

CHAPTER 1

CHINA JOINS THE TRADE WARS¹

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The International Trade Battlefield

China acceded to the WTO in December 2001 and almost immediately became enmeshed in the highly politicized world of international trade disputes. These disputes are increasingly fought for high economic stakes. Metaphors of “war” and “battlefields” involve a certain amount of hyperbole but are not far off the mark.

In recent decades nations have increasingly opened their domestic markets to foreign imports in the expectation that an expansion of trade will benefit their domestic economies. Trade liberalization, however, has proven to be a two-edged sword. Market openings have exposed less competitive domestic industries to unprecedented competition from foreign imports. Factories, workers, and the communities dependent on them exert enormous pressure on their governments to find means of protection from the consequences of market opening. China’s low-priced imports are often one of the major economic threats and, accordingly, one of the first targets for protective measures.

China’s own recent WTO entry is based on a similar economic calculus and confronts Chinese industry and China’s political leaders with similar problems. China’s leaders expect expanded trade to benefit China’s economy. Many Chinese state-owned enterprises, however, rely on outdated technologies and have bloated work forces; they simply cannot compete with many foreign imports, particularly products that require high technology or that must conform to very sophisticated technical specifications. China’s

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leaders understand that China's economy may ultimately benefit if these non-competitive industries close or are forced by foreign competition to restructure. But the closure of a major state-owned industry in China may mean unemployment for tens of thousands of workers and devastation for their communities. China's leaders are as responsive as those of any other country to the resulting political pressures.

The WTO trade agreements authorize only limited remedies to protect domestic industries from competition from imports. Each is designed to meet an exceptional situation: antidumping remedies to counter unfair import pricing; anti-subsidy remedies to counter foreign government subsidization of imports, and safeguard remedies to counter unexpected surges in imports. But threatened with plant closures and massive lay-offs, domestic industries are often tempted to demand that their governments initiate trade remedy investigations whether or not the facts conform to WTO legal criteria.

The resulting trade remedy investigations are often intensely political, and the stakes are high. Rejection of a domestic industry's request for protection may satisfy foreign trade partners but expose an important domestic industry to collapse. Such a collapse may jeopardize government leaders' own political positions. Grant of a request may protect the domestic industry but infuriate foreign exporters and their governments. It may also entangle the government in acrimonious legal disputes before a WTO panel in Geneva with potential diplomatic fallout in other areas. China is now fighting these battles on both fronts.

Antidumping Investigations: China on the Defensive

Chinese exports have been the subject of some 500 antidumping investigations in recent years, far more than the exports of any other country. China is an obvious target of antidumping investigations because its low labor costs permit China to export labor-intensive products at exceptionally low prices. Even China's low cost competitors are threatened by Chinese exports. Many Chinese industries have higher levels of productivity and greater economies of scale than industries in other developing countries

and are able to manufacture similar or identical products at significantly lower costs. As a result, Chinese imports have been the subject of antidumping investigations not only in the US and the EU but in countries such as India and Egypt as well.

The WTO Antidumping Agreement also authorizes special “surrogate country” pricing procedures for “non-market economy” countries. Despite the rapid evolution of its economy in recent years, China agreed as a condition to its WTO entry that other WTO Members may continue to treat China as a “non-market economy country” for up to 15 years. The surrogate country procedures exclude the use of actual market prices in China as the “normal value” benchmark against which export prices are compared to determine if dumping has occurred. Instead, the investigating government may calculate what the price of Chinese goods “should be” based on manufacturing costs in a “surrogate” market economy country – in China’s case, almost always India. These calculations are at best arbitrary and at worst grossly unfair to Chinese exporters. This gives domestic industries in countries that use the surrogate country procedures, e.g., the U.S., an added incentive to file petitions against Chinese imports because they hope that these arbitrary calculations can be manipulated to their advantage.

By and large, Chinese exporters have not fared well in foreign anti-dumping cases. Some of the adverse findings may, of course, be justified; Chinese exporters, like exporters elsewhere, may “dump” their products at times. Some may also be the product of the arbitrary surrogate country valuations. Often, however, the Chinese exporters have lost simply because they did not bother to defend investigations that they considered unfamiliar, expensive, and perhaps predetermined against them.

This passive posture may be ending. Since entering the WTO, the Chinese Government has strongly encouraged Chinese exporters to defend trade remedy investigations more aggressively. Government leaders have made public speeches to this effect, and government departments reportedly have offered Chinese exporters advice or even funding to defend specific cases. Chinese exporters also received encouragement from victories in several aggressively defended US and Canadian antidumping cases. With continued

government support and more favorable experiences like this, it seems probable that Chinese companies will more actively defend their interests in trade cases than they have in the past.

Antidumping Investigations: China Takes the Offensive⁴

Under the 1994 Foreign Trade Law and 1997 Anti-dumping and Anti-Subsidy Regulations, China initiated 12 antidumping investigations of foreign imports in the four years prior to entering the WTO. Eight of the 12 involved chemical products or synthetic fabrics derived from chemicals; two involved steel products. When China entered the WTO in December 2001, five of the 12 investigations were still pending.

In early 2002, shortly after entering the WTO, China issued new, more detailed Anti-dumping Regulations⁵ that follow WTO standards quite closely. (New regulations were also issued for anti-subsidy⁶ and safeguard investigations.⁷) China then entered the anti-dumping business with a vengeance – literally, with many government and industry spokesmen stating unambiguously that China intended to get even for all the anti-dumping investigations of Chinese products by other countries. China launched six new investigations by March 31, 2002 and a total of nine by September 2002. One of the nine new investigations involved important steel imports (steel plate); another, seemingly minor art paper imports. The large majority again involved various chemical imports. A few investigations involved US or EU exports, but most focused on products from Korea, Japan, Taiwan (a separate jurisdiction for WTO purposes) or elsewhere in Asia. Three more investigations were launched in 2003, two of them again involving chemicals

A large majority of China's 24 anti-dumping investigations have thus involved either chemical or steel products. In most instances, these are intermediate products supplied to other manufacturers. Virtually all of the Chinese petitioners in these investigations have been state-owned heavy industries.

⁴ China's antidumping investigations are discussed in more detail in Chapter 2.

⁵ Appendix I-A-1.

⁶ Appendix I-B-1.

⁷ Appendix I-C-1.

As of October 1, 2003, China had imposed final anti-dumping duties in 16 of its 24 anti-dumping investigations. Two had been dismissed. Six were still pending.⁸

China Joins the Steel Wars⁹

More dramatic and less expected than China's anti-dumping ventures was China's entry into 2002's steel trade war. This was not a battle of China's making, but China quickly became an active participant.

In March 2002, US President George W. Bush announced the application of safeguard measures to a broad range of steel imports into the US, including imports from China. The measures imposed additional, onerous duties on many categories of steel imports, effectively barring them from the US market. The U.S. action was highly controversial and provoked a widespread international trade crisis.

Almost immediately, countries that were exporting steel to the US filed requests for WTO dispute panels. The EU, Japan, and Korea led the way. China was not far behind. China's application for a panel appeared to have been modeled on the EU's earlier filed application. (WTO Document No. WT/DS252/5, May 27, 2002.)

In late May 2002, China also announced its own safeguard investigation of steel imports into China. (MOFTEC, Public Notice No. 29 (May 20, 2002).) The investigation covered 84 HTS tariff codes, encompassing a very broad range of steel products. Pending a final decision, China applied provisional measures to products within 48 of these HTS tariff codes, consisting of global quotas that, once filled, led to the imposition of additional duties. (MOFTEC, Public Notice No. 30 (May 21, 2002).) China notified the WTO Committee on Safeguards of these measures on May 20, 2002. (WTO Document Nos. G/SG/N/6/CHN/1, G/SG/N/7/CHN/1, and G/SG/N/11/CHN/1).

⁸ See Appendix II-A "List of Chinese Antidumping Investigations of Imported Products."

⁹ China's steel safeguards investigation is discussed in more detail in Chapter 3.

China's rationale for pursuing steel safeguard measures was that the US and EU measures would close those markets to steel imports from other countries, divert the products to China, and overwhelm the domestic Chinese steel market. China never substantiated this theory (and never responded to evidence submitted during the investigation indicating that it was not well-founded). Since China was fully aware of the pending US investigation when China entered the WTO in December 2001, the U.S. measures were also clearly not an "unanticipated development" – a precondition for applying safeguard measures under Article XIX(a)(1) of the GATT. China's diversion theory was, in any event, inapplicable to a large part of the imports China investigated since they were not subject to either US or EU measures in the first place. In short, China's stated rationale was unconvincing.

More likely, the U.S. and EU safeguard measures simply provided China with an excuse to apply protectionist measures that were otherwise difficult to justify under its new WTO obligations. Prior to China's WTO entry, China's domestic steel industry had been protected from competition from foreign imports by various licensing programs. China was obligated under the WTO to terminate those programs, and the China trade press was full of dire predictions of the consequences. It seems likely that China seized on the international safeguards battle initiated by the US and the EU as an excuse to impose measures that allegedly paralleled those of the other countries but were primarily intended to erect new protections for China's domestic industry.

China may also have felt it useful to challenge the US measures so that China would have a direct stake in any subsequent negotiations on these important international trade issues. The risk to China probably appeared limited. The US measures were highly vulnerable to a legal challenge, and China could rely on the EU and Japan to take the lead in that challenge. China's own measures were at least as vulnerable, but the challenges to the US and EU measures would go before WTO panels first. China therefore probably felt that it had considerable room to maneuver diplomatically before its own measures were subjected to scrutiny.

Government Reorganization

China's steel safeguards investigation and all of China's antidumping investigations up to March 2003 were conducted in parallel by two government agencies. The Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") investigated dumping and dumping margins in antidumping cases and increased imports in safeguard investigations. The State Economic and Trade Commission ("SETC") investigated injury issues in both antidumping and safeguard investigations. The SETC was also solely responsible for causation issues in antidumping investigations. The two agencies had joint responsibility for causation determinations in safeguard cases. (This system resembled in many respects the bifurcated system in the United States where the Department of Commerce is responsible for dumping issues and the International Trade Commission for injury issues.) There was frequent evidence that the two agencies did not cooperate well with each other and in some cases openly disagreed. This caused particular problems in the steel safeguards investigation when the agencies categorized the products under investigation by different systems, thus requiring all foreign importers to prepare and calculate their data under two different systems.

As part of a general reorganization of the Chinese Government in March 2003, MOFTEC and the part of the SETC responsible for trade cases were combined into a new Ministry of Commerce ("MOFCOM"). It remains to be seen what effects this will have on the conduct of investigations.

Another potentially important but untested aspect of China's trade investigations is judicial review. The various WTO trade remedy agreements generally require the availability of judicial review of administrative rulings in trade remedy investigations. The Intermediate Court in Beijing has been granted jurisdiction over such reviews, but there have been no cases to date.

The Economics of Trade Cases in China

Trade remedy cases in China follow a remarkably consistent pattern.

Typically, the domestic Chinese industry that requests an antidumping (or safeguard) investigation of foreign imports is in a state of transition. Several large, state-owned producers have recently introduced modern technology and are manufacturing products that compete, if not with all imports, at least with a broad range of imports. Scores of much smaller producers are scattered around China — a legacy of Mao's autarkic economic policies of the 50's and 60's. These smaller producers lack economies of scale and use outdated (often very outdated) technology. Their products are generally high cost and low quality and cannot compete with imports; indeed, many cannot be sold in China. Central government efforts to close down these inefficient small producers are frustrated by local political pressures to keep the plants open and people employed.

The successful large domestic producers are accustomed to various forms of government protection from foreign competition and feel threatened by the elimination of these protections as China implements its WTO obligations. They are also aware that they cannot yet produce many high-tech or high value-added products required by customers in China, but they would like room to develop their capacity to compete in this higher, and more profitable, end of the market. So the large domestic producers petition for an antidumping investigation (and, in the case of steel, a safeguard investigation as well), alleging that the domestic industry is being "seriously injured" by under-priced imports and demanding that the government impose antidumping duties to protect them. In fact, Chinese government and internal Chinese industry reports, as well as the companies' own financial statements, often show that these large producers are quite successful. The large producers, however, mask their own successes with aggregate industry data that includes the numerous small producers. Because the smaller, inefficient producers make up a large proportion of the domestic industry, the aggregate data typically shows low average profits, revenues, capacity utilization, etc., giving at least a veneer of credibility to the injury claims.

The Chinese end-users of the products tend to be divided into three groups. Large state-owned companies generally buy domestically manufactured products because their own products

are sold in China and are not required to conform to exceptionally high technical or quality specifications. Smaller, privately owned Chinese exporters often do require high quality or specialized inputs in order to export their products to foreign markets — e.g., materials certified as satisfying particular foreign industry standards. Often, only imports satisfy their requirements. Many foreign-owned enterprises buy imports for the same reason or, in some cases, because they are supplied by their own offshore affiliates.

The battle lines are, then, usually quite clear. On the one side are the large, state-owned domestic producers of chemicals or steel (or whatever) petitioning for redress. Their large, state-owned customers will buy the domestic products anyway and are, accordingly, indifferent to the results of the investigation. On the other side are foreign importers and the smaller, privately owned Chinese exporters and foreign-owned enterprises that require imported products. They will bear the brunt of any additional anti-dumping duties or safeguard measures. In China this is not a contest of political equals.

The Domestic Industry Generally Wins *But*

In this environment, it is not surprising that most Chinese investigations to date have resulted in the application of anti-dumping or safeguard measures. Some of these measures may, in fact, be justified under WTO standards. In many cases, however, the measures have often appeared unjustified by the evidence. A WTO dispute panel would almost certainly reject at least some of these decisions as either unsubstantiated or contrary to the evidence in the record.

That said, the potential harshness of the results has often been ameliorated by exceptions of one sort or another. Chinese authorities, for example, generally exclude from (or rebate) anti-dumping or safeguard duties on imports that are reprocessed into Chinese exports. This is consistent with the exemption of these products from normal import duties. It is also the right legal result under the WTO Anti-dumping Agreement, which authorizes anti-dumping duties only on goods that “enter the commerce” of an importing Member (generally interpreted as excluding goods that

go into export processing). More importantly for the Chinese authorities, this approach: does not injure the domestic industry, which cannot, in any event, manufacture many of the high tech or high quality products required for export processing; allows the Chinese exporters to continue to obtain their import supplies without paying additional duties; and mollifies the complaints of the countries supplying the imports. Chinese authorities have also on occasion been willing to exempt specific products sold into the Chinese market itself when it was clear that the domestic industry could not supply the product.

These results may not fit a WTO legal template very well and would often not stand up to scrutiny by a WTO dispute panel. As a result, some foreign importers and some foreign end-users wind up paying additional duties that strict application of WTO rules would not require them to pay. Nevertheless, this approach effects a rough, practical compromise in the marketplace. That may well be the intended result.

In two exceptions to this pattern (*Polystyrene*¹⁰ and *Lysine*¹¹), the SETC has dismissed petitions outright for failure to prove that the domestic industry has been injured. The evidence of non-injury cited by the SETC in the most recent case (*Lysine*, September 2002) was convincing. Interestingly, however, the evidence of non-injury was markedly less persuasive than that in previous cases in which the SETC had found injury. Rumors also suggested that the outcomes in both *Polystyrene* and *Lysine* cases resulted less from the persuasiveness of the evidence than from the political clout of opposing domestic interests.

The Rules of Battle

The procedural issues in a trade investigation are, in many respects, at least as important as the substantive results. If the procedures have been proper and the parties have had a reasonable opportunity to present their evidence and arguments, the result is more likely to be fair. There will also be a record that can be analyzed. It is then up to the governments of the companies concerned to

¹⁰ Appendix II-A-7.

¹¹ Appendix II-A-8.

determine whether they can live with the results or wish to take those results to a WTO panel. That is the way the system is intended to work.

The procedures followed in recent Chinese antidumping and safeguard investigations have formally followed those set out in the applicable WTO agreements: notices of investigation are announced; questionnaires are sent out to interested parties and replies received; hearings are held; on-site verification visits are conducted; and interim and final decisions are issued. There have been marked improvements in the last year in administering these procedures. Better resources, more staff, additional training, and, above all, greater experience have permitted Chinese agencies to focus their investigations better and to deal better, and with greater confidence, with a broad range of issues that inevitably arise in such investigations. (The steel safeguard investigation was, in many respects, an exception, in part because different, unfamiliar WTO rules applied.)

Nevertheless, there have been recurrent procedural problems in China's trade remedy investigations. These problems fall roughly into two groups.

Chinese Trade Investigations: The Black Box

WTO procedures are premised on transparency. In one fashion or another, the WTO trade remedy agreements require that all procedures, evidence, argumentation, etc. be open to all parties. Exceptions for confidentiality are narrowly drawn, and every effort is made to ensure that the parties' interests are not compromised by those exceptions. Final decisions must also be wholly transparent. The parties should be able to read the decisions and readily identify the evidence and methodologies that have been used and the arguments that have been considered and rejected. In addition to considerations of due process, this transparency permits foreign producers to identify the specific reasons for an adverse determination and, if possible, to correct the problems and continue trading. It also insures that there is a clear record to be reviewed by a WTO dispute panel if the foreign party's government wants the decisions reviewed later.

China's investigations are, in many respects, precisely the opposite.

There is, first of all, no requirement that the parties exchange their legal and evidentiary filings and be permitted to comment on one another's positions. More likely than not, the Chinese parties are provided, one way or another, with the filings of all foreign parties (with confidential sections, one hopes, excised). The converse is certainly not true. Foreign parties frequently do not see the filings of domestic parties at all or, at best, only after it is too late to be useful.

Even access to the Chinese parties' filings is not entirely helpful. Chinese parties routinely request confidential treatment for virtually all of the data they file. The WTO Anti-dumping Agreement authorizes such requests but only for genuinely proprietary data. Much of the data withheld by Chinese parties falls far short of that standard. Virtually any kind of data, including sales, revenue, production, employment, and capacity utilization data, not only current but from past years, is stamped "confidential" and deleted from any materials provided to foreign parties. In fact, exactly the same information is often available from public sources in China, on the Internet, or in the Chinese petitioners' own public financial reports. Chinese agencies nevertheless routinely acquiesce in the Chinese parties' confidentiality requests. These practices are doubtless explained in part by China's long-standing obsession with economic "secrets," and in part by the Chinese legal system's unfamiliarity with handling confidential data in adversarial proceedings generally. Whatever the causes, China's penchant for secrecy prevents foreign parties from confirming whether the data the Chinese parties have submitted are either accurate or complete.

Following common procedures in Chinese courts, *ex parte* communications with the investigating agencies are also the rule, not the exception, in Chinese trade investigations. To some extent all parties are granted *ex parte* access, but it is almost certainly safe to assume that *ex parte* contacts between the domestic Chinese producers and the investigating agencies are much more extensive and at higher levels. In some instances, too, Chinese authorities have reportedly held meetings with groups of Chinese end-users.

Foreign importers are not notified of these meetings or permitted to attend. The result of these kinds of procedures is, again, that no foreign party can be entirely certain what information is being provided to the investigating authorities or on what basis.

Nor are the investigating authorities' decisions transparent. SETC injury and causation decisions were conclusory. The SETC's factual findings gave no indication as to the source of the data on which they are based. In some cases, it was not even clear what the data was since the SETC expressed its factual findings only in percentages. Even more troubling, the SETC often ignored evidence – including official SETC reports and reports from the petitioning Chinese industry – that appeared directly to contradict the SETC's injury and causation findings. In this respect, many SETC decisions conspicuously failed to comply with the WTO Antidumping Agreement's requirement that investigating authorities examine all contrary evidence and arguments and explain why they have been rejected. The injury findings in the few cases since the SETC was incorporated into the new MOFCOM in March 2003 are generally consistent with this pattern. It remains to be seen, therefore, whether the government reorganization of the trade remedy investigations will have any beneficial effects.

MOFTEC's pre-WTO antidumping determinations were also problematic. From the decisions themselves it was generally impossible to determine either the evidence on which MOFTEC had relied or the methodology it had used to make specific dumping margin determinations for foreign producers. The actual determinations may have been defensible, but on the face of the decisions it was impossible to tell. Recent investigations have shown some encouraging signs, but it is too early to be entirely optimistic.

These and other transparency problems run through the Chinese investigations. On this basis alone, the procedures in few, if any, of the Chinese decisions to date would be able to withstand the scrutiny of a WTO panel.

Form Over Substance

In other areas, Chinese investigations follow the form of WTO rules but sometimes seem to miss the intent.

There is, first of all, an apparent reluctance to confront procedural issues generally, especially when adverse determinations might be contrary to the interests of the Chinese petitioners. In some cases, the definition of the product under investigation is unclear, and a proper comparison of competing imports and domestic products cannot be made without a clarification. In others, the Chinese petitioners appear not to satisfy basic qualifying criteria set out in the applicable WTO agreement – for example, they do not represent the requisite share of the domestic industry; they themselves are importers of the products to be investigated; or they are affiliated with foreign importers. These kinds of questions should be resolved at the outset of an investigation because a decision may terminate the investigation altogether or at least make the investigation substantially easier and fairer for all parties. Chinese agencies, however, have often failed to make timely rulings on these issues. In many cases, they have simply not responded to foreign parties' written requests for rulings.

Hearings in Chinese investigations also present problems. In form, they are generally unobjectionable. Each party is afforded an opportunity to present its arguments in a formal hearing presided over by a panel of officials, who keep the proceedings strictly under control. Behind the formality, however, the hearings often lack the elements necessary to illuminate the facts or issues. Members of the panel never ask questions of witnesses or counsel. The Chinese petitioners and foreign parties are typically given exactly the same amount of time, regardless of whether that is appropriate to an effective presentation of their evidence and arguments. Often, the time allocated to the foreign parties is clearly inadequate. And foreign producers have sometimes been barred from presenting supporting testimony from their Chinese buyers, even though that may be the most persuasive evidence in support of their legal and factual arguments. It often seems that simply holding the hearing is the goal; actually advancing the investigating agency's understanding of the legal or evidentiary issues appears secondary.

Administrative Law with Chinese Characteristics

The fact that China is holding administrative investigations of important disputes between domestic and foreign companies, with each party permitted to file briefs, participate in public hearings,

etc. is, of course, itself remarkable. It is difficult to think of any comparable proceedings in China, now or in China's long history. As with so many developments in China today, these proceedings would have been unthinkable just a short time ago. One must, accordingly, be cautious in criticizing their shortcomings.

The lack of a tradition of adversarial legal proceedings in China may explain some of these shortcomings. In more developed legal cultures, it is easy to take for granted various procedures for exchanging written briefs, submitting evidence, holding hearings, ruling on preliminary procedural questions, dealing with confidential data, etc. that, in fact, took decades, if not centuries, to evolve. Many of the procedures set out in various WTO agreements presuppose such a legal culture. China's bureaucracy and legal profession are not yet well grounded in these practical aspects of adversarial proceedings, and it is not, therefore, surprising that they have difficulties implementing them.

WTO dispute resolution procedures also rest on a number of unstated assumptions about the form and purpose of dispute resolution that are generally subsumed under Western concepts of the "rule of law": impartial third-party decisions, clearly articulated substantive rules, transparent evidentiary presentations and legal arguments — all with the goal of "doing justice" between the parties to the dispute. This is not the place to analyze how dispute resolution in Chinese history has differed from that model, but any evaluation of China's practices in an area like this must take those differences into account. In China, the goal of dispute resolution historically has often been less a "just" result between the parties to the dispute than a result satisfactory to the broader community. General legal precepts have often been preferred to carefully articulated written legal standards. Decisions have typically been entrusted not to an impartial judiciary but to an elite vested with both administrative and judicial powers – the mandarins in imperial times or, more recently, communist cadres. And this decision-making elite has been trusted to obtain evidence or views any way it considered appropriate, including secret consultations with prominent interests in the community. China is moving away from these traditions, right or wrong, but they still affect many judicial proceedings in contemporary China. It would be surprising if they did not influence

administrative proceedings as well and explain, if not justify, the ways that Chinese trade investigations are sometimes conducted.

Trade Remedies in a Transitional Economy

China is rapidly moving toward a market-based economy. Important vestiges of its recent socialist economy remain, however, and this aspect of China's past may also affect trade remedy investigations on various levels.

Most importantly, the petitioners in Chinese trade investigations are almost all state-owned enterprises. As the owner of these enterprises, the Chinese state has a direct economic interest in the outcome of the disputes it is investigating – a situation, if not unique among WTO Members, far greater in scale than anywhere else. Nor has China entrusted the investigations to separate, impartial government agencies. The SETC was responsible in trade investigations for determining whether imports are causing injury to the petitioning Chinese industry. At the same time, the SETC was vested with broad responsibilities for planning large sectors of China's industrial economy, including many of the same industries. It is not difficult to imagine the outcome of a trade investigation having an important impact on the industrial planning of an economic sector for which the SETC had direct planning responsibilities. MOFTEC did not have the same integral relationship with as many domestic industries, but the ties were very close.

It is impossible to say how the combination of these investigative functions into the new MOFCOM will affect the relationships between government agencies responsible, in one way or another, for state-owned industries and the agencies responsible for trade investigations. On the one hand, the parts of the SETC responsible for industrial planning have now been placed in a different government agency. On the other, the new MOFCOM will have more responsibility for protecting and promoting the Chinese economy generally than did the old MOFTEC, whose responsibilities focused principally on international matters. Whatever the specific impact of the government reorganization, it seems safe to anticipate that the continued state ownership of a substantial part of China's industry will pose potential conflicts of

interest in Chinese trade investigations that are present in few, if any, other WTO Member countries.

The extensive role of the government in China's economy may have other effects on investigations. A common feature of trade remedy investigations in other countries, for example, is the open conflict between the domestic producers who are petitioning for additional duties on imports and the domestic end-users who will ultimately pay a large share of those duties. It is, therefore, surprising how few Chinese end-users, despite important interests in the results, appear in Chinese trade investigations. Even foreign invested enterprises have been reluctant in many instances to step forward and publicly defend their interests in these proceedings. One can only assume that these companies are intimidated by the prospect of publicly confronting the government. Although many of these end-users in China reportedly express their views to the government in private, such off-the-record contacts are inconsistent with the transparency required by the WTO.

China's proposed judicial review process¹² for administrative trade remedy decisions will also raise questions as to whether China's governmental system can operate as the WTO agreements intend. China will have a strong interest in showing that its courts are able to handle important international cases of this kind impartially and competently. The WTO system, however, presumes an independent judiciary, and few would claim that Chinese judges have such independence. All judges in China are appointed by and answerable to the communist party. They may be allowed to exercise considerable discretion in commercial cases, but few cases involving important political interests do not generate consultations between the judges and political authorities. Any cases involving judicial review of high level government agency determinations in an international trade dispute will certainly fall within this political category. It will be interesting to see how China deals with this dilemma.

Throwing Stones in the WTO's Glass House

Some of the judgments here may appear harsh – China's trade investigations have often fallen short of WTO procedural

¹² Appendix I-D.

standards; some of the substantive decisions appear unjustified by the evidence; China's government agencies may have serious conflicts of interest in conducting the trade investigations. Before we are too critical of China, however, we must go back to where we started: the international trade wars.

Very few of these criticisms of China cannot also be made, in one degree or another, of other WTO Members. If China's steel safeguard measures appear suspect in many respects, it is well to remember that they were precipitated by equally questionable measures adopted by the United States. If China's antidumping investigations often seem influenced by China's political and economic interests, the same has been true of many U.S. and EU investigations. If domestic Chinese industries petition for trade remedy relief that seems patently unjustified under WTO standards, industries in other countries make similar demands of their governments. Etc.

The fact is that major trade disputes are highly political. They are political domestically in that the fate of entire industries may turn on the outcomes. They are political internationally because they involve important economic interests of different countries. The structure of the WTO dispute resolution system, moreover, gives politicians a strong incentive to give priority to domestic political issues. It is only natural for a politician to satisfy domestic political pressures today and worry less about losing a WTO dispute 18 months from now – at which time the problem can, in any event, be blamed on a far away international tribunal. If China's leaders sometimes yield to that temptation, they will not be alone.

That said, the world's major trading nations, including China, have agreed that their mutual interests are served by the complex agreements that make up the WTO system. Their political interests will cause WTO Members, including China, sometimes to deviate from those agreements. Other political interests will also give them the right to object to such deviations. Although these trade battles are, therefore, ultimately political, and many will be resolved only on political terms, the battles will, by mutual agreement of the parties, continue to be fought in legal terms for the foreseeable future. China will continue to be one of the most prominent protagonists.