

Chapter 6

How China Took on the United States and Europe at the WTO

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In joining the World Trade Organization in December 2001, China assumed vast legal commitments that significantly affected its internal laws and institutions. Western countries hoped to transform China and integrate it into a liberal, capitalist global economy.¹ Many of China's leaders aimed to use the process for internal reform as well, although they wished to do so on their own terms, and they faced considerable opposition internally. The government invested massively in developing legal capacity to adjust to WTO requirements that the United States had pressed upon it. In the process, China learned how to defend its interests through the WTO and to use the rules against the United States and European Union. China's responses affected U.S. and European perceptions of the legal order, and the U.S. reaction, in turn, has eroded it. As China grew economically and benefited from liberalized trade, as the 2008 financial crisis humbled American-style neoliberalism and raised China's profile, and as President Xi assumed power and favored a growing role for the state and state-owned enterprises, what had seemed a tough deal for China in its WTO Accession Protocol increasingly appeared to many in the United States to be unfair to the United States.

WTO rules played into law and policy developments in China involving political and professional contests, including between market liberalizers and neo-Maoists.² Officials had to manage and respond to domestic political backlash that China had "sold out" its interests by making such concessions.³ Leftist scholars and activists "framed the WTO as part of a 'soft war' waged by Western powers, particularly the United States and United Kingdom, to pry open China's markets for the benefit of Western corporations, and ultimately to 'advance neo-colonialism and to control the entire world.'"⁴ Reformers, in contrast, used international legal norms as leverage to advance their internal policy goals.

¹ For example, President Clinton stated, "[by] joining the WTO, China is not simply agreeing to import more of our products; it is agreeing to import one of democracy's most cherished values: economic freedom. The more China liberalizes its economy, the more fully it will liberate the potential of its people — their initiative, their imagination, their remarkable spirit of enterprise. And when individuals have the power, not just to dream but to realize their dreams, they will demand a greater say." Clinton's Speech on China Trade Bill, 9 March 2000.

² On the neo-Maoist left, Jude Blanchette, *China's New Red Guards: The Return of Radicalism and the Rebirth of Mao Zedong* (Oxford: Oxford University Press, 2019), 84 (a movement "that saw global conspiracies of Western domination, the infiltration of China and the party by traitors and 'hostile forces,' and a belief in an inevitable and unavoidable conflict with the United States").

³ Interview with high-level official, May 2012; Margaret 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*, ed. Alastair Iain Johnston and Robert Ross (Stanford: Stanford University Press, 2006), 242, 246.

⁴ Blanchette, *China's New Red Guards*, 66.

As China developed legal capacity to handle WTO issues, it became enmeshed in transnational legal processes. These processes spurred changes and transformations in government, academia, law firms, and business. Key parts of the Chinese government and Chinese stakeholders became embedded in transnational legal processes of international economic integration, which included a binding international dispute settlement process that was new to China.

From the perspective of transnational legal ordering, international trade law involves not just law at the international level, but dynamic interactions within states, between states, and with international organizations that implicate international, national, and local law and practice. The international trade regime affected institutions and professions within China along multiple dimensions, including within government, academia, law firms, business, and private trade associations. To implement its WTO obligations, China made sweeping changes in its legal system. The Chinese government took novel steps to spread understanding of WTO law and dispute settlement throughout society in ways that helped legitimate international trade litigation and domestic legal change. Investment in teaching and research on WTO law brought new approaches such as the case method for the study of law. By contributing to the opening of the economy, and subjecting internal governance to external accountability norms and processes, the WTO increased the overall prominence of the legal profession within China. Yet, to preserve its unique political and economic system, China also introduced initiatives that, in the view of many in the United States and Europe, violate WTO disciplines either in letter or in spirit. China aimed to shape the understanding and flexible application of WTO legal norms for its model of state capitalism, affecting U.S. perceptions of the system's legitimacy and relevance. This chapter addresses the WTO context while the following one assesses China's initiatives under President Xi that could give rise to a broader Sino-centric legal order alongside the multilateral one, building from infrastructure finance, a web of trade and investment agreements, and indigenous innovation policies in which intellectual property plays a supporting role.

Without building strong capacity in WTO law, China's growing clout in the WTO would not have been possible. In turn, the United States would not have viewed WTO negotiating principles of reciprocity and the WTO dispute settlement system with its Appellate Body as significant constraints on U.S. trade policy. How did China, a country with an anti-legalist, Confucian tradition not known for lawyering, 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 did those efforts have for Chinese institutions, professions, and practices? And what were the implications for the multilateral trading system?

I. China's Challenges in Joining the WTO

A. China's Challenges

While China was one of the founding members of the General Agreement on Tariffs and Trade formed after World War II, it withdrew after the communist revolution in 1949 and did not

play any role in the multilateral trading system while it sought to resume its membership in 1986.⁵ It then took fifteen years for China to be accepted into the GATT and WTO system. Unlike other WTO members, China had no experience with GATT and WTO law, whether in terms of the WTO committee system or litigation. Moreover, it had not participated in litigation before international courts as litigation was at odds with Chinese state and business norms for dispute resolution. China, in short, faced daunting challenges in joining the WTO's legalized and judicialized system. In order to join the organization, China had to agree to a stringent accession protocol in November 2001. To start, it had to make deep tariff cuts for imports, and it agreed to significantly liberalize services trade, in each case by far more than any other emerging economy.⁶ For trade in goods, it agreed to reduce its average bound tariff to ten percent by 2008, with an average of 9.1% for industrial products and 15.8% for agricultural products. In comparison, Brazil agreed to an average bound tariff of 31.4% (30.8% for industrial and 35.5% for agricultural goods) and India an average bound tariff of 49% (34.7% for industrial and 114.2% for agricultural goods). In contrast, however, the United States had agreed to average bound tariffs of 3.5% (3.3% for industrial and 4.8% for agricultural goods) and the European Union to 5.5% (3.9% for industrial and 15.9% for agricultural goods).⁷

China further agreed to eliminate state monopolies on imports and exports, to open its economy to competition, and to overhaul its laws, regulations, procedures, and administrative and judicial institutions across all levels of government. It agreed that all regulations affecting trade would be non-discriminatory and that government standard setting would be transparent and based on international standards.⁸ It committed to stringent intellectual property protection,⁹ and independent review by judicial or administrative tribunals of all trade-related administrative actions.¹⁰ And it agreed to grant greater rights to other WTO members against China, and reduced China's rights against them, compared to standard WTO rules. For example, as a condition to accession, China agreed not to apply export taxes (except as scheduled), and it granted other WTO members the right to treat China as a "nonmarket economy" in their anti-dumping investigations for a fifteen-year period, and to use alternative benchmarks in their subsidy and countervailing duty investigations of Chinese products. It thus made it easier for countries to impose anti-dumping and countervailing duties against Chinese products. These provisions, which did not apply to other

⁵ 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, Henry Gao, "China's Participation in the WTO: A Lawyer's Perspective," *Singapore Year Book of International Law* 11 (2007): 41-48. China sought to rejoin the GATT in the 1980s when the reformist Zhao Ziyang was China's Premier.

⁶ Nicholas Lardy, *Integrating China into the Global Economy* (Washington DC: Brookings Institution Press, 2002), 33-35, 66-75.

⁷ World Trade Organization, International Trade Center, United Nations Conference on Trade and Development, *World Tariff Profiles 2009* (2009), 2-18 (these reflect initial bindings at the time of accession).

⁸ GATT Articles III and X, *The TBT Agreement, The SPS Agreement*.

⁹ TRIPS Agreement; Andrea Wechsler, "China's WTO Accession Revisited: Achievements and Challenges in Chinese Intellectual Property Law Reform," *European Yearbook of International Economic Law*, ed. Christoph Herrmann, Markus Krajewski and Jörg Philipp (2012), 125.

¹⁰ Article 2(D)1, *China's Protocol of Accession*.

WTO members, raised charges that China's Accession Protocol was an unequal treaty mirroring China's earlier history of "unequal treaties" with Western powers.¹¹

The country started the complicated process of revising its laws before it formally joined the WTO pursuant to a bilateral agreement with the United States on November 15, 1999. The United States wielded significant leverage since it was the gatekeeper to China's WTO accession. To implement the bilateral agreement and China's subsequent WTO commitments, the 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).¹² The "clean up" operation was immense, involving bureaucrats at all levels, from the central government to provincial and local ones. The office first focused on the "clean up" of laws and regulations at the central level, starting with MOFTEC and expanding to other Ministries. The office then turned to provincial and local regulations. It classified laws and regulations into one of four categories: regulations "to be kept," "to be revised," "to be abolished," and "to be reenacted." Overall, the office reports 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.¹³ The office completed its work in around two years, constituting arguably the largest, condensed exercise of lawmaking and law revision in China's (and perhaps the world's) history. Pause for a moment and think counterfactually if this were demanded of the United States: It is inconceivable that the United States would revise its laws to such an extent upon signing a treaty and joining an international organization. Rather, WTO law largely reflected existing U.S. law.

Although there was significant debate in government about the terms of China's accession, after China joined the WTO, the government launched a campaign to generate enthusiasm in the country regarding its accession.¹⁴ The government sponsored numerous WTO-related initiatives, such as the establishment of WTO centers around the country. 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.¹⁵ Scores of Chinese officials, judges, and scholars came to the United States for training in WTO law, and scores of experts went to China

¹¹ Julia Qin, "WTO-Plus Obligations and their Implications for the World Trade Organization Legal System—An Appraisal of the China Accession Protocol," *Journal of World Trade* 37 (2003): 483.

¹² "Zhang Yuqing Interview," *Rushi Shinian Fazhi Zhongguo [10 Years in the WTO, Rule of Law in China]*, ed. Lu Xiaojie, Han Liyu, Huang Dongli, Si Xiaoli and Yang Guohua (2011): 6-7.

¹³ *Ibid.*, 6-11.

¹⁴ Pearson, "China in Geneva;" Yang Guohua, "A Memoir," 1, 3. Stories of common peoples' interests in the WTO in China are legion. To give an example, Peter Hessler's popular book *Oracle Bones* frequently refers to the excitement of China's joining the WTO among the people he encounters. At one point, Hessler meets 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* (New York: HarperCollins, 2006), 67.

¹⁵ Julia Qin, "Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System," *China Quarterly* 191 (2007): 720.

to teach WTO law under technical assistance and capacity-building initiatives.¹⁶ In 2003, the government even organized a national contest regarding knowledge of the WTO in which over five million people reportedly participated. 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.¹⁷ Such popular participation in learning technical international law rules is unheard of and, we imagine, would be the envy of international law enthusiasts around the world. The government trumpeted China's joining the WTO as leverage to carry out market-oriented reforms, and further China's integration in the global economy and global institutions. The United States and European Union likewise hoped that China's accession would further China's transformation into a market economy, and to encourage it to move towards a liberal democracy.

B. 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 less competitive in low-wage production (because wages have risen) and unable to compete in high-value-added markets.¹⁸ Trade (imports plus exports) soared to around sixty-five percent of China's gross domestic product in 2006 from twenty-four percent in 1990, before declining to thirty-eight percent by 2018 as a huge Chinese middle class formed and China's domestic market grew.¹⁹

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. The Chinese state invests significantly in industrial policies, ranging from direct state ownership to state subsidization of economic sectors, including (as alleged by the United States and European Union) through state bank financing at lower than market rates, state company selling manufacturing inputs at less than market value, and a state innovation policy that discriminatorily promotes indigenous research and development to upgrade China's economy.²⁰ Law and lawyers play increasingly important roles in this mixed economy, whether one views it as "socialist with Chinese characteristics," "capitalist with Chinese characteristics," or simply "state capitalism."²¹ Although many commentators maintain there has been a turn away from law

¹⁶ Yang Guohua, "China in the WTO Dispute Settlement: A Memoir," *Journal of World Trade* 49, no. 1 (2015): 1, 3-5; Asian Development Bank, *Technical Assistance to the People's Republic of China for WTO Membership and Foreign Trade Reform* (2001).

¹⁷ Zhenyu Sun, "China's Experience of 10 Years in the WTO," *A Decade in the WTO: Implications for China and Global Governance*, ed. Ricardo Meléndez-Ortiz, Christophe Bellmann, and Shuaihua Cheng (Geneva: ICTSD Programme on Global Economic Policy and Institutions, 2011), 12.

¹⁸ Randall Peerenboom and Tom Ginsburg, *Law and Development of Middle-Income Countries: Avoiding the Middle-Income Trap* (Cambridge: Cambridge University Press, 2014).

¹⁹ The World Bank, "Merchandise Trade (% of GDP)," *The World Bank*, <https://data.worldbank.org/indicator/NE.TRD.GNFS.ZS> (accessed Jan. 22, 2020).

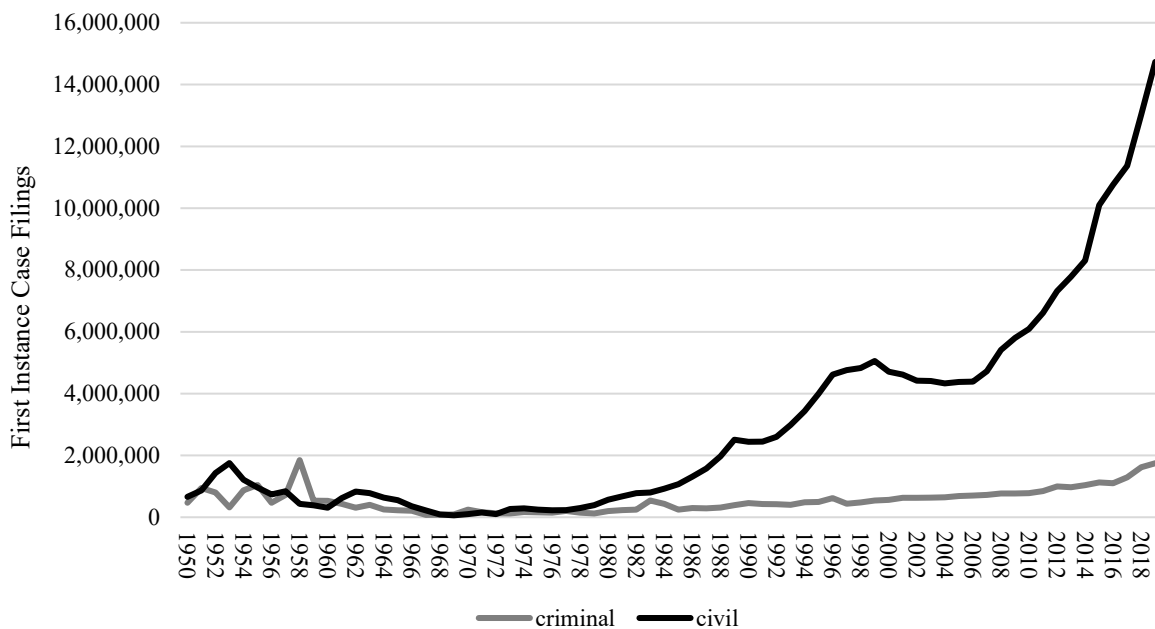
²⁰ Chapter 7, this book; David Wertime, "It's Official: China is Becoming a New Innovation Powerhouse," *Foreign Policy*, Feb. 7, 2014.

²¹ Compare Yasheng Huang, *Capitalism with Chinese Characteristics: Entrepreneurship and the State* (Cambridge: Cambridge University Press, 2008); *Law and Economics with Chinese Characteristics: Institutions for Promoting Developing in the Twenty-First Century*, ed. David Kennedy and Joseph Stiglitz (Oxford: Oxford University Press,

in general,²² business, investment, and trade law flourish, creating new career opportunities for lawyers.²³

Joining the WTO was part of, and contributed to, a broader “opening up” process in China in which law and lawyers play a growing role in commercial transactions and dispute settlement, both internally and externally. By 2018, the Chinese legal bar had over 300,000 members and the judiciary had over 200,000 judges.²⁴ This is a remarkable change given that the legal profession was almost wiped out during the Cultural Revolution. The use of courts for dispute settlement in China skyrocketed. The number of civil claims filed at first instance soared from 62,000 in 1969 (during the Cultural Revolution), to 2.4 million in 1990, to six million in 2010, and to almost fifteen million in 2019. China’s economic opening, the increased role of markets and commercial law, and rising expectations among the populace help explain these changes.

Figure 6.1 Number of First Instance Case Filings in China (1950-2019)²⁵



In parallel, lawyers play an increasingly significant role in China’s outbound commercial relations, including for its Belt and Road Initiative, as addressed in Chapter 7. China’s joining the WTO and

2015); Branko Milanovic, *Capitalism Alone: The Future of the System that Rules the World* (2019). China formally revised its constitution to call itself a “socialist market economy” in 1993, just as negotiations for the WTO’s creation were being completed.

²² Compare Carl F. Minzner, “China’s Turn Against Law,” *American Journal of Comparative Law* 59 (2011): 935; Randall Peerenboom, *China’s Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

²³ Sida Liu, David Trubek and David Wilkins, “Mapping the Ecology of China’s Corporate Legal Sector: Globalization and its Impact on Lawyers and Society,” *Asian Journal of Law and Society*, 3 (2016), 2273-297.

²⁴ Ji Li, *Power, Law, and Justice in China* (Cambridge: Cambridge University Press, forthcoming) (manuscript on file).

²⁵ *Ibid.* (citing Report on China Law Development and China Statistics Yearbook).

its experience in the organization helped catalyze and significantly contributed to these economic, institutional, and professional changes within it. International trade law, in short, had huge implications for the Chinese economy, the Chinese government, and Chinese law and lawyers.

By 2009, 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, the U.S.-China relationship had dramatically changed.²⁶ China began to increasingly assert itself as a rival to the United States and European Union. 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.²⁷ By 2013, it became the world's largest trader in goods, surpassing the United States, while its internal market grew at even a faster rate than its exports. As Figure 6.2 shows, Chinese trade soared after China joined the WTO in 2001, reflecting huge transformations in China's economy and the accompanying role of Chinese lawyers. Forecasters predict that China will surpass the United States as the world's largest economy in around a decade.²⁸ In law and development circles, one heard of a new "Beijing consensus" as displacing, or at least rivaling, the neoliberal "Washington consensus."²⁹ By 2018, the rest of the world was more connected through trade with China — which is the top importer for twice as many countries as the United States (61 vs 30) — enhancing China's influence.³⁰ This reduced the clout of the United States and European Union in the WTO, which represented well over half of the GDP and trade of all other WTO members combined until China joined.³¹

Figure 6.2. Comparison of Exports between China and the United States³²

²⁶ Martin Jacques, *When China Rules the World: The End of the Western World and the Birth of a New Global Order* (East Rutherford: Penguin, 2009); Ho-fung Hung, *The China Boom: Why China Will Not Rule the World* (New York: Columbia University Press, 2016).

²⁷ The World Bank, "The World Bank in China: Overview," *The World Bank*, <http://www.worldbank.org/en/country/china/overview> (accessed Feb. 16, 2019). David Barboza, "China Passes Japan as Second-Largest Economy," *New York Times*, Aug. 15, 2010, B1, http://www.nytimes.com/2010/08/16/business/global/16yuan.html?pagewanted=all&_r=0 (accessed Feb. 16, 2019).

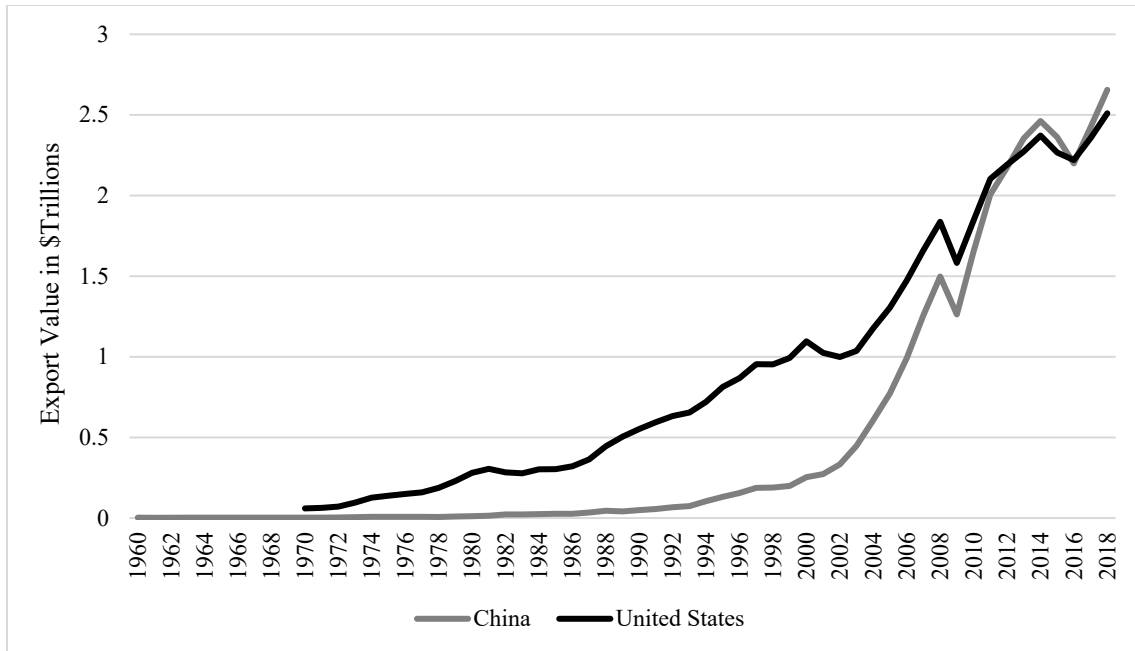
²⁸ Pankaj Ghemawat and Thomas Hout, "Can China's Companies Conquer the World," *Foreign Affairs* (2016): 86.

²⁹ John Williamson, "Is the "Beijing Consensus" Now Dominant?," *Asia Policy* (2012): 1; Stefan Halper, *The Beijing Consensus: Legitimizing Authoritarianism in Our Time* (New York: Basic Books, 2012).

³⁰ Cent. Intelligence Agency, *Imports - Partners*, The World Factbook <https://www.cia.gov/library/publications/the-world-factbook/fields/403.html>; Cent. Intelligence Agency, *Exports - Partners*, The World Factbook <https://www.cia.gov/library/publications/the-world-factbook/fields/241.html>.

³¹ John Barton, Judith Goldstein, Richard Steinberg, *The Evolution of the Trade Regime: Politics, Law, and Economics of the GATT and the WTO* (2006): 13.

³² World Bank, Exports of goods and services (current US\$) – United States, China, <https://data.worldbank.org/indicator/NE.EXP.GNFS.CD?locations=US-CN>.



To participate effectively in the multilateral trading system, China invested in building legal capacity. 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 non-governmental actors since it realized that private actors play important roles at the WTO, particularly in dispute settlement.³³ By 2006, within five years of its accession, China emerged from being a reluctant participant that tried to avoid WTO litigation to become an active and formidable player that used the system to defend its interests. China’s joining the WTO and its building of trade-related capacity contributed to changes within China, which in turn affected the transnational legal order for trade.

II. Building a Trade Law Community in China

A. 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.³⁴ 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,

³³ Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington DC: Brookings Institution Press, 2003).

³⁴ Jiang Zemin, “Zai Jilie de Guoji Jingzheng zhong Zhangwo Zhudong [Seize the Initiative amidst Intense International Competition],” *Jiang Zemin Wenxuan: Disan Juan [Selected Works of Jiang Zemin: Volume III]* (Beijing: Foreign Languages Press, 2006), 455.

including experts on international trade policy, trade law, trade negotiations, and antidumping investigations. Pursuant to the high-level exhortations, central, provincial, and local government departments invested significantly in WTO-related capacity-building initiatives, expanding the role for lawyers.

In the central government, the State Council and the Central Committee of the Communist Party of China 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.³⁵ Many ministries restructured their internal organization in preparation for the upcoming accession. They worked with MOFTEC to "clean up" laws and regulations to meet China's new obligations and ensure that new laws and regulations comply with WTO rules.

The government reorganized its lead ministry for international trade and renamed it the Ministry of Commerce (MOFCOM). MOFCOM has a Janus-faced role of looking inward and outward. Internally, MOFCOM oversees China's compliance with its WTO obligations. Externally, MOFCOM protects China's trading interests abroad, including before the WTO. It staffs China's mission to the WTO, which is the largest in Geneva with a delegation of over twenty individuals.³⁶ By Janus-faced, we do not mean that MOFCOM is "insincere," but rather that, in having to look both inwards and outwards, MOFCOM experiences pressure toward compliance so as not to open China to legal challenge when it pursues claims against others.

Following China's accession, MOFCOM (then named MOFTEC) established two new Departments to address WTO matters which likewise have two-sided missions: the Department of WTO Affairs and the Fair Trade Bureau. Internally, the Department of WTO Affairs reviews draft Chinese legislation and policy to ensure they are WTO consistent.³⁷ Externally, it represents China in WTO negotiations, WTO trade policy reviews, and before WTO committees, where it is responsible for notifying new and amended Chinese regulations as required under WTO agreements.³⁸ The Fair Trade Bureau plays the same dual role regarding the application of import relief laws, both in China where it conducts investigations of foreign products, and outside of China where it follows investigations of Chinese products. These roles likewise enhance the

³⁵ 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.

³⁶ Based on personnel identified as working on WTO issues in the WTO Directory. The mission, housed in a beautiful building on Lake Geneva, is by far the nicest of all missions to the WTO. Based on the author's years of interviews.

³⁷ MOFCOM, Zhuyao Zhineng [Main Functions], *Ministry of Commerce of the People's Republic of China: Department of WTO Affairs (China WTO Notification and Inquiry Center)*, June 23, 2015, <http://sms.mofcom.gov.cn/article/gywm/200606/20060602467456.shtml>; Interview with official, Beijing, July 20, 2016; interview with former MOFCOM official, Beijing, July 22, 2016.

³⁸ *Ibid.* 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 Years' Experience in WTO Dispute Settlement Practices]*, ed. Li Chengang (2011), 14-15.

departments' sensitivity to the importance of Chinese compliance with WTO commitments since it needs credibility when pressing other countries to meet their commitments toward China.³⁹

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. In 2001, MOFCOM created a Division on WTO law within DTL to handle WTO disputes.⁴⁰ It established a second DTL Division on WTO Law in 2009 when China faced a slew of new disputes. The total number of DTL officials dedicated to WTO litigation increased from five to nine.⁴¹ 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. China's WTO dispute settlement team enhanced lawyers' roles in China's international trade relations.

The GATT requires WTO members to take "reasonable measures" to ensure local compliance with GATT obligations.⁴² China's central government has used this provision to try to assert greater control over local actors, which generally is a challenge.⁴³ The central government aimed to spur local government officials to become familiar with WTO rules. 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 Level.⁴⁴ 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.

After the training course, many provinces drafted Plans of Action in response to China's WTO accession.⁴⁵ A key component was to strengthen trade law capacity. To achieve this objective, local governments established what they called "WTO Centers," analogous to, but much more ambitious than, India's "WTO cells." Funded by the local governments, these centers are semi-governmental institutions that conduct WTO-related training, research, and outreach activities. 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 them across the country. In 2019, the Shanghai center employed about forty professionals and the Shenzhen center about thirty.⁴⁶

The centers served important internal and external roles. Internally, when a local government passed a regulation, it was to consult with the local WTO center to confirm that the

³⁹ Interviewees noted how the WTO has helped to discipline the government's application of antidumping law in China. Interview with partner, Beijing law firm, June 11, 2014.

⁴⁰ Li Chengang, *Overview*, 15.

⁴¹ *Ibid.*, 27.

⁴² GATT Article XXIV.12.

⁴³ Pittman Potter, "China and the International Legal System: Challenges of Participation," in *China's Legal System: New Developments, New Challenges*, ed. Donald C. Clarke (Cambridge: Cambridge University Press, 2008), 145, 150.

⁴⁴ Sun Zhenyu, *Rineiwa Kongzong Suiyue [Busy Years in Geneva]* (Beijing: Ren Min Chu Ban She, 2011), 37.

⁴⁵ *Zhongguo Jiaru Shijie Maoyi Zuzhi Guoduqi Beijing Xingdong Jihua [Action Plan for Beijing during China's Transition Period in the WTO]*, ed. Zhang Mao (Beijing: Social Science Literature Publishing House, 2003).

⁴⁶ Interviews in Shanghai and Shenzhen Centers, June 2014 and email confirmation in April 2020.

regulation is WTO consistent, and amend it as needed.⁴⁷ This process aimed to embed the international rules within internal policymaking. Externally, the centers were to provide information to companies to help them address trade barriers, such as antidumping and countervailing duty investigations, and seizures of goods on intellectual property grounds. As Chinese companies moved up the value chain and produced technology-intensive goods, intellectual property issues became more salient, such as under U.S. Section 337 pursuant to which U.S. customs seizes imported products that allegedly violate U.S. intellectual property rights.⁴⁸ The centers also helped MOFCOM prepare an annual trade barriers report regarding measures that Chinese exporters face. It was 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.⁴⁹

When China first joined the WTO, WTO matters represented the cutting edge for policy and the leadership spurred officials to exhibit WTO awareness.⁵⁰ The WTO “craze” 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 antidumping and other measures against Chinese products.⁵¹ 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.⁵² 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,⁵³ and it played an important supporting role in the creation of the China (Shanghai) Pilot Free Trade Zone, which experimented with trade and investment liberalization. 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 began to have an economic background and provided economic analysis to support bilateral and plurilateral trade and investment negotiations as part of China’s new initiatives addressed in Chapter 7.⁵⁴

The U.S. election of President Trump and the U.S.-launched trade war deepened these trends. Nonetheless, cloaking its national interest within a commitment to the multilateral rules-based trading system and standing with other countries to oppose U.S. unilateralism and protectionism strengthened China’s international position politically. In January 2020, China formed an alliance with the European Union, Australia, Brazil, Canada, Mexico and others to develop an interim WTO appeals mechanism after the U.S. blockage of the Appellate Body in

⁴⁷ Interview at Shenzhen WTO Affairs Center, June 13, 2014.

⁴⁸ Ibid.

⁴⁹ Interview with member of Shanghai WTO Center, June 12, 2014.

⁵⁰ Interview with lawyer, Shanghai, June 12, 2014.

⁵¹ Interview at Shenzhen WTO Affairs Center, June 13, 2014.

⁵² Interview with member of Shanghai WTO Center, June 12, 2014.

⁵³ Shanghai’s WTO Affairs Consultation Center, “About the Center,” *SCCWTO*, <http://www.sccwto.org/introduce?locale=zh-CN>.

⁵⁴ Interview with member of Shanghai WTO Center, June 12, 2014.

December 2019, which the group formalized in March 2020.⁵⁵ These countries remain wary of China's rise and many are skeptical of its commitments. Nonetheless, China is better positioned in aligning itself with international organizations such as the WTO that the United States threatens to abandon.

B. Building Expertise in Academia, WTO Centers and Think Tanks

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. Through these initiatives, WTO legal norms diffuse. The capacity-building initiatives spanned academia, law firms, private businesses, and industry associations. We start with academia, which illustrates the implications for Chinese legal study, research, and practice in international economic law.

China's government exercises great influence in academia, in particular through its funding of research. 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.⁵⁶ China's Ministry of Education included International Economic Law (and thus WTO law) as one of sixteen mandatory courses for all Chinese law schools.⁵⁷ Between 2007-2014, almost two-thirds of all funded research proposals were for international economic law topics.⁵⁸

As a result, in most of the more than six hundred law schools in China, there is at least one professor who claims to specialize in WTO law, a much greater number and percentage than in the United States where the study of WTO law has waned.⁵⁹ 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 these 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 when the government restructured higher education institutions in 1952. 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. These elite schools have multiple professors who teach international trade law, including specialized seminars on WTO law and

⁵⁵ Philip Blenkinsop, "EU, China and 14 others agree to stop-gap fix for WTO crisis," Reuters, March 27, 2020.

⁵⁶ Ministry of Justice, "Lvshi Zige Kaoshi Banfa [Rules on Lawyer's Qualification Exam]," *Art. 16*, Order 61, July 26, 2000.

⁵⁷ Ministry of Education, "Putong Gaodeng Xuexiao Benke Zhuanye Mulu he Zhuanye Jieshao [Overview of the Catalogue of Majors for Institutions of Higher Education]," *Ministry of Education of the People's Republic of China*, 67, 2012, http://www.moe.edu.cn/s78/A08/A08_gggs/s8468/201212/t20121218_181006.html.

⁵⁸ Anthea Roberts, *Is International Law International?* (New York: Oxford University Press, 2017), 216-217 (Figure 17).

⁵⁹ Interview with law professor, Beijing, July 25, 2016. Compare Roberts, *Is International Law International?*, 224 (international law occupying a peripheral place in the U.S. academy).

specific topics such as WTO dispute settlement, trade in services, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

Most WTO scholars in China are graduates from these elite law schools, and the leading ones couple their degrees with overseas experience. The foreign study and experience of China's WTO scholars exemplifies the transnational nature of this legal field.⁶⁰ Each of the eight Chinese academics on China's Indicative List of WTO Panelists for WTO disputes had either studied overseas or been visiting scholars abroad.⁶¹ More broadly, over forty percent of international law academics have received at least one law degree outside the country.⁶²

Professors teaching WTO law in China have spearheaded use of the case study method in China. 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. The WTO legal field, however, is completely different. By the start of 2020, WTO panels and the Appellate Body had issued 258 panel reports and 145 Appellate Body reports that built an elaborate, evolving jurisprudence to create "legitimate expectations" among the WTO's member governments and traders and other stakeholders within them.⁶³ To teach WTO law, Chinese professors thus included cases in the advanced curriculum.

In 2007, the Ministry of Education of China launched a comprehensive teaching reform plan to improve the teaching quality in Chinese universities. One important component of the plan was 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."⁶⁴ Among law school subjects, WTO law was considered one of the few that are most suitable for teaching in English. Many law schools thus began to offer courses on WTO law in English in order to build students' English language capacity. 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 organized the China WTO Moot Court Competition with two of China's elite law schools, China University of Politics and

⁶⁰ The transfer and China's pragmatic adaptation of legal ideas has parallels with China's receipt and pragmatic adaptation of economic ideas. Julian Gewirtz, *Unlikely Partners: Chinese Reformers, Western Economists, and the Making of Global China* (2017). More broadly, China became the largest sender of law students (as well as visiting students) to the United States. Paul Musgrave, "Universities Aren't Ready for Trade War Casualties," *Foreign Policy* (May 19, 2019) ("Chinese visitors account for one-third of the foreign undergraduates and graduate students studying in the United States").

⁶¹ Because of the large number of cases in which China is a party, only one Chinese has served on a panel, Mr Zhang Yuqing, who was a member of an *EC-Bananas* compliance panel. European Communities - Regime for the Importation Sale and Distribution of Bananas, Recourse to Article 21.5 of the DSU by the United States," *Constitution of the Panel, Note by the Secretariat*, WT/DS27/84, Aug. 13, 2007.

⁶² Anthea Roberts, "Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field," in eds. Bryant Garth and Gregory Shaffer, *The Globalization of Legal Education: A Critical Perspective* (on file) (typically an advanced degree such as an LLM or PhD).

⁶³ Appellate Body Report, "Japan-Taxes on Alcoholic Beverages," *WTO/DS8*, July 11, 1996, 10, 11. This number does not include separate decisions regarding the amount of time for compliance and actual compliance, and three arbitrations.

⁶⁴ Ministry of Education and Ministry of Finance, "Guanyu Shishi Gaodeng Xuexiao Benke Jiaoxue Zhiliang yu Jiaoxue Gaihe Gongcheng de Yijian [Advice on the Implementation of the Project on Quality of College Teaching and Teaching Reform in Higher Education]," *Jiaogao*, Jan. 22, 2007.

Law and Southwest University of Political Science and Law.⁶⁵ 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.” The first competition was held in Beijing in November 2012, and it drew teams from eight universities from four cities. The number of teams doubled to sixteen in 2013 and rose to eighteen in the ensuing years. The panelists include Chinese trade lawyers, professors, and MOFCOM officials that handle WTO cases. MOFCOM officials and the private lawyers use the opportunity to identify and recruit young talent.⁶⁶

The study of WTO case law can have broader 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. When graduates work in ministries outside of MOFCOM, not only does basic knowledge of WTO law diffuse through the government, but MOFCOM has interlocutors in other ministries acquainted with WTO legal rules and principles. Such diffusion of expertise facilitated compliance with China’s WTO commitments and potentially deeper socialization processes regarding trade law principles and legal reasoning.

A senior MOFCOM official stressed to us how the judges of the Supreme People’s Court know WTO law.⁶⁷ 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.⁶⁸ Chinese courts have referenced WTO law in a number of decisions.⁶⁹

Although, unlike Brazil, China did not create an internship program in its Geneva mission, it 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. From the experience of the hearing, he highlighted how “the training of our students should be harder, should

⁶⁵ It is “the first Moot Court Competition officially sponsored by a Ministry” in China, revealing the importance that the government has given to WTO law and dispute settlement. Nankai University, “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.

⁶⁶ Interview with lawyer, Beijing, June 11, 2014.

⁶⁷ Interview with official at MOFCOM Research Institute, July 201, 2016. 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 and President of the Supreme People’s Procuratorate. 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.

⁶⁸ Article 9 of the Supreme People’s Court’s Regulations on Issues Concerning the Trial of Administrative Cases Relating to International Trade provides, “[i]f there are two or more reasonable interpretations for a provision of the law or administrative regulation applied by a peoples 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.” Congyan Cai, “International Law in Chinese Courts,” *American Journal of International Law* 110 (2016): 269, 275-277.

⁶⁹ *Ibid.*, 286-287.

be tougher.”⁷⁰ Another law professor attending a WTO hearing noted that the experience gave him a completely new perspective of the WTO that he brings to his classroom. Now he gives factual scenarios to his students and lets them work through the facts while studying the WTO background rules on their own.⁷¹

The experiences of Chinese trade law professors abroad shape their teaching. As one law professor noted in 2014, “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 law teaching in China.⁷² 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.⁷³ The mandatory study of WTO law in Chinese law schools fostered transnational processes that affect legal training.

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, which was established in 1984 by Professor Yao Meizhen from Wuhan University⁷⁴ and later led by Professor Chen An from Xiamen University.⁷⁵ 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. Two years later, MOFCOM established the China Society for World Trade Organization Studies.⁷⁶ 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.

In addition to the formal research societies, entrepreneurial individuals 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 of DTL in MOFCOM. 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 parallel, when the WTO Secretariat launched a WTO Chairs Programme in 2010, it selected the Shanghai Institute of Foreign Trade (which changed its name in 2013 to Shanghai University of International Business and Economics) as one among fourteen centers worldwide. The program aims to enhance knowledge of the WTO and the international trading system among

⁷⁰ Interview with Chinese law professor, Beijing, June 11, 2014.

⁷¹ Interview with two Chinese law professors, Beijing, June 11, 2014.

⁷² Interview with Chinese law professor, Beijing, June 11, 2014.

⁷³ Interview with group of Chinese law professors, Beijing, July 27, 2016.

⁷⁴ Wang Chuanli, “Yao Meizhen yu zhongguo Guoji Jingjifa [Yao Meizhen and international Economic Law in China],” *Wuda Guojifa Pinglun [Wuhan University International Law Journal]* 18, no. 1, (2016): 15.

⁷⁵ Chinese Society of International Economic Law, “Xuehui Jianjie [About the Society],” *CSIEL*, 2014, http://www.csiel.org/about.aspx?baseinfoCateID=72&baseinfo_Id=72&CateId=72&ViewCateID=72.

⁷⁶ China Society for World Trade Organization Studies, “Jianjie, Zongzhi ji Zhuyao Zhineng [Introduction, Objectives and Main Functions],” *Ministry of Commerce of the People’s Republic of China*, Oct. 17, 2013, <http://cwto.mofcom.gov.cn/article/about/201310/20131000353150.shtml>.

academics and policy makers in developing countries through curriculum development, research, and outreach by universities and research institutions. As of 2019, the Shanghai team consisted of five professors and around twenty full-time faculty and researchers spanning two schools — the WTO Chair Institute-China and the School of Trade Negotiations — which, in turn, link with researchers in other faculties. The institute covers WTO dispute settlement and trade policy review, and it provides translation services for MOFCOM. These initiatives illustrate the broad transnational ties of WTO researchers in China, linking with the WTO secretariat as well as other Geneva-based organizations.

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. This practice gradually became institutionalized after MOFCOM organized regular seminars on current WTO cases. The exchanges helped the government tap into academic expertise, and helped the academics keep abreast of legal developments. A Chinese academic specializing in WTO law, for example, was part of the legal support team for the U.S.-China “phase 1” agreement in relation to the trade war.⁷⁷

In addition to its consultations with academics, MOFCOM runs a formal secondment program for law professors, which it started in 2011.⁷⁸ Under the program, MOFCOM selects young academics from elite law schools around the country and assigns them to the Department of Treaty and Law. During their one-year stint, 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. MOFCOM invited law professors to observe WTO hearings in Geneva as members of the Chinese delegation. It also invited them to hear presentations at MOFCOM by foreign lawyers who handle China’s WTO cases.⁷⁹ These experiences help orient their research and pedagogy.

The rise of Chinese nationalists under President Xi,⁸⁰ the U.S. trade war launched in 2018, and the U.S. neutering of the WTO Appellate Body, raise questions regarding the future of such transnational processes in Chinese academia regarding WTO law. However, as Chapter 7 shows, trade, investment, and cross-border private law remain central to China’s ambitions, which have helped spur Chinese legal education on transnational dispute settlement. China aims to build on and repurpose Western models for legal education to enhance its sphere of influence. As Anthea Roberts writes,

“Top Chinese law schools are beginning to offer LLM programs in English designed to attract students from around the world. The Chinese government is offering tens of thousands of scholarships to Chinese universities to foreign

⁷⁷ Email from Chinese academic, March 20, 2020.

⁷⁸ Interview with two Chinese law professors, Beijing, June 11, 2014.

⁷⁹ Interview with U.S. lawyer, Washington D.C., Dec. 19, 2014.

⁸⁰ Blanchette, *China’s New Red Guards*, 128 (quoting a neo-Maoist military propagandist saying, American agents are “entering China’s top think tanks and guiding the country toward low-skilled labor and economic colonization. This is an attempt to get China to enter the global economic system they themselves lead”).

students, scholars, and diplomats, including a significant number to individuals coming from Africa. These efforts represent an attempt by China to build up its soft power by sensitizing foreign students to Chinese views, customs, and preferences, and to cultivate professional and personal networks that will carry on into the future”⁸¹

In Shenzhen, which serves “as a principal gateway for China’s Belt and Road Initiative” and aspires to be “China’s Silicon Valley,” China created the Peking University School of Transnational Law, linked to China’s leading research university — Bei-da, Peking University. The school, which offers both a Chinese Juris Master and a traditional English-language U.S. Juris Doctor degree in a four-year program, has focused research and teaching on the hybrid transnational legal approaches that Chinese firms employ for China’s Belt and Road Initiative.⁸² In particular, the school seeks scholars who are able to address “the legal systems of major Belt and Road countries” for “transactions and commercial dispute resolution involving non-Western parties.” In reflection of the school’s name, first-year students take a year-long course in “Transnational Legal Practice.”

C. Building Trade Law Expertise in 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.⁸³ Given the stakes for China’s development policy, the government hired the world’s best trade lawyers to defend it, who were in U.S. and European law firms. In parallel, it worked to foster the development of internal expertise within Chinese law firms. 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.⁸⁴ 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.”⁸⁵ Over time, lawyers in Chinese private law firms developed significant WTO law-related expertise.

The development of the international trade and business law fields in China is a phenomenon that flourished after the WTO’s creation. 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.”⁸⁶ For China to effectively engage with WTO law,

⁸¹ Roberts, “Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field.”

⁸² Philip J. McConaughay and Colleen B. Toomey, “China and the Globalization of Legal Education: A Look into the Future,” in eds. Bryant Garth and Gregory Shaffer, *The Globalization of Legal Education: A Critical Perspective* (on file).

⁸³ Shaffer, *Defending Interests*.

⁸⁴ 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.

⁸⁵ Interview with U.S. lawyer, Washington D.C., Dec. 19, 2014.

⁸⁶ “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 (also 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”).

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.

China's accession to the WTO was a catalyst for developing the Chinese legal profession more generally, thereby facilitating transnational legal ordering.⁸⁷ 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 2001.⁸⁸ The ministry noted, "Chinese lawyers are weak in handling international legal business, and China lacks talents who can excellently handle foreign-involved legal services, and the lawyers' competitive capacity in the international legal service market are weak." 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."

It was a policy paralleling the country's initiatives for building indigenous technology (Chapter 7) through massive investment, cross-border exchange, and considerable "imitation" — including learning through "copying" and "pasting."⁸⁹

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..⁹⁰ The delegation included officials from the main ministries handling economic issues and legislative bodies, scholars from universities and research institutes, and practicing lawyers, all selected by DTL. The course was taught at Georgetown University Law Center by Professor John Jackson, widely referenced in China as the "father of the WTO."⁹¹ The

⁸⁷ Sida Liu, "The Changing Role of Lawyers in China: State Bureaucrats, Market Brokers, and Political Activists," in *The New Legal Realism: Studying Law Globally*, eds. Heinz Klug and Sally Engle Merry ("after joining the WTO, more than a hundred new foreign law offices were established in Beijing and Shanghai, which significantly intensified the competition in the corporate law market. While elite Chinese corporate law firms grew into megafirms with hundred or even thousands of lawyers, foreign law offices also localized by employing Chinese lawyers and developing localized expertise on practicing Chinese law").

⁸⁸ 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 (translation by LawinfoChina, a legal database run by Peking University).

⁸⁹ Interview with lawyer in Chinese law firm, Beijing, June 11, 2014.

⁹⁰ Li Chengang, *Overview*, 15.

⁹¹ An Chen, *The Voice from China: An Chen on International Economic Law* (New York: Springer, 2013), 248 (Jackson as the "Father of the WTO"); Yang Guohua, "A Memoir," 4 ("Jackson as famously called the 'Founding Father of the GATT/WTO'").

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.

Although the government always hired foreign lawyers to be best represented in WTO cases, it also wished to build the capacity of Chinese law firms.⁹² From its very first case, the government deliberately hired domestic private law firms to work with the foreign firms. 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 alone with the government on third party submissions.⁹³ 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 private law firms to assist in the background.⁹⁴ Most of these Chinese firms were boutique law firms with trade remedies practices.

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. In 2016, only the mega-firm King & Wood Mallesons, among the original firms, continued to handle WTO dispute settlement for the government, along with four other firms: Zhong Lun; Jincheng, Tongda & Neal; AllBright; and Gaopeng & Partners. When one compares these two groups of law firms, the new firms are much larger, include some of the largest law firms in China, are “full-service” firms, engage younger lawyers with experience abroad, and are based in Beijing.⁹⁵

These larger law firms have the resources to support a WTO legal practice, as their corporate practices generate sufficient surpluses. Although WTO work remains much less lucrative than these firms' other practice areas, maintaining a WTO practice enhances the prestige of the firm since it involves representing the Chinese government. On the practical side, working on these cases helps the big law firms maintain “guanxi” (good 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. Navigating WTO law mixes with traditional Chinese ways of doing business.

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 writes, “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.”⁹⁶ The most clearly linked area is trade remedy practices, which reflect a legalization

⁹² Li Chengang, *Overview*, 27.

⁹³ Interview with official in MOFCOM, Dec. 2013.

⁹⁴ Li Chengang, *Overview*, 27.

⁹⁵ In 2019, for example, King & Wood Mallesons had over two thousand lawyers in twenty-seven offices around the world.

⁹⁶ Yang Guohua, “A Memoir,” 11.

of Chinese import relief practices. These law firms also have expanded into other related areas, such as international investment law, international commercial arbitration, foreign project investment under the Belt and Road Initiative, and bilateral and plurilateral trade agreements, addressed in Chapters 7 and 9.⁹⁷

D. Development of Trade Law Expertise in Companies and Trade Associations

Thirty years ago, most Chinese companies were not only state owned; they were arms of Chinese ministries and local governments. Today, state-owned enterprises have become corporatized and many have shares listed on stock exchanges.⁹⁸ Although private companies produce more than sixty percent of the country's GDP, the larger ones all have Communist Party representatives and committees within them, designed to exercise oversight.⁹⁹ Chinese companies are thus generally much more deferential to state officials than their counterparts in the United States, Europe, Brazil, and India.¹⁰⁰ Many private Chinese companies, especially those that are small or not well connected, find that government officials are difficult to approach. 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.¹⁰¹ In antidumping cases, many Chinese companies, in addition, face collective action problems to organize and defend themselves.

Following China's accession to the WTO, there were signs of change, as large Chinese companies and independent trade associations became more willing to hire trade lawyers and defend their interests as partners with the government. Larger Chinese companies increasingly hired in-house counsel, including trade lawyers. In addition, some small and medium-sized companies created industry associations independent of the Chinese state to work with private law firms on foreign and domestic antidumping investigations that eventually can (and did) lead to WTO cases. Both initiatives represent major changes in China and reflect a relative turn of Chinese companies to engage trade lawyers, thus supporting transnational legal ordering.

⁹⁷ Interview with lawyer in major Beijing law firm, June 8, 2014; interview with lawyer Beijing, July 27, 2016; telephone interviews with senior partners in Beijing law firms, March 20, 2020.

⁹⁸ Curtis Milhaupt and Wentong Zheng, "Reforming China's State-Owned Enterprises: Institutions, Not Ownership," in *Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism*, ed. Benjamin L. Liebman and Curtis J. Milhaupt (Oxford: Oxford University Press, 2015), 175, 182.

⁹⁹ Nicolas Lardy, *The State Strikes Back: The End of Economic Reform in China* (Washington DC: Peterson Institute for International Economics, 2019), 2; Mark Wu, "The WTO and China's Unique Economic Structure," in *Regulating the Visible Hand?*, 313, 330-331.

¹⁰⁰ Milhaupt and Zheng contend 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 and Zheng, *Reforming China's State-Owned Enterprises*.

¹⁰¹ Scott Kennedy, *The Business of Lobbying in China* (Cambridge: Harvard University Press, 2005) (noting some changes, including in light of China's joining the WTO).

1. Chinese Companies' In-house Counsel. Before China's accession to the WTO, Chinese companies also faced significant trade barriers abroad. Most of them chose to abandon the foreign market rather than fight in a foreign legal procedure. Following China's accession, in order to help Chinese companies to understand and benefit from WTO rules, the government launched extensive education campaigns, which were conducted by WTO Centers established around the country.

Larger Chinese companies independently saw the need to develop trade-related legal capacity from their experience with foreign antidumping and other measures. They built in-house expertise, including in import relief, intellectual property, customs, export control, trade facilitation, and investment law. For example, by 2018, the Chinese technology giant Huawei had around five hundred lawyers in the legal department at its headquarters in Shenzhen, of whom around fifty-five to sixty percent were intellectual property specialists.¹⁰² This number does not include lawyers in its foreign affiliates of whom there were around thirty in Western Europe.¹⁰³ In addition, from 2013-2018, Huawei hired as its Vice-President and Head of Trade Facilitation and Market Access an American lawyer who formerly served as Chairman of the American Chamber of Commerce in Brussels.¹⁰⁴

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.¹⁰⁵ However, companies 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. A main reason Chinese private companies did not use it is that traditionally they lacked access to the government. Thus, when they encountered trade barriers, they resolved the problem by shifting their exports elsewhere or by switching to other products.

Because the formal Foreign Trade Barrier Investigation mechanism was rarely used, MOFCOM introduced an informal alternative around 2005. This approach — nicknamed the “Quadrilateral Coordination” mechanism — involves the cooperation of four parties: the central government, local government, industry association, and individual companies.¹⁰⁶ Under it, industry associations play a key role as the bridge between private companies and the government,

¹⁰² Interview with James Lockett, formerly of Huawei, March 23, 2020. These are estimates. By lawyers, we mean legal professionals with law degrees. Compare a post on BRC job search, *Exclusive Recruitment, Huawei Legal Department*, July 28, 2018, <https://posts.careerengine.us/p/5b5b98562451b570012d5359> (stating “Established in 1995, Huawei's Legal Department has 700+ employees worldwide, 300+ legal employees (including 170 local foreign lawyers), and 300+ intellectual property employees,” by which it probably references patent and trademark experts).

¹⁰³ The Legal 500, “In conversation: Jan Bredehöft, head of legal Germany, Huawei Technologies,” summer 2018, <https://www.legal500.com/gc-magazine/interview/in-conversation-jan-bredehoft-head-of-legal-germany-huawei-technologies/>.

¹⁰⁴ Personal website of James Lockett, “Overview,” *Lockett-International*, http://www.lockett-intl.com/about_james.

¹⁰⁵ Henry Gao, “Taking Justice into Your Own Hand: The Trade Barrier Investigation Mechanism in China,” *Journal of World Trade* 44 (2010).

¹⁰⁶ Henry Gao, “Public-Private Partnership: The Chinese Dilemma,” *Journal of World Trade* 48 (2014): 983.

thus resolving private companies' concerns about access. But to act effectively, industry associations would have to enhance their trade law capacity and their independence.

2. New Independent Industry Associations Organized for Trade. 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, moreover, had no expertise on foreign trade issues. To address this problem, MOFTEC created in the late 1980s seven trade associations for importers and exporters of products, divided into broadly defined sectors.

Although these trade associations have closer links with MOFCOM, they still are ineffective in assisting most Chinese companies. Because they are established by the government, and not by the companies themselves, they are rather bureaucratic and irresponsive to the companies' needs and demands. Many companies rarely turn to them for help since the companies view them as associations that govern them, rather than serve them. As one lawyer told us, "the trade association is a second government.... This is central planning."¹⁰⁷

After China's Foreign Trade Law liberalized trading rights in July 2004, private firms could directly conduct international trade. To protect their interests, they began to form independent industry associations. This represented a significant institutional development in China, which resulted from its integration in the global economy. Private firms do so to overcome collective action problems and better address the informational demands for defending (as well as avoiding) trade disputes. These private associations better respond to company interests because their scope of coverage is very narrow and tends to cover just a single product or several closely related products. For example, there are trade associations for fasteners, for parasols, and for cigarette lighters. Such high degree of product specialization facilitates their ability to identify specific trade measures affecting the industry, such as antidumping investigations. Moreover, these industry associations locate in the cities and counties where the industry operates, as in provinces such as Zhejiang and Guangdong. Most importantly, 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. 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 antidumping investigation of Chinese iron and steel fastener imports illustrates the proactive role that local industry associations can play.¹⁰⁸ In that case, the Jiaying Fasteners Export and Import Industry Association 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

¹⁰⁷ Interview with lawyers from Beijing law firm, June 10, 2014. Milhaupt and Zheng, *Reforming China's State-Owned Enterprises*, 196 ("the industrial associations actively supervise the operations of firms in the respective industries and have retained much, if not all, of the power exercised by their state predecessors").

¹⁰⁸ Gao, "Public-Private Partnerships," 993-996.

the E.U. measures before E.U. courts, a WTO panel, and the Appellate Body.¹⁰⁹ 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 antidumping duties, the association pressed MOFCOM to initiate an antidumping 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.

This arrangement involved public-private coordination comprised of the central government, local government, industry association, individual companies, and private lawyers. 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. Now in China, he advises his clients to form industry-developed coalitions with a secretariat to defend themselves against foreign antidumping proceedings.¹¹⁰ Such arrangements once more represent a form of borrowing 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. 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 one hundred pre-warning centers had sprouted around the province by late 2011.¹¹¹ 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. On average, every center has two full-time staff. They distribute pre-warning information to companies through newsletters, websites, bulk text message broadcasts, and instant messaging programs. 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.

It remains a much greater challenge to form independent industry associations in China than in Brazil and India. A Chinese lawyer who earlier worked for a law firm in the United States notes three particular challenges.¹¹² First, "the mentality in China" differs because the firms are so focused on competing against each other in foreign markets that they have trouble cooperating in foreign antidumping investigations. They generally have difficulty overcoming collective action problems. Second, the firms lack faith that WTO law can help them gain real market access following a WTO case, given the drawn-out legal procedures and weak remedies, including no retrospective remedies in WTO law, complemented by a protectionist turn in the United States and elsewhere. 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

¹⁰⁹ WT/DS397/AB/R (July. 15, 2011); WTDS397/AB/RW (Jan. 18, 2016) (article 21.5).

¹¹⁰ Interview with lawyer, Shanghai, June 11, 2014. These clients often are small and medium-sized companies that produce consumer items, such as footwear and bedroom furniture.

¹¹¹ Gao, "Public-Private Partnerships," 1002-1003.

¹¹² Interview with lawyer, Shanghai, June 11, 2014.

industries to organize collectively, hire lawyers, bring matters to MOFCOM, and challenge foreign measures, compared to Brazil.¹¹³ 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. These associations continue to help businesses navigate import barriers to Chinese products in the United States, Europe, and around the world.

III. Transnational Legal Ordering of Trade Policy

A. WTO Negotiations

In WTO negotiations, China deliberately kept a low profile in its first years as a WTO member. During the early days of 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.¹¹⁴ Early on, at the 2003 ministerial meeting in Cancun, China joined the G-20 group in supporting the Brazil-India initiative on agricultural subsidies and safeguards, but it did not play an active role. It likewise joined the G-33 of developing countries, led by India, but only provided “support from behind,” happily “leaving the leadership role to India and Brazil.”¹¹⁵ As China grew economically, however, the United States pressed China to be more engaged. It invited China to join what had expanded from a G-4 and G-6 to become the G-7 inner group of WTO members at the July 2008 Mini-Ministerial negotiations in Geneva.¹¹⁶ It urged China to be “more responsible” and make greater concessions in key industrial sectors.¹¹⁷

Yet, China wanted to protect its policy space to upgrade its economy through state intervention and state subsidies. China thus rather supported broader developing country coalitions that refused to make greater concessions. With developing countries, China pointed to the mandate of the Doha round pursuant to which “developing countries” were to receive “*special and differential treatment*” in “all elements of the negotiations,” which was a longstanding GATT and WTO negotiating principle.¹¹⁸ In this way, China could bide its time and preserve the status quo. Time was on its side given that the United States and Europe were bound by much greater tariff commitments. China thus felt little need to be proactive in negotiations.

¹¹³ Interview with lawyer, Shanghai, June 11, 2014.

¹¹⁴ 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*, ed. Carolyn Deere-Birkbeck (Cambridge: Cambridge University Press, 2011), 156-167.

¹¹⁵ Kristen Hopewell, *Clash of Powers: US-China Rivalry in Global Trade Governance* (2020), 37 (citing interviews in Geneva and New Delhi).

¹¹⁶ Paul Blustein, *Misadventures of the Most Favored Nations: Clashing Egos, Inflated Ambitions, and the Great Shambles of the World Trade System* (2009), 13, 262-263.

¹¹⁷ Henry Paulson, *Dealing with China: An Insider Unmasks the New Economic Superpower* (2015), 398 (“want China to play a bigger, more responsible leadership role in international groups like the World Trade Organization”).

¹¹⁸ In 1965, the parties added Part IV of the GATT that provided, “The developed countries do not expect reciprocity for commitments... of less developed contracting parties.” GATT article XXXVI.8. In the WTO, see Doha Declaration, par. 13 on agriculture, and par. 16 on non-agricultural products.

The United States became increasingly frustrated. It contended that China was hiding behind its self-designated developing country status while becoming an economic powerhouse. China responded that, despite its economic growth, it remained a developing country given the huge number of Chinese who remain poor, especially in rural areas, and the much lower rate of China's per capita income.¹¹⁹ Moreover, such self-designation was a longstanding GATT and WTO convention, as even South Korea and Singapore continued to claim such status until they relinquished it in 2019 under U.S. pressure for future negotiations.¹²⁰ In parallel, China worked hard to win friends with developing countries by not only supporting their positions in Geneva, but also providing foreign aid and investment, and sponsoring WTO technical assistance programs that they sought, such as a new WTO training program for them.¹²¹ Developing countries were thus wary of frontally challenging China.¹²²

In addition, China was able to take advantage of a second traditional WTO negotiating principle, which is that negotiations should be based on “*reciprocity*.” Under the reciprocity principle, if a country, such as the United States, requests tariff concessions of another country, such as China, it must “pay” for them by providing a substantially equivalent level of concessions in return. For GATT negotiations, this principle was combined with the “*principal supplier rule*,” where major traders negotiate bilaterally, the results of which are then multilateralized through the most-favored-nation principle. The United States had insisted on the reciprocity and principal supplier rules, which became “foundational” for GATT lawmaking.¹²³ These negotiating practices once more reflected U.S. law, in this case the 1934 Reciprocal Trade Agreements Act in which Congress defined U.S. negotiating authority for the GATT.¹²⁴ At the time, these two negotiating principles served to exclude developing countries because developing countries lacked important markets with which to “pay” for U.S. concessions of interest to them. As Nicolas Lamp writes, “the overarching effect of the two exclusionary moves that marked the origins of the GATT was to universalize the principles and practices of US lawmaking.”¹²⁵ Paradoxically, however, because of these longstanding practices, the United States lacked negotiating leverage over China (as well as other major emerging economies) during the Doha round because U.S. average bound tariffs

¹¹⁹ China's per capita income was just fifteen percent of that of the United States in 2017, according to World Bank data. It is this combination of China's economic size and its level of development in per capita times that Hopewell calls the “China paradox,” which has been so disruptive of the WTO regime. Hopewell, *Clash of Powers*, 29.

¹²⁰ Singapore announced in September 2019 that it will “not seek special and differential treatment in ongoing and future negotiations at the WTO.” Channel News Asia, “Singapore supports update of WTO rules, will not use special provisions for developing nations: Chan Chun Sing,” Sept. 18, 2019. South Korea maintained that status until 2019, mainly to protect its rice farmers. Jane Chung and Joori Roh, “South Korea to give up developing country status in WTO talks,” *Reuters*, Oct. 25, 2019.

¹²¹ Under the program, China provides five intern positions at the WTO per year “to help recent graduates and young professionals from least-developed countries and developing countries increase their understanding of the WTO and of trade law, international economics and international relations in general.” WTO, “The China WTO accession internship programme,” at https://www.wto.org/english/thewto_e/acc_e/pillar1_e.htm.

¹²² Hopewell, *Clash of Powers*, 85.

¹²³ Rorden Wilkinson and James Scott, “Developing country participation in the GATT: a reassessment,” *World Trade Review* 3: 473-510 (2008), 486. As a result, the GATT and WTO were viewed as a bundle of bilateral contracts.

¹²⁴ Nicolas Lamp, *Lawmaking in the Multilateral Trading System* (2013), 27-36 (thesis on file);

¹²⁵ Lamp, *Lawmaking*, 36.

were already at 3.5 percent, while Chinese average bound rates were ten percent. The United States thus wanted China (and other emerging economies) to “catch up” and agree to greater tariff cuts than the United States in order to create more balance.¹²⁶

In key negotiating meetings in 2008 and 2011, the United States pressed for “sectoral” tariff cuts pursuant to which China and others were to make greater concessions in key sectors, such as for chemicals, industrial machinery, and electronics and electrical products. The United States pressed for zero percent tariffs in such sectors to ensure that emerging economies (and particularly China) made market access commitments that would ensure greater balance.¹²⁷ China with Brazil and India, however, resisted and maintained that, under the U.S. approach, they would be making a “disproportionate effort” that is inconsistent with the principle of reciprocity, not to mention that of “special and differential treatment” under the Doha mandate.¹²⁸ Technically, China, along with Brazil and India, was correct. Yet, from the U.S. perspective, the deal that China reached when it joined the WTO in 2001 looked much worse as China became the world’s largest trader. The United States thus maintained that China was not assuming obligations “commensurate” with its role in the global economy.¹²⁹ China had become the primary U.S. concern.

In 2015, the United States extended its demand that China “catch up” in the area of agricultural subsidies. China had committed to a de minimis exemption for agricultural domestic support at 8.5 percent in its Accession Protocol, which was less than the ten percent applied to developing countries, but more than the five percent applied to the United States and Europe.¹³⁰ China’s agricultural production had grown massively since 2001 and so had the value of its domestic agricultural subsidies, such that China had become the world’s largest provider of domestic agricultural support, as well as the world’s fourth largest exporter.¹³¹ Once again China refused to make these concessions, in this case on the grounds that it needed to develop its poorer rural regions (including politically sensitive regions such as Xinjiang) and thus better manage mass urbanization, and ensure food security.¹³² Once again it invoked the principle of special and differential treatment as a developing country. Similarly, under the reciprocity principle, if the United States demanded more from China, the United States would have “to pay” by making its

¹²⁶ Report by the Director-General on His Consultations on NAMA Sectoral Negotiations, TN/C/14, April 21, 2011, par. 8, 12.

¹²⁷ Blustein, *Misadventures*, 253 (“Most important, Washington was demanding that the round include ‘sectoral’ deals—special accords in which a handful of key countries would reduce tariffs to zero, or very close to zero, in individual sectors”).

¹²⁸ Report by the Director-General on His Consultations on NAMA Sectoral Negotiations, TN/C/14, April 21, 2011, par. 13 (referencing balance, proportionality, and the Doha mandate); and Lamp, *Lawmaking*, 61-62. Brazil and India, in turn, also feared that if they made such concessions, it would trigger a new onslaught of Chinese imports.

¹²⁹ The President’s 2011 Trade Agenda, United States (2011) (“asking these emerging economies to accept responsibility commensurate with their expanded roles in the global economy”).

¹³⁰ I thank Nicolas Lamp for this point.

¹³¹ Hopewell, *Clash of Powers*, 64. China similarly has the world’s largest fishery fleet, which it massively subsidizes (such as through fuel subsidies) but defends on development grounds. It thus has blocked a U.S. initiative to curtail fisheries subsidies, which it tried to link to U.S. concessions on antidumping rules that it knew the United States would not accept. *Ibid.*, chapter 3.

¹³² Xianjing is a major producer of cotton.

own concessions. In the realm of agriculture, U.S. concessions were of relatively little value to China.¹³³

In sum, China used traditional WTO negotiating principles of reciprocity and special and differential treatment to thwart U.S. pressure on it to commit to greater market access, which created U.S. disenchantment with the WTO system. Since 2015, China played a somewhat more proactive role in making proposals in WTO negotiations, but they did not involve new tariff or subsidy commitments.¹³⁴ Beginning in 2016, it advanced new proposals on investment facilitation and e-commerce, and it helped initiate the establishment of a Trade and Investment Working Group.¹³⁵ For WTO insiders, however, China has not stepped up to assume the leadership role in the WTO that the United States once held, and it is not prepared to do so, especially in terms of granting greater market access.¹³⁶ Rather, China appears to have been biding its time in a mercantilist manner, and is simply not ready to lead an organization whose primary focus has been trade liberalization.

B. Litigation

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.¹³⁷ As a Chinese official working on WTO matters confirmed in 2003, “China is uncertain about the DSU People in government do not like to bring cases [and] they also fear the U.S. bringing cases against them.”¹³⁸ Thus, the official said, in line with “Asian values,” “you negotiate over disputes; you do not litigate.” In the meantime, however, the government invested in learning about the dispute settlement process through attending proceedings as a third party before every WTO panel from August 2003 to 2006. In the words of another official, China was learning from “the example of the United States and E.U.”¹³⁹

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 in its disputes with the United

¹³³ Hopewell, *Clash of Powers*, 80-83.

¹³⁴ Henry Gao, “From the Doha Round to the China Round: China’s Growing Role in WTO Negotiations,” in *China in the New International Economic Order: New Directions and Changing Paradigms*, ed. Lisa Toohey and Jonathan Greenacre (Cambridge: Cambridge University Press, 2015), 94-96.

¹³⁵ Marcia Don Harpaz, “China and the WTO: On a Path of Leadership?,” in *Handbook of the International Political Economy of China*, ed. Ka Zeng (Northampton: Edward Elgar Publishing, 2019).

¹³⁶ Interviews with officials at WTO, Geneva, July 9-11, 2019. In a related vein, a lawyer who long worked inside a major Chinese company stated that China’s refusal to agree to negotiate a reduction in its tariffs during the Doha round “was a PR disaster for China,” and that this “left MOFCOM dangling,” but it was imposed by the National Development and Reform Commission and Finance Ministry, which were more powerful. Telephone interview, March 23, 2020.

¹³⁷ Henry Gao, “Aggressive Legalism: The East Asian Experience and Lessons for China,” in *China’s Participation in the WTO*, ed. Henry Gao and Don Lewis (London: Cameron May Ltd., 2005), 315-351.

¹³⁸ Interview with official in Chinese mission, Geneva, May 25, 2012 (referencing the WTO Dispute Settlement Understanding). As another official remarked seven years earlier, 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 official in Chinese mission, Geneva, July 12, 2005.

¹³⁹ Interview with official in Chinese mission, Geneva, July 12, 2005.

States and European Union.¹⁴⁰ 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. In 2008, its litigation strategy became more aggressive, as it advanced creative interpretations of China-specific commitments in its Accession Protocol to reduce asymmetries. It also started bringing cases against the United States and European Union as a complainant. As an official told us, these changes 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.”¹⁴¹ The official thought “highly of the system” because it ultimately makes it “easier to settle” disputes thanks to the third-party ruling.

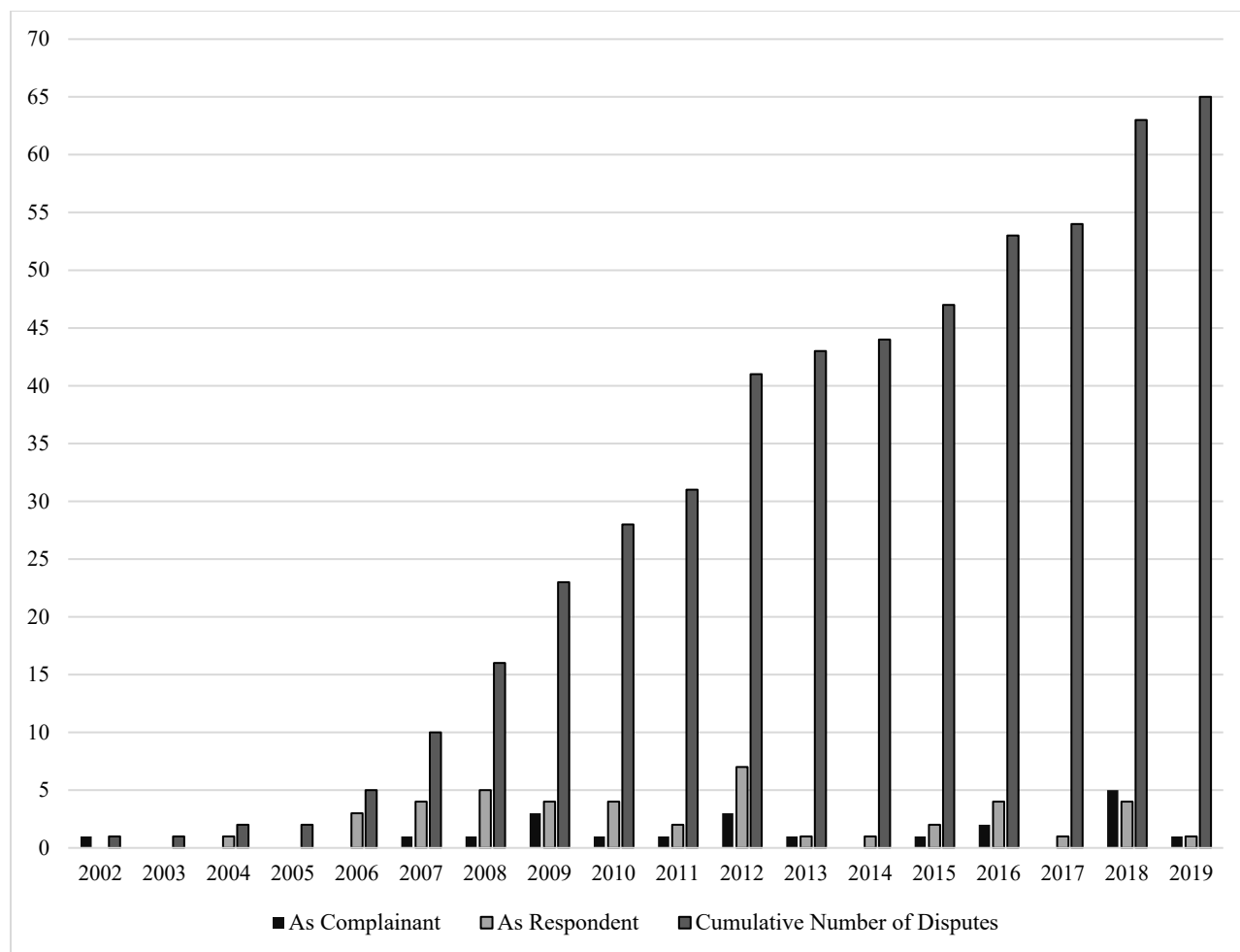
By the end of 2019, China was the WTO’s third most active party in dispute settlement (after the United States and European Union), as well as the third most active third party (after Japan and the European Union), even though it joined the WTO seven years after the organization’s creation. Figure 6.3 shows China’s annual and cumulative number of cases as a respondent and complainant through 2019, as it became a repeat player.

Figure 6.3. China as Complainant and Respondent in WTO Dispute Settlement (2001-2019)¹⁴²

¹⁴⁰ Henry Gao, “China’s Ascent in Global Trade Governance,” 167-172.

¹⁴¹ Interview with official in Chinese mission, Geneva, May 25, 2012.

¹⁴² WTO, Disputes by Member, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm, accessed May 25, 2020.



In WTO dispute settlement, MOFCOM involves lawyers from the beginning of formal consultations. It does so because the consultations can be helpful in gathering information to help prepare a case or defense. Once MOFCOM determines that a WTO complaint will be litigated, 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.¹⁴³ In deciding whom to select, MOFCOM considers both the quality of the memorandum and the fees.¹⁴⁴

Since no Chinese law firm had any experience in WTO dispute settlement, MOFCOM turned to foreign law firms for representation when China began to litigate WTO disputes rather than settle them. 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.¹⁴⁵ Li Chengang, former Director-General of DTL who

¹⁴³ Interview with lawyer in major Beijing law firm, June 8, 2014 and with official from MOFCOM Research Institute, July 20, 2016.

¹⁴⁴ One participating lawyer stressed that “the government picks on the strength of the analysis, not just on the price.” Interview with lawyer in major Beijing law firm, June 8, 2014.

¹⁴⁵ Interview with former official of Department of Treaty and Law, June 9, 2014.

then became an Assistant Minister at MOFCOM, justified 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 GATT/WTO Members such as Japan, India, and Brazil.¹⁴⁶ 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.”¹⁴⁷ In the process, they also facilitate legal technology transfer since the government always hires a Chinese law firm to work in parallel.

When WTO members bring complaints against China, China relies primarily on foreign counsel for its defense because of their greater familiarity with WTO jurisprudence and courtroom advocacy.¹⁴⁸ In these cases, 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. A Chinese lawyer quips, “the Chinese law firm collects the ingredients, while the foreign law firm cooks them into a dish.”¹⁴⁹ 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. In the process, the foreign law firms grant access to the Chinese lawyers to their WTO databases and the WTO submissions that they used in previous cases. From this experience, Chinese lawyers learn significant legal skills involved in building and defending WTO cases.¹⁵⁰

In terms of being a complainant, China has only filed WTO complaints against the United States (sixteen cases) and the European Union (five cases) through the start of 2020. In these cases, MOFCOM hires an American or European law firm not only because of their WTO expertise, but also because they understand the trade laws and practices in their home jurisdictions.¹⁵¹ In contrast, for other countries, China has used informal, political mechanisms to resolve its trade disputes. It has either acquiesced to their protectionist policies to retain good relations (such as with developing countries), used more coercive responses (such as tit-for-tat import relief measures against the other country’s imports), or otherwise settled them politically. As Ji Li writes, norms on litigiousness still matter, such that China is less likely to bring a case against another state with non-litigious norms.¹⁵² Moreover, China can use carrots and sticks to resolve disputes with weaker parties.

¹⁴⁶ Li Chengang, *Overview*, 27.

¹⁴⁷ Yang Guohua, “Zuihao de Lushi (The Best Lawyers),” in *Women Zai WTO Da Guansi [Litigating in the WTO]*, Yang Guohua & Shi Xiaoli eds. (2015), 146.

¹⁴⁸ Only the U.S., E.U., Brazil, Canada, Mexico, Guatemala, and Japan had filed complaints against China as of January 2020.

¹⁴⁹ *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).

¹⁵⁰ Interview with lawyer, Beijing, June 11, 2014.

¹⁵¹ As explained by a senior MOFCOM official, “we hire Washington D.C. lawyers in cases against the U.S., and Brussels lawyers in cases against the E.U.” Interview, Dec. 2013.

¹⁵² Ji Li, “The Impact of Chinese Legal Reform on WTO Dispute Resolution,” in *China’s Socialist Rule of Law Reforms under Xi Jinping*, John Garrick and Yan Chang Bennett, eds. (New York: Routledge, 2016): 167, 171-73 (setting forth a “norm-based theory” and noting non-litigious strategies in disputes with Korea and Japan).

For WTO complaints that do not proceed to litigation before a panel, the government hires only Chinese law firms, and, in the process, helps train Chinese lawyers. It likewise hires only Chinese law firms when China is a third party before a WTO panel, except in rare cases involving systemic issues that are important to China. One Chinese lawyer active in WTO cases worked with the government in about a dozen cases in which China was a third party between 2003-2008, including a number of subsidy cases involving the United States, European Union, Canada, and Korea, an area in which Chinese practices would subsequently be challenged before the WTO.¹⁵³ 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.” As another attorney stated, “we copied, we learned, we pasted. As an entrepreneurial saying goes (in Chinese), creation starts from imitation.”¹⁵⁴ The lawyer “loved” to see how “legal” the WTO work was. 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.

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.¹⁵⁵ The case *EU-Antidumping Measures on Biodiesel* brought by Argentina, for example, was of systemic importance for China because it involved the use of surrogate prices from third countries in antidumping calculations. This practice favors the finding of dumping, and, where dumping is found, inflates antidumping margins. It is often used against Chinese imports. China submitted a fifty-page submission in support of Argentina’s arguments.¹⁵⁶ 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. Argentina won the case establishing precedent to China’s benefit.

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. Initially, many ministry officials were annoyed by the meetings and regarded the foreign law firms as troublemakers. However, after MOFCOM explained to them that the meetings help the law firms better understand and defend the Chinese measures before the WTO, ministry officials softened their attitude and became more accommodating. For example, in the *China-IPR* case, 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.¹⁵⁷

For the panel hearings in Geneva, MOFCOM typically sends the largest delegations of any WTO Member. The Chinese delegation includes MOFCOM officials, lawyers from both foreign and domestic law firms, representatives from the relevant ministries, and possibly also industry

¹⁵³ Interview with lawyer in major Chinese law firm, Beijing, June 8, 2014.

¹⁵⁴ Interview with lawyer in Chinese law firm, Beijing, June 11, 2014.

¹⁵⁵ Interview with official from MOFCOM Research Institute, July 20, 2016.

¹⁵⁶ Interview with lawyer, Beijing, July 27, 2016.

¹⁵⁷ Interview with lawyer in major Beijing law firm, June 8, 2014.

association representatives and academics. Unlike some WTO Members such as Japan and the United States, which always keep the private lawyers outside of the panel hearing room, MOFCOM had no reservation about bringing the foreign lawyers into the hearing and having them make China's oral arguments and answer the panel's questions.

Chinese officials and lawyers have spoken about a potential new stage in which Chinese firms become solely responsible for China's WTO cases.¹⁵⁸ 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 United States did not defend itself because the case involved Appellate Body precedent that the United States no longer challenged.¹⁵⁹ In any case, lawyers in China have gained substantial expertise to advise the Chinese government and companies on trade law matters.

2. Impact on Jurisprudence. Through its investments in developing trade law expertise, China became a formidable opponent of the United States and European Union in WTO litigation. Within a decade of its accession, China established itself as a "repeat player" that could strategize to "play for rules" by shaping their meaning in WTO jurisprudence.¹⁶⁰ As Mark Daku and Krzysztof Pelc show statistically through textual analysis, "across a single decade, China effectively doubled its average level of influence over panel and AB rulings,"¹⁶¹ affecting the meaning of WTO legal norms. U.S. perceptions of the WTO legal order correspondingly changed.

Through its WTO complaints, China began to shape WTO jurisprudence to constrain U.S. and E.U. discretion in imposing protection against Chinese imports, which created consternation in Washington D.C.. In a series of cases, China successfully challenged U.S. and E.U. antidumping and countervailing duty measures that provided protection to U.S. and European import-competing industries. Notably, China repeatedly and successfully challenged the U.S. practice of double counting injuries to U.S. industries through combining relief from antidumping and subsidy investigations to increase duties.¹⁶² Perhaps most importantly, it successfully challenged the U.S. definition of a "public body" that the U.S. Commerce Department used to find that Chinese state-owned enterprises subsidized other Chinese producers by providing inputs at below market rates, and thereby apply countervailing duties against Chinese products. The Appellate Body found that Chinese state-owned enterprises are not "public bodies" unless they exercise "government functions," and thus their actions are not subject to the WTO Agreement on Subsidies and Countervailing Measures unless this is shown.¹⁶³ This decision was of great importance for China

¹⁵⁸ Interviews with MOFCOM official, Beijing, June 9, 2014; and with lawyer, Beijing, June 11, 2014.

¹⁵⁹ WT/DS422/R (July 23, 2012). The case regarded the U.S. practice of "zeroing" in antidumping calculations during a period in which the U.S. was revising its regulations to comply with earlier Appellate Body rulings. Interview with lawyer with major Beijing law firm, July 23, 2016.

¹⁶⁰ Joseph Conti, "Learning to dispute: repeat participation, expertise, and reputation at the World Trade Organization," *Law & Social Inquiry*, 35: 625-662 (2010).

¹⁶¹ Mark Daku and Krzysztof J. Pelc, "Who Holds Influence Over WTO Jurisprudence?," *Journal of International Economic Law*, 20(2): 233-255 (2017), 250.

¹⁶² WT/DS379/AB/R (March 25, 2011); WT/DS449/AB/R (July 7, 2014).

¹⁶³ WTO Doc. WT/DS379/AB/R (Mar. 11, 2011); USTR Statement Regarding WTO Appellate Body Report in Countervailing Duty Dispute with China, Office of U.S. Trade Representative (Mar. 17, 2011) ("I am deeply troubled

since Chinese state-owned enterprises monopolize key utilities such as electricity, oil, and water, and control key sectors such as banking, telecommunications, and steel, and allegedly provide inputs at below market prices.

In addition, China benefited from earlier cases brought by India and others that challenged the practice of zeroing in antidumping calculations, which involves discounting (setting at zero) any negative price comparisons between foreign domestic prices and foreign export prices. In this way, U.S. authorities could inflate dumping margins, or find dumping where otherwise there would be none, to better protect domestic industry. China successfully challenged the United States' ongoing use of these practices under revised methodologies.¹⁶⁴

China likewise successfully challenged E.U. and U.S. practices of using surrogate, third-country data in import relief cases to inflate antidumping duties on Chinese products.¹⁶⁵ These complaints were highly politically sensitive for China, the United States, and the European Union because they implicated U.S. and E.U. treatment of China as a “non-market economy” for purposes of antidumping calculations. The United States and European Union apply the non-market economy label to justify using third-country prices in assessing whether China dumps products in their markets so that they can raise tariffs to counter such dumping. If the United States or European Union uses prices from Singapore (as a surrogate for Chinese domestic prices), for example, it can more easily find lower priced or below cost sales in the United States and Europe.¹⁶⁶ The United States and European Union use these methodologies to raise antidumping duties to prohibitive levels (such as over five hundred percent) and effectively block market access to Chinese products.¹⁶⁷ In December 2016, China launched systemic claims against the United States and European Union concerning provisions of their laws “pertaining to the determination

by this report,’ said United States Trade Representative Ron Kirk. ‘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’’); WT/DS437/AB/R (Dec. 18, 2014).

¹⁶⁴ WT/DS422/R (23 July 2012); WT/DS471/AB/R (23 May 2017).

¹⁶⁵ China challenged the use of third-country data in 2009 and 2010, giving rise to WT/DS397/AB/R (28 July 2011); and WT/DS405/R (22 February 2012).

¹⁶⁶ For example, the E.U. used Singapore prices in an antidumping case involving television sets from China, and the U.S. used Portuguese prices in an antidumping case involving crayfish. Le Thi Thuy Van and Sarah Y. Tong, “China and Anti-Dumping: Regulations, Practices, and Responses,” *EAI Working Paper No. 149*, Singapore 2009, footnote 55 (on E.U. use of Singapore); Department of Commerce, “International Trade Administration, Notice of Preliminary Results of Antidumping Duty New Shipper Administrative Reviews: Freshwater Crawfish Tail Meat From the People's Republic of China,” 66 *FR* 18604, Apr. 10, 2001.

¹⁶⁷ For examples of exorbitant U.S. antidumping duties imposed against Chinese products through using third country prices, Len Bracken, “U.S. Hits Chinese Melamine With 500 Percent Tariffs,” *Bloomberg International Trade Representative*, Jan. 7, 2016 (“The U.S. is imposing antidumping duties and countervailing duties on melamine exports from China that add up to at least 507.65 percent.”); Brian Flood, “Chinese Fertilizer Will Face Massive Duties,” *Bloomberg International Trade Representative*, 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, “Chinese Roadbuilding Products to Face Stiff Duties,” *Bloomberg International Trade Representative*, 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 and Rossella Brevetti, “Commerce Assigns Duties on Cold-Rolled Steel,” *Bloomberg International Trade Representative*, 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.”).

of normal value for ‘non-market economy’ countries in antidumping proceedings involving products from China.”¹⁶⁸ After the WTO panel issued an interim report which reportedly ruled against China on most points, China suspended the case in June 2019 to avoid having the decision published.¹⁶⁹ Regardless of the rationale of the panel decision, a loss in the case fueled China’s suspicion that it was being treated unequally in light of political pressure. USTR Robert Lighthizer had stated that “I have made it very clear that a bad decision with respect to the non-market economy status of China . . . would be cataclysmic for the WTO.”¹⁷⁰

Through its WTO complaints, China nonetheless was able to challenge and legally constrain U.S. and E.U. administrative practices that increase protection against Chinese imports. The individual cases involved billions of dollars of Chinese imports. For example, just one of the products (rubber pneumatic tyres) covered in one case (DS379) against the United States involved over US\$ 17 billion dollars in imports.¹⁷¹ Similarly, one case against the European Union regarding steel fasteners (DS397) involved almost US\$ 5 billion dollars of imports.¹⁷² In 2019, China received permission to impose US\$ 3.6 billions in sanctions against the United States for failure to comply with an Appellate Body ruling, which constituted the third highest award in WTO history.¹⁷³

Most importantly, these cases created de facto precedent regarding the legality of U.S. and E.U. antidumping and countervailing duty methodologies that potentially affect all trade from China, which respectively totaled US\$ 462.8 billion of imports into the United States and US\$ 368 billion of imports into the European Union in 2016.¹⁷⁴ Following these cases, the United States and European Union changed their administrative regulations, but these regulations too are subject to challenge.¹⁷⁵ Moreover, these decisions affect negotiating leverage. If the United States would

¹⁶⁸ WTO DS 515 and DS 516. 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, which expired on December 11, 2016 pursuant to Article 15(d) of the Accession Protocol. China only had a panel created in its complaint against the E.U., and not against the U.S..

¹⁶⁹ Communication from the Panel, WT/DS516 (17 June 2019). Bryce Baschuk, “China Loses Market-Economy Trade Case in Win for EU and U.S., Sources Say,” *Bloomberg*, April 23, 2019. It is unclear whether the ground of the Panel’s decision was the continued validity of the rest of Section 15 despite the expiration of 15(a)(ii), or relevant provisions in the Antidumping Agreement, such as the language on “particular market situation” under Article 2.2. Henry Gao & Weihuan Zhou, “The End of WTO and the Last Case?” *East Asia Forum*, July 10, 2019.

¹⁷⁰ Shawn Donnan, “Trump Trade Tsar Warns against China ‘Market Economy’ Status,” *Financial Times*, June 22, 2017.

¹⁷¹ WTO Dispute Data, <http://www.wtodisputedata.com/data> (follow the “Download” link under “Disputed Product Imports” to view the dataset using Stata) (listing bilateral imports of Chinese rubber pneumatic tyres into the U.S. totaling \$17,125,810,660 from 1996 to 2010 — an average of \$1,141,720,710 per year).

¹⁷² *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).

¹⁷³ Brendan Murray, “China Wins WTO Case to Sanction \$3.6 Billion in U.S. Trade,” *Bloomberg*, Nov. 1, 2019 (the case involved the U.S. practice of zeroing).

¹⁷⁴ 2016: *U.S. Trade in Goods with China*, Foreign Trade, <https://www.census.gov/foreign-trade/balance/c5700.html>; *EU-China: Trade in Goods*, European Commission Trade, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/> (click on icon for “table view”) (figures converted from euros to U.S. dollars).

¹⁷⁵ Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New

like to revise WTO texts to permit these practices, it will have to give China and other countries something in return under traditional WTO negotiating principles. The extent of U.S. trade with China potentially affected by antidumping and countervailing investigations, and U.S. reactions to these losses, compared to earlier losses in WTO disputes, highlight the United States' sense of vulnerability to Chinese legal challenges.

C. Implementation and Policy Space

The WTO and international trade law generally represent a significant shift in Chinese views about “sovereignty,” because China has submitted to binding dispute settlement and formally complied with rulings against it.¹⁷⁶ It has done so because the government views trade, economic globalization, and the development of international economic institutions to be in China's interest. Nonetheless, there are those who have seen WTO law and litigation as a force that must be contained for China to pursue its development goals through state planning and others who have seen the WTO as a force for liberalization and the rule of law in China's domestic governance.¹⁷⁷

As with any country, there are divisions within China about how to approach WTO law, litigation, and implementation. As an E.U. embassy official in Beijing stated, “there is no one China. It's not one country... Central agencies vary. Provincial and local governments vary.”¹⁷⁸ These internal divisions are reflected in struggles “between pro-trade departments such as MOFCOM and more conservative ministries.”¹⁷⁹ The divisions explain why MOFCOM had other ministries' officials involved in WTO hearings because it believed their participation would help facilitate eventual acceptance and compliance with WTO rulings.¹⁸⁰ 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.”¹⁸¹ In engaging in capacity-building efforts, MOFCOM simultaneously engaged in constituency building.

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. 52,683-02 (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.

¹⁷⁶ Maria Adele Carrai, *Sovereignty in China: A Genealogy of the Concept since 1840* (2019), 204-212 (“entering the WTO... constituted a major exception to its usual rejection of international institutional scrutiny”); Weihuan Zhou, *China's Implementation of Rulings of the World Trade Organization* (2019).

¹⁷⁷ Interview with former MOFCOM official, July 22, 2016.

¹⁷⁸ Interview with Delegation of EU, Beijing, July 30, 2016.

¹⁷⁹ Xiaowen Zhang and Xiaoling Li, “The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China,” *Journal of Contemporary China* 23 (2014): 143, 158. One practitioner stated, “MOFCOM always stands on the liberal side.” Interview with Senior Partner, Beijing, July 25, 2016.

¹⁸⁰ Interview with professor at UIBE, July 21, 2016.

¹⁸¹ Interview with former Ambassador, June 10, 2014.

MOFCOM is the key intermediary between the WTO and national ministries engaged in domestic policy.¹⁸² Its WTO departments are the “watch dogs” for China’s compliance.¹⁸³ 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.”¹⁸⁴ 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. The impact of the decline and collapse of WTO Appellate Body authority remains to be seen, but it is nonetheless important to understand the processes through which WTO dispute settlement had an impact, as well as the limits of that impact, within China.

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.¹⁸⁵ 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.”¹⁸⁶ As a leading private lawyer confirmed, MOFCOM has involved 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.”¹⁸⁷ 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.”¹⁸⁸ Chinese lawyers saw a positive effect in that ministry officials “start to care about WTO rules because once they were being sued in the WTO they start to think that ‘this is for real!’”¹⁸⁹ As one stated, “my observation is that through the experiences gained from these years, people become more and more serious about WTO law when they formulate the measures or policies.”¹⁹⁰

This experience implicated many government ministries, as well as local government. 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. A lawyer notes how 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

¹⁸² Interview with official at MOFCOM Research Institute, July 20, 2016.

¹⁸³ Yang Guohua, “WTO and Rule of Law in China: A View Based on Personal Experience,” *Global Trade and Customs Journal* 11 (2016): 1, 3.

¹⁸⁴ *Ibid.*, 3.

¹⁸⁵ As a Chinese lawyer notes, “MOFCOM has built up a reputation as a professional in this area.” Interview with partner at major Beijing law firm, June 8, 2014.

¹⁸⁶ Interview with MOFCOM official, Beijing, Dec. 2013.

¹⁸⁷ Interview with partner at major Beijing law firm, June 8, 2014.

¹⁸⁸ Interview with partner, Washington DC, Dec. 19, 2014.

¹⁸⁹ *Ibid.*

¹⁹⁰ Interview with partner at major Beijing law firm, June 8, 2014. Another practitioner spoke of being consulted by a Chinese ministry as to whether its proposed new regulations are valid under WTO law, which constitutes “a different language” in China now. Interview with Senior Partner, Beijing, July 25, 2016.

comply, the policies “can escalate to the State Council.”¹⁹¹ Different ministries now call the lawyer “periodically to ask random questions to see if an initiative is ok under WTO rules.” The value of WTO litigation, in other words, is not just winning a case, but socializing a ministry to take account of WTO law,¹⁹² leading to the settlement of the legal norms in practice.

The use and acceptance of WTO litigation and its implications for Chinese law and regulatory practice became somewhat normalized within China, as reflected in the 244 cases in which China participated through 2019 as a party or third party.¹⁹³ The former Deputy Director-General of MOFCOM’s Treaty & Law Department underscores how this “was unprecedented in its [China’s] legislative history in the sense of amending its laws according to international rules” following an international court ruling.¹⁹⁴ China, for example, 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.”¹⁹⁵ The official contended, “this is such an important progress;” it helps one “envisage the rule of law in China.” Another MOFCOM official thus contended that the WTO has been a “pioneering area in China for the rule of law.”¹⁹⁶ 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 in China on WTO-related matters, thereby helping with China’s compliance with its WTO commitments.¹⁹⁷

Many of the Chinese practitioners we met said that they are trade liberals and believers in the WTO. They thus have clear predilections about the role of markets and law in society. Their hope is that WTO law can seep into the practices of local governments and firms. They stressed 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.”¹⁹⁸ China still has much to learn regarding the WTO, he said, but things are getting better. As regards 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

¹⁹¹ Interview with partner at major Beijing law firm, June 8, 2014.

¹⁹² Interview with senior partner, Beijing, July 25, 2016.

¹⁹³ This figure is as of Jan. 1, 2020.

¹⁹⁴ Yang Guohua, “A Memoir,” 11-12. The U.S., however, lost on its key enforcement claims, which made it much easier for China to comply. Cui Huang and Wenhua Ji, “Understanding China’s Recent Active Moves on WTO Litigation: Rising Legalism and/or Reluctant Response?,” *Journal of World Trade* 46 (2012): 1303.

¹⁹⁵ Interview with MOFCOM official, June 9, 2014.

¹⁹⁶ Interview with official at MOFCOM Research Institute, July 20, 2016.

¹⁹⁷ Interview with two law professors, Beijing, June 11, 2014.

¹⁹⁸ Interview with law partner, Beijing, June 9, 2014.

unbelievable. ... Now we can criticize the government, comment on the policies, talk about WTO law. It really changed a lot.”

Yet, as time passed, more Chinese officials and stakeholders became skeptical and some disillusioned about the WTO, even before the Trump administration’s 2018 launch of a trade war. Some disenchantment stemmed from China learning how to play the legal game and limit the impact of losses in WTO cases. 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*.”¹⁹⁹ In the early years, China knew nothing about internal WTO processes and took the Trade Policy Review Mechanism (TPRM) quite seriously. But, over time, the government saw that other WTO Members took little heed of the TPRM process.²⁰⁰ For reformers in China, this realization adversely affected attitudes and decision making within China’s ministries. For example, China has export restrictions on around two hundred products. When it lost the *China—Raw Materials* case regarding export restrictions on ten raw materials,²⁰¹ the United States asked China to remove all of China’s restrictions.²⁰² Instead, the 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.²⁰³ 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.²⁰⁴

Even before the trade war, WTO law was perceived as less important in China for multiple reasons, including because the dispute settlement system could be gamed and thus was seen as less constraining, because trade negotiations turned to other venues, and because foreign political leaders espoused economic nationalism that targeted China. A leading Chinese WTO law academic noted that, as a result, “fewer students are interested in the WTO than in earlier years.”²⁰⁵ 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

¹⁹⁹ Gao, “Public-Private Partnerships,” at 169.

²⁰⁰ Interview with two professors, Beijing, July 28, 2016.

²⁰¹ WT/DS394/AB/R (22 Feb. 2012). The raw materials were bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc.

²⁰² Interview with two professors, Beijing, July 28, 2016.

²⁰³ This led the U.S. and others to file new complaints in 2012 in DS432 (regarding tungsten and molybdenum), and in 2016 in DS508 (regarding various forms of antimony, cobalt, copper, graphite, lead, magnesia, talc, tantalum, and tin).

²⁰⁴ Compare Zhou, *China’s Implementation*; Timothy Webster, “Paper Compliance: How China Implements WTO Decisions,” *Michigan Journal of International Law* 35 (2014) 525, and Timothy Webster, *China’s Implementation of WTO Decisions, in China in the International Economic Order: New Directions and Changing Paradigms* 98, 110-111 (Lisa Toohey, Colin Picker & Jonathan Greenacre 2015) (noting that China’s compliance record is better than that of the U.S. and E.U., and that “China has made major revisions to its domestic legal system in order to comply with the DSB rulings, [and] ... typically within the reasonable period of time in which it agreed to do so”).

²⁰⁵ Interview with law professor, Beijing, June 11, 2014.

diminish within functional ministries and local administrative bureaucracies in adopting and implementing new regulations.²⁰⁶

With the consolidation of power of President Xi, China enhanced state-owned enterprises as central pillars for China's economic strategy, and market-oriented reforms declined in importance.²⁰⁷ 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 National Development and Reform Commission, and WTO divisions within MOFCOM are now viewed as lower in the MOFCOM hierarchy.²⁰⁸ For those developing China's version of state capitalism, such as at the National Development and Reform Commission (NDRC), WTO rules did not seem too constraining given the case-by-case nature of their application, the difficulty of developing factual evidence regarding Chinese subsidies and market access barriers, the advantage of procedural delay given the lack of retrospective remedies, and the possibility of restricting compliance to narrow issues and thus not implicating China's state capitalist model.

For some, China only uses trade lawyers in WTO litigation to legitimate its policies and thus its model of state capitalism.²⁰⁹ Where China loses a case, it formally complies, but it does so to a minimal extent in ways that continue to deny market access and pose no threat to its broader policies — giving rise to charges of Chinese “paper compliance.”²¹⁰ This spurs U.S. charges that the WTO system is not working for China because China's form of state capitalism is at odds with the spirit of the WTO system.²¹¹ From this perspective, China's use of lawyers permits it to appeal to having a law-abiding nature, while avoiding the changes that the United States argues are required for China to comply with the spirit of a liberal trade legal order.

Although WTO legal disputes are less important in China today, the WTO nonetheless 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 non-discrimination. 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 a procedure administered by MOFCOM's

²⁰⁶ Interview with former official of Department of Treaty and Law, Beijing, June 9, 2014.

²⁰⁷ Elizabeth Economy, *The Third Revolution: Xi Jinping and the New Chinese State* (Oxford: Oxford University Press, 2018). As a Chinese lawyer euphemistically concluded, “the atmosphere in China on the WTO is not as good as when China joined.” Interview with former official of Department of Treaty and Law, Beijing, June 9, 2014. Another said, “these are difficult times.” In a similar vein, another stated, “I think it is a really hard moment.” Interview with partner, Beijing law firm, July 29, 2016. Compare Nicholas Lardy, *The State Strikes Back*, with Nicholas Lardy, *Markets over Mao: The Rise of Private Business in China* (New York: Columbia University Press, 2014) (for a more optimistic view written a few years earlier).

²⁰⁸ Interview with two law professors, Beijing, July 28, 2016.

²⁰⁹ Compare Ian Hurd, *How to Do Things with International Law* (2017), 131 (“By presenting acts as lawful, governments seek the political legitimation that coes from behaving legally in a rule-of-law setting”).

²¹⁰ Webster, “Paper Compliance.”

²¹¹ Mark Wu, “The ‘China, Inc.’ Challenge to Global Trade Governance,” *Harvard International Law Journal* 56 (2016).

Department of WTO Affairs.²¹² MOFCOM also helps oversee compliance with China's other external trade commitments, such as under the so-called "phase 1" Economic and Trade Agreement with the United States, although that agreement raises concerns about consistency with WTO rules.²¹³ Differing views and responses to the WTO — and trade law more broadly — continue to compete in China. In any case, lawyers are used, and those lawyers have worked with the Chinese government and Chinese enterprises, implicating transnational legal ordering and China's ability to take on the United States and European Union before the WTO and in trade governance more broadly.

D. Transnational Legal Ordering of Protectionism: Import Relief

WTO import relief law catalyzed the development of new institutions, norms and practices in China, just as in Brazil and India. Chinese state officials and private lawyers handle both foreign import relief investigations against Chinese exports, and internal investigations against foreign imports. This area of law did not exist until 1996 so that there were no antidumping lawyers in China. China only launched its first trade remedy case in 1997 when Chinese lawyers on behalf of a group of Chinese newsprint manufacturers submitted a petition to MOFTEC to commence an antidumping investigation.²¹⁴ The case heralded the legalization of Chinese import relief administration and the development of China's import relief bar. The government official who handled the investigation, 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*.²¹⁵

Within government, China created a new Fair Trade Bureau within MOFCOM that has internal and external responsibilities regarding antidumping, subsidy, and safeguards law (collectively known as import relief law). Internally, the bureau conducts import relief investigations of foreign products, administering these laws. Externally, it follows foreign import relief investigations of Chinese products, which is critical because China is subject to more foreign

²¹² 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." 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 to conform with WTO law. Interview with official at MOFCOM Research Institute, Beijing, July 20, 2016. Case discussed in Guohua, "WTO and Rule of Law."

²¹³ Weihuan Zhou and Henry Gao, "US-China Phase One Deal: A Brief Account," *Regulating for Globalization Blog*, Jan. 22, 2020.

²¹⁴ Wang Qinhua, "Zhongguo Duiwai Fanqingxiao de Zhuangkuang ji Anli [China's Antidumping Experience and Cases]," in *Fanqingxiao Yingdui Zhidao [How to Deal with Antidumping]*, ed. Wang Qinhua and Zhang Hanlin (2004), 28-29.

²¹⁵ Ding Purple, "93 Jie Xiaoyou, Sifeng Lushi Shiwusuo Hehuoren Wu Xiaochen: Yi Shisan Nian, Sishi qi Fanqingxiao An [Wu Xiaochen: Class of 93 Alumni and Partner at Sifeng Law Firm: Thirteen Years, Forty Antidumping Cases]," *University of International Business and Economics School of Law*, <http://law.uibe.edu.cn/OutListContent/index.aspx?nodeid=109&page=ContentPage&contentid=2300>. Mark Wu, "Attacking with a Borrowed Sword: The Rise of Trade Remedies Law in China," *Harvard Globalization Lawyering and Emerging Economies China Series Working Paper* (2015).

investigations and measures than any other country.²¹⁶ In this way, the bureau differs from the U.S. Department of Commerce and the E.U. trade directorate that largely let companies fend for themselves in foreign antidumping 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.²¹⁷ In particular, MOFCOM always pays the lawyers' fees in foreign countervailing duty investigations to defend Chinese interests.²¹⁸ 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, facilitating transnational legal ordering. While antidumping law did not exist in China in 1996, by 2018, around fifty officials specialized in this area.²¹⁹

The practice has since flourished in China, which has become one of the world's largest users of antidumping measures. After China joined the WTO and as Chinese officials became more familiar with this legal tool, a growing number of Chinese lawyers specialized in antidumping law, as depicted in Figure 6.4. This represents a form of legalization of import relief that empowers private and state-owned companies to trigger a government investigation through a petition, starting a formal legal process in which lawyers represent both sides. China now uses antidumping law frequently against the United States and Europe, allegedly at times in a tit-for-tat fashion as a "retaliatory" response to U.S. and E.U. investigations.²²⁰ As in the West, it is the primary area of practice in trade law in China through which lawyers can build expertise in an active sector of WTO law. Although the practice slightly declined in China following the 2008 financial crisis, it remains highly institutionalized, representing a transnational legal order for import relief law that builds from Western models and is subject to international discipline under WTO rules, namely the WTO Antidumping Agreement. A former member of the WTO secretariat noted how Chinese officials "used the WTO to bring the rule of law to China" in import relief matters, which was a "huge sea change for the Chinese" who now "have keen lawyers" and "solid investigative authorities" to handle import relief claims.²²¹

Figure 6.4: The Development of China's Antidumping Bar²²²

²¹⁶ MOFCOM, "Main Functions."

²¹⁷ Interview with lawyer in major law firm, Beijing, June 10, 2014.

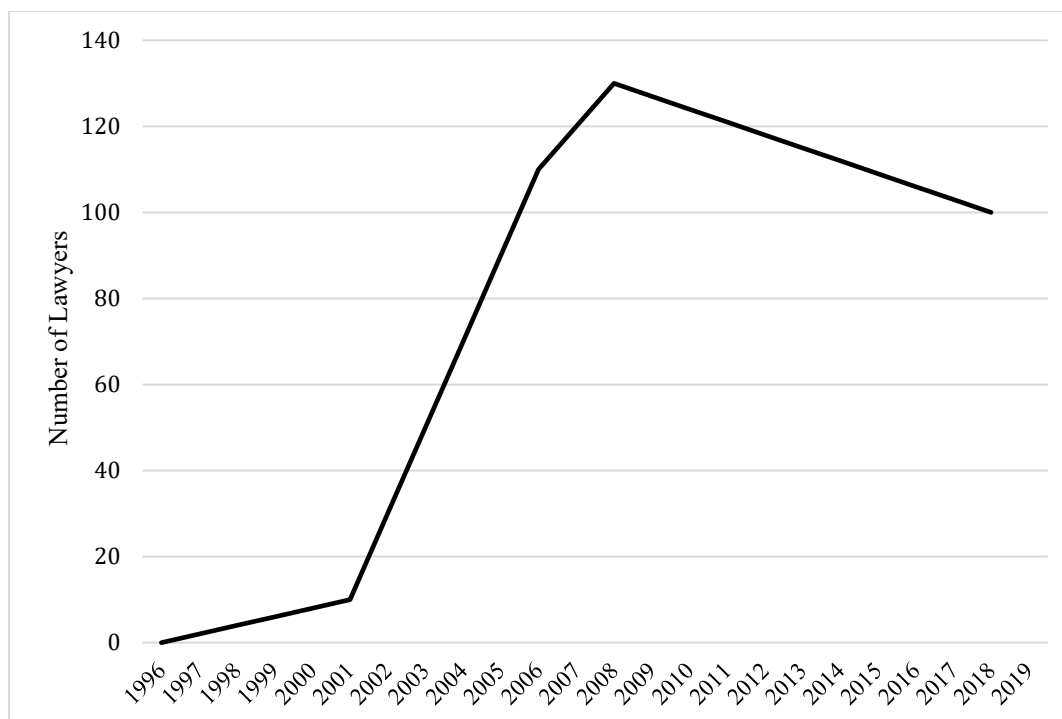
²¹⁸ Interview with lawyer formerly in Department of Treaty and Law, Beijing, June 8, 2014.

²¹⁹ Email exchange with Yu Shengxing, a leading Chinese antidumping practitioner, in April 2019.

²²⁰ USTR, *2019 USTR Report on China's WTO Compliance* (March 2020) ("China has made a practice of launching AD and CVD investigations that appear designed to discourage its trading partners from the legitimate exercise of their rights under WTO rules"); Mark Wu, "Antidumping in Asia's Emerging Giants," *Harvard International Law Journal* 53 (2012): 101 (earlier contesting this finding regarding China, but arguing it is true regarding India).

²²¹ Interview, June 29, 2017.

²²² Authors' estimate based on interviews with trade remedies lawyers in China. The numbers are not exact but reflect the average change in numbers between the years 1996, 2001, 2006, 2008 and 2018. We include the figure to illustrate visually the rapid growth of this specialized area of practice following China's accession to the WTO in 2001.



Chinese law firms represent both the Chinese petitioner and the foreign companies in these cases. From 2003 to 2010, China implemented 122 antidumping measures and was the world’s largest user after India.²²³ Since 2010, although the number of antidumping measures initiated by China dropped, the country still remained one of the main users along with India and Brazil.²²⁴

As Chinese law firms built expertise in this area, they increasingly represented Chinese companies and trade associations in foreign antidumping and other import relief investigations as well.²²⁵ They often work closely with MOFCOM and industry associations to help overcome collective action problems.²²⁶ They typically work with foreign law firms in foreign administrative processes, but sometimes they do the work alone for Chinese clients. One of the leading practitioners, Mr Pu Ling-chen 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 antidumping work with law firms from the United States and United Kingdom. He often defends Chinese clients in import relief investigations directly before E.U. administrative bodies even though based in Beijing.²²⁷ Once

²²³ Wu, “Antidumping in Asia’s Emerging Giants,” 101.

²²⁴ World Trade Organization, “Anti-dumping Measures: By Reporting Member 01/01/1995-31/12/2015,” *WTO*, https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf.

²²⁵ One practitioner noted that the firm had represented Chinese firms in antidumping proceedings in the U.S., E.U., Argentina, Brazil, Egypt, India, Mexico, South Africa, and Turkey. Interview with Senior Legal Counsel, Beijing, July 26, 2016.

²²⁶ Interview with lawyer, Shanghai, June 12, 2014.

²²⁷ Similarly, another Chinese attorney told us he was about to go to India for an optical company to represent it in an antidumping case there. Interview with lawyer, Beijing, June 11, 2014.

more, China had built legal capacity, transformed its institutions domestically, upgraded its profession, and used this legal capacity to defend Chinese interests.

IV. Conclusion

More than any other country in our study, China illustrates the critical role of legal capacity, the broad domestic implications of transnational legal ordering processes, and the recursive impacts of these changes on the international trade legal order. Building trade law capacity in the legal profession and among firms to use WTO rules served the dual purpose of changing Chinese domestic institutional practices and advancing national interests within the global economy. By investing in human capital to build legal capacity, China enhanced state capacity to challenge the United States and Europe in WTO dispute settlement and other trade fora, in turn affecting the transnational legal order for trade. In parallel, 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 significantly opened its economy, integrated in the global economy, and invested in the diffusion of trade law norms. China's accession to the WTO illustrates how a government that fiercely resists any external intervention into domestic affairs embraced international economic law for its own ends within the broader transnational context.

Transnational legal processes involve conflicts within states as well as between states, and these different sets of conflicts interact. Bringing China into the WTO was about more than just opening its market. It involved processes of transnational legal ordering that had broad implications along multiple dimensions for government institutions, the role of markets, the development of professions, and normative frames in which government accountability is assessed. It involved internal Chinese contests over the direction of China's economic policy conducted within the context of an international legal regime. As Mark Wu writes, "[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."²²⁸ Some even viewed the WTO in quasi-constitutional terms regarding its impact on Chinese public law. Tom Ginsburg writes, "[t]he 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."²²⁹ The WTO, in other words, was more than just about international law and compliance with it; it was about transnational legal ordering.

²²⁸ Wu, *The WTO and China's Unique Economic Structure*, 313, 344-345. As President Jiang Zemin noted in the speech he gave at the WTO Seminar for Provincial-level Officials on Feb. 25, 2002, "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." Zemin, *Jiang Zemin Wenxuan: Disan Juan [Selected Works of Jiang Zemin: Volume III]*, 454.

²²⁹ Tom Ginsburg, "The Judicialization of Administrative Governance: Causes, Consequences and Limits," in

Yet, China also fiercely defended its model of state capitalism, which it enhanced following President Xi's assumption of power, while it "revived Maoist tools of governance."²³⁰ Simultaneously, China continued to express its commitment to the multilateral trade legal order, which it saw as benefiting China. The earlier extensive changes to Chinese laws and the process of promoting consistency with WTO rules, in other words, did not represent an abdication of sovereignty, but rather a means for Chinese officials to achieve internally contested goals of economic and governmental reform to advance the government's version of state capitalism within a broader transnational context.

China's successful deployment of legal capacity in WTO litigation did not fit well with the United States. Many in the U.S. political establishment began to view China's joining the WTO as a bad bargain given China's economic rise, the surge in Chinese imports into the United States, and WTO constraints on the U.S. ability to raise protective tariffs. As a result, the United States became less committed to upholding the international trade legal order and pressed for its fundamental reform. China's successful adaptation to WTO law, in other words, paradoxically called into question U.S. commitments to the trade legal order that the United States had created, as Chapter 8 addresses. Already by 2008, the WTO became less central to international trade law as countries turned to negotiating bilateral and plurilateral trade agreements. As a result, the WTO is best viewed as part of a broader ecology of international trade law involving increased geopolitical rivalry between the United States and China. It is here that China has made its most dramatic moves in shaping the international economic legal order, offering a new model for trade governance. Chapter 7 shows how.

Administrative Law and Governance in Asia, ed. Tom Ginsburg and Albert H.Y. Chen (Abingdon: Routledge, 2009), 10. One Chinese academic went so far as to affirm, "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 with professor, July 25, 2016.

²³⁰ Blanchette, *China's New Red Guards*, 139.