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## *China's Rise: How it Took On the U.S. at the WTO*

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## CHINA'S RISE: HOW IT TOOK ON THE U.S. AT THE WTO

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*This Article builds from original fieldwork to show what lies behind China's remarkably successful use of international trade law to take on the United States and Europe. The World Trade Organization ("WTO") is unique in China's international relations as it is the only forum where China, with its anti-legalist traditions, has resolved its disputes through law and the use of third-party dispute settlement. After China acceded to the WTO in 2001, it invested massively in building trade law capacity to transform itself and defend itself externally. Through these investments and its increased market power, China became a serious rival to the United States and Europe in the development and enforcement of international trade law. This Article provides the most complete account of this important development, which has had significant political impacts within the United States and Europe. The Article first explains China's significant trade law capacity-building efforts in government, academia, law firms, and business. It then assesses the broader implications for the international trade legal order. It shows that global economic order, itself, is at stake, affecting citizens around the globe. The Article builds from research involving over a decade of original fieldwork in China, Washington D.C., Brussels, and Geneva.*

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“We are in the history. We are making the history.”<sup>1</sup>

- Peng Jun, Jincheng Tongda & Neal (“JT&N”)

## I. INTRODUCTION

Much ink has been spilled on the trade threat of China, but there is little knowledge and appreciation of the remarkable institution building in China that led it to adapt to the World Trade Organization (“WTO”) and its rules, an international legal order created largely by the United States (“U.S.”) and the European Union (“E.U.”). China’s investment in WTO law and policy helped to dramatically move China toward a trade-liberal direction, integrate it into the global economy, and embed it in existing global economic-governance re-

1. Peng Jun, *Wo yu WTO de Jige Shunjian [Glimpses of WTO and I]*, in *WO YU WTO: FALVREN DE SHIJIAO [ME AND WTO: LAWYER’S PERSPECTIVES]* 221 (Yang Guohua & Shi Xiaoli eds., 2016).

gimes.<sup>2</sup> Many commentators and scholars now challenge China for not abiding by international trade law norms.<sup>3</sup> Yet, these commentators often underplay or fail to acknowledge the baseline from which China started when it was a closed economy disengaged from international economic law and institutions.<sup>4</sup> They also fail to acknowledge the United States' own contribution to its trade challenges with China.<sup>5</sup>

Many commentators, in parallel, describe a turn away from the rule of law in China.<sup>6</sup> In trade law, however, China massively invested in developing legal capacity to adjust to the WTO requirements that the U.S. pressed upon it.<sup>7</sup> In the process, China learned how to defend its interests through the WTO

2. EDWARD S. STEINFELD, PLAYING OUR GAME: WHY CHINA'S RISE DOESN'T THREATEN THE WEST 18, 24 (2010) ("The bottom line is that China today is growing not by writing its own rules but instead by internalizing the rules of the advanced industrial West. . . . This is not a story about China playing its own game. Instead, it is a story about China playing *our* game, a game created and defined by the world's advanced industrial economies, most notably the United States.").

3. Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 261 (2016) [hereinafter Wu, *The "China, Inc." Challenge*]; cf. THOMAS J. CHRISTENSEN, THE CHINA CHALLENGE: SHAPING THE CHOICES OF A RISING POWER 151 (2015) ("In the United States, many observers use an unhelpful measure when they accuse China of economic irresponsibility: the unprecedented bilateral trade deficit between the United States and China. . . . But economists generally lend little importance to bilateral trade deficits . . ."); STEINFELD, PLAYING OUR GAME, *supra* note 2, at 41 ("[There exists] a category of scholars who interpret China's politics-economics disconnect . . . as a departure from globally prevailing rules of fair play."); Bryce Baschuk, *China Hasn't Met WTO Obligations, U.S., EU Say*, BLOOMBERG INT'L TRADE REP., July 28, 2016 ("U.S. and European Union Trade officials criticized China for what they said was its failure to fulfill and adhere to the terms of its 2001 agreement to join the World Trade Organization (WTO). . . . Deputy Chief of the U.S. Mission Christopher Wilson criticized a slew of Chinese policies that he said 'skew the playing field' in favor of domestic enterprises. He said China hasn't lived up to its WTO transparency commitments, has a poor record of notifying its subsidies, has failed to provide adequate notification of new economic policies and hasn't provided translations of its laws and regulations."). See generally TED C. FISHMAN, CHINA INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD (2006).

4. STEINFELD, PLAYING OUR GAME, *supra* note 2, at 1 ("[T]he China of twenty years ago is so far removed from the present as to feel like a distant dream . . .").

5. U.S. consumption and borrowing are primarily responsible for the huge U.S. trade deficit with China. The resulting global imbalances have created political upheaval in the U.S., where blame has been cast on China, but China is not primarily responsible. As Irwin explained: "The trade deficit is impervious to import restrictions . . . because it is determined not by trade policies but by net capital flows into the United States. . . . [U]nless domestic savings rise (a good thing) or national investment falls (a bad thing), the United States will be a recipient of capital from abroad. . . . This, in turn, means that the United States will continue to buy more from other countries than they do from it." Douglas A. Irwin, *The False Promise of Protectionism: Why Trump's Trade Policy Could Backfire*, 96 FOREIGN AFF., May-June 2017, at 45, 52-53. In the case of China, the U.S. sells U.S. Treasury bonds to China at virtually no interest to help finance U.S. consumption and debt. The resulting U.S. capital account surplus balances the U.S. current account deficit (*i.e.*, the U.S. trade deficit). See Paul Krugman, *Tariffs and the Trade Balance (Wonkish) (Updated)*, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (Dec. 27, 2016, 11:08 AM), <https://krugman.blogs.nytimes.com/2016/12/27/tariffs-and-the-trade-balance-wonkish/> ("The starting point for a simple analysis of trade balances is the accounting identity, Current account + Capital account = 0"). As a matter of basic economics and accounting, the current account deficit (involving trade in goods and services) is offset by the capital account surplus (involving capital inflows), reflecting the balance of U.S. national consumption and savings in relation to global consumption and savings. See Scott Wolla, *Making Sense of the Trade Deficit*, PAGE ONE ECON. (Nov. 2016), <https://research.stlouisfed.org/publications/page1-econ/2016/11/01/international-trade/> ("[T]he net outflow of funds on the goods and services side of the ledger (the current account) is offset by the net inflow of funds on the assets side of the ledger (the financial and capital account). Because the two accounts must offset each other (as a matter of accounting), if Americans saved more, the trade deficit would be smaller. As such, the U.S. trade deficit says more about U.S. national and global saving than trade policy.").

6. See, e.g., Carl F. Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 935 (2011).

7. *Id.* at 943.

against the United States. Built on over a decade of fieldwork, this Article tells the original story of how China developed legal capacity to go head-to-head, lawyer-to-lawyer, in trade conflicts with the U.S. and Europe and became enmeshed in transnational legal processes. China, in short, took on the economic powers through investing in law, transforming its trade-related laws, institutions, and policies in the process. The U.S. and Europe had long called for China to invest in the rule of law.<sup>8</sup> China answered that call regarding trade law. Our research provides the most thorough and empirically grounded assessment of such developments in China and their implications for the United States, Europe, and the international trade legal order.

These developments are remarkable. Economists explain China's rise in terms of efficiency based on the combination of Western know-how and Chinese wages that triggered the Chinese "manufacturing miracle," where China became a giant in manufacturing in a couple of decades.<sup>9</sup> Political scientists, in turn, write of China's rise in terms of its increased economic power.<sup>10</sup> But what about law? After all, it is not just power and money that rule the world, but also law and legal institutions. The three are complementary, and the story of China's rise and its implications for global trade governance needs a complementary assessment of law.

International relations scholars stress the importance of who designs and drafts international rules to place institutional constraints on others.<sup>11</sup> In the WTO context, the U.S. and E.U. dominated the design and drafting of the WTO and its rules.<sup>12</sup> China was not accepted into the WTO until seven years later, and, when it was, it appeared to get a terrible deal.<sup>13</sup> China had to agree to China-specific rules that granted other WTO members greater rights against China, and China fewer rights against them, compared to the standard provisions of the WTO treaties.<sup>14</sup> And yet, through China's investment in legal capacity, it was able to become a legal rival to the U.S. and Europe, who now

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8. See WAYNE M. MORRISON, CONG. RESEARCH SERV., IB91121, CHINA-U.S. TRADE ISSUES, at CRS-12 (2003) ("The Clinton Administration further maintained that China's accession to the WTO would promote U.S. economic and strategic interests, namely by inducing China to deepen market reforms [and] promote the rule of law . . ."); Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL RTS. J. 603, 604 (2003) ("As early as 1994, President Clinton had expressed 'support for efforts underway in China to promote the rule of law' . . .").

9. RICHARD BALDWIN, *THE GREAT CONVERGENCE: INFORMATION TECHNOLOGY AND THE NEW GLOBALIZATION* 135 (2016).

10. Gregory Chin, *Two-Way Socialization: China, the World Bank, and Hegemonic Weakening*, 19 BROWN J. WORLD AFF. 211, 212 (2012).

11. Cf. LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* 10 (2000); G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS I* (2000); G. John Ikenberry, *The Rise of China and the Future of the West: Can the Liberal System Survive?*, FOREIGN AFF. (2008), <https://www.foreignaffairs.com/articles/asia/2008-01-01/rise-china-and-future-west>.

12. IKENBERRY, *AFTER VICTORY*, *supra* note 11, at 244-45.

13. See WAYNE M. MORRISON, CONG. RESEARCH SERV., IB91121, CHINA-U.S. TRADE ISSUES, at CRS-9 (2001).

14. See *infra* note 99.

suggest that the rules favor China.<sup>15</sup> China successfully moved from being a “rule taker” to a “rule shaker” to a “rule maker.”<sup>16</sup> How did this come to be?

The Article shows how trade law is a two-level game involving the interaction of domestic and international law and policy.<sup>17</sup> The WTO and its rules create an institutional context that plays into law and policy developments within China, with actors using international legal norms as leverage to advance internal positions.<sup>18</sup> China's response, in turn, helps shape the international trade legal order. These developments affect U.S. and European domestic perceptions of the legal order and their responses to it, which in turn further shape, or erode, that legal order. Whether one views China's investment in trade law cynically as a threat to U.S. and European interests or as welfare-enhancing for China and the world, these developments need to be understood.

This Article first assesses the transformations China made in government, academia, law firms, and business to build capacity in trade law. It finds that such investment embedded key parts of the Chinese government and Chinese stakeholders in transnational legal processes of international economic integration and cooperation. It rooted China in an international dispute settlement process through law and a third-party institution. In no other area of international relations has China agreed to resolve its foreign conflicts through decisions of an international court.<sup>19</sup> In fact, China's traditional response to binding third-party dispute settlements is illustrated by its rejection of the rulings of the Permanent Court of International Arbitration in the South China Sea dispute as “waste paper.”<sup>20</sup>

15. Henry Gao, *China's Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?*, in *MAKING GLOBAL TRADE GOVERNANCE WORK FOR DEVELOPMENT* 153, 162, 167–172 (Carolyn Deere-Birkbeck ed., 2011) [hereinafter Gao, *China's Ascent*].

16. *Id.* at 167–72.

17. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 *INT'L ORG.* 427, 459–60 (1988).

18. Cf. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 34 (2002) (referring to such contests as “palace wars” among competing elites); Margaret M. Pearson, *The Case of China's Accession to GATT/WTO*, in *THE MAKING OF CHINESE FOREIGN AND SECURITY POLICY IN THE ERA OF REFORM, 1978–2000*, 337, 364 (David M. Lampton ed., 2001) (Premier Zhu Rongji finding that “the only way to break the hold of the ‘old’ economy and its champions was to force change on it via the stringent requirements imposed by WTO rules”).

19. Compare Gao, *China's Ascent*, *supra* note 15, 167–72, with Owen Bowcott et al., *Beijing Rejects Tribunal's Ruling in South China Sea Case*, *GUARDIAN* (July 12, 2016, 1:21 PM), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

20. See Simon Denyer & Emily Rauhala, *Beijing's Claims to South China Sea Rejected By International Tribunal*, *WASH. POST* (July 12, 2016), [https://www.washingtonpost.com/world/beijing-remains-angry-defiant-and-defensive-as-key-south-china-sea-tribunal-ruling-looms/2016/07/12/11100f48-4771-11e6-8dac-0c6e4acc5b1\\_story.html?utm\\_term=.25cad7c3679c](https://www.washingtonpost.com/world/beijing-remains-angry-defiant-and-defensive-as-key-south-china-sea-tribunal-ruling-looms/2016/07/12/11100f48-4771-11e6-8dac-0c6e4acc5b1_story.html?utm_term=.25cad7c3679c) (“Foreign Minister Wang Yi was quoted as telling Secretary of State John F. Kerry last week that the case was a ‘farce.’ His ministry said it was delusional to think China would bow to diplomatic pressure to accept the ruling.”); Bowcott et al., *supra* note 19 (“Xinhua, [China]’s official news agency, hit out at what it described as an ‘ill-founded’ ruling that was ‘naturally null and void.”); Jane Perlez, *Panel Rejects China's Claims in Sea Dispute*, *N.Y. TIMES* (July 13, 2016), <https://www.nytimes.com/2016/07/13/world/asia/south-china-sea-hague-ruling-philippines.html> (“In a tough speech in Washington last week, a former senior Chinese official, Dai Bingguo, said that the findings would amount to no more than ‘waste paper’ and that China would not back down from its activities in the South China Sea . . .”).

Second, the Article assesses the implications of China's ability to use international trade law against the U.S. and Europe for the multilateral trade system itself. The Article shows how domestic and international law and policy interact and cannot be understood in isolation from each other. Such interaction involves processes of transnational legal ordering and disordering. The Article shows how China invested in developing legal capacity to defend its interests, transform itself, and, in the process, become the rival of the U.S. and the E.U. before the WTO dispute settlement system. China's investment, in turn, spurred reactions in the U.S. and Europe that could call into question the future of the international economic legal order.<sup>21</sup> Much is at stake. Less than a century ago, during the inter-war period in the 1930s, the world experienced the dangers of unilateralism, protectionism, extremism, and great power rivalry unconstrained by international law and institutions.<sup>22</sup> A return to great power economic rivalry and protectionist practices could bring dire consequences.

The remainder of this Article is in eight parts. Part II introduces the Article's theoretical frame of transnational legal ordering and the Article's methodology. Part III sets the background by reviewing the considerable challenges that China faced in adapting its laws, institutions, and practices upon joining the WTO. Part IV explains China's initiatives within government to build trade-related legal capacity to comply with WTO law and represent China externally in negotiations, legal monitoring, and dispute settlement. Part V describes Chinese initiatives in academia, Part VI in law firms, and Part VII in companies and industry associations. Part VIII first analyzes the broader implications and limits of the WTO's impact within China. It then assesses the implications of China's rise, and the ensuing U.S. and European reaction, for the international trade legal order itself.

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21. To start, President Donald Trump won the 2016 U.S. election due to his victory in the "rust belt" states of Michigan, Ohio, Pennsylvania, and Wisconsin; he won those states because he successfully lambasted trade from China for its "cheating" on "disastrous" trade deals. See Donald J. Trump, Jobs Plan Campaign Speech at Monessen, Pennsylvania (June 28, 2016) ("China's entrance into the World Trade Organization has enabled the greatest jobs theft in history. . . . China cheated on its currency, added another trillion dollars to our trade deficits, and stole hundreds of billions of dollars in our intellectual property."); DAVID AUTOR ET AL., IMPORTING POLITICAL POLARIZATION? THE ELECTORAL CONSEQUENCES OF RISING TRADE EXPOSURE 34 n.50 (2016) ("We calculate that a 50 percent ceteris paribus reduction in the China trade shock between 2000-14 would have tipped the (narrow) voter majority in the states of Pennsylvania, Wisconsin, and Michigan, leading to an Electoral College victory for candidate Hillary Clinton."); Michael Schuman, *Is China Stealing Jobs? It May Be Losing Them, Instead*, N.Y. TIMES (July 22, 2016), <https://www.nytimes.com/2016/07/23/business/international/china-jobs-donald-trump.html> ("Throughout his presidential campaign, Donald J. Trump has claimed that China is stealing American manufacturing jobs."); see also David H. Autor et al., *The China Shock: Learning from Labor-Market Adjustment to Large Changes in Trade*, 8 ANN. REV. ECON. 205, 214-15 (2016). Now the future of the World Trade Organization as a guardian of global economic order is in question.

22. DOUGLAS A. IRWIN, PEDDLING PROTECTIONISM: SMOOT-HAWLEY AND THE GREAT DEPRESSION 1-9 (2011).

## II. THEORETICAL FRAMING AND METHODOLOGY

### A. *Frame of Transnational Legal Ordering*

This Article assesses the linkages between international and national trade law from the perspective of transnational legal ordering. By transnational legal ordering, we refer to the recursive interaction and impacts of international law, national law, and local practice on each other.<sup>23</sup> These impacts involve law, institutions, professions, and professional practices conducted within particular normative frames.<sup>24</sup> The processes involve both strategic action and social interaction because any strategic action takes place within existing institutional contexts, and socialization occurs within institutional frames shaped by, and reflecting the positions of, powerful actors.<sup>25</sup>

This approach permits us to go beyond the study of the formal relation of treaties and national law in China<sup>26</sup> and the study of Chinese compliance with

23. See TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 1–2 (Gregory Shaffer ed., 2013) (defining transnational legal ordering in terms of the processes through which legal norms are constructed and conveyed vertically and horizontally); Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 1, 1–11 (Terence C. Halliday & Gregory Shaffer eds., 2015) (defining transnational legal orders as a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions). For earlier important work in this vein, see generally RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745–46 (2006). On recursivity, see Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1135 (2007). For work in political science regarding the two-way flow of norms between China and international economic institutions, see Chin, *supra* note 10, at 211–13.

24. See Gregory Shaffer, *How the WTO Shapes Regulatory Governance*, 9 REG. & GOVERNANCE 1, 2 (2015) [hereinafter Shaffer, *WTO Shapes Regulatory Governance*].

25. Our approach has parallels with two-level game theory in addressing the interaction of domestic and international law and politics. See Putnam, *supra* note 17, at 434. Overall, our approach most closely resembles historical institutional theory in international relations, as a complement to rationalist and social constructivist theories. For the realist approach to international law, see JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2005), and for its application to China, see Mark Wu, *The End of an Era for Global Trade: Resetting U.S. Trade Policy in the Wake of the Trans-Pacific Partnership's Demise* (draft on file with authors) [hereinafter Wu, *The End of an Era for Global Trade*]. For a rational institutional approach, see ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* ix (2008). For a constructivist approach, see JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 13 (2010), and for its application to China, see ALASTAIR IAIN JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980–2000* 38 (2008). For an application of the English School of international relations to China regarding China's place in "international society," see Ian Clark, *International Society and China: The Power of Norms and the Norms of Power*, CHINESE J. INT'L POL. 315, 316, 319, 321, 334 (2014). On historical institutionalism, see generally Thomas Rixen & Lora Anne Viola, *Historical Institutionalism and International Relations: Towards Explaining Change and Stability in International Institutions*, in *HISTORICAL INSTITUTIONALISM & INTERNATIONAL RELATIONS: EXPLAINING INSTITUTIONAL DEVELOPMENT IN WORLD POLITICS* 4 (Thomas Rixen et al. eds., 2016). For an overview of such approaches, see generally ANDREAS HASENCLEVER ET AL., *THEORIES OF INTERNATIONAL REGIMES* (1997). For a discussion of these theories in relation to China in international relations, including "power transition theory," which is a variant of realism applied to rising powers, see Christopher Herrick, *The Perspectives of International Relations Theory*, in *CHINA'S PEACEFUL RISE: PERCEPTIONS, POLICY AND MISPERCEPTIONS* 43, 44 (Christopher Herrick et al. eds., 2016).

26. For excellent overviews, see generally Xue Hanqin et al., *China*, in *NATIONAL TREATY LAW AND PRACTICE* 155 (Duncan B. Hollis et al. eds., 2005); Xue Hanqin & Jin Qian, *International Treaties in the Chinese Domestic Legal System*, 8 CHINESE J. INT'L L. 299 (2009). See also XUE HANQIN, *CHINESE*



international law.<sup>27</sup> Its aim is to more deeply probe the impact of the international trade law regime on institutions and professions within China, including impacts within government, academia, law firms, business, and private trade associations.<sup>28</sup> The approach provides a framework for our empirical investigation of how the development of transnational legal ordering depends on legal infrastructure that penetrates and permeates national institutions and professions. We aim to open the black box of the development of China's international trade-related legal capacity by disaggregating the Chinese state.<sup>29</sup> Our approach, thus, contrasts with those treating China as if it were a billiard ball—a homogenous, singular, coherent entity whose policies can be fully understood from its structural position in international relations.<sup>30</sup>

We do not suggest that structural context and strategic exercise of power do not matter. Rather, we contend that developments in international regimes and domestic institutions interact, and we should analyze these interactions. Thus, our transnational framework calls for the reciprocal assessment of the implications of internal changes within China for the international trade legal order itself.<sup>31</sup> From the perspective of transnational legal ordering, internation-

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CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW 22–40 (2012) [hereinafter HANQIN, CHINESE CONTEMPORARY PERSPECTIVES] (addressing Chinese views of international law generally).

27. See, e.g., Timothy Webster, *China's Implementation of WTO Decisions*, in CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS 98, 110 (Lisa Toohey et al. eds., 2015) [hereinafter Webster, *China's Implementation*] (noting that China's compliance record is better than that of the U.S. and the E.U. and further noting that "China has made major revisions to its domestic legal system in order to comply with the DSB rulings. Moreover, China has done so typically within the reasonable period of time in which it agreed to do so"); see also Guang Ma & Jiang Li, *A Legalization Theory Based Response to Timothy Webster's 'Paper Compliance' of China in WTO Dispute Settlement*, 10 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 541, 575 (2015); Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525, 528 (2014) [hereinafter Webster, *Paper Compliance*].

28. On professionalization in China, see generally PROSPECTS FOR THE PROFESSIONS IN CHINA, (William P. Alford et al. eds., 2011); Sida Liu & Hongqi Wu, *The Ecology of Organizational Growth: Chinese Law Firms in the Age of Globalization*, 122 AM. J. SOC. 798, 828 (2016). For previous studies on India and Brazil in relation to the global trade regime, see Hugo Perezcano, *Peeling NAFTA Layers: Twenty Years Later*, CTR. FOR INT'L GOVERNANCE INNOVATION (CIGI Papers No. 68), May 2015, at 3–6 (discussing the impact of NAFTA on Mexico); Gregory Shaffer et al., *State Transformation and the Role of Lawyers: The WTO, India and Transnational Legal Ordering*, 49 LAW & SOC'Y REV. 595 (2015); Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 384–85 (2008) [hereinafter Shaffer et al., *The Trials of Winning*]; see also Shaffer, *WTO Shapes Regulatory Governance*, *supra* note 24, at 10.

29. See SUSAN L. SHIRK, CHINA: FRAGILE SUPERPOWER 5 (2007) ("Our best chance of avoiding antagonism with China is to open up the black box of Chinese domestic politics, look inside, and figure out what makes China act as it does on the world stage. We find a society drastically changed by economic reforms and opening to the world.")

30. Cf. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 5–6 (2004) ("Stop imagining the international system as a system of states—unitary entities like billiard balls. . . . Seeing the world through the lenses of disaggregated rather than unitary states allows leaders, policymakers, analysts, or simply concerned citizens to see features of the global political system that were previously hidden."); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS 180 (1979); Christopher Layne, *Kant or Cant: The Myth of the Democratic Peace*, 19 INT'L SECURITY 5, 12 (1994) ("Realism takes the view that even if states change internally, the structure of the international political system remains the same. As systematic structure is the primary determinant of international political outcomes, structural constraints mean that similarly placed states will act similarly, regardless of their domestic political systems.")

31. Cf. JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 14 (2000) ("Micro-macro theory" attempts to build theory "by comprehending micro processes that constitute structural change, just as those micro processes are constituted and contained by the structural.")

al trade law involves not just law at the international level, but dynamic interactions within states, between states, and with international organizations, implicating international, national, and local law and practice. These interactions drive transnational legal settlement, unsettlement, and change. In the case of China's rise and the U.S. response to it, current developments in the U.S.-China relationship could put the international trade legal order at risk.

### B. Methodology

This Article builds from over a decade of fieldwork and in-depth, semi-structured elite interviews with Chinese officials, Chinese academics, Chinese lawyers, and foreign lawyers, the latter respectively representing China, the U.S., the E.U., and companies implicated by Chinese practices, members of Chinese think tanks, and Chinese company and industry association representatives. We conducted forty formal interviews with over sixty individuals in Beijing, Shanghai, Shenzhen, Brussels, Geneva, and Washington D.C. The vast majority of the interviews were with one interviewee, but some interviews included small groups of colleagues in government, law firms, academia, and think tanks. The interviews lasted from one to two hours. We arranged them most frequently in the interviewee's office, but we also held them in neutral fora like restaurants and cafes. We conducted the vast majority of the interviews together.

We began the interviews with open-ended questions regarding the interviewee's background and experience, the challenges China faces, and the development of Chinese legal capacity. We did so to gain the interviewee's trust and to obtain the interviewee's perspectives without steering them with our questions.<sup>32</sup> We also asked each interviewee a common set of questions to cross-check what we learned. We asked the questions to a diverse range of informants with different interests—such as in government, in the private sector, and from outside China—to check statements for consistency, complementarity, and contradiction. In a number of cases, we interviewed the same individual more than once, which allowed us to corroborate information, assess trends, and evaluate ideas raised over the project's course.<sup>33</sup>

We also engaged in participant observation as we were each part of meetings with Chinese officials and other Chinese stakeholders. Shaffer worked with the nongovernmental organization, the International Center of Trade and Sustainable Development ("ICTSD"), on its WTO dispute settlement and de-

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32. See LEWIS ANTHONY DEXTER, ELITE AND SPECIALIZED INTERVIEWING 5–6 (1970) ("In elite interviewing . . . the investigator is willing, and often eager to let the interviewee teach him what the problem, the question, the situation is—to the limits, of course, of the interviewer's ability to perceive relationships to his basic problems, whatever these may be. . . . [I]n an elite interview, an exception, a deviation, an unusual interpretation may suggest a revision, a reinterpretation, an extension, a new approach.")

33. *Id.* at 43 ("Field research, that is, always ought to be and frequently is a process of continuing discovery. One is learning how to reformulate or at least modify one's formulation of a problem; one is locating new data. So, the decision as to whom to see depends largely upon one's on-going reflection about the issues, upon new data and hypotheses that come to one's attention, from whatever source—often from earlier interviews.") (footnote omitted).

veloping countries project in which Chinese officials participated in Beijing, Geneva, and Jakarta.<sup>34</sup> Gao worked as a dispute settlement lawyer in the WTO Secretariat, as a consultant to the Chinese government, and as a resource person in various technical assistance initiatives sponsored by the WTO, such as the Regional Trade Policy Course for Asia Pacific and the WTO Chairs program. This work enabled us to observe discussions among stakeholders, as well as to engage in informal discussions that supplemented our formal interviews.

Qualitative empirical studies such as this one enable us to unpack the processes and mechanisms through which legal ordering takes place, and, in this respect, complement and help orient quantitative empirical studies. As with all empirical studies, this study needs to be wary of biases.<sup>35</sup> We have done our best to reduce those biases by cross-checking information obtained from informants with people who have different material interests, as well as by corroborating such information through a review of primary and secondary sources in Chinese and in English. In this way, we aimed to triangulate information from multiple sources.

As with any empirical study, there are limits to this one. The information we present captures predominantly one part of China's government, which is that involved directly in trade policy, and predominantly one group of stakeholders, those whose profession or business is linked to international trade. The information we provide, about this part of China's government and professions in relation to other parts, reflects our informants' views. Nonetheless, our sources stressed the limits of their positions in the context of internal Chinese contests over the role of trade law and the directions of China's economic policy, as our Article shows. Moreover, we combined our fieldwork with a review of primary and secondary sources in Chinese and English, and we tried to limit bias by asking questions to those with different interests in China and abroad. In any case, this research provides the most original, thorough, and empirically grounded analysis of China's development of legal capacity in trade and that development's implications within China, as well as for the international trade legal order itself.

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34. The project gave rise to the book *DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE* (Gregory C. Shaffer & Ricardo Meléndez-Ortiz eds., 2010).

35. As with any study, there is the challenge of the writers' backgrounds reflecting their experiences and presuppositions, which we acknowledge and have been transparent about. See, e.g., Pierre Bourdieu, *Participant Observation*, 9 *J. ROYAL ANTHROPOLOGICAL INST.* 281, 283–85 (2003). Empirical study nonetheless is vastly superior to the alternative of armchair theorizing provided it is sufficiently reflexive of its approach and findings, and thus Bourdieu grounded his social theory in empirical study. While empirical approaches are never entirely "correct" in the sense of finding truth, from a pragmatist perspective, they are "the best way for us to proceed toward a better understanding of the world in which law operates." See Gregory C. Shaffer, *New Legal Realism and International Law*, in 2 *STUDYING LAW GLOBALLY: NEW LEGAL REALIST PERSPECTIVES* (Heinz Klug et al. eds., 2016); see also Joel Handler et al., *A Roundtable on New Legal Realism*, 2 *WIS. L. REV.* 482, 483–84 (2005) ("[T]he power of social science methodology [is] to push us beyond our personal politics or situations, to enforce a form of humility in which we must listen to voices other than our own.").

## III. CHINA'S CHALLENGES IN JOINING THE WTO

The WTO is conventionally viewed as a creation of the U.S. and the E.U., which harnessed the opportunities provided by greater ideological consensus at the end of the Cold War and the shift toward export-oriented development models to advance liberal trade norms.<sup>36</sup> At the time that the WTO agreements were signed in 1994, the U.S. and E.U. collectively represented 56% of global gross domestic product (“GDP”) in real terms and 45% in terms of purchasing power parity.<sup>37</sup> Because of the importance of their markets, they exercised considerable economic power and leverage during the Uruguay Round negotiations that led to the WTO’s creation.<sup>38</sup> Commentators viewed the WTO as a victory of economic liberalism and described it in constitutional terms.<sup>39</sup>

China was not an original WTO member.<sup>40</sup> To join the organization, it agreed to a stringent accession protocol in November 2001 that granted greater rights to other WTO members against China, and reduced China’s rights against them, compared to standard WTO rules.<sup>41</sup> China agreed to open its markets to eliminate state monopolies on imports and exports and to significantly change its laws, regulations, and practices.<sup>42</sup> Scores of Chinese officials, judges, and scholars came to the U.S. for training in WTO law, and scores of experts went to China to teach WTO law under technical-assistance and capac-

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36. See, e.g., JOHN H. BARTON ET AL., *THE EVOLUTION OF THE TRADE REGIME: POLITICS, LAW, AND ECONOMICS OF THE GATT AND THE WTO* 56 (2006). Ikenberry views the Bretton Woods institutions as an example of the constitutional ordering of international relations in line with the interests of a hegemonic or leading state that, in turn, agrees to limit its power through these institutions. G. John Ikenberry, *Constitutional Politics in International Relations*, 4 EUR. J. INT’L REL. 147, 168 (1998); GRUBER, *supra* note 11.

37. See *GDP (Current Prices, US Dollars) Data for Year 1994, All Countries*, ECON. WATCH, [http://www.economywatch.com/economic-statistics/economic-indicators/GDP\\_Current\\_Prices\\_US\\_Dollars/1994/](http://www.economywatch.com/economic-statistics/economic-indicators/GDP_Current_Prices_US_Dollars/1994/) (last visited Nov. 8, 2017); *GDP (PPP), US Dollars Data for Year 1994, All Countries*, ECON. WATCH, [http://www.economywatch.com/economic-statistics/economic-indicators/GDP\\_PPP\\_US\\_Dollars/1994/](http://www.economywatch.com/economic-statistics/economic-indicators/GDP_PPP_US_Dollars/1994/) (last visited Nov. 9, 2017).

38. See HUGO PAEMEN & ALEXANDRA BENSCH, *FROM GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND* 91, 93 (1995).

39. See, e.g., DEBORAH CASS, *THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY, AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM* 16 (2005); JOHN JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 8 (1998); ERNST-ULRICH PETERSMANN, *INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: CONSTITUTIONAL PLURALISM AND MULTILEVEL GOVERNANCE OF INTERDEPENDENT PUBLIC GOODS* 129 (2012); Jeffrey L. Dunoff, *Constitutional Concepts: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 EUR. J. INT’L L. 647, 651 (2006); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT’L L. 623, 633 (2006). These changes at the international level were complemented by the rise of constitutional courts and judicial review of national legislation in countries around the world, which further diffused a liberal order. See, e.g., *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* 142 (Javier Couso et al. eds., 2010); *COURTS IN LATIN AMERICA 2* (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 21 (2003); Victor Ferreres Cornelia, *The Rise of Specialized Constitutional Courts*, in *COMPARATIVE CONSTITUTIONAL LAW* 265, 265 (Tom Ginsburg & Rosalind Dixon eds., 2011).

40. Wu, *The “China, Inc.” Challenge*, *supra* note 3, at 265 (2016).

41. See *infra* notes 70–71 and accompanying text.

42. Henry Gao, *China’s Participation in the WTO: A Lawyer’s Perspective*, 11 SING. Y.B. INT’L L. 41, 49 (2007) [hereinafter Gao, *China’s Participation*].

ity-building initiatives.<sup>43</sup> The U.S. and the E.U. hoped to use China's accession to the WTO to transform China into a market economy and to encourage it to move towards a liberal democracy.<sup>44</sup> It was a time of U.S. triumphalism.

By 2009, however, following the global financial crisis, the continued rise of China as an economic power and the significant strengthening of China's legal capacity to defend its interests in WTO dispute settlement and negotiations dramatically changed the situation.<sup>45</sup> China increasingly asserted its rights as a rival to the U.S. and E.U.<sup>46</sup> It had little to learn from them after their economic governance models lost credibility during the 2008 Great Recession. By 2010, China had become the world's second largest economy, surpassing Japan.<sup>47</sup> By 2013, it became the world's largest trader in goods, surpassing the United States.<sup>48</sup> Forecasters expect that China will surpass the U.S. as the world's largest economy by 2028.<sup>49</sup> In law and development circles, one heard of a new "Beijing consensus" as displacing, or at least rivaling, the neoliberal "Washington consensus."<sup>50</sup>

#### A. *The WTO's Significance for China*

Economic development is critical for the Chinese government, which hopes to avoid being mired in a "middle-income trap" where the country is both less competitive in low-wage production (because wages have risen) and unable to compete in high-value-added markets.<sup>51</sup> Trade (imports plus exports)

43. ASIAN DEVELOPMENT BANK, TECHNICAL ASSISTANCE TO THE PEOPLE'S REPUBLIC OF CHINA FOR WTO MEMBERSHIP AND FOREIGN TRADE LAW REFORM 3–4 (2001); Yang Guohua, *China in the WTO Dispute Settlement: A Memoir*, 49 J. WORLD TRADE 1, 3–5 (2015) [hereinafter Guohua, *A Memoir*].

44. See *infra* notes 70–71 and accompanying text.

45. Cf. HO-FUNG HUNG, *THE CHINA BOOM: WHY CHINA WILL NOT RULE THE WORLD* 83 (2016); MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE END OF THE WESTERN WORLD AND THE BIRTH OF A NEW GLOBAL ORDER* 163 (2009).

46. See generally JACQUES, *supra* note 45.

47. *The World Bank in China: Overview*, WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last visited Nov. 11, 2017); see David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES (Aug. 16, 2010), [http://www.nytimes.com/2010/08/16/business/global/16yuan.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/08/16/business/global/16yuan.html?pagewanted=all&_r=0). But compare the UN measurement of "inclusive wealth" regarding a country's underlying "stock of assets" in terms of "(i) manufactured capital (roads, buildings, machines, and equipment, (ii) human capital (skills, education, health), and (iii) natural capital (sub-soil resources, ecosystems, the atmosphere)," in which the U.S. is estimated to have an inclusive wealth of almost \$144 trillion, which is 4.5 times that of China's \$32 trillion. See Stephen Brooks & William Wohlforth, *The Once and Future Superpower: Why China Won't Overtake the United States*, FOREIGN AFF. 91, 93–94 (2016).

48. Angela Monaghan, *China Surpasses U.S. as World's Largest Trading Nation*, GUARDIAN (Jan. 10, 2014), <https://www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation>.

49. Pankaj Ghemawat & Thomas Hout, *Can China's Companies Conquer the World?*, 95 FOREIGN AFF. 86 (2016).

50. See STEFAN HALPER, *THE BEIJING CONSENSUS: LEGITIMIZING AUTHORITARIANISM IN OUR TIME* 26 (2012); John Williamson, *Is the "Beijing Consensus" Now Dominant?*, 13 ASIA POL'Y 3 (2012).

51. RANDALL PEERENBOOM & TOM GINSBURG, *LAW AND DEVELOPMENT OF MIDDLE INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP* (2014); Randall Peerenboom, *Revamping the China Model for the Post-Global Financial Crisis Era: The Emerging Post-Washington, Post-Beijing Consensus*, in *CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS* 11 (Lisa Toohey et al. eds., 2015). This development model has been extraordinarily successful, as China experienced an average of 10% growth over thirty years, the poverty rate plummeted from 84% in 1981 to 16% in 2005, and China has become the world's largest trader in goods. See *The World Bank in China: Overview*, *supra* note 47; Williamson, *supra* note 50, at 4.

represents over 30% of China's GDP,<sup>52</sup> so international trade law has huge implications for the Chinese economy and the Chinese government.

Managing its trade relations is crucial not only for China's economic development, but also for its political stability. China has a strong state under an authoritarian (formally Marxist) government.<sup>53</sup> The Chinese state significantly invests in industrial policies, ranging from direct state ownership to state subsidization of economic sectors, including (as alleged by the U.S. and E.U.) through state bank financing at lower-than-market rates, state companies selling manufacturing inputs at less-than-market value, and a state innovation policy that promotes indigenous research and development to upgrade China's economy.<sup>54</sup> China's state-owned enterprises still control over 38% of China's industrial assets.<sup>55</sup> At the same time, however, there is intense competition between firms. Even where the Chinese state controls an economic sector, it has tried to foster competition among different state-owned enterprises ("SOEs") within that sector.<sup>56</sup> Law and lawyers play increasingly important roles in this mixed economy, whether one views it as "socialist with Chinese characteristics" or "capitalist with Chinese characteristics."<sup>57</sup> Although many commenta-

52. *Merchandise Trade (% of GDP)*, WORLD BANK, <http://data.worldbank.org/indicator/TG.VAL.TOTL.GD.ZS> (last visited Nov. 11, 2017). China's trade with Asia and the United States has increased over four-fold since China joined the WTO in 2001, and over eight-fold since 1998. See CHRISTENSEN, *supra* note 3, at 58.

53. See CHRISTENSEN, *supra* note 3, at xvii.

54. See David Wertime, *It's Official: China Is Becoming a New Innovation Powerhouse*, FOREIGN POL'Y (Feb. 7, 2014, 12:05 AM), <http://foreignpolicy.com/2014/02/07/its-official-china-is-becoming-a-new-innovation-powerhouse/>.

55. See Fan Gang & Nicholas Hope, *The Role of State-Owned Enterprises in the Chinese Economy*, in US-CHINA 2022: ECONOMIC RELATIONS IN THE NEXT 10 YEARS (China-United States Exchange Foundation ed., 2013), [http://www.chinausfocus.com/2022/index-page\\_id=1480.html](http://www.chinausfocus.com/2022/index-page_id=1480.html) (over 40%); Enda Curran, *State Companies: Back on China's To-Do List*, BLOOMBERG BUSINESSWEEK., (July 30, 2015, 2:19 PM), <https://www.bloomberg.com/news/articles/2015-07-30/china-s-state-owned-companies-may-face-reform> (citing JPMorgan Chase). See generally NICHOLAS LARDY, *MARKETS OVER MAO: THE RISE OF PRIVATE BUSINESS IN CHINA* (2014).

56. See Henry Gao, *Telecommunications Reform in China: Fostering Competition Through State Intervention*, in WTO DOMESTIC REGULATION AND SERVICES TRADE: PUTTING PRINCIPLES INTO PRACTICE 142, 142 (Aik Hoe Lim & Bart De Meester eds., 2014) (noting how China deliberately created and reorganized the telecom firms to foster competition in the sector and promote its development); see also Angela Huyue Zhang, *Antitrust Regulation of Chinese State-Owned Enterprises*, in REGULATING THE VISIBLE HAND 85, 105-06 (Liebman & Milhaupt eds., 2015) ("Contrary to the popular perception that all SOEs are monopolies, the vast majority of SOEs operate in competitive sectors and compete head-to-head with nonstate firms."). There is nonetheless some pressure to consolidate for purposes of international competitiveness.

57. The government's official stance is "socialism with Chinese characteristics," but some contend that "capitalism with Chinese characteristics" is a better label. See JOHN BRYAN STARR, *UNDERSTANDING CHINA: A GUIDE TO CHINA'S ECONOMY, HISTORY AND POLITICAL CULTURE* 116 (3d ed. 2010). There is some ambivalence in the government as well, as reflected in China's contention that it has a "market economy" for purposes of anti-dumping cases abroad and before the WTO. Cf. YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* (2008); Zheng Liang & Lan Xue, *The Evolution of China's IPR System and its Impact on the Innovative Performance of MNCs and Local Firms in China*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY (David Kennedy & Joseph Stiglitz eds., 2015); see also REGULATING THE VISIBLE HAND (Liebman & Milhaupt eds., 2015) (book on China's "state capitalism" involving "the combination of capitalist institutions and state power").

tors maintain there has been a turn away from law in general,<sup>58</sup> business, investment, and trade law flourish, creating new career opportunities for lawyers.<sup>59</sup>

The WTO system is more legalized and judicialized than any other area of international relations at the multilateral level.<sup>60</sup> The WTO's complex legal framework includes nineteen main agreements, the *acquis* developed under the General Agreement on Tariffs and Trade ("GATT") since 1948, and the decisions and understandings adopted by various WTO bodies since 1995.<sup>61</sup> The WTO's compulsory dispute settlement system has given rise to over 90,000 pages of jurisprudence developed by WTO dispute settlement panels and the Appellate Body in over three hundred decisions.<sup>62</sup>

Given the extent of Chinese trade and the role of the state in China's development, Chinese exports face close regulatory and legal scrutiny around the world. They have triggered far more anti-dumping, countervailing duty, and other import relief measures than products from any other country.<sup>63</sup> By 2009, China "was the object of 40 percent of total anti-dumping investigations and 75 percent of countervailing duties (tariffs) in the world."<sup>64</sup> China also faces a growing number of international trade disputes regarding Chinese internal measures, particularly with the U.S. and E.U. Since joining the WTO, China has been a party in fifty-four WTO cases and a third party in an additional 136 cases.<sup>65</sup> As a respondent, it has had to defend more cases than any other WTO member except the U.S. or the E.U., even though it only acceded to the WTO in late 2001, seven years after the WTO's creation.<sup>66</sup> In contrast, China has never agreed to be a party before any other international tribunal, such as the

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58. Cf. Minzner, *supra* note 6, at 960. *But cf.* RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 468 (2002); Neysun A. Mahboubi et al., *The Future of China's Legal System*, CHINAFILE (Aug. 11, 2016), <http://www.chinafile.com/viewpoint/future-of-chinas-legal-system>.

59. In a book otherwise criticizing U.S. optimists about change in China, James Mann wrote, [T]he initiatives for rule of law in China appear to have made some progress when it comes to business disputes. The leadership knows that in order to continue to attract and retain foreign investment, it needs to show that there are courts, arbitration panels, or other mechanisms for resolving disputes about money. JAMES MANN, *THE CHINA FANTASY* 20–21 (2007); *see also* Sida Liu et al., *Mapping the Ecology of China's Corporate Legal Sector: Globalization and Its Impact on Lawyers and Society*, *ASIAN J.L. & SOC'Y* 273, 273 (2016); *see infra* Part VI.

60. Shaffer et al., *The Trials of Winning*, *supra* note 28, at 388.

61. *Id.* at 406.

62. Shaffer, *WTO Shapes Regulatory Governance*, *supra* note 24, at 5.

63. Gao, *China's Participation*, *supra* note 42, at 62.

64. DAVID SHAMBAUGH, CHINA GOES GLOBAL: THE PARTIAL POWER 160 (2013). Chinese products are far more subject to anti-dumping measures worldwide than products from other countries. *See* PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXT, CASES AND MATERIALS* 680 (3d ed. 2013). Between January 1, 1995 and December 31, 2014, other countries initiated 1,052 anti-dumping investigations and applied 759 anti-dumping duties against Chinese products. *Statistics on Anti-Dumping*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_InitiationsByExp\\_Cty.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExp_Cty.pdf) (last visited Nov. 11, 2017).

65. *Disputes by Member*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_by\\_country\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm) (last visited Nov. 11, 2017).

66. *Id.*

International Court of Justice or the International Tribunal of the Law of the Sea, despite its many territorial disputes with other countries.<sup>67</sup>

In the area of international trade, the U.S., the E.U., and China have confronted their differences and resolved their disputes through law before WTO dispute settlement panels.<sup>68</sup> As a consequence, China has had to develop significant legal capacity to engage effectively with the WTO system; it has devoted significant resources to build that capacity within the government, academia, law firms, and business.<sup>69</sup>

### B. *China's Challenges*

On November 10, 2001, WTO members approved the terms of China's accession to the WTO at the WTO Ministerial Conference in Doha.<sup>70</sup> It was a momentous occasion for China, which had formally filed a request to resume its status as a contracting party to the GATT in July 1986, over fifteen years earlier, and nine years before the WTO's creation.<sup>71</sup> As a new WTO member, China could enjoy guaranteed access to other members' markets on a most-favored-nation basis, backed by a quasi-automatic dispute settlement process.<sup>72</sup> It could also participate in the creation of new WTO law through trade negotiations and the interpretation of existing WTO law through trade litigation.<sup>73</sup>

Although the terms of China's negotiations pitted rival factions within China against each other,<sup>74</sup> there was huge enthusiasm in China once the country joined the WTO.<sup>75</sup> The government sponsored numerous WTO-related ini-

67. Marcia Don Harpaz, *China and International Tribunals: Onward from the WTO*, in *CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS* 45 (Lisa Toohey et al. eds., 2015); cf. *supra* note 20 and accompanying text.

68. Xiaowen Zhang & Xiaoling Li, *The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China*, 23 *J. CONTEMP. CHINA* 143, 144–47 (2014).

69. *Id.* at 144.

70. *WTO Ministerial Conference Approves China's Accession*, WORLD TRADE ORG. (Nov. 10, 2001), [https://www.wto.org/english/news\\_e/pres01\\_e/pr252\\_e.htm](https://www.wto.org/english/news_e/pres01_e/pr252_e.htm).

71. China was an original member of the GATT in 1948, but the Kuomintang government in Taiwan, which occupied the Chinese seat at that time, withdrew from the GATT in May 1950. For more details on the legal controversy surrounding the withdrawal and the history of the accession process, see Gao, *China's Participation*, *supra* note 42, at 41–48.

72. *Id.* at 48.

73. Henry Gao, *China in the WTO Dispute Settlement System: From Passive Rule-Taker to Active Rule-Maker?*, in *A DECADE IN THE WTO: IMPLICATIONS FOR CHINA AND GLOBAL TRADE GOVERNANCE* 17 (Ricardo Meléndez-Ortiz et al. eds., 2011).

74. SHIRK, *supra* note 29, at 228–30. For example, when the U.S. released a negotiating text, China's Premier Zhu Rongji "was met by a firestorm of criticism from agriculture and industry, the Internet public, and other leaders. Zhu was attacked as a 'national traitor' . . ." *Id.* at 230.

75. Guohua, *A Memoir*, *supra* note 43, at 3. Stories of common peoples' interests in the WTO in China are legion. To give one other example, New Yorker writer Peter Hessler's popular book *ORACLE BONES* frequently referred to the excitement regarding China's joining the WTO among the people Hessler encountered. At one point, Hessler encountered a photographer on a bridge on the Yalu River in the town of Yabaolu across from North Korea who

kept bringing up the WTO. I asked him why he was so interested. "The newspapers say that if we join the WTO, we'll have more foreign visitors coming to China," he explained. "And of course if China's economy improves, then there will be more Chinese tourists coming here, too. So it has an effect on me."

PETER HESSLER, *ORACLE BONES: A JOURNEY THROUGH TIME IN CHINA* 67 (2006). This popular response was driven by government information campaigns. See Pearson, *supra* note 18, at 364–65.



tiatives, such as the establishment of WTO centers around the country.<sup>76</sup> Thousands of seminars were held and books published on WTO law, arguably constituting more publications on the WTO than the total published elsewhere in the world combined.<sup>77</sup> In 2003, the government even organized a national contest regarding knowledge of the WTO in which over 5 million people reportedly participated.<sup>78</sup> The final session broadcast like a game show on China Central Television, and the winner was flown to Geneva to visit the WTO and meet with its Director-General.<sup>79</sup> Such popular participation in learning technical international law rules is unheard of and, we imagine, would be the envy of international law professors and international law enthusiasts around the world.

China faced daunting challenges in joining the WTO. It agreed to open its economy to competition and to overhaul its laws, regulations, procedures, and administrative and judicial institutions across all levels of government.<sup>80</sup> It made deep tariff commitments for imports, and it agreed to significantly liberalize services.<sup>81</sup> It agreed that all regulations affecting trade would be nondiscriminatory and that government standard-setting would be transparent and based on international standards.<sup>82</sup> It committed to stringent intellectual property protection<sup>83</sup> and independent review of all trade-related administrative actions by judicial or administrative tribunals.<sup>84</sup>

China made deeper market access tariff commitments than any other emerging economy. For trade in goods, it agreed to reduce its average bound tariff to 10% by 2008, with an average of 9.1% for industrial products and 15.1% for agricultural goods.<sup>85</sup> In comparison, Brazil agreed to an average

76. See *infra* notes 175–92, 388–402.

77. HANQIN, CHINESE CONTEMPORARY PERSPECTIVES, *supra* note 26, at 56 n.94 (citing Julia Qin, *Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System*, 191 CHINA Q. 720 (2007)).

78. Zhenyu Sun, *China's Experience of 10 Years in the WTO*, in A DECADE IN THE WTO: IMPLICATIONS FOR CHINA AND GLOBAL TRADE GOVERNANCE 11, 12 (Ricardo Meléndez-Ortiz et al. eds., 2011).

79. *Id.*

80. Xiaozhun Yi, *A Decade in the WTO, A Decade of Shared Development*, in A DECADE IN THE WTO: IMPLICATIONS FOR CHINA AND TRADE GOVERNANCE 1 (Ricardo Meléndez-Ortiz et al. eds., 2011).

81. Gao, *China's Participation*, *supra* note 42, at 52, 60.

82. See, e.g., Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994 Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 493; Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 U.N.T.S. 186; General Agreement on Tariffs and Trade art. 3 & 10, Oct. 30, 1947, 55 U.N.T.S. 194.

83. Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; see Andrea Wechsler, *China's WTO Accession Revisited: Achievements and Challenges in Chinese Intellectual Property Law Reform*, in EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 125 (Christoph Herrmann & Jörg Philipp eds., 2012).

84. World Trade Organization, Accession of the People's Republic of China Ministerial Decision of 10 November 2001, art. 2(D)(1), WTO Doc. WT/L/432 (2001) [hereinafter WTO China Accession Protocol].

85. Shi Guangsheng, *Working Together for a Brighter Future Based on Mutual Benefit*, in CHINA'S PARTICIPATION IN THE WTO 15 (Henry Gao & Don Lewis eds., 2005) [hereinafter Guangsheng, CHINA'S PARTICIPATION]. According to Nicholas Lardy, China's average statutory tariff in 2001 was 15.3%, and these tariff rates were not bound and so could be raised at any time. See NICHOLAS LARDY, INTEGRATING CHINA INTO THE GLOBAL ECONOMY 33–35 (2002) [hereinafter LARDY, INTEGRATING CHINA].

bound tariff of 31.4% (30.8% for industrial products and 35.4% for agricultural goods) and India an average bound tariff of 48.6% (41.6% for industrial and 113.5% for agricultural goods).<sup>86</sup> China also made much broader and deeper commitments on services liberalization than any other emerging economy, covering such key sectors as financial, telecommunication, professional, and distribution services.<sup>87</sup> China implemented its tariff commitments three years ahead of schedule<sup>88</sup> and its services commitments largely on schedule.<sup>89</sup>

The country started the complicated process of revising its laws before it formally joined the WTO, pursuant to a bilateral agreement with the U.S. on November 15, 1999.<sup>90</sup> At the time, the U.S. wielded significant leverage since it was essentially the gatekeeper to China's WTO accession.<sup>91</sup> To implement the bilateral agreement and China's subsequent WTO commitments, the Chinese government established an "Office for the Clean-up of Laws and Regulations" on December 1, 1999, under the auspices of the Ministry of Commerce (then named "MOFTEC," or Ministry of Foreign Trade and Economic Cooperation).<sup>92</sup> The "clean up" operation was immense, involving bureaucrats at all levels, from the central government to provincial and local ones.<sup>93</sup> The Office first focused on the "clean up" of laws and regulations at the central level, starting with MOFTEC and expanding to other Ministries.<sup>94</sup> It then turned to provincial and local regulations.<sup>95</sup> It classified laws and regulations into one of four categories: regulations "to be kept," "to be revised," "to be abolished," and "to be reenacted."<sup>96</sup> Overall, the Office reported that it oversaw the "cleaning up" of more than 3,000 laws and regulations, including around 1,150 at the central government level, in order for China to meet its WTO commitments.<sup>97</sup> The Office completed its work in around two years,<sup>98</sup> constituting arguably the largest condensed exercise of law-making and law revision in China's (and perhaps the world's) history.

As a condition of China's accession, the U.S., the E.U., and other WTO members pressed China to agree to China-specific rules that granted other

86. WORLD TRADE ORG., INT'L TRADE CENTRE, UNITED NATIONS CONFERENCE ON TRADE & DEV., WORLD TARIFF PROFILES 2013 6–18 (2013), [https://www.wto.org/english/res\\_e/booksp\\_e/tariff\\_profiles13\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/tariff_profiles13_e.pdf).

87. LARDY, INTEGRATING CHINA, *supra* note 85, at 66–75.

88. It reduced its overall tariff to 9.9% percent in 2005, with an average tariff rate of 9% for industrial goods and 15.3% for agricultural products. Guangsheng, CHINA'S PARTICIPATION, *supra* note 85, at 15–16.

89. Shi Miaomiao, *China's Participation in the Doha Negotiations and Implementation of its Accession Commitments*, in CHINA'S PARTICIPATION IN THE WTO 30–32 (Henry Gao & Don Lewis eds., 2005).

90. 8 THE LONDON-LEIDEN SERIES ON LAW, ADMINISTRATION AND DEVELOPMENT: IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA vii–viii (Jianfu Chen et al. eds., 2002).

91. COMMUNICATIONS MEDIA GLOBALIZATION AND EMPIRE 103 (Oliver Boyd-Barrett ed., 2016).

92. Zhang Yuqing Interview, in RUSHI SHINIAN FAZHI ZHONGGUO [10 YEARS IN THE WTO, RULE OF LAW IN CHINA] 6–7 (Lu Xiaojie et al. eds., 2011).

93. YU KEPING, GLOBALIZATION AND CHANGES IN CHINA'S GOVERNANCE 30 (2008).

94. Trade Policy Review Body, *Report by the Secretariat: People's Republic of China*, WTO Doc. WT/TPR/S/161 (Feb. 28, 2006).

95. Zhang Yuqing Interview, *supra* note 92, at 6–7.

96. *Id.*

97. *Id.* at 6–11.

98. KEPING, *supra* note 93.

WTO members greater rights against China than China had against them.<sup>99</sup> All of these provisions constitute discrimination authorized by China's accession protocol in violation of what is otherwise the core nondiscrimination norm in WTO law.<sup>100</sup> These provisions are particularly controversial for China given the legacy of its being forced to sign "unequal treaties" with foreign imperialist powers during the nineteenth and early twentieth centuries.<sup>101</sup>

### C. *China's Participation in the WTO over Time*

To participate effectively in the multilateral trading system, China invested in building legal capacity.<sup>102</sup> Only then could it attempt to shape the interpretation of WTO law to better protect its access to foreign markets and defend its domestic trade-related policies. Most of its initial programs focused on building the capacity of government officials, but gradually, the government turned toward enhancing the capacity of nongovernmental actors since it realized that private actors play important roles at the WTO, particularly in dispute settlement.<sup>103</sup> By 2006, within five years of its accession, China emerged from being a reluctant participant that tried to avoid WTO litigation to being an active and formidable player that used the system to defend its interests.<sup>104</sup>

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99. For a detailed discussion of these clauses, see Gao, *China's Participation*, *supra* note 42, at 54–57; see also Julia Ya Qin, "WTO-Plus" Obligations and their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 491–509 (2003). Examples of China's WTO-plus obligations (those that exceed what is normally required of WTO members) include its obligation not to use export taxes except as scheduled, the expansion of its national treatment commitment to cover foreign individuals and enterprises in addition to foreign products (the latter being the WTO requirement for other members), its commitment to translate all "foreign trade laws" into one of the official languages of the WTO (which in practice means English), and a special enhanced trade policy review mechanism for the first decade after its accession. Examples of China's WTO-minus rights (those that provide less protection than generally enjoyed by WTO members) include the grant to other members of the ability to categorize China as a "non-market economy" in their anti-dumping investigations for a fifteen-year period (and thus making it easier to impose anti-dumping duties against Chinese products), to use alternative benchmarks in their subsidy and countervailing duty investigations of Chinese products (and thus making it easier to impose countervailing duties), and to apply special textile safeguards and a transitional product-specific safeguards for seven and twelve years respectively against Chinese products under criteria that are less demanding than for products from other WTO members (which enabled quotas and increased tariffs against Chinese goods). See WTO China Accession Protocol, *supra* note 84, ¶ 2(d), ¶ 11(3), ¶ 5(1), ¶ 15(a), ¶ 15(b), ¶ 16; see also World Trade Organization, *Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, ¶ 334 (Oct. 1, 2001). Most of the provisions in China's accession protocol, and in particular the WTO-minus rights provisions, were time bound so that they expired by December 11, 2016, which was the fifteenth anniversary of China's accession.

100. Gao, *China's Participation*, *supra* note 42, at 15, 18.

101. See HANQIN, CHINESE CONTEMPORARY PERSPECTIVES, *supra* note 26, at 23; see also TEEMU RUSKOLA, LEGAL ORIENTALISM 127–30 (2013); Dong Wang, *The Discourse of Unequal Treaties in Modern China*, 76:3 PACIFIC AFF. 399, 399 (2003). After China joined the WTO, officials had to respond to domestic political backlash that China had "sold out" its interests by making such concessions. See Margaret M. Pearson, *China in Geneva: Lessons from China's Early Years in the World Trade Organization*, in NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY 242, 246 (Alastair Iain Johnston & Robert Ross eds., 2006).

102. Pasha L. Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997, 999 (2010).

103. See generally GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION (2003).

104. Gao, *China's Ascent*, *supra* note 15, at 153, 167–72.

In WTO negotiations, China deliberately kept a low profile in its first years as a Member.<sup>105</sup> During the Doha Round, China contended that it made such huge commitments in its accession protocol that its market access commitments already exceeded what other emerging economies were being asked to make.<sup>106</sup> Initially, the major players left China alone as they bargained on agricultural commitments—an issue of little relevance to China.<sup>107</sup> After a major breakthrough on agriculture in 2006, however, their focus shifted to non-agricultural market access (“NAMA”), and China, as the world’s largest exporter of industrial products, became the elephant in the room.<sup>108</sup>

The major players invited China to join the G6 group of key WTO Members, which became the G7 at the July 2008 Mini-Ministerial in Geneva. They urged China to be “more responsible” in negotiations and to make greater concessions in such key sectors as industrial machinery, chemicals, and electronics.<sup>109</sup> China responded by showing greater flexibility on some issues, but it resisted efforts by the U.S. and the E.U. to press it to make more concessions than other developing countries and linked itself to developing country positions.<sup>110</sup> Over time, however, China moved away from simply supporting developing country positions, as it realized the role it would need to play to uphold the overall system.<sup>111</sup>

China gradually played a more active role in making proposals in WTO negotiations.<sup>112</sup> By February 2005, it had made over ten submissions.<sup>113</sup> Less than three years later, by the end of December 2007, it had made sixty-seven submissions, and just seven months later, after the flourish of meetings in late July 2008 that gave rise to a “July 2008 package,” China had made more than 100 submissions.<sup>114</sup> Its proposals covered a wide range of issues, including agriculture, NAMA, import relief rules, and dispute settlement.<sup>115</sup> In parallel, the Chinese government negotiated bilateral and plurilateral trade agreements pursuant to which countries agreed to recognize China as a “market economy” so

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105. *Id.* at 156–57.

106. Miaomiao, *China's Participation in the Doha Negotiations and Implementation of its Accession Commitments*, in CHINA'S PARTICIPATION IN THE WTO 28–29 (Henry Gao & Don Lewis eds., 2005).

107. For a detailed discussion of China's growing role in the Doha Round, see Henry Gao, *From the Doha Round to the China Round: China's Growing Role in WTO Negotiations*, in CHINA IN THE INTERNATIONAL ECONOMIC ORDER: NEW DIRECTIONS AND CHANGING PARADIGMS 79, 91 (Lisa Toohey et al. eds., 2015) [hereinafter Gao, *From the Doha Round to the China Round*].

108. *Id.* at 92.

109. *Id.*; see also HENRY M. PAULSON JR., DEALING WITH CHINA: AN INSIDER UNMasks THE NEW ECONOMIC SUPERPOWER 398 (2015) (“We should want China to play a bigger, more responsible leadership role in international groups like the World Trade Organization . . .”).

110. Gao, *From the Doha Round to the China Round*, *supra* note 107, at 90.

111. Interview with Anonymous (July 28, 2016) (Interview #32) [hereinafter Interview #32] (on file with authors); see also Gao, *From the Doha Round to the China Round*, *supra* note 107, at 92–93.

112. Gao, *From the Doha Round to the China Round*, *supra* note 107, at 94–96. China made its first submission in the Doha Round of negotiations on June 20, 2002 with a proposal on fisheries subsidies. Negotiating Group on Rules, *Proposal from the People's Republic of China on Fisheries Subsidies*, WTO Doc. TN/RL/W/9 (June 20, 2002).

113. Gao, *China's Ascent*, *supra* note 15, at 161.

114. Gao, *From the Doha Round to the China Round*, *supra* note 107, at 94.

115. *Id.*

as not to discriminate against it in anti-dumping investigations.<sup>116</sup> Ninety-seven nations had granted China “market economy” status by 2009, but China made less headway with the world’s major economies.<sup>117</sup>

Similarly, China began to participate more actively in the WTO’s web of over seventy councils, committees, working parties, and other groupings that involve over 1,000 meetings (and, according to one estimate, has reached over 5,000 meetings) each year.<sup>118</sup> Through this monitoring and deliberative process, officials can place pressure on other WTO members to respect their legal commitments and are themselves pressed to justify or reconsider their own domestic policies. To give one example, “China has submitted over 850 TBT [technical barriers to trade] notifications, . . . in some years exceeding the more established Members. . . . [O]ther Members praised China for making many of its regulations and policies more transparent and predictable.”<sup>119</sup> Over time, Chinese officials found that the committee system, coupled with the WTO’s trade policy review mechanism, was “helpful in placing pressure on officials” who “must come and explain” and “need to answer questions” so that officials “may think twice before adopting a measure,” and “protectionism” can be “combated.”<sup>120</sup>

In WTO dispute settlement, China started passively. In the first few years, it tried to avoid WTO litigation by settling every WTO complaint brought against it.<sup>121</sup> As one of a series of proposals for “special and differential treatment” for developing countries, China formally proposed to limit the number of complaints that a developed country could bring against a developing-country Member in a calendar year to two.<sup>122</sup> It contended that “the lack of human and financial resources as well as capacities and experiences of developing-country Members results in *de facto* imbalance in the participation in the dispute settlement mechanism.”<sup>123</sup> As a Chinese official working on WTO matters confirmed in 2003, “China is uncertain about the [World Trade Organ-

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116. Gao, *China’s Ascent*, *supra* note 15, at 172–75.

117. SHAMBAUGH, CHINA GOES GLOBAL, *supra* note 64, at 160; see Alessia Amighini, *Beijing’s Economy: Dream a Little Dream of China?*, in CHINA DREAM: STILL COMING TRUE? 33, 45 (Alessia Amighini ed., 2016) (“[M]ore than 80 countries have already granted China Market Economy Status (MES), including . . . Russia and Brazil, but also advanced economies, including Switzerland, Singapore, Australia and New Zealand, but not any of its major trading partners, including the EU and the US.”); Ben Blanchard & David Lawder, *China Launches WTO Complaint Against U.S., EU Over Dumping Rules*, REUTERS (Dec. 12, 2016, 4:52 AM), <http://www.reuters.com/article/us-china-trade-wto-idUSKBN14112M>; Gary Clyde Hufbauer & Cathleen Cimino-Isaacs, *The Outlook for Market Economy Status for China*, PETERSON INST. INT’L ECON. (Apr. 11, 2016, 8:45 AM), <https://piie.com/blogs/trade-investment-policy-watch/outlook-market-economy-status-china>.

118. Bernard Hoekman, *Proposals for WTO Reform: A Synthesis and Assessment*, 20 MINN. J. INT’L L. 324, 330 (2011).

119. Robert Wolfe, *Letting the Sun Shine in at the WTO: How Transparency Brings the Trading System to Life* 33–34 (WTO Economic Research and Statistics Division, Working Paper ERSD-2013-03 2013).

120. Interview with Anonymous (May 25, 2012) (Interview #19) [hereinafter Interview #19] (on file with authors).

121. See Henry Gao, *Aggressive Legalism: The East Asian Experience and Lessons for China*, in CHINA’S PARTICIPATION IN THE WTO 315–51 (Henry Gao & Don Lewis eds., 2005).

122. *Id.* at 300.

123. Communication from China, *Responses to Questions on the Specific Input of China*, WTO Doc. TN/DS/W/57 (May 19, 2003).

ization's Dispute Settlement Understanding]"; "people in government do not like to bring cases," and "they also fear the U.S. bringing cases against them."<sup>124</sup> Thus, the official said that, in line with "Asian values," "you negotiate over disputes; you do not litigate."<sup>125</sup> After the U.S. filed two cases against China in 2007 regarding intellectual property protection and market access for audio-visual products, the Chinese government reacted vehemently that "the American decision . . . will seriously undermine cooperative relations."<sup>126</sup> In the meantime, however, the government invested in learning about the dispute settlement process through attending proceedings as a third party before almost every WTO panel.<sup>127</sup> In the words of another official, China was learning from "the example of the United States and E.U."<sup>128</sup> As a result, China has become the fourth most active WTO participant as a third party after the U.S., the E.U., and Japan, despite its late accession.<sup>129</sup>

After learning how the dispute settlement system operated, the government became more active as a litigant—first as a respondent and then as a complainant.<sup>130</sup> Starting with the *China-Auto Parts* case in 2006, China no longer favored settling claims over litigating them but, instead, strove to raise strong defenses in almost every case through substantive and procedural arguments.<sup>131</sup> In 2008, its litigation strategy became even more aggressive as it advanced creative interpretations of its accession protocol commitments to reduce asymmetries.<sup>132</sup> As an official told us, this change represented a "transformation for China from the perspective that litigation is not the goal" to one where "we now accept that multilateral dispute settlement process is an appropriate channel for resolving disputes. Although many in government feel shocked that we are a defendant in an international court, and still think that litigation is not good, which is a reflection of our heritage, our culture, we now accept it."<sup>133</sup> The official thought "highly of the system" because it ultimately makes it "easier to settle" disputes thanks to the third-party ruling.<sup>134</sup>

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124. Interview with Anonymous (June 19, 2003) (Interview #20) [hereinafter Interview #20] (on file with authors).

125. *Id.* As another official remarked in a July 2005 interview, "it is contrary to Chinese philosophy and culture" to litigate. If you litigate against a friend, then they "will no longer be a friend." Interview with Anonymous (June 12, 2005) (Interview #21) [hereinafter Interview #21] (on file with authors).

126. Thomas J. Christensen, Deputy Assistant Secretary for East Asian and Pacific Affairs, Remarks Before the US-China Economic and Security Review Commission (Feb. 2, 2007), <http://2001-2009.state.gov/p/eap/rls/rm/2007/79866.htm> (delivered by John Norris, Director of the Office of Chinese and Mongolian Affairs on Mr. Christensen's behalf).

127. Jessica C. Liao, *China's Reluctant Usage of the WTO Dispute Settlement System*, USC US-CHINA INSTITUTE (Oct. 25, 2011), <http://china.usc.edu/china%E2%80%99s-reluctant-usage-wto-dispute-settlement-system>.

128. Interview #21, *supra* note 125.

129. *Id.*

130. Gao, *China's Ascent*, *supra* note 15, at 167–72. Moreover, China also started to hold leadership roles in WTO committees. As noted proudly by former Chinese ambassador Sun Zhenyu, Chinese officials have been elected to chair the Committee on Technical Barriers to Trade and Working Party on State Trading Enterprises. *Id.* at 170–72.

131. *Id.* at 170.

132. *Id.* at 170–72.

133. Interview #19, *supra* note 120.

134. *Id.*

As a relatively new member of a legalistic regime, China's record in the WTO is impressive. In terms of metrics of China's success, one can start by looking at the number of WTO cases that China has won against the U.S. and the E.U., the amount of trade involved in these cases, and the number and importance of administrative law changes that the U.S. and the E.U. have made because of these losses. Since 2010, the U.S. and the E.U. have lost, in whole or in part, four important WTO cases brought by China, involving billions of dollars of imports.<sup>135</sup> For example, just one of the products (rubber pneumatic tires) covered in one case (DS379) against the U.S. involved over \$17 billion in imports.<sup>136</sup> Similarly, just one case against the E.U. involving just steel fasteners (DS397) involved almost \$5 billion of imports.<sup>137</sup> These cases, moreover, created precedent regarding the legality of U.S. and E.U. anti-dumping and countervailing duty methodologies that potentially affect all trade from China, which respectively totaled \$462.8 billion in imports to the U.S. and \$368 billion in imports to the E.U. in 2016.<sup>138</sup> Following these cases, the U.S. and the E.U. changed their administrative regulations, but these regulations too are subject to challenge.<sup>139</sup> Daku and Pelc have created a statistical measure of parties' influence in the development of WTO jurisprudence and have found that "across a single decade, China has effectively doubled its average influence over panel and [Appellate Body] rulings."<sup>140</sup> There is no single metric for measuring success, and simply counting disputes and the amount of affected trade is insufficient. But the extent of U.S. and European trade with China po-

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135. See Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (Dec. 18, 2014) [hereinafter Appellate Body Report DS449]; Appellate Body Report, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, WTO Doc. WT/DS449/AB/R (July 7, 2014); Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO Doc. WT/DS397/AB/R (July 15, 2011); Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011) [hereinafter Appellate Body Report DS379].

136. See WTO DISPUTE DATA, <http://www.wtodisputedata.com/data> (last visited Nov. 10, 2017) (follow the "Download" link under "Disputed Product Imports" to view the dataset using Stata) (listing bilateral imports of Chinese rubber pneumatic tires into the U.S. totaling \$17,125,810,660 from 1996 to 2010—an average of \$1,141,720,710 per year).

137. See *id.* (listing bilateral imports of Chinese steel fasteners into the E.U. totaling \$4,945,502,110 from 1996 to 2010—an average of \$329,700,140 per year).

138. See *Foreign Trade*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/balance/c5700.html> (last visited Nov. 11, 2017) (2016: U.S. Trade in Goods with China); *Trade*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> (last visited Nov. 11, 2017) (EU-China: Trade in Goods, click on table icon on graph for table view) (figures converted from euros to U.S. dollars).

139. See, e.g., Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube From the People's Republic of China, 77 Fed. Reg. 52,683, 52,684 (Aug. 30, 2012); Commission Implementing Regulation (EU) 2016/278, Repealing the Definitive Anti-Dumping Duty Imposed on Imports of Certain Iron or Steel Fasteners Originating in the People's Republic of China, as Extended to Imports of Certain Iron or Steel Fasteners Consigned from Malaysia, Whether Declared as Originating in Malaysia or Not, 2016 O.J. (L 52) 1, 24.

140. Mark Daku & Krzysztof J. Pelc, *Who Holds Influence over WTO Jurisprudence*, 20 J. INT'L ECON. L. 233, 252 (2017) (using text analysis of country submissions compared to the content of rulings).

tentially affected by anti-dumping and countervailing investigations,<sup>141</sup> and U.S.-European reactions to these losses and the jurisprudence developed,<sup>142</sup> especially compared to earlier losses in WTO disputes, highlight Europe's and the United States' sense of vulnerability to Chinese legal challenges.

Without building strong capacity in WTO law, China's record would not have been possible. How did China, a country with an anti-legalist, Confucian tradition not known for lawyering,<sup>143</sup> a country also facing considerable language barriers in an organization where English is the *de facto* governing language, build its trade law capacity? What broader effects might those efforts have in embedding international trade law in China? In the following sections, we explain the strategies that lie behind China's success and their potential implications within China and for the international trading system.

#### IV. BUILDING TRADE LAW CAPACITY IN GOVERNMENT

Even before its accession to the WTO, the Chinese government realized that its lack of legal capacity could be a major challenge. For example, in early 2002, President Jiang Zemin stated that it was inevitable that China would suffer losses in WTO dispute settlement due to its unfamiliarity with WTO rules.<sup>144</sup> To prepare China for its post-accession challenges, Jiang urged the government to prioritize the development of a team of professionals well-versed in WTO rules, including experts on international trade policy, trade law, trade negotiations, and anti-dumping investigations. Pursuant to the high-level exhortations, central, provincial, and local government departments significantly invested in WTO-related capacity-building initiatives, expanding the role for lawyers.<sup>145</sup>

141. China is the largest trading partner of the U.S. and the second largest trading partner of the E.U. after the U.S.

142. See, e.g., Dispute Settlement Body, *Minutes of Meeting*, ¶¶ 46–50, WTO Doc. WT/DSB/M/322 (Nov. 23, 2012) (E.U. expressing disagreement with China on whether E.U. had fully implemented the DSB's recommendations and rulings); Dispute Settlement Body, *Minutes of Meeting*, ¶¶ 92–102, WTO Doc. WT/DSB/M/294 (Jun. 9, 2011) (U.S. expressing concern over definition of several terms included in the Appellate Body Report in WT/DS379/R); Statement by the United States to the Dispute Settlement Body, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379 (Mar. 25, 2011), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds379\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds379_e.htm) (“The United States is deeply disappointed with the findings in the Appellate Body report related to the interpretation of the term ‘public body’ and China’s claims related to the concurrent application of CVDs and NME ADs, and considers that the report’s reasoning is based on a number of problematic assertions and assumptions.”); *WTO’s Appellate Body Reverses Ruling in China Challenge to U.S. AD/CVD Measures*, BLOOMBERG INT’L TRADE REP. (Mar. 17, 2011), [https://www.bloomberglaw.com/search/results/a12c13f18d6f72238a9c538c62642e27/document/XAMVGRG5GVG0?search32=ohR\\_SsS1EI9LlkpPOMzmLQ==RDine5sb4MzhKADYeA4PkQjrIQ2Xj6877kLQyoa4mMoHbVXBw3wySpKh-VLlhQKd](https://www.bloomberglaw.com/search/results/a12c13f18d6f72238a9c538c62642e27/document/XAMVGRG5GVG0?search32=ohR_SsS1EI9LlkpPOMzmLQ==RDine5sb4MzhKADYeA4PkQjrIQ2Xj6877kLQyoa4mMoHbVXBw3wySpKh-VLlhQKd) (“U.S. Trade Representative Ron Kirk said in a statement that he was ‘deeply troubled’ by the ruling. ‘It appears to be a clear case of overreaching by the Appellate Body. We are reviewing the findings closely in order to understand fully their implications.’”).

143. See PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN THE LAW* Ch. 9 (5th ed. 2015).

144. JIANG ZEMIN, *Zai Jilie de Guoji Jingzheng zhong Zhangwo Zhudong [Seize the Initiative Amidst Intense International Competition]*, in 3 JIANG ZEMIN WENXUAN: DISAN JUAN [SELECTED WORKS OF JIANG ZEMIN] 455 (2006).

145. *Id.*



In the central government, the State Council and the Central Committee of the Communist Party of China (“CPC”) issued a joint Notice on China’s WTO Accession to all Ministries and provincial governments on November 20, 2001, in which they called for Party organs and government organizations at all levels to strengthen the study of WTO rules and the training of WTO experts.<sup>146</sup> Many ministries restructured their internal organization in preparation for the upcoming accession.<sup>147</sup> They worked with MOFTEC to “clean up” laws and regulations to meet China’s new obligations and to ensure that new laws and regulations would comply with WTO rules.<sup>148</sup>

The government reorganized its lead ministry for international trade and renamed it the Ministry of Commerce (“MOFCOM”).<sup>149</sup> MOFCOM has a Janus-faced role of looking inward and outward.<sup>150</sup> Internally, MOFCOM oversees China’s compliance with its WTO obligations.<sup>151</sup> Externally, MOFCOM protects China’s trading interests abroad, including before the WTO.<sup>152</sup> Following China’s accession, MOFCOM (then named MOFTEC) established two new departments to address WTO matters, which, likewise, have Janus-faced missions: the Fair Trade Bureau and the Department of WTO Affairs.<sup>153</sup> Internally, the Department of WTO Affairs reviews draft Chinese legislation and policy to ensure it is WTO consistent.<sup>154</sup> Externally, it represents China in WTO negotiations, WTO trade policy reviews, and before WTO committees, where it is responsible for notifying the committees of new and amended Chinese regulations as required under the WTO agreements.<sup>155</sup> This dual role enhances its sensitivity to the importance of China’s compliance with its WTO

146. Zhonggong Zhongyang Bangongting, *Guowuyuan Bangongting Guanyu Woguo Jiaru Shijie Maoyi Zuzhi Youguan Qingkuang de Tongbao* [Announcement by the General Office of the Central Committee of the Communist Party of China and the General Office of the State Council on China’s Accession to the WTO], ZHONGBANFA (Nov. 20, 2001). Within the Chinese system, the State Council is the Central Government, headed by the Premier. *Overview of the PRC Political System*, US-CHINA BUS. COUNCIL, <https://www.uschina.org/overview-prc-political-system> (last visited Nov. 11, 2017).

147. Gong Baihua, *Shanghai’s WTO Affairs Consultation Center: Working Together to Take Advantage of WTO Membership*, in *MANAGING THE CHALLENGES OF WTO PARTICIPATION: 45 CASE STUDIES* 167–77 (Peter Gallagher et al. eds., 2005).

148. *Id.* at 168.

149. Dennis D. Trinidad, *The Foreign Aid Philosophy of a Rising Asian Power: A Southeast Asian View*, in *A STUDY OF CHINA’S FOREIGN AID: AN ASIAN PERSPECTIVE* 19, 33 (Y. Shimomura & H. Ohashi eds., 2013).

150. *Mission*, MINISTRY COM. CHINA, <http://english.mofcom.gov.cn/column/mission2010.shtml> (last visited Nov. 11, 2017).

151. *Id.*

152. *Id.*

153. THOMAS W. HUANG, *TRADE REMEDIES: LAWS OF DUMPING, SUBSIDIES, AND SAFEGUARDS IN CHINA* 29 (2013).

154. Interview with Anonymous (July 22, 2016) (Interview #26) [hereinafter Interview # 26] (on file with authors); Interview with Anonymous (July 20, 2016) (Interview #25) [hereinafter Interview #25] (on file with authors); *Zhuyao Zhize* [Main Duties], MINISTRY COM. CHINA: DEP’T WTO AFF. (June 23, 2015), <http://sms.mofcom.gov.cn/article/gywm/200606/20060602467456.shtml>.

155. *Zhuyao Zhize* [Main Duties], *supra* note 154; see also Li Chengang, *Zhongguo Canyu Shimao Zuzhi Zhengduan Jiejue Shijian Gaishu* [Overview of China’s Participation in WTO Dispute Settlement Practices], in SHIMAO ZUZHI GUIZE BOYI: ZHONGGUO CANYU WTO ZHENGDUAN JIEJUE DE SHINIAN FALU SHIJIAN [GAMING WITH WTO RULES: CHINA’S TEN YEAR’S EXPERIENCE IN WTO DISPUTE SETTLEMENT PRACTICES] 14–15 (Li Chengang ed., 2011) [hereinafter Chengang, *Overview*].

commitments since it needs credibility when pressing other countries to meet their commitments toward China.

MOFCOM's Fair Trade Bureau, in parallel, has internal and external responsibilities regarding anti-dumping, subsidy, and safeguards law (collectively known as import relief law).<sup>156</sup> Internally, it conducts import relief investigations of foreign products, administering these laws.<sup>157</sup> Externally, it follows foreign import relief investigations of Chinese products.<sup>158</sup> In this way, it differs from the U.S. Department of Commerce and the E.U. trade directorate that largely let companies fend for themselves in foreign anti-dumping and countervailing duty investigations. In contrast, MOFCOM's Fair Trade Bureau spends much of its time helping Chinese exporters in foreign proceedings, including through bilateral bargaining.<sup>159</sup> In particular, MOFCOM always pays the lawyers' fees in foreign countervailing duty investigations to defend Chinese interests.<sup>160</sup> Since most WTO disputes brought by China involve foreign import relief measures, the Fair Trade Bureau must keep abreast of WTO jurisprudence in this area. This dual internal-external role can socialize the Fair Trade Bureau in its application of China's import relief laws.

MOFCOM has a separate Department of Treaty and Law ("DTL") that is responsible for legal issues in China's international economic relations and handles cases before the WTO dispute settlement system.<sup>161</sup> In 2001, MOFCOM created a division on WTO law within DTL to handle WTO disputes.<sup>162</sup> It established a second DTL division on WTO Law in 2009 when China faced a slew of new disputes.<sup>163</sup> The total number of DTL officials dedicated to WTO litigation increased from five to nine.<sup>164</sup> These officials work with China's diplomats responsible for WTO dispute settlement in China's WTO mission in Geneva, so that China has around a dozen officials specializing in WTO dispute settlement in total.<sup>165</sup> Overall, the size of China's WTO dispute settlement team doubled despite a wave of downsizing in the central government,<sup>166</sup> enhancing lawyers' roles in China's international trade relations.

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156. *Functions*, MINISTRY COM. CHINA: DEP'T INT'L TRADE & ECON. AFF., <http://english.mofcom.gov.cn/departments/fms2/> (last visited Nov. 11, 2017).

157. See, e.g., *MOFCOM Announcement No.45 of 2017 on Filing of Anti-Dumping Investigation against Imports of Halogenated Butyl Rubber Originating in the United States*, EUR. UNION & SING., MINISTRY COM. CHINA (Aug. 31, 2017), <http://english.mofcom.gov.cn/article/policyrelease/buwei/201709/20170902637955.shtml>.

158. *Zhuyao Zhize [Main Duties]*, *supra* note 154.

159. Interview with Anonymous (June 10, 2014) (Interview #3) [hereinafter Interview #3] (on file with authors).

160. Interview with Anonymous (June 8, 2014) (Interview #2) [hereinafter Interview #2] (on file with authors).

161. *The Department of Treaty and Law*, MINISTRY FOREIGN AFF. CHINA, [http://www.fmprc.gov.cn/mfa\\_eng/wjb\\_663304/zzjg\\_663340/tyfls\\_665260/](http://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/tyfls_665260/) (last visited Nov. 10, 2017).

162. Chengang, *Overview*, *supra* note 155, at 15.

163. *Id.*

164. *Id.* at 27.

165. *Id.*

166. *Id.*

The GATT requires WTO members to take “reasonable measures” to ensure local compliance with GATT obligations.<sup>167</sup> China’s central government has used this provision to try to assert greater control over local actors, which generally is a challenge.<sup>168</sup> The central government aimed to spur local government officials to become familiar with WTO rules.<sup>169</sup> In February 2002, two months after China’s formal WTO accession, the central government held a one-week training course for senior officials at the provincial and ministerial levels.<sup>170</sup> The lecturers included President Jiang and Premier Zhu Rongji, as well as high-level officials from MOFCOM and other ministries, highlighting the political importance that the central government wished to convey. The training course explained the main rules in the WTO to senior officials and reminded them that all new laws and regulations needed to be consistent with WTO requirements.<sup>171</sup>

After the training course, many provinces drafted Plans of Actions in response to China’s WTO accession.<sup>172</sup> A key component was to strengthen trade law capacity.<sup>173</sup> To achieve this objective, local governments established what they called “WTO Centers.”<sup>174</sup> Funded by the local governments, these centers are semi-governmental institutions that conduct WTO-related training, research, and outreach activities.<sup>175</sup> In the two-to-three years before and after China’s WTO accession, the centers were the favorite pet projects of ambitious local officials, who established centers across the country.<sup>176</sup> In 2014, the Shanghai center employed about forty professionals and the Shenzhen center employed about thirty.<sup>177</sup>

The centers have served important internal and external roles. Internally, when the local government passes a regulation, it is to consult with the local WTO center to confirm that the regulation is WTO consistent and amend it as needed.<sup>178</sup> Externally, the centers are to provide information to companies to

167. See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 221.

168. Pittman Potter, *China and the International Legal System: Challenges of Participation*, in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 145, 150 (Donald C. Clarke ed., 2008); see also HUNG, *supra* note 45, at 54–61 (regarding some of the challenges of decentralization in China for the central government). Hung noted “the central government’s weakening power vis-à-vis that of local governments in direct economic management.” *Id.* at 57.

169. HUNG, *supra* note 45, at 54–61.

170. SUN ZHENYU, RINEIWA KONGZONG SUIYUE [BUSY YEARS IN GENEVA] 37 (2011).

171. *Id.*

172. See, e.g., ZHONGGUO JIARU SHIJE MAOYI ZUZHI GUODUQI BEIJING XINGDONG JIHUA [ACTION PLAN FOR BEIJING DURING CHINA’S TRANSITION PERIOD IN THE WTO] (Zhang Mao ed., 2003).

173. Hsieh, *supra* note 102, at 999.

174. EXEC. OFFICE OF THE PRESIDENT, U.S. TRADE REPRESENTATIVE, REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE (2015), <https://ustr.gov/sites/default/files/2015-Report-to-Congress-China-WTO-Compliance.pdf>.

175. Hsieh, *supra* note 102, at 1013–14.

176. *Id.* at 1013–15.

177. Interview with Anonymous (June 12, 2014) (Interview #16) [hereinafter Interview #16] (on file with authors); Interview with Anonymous (June 13, 2014) (Interview #17) [hereinafter Interview #17] (on file with authors).

178. Interview #17, *supra* note 177. Cities like Shanghai and Shenzhen are reputed to be trade liberal in their orientation. As an example, an individual at the Shanghai center noted to us how the Shanghai govern-

help them address trade barriers, such as anti-dumping and countervailing duty investigations and seizures of goods on intellectual property grounds.<sup>179</sup> As Chinese companies move up the value chain and produce technology-intensive goods, intellectual property issues have become more salient, as when U.S. Customs seizes imported products that allegedly violate U.S. intellectual property rights under U.S. Section 337.<sup>180</sup> The centers also help MOFCOM prepare an annual trade barriers report regarding measures that Chinese exporters face.<sup>181</sup> It is modeled after the annual U.S. National Trade Estimates Report on Foreign Trade Barriers—once more illustrating the influence of U.S. models in transnational legal ordering.<sup>182</sup>

When China first joined the WTO, WTO matters represented the cutting edge for policy, and the leadership spurred officials to exhibit WTO awareness.<sup>183</sup> The WTO “craze” has since faded, in part because of the turn away from multilateral trade negotiations to bilateral and regional ones, and in part because of disenchantment with the WTO given the widespread use of anti-dumping and other measures against Chinese products.<sup>184</sup> The U.S. election of President Trump may deepen these trends. Most provincial and local governments quietly abandoned their WTO centers so that, by 2014, only the WTO centers in Beijing, Shanghai, and Shenzhen remained active.<sup>185</sup> These centers broadened their mandates to encompass bilateral and plurilateral trade and investment agreements. For example, in 2012, the Shanghai center established an Institute of Global Trade and Investment under its auspices,<sup>186</sup> and it played an important supporting role in the creation of the China (Shanghai) Pilot Free Trade Zone.<sup>187</sup> In addition, while in the early years, the majority of the Shanghai center’s staff had a legal background and focused on WTO implementation, a growing proportion of the staff now has an economic background and provides economic analysis to support bilateral and plurilateral trade and investment negotiations.<sup>188</sup> Although the WTO has declined in importance in

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ment asked the Center to review a regulation that gave different quotas to imported and domestic manufactured cars in Shanghai for license plates, and when the Center raised a national treatment issue, the local government amended the rules so as to be WTO compliant. See Baihua, *supra* note 147, at 167–77.

179. Interview #17, *supra* note 177.

180. *Id.*

181. Interview #16, *supra* note 177.

182. *Id.*

183. Interview with Anonymous (June 12, 2014) (Interview #7) [hereinafter Interview #7] (on file with authors).

184. Interview #17, *supra* note 177.

185. Interview #16, *supra* note 177.

186. *About the Center*, SHANGHAI WTO AFF. CONSULTATION CTR., <http://www.sccwto.org/introduce?locale=zh-CN> (visited on Nov. 11, 2017).

187. *Id.* The China (Shanghai) Pilot Free Trade Zone (“SPFTZ”) was first established in the Pudong area in Shanghai in September 2013. It aims to become China’s testing ground for new regulatory regimes on trade and investment. Initially covering only twenty-eight square kilometers, the SPFTZ quickly introduced many new regulatory reforms in a host of areas ranging from investment and financial liberalization to the shift of government functions. For more detailed analysis, see Henry Gao, *TPP, Regulatory Coherence and China’s Free Trade Strategy from A to Z*, EUR. Y.B. INT’L ECON. L. 507–14 (2016).

188. Interview #16, *supra* note 177.

China, a member of the Shenzhen center told us that, in the early years, China likely “was overheated about the WTO; right now it is overcooling.”<sup>189</sup>

## V. WTO LAW AND ACADEMIA

In addition to boosting WTO-related capacity within central, provincial, and local governments, the central government took steps to build the capacities of other actors and incentivize them to invest in developing expertise in WTO law.<sup>190</sup> These capacity-building initiatives spanned academia, law firms, private businesses, and industry associations.<sup>191</sup> We start with academia, which illustrates longer-term thinking about developing WTO-related legal capacity and the implications for legal study, research, and practice in international economic law in China.

### A. Teaching

China is an authoritarian regime in which the government exercises a heavy influence in academia.<sup>192</sup> With the government’s promotion of the WTO’s importance for China, WTO law became a popular subject and discipline in Chinese universities. In 2000, the year before China joined the WTO, the government made International Economic Law (which includes WTO law) a mandatory subject on the national bar exam.<sup>193</sup> China’s Ministry of Education included International Economic Law (and thus WTO law) as one of sixteen mandatory courses for all Chinese law schools.<sup>194</sup> As a result, in most of the more than 600 law schools in China, there is at least one professor who claims to specialize in WTO law,<sup>195</sup> a much greater number and percentage than in the U.S. where the study of WTO law has waned.<sup>196</sup>

Because of the concentration of universities in major cities, the most reputable centers for WTO teaching and research are in cities such as Beijing, Shanghai, Guangzhou, Chongqing, and Xiamen. Many of the specialists teach in the traditional elite law schools, the so-called “Five Institutes and Four Departments,” which refers to the five independent law institutes and four law departments in comprehensive universities that resulted when the government

189. Interview #17, *supra* note 177.

190. Hsieh, *supra* note 102, at 1016.

191. Interview #2, *supra* note 160.

192. See, e.g., Interview with Anonymous (July 25, 2016) (Interview #28) [hereinafter Interview #28] (on file with authors) (“[E]ven WTO academics in china in chat rooms don’t use legal reasoning but rather only reason in terms of policy outcomes desired.”).

193. Ministry of Justice, Lvshi Zige Kaoshi Banfa [Rules on Lawyer’s Qualification Exam], Art. 16, Order 61, July 26, 2000.

194. *Putong Gaodeng Xuexiao Benke Zhuanye Mulu & Zhuanye Jieshao* [Overview of the Catalogue of Majors for Institutions of Higher Education], MINISTRY EDUC. CHINA (Dec. 18, 2012), [http://www.moe.edu.cn/s78/A08/A08\\_gggs/s8468/201212/t20121218\\_181006.html](http://www.moe.edu.cn/s78/A08/A08_gggs/s8468/201212/t20121218_181006.html).

195. Interview #28, *supra* note 192.

196. See generally John J. Barceló III, *The Status of WTO Rules in U.S. Law*, CORNELL L. FAC. PUBLICATIONS (Jan. 6, 2006), [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lsrp\\_papers](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1035&context=lsrp_papers) (explaining the separation between WTO and U.S. law in the U.S. legal system).

restructured higher education institutions in 1952.<sup>197</sup> In addition, the government established two main foreign trade institutes, in Beijing in 1951 and Shanghai in 1960 respectively, under the auspices of the trade ministry.<sup>198</sup> These elite schools have multiple professors who teach international trade law, including specialized seminars on WTO law and specific topics such as WTO dispute settlement, trade in services, and Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>199</sup> These classes are offered as part of the upper-year undergraduate curriculum and as postgraduate courses.<sup>200</sup>

Most WTO scholars in China are graduates from these elite law schools, and the leading ones couple their degrees with overseas experience. For example, Professor Zhang Naigen at Fudan University Law School, a senior figure in the field, conducted a year of study on WTO law under the supervision of Professor John Jackson at the University of Michigan Law School as a Fulbright Scholar in 1996–1997, and he spent time as a visiting scholar at the law schools of Columbia University (1989–1990) and George Washington University (1993–1994), and the Max Planck Institute of Comparative Public Law and International Law in Heidelberg, Germany (2000).<sup>201</sup> He since founded, and is the director of, the Center for Intellectual Property Study, which involves the study of international, domestic, and comparative intellectual property law, and he became Vice President of the Shanghai Society for Intellectual Property Law.<sup>202</sup> In light of the TRIPS Agreement and China’s innovation policies which seek to promote patents, Chinese law firms have developed strong intellectual property practices,<sup>203</sup> and Chinese courts have applied the TRIPS Agreement in dozens of cases between private parties.<sup>204</sup> The foreign study and experience of China’s WTO scholars exemplifies the transnational nature of

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197. The five institutes specialized in legal education are the Beijing Institute of Politics and Law (upgraded to China University of Politics and Law or “CUPL” in 1983); the Eastern China Institute of Politics and Law in Shanghai (upgraded to Eastern China University of Politics and Law in 2007); the Southwest Institute of Politics and Law in Chongqing (upgraded to Southwest University of Political Sciences and Law in 1995); the Northwest Institute of Politics and Law in Xi’an (upgraded to Northwest University of Politics and Law in 2006); and the Zhongnan Institute of Politics and Law in Wuhan (merged with Zhongnan University of Finance and Economics to form the Zhongnan University of Economics and Law in 2000). The four elite law departments in elite universities are Peking University and People’s University in Beijing, Jilin University in Changchun, and Wuhan University in Wuhan. There are also well-established WTO programs in several other elite universities, such as Xiamen University in Fujian province, Fudan University and Shanghai Jiaotong University in Shanghai, and Tsinghua University in Beijing.

198. These institutes were later upgraded to universities and are now known as the University of International Business and Economics (“UIBE”) in Beijing, and Shanghai University of International Business and Economics (“SUIBE”). Both have strong WTO law and policy programs. Both authors have taught at UIBE in a program organized by its Institute for WTO Studies.

199. Hsieh, *supra* note 102, at 1009.

200. Interview with Anonymous (June 12, 2014) (Interview #13) [hereinafter Interview #13] (on file with authors).

201. Zhang Naigen, *WTO Fa yu Zhongguo Shean Zhengduan Jiejue [WTO Law and Disputes Relating to China]*, 1 SHANGHAI PEOPLE’S PRESS (2013); see also Zhang Naigen, *Dispute Settlement Under the TRIPS Agreement from the Perspective of Treaty Interpretation*, 17 TEMP. INT’L & COMP. L.J. 199, 199 n.\* (2003) [hereinafter Zhang, *Dispute Settlement*].

202. See Zhang, *Dispute Settlement*, *supra* note 201, at 199.

203. Interview #13, *supra* note 200.

204. See Congyan Cai, *International Law in Chinese Courts During the Rise of China*, 110 AM. J. INT’L L. 269, 286–87 (2016).

this legal field. Each of the eight Chinese academics on China's Indicative List of WTO Panelists have either studied overseas or have been visiting scholars abroad.<sup>205</sup>

Given the role of studying abroad, some academics speak of a paternalistic relationship in academia in which U.S. and European academics hold privileged positions.<sup>206</sup> They point to the hegemony of English and English-language journals for WTO law, as well as the strength of U.S. academic institutions. Over time, Chinese academics have developed their own perspectives on WTO law. Some Chinese law professors believe that, through developing their own expertise, they now have a more independent relationship with the Chinese government than in the past as well.<sup>207</sup>

Professors teaching WTO law in China have spearheaded the use of the case study method in China.<sup>208</sup> China is a civil law country where judges do not create jurisprudence, and it has thus been difficult to adopt the case law method in Chinese law schools.<sup>209</sup> The WTO legal field, however, is completely different. WTO panels and the Appellate Body have decided over 300 cases and built an elaborate, evolving jurisprudence.<sup>210</sup> These decisions create *de facto* precedent that affects the interpretation and application of the law in future cases, so that Chinese students need to study them carefully.<sup>211</sup> The students cannot simply study legal texts and general principles, as in other subject areas, to learn and appreciate WTO law. To teach WTO law, Chinese professors thus include cases in the advanced curriculum.<sup>212</sup>

In the beginning, most professors translated the WTO case reports into Chinese since the students lacked sufficient English language skills.<sup>213</sup> Given the length of WTO reports, which can vary from over 100 to over 1,000 pages, the task of translation can be considerable. Gradually, some professors started to include excerpts in English and even publish entire books of cases in English. For example, in 2003, Professor Huang Dongli from China Academy of Social Sciences ("CASS") published *International Trade Law: Economic Theories, Law and Cases*, which reflected the casebooks used in American law schools.<sup>214</sup>

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205. See generally Dispute Settlement Body, *Indicative List of Governmental and Non-Governmental Panelists*, WTO Doc. WT/DSB/44/Rev.39 (Aug. 22, 2017).

206. Interview #13, *supra* note 200.

207. *Id.*

208. Interview with Anonymous (June 11, 2014) (Interview #11) [hereinafter Interview #11] (on file with authors).

209. *Id.*

210. *Dispute Settlement*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm) (last visited Nov. 11, 2017).

211. Interview #11, *supra* note 208.

212. Hsieh, *supra* note 102, at 1011.

213. Prominent examples include three series of Case Commentaries published respectively by Zhu Lanye from ECUPL, Han Liyu from Renmin University, and Gong Baihua from Fudan University. See GONG BAIHUA, WTO ANLI JI [COLLECTION OF WTO CASES] (2001–2008); ZHU LANYE, SHIJI MAOYI ZUZHI GUOJI MAOYI JIUFEN ANLI PINGXI [ANALYSIS OF INTERNATIONAL TRADE DISPUTE SETTLEMENT CASES AT THE WTO] (2000); HAN LIYU, SHIMAO ZUZHI ANLI FENXI [WTO CASE COMMENTARIES] (2002).

214. Huang Dongli, CHINESE ACAD. SOC. SCI., <http://www.iolaw.org.cn/global/EN/showNews.aspx?id=33215> (last visited Nov. 11, 2017).

In 2007, the Ministry of Education of China launched a comprehensive teaching reform plan to improve the teaching quality in Chinese universities.<sup>215</sup> One important component of the plan is to develop “Bilingual Courses” that can “substantially improve the English levels of college students in their areas of studies and enhance their capacities to conduct research in English.”<sup>216</sup> Among law school subjects, WTO law is considered one of the most suitable for teaching in English.<sup>217</sup> Many law schools thus began to offer courses on WTO law in English to build students’ English language facility.<sup>218</sup> In turn, this development helped professors and students become more familiar with foreign scholarship on WTO law.

To build students’ understanding of WTO rules, MOFCOM organizes the China WTO Moot Court Competition with two of China’s elite law schools, the China University of Politics and Law (“CUPL”) and the Southwest University of Political Science and Law (“SWUPL”).<sup>219</sup> The competition, which is conducted in English and simulates WTO panel procedures, aims to “promote the training and selection of [China’s] personnel for WTO negotiations and dispute settlement.”<sup>220</sup> The first competition was held at CUPL in Beijing in November 2012, and it drew teams from eight universities from four cities.<sup>221</sup> The number of teams doubled to sixteen in 2013 and rose to eighteen in 2014.<sup>222</sup> The panelists include Chinese trade lawyers, professors, and MOFCOM officials who handle WTO cases.<sup>223</sup> The MOFCOM officials and private lawyers use the opportunity to identify and recruit young talent.<sup>224</sup>

The study of WTO case law can have broad implications on the formation of legal professionals in China, especially those who will enter commercial practice but also for those who enter government or become judges.

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215. *A Brief Overview of Chinese Higher Education System*, BRIT.COUNCIL INDIA, [https://www.britishcouncil.in/sites/default/files/higher\\_education\\_system\\_of\\_china.pdf](https://www.britishcouncil.in/sites/default/files/higher_education_system_of_china.pdf) (last visited Nov. 11, 2017).

216. Jiaoyun Bu, Caizheng Bu Guanyu Shishi Gaodeng Xuexiao Benke Jiaoxue Zhiliang Yu Jiaoxue Gaige Gongcheng De Yijian (教育部、财政部关于实施高等学校本科教学质量与教学改革工程的意见), ADVICE OF MINISTRY OF EDUCATION & MINISTRY OF FINANCE ON THE IMPLEMENTATION OF THE PROJECT ON QUALITY OF COLLEGE TEACHING AND TEACHING REFORM IN HIGHER EDUCATION (Jan. 22, 2007), [http://www.gov.cn/zwqk/2007-01/31/content\\_513448.htm](http://www.gov.cn/zwqk/2007-01/31/content_513448.htm).

217. Interview #11, *supra* note 208.

218. *Id.*

219. It is “the first Moot Court Competition officially sponsored by a Ministry” in China, revealing the importance that the government gives to WTO law and dispute settlement. Xie Yangjin, *Nankai Daibiaodui Huode Shoujie Quanguo WTO Moni Fating Jingsai Jijun* [Nankai Team Won Third Place in the First National WTO Moot Court Competition], NANKAI NEWS NETWORK (Dec. 6, 2012, 5:33 PM), <http://news.nankai.edu.cn/nkyw/system/2012/12/06/000104613.shtml>.

220. *Id.*

221. They were from CUPL, Central University of Finance and Economics, University of International Economics and Business (“UIBE”), Capital University of Economics and Business, Xiamen University, Nankai University, Zhongnan University of Economics and Law, and SWUPL. See *Feng Xuwei Attends the First College WTO Moot Court Debate*, ALL BRIGHT L. OFF. BEIJING (Mar. 24, 2013, 9:00 AM), <http://www.allbrightlawbj.com/CN/NEW/201303241133.html>.

222. Eric H. Mao, *STL Adds to Moot Court Achievements with National Championship at WTO Moot Court in Beijing*, PEKING U. SCH. TRANSNAT’L L., <http://stl.pku.edu.cn/news-and-events/stl-adds-to-moot-court-achievements-with-national-championship-at-wto-moot-court-in-beijing/> (last visited Nov. 10, 2017).

223. Xie Yangjin, *supra* note 219.

224. Interview with Anonymous (June 11, 2014) (Interview #5) [hereinafter Interview #5] (on file with authors).



When graduates work in ministries outside of MOFCOM, not only does basic knowledge of WTO law diffuse through the government, MOFCOM also gains interlocutors in other ministries acquainted with WTO legal rules and principles.<sup>225</sup> Such diffusion of expertise facilitates compliance with China's WTO commitments and potentially deepens socialization processes regarding trade law principles and legal reasoning.

Some of these students and professors become judges in China, including at a high level. For example, Cao Jianmin, a well-known WTO scholar and former President of the East China University of Politics and Law, served as Deputy President of the Supreme People's Court, starting in 1999.<sup>226</sup> Similarly, in 2015, the government appointed WTO scholar Liu Jingdong from the Institute of Law at the China Academy of Social Sciences to be the Deputy Presiding Judge for the Fourth Division on Civil Cases of the Supreme People's Court of China.<sup>227</sup> They can bring their experiences to courts in China.

A senior MOFCOM official stressed to us how the judges of the Supreme People's Court know WTO law.<sup>228</sup> Although the Supreme People's Court rejected proposals that WTO law should be directly applicable before Chinese courts, their rules provide that Chinese law is to be interpreted where possible to comply with WTO requirements.<sup>229</sup> Chinese courts have referenced WTO law in several decisions.<sup>230</sup>

China often includes Chinese law professors in its delegations to WTO hearings before panels and the Appellate Body, and they take these experiences back home with them. A law professor attending an Appellate Body hearing, for example, emphasized how quickly and repeatedly the legal issues arose, reflecting more of an "inquisitorial process" involving "common law" reasoning.<sup>231</sup> From the experience of the hearing, he highlighted how "the training of our students should be harder, should be tougher."<sup>232</sup> Another law professor attending a WTO hearing noted that the experience gave him a com-

225. *Id.*

226. See *The Supreme People's Procuratorate of the People's Republic of China: Cao Jianmin Biography*, XINHUA NEWS AGENCY (Mar. 16, 2013), [http://www.spp.gov.cn/gjyld/sxdjcg1/201209/t20120914\\_940.shtml](http://www.spp.gov.cn/gjyld/sxdjcg1/201209/t20120914_940.shtml).

227. See *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Renmian Mingdian [List of New Appointments and Removals by the Standing Committee of the National People's Congress of China]*, NAT'L PEOPLE'S CONGRESS (Apr. 24, 2015), [http://www.npc.gov.cn/npc/cwhhy/12jcw/2015-04/25/content\\_1934610.htm](http://www.npc.gov.cn/npc/cwhhy/12jcw/2015-04/25/content_1934610.htm).

228. Interview #25, *supra* note 154.

229. Article 9 of the Supreme People's Court's Regulations on Issues Concerning the Trial of Administrative Cases Relating to International Trade provides:

If there are two or more reasonable interpretations for a provision of the law or administrative regulation applied by a people's court in the hearing of an international trade administrative case, and among which one interpretation is consistent with the relevant provisions of the international treaty that the PRC concluded or entered into, such interpretation shall be chosen, unless China has made reservation to the provisions.

See Cai, *supra* note 204, at 275–77.

230. *Id.* at 286–87.

231. Interview #11, *supra* note 208.

232. *Id.*

pletely new perspective of the WTO that he brings to his classroom.<sup>233</sup> Now he gives factual scenarios to his students and lets them work through the facts while studying the WTO background rules on their own.<sup>234</sup> Professor Yang Guohua, the former Deputy-Director of DTL, stressed how WTO reports provide “excellent teaching materials to help the students to develop a good sense of legal reasoning and rule of law.”<sup>235</sup> He wrote of “the appeal of the legal reasoning in the Panel and Appellate Body reports which were very rare in [his] legal education” during the 1990s.<sup>236</sup>

The experiences of Chinese trade law professors abroad can shape their teaching to assume more of a common-law approach to factual analysis and legal interpretation. As one law professor noted, “more and more professors in China are trained in the United States,” many of whom take a course in international trade law, and these experiences could have significant effects over the next ten to twenty years for teaching law in China.<sup>237</sup> Many of these academics stress that much is at stake in the study of the WTO in China, both for the multilateral trading system and internally within China.<sup>238</sup> The mandatory study of WTO law in Chinese law schools, in other words, has fostered transnational processes that affect legal training.

### B. Research

After China's accession to the WTO, Chinese scholars published thousands of books and articles on almost all aspects of the WTO and WTO law, exemplifying the remarkable enthusiasm within China regarding its accession, promoted by the government.<sup>239</sup> The WTO books range from introductory textbooks to highly specialized treatises.<sup>240</sup> Early publications tended to be in Chinese, given that the primary goal was to explain the basics of WTO law to Chinese readers, especially to officials, businessmen, and students.<sup>241</sup> Gradually, however, as Chinese scholars improved their English language skills and as they pushed deeper in their research, some of them started to publish works in English, including in the main English language journals in the field, such as the *Journal of World Trade* and the *Journal of International Economic Law*.<sup>242</sup>

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233. Interview with Anonymous (June 11, 2014) (Interview #12) [hereinafter Interview #12] (on file with authors).

234. *Id.*

235. *Id.*

236. Guohua, *A Memoir*, *supra* note 43, at 5. Yang is a law professor at Tsinghua and was a Deputy Director-General in DTL until August 2014. *Mr. Yang Guohua*, TSINGHUA U. SCH. L., [http://www.tsinghua.edu.cn/publish/lawen/3562/2014/20140825161427975536986/20140825161427975536986\\_.html](http://www.tsinghua.edu.cn/publish/lawen/3562/2014/20140825161427975536986/20140825161427975536986_.html) (last visited Nov. 11, 2017).

237. Interview #11, *supra* note 208.

238. Interview with Anonymous (July 27, 2016) (Interview #31) (on file with authors).

239. Guohua, *A Memoir*, *supra* note 43, at 1, 3; Interview #11, *supra* note 208.

240. Hsieh, *supra* note 102, at 1004 n. 23–24, 1008.

241. *Id.* at 1011.

242. See, e.g., Guohua, *A Memoir*, *supra* note 43, at 1; see also Manjiao Chi, *The “Greenization” of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and Its Implications for China's Future Bit-Making*, 18 J. INT'L ECON. L. 511 (2015); Kong Qingjiang, *China's Uncharted FTA Strategy*, 46 J. WORLD TRADE 1191 (2012); Jingxia Shi & Weidong Chen, *The “Specificity” of Cultural Products ver-*

These publications enable them to exchange ideas with non-Chinese scholars and bring Chinese perspectives to these journals' broader readerships. They can help the Chinese government in two ways. First, these efforts help Chinese scholars become more proficient in WTO law in English so that they become useful as consultants to the government and law firms, as well as to the next generation of Chinese trade law specialists who they train. Second, they potentially help these scholars advance juris-prudential interpretations and arguments informed by a Chinese perspective and, thus, more favorable to China's positions, such that this work may inform the broader WTO legal field, including the WTO secretariat and WTO panelists.<sup>243</sup>

To promote research on WTO issues, the government supported the creation of several WTO research associations. The oldest is the Chinese Society of International Economic Law ("CSIEL"), which was established in 1984 by Professor Yao Meizhen from Wuhan University<sup>244</sup> and later led by Professor Chen An from Xiamen University.<sup>245</sup> When China joined the WTO, the government established the WTO Law Research Society under the auspices of the China Law Society, and it appointed Sun Wanzhong, a former Director-General of the Office for Legislative Affairs at the State Council, as its first President.<sup>246</sup> Two years later, MOFCOM established the China Society for World Trade Organization Studies.<sup>247</sup> China's first ambassador to the WTO, Sun Zhenyu, took the helm in 2011, and the Society became quite active, organizing many training courses and research projects.<sup>248</sup>

The annual meetings of these research associations provide a forum for WTO scholars and trade officials in China to exchange views. Starting with its 2010 Annual Meeting, the Chinese Society of International Economic Law has organized an annual Special Symposium on WTO Law jointly with MOFCOM's Department of Treaty and Law, where DTL officials, private lawyers involved in China's cases, and leading WTO scholars in China review and discuss WTO panel and Appellate Body reports.<sup>249</sup> Senior MOFCOM offi-

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*sus the "Generality" of Trade Obligations: Reflecting on "China-Publications and Audiovisual Products,"* 45 J. WORLD TRADE 159 (2011).

243. Zhang Naigen, *Teshu de Fating - Zhongguo She An Zhengduan Jiejue Tingzhenhui Sanji [A Special Court: Notes on China's WTO Dispute Hearings]*, in WOMEN ZAI WTO DA GUANSI [LITIGATING IN THE WTO] 5 (Yang Guohua & Shi Xiaoli eds., 2015).

244. Wang Chuanli, *Yao Meizhen yu zhongguo Guoji Jingjifa [Yao Meizhen and International Economic Law in China]*, 18 WUDA GUOJIFA PINGLUN [WUHAN U. INT'L L.J.] 1, 15.

245. Xuehui Jianjie (学会简介), *About the Society*, CHINESE SOC'Y INT'L ECON. L., [http://www.csiel.org/about.aspx?baseinfoCatelD=72&baseinfo\\_Id=72&CatelD=72&ViewCatelD=72](http://www.csiel.org/about.aspx?baseinfoCatelD=72&baseinfo_Id=72&CatelD=72&ViewCatelD=72) (last visited Nov. 17, 2017).

246. *Memorial Assembly for China's 10th Anniversary of WTO Entry: Summing Up the Experience, Looking into the Future, and Perfecting China's Market Economic Structure and the Rule of Law*, TSINGHUA U. SCH. L., [http://www.tsinghua.edu.cn/publish/lawen/5564/2011/20111010145553112430167/2011101014553112430167\\_.html](http://www.tsinghua.edu.cn/publish/lawen/5564/2011/20111010145553112430167/2011101014553112430167_.html) (last visited Nov. 11, 2017).

247. *Zhongguo Shije Maoyi Zuzhi Yangjiu Hui Jianjie, Zongzhi ji Zhuyao Zhineng [Introduction, Objectives and Main Functions of China World Trade Organization]*, MINISTRY COM. CHINA (Oct. 17, 2013), <http://cwto.mofcom.gov.cn/article/about/201310/20131000353150.shtml>.

248. *Zhenyu Sun*, EXPERTS NETWORK, <https://www.icts.org/about-us/zhenyu-sun> (last visited Nov. 11, 2017).

249. *Host the Seventh WTO Law Symposium*, CHINA INT'L ECON. L. INST. (Nov. 4, 2016), [http://www.csiel.org/growsinfo.aspx?newsID=341&newsCatelD=73&news\\_Id=73&CatelD=73&ViewCatelD=73](http://www.csiel.org/growsinfo.aspx?newsID=341&newsCatelD=73&news_Id=73&CatelD=73&ViewCatelD=73).

cials deliver keynote speeches at the meeting, where they update the academic community on the state of play of trade negotiations and disputes and the most important trade law issues that China faces.<sup>250</sup> These interactions help spur Chinese researchers to focus on topics of practical relevance to the government.

In addition to the formal research societies, entrepreneurial individuals have established informal networks to exchange views on WTO law. Yang Guohua, now a law professor at Tsinghua University, established an email list entitled “Academic Circle on WTO” and a WeChat group named “Rule of Law Utopia” when he was Deputy Director-General in DTL. Most of China’s leading WTO scholars are members of these groups, and they often engage in heated discussions on cutting-edge issues in WTO law.

In 2010, the WTO Secretariat launched the WTO Chairs Programme, which aims to enhance knowledge of the WTO and the international trading system among academics and policy-makers in developing countries through curriculum development, research, and outreach by universities and research institutions.<sup>251</sup> The secretariat announced a call for proposals in 2009 and selected the Shanghai Institute of Foreign Trade as one among fourteen centers worldwide.<sup>252</sup> The Shanghai team, which has since changed its name to Shanghai University of International Business and Economics (“SUIBE”), includes three professors and around twenty researchers.<sup>253</sup> The institute established initiatives on WTO dispute settlement and trade policy review, and it provides translation services for MOFCOM.<sup>254</sup> It partners with the Geneva-based non-governmental organization International Centre on Trade and Development (“ICTSD”) to publish a Chinese language version of ICTSD’s periodical on trade law developments, *Bridges*.<sup>255</sup> These initiatives illustrate the broad transnational ties of WTO researchers in China, linking with the WTO secretariat and other Geneva-based organizations.<sup>256</sup>

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250. *Id.*

251. *WTO Chairs Programme*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/devel\\_e/train\\_e/chairs\\_prog\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/train_e/chairs_prog_e.htm) (last visited Nov. 11, 2017).

252. *School of WTO Research and Education (SWTO)*, SHANGHAI U. INT’L BUS. ECON., <http://eng.suibe.edu.cn/wwwesearchandwducationwchoolwww/list.htm> (last visited Nov. 11, 2017).

253. *Study in China*, SHANGHAI U. INT’L BUS. ECON., <http://www.csc.edu.cn/studyinchina/universitydetailen.aspx?collegeId=118> (last visited Nov. 8, 2017); *see also School Profile*, SHANGHAI U. INT’L BUS. ECON., <http://www.suibe.edu.cn/558/list.htm> (last visited Nov. 8, 2017).

254. The initiatives include the “China-WTO Dispute Settlement Mechanism Research Center” (in partnership with the Shanghai WTO Affairs Consultation Center), the “China-WTO Trade Policy Review Center,” the “WTO and the Research Center for the Internationalization of Chinese Enterprises” (in partnership with the City University of Hong Kong), and the “WTO Literature Translation Center.” Interview with Anonymous (June 12, 2014) (Interview #15) (on file with authors); *see Study in China*, *supra* note 253.

255. The translation programs exemplify the greater demands placed on countries that do not use a WTO official language (English, Spanish, and French) and want to participate meaningfully in the WTO. As one official quipped, “just imagine if the USTR had to defend itself in Chinese.” Interview #19, *supra* note 120.

256. Interview with Anonymous (July 20, 2016) (Interview #34) [hereinafter Interview #34] (on file with authors).

C. *Interactions with Government and Law Firms*

Chinese law firms and MOFCOM occasionally seek advice from Chinese law professors on international trade matters; they initially did so on an *ad hoc* basis where an individual official knew a law professor.<sup>257</sup> This practice gradually became institutionalized after MOFCOM organized regular seminars on current WTO cases.<sup>258</sup> The exchanges helped the government tap into academic expertise and helped the academics keep abreast of legal developments.<sup>259</sup>

In addition to its consultations with academics, MOFCOM runs a formal secondment program for law professors, which it started in 2011.<sup>260</sup> Under the program, MOFCOM selects young academics from elite law schools around the country and assigns them to the Department of Treaty and Law.<sup>261</sup> During their one-year stay, the professors are treated as MOFCOM staff members and conduct research on legal issues and participate in all aspects of the WTO dispute settlement process.<sup>262</sup> MOFCOM invites law professors to observe WTO hearings in Geneva as members of the Chinese delegation.<sup>263</sup> It also invites them to hear presentations at MOFCOM by foreign lawyers who handle China's WTO cases.<sup>264</sup> These experiences help orient their research and pedagogy.

The government has nominated several Chinese academics to the Indicative List of Panelists maintained by the WTO secretariat.<sup>265</sup> MOFCOM nominated three individuals in 2004, followed by two in 2006, six in 2010, and eight in 2011.<sup>266</sup> By 2012, the government had nominated a total of nineteen individuals,<sup>267</sup> of which eight were full-time academics, eight were sitting officials at MOFCOM at the Director or Director-General level, and the remaining three were former government officials who practiced as lawyers or teach part-time as professors.<sup>268</sup>

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257. Interview #11, *supra* note 208.

258. Interview #2, *supra* note 160.

259. GREGORY SHAFFER & RICARDO MELENDEZ-ORTIZ, DISPUTE SETTLEMENT AT THE WTO: THE DEVELOPING COUNTRY EXPERIENCE 126 (2010) [hereinafter DISPUTE SETTLEMENT AT THE WTO].

260. Interview #12, *supra* note 233.

261. Interview #20, *supra* note 124.

262. *Id.*

263. Interview #34, *supra* note 256.

264. Interview with Anonymous (June 19, 2014) (Interview #6) [hereinafter Interview #6] (on file with authors).

265. Interview #16, *supra* note 177.

266. The initial nominees were Professor Zeng Lingliang from Wuhan University, Professor Zhu Lanye from East China University of Politics and Law, and Mr. Zhang Yuqing, then Director-General of the DTL at MOFCOM. See Chengang, *Overview*, *supra* note 155, at 18–19, 27.

267. *Id.* at 28.

268. Given the large number of cases in which China is a party, however, only one Chinese person has served on a panel, Mr. Zhang Yuqing who was a member of an *EC-Bananas* compliance panel. *EC-Bananas Compliance Panel, Note by the Secretariat: European Communities—Regime for the Importation, Sale and Distribution of Bananas*, Constitution of the Panel, WTO Doc. WT/DS27/84 (Aug. 13, 2007).

## VI. ENGAGING LAW FIRMS

Litigation in the WTO is a highly specialized activity that has spurred governments to hire and work with legal professionals and, in particular, WTO law specialists in private law firms.<sup>269</sup> Given the stakes for China's development policy, the government developed a policy of hiring the world's best trade lawyers to defend it, who were in U.S. and European law firms.<sup>270</sup> In parallel, it worked to foster the development of internal expertise within Chinese law firms.<sup>271</sup> It did so by having a Chinese law firm work with a foreign law firm in all but one of the first twenty-eight cases that China faced before WTO panels.<sup>272</sup> As one U.S. lawyer working for China stated, China has been "smart" in its dual use of foreign and domestic lawyers, which facilitates "technology transfer."<sup>273</sup> Over time, lawyers in Chinese private law firms developed significant WTO law expertise.<sup>274</sup>

The government worked along with Chinese law firms whenever China was a third party in a WTO case to help the government form its legal positions and, in the process, help train Chinese lawyers. For example, one Chinese lawyer now active in WTO cases worked with the government in about a dozen cases in which China was a third party between 2003 and 2008, including a number of subsidy cases involving the U.S., the E.U., Canada, and Korea, an area in which Chinese practices would subsequently be challenged before the WTO.<sup>275</sup> He stressed how "being a third party was important for capacity building. I saw and studied how others would write submissions, develop arguments; in some cases I could see how a party participated in oral hearings, such as before the Appellate Body."<sup>276</sup> As another attorney stated, "we copied, we learned, we pasted. As an entrepreneurial saying goes (in Chinese), creation starts from imitation."<sup>277</sup> The lawyer "loved" to see how "legal" the WTO work was.<sup>278</sup> Through these processes of public-private partnership in WTO litigation, the government helped build expertise to defend Chinese interests, as well as to bring international trade law home.

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269. See SHAFFER, DEFENDING INTERESTS, *supra* note 103, at 33.

270. Tina Wang, *China's Coming of Age in the WTO War*, FORBES (Apr. 20, 2009, 10:00 PM), <https://www.forbes.com/2009/04/20/china-wto-trade-markets-economy-law.html>.

271. See Interview #3, *supra* note 159.

272. For example, in the 2014 *China—Rare Earths* case, the government worked with the U.S. law firm Sidley Austin, together with the Chinese law firm AllBright. See, e.g., *Relationships*, SIDLEY: RELATIONSHIPS, <https://www.sidley.com/en/relationships-clients> (last visited Nov. 11, 2017) ("We represented MOFCOM in a WTO dispute involving *China—Rare Earths*, in defense of export restraints responding to claims made by the U.S., the EU, and Japan"); see also *AllBright Lawyer Participates in 2014 China Rare Earth Forum*, ALLBRIGHT (Dec. 9, 2014), <http://www.allbrightlaw.com/info/7e3c60448c6e41a6af330be55a5a9dee> (describing the lawyer's role in the case).

273. Interview #6, *supra* note 264.

274. Wang, *supra* note 270.

275. Interview #2, *supra* note 160.

276. *Id.*

277. Interview #5, *supra* note 224.

278. *Id.*

A. *The Development of China's Trade Bar*

The development of the international trade and business law fields in China is a phenomenon that flourished after the WTO's creation. Between 1997 and China's WTO accession in late 2001, the government launched a dozen anti-dumping cases.<sup>279</sup> The trade bar, however, still remained underdeveloped. As the *China Youth Daily*, a major national newspaper, lamented in late 2001, "Chinese lawyers familiar with international law, international trade law and WTO rules are extremely rare."<sup>280</sup> For China to effectively engage with WTO law, including for the preparation and defense of its own regulations, it needed Chinese legal professionals to enhance their competency in English and in trade law.<sup>281</sup>

China's accession to the WTO was a catalyst for developing the Chinese legal profession more generally, thereby facilitating transnational legal ordering in trade and business law. To promote such development, the Ministry of Justice issued an Opinion on "Accelerating the Reform and Development of the Legal Profession after China's Accession to the WTO" in August 2001.<sup>282</sup> The ministry noted, "Chinese lawyers are weak in handling international legal business, and China lack talents who can excellently handle foreign-involved legal services, and the lawyers' competitive capacity in the international legal service market are weak."<sup>283</sup> It stressed:

We should improve the continuing education of the practicing lawyers, strengthen the education and training of the lawyers in respect of newly arising economic and legal knowledge, scientific and technological knowledge, and foreign language ability. We should open various training avenues, select excellent talents to accept trainings abroad, and meanwhile take corresponding measures to guarantee those lawyers selected for overseas studies will come back to China to provide services. We should do our utmost to make the quantity and quality of China's foreign-involved lawyers reach a level in line with the demand of China's market economic construction and development by the year 2010.<sup>284</sup>

In the area of trade law, MOFTEC and its Department of Treaty and Law took the lead in building the trade bar's capacity. In June 2000, the DTL organized a delegation to attend a training course in Washington D.C.<sup>285</sup> The delegation included officials from the main economic ministries, officials from leg-

279. Wang Qinhua, *Zhongguo Duiwai Fanqingxiao de Zhuangkuang ji Anli [China's Antidumping Experience and Cases]*, in WANG SHICHUN, FANQINGXIAO YINGDUI ZHIDAO [HOW TO DEAL WITH ANTIDUMPING] 28–29 (Wang Qinhua & Zhang Hanlin eds., 2004).

280. Yang Lushi *Qiangtan Zhongguo Zhan Bentu Lushi: Shuilai Da WTO Guansi [Foreign Lawyers Entering China to Compete with Local Lawyers: Who will Litigate the WTO Cases?]*, ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY] (Dec. 10, 2001) (lamenting that "there are only about 2,000 lawyers in the whole country who can use English fluently to negotiate deals and sign contracts with foreign clients").

281. Wang, *supra* note 270.

282. Ministry of Justice, *Opinions of the Ministry of Justice on Accelerating the Reform and Development of the Legal Profession after China's Accession to the WTO*, SIFATONG (Mar. 8, 2001).

283. *Id.* (translation by LawinfoChina, a legal database run by Peking University).

284. *Id.*

285. Chengang, *Overview*, *supra* note 155, at 15.

islative bodies, scholars from universities and research institutes, and practicing lawyers, all selected by DTL.<sup>286</sup> Professor John Jackson, widely referenced in China as the “father of the WTO,” taught the course at Georgetown University Law Center.<sup>287</sup> The course was a great success and many participants became leading figures on WTO law issues in China, such as Dr. Yang Guohua who would become lead counsel in many of China’s WTO cases as Deputy General-Counsel at DTL.<sup>288</sup>

Since no Chinese law firm had any experience in WTO dispute settlement, MOFCOM turned to foreign law firms for representation when China began to fully litigate disputes before the WTO rather than settle them.<sup>289</sup> While the Chinese government is generally wary of involving foreign lawyers in other areas, and although there initially was some internal debate, the government continues to hire foreign law firms for WTO litigation.<sup>290</sup> Li Chengang, Director-General of DTL, justifies the decision by noting that WTO litigation is a highly specialized activity that requires significant legal skills and that this strategy has proven effective for long-time General Agreement on Tariffs and Trade (“GATT”)/WTO Members such as Japan, India, and Brazil.<sup>291</sup> In response to concerns that foreign lawyers might be untrustworthy, his former colleague Yang Guohua noted, the “lawyers provide professional legal services. They will do their best no matter which country they work for. As a client, all we care about is their capabilities to provide professional services.”<sup>292</sup> In the process, they also facilitate legal technology transfer.

Such transfer has particularly thrived in the area of import relief law. Although China has been the target of trade remedy cases abroad since the 1980s, it only launched its first trade remedy case in 1997 when Chinese lawyers submitted a petition to MOFTEC to commence an anti-dumping investigation on behalf of a group of Chinese newsprint manufacturers.<sup>293</sup> The case heralded

286. *Id.*

287. See, e.g., AN CHEN, THE VOICE FROM CHINA: AN CHEN ON INTERNATIONAL ECONOMIC LAW xli (2013) (Jackson as the “Father of the WTO”); Guohua, *A Memoir*, *supra* note 43, at 4 (referencing Jackson as famously called the “Founding Father of the GATT/WTO”).

288. Interview with Anonymous (June 9, 2014) (Interview #9) [hereinafter Interview #9] (on file with authors).

289. Mary E. Footer, *Dispute Settlement at the WTO: The Developing Country Experience*, 22 EUR. J. INT’L L. 1204, 1206 (2011) (reviewing DISPUTE SETTLEMENT AT THE WTO, *supra* note 259).

290. Interview with Anonymous (June 9, 2014) (Interview #4) [hereinafter Interview #4] (on file with authors).

291. Chengang, *Overview*, *supra* note 155, at 27.

292. Yang Guohua, *Zuihao de Lushi (The Best Lawyers)*, in WOMEN ZAI WTO DA GUANSI [LITIGATING IN THE WTO] 146 (Yang Guohua & Shi Xiaoli eds., 2015).

293. When the newsprint producers first approached lawyers Wang Xuehua, He Jinghua, and Huang Tao at the Huanzhong Law Firm in Beijing in 1996, there were no anti-dumping regulations in China, but only a vague clause in the 1994 Foreign Trade Law that allowed the state to take action against dumping. See He Jinghua, *Fanqingxiao Shensu Xietiao Gongzuo Bibu Keshao [Coordination of Antidumping Petitions Needed]*, FAZHI RIBAO [LEGAL DAILY] (June 26, 2007) [hereinafter *Coordination of Antidumping Petitions Needed*]; Wang Xuehua, *Shensu Lushi Yaozuo ChanYe Daibiaoren [Petitioners’ Lawyer Should Represent the Industry]*, FAZHI RIBAO [LEGAL DAILY] (June 24, 2007) [hereinafter *Petitioners’ Lawyer Should Represent the Industry*]. As nobody in China knew how to submit an anti-dumping petition and conduct an anti-dumping investigation, the law firm went to officials in MOFCOM’s Department of Treaty and Law, where Wang used to work, to discuss the matter. *Coordination of Antidumping Petitions Needed*, *supra*; *Petitioners’ Lawyer Should Represent the Industry*, *supra*. The Department reported the case to the Minister and asked the Huanzhong Law Firm



the legalization of Chinese import-relief administration and the development of China's import-relief bar.<sup>294</sup> The government official, Mr. Wu Xiaochen, later became a leading private trade lawyer at the Hylands Law Firm and wrote a book, *Antidumping Law and Practice of China*.<sup>295</sup> The practice has since flourished in China, which has become one of the world's largest users of anti-dumping measures.<sup>296</sup> China now uses anti-dumping law frequently against the U.S. and Europe, often in a tit-for-tat fashion in response to U.S. and E.U. investigations.<sup>297</sup>

### B. Who Are the Government's Chinese Trade Lawyers?

Although the government hired foreign lawyers to be best represented in WTO cases, it also wished to build the capacity of Chinese law firms.<sup>298</sup> From its very first case, the government deliberately hired domestic law firms to work with the foreign firms.<sup>299</sup> In the early years, the government selected ten Chinese law firms and tried to groom them for WTO work by having them provide support to the foreign law firms and work along with the government on third-party submissions.<sup>300</sup> For example, in its first case, the *US-Steel Safeguard* case initiated in 2002, China hired the French law firm Gide Loyerette as its counsel, together with four domestic law firms to assist in the back-

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to start preparing for the case after the Minister approved it in February 1997. *Coordination of Antidumping Petitions Needed, supra; Petitioners' Lawyer Should Represent the Industry, supra*. In March, the State Council issued The Regulation on Anti-dumping and Subsidy Countervailing Measures; in November, Huanzhong filed the formal petition on behalf of the domestic producers; and in December, MOFTEC formally launched the investigation. *Coordination of Antidumping Petitions Needed, supra; Petitioners' Lawyer Should Represent the Industry, supra*. The official handling the investigation was Wu Xiaochen, a student of Wang at UIBE. *Coordination of Antidumping Petitions Needed, supra; Petitioners' Lawyer Should Represent the Industry, supra*. The investigation targeted exporters from the U.S., Canada, and Korea, which hired other Chinese law firms such as King and Wood, Zhong Lun, and T&D Associates to prepare their defenses. *See also Peng Wu Peng, ZHONG LUN*, <http://www.zhonglun.com/Content/2016/10-14/1642323112.html> (last visited Nov. 11, 2017); *Ning Xuanfeng: Zhongguo "Shuangfan" Lingyu Linjun Lushi [Nin Xuanfeng: China's Leading "Double Reverse" Lawyer]*, LEGAL DAILY (July 19, 2014), <http://epaper.legaldaily.com.cn/fzrb/content/20140719/Article105008GN.htm>; *World and News, T&D*, <http://www.tdlawyers.com> (last visited Nov. 11, 2017).

294. David R. Grace et al., *China's Antidumping Regime: Worth Keeping an Eye On*, COVINGTON & BURLING, <https://www.cov.com/files/Publication/8b6e39b8-5a2d-45cd-9749-074bd978ccb/Presentation/PublicationAttachment/8953a338-1784-45c5-ab11-0bcc7a9389e1/oid6344.pdf> (last visited Nov. 30, 2017).

295. 93 Jie Xiaoyou, *Sifeng Lushi Shiwusuo Hehuoren Wu Xiaochen: Yi Shisan Nian, Sishi qi Fangqingxiao An [Wu Xiaochen: Class of 93 Alumni and Partner at Sifeng Law Firm: Thirteen Years, Forty Antidumping Cases]*, UIBE, <http://law.uibe.edu.cn/OutListContent/index.aspx?nodeid=109&page=ContentPage&contentid=2300> (last visited Nov. 30, 2017); *see also* Mark Wu, *Attacking with a Borrowed Sword: The Rise of Trade Remedies Law in China* (Harvard Globalization Lawyering & Emerging Economies China Series Working Paper, 2015).

296. *See infra* notes 312–318 and accompanying text.

297. *See* Mark Wu, *Antidumping in Asia's Emerging Giants*, 53 HARV. INT'L L.J. 101, 104 (2012) [hereinafter Wu, *Antidumping*]; Jennifer M. Freedman, *China Floods the WTO with Tit-for-Tat*, BLOOMBERG (June 7, 2012, 8:30 PM), <https://www.bloomberg.com/news/articles/2012-06-07/china-floods-the-wto-with-tit-for-tat>.

298. Chengang, *Overview, supra* note 155, at 27.

299. Interview #4, *supra* note 290.

300. Interview with Anonymous (Dec. 2013) (Interview #22) [hereinafter Interview #22] (on files with author).

ground.<sup>301</sup> Most of these Chinese firms were boutique law firms with trade remedies practices.<sup>302</sup>

Over the past decade, however, all but one of the original ten discontinued their WTO litigation practices, although domestic trade remedies practices continued to grow.<sup>303</sup> In 2016, only King & Wood Mallesons (“KWM”), among the original firms, continued to handle WTO dispute settlement for the government, along with four other firms: Zhong Lun; Jincheng, Tongda & Neal (“JTN”); AllBright; and Gaopeng & Partners.<sup>304</sup> When one compares these two groups of law firms, the following differences in firm size, practice areas, location, and lawyer profiles become salient:

1. *Firm size.* While most of the firms on the initial list were boutique firms, among the five firms in the current group, three (KWM, Zhong Lun, and AllBright) are among the largest law firms in China, each having over 900 lawyers, while the other two are among the largest of the medium-sized Chinese firms, having about 200 lawyers each.
2. *Practice areas.* As boutique firms, those in the initial list tended to specialize in a few related areas, such as trade remedies. In contrast, those in the current group are “full-service” law firms that cover almost all areas of business law, including corporate law, intellectual property law, competition law, and arbitration, in addition to international trade law.
3. *Location.* The initial list included law firms based in Shanghai and Guangzhou. In contrast, all of the firms in the current group are based in Beijing.<sup>305</sup>
4. *Lawyers’ profiles.* The lawyers in the initial list tended to be older with no significant overseas experiences, while the lawyers in the current group are younger and have significant experiences abroad, including practice in U.S. and European law firms. Most of the trade lawyers in the initial list had strong MOFCOM connections. In contrast, with the exception of two trade lawyers at Gaopeng, to our knowledge, no lawyer in the current group has worked as an official in MOFCOM.

These comparisons reflect the evolution and maturation of China’s trade bar. The initial decision by MOFCOM to cultivate WTO practices among boutique firms with trade remedy practices made sense in 2002 since these firms had some expertise on trade law issues regarding dumping. After China’s first WTO case (*US-Steel Safeguard*) ended in 2003, however, China did not have another major WTO case litigated before a panel until 2006 when the U.S.

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301. Chengang, *Overview*, *supra* note 155, at 27.

302. Interview with Anonymous (July 29, 2016) (Interview #33) [hereinafter Interview #33] (on file with authors).

303. See Interview #2, *supra* note 160.

304. See Interview #3, *supra* note 159.

305. *Asia’s Top 50 Largest Law Firms*, ASIAN LEGAL BUS. (Nov. 1, 2014), <http://www.legalbusinessonline.com/features/asia%E2%80%99s-top-50-largest-law-firms/68885>.

brought the *China-Auto Parts* and *China-Intellectual Property Rights* cases.<sup>306</sup> During the three-year dry spell, the boutique law firms had little incentive to continue investing in their WTO practice; they chose to turn to more lucrative practice areas.

In contrast, larger law firms have the resources to support a WTO legal practice, and these practices have grown.<sup>307</sup> Although WTO work remains much less lucrative than these firms' other practice areas, maintaining a WTO practice can greatly enhance the prestige of a firm since it involves representing the Chinese government, which every Chinese person has been taught since their youth to be sacred and infallible. On the practical side, working on these cases helps the big law firms maintain "guanxi" (personal connections) with MOFCOM, which in addition to its jurisdiction on trade issues is entrusted with regulatory powers over commercially important areas such as the approval of foreign investment and the enforcement of China's competition laws. While different divisions within MOFCOM handle these issues, building "guanxi" with DTL officials through WTO cases makes it easier for the law firms to contact officials in other divisions.

These Chinese law firms have also generated work related to WTO law that has broader implications within China, as well as for the international trading system. As the former DTL Deputy Director-General Yang Guohua wrote, "Chinese lawyers have grown up to provide WTO legal services not only to MOFCOM in [WTO disputes], but also to other government agencies and companies."<sup>308</sup> The most clearly linked area is trade remedy practices, which reflect a legalization of Chinese import-relief practices. Chinese law firms represent both the Chinese petitioner and the foreign companies in these cases. From 2003 to 2010, China implemented 122 anti-dumping measures and was the world's largest user of these policies, second to India.<sup>309</sup> Since 2010, although the number of anti-dumping measures initiated by China dropped, the country still remained one of the main users of these measures, along with India and Brazil.<sup>310</sup>

As Chinese law firms build expertise in this area, they increasingly represent Chinese companies and trade associations in foreign anti-dumping and

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306. Although China participated as a third party in many WTO cases during this period, the legal fees that the government paid were too low to provide sufficient incentives for the firms. Interview with Anonymous (June 9, 2014) (Interview #1) [hereinafter Interview #1] (on file with authors). According to a senior lawyer, the legal fees for law firms to represent China in third-party cases are only two-to-three hundred thousand RMB, around thirty to fifty thousand USD. *Id.* The only other case where China was a main party during this period—the 2004 *China-VAT on Integrated Circuits* case—failed to create significant revenue for the two Chinese law firms hired since China settled the case within four months and no WTO panel was formed. For a detailed discussion of this case, see Henry Gao, *Aggressive Legalism*, *supra* note 121, at 329–34. The government did not even hire a foreign law firm in that case. Interview #1, *supra*.

307. Other factors include Chinese patriotism ("it's good to help my country," noted one interviewee) and the career reputational opportunities for young ambitious lawyers with English proficiency and greater facility with common-law reasoning. Interview #5, *supra* note 224.

308. Guohua, *A Memoir*, *supra* note 43, at 11.

309. Wu, *Antidumping*, *supra* note 297, at 104.

310. See *Anti-Dumping Measures: By Reporting Member 01/01/1995-31/12/2015*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_MeasuresByRepMem.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf) (last visited Nov. 11, 2017).

other import-relief investigations as well.<sup>311</sup> They often work closely with MOFCOM and industry associations to help overcome collective action problems.<sup>312</sup> Often they work with foreign law firms, but sometimes they do the work alone.<sup>313</sup> Most notably, one of the leading practitioners, Mr. Pu Lingchen of Zhong Lun law firm, returned to Beijing after over twenty years in Brussels, where he had received a law degree at Free University of Brussels, interned for the European Commission, and practiced anti-dumping work with law firms from the U.S. and the U.K.<sup>314</sup> He often defends Chinese clients directly before E.U. administrative bodies in import-relief investigations.<sup>315</sup>

In addition, these law firms have been able to expand into other areas, such as foreign investment law and bilateral and plurilateral trade agreements.<sup>316</sup> For example, the professionals in China that work on Bilateral Investment Treaty (“BIT”) negotiations also work on trade matters, and they build from their trade experiences, exemplifying the interpenetration of these two fields in China.<sup>317</sup> Those in MOFCOM who work on the BIT negotiations come from the WTO department, and they work with outside Chinese law firms with significant experience in WTO disputes.<sup>318</sup> The government is harnessing these individuals’ knowledge to form public-private partnerships in the negotiation of bilateral investment agreements with the U.S., the E.U., and others.<sup>319</sup> If agreements are reached, these same law firms hope to work on investor-state cases under the resulting rules.<sup>320</sup> As one lawyer noted, “these law firms can help with the drafting of BIT language because they understand how judicial interpretation works before an international tribunal.”<sup>321</sup>

Overall, the increased number of WTO cases involving China has generated sufficient work for these five firms to create specialized WTO law practices.<sup>322</sup> As one leading Chinese lawyer on WTO matters told us, “I spend

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311. One practitioner noted that the firm had represented Chinese firms in anti-dumping proceedings in the U.S., E.U., Argentina, Brazil, Egypt, India, Mexico, South Africa, and Turkey. Interview with Anonymous (July 26, 2016) (Interview #30) (on file with authors).

312. Interview #7, *supra* note 183.

313. Interview #1, *supra* note 306.

314. Interview #9, *supra* note 288.

315. Similarly, another Chinese attorney told us he was about to go to India for an optical company to represent it in an anti-dumping case there. Interview #5, *supra* note 224.

316. Interview with Anonymous (July 27, 2016) (Interview #35) [hereinafter Interview #35] (on file with authors).

317. Interview with Anonymous (July 23, 2016) (Interview #27) [hereinafter Interview #27] (on file with authors).

318. Interview #5, *supra* note 224; Interview #27, *supra* note 317; Interview with Anonymous (July 25, 2016) (Interview #29) [hereinafter Interview #29] (on file with authors).

319. Interview #29, *supra* note 318.

320. Interview #27, *supra* note 317.

321. Interview #29, *supra* note 318. From its international trade law experience, some Chinese trade specialists believe that China could look favorably on an appellate process for investor-state dispute settlement. *Id.* As one interviewee noted, in NAFTA investor-state dispute settlement, the U.S. has never lost before ad hoc panels, and in the WTO context, China has often fared better on U.S. import relief measures before the Appellate Body than before ad hoc panels. Interview #27, *supra* note 317. In short, it appears that the U.S. would prefer a less court-like process for investment disputes than would China. *Id.*

322. Interview #2, *supra* note 160.

eighty percent of my time on WTO cases.”<sup>323</sup> The firms employ five to ten lawyers, complemented by four to five interns, to work on trade law matters.<sup>324</sup>

### C. Procedure of a Typical Case

The WTO dispute settlement process combines lawyering and diplomacy at two levels: the domestic and the international. When asked what is the greatest challenge that Chinese officials face regarding WTO dispute settlement, a high-level official responded that it is managing “Chinese nationalism.”<sup>325</sup> In a subsequent discussion, that same official emphasized the broader importance of the WTO globally to “maintain peace and prosperity.”<sup>326</sup> In an economically interdependent world, these domestic and international diplomatic tasks mesh, facilitating trans-national legal ordering.

Parties use WTO law to press countries to settle disputes under the threat of litigation.<sup>327</sup> Even after a formal WTO legal ruling, they also negotiate over what action suffices to resolve the dispute.<sup>328</sup> The WTO dispute settlement process, as a result, is never purely legal, but always combines law and diplomacy.

The formal process starts with consultations.<sup>329</sup> In practice, the consultations typically involve lawyers who use them to gather information to help prepare a case or defense.<sup>330</sup> MOFCOM thus involves lawyers from the very beginning. Once MOFCOM determines that a WTO complaint will be litigated,<sup>331</sup> it starts the process of selecting outside law firms by asking firms to submit bids. In formulating their bid, the firm provides, along with its fee schedule, a twenty-to-fifty page memorandum analyzing the legal issues.<sup>332</sup> In deciding who to select, MOFCOM considers both the quality of the memorandum and the fees.<sup>333</sup>

For WTO complaints that do not proceed to litigation before a panel, the government hires only Chinese law firms.<sup>334</sup> It, likewise, hires only Chinese law firms when China is only a third party before a WTO panel, except in rare

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323. *Id.*

324. Interview #5, *supra* note 224.

325. Interview #19, *supra* note 120 (including both WTO and work on bilateral and plurilateral trade agreements).

326. Interview with Anonymous (June 10, 2014) (Interview #18) [hereinafter Interview #18] (on file with authors).

327. Interview with Anonymous (June 13, 2014) (Interview #14) [hereinafter Interview #14] (on file with authors).

328. Interview #18, *supra* note 326.

329. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 6.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

330. *Id.*

331. Under the WTO’s “negative consensus” rule a panel will be formed unless all WTO Members (including the complainant) agree that it not be. *See id.* art. 6.1.

332. Interview #2, *supra* note 160; Interview #35, *supra* note 316.

333. One participating lawyer stressed, “the government picks on the strength of the analysis, not just on the price.” Interview #2, *supra* note 160.

334. Interview #1, *supra* note 306.

cases involving systemic issues.<sup>335</sup> Even in cases where it is a third party, however, the government may be quite demanding; to submit a bid to represent China in such cases, a Chinese law firm may again write up to thirty to fifty pages of legal analysis.<sup>336</sup> The government's actual third-party submissions, in turn, can fall within that range.<sup>337</sup> The case *EU-Antidumping Measures on Biodiesel* brought by Argentina, for example, was of systemic importance because it involved the use of surrogate prices from third countries in anti-dumping calculations.<sup>338</sup> This practice can favor the finding of dumping and, where dumping is found, inflate anti-dumping margins.<sup>339</sup> It is often used against Chinese imports.<sup>340</sup> China submitted a fifty-page submission in support of Argentina's arguments.<sup>341</sup> Because of the case's systemic importance, the government hired a U.S. law firm (Sidley Austin) and a Chinese law firm (Zhong Lun) for the third-party submission and the WTO hearings.<sup>342</sup> Argentina won the case, establishing precedent to China's benefit.<sup>343</sup>

In contrast, if a case is argued before a panel where China is a party, MOFCOM has always hired a foreign law firm together with a Chinese law firm, with each selected in a separate bidding process.<sup>344</sup> The first thirteen WTO cases China filed were all against the U.S. (nine cases) or the E.U. (four cases).<sup>345</sup> In these cases, MOFCOM used American and European law firms because they better understand the trade laws and practices in their home jurisdictions.<sup>346</sup>

When WTO members bring complaints against China,<sup>347</sup> China also relies primarily on foreign counsel for its defense because of their greater familiarity with WTO jurisprudence and courtroom advocacy.<sup>348</sup> The foreign law firm takes primary responsibility for the legal analysis while the Chinese firm assists primarily with the factual presentation of the relevant Chinese measures.<sup>349</sup> A Chinese lawyer quipped, "the Chinese law firm collects the in-

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335. Interview #21, *supra* note 125.

336. Interview #35, *supra* note 316.

337. *Id.*

338. *Id.*

339. Wu, *Antidumping*, *supra* note 297, at 12.

340. *Id.* at 25.

341. Interview #35, *supra* note 316.

342. *Id.*

343. The case is of systemic importance for China because Article 15 of China's Accession Protocol permitted countries to use third-country cost data in place of prices in China for anti-dumping determinations based on China's nonmarket economy status, but the relevant provision expired in December 2016. *See infra* note 548. The U.S. was also a third party in the case and not surprisingly supported the E.U.'s position; Argentina prevailed before the panel and the Appellate Body. *See Appellate Body Report, EU-Antidumping Measures on Biodiesel from Argentina*, WTO Doc. WT/DS473/R (Oct. 26, 2016).

344. Interview #21, *supra* note 125.

345. Interview #35, *supra* note 316.

346. As explained by a senior MOFCOM official, "we hire Washington DC lawyers in cases against the U.S. and Brussels lawyers in cases against the E.U." Interview #22, *supra* note 300.

347. Only the U.S., the E.U., Canada, Mexico, Guatemala, and Japan had filed complaints against China as of November 2017. *See Disputes by Member*, *supra* note 65.

348. Interview #2, *supra* note 160.

349. Interview #5, *supra* note 224.

gredients, while the foreign law firm cooks them into a dish.”<sup>350</sup> The foreign law firms can (and often do) hire and pay higher salaries to employ Chinese lawyers to do this analysis in parallel, but the government insists that a Chinese law firm be included.<sup>351</sup> In the process, the foreign law firms grant the Chinese lawyers access to their WTO databases and the WTO submissions that they used in previous cases.<sup>352</sup> From this experience, Chinese lawyers learn significant legal skills involved in building and defending WTO cases.<sup>353</sup> Although the foreign law firms draft China’s submissions, the Chinese law firms can assist and comment on them.<sup>354</sup> For example, in the *China-IPR* case, the U.S. challenged the Chinese threshold for criminal prosecution as too high.<sup>355</sup> The Chinese lawyers helped gather information about how Chinese cases operate in practice so that the panel could see the issue in broader context, and the panel found that the U.S. failed to make a *prima facie* case.<sup>356</sup>

To help them understand the Chinese measures at issue, the foreign law firms sometimes request meetings with the relevant government agencies responsible for the measure, which MOFCOM helps to arrange and coordinate.<sup>357</sup> Initially, many ministry officials were annoyed by the meetings and regarded the foreign law firms as troublemakers. After MOFCOM explained to them that the meetings helped the law firms better understand and defend the Chinese measures before the WTO, however, ministry officials softened their attitude and became more welcoming. In the *China-IPR* case, for example, lawyers met with the Ministry of Public Security, as well as the Supreme People’s Court because the U.S. challenge raised issues of judicial interpretation of Chinese law and judicial practice.<sup>358</sup>

For the panel hearings in Geneva, MOFCOM typically sends the largest delegations of any WTO Member.<sup>359</sup> The Chinese delegation includes MOFCOM officials, lawyers from both foreign and domestic law firms, representatives from the relevant ministries, and possibly also industry association representatives and academics.<sup>360</sup> Unlike some WTO Members such as Japan, which always keep the private lawyers outside of the panel hearing room, MOFCOM had no reservations about bringing the foreign lawyers into the hearing and having them make China’s oral arguments and answer the panel’s questions.<sup>361</sup>

Although foreign lawyers generally handle the oral proceedings, Chinese lawyers and officials inform us that, more recently, the Chinese lawyers have

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350. *Transcript of the High-Level Forum on Litigating in the WTO*, in *LITIGATING IN THE WTO*, 174 (Yang Guohua & Shi Xiaoli eds., 2015) (translated into English by the authors).

351. Interview #5, *supra* note 224.

352. Interview #2, *supra* note 160.

353. Interview #5, *supra* note 224.

354. Interview #2, *supra* note 160.

355. *Id.*

356. *Id.*; Interview #27, *supra* note 317.

357. Interview #2, *supra* note 160.

358. *Id.*

359. Interview #6, *supra* note 264.

360. Interview #2, *supra* note 160.

361. Interview #1, *supra* note 306.

contributed to a greater extent.<sup>362</sup> MOFCOM officials refer to the increased substantive role of Chinese lawyers in stages.<sup>363</sup> The “first stage” was for Chinese lawyers to learn about the process, while the “second” was for them to engage more substantively.<sup>364</sup> In 2014, in the case *China-Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes* (“HP-SSST”), a Chinese lawyer made the oral argument on an important factual issue in the panel hearing.<sup>365</sup> Both the foreign lawyers and MOFCOM officials who were at the hearing praised his performance.<sup>366</sup>

Chinese officials and lawyers talk about a potential “third stage” in which Chinese firms become solely responsible for China’s WTO cases.<sup>367</sup> In the 2012 case of *US-Antidumping Measures on Shrimp and Diamond Sawblades from China*, a Chinese law firm assumed the role of lead counsel, but the U.S. did not defend itself because the case involved Appellate Body precedent that the U.S. no longer challenged.<sup>368</sup> It may be just a matter of time. In any case, lawyers in China have gained substantial expertise to advise the Chinese government and companies on trade law matters.

#### VII. CHINESE COMPANIES’ AND TRADE ASSOCIATIONS’ ENGAGEMENT WITH TRADE LAW

Thirty years ago, most Chinese companies were not only state owned, they were arms of Chinese ministries and local governments.<sup>369</sup> Today, state-owned enterprises have become corporatized, and many have shares listed on stock exchanges.<sup>370</sup> Although private companies now represent around 54% of the country’s GDP, the larger ones all have Communist Party representatives and committees within them, designed to exercise oversight.<sup>371</sup> Chinese companies are thus generally much more deferential to state officials than their

362. Interview #5, *supra* note 224.

363. Interview #1, *supra* note 306.

364. *Id.* One Chinese lawyer stated that, while the other party read its oral statement, he left the hearing along with the foreign lawyer hired by China to exchange opinions on legal issues. Li Fayin, *Dui WTO Zhengduan Jiejue Jizhi de Yixie Suigan [Random Thoughts on the WTO Dispute Settlement System]*, in WOMEN ZAI WTO DA GUANSI [LITIGATING IN THE WTO] 75 (Yang Guohua & Shi Xiaoli eds., 2015).

365. Peng Jun, *Zhongguo Lushi Shouci WTO Tingbian Ji [First Oral Debate by Chinese Lawyer in a WTO Proceeding]*, in WOMEN ZAI WTO DA GUANSI [LITIGATING IN THE WTO] 65–68 (Yang Guohua & Shi Xiaoli eds., 2015).

366. The lawyer noted, however, that arguing factual issues before a panel is much less challenging than arguing legal ones before the Appellate Body. Interview #5, *supra* note 224.

367. Interview #1, *supra* note 306; Interview #5, *supra* note 224.

368. The case regarded the U.S. practice of “zeroing” in anti-dumping calculations during a period in which the U.S. was revising its regulations to comply with earlier Appellate Body rulings. Interview #27, *supra* note 317.

369. See Curtis Milhaupt & Wentong Zheng, *Reforming China’s State-Owned Enterprises: Institutions, Not Ownership*, in REGULATING THE VISIBLE HAND 175, 181 (Liebman & Milhaupt eds., 2015).

370. *Id.* at 182, 205 n.3 (“[C]orporatization refers to the process of transforming SOEs from units of government into legally distinct corporate actors with ownership interest represented by shares, a board of directors, and other accouterments of the corporate form.”).

371. RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST LEADERS* 72 (2010); Mark Wu, *The WTO and China’s Unique Economic Structure*, in REGULATING THE VISIBLE HAND 313, 330–31 (Liebman & Milhaupt eds., 2015) [hereinafter Wu, *The WTO and China’s Unique Economic Structure*].



U.S. and European counterparts.<sup>372</sup> Many private Chinese companies find that government officials are difficult to approach.<sup>373</sup> They, thus, have not developed a habit of hiring law firms to lobby and work with the government on trade disputes, and they have been further reluctant on account of the firms' fees. In anti-dumping cases, many Chinese companies, in addition, face collective action problems to organize and defend themselves.

The 2000s showed signs of change, as large Chinese companies and independent trade associations became more willing to hire trade lawyers and to defend their interests as partners with the government. First, larger Chinese companies increasingly hired in-house counsel, and many hired trade lawyers.<sup>374</sup> Second, some small- and medium-sized companies created industry associations independent of the Chinese state to work with private law firms on foreign and domestic anti-dumping investigations that eventually can (and did) lead to WTO cases.<sup>375</sup> Both initiatives represent major changes in China and reflect a relative turn of Chinese companies to engage trade lawyers, thus supporting transnational legal ordering.

#### A. *Chinese Companies and International Trade Law*

Before China's accession to the WTO, Chinese companies also faced significant trade barriers abroad.<sup>376</sup> Most of them chose to abandon the foreign market rather than fight in a foreign legal procedure.<sup>377</sup> Following China's accession, in order to help Chinese companies understand and benefit from WTO rules, the government launched extensive education campaigns, which were conducted by WTO Centers established around the country.<sup>378</sup> It was a paternalistic endeavor. For example, in July 2001, the Shanghai WTO Center launched the "50/100 Senior WTO Affairs Experts Training Project."<sup>379</sup> Under it, the center selected one hundred participants from fifty organizations, including government departments, state-owned enterprises, professional service organizations, and government-formed industry associations.<sup>380</sup> The program lasted one year and was in three parts.<sup>381</sup> Phase One provided a three-month

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372. Milhaupt and Zheng contended that "state capitalism as practiced in China today is largely synonymous with state capture. . . . Large firms in China—whether SOEs, privately owned enterprises (POEs), or ambiguous mixtures of state and private ownership—survive and prosper precisely *because* they have fostered connections to state power." Milhaupt & Zheng, *supra* note 369, at 175, 181.

373. *See generally* SCOTT KENNEDY, *THE BUSINESS OF LOBBYING IN CHINA* 53 (2005).

374. *Id.* at 46.

375. *Id.* at 84.

376. OFFICE OF THE U.S. TRADE REPRESENTATIVE, *NTE CHINA* (2013), <https://ustr.gov/sites/default/files/2013%20NTE%20China%20Final.pdf>.

377. *See id.*

378. *See id.*

379. *Jiemi Shanghai Dazao WTO Rencai [Decoding how Shanghai Train WTO Experts]*, BEIJING QINGNIAN BAO [BEIJING YOUTH DAILY] (Sept. 10, 2001).

380. Gong Baihua, *Shanghai's WTO Affairs Consultation Center: Working Together to Take Advantage of WTO Membership*, WORLD TRADE ORG., [https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case11\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case11_e.htm) (last visited Nov. 11, 2017).

381. *Id.*

introductory course,<sup>382</sup> and Phase Two provided a three-month course on more advanced topics.<sup>383</sup> Phase Three offered an overseas internship for participants to work in the U.S., the E.U., Japan, and other countries.<sup>384</sup> The government launched the project with great fanfare and the response was overwhelming; the first morning after the announcement, the Shanghai WTO Center received more applications than places available.<sup>385</sup> Hundreds of these programs mushroomed around the country, and the WTO centers trained thousands of Chinese officials and other stakeholders.

Larger Chinese companies independently saw the need to develop WTO knowledge from their experience with foreign anti-dumping and other measures, and built in-house expertise.<sup>386</sup> Since import-relief investigations often target Chinese companies, the companies hire specialized employees to respond to them.<sup>387</sup> Baosteel, one of the largest steel manufacturers in China, has an anti-dumping task force that coordinates over 110 people from twenty-two internal departments.<sup>388</sup> Combining internal expertise with assistance from external legal counsel, Baosteel learned to defend itself successfully in anti-dumping investigations.<sup>389</sup> In the WTO case *China-Certain Measures Affecting Electronic Payment Services*, the banking association China UnionPay directly hired a Chinese law firm that MOFCOM included in its WTO delegation, together with the Chinese law firm that MOFCOM hired separately.<sup>390</sup>

Larger Chinese companies have built internal legal expertise on many trade-related issues, including intellectual property, import relief, customs, trade facilitation, and investment law.<sup>391</sup> For example, the Chinese technology giant Huawei has over one hundred in-house counsel.<sup>392</sup> In 2013, Huawei hired international trade lawyer James Lockett as its Vice-President and Head of Trade Facilitation and Market Access.<sup>393</sup> Before he joined Huawei, Lockett

382. The subjects included: the WTO and China in economic globalization; WTO and regional economic cooperation; WTO and special and differential treatment for developing countries; the basic principles, legal framework, and organizational structure of the WTO; the transparency principle and the shifting of government functions; the non-discrimination principle and the establishment of fair market practices; the WTO dispute settlement system; and the WTO trade policy review mechanism. *Id.*

383. The topics included: the GATT and specialized agreements; the GATS and specialized agreements; the TRIPS Agreement; and the Doha Round Agenda. *Id.*

384. *Id.*

385. Luo Xinyu, *Shanghai wei Rushi Zaozuo Zhunbei, Jiajin Peiyang WTO Gaoji Rencai [Shanghai Prepares Early for the WTO Accession by Training WTO Senior Experts]*, XIN LANG [SINA], (Oct. 6, 2001), <http://news.sina.com.cn/c/2001-10-06/371065.html>.

386. Interview #9, *supra* note 288; Wendy Zeldin, *World Trade Organization: Panel Rules in China's Favor on Anti-Dumping Complaint Involving Fasteners*, GLOBAL LEGAL MONITOR (Dec. 16, 2010), <http://www.loc.gov/law/foreign-news/article/world-trade-organization-panel-rules-in-chinas-favor-on-anti-dumping-complaint-involving-fasteners/>.

387. Interview #32, *supra* note 111.

388. *Shanghai Baogang de Gushi—Jiaru WTO Zhihou Zhongguo Qiye Yingdui Fanqingxiao de Celu [The Story of Shanghai Baosteel: Strategies for Chinese Firms in Dealing with Antidumping Cases Post WTO Accession]*, ZHONGGUO JINJI SHIBAO [CHINA ECON. TIMES] (Mar. 1, 2002), <http://news.mysteel.com/02/0301/00/2E7D37E77673E1CD.html>.

389. *Id.*

390. Interview #5, *supra* note 224; Interview #6, *supra* note 264; Interview #29, *supra* note 318.

391. Interview #9, *supra* note 288.

392. *Id.*

393. See LOCKETT INT'L, <http://www.lockett-intl.com/> (last visited Nov. 11, 2017).

had worked for the U.S. Department of Commerce, served as the Chairman of the American Chamber of Commerce in Brussels, and had been a lawyer for U.S. law firms in Brussels and Vietnam.<sup>394</sup> He was thus highly familiar with U.S. and E.U. regulatory systems. His hiring indicates that leading Chinese companies like Huawei are looking beyond their defensive interests in foreign trade remedies cases and increasingly lobby proactively to open foreign markets.

During our discussion, Lockett maintained that Huawei plays an important role in developing international standards on telecommunication equipment and reducing tariffs in information technology product.<sup>395</sup> For example, Huawei lobbied for the expansion of the WTO Information Technology Agreement (“ITA”) to include Latin American countries such as Brazil and Mexico,<sup>396</sup> and its position on the ITA publicly differed from that of the Chinese government.<sup>397</sup> Huawei’s taking such a public position exhibits a growth in confidence of a large firm to advance its views before state officials.<sup>398</sup>

Building in-house trade law expertise takes time and resources that most Chinese small- and medium-sized enterprises cannot afford. To encourage more Chinese companies to bring their problems to the government, MOFCOM introduced a Foreign Trade Barrier Investigation mechanism in 2002, which was modeled after U.S. Section 301 legislation and the E.U.’s Trade Barrier Regulation.<sup>399</sup> The mechanism allows private companies to petition MOFCOM to launch an investigation and take necessary action when the companies encounter foreign trade barriers, whether through bilateral consultation or WTO litigation.<sup>400</sup> The government introduced the mechanism with great fanfare.<sup>401</sup> Companies, however, only formally invoked it in two cases in the first twelve years—the first involving a 2004 investigation regarding Japanese import quotas on laver (seaweed) that was successfully settled, and the second regarding U.S. subsidies in the renewable-energy sector initiated in 2012.<sup>402</sup> As Gao argues, a main reason Chinese private companies do not use it is that, traditionally, they have lacked access to the government.<sup>403</sup> Thus, when

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394. *About James*, LOCKETT INT’L, [http://www.lockett-intl.com/about\\_james](http://www.lockett-intl.com/about_james) (last visited Nov. 11, 2017).

395. Interview #14, *supra* note 327.

396. *Huawei Urges Brazil, Mexico to Sign IT Trade Agreement*, LATIN AM. HERALD TRIB., <http://www.laht.com/article.asp?ArticleId=1903450&CategoryId=13936> (last visited Nov. 11, 2017). The ITA was concluded at the WTO’s Tenth Ministerial Conference on December 16, 2015. *Id.*

397. *Id.*

398. Cf. Shannon Tiezzi, *China, US Clash Kills IT Trade Agreement: The Collapse of the ITA Signifies Why One Shouldn’t Be Optimistic About Broader US-China Cooperation on Trade Issues*, DIPLOMAT (Nov. 26, 2013, 11:42 AM), <http://thediplomat.com/2013/11/china-u-s-clash-kills-it-trade-agreement/>; William Mauldin & Natalia Drozdiak, *WTO Countries Clinch Deal to End Tariffs on Many High-Tech Goods*, WALL STREET J. (July 24, 2015), <http://www.wsj.com/articles/wto-countries-clinch-deal-to-end-tariffs-on-many-high-tech-goods-1437710461>.

399. For a detailed discussion of the mechanism, see Henry S. Gao, *Taking Justice into Your Own Hand: The Trade Barrier Investigation Mechanism in China*, 44 J. WORLD TRADE 633, 651 (2010).

400. *Id.* at 638–42.

401. Henry S. Gao, *Public-Private Partnership: The Chinese Dilemma*, 48 J. WORLD TRADE 983, 985 (2014).

402. *Id.*

403. Gao, *Taking Justice*, *supra* note 399, at 649.

they encountered trade barriers, they preferred to resolve the problem by shifting their exports elsewhere or by switching to other products.<sup>404</sup>

Because the formal Foreign Trade Barrier Investigation mechanism was rarely used, MOFCOM introduced an informal alternative around 2005.<sup>405</sup> This new approach—nicknamed the “Quadrilateral Coordination” mechanism— involves the cooperation of four parties: the central government, local government, industry association, and individual companies.<sup>406</sup> Under it, industry associations play a key role as the bridge between private companies and the government, thus resolving private companies’ concerns about access.<sup>407</sup> But to act effectively, industry associations would have to enhance their trade law capacity and their independence.

### B. *Chinese Industry Associations and International Trade Law*

Historically, industry associations have not been independent of the government in China. Rather, they were established by and affiliated with functional Ministries in particular domains, which were separate from MOFTEC (MOFCOM’s predecessor). These associations more-over had no expertise on foreign trade issues. To address this problem, MOFTEC, in the late 1980s, created seven trade associations for importers and exporters of products, divided into broadly defined sectors.<sup>408</sup>

Although these trade associations have closer links with MOFCOM, they still are ineffective in assisting most Chinese companies for multiple reasons. First, their scope of coverage is extremely broad, so that companies within the trade associations do not share the same concerns. To address a problem involving a specific product, a company must work through many levels of bureaucracy within the trade association.<sup>409</sup> Second, these associations are typically based in Beijing and do not have branch offices in the provinces. Companies facing trade remedies cases are often located in distant provinces like Guangdong, Fujian, and Zhejiang, and they are not engaged with these trade associations.<sup>410</sup>

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404. *Id.* at 649–50.

405. Gao, *Public-Private Partnership*, *supra* note 401, at 986–87.

406. For a detailed discussion of the mechanism, see *id.* at 986–89.

407. *Id.* at 986–88.

408. *Id.* (“They are: China Chamber of Commerce for Import and Export of Textiles and Apparel (CCCT), China Chamber of Commerce for Import and Export of Light Industrial Products and Arts-Crafts (CCCLA), China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters (CCCMC), China Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME), China Chamber of Commerce of Foodstuffs and Native Produce (CFNA), China Chamber of Commerce for Import & Export of Medicines & Health Products (CCCMHPIE), and China International Contractors Association (CHINCA).”).

409. To give an example, steel fasteners, along with many other products such as ball bearings and chains, are under the jurisdiction of the Machinery Components Branch, which is one of twelve different branches under the Department of Machinery Industry, which, in turn, is one of three departments in the China Chamber of Commerce for Import and Export of Machinery and Electronic Products (“CCCME”). *Id.* at 997–98.

410. *Id.* at 998.

Third, since the associations target trading firms, their memberships are typically limited to companies granted foreign trading rights by the government. Until the revision of the Foreign Trade Law in 2004, MOFCOM granted trading rights only after careful examination and subject to particular criteria. The high procedural threshold effectively limited trading rights as a privilege for state-owned enterprises and large companies. Because most small- and medium-sized companies did not enjoy trading rights, they could not join the associations.

Fourth, these trade associations are established by the government, and not by the companies themselves. They tend to be rather bureaucratic and irresponsible to the companies' needs and demands. Many companies rarely turn to the trade associations for help since the companies view them as associations that govern them, rather than serve them.<sup>411</sup> As one lawyer told us, "the trade association is a second government. . . . This is central planning."<sup>412</sup> The lawyer suggested that the formation of independent trade associations will finally signal that China has become a market economy.<sup>413</sup>

In the last decade, more independent industry associations have emerged, which represents a significant development in China resulting from its integration in the global economy.<sup>414</sup> These private associations respond better to company interests.<sup>415</sup> First, their scope of coverage is very narrow and tends to cover just a single product or several closely related products. For example, there are associations for fasteners, for parasols, and for cigarette lighters. Such a high degree of product specialization facilitates their ability to identify specific trade measures affecting the industry, such as anti-dumping investigations. Second, the new industry associations are located in the cities and counties where the industry operates, as in provinces such as Zhejiang and Guangdong. Third, these local associations accept both exporters and manufacturers as members and are more representative of the interests of the industry as a whole. Fourth, because these industry associations are formed on the companies' own initiatives, they are more responsive to the companies' needs and demands, and the companies are more comfortable approaching them when the companies encounter trade barriers.<sup>416</sup>

To help their members address trade barriers, the private industry associations hire personnel with trade law expertise, train existing staff, and work with government trade departments and private law firms in individual cases. The E.U.'s 2007 anti-dumping investigation of Chinese iron and steel fastener imports illustrates the proactive role that local industry associations can play. In that case, the Jiaying Fasteners Export and Import Industry Association

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411. *Id.* at 986.

412. Interview #3, *supra* note 159; *see also* Milhaupt & Zheng, *supra* note 369, at 196 ("The industrial associations actively supervise the operations of firms in their respective industries and have retained much, if not all, of the power exercised by their state predecessors.").

413. Interview #3, *supra* note 159.

414. PETER NOLAN, CHINA AND THE GLOBAL ECONOMY 54 (2001).

415. Gao, *Public-Private Partnership*, *supra* note 401, at 993–1003.

416. *Id.*

helped fight the E.U. investigation at every step of the process. It helped complete the E.U. questionnaires and worked with lawyers to challenge the E.U. measures before E.U. courts, a WTO panel, and the Appellate Body.<sup>417</sup>

The association engaged in extensive lobbying efforts. Its representatives went to Brussels to meet with Commission officials and work with other stakeholders, such as European importers, distributors, and downstream industries, to lobby against the E.U. investigation. After the Commission imposed anti-dumping duties, the association pressed MOFCOM to initiate an anti-dumping investigation against E.U. producers as retaliation and to file a WTO complaint that led to the Appellate Body ruling against the European Union. It also convinced the government to challenge the E.U.'s compliance with the Appellate Body's findings.<sup>418</sup>

This arrangement involved public-private coordination comprised of the central government, local government, industry association, individual companies, and private lawyers.<sup>419</sup> As one Chinese lawyer told us, he learned how U.S. trade associations operate when he worked in Washington D.C. with a U.S. law firm.<sup>420</sup> Now, in China, he advises his clients to form industry-developed coalitions with a secretariat to defend themselves against foreign anti-dumping proceedings.<sup>421</sup> Such arrangements once more represent learning from U.S. practice.

In addition to assisting companies in individual cases, new industry associations provide other trade-related services, such as the creation of Foreign Trade Pre-Warning Centers.<sup>422</sup> These Centers monitor trade data in a particular sector and alert companies when they identify risks of impending trade barriers. First pioneered in Zhejiang Province, more than 100 pre-warning centers sprouted around the province by late 2011. "Linking more than 6,000 [companies] in sectors ranging from textiles and clothing, to steel, consumer electronics, and agricultural products, the centers cover every major regional economic block in the province."<sup>423</sup> "On average, every center has two full-time staff."<sup>424</sup> "They distribute pre-warning information to [companies] through newsletters, websites, bulk text message broadcasts, and instant messaging programs."<sup>425</sup> In 2010, the centers in Zhejiang sent more than half a million pre-warning messages through websites and text messages. Based on the experience in Zhejiang, associations in other provinces established similar pre-warning centers.<sup>426</sup>

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417. *Id.*

418. *Id.* at 995–96.

419. *Id.* at 986–87.

420. Interview #7, *supra* note 183.

421. *Id.* (stating that Taiwanese and Chinese associations often are small and medium-sized companies that produce consumer items, such as footwear and bedroom furniture).

422. Gao, *Public-Private Partnership*, *supra* note 401, at 1002–03.

423. *Id.* at 1003.

424. *Id.*

425. *Id.*

426. *Id.*

It remains a much greater challenge to form independent industry associations in China than in the U.S. or Europe. A Chinese lawyer who earlier worked for a law firm in the U.S. noted three particular challenges.<sup>427</sup> First, he found that “the mentality in China” differs because the firms are so focused on competing against each other in foreign markets they have trouble cooperating in foreign anti-dumping investigations. Second, the firms now lack faith that WTO law can help them gain real market access following a WTO case. Third, creating *ad hoc* coalitions is much more difficult in China because they invite closer scrutiny by the Chinese government. There is thus less of a bottom-up push from Chinese industries to organize collectively, hire lawyers, bring matters to MOFCOM, and challenge foreign measures.<sup>428</sup> Nonetheless, the development of independent industry associations for trade matters represents a significant development in China, constituting both an offshoot of, and further conduit for, transnational legal ordering.

## VII. THE IMPLICATIONS FOR CHINA AND THE INTERNATIONAL TRADE LEGAL ORDER

### A. *The Implications within China*

Bringing China into the WTO was more than just about opening China’s markets and foreign markets to Chinese goods. It involved processes of transnational legal ordering that have broader implications for government institutions, the role of markets, the development of professions, and normative frames in which government accountability is assessed.<sup>429</sup> It involved internal Chinese contests over the direction of China’s economic policy conducted within the context of an international legal regime.<sup>430</sup> Some even view the WTO in quasi-constitutional terms regarding its impact on Chinese public law. As Tom Ginsburg noted: “The WTO became, in essence, an amendment to the Chinese constitution. Internal forces wished to ‘lock in’ commitments before they could be whittled away at the local level, and third-party monitoring, locked in by international agreements, provided the mechanism.”<sup>431</sup> The WTO,

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427. Interview #7, *supra* note 183.

428. *Id.*

429. Shaffer, *WTO Shapes Regulatory Governance*, *supra* note 24, at 5.

430. As Mark Wu wrote, “[e]conomic reformers, led by Premier Zhu, utilized the WTO accession process to push their agendas. WTO commitments served as a means to lock in desired reforms of China’s economic structure.” Wu, *The WTO and China’s Unique Economic Structure*, *supra* note 371, at 313, 344–45; see also STEINFELD, *PLAYING OUR GAME*, *supra* note 2, at 29 (explaining that, ultimately, Zhu Ronji “used the WTO accession agreement as a lever to downsize the state bureaucracy and drive out ministerial resistance to reform. Tying China to external rules served the production needs of export processors. It also served the political needs of a reformist premier”); ZEMIN, *supra* note 144, at 454 (“The accession to the WTO demands major changes in the ways the economy is managed by our governments at all levels. We shall further adjust and improve our modus operandi and legal system to meet the demands of the socialist market economy in accordance with the general rules of the market economy.”) (quoting from President Jiang Zemin’s speech he gave at the WTO Seminar for Provincial-level Officials on Feb. 25, 2002).

431. Tom Ginsburg, *The Judicialization of Administrative Governance: Causes, Consequences and Limits*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA 10* (Tom Ginsburg & Albert H.Y. Chen eds., 2009). One Chinese academic went so far as to affirm

in other words, was more than just about international law and compliance with it; it was about transnational legal ordering.

The Chinese government significantly invested in developing trade law expertise at the central and provincial levels.<sup>432</sup> It took complementary initiatives to foster the development of trade-related legal capacity in academia, private law firms, companies, and trade associations.<sup>433</sup> What started as top-down government paternalism, over time, turned organically toward partnerships, as the government increasingly relied on these actors to defend its view of China's interests.<sup>434</sup> In the process, these actors pursued their own career and business interests and worked with the government where their interests coincided.<sup>435</sup> As in the U.S., many government officials were tempted to leave for more lucrative careers in the private sector and developed trade law practices within companies and law firms.<sup>436</sup> These professionals were transnationally connected and their social capital depended on such transnational knowledge and connections.<sup>437</sup>

As with any country, there are divisions within China about how to approach WTO law and litigation.<sup>438</sup> There are those who see the WTO as a force for liberalization and the rule of law in China's domestic governance, and others who see WTO law and litigation as a force that must be contained for China to pursue its development goals through state planning.<sup>439</sup> These divisions are reflected in struggles "between pro-trade departments such as MOFCOM and more conservative ministries . . ." <sup>440</sup> The divisions explain why MOFCOM has those ministries' officials involved in WTO hearings—because it believes their participation will help facilitate eventual acceptance and com-

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I was optimistic about China's joining the WTO . . . and the impact of legal reasoning [from engaging with the WTO]—that once the skill was mastered it would teach people to be rational, and once rational, they would manage their rights and obligations, . . . and this is the beginning of the rule of law.

Interview #28, *supra* note 192.

432. Hsieh, *supra* note 102, at 1000–14.

433. *Id.* at 1005.

434. *Id.* at 1028.

435. STEINFELD, *PLAYING OUR GAME*, *supra* note 2, at 31.

436. Interview #19, *supra* note 120; cf. SHAFFER, *DEFENDING INTERESTS*, *supra* note 103; Interview with Anonymous (July 24, 2016) (Interview #38) (on file with authors). The government's WTO and international trade departments face continuity challenges since officials often rotate out of WTO work into different government positions after they develop WTO expertise—a challenge common to many countries.

437. As Steinfeld wrote:

In a pattern that would spread across government, academia, and industry, the senior management team, so to speak, would increasingly be drawn from people who had been trained abroad, often in the United States. These individuals not only spoke English, but they spoke and fully absorbed the language of modern market systems. They valued such systems, realized professional status from prior experience in those systems, and saw as their personal mission the fostering of China's modernization through adoption of those systems.

STEINFELD, *PLAYING OUR GAME*, *supra* note 2, at 31.

438. As an E.U. official stated, "There is no one China. It's not one country," noting that central agencies vary, as do provincial and local governments. Interview with Anonymous (July 30, 2017) (Interview #36) [hereinafter Interview #36] (on file with authors).

439. Interview #29, *supra* note 318.

440. Zhang & Li, *supra* note 68, at 158. One practitioner stated, "MOFCOM always stands on the liberal side." Interview #29, *supra* note 318.



pliance with WTO rulings.<sup>441</sup> In engaging in capacity-building efforts, MOFCOM simultaneously engages in constituency building.<sup>442</sup>

MOFCOM is the key intermediary between the WTO and national ministries engaged in domestic policy.<sup>443</sup> Its WTO departments are the “watch dogs” for China’s compliance.<sup>444</sup> A routine part of MOFCOM’s work, in the words of a former Deputy Director-General of its Treaty and Law Department, is “to check the WTO consistencies of the draft documents from both the other departments of MOFCOM and different ministries . . . . Normally my colleagues and I would send back our feedbacks to the drafters and meetings would be held when necessary.”<sup>445</sup> MOFCOM’s authority is thus critical for China’s implementation of WTO law and, more deeply, for the permeation of WTO legal norms in the mentalities and practices of Chinese government officials and private actors.

MOFCOM’s handling of WTO cases helped it build a professional reputation among China’s ministries and thus enhanced its relative authority in inter-ministerial discussions.<sup>446</sup> As one senior official noted, “during their meeting with other ministries, they [MOFCOM officials] will explain why a measure is inconsistent with WTO rules. When their view is affirmed by the WTO, the MOFCOM gains more respect from the other ministries.”<sup>447</sup> As a leading private lawyer confirmed, MOFCOM involves affected ministries from the start of a WTO case so that, when China loses a WTO case, “the affected ministry will understand the fact that the measure is not WTO consistent.”<sup>448</sup> Especially in the early days, “China brought huge delegations to Geneva because it brought in the agencies to show the process is fair and that China is going to lose, which would make acceptance of the rule of law and compliance easier.”<sup>449</sup> Chinese lawyers see a positive effect in that ministry officials “start to care about WTO rules because once they [are] being sued in the WTO they start to think that ‘this is for real!’”<sup>450</sup> As one lawyer stated, “my observation is that through the experiences gained from these years, people become more and

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441. Interview with Anonymous (July 21, 2016) (Interview #24) (on file with authors). When asked about the most difficult challenge that the Chinese mission faces, one Chinese diplomat in Geneva responded, “We don’t wish to arouse anxieties at home; we thus prepare information for the media; we give a view of the positive side of dispute outcomes; we try to mitigate so it does not become a difficult political issue.” Interview #18, *supra* note 326.

442. We thank Jacques de Lisle for this point.

443. Interview #25, *supra* note 154; see Shaffer, *WTO Shapes Regulatory Governance*, *supra* note 24, at 4.

444. Yang Guohua, *WTO and Rule of Law in China: A View Based on Personal Experience*, 11 *GLOBAL TRADE & CUSTOMS J.* 252, 252–54 (2016).

445. *Id.*

446. As a Chinese lawyer noted, “MOFCOM has built up a reputation as a professional in this area.” Interview #2, *supra* note 160.

447. Interview #22, *supra* note 300.

448. Interview #2, *supra* note 160.

449. Interview #6, *supra* note 264.

450. Interview #2, *supra* note 160.

more serious about WTO law when they formulate the measures or policies.”<sup>451</sup>

This experience spans across government ministries. For example, the *China-Raw Materials* case involved the Ministry of Land and Resources, the Ministry of Environmental Protection, and the powerful National Development and Reform Commission (“NDRC”).<sup>452</sup> A lawyer noted that MOFCOM also works with local governments regarding their subsidy policies. If local subsidies are found to be WTO-inconsistent and the local government does not comply, the policies “can escalate to the State Council.”<sup>453</sup> Different ministries now call the lawyer “periodically to ask random questions to see if an initiative is ok under WTO rules.”<sup>454</sup> The value of WTO litigation, in other words, is not just winning a case, but also socializing a ministry to take account of WTO law.<sup>455</sup>

The use and acceptance of WTO law and litigation has become somewhat normalized within China, as reflected in the 195 cases in which China has participated.<sup>456</sup> China has changed laws and regulations to comply with WTO decisions, although the required changes have generally not been fundamental.<sup>457</sup> For example, following the *China-Intellectual Property Rights* decision, China amended its copyright laws.<sup>458</sup> An official told us that MOFCOM simply prepared the amendment, and the State Council passed it without question.<sup>459</sup> The former Deputy Director-General of MOFCOM’s Treaty & Law Department underscored how this “was unprecedented in [China’s] legislative history in the sense of amending its laws according to international rules” following an international court ruling.<sup>460</sup> Similarly, China complied with the *China-Raw Materials* and *China-Rare Earths* decisions because, in a Chinese official’s words, “the Ministries see the WTO as a just process.”<sup>461</sup> The official contended, “that is such an important progress”; it helps one “envisage[] the rule of law in China.”<sup>462</sup> Another MOFCOM official thus contended that the WTO has

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451. *Id.* Another practitioner spoke of being consulted by a Chinese ministry as to whether its proposed new regulations were valid under WTO law, which constitutes “a different language” in China. Interview #29, *supra* note 318.

452. Interview #2, *supra* note 160.

453. *Id.*

454. *Id.*

455. Interview #29, *supra* note 318.

456. *Disputes by Member*, *supra* note 65.

457. U.S. DEP’T OF STATE, EXECUTIVE SUMMARY (June 2014), <https://www.state.gov/documents/organization/228504.pdf>.

458. Interview #1, *supra* note 306.

459. *Id.*

460. Guohua, *A Memoir*, *supra* note 43, at 11–12. The U.S., however, lost on its key enforcement claims, which made it much easier for China to comply. See Cui Huang & Wenhua Ji, *Understanding China’s Recent Active Moves on WTO Litigation: Rising Legalism and/or Reluctant Response?*, 46 J. WORLD TRADE 1281, 1303 (2012); cf. Webster, *Paper Compliance*, *supra* note 27, at 557–62 (noting that the changes China made had no significant impact on copyright protection in China). Even though the case arguably did not significantly affect China’s enforcement of copyright protection, China did comply with the legal rulings. Webster, *Paper Compliance*, *supra* note 27, at 557–62.

461. Interview #1, *supra* note 306.

462. *Id.* Other interviewees noted how the WTO has helped to discipline the government’s application of anti-dumping law in China. See, e.g., Interview #5, *supra* note 224.

been a “pioneering area in China for the rule of law.”<sup>463</sup> Similarly, one legal academic speculated that among the reasons MOFCOM created secondment programs for Chinese law professors to assist it on WTO matters is that the professors can become supporters of MOFCOM’s efforts on WTO-related matters in China, thereby helping China’s compliance with its WTO commitments.<sup>464</sup>

Many of the Chinese practitioners we met said that they are trade liberals and believers in the WTO.<sup>465</sup> They thus have clear predilections. Their hope is that WTO law can seep into the practices of local governments and firms. They stress how far China has come in relation to its past. One told us that he “can’t believe how much freer is China today, where one can be sarcastic, ironic, and criticize the government on trade law issues, at least privately.” China still has much to learn regarding the WTO, he said, but things are getting better. Regarding trade law and policy, he emphasized:

I am a person who lived through the time of the Cultural Revolution. I was in China from the worst time and now, and I can say that it’s not easy progress to become what China is today. . . . We went through lots of ups and downs, suffered a lot. And now I see the people, news, criticism, comments, journalists. It’s unbelievable. From your perspective it might be normal, but for me it’s really unbelievable. . . . Now we can criticize the government, comment on the policies, talk about WTO law. It really changed a lot.<sup>466</sup>

As time passed, nonetheless, more Chinese officials and stakeholders have become skeptical and disillusioned.<sup>467</sup> Regarding the rule of WTO law in international trade relations, some disenchantment stems from China learning how to play the system and limit the impact of losses in WTO cases. Thus, when scholars such as Timothy Webster write of China’s “paper compliance” with WTO rulings in ways that do not increase actual market access, he, as well as others, suggests that China has followed U.S. examples of how to play the legal game.<sup>468</sup> As MOFCOM official Ji Wenhua noted after watching the tactics of others at the WTO, “we should try to employ some [such] strategies, including resorting to *sophistry* and *delay tactics*.”<sup>469</sup>

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463. The official pointed to the Decision of the Fourth Plenary Session of the Eighteenth Central Committee of the CCP in 2014, the first plenary session to focus on the rule of law in China. Interview #25, *supra* note 154; see CCP News, *Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Ruogan Zhongda Wenti de Jueding [Decision of the CCP Central Committee on Important Issues concerning Comprehensive Advancement towards Ruling the Country According to Law]* (Oct. 29, 2014), [http://news.xinhua.net.com/politics/2014-10/28/c\\_1113015330.htm](http://news.xinhua.net.com/politics/2014-10/28/c_1113015330.htm) (stressing “socialist rule of law with Chinese characteristics” grounded in many traditional rule-of-law goals while noting the preeminence of the Chinese Communist Party); Cai, *supra* note 204, at 272.

464. Interview #12, *supra* note 233.

465. Interview #9, *supra* note 288.

466. *Id.*

467. Interview #17, *supra* note 177.

468. See Freedman, *supra* note 297 (“[T]he mainland’s negotiators are simply learning how to play the game.”); cf. Webster, *Paper Compliance*, *supra* note 27, at 534; Webster, *China’s Implementation*, *supra* note 27, at 100.

469. See Gao, *China’s Ascent*, *supra* note 15, at 169.

For example, after the Appellate Body's 2011 ruling in *US-Definitive Anti-Dumping Duties and Countervailing Duties Against Certain Products from China* (DS379), China was hopeful that many of the findings could rein in U.S. countervailing duty practices against China.<sup>470</sup> A key issue in the case was whether Chinese state-owned enterprises should be deemed "public bodies," in which case they would be subject to subsidy rules under the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement").<sup>471</sup> The U.S. maintained that the state-owned enterprises were "public bodies" because they were owned and controlled by the state.<sup>472</sup> On this ground, the U.S. imposed countervailing duties on Chinese products that included inputs from Chinese state-owned enterprises allegedly sold at less than market value.<sup>473</sup> A WTO panel found in favor of the U.S. position and declared that, "on its own, majority government ownership is clear and highly indicative evidence of government control, and thus whether an entity is a public body for purposes of the SCM Agreement."<sup>474</sup>

Before the Appellate Body, China countered that ownership alone is not determinative, and that the key criterion should be whether the entity exercises governmental authority.<sup>475</sup> The Appellate Body largely sided with China and ruled against the United States.<sup>476</sup> It maintained that in order to find that a state-owned enterprise is a "public body" under the SCM Agreement, the U.S. Department of Commerce must show that such enterprise exercises "government functions."<sup>477</sup> This threshold requirement creates legal constraints on U.S. countervailing duty practice against Chinese imports.<sup>478</sup> The Office of the United States Trade Representative bitterly protested the ruling.<sup>479</sup>

The U.S. Commerce Department nonetheless responded by almost immediately writing a memorandum to find that the Chinese state-owned enterprises indeed "possess, exercise, or are vested with governmental authority" so that they are public bodies under the new criteria.<sup>480</sup> It accordingly maintained

470. *Id.* at 171.

471. Appellate Body Report, *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 207(a), WTO Doc. WT/DS471/AB/R (adopted July 28, 2011) [hereinafter Appellate Body Report DS471].

472. *Id.* at ¶ 150; see Gao, *China's Ascent*, *supra* note 15, at 169.

473. Appellate Body Report DS471, *supra* note 471, ¶ 209; see Gao, *China's Ascent*, *supra* note 15, at 169.

474. Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 8.135, WTO Doc. WT/DS379/R (Oct. 22, 2010).

475. Appellate Body Report DS379, *supra* note 136, ¶ 137.

476. *Id.* at ¶ 611.

477. *Id.* at ¶ 318.

478. *Id.* at ¶ 543.

479. See Melissa Lipman, *WTO Rejects US Duty Double-Counting in China Fight*, LAW360 (Mar. 11, 2011, 3:26 PM), <https://www.law360.com/appellate/articles/231712/wto-rejects-us-duty-double-counting-in-china-fight>.

480. Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance (June 22, 2015), <http://enforcement.trade.gov/fm/summary/prc/2015-15891-1.pdf>, ("The GOC [government of China] exercises meaningful control over these entities and uses them to effectuate its goals of upholding the socialist market economy, allocating resources, and maintaining the predominant role of the state sector."); see also Memorandum for Paul Piquado, Assistant Secretary for Enforcement and Compliance, Section 129 Determination of the

the duties. One U.S. trade lawyer concluded, “it is the U.S. that teaches China how to do facial implementation without concrete results. . . . If the U.S. is doing this, it is losing its credibility and it will hurt itself when China implements WTO decisions. . . . At the end of the day, if everyone is gaming the system, then why play at all.”<sup>481</sup>

These experiences lead to legal cynicism. A U.S. trade lawyer representing China thus contended, “[t]he U.S. is doing a disservice to the rule of law in China. It is sending a message to China that this is just a game. It is so short sighted. Instead of taking the high road so that we fully comply, the U.S. turns it into a game.”<sup>482</sup> He gave the example of another U.S. action—this one involving U.S. retroactive legislation against Chinese products. Following a U.S. Federal Circuit ruling which held that existing U.S. countervailing duty law does not apply to nonmarket economies like China, the U.S. Congress passed new legislation that U.S. countervailing duty law indeed applies to China, and does so with retroactive effect going back six years.<sup>483</sup> The lawyer shrugged, “This business about retroactive legislation. Can you imagine if it involved China and the National People’s Congress retroactively changed law and forced courts to go back six years to enforce it!”<sup>484</sup> He lamented, “early on China was very focused on WTO compliance,” but now one gets a sense of legal cynicism.<sup>485</sup> The U.S., in particular, has turned to “mutually agreed solutions” (“MAS”) to resolve disputes against it, which led a former Chinese official to question the utility of WTO dispute settlement.<sup>486</sup> In his words, “MAS is a big basket. You can put anything into it. Or you could see it as a black hole.”<sup>487</sup>

Similarly, in the early years, China knew nothing about internal WTO processes and took the Trade Policy Review Mechanism (“TPRM”) quite seriously.<sup>488</sup> But, over time, the government saw that other WTO Members took little heed of the TPRM process. For reformers in China, this realization adversely affects attitudes and decision-making within China’s ministries.<sup>489</sup> For example, China has export restrictions on around 200 products. When it lost the *China-Raw Materials* case regarding export restrictions on ten raw materials,<sup>490</sup> the U.S. asked China to remove all of China’s restrictions.<sup>491</sup> Instead, the

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Countervailing Duty Investigations of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People’s Republic of China: An Analysis of Public Bodies in the People’s Republic of China in Accordance with the WTO Appellate Body’s Findings in WTO DS379 (May 18, 2012).

481. Interview #2, *supra* note 160.

482. Interview #6, *supra* note 264.

483. 19 U.S.C. § 1671(f)(1) (2012); *see* Interview #6, *supra* note 264.

484. Interview #6, *supra* note 264.

485. *Id.*

486. Interview #4, *supra* note 290.

487. *Id.*

488. Interview #32, *supra* note 111.

489. *Id.*

490. *See generally* Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R (adopted Feb. 22, 2012) The raw materials were bauxite, coke, fluor-spar, manganese, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. *Id.*

491. Interview #32, *supra* note 111.

Chinese government removed only those restrictions that the WTO decision specifically enumerated, and it waited to be sued, possibly after full WTO litigation, before removing others.<sup>492</sup> In other words, it engaged in second-order compliance with the specific Appellate Body ruling, and not first-order compliance with the rules as applied to Chinese measures.

WTO law is perceived as less important in China today,<sup>493</sup> whether because the dispute settlement system is gamed and viewed as less constraining, because trade negotiations turn to other venues, or because foreign political leaders espouse economic nationalism and target China. A leading Chinese WTO law academic noted that, as a result, “fewer students are interested in the WTO than in earlier years.”<sup>494</sup> This attitudinal change poses a challenge for reform advocates using WTO law to foster domestic change in China. Since “each national and local agency must know WTO law” in order to “know if a violation might occur,” if WTO law is deemed less important to study, such knowledge will diminish within functional ministries and local administrative bureaucracies in adopting and implementing new regulations.<sup>495</sup> Even though the WTO somewhat empowered MOFCOM in inter-ministerial relations, MOFCOM is a much less powerful ministry than others, such as the Ministry of Finance and the NDRC, and WTO divisions within MOFCOM are now viewed as lower in the MOFCOM hierarchy.<sup>496</sup> With the consolidation of power of President Xi, most commentators view China as moving backwards, retaining or even enhancing state-owned enterprises as central pillars for China’s economic strategy while cracking down on and imprisoning rights-oriented lawyers.<sup>497</sup> Surveys of U.S. and European businesses operating in China find that they feel less welcome in China in recent years.<sup>498</sup>

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492. This led the U.S. and others to file complaints in 2012, Appellate Body Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, ¶ 1.2, WTO Doc. WT/DS432/AB/R (Aug. 7, 2014) (regarding tungsten and molybdenum), and in 2016, *China—Export Duties on Certain Raw Materials*, WTO Doc. WT/DS508/1 (July 13, 2016), [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) (regarding various forms of antimony, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin).

493. See Interview #4, *supra* note 290 (asserting that few agencies within China “care about WTO”); Interview #11, *supra* note 208 (explaining that learning about the WTO is not widely required in undergraduate education).

494. Interview #11, *supra* note 208.

495. Interview #4, *supra* note 290.

496. Interview #32, *supra* note 111.

497. As a Chinese lawyer euphemistically concluded, “the atmosphere in China on the WTO is not as good as when China joined.” Interview #4, *supra* note 290. Another said, “[I]t has been a difficult time.” Interview #33, *supra* note 302. In a similar vein, another stated, “I think it is a really hard and dark moment.” *Id.*; see also Mahboubi et al., *supra* note 58; Minzner, *supra* note 6, at 936–40; Youwei, *The End of Reform in China*, FOREIGN AFF., May/June 2015, at 2, 4 (“[R]eform in China has now stagnated and may even be moving backward.”). See generally DAVID SHAMBAUGH, CHINA’S FUTURE (2016). But cf. NICHOLAS R. LARDY, MARKETS OVER MAO: THE RISE OF PRIVATE BUSINESS IN CHINA 1 (2014) (for a more optimistic view, although written before President Xi took power).

498. Simon Denyer, *No Longer Welcome? American Companies Fear China’s Turning Its Back on Them*, WASH. POST (Jan. 17, 2017), [https://www.washingtonpost.com/world/asia\\_pacific/no-longer-welcome-american-companies-fear-china-is-turning-its-back-on-them/2017/01/17/bd0e16e6-dcc7-11e6-b2cf-b67fe3285cbe\\_story.html?utm\\_term=.85a707755832](https://www.washingtonpost.com/world/asia_pacific/no-longer-welcome-american-companies-fear-china-is-turning-its-back-on-them/2017/01/17/bd0e16e6-dcc7-11e6-b2cf-b67fe3285cbe_story.html?utm_term=.85a707755832) (citing surveys of the American Chamber of Commerce China and European sources).

At the same time, the WTO has served as a catalyst for reformers within China in the development of legal institutions and the disciplining of central, regional, and local decision-makers to be more responsive to the WTO's legal constraints, including WTO requirements for transparency, judicial review, and nondiscrimination.<sup>499</sup> Efforts continue. In 2014, the State Council again passed a notice calling on all Chinese ministries to ensure that new Chinese trade-related laws and regulations, including those passed at the sub-central level, comply with WTO requirements through adherence to a procedure administered by MOFCOM's Department of WTO Affairs.<sup>500</sup> Differing views and responses to the WTO continue to compete in China, and it is too early to tell which will prevail—a continued turn toward the rule of law for trade matters, a turn to legal cynicism, or both. In any case, lawyers are needed. And those lawyers have worked with the Chinese government and Chinese enterprises, facilitating transnational legal ordering and China's ability to take on the U.S. and the E.U. before the WTO.

### B. *Implications for the International Trade Legal Order*

As a result of its investments in developing trade law expertise, China has become a formidable opponent of the U.S. and the E.U. in WTO litigation and a critical player in the WTO system. By 2006, China started asserting its status by not only using WTO rules vigorously to defend its trade policies as a respondent, but also by bringing cases against the U.S. and the E.U. as a complainant.<sup>501</sup> As an E.U. official stated, “China now knows how the WTO works. It does not hesitate to threaten bringing a WTO case. For the Commission, it creates more challenges in the relationship. They know, and they know we know they know.”<sup>502</sup>

China has started to shape WTO jurisprudence to constrain U.S. and E.U. discretion in imposing protection against Chinese imports. U.S. and European perceptions of the WTO legal order have correspondingly changed. Within a decade of its accession, China established itself as a “repeat player” in WTO litigation.<sup>503</sup> As a repeat player, it can strategize to “play for rules,” shaping the

499. See Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L COMP. L. REV. 319, 345 (2004).

500. The rules provide:

Any regulations and documents related to trade in goods, trade in services and trade-related intellectual property, either by ministries under the State Council or by local governments . . . must be in compliance with the WTO Agreement, its Annexes and subsequent agreements, and China Accession Protocol and Working Party Report.

See State Council, *Guowuyuan Bangongting Guanyu Jinyibu Jiaqiang Maoyi Zhengce Hegui Gongzuo de Tongzhi* [State Council Rules on Further Strengthening Trade Policy Compliance Practice], June 17, 2014. A Chinese official claimed that this shows China's commitment to WTO compliance through transforming decision-making by central and sub-central government units in China so as to conform with WTO law. Interview #25, *supra* note 154; see Guohua, *WTO and Rule of Law in China*, *supra* note 475.

501. See Huang & Ji, *supra* note 460, at 1283–88.

502. Interview #36, *supra* note 438. The official also noted that “the level of discussions” has improved and that the rules can be a framework for the discussions.” *Id.*

503. See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC. REV. 95, 98 (1974).

international trade legal order.<sup>504</sup> Chinese engagement in WTO litigation, in particular, pushed back on the U.S. and the E.U.'s practice of protecting against imports by using anti-dumping and countervailing duty investigations. The litigation resulted in tightened legal constraints on these practices, affecting U.S. and European import-competing industries.<sup>505</sup> Notably, China twice successfully challenged the U.S. practice of double-counting injuries to U.S. industries by combining relief from anti-dumping and subsidy investigations to increase duties.<sup>506</sup> Similarly, China successfully challenged the U.S. definition of a public body that the U.S. Commerce Department had used to find that Chinese state-owned enterprises subsidized other Chinese producers, thereby increasing duties against Chinese products.<sup>507</sup> China also successfully challenged E.U. and U.S. practices of using surrogate third-country data in import relief cases to inflate anti-dumping duties.<sup>508</sup>

These cases are relevant to a major issue affecting the U.S. and Europe: China's "market economy" status for purposes of their anti-dumping calculations. The U.S. and the E.U. apply the nonmarket economy label to justify using third-country prices in assessing whether China dumps products in their markets so that they can then raise tariffs to counter China's alleged dumping.<sup>509</sup> If the U.S. and the E.U. use prices from Singapore,<sup>510</sup> for example, they can more easily find lower-priced or below-cost sales in the U.S. and Europe. The U.S. and the E.U. use these methodologies to raise anti-dumping duties to prohibitive levels (such as over 500%) and effectively block market access to Chinese products.<sup>511</sup> In December 2016, China launched systemic claims

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504. On the benefits of a "repeat player" in adjudication processes, see *id.* at 95–100. As applied to WTO litigation, see Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, in *TOWARDS A DEVELOPMENT-SUPPORTIVE DISPUTE SETTLEMENT SYSTEM IN THE WTO 2003*, at 15–18 (Int'l Ctr. for Trade and Sustainable Dev., ICTSD Resource Paper No. 5, 2003).

505. See Huang & Ji, *supra* note 460, at 1292–301.

506. Appellate Body Report DS379, *supra* note 136, at ¶¶ 611–12; Appellate Body Report DS449, *supra* note 136, at 91; Interview #27, *supra* note 317 (referencing these challenges as Chinese contributions to WTO jurisprudence).

507. See *supra* note 54 and accompanying text. This decision was of great importance for China since Chinese SOEs monopolize key utilities such as electricity, oil, and water, and control key sectors such as banking, telecommunications, and steel. See Gabriel Wildau, *China's State-Owned Enterprise Reform Plans Face Compromise*, *FIN. TIMES* (Sept. 14, 2015), <https://www.ft.com/content/5eeeb84a-5aaa-11e5-97e9-7f0bf5e7177b>.

508. Appellate Body Report DS397, *supra* note 136; Panel Report, *United States—Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/R (rendered Oct. 19, 2016, under appeal).

509. Shannon Donnan et al., *China Challenges EU and US Over Market Economy Status*, *FIN. TIMES* (Dec. 12, 2016), <https://www.ft.com/content/6af8da62-bf5d-11e6-9bca-2b93a6856354>.

510. For example, the E.U. used Singapore prices in an anti-dumping case involving television sets from China, and the U.S. used Portuguese prices in an anti-dumping case involving crayfish. See Le Thi Thuy Van & Sarah Y. Tong, *China and Anti-Dumping: Regulations, Practices, and Responses*, 22 n.55 (EAI Working Paper No. 149), <http://www.eai.nus.edu.sg/publications/files/EWP149.pdf> (on E.U. use of Singapore); see also Notice of Preliminary Results of Antidumping Duty New Shipper Administrative Reviews: Freshwater Crawfish Tail Meat from the People's Republic of China, 66 Fed. Reg. 18604 (Apr. 10, 2001), <http://enforcement.trade.gov/frn/2001/0104frn/01-8819.txt>.

511. For examples of exorbitant U.S. anti-dumping duties imposed against Chinese products through using third country prices, see Len Bracken, *U.S. Hits Chinese Melamine With 500 Percent Tariffs*, 33 *BLOOMBERG INT'L TRADE REP.* 1, 24 (Jan. 7, 2016) ("The U.S. is imposing antidumping duties and counter-



against the U.S. and the E.U. concerning provisions of their laws “pertaining to the determination of normal value for ‘non-market economy’ countries in anti-dumping proceedings involving products from China.”<sup>512</sup> This litigation will take years and will place considerable strain on the WTO dispute settlement system, potentially undercutting perceptions of its legitimacy within the side that loses. Yet already, through the above WTO cases, China has built a base to successfully challenge U.S. and E.U. administrative practices that increase protection against Chinese imports.<sup>513</sup>

While some argue that China simply follows U.S. practices in responding to Appellate Body rulings, many in the U.S. now view China’s joining the WTO as a bad bargain.<sup>514</sup> As a result, the U.S. appears less committed to upholding the international trade legal order. China’s successful adaptation to WTO law, in other words, paradoxically has called into question U.S. commitments to the trade legal order itself.

Complaints center on how WTO rules asymmetrically help China.<sup>515</sup> On the one hand, China has learned to use the WTO legal regime to effectively challenge U.S. trade remedy measures.<sup>516</sup> On the other hand, the U.S. has found it increasingly difficult to use WTO rules to address trade barriers within

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vailing duties on melamine exports from China that add up to at least 507.65 percent.”); Brian Flood, *Chinese Roadbuilding Products to Face Stiff Duties*, 34 BLOOMBERG INT’L TRADE REP. 243, 252 (Feb. 9, 2017) (“The decision means that the imports will face antidumping duties of up to 372.81 percent and anti-subsidy duties of up to 152.50 percent, based on a previous Commerce Department ruling.”); Brian Flood, *Chinese Fertilizer Will Face Massive Duties*, 34 BLOOMBERG INT’L TRADE REP. 275, 282 (Feb. 16, 2017) (“[T]he imports will face antidumping duties of 493.46 percent, and anti-subsidy duties of 206.72 percent, in line with rates previously calculated by the Commerce Department.”); Brian Flood & Rossella Brevetti, *Commerce Assigns Duties on Cold-Rolled Steel*, BLOOMBERG INT’L TRADE REP. (May 19, 2016) (“Commerce found dumping margins of 71.35 percent for Japan and 265.79 percent for China. It found a subsidy rate of 256.44 percent for China.”).

512. See *United States—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/1 (request for consultations received Dec. 21, 2016), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds515\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm); *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/2 (request for consultations received Dec. 21, 2016), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds516\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm). These cases involve Article 15(a)(ii) of China’s Protocol of Accession, which permits WTO Members to treat China as a “non-market economy” and thus use prices from surrogate third countries for the determination of normal value for a fifteen-year period. That provision expired on December 11, 2016 pursuant to Article 15(d) of the Accession Protocol. Article 15(a)(ii) provides: “The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.” *Accession of the People’s Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001). The second sentence of Article 15(d) provides: “In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.” *Id.* Some commentators contend that WTO Members may continue to treat China after the expiration of this provision on the basis of a *de facto* finding of its status, whether on a case-by-case basis or otherwise. *Id.*

513. Mark Magnier, *China Challenges U.S., EU Over WTO Antidumping Duties*, WALL STREET J. (Dec. 12, 2016, 8:54 PM), <https://www.wsj.com/articles/china-challenges-u-s-eu-over-wto-antidumping-duties-1481548883>.

514. See, e.g., Wu, *The WTO and China’s Unique Economic Structure*, *supra* note 371, at 350 (“The Party-state’s desire to preserve its unique political economy is threatening to shatter the liberal [WTO] project of building a strong multilateral trading regime. In the end, both cannot stand.”); Wu, *The End of an Era for Global Trade*, *supra* note 25.

515. Keith Bradsher & Paul Mozur, *As Washinton Tries to Protect Tech, China Could Fight Back*, N.Y. TIMES (Aug. 2, 2017), <https://www.nytimes.com/2017/08/02/business/china-trade-trump-technology.html?mcubz=3>.

516. *Id.*

China because of the lack of transparency in China regarding the state's role in the economy.<sup>517</sup> The WTO rules, Mark Wu argued, are designed mainly for countries with market economies, but in China, the government intervenes significantly through formal and informal state command.<sup>518</sup> Thus, he found, WTO rules are inadequate.<sup>519</sup> Consider, for example, the question of whether state-owned enterprises shall be deemed "public bodies" under the SCM Agreement. In a country like China, even SOEs without explicit governmental authority are often required to exercise various state functions such as providing loans and promoting the development of particular economic sectors.<sup>520</sup> Indeed, the 2015 Guiding Opinions on Deepening SOE Reform provided that SOEs shall "serve the national strategy and implement national industrial policy."<sup>521</sup> In many cases, however, the lack of government transparency could make it difficult to prove SOEs are acting as public bodies.<sup>522</sup>

In addition, the U.S. contends that China violates basic rule-of-law norms by filing tit-for-tat anti-dumping investigations against U.S. firms whenever the U.S. brings a WTO complaint against China.<sup>523</sup> Going further, officials contend that China punishes firms that cooperate with the U.S. or the E.U. in bringing WTO cases.<sup>524</sup> The Chinese government's aim, they contend, is to undermine enforcement of WTO rules against it.<sup>525</sup> By retaliating directly against innocent individual companies, China undermines rule-of-law norms. The Chinese government denies such practices, but others, such as Stephen Kho, a former United States Trade Representative attorney for China enforcement, have claimed that China's actions violate the spirit of WTO law and risk sparking a trade war.<sup>526</sup>

Finally, many find that WTO rules do not adequately address new technologies important for U.S. trade. For example, when China introduced regulations requiring Internet companies to use local servers<sup>527</sup> and hand over the

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517. David Barboza & Chris Buckley, *China Plans to Reduce the State's Role in the Economy*, N.Y. TIMES (May 24, 2013), <http://www.nytimes.com/2013/05/25/business/global/beijing-signals-a-shift-on-economic-policy.html>.

518. Wu, *The "China, Inc." Challenge*, *supra* note 3, at 265.

519. *Id.*

520. *Id.* at 274.

521. Zhonggong Zhongyang, *Guowuyuan Guanyu Shenhua Guoyu Qiye Gaige de Zhidao Yijian [Guiding Opinions on the CPC Central Committee and the State Council on Deepening State-owned Enterprises Reform]*, CHINESE GOV'T NETWORK (Aug. 24, 2015), [http://www.gov.cn/zhengce/2015-09/13/content\\_2930440.htm](http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm).

522. Wu, *The "China, Inc." Challenge*, *supra* note 3, at 302.

523. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2017 TRADE POLICY AGENDA AND 2016 ANNUAL REPORT 96 (2017), <https://ustr.gov/sites/default/files/Chapter%20II%20-%20The%20World%20Trade%20Organization.pdf> (decrying China's retaliatory use of trade remedies); see also Freedman, *supra* note 297; Mark Wu, *Antidumping*, *supra* note 297, at 141.

524. Shaffer Informal Discussions with U.S. and European Officials and Practicing Lawyers (on file with authors).

525. Freedman, *supra* note 297.

526. *Id.* at 305.

527. *China's Control over Internet Map Services*, INTERNET GOVERNANCE PROJECT (June 11, 2010), <http://www.internetgovernance.org/2010/06/11/chinas-control-over-internet-map-service/>.

source code<sup>528</sup> to provide services, the U.S. found that existing WTO rules were unhelpful to deal with these restrictions.<sup>529</sup> The U.S. thus would like to modify existing WTO rules or introduce new rules to constrain China, including in response to Appellate Body rulings.<sup>530</sup> The U.S. has been unable to make headway in the WTO, however, and it thus turned to fora where China and other rival emerging economies do not participate in the negotiations.<sup>531</sup>

The United States' turn to these bilateral and plurilateral negotiating venues has called into question the WTO's relevance and fragmented the international trade legal order.<sup>532</sup> The Obama administration, in particular, tried to ratchet up rules through two regional initiatives, the Transpacific Partnership ("TPP") with Asia and the Transatlantic Trade and Investment Partnership ("TTIP") with Europe.<sup>533</sup> Many of the negotiated rules were tailor-made for China and directly responded to existing WTO jurisprudence favoring China.<sup>534</sup> For example, the TPP chapter on SOEs defined SOEs according to their ownership, rather than in terms of the "exercise of government functions."<sup>535</sup> The TPP chapter explicitly prohibited SOEs from providing or receiving subsidies in relation to their commercial activities.<sup>536</sup> The rules aimed to update trade rules regarding e-commerce.<sup>537</sup> In particular, the TPP included provisions prohibiting forced localization requirements and transfers of source code.<sup>538</sup>

The Obama administration hoped that the TPP would create a competitive negotiating environment that would draw other countries to join the TPP on the U.S.'s terms so that their products would receive nondiscriminatory U.S. market access.<sup>539</sup> Because Vietnam would benefit through the TPP, the Philippines would feel pressure from Philippine enterprises to join, so as to

528. Armstrong Chen, *Who Will Be Affected by the New Regulation of Banking Security?*, KWM (Aug. 31, 2015), <http://www.kwm.com/en/us/knowledge/insights/the-influence-of-new-rules-on-financial-security-20150831>.

529. *Members Debate Cyber Security and Chemicals at Technical Barriers to Trade Committee*, WORLD TRADE ORG. (June 15, 2017), [https://www.wto.org/english/news\\_e/news17\\_e/tbt\\_20jun17\\_e.htm](https://www.wto.org/english/news_e/news17_e/tbt_20jun17_e.htm).

530. See Tim Worstall, *Trump to Revert to Pre-WTO Rules to Deal with China Trade, Bad Idea*, FORBES (Aug. 2, 2017, 5:05 AM), <https://www.forbes.com/sites/timworstall/2017/08/02/trump-to-revert-to-pre-wto-rules-to-deal-with-china-trade-bad-idea/#18be4a4836dc>.

531. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2013 TRADE POLICY AGENDA AND 2012 ANNUAL REPORT (2013), <https://ustr.gov/sites/default/files/Chapter%20II%20-%20The%20World%20Trade%20Organization.pdf>.

532. WORLD TRADE ORG., 2012 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 8 (2013), <https://ustr.gov/sites/default/files/Chapter%20II%20-%20The%20World%20Trade%20Organization.pdf>.

533. See Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, CHI. J. INT'L L. (2016). For an overview of the TPP, see TRANS-PACIFIC PARTNERSHIP: AN ASSESSMENT (Cathleen Cimino-Isaacs & Jeffrey J. Schott eds., 2016).

534. *China's WTO Updates*, CHINA.ORG.CN (July 11, 2002), <http://www.china.org.cn/english/36714.htm>.

535. Trans-Pacific Partnership, art. 17.1, Jan. 26, 2016 [hereinafter TPP].

536. *Id.* art. 17.6.

537. *Id.* art. 14.2.

538. *Id.* art. 14.13 & 14.17.

539. ADVISORY COMM. FOR TRADE POLICY & NEGOTIATIONS, REPORT TO THE PRESIDENT, THE CONGRESS, AND THE UNITED STATES TRADE REPRESENTATIVE ON THE TRANS-PACIFIC PARTNERSHIP 6 (2015), <https://ustr.gov/sites/default/files/Advisory-Committee-on-Trade-Policy-and-Negotiations.pdf>.

level the playing field for their products.<sup>540</sup> Similarly, if Malaysia and other Southeast Asian countries would benefit, Thailand would feel pressure from Thai constituencies to accede.<sup>541</sup> And if the Philippines and Thailand joined, the Indonesian government would feel constrained.<sup>542</sup> In each case, these countries would have to agree to TPP rules they did not participate in negotiating. Over time, to the extent that the TPP created significant benefits for members in discriminating against China, China would feel pressure to join.

Most dramatically, were the U.S. able to complete both the TPP and TTIP, then it could merge the two agreements and withdraw from the WTO. It would thereby force China and the rest of the world to join the new organization if they wished to avoid discrimination against their products. It is through such processes that the Obama administration hoped to shape the global legal order for trade.<sup>543</sup> In President Obama's words, "America should write the rules."<sup>544</sup> Once more, as with its accession to the WTO, China would have to accept rules that the U.S. made and negotiate an accession protocol, possibly on discriminatory terms, to benefit from them.<sup>545</sup>

It was a risky strategy since it was not clear that China would join the TPP, and China, in parallel, responded by leading negotiations for a rival mega-regional agreement called the Regional Comprehensive Economic Partnership ("RCEP") with the Association of Southeast Asian Nation's ten members and five other Asian countries.<sup>546</sup> China also led parallel economic initiatives that do not include the U.S., such as the Asian Infrastructure Investment

540. Babe G. Romualdez, *The Philippines Should Join the TPP*, PHIL. STAR (Oct. 8, 2015 12:00am), <http://www.philstar.com/business/2015/10/08/1508233/philippines-should-join-tpp>.

541. *Mounting Pressure for Thailand to Join TPP*, THAILAWFORUM (Oct. 13, 2015), <http://www.thailawforum.com/mounting-pressure-for-thailand-to-join-tpp/>.

542. Joe Cochrane, *Indonesia to Decide on Joining Trans-Pacific Partnership*, N.Y. TIMES (Oct. 25, 2015), <https://www.nytimes.com/2015/10/26/world/asia/joko-widodo-indonesia-washington-trans-pacific-partnership.html>.

543. Rem Korteweg, *Unfreezing TTIP: Why a Transatlantic Trade Pact Still Makes Strategic Sense*, CTR. EUR. REFORM (May 2017), [http://www.cer.eu/sites/default/files/pb\\_ttip\\_rk\\_10.5.17.pdf](http://www.cer.eu/sites/default/files/pb_ttip_rk_10.5.17.pdf).

544. Barack Obama, *President Obama: The TPP Would Let American, Not China, Lead the Way on Global Trade*, WASH. POST (May 2, 2016), [https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d\\_story.html?utm\\_term=.7736c5a35356](https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.7736c5a35356) ("America should write the rules. America should call the shots. Other countries should play by the rules that America and our partners set, and not the other way around. That's what the TPP gives us the power to do. . . . The world has changed. The rules are changing with it. The United States, not countries like China, should write them."); see also Michael Froman, *The Strategic Logic of Trade: New Rules of the Road for the Global Market*, 93 FOREIGN AFF. 111, 111 (Nov./Dec. 2014).

545. The aim was to press for change in the role of the Chinese state and state industrial policy. As former Secretary of Treasury Henry Paulson wrote, "China is more likely to make the reforms necessary to join the TPP when it recognizes the danger of being excluded from it." PAULSON, *supra* note 110, at 399.

546. The five other countries are Japan, Korea, India, Australia, and New Zealand. See *Factsheet: What You Need to Know About Regional Comprehensive Economic Partnership (RCEP)*, MINISTRY TRADE & INDUS.: SING. (June 18, 2014), [https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/FACTSHEET-WHAT-YOU-NEED-TO-KNOW-ABOUT/Factsheet%20on%20RCEP%20\(June%202014\).pdf](https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/FACTSHEET-WHAT-YOU-NEED-TO-KNOW-ABOUT/Factsheet%20on%20RCEP%20(June%202014).pdf). If the RCEP is signed and ratified, it could create pressure on the U.S. Congress to ratify the TPP so that U.S. companies do not face discriminatory trade barriers in relation to Chinese exports. In this sense, the RCEP and TPP could have a symbiotic relationship such that the U.S. could subsequently return to the TPP.

Bank (“AIIB”) and the Belt and Road Initiative with Eurasian economies.<sup>547</sup> The result could be rival trading blocs. Now that the Trump administration has abandoned the TPP, however, China is positioned to take the lead in negotiating trade agreements governing Asian economic integration, ironically by excluding the United States.<sup>548</sup> While some have criticized China’s initiatives for their lack of imagination regarding new rules, these rules create fewer constraints on China’s internal practices while guaranteeing market access.<sup>549</sup> China has attracted many followers through these initiatives because of its promises of access to its huge market and its grant of other benefits to countries that sign.<sup>550</sup> So far, there is little evidence that China has aimed to be revisionist to change the existing international trade legal order.<sup>551</sup> Rather, China, through its investment in trade law could become the new upholder of the international trade legal order initially created by the U.S. and Europe.<sup>552</sup> Without U.S. support and engagement, however, the existing legal order for the global economy could erode from within, even if the Trump administration does not formally withdraw from the WTO as it has threatened.<sup>553</sup>

#### VIII. CONCLUSION

This Article illustrates the enmeshment of international and national trade law in a major emerging economic power, China, and the implications of developments in China for the international trade legal order itself. International trade law and Chinese law and policy mutually implicate each other in complex processes of transnational legal ordering and disordering. Developments in one cannot be understood without attending to the other.

Internally, China’s engagement with the WTO started as a top-down initiative of the Chinese government to boost its trade-related legal capacity both internally (for compliance) and externally (to defend its legal rights) through

547. For the AIIB, see *Who We Are*, AIIB, <https://www.aiib.org/en/about-aiib/index.html> (last visited Nov. 11, 2017). For Belt and Road, see *Full Text: Vision and Actions on Jointly Building Belt and Road*, CHINA.ORG (Sept. 15, 2015), [http://www.china.org.cn/chinese/2015-09/15/content\\_36591064\\_3.htm](http://www.china.org.cn/chinese/2015-09/15/content_36591064_3.htm).

548. Jason Scott & David Rowman, *Trump Trade Snub Set to Boost China’s Bid for its Own Asian Pact*, 33 INT’L TRADE REP. 1638 (Nov. 17, 2016) (noting that RCEP would give China “greater prestige in a region where it is seeking to displace U.S. influence”).

549. *Id.* at 1637.

550. *Id.* at 1615.

551. Jacques de Lisle, *China and International Economic-Legal Institutions: A Revisionist Option* (draft on file with authors); Ian Clark, *International Society and China: The Power of Norms and the Norms of Power*, CHINESE J. INT’L POL. 315, 315 (2014).

552. See Stephen Fidler et al., *China’s Xi Jinping Seizes Role as Leader on Globalization (UNE)*, WALL STREET J. (Jan. 17, 2017, 12:57 PM), <https://www.wsj.com/articles/chinas-xi-jinping-defends-globalization-1484654899>. China already has become the second largest contributor to the WTO’s budget after the U.S. and contributes over three times as much as the U.S. in terms of per capita GDP. See Hongying Wang & Erik French, *China in Global Economic Governance*, 9 ASIAN ECON. POL’Y REV. 254, 254 (2014).

553. As a candidate, President Trump threatened to pull the U.S. out of the WTO if the WTO ruled against his plan to massively increase tariffs on Chinese products. Geoff Dyer, *Donald Trump Threatens to Pull US Out of WTO*, FIN. TIMES (July 24, 2016), <https://www.ft.com/content/d97b97ba-51d8-11e6-9664-e0bdc13c3bef>; see also John Brinkley, *Trump May Withdraw U.S. from WTO, Outside Advisor Says*, FORBES (Feb. 13, 2017, 2:06 PM), <https://www.forbes.com/sites/johnbrinkley/2017/02/13/trump-may-withdraw-u-s-from-wto-outside-advisor-says/#286938c933bb>.

engaging with nongovernmental actors. With time, government officials and private actors began working in public-private partnerships, involving academia, law firms, companies, and trade associations, thereby conveying WTO legal norms more broadly within China and enabling deeper transnational legal ordering. What started as a strategic, top-down initiative became a more organic process. As a result, China developed significant legal capacity in terms of breadth and depth. In terms of depth, China still does not have the internal expertise of the U.S. and Europe. Yet, China readily taps into U.S. and European expertise by hiring the world's leading professionals in Washington, Brussels, and Geneva to work with Chinese counterparts.

Through these processes, the WTO helped advance the position of trade legal norms in China's economic governance, increasing the role of law and lawyers. Compared to the baseline where China started, the country has opened its economy, integrated in the global economy, and invested in the diffusion of trade law norms. In our view, these developments should give pause to bold claims that China is undermining the global trade legal order.

Externally, at the time of China's accession to the WTO, the U.S. and the E.U. remained economically dominant and pressed China to adopt requirements that would transform its economy and its governance of trade. Over time, by investing in human capital to build legal capacity, China became a rival to the U.S. and Europe in WTO dispute settlement and other trade fora. As a result, the U.S. and the E.U. would have to work with China if the WTO were to remain a meaningful multilateral institution for fostering global legal order and prosperity. With China's rise, the WTO helped China, the U.S., and the E.U. resolve their trade disputes through law and the use of a third-party dispute settlement mechanism. Political disputes were turned over to lawyers.<sup>554</sup> There is no other area of international relations where one can speak of such a turn to law and legal proceedings to resolve disputes between China, the U.S., and the E.U.<sup>555</sup>

Yet, pessimism now builds regarding the multilateral trade legal order and China, especially with the rise of economic nationalism in the U.S. and Europe punctuated by the withdrawal of the United Kingdom from the European Union and the election of U.S. President Trump. That pessimism feeds off of, and back into, domestic policy choices. It undercuts those advancing rule of

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554. As a government official maintained, "the WTO dispute settlement system helps to solve problems politically. The Chinese president talked with [U.S. President] Obama about trade disputes. But once a WTO case was filed, all the talk about this disappeared. It became a legal issue instead of a political one." Interview #1, *supra* note 306; see also Interview #26, *supra* note 154 (referring to the U.S.-tire special safeguards case and contrasting it to the South China Sea dispute—the interviewee noted that in the tires case, "China lost the case and that settled it.").

555. Similarly, in the four years after the Russian Federation joined the WTO on August 22, 2012, it was a complainant in four cases, a respondent in seven cases, and a third party in twenty-eight cases. See *Chronological List of Disputes Cases*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) (last visited Nov. 11, 2017).

law reforms in China. It reflects and supports the rise of populism, nationalism, demagoguery, and xenophobia in politics around the world.<sup>556</sup>

Ironically, China could become the upholder of a multilateral trade legal order that the U.S. and Europe created. Yet, if the U.S. indeed withdraws its support, the WTO would hollow out as an authoritative organization for trade governance and dispute settlement. The trans-national legal order for trade, erected through U.S. and European initiative following World War II and deepened after the collapse of the Soviet Union, would decline and fall.<sup>557</sup>

To maintain the WTO as a multilateral organization to foster economic order, stabilize growth, and encourage the peaceful settlement of disputes through law, the U.S., Europe, and China would need to join efforts. Prospects are dimming. The WTO is no nirvana (no institution is), but the alternative of unchecked economic nationalism could be dire. The world has experienced the implications of U.S. abandonment of an international institution, the League of Nations, especially when economic crises break.<sup>558</sup> Will post-Cold War institutions show resilience? Are current trends so strong that they will catalyze international regime change? Will the world fall into darker times? Time will tell. To paraphrase Peng from this Article's epigraph, we are in the history and make the history with the choices we make today.

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556. See Sewell Chan, *A Future Haunted by Ghosts of the Past*, N.Y. TIMES (Sept. 22, 2016), <http://www.nytimes.com/2016/09/23/world/europe/a-future-haunted-by-ghosts-of-the-past.html> (quoting former Greek foreign minister on the "rise of nationalism, populism, demagoguery and xenophobia"); David E. Sanger, *Hopes for Democracy's Spread Meet with Harsh Facts*, N.Y. TIMES (Sept. 14, 2016), <http://www.nytimes.com/2016/09/14/world/hopes-for-democracys-spread-meet-with-harsh-facts.html> (rise of nativism). In the U.S., for example, the Republican candidate Donald Trump successfully attacked "bad trade deals" and trade with China to build support at the same time that he vowed to put the Democratic candidate Hillary Clinton in jail once elected. See, e.g., Jim Tankersley, *How the Politics of Trade Changed So Fast*, WASH. POST (Oct. 7, 2016), [https://www.washingtonpost.com/news/wonk/wp/2016/10/07/how-the-politics-of-trade-changed-so-fast/?utm\\_term=.42c045311011](https://www.washingtonpost.com/news/wonk/wp/2016/10/07/how-the-politics-of-trade-changed-so-fast/?utm_term=.42c045311011); Matt Zapposky, *One of Clinton's Biggest Critics in Email Case Says He'd Tell Trump Not to Jail Her*, WASH. POST (Oct. 10, 2016), [https://www.washingtonpost.com/world/national-security/one-of-clintons-biggest-critics-in-email-case-says-hed-tell-trump-not-to-jail-her/2016/10/10/28a03b68-8ef9-11e6-a6a3-d50061aa9fae\\_story.html?utm\\_term=.150fe88ab734](https://www.washingtonpost.com/world/national-security/one-of-clintons-biggest-critics-in-email-case-says-hed-tell-trump-not-to-jail-her/2016/10/10/28a03b68-8ef9-11e6-a6a3-d50061aa9fae_story.html?utm_term=.150fe88ab734).

557. See Halliday & Shaffer, *supra* note 23, at 39.

558. Gregory Shaffer & Michael Waibel, *The Rise and Fall of Trade and Monetary Legal Orders: From the Interwar Period to Today's Global Imbalances*, in CONTRACTUAL KNOWLEDGE: ONE HUNDRED YEARS OF LEGAL EXPERIMENTATION 289-333 (Gregoire Mallard & Jerome Sgard eds., Cambridge University Press 2016).