to modify unfavorable domestic policies.[13]

Transnational P-P partnerships' association with domestic feud impacts the international legal order in two important ways: first, it connects national and international legal orders in unexpected manners; second, it raises concern that current international institutions further tilt the power balance toward corporate interests in relation to other interests. As the following case studies illustrate, trade barriers are more than protectionist measures discriminating against foreign producers—they can be weapons against domestic companies that moved operations abroad, or a potent legal right to be invoked to resolve non-trade issues.[14] Through the device of transnational P-P partnership, conflict and competition between domestic groups is reframed, repackaged, and brought up to an international court as a dispute between two states. This internationalization of domestic disputes impinges on the traditional meaning of interstate disputes and makes national law increasingly affected by international law. Private actors' innovative framing of their problems in terms of *trade barriers* and leveraging international courts also imparts "discursiveness" to the development of international law as well as the interaction between international and national legal orders.[15]

The phenomenon of transnational P-P partnership at the WTO court (arguably the most powerful international court to-date) also causes fears that it provides corporate interests an additional venue to exert pressure, circumvent traditional controls established in national legislative and judicial course, prioritize corporate values over other values, and restrict state autonomy in policy-making.[16] In this manner, transnational P-P partnership allows corporate interests to empower themselves in the WTO dispute settlement system. Yet international law and courts not only empower but also constrain corporate interests. Indeed, the case studies here offer valuable lessons for private interests attempting to try their case before the WTO court by displaying how the complexity of interstate relations complicates what would be a much simpler issue under national law. In addition, from an institutional perspective, the capacity of private interests to leverage the intergovernmental WTO court is quite restricted: access to the international court depends on a state's sponsorship; the legality and reasonableness of its case are examined by judges who are delegates from member states and surely take into consideration the regulatory concerns of those states; and the enforcement of the court's decisions relies on state apparatus.[17]

The remainder of this essay proceeds as follows: Part I provides two case studies that exemplify two types of transnational P-P partnerships in utilizing the WTO dispute system: public-dominated and private-dominated. Through in-depth process-tracing, the case studies reveal the capabilities and mechanisms of how

13. Schäferhoff, *supra* note 9 at 10.
14. *See infra* Part I.
15. Schäferhoff, *supra* note 9 at 4.
16. *See id.* at 23-24.
17. *Understanding the WTO: Settling Disputes*, *supra* note 2.

transnational partnerships engage the WTO court. Continuing with the concern of how WTO cases are produced, Part II digs into the formation process of transnational P-P partnerships. Part III turns to theoretical reflections exploring the implications of transnational P-P partnerships in WTO litigation for international legal order. Part IV offers ideas for further research.

## I. PUBLIC-DOMINATED AND PRIVATE-DOMINATED TRANSNATIONAL P-P PARTNERSHIPS

Public-Private Partnership, built upon the assumption of a "public-private divide," readily captures a joint venture of public and private actors based on pooling their resources and capabilities to accomplish "public interest" related goals.[18] The phrase "transnational P-P partnership in WTO litigation" is employed here as a metaphor to conceptualize the cooperative efforts between cross-border public and private actors in pursuing WTO lawsuits. One example of this phenomenon occurred in the context of China–U.S. clashes over the U.S. application of countervailing duty to Chinese imports. A second example involves the Antigua–U.S. dispute regarding internet gambling. The two cases represent divergent patterns of how the partnership emerged and functioned. The divergence between the partnerships was influenced by the public partner's economic size, administrative culture, and issue areas involved.

### *A. China–U.S. WTO Disputes on U.S. Countervailing Duty Law*

Many works have documented the Chinese government's efforts to engage its private sector for effective participation in the WTO dispute system.[19] Compared with its proactive and strategic role in fostering internal P-P partnerships, the Chinese government in the following case seemed to forge the transnational alliance by accident. The private party in this transnational alliance is GPX International Tire Corporation ("GPX"), a U.S.-based tire company. The partnership between the Chinese government and GPX took place amid intensified friction between the U.S. and China over China's non-market economy status and the treatment of Chinese goods in trade remedy investigations.[20] The related legal battle was remarka-

18. Schäferhoff, *supra* note 9 at 7

19. *See*, *e.g.,* Shaffer & Gao, *supra* note 5; Henry Gao, *Public-Private Partnership: The Chinese Dilemma*, 48 J. WORLD TRADE 983 (2014); Han Liyu & Henry Gao, China's Experience in Utilizing the WTO Dispute Settlement Mechanism, in DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 137, 158 (2010); Pasha L. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997 (2010).

20. *See, e.g.*, Vivian C. Jones, Cong. Research. Serv., RL33550, Trade Remedy Legislation: Applying Countervailing Action to Nonmarket Economy Countries 9–10 (2007), *available at* https://www.everycrsreport.com/files/20071206_RL33550_a1fdae9e774c687be5bfdf05f5726107a5143565.pdf. A non-market economy ("NME") is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (2012). The NME status creates a rebuttable presumption that the prices of a surrogate market-economy country will be used in calculating dumping margins for exports from the NME country, *id.*

bly lengthy and complex, involving a string of four WTO disputes (DS368, DS379, DS437, DS449) and two appeals to the U.S. Court of Appeals for the Federal Circuit.

### i. Prologue

The reliance on China as a low-cost manufacturing base makes U.S. multinational corporations share China's interest in maintaining a liberalized trade policy, but the U.S. multinationals typically are reluctant to side with China regarding trade remedy issues. China did not accede to the WTO organization until December 2001, approximately seven years after the WTO came into being.[21] In China's accession negotiations, the U.S. was both the major obstacle and motivator for China to enter the organization.[22] U.S. business lobbying groups made great effort to push through the approval of China's accession in the U.S. Congress.[23] Though the U.S. Congress finally overwhelmingly supported admitting China to WTO,[24] the U.S. imposed non-market economy status and a special safeguards provision in China's Accession Protocol. While such provisions are not common in WTO members' accession protocols, their disadvantageous impacts are limited to the scope of trade remedy investigations.[25] In spite of the disadvantage of non-market economy status, China's first few years at the WTO were a honeymoon period for the U.S.-China trade relation.[26] U.S. trade deficits with China multiplied during this time, however, leading to mounting pressure on the U.S. Congress to take a tough stance with China on trade matters.[27]

In light of these developments, the U.S. Department of Commerce broke with its long-standing tradition of not applying countervailing duty to imports from non-market economies, and initiated a countervailing duty investigation of coated free sheet paper from China on November 27, 2006.[28] The respondent companies and

21. Preliminary Ruling by the Panel, *Accession of the People's Republic of China*, ¶¶ 15-16, WTO Doc. WT/L/432 (Nov. 23, 2001).

22. Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, THE NAT'L BUREAU OF ASIAN RESEARCH (Nov. 1999), https://www.iatp.org/sites/default/files/China_and_the_WTO_The_Politics_Behind_the_Agre.htm. On one hand, in the protracted negotiations for China's accession, most of the time was spent on reaching a bilateral WTO agreement with the US, *see id.*. On the other hand, the significance of the U.S. market and the uncertainty deriving from lack of permanent normal trading status with the U.S. motivated China to seek WTO membership. *See, e.g.*, John B. Judis, *Open Door*, THE NEW REPUBLIC (Dec. 19, 1999), https://newrepublic.com/article/77434/world-trade-organization-china-labor-rights-open-door.

23. *See, e.g.*, Robert G. Kaiser & Steven Mufson, *U.S. Business Lobby Poised for China Trade Deal*, WASH. POST (Nov. 14, 1999), http://www.washingtonpost.com/wp-srv/WPcap/1999-11/14/052r-111499-idx.html.

24. Judis, *supra* note 22.

25. WTO Doc. WT/L/432, *supra* note 21. These provisions are a departure from the most-favored-nation treatment and non-discrimination principles underpinning the WTO regime.

26. *See* Xiuli Han, *China's First Ten Years in WTO Dispute Settlement*, 12 J. WORLD INV. & TRADE 49, 50 (2011).

27. JONES, *supra* note 20, at 1.

28. JONES, *supra* note 20, at 16. Countervailing duty refers to the extra duty charged on imports that are subsidized by a foreign government or public entity and have caused material injury or a threat

the Chinese government in this investigation filed suit in the U.S. Court of International Trade, requesting a preliminary injunction to prevent the U.S. Department of Commerce from conducting the countervailing investigation.[29] Alongside this investigation, the U.S. Department of Commerce solicited public comment on the issue of whether the countervailing duty law should apply to non-market economies.[30] The majority of responses from U.S. industries backed extending countervailing duty law to Chinese exports.[31] The coated free sheet paper investigation ended without imposing countervailing duty after finding no material injury nor threat of material injury to a U.S. industry, and that the establishment of an industry was not retarded.[32] In reaction to the U.S. Department of Commerce's change of practice, the Chinese government originally filed a complaint with the WTO, which was later withdrawn following the investigation's negative determinations.[33]

### ii. First Round of the Battle

The previous sub-section introduced the background of U.S.–China clashes over countervailing duty and trade remedies in general.[34] This brief review indicates that U.S. import industries tended to be opportunistic on trade remedy issues and were not willing to be outspoken on disciplined use of trade remedy measures. GPX's experience will be a case in point. The company partnered with the Chinese government in legal fights against the U.S. government as it had no choice after suffering financial devastation as a result of countervailing and anti-dumping duties imposed on its imports from its Chinese subsidiary.[35] However, with regard to

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of material injury to domestic industries, or the establishment of an industry was retarded. The U.S. Commerce Department's practice of not applying countervailing duty to imports from non-market economies was established in countervailing investigations of carbon steel wire rod imports from Czechoslovakia and Poland. 49 Fed. Reg. §19374 (1984).

29. Gov't of the People's Republic of China v. U.S., 483 F. Supp. 2d 1274, 1275–76 (Ct. Int'l Trade 2007). The Court declined to grant the injunction for the reason that the plaintiffs could seek judicial review after conclusion of the investigation, which was not a manifestly inadequate remedy for plaintiffs. Interestingly, the Chinese government and the respondent companies shared counsel on this suit, *id.* at 1274, 1284.

30. 71 Fed. Reg. § 75507 (2006).

31. *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Admin., Issues & Memorandum for the Final Determination in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the PRC (May 29, 2019). Submissions supporting application of countervailing law to Chinese products include various trade associations and individual companies, *id*.

32. Coated Free Sheet Paper from China, Indonesia, and Korea, Inv. Nos. 701-TA-444-446, 731-TA-1107-1109 U.S.I.T.C. Pub. 3965 (Dec. 2007) (Final), *available at* https://www.usitc.gov/publications/701_731/pub3965.pdf.

33. Summary Request for Consultations by China, *United States—Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WTO Doc WT/DS368/1 (Sept. 2007).

34. *See, e.g. An Introduction to U.S. Remedies*, U.S. INT'L TRADE ADMIN., https://enforcement.trade.gov/intro/index.html (last visited Jan. 27, 2018).Trade remedies refer to anti-dumping and countervailing actions taken by the importing government to protect the market share of domestic producers from unfair competition of exports, *id.*

35. *GPX Int'l Tire Corp. Announces Chapt. 11 Restructuring*, BUSINESS WIRE (Oct. 27, 2009),

the U.S. Department of Commerce request for comment on applicability of countervailing duty to Chinese imports, GPX did not provide comment, probably because by then it did not foresee its imports would soon be affected by this policy change.

GPX was incorporated in 2005 after a merger of Boston-based Galaxy Tire & Wheel Inc. and Toronto-based Dynamic Tire Corp.[36] In 2006, GPX acquired a factory in China through its wholly-owned subsidiary Starbright.[37] One year later, in 2007, the U.S. Department of Commerce initiated concurrent anti-dumping and countervailing duty investigations of pneumatic off-the-road tires imported from China.[38] This investigation was one of the earliest that resulted in countervailing duty for imports from China. GPX's subsidiary Starbright, a respondent company in the investigations, received stiff countervailing and anti-dumping duty rates.[39] Soon after the investigations were completed, GPX contested the U.S. trade authorities' determinations in the U.S. Court of International Trade.[40] At roughly the same time, on September 19, 2008, China requested consultations with the U.S. at the WTO regarding four sets of concurrent anti-dumping and countervailing determinations by the U.S. government on goods from China: circular welded carbon quality steel pipe, pneumatic off-the-road tires, light-walled rectangular pipe and tube, and laminated woven sacks.[41] Among the four products, the investigations of pneumatic off-the-road tires concluded lastly. The Chinese government seemed to wait until the conclusion of pneumatic off-the-road tires investigations to lodge a complaint at the WTO.[42]

There was convincing circumstantial evidence that the Chinese government likely contributed funds to GPX's legal actions in the U.S. trade courts. GPX filed for bankruptcy on October 26, 2009, approximately 45 days after suing in the U.S. Court of International Trade.[43] The Chinese government then moved to intervene in the GPX litigation when it learned that the plaintiffs could no longer afford the

https://www.businesswire.com/news/home/20091027006027/en/GPX-International-Tire-Corporation-Announces-Chapter-11.

36. *Galaxy, Dynamic Complete Merger Boston*, TIRE BUS. (Oct. 10, 2005), http://www.tirebusiness.com/article/20051010/NEWS/310109967/galaxy-dynamic-complete-merger.

37. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d 1296, 1320 (Ct. Int'l Trade 2013).

38. *See* Certain New Pneumatic Off-the-Road Tires from China, 72 Fed. Reg. 43591 (Dep't of Commerce Aug. 6, 2007) (AD Initiation); Certain New Pneumatic Off-the-Road Tires from China, 72 Fed. Reg. 44122 (Dep't of Commerce Aug. 7, 2007) (CVD Initiation).

39. GPX Int'l Tire Corp. v. U.S., 645 F. Supp. 2d 1231, 1236 (Ct. Int'l Trade 2009), (discussing how Starbright's countervailing duty rate was 14% and anti-dumping was 29.93%.).

40. GPX Int'l Tire Corp. v. U.S., 587 F. Supp. 2d 1278, 1283 (Ct. Int'l Trade 2008).

41. Request for Consultations by China, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/1 (Sep. 22, 2008).

42. *Id*. (discussing the date of anti-dumping and countervailing duty orders being July 22, 2008 for Circular Welded Carbon Quality Steel Pipe, August 5, 2008 for Light-Walled Rectangular Pipe and Tube, August 7, 2008 for Laminated Woven Sacks, and September 4, 2008 for Pneumatic off-the-road Tires).

43. *In re* GPX Int'l Tire Corp. v. U.S., Debtor., No. 09-20170-JNF, 2010 WL 6595319 (Bankr. D. Mass. June 4, 2010).

legal action, but the motion was denied because of untimely filing.[44] In the Chinese government's motion to intervene, the attorneys for the Chinese government interestingly also represented GPX.[45] Despite the Chinese government's failure to effectively intervene, GPX did not quit the lawsuit. GPX continued the litigation for nearly seven years.[46] Additional incidents further indicate that the Chinese government likely assisted with GPX's litigation.[47]

A Chinese official admitted in his book that the Chinese government took a dual-track approach in this legal battle.[48] He stated that China:

> "adopted a litigation strategy of making multilateral and bilateral mechanisms complementing each other: on one hand, we planned to sue the U.S. anti-dumping and countervailing measures at the WTO; on the other hand, we pushed forward the U.S. domestic proceedings."[49]

On the WTO front, there seemed to be relatively minor private involvement. China's WTO claims focused on the definition and interpretation of generic legal elements of countervailing duty measures, and procedural requirements for the importing government in requesting information from the exporting government.[50] These issues were shared among the investigations of the four products.

At the national venue, the Chinese government submitted an *amicus curiae* brief to endorse GPX's positions when GPX litigation proceeded to the U.S. Fed-

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44. *See* GPX Int'l Tire Corp. v. U.S., No. 08-00285 (Ct. Int'l Trade Sept. 18, 2009), *available at* http://www.cit.uscourts.gov/SlipOpinions/Slip_op09/Slip%20Op.%2009-11.pdf.

45. *See id.*

46. *See* GPX Int'l Tire Corp. v. U.S., 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008). The series of GPX cases in U.S. courts spanned from 2008 to 2015. GPX Int'l Tire Corp. v. U.S., 587 F. Supp. 2d 1278 (Ct. Int'l Trade 2008) *reh'g denied*, 593 F. Supp. 2d 1389, *motion denied*, 33 Ct. Int'l Trade 114 (2009), *remanded by* 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009), *remanded by* 715 F. Supp. 2d 1337 (Ct. Int'l Trade 2010), *request denied* by 34 Ct. Int'l Trade 1307 (2010), *motion denied by and motion granted by* 2011 U.S. App. LEXIS 4758 (Fed. Cir. Mar. 10, 2011), *motion granted by* 2011 U.S. App. LEXIS 10122 (Fed. Cir. May 17, 2011), *motion denied by and motion granted by* 2011 U.S. App. LEXIS 10048 (Fed. Cir. May 18, 2011), *motion granted by* 2011 U.S. App. LEXIS 10061 (Fed. Cir. May 18, 2011), *aff'd by* 666 F.3d 732 (Fed. Cir. 2011), reh'g granted and remanded by 893 F. Supp. 2d 1296 (Ct. Int'l Trade 2013), *appeal after remand at* 942 F. Supp. 2d 1343 (Ct. Int'l Trade 2013), *aff'd by* 780 F.3d 1136 (Fed. Cir. 2015), *motion granted by* 70 F. Supp. 3d 1266 (Ct. Int'l Trade 2015).

47. *See* Motion for Final Decree, *In re* GPX Int'l Tire Corp., Debtor., No. 09-20170-JNF, 2011 WL 7783264 (Bankr. D. Mass. Nov. 23, 2011); Docket, *In re* GPX Int'l Tire Corp., Debtor., No. 1:09-BK-20170 (Bankr. D. Mass. 2012) (Westlaw). GPX's bankruptcy files show that a Massachusetts-based holding firm MITL Acquisition Company LLC ("MITL") purchased Hebei Starbright, and agreed to assume responsibility for the prosecution of anti-dumping & countervailing actions at its sole cost and expense, *id*. Records state that MITL was incorporated in 2010, and has only two staff. *Mitl Acquisition Company LLC*, MANTA, https://www.manta.com/c/mb0b15b/mitl-acquisition-company-llc (last visited Jan. 28, 2018). This seems unable to undermine the speculation that the Chinese government helped GPX on legal fees.

48. Sun Zhao (孙昭), Cuntu Bizheng de Shimao Zhengduan (寸土必争的世贸争端) 10 (2015).

49. *Id.*

50. *See* Request for Consultations by China, *supra* note 41. The government of foreign producers/exporters is a mandatory participant in the importing country's countervailing investigation. *See* Appellate Body Report*, infra* Part II.

eral Circuit Court of Appeals.[51] In this amicus brief, the Chinese government noted the U.S. Department of Commerce by then had initiated twenty-eight countervailing investigations against Chinese goods, and therefore it,

> "ha[d] an interest in the legal issue presented in this appeal that [went] well beyond the outcome of Commerce's investigation of alleged subsidies to producers of off-road tires, and [gave] the Government of China a perspective that [was] distinct from that of the private party Appellees in this action."[52]

At that time, the WTO Appellate Body in dispute DS379 had determined "offsetting the same subsidization twice by the concurrent imposition of anti-dumping duties calculated on the basis of a [non-market economy] methodology and countervailing duties" (commonly known as the "double remedies" issue) was inconsistent with the WTO rules.[53] The Chinese government thus asked the Federal Circuit to consult the WTO Appellate Body's decision for its "persuasive value."[54] The Federal Circuit ruled in favor of GPX, affirming the trial court's position on the double remedy issue but on a different ground. The Federal Circuit's reasoning was indeed closer to the GPX's arguments.[55]

China subsequently initiated the WTO complaint DS437 in May 2012, about a year after the WTO Appellate Body's decisions in DS379.[56] The DS437 addressed another 17 countervailing duty investigations by the U.S. Department of Commerce following the four investigations covered in DS379.[57] Again, China's claims in DS437 concerned its burden of proof as the exporting government in countervailing investigations, and thus can be seen as an extension of DS379 to include more products.[58] To conclude, in the first round of legal combat, China launched two WTO disputes against the US involving a wide array of products, and GPX was marching toward victory in U.S. domestic courts.

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51. *See* Brief of Amicus Curiae, Ministry of Commerce of China, GPX Int'l Tire Corp. v. U.S., 666 F.3d 732 (Fed. Cir. 2011) (Nos. 2011-1107, 2011-1108, 2011-1109), 2011 WL 2323800, at 1 [hereinafter Amicus Brief of China].

52. *Id.* at 2.

53. Appellate Body Report, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ VIII.1(d), WTO Doc. WT/DS379/AB/R (Mar. 11, 2011). Overall, China scored partial success in WTO DS379, *id.* at 121–23.

54. Amicus Brief of China, *supra* note 51, at 28.

55. *See* GPX Int'l Tire Corp. v. U.S., 666 F.3d 732, 732–45 (Fed. Cir. 2011). The Federal Circuit held that the countervailing law could not be applied to NME countries because that was the intent of the U.S. Congress, as evidenced by the Congress acquiescing on U.S. Commerce's and the Federal Circuit's earlier consistent interpretation that subsidies did not exist in the NME context, *id.* at 745. Regarding GPX's arguments, *see* Brief of Plaintiffs-Appellees GPX Int'l Tire and Hebei Starbright, 666 F.3d 732 (Nos. 2011-1107, 2011-1108, 2011-1109), 2011 WL 1748633 (Apr. 19, 2011).

56. Request for Consultations by China, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/1 (May 30, 2012).

57. *See* Request for the Establishment of a Panel by China, *United States—Countervailing Duty Measures on Certain Products from China*, 5–9, WTO Doc. WT/DS437/2 (Aug. 21, 2012).

58. *Id.* at 1–4.

### iii. Second Round of the Battle

The initial winnings of GPX and China on national and international fronts were not the end of the legal battle. Unexpectedly, while the U.S. Federal Circuit's ruling was pending, the U.S. Congress swiftly passed an act on March 13, 2012 authorizing the U.S. Commerce Department to conduct countervailing investigations on merchandise from non-market economies in order to prevent the Federal Circuit ruling from taking effect.[59] In the face of this dramatic change, the Chinese government and GPX started another round of legal battle.

In the national venue, GPX brought constitutionality challenges against the new act in the U.S. Court of International Trade.[60] It argued that this legislation violated the Ex Post Facto Clause of the U.S. Constitution, and Due Process and Equal Protection of the Fifth Amendment.[61] In employing a highly deferential review standard that national courts apply with respect to economic legislation, the trial court did not accept GPX's arguments.[62] GPX appealed the trial court's findings to the U.S. Federal Circuit again.[63] The Chinese government, without participating in the lower court proceeding, appeared before the Federal Circuit as a *plaintiff* (not an appellant).[64] What makes the Chinese government's appearance more mysterious was there was neither information on the attorneys representing it nor any briefs submitted by it in the case files.[65] The Federal Circuit found the new legislation retroactively imposed countervailing duties on exporters from non-market economies, but affirmed the lower court's decisions that the new statute was not unconstitutional.[66]

In the WTO, the Chinese government lodged a new complaint DS449 against the U.S. on September 17, 2012, approximately three months after GPX started constitutionality litigation in the U.S. Court of International Trade.[67] China argued that the new law was inconsistent with the WTO provisions preventing WTO members from taking measures that effect an advance in duty rate or other charge on imports before official publication of such measures (the transparency and no-

59. An Act to Apply the Countervailing Duty Provisions of the US Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes, Pub. L. No. 112-99, 126 Stat. 265 (2012) (codified as amended at 19 U.S.C. §§ 1671, 1677f-1).

60. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d at 1296. GPX's constitutionality claims were first raised before the Federal Circuit. The Federal Circuit remanded the case to the lower court to have it evaluate the claims in the first instance. GPX's challenges targeted the different effective dates of the two sections of the new law. The different effective dates mean that the U.S. Commerce is only obliged to adjust antidumping duty rate calculated by non-market economy methodologies to avoid the double remedies problem from the enactment of the new law onward; no adjustment is required to be made to investigations initiated before March 13, 2012 when the new law took effect, *id.* at 1304, 1337.

61. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d at 1309.

62. *Id.* at 1310-11.

63. *See* GPX Int'l Tire Corp. v. U.S., 780 F.3d 1136 (Fed. Cir. 2015).

64. 780 F.3d at 1138.

65. *Id.*

66. *Id.* at 1136.

67. GPX Int'l Tire Corp. v. U.S., 893 F. Supp. 2d at 1305 (showing GPX's constitutionality challenges in the U.S. Court of International Trade started on June 4, 2012 when the case was reopened).

tice requirement).[68] The WTO Appellate Body concluded it was unable to "complete the analysis" to determine whether the new law violated the WTO requirement because the panel's report did not provide sufficient factual findings to examine this claim.[69] Thus, GPX and the Chinese government did not succeed in challenging the new legislation. GPX's bankruptcy proceeding closed on January 3, 2012 with its assets broken apart and sold.[70]

*B. Antigua–U.S. WTO Dispute on Internet Gambling*

The transnational P-P partnership that drove the Antigua-U.S. confrontations at the WTO exemplifies a different kind of power dynamic within the partnership. Contrasted with the public-dominated pattern in the first case study, the private party in this case played a leading role. This second partnership revolved around a prominent case in WTO jurisprudence, entitled *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US-Gambling)* (DS285).[71] Many commentators viewed this case as notable progress both from legal and institutional perspectives; it touched upon a number of first-ever legal issues under the WTO law, such as "digital trade" and "electronically-supplied service trade," and it was brought by a small country, Antigua and Barbuda ("Antigua"), against a great power, the United States, claiming that a number of U.S. national laws were inconsistent with the WTO provisions.[72]

Antigua was one of the smallest WTO members. It had been a British colony until 1981.[73] Before the 1970s, Antigua's economy relied heavily on the production and export of cane sugar.[74] To diversify its economy, the Antiguan government encouraged the development of Information and Communications Technology ("ICT") infrastructure, and encouraged the growth of information-intensive

68. General Agreement on Tariffs and Trade 1994, arts.X:1, X:2, X:3(b), Apr. 15, 1994, 1867 U.N.T.S. 187 (GATT 1994). *See* Appellate Body Report, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, ¶ 1.7, WTO Doc. WT/DS449/AB/R (July 7, 2014).

69. *Id*. ¶ 5.1(g). *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WTO WT/DS449/AB/R at ¶ 5.1(g).

70. *See, e.g.,* Gov't of the People's Republic of China v. U.S., 483 F. Supp. 2d 1274, 1275–76 (Ct. Int'l Trade 2007); 71 Fed. Reg. § 75507 (2006); Coated Free Sheet Paper from China, Indonesia, and Korea, supra note 32; Memorandum from Stephen J. Claeys, supra note 31; Summary Request for Consultations by China, *supra* note 33. *See also* Christie Smythe, Blaming Chinese Tire Duties, GPX Files Ch. 11, LAW360 (Oct. 27, 2009, 3:03 PM), http://www.law360.com/articles/130707/blaming-chinese-tire-duties-gpx-files-ch-11. *See also* In re GPX Int'l Tire Corp., Debtor, No. 09-20170-JNF, 2011 WL 7783264 (Bankr.. D. Mass. Nov. 23, 2011).

71. Dispute Settlement, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/1 (initiated Mar. 27, 2003).

72. *See, e.g.*, Tom Newnham, *WTO Case Study: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 ASPER REV. INT'L BUS. & TRADE L. 77 (2007); Sacha Wunsch-Vincent, *The Internet, Cross-Border Trade in Services, and the GATS: Lessons from US—Gambling*, 5 WORLD TRADE REV. 319 (2006).

73. First Submission of Antigua Before the Panel of the WTO, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 2, WTO Doc. WT/DS285 (Oct. 1, 2003).

74. *Id*. at 3.

businesses.[75] In 1994, Antigua was one of the first jurisdictions that issued licenses to online wagering companies.[76] The WTO dispute DS285 centers on whether companies in Antigua were allowed to provide gambling and betting services remotely to customers within the U.S.[77] In the U.S., gambling is a legal but highly regulated industry where it is under the dual regulations of federal and state governments.[78] At that time, several states outlawed online gambling, and several federal acts banned the use of communication technology to assist or enable betting or wagering.[79] Nevertheless, the U.S. was the predominant market for Antigua's internet gambling companies.

Jay Cohen was the first person convicted on federal charges of internet gambling.[80] He lived in San Francisco and was formerly a stock trader.[81] Inspired by the new technology of the internet, he left his job in San Francisco, moved to Antigua, and cofounded the World Sports Exchange by the end of 1996.[82] The World Sports Exchange solicited Americans through the internet, telephone calls, and advertisements in U.S. newspapers and magazines to place sports bets.[83] Cohen and another twenty U.S. citizens who had similar operations overseas were indicted in 1998 for illegally using interstate telephones and the internet to take wagers from U.S. customers.[84] The federal prosecutors alleged that Cohen and other defendants tried to circumvent the U.S. law by taking their business overseas.[85]

While the other twenty citizens who were indicted either entered guilty pleas prior to trial or became fugitives, Cohen elected to fight the charges in court.[86] A Manhattan federal jury subsequently found Cohen guilty.[87] Cohen appealed his conviction to the Second Circuit, and the Second Circuit upheld the trial court decisions.[88] He then petitioned the U.S. Supreme Court to hear the case but was re-

75. *Top Reasons to Invest in Antigua and Barbuda*, ANTIGUA AND BARBUDA INV. AUTHORITY, http://investantiguabarbuda.org/top-reasons-to-invest.

76. *See* First Submission of Antigua, *supra* note 73, at 8; *See also Antigua and Barbuda Online Gambling Jurisdictions*, GAMBLING SITES.COM, http://www.gamblingsites.com/online-gambling-jurisdictions/antigua-barbuda/ (last visited Jan. 30, 2018).

77. Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services,1*, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005).

78. *See, e.g.*, Douglas A. Irwin & Joseph Weiler, *Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (DS 285), 7 WORLD TRADE REV. 71, 74 (2008).

79. *Id.*

80. Reuters, *Man Jailed in 1st U.S. Online Gambling Conviction*, N.Y. TIMES (Aug. 11, 2000), http://partners.nytimes.com/library/tech/00/08/biztech/articles/11gambling.html.

81. *Id.*

82. United States v. Cohen, 260 F.3d 68, 70 (2d. Cir. 2001).

83. Reuters, *supra* note 80.

84. Mike Brunker, *Net Betting Conviction Upheld: Online Gambling Pioneer Suffers Legal Setback*, NBC NEWS (July 31, 2001), http://www.nbcnews.com/id/3071037/ns/technology_and_science-internet_roulette/t/net-betting-conviction-upheld/#.VotgzPkrLIU.

85. Reuters, *supra* note 80.

86. Brunker, *supra* note 84.

87. Reuters, *supra* note 80.

88. *United States. v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001).

jected in June 2002.[89] Shortly afterwards, he began serving his 21-month prison sentence.[90] Mark Mendel, Cohen's attorney, who did not gamble and knew little about international trade law when he took this case, became involved because the other partner, Robert Blumenfeld, of his law firm, was a friend with Cohen.[91] Cohen asked Blumenfeld "to see if there was anything his firm could do."[92] Mendel innovatively persuaded officials in Antigua to initiate a trade complaint against the United States at the WTO.[93]

To make the case politically appealing, Mendel framed the case as a dispute between a powerful developed country and a vulnerable developing country; cross-border gambling was characterized as a development issue and a life-or-death matter for Antigua's economy.[94] Besides merely leveling political charges, Antigua was able to overcome the difficulty of proving "gambling and betting services" fell within the scope of U.S. commitments under its GATS (WTO General Agreement on Trade in Services) Schedule.[95] Next, Antigua successfully linked the U.S. ban on internet gambling with Article XVI of the GATS agreement which prohibits certain quantitative restrictions on market access.[96] Finally, it convinced the WTO Appellate Body that though the relevant U.S. federal acts (the Wire Act, Travel Act, and Illegal Gambling Business Act) forbidding online gambling were measures necessary to protect public morals or maintain public order, the U.S. Interstate Horseracing Act permitted domestic operators to provide remote betting services for horse racing, and thus those federal acts discriminated against foreign service suppliers.[97]

Nonetheless, these wins at the WTO did not result in real economic benefits to Antigua or Cohen, which ultimately led to the collapse of this transnational partnership. The U.S. declined to implement the WTO decision or pay monetary compensations.[98] Antigua asked the WTO to authorize it to suspend its obligations under the WTO Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement to allow infringing on the copyrights of U.S. films, music and software.[99] Antigua received authorization of retaliation against the U.S., but did not

89. *Cohen v. U.S.*, 122 S. Ct. 2587 (2002).

90. Brunker, *supra* note 84.

91. Gary Rivlin, *Gambling Dispute with a Tiny Country Puts U.S. in a Bind*, N.Y. TIMES (Aug. 23, 2007), http://www.nytimes.com/2007/08/23/business/worldbusiness/23gamble.html.

92. *Id*.

93. *Id. See also* Paul Blustein, *Against All Odds*, WASH. POST (Aug. 4, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/08/03/AR2006080301390_2.html. Before Cohen was convicted in July 2001, Cohen seemed to have good connections with the Antiguan government, as an Antiguan government official wanted to be a witness for him in his trial. *United States v. Cohen*, 260 F.3d at 78.

94. *See* First Submission of Antigua Before the Panel of the WTO, *supra* note 73, at 1, 35.

95. Appellate Body Report, *supra* note 77, at 73.

96. *Id.* at 73-74.

97. *Id.* at 116.

98. Blustein, *supra* note 93.

99. Recourse to Arbitration by the United States under Article 22.6 of the DSU, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 1, WTO Doc.

implement it.[100] WTO trade cases typically cost millions of dollars, which was unaffordable for a small country like Antigua with an annual governmental budget of about $145 million USD.[101] Indeed, Antigua-based online gambling companies had incurred between $10 million to $15 million in legal fees for the WTO litigation. And the Antiguan government agreed that these companies' legal expenses would be reimbursed first from any settlement Antigua could reach with the U.S., and the gambling companies were also entitled to claim 75 percent of the rest.[102]

In 2013, Cohen's World Sports Exchange was shut down.[103] In 2014, Antigua's new government administration fired Mendel and made an offer to resolve the gambling dispute with the United States.[104] Antigua's new Prime Minister, Gaston Browne, rebuked the United Progressive Party – which controlled Antigua previously – for striking a deal with Antigua's online gambling companies that had benefited these companies far more than the country.[105] Browne saw little value in continuing this arrangement.[106] At the time this article was written in September 2017, Antigua was still asking the U.S. to pay damages for not implementing the WTO rulings, hoping the compensation could help it recover from the great loss due to Hurricane Irma.[107]

## II. HOW THE "TRANSNATIONAL COALITIONS" FORMED

One question often asked about P-P partnerships is "how was the P-P partnership formed?" This question is of particular importance because, since P-P partnerships draw on public authority and resources, they tend to attract scrutiny over private capture. For example, in infrastructure construction projects where the P-P partnership model is widely used, special focus is placed on the bidding process to assuage these concerns.[108] By virtue of the low frequency of WTO actions, P-P partnerships in this context not only invite scrutiny, but also entice scholarly interests to investigate the formation process and mechanisms of litigation P-P partnerships .[109]

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WT/DS285/ABR (Dec. 21, 2007).

100. *Id.* at 78. *See also* Tom Miles, *Storm-Battered Antigua Askes U.S. to Settle 12-Year Old WTO Bill*, REUTERS (Sept. 29, 2017, 4:27 AM), https://www.reuters.com/article/us-usa-antigua-wto/storm-battered-antigua-asks-u-s-to-settle-12-year-old-wto-bill-idUSKCN1C4165.

101. Blustein, *supra* note 93.

102. Steven Stradbrooke, *Antigua Fires Attorney Mark Mendel, Makes New $100M Offer to End US WTO Dispute*, CALVINAYRE.COM (Sep. 9, 2014), http://calvinayre.com/2014/09/09/business/antigua-fires-attorney-mark-mendel-makes-new-100m-offer-to-end-us-wto-dispute/.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. Miles, *supra* note 100.

108. *See, e.g.*, D. Joseph Darr, *Current Trends in Public-Private Partnership Laws*, 28 CONSTR. LAW. 53, 53–54 (2008).

109. *See Understanding the WTO: Settling Disputes, supra* note 5.

The formation process of national P-P partnerships in WTO litigation is less institutionalized than that found in construction projects, and the development of *transnational* P-P partnerships tends to be further less institutionalized than that of national ones. For instance, the United States is a pioneer and notable user of P-P partnerships in WTO disputes.[110] The tradition of engaging private interests in establishing U.S. trade policy agenda and strategies was rooted in the "Section 301" petition procedures.[111] This institutional device along with the "revolving door" culture in the U.S. trade law circle encourage private interests to influence U.S. trade litigation and negotiation.[112] The U.S. thus enjoyed a competitive edge in early WTO litigation, and the EU/EC thus installed mechanisms such as a procedure similar to U.S. "Section 301" and a Market Access Unit office to encourage private participation in the EU's use of the WTO dispute settlement function.[113] Commentators have noted that the ability to leverage P-P partnership is a key aspect of a state's "legal capacity" in accessing the WTO dispute system.[114] In response to the challenges arising from WTO dispute procedures, emerging countries such as Brazil, China, and India have followed suit, purposely cultivating public-private coalitions to enhance their WTO legal capacity and make better use of the dispute settlement mechanism.[115]

While WTO members actively implement an array of measures to foster internal P-P partnerships, they take on transnational partnerships mostly by chance. As the case studies suggest, there were neither pre-existing institutions nor plans aimed to promote transnational partnerships for WTO actions. Also, in the case studies, the multinational corporations did not become involved in transnational partnerships until they had no choice. By contrast, WTO disputes involving recurring national P-P partnerships tend to associate with a specific segment of economy.[116] Transnational partnerships, on the other hand, appear to be a onetime endeavor.[117]

To be sure, operation-globalized multinational corporations and investment-craving, developing countries share interest in a liberalized world economy. Yet

110. SHAFFER, DEFENDING INTERESTS, *supra* note 5.

111. *Id*.

112. *Id*.

113. *Id.* at 69.

114. *See, e.g*., Marc L. Busch et al., *Does Legal Capacity Matter? A Survey of WTO Members*, 8 WORLD TRADE REV. 559 (2009).

115. *Id.*at 561.

116. Industries such as aircraft, steel, lumber, paper are frequently litigated for before the WTO. Aircraft, for example, has been the product at issue in 10 cases so far. *Brazil—Export Financing Programme for Aircraft*, WT/DS46 (June 19, 1996); *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70, WT/DS/71 (Mar. 10, 1997); *Canada—Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222 (Jan. 22, 2001); *European Communities—Measures Affecting Trade in Large Civil Aircraft*, WT/DS316 (Oct. 6, 2004), WT/DS347 (Jan. 31, 2006); *United States—Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, WT/DS353 (June 27, 2005); *United States—Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487 (Dec. 19, 2014); *China—Tax Measures Concerning Certain Domestically Produced Aircraft*, WT/DS501 (Dec. 8, 2015).

117. *See supra* Part I.

this does not easily translate into litigation partnerships. The forging of a partnership involves significant transaction costs—it takes effort and money for the parties to get connected, build confidence, and negotiate terms of the risky cooperative undertaking. As the case studies above indicate, the power discrepancy between the parties affects the power structure within transnational P-P partnerships. In a partnership dominated by private actors, the public partner tends to be a small or weak state that is susceptible to private actors' economic clout. Another related feature of private-dominated partnership is that the substantive legal issues involved may have only loose nexus with the state's trade profile. The five WTO suits brought by Ukraine, Honduras, Dominican Republic, Cuba, and Indonesia, against Australia, regarding the plain packaging requirements on tobacco products are a case in point.[118] These five WTO members had little to no trade flows with Australia.[119]

However small, getting a state to commit to international litigation imaginably demands considerable networking and lobbying efforts from private actors.[120] Nonetheless, the issue areas and related institutions and procedures can play a game-changing role in the partnership formation. Countervailing investigations are an area that bridges the gap between private actors and foreign states through a mandatory cooperative procedure and greatly reduces the barriers to establishing transnational coalitions.

Pursuant to the WTO Agreement on Subsidies and Countervailing Measures ("SCM"), the government of the exporting country (*e.g.* China in the first case study) is a mandatory participant in a countervailing investigation, along with private exporters.[121] This institutional mechanism simplifies the formation of the transnational partnership between an exporting country and foreign investors whose subsidiary companies produce imports in the exporting country. The importing government solicits comprehensive, detailed information from the exporting government and private exporters through questionnaires.[122] It also visits the exporting country to verify the information provided.[123] Since the exporting gov-

118. Dispute Settlement, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, brought by Ukraine (WT/DS434), Honduras (WT/DS435), Dominican Republic (WT/DS441), Cuba (WT/DS458), and Indonesia (WT/DS467).

119. Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383, 411 (2016).

120. *See, e.g.*, WORLD HEALTH ORGANIZATION, CONFRONTING THE TOBACCO EPIDEMIC IN A NEW ERA OF TRADE AND INVESTMENT LIBERALIZATION 83–97; Oliver Teves, *WHO Urges Philippine Senate to Defy Tobacco Lobby*, MED. XPRESS, July 27, 2020, https://medicalxpress.com/news/2012-07-urges-philippine-senate-block-tobacco.html.

121. The minimum procedural requirements for conducting countervailing duty investigations are provided in the WTO SCM Agreement and incorporated into national laws by WTO members. Agreement on Subsidies and Countervailing Measures Part V, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex B, 1869 U.N.T.S. 14 [hereinafter SCM].

122. *See, e.g.,* Certain Carbon and Alloy Steel Cut-to-Length Plate from China, No. C-570-048, Doc. 3470867 (Dept. of Commerce May 19, 2016) (CVD Questionnaire), ACCESS database, https://access.trade.gov/.

123. Antidumping and Countervailing Duties, 19 C.F.R. § 351.307 (2018).

ernment's input constitutes the factual basis to evaluate if a countervailable subsidy exists, its quality is important. From responding to questionnaires to on-site verification, private companies and the exporting government must coordinate to reconcile their answers.[124] The exporting government's participation in the investigation allows it to be familiar with the private exporters and legal issues involved, thus paving the way for a potential partnership in subsequent litigation.

The standard of review that the WTO court adopts in evaluating national countervailing duty determinations further reinforces the need for sound cooperation between the exporting government and private exporters at the investigation stage. The standard for assessing the importing country's countervailing determinations is whether "a reasonable and objective investigating authority could, *based on the evidence before it*," have made the same findings.[125] This means the success of contesting countervailing determinations in the WTO depends on a solid documentation of relevant financial and legal data provided by the investigation phase. Thus, private exporters and the exporting government must submit good-quality responses. In this way, the countervailing investigation procedures organize the interaction between the exporting government and private exporters, and facilitate their alliance. Looking back on the first case study, it is this institutional linkage that brought GPX and the Chinese government together.

## III. IMPLICATIONS FOR INTERNATIONAL LEGAL ORDER

The mere image of a transnational alliance between a state and a multinational corporation attacking the policies of another state incurs bitter feelings, as it offends the nation-state loyalty deeply rooted in society for the past several centuries.[126] Indeed, the phenomenon of transnational coalitions in inter-state litigation violates the nation-state model that has been a dominant organizing principle of the

124. For example, the Chinese government hired U.S. law firms to represent it in countervailing duty investigations before the U.S. Department of Commerce. The U.S. attorneys representing the Chinese government worked with investigated companies in answering the U.S. Department of Commerce's questionnaires to ensure the Chinese government's response aligned with that of private companies. If none of the Chinese producers were willing to respond to the U.S. Department of Commerce's investigation, the Chinese government would withdraw from the investigation. *Where Are China's WTO Lawyers?,* FORBES, (Apr. 27, 2009, 1:14 AM), https://www.forbes.com/2009/04/27/china-wto-law-business-economy-trade.html#b6493786fa42; *China's Coming of Age in the WTO War,* FORBES (Apr. 29, 2009, 9:00 PM), https://www.forbes.com/2009/04/20/china-wto-trade-markets-economy-law.html#661648a924c3.

125. *See, e.g.*, Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 18, 40, 76, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011).

126. *See, e.g.*, Kim Rubenstein, *Rethinking Nationality in International Law*, 101 AM. SOC'Y INT'L L. PROC. 99 (2007); Gerald L. Neuman, *The Resilience of Nationality*, 101 AM. SOC'Y INT'L L. PROC. 97 (2007); Ernest Barker, *Nationality*, 4 HIST. 135 (1919). The Treaties of Westphalia in 1648 which ended the Thirty Years War marked the beginning of the "nation-state" era characterized by an international society that consists of sovereign states possessing the monopoly of force within their mutually recognized territories. LAIN MCLEAN & ALISTAIR MCMILLAN, THE CONCISE OXFORD DICTIONARY OF POLITICS (2009) ("Westphalian State System").

WTO trading system,[127] and exposes internal divides within states that underlie the disputes between states. This captivating phenomenon will be examined in this Part, in terms of its implications for the understandings of international disputes, the interface between international and national law, and the power of multinational corporations in the globalization trend.

### *A. Internationalization of Domestic Disputes*

Transnational litigation partnerships are a manifestation of internationalization of conflicts that used to be "nation-centered."[128] While internationalization of domestic affairs is not news,[129] internationalization of domestic *disputes* is a recent phenomenon that comes with the "judicialization" trend of international relations.[130] The "enormous expansion of the international judiciary"[131] after the end of the Cold War created new opportunities and venues for private actors to pursue their cause. The availability of international adjudication makes commitments under treaties enforceable and credible, and the role of international courts in influencing states' behaviors inspires private actors to attempt international litigation when efforts do not fare well domestically.[132]

Internationalization of domestic disputes means confrontations between internal individuals or groups are turned into disputes between sovereign states, framed in international law terms (e.g. trade barriers), and evaluated before an international body. Conflicting economic interests that used to compete exclusively in national courts—such as capital *versus* labor, new technology *versus* traditional production methods, state paternalism *versus* free market—now vie for international venues as well. Transnational P-P partnership enables private interests to make their way into the WTO court by collaborating with foreign governments, even if they lose at the national level. The changes to the way conflicts are displayed and tackled mark the changing nature of international disputes; interstate lawsuits drift away from conventional nation-state competition for resources and power, and are increasingly driven by transnational private actors.

Interstate conflicts are often more than conflicts between two states. More commonly, conflicts happen between two blocs of states along ideological, cultural, socio-economic, or geographic divisions.[133] Without the disclosure of behind-

127. Janne Nijman & André Nolkaemper, NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 8 (Janne Nijman & André Nolkaemper, 1st ed., 2007).

128. ROBERT W. COX & TIMOTHY J. SINCLAIR, APPROACHES TO WORLD ORDER 515 (Steve Smith et al. eds., 1st ed. 1996).

129. *See, e.g.*, Harlan Cleveland, *The Internationalization of Domestic Affairs*, 442 ANNALS AM. ACAD. POL. & SOC. SCI. 125 (1979).

130. *See, e.g.*, Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, *supra* note 6.

131. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 INT'L L. & POL. 709, 709 (1999).

132. *See e.g.*, KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 335–65 (Jeffrey L. Dunoff et al. eds., 1st ed. 2014).

133. *See, e.g.*, ROBERT E. HUDEC WITH J. MICHAEL FINGER, DEVELOPING COUNTRIES IN THE

the-scene corporate interests, the WTO disputes of Antigua–U.S. or China–U.S. seem to embody the continuation of the developing-developed countries divide, *i.e.,* the divide between rich, industrialized countries, and countries that have a colonial history, are late in industrializing, and boast a relatively cheap manufacturing base. But the actual involvement of multinational corporations not only defies the connotation of "state-to-state" disputes, but also casts doubt on some conventional characterizations of interstate disputes (e.g. developing-developed disputes).

Categorizing countries into *developing* and *developed* used to be an important distinction in the discourse of international relations. For a long time, until the Uruguay round of negotiations, developing countries largely remained outside the trade liberalization system (the GATT system).[134] At the peak of developing/ developed country tension in the 1970s, developing countries demanded exemptions from tariff disciplines obliging developed countries, and maintained hostile attitudes toward multinational corporations by asserting the territoriality principle and control over multinationals.[135] In spite of this tough environment, multinationals, in their pursuit for internationalization of *production*, have been an important force to integrate developing countries to the world economy and elevate the economic status of developing countries.[136] The convergence of financial interests between multinationals and developing countries shatters the solidarity within developed countries and, to some degree, renders the phrase of "developing-developed countries disputes" much less relevant. In fact, the linkage among states deriving from multinationals' globalized operations blurs and transcends the borders between states, as well as that between categories of states.

Bringing internal problems to the international level, however, raises the question of whether the international court is the suitable venue to deal with these thorny problems.[137] For example, the first case study arose from disputes over countervailing duty law, and countervailing duty is one of the most controversial legal areas in international trade. When a country's importers want to bring their perceived unfair treatment in countervailing investigations into the international venue, they tend to underrate the empathy and flexibility the WTO court gives to national trade remedy measures in considering the role of such measures in dealing with economic uncertainty and political sustainability.[138] Evaluating trade remedy

GATT LEGAL SYSTEM (2011) (the conflicts between developing and developed member countries).

134. ROBERT E. HUDEC WITH J. MICHAEL FINGER, DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM 1–19 (2011).

135. *See id.* at 71.

136. *See, e.g.*, WTO, INTERNATIONAL TRADE STATISTICS 2015, 25 ("The share of developing economies' exports in world trade increased from 26 per cent in 1995 to 44 per cent in 2014 while the share of developed economies' exports decreased from 70 per cent to 52 per cent."), https://www.wto.org/english/res_e/statis_e/its2015_e/its15_highlights_e.pdf; JOHN H. BARTON ET AL., THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW AND ECONOMICS OF THE GATT AND THE WTO 7 (2006).

137. JOHN H. JACKSON, SOVEREIGNTY, THE WTO, AND CHANGING FUNDAMENTALS OF INTERNATIONAL LAW 128–33 (2006).

138. *See supra* Part I.A.

measures is not simply a matter of whether a WTO member observes its obligations and commitments; it must consider the measures' impacts on the stability of the WTO member's economy as well as the entire multilateral trading system. Further, what underpins and perpetuates the trade remedies controversy is the trade imbalances between countries, which the WTO court alone cannot fix.

In addition, private actors may underestimate how the disputing party state's relations with other states will come into play and add complexity to the problem. In the first case above, when GPX made the "double remedies" argument before the U.S. Court of International Trade, the Court did not struggle in sympathizing with GPX's positions.[139] In stark contrast, when the same argument was raised before the WTO, third participant states either explicitly asserted or acquiesced that simultaneous imposition of countervailing duty and anti-dumping duty calculated by non-market economy methodology is not forbidden by the WTO laws.[140] This position was understandable given that the influx of Chinese exports would pose threats to the trade balance of many countries in the world. The WTO panel sided with the popular opinion that the concurrent application of anti-dumping and countervailing duties to non-market economies is not inconsistent with the WTO law.[141] Resisting substantial pressure, the WTO Appellate Body ruled in favor of China's stance on this issue.[142] This seriously dismayed the U.S., and the U.S. blocked the reappointment of the WTO appellate judge, Seung Wha Chang, who voted for China in this case.[143] Internationalization of domestic disputes is not necessarily a more promising path than domestic proceedings.

### *B. The "Discursive" Unity of National and International Law*

Legal pluralism has become a widely accepted characterization of legal orders that currently organize our society.[144] With developments such as "globalization, the emergence of common values, and the dispersion of authority over different public and private actors,"[145] there are increased communications and interactions between international and national law. Scholars that study the divide and continuity between international and national law largely place their empirical focus on the role of domestic courts.[146] This leads scholars to stress the persuasive power/

139. *See* GPX Int'l Tire Corp. v. U.S., 645 F. Supp. 2d 1231, 1240–46 (Ct. Int'l Trade 2009).

140. *See* Appellate Body Report, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China,* § II.C, WTO Doc. WT/DS379/AB/R (adopted Mar. 11, 2011).

141. Panel Report, *United States—Definitive and Anti-Dumping and Countervailing Duties on Certain Products from China*, 281–82, WTO Doc. WT/DS379/R (adopted Oct. 22, 2010).

142. Gov't of the People's Republic of China v. U.S., 483 F. Supp. 2d 1274, 1284 (Ct. Int'l Trade 2007).

143. Bryce Baschuk, *U.S. Blocks Korean Judge from WTO Appellate Body*, BLOOMBERG (May 24, 2016), https://www.bloomberglaw.com/product/blaw/document/X52F0090000000?criteria_id=c00510b723cfd58795f6db82e5da9a96&searchGuid=8e90169a-9068-418b-8db4-b68d3e9a1028.

144. Nijman & Nolkaemper, *supra* note 127, at 348–51.

145. Nijman & Nolkaemper, *supra* note 127, at 1.

146. Nijman & Nolkaemper, *supra* note 127, at 343-4.

influential value of international law for domestic judges who are looking for guidance in deliberation and justification of hard cases.[147] As Professor Harold Hongju Koh observes, the model predicts that through "*interaction*, *interpretation*, and *internalization*, international legal rules become integrated into national law."[148]

The multilateral trading regime provides unique examples of the relationship between international and national law. The WTO regime is close to a centralized, monistic system with member states incorporating their WTO commitments into national law. This is the "traditional legislative incorporating"[149] model where "the validity of a rule of international law in the domestic legal order [is] contingent on an authorizing rule of domestic law and vice versa."[150] Nevertheless, the WTO regime is distinguished from the traditional model, due to its unique judicial body that has compulsory jurisdiction over a wide range of economic issues, an expansive membership, and the authority to make binding rulings. Other international courts with a membership of similar size cannot match the magnitude of authority delegated to the WTO court.[151]

Transnational P-P partnership is of considerable importance in terms of improving the availability of the powerful WTO court to a broad scope of potential litigants. The legalized WTO court stimulates private actors to creatively associate their problems with trade issues, particularly trade barriers. These invisible private plaintiffs instill diversity and unpredictability in the interaction between international and national law. For example, the second case study shows how Cohen cast his criminal conviction of internet gambling as unjustified discrimination by the U.S. government against foreign service providers.[152] One journalist reported, "[m]ore than a few people in Washington initially dismissed as absurd the idea that the trade organization could claim jurisdiction over something as basic as a country's own policies toward gambling."[153] Private actors often attempt international venues when they encounter obstacles in domestic legislative or juridical process. As various private actors may be frustrated by various national laws and try to combat various national laws with WTO law, their approaches of linking national law and the WTO law can be hard to predict, and be best captured by the "discursive" model.[154]

The Antigua–U.S. case suggests one relatively convenient way for private actors to invoke the WTO court to disrupt unfavorable domestic political outcomes—

147. Christine Chinkin, *Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 8, *supra* note 127, 341—60.

148. Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626 (1998) (*italics original*).

149. Nijman & Nolkaemper, *supra* note 127 at 352.

150. *Id.* at 341.

151. *See, e.g.*, Gregory Shaffer et al., *The Extensive (But Fragile) Authority of the WTO Appellate Body*, 79 LAW & CONTEMP. PROBS. 237, 237 (2016).

152. *See* Mike Brunker, *supra* note 84.

153. Rivlin, *supra* note 91.

154. *See, e.g.*, *supra* Part I.B. *See also* Schäferhoff, *supra* note 9 at 4.

use of the Non-Discrimination principle. This principle is commonly acknowledged in international treaties. More importantly, it significantly reduces burdens on international judges who worry about the complicated, sometimes profound implications of their decisions, since if the national policy under review empowers certain entities while refusing others the same opportunity, international judges can avoid the struggle of weighing conflicting values or commitments, and just demand an equal treatment. The fundamental principle "all are equals in the eyes of the law" undermines the legitimacy of arbitrarily discriminatory policies. Such complaints for equal treatment may lose in national courts due to the greater deference national judiciary accords to its legislative branch.[155] International courts, however, can invoke international commitments to exercise stricter scrutiny. In the Antigua–U.S. internet gambling case, U.S. statutes recognized as valid the differential treatments between online horseracing gambling and sports gambling. However, such differential treatments were not seen as legal by the WTO court.[156] While stories involving domestic P-P partnerships in WTO disputes demonstrate that seemingly-neutral national measures may be effectively disguised trade barriers to protect domestic producers, transnational P-P partnerships reveal how unexpected issues can be packaged as trade barriers discriminating against foreign exporters.

This private actor-driven linkage is a further step toward the amorphous development of international law. In terms of degree of discursiveness in the growing body of international law, the internalization model noted by scholars represents an advance from the conventional model of treaty-making by state consent.[157] The unorthodox leverage of international law by private actors surpasses the internalization model in pushing international law into unpredictable direction. Despite its infrequency, this connection between national and international law, through private actors and international judiciary, further impinges on state autonomy by implicating an expansive scope of national law as well as on state supremacy in international law-making.

### *C. Corporate Power in Check*

Since the 1990s, the movement of goods, services, information, capital, and people across boundaries has grown dramatically—an embodiment of the globalization trend. Critique of globalization often overlaps with criticisms of multinational corporations. As one commentator contends:

> [M]arket forces are increasingly mobile and powerful, often pitting governments as well as workers against each other. . . . The purpose of the actors who push for and benefit from economic globalization is to maximize profit and secure continual economic growth. They thus seek to reproduce and maintain the prevailing patterns of governance, which refer to the liberalization of trade and finance, the pri-

155. *See, e.g.*, Anja Seibert-Fohr, *The Rise of Equality in International Law and Its Pitfalls: Learning from Comparative Constitutional Law*, 35 BROOK. J. INT'L L. 1, 33 (2010).

156. *See* Tom Newnham *supra* note 72 at 84-5.

157. Schäferhoff, *supra* note 9 at 4.

> vatization of production (often including health and other public services), competitiveness, and consumerism.[158]

The WTO, as a core institution in the globalization process, has been blamed for acting as a vehicle for enriching corporate interests, and painted as the common enemy of workers, environment, democracy, and human rights by some radical views.[159] Transnational P-P partnership in WTO litigation seems to reinforce such skeptical views of globalization and corporate interests in that it indicates corporate power extends beyond the domains of international trade negotiations and national trade policy-making,[160] and gains additional ground to pursue their interests. In other words, it appears that traditional controls on corporate power are further compromised due to corporate interests ability to abet foreign states and invoke international courts.

Multinational corporation use of international adjudication has received strong criticisms, particularly in the area of investor-state investment arbitration.[161] Multinationals are blasted for abusing the availability of suing states to intimidate poor countries, encroach on state regulatory autonomy, and obstruct policies important for environment protection and public health.[162] Transnational P-P partnership enhances the chance for a multinational to access international courts where they have no standing, and thus, raises concern of whether it will enable multinationals to manipulate such venues as they have done to investor-state arbitrations.

Yet it is evident that multinationals did not recover financial losses in the case studies here.[163] Complaining to the WTO did not get them to a better situation than if they had not done so. Admittedly, their inability to secure real financial gains from WTO litigation is the result of the inherent weaknesses of international courts which operate in the shadow of power politics and lack policing power to implement judgments.[164] But there is more to that.

The WTO dispute settlement mechanism is a state-centered system with embedded constraints on corporate interests in each step of the proceeding. First, whether requests from multinationals would reach the WTO court depends on state

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158. Marie-Josee Massicotte, *Global Governance and the Global Political Economy: Three Texts in Search of a Synthesis, review Essay,* 5 GLOBAL GOVERNANCE 127, 142.

159. *See, e.g.*, LORI WALLACH & MICHELLE SFORZA, WHOSE TRADE ORGANIZATION: CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY: AN ASSESSMENT OF THE WORLD TRADE ORGANIZATION (1999).

160. Jeffery Atik, *Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 459 (2001).

161. *See, e.g.*, Lise Johnson et al., *Investor-State Dispute Settlement: What Are We Trying to Achieve? Does ISDS Get US There?*, COLUM. CTR. ON SUSTAINABLE INV. (Dec. 11, 2017), http://ccsi.columbia.edu/2017/12/11/investor-state-dispute-settlement-what-are-we-trying-to-achieve-does-isds-get-us-there/#_edn1.

162. Michael Robinson, *Is Democracy Threatened If Companies Can Sue Countries?*, BBC NEWS (Mar. 31, 2015), http://www.bbc.com/news/business-32116587.

163. *GPX Int'l Tire Corp. v. U.S.*, 666 F.3d 732, 732–45 (Fed. Cir. 2011). The Federal Circuit held that the countervailing law could not be applied to NME countries because that was the intent of the U.S. Congress, as evidenced by the Congress acquiescing on U.S. Commerce's and the Federal Circuit's earlier consistent interpretation that subsidies did not exist in the NME context, *id.* at 745.

164. *See supra* Part I.

approval and sponsorship. Only WTO members are allowed to participate in WTO proceedings as a party or third participant to the dispute.[165] Not only do private actors not have legal standing before the Court, but also private participation of any sort in the WTO dispute procedures is tightly controlled. For example, the WTO provisions do not expressly address the issue of *amicus curiae* submissions.[166] Though the WTO Appellate Body maintains that both WTO panels and the Appellate Body have authority to accept and consider amicus briefs, this issue remains highly controversial.[167] In practice, the Appellate Body never considers unsolicited amicus submissions.[168] Another example is the appearance of private counsel on behalf of WTO members in hearings before the panels and Appellate Body.[169] Private counsel was not allowed in the proceedings of GATT, the predecessor of WTO.[170] It was in *EC—Bananas III* that the Appellate Body ruled WTO members have the right to determine the composition of its delegation in the WTO dispute procedures, including to have private counsel as their representatives.[171]

Second, the legality and reasonableness of multinational corporation petitions are examined by judges who are state delegates, and certainly would take into account state regulatory concerns. WTO members monopolize the selection process of the Appellate Body jurists, and in fact, the selection process has become increasingly politicized.[172] Candidates are nominated by WTO members, and it has become practice for WTO members to carefully investigate the "exact preferences and dispositions" of candidates in the screening process.[173] Besides, WTO members emphatically pronounce their "commitment to the objective of sustainable development,"[174] and the WTO Appellate Body materialized such commitment prioritizing non-trade values over free trade in a number of cases.[175]

Third, the implementation of the WTO court's decisions relies on state apparatus. The WTO Dispute Settlement Body is responsible for monitoring the im-

165. WTO, *Understanding the WTO: Settling Disputes*, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Feb. 3, 2018).

166. WTO, *Participation in Dispute Settlement Proceedings 9.3*, DISPUTE SETTLEMENT SYSTEM TRAINING MODULE, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm (last visited Feb. 3, 2018).

167. *Id*.

168. *Id*.

169. WTO, *Participation in Dispute Settlement Proceedings 9.2*, DISPUTE SETTLEMENT SYSTEM TRAINING MODULE, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s2p1_e.htm (last visited Feb. 3, 2018).

170. *Id*.

171. *Id*; *see also* Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, 4–7, WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997).

172. Shaffer, *supra* note 151, at 271.

173. *Id.*

174. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter Doha Declaration].

175. Henrik Andersen, *Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments, and Eluding Questions*, 18 J. INT'L ECON. L. 383 (2015).

plementation of WTO panel and Appellate Body reports.[176] Yet the only sanction the Dispute Settlement Body can authorize is retaliation from the complainant state against the respondent state by suspending concessions or other obligations under WTO agreements.[177] The threat of countermeasures is hardly effective by a small economy against a major power. Further, it is difficult to tell if the respondent has complied with Dispute Settlement Body reports because the Body recognizes there are different understandings of what constitutes full compliance.[178] It is not surprising this gives powerful countries ample room to discount, delay or evade compliance. Thus, even if transnational P-P partnerships can help corporations win complaints, they are not able to guarantee implementation of the decisions.

In sum, the fear about corporate power in maneuvering the WTO court is excessively exaggerated. Transnational P-P partnerships are subject to the WTO court's own institutional limitations. In working with other states, transnational P-P partnerships circumvent, to some degree, restraints from national political and legal systems. Yet they are far from being unchecked as globalization literature suggests.

## IV. CONCLUDING REMARKS

Exploring transnational P-P partnerships in the WTO court supplements our understanding of the role of multinational corporations in international law. The behaviors and power of multinational corporations are a significant, if not the most important, aspect of globalization. Multinationals are not only key economic players, but also influential political actors, shaping national and international legal orders.

Yet their attempts to internationalize domestic disputes are not as fruitful as would be assumed based on the impressions that international judges tend to share cosmopolitan values with multinationals, and stay relatively remote from national politics. Rather, an inter-governmental court, like the WTO Dispute Settlement Body, has layers of institutional controls on private interests. Besides, bringing actions in a larger context may complicate the matter due to the expansive scope of interests implicated.

There is more to learn about transnational alliances forged for international litigation—this phenomenon raises intriguing questions such as how this phenomenon affects the development path of international law, whether corporate nationality matters, and how such transnational collaborations distribute over issue areas and countries. What's more, studying transnational alliances offers important insight concerning the underlying conflicts, competitions, and dominance that actual-

176. DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes art. 21.6, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994) [hereinafter DSU].

177. DSU, *supra* note 176, art. 22.

178. *See, e.g.*, H.E. Mr Shahid Bashir, *WTO Dispute Settlement Body Developments in 2012*, WTO, https://www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm.

ly fueled the studied legal actions. By transcending doctrinal debates and the characterization of problems in case reports, transnational P-P partnership drives new avenues to help resolve international economic disputes.