

Singapore Management University

Institutional Knowledge at Singapore Management University

Research Collection Yong Pung How School Of Law

Yong Pung How School of Law

12-2010

China's Development of International Economic Law and WTO Legal Capacity Building

Pasha L. HSIEH

Singapore Management University, pashahsieh@smu.edu.sg

Follow this and additional works at: https://ink.library.smu.edu.sg/sol_research



Part of the [Asian Studies Commons](#), [International Trade Law Commons](#), and the [Law and Economics Commons](#)

Citation

HSIEH, Pasha L.. China's Development of International Economic Law and WTO Legal Capacity Building. (2010). *Journal of International Economic Law*. 13, (4), 997-1036.

Available at: https://ink.library.smu.edu.sg/sol_research/954

This Journal Article is brought to you for free and open access by the Yong Pung How School of Law at Institutional Knowledge at Singapore Management University. It has been accepted for inclusion in Research Collection Yong Pung How School Of Law by an authorized administrator of Institutional Knowledge at Singapore Management University. For more information, please email cherylds@smu.edu.sg.

CHINA'S DEVELOPMENT OF INTERNATIONAL ECONOMIC LAW AND WTO LEGAL CAPACITY BUILDING

Pasha L. Hsieh^{*}

ABSTRACT

This article examines legal and institutional aspects of the evolution of China's approach to the dispute settlement mechanism of the World Trade Organization (WTO). It begins by analyzing the impact of China's changing attitude toward international law on the escalation of international economic law research. In particular, the article provides the first detailed examination of China's efforts to strengthen public-private cooperation in building its WTO legal capacity. China established think tanks to bridge the information and communication gaps between the government and industries. To develop its WTO lawyers, the Chinese government has consistently required international law firms to collaborate with domestic firms in major disputes and engaged the latter in third-party cases. Finally, the article evaluates China's assertive legalism strategy that enhances its recent participation in WTO rule-making and disputes against the US and the European Union. This research, therefore, provides a valuable case study for other emerging economies and the multilateral trading system.

I. INTRODUCTION

The primary indication of China's emergence as a global power is its astonishing growth since the 1980s. Today, China is the world's largest holder of foreign exchange reserves, the third-largest economy and a market that

^{*} Assistant Professor of Law, Singapore Management University School of Law (SMU); formerly with the WTO Appellate Body Secretariat and Shearman & Sterling LLP. JD, LL.M., University of Pennsylvania Law School; LL.B., National Chengchi University, Taiwan.

E-mail: pashahsieh@smu.edu.sg. This article benefits from the generous support provided by the Lee Foundation and SMU. I wish to thank Professors Margo Bagley, Julien Chaisse, Mary Hiscock, Xiaojie Lu, Andrew White, Eliza Mik, Xiaolin Li, C.L. Lim, Krista Nadakavukaren Schefer, Sungjoon Cho, Adam Perlin, Peihuan Benjamin Kao, Benjamin Hartmann, Wenhua Ji, Omar Ramon Serrano, Melisma Cox, Christine Y. Chang, two anonymous reviewers and participants at the First Cross-Strait International Law Forum for their insights or comments on earlier drafts of this article. I also acknowledge the valuable research assistance of Cia Ai Eng and Tai-Jung Wu. All errors are my own.

attracts \$23,435 billion in foreign investments.¹ Even in the midst of the financial crisis, the economic growth of China contributed to more than 50% of global development.² China's trade has also elevated its position on the international stage, as demonstrated by the World Bank's recent decision to increase China's shares, that is, voting power, to the third place in the world.³

China's economic success could not have been achieved in less than three decades absent its accession to the World Trade Organization (WTO) in 2001.⁴ WTO membership not only marks a milestone that signifies China's integration into the international legal order, but also poses new challenges to the world trading system. Many scholars have contributed to the literature on the importance of China *vis-à-vis* the WTO, primarily discussing the impact of China's WTO membership⁵ or legal issues that arose in dispute settlement cases involving China.⁶ Nonetheless, this article adopts

¹ *China's Foreign Reserves Top \$2tn*, 15 July 2009, BBC News, available at <http://news.bbc.co.uk/2/hi/8151223.stm> (visited 1 May 2010); Trade Policy Report by Secretariat, China, WT/TPR/S/199 (16 April 2008), at 1; Table 4: China's Trade with the World (\$ billion), US-China Trade Statistics and China's World Trade Statistics, The US-China Business Council, available at <http://www.uschina.org/statistics/tradetable.html> (visited 25 April 2010); Non-Financial Foreign Direct Investment (FDI) Inflows, 2000–09, Foreign Direct Investment in China, available at http://www.uschina.org/statistics/fdi_cumulative.htm (visited 30 April 2010). It is also noteworthy that China is becoming an important overseas investment power. For pertinent statistics, see Philippe Gugler and Julien Chaisse, 'Editors' Introduction: Patterns and Dynamics of Asia's Growing Share of FDI', in *Expansion of Trade and FDI in Asia – Strategic and Policy Challenges* (London: Routledge, 2009) at 4–7.

² Markus Jäger, Will the BRICs (Read: China) Really Become the New Global Growth Engine?, 26 September 2009, VOX, available at <http://www.voxeu.org/index.php?q=node/4026> (visited 5 December 2010).

³ See *Chinese Minister: World Bank Reform Benefits World Development*, 26 April 2010, Xinhua, available at http://news.xinhuanet.com/english2010/china/2010-04/26/c_13267705.htm ('China's stake at the bank, in terms of voting power, rises from 2.78 percent to 4.42 percent.') (visited 1 May 2010).

⁴ *WTO Successfully Concludes Negotiations on China's Entry*, WTO News: 2001 Press Releases, Press/243, (17 September 2001), available at http://www.wto.org/english/news_e/pres01_e/pr243_e.htm (visited 1 May 2010).

⁵ See e.g. Julia Ya Qin, 'Trade, Investments and Beyond: The Impact of WTO Accession on China's Legal System', 191 *China Quarterly* 720 (2007); Karen Halverson Cross, 'China's WTO Accession: Economic, Legal, and Political Implications', 27 *Boston Journal of International and Comparative Law Review*, 319 (2004); Qingjing Kong, 'China's WTO Accession: Commitments and Implications', 13 (4) *Journal of International Economic Law* 166 (2000); Sylvia A. Rhodes and John H. Jackson, 'United States Law and China's WTO Accession Process', 2 (3) *Journal of International Economic Law* 497 (1999).

⁶ See e.g. Hao Dong and Minkang Gu, 'Copyrightable or Not: A Review of the Chinese Provision on "Illegal Works" Targeted by WTO DS362 and Suggestions for Legal Reform', 4 *Asian Journal of WTO and International Health Law and Policy* 335 (2009); Julien Chaisse and Laun Xinjie, 'The CFS Case: Looking Back and Looking Forward', 4 *Global Trade and Customs Journal* 15 (2009); Donald P. Harris, 'The Honeymoon is Over: Evaluating the United States' WTO Intellectual Property Complaint against China', 32 *Fordham International Law Journal* 801 (2008).

a different approach by examining legal and institutional positions that indicate a significant shift in China's behavior within and toward the WTO. Its purpose is to show why and how China's skeptical attitude toward international law and tribunals has transformed to an 'assertive legalism' strategy in the WTO arena. To deter escalating cases initiated by the US, the European Union and developing countries that follow their lead, China has endeavored to build its legal capacity to handle WTO litigation. To bridge the legal expertise gap, China has strengthened public-private cooperation by establishing think tanks, known as WTO centers, to link local industries with the central government. To train Chinese WTO lawyers, China not only requires international law firms to work with Chinese firms in handling major disputes, but also engages local firms to participate in third-party cases. This 'learning by doing' approach has increased WTO legal capacity within the Chinese government and local law firms, thus enhancing China's 'WTO bar'. During China's 10-year WTO membership, the country has become increasingly active in WTO rule-making by submitting proposals to revise WTO rules and by appointing Chinese nationals to WTO bodies. China has also shifted from having a passive attitude to acting preemptively in its litigation approach, as demonstrated by a series of complaints that China filed against the US and the European Union from 2007 to 2010. China's WTO experience is important to other emerging economies and to the multilateral trading system.

This article enriches the current literature on this topic for three reasons. First, it provides a case study regarding WTO legal capacity building in China, which is both a major developing country and an emerging economic superpower. To have been able to understand the challenges that China has encountered, the results of this article reflect a 3-year investigation based on original sources, as well as interviews and discussions with government officials, trade lawyers and academics. These individuals are Chinese and foreign experts who have first-hand experience with China's dealings with WTO affairs while working in their various capacities in Beijing, Shanghai, Geneva and Washington, DC. Secondly, China's experience offers valuable lessons for developing countries that face similar obstacles. These countries include those in the process of acceding to the WTO (e.g. Russia, Iran and Laos) and those that have joined the WTO yet lack substantial WTO experience (e.g. Cambodia, Myanmar and Vietnam). To some extent, these countries are comparable to China, as their embedded political structures invariably clash with cardinal free trade principles. China's experience in handling these clashes is thus important to them. Finally, the US and the European Union have adopted an offense-oriented strategy toward trade litigation against China. This research will help them gain a sounder understanding of political and institutional barriers jeopardizing China's compliance with its WTO commitments. It also demonstrates China's litigation strategy in the

WTO and assesses whether China's capacity-building efforts may turn the balance of power in global trade.

This article comprises five parts. Part II examines the emergence of international economic study in China and its impact on China's development of expertise in international law. In particular, it explains how the country has shifted to a focus that enhances its legal capacity in handling trade litigation in the WTO. Part III identifies weaknesses in China's current legal education system and government structures that hinder its legal capacity building. It also provides an analysis of the government's approach to strengthening public-private cooperation by establishing local think tanks and retaining international trade law and local firms to assist the government in WTO disputes. Part IV offers insights into the Chinese government's role in WTO rule-making, and illustrates the evolution of China's litigation strategy in third-party, defensive and offensive cases and assesses the results of such cases. Part V concludes the discussion with the major findings concerning China's WTO legal capacity building and an outline of lessons other developing countries may learn from Chinese experiences.

II. THE EMERGENCE OF INTERNATIONAL ECONOMIC LAW RESEARCH IN CHINA

In order to understand China's development of international economic law expertise from a holistic point of view, one cannot ignore the history of the country's reception of international law. Chinese elites' study of international economic law and the practical application of knowledge in international organizations, including the WTO, signify a new milestone for China's entrance into the family of nations. This milestone also represents a shift in the Chinese attitude toward international law and, more notably, international dispute settlement mechanisms. From the Chinese perspective, while the admission of the People's Republic of China (PRC) into the United Nations (UN) acknowledges its legitimacy as the 'real' China, the country's WTO membership further affirms its ascended status on par with Western powers.⁷

A. Trade matters and China's exposure to international law

China was by no means unfamiliar with trade matters. In fact, the mounting pressure that Western powers exerted on China to open trade in the 19th

⁷ The government of the People's Republic of China (PRC) and international law scholars often address the previous Republic of China (ROC) government, which relocated to Taiwan in 1949, as the 'old' China. For two decades, the PRC and the ROC vied for representation of China and, in 1971, the PRC 'restored' its seat in the UN. For relevant legal issues and historical backgrounds, see Pasha L. Hsieh, 'An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan', 28(4) *Michigan Journal of International Law* 765 (2007), at 768–69.

century first exposed the ancient kingdom to the modern international legal regime. Yet, China's experience with international law was initially frustrating. China failed to deter Britain from importing opium into the country on the basis of international law. China's defeat in the Opium War by the British compelled its leaders to sign the 1842 Treaty of Nanjing, which was the prelude to a series of 'unequal treaties' with Western powers that led to China's century of humiliation. Ironically, the text of these treaties to some extent reflects modern-day WTO principles. The Treaty of Nanjing, for instance, requested that China abolish the 'monopolistic system of trade', promise the 'opening [of] ports . . . to British consuls and merchants', and the use of 'a fixed tariff'.⁸ Most of the subsequent treaties also demanded *unilateral* 'Most-Favoured-Nation' (MFN) treatment, obliging China to grant whatever rights it conceded to the other powers under their treaties with China.⁹ This unpleasant history explains why the Chinese perceived international law as 'reasonable but unreliable' and how the WTO-plus obligations to which China committed often led to a reminiscence of discriminatory treatment under past unequal treaties.¹⁰

China's traditional attitude toward international law certainly influenced its approach to international disputes. From the Ching Dynasty to the beginnings of the PRC, China consistently refrained from appearing before any international courts and preferred negotiations over any form of binding decisions rendered by 'biased' courts dominated by the West.¹¹ This attitude was compounded by the PRC's Marxist-Leninist ideology that stressed the inviolability of sovereignty free from intervention of bourgeois

⁸ See Immanuel C. Y. Hsü, *The Rise of Modern China* (6th edn, New York, Oxford: Oxford University Press, 2000), at 199 (citing the text of the Treaty of Nanjing).

⁹ For example, the unilateral MFN treatment was included in the Treaty of the Bogue with the UK (1843), the Treaty of Wangxia with the US (1844) and Treaty of Whampoa with France (1844). The unilateral MFN treatment is distinguishable from the MFN principle under Article I of the General Agreement on Tariffs and Trade (GATT), as the former does not oblige Western powers to accord China benefits under their trade agreements.

¹⁰ See Jerome Alan Cohen and Hungdah Chiu, *People's China and International Law: A Documentary Study* (Princeton, NJ: Princeton University Press, 1974), at 10 (citing comments by Tsui Kuo-ing, an early Chinese diplomat, in 1891). WTO-plus obligations refer to provisions in China's Protocol of Accession that mandate more stringent requirements than those imposed on other WTO members. For information on China's WTO-plus obligations, see Julia Ya Qin, 'WTO-Plus' Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol', 37 (3) *Journal of World Trade* 483 (2003), at 491–509.

¹¹ For instance, the Ching government rejected Portugal's request to refer Macao-related boundary disputes to the Permanent Court of Arbitration in 1909, the ROC refused to appear before the Permanent Court of International Justice concerning the termination of the 1865 China–Belgium treaty in 1926, and the PRC rejected India's proposal to resolve China–India boundary disputes through an arbitral tribunal in the 1960s. *Ibid.*, at 11; Hungdah Chiu, *Xiang Dai Guo Ji Fa*, [Modern International Law] (2nd edn, Taipei: San Min Book Co., Ltd., 2008), at 972–73 (in Chinese); Zho Gengshen, *Guo Ji Fa*, [International Law] (2nd edn, Wuhan: Wuhan University Press, 2007) at 667–68 (in Chinese).

imperialism.¹² The PRC's entry into the UN in 1971¹³ and its appointment of national judges to the International Court of Justice (ICJ) since 1985¹⁴ marked the beginning of the slow transformation of its attitude toward solving international disputes. This new trend, which influenced legal academia, can be illustrated by the establishment of Peking University Department of Law's international law section in 1979 and the Chinese Society of International Law in 1980.¹⁵ China's first authoritative textbook on

¹² For details on the Chinese concept of sovereignty, see Shan Wenhua, 'Redefining the Chinese Concept of Sovereignty', in Wang Gungwu and Zheng Yongnian (eds) *China and the New International Order* (Abingdon, New York: Routledge, 2008) at 57–9.

¹³ United Nations General Assembly Resolution 2758 replaced the ROC with the PRC.

¹⁴ PRC judges of the ICJ include Ni Zhengyu (1985–94), Shi Jiuyong (1994–2010) and Xue Hanqin (2010–present). Prior to them, Chinese judges, nominated by the ROC, sitting on international courts included Wang Chonghui (1921–39) and Zheng Tianxi (1939–46) of the Permanent Court of International Justice, and Hsu Mo (1946–57) and Wellington Koo (1957–67) of the ICJ and Mei Ju-ao (1946–48) of the International Military Tribunal for the Far East. Other PRC judges of international courts include Zhang Yuejiao (2008–present) of the WTO Appellate Body, Zhao Lihai (1996–2000) and Gao Zhiguo (2008–present) of the International Tribunals for the Law of the Sea and Wang Tieya (1997–2000) of International Criminal Tribunal for the Former Yugoslavia. Appellate Body Members, available at http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (visited 2 May 2010); PRC judges of the ICJ include Ni Zhengyu (1985–94), Shi Jiuyong (1994–2010) and Xue Hanqin (2010–present). The Court: All Members, available at <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2&PHPSESSID=4eda12aa412deb18efcd30875d7a3156> (5 December 2010). Prior to them, Chinese judges, nominated by the ROC, sitting on international courts include Wang Chonghui (1921–39) and Zheng Tianxi (1939–46) of the Permanent Court of International Justice, and Hsu Mo (1946–57) and Wellington Koo (1957–67) of the ICJ and Mei Ju-ao (1946–48) of the International Military Tribunal for the Far East. Id.; International Military Tribunal for the Far East, available at http://www.absoluteastronomy.com/topics/International_Military_Tribunal_for_the_Far_East (visited 1 May 2010). Other PRC judges of international courts include Yuejiao Zhang (2008–present) of the WTO Appellate Body, Zhao Lihai (1996–2000) and Gao Zhiguo (2008–present) of the International Tribunals for the Law of the Sea and Wang Tieya (1997–2000) of International Criminal Tribunal for the Former Yugoslavia. Appellate Body Members, available at http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (visited 2 May 2010); General Information – Judges, available at http://www.itlos.org/start2_en.html (visited 1 May 2010); and Former ICTY Judge Wang Tieya Dies Aged 89, CC/PIS/722-e (15 January 2003), available at <http://www.icty.org/sid/8314> (visited 10 October 2010); and Former ICTY Judge Wang Tieya Dies Aged 89, CC/PIS/722-e (15 January 2003), available at <http://www.icty.org/sid/8314> (visited 1 May 2010).

¹⁵ Wang Tieya, 'Teaching and Research of International Law in Present Day China', 22 *Columbia Journal of Transnational Law* 77 (1983–84), at 78–9; *Introduction to the Chinese Society of International Law*, available at <http://www.csil.cn/1frontpages/indexes/csilFrameset-1.html> (visited 1 May 2010). The China Political Science and Law Association that represented the PRC in the International Law Association (ILA) withdrew its membership to protest the admission of the Chinese (Taiwan) Society of International Law, based in Taipei. See Hungdah Chiu, 'Communist China's Attitude toward International Law', 60 *American Journal of International Law* 245 (1966), at 263 (explaining China's study of international law). Currently, the PRC has no representation in the ILA, although Chinese individuals have joined the ILA as members of the headquarter offices or the Hong Kong branch.

international law, authored by an eminent Chinese scholar, Zhou Gengsheng, was published in 1976.¹⁶

The Chinese approach to international law in the 1970s can be categorized as 'reception with silent participation'. During this era, the PRC did not challenge the normative validity of international law, but frequently questioned the universal application of such law.¹⁷ China's sensitivity concerning its sovereignty did not decrease, and the Cold War conflict also made China hesitant to resolve disputes before international tribunals, let alone submitting to courts that mandate compulsory jurisdiction.¹⁸ Active participation in rule-making, in either political or economic arenas, was not Beijing's concern.

B. International economic law as a new discipline

The economic reform that Deng Xiaoping commenced in 1978 resulted in a significant increase in foreign trade. Traditional international law research that concentrated on sovereignty, recognition and state succession was not adequate to meet China's need to understand new trade law issues. The academic debate on whether international economic law should be separate from public international law first appeared in the 1983 *Zhong Guo Guo Ji Fa Nian Kan* (Chinese Yearbook of International Law).¹⁹ The debate caused the government to grant international economic law status as a new academic discipline independent of public international law.²⁰ In 1987, the

¹⁶ This book entitled '*Guo Ji Fa* [International Law] (Beijing: The Commercial Press, 1976)' was based on Zhou's earlier works, including presumably the earliest book on international law written in Chinese, '*Guo Ji Fa Da Gang* [International Law Outline] (Shanghai: The Commercial Press, 1929)'. These books focus on public international law issues and do not address international economic law.

¹⁷ See Louis Henkin, *How Nations Behave* (2nd edn, New York: Columbia University Press, 1979) at 45 (asserting that even in the Maoist era, China 'did not seek to destroy or remake international law. Indeed, it invoked international law and acquiesced in its authority...'); Chiu, above n 15, at 256 (observing that Chinese scholars viewed international law as divided into multiple systems that govern socialist and bourgeois states, respectively).

¹⁸ In 1972, the PRC notified the UN Secretary-General that it did not recognize the ICJ's compulsory jurisdiction that the ROC accepted in 1946. It should be noted that the backdrop of China's political ideology led to its international law practice. The major goal of the PRC's foreign diplomacy was to pursue the legitimacy of its regime by replacing Taiwan in as many international organizations as possible.

¹⁹ See Zhang Hui, *Zhongguo Guoji Faxue Sanshimian (1978-2008 nian)* [Thirty Years of Chinese Scholarship on International Economic Law: 1978-2008], 11 Wuda Guojifa Pinlun [Wuhan International Law Review], at 276, 278, fn 2 (explaining scholars' views on whether international economic law should be considered as a sub-area of public international law) (2009) (in Chinese).

²⁰ It means that similar resources designated to international law research would be designated to international economic law. China's education authorities listed international economic law as a separate legal subject from international law in 1982, but merged public international law, international economic law and private international law as a subject entitled 'international law' in 1997. Ibid, at 278. The issue of whether particular legal subjects can be recognized by the government affects whether a law school can offer degrees with the specializations.

Chinese Society of International Economic Law was established.²¹ It is now based at Xiamen University and has been a major impetus for the diffusion of international economic law. Not only has it held annual national conferences since 1992, but it has also published the *Guo Ji Jing Ji Fa Lun Cong* (Journal of International Economic Law) in Chinese since 1998, and it is considered to be an authoritative academic journal in China.²²

With the publication of China's first textbook on international economic law, written by Professor Liu Ding of Renmin University in 1984,²³ this new discipline soon attracted law scholars of the new generation. During the 1980s, most manuscripts on international economic law addressed the private side of international economic law with a focus on trade terms, contracts, investments, taxation and maritime law.²⁴ This academic focus occurred because Chinese enterprises often encountered private international economic law issues. WTO research was not a priority because Beijing did not plan to accede to the General Agreement on Tariffs and Trade (GATT) until the early 1980s. In addition, with the government's support, Peking University began offering an LLM program with a concentration on international economic law in 1981 and Xiamen University established a PhD program on this subject in 1986.²⁵

The emergence and development of international economic law in China during the economic reform period not only paved the way for WTO research, but also influenced the government's approach to international law.

²¹ *Zhongguo Guoji Jingji Faxuehui Dashiji* [Chronology of the Chinese Society of International Economic Law], available at <http://www.csiei.org/lsg.asp> (visited 1 May 2010) (in Chinese). The idea for establishing the CSIEL was proposed by the participants at the International Economic Law Seminar, sponsored by five academic institutions, in Jiangxi in 1984. *Ibid.* The International Economic Law Research Association of the China Law Society, the second nation-wide association devoted to international economic law research, was established in Beijing in 2005. *Ibid.*

²² *Ibid.*

²³ Liu Ding, *Guo Ji Jing Ji Fa* [International Economic Law] (Beijing: China Renmin University Press, 1984). Cheng An of Xiamen University, the Editor in Chief of China's *Guo Ji Jing Ji Fa Lun Cong* [Journal of International Economic Law], also published a series of authoritative textbooks on international economic law. In addition, various international law textbooks include discussions on international economic law. For instance, '*Guo Ji Fa* [International Law]' (Beijing: Law Press China, 1995), a standard textbook adopted by Chinese law schools was edited by Wang Tieya, and includes Chapter 15: International Economic Law, authored by Wang Guiguo of City University of Hong Kong.

²⁴ For example, Chen An of Xiamen University published the first series of textbooks in China that focus on various subtopics of international economic law, including *Guoji Maoyi Fa* [International Trade Law], *Guoji Touzi Fa* [International Investment Law], *Guoji Huobi Jinrong Fa* [International Monetary and Financial Law], *Guoji Sui Fa* [International Tax Law] and *Guoji Haishi Fa* [International Maritime Law]. *Kecheng Jianjie* [Introductory Curriculum], available at <http://xmujpkc.xmu.edu.cn/gjjjfx/index.asp> (visited 1 May 2010) (in Chinese). The textbook edited by Chen, *Guoji Jinji Faxue* [International Economic Law] (4th edn, Beijing: Peking University Press, 2007), remains an authoritative textbook in China.

²⁵ Zhang, above n 19, at 279.

First, China's public and private sectors prior to the 1980s were isolated from the global arena and had limited interest in following international rules. However, the economic reform compelled Chinese businesses to interact with rules governing transnational commercial transactions. The pragmatic needs of the private sector to understand such rules generated the government's interest in these 'Western' rules. The official attitude change was also reflected in the incorporation of international rules into Chinese laws.²⁶ Thirdly, China no longer viewed international law as a set of rules that contain multiple systems governing capitalist and socialist states, respectively. This 'unity' of international law facilitated Chinese acquiescence to such law and decreased China's challenges to the fairness of multilateral tribunals. It can be exemplified by the 1998 Sino-Barbadian Bilateral Investment Treaty (BIT), in which China for the first time agreed to allow foreign investors to resort to international arbitral tribunals without specific consent from the Chinese government.²⁷ Finally, China's development of international economic law boosted the international law research capacity in academic institutions in newly developed coastal cities in the South, including Xiamen University. This development widened international economic law research, and scholars studied new topics that included the PRC's trade relations with Taiwan, Hong Kong and Southeast Asian nations.

C. WTO legal capacity building as a priority

A new period for China's economic development began in the late 1980s because the government started to negotiate its accession to the GATT and finally gained WTO membership in 2001.²⁸ The focus of international economic law research soon shifted to GATT/WTO rules. Unlike the preceding

²⁶ For instance, the PRC's contract law is mostly consistent with the UNIDROIT Principles of International Commercial Contracts and the United Nations Convention on Contracts for the International Sale of Goods (CISG). Given the treaty-friendly language in Article 142 of the PRC's General Principles of the Civil Law, the CISG was also part of the applicable rules.

²⁷ Shan, above n 12, at 63. This new model is also reflected in subsequent BITs with Western states, although dispute settlement mechanisms under these BITs have not been invoked as of today. See Wenhua, above n 12, fns 72–3, at 77 (listing China's BITs with Germany, Finland, the Netherlands and other states). The PRC joined the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention) in 1993. Nonetheless, prior to the 1998 Sino-Barbadian BIT, the matters that could be submitted to the International Centre for Settlement of Investment Disputes (ICSID) were limited and a specific consent to the jurisdiction was required for each case.

²⁸ Based on the official report submitted to the State Council in 1982, Beijing 'formally applied for the restoration of its contracting party status in GATT in 1986 and the Working Party on China was set up by GATT in 1987 to deal with the related issues'. *China and World Trade Organization (WTO)*, Ministry of Foreign Affairs of the People's Republic of China (15 November 2000), available at <http://www.mfa.gov.cn/eng/wjb/zzjg/gjs/gjzzyhy/2616/t15330.htm> (visited). For information on the impact of the PRC's UN membership on its accession to the GATT/WTO, see Pasha L. Hsieh, 'Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization', 39 (6) *Journal of World Trade* 1195 (2005), at 1196–99. During the 1990s, 1997 is a noteworthy year because China passed the first anti-dumping

period, in which compliance with multilateral trade rules was largely considered to be the concern of private enterprises, the Chinese government started to adopt a relatively active role. There are several reasons for this change. First, the Chinese government realized that Chinese companies would encounter barriers when attempting to export goods due to the absence of government involvement. The prime example is the Multi Fibre Arrangement (MFA), which imposed quotas on the volume of textiles that developing countries could export to developed countries. China realized that its growing textile industry would be harmed if the government did not get the quotas under the MFA. Hence, in addition to signing bilateral textile agreements with some trading partners in the 1970s, Beijing sent an observer to attend the GATT meeting where the renewal of the MFA was discussed in 1981.²⁹ This move, along with China's formal MFA membership in 1983,³⁰ was the beginning of the country's participation in following and negotiating global trade rules.

Secondly, the potential conflict between China's communist ideology and 'presumable' market economy was removed. This occurred because the Communist Party's 14th National Congress in 1992 passed a resolution to ensure an economic reform under 'socialism with Chinese characteristics'.³¹ This rubric was incorporated into the amendment to the PRC Constitution in the following year.³² From an official standpoint, China's market economy does not equate with capitalism. Following this logic, the government would actively participate in global trade to strengthen Chinese socialism rather than succumb to the Western capitalist ideology. Finally, and most importantly, pursuant to the WTO's 'single undertaking' approach,³³ China's membership obliges the country to accept the jurisdiction of the WTO dispute settlement mechanism. This is fundamental to the development of

rule (the first GATT/WTO-type trade law that China adopted) and initiated the first anti-dumping case against foreign products.

²⁹ For example, China signed the textile agreement with the European Economic Community in 1979; Harold K. Jacobson and Michel Oksenberg, *China's Participation in the IMF, the World Bank, and GATT: Toward a Global Economic Order* (Ann Arbor, MI: The University of Michigan Press, 1990) at 84.

³⁰ Ibid.

³¹ *Zhongguo Gongchangdang Dishisici Quanguo Daibiao Dahui* [14th National Congress of the Chinese Communist Party], available at http://news.xinhuanet.com/ziliao/2003-01/20/content_697129.htm (visited 1 May 2010) (in Chinese).

³² See Amendment Two (Approved on 29 March 1993, by the 8th NPC at its 1st Session), Constitution of the People's Republic of China (Adopted on 4 December, 1982), available at <http://english.peopledaily.com.cn/constitution/constitution.html> (visited 1 May 2010) (stating that the Preamble was to 'be amended as: "China is at the primary stage of socialism. The basic task of the nation is, according to the theory of building socialism with Chinese characteristics, to concentrate its effort on socialist modernization..."') (emphasis added).

³³ See How the Negotiations Are Organized, World Trade Organization, available at http://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm (visited 1 May 2010) ('Virtually every item of the negotiation is part of a whole and indivisible package and cannot be agreed separately.') (visited 1 May 2010).

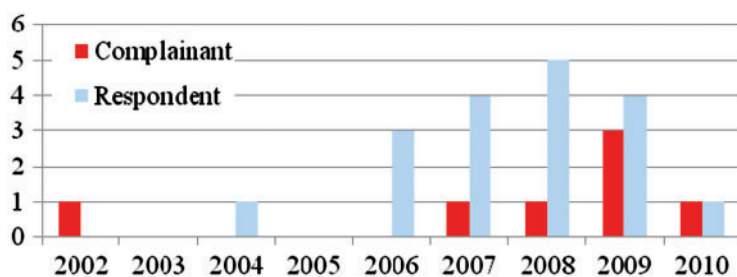


Figure 1. China as a complainant and respondent in WTO cases (as of 1 July 2010)

international law in China because the WTO is the only international ‘court’ with compulsory jurisdiction that China accepted, and it is the only tribunal to which it has actually resorted. This is distinguishable from the preceding period when China’s BITs allowed only ‘private parties’ to have access to arbitration tribunals.

The WTO dispute settlement mechanism directly calls for enhanced WTO capacity building. In the initial years after China’s accession, China’s major trade partners gave China leeway in implementing its commitments and did not initiate complaints against China.³⁴ As Figure 1 shows, due to their rapidly growing trade deficits with China, these partners adopted a more aggressive attitude in WTO litigation. In 2004, the US filed the very first WTO case against China, challenging its exemption of value-added tax on domestically produced integrated circuits.³⁵ This case shocked the Chinese government and academia, and motivated them to reach a consensus to increase China’s capacity in dealing with WTO litigation. They predicted that WTO complaints against China would be the norm rather than an exception. This prediction proved to be accurate because as of June 2010, five countries—the US, the European Union, Canada, Guatemala and Mexico—have initiated 18 complaints against China.³⁶

Remarkably, in 2007, China filed its first WTO complaint without any co-complainants, challenging countervailing and antidumping duties that the US imposed on Chinese paper-product manufacturers.³⁷ All of the seven cases that China has initiated were directed against the US and the

³⁴ See Pasha L. Hsieh, ‘China–United States Trade Negotiations and Disputes: The WTO and Beyond’, 4 (2) *Asian Journal of WTO and International Health Law and Policy* 369 (2009), at 375–7 (providing an overview of the US trade policy on China).

³⁵ *China - Value-Added Tax on Integrated Circuits*, DS309. China decided to settle this case and withdraw WTO-inconsistent measures. For details, see data available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds309_e.htm (visited 2 May 2010).

³⁶ DS309, 339, 340, 342, 358, 359, 362, 363, 372, 373, 378, 387, 388, 390, 394, 395, 398 and 407.

³⁷ *US - Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, DS368. The 2002 *US–Steel Safeguards* case, DS252, was the first case for

European Union,³⁸ China's two major export markets. Beijing's litigation approach is aimed at overcoming the significant number of trade-remedy cases against Chinese enterprises. It also sought 'new' interpretations of those WTO-plus or discriminatory obligations to which China committed in exchange for WTO membership.³⁹ The transition of the government mindset in resorting to legal remedies also affected Chinese businesses, which had always avoided resolving disputes through the courts. For example, in *Tza Yap Shum v Peru*, Chinese investors for the first time sued a foreign government at the International Center for Settlement of Investment Disputes (ICSID) in 2007.⁴⁰

The importance of the WTO prompted government officials and legal academics to make studying the WTO a priority on China's international economic law research agenda. Translations of books from Western WTO experts helped domestic scholars gain a better understanding of the operation of the new organization. For example, Professor John H. Jackson's book, *The World Trading System: Law and Policy of International Economic Relations*, was translated into Chinese and published in 2001.⁴¹ This book provides an overview of cardinal WTO principles and, in particular, addresses issues that China may encounter. In addition to reading

which China sued the US, but China was one of the eight complainants challenging the US's safeguard measures on imports of steel products.

³⁸ DS252, 368, 379, 392, 397, 399 and 405.

³⁹ These discriminatory treatments primarily arise from China's acceptance of its status as a non-market economy in the Protocol of Accession. See US-China Bilateral WTO Agreement, 15 November 2009, available at <http://clinton4.nara.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html> (visited 2 May 2010) (explaining that under the US-China WTO Bilateral Agreement, 'the United States can continue to apply our current non-market economy methodology in antidumping cases involving imports from China for 15 years'); On China's Non Market Economy, G-IPR Global Research Center, 25 May 2009, available at <http://www.giprs.org/node/464> (visited 3 May 2010) (stating that under China's protocol, 'the surrogate markets for purposes of arriving at the normal value often are India, Turkey and Mexico, which usually is the very reason why China's anti-dumping cases end in failures.'). China has attempted to solicit its important trade partners, many of which are FTA partners, to recognize its market-economic status. See Qingjiang Kong, 'Trade Disputes between China and the EU: Are They Manageable?', 5 (2) *Global Trade and Customs Journal* 47 (2010), 51 ('[China] has acquired market economy recognition from New Zealand, Singapore, Malaysia, Thailand, and Kyrgyzstan but is awaiting approval from the US and the EC, its biggest trading partners.').

⁴⁰ *Tza Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6 (China/Peru BIT) – Decision on Jurisdiction and Competence, 19 June 2009, paras 1–29. Although Chinese businesses have frequently resorted to foreign courts for legal remedies, the Chinese government was reluctant to participate in foreign legal proceedings. A significant change to this governmental attitude is the countervailing duty-related Coated Free-Sheet Paper case, in which the Chinese government, for the first time, under its name, filed a lawsuit against the US Department of Commerce in a US court. Scott M. Berry, 'When Tariffs Encourage Free Trade', *Asia Times*, 7 August 2007, available at http://www.atimes.com/atimes/China_Business/IH07Cb02.html (visited 3 May 2010).

⁴¹ Jackson's book was translated by Zhang Naigen of Fudan University and published by the Fudan University Press in China.

publications that introduce the WTO,⁴² Chinese scholars also focus on WTO dispute settlement cases, particularly those involving trade remedies.⁴³ Because the WTO is the only multilateral organization in which China co-exists with Taiwan, Hong Kong and Macau, publications that discuss legal issues involving 'one country, four seats' also proliferated.⁴⁴

China's keen interest in the WTO also increased the demand for experts in relevant fields and its academic institutions have responded. Currently, several law schools have established graduate institutes of international economic law, which offer graduate degrees on WTO subjects.⁴⁵ Wuhan University and the Shanghai Institute of Foreign Trade even launched independent colleges of WTO specifically devoted to research and teaching of relevant disciplines.⁴⁶ The China-EU School of Law, financed by the European

⁴² For example, Zhao Weitian, *Shi Mao Zuzhi (WTO) De Falu Zhidu* [The Legal System of the WTO] (Chang Chun: Jilin People Press, 2000) and Yang Guohua, *Zhongguo Jiaru WTO Falu Wenti Zhuanolun* [Legal Problems on China's Accession to the WTO] (Beijing: Law Press China, 2003).

⁴³ For example, Ji Wenhua and Jiang Liyong, *WTO Zhengduan Jiejue Guize Yu Zhongguo De Shijian* [WTO Dispute Settlement Rules and China's Practices] (Beijing: Peking University Press, 2005), Zhu Lanye, *Shijie Maoyi Zuzhi Guoji Maoyi Jiu fen Anli Pingxi 2003–06* [Case Analysis of the WTO International Trade Disputes: 2003–06] (Beijing: Law Press China, 2007), Zhang Naigen, *WTO Zhengduan Jiejue Jizhi Lun – Yi TRIPS Xieding Weili* [On WTO Dispute Settlement Mechanism – TRIPS Agreement As Example] (Shanghai: Shanghai People Press, 2007), and Gong Baihua, *WTO Zhengduan Jiejue Yu Zhongguo* [WTO Dispute Settlement & China] (Shanghai: Shanghai People Press, 2009).

⁴⁴ For example, Sun Wangzhong and Zhao Xueqing, *Rushihou Yiguosixi Redian Falu Wenti Yanjiu* [Studies on Hot Legal Issues Related to 'One Country, Four Seat' After China's Accession into The WTO] (Beijing: Law Press China, 2004) and 'Hai Xia Liang An WTO Fa Lu Lun Tan' Lun Wen Ji [Proceedings of 'Cross-Straits WTO Law Forum'] (Beijing: Peking University Press, Sun Wangzhong ed. 2007). As the WTO is the least sensitive international law-related topic, cross-strait academic conferences often focus on WTO-related issues. For instance, the Chinese (Taiwan) Society of International Law and Chinese universities organized the Cross-Straits WTO Law Forum in Beijing in 2007 and the first Cross-Straits International Law Forum in Taipei in 2009. Consequently, WTO research also increases exchanges between international law scholars in China and Taiwan.

⁴⁵ Eg China University of Political Science and Law, Nanjing University of Finance and Economics, Nankai University, Northwest University of Politics and Law, Peking University and Xiamen University. Currently, 17 Chinese universities have graduate institutes of international law, most of which also have faculty members who focus research on WTO law. Peking University and China University of Politics and Law have both graduate institutes of international law and international economic law.

⁴⁶ Wuhan University's WTO Studies School was established in 1999 and offers masters degrees specifically on WTO law. Introduction to College, available at <http://www.whuwtu.com/Index-listdetail-pid-3> (visited 1 May 2010) (in Chinese). Shanghai Institute of Foreign Trade's School of WTO Research & Education was established in 2002, and in 2010 the school was designated by the WTO as one of the 14 academic partners for the WTO Chairs Program. School of WTO Research & Education, available at <http://www.shift.edu.cn/home/wtoxy/index.htm> (visited 2 May 2010); WTO Academic Cooperation: WTO to establish chairs at 14 developing country universities, Press/593, 26 January 2010, available at http://www.wto.org/english/news_e/pres10_e/pr593_e.htm (visited 3 May 2010). Peking University's Institute of the Chinese Economy and WTO Studies was also established under the Guanghua School of Management in 2002. Introduction to the Institute, available

Union, also started the Master of European and International Law program, which made WTO law compulsory.⁴⁷ Foreign institutions have also contributed to China's WTO legal capacity. Since China's WTO accession, foreign governments, non-governmental organizations (NGOs) and international organizations have funded various training projects for Chinese officials.⁴⁸ But, as discussed in the next section, the proliferation of these programs has not yet efficiently increased China's WTO legal capacity in dealing with actual litigation.

Foreign contributions, particularly those funded by business associations, may not be entirely altruistic. WTO-related training events aim at 'teaching' officials how to implement WTO rules. This is important for foreign companies because the major problem they encounter in China has more to do with enforcement than the law. This is particularly true concerning intellectual property enforcement at the local level. From the business perspective, it is often the last resort to request that the home government initiate WTO litigation, given the time and resources that may be incurred. Consequently, the WTO training projects for Chinese officials could defuse potential WTO disputes at a much lower cost. Moreover, these events provided public relations opportunities by allowing foreign businesses leaders to interact with Chinese officials in charge of trade policy and large-scale government projects. As China is not yet a party to the WTO Government Procurement Agreement and hence not bound by its national treatment and MFN obligations, multilateral enterprises clearly understand the importance of building *guanxi*—personal connections—with government officials.

III. PUBLIC—PRIVATE COOPERATION IN WTO DISPUTE SETTLEMENT

The analysis above provides evidence of China's new attitude toward international law and dispute settlement that has evolved from rejection, to reception, and finally to participation. Such involvement has been both politically and economically motivated. Although the Chinese notion of

at <http://wto.gsm.pku.edu.cn/cn/background.htm> (visited 10 May 2010) (in Chinese). This institute focuses on WTO research and does not offer degrees.

⁴⁷ The China–EU School of Law is under the China University of Political Science and Law. Master of European and International Law at the China–EU School of Law in Beijing, at 6, available at http://ec.europa.eu/euraxess/links/china/docs/cesl_european_master.pdf (visited 2 May 2010).

⁴⁸ The sponsors were the government agencies and embassies of the US, EU, UK, Germany, Australia and Japan; NGOs including the US–China Business Council, the Ford Foundation, and the Asian Foundation; and international organizations included the Asian Development Bank, the World Bank; and educational institutions, such as Georgetown University and Harvard University Kennedy School of Government. Brian L. Goldstein and Stephen J. Anderson, 'Foreign Contributions to China's WTO Capacity Building', *The China Business Review* 9, at 10–11 (January–February 2002).

sovereignty in the political sphere (in particular, territorial integrity) has altered marginally in past decades, the perception with regard to economic sovereignty has significantly changed, thereby facilitating China's integration into the global order. The WTO has undoubtedly played a pivotal role in this transformation.

A. The de-linking of legal education from the practice of WTO law

As examined in Part II, the pragmatic need to understand the WTO galvanized the Chinese government and academic institutions to respond to such demands. Publications and academic programs have increased the focus on WTO research. Yet, China's WTO legal capacity still lagged behind other emerging economies, such as India and Brazil. A preliminary question is why Chinese legal education does not seem to be capable of producing WTO lawyers.⁴⁹ I offer the following explanations.

First, Chinese law schools focus primarily on the doctrinal understanding rather than the application of legal subjects. In other words, vast educational resources were invested to make students 'understand' WTO law, but not to enable them to 'practice' the law. For instance, WTO-related courses often include the study of panel and Appellate Body reports, but rarely teach legal research and writing. WTO litigation is highly dependent on one's proficiency in oral and written English. In cases involving the US and the European Union, a solid understanding of their respective trade regimes and pertinent cases is a prerequisite. However, legal English and foreign law research training, including the use of legal databases such as Westlaw or Lexis, are rather constrained in Chinese law schools.⁵⁰ This deficiency is also because most students in non-elite schools outside major cities have limited access to legal databases, law reporters and digests or libraries of international law including WTO subjects. Moreover, the *de facto* common law approach in WTO jurisprudence is new to Chinese instructors and students. This is not simply because of China's civil law system, but because most local courts' decisions are not publicly available and are rarely taught in schools. In addition to improving the country's fundamental legal mentality and infrastructure, an efficient way to address the shortfall may be to incorporate global moot court competitions into legal education. These competitions, including the Philip C. Jessup International Law Moot Court Competition and the ELSA Moot Court

⁴⁹ See Tina Wang, 'Where Are China's WTO Lawyers?', *Forbes*, 27 April 2009, available at <http://www.forbes.com/2009/04/27/china-wto-law-business-economy-trade.html> (visited 3 May 2010) (discussing the lack of WTO lawyers in Chinese firms).

⁵⁰ For example, Roy L. Sturgeon, *Teaching and International Legal Research at Wuhan University (Wuda) Law School* 6 (2010), available on SSRN (describing that law students at Wuhan University, a leading school in China, are not familiar with basic research tools for Westlaw).

Competition on WTO Law,⁵¹ model cases heard before the ICJ and the WTO, and would allow participants to develop research, writing and oral argument skills.

Secondly, the lack of 'practical' WTO training has been compounded by the fact that Chinese law professors usually possess no work experience prior to beginning their academic careers. A small number of WTO law professors have developed trade law expertise through taking on occasional projects from government agencies or their affiliations with WTO think tanks.⁵² However, the Chinese government has frequently requested advisory opinions from them, offering them only limited remuneration. The official expectation is that law professors are public officials, and providing assistance to the government is an honor or political responsibility.⁵³ This mentality, along with underpaying them for legal services, has significantly diminished academics' motivation to participate in WTO litigation. Finally, although it is increasingly common for Chinese law students to pursue graduate degrees at Western law schools, these graduates do not plan to enter the government. For example, none of the former Chinese interns at the WTO Legal Affairs Division and Appellate Body Secretariat pursued a public career, notwithstanding their expertise in the field.⁵⁴ In addition, most overseas Chinese law

⁵¹ The Philip C. Jessup International Law Moot Court Competition was introduced into China in 2003. Introduction to Competition, available at <http://www.jessupchina.org/> (visited 2 May 2010) (in Chinese). China has not sent teams to participate in the ELSA Moot Court Competition on WTO Law organized by the European Law Students' Association. The Asia Regional Round of this competition has been organized by National Taiwan University College of Law in Taipei. Both Hong Kong and Taiwan have participated in the competition.

⁵² For example, Gong Baihua is both Professor of International Law in the Fudan University School of Law and the Director of Information at the Shanghai WTO Affairs Consultation Center. In addition, Tsinghua Law School had an agreement with government agencies under which junior faculty members could work in relevant agencies (e.g. Ministry of Commerce) for one year and their service seniority would be recognized by the university. The program ceased to function due to faculty members' lack of interest. Meeting with faculty members of Tsinghua Law School (names withheld) in Beijing, July 2009 (on file with the author).

⁵³ Zeng Lingliang, a Chinese WTO scholar, argues that the current practice of the government complies with neither the international norm nor the market discipline and that legal fees for academics should be comparable to those for private lawyers. Zeng Lingliang, 'WTO Zheng Duan Jie Jue Zhong De Fa Lu Fu Wu Yu Wo Guo De Dui Ce Ce [Legal Services in WTO Dispute Settlement and China's Reponse]', in Zeng Lingliang (ed.), *21 Shijichu De Guojifa Yu Zhongguo* [International Law in the Early 21st Century and China] (Wuhan: Wuhan University Press, 2005) at 412–412 at 412.

⁵⁴ As of today, four Chinese law school graduates/lawyers who interned with the Legal Affairs Division (LAD) and Appellate Body Secretariat (ABS) that assist panelists and Appellate Body members in dispute settlement cases include Yi Wang (former LAD intern; currently an associate in the Shanghai office of Jones Day), Xiaoyi Tang (former LAD intern, currently an associate in the Brussels office of Mayer Brown), Gangqiu Wang (former LAD intern, currently a SJD candidate at Harvard Law School) and Henry Gao (former ABS intern, currently an associate professor of law at Singapore Management University). The WTO Rules Division, which assists panelist in cases concerning anti-dumping, subsidies and

students tend to join international law firms that focus on corporate work instead of litigation, to which trade practice belongs.⁵⁵ The fact that China's WTO legal capacity cannot benefit from these elite law graduates aggravates the disengagement between the academia and the government's handling of WTO disputes.

B. The role of think tanks to bridge the information and communication gaps

Due to the above-mentioned weaknesses, China's legal education and academia have contributed more to the dissemination of knowledge about WTO law than to the increase of the country's legal capacity to handle WTO disputes. To address the problem, local governments established think tanks, known as WTO centers, to develop local WTO expertise and to bridge the gaps between the government, academia and private companies. These think tanks are governmental entities rather than independent NGOs.

Among the most prominent think tanks are the Shanghai WTO Affairs Consultation Center, the Beijing WTO Affairs Center, the Shenzhen WTO Affairs Center and the China–WTO Dispute Settlement Mechanism Center.⁵⁶ These think tanks offer assistance to companies in which managers and employees had limited knowledge of WTO rules and minimal access to training courses offered by universities. These companies, usually of small and medium stature, most frequently encounter trade-remedy measures in export markets and do not know how to use the government resources.

safeguard matters, does not run a regular internship program. I do not know of any Chinese interns formerly or currently with this Division.

⁵⁵ It is increasingly popular for Chinese students to pursue JD degrees in US law schools and seek to transfer from New York headquarter offices of their firms to Chinese branch offices. Because US-qualified Chinese lawyers are considered as foreign lawyers and cannot practice Chinese law in China, they mostly choose to be in corporate departments working on M&A matters. In addition, most Chinese branch offices of US firms do not have litigation departments and thus it would be more difficult for US litigation lawyers to relocate to China.

⁵⁶ The first three centers were established by the Shanghai Municipal Government in 2000, Beijing Municipal Government in 2001, and Shenzhen Municipal Government in 2002, respectively. *Introduction*, available at http://www.sccwto.net/webpages/WebMessageAction_indexList.action?menuorderno=3002&lang=en&menuid=4fa335cb-150e-4a90-bab2-1884156c8eae&menucode=sccwto&messagecount=0 (visited 20 May 2010); About BAC/WTO, available at <http://en.bjwto.gov.cn/newshtml/06/20030707111804.asp>, (visited 10 May 2010) 9 December 2009; Introduction to the Center, available at <http://www.szwto.gov.cn/news/AboutUs.aspx?id=7117>, (visited 10 May 2010) 7 May, 2009. The China–WTO Dispute Settlement Mechanism Center was founded by the Shanghai Institute of Foreign Trade and the Shanghai WTO Affairs Consultation Center in 2008. China Launches First Research Center on WTO Dispute Settlement Mechanism, *People's Daily*, 12 May, 2008, available at <http://english.peopledaily.com.cn/90001/90776/90884/6408352.html> (visited 10 May 2010). At the provincial level, counterparts to WTO centers are government entities, usually named 'WTO Section' or the 'Bureau of Foreign Trade' of the Commerce Commission or the Department of Foreign Trade and Economic Cooperation.

Although the WTO centers receive subsidies for research projects from the ministries of the central government, including the Ministry of Commerce (MOFCOM), they are primarily funded by provincial and municipal governments. What motivates these local governments to develop WTO expertise? China's WTO commitments require that both central and local governments revamp their legal regimes. Local government agencies and people's congresses would, therefore, need advice on conforming local regulations to WTO law, to which they have had little exposure. In addition, Beijing, Shanghai and Shenzhen are the prime beneficiaries of China's economic reform. Companies located in these cities contribute a significant share of taxes essential for the cities' financial base. It is thus essential for local governments to safeguard these companies' economic interests by helping them tackle trade barriers, both abroad and in China. There is an unwritten rule that city leaders' political career in either the bureaucracy or the Communist Party depend predominantly on their performance in generating economic growth, and this provides an extra incentive to enhance WTO legal capacity at the local level.

WTO centers fill the information and communication gaps for those in academia, industries and the government. They also, to some extent, substitute for trade associations in other countries. First, by holding programs and conferences, these centers disseminate WTO knowledge not just to students, but also to government officials and entrepreneurs.⁵⁷ Their websites also keep track of changes in foreign trade rules and WTO disputes involving China. Secondly, WTO centers assist private companies with 'identifying' trade and investment barriers. While local companies may 'describe' these barriers, they often do not know the technical WTO terms for such barriers (e.g. 'non-tariff barriers'), and this keeps them from expressing effectively the unfair treatment to competent ministries.⁵⁸ Legal experts at local WTO centers can 'translate' layman's language into WTO jargon and submit the materials to the MOFCOM in Beijing.⁵⁹ These materials are important to the ministry, as they serve as background information for questions posed to China's trading partners during WTO trade policy reviews. The information can also be included in the *Foreign Market Access Report*, which helps the

⁵⁷ For example, the Shanghai WTO Affairs Consultation Center runs the '50/100 Senior Expertise Training Project on WTO Affairs' and the Shenzhen WTO Affairs Center runs the '9090 Training Project' for government officials. Yu Minyou and Liao Li, *Zhongwai WTO Peixun Jiguo Yu Xianmu Gailan* [An Overview of Chinese and Foreign WTO Training Institutions and Projects], in Sun Wanzhong and Yu Minyou (eds), *WTOFA Yu Zhongguo Luncong* [WTO Law and China Forum] (Beijing: Intellectual Property Press, 2008), 390–406 at 402–403. These two centers also regularly recruit post-doctoral researchers for their research and consultation projects.

⁵⁸ Email from a former member of the Shanghai WTO Affairs Consultation Center (name withheld), 15 September 2009 (on file with the author).

⁵⁹ For example, the Shenzhen WTO Affairs Center includes the Shenzhen Trade Barrier Complaint and Investigation Services Center.

ministry identify foreign ‘unfair trade practices’ that it should investigate and initiate action against.⁶⁰

Thirdly, outside the WTO arena, these centers provide assistance to local enterprises in foreign legal proceedings. This is known as overseas *weiquan*, that is, rights protection. For example, with the assistance of the Shenzhen WTO Affairs Center, Netac Technology Co. sued PNY Technologies, Inc., in Texas, alleging that the latter had infringed on its patent rights.⁶¹ This case demonstrates a unique but not an isolated example that shows the flip side of intellectual property infringement cases involving Chinese companies. In anti-dumping and Section 337 proceedings,⁶² which Chinese exporters frequently encounter in the US, the WTO centers also provide a vertical framework that allows medium-sized companies to share information and lower litigation expenses by retaining joint counsel. Finally, these centers operate early warning systems related to potential foreign anti-dumping measures by monitoring export volumes to export markets and other data.⁶³ This system is crucial for local companies because 35% of the world’s anti-dumping measures are directed against China, making the country the number-one target of such measures.⁶⁴ These functions performed by the various centers have contributed to China’s WTO legal capacity building and made them a more effective link among major actors in the trade circle.

C. The operation of government agencies in response to WTO disputes

The think tanks cannot replace the government’s role in the WTO, as participation in the WTO rule-making and dispute settlement is legally confined

⁶⁰ The Ministry of Commerce began issuing the annual Report in 2003. Forward, Foreign Market Access Report 2003, at 2, available at <http://gpj.mofcom.gov.cn/table/2004report-en.pdf> (visited 20 May 2010).

⁶¹ China – Law Firms: A Chinese Company Takes The Initiative In Protecting Its Patents, The Metropolitan Corporate Counsel, December 2009, at 48. See also Netac Reaches Settlement in US Patent Case, Xinhua, 27 March 2008, available at http://www2.chinadaily.com.cn/business/2008-03/27/content_6570019.htm (visited 20 May 2010) (‘Netac had sought unspecified financial damages and suspension of PNY’s flash-memory storage devices in a suit filed in the Eastern District Court, in Texas, in 2006. It was the first case of a Chinese IT company pursuing patent charges overseas.’)

⁶² See Charles F. Schill, *A Brief Overview of Practice under Section 337*, available at <http://library.findlaw.com/2002/Nov/26/132414.html> (visited 1 July 2010) (‘Section 337 of the Tariff Act of 1930 ... provides that unfair methods of competition and unfair acts in the importation of articles into the US, or in their sale for importation, or sale within the US after importation, are unlawful.’)

⁶³ See e.g. Gong Baihua, *Shanghai’s WTO Affairs Consultation Center: Working Together to Take Advantage of WTO Membership*, available at http://www.wto.org/english/res_e/booksp_e/case-studies_e/case11_e.htm (visited 2 May 2010) (describing the Center’s early warning system for anti-dumping disputes).

⁶⁴ For example, in 2008, China encountered 73 anti-dumping investigations. AD initiations: by exporting country from 1 January 1995 to 31 December 2008, available at http://www.wto.org/english/tratop_e/adp_e/ad_init_exp_country_e.pdf (visited 10 May 2010).

to governments. To adapt to WTO accession, China's governmental structure has undergone a significant change. A salient reorganization was the establishment of the MOFCOM in 2003.⁶⁵ The MOFCOM merged the State Economic and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation, which governed domestic and foreign trade, respectively. The division of work on domestic and foreign markets was the result of the planned economy, and the separate agencies could not cope with the market economy mechanism that the WTO mandates.

The government's legal capacity is essential to its performance in the WTO. Within the MOFCOM, the two units devoted to WTO tasks are the Department of WTO Affairs and the Department of Treaty and Law.⁶⁶ The Department of WTO Affairs serves concurrently as China's WTO Notification and Enquiry Center,⁶⁷ and it was established to comply with transparency obligations under WTO rules. This department is in charge of WTO-related work within the government, responsible primarily for bilateral and multilateral negotiations, and trade policy reviews. Nonetheless, participation in WTO disputes and negotiations on the Dispute Settlement Understanding (DSU) are within the purview of the Department of Treaty and Law.⁶⁸ The WTO Law Division under the department retains five to eight staff lawyers to deal with WTO disputes involving China.⁶⁹ In addition, China's Permanent Mission to the WTO in Geneva consists of 18 members.⁷⁰ The competition for entry into the MOFCOM has been rather intense, given that officials in the ministry are civil servants and enjoy high levels of job security.⁷¹ The competition includes the qualification review,

⁶⁵ *Shangwubu: Zhongguo Jingji Duiwai Lianxi De Qiaoliang* [Ministry of Commerce: The Bridge of China's Economy to the Outside World], 15 December 2008, available at http://www.china.com.cn/economic/zhuanti/ggkf30/2008-12/15/content_16949851.htm (in Chinese) (visited 25 May 2010).

⁶⁶ The fact that both directors of these two departments are well-trained legal professionals vindicates the government's goal to enhance its WTO legal capacity.

⁶⁷ *Functions of the Department of WTO Affairs*, 22 August 2008, available at <http://sms.mofcom.gov.cn/aarticle/gwym/200606/20060602467456.html?3591199086=3878450466> (in Chinese) (visited 25 May 2010).

⁶⁸ The Department of Treaty and Law is also responsible for providing advice on amendments to Chinese laws and rules in compliance with WTO commitments. See Donald C. Clarke, 'China's Legal System and the WTO: Prospects for Compliance', 2 *Washington University Global Studies Law Review* 97 (2003), 104–11 (detailing China's compliance with WTO commitments).

⁶⁹ Email from a Chinese trade official (name withheld), 25 September 2009 (on file with the author).

⁷⁰ Email from a Taiwanese trade official (name withheld), 24 September 2009 (on file with the author). The number of staff members in China's WTO Mission is based on the WTO Bluebook (March 2009 version).

⁷¹ Legal positions for the Department of Treaty and Law are even more competitive than other positions, as they require applicants to have at least a master's degree and a substantially higher written examination score than the minimum eligible for interview.

oral and written examinations in both Chinese and foreign languages.⁷² It is noteworthy that MOFCOM legal professionals are not required to be admitted to the national bar or have prior legal practice experience. Unlike many trade lawyers in the US Trade Representative (USTR) or the US Department of Commerce (USDOC), most lawyers in China's WTO Law Division never practiced in the private sector.

An analysis of the actual handling of WTO disputes reveals the institutional weakness in practice. Under the country's 'active defense' trade strategy, China enacted the *Foreign Trade Barriers Investigation Rules (Rules)*, which came into force in 2005.⁷³ The function of the *Rules* is comparable to that of Section 301 of the *US 1974 Trade Act* or the *EU Trade Barriers Regulation (TBR)* under which domestic companies can request that their government challenge foreign trade barriers.⁷⁴ Article 33 of the *Rules* clearly mandates that the MOFCOM adopt measures, including initiating WTO complaints, should foreign barriers persist after investigations are completed.⁷⁵ In practice, there has been only one instance in which a Chinese company petitioned the MOFCOM under the *Rules*. The case was filed by the Jiangsu Province Laver Association to challenge Japan's restriction on Chinese laver exports.⁷⁶ Some may applaud the 'success' of the *Rules* because Japan reopened the market to laver from China in the following year. However, I would argue that this isolated case in fact exposes the weakness of the petition system, which makes Chinese companies reluctant to resort to the *Rules*, unlike their counterparts in the US and the European Union.

Two explanations underline why private companies have rarely resorted to the *Rules*. First, Chinese companies engaged in foreign exports are usually hesitant to retain lawyers to petition under the *Rules* for financial reasons. Most companies located outside the cities that establish WTO centers are unable to receive their assistance. Although the financial obstacle may be overcome by trade associations, active associations in China are rare in

⁷² Shangwubu 2010nian Gongwuyuan Luyong Zhuanye Kaoshi He Mianshi Tongzhi [Ministry of Commerce Notification regarding Examinations and Interviews for Civil Servants in 2010], 11 February 2010, available at <http://rss.mofcom.gov.cn/aarticle/xxfb/201002/20100206784906.html?236018030=3878450466> (visited 25 May 2010).

⁷³ Dui Wai Mao Yi Bi Lei Tiao Cha Gui Ze [PRC Foreign Trade Barriers Investigation Rules], available at <http://www.asianlii.org/cn/legis/cen/laws/iroftb414/> (visited 25 May 2010).

⁷⁴ For the operation of US Section 301 and EU TBR rules, see generally Gregory Shaffer, 'Public-Private Partnerships' in WTO Dispute Settlement: the US and EU Experience', in Yasuhei Taniguchi et al. (eds), *The WTO in the Twenty First Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (New York: Cambridge University Press, 2006).

⁷⁵ See Article 33 of the *Rules* (stating that the MOFCOM may '[s]tart settlement mechanism of multilateral dispute' or '[t]ake other proper measures').

⁷⁶ Yan Luo, 'Engaging the Private Sector: EU-China Trade Disputes under the Shadow of WTO Law?', 13 (6) *European Law Journal* 800 (2007), at 809. This case was filed under the Provisional Rules on Foreign Trade Barriers Investigations, enforced since November 2002.

comparison with other countries, such as the US and Brazil.⁷⁷ Second, some may contend that the government may initiate the investigations if 'it deems necessary' under Article 4 of the *Rules*.⁷⁸ This position ignores China's unique political structure and the fact that the Western concept of 'lobbying' does not apply in China.⁷⁹ Local companies usually have no contact with the central government. Moreover, members of the National People's Congress do not necessarily represent voters in their election districts due to the complex multi-layered election system.⁸⁰ These reasons explain weaknesses about the practice of the *Rules*.

Once China files a complaint or receives one from another WTO member, consultation is a prerequisite before the matter goes to the panel, as required by the DSU.⁸¹ Lawyers at the WTO Law Division under the Department of Treaty and Law are responsible for the entire litigation process. This allocation of work is similar to the USTR model and different from the European Commission model, where legal work for consultation and post-consultation stages is divided between the Directorate-General (DG) for Trade and the DG for Legal Service.⁸² The WTO Law Division also cooperates with other departments and divisions in pertinent disputes, including, for instance, the Intellectual Property (IP) Law Division in IP-related cases. In general, foreign law firms are rarely retained at the consultation stage, but are frequently involved in subsequent ones.⁸³ Chinese firms are, nonetheless, hired for both consultation and subsequent phases for almost every case. Individual lawyers in the WTO Law Division are paired up with external counsels in disputes. This cooperation enables government lawyers to absorb DSU expertise from experienced professionals, thereby enhancing in-house WTO legal capacity. Substantive litigation work, including legal research and drafting briefs, is

⁷⁷ Active trade associations include, for instance, the United Steelworkers of the US and Brazilian Association of Cotton Producers.

⁷⁸ See Article 4 of the *Rules* ('Ministry of Commerce may place the case on file for trade barriers investigation o[f] its free will as it deems necessary').

⁷⁹ Lobbying and government relations are one of the practice areas of certain Washington-based firms. See e.g. Sheri Qualters, *Firms Help U.S. WTO Cases*, Law.Com, 13 June 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1181552738538> (visited 28 May 2010) ('Lobbying followed the information gathering and legal analysis. [A US industry coalition,] China Copyright Alliance's 2006 lobbying fees totaled \$280,000 for Greenberg Taurig and \$180,000 for Smith Strong. ...').

⁸⁰ China's 'real' elections in the Western sense are limited to villages and factory management. Kerry Dumbaugh and Michael F. Martin, *Understanding China's Political System*, Congressional Research Service, at 16–17 (31 December 2009).

⁸¹ DSU, Article 4.7.

⁸² Email from an EU trade official (name withheld), 6 January 2009 (on file with the author).

⁸³ Email from a Chinese lawyer of a Brussels-based firm (name withheld), 28 September 2009. An exception is *China – Value-Added Tax on Integrated Circuits* (DS309), where Beijing Huanzhong and Partners (BHP) was retained to participate in the consultation. *Huanzhong Yéji* [Records of BHP], available at <http://www.huanzhonglaw.com/hzlaw/hzyj/hzyj.htm> (visited 20 May 2010) (in Chinese). In that case, China subsequently agreed to withdraw the measures at issue in 2004 (on file with the author).

primarily done by the MOFCOM and law firms in Beijing. Similar to most other countries, China's Geneva-based WTO Mission does not play a significant role in the actual litigation process because of its lack of legal professionals.⁸⁴

D. Participation of external counsel in WTO cases

As noted earlier, China's WTO legal capacity is at the early stage of development. Compared with other states that have lawyers with WTO litigation expertise, the size of the legal teams within the Chinese government is about one-third the size of their counterparts in the US, the European Union or Canada.⁸⁵ The small number of specialized WTO lawyers, along with the fact that they have much less WTO litigation experience, invariably leads to China's shortage of 'institutional memory'. This shortage hinders the lawyers' ability to deal with unwritten procedures established by customs.⁸⁶ Furthermore, legal professionals in the WTO Law Division of the Department of Treaty and Law become civil servants after they pass the public official examination. The 'value' of their prior legal experience, if any, is not reflected in their salaries or official rankings. In the US, the 'revolving door' is common between the government and private firms, which allows the agency to benefit from private experience at a low cost.⁸⁷ Nevertheless, a more common scenario in China is the 'one-way door': senior government lawyers often move to law firms, but not vice versa.⁸⁸ In fact, there is no mechanism for senior private lawyers to join the government without taking the official examination with recent law school graduates. In this regard, Korea employs a more flexible mechanism that allows its Ministry of Foreign Affairs and Trade to directly recruit foreign lawyers,

⁸⁴ Currently, Wenhua Ji (Second Secretary; PhD in Law, Peking University) is the primary official devoted to Dispute Settlement Understanding (DSU) matters with the Chinese Mission.

⁸⁵ As mentioned in Section III.C., the WTO Law Division within China's MOFCOM has five to eight staff lawyers. In comparison, the USTR, EU DG-Legal Services and DG-Trade, and Canada's Ministry of International Trade retain approximately 25–30 trade lawyers. Memorandum on Handling WTO Disputes by WTO Members (on file with the author) (in Chinese).

⁸⁶ These unwritten customs, not governed by any WTO rules, are of importance to developing countries in WTO litigation. These customs include, for instance, the format of the brief, the method of submitting the brief to the WTO Secretariat, a motion to postpone the oral hearing, the style of oral arguments, or even the selection of foreign or domestic law firms.

⁸⁷ This is particularly true in the USTR or US Department of Commerce, where many officials were previously senior attorneys or partners at Washington, DC-based law firms.

⁸⁸ For example, Jun Wei and Roy Zou of Hogan Lovells (formerly Hogan and Hartson) were previously with the Legislative Affairs Commission of the National People's Congress and the Department of Treaty and Law of the Ministry of Foreign Affairs, respectively. *International Trade*, available at <http://www.hoganlovells.com/pressroom/detail.aspx?news=1573> (visited 15 May 2010). Zhang Yuejiao, current WTO Appellate Body Member, was previously with the Department of Treaty and Law of the Ministry of Foreign Trade and Economic Cooperation before she joined Jun He Law Offices. Appellate Body Members, available at http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#zhang (visited 15 May 2010).

usually US-qualified lawyers of Korean descent, to handle WTO litigation.⁸⁹ China should allow similar flexibility in its official recruitment in order to attract experienced lawyers, both foreign and Chinese, to enhance its in-house WTO legal capacity.

1. *The WTO Secretariat and the Advisory Centre on WTO Law*

Considering the lack of in-house legal capacity, it is essential for China to gain additional assistance from external sources, as many developing countries do. The WTO Secretariat regularly provides technical assistance to developing country members. The Secretariat's technical assistance is, nonetheless, remotely useful in WTO litigation because it provides mostly training courses, instead of legal advice in actual disputes.⁹⁰ Some may refer to the Advisory Centre on WTO Law (ACWL), an international organization that was established to assist developing countries in WTO law.⁹¹ I do not challenge the ACWL's contribution to ensure fair participation by those countries in WTO disputes.⁹² It is, however, noteworthy that emerging economies, including China, Korea and Brazil, have showed no intention to join the ACWL.⁹³

Why does China have little interest in the ACWL's 'relatively affordable' legal services? First, the ACWL is not mandated to assist countries in fact-gathering, which is crucial to China's WTO cases because most

⁸⁹ Memorandum on Handling WTO Disputes by WTO Members, above n 85. The Ministry has gradually increased contract-based WTO law experts who went to domestic or foreign law schools. Unlike most Korean government officials, these experts do not need to take the official examination. Although the number of these experts is still limited, this flexible recruitment mechanism enables Korean professionals trained overseas to practice WTO law in the Korean government, thus increasing its legal capacity with limited cost. Discussions with a member of the WTO Secretariat (name withheld), 2006–2007; one anonymous reviewer also provided insight into this issue.

⁹⁰ The WTO runs Geneva-based training courses and Regional Trade Policy Courses (RTPCs). The RTPCs for the Asia and Pacific region were jointly held by the WTO and the University of Hong Kong (2004–2006) and the National University of Singapore (2007–Present). Biennial Technical Assistance and Training Plan 2010–11, Committee on Trade and Development, WT/COMTD/W170/Rev.1, 21 October 2009, at 12–13 and 20. See also, Mitsuo Matsushita [former Appellate Body Member], 'The Sutherland Report and its Discussion of Dispute Settlement Reforms', 8 (3) *Journal of International Economic Law* 623 (2005), at 628 (stating that based on his own experience, 'just occasionally giving seminars on WTO matters for officials of developing country Members seem to be insufficient.'). Andrew D. Mitchell, 'A Legal Principle of Special and Differential Treatment for WTO Disputes', 5 (3) *World Trade Review* 445 (2006), at 453 ('[D]eveloped countries may be prepared to provide [technical] assistance only on an ad hoc basis... and may tend to construct technical assistance to pursue their own interests....')

⁹¹ The ACWL was established in 2001 and operates independently of the WTO Secretariat. ACWL, available at <http://www.acwl.ch/e/index.html> (visited 20 May 2010).

⁹² See e.g. Report on Operations 2009, ACWL, at 8–9 (describing the ACWL's dispute settlement support for its members).

⁹³ *Ibid.*, at 21 ('[S]ix of the most experienced countries (Brazil, Mexico, Argentina, Korea, Chile and China) have not considered it necessary to join the ACWL.'). It should be noted that although Brazil, Korea and China are emerging economies, they possess relatively extensive WTO litigation experience.

controversial issues do not arise from statutes, but from their enforcement. Secondly, the ACWL possesses neither translation services nor Chinese professionals. This deficiency makes it difficult for ACWL lawyers to understand the operation of Chinese law. Thirdly, ACWL professionals lack economic expertise. They are unable to help a country assess whether it is economically viable to bring complaints. Even if a country prevails, the ACWL cannot advise how to retaliate against the industries of the losing party. This is particularly important to developing countries' use of cross-retaliation against developed ones, as efficient retaliation invariably depends on an economic analysis. Finally, the preferential rate that the ACWL charges provides a limited incentive for China.⁹⁴ The huge costs of WTO litigation *per se* constitute no deterrent for China to go to the WTO court.⁹⁵ Many other developing countries cannot fund the litigation expenses without the involvement of trade associations.⁹⁶ China is different. Its government agencies are *de facto* owners of state-owned enterprises (SOEs), and all WTO litigation expenses are covered within the government budget. Therefore, the Chinese mentality concerning retaining external counsel is to prefer fully committed lawyers in leading law firms rather than seek the ACWL's assistance, despite the fact that it charges less.

2. International trade law firms

China is well aware that in order to litigate before WTO courts, it is essential to seek the assistance of experienced international lawyers. A common misunderstanding is that China did not retain foreign law firms until its involvement in WTO disputes. In fact, China first hired a foreign firm in the early 1980s when it was involved in *Jackson v. People's Republic of China*, commonly known as the *Huguang Railway Bond* case.⁹⁷ This case concerned

⁹⁴ For ACWL members, the hourly rates for WTO proceedings are divided by four categories, including Categories A to C and least developed countries, and range from US \$25 to US \$200. *Annex IV: Schedule of Fees for Services Rendered by the Centre*, available at http://www.acwl.ch/e/documents/annex_4_e.pdf (visited 20 May 2010). By comparison, leading New York and Washington DC-based firms charge approximately US \$300–400 per hour for work performed by junior lawyers and US \$200 by paralegals (non-lawyers).

⁹⁵ See Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies*, ICTSD Resources Paper No. 5 (2003), at 16 ('Lawyers for Kodak and Fuji in the *Japan-Photographic Film* case respectively charged their clients fees in excess of \$10 million dollars.'). In that case, Fuji, instead of the Japanese government, covered most litigation expenses. See also, Wang, above n 49 ('Given Beijing's vast resources, cost is a negligible issue, even though the billable hours can rack up and trade disputes drag on for years.').

⁹⁶ For instance, legal work for *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* (DS241) and *EC – Customs Classification of Frozen Boneless Chicken* (DS269), and the *EC – Bananas III Arbitration* (DS27) were funded, respectively, by the Brazilian Poultry Association and Del Monte, the largest Brazilian banana exporter. Gregory Shaffer et al., 'The Trials of Winning at the WTO: What Lies behind Brazil's Success', 41 *Cornell International Law Journal* 382 (2008), at 461–62.

⁹⁷ *Jackson v People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

whether the PRC could assert sovereign immunity regarding unpaid principal and interest that arose from bonds issued by the Ching Dynasty to finance railroad construction.⁹⁸ China initially declined to appear before the US court, but then decided to safeguard its interests with 'foreign assistance'. The Ministry of Foreign Affairs retained a prominent US firm, Baker & McKenzie, which persuaded the court to set aside the unfavorable default judgment.⁹⁹ The shift in China's official attitude toward foreign litigation and law firms echoes my previous analysis regarding China's evolving view on international law and sovereignty in the post-economic reform era.

WTO cases are often more complex than domestic ones. Foreign law firms with WTO expertise are thus essential to China and other developing countries. Since the 1997 *EC-Bananas* case in which the Appellate Body found that a WTO member possesses the right to decide the 'composition of its delegation',¹⁰⁰ it is increasingly common to see developing countries represented by Western law firms.¹⁰¹ Throughout the 15 years of DSU practice, certain elite law firms have formed a 'WTO bar' with a *de facto* monopoly on WTO cases.¹⁰² A renowned example is Sidley Austin, which has represented Brazil in multiple high-profile disputes.¹⁰³

One crucial issue concerning employment of foreign law firms to represent developing countries is to select suitable ones, given that the quality of services and attorney fees vary. While many Washington, D.C., and Brussels-based law firms claim to have international trade practices, they are limited to handling domestic anti-dumping cases. For countries that lack WTO experience, it is often onerous to identify law firms that are capable of handling WTO cases. Unlike domestic judgments, WTO decisions do

⁹⁸ Note that the case occurred before the enactment of the Foreign Sovereign Immunity Act, which contains the 'commercial exception' to sovereign immunity claims. See Monroe Leigh, 'Jackson v. People's Republic of China 794 F.2d 1490,' 81 American Journal of International Law 1 (1987), at 214–16 (discussing the decisions of the District Court, Court of Appeals and the involvement of the Department of State).

⁹⁹ William Scarbrough, 'Practicing Law in China', 6:1 Practice Innovation: Managing in a Changing Legal Environment (2005), at 9.

¹⁰⁰ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para 10.

¹⁰¹ See Yasuhei Taniguchi [former Appellate Body member], 'The WTO Dispute Settlement as Seen by a Proceduralist', 42 Cornell International Law Journal 1 (2009), 16 ('[I]t is common to see a lawyer from a big American law firm arguing a case before the panel and Appellate Body on behalf of a non-American government.').

¹⁰² For information on the involvement of US firms (e.g. King and Spalding, Willkie Farr and Gallagher and Wilmer Cutler Pickering Hale and Dorr) in DSU cases, see Chad P. Brown and Bernard M. Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging The Private Sector', 8 (4) Journal of International Economic Law 861 (2005), at 872.

¹⁰³ For instance, the firm represented Brazil in *US – Upland Cotton* (DS267) and *Brazil – Retreaded Tyres* (DS332). *Our Practice: WTO Disputes*, available at <http://www.sidley.com/OurPractice/ServiceDetail.aspx?Service=689> (visited 15 May 2010).

not bear the names of representative law firms and lawyers. Due to 'national dignity', some developing countries also intentionally hide such information because most, if not all, external counsels are Americans or Europeans.¹⁰⁴

Chinese companies are hesitant to accept the 'foreign' practice of hourly charges. To attract their business, it is not uncommon for foreign law firms to cap the attorney fees on a case basis.¹⁰⁵ Like those companies, the Chinese government also tends to limit the litigation budget. Thus, for WTO litigation, the MOFCOM's Department of Treaty and Law requests that certain international and domestic law firms bid for the right to represent. For foreign trade-remedy cases, the relevant chamber of commerce or the trade association sets up a 'beauty contest', in which invited firms are given 5–20 minutes to demonstrate their expertise and experience.¹⁰⁶ Potential respondents, usually SOEs, in those cases, may contact the firms that meet their expectations. This bidding process enables the affected SOEs to retain a firm 'at a very low rate'.¹⁰⁷ On the one hand, some firms have shied away from representing China because the low charge significantly compresses profit margins. For instance, despite its Washington, D.C.-based lawyers' DSU expertise, White & Case's Beijing office primarily focuses its trade practice on providing more profitable WTO-related consulting services to enterprises. On the other hand, some firms view an opportunity to work with the Chinese government or SOEs as a gateway to their China practice. This can be demonstrated by the fact that US firms retained by the Chinese government in WTO cases, including Winston & Strawn, Hogan Lovells (formerly Hogan & Hartson) and Steptoe & Johnson, all maintain branch offices in Beijing.¹⁰⁸

¹⁰⁴ Korea and Japan had disallowed foreign lawyers from appearing in oral hearings. This practice varies. For example, Korea was the first country to retain foreign private counsels for GATT disputes (e.g. *Korea – Beef I case*, in which the Korean government permitted a European lawyer to attend the oral hearing) and was one of the first countries to argue for the right to use foreign lawyers in the WTO proceedings (e.g. *Korea – Taxes on Alcoholic Beverages case*). Dukgeun Ahn, 'Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development', 6 (3) *Journal of International Economic Law* 597 (2003), at 603–4, fn 43 and 611–3.

¹⁰⁵ This is particularly common in anti-dumping cases involving Chinese exporters.

¹⁰⁶ Email from a partner of a Washington, DC-based law firm (name withheld), 28 September 2009; comments from an anonymous reviewer.

¹⁰⁷ Ibid. Because a small number of law firms stand out as elite firms, the 'beauty contest' bidding process has been gradually replaced by direct contact by the law firms and potential respondents.

¹⁰⁸ The Chinese government retained foreign law firms in the following cases in which China was either the complainant or respondent: Winston & Strawn in *US – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* (DS399); *US – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China* (DS368); Hogan and Hartson, which merged with Lovells in May 2010, in *China – Intellectual Property Rights* (DS362); Steptoe & Johnson in *China – Auto Parts* (DS339). Hana R. ALberts, *Paper: The Next Trade Skirmish*, *Forbes*, 24 September 2009, available at <http://www.forbes.com/2009/09/24/china-indonesia-paper-dumping-business-washington-trade.html> (visited 28 May 2010).

3. China's WTO bar

To develop WTO legal capacity within its private sector, the Chinese government requires foreign law firms to work with Beijing-based local firms. It is thus common to see multiple law firms represent China in a given case. For example, both Hogan Lovells and King & Wood collaborated on *China – Intellectual Property Rights*,¹⁰⁹ and Steptoe & Johnson and Hylands Law Firm on *China – Auto Parts*.¹¹⁰ In these cases, Chinese firms—King & Wood and Hylands—were cost-effective for their fact-gathering, the Chinese law analysis and translations.¹¹¹ For third-party cases that involve less risk to Chinese enterprises' substantive interests, the government usually retains local firms, also through a bidding process. It is the government's goal that through working with foreign law firms and on third-party cases, local firms will accumulate WTO litigation experience and may one day represent China without foreign assistance.

Although the result of strengthening public–private cooperation remains to be seen, the Chinese version of the 'WTO bar' is becoming increasingly visible. This bar consists of prominent Beijing law firms, such as King & Wood, Beijing Huanzhong & Partners (BHP) and Jincheng Tonda & Neal.¹¹² They have developed DSU expertise through handling various

¹⁰⁹ *China – Intellectual Property Rights* (DS362). King & Wood was retained in DS212, 257, 273, 296, 301, 316, 317, 362 and 379. Xuanfeng (Susan) Ning, King & Wood PRC Lawyers, Trade Lawyers Blog, available at <http://tradelawyersblog.com/contributors/susan-ning/> (visited 10 May 2010); King & Wood Assists MOFCOM in Winning a Landmark IPR Protection Dispute, available at <http://www.kingandwood.com/ProjectsCases.aspx?id=King-Wood-Assists-MOFCOM-in-Winning-a-Landmark-IPR-Protection-Dispute&language=en> (visited 10 May 2010).

¹¹⁰ *China – Auto Parts* (DS339). US lawyers from Steptoe & Johnson also appeared and argued before the panel and Appellate Body. The firm also hired a Chinese lawyer (Ying Huang) to work on this case in the Washington, DC office. See also, Services, Hylands Law Firm, available at http://www.hylandslaw.com/english/services/work_range_6.asp?sType=6 (visited 10 May 2010) (describing the firm's WTO practice).

¹¹¹ It is also increasingly important for US trade law firms to retain Chinese staff. See Zach Lowe, Winston, King & Spalding in Middle of China Trade Wars, 25 September 2009, *The American Law Daily*, available at <http://amlawdaily.typepad.com/amlawdaily/2009/09/winston-king-spaulding.html> (visited 1 June 2010) ('King & Spalding has made a point of hiring lawyers and staff in Washington, DC who can speak Chinese, and the firm has well-sourced connections in China that it hires to dig up evidence of government subsidies...').

¹¹² The WTO law practices of Chinese firms are rapidly developing, yet still at the early stage in comparison with their US or EU counterparts. BHP and King & Wood are Chinese law firms' pioneers in the WTO practice. BHP has been involved in numerous WTO disputes, including China's first WTO case as one of the complainants, *US-Steel Safeguards* (DS251) and DS276, 294, 302 and 309. King & Wood 'started its WTO practice soon after China joined the WTO in 2001' and 'is the Chinese firm that most consistently works with foreign lawyers to represent China in WTO disputes'. Tina Wang, *China's Coming of Age in the WTO War*, *Forbes*, 20 April 2009, available at <http://www.forbes.com/2009/04/20/china-wto-trade-markets-economy-law.html> (visited 1 June 2010). The WTO cases in which the firm was involved are listed in fn. 107. Other Chinese law firms that have represented the government in WTO disputes include, for instance, Jincheng Tongda & Neal (D295, 312, 323, 334, and 363), Grandall Legal Group (DS108, 267, and 308), Broad & Bright (DS264 and 358),

cases and cultivated China's WTO lawyers. These lawyers are former government officials or law school graduates with foreign education and experience.¹¹³ Among them, the most prominent example may be the first Chinese Appellate Body Member, Zhang Yuezhao, previously a senior counsel with Jun He Law Offices in Beijing.¹¹⁴ In my view, China's 'learning by doing' strategy to enhance its WTO legal capacity by involving local lawyers in WTO cases can bridge the 'one-way door' weakness in the Chinese government system and allow local lawyers to gain WTO expertise with minimum 'tuition'. This strategy may serve as a model for other developing countries.

IV. THE CHINESE WAY APPLIED IN THE WTO PRACTICE: 2001–2010

As discussed previously, China's awareness of the importance of international economic law began with its enterprises' pragmatic needs when interacting with the outside world during the economic reform. Since China's accession to the WTO, the world trading system has prompted the government to assume a more active role to safeguard its companies. Due to the overlapping interest of public and private sectors, the past decade witnessed the evolution of China's participation in WTO affairs. While the phrase 'aggressive legalism' has been suggested to describe some East Asian states' approach to the WTO,¹¹⁵ a more accurate term for China is 'assertive legalism'. China's strategy in the WTO's rule-making and dispute settlement is not yet aggressive,¹¹⁶ as it primarily aims to protect its legitimate trade interests by increasingly resorting to WTO rules. Its assertive legalism drew global attention because it is distinguishable from the country's passive attitude toward international rules and the WTO in the early days.

A. China and WTO rule-making

Following China's initial exposure to modern international law, it found the Western legal order biased because China was barred from participating in rule-making. Interestingly, even after the PRC entered the UN and its

Hylands Law Firm (two cases with multiple complainants: DS339, 340, 342 and; DS372, 373, 378), Scott Liu & Associates (DS212; and one case with multiple complainants: DS339, 340, 342) and Seafront Law Office (DS251 and 309). Information above is gathered from the websites of the respective law firms.

¹¹³ Prominent trade lawyers in China include, for example, Stephen Peng of Jincheng Tongda & Neal, Susan Ning of King & Wood, Wang Xuehua of BHP, and Scott Liu of Scott Liu & Associates. These law firms and lawyers with WTO litigation experience constitute what I call China's 'WTO bar'.

¹¹⁴ Jun He is also a leading Chinese firm, but its website does not list specific WTO cases in which it was involved.

¹¹⁵ For example, see generally Saadia M. Pekkanen, *Japan's Aggressive Legalism: Law and Foreign Trade Politics Beyond the WTO* (Stanford: Stanford University Press, 2008).

¹¹⁶ According to Table 1, as of 1 July 2010, while India, Japan and Korea have filed 19, 13 and 14 complaints, respectively, China has filed only 7 complaints.

affiliated agencies, its role was mostly to follow the rules rather than to change such rules, except regarding issues concerning its legitimacy or sovereignty. The Chinese 'UN mentality' predominated during its initial participation in the WTO, but this mentality has changed. In fact, it had to change because with the increased knowledge about the WTO, it has become a common desire among those in China's trade circle to become more actively involved in WTO rule-making.

In China's view, an 'efficient' way to get involved is to have rule-makers of Chinese nationality. This approach has been applied in other international courts and tribunals.¹¹⁷ While the DSU mandates that panelists and Appellate Body members be impartial in WTO litigation, these WTO judges' first-hand experience can benefit their respective countries' legal capacity. A panelist in the present case may serve as a government counsel in the next case. Furthermore, although it has official status in the UN, Chinese is not one of the three official languages at the WTO, and the Chinese government and academia must gain an understanding of WTO law by using translations. Having Chinese WTO judges share their experience could fill the information void for the country. Recognizing the importance of rule-making, in 2004, 2006 and 2010, respectively, China nominated a total of 11 WTO experts to be panelists, although so far only Zhang Yuqing was selected to be a panelist in *EC – Bananas*.¹¹⁸ Moreover, in 2008, the first Chinese lawyer was nominated to the seven-person Appellate Body after a brief episode of Taiwan blocking her nomination.¹¹⁹ It is likely that more Chinese will sit on the WTO bench and bring their experience to the government, particularly given that most WTO experts whom China nominated are either incumbent or former Ministry of Commerce officials.

Another circle that China is attempting to break into is the WTO Secretariat. Undoubtedly, WTO judges play a significant role in WTO judicial functions. Nevertheless, under the current system, both panelists and Appellate Body members are 'part-time' and most of them are not based in

¹¹⁷ For the list of Chinese judges in international courts and tribunals, see above n 14.

¹¹⁸ For personal information on the 11 Chinese WTO experts, see Prof. Han Liyu Appointed into Indicative List of WTO Dispute Settlement Panel, Remin University of China Law School, available at <http://www.law.ruc.edu.cn/eng/ShowArticle.asp?ArticleID=22229> (visited 30 May 2010). Zhang Yuqing served as a panelist in *EC – Bananas*, Article 21.5 II (Ecuador), WT/DS27/RW2/ECU and *EC – Bananas*, Article 21.5 (US), WT/DS27/RW/USA.

¹¹⁹ At the DSB meeting, Taiwan blocked the nomination of Appellate Body members, stating that its government has 'deep concerns on the question of impartiality and qualification of one of the recommended candidates'. *Taiwan blocks Chinese WTO judge*, BBC News, 19 November 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7102347.stm> (visited 2 June 2010). For information on recent developments in China–Taiwan relations, see Pasha L. Hsieh, 'The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum', 84 (3) *Die Friedens-Warte: Journal of International Peace and Organization* 59 (2009), at 73–9.

Geneva. The individuals who are exposed to the inside information related to the WTO are staff of the WTO Secretariat. In particular, legal officers from the Rules Division, the Legal Affairs Division (LAD), and the Appellate Body Secretariat (ABS) consistently assist panelists and Appellate Body members in cases. They gain insight into the process of judicial decision-making. Shockingly, despite China's status in the world economy, only five out of the 629 WTO officials are PRC nationals, including one serving in the LAD and the other in the ABS.¹²⁰ This is an extremely low percentage of WTO staff, especially in comparison with 181 French and 72 British nationals in the Secretariat.¹²¹ The shortage of Chinese staff members in the Secretariat may be due to the French or Spanish language requirement. This creates a disadvantage for Chinese professionals because neither French nor Spanish is a common second language in China's education system.¹²² To rectify this situation, China, along with other developing countries, recently submitted a formal proposal that called for increasing 'diversification of the WTO Secretariat'.¹²³ Although the result of the proposal remains to be seen, it indicates a start of Chinese engagement in the institutional change of international organizations.

With respect to the substance of WTO rules, China focuses primarily on those rules it deems unfavorable to itself, so it is inclined to join the negotiating coalitions made up of other developing countries. For instance, as Chinese enterprises are the prime target of anti-dumping measures, China has called for reforming the special and differential (S&D) treatment provisions in the Anti-Dumping Agreement.¹²⁴ In particular, China strongly advocates the abolition of the non-market economy status provisions in the agreement because foreign authorities tend to resort to such provisions to inflate the margin of dumping, thereby finding Chinese companies liable for dumping.¹²⁵ Regarding procedural rules in WTO proceedings, China also

¹²⁰ *Overview of the WTO Secretariat*, available at http://www.wto.org/english/thewto_e/secre_e/intro_e.htm (visited 30 May 2010). As of May 2010, the WTO Secretariat has six Chinese staff members, including five from Mainland China and one from Hong Kong.

¹²¹ *Ibid.* Note that the WTO divides staff into two categories: supporting staff (e.g. translators and guards) and professional staff (e.g. legal and economic officers). Many French staff belongs to the former category.

¹²² The justification for requiring legal officials to speak French or Spanish can hardly stand because almost every WTO case proceeds in English. To cope with the growing number of cases involving China and other Asian nations and their demand for technical assistance, the WTO Secretariat should consider revising its recruitment practice.

¹²³ Committee on Budget, Finance and Administration – Joint Proposals on the Improvement of Diversification of the WTO Secretariat, WT/BFA/W/191, 4 November 2009, by Brazil, China, Cuba, Ecuador, India, Pakistan and South Africa.

¹²⁴ See generally, Negotiating Group on Rules, Communication from the People's Republic of China, Proposal of the People's Republic of China on the Negotiation on Anti-Dumping, TN/RL/W/66, 6 March 2003.

¹²⁵ *Ibid.* For the analysis of China's position on anti-dumping rules, see Won-Mog Choi, 'People's Republic of China's Proposal for Anti-Dumping in WTO/DDA Rules', 2 Asian Journal WTO and International Health Law and Policy 25 (2007).

Table 1. Asian and other emerging economies’ participation in WTO cases (as of 1 July 2010)

WTO Member since	Complainant	Respondent	Third party
Brazil, 1995	24	14	59
China, 2001	7	18	67
India, 1995	19	20	55
Japan, 1995	13	15	99
Korea, 1995	14	14	52
Taiwan, 2002	3	0	53
Vietnam, 2007	1	0	3

Statistics based on the WTO website.

asked for S&D treatment in DSU negotiations, requiring developed countries to ‘exercise due restraint’ in cases against developing countries.¹²⁶ This proposal can be understood in the backdrop of the dramatic increase in WTO litigation brought against China by the US and the European Union. In addition, China has proposed enhanced third-party rights, which, for instance, allow third parties to attend ‘all substantive meetings of the panel’, instead of only the first meeting according to the current DSU rules.¹²⁷ Third-party rights are of importance to China, as it is a cost-effective way for China’s participation in WTO litigation.

B. China in WTO dispute settlement

Over the past decade, China has consistently made WTO legal capacity building a priority and endeavored to fortify public–private partnerships to enhance this capacity. Hence, it is important to examine the Chinese approach in handling WTO disputes and rule-making and assess the impact of its WTO legal capacity-building efforts in that process.

1. China as a third party

As with many other developing countries, China consistently participates in WTO cases as a third party. Since China’s first third-party experience in *US – Textiles Rules of Origin* in 2003,¹²⁸ only 2 years after its accession to the WTO, the country has been involved in 67 cases as a third party.¹²⁹ As Table 1 shows, this figure surpasses that of many developing countries, such as Brazil, India and Korea, that joined the WTO much earlier. There are compelling reasons for China’s third-party strategy. First, being a third party allows the government to gain a better understanding of the operation of

¹²⁶ Specific Amendments to the Dispute Settlement Understanding – Drafting Inputs from China, TN/DS/W/51/Rev.1, 13 March 2003.

¹²⁷ Ibid. China’s DSU proposals also include TN/DS/W/29, 23 January 2003; TN/DS/W/51, 5 March 2003; and TN/DS/W/57, 19 May 2003.

¹²⁸ DS243, *US – Rules of Origin for Textiles and Apparel Products*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds243_e.htm (visited 15 May 2010).

¹²⁹ *China and the WTO*, available at http://www.wto.org/english/thewto_e/countries_e/china_e.htm (visited 15 May 2010).

trade law among China's trading partners and to obtain access to the litigants' submissions, which may not always be publicly available. Such information benefits China when it is a complainant. Secondly, being a third party is a cost-effective way to enhance China's WTO legal capacity. Even at the appellate stage, a third participant is not required by the Working Procedures for Appellate Review to submit briefs, thus requiring much less preparation and litigation expenses.¹³⁰ For example, China made only oral statements at the hearings instead of submitting written statements in all of the 2008 and 2009 appellate cases in which it was a third participant.¹³¹ If a third party wishes to make submissions, it can address only the two to three key issues that it deems to be systemically important. As being a third party provides a good training opportunity, the MOFCOM consistently retains Chinese law firms to handle these cases.¹³² Finally, participation in cases as a third party allows China to express its views on the interpretation of important WTO rules, thus facilitating its involvement in the rule-making process. The benefit of being a third party is exemplified in *US – Upland Cotton* in which the parties involved sought a favorable interpretation of WTO subsidies rules when they faced an impasse in negotiating such rules.¹³³

2. China as a respondent

The accumulation of third-party experience certainly benefits China's legal capacity. This is particularly important to China because it has been a prime target of WTO litigation by other WTO members due to its rapidly increasing volume of exports as a result of its perceived unfair trade practice. This trend is primarily prompted by the fact that most of China's WTO commitments were phased in by the end of 2006. Thus, China's trading partners, especially the US, intend to hold China 'fully accountable as a mature member' in the WTO.¹³⁴ More importantly, the escalation of pressure

¹³⁰ A third party at the appellate stage is known as a third participant. Definitions, Working Procedures for Appellate Review, WT/AB/WP/5, 4 January 2005 (Working Procedures).

¹³¹ In these cases, China appeared before the Appellate Body as a third participant according to Rule 24(2) of the Working Procedures, under which 'a Member that was a third party to the panel proceedings that has not filed a written submission may, within 25 days of the filing of the Notice of Appeal, notify its intention to appear at the oral hearing and whether it intends to make a statement at the hearing'. Appellate Body Annual Report for 2009, WT/AB/13, 17 February 2010, at 40–1; Appellate Body Annual Report for 2008, WT/AB/11, 9 February 2009, at 37–9. As the standard practice, oral statements are made at the beginning and the end of the hearing.

¹³² For WTO cases in which Chinese law firms were involved, see above n 112. China was a third party in most of the cases.

¹³³ See generally, Appellate Body Report, *US – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3; Appellate Body Report, *US – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008.

¹³⁴ See 2009 Report to Congress on China's WTO Compliance, United States Trade Representative, December 2009, at 2 ('All of China's key commitments should have been

from domestic industries compelled these governments to take trade actions against China. In simple words, their WTO honeymoon with China was over.

Since the US filed the very first WTO case against China in 2004, the country so far has faced 18 complaints¹³⁵ and 61% of them were filed by joint complainants.¹³⁶ Given their significant trade interests, it is not surprising to see the predominant presence of the US and the European Union in these cases. Yet, the joint-complainant cases have resulted in the 'bandwagon effect' that prompted other developing countries, such as Mexico and Guatemala, to join the US or the European Union against China.¹³⁷ An attractive incentive for joining the alliance is that it is common for joint complainants to share information and strategies, thus decreasing litigation costs.¹³⁸ Moreover, 50% of the complaints against China were settled with complainants at the consultation stage.¹³⁹ In all of these cases and those in which the WTO courts found against China, China agreed to withdraw its WTO-inconsistent measures in less than a year.

The statistics above suggests China's 'soft' approach to WTO disputes and reaffirms its traditional preference to solve international disputes by diplomacy rather than litigation. However, the country's attitude and strategy toward WTO litigation is gradually changing. In 2006, China suffered the first WTO defeat in *China – Auto Parts*, in which both the panel and Appellate Body found China's tariff imposed on imported parts illegal under WTO rules.¹⁴⁰ Remarkably, from the perspective of legal capacity building, China, for the first time, appealed the case to the Appellate Body. China's changing attitude resulted in a limited success in *China – Intellectual Property Rights* in 2007.¹⁴¹ In this case, although the US

phased in by December 11, 2006, two years ago. [Thus,] the United States has been working to hold China fully accountable as a mature member of the international trading system....').

¹³⁵ *China – Value-Added Tax on Integrated Circuits*, DS309.

¹³⁶ 11 of 18 complaints were filed by multiple complainants. For additional information, refer to Table A1 (lower panel).

¹³⁷ For example, in *China – Measures Related to the Exportation of Various Raw Materials*, co-complainants were the US (DS394), the EU (DS395) and Mexico (DS398); and in *China – Grants, Loans, and Other Incentives*, co-complainants were the US (DS387), Mexico (DS388) and Guatemala (DS390). The ACWL assisted Guatemala in this matter. Report on Operations 2009, ACWL, at 11.

¹³⁸ For instance, Canada, the US and the EU in *China – Auto Parts* submitted almost identical factual statements in their respective submissions, hence reducing workloads for individual countries.

¹³⁹ Nine of 18 complaints were settled at the consultation stage. For additional information, refer to Table A1 (lower panel).

¹⁴⁰ Appellate Body Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009, para 253.

¹⁴¹ Panel Report, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R, adopted 20 March 2009.

succeeded in most claims, the panel disagreed with its challenge to China's high threshold for criminal prosecution of copyright infringement.¹⁴² Given China's defense, the US failed to prevail over this presumably most vital issue from the industry perspective. The mixed ruling in this case taught China a lesson: active defense can be useful. It should be noted that in both cases, China's active defensive strategy may have been due to advice rendered by experienced US law firms.

Despite China's change in attitude toward defensive cases, there remains a deficiency in its litigation skills. *China – Publications and Audiovisual Products*¹⁴³ serves as a conspicuous example. This case was brought by the US in 2007 against China's measures to restrict trading rights and distribution services for foreign publications and audiovisual home entertainment products.¹⁴⁴ It is difficult to understand how China failed to provide English translations of key provisions of its own laws, which were at the core of the case.¹⁴⁵ This oversight, which led to the panel and Appellate Body's acceptance of US translations of Chinese statutes, contributed to the panel's decision against China. The inadequacy of litigation skills in certain cases does not overshadow the fact that China's defensive strategy is rapidly maturing. This strategy will continue not only because of the nation's trade interests, but because WTO cases against China are no longer limited to trade rules. China increasingly faces legal challenges in politically sensitive areas, such as the country's censorship policy¹⁴⁶ and economic sovereignty over the export of raw materials.¹⁴⁷ These cases often incur ultra-nationalist

¹⁴² See James Mendenhall, 'WTO Panel Report on Consistency of Chinese Intellectual Property Standards', 13 (4) ASIL Insight (2009), available at <http://www.asil.org/insights090403.cfm> (visited) ('Significantly, the panel did not find that China's criminal enforcement scheme was consistent with TRIPS Article 61, but only that [the] United States had failed to prove its claims'). This panel decision was not appealed.

¹⁴³ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010.

¹⁴⁴ Ibid, paras 1–2.

¹⁴⁵ China did not provide English translations for Articles 3 and 4 of the Foreign Investment Regulation and Article 4 of Several Opinions. Provisions of the Chinese Measures Relevant to This Appeal. Ibid, at 178–9.

¹⁴⁶ For example, in *China – Publications and Audiovisual Products*, one major issue was whether China could justify its restrictions on entities permitted to import publication and audiovisual products under Article XX of the GATT because such restrictions are 'necessary to protect public morals' in order for the government to efficiently carry out its content review policy. Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report, WT/DS363/AB/R, paras 7.794–7.807.

¹⁴⁷ In *China – Measures Related to the Exportation of Various Raw Materials*, the US, EC and Mexico challenged 'China's restraints on the exportation from China of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc'. Request for the Establishment of a Panel by the United States, WT/DS394/7, 9 November 2009.

reactions from the public, thus further compelling the government to vigorously defend itself at the WTO.

3. *China as a complainant*

China's shift to an offensive position in WTO courts signifies its new thinking toward the international legal system. The tactic is to 'fight the war to end all wars'. Mainstream thinking among members of China's trade circle is that to deter a potential trade war with the US, the European Union and developing countries that have jumped on the bandwagon, China must act preemptively.¹⁴⁸ As of June 2010, China has initiated seven complaints, all of which were against the US and the European Union. China has resorted to the WTO every year since 2007 and filed three consecutive complaints in 2009 alone. Most of these cases challenge the non-market economy treatment of anti-dumping and safeguard proceedings that China deems unfair.

China's assertive tactics are not confined only to the WTO arena. Frictions under the WTO often originate from US or EU domestic trade proceedings. China is attempting to bar these disputes at their origins. This tactic can be seen in a series of domestic cases in 2009. The US and the European Union, respectively, announced their punitive tariffs or trade-remedy investigations against Chinese goods, including car tires, steel pipes and chicken products.¹⁴⁹ China immediately responded to every case by initiating anti-dumping and anti-subsidy investigations on US and EU manufacturers that export the same products to China.¹⁵⁰ Although Beijing declined to recognize its response as retaliation, it was clear that its goal is to magnify foreign industry costs, thereby creating a chilling effect for foreign governments that contemplate actions against China.

China's recent litigation experience also reveals significant progress from the public-private cooperation perspective. For instance, in 2006, the MOFCOM issued the *Provisions on Responding to Antidumping Cases concerning Export Products*, which require Chinese enterprises to 'actively respond' to foreign anti-dumping investigations with the government's assistance.¹⁵¹

¹⁴⁸ See e.g. Mehul Srivastava, 'India-China Trade Tensions Rise', *Bloomberg Businessweek*, 11 February 2009, available at http://www.businessweek.com/globalbiz/content/feb2009/gb20090211_202935.htm (visited 5 June 2010) ('China threatens to bring its opposition to India's toy import ban to the WTO, while India seems poised to restrict other Chinese products.')

¹⁴⁹ *Meiguo Shijie Ribao Shehui* – *Maoyizhan Kaida* [US World Journal Op-Ed: The Start of the Trade War], 18 October 2009 (on file with the author) (in Chinese); *Kelugeman Zhuanwen Gudong Meiguo Yu Zhongguo Da Maoyizhan (Guan Wen)* [Paul Krugman Wrote to Encourage the US to Start a Trade War with China (full text)], CFI.CN, January 8, 2010, available at <http://cfi.cn/p20100108000535.html> (visited 20 June 2010) (in Chinese).

¹⁵⁰ *Ibid.*

¹⁵¹ Article 3 of the *Provisions on Responding to Antidumping Cases concerning Export Products* (Order of the Ministry of Commerce, No. 12 [2006]) provides that '[t]hose enterprises that produce and export the products involved to the investigation country or region during the investigation period of an anti-dumping case shall actively respond to the action'.

The *Provisions* not only legally fortify public–private partnerships, but also attempt to stop the escalation of domestic trade disputes argued at the WTO. Given the government’s aggressive approach to WTO disputes, Chinese industries have become increasingly inclined to turn to the government. For example, in 2010, Chinese paper manufacturers requested that the government adopt actions immediately after the USDOC imposed unfavorable preliminary rulings on their exports.¹⁵² This is distinguishable from previous experiences of anti-dumping or subsidies proceedings, where Chinese industries considered asking for the government’s assistance only after the issuance of final rulings by the USDOC.

V. CONCLUSION

China’s entrance into the family of nations occurred after it succumbed to the demand of Western powers to open its trade regime. This historical background and its Marxist–Leninist ideology noticeably contributed to China’s suspicions about the modern legal order and international tribunals. While this hesitant mentality persisted, private enterprises’ interactions with foreign trade rules during the economic reform era prompted the government and academia’s interest in developing the study of international economic law. China’s accession to the WTO provided a new momentum to this new discipline. The government’s attention swiftly focused on enhancing its legal capacity building in order to cope with WTO disputes. The evolution of China’s approach to WTO litigation is best depicted as assertive legalism. To protect its legitimate interests under WTO rules, China has transformed its initial passive attitude. As recent disputes demonstrate, China not only defends its cases vigorously, but also acts preemptively by filing cases against the US and the European Union. This transformation furthers its integration into the international legal order.

Although embedded weaknesses in its legal education and government structures pose institutional obstacles, China has developed its approach to enhancing its WTO legal capacity. Its experience provides valuable lessons for other emerging economies. The government’s goal is to strengthen public–private cooperation in WTO disputes. Notably, local governments established think tanks, widely known as WTO centers, to bridge the information and communication gap between the industries and government. They assist China’s Ministry of Commerce in identifying foreign trade barriers,

The text is available at <http://www.lawinfochina.com/law/displayModeTwo.asp?ID=5435&DB=1&keyword=> (visited 20 June 2010).

¹⁵² See Ding Qingfen, ‘WTO Ruling on Coated Paper Row Sought’, *China Daily*, 11 May 2010, http://www.chinadaily.com.cn/business/2010-05/11/content_9833150.htm (visited 20 June 2010) (‘On April 29, the US Commerce Department said it was imposing preliminary anti-dumping duties of up to 136 percent on coated paper imports from China, ... and China will make the appeal to the WTO in June’).

providing legal support for enterprises to handle litigation abroad and operating early warning systems to help companies avoid foreign anti-dumping investigations. To train its own WTO lawyers, China has consistently participated in WTO disputes as a third party, hence providing a low-cost opportunity for lawyers in the Department of Treaty and Law and Chinese firms to cultivate DSU expertise. The bidding requirement that compels international trade law firms to cooperate with local firms further upgrades the latter's litigation experience. China's WTO bar is therefore emerging.

China's 10-year experience as a WTO member has shaped the country's global vision. This emerging economic power has taken a more assertive role in shaping WTO rules and defending its political and commercial interests in WTO disputes. Although the success of China's WTO strategy remains to be seen, it can be expected that as the WTO transforms China's position in the international arena, China will continue to pose challenges and opportunities to the multilateral trading system.

Table A1. China's participation in WTO disputes (as of 1 July 2010)

Case name	DS number	Respondent	Year initiated	Panel report	Appellate Body report	Current status
China as a complainant (seven complaints)						
<i>European Union – Anti-Dumping Measures on Certain Footwear from China</i>	405	EU (formerly EC)	2010			Consultation in progress
<i>US – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i>	399	US	2009			Panel established on 19 January 2010; ongoing
<i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i>	397	EC	2009			Panel established on 23 October 2009; ongoing
<i>US – certain Measures Affecting Imports of Poultry from China</i>	392	US	2009			Panel issued the interim ruling against the US
<i>US – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i>	379	US	2008			Panel established on 20 January 2009; ongoing
<i>US – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China</i>	368	US	2007	N	N	No panel established; inactive
<i>US – Definitive Safeguard Measures on Imports of Certain Steel Products</i>	252 (other complainants included a EC, Japan, Brazil, Switzerland, Norway, New Zealand, Brazil)	US	2002	Y	Y	Ruling against the US; the US terminated safeguard measures at issue in December 2003
China as a respondent (18 complaints/9 matters)						
<i>China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners</i>	407	EU	2010			Consultation in progress
<i>China – Measures Related to the Exportation of Various Raw Materials</i>	398 395 394	Mexico EU (formerly EC) US	2009			Panel established on 21 December 2009; ongoing

(continued)

Table A1. Continued

Case name	DS number	Respondent	Year initiated	Panel report	Appellate Body report	Current status
<i>China – Grants, Loans, and Other Incentives</i>	390 388 387	Guatemala Mexico US	2009	N	N	China agreed to withdraw the measures at issue in 2009
<i>China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers</i>	378 373 372	Canada US EC	2008	N	N	China agreed to withdraw the measures at issue in 2008
<i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i>	363	US	2007	Y	Y	Ruling against China; the DSB adopted AB/Panel reports in Jan 2010
<i>China – Measures Affecting The Protection And Enforcement Of Intellectual Property Rights</i>	362	US	2007	Y	N	Ruling against China; China agreed to withdraw the measures at issue in 2009
<i>China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments</i>	359 358	Mexico US	2007	N	N	Panel proceedings terminated; China agreed to withdraw the measures at issue in 2007
<i>China – Measures Affecting Imports of Automobile Parts</i>	342 340 339	Canada US EC	2006	Y	Y	Ruling against China; China agreed to withdraw the measures at issue in 2009
<i>China – Value-Added Tax on Integrated Circuits</i>	309	US	2004	N	N	China agreed to withdraw the measures at issue in 2004

N: not yet issued; Y: issued.