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PHD/ACC/06 GU

Between Politics and Law: China's Approaches to Trade Disputes under the World Trade Organization Framework

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A thesis submitted in partial fulfilment of the requirements of the Nottingham Trent University for the degree of Doctor of Philosophy

May 2006

Abstract

International law and international institutions are becoming increasingly significant in world politics. One of the most distinctive aspects of what is sometimes called the "legalisation process" is the "judicialization" of the dispute settlement mechanism of the World Trade Organization (WTO). This mechanism provides for compulsory adjudication of intergovernmental trade disputes. China joined the WTO in 2001 after 15 arduous years. While the implications of China's WTO accession have drawn considerable scholarly attention, there is little detailed analysis publicly available about China's participation in the WTO dispute settlement and how it handles the international trade disputes.

The thesis explores China's approaches to international trade disputes under the WTO framework. In doing so, the study develops a theoretical framework, which includes dialectic between law and politics to parallel the choice between legal and political means of resolving disputes.

The thesis explains firstly how especially from the 1960s there has been a convergence between legal theory and international relations theory (IR theory) about how to resolve international disputes, especially in trade. Legal theory saw dispute resolution increasingly as an ongoing process in an institutionalised relationship of which a particular dispute would only be a part. IR theory overcame classical realist theory's focus on state sovereignty in favour of two other theories: neo-liberal institutionalism and social constructivism, which both accepted that states would enter international regimes for rational choice reasons, to reduce transaction costs, and for identity reasons, to express the relative permanence of their relations of interdependence. So it is not surprising that the WTO as a trade regime should appear and that it should leave open the possibilities of legal and political resolution of trade disputes.

The thesis refines the problematic further. It uses social constructivist theories to understand both the WTO and the dispute settlement mechanism as institutional structures that are open enough to allow policy choices both in interpretation of WTO rules and in choice of dispute settlement procedure. Finally, the thesis provides a theory of trade policy-decision making in China that allows one to take full account of all the factors which could influence the policy decision-making process in terms of trade dispute settlement, in order to weigh the importance of Culture alongside other factors such as Interests, Policy Agenda, Institutional and Legal Framework. The thesis then proceeds to apply this theoretical framework to the empirical experience of China both in the legal and political practice of dispute resolution and provides a better understanding of China's engagement in the WTO and its approaches to the intergovernmental trade disputes. The central contributions of the thesis are therefore to original and very practical knowledge about China's trade strategy in relation to dispute settlement.

Acknowledgements

This study has benefited from a number of individuals and institutions. I would like to thank Nottingham Trent University for allowing me to undertake this research and providing me with funding for fieldtrips and conferences that have greatly enhanced my research. I would also like to thank the Department of Treaty and Law of the Chinese Ministry of Commerce and the Library of the U.S. International Trade Commission for their support.

This study would not have come to fruition without the support from a number of individuals. I would like to thank my director of studies, Dr Neil Renwick who provided valuable support throughout the study. I am also indebted to Dr Chris Farrands for his valuable comments and advice. Many thanks also to Su Lin in the U.S. International Trade Commission and Yang Xiaochun in the Chinese delegation to the UN for their encouragement and support.

Most of all I would like to thank my parents, family and friends whose love and commitment have kept me going. My thesis, as well as my love, is dedicated to them.

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List of Acronyms

ADR	Alternative Dispute Resolution
BFT	Bureau of Fair Trade for Imports and Exports
BII	Bureau of Industry Injury Investigation
CCFRS	Certain Carbon Flat-rolled Steel Items
CS	Cultural System
COC	Chambers of Commerce
CPC	Communist Party of China
DOC	United States Department of Commerce
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GAO	Government Accountability Office
GATT	General Agreement on Tariffs and Trade
GSP	General System of Preferences
ICs	Integrated Circuits
IL	International Law
IR	International Relations
MES	Market Economy Status
MOFCOM/MOC	Ministry of Commerce (PRC)
NAFTA	North American Free Trade Area
NGO	Non-Governmental Organization
NME	Non-Market Economy
NPC	National People's Congress
PRC	People's Republic of China
ROC	Republic of China
SC	Socio-Cultural
SIA	Steel Industry Association
SOEs	State-Owned Enterprises
TPR	Trade Policy Review
TPS	Transitional Product-Specific Safeguard Mechanism
TRM	Transitional Review Mechanism
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
USITC	United States International Trade Commission
USTR	United States Trade Representative
VAT	Value-Added Tax
VRA	Voluntary Restraint Agreements
WTO	World Trade Organisation

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Introduction

In 2000, a very profound impression I have associated with Millennium is China's World Trade Organisation 'high fever'. Walking across Beijing's biggest book town – Haidian, I could see there were thousands of books and magazines on all kinds of topics about the WTO. It was such a 'fashion' and yet a 'fear'! There were two major perspectives: "the Rosy picture" and "the Wolf is coming". I remember a good friend who is a trade lawyer told me very confidently that once we join the WTO, we shall be able to use the WTO dispute settlement mechanism and we will not always have to go to bilateral negotiation like now. Having the 'fever' as well I then started to be interested in finding out whether the WTO is a "rain deer" or a "wolf" for China in terms of international trade disputes. In 2003 in Geneva, I had an interesting conversation with the Chinese trade officer Rong Min at the WTO, who said, "Indeed it's very unusual. In our country, from senior officials to ordinary farmers, WTO (世贸组织 Shi Mao Zu Zi) became a well-known word. But in fact, very few people have real knowledge of what's the nature of WTO and what China's WTO accession is all about."[1] So, the issue of WTO—China—Dispute Settlement became the main focus of my way of thinking about and contributing to this subject. I was very curious about how China, with its tradition of Confucian reserve about litigation would respond to the compulsory adjudication aspect of the WTO.

There are two antagonistic trends in dispute settlement. One the one hand there is the rise of adjudication. On the other hand there are varied 'political' means of resolving disputes.[2] For the WTO dispute settlement, supporters of the legalized Dispute Settlement Mechanism (DSM), as the grounding of the WTO framework of trade diplomacy, regard it as highly successful and effective. Others disagree with this system suggesting that the legalized DSM is a "step backward in the process towards greater cooperation".[3] They

[1] Author's interview with Chinese Trade Officer, Rong Min, Geneva in June 2003.
[2] See Anne Peters, 'International Dispute Settlement: A Network of Co-operational Duties', *European Journal of International Law*, Vol. 14(1), 2003, pp.4-10.
[3] See B. Peter Rosendorff, 'Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure', *American Political Science Review*, Vol. 99(3), August 2005, p.389.

call for enhancement of the political aspects of dispute settlement. Thus there is a confusion of phenomena. So what theory can be formulated from real world experiences to understand the social phenomena better? I hope China's experience can provide a better understanding of the problem.

My hope is to reach a better understanding not only of the case-studies of China's involvement in trade disputes, but also of the political and legal preconditions for preventing or settling such disputes effectively. One of the great expectations of the Chinese in joining the WTO was that they would use the WTO DSM. The Government publicity about the WTO engaged the whole population of China at all levels in the excitement of China's membership of the WTO, including the benefits of dispute settlement. Since 2005 the atmosphere in China has become much calmer. The thesis will explore what has been the nature of the real development of China's participation in the WTO. It will do this by taking into account the empirical evidence of the extent of dispute settlement at the level of negotiation and conciliation and the amount of disputes that go to compulsory arbitration through the panels. Before entering into the thesis, I will provide in this introduction a general picture of the study through a presentation of: Contextual Background; Statement of Originality; Research Questions; Methodology; Structure of the Thesis.

Contextual Background

China's WTO accession is the longest and most arduous accession in the history of the General Agreement on Tariffs and Trade (GATT) and its successor, the WTO. It is unprecedented in terms of time and scope of the negotiation.[4] China's accession took far too long, a total of 15 years. WTO accession is quite straight forward, not unlike the usual multilateral negotiations. Article XII of the Marrakesh Agreement Establishing the WTO (the "WTO agreement"), governing accessions reads: "Any state or separate customs territory…may accede to this Agreement, on terms to be agreed between it and

the WTO."[5] It sounds complicated, but in fact the whole system has been so much practiced that it can be made to work quickly.[6] First, the applicant negotiates bilateral trade concessions agreements with each current WTO member that requests such agreement. The whole GATT/WTO system is based on the idea that what is offered to one country has to be offered to others. Bilateral commitments always provide the foundation for the final multilateral agreement, and this is also the case with the terms of China's Accession Protocol.

So the question is then why China's accession took so long and what's the meaning of it? In fact the history of China's accession is very problematic. The decision of China was an attempt to come back into the world community. China's historical links with the WTO began with the formation of GATT. However there is a much deeper historical context to China's trading history with the West. From the failure of the British diplomat Lord McCartney's mission to China in 1792 to China joining the WTO in 2001, has been 210 years. The central theme of these 210 years for China has been a struggle to adapt and integrate itself into the world, but this has been profoundly affected by China having very unstable relationships with the world, a relationship that has huge internal repercussions for China. The Republic of China (ROC) was one of the twenty-three founding contracting members of GATT in May 1948. However after the founding of the People's Republic of China (PRC) in 1949, the government in Taiwan (ROC) announced in 1950 that it withdrew from GATT.[7] Although the PRC never recognized this withdrawal decision, due to complicated historical reasons[8], China did not formally apply for

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[4] The historical narrative in the following paragraphs draws from books by Liu Guangxi, *China and 'Economic UN'*, China Foreign Economic Trade Press, Beijing, 1998, p.17-20; Yang Guohua, *Legal Problems on China's Accession to WTO*, Law Press, Beijing, 2002, p. 26-57.

[5] See WT/ACC, Procedures for Negotiations under Article XII', available at: http://docsonline.wto.org/gen_trade.asp, visited on 10/05/2002.

[6] See Supachi Panitchpakdi and Mark Clifford, *China and the WTO: Changing China, Changing World Trade*, John Wiley & Sons, 2002, pp.74-77.

[7] Taiwan withdrew from membership of GATT under US pressure. The latter believed that if the PRC took the place of Taiwan in GATT, it could get around the trade embargo the US had imposed on China after China's involvement in the Korean War. The PRC claimed that Taiwan's withdrawal was without legal effect, because the ROC Government did not represent China from 1 October, 1949. See Yang, *op.cit.*, p.29.

[8] China had a socialist ideology, and with it a state monopoly of all foreign and national trading, effectively closing it to the outside world. In the 1950s China was strongly under the influence of the USSR and itself interested in internal reform: "GATT is still manipulated by the imperialist countries, it is an instrument

membership of GATT until July 1986. This was after the end of the Cultural Revolution, and Mao's influence, when China's new leaders had decided to accelerate economic reform, is to expand the foreign trade. That is China would grow by becoming a major world trader and by involving huge foreign interests in the development of China's economy. This would have to mean China having a strong interest in the making and application of international economic rules.

However, tortuous historical legacies have marred every stage of the accession negotiations. Significant progress was made prior to the Tiananmen Square Incident in 1989. After Tiananmen, the Chinese government, once again, was regarded as a cruel dictatorship. Widespread economic sanctions were imposed on China. Furthermore the United State's interest in China's strategic position became less important with the end of the cold war. With the western economic sanctions and the change of the international situation, i.e. the collapse of socialism in Eastern Europe and the Soviet Union, there was no accession activity in almost two-and-a-half years. After 1992 the negotiations became much tougher, because the Uruguay Round meant that the trade agenda had greatly increased, making China even further removed from GATT requirements. To include liberalisation in trade in services and protection of intellectual property could only complicate things for China. Hence China lost its chance to become an original member of the WTO in 1995.

It was not until 1998 that things started to move again. In June 1998, the then American President Clinton visited China. As Joseph Fewsmith described it, "Clinton's trip to China provided the boost to U.S.-China relations that made serious negotiations on WTO possible, perhaps for the first time since 1994."[9] Encouraged by this development, the Chinese Premier Zhu Rongji arrived in the United States with an unexpectedly good offer[10] to try to clinch a deal on China's WTO accession. Surprisingly, the Clinton

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that big countries use to bully small countries." Cited from a book by Beijing Second Foreign Languages Institute, *International Knowledge Brochure*, Guang Xi People Press, Guilin, 1981, p.153.

[9] See Joseph Fewsmith, *China and the WTO: The Politics Behind the Agreement*, 1999, available at: http://www.nbr.org/publications/report.html, visited on 22/05/2002.

[10] "Back to China:" This offer was called "new 21 demands selling out the country"- a reference to Japan's infamous demands of 1915 that sought to reduce China to a colony. See Frewsmith, *loc.cit.*

government rejected the offer. So once again, the Chinese hope of WTO membership was in the air. However, ironically, the failure of the April 1999 deal with the United States and, even worse, the U.S. bombing of the Chinese Embassy in Belgrade in May, finally forced a climax and brought a conclusion, with the key bilateral agreement with the United States in November 1999.[11]

The China-US bilateral agreement is the foundation for China's WTO accession package. Despite the fact that China would have to make a whole series of bilateral agreements with most WTO member states, the pivotal political, and not just economic, importance of the United States was such that progress in concluding bilateral negotiations with most other WTO member governments had to wait. Once it reached bilateral agreement with the United States and then with the European Communities in May 2000, the rest of China's negotiations took little time.

So, after 15 arduous years as a candidate, China was finally admitted to the WTO in November 2001 and became a Member of the WTO on December 11, 2001 in line with customary practice and as set out in China's Protocol of Accession. Taiwan also became a member of the WTO as Chinese Taipei in January 2002. So, there are three separate customs territories (Chinese Taipei, Hong Kong, and Macao) in the WTO. In the event that a dispute occurs between China and these separate customs territories, how they deal with trade disputes and whether the WTO dispute settlement system can resolve them is an interesting and controversial issue.

Now is the time to consider the remarkable commitments China has made to join the WTO. The former Vice Minister and Chief Trade Representative, Ministry of Trade and Economic Cooperation, Long Yongtu in an interview in December 2004 explained the extent to which China is concerned about how anxious other countries are about its potential Great Power status. So China would wish to appear as unthreatening as possible. We will discuss in great depth in chapter three how China's concern with its

[11] See Yongzheng Yang, 'China's WTO Accession, The Economics and Politics', *Journal of World Trade*, Vol.34 (4), 2000, p.77, arguing strongly that the Sino-US Trade Agreement is very discriminatory against

identity affected how it approached the importance of the WTO, the place of China's growing trade in its general foreign policy agenda and the care it takes over how other countries react to these developments. Here we stress simply that Long Yongtu wishes to present China as a country committed to a peaceful rise, to complying with international rules, and to a further opening of its markets. [12]

From this detailed policy statement one can see that for China the WTO is by no means simply a cost benefit analysis of its economic interest. Instead China is primarily concerned with its identity in the international community, including political and even military and security dimensions. The Chinese image in the world is the strategic meaning of China's WTO membership for China. China is aware that the identity of the world community will also change with its WTO membership. For the world, there is no doubt that China's WTO accession will be like the title of the book by the former WTO Director-General Supachai Panitchpakdi, "Changing China, Changing world trade."[13] Hence a combination of a neo-liberal institutional and social constructivist approach can best explain the whole process of Chinese participation in the WTO.

When China joined the WTO, internal and external attention covered both the advisability of joining, the conditions for entry and then, the domestic challenge of complying with accession-related reforms both domestically and in China's external relations. As Margaret Pearson points out, the WTO "establishes criteria for compliance with its charter and agreements, and has backed up these conditions with a dispute resolution mechanism."[14] Indeed, one of the high expectations China has towards the WTO is the DSM. This mechanism was regarded as one of the major benefits that China

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China and contradicts the WTO; this is especially argued at pp. 80-83.

[12] Long sets out the meaning of China's WTO membership under the intense criticism from people who thought China had paid too high price for joining the WTO. Some people even labelled him as having 'sold the country'; so this interview was a response in a way. See Long Yongtu, "I love China and I am also very sympathetic with those enterprises which suffer from anti-dumping charges", an interview conducted by Wang Wenxiang from *XinJingBao* Newspaper, available at: http://cn.news.yahoo.com/041201/346/2772t_9.html, visited on 16/12/2004.

[13] Supachi Panitchpakdi, *loc.cit.*

[14] Margaret Pearson, 'The Major Multilateral Institutions Engage China', in Alistair Johnston and Robert Ross (eds.), *Engaging China: The Management of an Emerging Power*, Routledge, London, 1999, p.213.

would enjoy from WTO accession.[15] Meanwhile, many western scholars predicted that China's membership would be a heavy burden for the WTO DSM, even causing the breakdown of this system because of overuse. As one study puts it, "Clearly, China's membership is likely to result in expanded recourse to the dispute settlement procedures of the WTO, both by China and by other members in relation to China's implementation of its WTO commitments."[16] Leonard stated that: "the generally unspoken and unexpressed fear around the globe on the part of many trade officials seems to be that the Dispute Settlement Body of the WTO (hereinafter 'DSB') will be inundated by cases related to China and its trading partners for most of the first decade of its WTO membership."[17] Leonard has even expressed the opinion that an entirely separate division of the DSB will have to be established early on to handle the volume of anticipated 'China-related' cases at the WTO.[18] In my interviews in Geneva, the WTO officer Susan Hainsworth and EU officer Oliver Slocock expressed the same view that the future of the DSM partly depends on the Chinese (either too many cases would involve China or China won't comply with the ruling and will thereby seriously weaken this system).[19]

In a question and answer session with Chinese students, in Chinese University of Finance and Economics in Beijing April 2002, the US Trade Representative (USTR) Robert Zoellick was asked about how should China respond to the increasing number of economic and trade disputes? He stated that he thought it more important to talk through these questions rather than go to the WTO. He said,

> In dispute settlement, these are difficult questions because the dispute settlement is there to resolve problems and that's one of the innovations. But one also has to be careful of overuse of it. Because I could tell you that there are many countries around

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[15] See Zhang Xiangchen, *The Political and Economic Relations between the Developing Countries and WTO*, Law Press, Beijing, 2002, pp.16-17. Also see 'The Rights of China After the WTO Accession (Zhong Guo Ru Shi Hou De Quan Li)', available at: http://finance.dayoo.com/gb/content/2004-12/13/content_1851618.htm, visited on 17/04/2005.

[16] Nicholas Lardy, *U.S.-China Economic Relations: Implications For U.S. Policy*, 25 April 2001, House East Asia Subcommittee, US Congress, Washington DC.

[17] See Sean Leonard, *The Dragon Awakens — China's Long March to Geneva*, Cameron May, London, 1999, pp.130-131.

[18] Leonard, *loc.cit.*

[19] Author's interviews with Susan Hainsworth, Counsellor in the Rules Division, WTO and Oliver Slocock, First Secretary, European Commission Delegation in Geneva, 25/06/03 – 27/06/03.

> the globe that right now are in violation of various rules. I could bring actions against them, including China, because it has not yet had time to implement some of its WTO obligations. But instead, it's often best to try to work through the process if you can...I think the key point is this (WTO) is a very important international institution and its future will partly be dependent on *the Chinese approach*.[20]

So, what are the Chinese approachs to trade dispute settlement? Is there a 'Chinese' style of dispute settlement? We see increasing references to 'Chinese values' and to 'the Chinese way' of forging political and legal agreements.[21] If this is so, in what way is it? What do we mean by China's approaches? In the following chapters I try to address the Chinese approach towards dispute settlement in its full political, economic, cultural and legal characteristics.

Statement of Originality

The few existing studies on China and its intergovernmental trade disputes in the context of WTO are mainly from the legal perspective, concentrating on the detailed legal rules and procedures.[22] These studies confine themselves to descriptions of the legal steps that China has taken to bring its laws into conformity with WTO law. There is very little analysis of China's participation in the WTO dispute settlement and there is no focus on the intergovernmental aspect of China's management of its trade disputes with other governments.

What has most interested me is to explore how China would manage its trade conflicts with major trading states such as the EU and the US in the context of the already established, legalized WTO DSM. It is known that this is a very rigorous system for

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[20]USTR 'Zoellick Says China Can Play Important Role in WTO', 09/04/2002, available at: http:// usinfo.org/USIA/usinfo.state.gov/topical/econ/wto/02040902.htm, visited on 08/07/2002.

[21] See Paul H. Kreisberg, 'China's Negotiating Behaviour' and also Wang Jisi, 'International Relations Theory and the Study of Chinese Foreign Policy: A Chinese Perspective', both in Thomas W. Robinson and David Shambaugh (eds), *Chinese Foreign Policy: Theory and Practice*, Clarendon Paperbacks, Oxford, 1998, p.481.

[22] See Li Juqian, *WTO Dispute Settlement Mechanism*, Chinese Political Science and Law Press, Beijing, 2000; Kong Xiangjun, *The Domestic Application of WTO Rules in China*, People's Court Press, Beijing; 2002, Yang Guohua, *A Study On WTO Dispute Settlement Mechanism and China*, China Commerce and Trade Press, Beijing, 2005; Ji Wenhua and Jiang Liyong, *WTO Dispute Settlement Rules and China's Practices*, Peking University Press, Beijing, 2005.

settling trade disputes, that the US was instrumental in pushing through the Uruguay Round (see chapter two) primarily in order to ensure the discipline it thought necessary for the EU, Japan and some other countries. The interesting question is whether China would fit easily into this already established picture. It is known to have a political and legal culture, which is not inclined either at a national or an international level, to give a prominent place to compulsory, third party legal resolution of disputes. Despite all the expectations already mentioned that China would be overwhelming the WTO DSM there have in fact been very few cases. Can one explain this in terms of China's culture or does one need a wider, more complex analytical structure to explain China's behaviour?

The originality of this thesis is the inter-disciplinary approach and empirical analysis of the dynamic interaction between law and politics in China's intergovernmental trade disputes. The study tries to understand better this virtual absence of Chinese litigation at the WTO from December 2001 to May 2006, nearly five years. Clearly the lawyers will not try to answer the question since it is not a legal question. International relations scholars are left to try. Yet they cannot do so without considering the details of the legal institutions themselves, since the question itself is why these institutions are not being used. So, we need a new approach to the relationship between international politics and international law in the area of economic relations, which does not resort to the purely descriptive techniques of law and does not adopt a political realism that is completely dismissive of the reality of norms. The way this study will be undertaken is to build a bridge between the international relations theories of social constructivism and neo-liberal institutionalism to explain the WTO Framework, including the DSM, as a socially constructed institution, which China has to confront.

The second original aspect of the thesis is that we develop a more complex picture of China as a trading actor within the WTO Framework, than simply as either a legal party with legal duties, or a political culture dominated by a Confucian reserve about litigation as a means of resolving trading disputes. We look to a complete decision-making framework to understand China, again within a balancing of neo-liberal institutionalism and social constructivism. This aims to afford us a dynamic social context in which to

understand the relationship between China and the WTO Framework as a mutually reactive dialectic. This will allow us to approach again the relative absence of Chinese litigation at the WTO and understand it better.

Research Questions

Within the above thesis context it is necessary to pose a number of specific research questions. These are as follows in terms of bullet points:

♣ To explain how the Legalised WTO DSM was politically possible

♣ To understand the extent of its operation and continuing viability in terms of support from major states

♣ To set out an exhaustive framework of the elements that go up to shape the cognitive context, both conscious and unconscious in which China takes decisions about how to deal with trade disputes with major trading powers, i.e. EU and US

♣ To evaluate the extent of the freedom of choice that China has between political and legal means of resolving conflicts and then evaluating the actual practice of China in this area and the individual decisions it has taken.

Methodology

To explore and answer these questions, this study establishes a distinctive theoretical approach. This is elaborated and explained in Chapter One. This provides the context for the construction of the methodology to be applied in the study. However, having detailed the key research questions above, the main methodological concepts can usefully be outlined in this introduction. The methodological approach of the study is qualitative: "Qualitative implies a direct concern with experiences as it is 'lived' or 'felt' or 'undergone'...Qualitative research is concerned with collecting and analysing

information in as many forms, chiefly non-numeric, as possible. It tends to focus on exploring, in as much detail as possible, smaller numbers of instances or examples which are seen as being interesting or illuminating, and aims to achieve 'depth' rather than 'breadth'."[23] So this study also devotes its attention to the collective intentions of the actors involved, the trading states, viewing also the WTO as a further, institutionalised collective of trading states, where the perspectives of all the actors are the dominant focus of inquiry. Qualitative studies tend to be descriptive, if by that is meant that it does not search for cause-and-effect relationships. However, there is another form of analysis suitable for the study of intentions, which is that we endeavour to describe collective experiences and, in particular, how they evolve. This means a distinction not about unpredictability and variability of outcomes, but about the influence of context and the distinctions between conscious and unconscious, between deliberately conceived intentions and routine habit and the force of custom.

To undertake this complex type of analysis it is necessary to engage in an interdisciplinary study of the relationship between international law and international politics. The WTO and its DSM are legally binding agreements, but they provide for different methods of dispute settlement and different stages of dispute settlement, the legally binding panel report being only a final stage that remains always a threat or an option. For instance, one leading study prepared by an international lawyer O'Connell recognizes that there are links between the study of dispute settlement in international relations and the study of negotiation, mediation and arbitration within national legal systems.[24] In the former, studies are known as conflict prevention or conflict resolution, which focus on effectiveness, rather than rules, as in international law. "Scholars tend to ask such questions as whether a particular conflict is 'ripe' for negotiation or mediation...whether a particular mediator has the trust of two disputing parties to effectively resolve a dispute".[25] International lawyers, on the other hand, tend to focus on "whether parties have an obligation to obey the outcome of a dispute resolution process

[23] Loraine Blaxter, Christina Hughes and Malcolm Tight, *How to Research*, Open University Press, Milton Keynes, 2001, p.64.
[24] M. O'Connell, *International Dispute Settlement*, Ashgate, Aldershot, 2003.
[25] *ibid.*, p.xix.

or to follow particular conduct mandated by procedural rules".[26] Some interdisciplinary studies try to explore why there appears to be a movement from non-binding to binding dispute settlement.[27] However, our study will suggest that the process is much more complex.

In fact, our study has to be interdisciplinary in the sense of understanding that there are profound changes in the self-understanding of law. It moves from a purely command theory, that the state gives orders to its subjects, which are irresistible, to a more horizontal approach. Law provides a facilitative framework within which the individuals make claims and counterclaims that are negotiated and conciliated, and only finally resolved, where unavoidable, in the courts. That is to say, China's practice of trade diplomacy and trade dispute resolution, since it has joined the WTO has to be understood very sensitively against a background of the changing relationship between international law and international relations thinking.

There is a large International Relations (IR) literature on the process of international legalization, but there are deep theoretical gaps between the two academic disciplines that have treated these phenomena, IL and IR, which it may be impossible to overcome. The WTO is understood by IR theorists as a trade regime. They focus on such issues as the relationship between international legalization and the relationship with domestic politics, varieties in the degrees of legalization. However, in the context of international relations studies, one more original feature of the study is that it addresses the lack of empirical studies that answer central questions explaining how international legalization comes into existence and how it operates. The study by Keohane, Moravesik and Slaughter says itself that it is only exploratory and highlighting opportunities for research. They merely set out a program for empirical research.[28] Most of the international law literature is purely descriptive. It gives an account of individual case and gives statistics of the number of disputes that are actually handled through the DSM each year. My research

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[26] *ibid.*, p.xx.
[27] R. Keohane, A. Moravesik, and A. Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', *International Organization*, Vol. 54 (3), 2000, pp. 457-488.
[28] *loc.cit.*

attempts to contribute a theoretical elaboration by constructing an analytical framework and by providing empirical studies of the WTO. For instance the questions of how legal discourses and institutions can change state preferences and behavior and of how international law induces compliance by being connected to shared norms and values are closely related to the matter of identity formation and transformation, which have been continuously explored by international relation theorists, as well as being related to how states reach compromises on their interests.

This thesis will look closely to the nature of China's trade diplomacy and trade dispute resolution in the light of theories of neo-liberal institutionalism and social constructivism. These explore theories of social structure and of independent agency. It will also consider the changing definitions of law, which have accompanied the legal revolution in the direction of Alternative Dispute Resolution. It will do all of this in the context of concrete trade disputes that China has had, particularly with the US and the EU. The argument concerned involves both the factors of law and politics continually playing off against each other. It is never a matter of one thing or the other. Law is the context and framework of political activity.

The aim of the study is to explain the nature of Chinese trade diplomacy with respect to the resolution of its trade disputes, after it joined the WTO. The question assumes that one has to try to understand the influence and impact of the WTO DSM on China, but that also one will be able to trace the nature of the interaction of China with the WTO DSM. As already mentioned, just before China joined the WTO, the WTO had, at US instigation, transformed its DSM from one, which was at least formally voluntary to one that provided for compulsory judicial adjudication of trade disputes. China, however, represents a huge addition to the trading system. The WTO DSM can only continue as a social structure, i.e. the idea system directing behaviour, as long as the power underlying it is still in place. If major trading powers, such as China and the US, begin again to deal with one another primarily bilaterally and directly, taking account of a whole range of factors besides the particular trade dispute, one might be able to say that the foundations of the WTO DSM are changing again. However, the changing theory of law and its

interaction with IR theory of dispute settlement shows that the empirical data, i.e. the Chinese practice of bilateral dispute resolution, is ambiguous. It does also allow an interpretation that gives some continuing play for an idea of law, as a horizontal framework of competing claims by equal parties, against the background of the shadow of the court, i.e. compulsory dispute resolution by law.

The interaction between China and the WTO in its dispute resolution is therefore a complex process of mutuality. It is not simply a changing reaction by one hegemonic power, the US. It is also that another major power, China, brings its characteristics to the relationships of the WTO, not just with the US but also with the EU and other countries. China's physical, geographical size, the size of its economy and also its cultural approach, particularly with respect to law, dispute settlement and social relations generally, affect the way it impacts upon the WTO. These empirical and political factors have to be read alongside China's initial enthusiasm for the WTO DSM and its belief in the advantages of compulsory dispute resolution. The two factors produce a swaying backwards and forwards in China's policies and attempts to balance conflicting tendencies. A theoretical underpinning to describe this phenomenon is Alexander Wendt's theory of the continuing autonomy of the individual actor in relation to all social structures. These structures do impinge upon the actor, but they cannot absorb it entirely. It still has itself to decide how to behave in facing structures, which never entirely create or shape it completely. It is also capable of having an effect on these structures and even changing them. It is possible that China begins to have a general effect on the use of compulsory DSM by other countries.

The thesis is interdisciplinary because it depends not only on a social political theory about the nature of international structures and international actors. It also develops a theory of the changing nature of legal theory, the theory of the state and the role the both play in evolving views about the role of law in dispute resolution in contemporary national and international society. The thesis shows an interaction between socio-political and legal theory that gives an equal play to both. It has to have a theory of the nature of legal codes as a social phenomenon. How autonomous can they be from the subjects,

which they are supposed to regulate? What is the nature of the relationship that exists between the codes and the pressures of power and interest coming from the members? Do the codes as a social structure completely dominate and determine the subjects or do the subjects have an absolute power of manipulation over the codes? Or is there a third possibility that the relationship is mutually interactive? These questions are essential to providing analytical explanations of changes in the codes and in demonstrating their continuing capacity to influence China.

A Note on Sources

My thesis combines the three complementary methods of documents analysis, detailed case study and interviews. The thesis will have to work with a variety of source materials. For instance, the chapter on the WTO DSM is concerned primarily with what Archer has called the Cultural System and the Social Cultural Forces underlying of the framework for world trade. The distinction between these two elements, which Archer makes (see chapter one), is a further refinement of the social constructivist view of ideational structure. The first explains the values, techniques and institutions of world trade, their origins, how they develop through the creative activity and struggles of states. The second concerns the power configurations, which produced, maintain and could change the first. To describe these one will draw to a large extent upon the sources enumerated below, primary archival material generated by the WTO, China, the US and the EU. At the same time there has been considerable authoritative academic reflection on the experience of the DSM, based directly on the sources of the WTO itself. This material plays a major part in the consensus that is emerging about the significance of the DSM practice. The primary archives bullet pointed below will also provide the grounding for the discussions of China's approaches to the WTO, including its incorporation of WTO standards into Chinese domestic practice. Wider discussions of the nature of Chinese culture will draw as well upon academic socio-cultural studies of Chinese society and empirical studies of the continuing effect of traditional values on such diverse issues as Chinese judicial administration and Chinese orientations to the fundamental issue of how to choose methods of resolving inter-governmental trade disputes. The chapter on

China's participation in the WTO Framework will draw primarily on the WTO records of meetings and negotiations, and draft proposals from states (especially China). The chapters on the steel and textile disputes will draw on extensive background of China, the EU and the US place in the industries, the records of the Panel and the Appellate Body (for steel), the agreements concluded for textiles, and full reports of negotiations, official speeches, commentaries and also academic analysis and reflection.

- WTO Annual Reports
- WTO Annual Reports of Dispute Settlement Body
- WTO Dispute Settlement reports, including Panel and Appellate Body reports
- WTO Annual overview of the state of play of WTO disputes
- Working documents of the DSU negotiations
- Official WTO Guides and Histories
- Trade Policy Reviews
- The Legal Texts of the Uruguay Round of Multilateral Trade Negotiations
- International Trade Statistics by WTO
- WTO press releases
- WTO speeches given by key officials
- Protocol on the Accession of the People's Republic of China
- USITC reports
- USTR reports and speeches
- USTR fact sheets and press releases
- Annual Reports of U.S.-China Economic and Security Review Commission
- U.S. Congressional testimonies and Speeches
- European Trade Commissioner, Speeches and Reports
- Decisions of the European Commission
- Reports of Decisions of the Court of First Instance of the European Court of Justice
- Chinese Government Reports on Trade Policy Review
- Policy Release of Chinese Ministry of Commerce
- Speeches given by key officials of Chinese Ministry of Commerce

- Counselor's Report by Chinese Ministry of Commerce
- Statements and Documents of The Permanent Mission of China to the WTO
- China Customs Statistics
- China's Industrial Development Reports 2003-2005
- 2004/2005 China-US, China-European Union Textile and Clothing Trade Report

Apart from these primary archival resources, I have also conducted fieldwork and telephone interviews with twenty trade officials, academics and trade lawyers in Geneva, Beijing and Washington (See Appendix). The field work provided opportunities to experience firsthand how the trade officials, particularly the Chinese and the US, felt about their experiences and understanding of dispute settlement.

The Structure of the Thesis

Chapter One is the main theoretical chapter of the thesis. It begins by considering whether peaceful settlement of disputes is possible from a perspective of international society, which has been, traditionally since 1945, dominated by the realist school. At the same time the classical theory of law has been that it is a command of a sovereign, and hence the absence of a world state makes the idea of an international legal order problematic. The chapter is built up on a principle of inter-disciplinarity that relies upon a gradual convergence of international law and international relations theory towards a shared ground favouring peaceful resolution of differences. Theories of regimes and interdependence in international relations are found parallel to a growing legalisation of the approach to economic and trade disputes within the GATT and later the WTO. The belief that there was a definite alternative to war through trade encouraged a pragmatic attitude that conflicts of interest could be resolved through rational compromise, whether by negotiation or by arbitration. This does not exclude the possibility that there are dominant and even hegemonic players within regimes that tend to subvert rationality to their own interests, but ultimately this is seen to remain within bounds.

The theory chapter also has to develop a more refined theory to explain how and in what sense a state submits to or is bound by international trade regimes. The command theory of law, submission of the individual to the powerful sovereign state, does not appear appropriate. But the legal theory has developed, from American legal realism and sociological approaches to law, that law is a framework for challenging and settling conflicting individual claims and expectations. The Alternative Dispute Resolution movement takes account of this changing view of the nature of legal authority, making it more consensual and informal. At the same time IR theory of the relationship of actor to structure (Alexander Wendt) explains how a structure (in this case the WTO DSM) does not rob the actor, the state of all autonomy, so that the actor automatically applies or merely reproduces the legal structure. The actor's autonomy, and in political terms, its individuality, its culture, power characteristics, historical situation all play a role in understanding the actor's relationship to the structure.

The theory chapter goes on to explain a socio-historical framework for the legalisation process (from GATT to WTO) in the theory of Margaret Archer, distinguishing the cultural system – the actual ideal normative standards of an order – and the socio-cultural foundations, which provide the material conditions necessary to support the cultural system. Vitally, this theory has to explain how systems change, to explain how one system can disintegrate and/or be transformed to become something else. This will be important to understand the reasons for the vacillation of the GATT/WTO DSM between diplomatic/political and compulsory/legal resolution of disputes.

Finally, the chapter offers a dynamic social constructivist theory to explain the role of China as a social actor. The theory of Wendt will show how it is both credible and intelligible to understand China as a unitary actor, a collective intentionality of shared knowledge whose foundation of identity includes, but is not limited to, a common political and legal culture. This will set the framework within which to ask what are the factors which influence China's choice of political or legal means of resolving trade disputes in the WTO context.

Chapter Two sets out in depth the context, which China is facing when it becomes, in 2001, a member of the WTO trading regime. It is a compulsory, legal adjudication of disputes. The chapter has to explain as well how it was possible for the legalisation process to come into play in the 1990s, under pressure from the US. This is the context in which the social theory of Margaret Archer becomes important in explaining institutional change. The chapter goes on to consider in depth the legal detail of the institutional structure of the DSM. After this, basing itself on WTO literature and academic reflection, it considers the operation of the WTO DSM since its foundation and reflections on how successful it has been in engaging states and ensuring compliance. The chapter concludes with a study of the reflections of IR theorists and also political scientists and legal sociologists on the process of legalisation of dispute adjudication, which has developed. At the end there remain real questions about the extent to which the legalised DSM process itself remains politicised and this must have implications for how China will view the process. The questions touch the composition of the panel bodies, but primarily the objectivity of the standards applied and the thoroughness and impartiality of the investigations undertaken.

Chapter Three sets out the particular elements of China joining the WTO. It asks the question whether there is a specific Chinese approach to dispute settlement. This is an exploration of the nature of China as an actor in relation to the WTO as a structure. The approach to dispute settlement will be influenced by the political and legal culture of China historically, in terms of Confucianism. This will affect attitudes to law, courts, alternative methods of dispute resolution and views about the relative merits of insisting upon one's rights and the importance of maintaining social harmony. Here there is a connection with the legal developments described in chapter one. To some extent what is traditionally understood as peculiarly Chinese ways of approaching compulsory legal dispute settlement may have now become widely appreciated in the West.

The third chapter makes use of the social constructivist theory of the state as a social fact, as a system of collective intentions and as a self-organizing social agent (Ruggie and Wendt). One has to explore all the elements of China as an actor and all the specific

elements of its own engagement with and commitment to the WTO and its DSM. Therefore the well known ground of the Chinese style of dispute settlement has to be seen alongside the detail of China's trade policy agenda. Both are considered in great detail, in contemporary and historical terms. The policy agenda is not simply an official propaganda, but also can be seen as China coping with the impression it is making upon other countries, trying to respond diplomatically. The policy agenda will indicate how far China takes a short term or a long term view of its trading interests and how far it links trading with other questions. The trade policy agenda is also placed in the concrete context of China's actual trading position since it joined the WTO and the nature of its trading relations in specific industry areas and with specific countries.

The chapter goes on to consider institutional detail in relation to foreign trade both at the domestic and the international level. It looks at the Foreign Trade Law, which sets out national competencies and the obligations national institutions have to fulfil. Particularly it calls upon Chinese agencies to react to unfair trading behaviour of other countries. The chapter gives some indication of the extent to which China will insist on its rights and how far it wants to engage its own civil society - business associations – in supporting its trade diplomacy. The institutional dimension also looks to the terms of Chinese accession to the WTO. Internationally, there is the whole range of specific obligations China had to undertake at accession to the WTO in 2001. These are a reflection of the weight of the structure of the WTO facing China as an actor. It may still have been free in accepting these duties but the duties may well appear incompatible with normal obligations of membership of the WTO, and create huge tensions with the notion of China as an actor. The main area considered in this chapter is about China as a supposedly non-market economy, an excuse for the EU and US to subject it to very unequal rules on dumping and safeguards.

The chapters four, five and six are the predominantly empirical parts of the thesis. Chapter four concerns the pattern of Chinese participation in the WTO DSM. The chapter begins by explaining how in 2001 China considered itself very much at the beginning of a long learning curve in terms of having the capacity to engage in the complexities of

WTO litigation. The chapter then outlines China's record till now as plaintiff and as defendant. It consigns the sole case of China as plaintiff to a separate chapter five, the steel case. Here one explains how China has behaved as a defendant, settling disputes before they reached the panel stage. The heart of the chapter is the discussion of the huge engagement of China as a third party to other countries' panel cases, over forty times in four plus years. I examine three cases in close detail, so as to outline a complex picture of China's strategy behind this course of activity. I conclude that there are four major factors driving this energetic policy: active participation in the WTO DSM without direct confrontation; acquisition of information and learning of legal skills; contribution to development of WTO rules in a direction suitable to China, and general increase of Chinese influence. I conclude the chapter by outlining China's own participation in the personnel of the panels, and by outlining China's contributions in the sense of proposals for the reform of the DSM in the Doha Round negotiations.

Chapter five describes China's participation in the worldwide coalition of states who formed the plaintiffs in the steel dispute with the US. The chapter explains the process whereby this dispute arose and the respective places of the US and China in the world steel industry. It then explains how this particular dispute arose against the background of crises in the US industry and also considering the impact of the US actions on the Chinese steel industry. The chapter then rehearses the full legal detail of the dispute, especially the whole issue of the use by the US of the Safeguards clause and whether this was legally justified. The chapter considers exact Chinese participation, mostly in parallel to the others in the coalition, but with special attention to the particular Chinese questions about the US failure to give it development country status in the face of its (the US) safeguards measures to restrict steel imports. The chapter affords a critical evaluation of the decision to assess whether it was taken on the best legal grounds or whether the panel and the Appellate Body were influenced by political factors. It also makes a critical evaluation of the US decision to provoke this litigation, the manner in which it conducted it, and the reasons for its final compliance with the DSM decisions. The heart of the chapter comes at the end in terms of an extensive evaluation the reasons and implications of China's participation. This represents a full application of the theory of social agent

and decision-making set out in chapter three. The conclusion is that while Chinese participation in the legal action was not surprising in the circumstances, the case does not contradict the general pattern of Chinese reluctance to be engaged in direct legal actions.

Chapter six considers the disputes between the EU, the US and China with respect to textiles in 2005, a major trade conflict which was resolved through bilateral negotiation and compromise. The chapter begins by setting out the material constraints facing China in its textile trade generally and particularly with the EU and the US. The idea behind the analysis, of what are called material constraints, is to ascertain how serious the conflict was for China and how urgent, in terms of concrete material interests, it was to find a solution, whether through political or legal means. The second part of the chapter sets out the institutional constraints imposed upon China. These are primarily international, the terms of its Accession Protocol, particularly Para.242. This limited permissible expansion of the quantity of Chinese textile exports and gave very wide rights to importers to impose trade restrictions. Again, these restrictions must have a lot of influence on the choice of dispute settlement method forced on China in this case. The chapter then engages in a description of the actual trade negotiations with the US and then the EU, to explain the relative importance of material trading interests and ideational construction of these interests by the parties in the two cases of negotiation. The chapter contrasts the two negotiations. In both cases the material interests of China were very substantial, even if the textile associations in China were not so well organised to have them effectively represented. This is a problem of the development of state and civil society in China.

Although for the US the issue of Chinese textile imports was not of itself of dramatic importance, the general US view of China and its own trade deficit with it, made the US particularly willing to use its option of a legal solution of the dispute quite firmly to produce a compromise largely in its favour. In contrast, the EU, for whom the textile imports from China are much more important, took a more holistic view of its relations with China and insisted thereby much less on what it might have regarded as its legal rights. Its compromise with China stressed more general principles of the WTO, to which China had wanted to appeal, than the strict legal rules. So, in conclusion, this chapter

offers a wealth of materials about the various ways that ideational and material factors can interact with one another in finding political or legal solutions to disputes.

Chapter One Politics, Law and Dispute Settlement: An Interdisciplinary Approach

Introduction

This chapter will explain the context in which the research question has arisen. In the immediate post-war period there was such a polarisation between law and politics that resolution of inter-state disputes through law was of marginal importance. However, since the 1960s the situation has changed and attention moved away from a world of warring national sovereigns to a picture of interdependence, a communication, process, in need of a variety of techniques to facilitate its continued functioning. The techniques may point to new legal means of dispute settlement or to a continued reliance on the exercise of diplomatic, political skills. The chapter will explore the space which IR theory then began to allow for ideational as distinct from material structures to constrain and influence states. For instance, Neo-liberal Institutionalism, complex interdependency theory and social constructivism all contributed to revisionist theoretical and methodological activity from the 1970s onwards. It is within the space secured by ideational structures that a role for international law, specifically international economic law, is guaranteed. The notion of ideational structure has to be very closely refined in order to provide adequate tools of analysis to grasp the continuing dialectic between law and politics. It is within this dialectic that a state has to make difficult choices between political and legal means of resolving its trade disputes. A choice of either/or has persisted because both law and politics are forming different parts of ideational structures. Therefore, this chapter will refine even further the permutations of ideational structures, through the work of Archer and Wendt. Drawing upon the perspectives advanced by these authors, it is possible to develop refinements of ideational structures, which will help in later chapters to understand the nature of the WTO Framework and China itself as ideational structures.

The Research Context—Setting for the Task for IR Theories

This thesis sets itself a task, which is to explain China's approach to trade disputes with other countries within the WTO Framework in a more nuanced way that gives a place both to law and politics. This is because of an enduring problem of tensions between politics and law in the search for peaceful resolutions to international trade disputes. Various international relations theories, including institutionalists and constructivists, will show that there are international structures, including such as the WTO, which seriously constrain the behaviour of states. At the same time, as we shall seek to demonstrate below, an intellectual hostility to or scepticism about international law, which followed immediately after 1945, has become more refined as lawyers themselves have modified their positions in parallel to the movement away from realism in IR theory.

For traditional International Relations Realists, international society is anarchic, with independent states engaged in a competition for power, prestige and even for their very existence. International law is basically "something of an epiphenomenona, dependent on power and therefore subject to the short-term change at the will of power applying states".[1] For instance, this is also what Waltz means when he says unequal states create their own systems of structural or systemic controls on their sovereign, anarchic powers, without a single, overall sovereign.[2] Hence, they assert, in practical terms, some states are simply more equal than others, and basically states are still only seeking to further their self-interests. So the question is, how are states constrained in their pursuit of their national interests? Law and power (politics) compete as approaches to this question. Realism's approach to enforcement is still only one of seeking to further state self-interests. For Hans Morgenthau, since it is only the victims who have the right to enforce the law against a transgressor and no one has an obligation to enforce it:

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[1] Michael Byers, *Custom, Power and the Power of Rules*, Cambridge University Press, London, 1999, p.22; see also Hans Morgenthau, *Politics Among Nations*, 2nd edition, 1954, Alfred Knopf, New York, p.249-286.

[2] Kenneth Waltz, *Theory of International Politics*, McGraw-Hill, New York, 1979, p.88-128.

> There can be no more primitive and no weaker system of law than this; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation. It makes it easy for the strong to violate the law and to enforce it, and consequently puts the rights of the weak in jeopardy.[3]

An international lawyer whose views are close to Morganthau is the international lawyer Georg Schwarzenberger. According to Schwarzenberger: "The primary function of law is to assist in maintaining the supremacy of force and the hierarchies established on the basis of power, and to give to this overriding system the respectability and sanctity law confers".[4] Law, in other words, is none other an instrument of the unceasing function of political power. Thus, dispute settlement must then be seen in terms of relative power, and not conceived just in terms of law and order. The question is whether international law is true to its principle of the sovereign equality of states or whether it is merely a product of one or a small number of hegemonies – that is, does the WTO present the consent of all states parties to it, or is it effectively imposed by a small number of states on all the others. This is the most critical question to be explored through the WTO and the Dispute Settlement Mechanism (DSM) in analysing the relationship of law and power in international economic relations. In other words, we are also interested in the political question of whose interests does the system serve?

A view close to Schwarzenberger is that the WTO serves only the interests of a small number of great economic Powers; especially the EU and the US.[5] So Alter points out how agriculture and light industrial products are not really included in the trade liberalisation rules, while intellectual property and services are. This scope of the WTO suits the West. It then enforces rules on trade dumping and countervailing duties to suit the West and so the DSM can be seen, in Schwarzenberger's terms, as a coercive framework to suit the interests of the West.

So the present study situates itself within well known developments in international relations theory since 1945 which modify the Morganthau – Schwarzenberger belief

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[3] Morgenthau, *op.cit.*, pp.279-281.
[4] See Georg Schwarzenberger, *Power Politics*, 3rd edition, 1964, Stevens, London, p.199.
[5] See Karen Alter, *The WTO DSU Exacerbating Conflicts? International Affairs*, Vol. 79(4), 2003, pp.783-800.

that international legal norms could not constrain the material power of states, which would act independently in what they conceived to be their national interest. The Classical Realist of Morganthau and Schwartzenberger approaches could accept that states were not simply material entities, determined entirely in their behaviour by their material power, but whatever ideational or ideological goals they set themselves would still be subjectively defined by each state, and not a product of genuine communication or negotiation among powers. Political Realism and a Power Politics approach to law marked a huge reaction to the legalism of international lawyers in the inter war period, following E.H. Carr. Their view of legalism was that lawyers had the naïve view that once standards of behaviour were formally enshrined in treaties, the treaties, of themselves as legal instruments, would impede the abuse of material power. These advocates of Political Realism argued that, because the 1930s dictators were not so constrained, there was either no place for legal rules or they treated them as purely an expression of a dominant Power. As we shall show, this disciplinary development has had a lasting and continuing effect on the way international relations continue to be studied, in separate compartments of law and politics.[6]

First significant modifications of the stark opposition of political realism and purely descriptive legal analysis of world society came with functionalism and behaviouralism in the 1950s and 1960s. These schools of thought supposed disputes among states at least in the area of economic interest, could have a technical character attributable not to fundamental clashes of values and interests but more to a failure of communication; i.e. a lack of essential and relevant information. While this theory began to apply in purely economic areas it came to be applied to across the whole range of international relations issues by the 1960s. However, it has always to be remembered, that until the present these modifications of International Relations theory have not permeated as far as international legal studies, not until the work of Abbott and Slaughter with Keohane, have the two disciplines been coming together.[7]

For this reason, the originality of the following study is to afford a new approach to the relationship between international politics and international law in the area of

[6] See E.H. Carr, *Twenty Years Crisis, 1931-1939, Introduction to the Study of International Relations*, esp. Chapters 10-12, and Michael Cox's 'Introduction', Palgrave, Basingstoke, 1981 and 2001.

economic relations, which does not resort to the purely descriptive techniques of law and does not adopt a Political Realism that is completely dismissive of the reality of norms. The way this study will be undertaken is to build a bridge between the International Relations theories of social constructivism and neo-liberal institutionalism to ground the WTO Framework as a reality which forms a significant if not an automatically applicable normative context for China's approaches to its intergovernmental trade disputes. However, before we do this we will show how these IR theories were, to some extent, foreshadowed in behaviouralism, and also we will show that modifications in legal theory, especially about dispute settlement, make law more amenable to these developments in IR theory.

The political scientists Northedge and Donelan explain how the classical distinction between Realist and Idealist interpretations of international society will also inevitably shape perspectives on the likelihood and character of disputes among states.[8] Classical Political Realists regard international strife as an ever-present possibility. On the other hand Idealists such as Norman Angell or law-based scholars such as Grotius consider conflict as undesirable and believe it can be eliminated by appropriate social and political and legal arrangements. For the former it is inevitable that states will make competing, rival claims, which will clash with one another. For a conservative such as Heraclitus "all things come into being and pass away through strife".[9]

The triumph of the idea of the sovereign state in early modernity institutionalised the element of subjectivity in answering such questions and the rise of nationalism in the 19th Century appeared to make definitive the incommensurability of values in international society.[10] Incommensurability means that there is no agreed common standard to evaluate different subjectively held claims. There were two specific elements to this. A Machievellian tradition supposed that since states depended upon

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[7] Robert Keohane, *Power and Governance in A Partially Globalized World*, Routledge, London, 2002, pp.12-13.
[8] F.S. Northedge and M.D. Donelan, *International Disputes, the Political Aspects*, Europa Publications: London, 1971, p.12. The authors are going back as far as the Ancient Greeks, such as Plato and Aristotle neither of whom regarded conflict between the city states of their day as part of nature.
[9] *ibid.* The assumption is that without such conflict there would be stagnation and no dynamism or progress in societies.
[10] *Ibid.*, pp.12-14.

themselves for their safety they alone should decide what this safety required. Also the idea of medieval natural law as the basis of morality was replaced by the ideal of the nation-state, a distinctly individual, unrelated entity, not necessarily part of any wider community.[11] In the decade before the First World War, the tendency of states to use economic power to support military power, and to struggle for markets and colonies subordinated economic to national military ambitions. In the inter-war period the tying of economic nationalism to military power became even more pronounced. However, a fascinating paradox is that the post 1945 situation was marked by a significant change of perspective, which led to an explicit attempt to separate the political from the economic in international relations. It will remain a question mark throughout the thesis whether this assumption applies safely to China. In particular the US appears to question whether China's rapid increase of economic power through trade may be diverted into increasing its military and political power.[12]

What Northedge and Donelan call "A New Age of Realism"[13], was a tendency, in the political sphere to think again about what might be an excessive realism, projecting onto the other side even more hostile intentions than it actually had. Instead, with the coming of the Bretton Woods System, a huge effort was made both at the European and international level, to implement institutionally the 19th century liberal belief in the peace producing effects of free trade. The turn away from state mercantilist nationalist economics would encourage peaceful relations of individuals across national boundaries. GATT and its successor, the WTO, would evolve in this environment. Disputes would then have, almost by their nature, a virtually technical character in which there would be no conflict of fundamental values between supposedly sovereign nation states. They would all agree on the common values of free trade in a sphere from which the state sought to withdraw.

In the 1960s, optimism about dispute settlement in economic and social relations gave rise to the elaboration of behaviouralist theories of functionalism as applying not just

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[11] *ibid.*, p.14.
[12] This is a consideration which appears in intense bilateral negotiations between the US and China, see especially chapter 6 below. Also see U.S. Deputy Secretary of State Robert Zoellick's Policy Address on U.S.-China Relations, 21 September, 2005, 'Whither China: From Membership to Responsibility? Remarks to National Committee on U.S.-China Relations', available at: http://www.state.gov/s/d/rem/53682.htm, visited on 08/11/2005.
[13] Northedge and Donelan, *op.cit.*, p.21 et seq.

to trading relations within the "free world", but to the whole of international relations. In quasi-economic terms (precursors of rational choice theory)[14] one could say that conflicts are mainly the result of poor communication between the parties, i.e. a lack of essential and relevant information. The future would lie with functional cooperation, i.e. international civil society could avoid obsession with power and prestige. Communication theory would assume that conflict is always dysfunctional "in so far as it is a symptom of some disarrangement of or interruption in the communication flows which are constantly at work in the international system".[15] Feedback processes and regular communication networks could overcome these deficiencies. Clearly conflict management is preferable to complete breakdown, and scientific understanding of the vulnerabilities of communication breakdowns could assure that they did not happen.

In this perspective, this is a matter of regulating the quality of communication among states. An internationally agreed framework may assist in ironing out stereotyping, projections and other forms of mind closure[16] and they can fit well with the rational economic man model of social organisation. The whole societal framework provides huge optimism for the manageability of international economic disputes. Northedge and Donelan do not, throughout their argument, relate this idea particularly to economic relations. However, they stress that there is a self-fulfilling side to the liberal democratic optimism that conflicts are not fundamental and will pass away. Behaviouralists are aware that the nature of a "self-fulfilling prophecy" is that "if you create a gulf of irreconcilable hostility between yourself and your rival, he is as likely as not to take your view of the situation at its face value and to react by becoming precisely the kind of person you falsely assumed he was".[17]

It is possible to project Northedge and Donelan's argument onto international economic negotiations, and to say that an optimistic desire to remove the state from international trade and hence to remove states from economic disputes, while not always nor yet completely successful, is bound to prevail, because of the asserted widespread desire of states to make it happen. Classical economics, of course, asserts

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[14] *ibid.*, p.23 et seq.
[15] *ibid.*, p.26.
[16] *ibid.*, pp.28-29.

a mutuality of interest through economic exchange. In Political Realism, instead of wishing conflict on one another by imagining the worst of one another, they have all such a mutual interest in achieving the goal of free trade by removing barriers to one another.

At the same time it is possible to point to changing approaches to the role of law in conflict resolution among states. Under George W. Bush, the US has asserted hegemonic responsibility through the 2002 Doctrine of Preemption (National Security Strategy). International economic lawyer Ari Afilalo has argued against the US behaving with the same unilateralism in international economic relations as in political relations, because the US needs the support of agreed rules as much as weaker states.[18] In the context of the US steel dispute in the WTO, he argues that the US must observe the rules of the WTO and avoid the type of unilateralist action it is undertaking in the context of the UN. He refers to and disagrees with the arguments of Robert Kagan in *Power and Weakness*[19] that the US can rely on force even if the EU relies on rules. To be part of an integrated world economy, the US needs to accept that universally applicable rules of trade law are necessary if it is to have a stable basis for its own trade. Imposing its own views on steel, agriculture and environmental protection unilaterally are attempts to behave as hegemony outside the law. Indeed this behaviour of the US shows that the law of the WTO must be more than an expression of US hegemonic interest.[20] Otherwise the US would so often come in conflict with it and perhaps even try to disregard it.[21]

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[17] *ibid.*, p.31
[18] See Ari Afilalo, Not in my Backyard: Power and Protectionism in US Trade Policy, *Journal of International Law and Politics*, Vol. 34 (1), 2002, pp.749-796.
[19] Robert Kagan, Power and Weakness, *Policy Review*, No.113, June-July 2002, pp.3-28.
[20] See Afilalo, *loc.cit.*
[21] See below especially Chapter 5.

So some lawyers have also been actively engaged in defending the 'relevance' of international law against Realist International Relations scholars and other sceptics. Slaughter Burley has commented:

> If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behaviour must afford a foundation and framework for legal efforts to regulate that behaviour...From the political science side, if law — whether international, transnational or purely domestic — does push the behaviour of States toward outcomes other than those predicted by power and the pursuit of national interest, then political scientists must revise their models to take account of legal variables.[22]

Indeed it is possible to see in the new "law as process school of jurisprudence" obvious parallels to the Behaviouralism of Northledge and Donelan. In an exhaustive account of this school Alberstein explains that it also came to the fore in the post-World War II era. Underlying the Legal Process notion of Law and the World, were positivism, naturalism, institutionalism and an evolutionary view of society[23]. Alberstein goes particularly to say:

> Within this image, the operation of law is captured through the pragmatic notions of reasoned elaboration, institutional settlement and the "Grand Pyramid" of legal norms. The purposive quality of human interaction in general, and law in particular, as the fundamental condition is constructed through the (Legal Teaching) Materials, helping to organize the above pragmatic notions as evading or overcoming the old dichotomies (is-ought, fact-value, reason-force, integrative- distributive)...[24]
> Fourth, the political climate of the post-war era produced an optimistic horizon of "institutional settlement" for each value judgement by promoting the process approach as overcoming the grand public questions through the singularity of the dispute...[25]

Sato, the East Asian (Japanese) commercial lawyer applies the "Legal Process school" approach specifically to the area of economic and commercial dispute settlement. Sato recognizes that the theoretical approach associated with "the process school" starts from the fundamental grounding experience that a dispute does not have to be solved with the intervention of a coercive state apparatus in the foreground — the absence of

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[22] Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, *American Journal of International Law*, Vol. 87 (205), 1993, pp.206-239.
[23] Michael Alberstein, *Pragmatism and Law: From Philosophy to Dispute Resolution*, Ashgate, Dartmouth, 2002, pp.100-101.
[24] *ibid.*, p.101.

which is supposed by theorists such as Morganthau and Schwarenberger to be the basic weakness of international law. A dispute is a social relationship, which emerges when a person with a grievance makes a claim against another person who is supposed to be responsible for it. In other words schools of jurisprudence, such as American Legal Realism, are aware that there is more to law than enforcement of state ordinances. In particular Llewellyn's law-job theory is premised on the assumption that the law is not monopolised by the institution of law-government.[26] The concept of law-government means that a compelling state authority decides everything, rather than being merely a shadow in the background. This perspective means that there is a continuing clear interest in dispute processing which is linked both to the autonomy of the parties and to the concrete and specific nature of their relations with one another.[27]

Hence it is not surprising that there should be a convergence and inter-changeability between the so-called political and legal means of resolving disputes. A clear distinction between law and political processes might argue that, traditionally, the former would involve a hierarchical structure of authority rather than a co-ordinate authority. The former is similar to a bureaucratic state apparatus run by professionals under a hierarchical order making most decisions according to precisely defined standards.[28] This is what is probably meant if one talks of legalisation of trade disputes, where the WTO is taken to resemble such a state apparatus. The procedure of WTO investigation would be equally from the top down, inquisitorial, rather than adversarial and marked by extensive lay participation. Facts will be processed for the applicability of laws and a judge and a lawyer are interested only in special facts, which address a point of law. Emotional issues and consideration of the relationship of the parties would be most often disregarded.[29] In sociological terms, what makes such a legal world possible is the fact that a legal judgement of a court "must be psychologically respected by the people as a symbol of irresistible authority, replacing

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[25] *ibid.*, p.102.
[26] Yasunobu Sato, *Commercial Dispute Processing: Japanese Experience and Future*, Kluwer Law International, The Hague, 2001, p.12, p.13, p.15, p.20. This work concerns private individuals in economic transactions, but it will be seen as the argument develops that it is applicable to the non-hierarchical relations among states.
[27] *ibid.*, p.13.
[28] *ibid.*, p.21.
[29] *ibid.*, p.21 and p.27.

an oracle from a god or an order by a federal lord, so that the disputing parties can be persuaded by it and accept it"[30]

According to Sato, this is increasingly an alien way of seeing the world for post-modern society, because people are being liberated from a psychological bondage of loyalty to authority and are becoming masters of their law. For Sato, the disputing parties are decisive elements in the choice of an appropriate dispute processing approach, legal or non-legal. Contrary to some superficial modern social theory, Sato believes, people are not totally individualistic, independent from various human relationships and ties. Just as Northedge and Donelan have stressed, international relations are not fatally marked by the hostility of state actors in relation to one another, just because there is no world state to look over them, at the internal level, individuals are not totally dependent upon the state to see them through their disputes. Autonomy of the parties is increasingly a first principle of legal dispute settlement.[31] These two factors, autonomy vertically towards the state, and inter-connectedness or interdependence, both shape the choice of means of settling disputes and lead to an apparent mixing of legal and political means.

This autonomy has given rise to the whole range of informal dispute settlement procedures that come under the rubric of Alternative Dispute Resolution. Within the context of legal dispute settlement, people are, on a hugely significant scale, resorting to a range of dispute settlement mechanisms that are characterised as legal but are in fact difficult to distinguish from political methods. These include negotiation, conciliation and mediation. As Sato explains, litigation is still a last resort. All of these more or less informal methods of dispute resolution occur "in the shadow of the court". As Sato puts it: "In other words, the law would be referred to as an authority for persuasion even in the course of non-legal dispute processing, such as negotiation or mediation/conciliation, unless there are other norms, standards or criteria to be shared between the parties."[32]

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[30] *ibid.*, p.28.
[31] *ibid.*, p.29.
[32] *ibid.*, p.32.

Underlying this whole informal approach is a conviction similar to that detected by Northedge and Donelan in relation to behaviouralist studies since the 1960s. Disputes in an essentially horizontal framework are going to be, in large measure, attributable to breakdowns in communication. The ambition will be to manage them so that there is not an irreparable break in the relations of the parties. It is most relevant for this thesis that Sato shows the importance of such considerations especially in the area of commercial disputes. Relationships in the business world, just as much in domestic or family groups, have been seldom brought to court. Sato quotes Macaulay that disputes in the commercial sector are frequently settled without reference to the contract or potential legal sanctions. Indeed parties will negotiate where a problem arises "apparently as if there had never been any original contract". [33]

The crucial question is whether the relationship itself is to be maintained. Sato says that merchants will not claim rights under a contract where this would jeopardize maintaining a business relationship: "Even in a contractual society, the human relationship is still a decisive element in dispute processing, since it often provides effective pressure as practical redress as long as the parties maintain the relationship".[34]

This type of analysis, being offered by a theorist of commercial law, is focussing on the area of international commercial transactions, covered by the historically respected *lex mercatoria*[35]. It is very close to the world of international trade covered by the WTO, which is particularly concerned to restore trade to an unfettered commercial world. So, one would surely expect there to be a great affinity in the perspectives on the breakdown of economic relations among states giving rise to disputes. These are, in any case, disputes between private parties about the alleged interference of their respective states in private commercial transactions. They only become inter-state disputes when states take them up. Therefore Sato's conclusions have inter-state relevance. He considers, in the same terms as the behaviouralists that everything boils down to management of effective channels of communication. Sato says that it is not possible to discuss dispute settlement without *understanding human*

[33] *ibid.*, pp.29-30.
[34] *ibid.*, p.30.

personalities, relationships, communities and societies, as well as underlying cultures, traditions and histories.[36]

Against this background it is interesting to see that, when it comes to making a classification of dispute settlement methods, some lawyers classify certain methods as political, which others regard as legal, although that is in the context of alternative dispute resolution (ADR). For instance, Anne Peters describes as political means of resolving disputes, negotiation, fact-finding, mediation, good offices and conciliation, while legal means cover arbitration, whether state-state, mixed (state and foreign company) and international adjudication.[37] These are rubrics, which Sato has already described as coming under ADR. In apparent contrast, Petersmann,[38] sets out a table or taxonomy for ADR in international law, including all of the methods outlined by both Sato and Peters.

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[35] This Latin term covers the law which, since the Middle Ages merchants have devised for themselves, as a self-regulatory regime for their international transactions.
[36] *ibid.*, p.35.
[37] Anne Peters, 'International Dispute Settlement: A Network of Co-operational Duties', European *Journal of International Law*, Vol.14 (1), 2003, pp.4-8.
[38] Ernst-Ulrich Petersmann and Mark A. Pollack (eds), *Transatlantic Economic Disputes — The EU, the US, and the WTO*, Oxford University Press, London, 2003.

Table 1: Alternative Dispute Resolution under International Law

Political methods *(Characteristics: flexibility of procedures, control by the parties, freedom to accept or reject proposed settlements, avoidance of 'winner-loser' situations, political and legal considerations)*	**Legal methods** *(Characteristics: rule-oriented legally binding decisions by independent judges based on previously agreed procedures and substantive rules of law that reflect the long-term interests of the parties)*
Negotiation/Consultation: voluntary or obligatory, ad hoc or institutionalized, bilateral or multilateral principal means of preventing/settling disputes peacefully by agreed solutions among the parties to the dispute (the negotiators retain control over their disputes; success depends on the belief by both parties that the benefits of an agreement outweigh their losses; prior negotiation is not a general prerequisite of adjudication by the ICJ; risk of positional power-oriented rather than principled, rule-oriented bargaining) **Good Offices**: intervention by a third party in a dispute so as to encourage and assist the disputants to negotiate (e.g., by offering them technical facilities and additional channels of communication) **Mediation**: active non-binding proposals by a third party, with the consent of the disputants which retain control of the dispute **Inquiry**: ascertainment of disputed facts by a third party (e.g., a fact-finding commission) so as to provide the disputants with an objective assessment **Conciliation**: ascertainment of facts and examination of the claims by independent third parties on a formal legal and institutionalized basis so as to submit non-binding proposals for a settlement	**International Adjudication**: submission of a dispute to a standing international tribunal for judicial settlement based on the procedures and applicable substantive international law specified in the tribunal's statute **Public International Arbitration**: submission of a dispute to a ad hoc arbitrators appointed by the parties for judicial settlement based on the procedures and applicable substantive international law agreed among the parties to the dispute **Mixed International Arbitration**: submission of a dispute between a private party (e.g., a foreign investor) and a state party to international arbitration (e.g., based on the 1965 Convention on the International Centre for Investment Disputes) **Private International Arbitration**: submission of a dispute between private parties over their compliance with international treaty rules (e.g., in the 1994 WTO Agreement on Preshipment Inspection) to a private international arbitration procedure provided for in the international treaty **Judicial Settlement By Domestic Courts**: submission of a dispute between a private party and a government over compliance with international law rules to a standing domestic tribunal

Source: Ernst-Ulrich Petersmann, in "Transatlantic Economic Disputes—The EU, the US, and the WTO", p.15.

As we can see, Petersmann does not attempt to provide a wider theoretical grounding of the different approaches as Sato has done. So, that is what may appear to make it surprising that Petersmann reintroduces the same distinction as Peters between legal and political means of resolving international trade disputes in the context of the WTO. So Petersmann describes the methods, which do not directly depend upon the institutional context, i.e. the distinction between the vertical and horizontal character of relationships of authority. These are what he calls political methods, characterised as: flexibility of procedures, control by the parties, freedom to accept or reject proposed settlements, avoidance of "winner-loser" situations, political and legal considerations. Legal methods are characteristically: rule oriented legally binding decisions by independent judges based on previously agreed procedures and substantive rules of law that reflect the long-term interests of the parties.[39]

By putting all of these, both political and legal methods, under the rubric of ADR Petersmann is undoubtedly recognising that they are in a dynamic relationship with one another. The wide range of trade disputes among states will occur, in the colourful language of Sato, under "the shadow of the court". That is, where communication breaks down in the world of trade diplomacy then there are all the factors coming into play that usually concern commercial relations. Continuation of the relations is very important, understanding communication problems of the parties is essential. Hence, before the very severe final remedy of compulsory adjudication comes into play, negotiation, fact finding and mediation/conciliation are bound to play a role.

So under what kind of circumstances will legal or political methods actually be applied? In other words, not merely what are the alternative ways to settle the disputes, but when will they actually be chosen? Scholars have diverse perspectives on this issue. However, for this thesis it is obviously of particular interest to consider the views of a Chinese legal sociologist. In his book,[40] the Chinese scholar Zhu Jingwen summarised several factors underlying, influencing and determining the choices, which could be made. It is possible to enumerate them in five parts in the

[39] *Ibid.*, p.14.
[40] Zhu Jingwen, *Framework and Methodology of Comparative Sociology of Law*, Chinese People University Press, Beijing, 2001, pp.434-442.

sense of recurring contexts, which are discussed from a behavioural perspective, i.e. to say, in scientifically observing the recurring situations:

(a) Simple Relations and Multiple Relations: According to Zhu, the relationship between people can be divided into two types, simple and multiple relationships. "Generally speaking, it would not be wise to use legal methods in multiple relationships. This is because it involves too many criss-crossing relationships, and in the end one just gets into more trouble".[41] While this is very important, especially for multilateral trading relations, there is a weakness in this theory, because many disputes have been solved through litigation even among people who are in complicated relationships with each other and with other people. Nonetheless, the general principle against litigation in multiple relations still has some applicability.

(b) Core Relations and Marginal Relations: People choose what kind of methods to settle their disputes depending on the importance of the relationship between the disputants. "With marginal relations, litigation is more likely to occur, because there will not be a continuing relationship that will be damaged. If the relationship is deep of or great strategic importance the parties will be much more careful about a dispute settlement procedure in which the winner takes all".[42]

(c) The degree of development of the society: With a high degree of modernization, more and more people choose litigation to resolve their disputes. This is sometimes called the growth of legalisation. "It is a little imprecise because there is more and more recognised to be a public interest in having certain matters regulated, but this does not compel, as the first means of dispute settlement, immediate recourse to litigation".[43] Negotiations can still effectively occur in what has been called already by Sato, "the shadow of the court". So, our Chinese author recognises that this theory is too simple, as mediation and other non-legal means still play an important role in resolving disputes.

(d) Culture: From a cultural perspective it is thought important to see, in certain parts of the world, e.g. a so-called Confucian space, why some people prefer litigation and some people prefer non-litigious means of dispute settlement. A popular

[41] *ibid.*, p.434.
[42] *ibid.*, p.438.
[43] *ibid.*, p.436.

explanation is that Eastern people put an emphasis on harmony, and thus dislike litigation. However, this purely cultural explanation is not without problems, because the idea of alternative dispute resolution, that is including non-litigious ways of resolving disputes, is increasingly popular around the world. Nonetheless, alternative dispute resolution does still occur "in the shadow of the court", so it is important to be able to make fine distinctions.

(e) Interests: That is to say, people do make a choice in the rational choice sense that they decide which method is most likely to bring them a definite profit or advantage that they can measure in advance.[44]

This first section has explained the context in which the research question has arisen. It has shown that in the post-war period, from the mid 1940s until the mid 1960s there was a huge polarisation between law and politics in international relations, which made any discussion of how a state would have to choose between political and legal methods of resolving any dispute superfluous. Resolution of inter-state disputes through law would be very occasional and of marginal importance. However, since the 1960s the situation has changed and a mixture of behavioralism in IR theory and "law as process" in legal theory has moved attention away from the absence of a world sovereign state to arbitrate warring national sovereigns to a picture of international society as interdependent and continually engaged in a negotiation, or communication, process which is in need of a variety of techniques to facilitate its continued functioning. It is realised that these techniques may sometimes point in the direction of new theories of legal process and sometimes to a continued reliance on the exercise of diplomatic, political skills. We have seen from the Chinese scholar Zhu Jingwen just how complex the choice might be technically. The section of the chapter which follows will explore in much greater detail the space which IR theory has been willing to allow for ideational as distinct from material structures binding states, showing how first steps were made by neo-liberal institutionalism and then the place for ideational structures became full-blown with social constructivism. It is within the space secured by ideational structures that a role for international law, specifically international economic law, is guaranteed. At the same time the notion of ideational structure has to be very closely refined in order to provide adequate tools of

[44] *ibid.*, pp.439-442.

analysis to grasp the continuing dialectic between law and politics. That is why the third and fourth sections of the chapter will refine even further the permutations of ideational structures.

The Relationship of Neo-liberal Institutionalism to Social Constructivism and its Relevance to the Thesis

The function of theory is to provide an analytical framework to analyse the data on China's decision to join the WTO, with its compulsory DSM, and to explain the history of China's behaviour since becoming a member. It wants to explain the why and how of China's participation in the WTO, and particularly the thesis puts its focus on the WTO Framework as a background for China's management of its intergovernmental trade disputes. Does China really accept the WTO Framework in practice, and if so to what extent? Why does it in some cases use the compulsory DSM and in other cases avoid it and compromise with trading rivals? Evaluating qualitatively the different elements, which help to explain why China resorts to what are described as political and legal methods of resolving disputes is the principal aim of the thesis and it is this which theory has to help us to explain.

This is why theory has to explore the different dimensions of what we will call the social facts and institutional reality – to use the language of both neo-liberal institutionalism and a social constructivism – within which China has to operate. If China itself is an evolving social fact, so also is the international framework for trade, which is the WTO. At the same time both are institutional realities.

The framework within which Chinese activity is to be analysed can also be set out in terms of a catalogue of elements for analysis. With such a catalogue of elements of recurring behavioural situations, it is intended later in the thesis to give an account of how choices will be made between legal and political methods. If one applies this to the reality of China's international trade dispute settlement, one could draw out some paradigms to explain recurring behaviour: there are external constraints and internal constraints. In terms of external constraints, there are mainly four factors:

(a)The rules of conduct provided in the codes and statute of the WTO;

(b) The legalization of the DSM, i.e. the settlement will always be, as it were, "in the shadow of the court".
(c) The relationships between the states, from their political and diplomatic and not merely economic aspect;
(d) The evolving international structures of material economic relations.

In terms of internal constraints or influencing factors, there are mainly five to be noted:

(a) Culture of dispute settlement, e.g. the attitude to methods of dispute settlement;
(b) The structural problems between the government and industry, the extent to which the government is willing to encourage and support industry in relying on rights under the WTO or in compelling it to observe duties under the WTO; otherwise, this could be described as government-civil society relations;
(c) The human resource, meaning the extent to which the talent exists to undertake WTO style negotiations and litigation;
(d) Policy agenda, being the government's foreign trade aims and strategy;
(e) Linked to the former are the evolving imperatives and constraints of China's economic and technological development

IR theory will now have to explore the different dimensions of what the neo-liberal institutionalists call the institutional reality and social constructivists call the social facts -- to use the language of both neo-liberal institutionalism and a social constructivism – within which China has to operate. These dimensions are significant both at the domestic and the international level, within and outside China's geographical boundaries. At the international level, the constraints are most clearly institutional, the WTO itself above all. However, the solidity or rigidity of the institution will also need to be understood in terms of social fact. The Chinese freedom of manoeuvre, that can be called its capacity as Agency/Actor does not necessarily mean simply what is left over after the international constraints are explained. There are domestic constraints of both institutional and of social fact, the product of hardened and settled national collective intentionalities (the goals which China sets itself, its policy agenda) that also pre-set the context in which China will

act. The remaining spontaneity of action is difficult to explain but what theory has, most of all, to do – and this will be the vital strength of social constructivism as against neo-liberal institutionalism – is to explain how social facts change, that is to say how collective intentionalities can evolve and change.

It is intended to explain these IR theories in detail, through a series of building blocks, which reflect the way they have taken up into the discipline, starting with neo-liberal institutionalism and moving on to social constructivism and the evolution of the idea of social fact. So one will begin with the work of Keohane, follow by using Ruggie as a bridge to social constructivism and that will lead on to the next two sections, which provide a social constructivist development of neo-institutionalism.

It has already been said that the confidence of the functionalist — Behaviouralist approach was rooted in the turn to multilateralism in international economic relations, after the bitter economic nationalism of the 1930s, i.e. the new Bretton Woods System, of which the GATT, the precursor of the WTO, was an essential part. The fact of this development and the accompanying theories gave rise to a crucial school of a new Institutionalist approach to International Relations, which remained very close to the utilitarian interests of law and economics approaches. States could see the utility of having predictable rules to govern their relations, particularly in the area of trade, but also over the whole range of international relations. This would reduce the transaction costs of how to take into account the likely behaviour of other states, especially in the context of increasingly complex interactions of multilateral relations. Agreed procedures for coping with these relations have been characterised by Keohane, as networked minimalism. That is, one recognises the necessity of a measure of global integration but the new Institutionalist insists, at the same time, on the state remaining largely intact and removed from external pressure, compromising in relation to such pressure only in so far as clearly defined, utility interest requires it. Nonetheless this approach does recognise the need to respond to what, Keohane and Nye called complex interdependence, a concept which is an ideal type for analysing situations of multiple transnational issues and contexts in which force is not a useful instrument of policy.[45]

[45] Keohane, *op.cit.*, p.2.

Keohane explains very usefully three ideas, firstly the relationship of his approach with Classical Political Realism. At the same time, secondly, he shows himself how his own Institutionalist approach can dovetail into constructivist approaches. Thirdly, he makes the connection with law. He asserts that Realism and Institutionalism have strong concepts of actors/agents, but the former is too crude on process, not being able to explain the detail of decision-making, for which one needs the elements of domestic politics and a role for ideas and beliefs. Keohane has in mind fundamental ideologies such as National Socialism, Communism, and Liberalism, particularly "sophisticated Liberalism".[46] The latter means a combination of commercial liberalism (methodological individualism, rational choice activity directed to consumption of material goods) and republican liberalism (with the emphasis on political self-determination and democracy). Liberalism accepts that interdependence between independent political communities can potentially produce discord, and it is this, which makes for the utility of institutions to reduce market failure and its transaction costs. Liberalism also recognises that the institutions can become oppressive where they are overly restrictive either of commercial or republican liberal freedoms.

At the same time Keohane makes the connection with law, indeed, he quotes Slaughter that political scientists speak legal prose without recognising it. In so far as institutions are inherited patterns of rules and relationships,[47] they are the same thing as what lawyers accept constitutes law. Legalised institutions impose precise obligations interpreted by third parties, thereby imposing particularly strong constraints. The political scientists' curiosity about the "puzzle of compliance" is left behind, in favour of what Goldstein calls the fear of legalism,[48] that the legal regime will become too inflexible to consider adequately legitimate political concerns, whether at the level of domestic politics or in terms of the situational complexities of international networks.

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[46] *ibid.*, p.10.
[47] *ibid.*, pp.12-13.
[48] Judith Goldstein and Lisa Martin, 'Legalization, Trade Liberalization and Domestic Politics' *International Organization* Vol. 54 (3), 2000, pp.603-632.

Keohane, having recognised that Realism ignores the role of ideas in International Relations, also accepts[49] that Constructivist theory offers promise in understanding how ideas matter. However, it is not his approach. He remains with a relatively hard notion of the role the state, as a subject, actor, not dissolving it into an epistemic community, a cultural complex. Yet Keohane does accept that concern with process in international relations does mean one has to break down the elements, which make up the place of ideas, in the sense of beliefs held, or culture. Here Ruggie helps to clarify the issues.

Ruggie identifies Keohane as a Neo-Realist and Neo-Institutionalist, who understands that the structure of anarchy in international relations can be partially overcome through regimes that reduce transaction costs and produce reliable information about one another's intentions, overcoming problems of credible commitments, monitoring and enforcement,[50] but like realists neo-liberal institutionalists are stipulating the identity and interests of states as given. Neoliberalism is merely committed to resolving the problems of market failures at the global level. However, they are also interested in exploring why agreement still fails, even where interests appear to be common, a new version of the concern of behaviouralists.[51]

This leads on to concern about cognitive factors, as inter-subjective understandings affect behaviour. Social facts exist where all relevant actors agree that they do. They are still subjective, in that their existence depends upon being subjectively experienced. Social constructivism "concerns itself with the nature, origin, and functioning of social facts, and what if any specific methodological requirements their study may entail."[52] This is to introduce the fundamental element of culture, its origins and its significance in the process of international relations.

Ruggie identifies precisely the relationship of the cognitive and culture to utilitarian notions of interest when he says that: "neo-utilitarianism has no analytical means for dealing with the fact that specific identities of specific states shape their perceived

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[49] *ibid.*, p.7.
[50] John Gerard Ruggie, *Constructing the World Polity: Essays On International Institutionalization*, Routledge , London, 2000, p.8.
[51] *ibid.*, p.9.
[52] *ibid.*, pp.12-13.

interests and, thereby, patterns of international outcomes."[53] This is not to say simply that states hold world views, such as liberalism or democracy, but that empirical work into what are called epistemic communities (transnational networks of knowledge based experts), particularly in international negotiations, whether economic, environmental or arms negotiations, will show that "learning progressively means more than merely adapting to constraints..." It involves "the process whereby actors change not only how they deal with particular policy problems but also their very concept of problem-solving".[54] Ruggie argues that Utilitarian misspecify certain types of ideas, that they are simply beliefs held by individuals.[55] Social constructivists recognise that beliefs are inter-subjective, social facts, resting on collective intentionality, supposing " a conception of actors who are not only strategically but also discursively competent".[56]

In other words, neo-liberal institutionalism can explain nothing that "is constitutive of the very possibility of conducting international relations: not territorial states, not systems of states, not any concrete international order..."[57] Yet what is needed is a transformational structure which can explain how what is constitutive of international society can change and evolve. One has to find a way to explain how international structures – including the classical anarchy of states — are "the aggregation of specific social practices that are situated in time and space; to specify what the characteristic forms of these social practices are; and to discern how they may become susceptible to change".[58]

The core ideas of social constructivism are that identities are generated by international interaction producing not merely states as states, but also specific states, such "as in America's sense of difference from the old world or from godless communism".[59] A central feature of the concept of social fact, following Durkheim is not merely that beliefs are inter-subjectively held, that there is a collective intentionality, but also that the beliefs so held (the social practices, institutions) are

[53] *ibid.*, p.14.
[54] *ibid.*, p.20.
[55] *ibid.*, p.20; also see Keohane, *op.cit.*, p.3.
[56] Ruggie, *op.cit.*, p.21.
[57] *ibid.*, p.23.
[58] *ibid.*, p.26.
[59] *ibid.*, p.33.

held continuously, independently of the actual individuals in the society at a particular time. There is continuity of identity in time as well as space, although it is contingent, and the whole aim of social constructivism is to understand how such collective intentionalities come into existence and then also vanish. So these building blocks of international reality are ideational as well as material. At both the domestic level and the level of the international polity "the concept of structure…is suffused with ideational factors …ranging from culture and ideology, to aspirations and principled beliefs, onto cause/effect knowledge of specific policy problems".[60]

The relationship with law, and so international economic law, has also to be treated specifically. Ruggie explains that collective intentionality has a deontic function within the system of states "that is, it creates new rights and responsibilities".[61] Collective intentionalities become precise about such questions as whether humanitarian intervention is permissible without endorsement of international organisations, or whether human rights attach to everyone "solely by virtue of being a human being".[62] It is vital to recognise that "…collective intentionality includes an interpretative function – as in the case of international regimes, which limit strictly interest-based self-interpretation of appropriate behaviour by their members. " It includes "a deontic function- creating rights and responsibilities in a manner that is not simply determined by the material interests of the dominant powers".[63] So international society has a social structure "made up of socially knowledgeable and competent actors who are subject to constraints that are partially material, in part instititutional".[64]

In other words international law is a particular form of socially constructed reality, where, as Keohane also says, norms and concepts have acquired a rather precise meaning, third party interpretation of the concepts looms, at least in the background, and the possibility of sanction is present. The logic of neo-liberal institutionalism explains both the rationality of the existence of international economic regimes in terms of overcoming the market deficiencies of a completely unregulated international

[60] *ibid.*, p.33.
[61] *ibid.*, p.21.
[62] ibid., p.21.
[63] *ibid.*, p.34.
[64] *ibid.*, p.34.

economic world, and also the credibility of the compliance with such norms of law. So also social constructivism goes further and explains the dynamic process whereby such regimes come into existence, how they evolve and the full extent of their vulnerability, not merely in terms of their failure to accommodate material interests but also in terms of their congruence with vital ideational factors that constitute the identity also of the actors relating to and interacting with the international structures represented by the law.

So the research of the thesis focuses also on intentions, aims and ideals or ideology, which inspire new actions, and not merely empirically identifying causal elements, which explain and predetermine behaviour. China is identified as an already given entity by neo-Realism or Neo-Liberalism, but social constructivism also sees the country as a continually evolving social fact. For instance, China has a particular political culture that fully adopts free trade values for the purpose of international trade integration, but it may be unable or unwilling to accept any more of the legalization of these relationships than is absolutely compelling. China will still have the freedom and capacity to comply with WTO norms at the intergovernmental level where it decides that, on balance this best serves its long term trade integration goals. It is at the intergovernmental level that one can observe whether China resorts to political or legal ways of resolving disputes and how far China is evolving in the sense understood by social constructivists such as Ruggie will help us to understand.

If China itself is an evolving social fact, so also is the international framework for trade, which is the WTO. This latter can, of course, also be understood in purely legal terms. Lawyers will engage in grammatical analysis of WTO texts, including panel and AB reports and observe the extent to which individual countries appear before panels, or, possibly, conciliate disputes with specific reference to WTO norms without going as far as using the DSM. This is to treat the WTO and its DSM as a social fact, which, through collective intentionalities of states, has so hardened that it constitutes an, as it were, automatic structure that applies quite simply grammatically to the disputes thrown up by China's trade relations particularly, in this thesis, with the EU and the US. In neo-liberal, institutionalist terms this will be satisfactory, because the WTO will, presumably, be meeting the transaction costs it was supposed to accommodate. However, it will appear evident from the case studies that follow in

the thesis, that China is all the time struggling between political/diplomatic and legal means of settling its disputes. It has accepted a very rigorously legal framework for its accession to the WTO, but this was a political decision at the time of accession, and the ambiguity of this decision remains the central question of the thesis. So it has to be seen that the WTO Framework is itself a continually contested social fact (internationally held collective intentionalities about how trade should be regulated), which China's partners have to decide, on a continuing basis, whether to enforce to the grammatical letter, or whether to allow to evolve in new directions.

Explaining the WTO as both an Institution and a Social Fact - Archer's Theories of Culture and Agency.

Therefore theory itself must have another dimension to explain how an international structure, itself already an apparently hardened social fact, can evolve to become an altered system of collective intentionalities. One needs a theory to explain changes in ideational structures suitable to understand the permutations from the GATT to the WTO, and possibly back again: The WTO Framework (consisting of its rules, procedures and the institutional mechanisms of dispute resolution all the way from consultation, conciliation to compulsory dispute adjudication) and China's approaches to it, specifically in terms of its choice between political and legal means of resolving inter-governmental disputes. This study argues that the change in the WTO Framework to Compulsory Dispute Resolution is the most important part of the move from the GATT to the WTO (the subject of chapter 2). It has meant a significant change in the nature of the international trading regime towards legalisation, i.e. the predominance of the automatic application of precise obligations interpreted independently by third parties. This is what theory has to account for.

Neo-Institutional theory already gives us regime theory which posits that states are willing to submit to international rule frameworks, which they see as serving their interests. However, regime theory merely explains statically why there is compliance with an already existing system of rules. The relationship of China to the WTO Framework, in the context of intergovernmental trade dispute resolution, is more complex, and this is what necessitates a more dynamic, process-oriented account of the significance of the recent legalisation process in the WTO. The approaches of

China to the WTO Framework have to take place in the specific context of legalisation of the Dispute Settlement aspect of the Framework. China is confronted with trade disputes, which, on the one hand, have to be considered in the wider context of China's more general relations with major Powers, such as the US or the EU, and the more specific context of China's choice between political and legal methods of resolving trade disputes against the "shadow of the court" of the WTO compulsory DSM.

The crucial research question is to identify the extent to which China has a choice of policy options in its engagement with the WTO Framework and how to evaluate critically the policy dimension, which exists for China. If the working of the WTO in relation to China was purely legal, there would be no policy dimension. States would invoke WTO rules and where there was disagreement about the standards there would be compulsory resolution through the DSM. However, the working of the law/politics dichotomy is enabled by the social-constructivist view of the WTO as a social fact. It is not the hardened social fact, which a purely legal perspective would require. Instead, the great trading powers, and especially China and the US, have a clear tendency, that will be seen in the Steel (the US especially) and the Textile Cases (China especially), to play beyond the legal framework of the WTO, including an instrumentalisation of the WTO DSM itself, to achieve wider state goals. These practices do not represent a formal repudiation of the WTO as a legal Framework, but they do mean that the process itself is undergoing a continuing process of change in which there is a partial reversion to the politicised process of the GATT. This is the context in which it has to be asked how exactly China as an actor/agent is able to create a policy space for itself. To understand this one needs not only a dynamic framework of analysis for the WTO Framework, but also one for an understanding of China itself as an agent/actor.

The sociologist Archer begins to assist us with the nature and problematic of an ideational structure as such. The abstract concept of structure can be applied within a society or at an international level. She does not have in mind any particular legal

structures, but in her book[65] she identifies the distinctive feature of an ideational structure which is similar to the ways lawyers understand law, a common language, internally intelligible, products of thought processes with the central ideal that what she calls the Cultural System should be free from logical contradiction; indeed only logical relations pertain to it.[66] Archer comes from a critique of a static neo-Marxist view that structures are causally determined in a totally derivative way, from socio-economic context. This is a way of reasoning she calls conflation.[67]

While a Cultural System[68] is a product of what she calls social cultural interaction, it takes on an objective existence that is not dependent on the awareness of individual actors. So meanings are separated from their use by individual actors, and the force of arguments about them is primarily systemic. In this way, Archer denies that the whole structure can be reduced to manipulation by one imperial power. A further aspect of her complex argument against social contextual dependence, is that there can be global common belief incorporated in a Cultural System, which is not context dependent, even if this is a heuristic ideal, in the nature of the logic of this system, and not something one tries to establish as an empirical fact.

Therefore the reasoning appropriate to arguments about the Cultural System (identical to law, as seen through lawyers' eyes) recognizes that objective items are "texts and logical relations between them" and "then the only part of the context which is relevant to them, because of their dependence on it, are the other ideas to which they are related".[69] Archer says again, that, contextually, contradictions at the level of the Cultural system are not dependent on any goings on at the level of Social-Cultural Interaction because analytically "...at any given point in time, the items populating the Cultural System realm have escaped their creators and have logical relationships among one another which are totally independent, at that time, of what the population notices, knows, feels, or believes about them...".[70]

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[65] Margaret S. Archer, *Culture And Agency: The Place of Culture in Social Theory*, Cambridge University Press, London, 1996, Chapter 5.
[66] This is similar to how lawyers understand the authority of treaties such as the WTO, and judicial decisions, such as its panel reports.
[67] Archer, *op.cit.*, pp.104-106 and pp.25-103.
[68] *ibid.*, p.107.
[69] *ibid.*, p.134.
[70] *ibid.*, p.141.

This very hard concept of ideational structure plays an essential part in the interaction of China, the US and the EU with the WTO Framework. All sides appeal to a system of ideas of fair and free trade that they regard as an independent standard of evaluation. However much China may want to argue for its own special circumstances, it will, as the others, attempt to justify its position in terms of its conformity with the general principles of the WTO and argue for inconsistencies in the conduct of other countries in relation to it. It will also find occasion to argue that there are internal inconsistencies in the Framework, which should be resolved to her advantage. This will be shown primarily in her struggles with the EU and the US over the contradictions between the legal terms China had to submit to, as a process of accession and the general principles of the WTO that apply otherwise equally to all states (in Chapter 4, on general Chinese participation in the WTO; in Chapter 6, on textiles). While there is a part of China's arguments and policy agendas that tries to go around the WTO Framework and a part that, for reasons of her own political and legal culture, it finds uncongenial (see Chapter 3), a major part of her policy and her reason for joining the WTO is the value she believes can be attached to it as an objective ideational structure. To ignore this independent dimension is to deprive the dialectic of law and politics of one of its two poles.

Archer shows how through history structures change. She provides a systematic explanation of this possibility of change through setting up analytical distinctions between the Cultural System (CS) and the Socio-Cultural level (SC). The former consists of configurations of ideas and ideological claims and the later, of constellations and configurations of power, which underlie and support these ideas of legitimacy. She claims there are general rules or patterns about the relationship of power and ideas, which explain how their interaction lead to changes in either the one or the other. The main part of Archer's argument concerns the ways that the CS and the SC level interact and how changes then come about in both. These arguments are abstract, for the purposes of the thesis, in the sense that she applies them to religious and metaphysical systems and the nature of scientific discoveries. Yet Archer's refinements in distinctions between ideational and social change give more nuances of distinctions between social fact, institutions and material interests, i.e. political, economic and social power, than we have up to now.

Archer does not at all say there are no contradictions in a normal CS but rather that where they are perceived, supporters of it will feel compelled to resolve them and if they are not able to, this will gradually induce disorder at the SC level (Chapter Six, Contradictions and Complementarities in the CS). So the CS is therefore an independent force in its negative failure to do its work of harmonizing the SC level, thereby significantly contributing to contradictions within the SC. The latter may eventually resolve these contradictions, but only by reacting again on the CS with a new configuration of power, without the power of the logic of the original CS itself. This is a final danger of disintegration that all parties to the WTO Framework at present want to avoid.

Archer speaks abstractly of how element A in a CS cannot stand without the support of element B, but B also constitutes a threat to A because it simultaneously contravenes it. But those seeking to sustain A are heavily constrained by what Archer calls, thereby, a constraining contradiction. They cannot simply repudiate B for they must invoke it, but if B is fully actualised it threatens to render A untenable.[71] For Archer, a constraining contradiction will produce mental torment, social subterfuge or technical contortions or even collective schizophrenia. The parties will seek to repair this by making corrections,[72] which may lead to a kind of ideational syncretism, which tries to sink differences, while effecting union between contradictory elements. One can try to correct B to fit A, or to correct both A and B.[73]

These theoretical considerations are directly applicable to the crisis in the GATT system, which led to the transition from diplomatic to legalised settlement of disputes in the WTO. Failure to settle trade disputes in strict accordance with GATT norms was causing an acute contradiction within the GATT as a CS. The ideology of free trade appeared to be undermined by the power of particular states to resist the application of the norms to them. This was frequent because the absence of compulsory legal resolution of trade disputes meant that a state dissatisfied with the outcome of a panel report could block its implementation in the Council of the States

[71] *ibid.*, p.149.
[72] *ibid.*, pp.155-156.
[73] *ibid.*, p.164-165.

Parties to GATT. The consequent resort to so-called diplomatic settlement meant that a more powerful state could compel a smaller one to compromise on its legal rights in order to maintain whatever concessions the more powerful state would make. This often happened where a developing country could compete more effectively with a developed country in more traditional manufacturing sectors, e.g. textiles, manufacture of steel products. However, even the most powerful states felt frustrated at the absence of compulsory dispute resolution with relatively equal states that preferred either not to submit to panel adjudication of disputes, or not to accept the outcome of the panel report. Therefore a contradiction was arising between the ideology of free trade of the GATT and the abuse of the legal deficiencies in its dispute settlement procedure.

What Archer's dynamic of the relation of the CS and SC helps to explain in Chapter 2, where the history of this issue is explored, is the process of *legalisation* whereby states agreed to forgo the freedom of the diplomatic means of resolving trade disputes in favour of legal rules and procedures. There was not primarily a change in the configuration of power underlying the GATT as a CS, i.e. as an ideational framework to ensure free trade. Instead, increasingly it was seen that there was a contradiction in the GATT system when it accepted a continuing capacity of states to treat trade disputes as a diplomatic problem to be solved, if at all, in the terms of the dynamics of diplomacy. The reason was that this allowed the taking into account of the trading strength of particular countries and their willingness to connect trade issues with non-trade issues. The tensions within the power configuration at the time of the key Uruguay Multilateral Trade Negotiations came from the willingness of the US to go it alone unilaterally, using its own national trade legislation as an unrestricted sanction if other states, particularly the equally powerful EU and Japan, were not willing to accept a *legalised process.* The US itself was, however, merely reacting to the contradiction in the CS and appealing to it. It obtained the support of the block of developing countries precisely because it was appealing to the logic of the CS and offering to resolve its internal contradictions. The US move led to forcing other major trading powers to submit to the new legalised DSM of the WTO.

While Archer gives real force to these ideational contradictions within the CS and their impact on the SC, she does not say that these alone cause all factors of

integration or disintegration at the SC level.[74] Conflictual relations at the SC can show significant independent variation and not mirror the CS.[75] This is because the SC level "...also embodies structured antagonisms based on material interests and the quintessential power of human agency to react with originality whatever its circumstances".[76] There are many strategies that the SC may adopt towards the CS which are quite independent of it. The SC may try for the sake of material interests to conceal a contradiction in the CS, a type of cultural repression. This never works well among governing elites who are aware of the contradiction. So one can hardly imagine that it will get far in intergovernmental conflict. In her words, Archer says it will not work where those opposing the exposure of the contradiction do not enjoy overwhelming resource supremacy.[77] This will often not be the case for China as an object of pressure from major trading powers, as it is perfectly aware, for instance, of the normative contradictions between its Protocol of Accession and the general norms of the WTO that apply to other countries.

It is possible, among Archer's scenarios, for a strong minority to exploit a split in the CS to accentuate a contradiction, and threaten to bring down the whole CS. This leads to what Archer calls competitive contradiction and total disintegration of both CS and SC. However, to avoid a naked conflict of interest, the opposing power or group will usually try to develop another set of ideas, say element C, which are able to compete with A and replace it, eventually reconstituting a new CS. Normally, there will not be unlimited and unrestrained manipulation of a new CS by forces within SC, because other groups will fight back. Dismissal of opponents by a process of devaluation (denigration) is possible but will only work if there is a very hefty imbalance between the rival groups.[78] For our thesis none of these scenarios are normally going to be applicable, because of China's size and they are presented to give a complete picture of Archer's analysis. However, one has to be aware of the possibility that trading rivals of China will say that its remarkable trading success is because it is engaging in unfair trade, e.g. because of the social conditions existing in China. For example there

[74] *ibid.*, Chapter 7.
[75] *ibid.*, p.185.
[76] *ibid.*, p.187.
[77] *ibid.*, pp.190-197.
[78] *ibid.*, pp.202-207.

are ambiguities in the norms of the WTO concerning non-market economy and dumping that can be competitively exploited to pressurize China.

Archer is also concerned about opportunistic groups, which accentuate independent but in fact non-contradictory elements of a CS as a form of social contradiction.[79] This comes close to the idea of subversive but not actually illegal behaviour, where a country is pushing an element of the Framework that does not contradict formally other elements, but effectively could undermine it. One thinks of the manipulative use of the DSM by the US in the steel dispute. The US is contradicting the international community by showing in practice how a correct use of the DSM can threaten to weaken the whole trading system by permitting extensive protectionism and harassment of fair trading.

To conclude, it would be impossible to understand China's interaction with the WTO DSM system, as a new-comer to the rank of the significantly powerful trading states, if one did not have a dynamic understanding of this system, necessary to understand that the process of the change to *legalisation of dispute settlement* makes its continuance dependent upon the continuing willingness of all the greater trading powers to submit to the new legalised regime. If the US were to adopt a particular attitude to the importance of its trading relations of China, or visa versa, this could have an impact on the relationship between diplomatic and legalised WTO approaches to trade dispute settlement. The thesis will be concentrating, in its empirical parts, on the relations between major trading states, the US, the EU and China, where the actors are so large as to make it possible to shake the power configurations (SC) underlying the WTO Framework (CS). The steel and the textile disputes and the history of other trade disputes that China has had with the EU and the US are conducted within the shadow of the WTO Framework, but what has to be explained is how, up till now (Spring 2006), China and its trading partners have largely avoided the DSM itself for something which appears to resemble precisely the type of intergovernmental trade dispute settlement which existed under the GATT.

[79] *ibid.*, pp.229-240.

China as an Actor/Agent: Both Social and Institutional Fact
– Wendt's Theory of Structure and Agency.

The theory for the third chapter, on the sources of China's approaches to trade disputes, relies on Alexander Wendt. The concern is to focus specifically on the dynamic of the structure-agency relationship within the domestic context. *The research question is: what are the factors, which define the parameters of and influence upon the decisions that are taken by China?* Domestic structures within China shape how it will behave towards the WTO. There are many different elements that explain China's decision-making process in a trade dispute within the WTO Framework. These factors are domestic (such as culture, interests, interest groups, policy agenda) and international (diplomatic relations, the legal and institutional Framework of the WTO). The question is to understand whether these elements form part of a settled structure or whether there is scope for agency, for China to reshape these elements and come up with new approaches to trade disputes.

Wendt's theory of agency rejects as inconceivable the idea that the social structure so takes over the being of the agent that the latter has no autonomy. The alternative position is that there is a dynamic between the, as it were, unconscious social structure affecting a country such as China, and its consciousness as a voluntary actor. This theoretical framework will have a two fold ascending place for structure-agency relations both at the national level and at the international level. At the international level, as already mentioned, structure will be primarily in terms of China's relationship with the WTO framework, but never exclusively as, by its very nature, the argument from agency supposes that no single set of factors, however important, such as the WTO, will be exclusively influencing China. A further fundamental dimension is the character of the wider diplomatic relations that intrude into China's intergovernmental disputes with powers of the size of the EU and the US. Here it is essential to note Wendt's concept of a distribution of knowledge that comes from states interacting with one another. "Upon interaction these beliefs become a social structure of knowledge that generates outcomes neither side expected".[80] A genuinely autonomous agent will always have some potential power at least to decide what

relative weight to give to these two broad factors (i.e. the WTO Framework and diplomatic relations between great powers). Indeed they will provide the context for China's policy reflections on its choice of dispute settlement method, whether political/diplomatic or legal/institutional. The major research question, which a theory of agency has to answer, in this context, is to what extent can a country such as China have real freedom of action, what space is it that China has to make priorities and develop policy agendas, especially trade policy agendas with respect to handling intergovernmental trade disputes in the shadow of the WTO Framework? However, it is essential to understand such a structure in Wendt's sense as not merely material but also ideational. Beliefs of states "when aggregated across interacting states…become an emergent, systemic phenomenon in the same way that aggregate material capabilities are a systemic phenomenon".[81]

The theory of agency has especially to explain at the domestic level that China has an inherited structure in terms of its historical situation, its interests, political and legal culture, its capacities to initiate trade disputes, the costs that this poses for China, the interest groups that are a part of its elites, its internal legal and political structures. Again, returning to the dominant dialectic of the law-politics dichotomy, one may compare this "political" view of China as an agent with a purely legalistic view. The latter will regard China as a legally responsible state with definite legal obligations, which it must apply. China will have been involved in a particular number of disputes that have had a definite legal outcome, which one can simply describe. The interdisciplinary law and politics approach adopted here will have a much more dynamic perspective that is pursuing two broad inquiries. The first question will be to explore the extent to which China is effectively pre-determined in its approach to trade disputes by, e.g. its prior interests, its attitude to conflict and in particular its legal and political culture, its internal business groupings, its resource capacities to wage a conflict. This aspect of the research is structural. However, more difficult and more important will be to attempt to evaluate precisely how a space for choice in the setting of agendas can open up, so that China is truly acting as an agent. When and how does China choose to fight or settle a trade dispute legally or politically? Here

[80] Alexander Wendt, *Social Theory of International Politics*, Cambridge University Press, London, 1999, p.141.
[81] *loc.cit.*

the case studies of the thesis will have to draw on the theories of Wendt, to explain the dynamic of whether and how far factors such as political interest (domestic or international) economic interests. brought about predictable outcomes in terms of China's behaviour, or whether China had any freedom in determining its trade policy agenda, and, if it had, how and why it used that freedom.

The most difficult issues to determine are the boundaries between the parameters of decision-making, e.g. the unconscious influence of political culture on decisions, or the already accepted imperative of maintaining open foreign markets for Chinese exports and avoiding whatever economic sanctions may come from alleged breaches of WTO rules. Here there is an elusive mixture of obviously material factors such as interests of certain industrial sectors and ideational factors such as China's image of itself as a modern state enjoying market economy status or a country that wishes to appear committed to the rules of the WTO Framework (including the DSM), yet at the same time, not to lose face by being engaged in a number of unsuccessful legal adjudication of trade disputes. Perhaps even more fundamentally, the question remains to what extent one can effectively think of China as a state that is a unitary actor/agent freely able to take trade policy decisions. To what extent and how far can one make the transition from describing patterns of behaviour within China, e.g. economic interests and political or legal culture, to relying seriously upon articulated policy agendas of a unitary Chinese entity, as a collective intentionality that is intended to shape the future of Chinese domestic and international responses to the WTO Framework?

This last distinction is the vital one that Wendt draws between materialists and idealists. The former argue that material interests determine actions, while idealists argue that people act towards objects on the basis of the meanings the objects have for them. A most important aspect of the argument about China will be that it has a distinctive political and legal culture, the latter merely an aspect of the former. Wendt defines culture as socially shared knowledge, which makes it appear more obviously relevant and less quaint or remote. Culture as such is indifferent to content, but it concerns more discourse, norms and ideology, than institutions and organisations. It may seem more remote from rational choice theory, which is often associated with a materialism privileging interests over beliefs. Indeed culture in this sense does not

somehow attach simply to one state as a property. It becomes, through interactive state relations, a shared knowledge among states, modifying all of them constitutively.[82]

Wendt provides a strong defence of the place of culture and self-image as an independent ground for action. He argues against materialism, that people act on the basis of private meanings and then common knowledge concerns actor's beliefs about each others beliefs, in the sense that there are interlocking beliefs, the subjective becoming inter-subjective. This is the substance of all culture, including laws.[83] This common knowledge is nothing but beliefs in heads, shared mental models. Wendt takes the decisive step to make culture in this sense a defining aspect of a collective being such as a state, by drawing upon Durkheim (as we have seen Ruggie did earlier) to argue that the shared knowledge is not simply between concrete individuals but that collective representations of knowledge "generate macro-level patterns in individual behaviour over time".[84] This is an essential building block in Wendt's argument for the state as a conscious, self-reflective unitary entity. This collective representation depends ultimately upon the existence of a substratum of individuals, but once established it is not reducible to them. Wendt keeps both of these dimensions not allowing either to be reduced to the other, so that culture does not become reified apart altogether from individuals, even if it cannot be reduced to a group of particular individuals in contemporary society.[85]

At the same time Wendt argues against methodological individualism, that beliefs are not primarily internal matters, but are external in the sense that at least some part of their content rests upon factors external to the mind, so thought is not logically prior to society but intrinsically dependent upon it. For externalists, as opposed to internalists, context determines meanings attributable to agents, and therefore "thinking depends logically on social relations".[86] This reduces the force of methodological individualists who try to claim that meaning can only come from the

[82] *ibid.*, pp.140-150.
[83] *ibid.*, pp.157-160.
[84] *ibid.*, pp.161-162.
[85] *ibid.*, pp.162-164.
[86] *ibid.*, p.175.

rational choice of individuals.[87] The individual's existence is not denied, as with post-structuralism, but the independent place for culture is guaranteed.

This analysis of the meaning of culture as shared knowledge has direct deontic implications for legal rights language. Wendt gives an example from international law. For instance the US may think that giving military aid to weak states, forbidding them to ally with other great powers and intervening in domestic affairs, may all be right in US eyes, but if these views of right are held only by the US and not shared by other countries then there is no common knowledge or language of right, and the US is simply an imperialist bully, and not a benign hegemon. Legal practice is the example par excellence of what cannot be a mere personal, individual belief.[88]

Yet remarkably, in contrast to Ruggie, who sees social constructivism as essential to explain the evolution of institutions, Wendt equally insists that one must draw limits to constructivism if one is to explain change and not be left with static ideational structures. "If an actor is unaware of shared knowledge or does not care about it, how can it explain his actions?"[89] Wider mental content refers to shared meanings which make thought intelligible to others, but narrow content is what motivates the individual actor, through his head. Wendt adopts a finally realist view that individuals have brains which ground independent cognitive powers, giving them an autogenetic quality, without which "culture would have no raw material to exert its constitutive effects upon".[90] It is wrong to say that "intentional agency is *nothing but* self-organisation, or *nothing but* an effect of discourse. It is both…".[91] This prepares the ground for Wendt's relatively realist view of the unitary character of states as actors, albeit ones constituted significantly by culture.

For Wendt: "states are real actors to which we can legitimately attribute anthropomorphic qualities like desires, beliefs and intentionality".[92] Crucially, he insists immediately on the essentialist position that the state is pre-social, just as the individual, constituted by self-organizing internal structures, although many qualities

[87] *ibid.*, p.176.
[88] *ibid.*, pp.176-177.
[89] *ibid.*, p.180.
[90] *ibid.*, pp.181-182.
[91] *ibid.*, p.184.

thought to be inherent in states, such as power-seeking are actually acquired, constructed by the international system. This is not to say that the state is a somehow natural or divine being, but rather that its social construction out of certain historical contingencies, has taken on a solid, continuous character, which is not simply a self-definition in opposition to another.[93] He rejects the pluralist view of the state as a collection of interest groups, individuals, including government, and also rejects the Marxist view of the state as merely a structure of political authority for capitalism and not an actor as such.[94] Corporate agency is a kind of structure or shared knowledge or discourse that enables people to engage in institutionalised collective action, not as a nominalistic useful fiction to describe what is really the action of individuals, but a real emergent phenomenon that cannot be reduced to individuals.[95]

While aware of the problems facing realism, the unobservable character of the state, apart from its effects if ignored, Wendt focuses on the continuity of the state in terms of "structures of collective knowledge to which individuals are socialised". Such macro-levels of regularity of behaviour of individuals means that states cannot even be reduced to their governments. So we cannot make sense of the actions of governments apart from the structures of states that constitute them as meaningful. For example, the common knowledge that Clinton is the President of the US Government is grounded in the structure of collective knowledge, which defines the US State. Ultimately it is an idea of corporate agency, which authorizes collective action, even if this is no more than individual' shared knowledge,[96] albeit as Wendt has already made clear, such a macro-structure is never reducible to the individuals at a particular point in time. Indeed a continuity once established is difficult to undo without manifest and sustained popular opposition. As for the functioning of the collective agency it is necessary only that the responsible "individuals accept the obligation to act jointly on behalf of collective beliefs, whether or not they subscribe to them personally".[97] This qualification is very important for an understanding of the exact role of political culture in shaping state agency. This reduces the role of rational

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[92] *ibid.*, p.197.
[93] *ibid.*, pp.244-245.
[94] *ibid.*, p.200.
[95] *ibid.*, p.215.
[96] *ibid.*, p.218.
[97] *ibid.*, p.219.

choice theory, with its methodological individualism and links to material interest to a point of complete insignificance in the constitution of the state as an agency.

A crucial dimension of the relationship of a state to an international institution or to other states, is Wendt's Realist rejection of the post-modernist definition of identity entirely in terms of the creating and maintaining of boundaries between the self and the other, so that all identity presupposes difference. Wendt rejects this argument as trivial "if it leads to a totalising holism in which everything is internally related to everything else if a constitutive process is self-organizing then there is no particular other to which the Self is related".[98] A country such as China cannot be absorbed into an international institutional order or be swallowed up into a symbiotic relationship with other states. Nor could its civil society, even if much more significantly developed, become absorbed in a globalised civil society, given the utterly subordinate place of rational choice theory and methodological individualism, the grounds of any such civil society, in the constitution of any state.

However, while "type identity" can happen by itself, e.g. the characterisation as a democracy, "role identity" depends entirely on relationships with others.[99] Roles can be conflictual as well as cooperative, but "what really matters in defining roles is not institutionalisation but the degree of interdependence or "intimacy" between the Self and the Other".[100] Identifications of self and other are the common foundation for the shared knowledge for state identities, but inter-state interdependence will never be so all embracing and will affect only certain parts of state identity oriented towards the *Other States* as part of a request for recognition in a particular field of activity, e.g. the general demand of states for sovereign equality. This argument can be easily extended to a demand for full equality within the WTO Framework, rather than having to accept some differentiated and therefore unequal status in terms of trading privileges.

[98] *ibid.*, p.125.
[99] *ibid.*, pp.226-227.
[100] *ibid.*, p.228.

This means that many state interests are at the same time constructions of the international system.[101] For instance Wendt adds to the national interests identified by George and Keohane (physical survival, autonomy and economic well being) "collective self-esteem" and "whether collective self-images are positive or negative...will depend in part on relationships to significant Others, since it is by taking the perspective of the other that the Self sees itself".[102] The relevance to China's concern with face and the tradition role of Confucian culture is clear. If states cannot achieve this self-esteem, they will compensate by self-assertion or devaluation and aggression towards the other.[103] The extension of this problematic to full participation in a trading system is clear, while at the same time it is not going to function in a system of equal trading states, if it appears that one state is eventually going to swamp the others with colossal trade surpluses. This is the danger that China increasingly appears to present to its major trading partners, the EU and the US. The tendency or direction of behaviour of the state, as essentially still a self-constituted entity, remains dangerously realist in the sense of self-oriented, in Wendt's view. However, it is possible to see the willingness of states to try to identify with those beyond themselves, to make a community. The roots of any profound international order are to be found in this direction. "The vast majority of states today see themselves as part of a "society of states" whose norms they adhere to not because of on-going self-interested calculations that it is good for them as individual states, but because they have internalised and identify with them".[104] The final question in studying China's approaches to the WTO Framework in its inter-governmental trading disputes is whether it has begun to internalise the Framework within its identity or whether its identity is still primarily a defensive means to shield itself or otherwise to reduce its engagement.

By way of a brief conclusion, it is argued that Wendt makes clearly both credible and intelligible the idea that China can be understood as a unitary actor, and unitary in the sense of being a social fact, held together by a collective intentionality whose force includes, as a central, although not exclusive element, a common political and legal culture. Without this supposition, the thesis has no intellectual foundation. A major

[101] *ibid.*, p.234.
[102] *ibid.*, pp.235-236.
[103] *ibid.*, p.237.

part of its argument is that, mainly because of China's political and legal culture, it is reluctant to engage in international trade litigation. Wendt's conceptual framework of agency shows that such a view of China is both possible and intelligible. He provides further a partially realist concept of agency in relation to social structure, which assists the thesis in maintaining a dialectic between China and the WTO, without having to argue that the one is absorbed into the other. Wendt isolates the idea of the state as a social fact prior to world society, so that there can be a place for distinct types of state that are not reduced, as post-structuralism would do, to their relations with other another. However, Wendt also accepts that identity is pooled in the roles that states have to adopt in their relations with one another, so that an international social fact, such as the WTO, can also arise. So, a part of a state's identity will be what it absorbs from what others see of it. At the same time the underlying principle of self-organisation that grounds a state will mean a constant pull to self-regard and egotism. The tensions are never resolved. This immensely subtle and complex picture will be reflected in our picture of China's relationship with the WTO DSM and with its other WTO trading partners.

Conclusion

The theory chapter has set the framework for the chapters, which follow. It has to explain how a law-politics dialectic is the context in which a country, such as China, with its particular political culture, policy agenda and material (especially trade) situation, comes to make choices between political and legal means of resolving inter-governmental trade disputes. So, the chapter explains how after 1945 and especially since the 1960s, international law and international relations theory have been converging around the possibility of pragmatic resolution of inter-state conflicts, especially in the economic sphere. The chapter explains a convergence between behaviouralist approaches to international relations and pragmatic, legal process approaches to law. A further refinement of the law-politics dialectic is given through the means of a combination of neo-liberal institutionalism and social constructivism. Both of these IR theories accept a place for legal institutions, but the former root them in rational choice theories of transaction costs, while the latter understands them as an

[104] *ibid.*, p.242.

expression of common ideational structures, rooted in common intentionalities and shared knowledge. The strength of social constructivism is its dynamic character, accounting for change and development. The chapter further refines the theory by reference to the work of Archer and Wendt who provide dynamic frameworks for explaining, respectively how international institutions such as the WTO change, and how both the WTO and individual state members, such as China, can change and evolve in a dialectic with one another.

Chapter Two The Evolution of the Dispute Settlement System of the WTO

Introduction

This chapter will explain in depth the context facing China as a member of the WTO trading regime, with the recent introduction of a compulsory, legal adjudication of disputes as a final 'shadow of the court'. The fundamental contextual change is the move from voluntary procedures for resolving trade disputes, to compulsory ones. The new system has advantages for a developing and relatively weak country, which China still believes itself to be. The rule of law, equally applied to all states, appears to favour a relatively weaker power, which does not have to face the full resources of its opponent, in a dispute with a stronger one. Diplomatic trade negotiations have allowed the linking of issues, in the sense that the stronger Power broadens the precise issue in dispute to bring to bear all aspects of the relations between the two sides. In this way the stronger Power will have multiple opportunities to put pressure on the weaker one; thus threatening retaliation if the latter insists on its rights in the specific matter which has just given rise to the dispute. In contrast, legal adjudication appears to promise to treat the specific issue in dispute on its own merits without regard to the character of either of the parties. This turn to legalization could be attractive to China if it expects that the liberalization of trade in one specific area, e.g. labour intensive manufactures products, including textiles products should greatly benefit it, but where China could fear that an economically stronger country might threaten to retaliate in an unrelated area, such as technology transfers to China.

However, there is a dilemma or contradiction in China's position. As already seen, the rule of law favours equality for the weaker party, but it does not exclude the possibility that the law itself is unequal. When one comes to a discussion of the terms of China's Accession Protocol it will be seen that it puts China at a considerable disadvantage in precisely the area of labour intensive manufactured exports where it expected to have a comparative trading advantage. So, much of the benefit of the DSM is excluded for some

time for China, by special reservations that it had to accept as a price of joining the WTO. Because of their compulsory character, the special substantive rules that China had to accept, on accession, e.g. on issues of anti-dumping and safeguards, if pushed to the literal limit of their wording, could dominate entirely the management of China's trade disputes. It would lose any of the flexibility that might have come from the more traditional trade diplomacy. For instance, the latter approach could allow China to gain a legal concession on an issue of antidumping if it made some kind of compromise in another area.

Here China is confronted by the role which major Western Powers, not just the US, see law playing in the ordering of international economic relations. This expanded use of law does run against how the Chinese, traditionally, like to deal with disputes. Compulsory legal regulation of disputes conflicts with a Confucian approach to the maintenance of order and harmony in society. This is in spite of the fact that China will welcome the idea that disputes are not resolved unilaterally according to the wishes of the more powerful trading party. In the next chapter specifically on the background and framework of China's approaches to the WTO, one will have to consider at more length, the influence of China's traditional legal and political culture on its policies towards the WTO Framework. However, already in this chapter, attention will be devoted specifically to outline precisely the reasons for the process of legalization of world trade disputes which has so recently taken place. One must understand, by reference to the practice of the WTO DSM, the extent to which this legalization is actually determining and decisive in the managing of trade disputes. It is hoped to show that neo-liberal institutional theory does go a long way to explain the development of the WTO dispute settlement.

It is argued in this study that, to grasp the development realistically (i.e. to assess the extent of its novelty), one has to consider the evolution of the character of dispute settlement since the founding of the GATT. The historical perspective is essential to understand why and how states originally came to be willing to accept the constraints of international institutions on their otherwise sovereign power to resolve conflicting trading interests through the exercise of whatever material power they might have. How could

states think the institutional approach had advantages? This historical perspective enables one to assess what elasticity still exists in this mechanism, which the Chinese might have the possibility of exploiting. Indeed, one question that can be raised is whether the US continues to be as enthusiastic about such legalization and how possible changes in US attitudes could affect the management of China's trade disputes with the US.

Beyond this historical perspective, to understand the regime of the WTO in the wider sense and how it impacts upon China requires also a rather full picture of its actual operation at present and the continuing expectations of the main Western countries, especially the US and the EU. This involves a close understanding of the DSM procedures themselves, a statistical overview of how far they have been used and, in what areas, involving which countries and what this says about the relative place of the DSM in overall inter-state trade diplomacy. The WTO itself has compiled detailed and very accessible records on the progress of the DSM and it is possible to draw policy conclusions on how far and why the DSM appeals to particular states.

Finally, as part of the problematic of assessing the strength of the DSM and its place alongside other means of resolving intergovernmental trade disputes, it is necessary to consider a major problem with the legalization process, which was recognized at the time of the Uruguay Round. This concerns the problem of the legal interpretation of trade rules and the extent to which the DSM process itself tends to a risk of politicization. The chapter will conclude with a discussion of these issues, which raise again questions of the limits of neo-liberal institutionalism in the field of international trading diplomacy. At the same time political scientists also make the charge that: "Constructivists have called attention to the basis for international identities and institutions in shared norms and beliefs, but they have not explained the distinctiveness of legal norms or why actors sometimes prefer to reinforce normative consensus with legalized institutions".[1] This chapter attempts to meet such criticism.

[1] Judith Goldstein, Miles Kahler, Robert Keohane and Anne-Marie Slaughter, 'Introduction: Legalization and World Politics', *International Organization* Vol. 54 (3), Summer 2000, pp. 385-399.

In other words it is widely recognized that politics again actively engages with law. The chapter will aim to offer a technical exposition of the exact meaning of substantive rules on free trade, so that one knows exactly what states are agreeing to, with all the necessary qualifications. However, this is only a prelude to understanding the possibility of political interpretation and application of the legal concepts, either because the concepts themselves are vague or because the DSM is itself significantly open to political pressure. All of this is essential to understand how an individual state, such as China, normally interacts with the WTO and its DSM in the widest sense.

The History of the Process of Legalization of the GATT/WTO

In the words of Supachai Panitchpakdi, former Secretary General of the WTO: "The world needs a reaffirmation of our choice of multilateralism over unilateralism; stability over uncertainty; consensus over conflict; rules over power".[2] One view is that the change from the GATT to the WTO represents a radical change in the development of international trade law in favour of judicialisation[3]. Another view is that the WTO's new legal regime is the outcome of a gradual process of judicialisation in the multilateral trade system.[4] The WTO certainly plays a vital role in international economic relations. It was established to promote trade liberalization. It is an institutional body with legal personality and the legal capacity necessary to carry out its functions.[5] Today, the WTO is one of the most powerful and effective international organizations with a compulsory dispute settlement system. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is a multilateral agreement under the WTO Agreement[6] and is a comprehensive mechanism under which WTO members can settle disputes

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[2] Supachai Panitchpakdi, *Speech at the World Summit on Sustainable Development High-Level Special Roundtable: The Future of Multilateralism,* WTO, Geneva, 3 September, 2002.

[3] See Michael K. Young, Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats, *International lawyer*, Vol. 29(5), 1995, pp.389-409; Also see Miquel Montana I. Mora, 'A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes', *Columbia Journal of Transnational Law*, Vol. 31(1), 1993, pp.103-180.

[4] See Alec Stone Sweet, 'Judicialization and the Construction of Governance', *Comparative Political Studies*, Vol.32 (2), 1999, pp.147-184.

[5] See Article VIII: 1, WTO Agreement.

[6] See Annex II, WTO Agreement.

through a structured and binding process. It is a central element in providing security and predictability to the multilateral trading system.[7] This dispute settlement system is called 'the backbone of the WTO'.[8]

Nevertheless, this system is faced with an increasing number of challenges in recent years. There are many scholars from different disciplinary perspectives who look at the dispute settlement system and try to understand the nature of this system. By applying a more interdisciplinary analysis of the system and its problems, this chapter will attempt to show that the existing debates are still in many ways flawed because they do not remember the longer historical perspective and because they do not recognize the inevitability of a continuing dialectical tension between law and politics.

The previous chapter defined the area of research to explain how a discipline (International Relations) and a field of study (international economic behaviour of States) could escape the traditional Realist approach to the discipline; just as economic relations themselves appear to escape the anarchy of international political and military relations. The following discussion traces the transition from the contribution of shared norms to the construction of international institutions and collective identities, to isolating the specific process of legalizing these normative practices into compulsorily binding rules and systems of adjudication.

This section of the chapter specifically explores the transformation of the dispute settlement system. Three features of this system are highlighted. Firstly, the historical background to the setting up of the system is explained. This means explaining how major actors, such as the US, the EC and Japan could come to accept the legalized DSM during the Uruguay Negotiations, i.e. from about 1986 until 1994. It is matter of the historical record of these negotiations. Next, one considers the naturalizing process whereby the WTO DSM becomes embedded in the habits of conduct and the identity of the States engaged, so that they absorb the balance of its rights and obligations in their

[7] See Article 3(2), DSU.
[8] Michael Moore, *WTO's Unique System of Settling Disputes Nears 200 Cases in 2000*, WTO Doc.

laws and practices. This analysis also evaluates how the States, and China in particular, absorb such supposed rules of fair-trading as anti-dumping and safeguards practices. The final part of the section outlines the exact features of the DSM, the compulsory character of its elements, such as time-limits on processes, including the submission of arguments, setting up of panels, choice of panelists, delivery of judgments, appeals and compliance procedures.

The study of dispute settlement has to be broken down into three elements, values, norms and institutions. The primary values are the promotion of free trade on the basis of a fair participation of the whole of the international trading community. To achieve this it is necessary to have norms, which give a sufficient precision to the notion of free trade. If the regime is to apply to all states, then there has to be some accompanying idea of fair trade. The balancing of these concepts requires rules which indicate what forms of intervention by states on behalf of their own economies constitute an unfair interference with free trade. At the same time where states agree to the observance of these norms, institutions are also necessary to ensure the elimination of the problem of the prisoners' dilemma, that some states behave opportunistically, observing the rules only in "fair weather" conditions, on the basis that other states can only be expected to do likewise, pleading extreme domestic hardship as a ground for imposing severe trading restrictions. So, institutions like the DSM are necessary to incorporate effectively the values and norms into the actual trading practices of states. The elements of compulsory, severe time-limited, constraints on the conduct of disputes, leading up to the binding panel decisions, provide this institutional dimension. This last dimension is the main theme of the part, although it will have to be related at all times to the first two elements of values and norms.

The Evolution from the GATT Dispute Settlement System up to the Uruguay Round (1947-1986)

The WTO DSM has to be understood against the background of the GATT regime. This

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Press/180, WTO, Geneva, June 5, 2000.

is to take the view that there has been a gradual legalization of dispute settlement in the GATT, which has then evolved into the WTO. The GATT emerged from the intensive process of post-war institution-building in the 1940s. It has already been seen in chapter one, that starting point of the international trade regime has been to avoid wars and promote peace. Before the end of the Second World War the relationship between nations was marked by high tariffs and discriminatory economic arrangements. It is possible to explain, but not excuse German and Japanese aggression (in Eastern Europe and Eastern Asia) partially in economic terms, that they were excluded from world trade by the trade protectionism of the colonial empires of France, England and Holland. The US led post-war era strove to dismantle these trading empires and to replace it with the Bretton Woods system. This was to introduce multilateral approaches to international economic relations. In the area of trade the evils to be combated were protectionism (a state closing its own market to trade with others) and the political supporting of one's own trade, where one state supports its own commerce unfairly. Indeed, as far back as the Atlantic Charter in 1941 Roosevelt and Churchill agreed on the idea of free trade without discrimination.[9]

The key to understanding how GATT developed is that the dynamic existed to agree on tariff reductions and on standards to restrict states imposing non-tariff barriers against one another. In 1946 and 1947 states met firstly in London, then Geneva and eventually Havana and *acting simultaneously in time and place* agreed with one another *mutual and reciprocal tariff concessions*. These were firstly negotiated by states pairing off in bilateral negotiations, but all intersecting with one another and linking together the effects of their negotiations with the principle of *most favoured nation treatment.* So any one country making a concession to another would automatically be enjoyed by all the others. Agreement was also reached on prohibiting non-tariff barriers, especially quantitative restrictions on the amount of goods that could come into the country.

The irony was that as these remarkable substantive concessions were agreed in 1946 and

[9] A good account of planning for a post-war trade and economic system is in R. Gardner, *Sterling-Dollar Diplomacy: The Origins and Prospects for Our International Economic Order*, Columbia University Press,

1947, there was not a parallel progress on setting up organizational and institutional frameworks to implement them. The US did draft an International Trade Organization, which was to supervise the implementation of trade concessions etc. This was eventually negotiated at Havana. It included rules on competition law and employment and favoured a comprehensive system of economic law and not just trade law. So there was so much in it covering what had usually been domestic issues that it was virtually impossible that a large number of states would agree to it. This would have provided an independent executive and judicial-style system to ensure observation of obligations. However, the Cold War was starting and there was an increasing lack of enthusiasm for the setting up of international institutions. Also the US Congress was not willing to allow its sovereignty to be restricted in economic matters by an international institution. One might say that there was more awareness of the advantages of international institutions in the executive branches of government concerned with foreign affairs, and much less sympathy among legislatures which were representative of exclusively domestic constituencies. This was both in the US and in other countries. Other countries waited for the US to ratify the Havana Charter before doing so themselves, but by 1950 Truman had given up on expecting the US Congress to do so.[10]

At the same time by 1947 States could see the substantive merits of the actual concessions, which had been agreed on trade. So as not to lose these benefits, on 30 October 1947 twenty-three countries signed a Final Act authenticating the text of the General Agreement on Tariffs and Trade.[11] The Contracting Parties did not follow the formal ratification procedures of the General Agreement. Instead, at the same time as signing the text of the GATT, they concluded a Protocol of Provisional Application (PPA) by which they agreed to apply the GATT from 1 January 1948, subject to certain conditions.[12] This meant that from the start there were substantive rules of trade but no real organizational mechanisms for enforcing them. All was to depend upon the

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New York, 1980.

[10] For the history, see John H. Jackson, *Restructuring GATT System*, London: Pinter, 1990; R. Hudec, *The GATT Legal System and World Trade Diplomacy*, Cameron May Ltd. London., 1975; E. McGovern, *International Trade Regulation*, Globefield Press, 1982; A. Lowenfeld, *International Economic Law*, Oxford University Press, 2003.

[11] McGovern, *ibid.*, pp.3-4.

diplomatic unity of the member states, acting pragmatically, in the various rounds of trade negotiations. This atmosphere and culture of diplomacy and pragmatism was also to affect profoundly the way individual trade disputes were to be settled.

In spite of this rather fragile beginning the GATT became established on the international stage. As Jackson puts it "The GATT is generally recognized as the principal international organization and rule system governing most of the world's international trade. Yet this organization is a curious institution, to say the least."[13] With McGovern, one finds even more enthusiasm:

> Of all the institutions which were born in the outburst of enthusiastic internationalism which accompanied the ending the Second World War few have as strong a claim to having transformed international trade relations as the one which for a time seemed least likely to see the light of day, and which was ultimately delivered only by means of a kind of political Caesarean section.[14]

Before proceeding to discuss the evolution of the GATT dispute settlement, it is necessary to understand the principles of GATT. *As the successor to GATT, the WTO retains and develops the principles of the GATT.* GATT provided a framework of multilateral rules for conducting international trade. It also functioned as the principal institutional body concerned with negotiating the multilateral reduction of trade barriers and with international trade relations more generally. The text of the GATT is highly technical, consisting of thirty-eight articles. The GATT Agreement appears complicated, but its principles are clear. It is a "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade, and to the elimination of discriminatory treatment in international commerce".[15]

The GATT contained in essence three fundamental principles, which the WTO has retained. The first principle is that trade should be conducted on the basis of non-discrimination. This is expressed in the concepts of the Most-Favoured-Nation (MFN)

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[12] *loc.cit.*
[13] Jackson, *loc.cit.*
[14] McGovern, *op.cit.*, p.3.
[15] GATT, Document LT/UR/A-1a/1/GATT/2, GATT, Geneva, 1947.

and National Treatment (NT) in the application of import and export duties and charges to all the Contracting Parties. Trade rules must be administered equally. The MFN rule requires that "any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties" (Article 1). The NT rule prevents countries from applying internal taxes or regulations in a different way to imported and domestically produced goods so as to afford protection to domestic production. These principles remain the basis of the multilateral trading system.[16]

The second principle concerns tariffs only. The GATT is based on the principle of reciprocity in tariff bargaining. The idea is that protection shall be granted to domestic industries only through the customs tariff and not through, for example non-tariff barriers such as import quotas. There are also provisions designed to prevent the use of administrative techniques as a means of protection.

The third major principle is rather weak and only half-binding, if one considers the final development to the WTO. It is the concept of consultation, which aimed at avoiding damage to the trading interests of all contracting parties.[17]

It is central to our argument to note how the GATT dispute settlement practices have evolved. According to Lowenfeld, the GATT was intended to be a forum for economic diplomacy and not a field for binding legal obligations.[18] It did not make any reference to a dispute-settling mechanism. But there are provisions for diplomatic consultation. In fact there are 19 provisions for consultation, for compensatory action, and for consultation and adjudication by the Contracting Parties.[19] Basically, as John Jackson describes it, "The GATT is not intended to be an 'organization', and has only a few paragraphs

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[16] Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge University Press, London, 2005, pp.78-86.
[17] See G.M. Meier, 1973, *Problems of Trade Policy*, pp.22-23.
[18] Lowenfeld, *op.cit.*, p.138.
[19] John H. Jackson, *World Trade and the Law of GATT*, Indianapolis: Bobbs-Merrill, 1969, p.164.

devoted to dispute settlement".[20] The central and formal procedures can be found in GATT Articles XXII and XXIII. The first of these, Article XXII is a provision, which requires the Parties to accord "sympathetic consideration" and consultation "in respect of any matter affecting the operation of this agreement".[21] Article XXIII is an important provision to deal with if there was "nullification or impairment" of any benefit under the agreement by any action of a contracting party, whether or not such action was consistent with the GATT.

Under the GATT, the only way to invoke the dispute settlement procedure was 'nullification or impairment'. There are three elements constituting nullification or impairment. First, there is the failure of another contracting party to carry out its obligations under the GATT. Secondly, comes the application by a contracting party of any measure regardless of whether or not it conflicts with the GATT. Thirdly, the existence of any other 'situation' constitutes the final element. No specific provision was written into Article XXIII about how a controversy submitted to the contracting parties was to be resolved, except that the contracting parties 'shall promptly investigate', and 'shall make appropriate recommendations...or give a ruling on the matter, as appropriate'.[22]

There were eight Rounds of negotiations during the GATT period. Early GATT Rounds (Annecy, 1949; Torquay, 1950-1951; Geneva, 1955-1956; and Dillon, 1960-1961) dealt primarily with further tariff reductions and the accession of more countries[23]. During this time, trade disputes were resolved in a way, which we would hardly recognize now. The Director General had a large role in practice. He would give a ruling, if what was at issue was the meaning of a provision. Sometimes one would set up a "working party" of representatives of contracting parties. These working parties produced negotiated solutions. However, in such working parties, it happened that the larger countries, with their greater human resources, were favoured. So the next, almost gradual and informal

[20] John H. Jackson, 1990, *Restructuring the GATT System*, p.61.
[21] GATT Article XXII.
[22] GATT Article XXIII.
[23] John H. Jackson, World Trade and the Law of GATT, *op.cit.*, p.164.

development was that the "panel" system was created. This consisted of the setting up of *ad hoc* panels of trade policy experts, acting in their personal capacities to try to help resolve such disputes as could not be solved by consultation. Usually panels were not asked to make recommendations as to what should be done to settle disputes before them, but merely to find the facts and to say whether or not a party was acting in breach of a GATT rule. Resolution of the dispute was left to the contracting parties to settle by negotiation and discussion.[24]

But on the whole this 'diplomat's jurisprudence'[25] worked reasonably well. Hudec made a survey of the 40 complaints filed during the period 1952-1958. From this he concluded that 30 resulted in a settlement satisfactory to the complainant, one ended with a ruling for the defendant, five ended in impasse, and four 'simply disappeared without a trace'. In the 30 satisfactory cases for the complainant, the challenged measures were completely eliminated or corrected in 21 of the cases, and the rest involved some measure of compromise. So Hudec concluded 'Probably the best measure of the overall attitude toward the procedure is the fact that governments did use it, again and again.'[26]

It is arguable that there was not the pressure to institutionalize dispute settlement at this time because trade was not sufficiently intense. Indeed there was a sudden quiet during the 1960s.[27] Then the Kennedy Round began and this changed the panorama of world trade. The Kennedy Round (1964-1967) covered approximately 75 percent of world trade and, inevitably this meant a huge increase of activity for GATT. Under so much more pressure of trade, the mixed system – consultation, working party or panel, discussion in the council of representatives or in the contracting parties – no longer worked as well. It did not resolve all the issues satisfactorily or promptly. So it is not surprising that with the coming of the Tokyo Round (1973-1979), the dispute settlement provisions of each agreement were to become a central subject of discussion. There were the beginnings of an attempt to codify the general dispute settlement procedure. There was a measure of

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[24] R. De C.Gray, 'The General Agreement after the Tokyo Round' in J.Quinn, P. Slayton (eds.), *Non-Tariff Barriers After the Tokyo Round*, Montreal: Institute for Research on Public Policy, 1982, pp.3-14.
[25] R. Hudec, *The GATT Legal System: A Diplomat's Jurisprudence*, Cameron May Ltd, London, 1999.
[26] *Ibid.*, pp.107-108.

consensus. So inevitably, there was a strong disposition to build on existing GATT practice. However, because of the gradualist, consensual approach there was not a willingness to make recourse to panels compulsory as a form of legally binding, quasi-judicial determination. The most that the Tokyo Round could agree was that any party to the GATT had a right to a panel inquiry, even if the issue might not be one which in the opinion of the other parties lent itself to consideration by a panel. Despite this small concession to more rigorous settlement, the Contracting Parties wanted to keep all avenues for settling disputes open.

As for purely organizational or institutional matters, there was not complete agreement about the role of the Secretariat. However, there was the proposal that the Secretariat have a legal division. This would inevitably improve its ability to give guidance to delegations as to the meaning of the GATT and of the new agreements and, when called upon, to assist panels. One could see here a very modest drift towards legalization, when this much was accepted. The accumulation of these in themselves small developments indicates the progress being made towards the more legalized resolution of international trade disputes. [28]

The document that emerged at the end of the Tokyo Round was an Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, including as an Annex an 'Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement'.[29] The Tokyo Round review of the general dispute settlement procedures reflected this gradualist consensual approach. Yet it was clear that the system could work well enough if the most important Contracting Parties wanted it to work. At the same time no drafting could ensure that the new dispute settlement procedures would work effectively if any of the major trading countries were opposed to it working in a particular case. This was the obvious consequence of the consensual principle. In the negotiation of the Understanding, the United States urged, and the European Community

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[27] *loc.cit.*
[28] R. De Gray, *op.cit.*, p.15.
[29] Gilbert R. Winham, *International Trade and The Tokyo Round Negotiation*, Princeton University Press, 1986.

opposed, an automatic right to appointment of a panel when a contracting party submitted a complaint. The outcome was another typical compromise: in the Understanding, there is no statement of a right to a panel. The Agreed Description, however, contains a statement that 'Before bringing a case, Contracting Parties have exercised their judgment as to whether action under Article XXIII (2) would be fruitful.' This shows the continuing strength of adherence to the diplomatic ethos. The assumption was implicit that not all disputes could be fruitfully submitted to adjudication, and that the Contracting Parties might exercise some restraint if defending Parties sought to block establishment of a panel. The Understanding stated that the Contracting Parties 'should take appropriate action on reports of panels and working parties within a reasonable period of time'. So, this set no timetable and made no change in the expectation that such action should be taken by consensus – i.e. that it was possible for a determined losing party to block adoption of the report.[30]

Nonetheless, after The Tokyo Round, there was surprising clarity on where exactly lay the weaknesses of the system, given that the pressure of international trade required, in pure market failure and transaction cost terms, a more regularized response. When the Uruguay Round began, this made it quite a brief matter to agree on all the details of a very complicated dispute settlement system, in the period of only four years. The main delay was with respect to the overall decision to make the entire dispute settlement mechanism binding. The remarks made by John Jackson criticizing the existing system are representative. He drew a contrast between a diplomatic procedure and a legal one. The former always allowed the stronger party above all to link issues and thereby avoid the fact that a clear rule with respect to a specific matter was being violated.

In sum, the defects of the GATT dispute settlement are as following:

First, the lack of dispute settlement body: there was not in existence a dispute settlement body in a legal sense in the GATT. All problems had to be referred to the "Contracting Parties", to which the disputing parties also belonged to the Contracting Parties. That

[30] Lowenfeld, *loc.cit.*

meant, formally, that every decision to set up a panel, was an amendment or development of the general treaty for which the consent of all the parties was necessary. They could block or delay it as they would any renegotiation of any treaty. Yet every single time a panel was to be set up the same thing would happen again. So, in fact the way of working and attitudes of the Contracting Parties was bound to give rise to problems of lack of continuity and consistency. So it was clear that there had to be an institution as such, not a continuing contractual relationship, which would take charge of setting up and servicing panels. It was evident that one had to set up a dispute settlement body with the legitimate rights to deal with disputes. Otherwise tactics of delay and evasion would continue, and possibilities of inconsistency and discontinuity would be exploited.

Second, the non-binding nature of the dispute settlement procedure: there were numerous provisions for diplomatic consultation in the GATT Articles. In fact this 'diplomatic jurisprudence' mainly depends on the actual power of disputing parties. As already mentioned the stronger party could link issues. That party may well have violated a clear rule in a specific area, but, effectively, have threatened the smaller or developing country, that if it insisted on its rights, the stronger party could always withdraw advantages elsewhere now or in the future. Hence, developing countries were very much unsatisfied with this. A particular aspect of the non-binding dispute system was that it could be delayed at any stage, because there was no time limit in dealing with disputes. This had to mean suffering for the complaining country because from the moment the defendant country took some measure to interfere with the complainant's trade (alleging dumping or whatever) its trade would be effectively already seriously injured. Yet the defendant country had obviously no interest in hurrying a procedure, which might only lead it to having to remove the barriers it had imposed. As such this non-adjudicative dispute settlement procedure had serious consequences, violating GATT rules and reviving trade protectionism from the 1960s.

Third, the misleading goal of the dispute settlement: the goal of the dispute settlement became resolving disputes rather than compliance with the GATT rules. Settling disputes become more an end in itself rather than a way of developing GATT and making it more

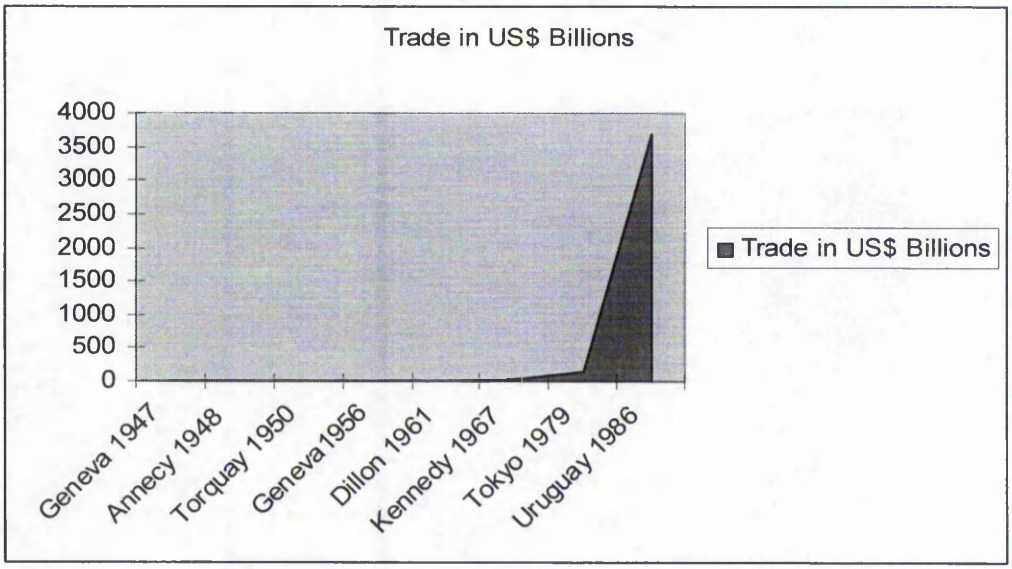
effective. This ideology and type of practice meant that the Contracting Parties were forced to seek other ways to solve disputes outside the GATT.

Fourth, the incomplete surveillance mechanism: there were no surveillance regulations in the original GATT Agreement. According to 1979 Understanding, 'Such kind of surveillance mechanism, which was composed of unclear contents and ambiguous requirements, could only rely on the Contracting Parties' conscientiousness. However, when interests and conscientiousness conflict with one another, very few Contracting Parties' choose to sacrifice their interests. There was no real threat of sanction other than that the party, which considered itself wrongfully injured could always retaliate by withdrawing other trade advantages. However, this mechanism was open to all the weaknesses of the whole diplomatic approach to dispute settlement.[31]

So, if one was to find a solution to so many deep and inter-related problems, in the Uruguay Round, this could only amount to the establishment of a new international trade order, especially through the dispute settlement provisions. This was why they were a central feature of the Uruguay Round and the subject of very intensive discussion during it.

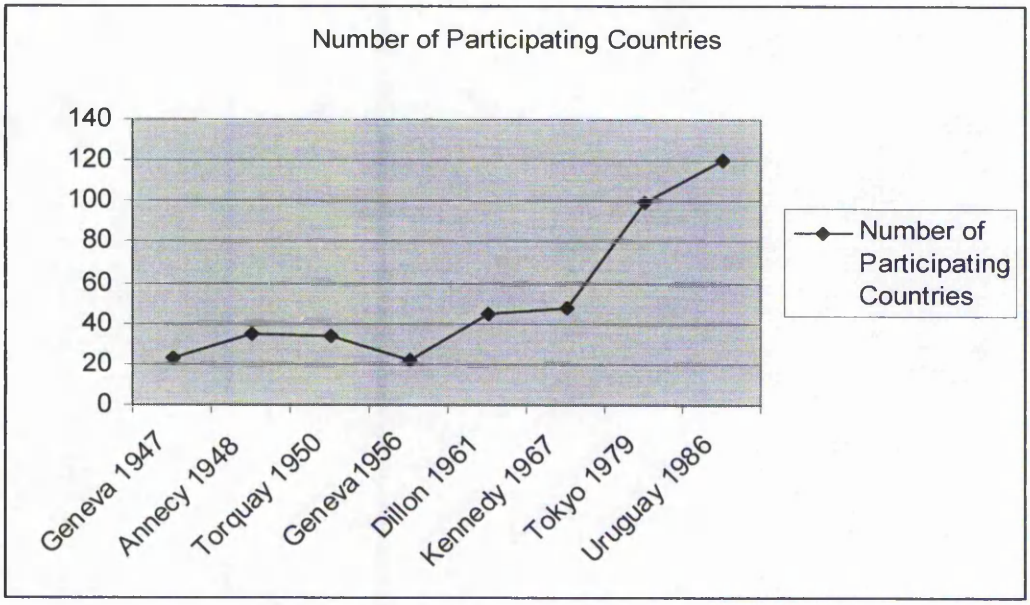
[31] Jackson, *loc.cit.*

Figure 2.1(a): The GATT Rounds



Source: based on statistics compiled by Jackson, in his book "The World Trading System", 1997.

Figure 2.1(b): The GATT Rounds



Source: based on statistics compiled by Jackson, in his book "The World Trading System", 1997.

Considerations in the Uruguay Round Negotiations Encouraging Institutional Change and Development

The Uruguay Round, which was the eighth multilateral negotiation of the GATT, was launched in September 1986 and finally concluded in April 1994. Just like the GATT 1986 Activities states: "Certainly, the launching of the Uruguay Round in September 1986 was of almost unprecedented importance in the history of the GATT". The Uruguay Round was different from the former rounds in various ways. As can be seen from Figure 3-1 the trade affected by the Uruguay Round has increased dramatically. The participating countries have also virtually exploded in numbers to more than one hundred and twenty. It was the most ambitious and wide-ranging of all the GATT rounds. For the first time in history, issues such as services, investments, intellectual property rights were included within the multilateral trade agreements. However, perhaps one of the greatest achievements, still related to the others was the introduction of the judicialized dispute settlement system. The bargaining history of the establishment of the legalized dispute settlement system provides excellent sources of empirical studies that better understand the nature of this unique system. The scale of the trading operations of the new WTO made the transactions costs of insufficiently regulated market failures (due to failure to observe the market friendly GATT substantive rules) become increasingly intolerable.

The Ministerial Declaration on the Uruguay Round set two objectives for the reform of the dispute settlement process: (1) strengthening rules and procedures; (2) enhancing surveillance and thereby increasing compliance.[32] So, from the beginning there was recognition that "something had to be done". There had already been an evolution towards a more legalized approach to dispute resolution under the pressure of increased trade from the mid-1960s to the mid-1980s.

At the same time it was the case that change would have variable distributive consequences for different countries. The global power structure of the Uruguay Round

[32] T.P. Stewart, *The GATT Uruguay Round: A Negotiating History*, Kluwer Law and Taxation Publishers, 1993, pp.2669-2876.

(involving the US, EC, Japan, Developing Countries) made negotiations over the establishment of the judicialized dispute settlement system a highly political, conflictual process. During the 1980s, half of the US complaints were brought against the EC. Lowenfeld stated that "Inevitably the GATT dispute process became a forum for US-EC controversy, in parallel and often overlapping the negotiations in the Uruguay Round."[33] At the early years of the Uruguay Round, there were very deep diverse views on the role of dispute settlement. US and Canada and other countries "saw the task of dispute settlement as being to establish right and wrong: to deliver a legal judgment with which the losing party ought obviously to comply."[34] However, the EC and Japan saw dispute settlement as an extension of the conciliation process, "with the aim less to reach legal judgments than to overcome a particular trade problem."[35] The EC and Japan were opposed to the US idea of establishing a compulsory mechanism and supported continuing a voluntary mechanism. The history of the subsequent struggle is now very well known and established accounts are given by T.P. Stewart and John Croome, upon whom reliance is placed in the account that follows.

The key role of the US as an actor here shows how the abstractions of neo-liberal institutionalism are not enough of themselves to explain radical institutional change. The pressures of market failure and transactional costs were present, but they were not of themselves enough to bring about change without the decisive intervention of a hegemonic power, which believed in the necessity of creating the social fact of a compulsory dispute settlement mechanism, and thereby struggled to restore the consistency in the GATT (becoming the WTO) through removing the inconsistency between the existence of standards for ensuring free and fair trade, but the absence of mechanisms for ensuring compliance with these standards. The gaps between substantial and procedural rules were being accentuated by certain GATT actors, such as the EU and Japan, and were resolved by other actors determined to create new social facts, to use the language of Ruggie, and a new Cultural System, to use the language of Archer, through

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[33] Lowenfeld, *op.cit.*, p.147.
[34] John Croome, *Reshaping the World Trading System - A History of the Uruguay Round*, Boston: Kluwer Law International, 1995, p.149.
[35] *loc.cit.*

an original agency, to use the language of both Archer and Wendt. Material factors alone, the increased density of trade increased the pressure for new institutional solution, but without the determination of individual states as actors, the change need not have come about. The WTO DSM, as a social construction, will therefore, as a new Cultural System still depend for its force and rigor, upon the determination of its original creator to maintain it.

As Stewart puts it:

> The US expressed concern with the EC and Japan's position regarding blocked GATT panel reports. The US delegates felt that merely requiring the submission of written justification for blocking reports did not go far enough in eliminating the problem. The US trade representative questioned the EC and Japan on their willingness to accept stronger reform.[36]

So the chief issue in the negotiation was that the US would be able to make it clear to the EC and Japan that the disadvantages of not agreeing to a centralized, automatically enforceable dispute settlement system were greater than agreeing to such a system. The narrative that follows comes from Stewart and Croome. The US did this by making it clear that the status quo was no longer an option. The US was not going to continue to accept the so-called diplomatic consensual approach of the GATT to dispute settlement. The US warned that in particular the EC practice of using delaying tactics in reaching panel decisions and then an outright veto of the panel decision in the Council of Members to avoid its obligations was intolerable. In other words for the US the existing system did not work well enough for it to be worth its while to remain in it.[37]

So the US Congress introduced domestic legislation, which allowed the President to act unilaterally whenever he thought that GATT obligations were not being met by member states. The EC and Japan perceived that if they did not agree to compulsory international adjudication of disputes they would end up entirely at the mercy of US trade authorities, a melt down of GATT. Of course background to the capacity of the US to make a threat of

[36] Stewart, *op.cit.*, p.2735.
[37] Stewart, *loc.cit.*, Croome, *loc.cit.*

this nature is that the size of the US market is so great, that the EU and Japan depend absolutely upon being able to export to it.[38]

The developing countries are much less significant both in international trade participation and in the participation in GATT dispute settlement procedures. However, their interest also broadly coincided with the US because legal procedures would to some extent eliminate disparities of power in negotiation processes. Of course that does not remove the problem of the use of legal processes as a form of harassment of a legally less competent and experienced state.[39] Nonetheless even this was preferable to a developing country attempting to negotiate against the EC or the US where they were delaying panel decisions or vetoing their application. This meant that the developing countries sided with the US against the EC and Japan on the issue of dispute settlement.[40] It is important to spell out the significance of this aspect of the negotiations for China's position. As will be explored in more detail in the next chapter, part of China's self-identity is as a developing country. In joining the WTO it did place hopes in the DSM as a mechanism for disciplining protectionist states that it knew would resist its comparative advantage in certain manufacturing sectors.

Nonetheless, this does not mean the path forward for China is clear, because there remains the question of the quality of the legal standards to be applied, and whether a political dimension remains built into either vague standards or standards which are clear but not to China's advantage. This general problem will be the subject of the last section of this chapter, but, now it is worth noting that reservation were expressed at the time by Hudec, that the negotiations to improve the DSM had perhaps overstepped the quality of the substantive rules of trade law that had been codified under the WTO at the end of the Uruguay Round. Hudec's arguments are the following.

One of the reasons for a resistance in perfectly good faith to the new DSM is that there are not already in existence rules sufficiently clear and agreed for the WTO Panels to be

[38] *ibid.*, p.2735.
[39] *ibid.*, p.2735.

deciding cases objectively. One is giving arbitrary power to un-elected Panel members who have no political legitimacy. This was a fear of many member states, especially the EC. However, they decided that it was better to live with this fear, which could materialize in the distant future (but then again might not) and the certainty that the US would retaliate at once with unilateral action if it did not get agreement at once to the DSM. This means one has to watch out for the possibility of a gradually increasing crisis of the authority of the WTO and its DSM, as countries might claim that Panel decisions are purely arbitrary and not based upon WTO law.

Almost by way of an appendix one might also make special mention of the ambiguous position of Japan. Although Japan shared positions with the EU in the negotiations, it is also an East Asian country like China, and while not a developing country, it has a political/legal culture somewhat distinctive from the EU. Historically, Japan was viewed as a supporter of a less legalistic approach to dispute settlement in GATT, preferring a system relaying on negotiation and compromise instead of adjudication[41]. In order to benefit from a compulsory DSM one has to be a country, which will use such a system a great deal. Yet the EC, Canada, the US continue to be the main users of the DSM. Japan is increasingly using it. Japan's self-perception is that it has learned, firstly, that it can win cases through even the GATT system, and secondly, that it also, like developing countries, tends to be hurt by diplomatic consensual negotiations, where a country such as the US uses its superior power to force concessions on it. Nonetheless Japan's relationship to the DSM remains more ambiguous than the EU and it does not benefit so clearly, because of its relative reluctance to use the system aggressively as a complainant, as distinct from finding itself there as a defendant.

The position of Japan was not as decisive as that of the United States and the EC in deciding the outcome of the Uruguay Negotiations so strongly in favour of the compulsory DSM. However, it is of special interest in a study devoted primarily to a case

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[40] *ibid.*, p.2735.

[41] For a detailed analysis, see Ichiro Komatsu, 'Japan and the GATT Dispute Settlement Rules and Procedures', in *The Japanese Annual of International Law*, Vol. 35, 1992, pp.33-61. He analyzed three phases in the evolution of Japan's basic approach to GATT dispute settlement and provided a very

study of China to consider that the last piece to complete the puzzle of the founding of the DSM was a country with a cultural history (relating to law and dispute settlement) similar to China's.

In December 1993, the Uruguay Round negotiations were completed. The states finally reached an agreement on the most significant international trade dispute settlement system in history. On January 1, 1995, as the institutional foundation of the world trading system, the WTO was established. Annex 2 to the WTO Agreement consists of the Understanding on Rules and Procedures Governing the Settlement of Disputes, which is the central part of DSM. In what follows I will explain how this institution is supposed to incorporate the values and the norms of free trade and the rule of law.

WTO Dispute Settlement

The dispute settlement mechanism of the WTO is a unique feature of the institution. As of September 2004, more than 300 disputes had come before the DSB, and about half of these had been referred to panels. The DSU is set out in an elaborate treaty of 27 articles totaling 143 paragraphs and four appendices subscribed to by all member states of the WTO and applicable to virtually all of the WTO agreements. As mentioned earlier, the DSU is the Bible of WTO dispute settlement system. Compare to GATT dispute settlement, this system has the following features.

The Dispute Settlement Body (the General Council) consists of representatives of every WTO member and has sole authority to deal with dispute settlement. This body represents the true institutionalisation of the dispute settlement process. In GATT, the panels were set up by the Contracting Parties, on an *ad hoc* basis, with the Director General having a limited facilitative role. Now the DSB is a permanent framework, authorized by its rules, and without the necessity of further member state consent, to set up panels and ensure their operation in circumstances clearly defined by rules. The DSB oversees the dispute from inception to its final resolution. In addition to this, the DSB is

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significant opinion as an insider commentator.

also serves as the forum where matters of dispute are discussed.

There is provision for the automatic establishment of a panel upon request and the adoption of panel report. Under the new Understanding there is guaranteed access to a panel.[42] Dispute settlement under the GATT was based on the consensus principle. The Council had to establish each panel and a panel report was merely advisory. The unanimity rule meant that, in theory, the respondent had the right to block either the establishment of a panel or the completion of the process. Under the WTO DSM, "rulings are automatically adopted unless there is a consensus to reject a ruling – any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view."[43]

Member states have rights as well as duties. They have a right of access to a panel in clearly defined circumstances. The obligation imposed on all members is "engage in these procedures in good faith".[44] They have equally - this is the essence of the compulsory dimension - the duty to appear, when a complaint is made against them. They cannot act to resolve disputes outside this framework, that is, unilaterally.

There are time limits for stages of the dispute. Dispute settlement procedure under the GATT had no fixed timetable and it was possible for one side to delay and obstruct a dispute, which was against its interest. The DSU sets out the timetable for each stage of the dispute, and in this way no state can prevent the operation of the time-limits fixed exactly. The damaging effect of trade disputes can only be limited if the time the disputes are allowed to run is also limited. The DSU emphasizes that prompt settlement is essential if the WTO is to function effectively.

The procedure is clearly an adjudication process and resembles arbitration. The arbitrators are not themselves permanent. They are reappointed, for each case, by the Chairman of the DSB. But otherwise the system is the same as a court system. It is

[42] Article 6(1) states that a "panel shall be established".
[43] Understanding the WTO, published by the WTO, 2004, p.58.

adjudication, according to pre-established rules. Appointment of panel members cannot be blocked by the parties and each party has a right to a hearing. The only remnant of the diplomatic process, a very important one, as will be seen in the final section of the chapter, is that the proceedings are confidential.[45]

There is surveillance of the implementation of the rulings. Under the DSU Article 21(1), compliance with the rulings of the DSB is required. It is provided that "in the absence of compliance with the panel report within the specified time, ... the General Council permits retaliation." The whole process after the decision is given is also closely regulated. The DSB has compliance enforcing powers and can authorize compensation, if necessary, after a time limit. Finally, the DSB can authorize retaliation, if necessary, through withdrawal of concessions or suspending obligations.

By way of summary conclusion, it can be noted that now the WTO, in contrast to the GATT, has removed the power of veto of a member state that had existed at every stage of the proceeding: the setting up of the panel, the adoption of the reports, the dragging out of the proceedings, the implementation of the reports, and the organization of the retaliation process in the event of non-compliance. This is not to mention the facility of having standard terms of reference for panels. In all, the effectiveness of the DSB is a huge improvement over the GATT, although it has to be said the process of transition was gradual in so far as the pressure was building up for change and the member states were clear for some time about what changes were needed.

Already some studies are very concerned with the results such a rule of law system produces. As Hudec argues: "The promise of a rule of law system is to level the playing field between the mighty and the weak".[46] The most basic idea of the rule of law is that it should apply equally among all the parties. So it should apply regardless of the size, importance and characteristics of the individual trading parties. It should not be possible for one of the parties to have any more influence on the outcome of a disputes procedure

[44] The "good faith" is a basic legal principle.
[45] DSU Article 14 (1).

than the other. A level playing field is that the adjudication is equally distant from both the parties. Busch and Reinhardt put their concern in this way: "Our point here is rather that the rule of law system does not by itself guarantee efficient outcomes. For that, one also needs an adequate level of legal capacity and expertise to realize the full promise of such a system".[47] This remains a problem, because the legal expertise to realise the system is still concentrated in a small number of Western countries and a tiny number of others which use it. However, this issue is related to the next, because increasing participation of developing and other countries in using the DSM can only have the effect, if gradually, in increasing their levels of expertise.

These final points will have to be considered again with respect to China in the third and fourth chapters. China faces a major problem of legal capacity that weakens its participation in the DSM. However, it does not treat this fact as a reason for questioning the very foundation of the system and endeavors, particularly through third party participation in panel cases, to acquire both experience and influence in the system. The wider question whether there is a level playing field in the way panel cases are decided is a more fundamental matter of whether politics, in the classical Realist (Morganthau) sense creep back through the supposedly firmly neo-liberal institutionalism of the WTO. That problem will be the subject of the last two sections of the present chapter.

A General Review and Critical evaluation of the Operation of the DSM

A fundamental question has to be the impact of the DSM on state behavior. As the WTO describes itself: "The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore for ensuring that trade flows smoothly."[48] Provided the system is actually implemented this development removes the prisoners' dilemma element of international trade. Because of the powerful DSM, unilateral trade measures are only allowed in limited and controlled circumstances

[46] Hudec, The GATT Legal System: A Diplomat's Jurisprudence, *op.cit.*
[47] Marc L. Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement', in *Journal of World Trade*, Vol. 37 (4), p.734.
[48] WTO/Dispute Settlement Gateway, WTO online information, http://www.wto.org.

or require multilateral authorization. This excludes opportunism by states which give and receive trade concessions in a multilateral context, and then withdraw their own concessions from others in the knowledge that they will not suffer effective retaliation, because they can insist on their own view that the withdrawals were justified, or limit withdrawals to countries which cannot effectively retaliate. The prisoners' dilemma would mean, applied to international trade, that no country would have a sufficient incentive to make or keep to concessions made, because it could not be sure that other countries would do likewise. For example, whenever a country chose to imagine itself in an economic crisis it would simply impose safeguards measures to exclude foreign imports, reckoning that if other countries were in the future to find themselves in a similar situation they would behave the same way. This is an example of what the DSM has eliminated as a risk, at least for the time being. For example, WTO has the agreements on safeguards, but in practice, very rarely can a member win a safeguards case.[49]

Article 3:2 of DSU states that:

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.[50]

In the early days of the WTO, it was widely expected that the legalization of trade disputes, compulsory settlement of trade disputes, would replace power-oriented relations. Pressurized deals made behind closed doors would give way to an open rule-based multilateral regime. The WTO's multilateralist system would give clear guidelines and certain direction to trade relations between governments. The DSM is described as "the central pillar" of the WTO.[51] Jackson claims:

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[49] So far there are 30 safeguards cases, see A. Lowenfeld, *op.cit.*, pp.87-93.
[50] Article3.2 of DSU
[51] A unique contribution from http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm.

> The dispute settlement system under the new procedures is having a profound impact on the world trading system. In particular, diplomats find themselves in new territory. Rather than operating in what is thoroughly a 'negotiating atmosphere', diplomats find themselves acting as lawyers, or relying on lawyers, much more heavily than before, and much more heavily than some of them would like.[52]

According to the DSU all members have the obligation to "engage in these procedures in good faith". The reference to "good faith" has legal significance. It requires fidelity to the provisions as a matter of legal obligation. Unique in public international law, the DSU confers compulsory jurisdiction on the DSM for purpose of resolving disputes.

There is expressed general satisfaction with the steady use of panels and the appellate body. The number of complaints each year, of one country against another, for the violation of WTO law comes to about thirty. The number of panel decisions averages ten, and about half of these are appealed to the Appellate Body. Traditionally about forty five percent of both the complainants and defendants in these cases are either the US or the EU, the main proponents and opponents of the introduction of the DSM. However, the number of lower-income countries bringing cases comes to about a third and there is an increase of both these and also of higher middle income countries (India, Mexico and Brazil) that are using the system. Japan is also a regular.[53] All of this is taken to suggest that the DSM has become embedded in the trading practices of states, so as to eliminate the fear of the prisoners' dilemma.

Now that the system is up and running — and there have been more than seventy panel reports, over half of which have been appealed — it is possible to note particular questions relating to the idea of the rule of law arising out of the practice. Obviously the formal system of the dispute settlement has to apply the substantive rules in the GATT/WTO themselves and in the particular agreements. Now developing countries consider that the agreements are skewed in favour of trade in the capital-intensive

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[52] Jackson, 'Emerging Problems of the WTO Constitution: Dispute Settlement and Decision-Making In the Jurisprudence of the WTO', in P. Ruttley, I. MacVay, and Masadeh (eds.), *Liberalization and Protectionism in the World Trading System.* Cameron May, 1999, p.30.

[53] K. Leitner and S. Lester, 'WTO Dispute Settlement: 1995-2003' in *Journal of International Economic*

products of the developed economies.[54] Certainly, the majority of panel cases involve the established GATT and the new agreements that regulate anti-dumping, subsidies, safeguards and health measures, are with respect to such products.[55] However, to balance against this bias, it is argued that the small number of complaints brought under the TRIPS Agreement and all against developed countries, suggest that the latter are showing restraint in bringing actions under a controversial agreement, such as TRIPS, against developing countries. There is probably anxiety not to upset the delicate political balance of the Uruguay Round. Indeed, the Doha Round of negotiations has made some concessions to developing countries, showing that the alternative of negotiation to panel decision-making can exist.[56]

Nonetheless, there is still a problem of constitutional legitimacy if the DSM and the substantive rules are not benefiting equally all members of the international community. For instance, consider closely the issue of anti-dumping, that products are exported at prices well below a fair price, however the issue of fairness is determined. This affects China especially as it is exporting manufactured products at very competitive prices, arguably because its own labour costs are exceptionally low. It is arguable that the direction of the idea of legalization of trade disputes is towards acceptance of the rule of law in trade disputes. The WTO is itself very upbeat. So a Press Release of 20 April 2004 reports a significant decline, from 2002 to 2003, in new anti-dumping investigations, occurring at the national level – where they all begin. These are always begun in member countries and it is left up to defendant countries to appeal against national tribunals to the WTO. India, the US and China, the EC and Japan are the most important players. China was a defendant in thirty cases, and complainant in eleven. There was, however, hardly a significant drop in the number of final determinations of anti-dumping, from 113 to 107.[57] What remains questionable is why so relatively few of these findings at the national level

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Law Vol. 7, 2004, pp.169-181.

[54] C. Arup, 'The State of Play of Dispute Settlement "Law" at the World Trade Organization' in *Journal of World Trade*, Vol.37, 2003, p.900, referring to Oxfam's publication, Rigged Rules and Double Standards: trade, globalization and the fight against poverty.

[55] *ibid.*, p.906.

[56] *ibid.*, p.907.

[57] WTO Press/374 WTO News: 2004 Press Releases. This information is based upon obligatory member reporting to the WTO.

are questioned all the way up to WTO panels. The statistics up until 2003 show an average of about seven cases a year, with the same number for subsidies actions, the other main trade remedy complaint. These are a very significant part of the whole number of complaints, about a half.[58] So the WTO reporters seem quite confident. And yet, it is equally arguable that while countries accept, nominally, the values and norms of the WTO, they apply them mainly at the national level. They are not, perhaps, fully accepting the institutions of the WTO, that is, by insisting on applying the values and norms also at the international, WTO level. Maybe the WTO itself is too upbeat about the interpretation it puts on its statistics.

So there this crucial issue of anti-dumping shows well enough on its own, that there could still be a problem of constitutional legitimacy if the DSM and the substantive rules are not benefiting equally all members of the international community. It is doubtful whether a solution can be found within the DSS itself, rather in renegotiating substantive rules. It is argued that judicial activism is not the answer, because substantive concepts of justice need to be the outcome of open democratic negotiation.[59] That is to say, the problems of legitimacy are incorporated within the rules themselves that the panels have to interpret. The Anti-Dumping Agreement is simply not free from serious ambiguity. The lynch-pin of the Agreement is the idea that dumping of products, selling them abroad at a price below the market price at home, is supposed to be unfair trading. Yet the Agreement itself does not contain a definition of unfair trading. Decisions about such matters are being taken by panel members who work on a sessional basis – panels are always reconstituted for particular disputes – and who are by no means confined to the discipline of law.[60] Vague concepts of natural justice or equity could have an influence on deciding whether anti-dumping in a particular case constitutes unfair trading since markets are usually not open and the panels have to decide the meaning of anti-dumping through a process of construction of what a product could sell for in a hypothetical free market. Whether products are sufficiently alike to be treated as relevant to the same market and whether there are "other factors" contributing to the damaging of the domestic market of the

[58] Leitner and Lester, *op.cit.*
[59] *ibid.*, pp.901-902.

complaining country in an anti-dumping action, are all matters so vague and speculative as to leave great discretion to the panel members to decide. The rules on interpretation of the Trade Law are supposed to follow the general principles of international law in the Convention on the Law of Treaties. This allows and invites the panels to interpret a treaty in accordance with the ordinary meaning of the terms, but also in their context and in the light of the objects and purposes of the treaty. This can mean the whole of the treaty text and not just a substantive individual article.[61]

So, it is not surprising that some critical voices say that the extent of the review of anti-dumping measures of member states by the WTO remains modest. This is in spite of the willingness of the panels to review fully all the facts and arguments determined by national tribunals when cases are brought to them. The overall impact of the panel reports on national practices is not clearly to change these practices significantly. [62] This leaves open the following theoretical question. Member states may not be openly contesting the DSM. However, the rigidity of the legal approach means that it is possible for domestic tension to mount in very specific areas of regulation (for domestic producers) without it being any longer possible for Member state governments to link these areas together into an all or nothing agenda, which forces national legislatures to accept that they either have to stay in the WTO and accept all it does, or leave it completely because they are not happy about a particular panel decision. There is mounting specific criticism that panels exceed their authority and legislate in particular cases.[63] However, for the time being all the talk is of strengthening the DSM, especially by tightening up procedures and it is still fair to say, generally, that the DSM has become embedded in the trading practices of countries.[64]

Equally important in practice, besides the question of the vagueness and non-legal

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[60] *ibid.*, p.912.
[61] *ibid.*, p.914.
[62] R. Cunningham and T. Cribb, A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures, *Journal of International Economic Law*, Vol. 6, 2003, p.155.
[63] J. Greenwald, WTO Dispute Settlement: An Exercise in Trade Law Legislation? *Journal of International Economic Law*, Vol. 6, 2003, p.113.
[64] D. McRae, What is the Future of WTO Dispute Settlement?, *Journal of International Economic Law*, Vol. 7, 2004, p.3.

character of the rules which the panels may be applying, is the vexed question of what influences countries to bring a complaint in the first place and then to pursue the complaint all the way to a final panel decision. By the nature of the process non-legal considerations must be influencing the decisions taken with respect to these matters. If one bears in mind that only about a quarter of complaints (seventy or so) out of three hundred brought actually come to a panel decision, it is obvious that the parties are moderating their legal goals by regard to either financial costs or the possible impact of the litigation on their long-term relationships with the opposing parties, although concrete research needs to be done on what is actually happening here.[65] Clearly it is possible that all of the problems of the diplomatic approach to dispute settlement can creep back in through the decision of countries not even to bring a complaint or then to decide, having brought it, not to pursue it. In particular, it is obvious that, even with a small number of stronger developing countries such as Brazil using the system of the DSM, smaller developing countries continue to treat it as an unrealistic option, which has severe implications for the idea that the rule of law is replacing the rule of the powerful. This has actually been said by the Least Developed Country Group in the continuing negotiations in the Dispute Settlement Body.[66]

Remaining Questions about the Relationship of Law and Politics in the DSM

This research has to lead up to the following research questions: how is one to evaluate qualitatively the various elements, which help to explain why China resorts to what are described as political and legal methods of resolving intergovernmental trade disputes? The nature of the legalization of the WTO DSM is relevant to this context. China's approach to the DSM will be influenced by political, economic and cultural factors peculiar to China itself, but it will also be influenced by the nature of the DSM itself. After all of this, the major research question remains, to what extent can a country such as China have real freedom of action, in the sense of space to make priorities and develop trade policy agendas with respect to handling inter-governmental trade disputes in the

[65] *ibid.*, p.903.
[66] *ibid.*, p.904.

shadow of the WTO?

It will appear that so far (to the spring of 2006) China's approach to the DSM is marked by a great engagement in panel proceedings as a third party, but almost no involvement directly as a plaintiff or as a respondent, all the way to panel decisions, except in the steel case, which can itself almost be characterized as a third party participation on the coattails of the EU, Japan and others. If it is the case that China's political and legal culture discourage it from thinking, *as a first resort,* to resolve its disputes through legal processes, then one must expect its judgment of the suitability of the WTO DSM to be affected by the extent to which there are serious questions being posed by lawyers and political scientists about both the legal rigor and the political legitimacy of the DSM. Of course, it would be inconsistent with what is argued in the next chapter about China's political and legal culture, to expect it to attack the DSM openly. It is perfectly consistent with skepticism about it, to try to influence it through third party participation. However, the real acid test of China's attitude to the DSM is the actual approach adopted, and that will be seen to be to avoid the legal approach in favor of the classical political, diplomatic one. That approach is bound to have been influenced by the arguments, even if contested, that the DSM both lacks legal rigor and political legitimacy.

It has been wondered whether IR specialists have now a sufficiently clear perspective of the significance of the development of the DSM for international relations theory. According to the prominent Harvard specialist in international economic constitutionalism, Joseph Weiler, international political scientists do not pay enough attention to the developments in the WTO since 1995.[67] If this is true it is surprising because regime theory grew up around the recognized importance of the GATT and Bretton-Woods System for providing a framework of order and regularity for American economic as well as political hegemony after 1945. In the 1970s there was some questioning whether American hegemony was basically shaken after the collapse of the Bretton Woods System. However, regime theory, with its backing of a neo-institutionalist

[67] Joseph Weiler, 'The Rule of Law and the Rule of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', *Journal of World Trade*, Vol.35 (2), April 2001, pp.191-207.

view of inter-state behavior, has remained very strong among IR theorists. Indeed, it has been the USA, which provided the main push for the virtual constitutionalisation of international economic relations.[68]

In fact, political scientists do mainly look at three aspects of the WTO and DSM. One is the question of legitimacy in the WTO, whether it takes account of factors such as democratic legitimacy, or power discrepancies. Jens Steffek has argued that the legitimacy of the WTO is dependent on public approval of its principles, procedures and politics, because in political practice 'the rational justification of international governance is its most important legitimacy resource'.[69] Robert Keohane and Joseph Nye equate "legitimacy" with notions of democracy and accountability. They hold that "in the contemporary world, democratic norms are increasingly applied to international institutions as a test of their legitimacy." Democratic governments, they maintain, "are judged both on the procedures they follow (inputs) and on the results they obtain (outputs)".[70] It is the formal aspect of democracy, which is crucial, decision-making procedures need to be accountable and transparent. This is not to deny a place also for material inputs, i.e. concrete issues. The lesson for the shaping of international organizations is that one has to establish reliable lines of communication between international organizations and the wider public of civil society.[71]

In these terms it is recognized that there are, even in purely legal and constitutional terms, serious problems about the legitimacy of the DSM. For instance, my research in my field trip to Geneva has revealed that some legal and non-legal officials within the Chinese Delegation and within the WTO Legal Secretariat itself, feel that the legalization of trade disputes has gone too far.[72] According to these officials, it is felt to be more and more

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[68] John H. Jackson, 'The Rumbling Institutions of the Liberal Trade System', *Journal of World Trade*, Vol.12 (93), 1978; *Restructuring the GATT System*, *op.cit.*

[69] Jens Steffek, 'The Legitimation of International Governance: A Discourse Approach', *European Journal of international Relations*, Vol. 9(2), 2003, pp.249-275.

[70] Keohane and Nye, 'The Club Model of Multilateral Cooperation and Problem of Democratic Legitimacy', in Porter, Robert, Sauve, P, Surbramanian A. and Beviglia-Zampetti A.(eds.), 2001, *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millenium*. Brookings Institution Press. Washington D.C. pp.281-282.

[71] *ibid.*, p.290-291.

[72] Author's interviews conducted in Geneva in June 2003.

difficult to consider the process of the DSM except internally in terms of its own technical logic and dynamic. This raises directly the question of democratic legitimacy and accountability because it means the rule of international economic relations by lawyers. If lawyers reply that the democratic will of the international community has been to put decisions into the hands of lawyers by setting up the DSM, the question still remains: whether decisions taken by Panels and the Appellate Body (AB) are sound or unsound in terms of canons of legal interpretation and deduction.

One criticism, which is serious for lawyers is that: "The WTO dispute-resolution is secretive, biased and exclusive, concentrating power in the hands of international trade insiders. It does not include procedural safeguards or due process protections, yet it exerts tremendous coercive power over member countries"[73] Indeed, the prominent international economic lawyer, Tarullo argues that "the dispute settlement processes of the WTO take place largely behind closed doors, reinforcing the image of an unaccountable, closeted group of foreign lawyers deciding key issues of public policy".[74]

International Relations scholars join in the criticism by arguing that rules of legal interpretation are being misapplied to DSM because they exclude the natural history of any legislation, which gives it its political legitimacy, the intentions of the legislators themselves. Karen Alter has explained the alienation between law and diplomats/ politicians very well in much these terms of democracy and legitimacy.[75] The Appellate Body is insisting that all decisions have to be taken though an international law (Vienna Convention on the Law of Treaties, 1969, article 30-33) definition of the rules of interpretation. One has to decide what are the natural and ordinary meanings of the words in the WTO provisions. No regard is given to the arguments of the parties about what the original intentions of the states drafting the rules were. Panels are advised by the Legal Secretariat on a purely legalistic approach to the rules. In this way the whole machinery

[73] See '*What's Wrong with the WTO*', http://www.speakeasy.org/peterc/wtow/wto-disp.htm, visited on 06/09/2003

[74] Daniel K. Tarullo, The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions, *Law and Policy in International Business*, Vol. 34, 2003.

[75] Karen Alter, 'The WTO DSU Exacerbating Conflicts?' *International Affairs*, Vol. 79 (4), 2003, pp.783-800.

of the DSU takes on an independent existence in purely legal terms, which it is very difficult for non-legal specialists to penetrate.

This might not matter if the methods of legal interpretation encouraged by the Legal Secretariat were regarded as sound, at least by lawyers. However, this is not clearly the case. Another form of criticism has been in terms of exposing internal institutional manipulation within the WTO/DSM, the very essence of political analysis. Chakravarthi Raghaven supports Alter's approach about legal interpretation but stresses more the institutional perspective. In his paper *The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South*, he explains that in terms of the Vienna Convention there is no valid negotiating history that can be looked at to get to the intentions of the parties.[76] In other words the Legal Secretariat adopted this approach to make sure there would be no way anyone could challenge its view of the "natural and ordinary" meaning of the rules of the WTO. Under Art.8.7 of the DSU the Secretariat chooses the Panel members and many members are serving repeatedly on the Panels. The Appellate Body members are chosen in the same way after being cleared with the US. Both Panels and the AB, with informal notes from the Legal Secretariat are now talking of the "Treaty Interpreter's authority" and duty to harmoniously interpret and reconcile contradictory language in agreements. This is even although the right of authoritative interpretation is vested exclusively in the Ministerial Conference and/or the General Council. As Raghaven puts it:

> the Secretariat is clearly feeling its way, playing a role behind the scenes...by providing panels with guidance on what negotiators had intended in the texts – a negotiating history of sorts – but behind the backs of the parties to the dispute...Some Panelists in private have told this writer that when they tried to adopt a different view, the secretariat often asked them why they wanted to do so, since they would not be there to defend their views! And there was the implied "threat" that they would never have a chance to serve on another panel.[77]

It is too early to say how states will react to the legalization process, but it would not be

[76] Chakravarthi Raghaven, *The World Trade Organization and its Dispute Settlement System: Tilting the Balance against the South*, Trade and Development Series No.9, 2000, http://www.twnside.org.sg/title/tilting.htm, visited on 12/09/2003.

surprising to find that the US itself, the originator of the DSM, became skeptical of its usefulness to it and more willing to respond to the demands of another power to engage in political and diplomatic negotiations, rather than get itself tied up in litigation which proves too constraining. Judith Goldstein has analyzed the changing relationship between international rules and domestic political goals, with respect to the role of the United States in the creation and evolution of the GATT and WTO. She argues that the political purpose of looser GATT consensual-diplomatic framework has been undermined by the compulsory legalism of the WTO (the automatic application of transparently clear rules). This has resulted in an increase in the politicization of trade policy in the United States and a decline in support for both the trade regime and its purposes. "America's allegiance to the trade regime is far more tenuous than at any earlier time" she concludes:

> Trade politics is essentially about politics, not technical rules. The WTO may be better suited than was the GATT to solve the host of systemic problems associated with international trade policy. However, such solutions are without value if member countries are not committed and interested in free trade.[78]

We have already considered in the last section, the question, whether in such key areas as anti-dumping rules there are clear legal guidelines for the DSM to follow. Now we have raised the question whether the so-called international law rules of legal interpretation developed at the instigation of the Legal Secretariat are merely a bureaucratic strategy on their part. Finally, political scientists have also raised the question whether the Panels themselves and the Appellate Body, are strong enough to keep distance from unequal parties appearing before them — raising the most fundamental aspect of the rule of law, the equality of the parties before the law. Garrett and Smith present a general framework for analyzing the politics of dispute settlement in the WTO. They argue that the members of the Appellate Body are interested in developing a reputation for jurisprudential coherence and authoritative decision-making. "In time, the Appellate Body (AB) may come to act as legal scholars hope it will-impartially and authoritatively applying the law against sovereign states that accept its rulings as binding. But in the short term, we

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[77] *ibid.*, pp.

[78] Judith Goldstein, *'The United States and World Trade: Hegemony by Proxy?'* in Thomas C. Lawton, James N. Rosenall, Amy C. Verdun (eds.), *Strange Power*, Ashgate, 2000.

believe it more likely that appellate Body decision making will be strategic and often political".[79] This means the actual process of taking decisions on disputes has a political dimension — finding a compromise between the parties, or taking account of whether one is stronger than the other. They go on: "Specifically, we expect the Appellate Body to be reluctant to make strong and unequivocal adverse rulings against powerful WTO members on issues of considerable domestic political salience".[80] Indeed, this type of argument is quite disturbing. Our analysis of the steel dispute in the fifth chapter will suggest that the sheer weight of the coalition against the US in this case, along with the strategic significance of the US itself for the success of the DSM, probably played a part in the evasive and superficial reasoning of the Panel and the Appellate Body in that case. As a participant in the case, one that pressed unsuccessfully to have questions about its legal status in the WTO answered, China must also have noticed how many questions went unanswered.[81]

Richard H. Steinberg has critiqued the processes of consensus decision-making operating in practice in the GATT and WTO. He argued that consensus decision making at the GATT and WTO is organized hypocrisy, allowing adherence to the instrumental reality of asymmetrical power and the sovereign equality principle upon which consensus decision making is purportedly based.[82] Also, Smith attributes the trend toward the setting up of regional trade agreements to the legalism in the enforcement of trade agreements. He focuses on the design of dispute settlement procedures of governance in international trade and offers a political theory of dispute settlement design in international trade. This theory of trade dispute settlement design ostensibly relies on a hybrid of Neo-Liberal, Institutionalist logic and structural realist indicators of relative economic power. But he claims this theory is "grounded in a political calculation of costs and benefits in the domestic arenas, not in expectations about absolute or relative gains

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[79] Geoffrey Garrett and James McCall Smith, *The Politics of WTO Dispute Settlement*, UCLA International Institute, Occasional Paper Series, Working Paper, 2000, http://repositories.cdlib.org/international/ops/wtogarrettsmith.

[80] *ibid.*,

[81] for instance, the recent ruling of the Appellate Body against the United States in the Steel Cases: WT/DS2 248/AB/R

[82] Richard H. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', in *International Organization*, Vol.56 (2), Spring 2002, pp.339-374.

internationally".[83]

Even collaborations between lawyers and political scientists, which are very positive about the developments in the GATT/WTO come to conclusions which are similar. In their ground-breaking study of the legalization of dispute settlement, Keohane and Slaughter develop a conception of international legalization to show how law and politics are intertwined: "International legalization is a form of institutionalisation characterized by three dimensions: obligation, precision, and delegation...Most international legalization lies between the extremes, where actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law".[84] Yet when applying this conception to international dispute resolution, Keohane and Slaughter hold that there are two ideal types of international dispute resolution: interstate and transnational. And the contrast between the two types of dispute resolution illuminates the impact of judicial independence, differential rules of access, and variations in the domestic embeddedness of an international dispute-resolution process. They point out that with respect to the dispute settlement of GATT/WTO; it is closer to the ideal type of interstate dispute resolution than to transnational dispute resolution. Under this type of dispute resolution, states closely control selection of, access to, and compliance with GATT/WTO. But also they admit that the GATT/WTO mechanisms do not reflect their ideal types so faithfully. They draw the ambiguous conclusion that: "The real dynamics of dispute resolution typically lie in some interaction between law and politics, rather than in the operation of either law or politics alone. GATT and WTO remind us that legal form does not necessarily determine political process. It is the interaction of law and politics, not the action of either alone, that generates decisions and determines their effectiveness".[85]

If that is the case why should China go against its history of political and legal culture and chose a legal method of trade dispute resolution when its supposed merit is that it is

[83] James McCall Smith, *'The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts', International Organization*, Vol. 54 (1), Winter 2000, p.137-180.
[84] Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, 'The Concept of Legalization', *International Organization*, Vol. 54 (3), Summer 2000, pp.603-632.

still really a political method? It is interesting to note the critical response of Robert E. Hudec to the novelty of the DSM. The WTO is not an institution of international government. Nation states still prevail. Standards of democratic legitimacy do not, therefore, easily apply to the WTO. The WTO functions in terms of the dynamics of conflict among nation states. So, Hudec believes that discussions of legitimacy in terms of democratic governance are not helpful.[86] Is Schwarzenberger right, along with the traditional Realists of IR, or are Grotius and Byers right, along with Neo-Institutionlists such as Keohane? The following empirical study of the DSM and its institutional context — including the background to states bringing cases to the DSM — will provide answers.

Conclusion

The complex condition of the WTO DSM is the framework within which China makes its choices between political and legal means of resolving its trading disputes. This framework operates within a dialectic of law and politics which might also be described by social constructivist like Ruggie, as the distinction between ideational and material structures. Ruggie would accept that the density of international trade and the inevitability of conflicts necessitate logically a framework of dispute resolution, which will reduce the transactional costs of the inevitable disputes. However, the driving forces which can make the necessary bridge to bring about the DSM require what Archer calls also the unavoidably unpredictable element of original initiative by individual actors. The difficulty for China, signing up to the WTO DSM is to distinguish clearly between what are the ideational dimensions of the WTO — the commitment to enforcement of free trade values - and the material realities whereby these values, the ideational dimension, are given a particular meaning, which reflects also the struggle of material interests. As China moves into the Framework it will be torn between the two poles of the WTO DSM as a Cultural System, to use the language of Archer.

The additional difficulty is that the Cultural System has been established, not simply

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[85] *loc.cit.*

[86] See Hudec, *The GATT Legal System: A Diplomat's Jurisprudence,* p.298.

because of material pressures calling for a reduction of transaction costs — to make for more efficient trading — but also because of the energy of a single actor, determined to create a new social fact – the dependable resolution of trade conflicts in according with principles of free trade. At the same time, the pressures of what Archer calls Social-Cultural Interaction are not sufficiently settled in support of the Cultural System to be able to exclude the possibility that either a Power the size of China cannot modify it, or that the power which instituted it, the US, might not tire of it, for instance for the reasons given by Goldstein. In addition, it was the Great Power status of the US that allowed the world to be "bounced into" the DSM. Now that another rapidly growing Superpower has appeared on the scene, China, the question arises whether there might be a measure of "bouncing back". China's response, will, however, certainly be very complex. Its material interests are not opposed to the idea of the DSM. However, what constitutes for it the "social facts" of its identity, particularly its political/legal culture (following Ruggie and Archer) are not automatically harmonious with the DSM.

Before one empirically investigates these dramatic questions and after the study of the nature of the WTO Framework, it will be necessary to offer the second serious theoretical part of the thesis — understanding China as an actor/agent. The study of the epistemological and ontological foundations of China as a social fact is the subject of the next chapter. What elements of China's material and ideational structure shape the internal context in which it finds a space to formulate its own policy agendas? At the same time a part of that internal structure will be what China considers it has had to absorb from the international context, particularly the WTO Framework. It will be part of China's pre-disposition to avoid confrontation with other states internationally in the context of the WTO Framework, by absorbing large parts of it into its own domestic structures, by acts of conscious anticipation of possible difficulties.

Chapter Three Sources of China's Approaches to International Trade Disputes

Introduction

"In order to understand Chinese international behaviour at any given time...one must look at both the international situation to which China must respond and the attitude towards the outside world prevailing within the Chinese leadership."[1] In the last chapter the international context, in particular the WTO Framework, was considered. In this chapter the intention is to look much more closely at the domestic dimension. One has to examine the various 'sources' of Chinese foreign policy. These sources are set out very clearly by the authoritative Chinese foreign policy analyst Wang Jisi. They include definitions of China's national interest, its material power, historical experience, culture, the domestic institutional structure, including the shape of political organisation, the changing political climate and the actual leadership of the country.[2]

We can describe these elements as having four aspects. These are the culture, or core, entrenched beliefs, secondly the interests of China consciously defined, both material and non-material, thirdly, the policy agenda, fourthly the institutional and legal framework. They have to be made specifically relevant to our theme of approaches to dispute settlement, as we are not offering a comprehensive survey of contemporary Chinese political society. The core dimension of the political and legal culture comes firstly because it is the most profound prior-determining dimension operating primarily at an unconscious level.

The institutional dimension must also be more widely considered to include the

[1] Wang Jisi, 'International Relations Theory and the Study of Chinese Foreign Policy: A Chinese Perspective' in Thomas W. Robinson and David Shambaugh (eds.), *Chinese Foreign Policy: Theory and Practice*, Clarendon Paperbacks, 1998, p.499.

relationship between the state and civil society. Given that most intergovernmental trade disputes emerge from the commercial disputes across borders among private trading partners and between domestic producers, retailers and consumers, it is necessary to study the relationship between government and enterprises. To what extent is government willing to prioritise industry interests in its diplomacy with other states. The role of the Chambers of Commerce and business associations in trade policy decision-making is very important to understand the nature of intergovernmental trade disputes. The question is then precisely why some commercial disputes are transformed into intergovernmental disputes and others not. The framework for these activities in China will be outlined in the last section of the chapter, and then further illustration of their operation will be provided in the sixth chapter on the major textile disputes.

All of these aspects relevant to decision-making about trade policy have to pass through the foreign and economic policy decision-makers within countries.[3] In the case of trade negotiation, these elites include governmental officials and interest groups. "Making decisions under uncertainty, they need to calculate interests and assess the costs, within the context of institutional procedures and rules."[4] Hence, *Culture*, *Interests, Policy Agenda*, *Legal and Institutional Framework* are four key concepts in the analytical framework.

We have already stressed in the theoretical discussion of Wendt's work in Chapter One, that it is inconceivable that the social structure of a society so overtakes the being of the society that it no longer has any autonomy. The alternative position is that there is a dynamic between the, as it were, unconscious social structure affecting a country such as China, and its consciousness as a voluntary actor. As we said in Chapter One, the question will be to explore the extent to which China is effectively pre-determined in its approach to trade disputes especially by its attitude to conflict

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[2] *loc.cit.*

[3] Robert Baldwin (ed.), *Trade Policy Issues and Empirical Analysis*, University of Chicago Press, 1988; Also see R. Baldwin, 'The Political Economy of Trade Policy', in *Journal of Economic Perspectives*, Vol. 3 (4), Autumn, 1989, pp. 119-135.

from within its legal and political culture. This structural aspect of the research is the starting point from which to evaluate precisely how a space for choice in the setting of agendas can open up, so that China is truly acting as an agent. When and how does China choose to fight or settle a trade dispute legally or politically?

The Culture of Dispute Settlement

To understand fully the relationship between culture and dispute settlement, it is necessary to understand the concept of culture. More than half a century ago, two eminent American anthropologists, A.L.Kroeber and Clyde Kluckhohn, surveyed the field for definitions of culture and came up with more than 150.[5] "Culture is a woefully complex, maddeningly dynamic phenomenon that does not lend itself easily to casual analysis ... the task of understanding and/or measuring culture is incredibly difficult."[6] However, Faure and Rubin argued: "The 'solution' to the so called 'problem' posed by culture is neither to ignore nor to derogate it, but to understand it better."[7] Our concern with culture in the context of the China is focussed particularly on dispute culture and it is probably not an exaggeration to say that Chinese political and legal culture are themselves largely directed to the issue of how to respond to the problem of social conflict.

Dispute cultures can be defined in two ways, depending upon the level at which we want to study dispute settlement. The first concentrates on the individual. Here dispute culture has a basically psychological focus. It entails all the important ways in which a person is subjectively oriented toward settling disputes.[8] We want to know what he feels and thinks about institutions and rules that constitute the fundamental order of dispute settlement of his society and how he responds to them. The second

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[4] Keohane, Power and Governance in A Partially Globalized World, *op.cit.*, p.123.
[5] See A.L. Kroeber and C. Kluckhohn, *Culture: A Critical Review of Concepts and Definitions*, Papers of the Peabody Museum of American Archaeology and Ethnology, Harvard University, Vol. 47, 1952, p.164.
[6] Guy O. Faure & Jeffrey Z. Rubin (eds)., *Culture and Negotiation*, Sage Publications, London, 1993, pp.228-229.
[7] *ibid*, p.231.

definition of dispute culture refers to the collective orientation of people as a group toward the basic elements in their dispute settlement system. This is a "system level" approach.[9] To say, for example, that a nation's (collective/group) dispute culture is largely "integrated" means that most people within the system have similar, or compatible, dispute culture orientations. When dispute culture is discussed, it usually refers to these mass dispute orientations across the whole dispute settlement system.

"To a certain extent, the Chinese way of viewing disputes and the ways and means of dealing with them differ from those of Western countries."[10] One has to take into account China's five thousand years of history to help to understand Chinese views and behaviour when it comes to dispute settlement. This is not intended to be the sole criterion to interpret Chinese behaviour but it is inevitable that modern society's behaviour will be profoundly influenced by the huge weight of such a long, relatively uninterrupted cultural history. This cultural influence will even extend to government behaviour. Therefore considerable space will be given to major characteristics of China's cultural heritage.[11] The purpose of the section is to understand the cultural context for trade dispute settlement.[12]

To say that dispute culture involves the important ways in which people are oriented toward the dispute settlement is an accurate but not yet satisfactory definition. One needs a firmer notion of what "orientations" this involves and, consequently, we need to spell out, clearly and concretely, the distinctive elements of thought and behaviour that concern us. At this point a nettlesome issue arises. Scholars themselves have never reached a consensus on the structure of dispute culture.[13] Their idea of the construction of dispute cultural structure is always closely linked to their concept of

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[8] GaoJianZheMo, 2003, *Disputes and Law in Modern China*, Law Press.
[9] ibid.
[10] Lei Wang, 'Are Trade Disputes Fairly Settled?' in the *Journal of World Trade*, Vol.31 (1), pp.59-72.
[11] ibid, pp.69-70
[12] Here I adopt the notion developed by Pitman Potter, 'The cultural context for trade disputes involves to a very large extent broad cultural norms, as well as specific attributes of legal culture in the societies from which one or both of the parties, and perhaps the dispute resolution institutions, are located', in Cultural Aspects of Trade Dispute Resolution in China, in *Journal of Philippine Development*, Vol.XXIII (1), First Semester.
[13] Guy O. Faure & Jeffrey Z. Rubin, *op.cit.*, pp. 209-233.

dispute culture. From an ideational perspective to understand the dispute culture, one must limit the definition of the dispute culture to the "attitudes, beliefs and sentiments that give order and meaning to the dispute process and provide the underlying assumptions and rules that govern behaviour."[14] However, Chiba's definition is too restrictive and exclusive. Rather, from a institutional process perspective[15], to understand the dispute culture, one must recognise that the structure of dispute culture includes about all factors which relate to dispute settlement: including not only the norms and values noted by Chiba, but also institutions and mechanisms (techniques) designed to settle the disputes.[16]

One needs to introduce the concept of reflexivity, since culture is a highly "reflexive" phenomenon[17]. Reflexivity captures the interface, already mentioned above with Wendt, between the conscious and the unconscious. It is a form of analysis derived from a complex interplay between experience and context, self and other, internal and external. As Lowi and Rothman says:

> A reflexive analysis of conflict begins with the assumption that where one stands and who one is — one's context, identity, cultural norms, values, and priorities — influences what one sees, how one perceives and interprets events and invests them with meaning. Moreover, a reflexive analysis suggests that one's interactions and interrelations with others influence and shape oneself.[18]

The terms 'legal culture' and "political culture" are not the same thing. However, in Chinese experience they are very closely related and it would not be effective to try to distinguish them in terms of dispute settlement. The term 'political culture' is hard to define. In this thesis I adopt Pye's broad concept of political culture, i.e. "political culture is the set of attitudes, beliefs, and sentiments which give order and meaning to a political process and provide the underlying assumptions and rules that govern

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[14] Masaji Chiba, 1997, *Legal Pluralism: Toward a General Theory through Japanese Legal Culture*, China Political Science and Law University Press.
[15] See above chapter one, footnote 23 refering to Albertsein and the literature on Legal Process.
[16] Liu Zhuoxiang, 1992, *Legal Culture Studies*, Shan Xi People Press.
[17] Faure and Rubin, *op.cit.*, pp.209-230.
[18] Miriam Lomi & Jay Rothman, in Faure and Rubin, *op.cit.*, pp.166-167.

behavior in the political system. It encompasses both the political ideals and the operating norms of a polity".[19] Coming back to Wang's analysis, we can see how close he is to Wendt. He says:

> The Chinese approach to world politics is distinctively actor-centred (state-centred in most cases) and relation-oriented...I see Chinese politics as basically an art of adjusting human relationships (guanxi), relationships between individuals, bureaucrats, factions, social groups, classes, and states.[20]

It is the mention of "human relationships" here which is the key to bring political and legal culture so close. Chinese culture, as influenced by Confucianism, *moralises* the public space, making it difficult to give autonomy to either law or politics over against morality as the basis for grounding good human relationships. Xinzhong Yao in his examination of social conflicts and their solutions stresses that the Confucian resolution of conflict insists harmony is found "by working on human nature, calling for cultivating one's virtues conscientiously".[21] One has to start "with the personal cultivation of one's own character" and Confucianism believes that conflicts then comes from "a dominance of self-centredness" that leads directly to the "misunderstanding and mistrust of others".[22] The fundamental moralistic aspect of this is to attribute blame to oneself rather than assert rights over against others. "Any failure to have a harmonious relation with others is said to have its root in our own character".[23] Xinzhong Yao finally insists that the political space is an extension of the virtues of the family sphere:

> For those who are of the ruling class, their virtues in family affairs are even more significant, because it is believed that when these people feel profound affection for their parents, the common people will naturally be humane...(S)ocial justice was nothing other than an extension of family affection and could not be realized unless affectionate family relationships were sustained.[24]

When one says that 'culture includes law' or 'culture consists of law', we are

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[19] Shiping Hua (ed.), *Chinese Political Culture: 1989-2000*, M.E.Sharpe: New York, London, 2001, p.6
[20] Wang, *op.cit.*, p.492.
[21] Xinzhong Yao, *An Introduction to Confucianism*, Cambridge University Press, London, 2001, p.178.
[22] *ibid,* p.179.
[23] *ibid,* p.180.

employing a new cultural concept. This new concept evolved through a succession of phases that we can characterise as: 'culture includes law'; 'law of culture'; 'law is part of culture'; and 'legal culture'. Legal culture as a new cultural concept emerged in 1960s. In the US, it became used in 1969,[25] and Japan, it started in 1960s.[26] In Russia, discussions began in 1962.[27] But in China, it began to be used only in the middle of 1980s.[28] 'Since legal culture could be interpreted by different writers as encompassing different elements, and the concept often seems indeterminate'[29] Ehrmann views legal culture as essentially a variant on political culture but in the realm of law: "Legal culture derives from the civilization and history of each country and is crucial in determining the way of life and the condition of people"[30]. So it is not suprising that a Chinese view is: "Legal culture is part of culture, it includes law, legal thoughts, legal system, legal institution and other legal actions"[31]. Therefore legal culture not only embraces law, but also those other normative elements, institutions, concepts and conceptions of law and rights, and other elements which make up legal culture. Legal culture's study relates law and other elements of legal culture closely with society in general, including the political forces which contribute to determining the substance and aims of law and other norms, but also with sociological and anthropological issues[32].

The Chinese have historically viewed law to be a product of the use of force, and hence the concern with the idea that law was about maintaining order rather than enforcing some abstract concept of right or wrong. One could talk of it as a "right of conquest". Law would then be a servant created by any government in power.[33] The connection between this view of law and the Confucian ethic of compromise is that

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[24] *ibid*, p.181.
[25] Susan Finder, American Legal Culture, *Chinese and Foreign Legal Studies*, Vol. 1, 1989, p.63.
[26] He Qinhua, The History of Japanese Legal Culture Studies, *Chinese and Foreign Legal Studies*, Vol. 5, 1989, p.53.
[27] Fan Shishen, Russian Legal Culture, *Chinese and Foreign Legal Studies*, Vol. 2, 1989, p.63.
[28] Liu Zhuoxiang, *Legal Culture Studies*, Shan Xi People Press, Beijing, 1992,.
[29] David Nelken (ed.), *Comparing Legal Culture*, Dartmouth, 1997.
[30] *ibid,* p.79.
[31] Liu Zhuoxiang, *op.cit.*, p.13.
[32] *ibid.,* p.13
[33] Stanley B. Lubman, *Bird in A Cage: Legal Reform in China After Mao*, Stanford University Press, Ca., 2001, p.35.

the whole ethos is of Chinese law as pragmatic, based upon political convenience and compromise.[34] This favours the Confucian spirit of compromise in the traditional Chinese view of law. For example, one person, who thinks that someone has violated the rules of Li (reason) in his behaviour towards him, should seek equitable resolution by peaceful discussion. It will only seriously upset the existing order if one insists upon one's rights, demanding a judgement by a court. This is disruptive and destroys social harmony. Principles of Li (reason) direct the parties in conflict to resolve differences through discussion and compromise. Clearly this is a conservative approach, encouraging submission to authority. The end result is what is called the "Confucian virtue of compromise" in dispute resolution, rather than insistent litigation, which not only destroys one's 'face' but damages business relationships through what is seen as disruptive, and uncultivated behaviour.[35]

Hence there is a conservative view of the origin of political authority and of the capacity to change the world, which underlies the traditional Chinese view of the danger of frequent legal quarrels. This still affects the way the Chinese will approach any major dispute in international society. However, this is by no means the only reason advanced for the reluctance of the Chinese to approach the court to assert their rights.

Again, to come back to Wang:

> In domestic politics, the Chinese polity is peculiarly reliant upon ethics more than law, upon moral consensus more than judicial procedure, upon benevolent government more than checks and balances. The same approach extends to Chinese behaviour in world politics...Institutionalization of norms and legal binding contracts are far less thought of in China than moral persuasion and tacit understandings. (Wang, 493)

This brings us directly to the crucial dimension of Guanxi. *The Golden Middle Way* expresses the key Confucian ethic harmony. Harmonious co-operation and willingness

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[34] *ibid.*, p.35

[35] Han Dayuan, *History and Notion of Legal System in Eastern Asia*, Law Press, Beijing, 2000, pp.1-49;Also see Birgit Zinzius, *Doing Business in the New China*, Praeger Publishers, New York, 2004.

to compromise are very important. This doctrine arises from what we have already explained as the relationship that both law and politics have with morality. Confucian doctrine emphasises that "there is order in human relations and in the relationship between the state and the people".[36] There are unequal relationships between men, whereby strong hierarchies maintain stability. Therefore, order is preserved by respecting these hierarchies. To step away from them is to invite chaos and, "a disturbance of harmony".[37] The tendency to supplement the rule of law with a context of Chinese civility (Guanxi) may be regarded from abroad as replacing the rule of law with the rule of man, when in fact a cultural context may be necessary for the interpretation and application of law.

One has only to state some principles of Guanxi to see how they would play a part in China's trade disputes. According to Lo and Otis, the three basic rules of Confucian Guanxi that have survived through the socialist era (from 1978) are a grammar of Guanxi idiom rather than a set of institutionalised rules. The idiom is employed voluntarily and is accepted as a common standard for social behaviour. They are:

♣ An integration of the material and the expressive, i.e. of the economically useful and of the emotional and affective side of personal relations; this greatly complicates judgements about what is bribery and what is a social convention about how to ground and strengthen relationships.
♣ An emphasis on long-term reciprocity over one time transactions, which is bound to encourage avoidance of confrontational litigation, that could permanently disrupt good continuing business relations, especially as these will usually also have an expressive side.
♣ A respect for hierarchies now understood in terms of face, with an emphasis on how their application is voluntary and serves as a cultural source of self-cohesiveness

[36] Zinzius, *ibid.*, p.43.
[37] Zinzius, *ibid.*, pp.42-43. The later expression is a constant theme in China's public policy declarations, as it tries to assure world opinion that it does not intend to disturb existing world harmony, e.g. with respect to the international division of labour. This is linked to the policy agenda and will be discussed in the next section

among networked social actors.[38]

Once again Wang makes the connection between these general principles of law, politics and morality, and actual diplomatic, negotiating strategies and styles. Without understanding this self-perception of the Chinese, one will be too ready to dismiss their policy statement as propaganda rhetoric. Despite its articulated quality, this Chinese policy declaration style is not self-conscious but part of an ingrained cultural style. Wang says:

> In Chinese eyes, 'adjustments' in domestic and foreign policies are only natural as long as 'principles and goals' remain unchanged...In the Chinese mind, wise and far-sighted statemen are those who can 'adroitly guide action according to circumstances (yinshi lidao)'.[39]

The idea of close personal relationships being a part of the public space is never far away. So another view is that "Looking at specifics of Chinese negotiating style, it is perhaps easiest to look at the theme of 'friendship'. Good interpersonal relationships are central in Chinese culture to 'getting things done'".[40] "What is striking about the Chinese use of 'friends' and 'friendship' in negotiations is that they make such an explicit issue of it".[41] Yet the intimate character of these relationships has to make for flexibility as part of the subtlety of personal relationships. As a famous Japanese commentator Nakamura has remarked: "It is a well-known fact that the habits and customs of the Chinese are usually based on practical common-sense and utilitarian ways of thinking."[42]

This has a further very important practical aspect, which affects the Chinese attitude to the WTO as a major form of international law based third party adjudication. Some scholars have argued that the role of the WTO DSM is like a nuclear bomb: a

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[38] Ming-Cheng M. Lo, Eileen M. Otis, 'Guanxi Civility: Processes, Potentials and Contingencies', *Politics and Society*, Vol.31, (1), March 2003, pp.42-143.
[39] Wang Jisi, *op.cit.*, pp. 489-490.
[40] Kreisberg, 'China's Negotiating Behaviour' in Robinson and Shambaugh, *op.cit.*, p.459,
[41] *ibid.*p.460
[42] Hajime Nakamura, *Ways of Thinking of Eastern Peoples: India-China-Tibet-Japan*, University of Hawaii Press, Honolulu, 1968, p.234.

threatening possibility but one, which hopefully would not easily be used.[43] The difficulty is the historical experience of China with international law as an instrument of victimization by the West. Keun-Gwan Lee explains that this has to do with the instrumentalisation of international law by the West against China and Korea in the past. It means, in his view, that one could not place much reliance upon modern international law, even its dispute settlement mechanisms.[44] This has continued to be the Chinese perspective during the period after 1949. The PRC practice on dispute settlement is not to include any reference to the International Court of Justice in its treaties with other countries. The PRC position has been clear that the settlement of disputes is the sole province of the contracting parties. As Chinese scholar Wang Yao-t'ien puts it, sovereign states should not be subject to a supranational organ. "The best method of settling this problem is through diplomatic negotiation".[45]

However, here is where it has to be recognized that the primary principle of Chinese culture is, as Nakamura says, the practical, common sense and utilitarian way of adapting to the particular relationships. As the following empirical chapters will show, China will not itself usually try to bring another country before it as a defendant, but it will make a huge use of the third party participation mechanism (see the next chapter) because this is a practical way of participating in the WTO DSM, learning how it works, and having some positive influence on it.

We can allow Wang to sum up the significance of all of this for the practicality of trading negotiation:

> the Chinese tendency to stress situational change, and to react and adjust accordingly... With regard to social behavior, Chinese believe that it is eminently reasonable for people to conduct themselves according to what makes sense for them in particular circumstances. Therefore, when conditions change, it is only natural that people's behaviour and attitudes also change.[46]

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[43] Zhang Xiangchen and Shun Liang, *The Relationship between China and the U.S., A Dialogue with an American Scholar*, Guang Dong People Press, Guangzhou, 2002, p.107.
[44] Keun-Gwan Lee, *The Reception of European International Law in China, Japan and Korea: A Comparative and Critical Perspective*, Conference Paper, Giessen, September 2005, p.7.
[45] L. Tung, *China and some Phases of International Law*, London, 1940, p.132.
[46] Wang Jisi, *op.cit.*, p.501.

It has to be mentioned that IR theory can also re-interpret this in terms of neo-liberal institutional theory, and this should not be too disturbing, because we have stressed in the theory chapter that the theory is closely related to social constructivism, where ideational interests are no longer treated as separate quantifiable elements, but become part of the constitution of the actor/agent. A central feature of not insisting absolutely on one's rights, is the idea of face, of not forcing a loss of dignity by compromising the other person. This would happen where the other person losses self-respect and dignity in a court action. The underlying principle is, therefore, not self-realization and the development of one's own personality, but preserving a social or family harmony, in which everyone can keep face. "The tradition of face-saving is also a source of over-emphasis on mediation in handling disputes, as the mediation approach would deal with the case privately – nothing being public there is no possibility of losing face".[47] This comes together with the theory of reputation in neo-liberal institutional theory, and with the element of collective self-esteem mentioned by Wendt (Chapter One, Part 4). IR theorists Brooks and Wohlforth define reputation in the following terms:

> the significance of reputation within institutionalist theory points to a powerful admonition against unilateralism. ... Despite the fact that reputation "now stands as the linchpin of the dominant neoliberal institutionalist theory of decentralized cooperation," it remains woefully underdeveloped as a concept. In the most detailed theoretical analysis to date of the role that reputation plays within international institutions, George Downs and Michael Jones decisively undermine the institutionalist conception of reputation. As they note, institutionalist theory rests on the notion that "states carry a general reputation for cooperativeness that determines their attractiveness as a treaty partner both now and in the future agreements".[48]

There will always be a tension between impartial law application in the Western sense and Guanxi, because the Chinese tendency may be to consider that those within one's network should work for one's advantage whatever the situation. The American

[47] GaoJianZheMo, *op.cit.*, p.71.
[48] Stephen G. Brooks and William C. Wohlforth, 'International Relations Theory and the Case Against Unilateralism', *Perspectives On Politics*, September 2005, Vol. 3 (3), p.516.

international trade lawyer, Jerome Cohen, has made severe criticism of the China International Economic and Trade Arbitration Commission (CIETAC), the body that still handles the bulk of the international commercial arbitrations in China. Cohen makes ten recommendations to ensure the institutional integrity of CIETAC, including the proviso that they should not use their own personnel as arbitrators, prevent their arbitrators serving as advocates in other CIETAC cases; both should fully disclose conflicts of interest, CIETAC should enhance the confidentiality of its proceedings.[49]

However, this problem should be seen also in a wider context of economic development that will encourage political liberalisation and legal reform. This would not be to eliminate the dimension of Guanxi, but would put it in a more restricted context. The reluctance to go to state courts in Chinese history is also rooted in the tradition of authoritarian relationships that meant going to state officials was to put oneself at the mercy of powerful figures who could be abusive.[50] This could only fortify a tendency to lack of expertise in the area of legal resolution of disputes. Hierarchy is here the fundamental problem and it is itself so ingrained in Chinese culture that it will always underlie the problem of face and reputation.

For instance a major study by Robert Heuser entitled *Outline of Chinese Legal Culture* argues that Chinese legal culture is in a process of transition, which will affect the values that continue to attach to all the elements of Guanxi. There will be five basic changes, in the norm system, norm direction, the state's legislative function, the power distribution as a result of social division and the ruling structure. Basically the changes are brought on by economic forces. A peasant society becomes a complex social economy, requiring contracts, recognizing horizontal rather than patrarchical relations and accepting that one is entitled to insist on one's own rights, where law entails not penalties but means to facilitate goals, and serves not as an instrument of a ruling class but as a means of structuring and directing it.[51]

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[49] Jerome A. Cohen, 'Time to Fix China's Arbitration', *Far Eastern Economic Review*, Jan.2005, pp. 31-37.
[50] Liang Zhiping, *Cultural Explanation of Law*, Shanlian Press, Beijing, 1994,
[51] Mi Jian, 'Chinese Legal Culture: In a Western Scholar's Eyes', *Journal of the History of*

These developments are proven by the increasing indigenous Chinese demand for foreign legal assistance. For instance, in 2001 the Chinese Ministry of Justice commissioned the organisation, International Bridges to Justice to assist in the development of legal aid and defender services. In a little under a decade China has developed more than 2,800 legal aid centres whose basic mission is to provide fair and competent legal representation to all of China's citizens regardless of ethnicity, gender or economic status. National information campaigns and roundtables on new laws, are reaching Chinese at all levels of society — government, law enforcement, lawyers, and ordinary citizens with a view to encouraging basic concepts of fairness and justice. Another project such as the National Legal Aid of China involved the creation and nationwide distribution of 500,000 posters and brochures describing the new legal rights of the accused in all the languages of China.[52] It is in this spirit that China has asked for a good deal of technical assistance. Ideally it would like to have hundreds of its government officials to receive training at WTO headquarters in Geneva, but the WTO does not have the resources. A possible remedy would be special courses in American or European Universities.[53]

The picture that emerges remains confusing, which one would expect from a time of transition. Potter points out that there is widespread statistical and anecdotal evidence among the judiciary, suggesting that the requirements of formal law and legal institutions remain contingent on political arrangements and personal relations, while the commonplace offence of taking bribes suggests that the requirements of formal law may be disregarded for monetary reward.[54] However, Potter also points out that many instances of alleged judicial misconduct involve not bribery but the use of Guanxi to influence judicial and regulatory decisions making and conversely the willingness of judges and administrative regulators to base decisions on the

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International Law, Vol.4, 2002, pp.172-173.

[52] Karen I. Tse, 'Justice in China: The Legal System's Quiet Revolution', *International Herald Tribune*, February 11, 2005, p.6.

[53] Keohane, *op.cit.*, pp.194-195.

[54] Pitman B. Potter, 2001, *The Chinese Legal System: Globalisation and Local Legal Culture*, Routledge, p30.

requirements of personal networks rather than the requirements of law.[55] A reflection on this experience reinforces the idea that the Chinese would prefer diplomatic negotiation to the DSM, because relationship factors can play a much larger role with the former than with the latter. Impersonality is the essence of the impartiality of law.

In one of the most convincing explanations of the role of traditional Chinese legal and political culture, Wong explains that everything did depend upon the integrity of the officials supposedly moved by the ethos of Confucianism, while, of course, this was frequently not the case. There were many crooked officials and it was this mundane fact which encouraged resolution of conflicts without recourse to law. However, the spirit of Confucianism will still be reflected in the most modern legal rules and procedures. For example the Civil Procedure Law has the aims which are purely Confucian: educating citizens to voluntarily abide by the law (i.e. prevention of dispute) and maintaining social and economic order. The law provides a very central part to conciliation and the officials may bring in third parties as far as this is necessary to educate all, find out the truth and restore social harmony - albeit not to the exclusion of the right to pursue adjudication. *Such a pressure to reveal the truth would always put substance before form, since it would not matter how it was reached.* It would make law subject to morality if the two were in conflict. This was the traditional effect of Confucianism and the pressure in that direction is always there.[56]

The significance of this national Chinese legal culture for China's international economic culture is widely recognised. For instance Kong considers it has to be the context in which one makes a comprehensive examination of the enforcement of WTO Agreements in China.[57] It is also recognised that Confucianism will influence the general way that East Asian countries interpret and apply international economic law. For instance, Wang argues that under the new neo-Confucianism, international

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[55] ibid

[56] Bobby K Y Wong, 'Dispute Resolution by Officials in Traditional Chinese Culture' in *Dispute Resolution*, 2003, Vol.10.

[57] Qingjiang Kong, 'Enforcement of WTO Agreements in China', in *Journal of World Trade*, Vol.35

law and national law should be seen as two sub categories of the same law category, similar to each other, while also different, as are the laws applied in different societies.[58] Furthermore, after a review of the essentially unfair starting rules applicable to China in the WTO, Wang argues that it is inevitable that the Chinese way of viewing disputes and dealing with them will differ from Western countries. In today's modern China, people's actions and even governmental behaviour are affected in varying degrees by inherent cultural heritage. He goes on to mention the three features of mediation v. litigation; morality v. legality, and the importance of face saving.[59]

This cultural heritage will be relevant to following China's strategy towards the DSM[60]. China is changing and modifying its attitude to legal procedures at the domestic level, as part of a policy of modernization and also internalization of WTO standards. However, it still remains the case for China, and this will be completely clear from its March 2006 report to the WTO in the context of its Trade Policy Review (see the section below, Policy Agendas, on the Handling of Trade Disputes) that China does still prefer, overwhelming, a diplomatic approach to trade disputes, that conflates law, politics and morality into a predominant attention being given to the quality of inter-state relations. Its reasons for doing so have to be understood as well in the context of the "interests" framework of analysis of foreign affairs decision-making.

Interests

"The most significant change in Chinese diplomatic thinking is probably the revision of guiding principle...On several occasions Deng Xiaoping told foreign visitors that Chinese diplomacy was based on China's national interest".[61] Despite the apparent

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(6), 2001, p.1187.

[58] Guiguo Wang, 'The New Neo-Confucianism and International Economic Law', in the *Journal of World Investment*, Vol.1 (1), 2000, p.153.

[59] Lei Wang, 'Are Trade Disputes Fairly Settled?', *Journal of World Trade*, Vol.5, 1997, pp.69-71.

[60] *Ibid.*, p.72.

[61] Wang Jisi, *op.cit.*, p.486.

clarity of Deng Xiaoping's statement, clearly the concept of "national interest" requires definition. The purpose of this section is to apply the theory elaborated in Chapter One to the practical concerns with national interests in this present chapter, in particular the Policy Agenda Section, which follows below. That will further prepare the ground for the choices that China makes and which are described in Chapters Five and Six, between legal and political means of resolving disputes.

The fundamental theoretical difficulty is the relationship between interests and identity, in the sense of what the social constructivists, such as Ruggie and Wendt, call collective intentionalities and social facts. A neo-liberal institutionalist such as Keohane, is well aware that interests are not to be understood as purely material. Keohane claims his conceptions of self-interest and rationality are broad ones. "Self-interest is not simply material; on the contrary, it encompasses one's interest in being thought well of, and in thinking well of oneself. One's self-interest is not divorced from one's principled ideas or identity but closely connected with them."[62]

However, he recognises that the approach of the ideal instrumentalist is still to search for causal explanations, even to assess the effect of non-material interests. So failures to follow what appear to be rationally defined ideational interests, e.g., one's reputation will be explained negatively in terms of misinformation or cognitive failure.[63] Keohane sees the static character of this approach. It does not explain how interests are created, shaped or changed. Interests are indeed important. "However, actors can redefine their own interests, in light of policies followed by others and the practices of international institutions. Hence, interests are neither fixed nor firm; they are not a solid platform on which to build a theory of rational self-interest".[64] Wendt reinforces this philosophical divide which is not simply a function of a distinction between the power of material and non-material interests. It is true that materialists argue that material interests determine actions, while idealists argue that people act

[62] Keohane, *op.cit.*, p.1.
[63] *ibid.*, p.123.
[64] *ibid.*, p.126.

towards objects on the basis of meanings the objects have for them.[65] However ideational interests can be examined causally and material interests can be interpreted as a matter of understanding goals.

This is the point developed so strongly by Ruggie, as seen in the first chapter. He has complained that one needs to explain how the specific identities of specific states shape their perceived interests.[66] Social constructivists recognise, in addition, that beliefs are inter-subjective.[67] The crucial issue, to assure us a dynamic framework of analysis, is to find a way of explaining how identities, and with them definitions of interests, actually change.[68] For instance, the Chinese Government perceives that, for a variety of reasons including those of geo-economics, geo-strategy, and geo-politics, other governments view its dramatic economic rise with concern and possibly even alarm.[69] It has to respond to fundamental questions asked about its identity, i.e. its wider and long- term intentions, and not simply about its immediate material interest in specific imports and exports of goods, technology and services.

Nonetheless, the version of social constructivism that appears most appropriate here is Wendt's. It accepts the need for a framework to explain change and modification of ideational interests and structures, but he rejects a post-modernist view that all identity presupposes difference. As seen in Chapter One, Part 4, Wendt rejects this argument as trivial "if it leads to a totalising holism in which everything is internally related to everything else. If a constitutive process is self-organising then there is no particular other to which the Self is related".[70] This apparently essentialist view of state personality does not claim the states somehow a divine being, but it is a social construction out of certain historical contingencies that has taken on a solid, continuous character, which is not simply a self-definition in opposition to others.[71]

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[65] Wendt, *op. cit.*, p.140.
[66] Ruggie, *op. cit.*, p.14.
[67] *ibid.*p.21.
[68] *ibid.*26.
[69] Chih-Yu Shih, 'Breeding A Reluctant Dragon: Can China Rise into Partnership and Away From Antagonism?', in *Review of International Studies*, 2005, Vol.31, pp.755-774.
[70] Ruggie, *op. cit.*, p.125.
[71] *ibid.*, pp.244-245.

Quite the contrary, however much the state may be a social fact, its tendency is still, as a self-constituted entity, dangerously self-oriented.[72]

So, put quite simply, the manner in which China defines its material trading interests will be also a function of China as a social fact, a collective intentionality, of how it defines and understands these interests, and its tendency will, in the finally analysis, only be partially a function of how China's definition of itself as a social fact, is a product of its interaction with other states and with the WTO Framework. It will internalise these to some degree, but the empirical question, to be answered partially causally and partially through interpretation, will be how far. Whether at an international or a domestic level the discussion of Chinese decisions will also remain contested.

For instance, the manner in which China intends to face intergovernmental trade disputes is indicated by the former Vice Minister and Chief Trade Representative, (MOFCOM), Long Yongtu in an interview in December 2004. He explained the extent to which China pays attention to how anxious other countries are about its potential Great Power status. So China wishes to appear as unthreatening as possible:

> The Central Government's judgement on the meaning of the WTO membership for China covers two points. First, it is an important strategic situating of China in its participation in economic globalisation. China's rapid rising has drawn the attention of the world. In these circumstances, the question is in what way and with what gestures should China emerge on the world stage, I recognize the idea of peaceful rise as China's strategic approach. One can say that China's WTO membership is an important choice in presenting China's peaceful rise. China has made two basic commitments for joining the WTO. The one is to comply with international rules. The other is to open its market further. Together these two commitments have important significance in setting up China's image of peaceful rise, as an open and responsible big country. Secondly, this symbolizes that China's open reform has entered a new stage.[73]

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[72] *ibid.*, p.242.

[73] Long sets out the meaning of China's WTO membership under the intense criticism from people who thought China had paid too high price for joining the WTO. Some people even labelled him as having 'sold the country'; so this interview was a response in a way. See Long Yongtu, "I love China and I am also very sympathetic with those enterprises which suffer from anti-dumping charges", an interview conducted by Wang Wenxiang from *Xinjing Newspaper*, http://cn.news.yahoo.com/041201/

From this detailed policy statement one can see that for China the WTO is by no means simply a cost benefit analysis of its economic interest. Instead China is primarily concerned with its identity in the international community, including political and even military and security dimensions. The Chinese image in the world is the strategic meaning of China's WTO membership for China. China is aware also that the identity of the world community will also change with its WTO membership. For the world, there is no doubt that China's WTO accession will be like the title of the book by the former WTO Director-General Supachai Panitchpakdi, "Changing China, Changing world trade."[74]

Hence a constructivist approach, combined with a neo-institutional approach, can help explain the process of Chinese participation in the WTO. China's most fundamental foreign policy problem at the present time is how to grow economically through global free trade without so frightening the rest of world society about the extent of its rise that they react by various levels of withdraw from world trade in relation to China. This is the strategic context in which China decides on its policy of choosing legal or political means of resolving intergovernmental trade disputes, and, within the latter category of settlement, how far to insist on its immediate interests or views of its rights. This is a marrying of material and ideational interests and how China will do so depends on the evolution of its collective sense of its priorities. How important is winning or losing a particular trade dispute to the overall development of China's trade? This will be a crucial dimension to the discussion of the impact of anti-dumping actions against Chinese exports (an issue considered in the later section of this chapter on Chinese Trade Laws and its Accession to the WTO), and in the dispute settlement strategies discussed in chapters five and six. For the moment it is important to stress that the present approach is not reductionist with respect to material interests. Without having a basic neo-liberal understanding of them, one cannot begin to understand whatever trade and trade dispute settlement strategy China adopts.

346/2772t_9.html, visited on 16/01/2005.

[74] Supachi Panitchpakdi and Mark Clifford, *China and the WTO – Changing China, Changing World Trade*, John Wiley & Sons, 2002.

So, since WTO Accession in 2001, it is clear from China's April 2006 report to the WTO that it has gained huge advantages from its membership.[75] So it reports "that China's growth domestically (GDP) rose from 10,965.5 billion Yuan (US$ 1,324.8 billion) in 2001 to 18,232.1 billion Yuan (US$ 2,225.7 billion) in 2005, scoring an annual average growth rate of 9.5% for five consecutive years". China stresses its import growth rather than export growth: " From 2001 to 2005, China imported goods of a cumulative value of US$ 2,172.8 billion, and the transfer of profit out of China by foreign invested enterprises totalled US$ 57.94 billions. Over the past few years, China has always been a net importer of commercial services with great attraction to foreign service providers".[76]

The Chinese report concludes, hopefully, and quite explicitly:

> that the fair, open and non-discrimination principles sponsored by WTO are conducive to the stability of international trade orders and the predictability of international trade development. It embodies the spirit of multilateralism in favour of joint participation in international affairs. China needs a fair, more open and dynamic multilateral trading system. This is an imperative external condition for China's economic development.[77]

However, the source of possible tension lies elsewhere, in China's trade surpluses with other countries or, as China's major trading partners necessarily terms it, trade deficits with China. The Commerce Minister, Mr Bo Xilai commented more directly in a report on January 28, 2006 that: "Foreign trade exceeded US$1.4 trillion, up by 23.2% (on the previous year) and contributing one third to the economic growth".[78] In particular China has large trade surpluses with the US and the EU, while it has smaller trade deficits with Asian countries, such as Korea and Japan.[79] How to approach any particular trade dispute will also be a function of how economically significant the

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[75] WT/TPR/G/161, Trade Policy Review Report By the PRC Government, p.5.
[76] *ibid.*, p.5.
[77] *ibid.*, p.5.
[78] Mr. Bo Xilai On Commercial Work, available at: http://wto2.mofcom.gov.cn/column/print.shtml?/bilateralvisits/2006, visited on 21/03/2006
[79] See Appendix G. With the US and the EU, in 2005, the surpluses were in millions US dollars, US$115,318 and US$70,116 respectively.

particular issue raised by the dispute.

Policy Agendas

The second aspects in the framework of China's decision-making process are the policy agendas. The idea of a *policy agenda* is a necessary analytical framework to understand the country's approach to trade dispute settlement. Although official discourse (rhetorical and justificatory statements) may be some indication of how a state intends to behave towards an international environment of regulation, the country's actual policy agenda is more objective. It indicates how a policy is to be put into practice, especially at the domestic level. It advises how far, in domestic political terms, the country will take its policy on international trade matters. One has to understand not merely whether a rule is accepted by the country (e.g. free trade without discrimination) but also how far this will be forced on the domestic agenda alongside other policies and whether exceptions will be made to the policy in practice, e.g. to encourage local industries. As Cortell and Davis put it: "The norm will be enmeshed in the state's institutions through regulations that reinforce practices associated with the norm or allow domestic groups to complain about violations of the norm and identify and eliminate contradictory practices."[80] There is a considerable difference between essentially ephemeral policy statements by officials and the reproduction of these statements in domestic practices.

Therefore the policy agenda will also be related to the Institutional and Legal Framework, which will follow on from it. Institutional and Legal Framework then become a reflection both of the above policy agenda and at the same institutionalised level, of an 'approved version' of core cultural values. These will be elaborated in the next section, following the discussion of core beliefs, values and their incorporation or modification in policy agendas.

[80] A. Cortell and J.W.Davis, 'When norms clash: International Norms, Domestic Practices, and Japan's 'Internalization' of the GATT/WTO', *Review of International Studies,* Vol.3, 2005, p.9.

Again, the continuity of the argument of this chapter is strengthened by a further quotation from Wang, illustrating the central point of the previous section: "It would be misleading to assume that Chinese ethical expressions in theories and statements are self-righteous rhetoric merely to serve propaganda purposes. Indeed, these expressions reflect the Chinese way of viewing and conducting politics and have their roots in Chinese political culture".[81] Examination of Chinese policy agendas illustrates to a remarkable degree the underlying political-legal philosophy, which has just been outlined.

(a) General Foreign Relations Principles and Objectives

The following analysis will build largely, but not exclusively, on the Government White paper called *Full Text: China's Peaceful Development Road*, published in the *People's Daily* on 22 December 2005. It contains an account of the philosophy behind Chinese trade diplomacy, in the wider context of China's definition of its role in world affairs. While the document appears to be very vague and rhetorical, one must bear in mind the words just quoted from Wang, that these statements are probably sincerely believed by those making them and, if carefully read in the light of what is known about Chinese political culture, it reveals a great deal.

A first fundamental principle of Chinese diplomacy is called the Chinese word "*He*". It means harmony, emphasizing coordination among different elements of society. It is also a basic thought of China's modern diplomacy. Keeping firmly in mind the modern history of China, the document claims that the Chinese people have an extreme yearning for stability and peace.[82] "Having suffered bitterly from the scourge of war in modern times, the Chinese people are keenly aware of the value of peace," Chinese President Hu Jintao said. Hu Jintao said in his speech to the UN General Assembly on 15 September 2005: "We must abandon the Cold War mentality, cultivate a new security concept featuring trust, mutual benefit, equality and co-operation..." He said one must build a world where all civilisations coexist

[81] Wang Jisi, *op.cit.*, p.493.

harmoniously and accommodate one another.[83]

The Peaceful Development Road tries to make it clear that China sees its economic growth and increasing participation in world trade in terms harmonious with the globalisation process. Hence, as the document says:

> China's foreign trade is mutually supplementary with many countries. About 70% of China's exports to the US, Japan and the European Union are labour-intensive, while 80% of its imports from there are capital intensive and knowledge intensive. In the new structure of international labour division, the country has become a key link in the global industrial chain.[84]

The argument continues that China makes a huge contribution to world prosperity by being the world's third largest importer. It expects to import US$1,000 billion by 2010 and to increase by 2020 to four times what it did in 2000. It wants world society to see itself as in a "win-win" situation with China. China knows it has to try to keep stressing such intentions, because there is now almost universal disquiet among both developed and developing countries about Chinese economic growth. It is hanging like a cloud over the whole of the stalled Doha Round Trade Negotiations.[85]

The Chinese Government asserts that the principle of trade complementary should be supported by the principle of intercivilization respect, a way of undercutting the widespread fear, especially in the US that China will use the resources obtained from economic growth to build itself up militarily.[86] A second principle of Chinese "Peaceful Rise" diplomacy is linked with the first principle, and also emphasizes Peace, Development and Coordination. In a recent statement of China's diplomacy, the Minister of Foreign Affairs Li Zhaoxing [87] sets out new principles for international order: "We need cooperation to maintain common security and this can only be on the

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[82] See Full Text: China's Peaceful Development Road, *op.cit.*
[83] Hu Jintao's speech to the UN General Assembly on September 2005. Available at: http://www.fmprc.gov.cn/eng/wjdt/zyjh/t212614.htm, visited on 08/10/2005.
[84] Full Text: China's Peaceful Development Road, *op.cit.*
[85] Briefing Paper of the UK Department of Trade and Industry, 25 April 2006.
[86] US-China Economic and Security Review Commission 2005 Report.
[87] Peace, Development and Cooperation—Banner for China's Diplomacy in the New Era:

basis of promoting inter-civilization harmony. There needs to be a new approach to development centred on equality and mutual benefit. This approach complies with The Golden Rule of Confucius over 2000 years ago, that is "Do not do unto others what you would not want done unto you".[88]

Of course, the Chinese Government must be aware that people are very skeptical about Chinese policy. Michael Pillsbury, a Sinologist, is the main author of a recent Pentagon Report to Congress. He stresses that part of the Chinese ancient philosophy *The Art of War* (Sun Zi Bing Fa) is to outsmart and deceive the enemy. In ancient China Gou Jian, the ruler of the Yue kingdom "hide his capabilities" in every matter and talked only about "peaceful prominence" and as a result, Fu Cha, the ruler of the Wu kingdom, fell into the trap. Pillsbury made the same comparison between the US and China in 30 years.[89] Fundamentally, China believes, in the words of the Peaceful Road document, that China must rely on itself to solve its problems in its development. "It will not shift its own problems and contradictions onto other countries; much less will it plunder other countries to further its own development".[90] So, China's response to the US anxiety about it, which is discussed in chapters four and six below, would be, supposedly, to recognize even more openly the need for self-criticism and to accept a willingness to take responsibility in the multilateral trading system.

Instead, the Chinese recognize that trade relations have to exist in a wider context of mutually constructed security and the absence of classical military threats. This has to be linked to a belief in the equality of civilisations. This explains the Chinese President's support for the United Nations (UN), as having an irreplaceable role in international co-operation to ensure global security. "Such a role can only be strengthened and must not in any way be weakened". So also the *Peaceful Road* document makes clear that never in China's history has it seen its place in the world

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http:www.fmprc.gov.cn/eng/zxxx/t208032.htm, visited on 07/12/2005.
[88] Yao, *op.cit.*
[89] "China's Rise to Eminence", *International Affairs*, Vol.51(6), 2005, p.26
[90] See Full Text: China's Peaceful Development Road, *op.cit.*

as requiring it to annex others' territory. It renounces as always a politics of hegemony. Deng Xiaoping has said that China has never sought and never will seek hegemony. The document states, in supporting the UN: "All countries should respect each other and treat each other equally. No country is entitled to impose its will upon others, or maintain its security and development at the price of the interests of others. The international community should oppose unilateralism, advocate and promote multilateralism".[91]

Of course the US is skeptical about the UN[92] and that alone could be enough grounds to give anxiety to many countries. A possible response to Chinese arguments about intercivilizational respect might be to point again to a traditional Chinese figure, Sun Zi. A superior way to defeat an enemy is not militarily but psychologically. "The warrior's way is one of deception. The key to success is to capitalize on your power to do the unexpected, when appearing to be unprepared".[93] Patient information gathering (the huge Chinese third party participation in WTO Panel Cases) while giving nothing away is the key to warrior of deception, while cultivating the appearance of social virtues. This view of Chinese tradition is different: "Humility, self-effacement, and the absence of pretension are cultivated social virtues".[94]

Still the document, *China's Peaceful Development Road* persists. One should seek common ground while putting aside differences, so as to make mankind more harmonious. Preserving diversity we may jointly build a harmonious world where all civilisations coexist and accommodate one another. This is the meaning of President Hu Jintao's call for "the spirit of inclusiveness...where all civilisations coexist harmoniously and accommodate one another". Perhaps there is an ambiguity even on the surface of this document. It says the world is not paradise. Even if one has good intentions, one needs to be building up capacities. Another way of putting this is that

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[91] *ibid.*
[92] See the Quadrennial Report of the Pentagon, 6 February 2006, *The Long War*, making no reference at all to international law.
[93] Robert M. March, *The Japanese Negotiator, Subtlety and Strategy Beyond Western Logic*, 1990, Kodansha International, London, p.30.
[94] *ibid.*, p.31.

China is rather openly attached to the principle called "TaoGuang YangHui" (It means "Bide our Time, Build our Capacities").[95]

Whatever the suspicion with which Chinese intentions are treated, China persists in the official line on dispute settlement, particularly authoritatively in the Report of The Sixteenth National Congress of the CPC. In Section IX, The International Situation and Our External Work, it clearly stated that "In the area of security, countries should trust one another and work together to maintain security, foster a new security concept featuring mutual trust, mutual benefit, equality and co-ordination, and settle their disputes through dialogue and co-operation and should not resort to the use or threat of force."[96]

This is the context in which to appreciate how a third principle of Chinese diplomacy, following logically from the first two is significant also because of its apparent vagueness. It was regarded as the most fundamental aspect of Chinese political culture in the last section. It is the adoption of a flexible and pragmatic strategy. No matter how discreetly and indirectly we "bide our time," by adopting an active foreign policy strategy, particularly at a global level, China makes specific choices in line with its long-term strategic desires. A proper, in the sense of prudent, level of engagement proportionate to its status will be more beneficial for it if it is to construct a better external environment in dealing with big powers.

This has enormous implications for China's approaches to disputes, and, of course, international trade disputes. A Foreign Ministry spokesman says that in dealing with problems cropping up in the development process "we should take a long-term perspective...We should handle trade disputes through negotiation on the basis of equality and mutual benefit".[97] The Peaceful Development document says that trade disputes are quite natural in international economic exchanges. However, following

[95] These ideas of "Tao Guang Yang Hui", concerning international affairs, were introduced by Deng Xiaoping after the Tiananmen Square Incident, a trying and dangerous time for Chinese diplomacy.
[96] Section IX
[97] China Foreign Ministry Spokesman Liu Jianchao's Press Conference on 6 April 2006, available at:

international practices and WTO rules, China has tried to resolve such conflicts through dialogue on an equal footing and through the WTO DSM. At the same time China has played a constructive role in helping developing countries and developed members to reduce disputes through talks.[98] So, the Chinese Government's claim is that it has taken major initiatives in the dispute resolution area, adopting a holistic approach: "In terms of economics, Chinese diplomacy tried to ease trade friction and facilitate mutually beneficial co-operations with other nations", said the Foreign Minister Li Zhaoxing.[99]

(b) Trade Policy Objectives

According to the Foreign Trade Law, China's main trade policy objectives are to accelerate its opening to the outside world, develop foreign trade, and promote sound economic development.[100] The WTO assessment of China in the period 1979-2001 is that China did make progress in reforming its economic system, to put in place the "socialist market economy" and engage with the outside world. In the words of the WTO Report:

> During that period, China adopted a combined import-substitution and export-orientation strategy with a view to encouraging exports by those labour-intensive industries in which it had a comparative advantage, and promoting the development of those capital- and technology-intensive industries in which it did not.[101]

The Government's plan was to reduce tariffs, as originally agreed with the WTO,

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http://www.china-embassy.org/eng/fyrth/t244864.htm, visited on 09/04/2006.

[98] See China's proposals on reform of the DSM in the Doha Round negotiations, in Chapter Four, following.

[99] 'Another vintage year for Chinese Diplomacy', available at: http://english.people.com.cn/200512/23/eng20051223_230373.html, visited on 07/01/2006.

[100] Article 1 of the Foreign Trade Law states: "(t)his Law is formulated with a view to expanding the opening to the outside world, developing foreign trade, maintaining foreign trade order, protecting the legitimate rights and interests of foreign trade dealers and promoting the sound development of the socialist market economy". This is taken from the Trade Policy Review of China done by the WTO in document, WT/TPR/S/161, April 2006. p.47 para.37.

[101] *ibid.*, p.48 para.38, basing itself on an article by Long Yongtu (2004). According to this article joining the WTO has meant that "China will not only thoroughly eliminate the influence exerted by the planned economy towards its economic system but also give up "import substitution" and "export

eliminating most non-tariff measures, and further open the services sector to foreign competition.[102] China did in fact do so much, slashing the average tariff level from 15.3% to 9.9% by 2005; for the industrial sector, from 14.8% to 9.0%. On NTB, including import quotas and licenses and import tendering have all been removed on target by 1 January 2005.[103]

To accommodate the inevitable flow of imports and ensure exports the Government's strategy was to:

> Increase manufacturing value added and ensure continued growth in exports and, in this regard, "effectually" import energy, key raw materials, technologies, and equipment, and reform customs and port clearance procedures; utilize foreign capital to improve industrial structure and technological capabilities...and to encourage qualified domestic companies to invest abroad including by giving them more credit, insurance, and foreign exchange support and to strengthen "guidance and coordination for enterprises investing abroad.[104]

So China's central trade policy objectives does risk bringing it into regular conflict with other WTO members because it is looking for ways to support and stimulate its export industry. The WTO itself is reporting that a central Chinese policy is its exports of value added products. This is unobjectionable in itself. However, to achieve this end,

> China continues to use trade and other measures, to promote local production in certain sectors, either for export, or as inputs for producers in China. The measures include: export taxes, reduced VAT rebate rates, and export licensing to deter exports of some products...[105] And other measures such as export credits and export credit insurance, to promote exports of certain processed products. It also continues to encourage the use of local inputs, including by foreign investors.[106]

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orientation" strategies, which do not conform to the regulations of the WTO".

[102] Ibid., para.37

[103] *ibid*, p.13, para. 48.

[104] Extract from the Government report to the National People's Congress, presented by Premier Wen Jiaobao in March 2005 (information provided by the authorities) reproduced in WT/TPR/S/161, p.47, para 37.

[105] WTO/TPR/S/161, p.48, para.39 The WTO notes that the Chinese authorities point out that export taxes and export restrictions are aimed at conservation of exhaustible resources.

[106] ibid, referring to a statement by Minister Bo Xilai "Exports mix to be adjusted". Available at:

China may be trying to say that it is aiming at conservation of exhaustible resources, or that it supports foreign companies manufacturing locally in a non-discriminatory way, but this kind of support is leading it into conflict with the US and the EU (See Chapter 4).

(c) Principles on Handling International Trade Disputes

In the presentation of its trade policy to the WTO China presented itself very much in the language that is set out in part (a) above. [107] Instead of mentioning any high regard for the DSM and the discipline that brings to trading relations, China focuses exclusively on what it calls WTO principles and rules, and applying them "through dialogues and consultations on equal footing and in the spirit of reaching compromise acceptable to both parties".[108] Now in April 2006 it mentions its intense and strenuous disputes with the EU and the US over textiles in the most general terms as affording China an opportunity to show it is "a responsible member of the international trading community", giving due consideration to the impact of its policies on other countries, by, for example "the restraints exercised over the issue of textile exports".[109]

The approach of the Chinese Government to disputes, it asserts, is not merely one of dialogue and compromise, but also a preventive strategy of anticipating in advance the possibility that disputes may arise. This is another reason for China to mention that it "attaches great importance to bilateral consultations and exchange of views with all countries and regions on economic and trade issues".[110] So it set up a Mixed (Joint) Economic and Trade Committee with 146 countries and regions, in truly Confucian spirit: "... to conduct regular consultations, review the state of bilateral trade and economic relations, resolve disputes and outstanding issues and ultimately

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http://boxilai2.mofcom.gov.cn/column/printshtml?/speech/200503/20050300020654. This is taken from the Trade Policy Review of China done by the WTO in document, WT/TPR/S/161, April 2006.
[107] WTO/TPR/S/161, p.17, para.83-88
[108] *ibid.*, para.83.
[109] *ibid.*, p.18, para.84.
[110] *ibid.*, para.85.

promote the harmonious and healthy development of economic and trade relations"[111].

Notwithstanding this spirit of conciliation and restraint China does not consider other countries have been quite so responsible in return. It does not mention any country in particular, but it does express itself fairly strongly

> that discriminatory measures against a particular member are contrary to the spirit of free trade and the principle of non-discrimination enshrined in the multilateral trading system. The abuse of such measures damages the creditability of the multilateral trading system and is harmful for its further development.[112]

Furthermore, China does assert firmly that it is being damaged by being the subject of the greatest number of anti-dumping actions among all WTO members, from 1995 till the first half of 2005, a full 16%, or 434 against Chinese products. Worst of all, to return to the textiles question, interests of Chinese businesses "were also seriously damaged by the restrictive measures against Chinese textiles and clothing"[113]

In other words, there may well be a ticking bomb, even if not a nuclear one, certainly a measure of resentment at the way it is being treated. It realises how others regard and even fear it. So it does try to reassure them. It claims that because it does not seek to pursue trade surpluses, and insists upon the complementary character of world trade, it argues that a country "should not be subject to undue harsh interference with trade policies such as export restrictions of technology".[114]

In merely one page of reporting on the proper handling of trade disputes China clearly shows its objections on a considerable number of issues, but there is not hint of threatening to retaliate by using the DSM, or indeed in any other way. Instead, China concludes its report with only the slightest hint of impatience:

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[111] *ibid.*, para.85.
[112] *ibid.*, para.88.
[113] *ibid.*, para.87

> The Chinese Government will *persist*[115] in the "mutually beneficial win-for-all" open strategy, and is of the view that all countries of the world should join hands to build a harmonious world embracing all civilisations. Countries should aim to create a healthy and orderly trading environment and a stable and efficient financial environment conducive to world economic growth through establishing and improving an open, fair and non-discriminatory multilateral trading system and perfecting the international financial regime.[116]

The conclusion to its report marks very clearly a reference to the world vision, which is central both to the policy agenda vision presented in part (a) and to the more theoretical account of Chinese culture with which the chapter began.

Institutional and Legal Framework

The Institutional and Legal Framework are a reflection both of the above policy agenda and at the same institutionalised level, of an 'approved version' of core cultural values. What follows sets out the institutional and legal framework within which China's trade regime works.

Institutional Framework

Where does the political and legal power lie in China? The National Institutional Framework of China reflects the fact that China is a unitary state rather than a federal state. There is a National People's Congress (NPC) which, as a legislature, is the highest state power. Between its annual meetings, its powers are delegated to its Standing Committee. The Communist Party of China (CPC) through its Central Committee controls these legislative and law enforcement activities. They set the programme of "socialist market economy and socialist democracy, including opening up to the outside world, its programme on national economic and social development is reviewed by the NPC."[117] The Standing Committee enacts the foreign trade

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[114] *ibid.*, para.86
[115] italics of the writer.
[116] ibid, p.20, para 100.
[117] WT/TPR/S/161, China's Trade Policy Regime, Institutional Structure, pp.3133; also Xin Zhang,

legislation and customs law. In addition there is an executive body, the State Council, which is the Central Government. The State Council's functions are to administer and to adopt administrative regulative regulations. In practice national ministerial rules will be promulgated by the ministries, which come under the State Council. The Constitution also provides for a Judiciary, the Supreme People's Court and local courts at different levels.[118]

MOFCOM or MOC is the principal institution in charge of the administration of foreign trade. "The Ministry of Commerce has the main responsibility for policy coordination and implementation in respect of all trade-related issues."[119] This means, beyond formulating the trade laws. the policy element of organizing and systematising domestic legislation on trade and economic affairs and bringing them into conformity with international agreements. There are further market organization activities it should ensure, such as regulating competition and managing administrative aspects of trade, such as import and export regulations, allocating import and export quotas and licences.[120]

Since 2001, MOC established the Bureau of Fair Trade for Imports and Exports (BFT) and Bureau of Industry Injury Investigation (BII) to be in charge of anti-dumping and anti-subsidy administration. These two bodies deal with all questions of anti-dumping.[121] There is also the Office of the Representative for International Trade Negotiation, and the State Economic and Trade Commission, under the State Council.[122] Within MOC, Trade Development Bureau, the Investment Promotion Agency, the International Centre for Economic and Technical Exchanges, and the

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International Trade Regulation in China: Law and Policy, Hart Publishing, 2005, pp.6-7.

[118] *ibid.*, pp.6-7.

[119] In 2003, the State Development and Planning Commission (SDPC) was reorganized into the National Development and Reform Commission (NDRC); the State Economic and Trade Commission (SETC) and the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) were abolished, and the Ministry of Commerce (MOFCOM) was established, supra note 53, WT/TPR/S/161.

[120] Online information from Ministry of Commerce. Available at: http://english.mofcom.gov.cn/mission.html.

[121] T.W. Huang, *Trade Remedies, Laws of Dumping, Subsidies and Safeguards in China*, Kluwer Law International, 2003, The Hague, p.29.

[122] *ibid.*, p.30.

China Foreign Trade Centre, all contribute to the promotion and development of trade, as we can see from Appendix C.

Within the Ministry of Commerce there is also a *China WTO Notification and Enquiry Centre* which satisfies China's WTO duty to explain China's trade policy, and to notify China's trade measures to the outside world. So, the public is provided with trade-related laws, regulation and rules in the *China Foreign Trade and Economic Cooperation Gazette*. This is at the website of the Ministry of Commerce.[123]

The last institutional dimension, part of the economic reform and opening out process deserves more extensive mention, also in the wider international context. In recent years, the concept of NGO has gained great prominence on the WTO agenda. It usually appears in WTO official's speeches, in public discussions and policy analyses and recommendations most issues concerning the WTO and public affairs. The Marrakesh Agreement has an Article V devoted to NGOs which proves that the General Council may make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO.[124] In 1996 the General Council set out further rules for relations with NGOs. A guideline (WT/L/162) "recognizes the role NGOs can play to increase the awareness of the public in respect of WTO activities". Since 1998, the WTO Secretariat has taken new initiatives to enhance its dialogue with civil society. The WTO says that these guidelines are instrumental for both Members and the WTO Secretariat in maintaining an informal and positive dialogue with the various components of civil society.[125] In the context of this framework, China has been raising awareness of the role of the Chambers of Commerce (COC).[126]

In Febrary 2005, the State Council passed 'Some Opinions of the State Council on

[123] WT/TPR/G1161, 17/03/2006, Trade Policy Review, Report by the People's Republic of China.
[124] Art.V of the Marrakesh Agreement.
[125] WTO and NGOs, available at http://www.wto.org/english/forums_e/ngo_e/ngo_e.htm, visited on 06/03/2005
[126] The phrases, Chambers of Commerce, Business Association, Industry Association are sometimes used interchangeably in China.

Encouraging, Supporting and Guiding the Development of Private and Other Non-Public Economic Sectors', it stated "According to marketization principle to regulate and develop various types of social intermediary organizations such as *Business association and chambers of commerce* to create a sound environment for the development of the private sector economy."[127]

With the rapid development of Chinese foreign trade and investment, China is facing more and more trade disputes - according to the 2005 Chinese Ministry of Commerce Foreign Market Access Report, one seventh of the total anti-dumping cases in the world from 1995 to June 2004, was against China. So Chinese enterprises are really concerned and want to be given some support in dealing with foreign trade difficulties. There is a question and answer section on the official website of Ministry of Commerce. The director of Department of Foreign Trade Lu Jianhua answered the important question.[128]

> Q: Many enterprises in our country are easily in a disadvantageous position and suffer loss due to lack of international trade experience when they engage in the negotiations with foreign companies. Is there any mediating agency or organization that can deal with problems with foreign companies?
>
> Lu: Our Chambers of Commerce are China's foreign trade intermediary organizations.[129] According to the Foreign Trade Law, Chambers of Commerce shall provide, in compliance with their articles of association, their members with foreign trade related services in aspects of manufacturing, marketing, information and training, play a positive role in coordination and self-discipline, submit applications for relevant foreign trade remedies, safeguard the interests of their members and the industry, report to the relevant authorities the suggestions of their members with respect to foreign trade promotion, and actively promote foreign trade.

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[127] See 'Some Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Private and Other Non-Public Economic Sectors', Ministry of Civil Affairs online information, available at http://www.mca.gov.cn/policy/index.asp.

[128] Ministry of Commerce Online Information, available at http://www.mofcom.gov.cn/at/at.html, visited on 05/02/2005.

[129] These include: the China Coal Industry Association; China Iron and Steel Association; China National Textiles and Clothing Association; China Machine Industry Federation; China Petroleum and Chemical Industry Association; China Light Industry Federation; China Building Material Industry Association; China Nonferrous Metals Society.

Indeed, compared to the 1994 Foreign Trade Law, the new Foreign Trade Law includes a specific reference to chambers of commerce and associations in Article 56.[130] It states that foreign trade dealers may organize or participate in relevant associations or chambers of commerce for importers and exporters in accordance with the law. Particularly, it highlights the mission of the associations or chambers of commerce. In other words, from this Article and Mr Lu's answer, one can sense the expectation of the Chinese government concerning the COC. Meanwhile, enterprises place much hope in the COC also in the area of trade remedies investigations as well, because the Foreign Trade Law requires the COC to help.[131]

Will their hopes be satisfied? Can Chinese COC live up to expectations— 'the important and indispensable bridge between government and enterprises'[132]? The following section shall give an account of the structure of the COC. It also examines the key issues they face.

China's business associations can be divided into two categories: 'officially organized business associations' and 'popular business associations'. The former was formed by the government during the change over from planned economy to market economy. For example China's Chamber of Textile Commerce was formed in 1988. They have been set up by the government to play a central part in liasing between it and the private economy. Such a body is charged by the government to perform partial administrative functions, such as regulate industry standards, put a break on excessive competition, and also, under the Foreign Trade Law, provide foreign trade services, including co-ordinating actions under that Law. In other words, they must feed to their own members the necessary trading information, and assist both their members and the government by dealing with industry problems, and discussing trade policy issues. So the COC have a two way representative function between their members and the government. The staffs are usually on government salaries and the leaders are

[130] See Art.56 in the Foreign Trade Law.
[131] *loc.cit.*
[132] Minister Bo Xilai's words, in "MOFCOM Holding a Symposium with Industry Associations", available at http://wto2.mofcom.gov.cn/column/print.shtml?/bilaterlvisits/2006..., visited on

sometimes government officials. Nonetheless the idea of setting up these bodies was for the government to reduce significantly its role in regulating the economy. "We will resolutely transfer responsibility for activities that the government should not be engaged in to enterprises, the market or civic organizations, and maximize the role of civic organizations, industrial associations, chambers of commerce and intermediary agencies."[133]

The private business associations are formed by the enterprises themselves during the period of development of the market economy. They have no staff from the government and no government subsidies. They work very closely with the enterprises, helping them with training and development of new business opportunities. Especially they organise to get companies together to deal with trade disputes, by hiring American or European lawyers, as well as Chinese lawyers, to assist in trade litigation abroad.

Among these associations, Wenzhou chambers of commerce are the successful example. Due to its rapid economic development, Wenzhou became one of the most infected areas involved in various international trade disputes. Since China joined the WTO, Wenzhou products have been involved in 26 trade disputes, more then 3700 enterprises involved. So far, Wenzhou has defended itself in 21 cases, more than 80%. And won 6 among the 13 completing cases. Wenzhou COC certainly played vital role in organizing and representing the enterprises.[134]

For example, in 2003 in the face of an EU anti-dumping suit concerning a Chinese manufacturer of tobacco making equipment, Wenzhou got fifteen companies together, donating the money to hire lawyers to bring the case in Brussels, where they won the case. This was the first example of a Chinese victory in an anti-dumping case after China joined the WTO. In February 2003, Wenzhou was set by the Ministry of

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21/03/2006.

[133] Chinese Premier Wen Jiabao in '2005 Report on the Work of the Government'.

[134] "The Secret of the Amazing Strength of the Wenzhou Chambers of Commerce", in *Chinese Journal of the Economy*, No.9, 2004.

Commerce as trial unit that allow local business organizations participate in the fair trade governmental work. Wenzhou is the only trial unit in China.[135] Because of the self-organising nature of this type of body, normally they have strength in mediation and self-discipline of the industry.

However, the private associations must still have an official sponsor. For example all Chambers of Commerce have to be established through the official Industry and Commerce Federation. The government makes regulations for NGO management and registration. These regulations apply to business associations and chambers of commerce as well. One regulation prohibits NGOs from the establishment of regional branches, while the second bars any individual from serving as a legal representative of more than one NGO. So the effect of these regulations is to implement a policy of one area one chamber, one industry one chamber. This effectively creates unequal obstacles in the competition between the official and private chambers of commerce.

So the effect of the government policy is a systemic contradiction. While the government wants to liberalise the economy, it wants to keep control over the associational activities of the private sector. Hence local business associations are highly integrated into the bureaucracy and this limits their capacity. Even the official associations remain limited in their ability. The Minister of Commerce recognized this in a Symposium in March 2006, he said:

> The Ministry would hear much more the suggestions of chambers of commerce and associations in the future in work of policies draft and foreign negotiations...the Ministry should be more active to enhance the connections with chambers of commerce and associations, should share information and support work of them."[136]

When I come to chapter six on the textile disputes I will discuss more the specific

[135] Huang Mengfu ed., 2005, *Report on the Development of Chinese Chambers of Commerce (Zhong Guo Shang Hui Fa Zhan Bao Gao)*, Chinese Academic of Social Science Press.
[136] Network Center of MOFCOM, "MOFCOM Holding a Symposium with Industry Associations", available at http://wto2.mofcom.gov.cn/column/print.shtml?/bilaterlvisits/2006..., visited at 21/03/2006.

problems of the Textile Chamber of Commerce and its role in the textile trade dispute settlement.

Legal Framework

The Chinese authorities many times reiterated that China, as a large and responsible country, is seriously honouring and capable of complying with the WTO rules and commitments. As the General Counsel of the State Council puts it,

> WTO rules broadly affect the economic, political and social life of each member. Since WTO is an intergovernmental organization based on mandatory rules, government actions (whether they are policy decisions or execution of policies) must be regulated and restricted by WTO rules, and subject to surveillance of other members through the trade policy review and dispute settlement mechanism.[137]

Generally, in the international context of the WTO, the emphasis will be on preventing conflict by revising laws and norms, i.e. institutional reform which means: undoubtedly the way to avoid difficult legal battles under the WTODSS is for China simply to comply with the WTO rules, both in its own laws and in the administrative practice of its government agencies. Obviously commentators in China do not dispute the binding nature of international trade remedies as codified in various codes in the WTO. They know these codes are part and parcel of the membership deal.

When it joined the WTO China complied with its duty to change large areas of legislation to make it conform to the WTO:

> From the end of 1999 to end of 2005, the Central Government adopted, revised or abolished more than 2,000 pieces of laws, administrative regulations and department rules. They cover trade in goods, trade in services, trade-related intellectual property rights protection, transparency and uniform application of trade measures.[138]

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[137] Huang, *op.cit.*, p.26.
[138] [138] WT/TPR/S/161, China's Trade Policy Report

(a) China's Major International Trade Laws

The main law covering international trade is the Foreign Trade Law. Basically, there are two legal prescriptions to which China can resort in front of bilateral trade disputes: one is the consultation clause in trade agreements; the other is the relevant clause in the Foreign Trade Law, effective 1 July 2004. The consultation clause varies from agreement to agreement. The new Foreign Trade Law that is based on the 1994 Foreign Trade Law provides the framework for the regulatory regimes of the entire foreign trade related area, empowering the Ministry in charge of foreign trade under the State Council to deal with matters concerning trade remedies. One of the significant features of this new law is there are many new clauses aimed to protect China's industries and market. Indeed, to some extent this new law is a make up for disadvantaged position created by China's WTO agreements. The new law has been described in the press as marking a change from a passive to an active approach to foreign trade relations.[139]

In Chapter 1 of the Foreign Trade Law, Art.5 reiterates the usual terms about trade being on the basis of the principle of equality and mutual benefit, but it is clear that this now also means trading fairly. Because another provision in the general part of the law, article 7, provides that, in the event that any country or region applies prohibitive, restrictive or other like measures on a discriminatory basis against the PRC in respect of trade, the PRC may, as the case may be, take counter-measures against the country or region in question.

On Foreign Trade Investigation, Art.37 provides very affirmatively and confidently, that in order to maintain the foreign trade order, China may carry out investigations, with respect to, inter alia, the following matters: trade barriers of relevant countries etc, whether there is a need to take foreign trade remedies against dumping, subsidies, or countervailing measures of other countries, activities that circumvent foreign trade

[139]'China Introduces Overall WTO Rules By Foreign Trade Law', available at http://en.ec.com.cn/pubnews/2004_07/01/202622/1028716.jsp, visited on 04/11/2004.

remedies. The procedures are set out in detail in Art.38 and Art.39, and the state may then act on the conclusions of the investigations.

Art.41 is precise in identifying dumping in a market at a price less than its normal value and under such conditions as to cause or to threaten to cause material injury to the established domestic industries etc. The state may take anti-dumping measures to eliminate etc the injury. The same type of provision covers countervailing measures (Art.43) and also safeguard clause exists (Art.44). So substantially increased quantities of imports causing serious injury etc may be blocked.

Most interesting is the aggressive tone of Art.47 concerning countries which are parties to economic and trade treaties with the PRC and then deprive China of or impair her interests in such treaties etc or hinders the realization of the object of such treaties or agreements, China has the right to request the country to take appropriate remedies and has the right to suspend or terminate its performance of relevant obligations in compliance with relevant treaties and agreements. There is scope for diplomatic approaches. Art.48 provides that China will carry out foreign trade consultations, negotiations and settle disputes in accordance with this law. However, the terms of the law are categorical and add prominently the concept of fairness to the concept of equality and mutual benefit.

This is all the more necessary, and hardly at all surprising, in view of the unequal terms China has had to accept to join the WTO.While the implications of China's WTO accession have drawn considerable scholarly attention, there is little detailed analysis publicly available about the price of China's WTO accession. So what are the costs of joining the world trading club? The following section shall give a detailed analysis.

(b) China's WTO Commitments

China's WTO commitments are contained in various accession documents:

(1) The Protocol on the Accession of the People's Republic of China, which is the primary document on China's accession;
(2) Its annexes containing primarily schedules of specific commitments made by China in respect of market access;
(3) The Report of the Working Party on China's Accession, another prime document, containing conclusions of the final negotiations between China and other members of the WTO in respect of China's foreign trade regime.

The Protocol, together with its nine annexes and the Working Party Report form a wide-ranging package of China's commitments and international framework of integrating China into the world. However, precisely as Gertler has pointed out: "The Protocol and Working Party Report essentially contain a one-way set of commitments (from China's side only), although these documents also contain some 'soft' commitments by Members..."[140]

For the purpose of this chapter, the following discussion focuses on the key provisions which are most relevant to the dispute settlement and which are also highly politically sensitive and controversial, e.g. the use of Non-Market Economy (the peculiar status accorded to China in antidumping investigations); the use of a special Transitional Product-Specific Safeguard Mechanism; the use of a Special Textile Safeguard provision and the Transitional Review Mechanism (TRM) on China.

According to Article 15 of the Protocol, (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO member shall use Chinese prices or costs for the industry under investigation in determining price comparability:

[140] See Jeffrey Gertler, 'What China's WTO Accession is All About', in Deepak Bhattasali, Shantong Li and Will Martin, *China and the WTO – Accession, Policy Reform, and Poverty Reduction Strategies*, World Bank, 2004.

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
(d)…In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.[141]

China was characterised as a Non-Market Economy (NME) for 15 years after its accession to the WTO. This most controversial provision came originally from the bilateral trade agreement between China and U.S. The United States had been treating China as a NME for a long time, although the practice was not endorsed explicitly in law until China's WTO accession agreement. "We achieved a significant concession when we were able to gain China's agreement that we (and other WTO members) could continue to use this methodology for 15 years after China's accession to the WTO." This was the evidence given by USTR General Counsel Peter Davidson to the US Congress.[142]

MES and NME Status are central to the legal criteria used in antidumping investigations. The original provision of NME treatment under WTO rules dates back to the GATT period. It was related to the accession of Communist Poland to the GATT in the mid-1950s. However this provision has been carried through to the WTO Agreement. Article 2.7 of the WTO Anti-dumping Agreement states that,

It is recognized that, in the case of imports from a country that has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1 [determination of normal value], and in such case, importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in a country may not always be appropriate.[143]

The difficulty with non-market economy status is that importing states will take

[141] Article 15 of the China' WTO Protocol.
[142]See Text: USTR General Counsel on China's "Imminent" WTO Accession, http://www.grandunionstone.com/wto/info/us/b08022001.htm, visited on 05/12/2005.
[143]G/ADP, Agreement on Implementation of Article VI of the GATT 1994,

advantage of the chance not to look to costs of production and sales in the NME country and choose arbitrarily a surrogate country in which the costs and local prices are much higher than the NME country. The anti-dumping rules are too vague for this practice to be prevented under the DSM. In his study, Patrick Messerlin estimates that the biases of the NME procedure for cases of alleged dumping involving Chinese exports to the United States and the European Union, has been, between 1995 and 1998, 3% to 14 % for the US and 20 to 24% for the EU, under a mix of price comparisons and constructed prices, and to 25% for both, under various constructed value methods.[144] For instance a report in *People's Daily* states:

> At present, for an average of every seven anti-dumping cases worldwide, one involves Chinese products, making China always one of the countries that are subjected to the most anti-dumping investigations, as well as the biggest victim of anti-dumping and other trading remedy measures.[145]

So, what is a Non-market Economy? According to the United Nations Conference on Trade and Development (UNCTAD), the definition of NME is:

> A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy which depends heavily upon market forces to allocate productive resources. In a 'non-market' economy, production targets, prices, costs, investment allocations, raw materials, labour, international trade and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority; hence the public sector makes the major decisions affecting demand and supply within the national economy.[146]

Is China a Non-Market Economy? This is a very controversial issue. There are hot debates surrounding it. Chinese officials and academics argue that the Chinese economy does not come within the UNCTAD definition of a 'non-market economy'.

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http://docsonline.wto.org/gen_trade.asp, visited on 06/12/2005.

[144] See Patrick Messerlin, China in the WTO: Antidumping and Safeguards, in Deepak Bhattasali, Shantong Li and Will Martin, *China and the WTO – Accession, Policy Reform, and Poverty Reduction Strategies*, World Bank, 2004.

[145] 'Market Economy Status: Will Article 15 cost another 15 years?', *People's Daily*, 28 June 2004.

[146] UNCTAD, http://usinfo.state.gov/products/pubs/trade/glossjr.htm#nonmarkeco, visited on 09/03/2005.

Zhou Shijian, a Permanent Adviser at the China Association of International Trade has stated that: "Of course China is a market economy. Ninety-eight percent of China's commodities are priced according to market demand and supply. Enterprises operate independently, without the control of government."[147] To prove China's market economy status, the Ministry of Commerce commissioned a research institute based at Beijing Normal University to conduct a research study on the development of China's market economy as of the end of 2001. The report was released on 13 April 2003, entitled 'Report on the Development of China's Market Economy 2003'. According to the report, "China is about 69 percent a market economy measured by the internationally accepted standard, exceeding 60 percent as the threshold of a market economy country."[148] The report concluded that China has already established a market economy system after over 20 years of reforms and opening-up.

These indisputable economic facts should alert one's attention to the fact that the politics of identity, security and anxiety, so familiar to China's relationship with the outside world, continue to apply at the present time. No less an authority than the former WTO Director General himself, Supachai Panitchpakdi has explicitly stated that the whole history of unequal treaties continues to haunt China. "As should be evident, China's is a mixed economy in which the state plays a strong role. But to call it a non-market economy is a stretch. China arguably has been the victim of heavy-handed politics as a result of the insistence by some of its negotiating partners that it be regarded as a non-market economy."[149]

However, a difficulty is that there are no universal standards of Market Economy Status. Different countries have different standards. Because the EU and US are the first and second trading partner of China and the most frequent users of anti-dumping measures against China, their approaches to this question are the most important. So

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[147] Chris Gelken, 'When is a market economy not a market economy?' http://www.atimes.com/atimes/printN.html, visited on 05/10/2005.
[148] Report on the Development of China's Market Economy 2003, The Economic and Resources Management Research Institute at Beijing Normal University, http://www.china.com.cn/chinese/zhuanti/306713.htm, visited on 29/11/2005.
[149] Supachi Panitchpakdi and Mark Clifford, *op.cit.*, p.195.

the following gives attention to specifying the standards applied by the U.S. and EU. The U.S. Department of Commerce sets six statutory criteria: the extent to which,

> (a) the currency of the foreign country is convertible into the currency of other countries;
> (b) wage rates in the foreign country are determined by free bargaining between labor and management;
> (c) joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
> (d) there is government ownership or control of the means of production;
> (e) there is government control over the allocation of resources and over the price and output decisions of enterprises, requesting that decisions concerning the output and prices of an industry are free of government intervention and that all important product inputs are paid at market prices;
> (f) such other factors as the administrating authority considers appropriate.[150]

The EU has five special criteria with regard to a market economy:

> (a) prices, costs and inputs etc. are determined by market demand and supply;
> (b) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;
> (c) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;
> (e) the firms concerned are subject to bankruptcy and property laws that guarantee legal certainty and stability for the operation of firms;
> (f) exchange rate conversions are carried out at the market rate.[151]

In other words, China has to meet the standard of these countries. Then it can be recognized as Market Economy. But, is the MES a purely technical issue or is it a political issue? And what's the significance of NME Status for China? If it is only a technical issue, i.e. a methodology in anti-dumping investigations, why does China struggle so hard to get the recognition of MES by as many countries as possible?

Since 2003, China adopted a series of strategies to get the recognition of the MES for

[150] Report on the Development of China's Market Economy 2003, *op.cit.*

itself. It undertook diplomatic action to persuade the US and others to accept it as a market economy. This, of course, would mean a radical review of China's trade in relation to all its main trading partners, such as the US and the EU. China also demanded the exercise of the rights that it did have under its protocol of accession to the WTO. This meant China looked to a change in the basic WTO agreements. This would also serve to prevent WTO members being treated as NME countries in future. Thus, 'China's Market Economy Status' and 'Anti-dumping' are areas that have received the most attention in the press and in actual practice in China. 'China's Market Economy Status' and 'Anti-dumping' were listed as top ten 2004 popular words in major Chinese newspapers.[152] So, they are terms which are part of the public imagination in China concerning its present identity. In fact, as we can see from below, the implications of NME for China are both economic and political.

Along with the rise of China's trade weight and importance in the international arena, there has come a period of increased tensions due to trade frictions between China and its trading partners. This is calling for very careful diplomatic attention and positive, pre-emptive and preventive measures to cope with the situation. NME is, as already has been pointed out by Messerlin, having a huge impact on the anti-dumping charges brought by United States, EU and other countries. This development is very much to the fore in Chinese public consciousness and debate.

China as the world's third largest trading power, did not bring any anti-dumping charges until 1997. By 2006, there were 44 charges and one safeguard measure.[153] "To date China is one of the smallest users of such trade remedy measures."[154] However, the most marked recent development in relation to anti-dumping is that large developing countries have become very frequent users of antidumping rules, and one might expect China to go the same way. Consider China's antidumping enforcement

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[151] *ibid.*.

[152] Chinese major newspapers include *People's Daily*, *Guang Ming Daily*, *Southern Weekend,* See http://isearch.china.com.cn/cgi-bin/i_textinfo.cgi?dbname=info_ctext3..., visited on 05/10/2005.

[153] See China Trade Remedy Information, http://www.cacs.gov.cn/DefaultWebApp/showNews.jsp?newsId=300080000016, visited on 05/04/2006

[154] See Patrick Messerlin, *op.cit.,* p.29.

from 1997 to 2004. As Kerr and Loppacher put it, "They are quickly learning the political convenience of anti-dumping measures. Once anti-dumping mechanisms become well established in these countries, they will be difficult to persuade to give them up."[155]

To better understand the issues, one must understand the politics behind the anti-dumping rules. Anti dumping is kind of trade remedy that is concerned with "unfair" pricing. Dumping is defined as an act of selling products in the foreign market at less than 'normal value', i.e. at a lower price than in the company's home market or selling below the full cost of production.[156] When the practice of dumping is found, one can impose anti-dumping duties. Despite the fact that anti-dumping is widely presented as being to correct unfair trade practices and to create a level playing field, most economists have come to the conclusion that it is nothing but protectionism in disguise. As one economist puts it: Anti-dumping constitutes straightforward protectionism that is packaged to make it look like something different...From an economic perspective there is nothing wrong with most types of dumping. Anti dumping is not about fair play. Its goal is to tilt the rules of the game in favour of import competing industries.[157]

Similarly, Kerr and Loppacher have stated that the so-called 'Dumping' is the international commercial policy equivalent of the invisible suit in the Andersen's fairy tale about the 'Emperor's New Clothes'.[158] It is protectionism and needs to be fundamentally reformed not mildly modified without changing its underlying principles. So they have called for fundamental reform of the WTO Anti-dumping Agreement. As economist Clarida puts it:

> A frequent justification for the administration of the antidumping laws in the United States is that it serves to protect domestic firms and workers against the

[155] Kerr and Loppacher, Anti-dumping in the Doha Negotiations – Fairy Tales at the WTO, in *Journal of World Trade*, 2004, Vol.38 (2), pp.211-244.
[156] G/ADP, Agreement on Implementation of Article VI of the GATT 1994.
[157] Thomas Huang, Trade Remedies: Laws of Dumping, Subsidies and Safeguards in China, Kluwer Law International, London, 2003, p.20.
[158] Kerr and Loppacher, *op.cit.*, p.214.

> ever present threat of foreign predation...[N]either the International Trade Commission nor the Commerce Department conducts, as part of the typical antidumping inquiry, an independent investigation to determine whether or not sales at less than fair value are part of a forward looking predatory strategy first to drive out U.S. competition and then second to raise U.S. prices enough as to recoup the losses incurred while dumping. Rather Predation is merely just inferred from a determination of dumping...[S]uch inference is, in general, without any substantial basis in either economics or the law.[159]

In the Doha Round negotiations, the issue of change of the Anti-dumping Agreement is under debate albeit only in terms of clarifying the existing rules. There are many country proposals on the issue, but they do not move in the direction of progressive change. In particular there is a large ad hoc grouping of countries called the "Friends of Anti-dumping" that have put forward a common position paper.[160] This group includes many of the larger developing countries that are becoming "addicted" to anti-dumping. While there are some countries[161] that want dumping altered in ways that prevent anti-dumping actions from being used as disguised barriers to trade, the US is not one of them. It managed to insist upon the "clarifying and improving" criterion, thereby putting relatively strict boundaries around what would be open for negotiation. The whole range of other major developed trading countries, such as Japan, Canada and Brazil, as well as the EU, also support this line, "because their governments can play upon the supposedly legal instrument of domestic antidumping mechanisms to assist them in accommodating their own domestic protectionist pressures."[162]

It has already been mentioned how the US and the EU use the NME criterion to apply the anti-dumping procedure against China. They use a surrogate country such as Turkey or Mexico where materials and labour costs are much higher than in China, to get comparable prices and costs of production to calculate the normal value of Chinese exports. In this way the US and the EU can argue Chinese exporters are

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[159] Thomas Huang, *op.cit.* p.20.
[160] 'Friends of Anti-dumping' includes Brazil, Chile, Colombia, Costa Rica, Hong Kong, Israel, Japan, South Korea, Mexico, Norway, Singapore, Switzerland, Taiwan and Thailand, see Kerr and Loppacher, *op.cit.*
[161] For example, China and 'Friends of Anti-dumping'.
[162] Kerr and Loppacher, *op.cit.*, p.215.

deemed to be selling below normal value. Even the former WTO Director General Panitchpakdi pointed out "Investigations under these conditions are inherently political. China is at a severe disadvantage in defending itself".[163]

The question arises can China be preparing to retaliate, which is a main risk that many analysts fear, that developing countries learn to use themselves a weapon that is so often used against them. From 1997 China is restructuring and developing its trade regime, including anti-dumping law and other trade remedies. "In many ways, trade remedies are adopted in China simply because they have been practiced in economically advanced countries."[164] Even although China is starting only now with anti-dumping laws, in a new situation and with no experience, it is expected to make sure that its anti-dumping laws and their implementation are compatible with the WTO rules, which are developed out of the extensive experience of the main WTO trading powers, especially the US and the EU. This should mean that China would make an aggressive use of such laws to attack imports to China, just as the US and the EU do. However, this does not appear to be the case. Instead China is adopting a pre-emptive diplomatic course to try to avoid conflict. China has, since 2002, been persuading trading partners to treat it as a market economy, rather than retaliating with its own national anti-dumping powers. So far, China has had some success. A total of 53 countries have recognized China's MES.[165]

The way this is achieved is through the type of trade-off diplomatic, bilateral bargaining that is rather a call back to the days before the legalisation of international trading rules. For example, Brazil as China's top Latin American trading partner, recognized China's MES in November 2004. According to Brazilian Industry and Trade Minister Furlan:

> At first, the Chinese position was like a Samba song with one note: 'We are here to get the market economy status'. President Lula's position was that we had to

[163] Supachi Panitchpakdi and Mark Clifford, *op.cit.*, p.195.
[164] Thomas Huang, *op.cit.*, p.25.
[165] MOFCOM Online information, available at http://www.cacs.gov.cn/DefaultWebApp/channel.jsp?chId=10082, visited on 04/04/2006

> have a balanced agreement or we wouldn't have an agreement. China pledged to give Brazil special access to its market as a reward for the market economy designation. Chinese authorities told us that countries that recognized it from the beginning will have access privileges in the Chinese market and will be treated as priority friends.[166]

Argentina and Chile have also accorded China MES, but again this was part of a *quid pro quo*. China promised to spend tens of billions of dollars on improving the country's infrastructure.[167] The MES has to be seen as a diplomatic concession, a move that makes it harder to bring anti-dumping charges. There was even joking about the diplomatic, bargaining character of this development: "Together, perhaps in exchange for market-economy recognition, we could have sold them not just soybeans but oil in bottles to sell in the supermarket."[168]

However, this does not guarantee that China is out of the woods. Most of the countries that have accorded MES so far have not been major trading partners of China. Major trading partners, such as EU and US have not yet recognized China's MES. The EU has refused to grant China the MES in June 2004, concluding that China's economy suffered from state interference in industry, poor corporate governance and lack of rule of law. "It is purely a technical classification. We are not casting judgement on the entire Chinese economy."[169] However, China believed this was a political decision. "EU made this decision to decline China's MES under the pressure of United States"[170] Nonetheless, the EU has a flexible system, granting MES to individual companies if they could provide reliable information. Recently, Sixteen Chinese chemical fibre cloth producers have won market economy status recognition from the EU.[171]

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[166]"Brazil recognizes China as market economy: Hu", http://au.news.yahoo.com/041112/19/p/rplo.html, visited on 15/12/2004

[167] China and Latin America: Magic, or Realism? Buenos Aires, *The Economist*, 1 January 2005, pp.37-38.

[168] *loc.cit.*

[169] EU spokeswoman Arancha Gonzalez's words, in 'EU ruling damages Beijing's trade Status', by Paul Meller, http://www.usvtc.org/Documents/USVTC%20TA/Technical%20Assistance/Trad..., visited on 27/02/2005.

[170] Ni Yanshuo, "The Dynamic Chinese Diplomacy", 24/01/2005, http://isearch.china.com.cn/cgi-bin/i_textinfo.cgi?dbname=info_ctext3..., visited on 26/01/2005

[171]16 Textile Producers Win EU Market Economy Status, http://www.china.org.cn/

Like the EU, the US has refused to grant China's MES. The United States Department of Commerce (DOC) is considering changing its policy and practice concerning the 'Separate Rates Practice in Anti-dumping Proceedings Involving Non-Market Countries'. One of three new proposals, to make even harder the existing rules on anti-dumping, is to adopt a rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that the ultimate destination of the merchandise is the United States. The DOC requests comments on this presumption. The interested Chinese groups have responded strongly. They expressed themselves as follows:

> In our views, it is really illogical that the DOC presumes in advance that the NME exporters necessarily be aware how their third-country resellers deal with the subject merchandise and which country is the ultimately destination. The DOC's assumption is totally based on its subjective guess and seriously deviates from any legal basis.[172]

They said this was a discrimination against China, to be resisted. Because such a discriminating assumption is absolutely an unfair treatment of Chinese exporters, such a presumption of guilt is against the principle of law.[173]

In another case, involving an anti-dumping investigation against Chinese shrimps, a total of 57 relevant Chinese enterprises responded to the shrimp antidumping case. Except for the 4 which were selected by US Department of Commerce as mandatory respondents, all other 53 respondents have carefully submitted Mini Section A, Sections A and supplemental questionnaires following US DOC's requirements. But disappointing enough, DOC rejected 32 respondents for weighed average rate with various irrelevant excuses. The rejection rate hit a height of 60%. The Chinese view is that US DOC's excuses are unreasonable, and not in accordance with the U.S.

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english/2005/Feb/119696.htm, visited on 27/02/2005.

[172] Comments by the China Chamber of Commerce for Light Industrial Products & Arts-Crafts, USITC Online Information.

[173] *ibid.*

Laws.[174], The Bureau of Fair Trade for Imports & Exports of Ministry of Commerce of China also hired a famous American law firm on behalf of it to make comments, they listed the current practice of DOC as unfair discrimination against China and asked the DOC to liberalize its practice on China.

China sees the general US approach as influenced not by law but by politics. So, by contrast, Russia was granted MES by the US and the EU. "I think this just reflects the different political perception those countries have when comparing Russia and China. Their definition of 'market' and 'non-market' economies is not based on universal norms but on their political and economic interests." This is the view of Li Yushi, vice-president of the China Academy of International Trade and Economic Co-operation, who was a first secretary at the Chinese Embassy in Washington.[175]

In November 2004, during my interview with an USTR senior official, I asked him about the issue of Russia's market economy status. My question was the EU recognised Russia's market economy status and some Chinese scholars think that was a political decision. What did he think about that? He hesitated for a second and then he said that yes it was a political decision. Then I asked him about the US also recognising Russia's market economy status. What did he make of that? He appeared not to know. Then he said if that was so then the American decision was based on law and not a political decision. In another interview that I made with a Chinese trade official through email, we discussed the same issue. He said "I think this is just political posturing in the United States, and I don't think there is any real possibility that we will be granted MES by US in the foreseeable future. I think they plan to make as much use of Article 15 as they possibly can."[176]

This view is widely reflected in the Chinese press as can be seen from the *People's Daily*. It says that how far the issues of MES and dumping are treated as political can

[174]Comments by China Chamber of Commerce For IMP.&EXP. of Foodstuffs, Native Produce & Animal By-Products, USITC Online Information

[175] 'When is a market economy not a market economy?', http://www.atimes.com/atimes/printN.html, visited on 07/02/2005.

be seen from the fact that the "US is willing to grant the market economy status to nations like India and Russia in favour of their 'democratic system'. However, it is not ready to understand China's 'socialist market economy'."[177] As has been already pointed out, the Chinese Ministry of Commerce commissioned a private research institute research in 2003, according to which China is about 69% a market economy, where two thirds of its GDP is created by the non-state or private sector.[178]

So, from this primary research evidence at least, China considers itself provoked to resort itself to anti-dumping measures at the domestic level, although currently it is still showing considerable self-control. Nonetheless the tendency is clearly there. China has initiated 44 anti-dumping investigations since 1997. The Chinese mood can be gathered from the following expressions of opinion in the public domain. For instance the address of the Minister of Commerce to American businessmen is very strongly expressed. As a Chinese saying goes, 'he who gives convenience to others will enjoy convenience himself'. Another saying is 'plant less thorns but more flowers'. "If China is granted full market economy status, you will have more friends in China to work with."[179] "As a matter of fact, any attempts at denying Chinese goods access into the world market will vice versa block the way of their own products into the enormous Chinese market".[180]This is the context in which to understand the Chinese recourse to anti-dumping itself.

In conclusion, it has to be said that, while NME status puts China at a considerable disadvantage in anti-dumping actions, these are still relatively marginal in the overall context of the amount of Chinese trade affected by such actions. The fact that it is difficult for Chinese enterprises to win the lawsuit may well encourage more countries to bring such suits against Chinese producers and compel Chinese enterprises to give

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[176] Interview conducted in Washington & Email interview in October 2004.
[177] See 'Market Economy Status: Will Article 15 cost another 15 years?' *People Daily*, 28 June 2004.
[178] Report on the Development of China's Market Economy The Economic and Resources Management Research Institute at Beijing Normal University, 2003.
[179] An article written about the meeting between Bo Xilai, Minister of Commerce of China and the top executives of American enterprises in China, "You are too Sensitive": Bo Xilai, available at http://english.people.com.cn/200412/09/print20041209-166669.html, visited on 03/02/2005.
[180] 'When the US is wielding anti-dumping cudgel', http://english.people.com.cn/200312/ 01/print

up trying to defend the cases. However, one must keep in mind that, compared to the total export volume; the amount of export volume subjected to the anti-dumping investigation is very small. In 2003 China's export volume was $438.37 billion. There were 19 countries and regions that launched 59 anti-dumping measures against China, the total involving US$2.2 billion, only accounting for about 0.51% of the total export.[181]

This brings one back to the ideational aspect of these trade disputes. They concern not exactly the neo-liberal institutionalist attention to material interests, but rather the social constructivist attention to the social fact of collective identity, i.e. how China considers it is seen on the international stage. The economically marginal character of the anti-dumping actions gives way to the huge political importance of NME status, in Chinese eyes. It is the Chinese elites who reconstruct the marginal economic interests into a symbolic matter of great importance. So the most important meaning of NME is ideational not material. As the major newspapers stated, "The NME Status denies the achievements and status quo of China's establishment of a market economy and thus tarnishes China's international image."[182] And China's international image is a central part of China's WTO membership.

Another key provision that put China on the spot is the multilateral review mechanism known as "Transitional Review Mechanism" created under Article 18 of China's Protocol of Accession. It calls for a detailed review of China's WTO compliance annually for the next 8 years, with a final review in year 10. It requires China to provide detailed information to WTO members for purposes of this review mechanism. It also gives WTO members the opportunity to raise questions about how China is complying with its commitments and it calls on China to submit responses to these questions. Each year, the review will be conducted initially in 16 WTO committees and councils. Each of those bodies will review implementation matters

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20031201 129442.html, visited on 03/09/2004.

[181] Rong Min, 'One needs to adjust the way of thinking to resolve the problem of China's market economy status', 06/09/2004, available at http://isearch.china.com.cn/cgi-bin/I_textinfo.cgi?dbname=info_ctext2..., visited on 03/02/2005.

[182] See 'Market Economy Status: Will Article 15 cost another 15 years?', *People Daily*, 28 June 2004,

within its mandate and then report on the results of its review.

The sixteen subsidiary bodies of the WTO that have mandates covering China's commitments, such as the Council for Trade in Goods, the Committee on Subsidies and Countervailing Measures, and the Committee on Anti-dumping Measures, will all review China's compliance. China is obliged to provide relevant information 'in advance' of these reviews. The results of these reviews will then be reported to the WTO General Council, which will conduct the final review. China's accession protocol gives a detailed list of specific information it must provide, including economic data in ten fields ranging from foreign exchange to pricing policies, as well as copies of laws and regulations on issues ranging from import licensing to government procurement. The idea of this TRM is to provide peer-group pressure on China to make it conform to its obligations.

However, the question arises whether this is not simply a forum for all other member states to put pressure on a country regarded as a long-term economic threat. For instance the comments of the 2004 Report to Congress of the U.S.-China Economic and Security Review Commission show how political or subjective can be the use made of the data which China has to provide.[183] In general terms the Commission says that China has deliberately frustrated the effectiveness and debased the value of the WTO's TRM, which was intended to be a robust mechanism for assessing China's WTO compliance and for placing multilateral pressure on China to address compliance shortfalls. If China continues to frustrate the TRM process, the US government should work with the EU, Japan, and other major trading partners to produce a separate, unified annual report that measures and reports on China's progress toward compliance and co-ordinates a plan of action to address shortcomings. Clearly this is a mechanism for co-ordinating maximum multilateral pressure on China, and for what purposes?

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p.3; 'Forum: Why China Struggle for Market Economy Status', *China Youth Daily*, 4 June 2004, p.3.

[183] See 2004 Annual Report to Congress of the U.S.- China Economic and Security Review Commission, available at: http://www.uscc.gov/researchpapers/2004/04annual_report.pdf, visited on

The accusations of the US Commission cover ground quite similar to that coming under anti-dumping provisions. They say that there is concern about China's manipulation of its currency, objectionable labour standards, denial of trading and distribution rights, lack of IPR protection, subsidies to export industries. They refer to what they call forced technology transfers used as a condition of doing business. They also mention use of unjustified technical and safety standards to exclude foreign products and discriminatory tax treatment for domestic semi-conductor production.[184] Clearly the US Commission considers that a multilateral judgement should be co-ordinated and then enforced against China in many areas where there are no clear objective standards.

Another two contentious provision are the Transitional Product-Specific Safeguard Mechanism (TPS) Article 16 of the Protocol and Paragraph 241-242 of The Report of the Working Party on China's Accession, together they provide for a regime which amounts to a unilateral, non-reciprocal right of other states to determine that specific products coming from China are causing market disruption, and to act alone with respect to the Chinese products, quite apart from whatever effect the import of similar products from other countries may have been having. The issue is related to that of MES because it concerns the alleged opaqueness of China's trade regulation. It is also similar to the TRM in that it is a unique multilateral regime focused exclusively on China.

Article 16 provides that where products of Chinese origin are being imported in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers etc, the member state concerned may, if agreement is not reached with China within 60 days of a request for consultations, may withdraw concessions or otherwise limit imports only to the extent necessary to prevent such market disruption.[185]

22/07/2005.
[184] *loc.cit.*
[185] Art.16 of the Protocol.

The alleged justification for the measure is the same as that of NME. Spadi explains that it concerns whether the PRC is committed to WTO rules. "The lack of transparency, the high number of State enterprises, the ever present role of central and local authorities, made them (members of the WTO) reluctant to permit China's admission without special protective measures."[186] All of this covers exactly the same ground as the MES debate. Only here, on a purely non-reciprocal basis, other countries may make use of a state of the art formulation (threat of market disruption) which is recognised in the GATT/WTO practice to be beyond third party review, thereby greatly reducing the advantages of China's joining the WTO in order to benefit from the DSM. As Spadi views the matter, "the main concept - market disruption - …remains well within the unilateral scope of determination of the WTO members."[187] It is only a substantial increase in imports, without any need to demonstrate any kind of injury to the domestic industry, which provides a threshold for intervention.[188]

With this mechanism China is subjected to a regime which is always in the first instance bilateral and non-reciprocal and which may even become multilateral and equally coercive. One can expect that China will try either to change these rules or to go around them. As Brooks and Wohlforth say: "Standards of legitimacy can change. Powerful states can sometimes create new rules to legitimate new practices that they find meet their interests."[189]

Conclusion

This chapter has set the wider theoretical context for China's approaches to dispute settlement. It has done this by exploring the extent to which traditional Chinese culture and history continue to influence its general approach to conflict resolution

[186] F. Spadi, 'Discriminatory Safeguards in the Light of the Admission of the People's Republic of China to the WTO', in *Journal of International Economic Law*, Vol. 5 (2), 2002, pp.421-430.
[187] *Ibid.*, p.442
[188] *ibid.*, p.441.
[189] Stephen G.Brooks and William C. Wohlforth, 'International Relations Theory and the Case Against Unilateralism', *Perspectives On Politics*, Vol. 3 (3), September 2005, p.518.

whether nationally or internationally. It has placed these ideational factors influencing China in the context of its material interests in pursuing international trade, and then explored the actual playing out of both elements in its trade policy agenda, objectives and its stated approaches to resolving trade disputes. The chapter then goes on to explore in detail the legal and institutional framework of China's trade policy and trade dispute resolution.

The chapter has shown that the central features of China's practice will include a pragmatic approach to situations as they actually arise. It explains the collective mentality of a country anxious not to make its trading partners afraid of it, while it pursues a pathway of fairly rapid economic development. The chapter goes on to explain that the agenda for foreign trade continues to stress the place for harmony and non-confrontational relationships with others. Finally, the chapter sets the scene for the rest of the thesis. The next chapter discusses further the way China participates in the WTO and the following chapters look at major case studies of trade dispute resolution.

Chapter Four The Pattern of Chinese Participation in the WTO Dispute Settlement Mechanism

Introduction

As mentioned in the last chapter, the meaning of China's WTO membership is to better protect its interests, actively to involve itself in the development of the rules of multilateral trade regime, including through DSM, and to build up China's international image. This chapter on China's Participation in the WTO dispute settlement will illustrate how China understands and practices this goal. As has been seen in Chapter 3, China entered the WTO at a considerable disadvantage in terms of its legal rights in respect of accusations that it might be engaging in unfair trading, particularly with respect to alleged dumping in labour intensive sectors, such as textiles. The aim of this chapter is to provide an overview of China's participation and to draw conclusions. The chapter will build upon the framework for analysing China's attitude to becoming engaged in legal proceedings within the WTO, which was explained in Chapter 3. For the reasons set out in that chapter China remains reluctant. However, it is, at the same time, obliged to accept that where other countries wish to force it into the position of defendant, going as far as a WTO Panel, it has ultimately no choice but to accept this, or simply to give way and accept the position of its critic. What the chapter will show is that, to a considerable extent, such "giving way" does appear to be in evidence. However, at the same time, China is building up a strategy of acquiring greater skills in the WTO practice through third party participation and also trying to influence the

development of WTO rules, especially where it sees its own trading interests as affected. Given the size of its interests, its interventions are extremely frequent. Whether in the long run China will become acclimatised to the idea of simply using the DSM directly, rather than giving way at the consultation phase, one might hope to see emerge with new cases on auto-parts where it is three times defendant. It has to be said that a difficulty the chapter faces is that Chinese direct practice as defendant is only beginning.

An Overview of the General Participation Strategies of China

"Resorting to the rules and mechanism of the WTO, China will effectively respond to trade disputes, seriously deal with and resolve various kinds of trade frictions. China must establish and improve the mechanism in responding to trade disputes and formulate unified response strategy." — Deputy Minister of Commerce Yu Guangzhou[1]

♣ Normative Strategies: Prepare in Advance (未雨绸缪 Wei Yu Chou Mou[2])

Before China joined the WTO, the Chinese government had already started its preparation for the dispute settlement. However, the evidence of these preparations reveals that China was starting from scratch. Overcoming this learning deficit must be a major feature of all of China's DSM strategy, as this chapter hopes to show. In June 2000, large numbers of members of the Chinese Ministry of Foreign Trade and

[1] See '*China to Respond to Trade Disputes with WTO Rules: MOC Official*', available at: http://english.people.com.cn/200312/26/print20031226_131296.html, visited on 07/01/2005

[2] It means "to repair the roof and the window when there is no rain" This is a figurative expression meaning "to prepare well in advance". Taken from 'Learn about Chinese Culture: Chinese Idioms', available at: http://www.folkarts.ca/chinese_art/Chinese_Idioms_10035.aspx, visited on 05/12/2005.

Economic Cooperation (Ministry of Commerce) participated in a Georgetown University Law School Program on the WTO. 10 Participants represented the Ministry of Foreign Trade and Economic Cooperation. There were also people from other ministries and institutions and several Chinese lawyers, bringing the total to 22 course participants. Georgetown University publicity itself presented the event to stress its own significance as an institution:

> The course gives participants an intensive presentation of the legal obligations of the WTO in the context of how the WTO operates and how it relates to national governments. Participants are expected to come away from the course with an understanding of the fundamentals of the legal structure of the trading systems, and knowledge of the trends and themes of ongoing developments within that system. [3]

One comment from the Director of the Department of Treaty and Law, of the Ministry of Commerce, on this type of intensive program makes clear the stage at which the Chinese feel they remain. The officials were surprised to find their lecturers critical of something to which they had the initial aim of adapting themselves uncritically. This made them realize how far they had to go to reach the level of intellectual maturity of other long standing members of the GATT/WTO. He stated:

> That was during China's 'WTO fever' period, it was very fashionable in

[3]The Participants representing the Ministry of Foreign Trade and Economic Cooperation were: Zhang Yuqing, director general of Department of Treaty and Law; Deng Zhan, deputy director general of Department of Foreign Investment; Shan Qingjiang, division director of General Office; Wang Kaiqian, division director of Department of Planning and Finance; Zhang Ji, division director of Mechanic and Electronic Products Import and Export; Zhang Chaomei, division director of Department of Foreign Trade Development; Guo Jingyi, division director of Department of Treaty and Law; Yang Guohua, deputy division director of Department of Treaty and Law; and Li Ke, section chief of Department of Foreign Investment. See "Chinese Trade Officials Get WTO Education At Georgetown University Law School", available at: http://www.law.georgetown.edu/news/releases/june.27.2000.html, visited on 19/06/2004.

> acquainting oneself with knowledge about the WTO rules. However, all the lecturers in that program are very *critical* of the WTO. This made the Chinese delegation feel deeply the gap between China and Western countries in terms of WTO knowledge and epistemological perceptions of it. It should be said, this research program has a very clear revelation—there is a long way to go for China to become really engaged into the WTO scene, especially on the issue of dispute settlement.[4]

After this study program in Washington, a big WTO Study conference was organized by the Ministry of Commerce in Beijing in October 2000. More than a hundred trade officials, academics and lawyers attended this conference. The main speakers were the foreign experts from the US, EU etc. In September 2001, the Ministry of Foreign Trade invited Gaetan Verhoosel from the WTO Office of Legal Affairs and American trade lawyer Chris Parlin to hold five days of "WTO Case Studies" seminars.[5] The main themes of these lectures were WTO dispute settlement procedures and cases. According to the senior Chinese trade officer Yang Guohua: "This research seminar symbolizes that we are working from the general knowledge of the WTO to the research of special topics."[6] He also noticed, due to the lack of experience, China has to rely on foreign lawyers for quite a long time in future. Hence apart from organizing research seminars and conferences, the Ministry of Commerce was developing wide contacts with foreign lawyers to prepare for the possible future cases.[7]

♣ Third Party Strategies: Golden Middle Way (中庸之道 Zhong Yong Zhi Dao)

This very stark picture of China's technical vulnerability in the face of the DSM

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[4] Yang Guohua, *A Study On WTO Dispute Settlement Mechanism and China*, China Commercial Press, Beijing, 2005, p.98.
[5] *ibid.*, p.98
[6] *ibid.*, p.98
[7] *ibid.*, p.99

obviously comes on top of its wider cultural reticence about the confrontational aspect of legal proceedings considered in our earlier chapters. It will be possible to see at the beginning a quick Chinese desire to bring any bilateral dispute to an end, and it will be difficult to assess which of these possible factors is influencing it.

China was involved immediately as plaintiff in one case, i.e., the Steel case. In March 2002, shortly after China joined the WTO, it filed a complaint against the United States over its steel safeguard measure. In the next chapter I shall give a detailed analysis of the significant Steel case. As defendant China has been involved in 4 cases (1 case has been concluded and the other 3 cases are still at the consultation stage). The following shall give a detailed account of these 'defendant' experiences. Last but most importantly, China has been a third party in 47 cases out of the total 52 cases (See Appendix B). In other words, being involved as a third party has counted for 90% of China's total WTO DSM participation. Why China has adopted this third party approach and what are the implications of this may remain open questions at this early stage in its WTO history but some suggestions will be offered.

a) As Defendants

As mentioned above, there are 4 cases against China so far. The first one is on China Value-added Tax (VAT) on integrated circuits (ICs). This was the first case brought against China since it joined the WTO and it drew the world's attention. On 18 March 2004, the US filed a complaint against China about its value added tax rebate on domestically- produced ICs. The US claimed[8] that Chinese enterprises were entitled to

[8] WT/DS309/1, G/L/675, S/L/160.

a partial refund of the 17% VAT on ICs that they produced and this resulted in a lower VAT rate on their products: "China therefore appears to be subjecting imported ICs to a higher taxes than applied to domestic ICs and to be according less favourable treatment to imported ICs".[9]

This decision by the Bush administration was one taken under domestic political pressure from domestic interest groups. The Semiconductor Industry Association (SIA) played an important role in pushing the Bush's administration to bring the issue to the WTO.[10] The chairman of SIA George Scalise stated: "The SIA has discussed this matter on several occasions with the U.S. Government, and the Chinese Government and industry. We will continue to raise this issue and we're hopeful it can be resolved quickly and amicably".[11] Bush's administration was often being criticized by Democrats, because he had not done enough to crack down on Chinese unfair trade practices.[12] So China was threatened by the US over its VAT break to Chinese domestic production of semi-conductors, as giving them an unfair advantage over imports.

China's initial reaction was to be 'puzzled'. The spokesman of MOC Chong Quan said: "At a time when bilateral negotiations are still under way, the United States suddenly requested at the WTO to consult with China on the issue, it is totally beyond understanding".[13] The Chinese argument was that it imported more than 80% of

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[9] *loc.cit.*
[10] Yang, *op.cit.*, p.213
[11] *ibid.*, also see '*SIA Report Details Growth of China Chip Industry*', available at: http://www.sia-online.org/pre_release.cfm?ID=287, visited on 05/10/2005
[12] '*House Democrats Call On Bush Administration To Act To Remove Unfair Trade Barriers, Not Just Estimate Them*', available at: http://www.house.gov/apps/list/press/wm31_democrats/040401bush_admin_remove_unfair_trade.html, visited on 05/06/2004.
[13] Ministry of Commerce Online Information. Also see *China: US Request of Chip Consultation in WTO 'Beyond Understanding'*, available at http://english.people.com/cn/200403/20/eng20040320-_137991.shtml, visited on 05/06/2004.

semi-conductors in 2003 and the US$ 19 billion market has become a major market for foreign made chips, including US$ 2 billion from the US alone, said Zhang Qi, a director general of the Commerce Ministry.[14] At issue was a 17% VAT that was refunded on firms that produced the chips domestically, a system designed to encourage firms to build high-tech fabrication plants in China.

Following the complainant of US, the EU, Japan, Mexico and Taiwan requested to join the consultation as third parties. China accepted the requests of the EU, Japan and Mexico but refused Taiwan's request on the grounds that "the letter illegally used 'Permanent Mission'— a words with a meaning of sovereignty ".[15] Indeed, because of political sensitivity, China has been adopting an avoidance strategy on issues to do with Taiwan in the WTO dispute settlement.[16]

Under the DSM there had to follow a consultation process. If at the end of this process agreement was not reached there was the danger that the US might ask for a panel to be set up to decide the case compulsorily. So eventually, this dispute was resolved in the consultation stage only after the U.S. Trade Representative Robert Zoellick met directly with China Vice Premier Wu Yi during the fifteenth US-China Joint Commission On Commerce and Trade.[17] China and the US signed a Memorandum of Understanding regarding China's VAT on integrated circuits.[18] In 2006, USTR trade

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[14] *China Daily*, '*China Puzzled Over US Tax Complaint At WTO*', available at: http://www.chinadaily.com.cn/english/doc/2004-03/19/content_316453.htm,visited on 05/06/2004.
[15] Yang, *op.cit.*, p.214.
[16] For detail study see Kong Qingjiang, 'Can the WTO Dispute Settlement Mechanism Resolve Trade Disputes between China and Taiwan?, *Journal of International Economic Law*, Vol.5, 2002, pp.747-758.
[17] USTR, '*US and China Resolve WTO Dispute Regarding China's Tax On Semiconductors*', http://www.ustr.gov/Document_Library/Press_Releases/2004/July/US_China_Resolve_WTO_Dispute_Regarding_China's_Tax_on_Semiconductors.html?ht=, visited on 18/08/2004. Also see Yang, *op.cit.*, p.216.
[18] WT/DS309/7, WT/DS309/8, G/L/675/Add.2, S/l/160/Add.2.

representative Robert Portman said, "That case which involved semiconductors was settled to the advantage of US exporters without having to proceed with a formal dispute panel".[19]

China appeared to recognize that by continuing to protect domestic chip makers with favorable tax policies, Beijing would effectively stymie their development as global competitors. Also the WTO membership permitted the central Chinese Government to oppose protectionism at the local government level.[20] China added that they agreed to this concession because they realized that there were ways that they could favour domestic technological development that were not contrary to WTO rules. The WTO would not oppose general research funding which China gave to stimulate domestic semi-conduct production.

In fact, industry experts such as the Chinese Semiconductor Industry Association (CSIA) argued that the amount of money involved was insignificant and the government was likely to bring about more preferential policies to develop the industry. The CSIA's Li Ke argued that the revocation of the tax had only a symbolic significance, as the size of the rebate was only a few hundred million Yuan.[21] China is now the world's third largest semiconductor consumer, with sales rising 41% to $25 billion and growth expected of 31% in 2004. The Ministry of Science and Technology, Commerce and others announced they would offer such tools of support as preferential bank loans with lower than market rates (which could be seen as another subsidy) but

[19] Remarks of Ambassador Rob Portman United States Trade Representative Media Availability Following Announcement of a WTO Case Against China Over Auto Parts, Washington, DC, 30 March, 2006, available at: http://www.ustr.gov/assets/Document_Library/Transcripts/2006/March/asset_upload_file267_9257.pdf, visited on 05/04/2006

[20] Paul Blustein, *China Agrees to Resolve Dispute over Tax Breaks*, Washington Post, 09/07/2004.

[21] '*China US resolve semiconductor dispute*', China Daily, 26 Feb 2005, available at:

more securely, subsidies for research and development would not be contrary to WTO rules.[22]

Though it was a short 'defendant' experience for China in this case, it has important lesson for China. As one trade officer Ji Wenhua argued:

> According to the WTO DSU procedure, even if eventually the measures are ruled illegal, the defendant still has some time to comply with the ruling. Chinese government can always use this period to continue the VAT tax policy. It seems to me that using the WTO rules flexibly is a very important issue that the Chinese government should pay attention to. Every [litigation] procedure has its time limit, whether to win is not simply dependent on the final ruling; sometimes winning the time for the domestic industry adjustment is victory…When and how to make a concession in order to protect ones interests need high wisdom in the negotiation.[23]

Indeed, this is one of the skills China learned from the US steel case, as we shall see from the next chapter. However, it is probable that China also gave way very quickly in this case, because of its lack of experience as a defendant and its consequent anxiety not to lose face. It is being commented at the present time, that China should not give way so quickly on the next case that comes to it as a defendant.[24]

The other three cases against China are taking place at present and they are all on the same issue—*Measures Affecting Import of Automobile Parts*. This is the first time China faces a joint complaint from the US, the EU and Canada. As the *People's Daily* stated: "Now, a Cross-Atlantic trade alliance has emerged to press the charge against

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http://www.chinadaily.com.cn/english/doc/2004-07/09/content_346874.htm, visited on 17/03/2005.

[22] *loc.cit.*

[23] Ji Wenhua and Jiang Liyong, 2005, *WTO Dispute Settlement Rules and China's Practice*, Peking University Press, Beijing, p.275.

China".[25] The USTR trade representative Robert Portman said in a press conference:

> As noted in our top-to-bottom review of US-China trade policy, we will not hesitate to pursue our legal options when negotiations are not productive. As also indicated in the review, we seek to enhance cooperation with our trading partners in promoting China's accountability and reform. Today's actions are consistent with these commitments.[26]

Indeed, in my interviews with the China Director, at the USTR Office, Neureiter. I asked him: What do you think about the quality of China's compliance with the WTO rules? Neureiter gave a reply which indicated as well that the US would make alliances with other countries to contain China whenever it is needed. He said:

> We have several mechanisms to ensure China's compliance with the WTO. It is important for China to live up to their bargain and promise. China also needs more technical assistance, but the political will is more important. The WTO is a good thing for China and is a big deal for China. It has brought about China's rapid economic growth. I am quite optimistic about China US trade relations. But I think, the real danger is that with the rapid economic growth the Chinese Government might become overconfident and make policy mistakes. For example it may miscalculate its role in international relations. So, countries like the US and the EU etc. have to help to manage China's expectations.[27]

If one adds Canada to the list of countries one sees how consistent or persistent the US is in its attitude of suspicion towards China. This attitude is most fully illustrated in this thesis in chapter 6, where the US and EU approaches to China in the textile disputes are

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[24] *ibid.*, p.215

[25] *People's Daily, 'US, EU protectionists stuck in wrong gear'*, available at: http://english.peopledaily.com.cn/200604/03/eng20060403_255483.html, visited on 06/04/2006

[26] '*United States Files WTO Case Against China Over Treatment of US Auto Parts*', available at: http://www.ustr.gov/Document_Library/Press_Releases/2006/March/United_States_Files_WTO_Case_Against_China_Over_Treatment_of_US_Auto_Parts.html, visited on 05/04/2006.

[27] Author's interview with USTR officer Neureiter at Washington in November 2004.

contrasted.

The USTR Portman spoke of how he had to persuade the EU to participate: "They in the end agreed to join us in this action". At the same time he claims that he does not know exactly why he could not persuade the Japanese to participate. It is, however, a fact that the Japanese, and the Koreans, are not really affected by the Chinese auto-parts policy. Most of Japanese and Korean auto enterprises do manufacture auto-parts in China.[28] On 30 March and 13 April 2006 the US, the EU and Canada filed the cases against China on the issue of automobile parts policy. They claim that China charges unfair tariffs on the imported auto parts and has acted inconsistently with relevant Articles of the GATT 1994 and WTO obligations. Under two Chinese regulations,[29] "imported automobile parts that are used in the manufacture of vehicles for sale in China are subject to charges equal to the tariffs for complete vehicles, if they are imported in excess of certain thresholds (60%)".[30]

China expressed 'regrets' over the complaints and has agreed to participate in consultations.[31] The Chinese Government argues that: "China's tax are aimed at curbing tax evasion by some foreign auto manufactures; some of them disassemble their cars before importing and then reassemble them in China thereby avoiding customs payments on importing whole cars".[32]

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[28] *People's Daily, US, EU protectionists stuck in wrong gear'.*
[29] WT/DS339/1, G/L/770, G/TRIMS/D/22, G/SCM/D67/1
[30] WT/DS339/1, G/L/770, G/TRIMS/D/22, G/SCM/D67/1; WT/DS340/1, G/L/771, G/TRIMS/D/23, G/SCM/D68/1; WT/DS342/1, G/L/774, G/TRIMS/D/24, G/SCM/D70/1
[31] Ministry of Commerce Online Information. Also see http://www.cacs.gov.cn/DefaultWebApp/showNews.jsp?newsId=201420009615, visited on 25/04/2006
[32] '*China, EU, US to talk over auto parts dispute*', available at: http://english.peopledaily.com.cn/200604/09/eng20060409_257037.html, visited on 11/04/2006

The background of the complaints is an increasing trade tensions between China and other developed countries: "A soaring deficit with China has driven some US politicians to urge actions, fair or not, against Chinese exports. The EU's March endorsement of anti-dumping duties on Chinese shoes merely betrayed a lack of resolve among EU trade officials to resist protectionist pressure."[33] China is the world's second largest auto market after the US. Chinese policy on auto parts "has lead to complaints mainly from manufacturers of high-end vehicles, such as BMW and Mercedes Benz, which do not currently manufacture parts in China".[34]

According to the WTO DSU procedure, there is a 60 days consultation period for China, the US and the EU to reach a solution. So, at the time of writing, these three cases are still in the consultation stage. After 60 days, i.e., June 2006, if a mutual solution is not found, the case will reach panel stage.

A trade expert with a think tank with the Ministry of Commerce, Mei Xinyu said: "The final result of the trade row will certainly be decided through the parties' relevant economic and political capacities, alongside their mastering of WTO rules and negotiation".[35] In my interview with leading Chinese researcher Han Tao, I asked about the possible solution of the cases. He said: "Possibly this will be solved in the consultation stage like the first integrated circuits case. But again it depends on how important this automobile policy is for the domestic industry. China can always use the skill she learned from the Americans in the Steel disputes".[36]

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[33] *People's Daily, US, EU protectionists stuck in wrong gear'.*
[34] *loc.cit.*
[35] *People's Daily,* '*China becomes victim of trade protectionism*', available at: http://english.peopledaily.com.cn/200604/10/eng20060410_257189.html, visited on 11/04/2006.
[36] Author's interview via email at 18/04/2006 with Han Tao, a researcher with the Chinese Academy of Social Science.

It remains to be seen whether there is any chance that China will cave in quickly on this case. It is quite likely that it will not, because of the danger, once again, of a loss of face. The issue is relatively easy to treat as one of sovereignty, because the argument that auto-parts imported in excess of a certain threshold (i.e. 60%) are an attempt to evade taxation is relatively simple to grasp and is a clear allegation of bad faith. To give way before a Panel case would be to admit that China's original sovereign judgment that it had a right to tax, would be abandoned under pressure.

b) China as a Third Party

China has participated very actively in the WTO dispute settlement since its accession. In the WTO, China has been involved in 52 cases (See Appendix B) out of 101 cases.[37] About 51% of the total WTO cases include China as a third party. So what are the third party rights and what are the differences between it and the parties to the dispute? Under Art.10 of the DSU it is provided that any member having a substantial interest in a matter before a panel and having notified its interest to the DSB shall be able to make written submissions to the panel: "These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report".[38] Third parties then receive the submissions of the parties to the dispute to the first substantive meeting of the panel. Where the third party thinks the measure already the subject of a panel proceeding nullifies or impairs benefits accruing to it, then it may have recourse to a normal dispute settlement procedure.[39]

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[37] After China joined the WTO (Dec 2001), there are 101 cases brought to the WTO by member states till 30 April 2006. Detailed information can be obtained from WTO website, dispute settlement section.
[38] Article.10(1-3) of the DSU.
[39] Article.10(4) of the DSU.

"All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to present their views during a session of the first substantive meeting of the panel set aside for that purpose. All such third parties may be present during the entirety of this session".[40]

There are advantages in the third party procedure when there are multiple complainants in a case. It can broaden the base of criticism, where a variety of arguments appear, because only one of them needs to succeed. The multilateral pressure may also affect consultations and generally bring pressure upon the alleged violator.[41] Of course, there are numerous disadvantages in being a third party. It can be excluded from confidential information hearings and its rights limited. However, a third party does not need to spend effort in bringing a complainant to a panel and can attend the first meeting of the panel where it can present its own views. It will enjoy the benefits of a successful result for the plaintiff on a Most Favored Nation (MFN) basis. So for a WTO member being a third party means gaining experience, while spending relatively little, and coming to integrate oneself into the system.

After close study of the data concerning China as third parties, I found China mainly involved in two categories of disputes. One is the type of dispute in which China has substantial trade interests and the result of the case will have direct impact on China. The other is where there are no obvious effects on China, but the disputes have significance for the WTO regime, so that China's interests will be affected indirectly. The following shall give some good examples of the two type of cases in which China

[40] Appendix 3(6) of the DSU, Working Procedures.
[41] Peter Gallagher, 2002, *Guide to Dispute Settlement*, Kluwer Law International and World Trade Organization, p.27.

has been involved.

The first case chosen concerned the *Rules of Origin for Textiles and Apparel Products between the US and India*. China, as an important manufacturer and exporter of textile and apparel products acted as a third party. Though in the end it had to accept that the main party, India, was defeated, China could still put forward its understanding of the WTO rules. China stated the US had introduced new rules of origin that were supposed to be for verification for customs purposes, but were in fact for protectionist trading purposes.[42] The US has changed from a system that was based on the criterion of "whether the product was 'substantially transformed', to the new regime that confers origin on the basis of *per se* criteria that take no account of the value added or significance of the change in characteristics of the product as a result of subsequent processing, assembly or manufacturing in a third country".[43] In other words the new rules fail to take account of the degree of subsequent processing in a third country. Indeed the US said it was concerned about quota circumvention through "illegal transshipment". Yet the way to do that would have been to require true and correct information of the sources of materials and processes.[44] Instead, the US drew up exemptions in favor of the EU based on types of fibers rather than with reference to processing etc.[45] Clearly China saw itself as having a strong interest in intra-developed country discrimination in the textile trade, although it was not alleged by China that its trading interests were directly affected. One might have thought that the US hostility to value added as a criterion, rather than the place of actual fabrication might have suited China. As the US said the idea was not to penalize countries with lower labour costs.

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[42] WT/DS243/R.
[43] *ibid,* India Textile Case, Third Party Submission of China, 1.3.
[44] *loc.cit.*
[45] *ibid.*, para.1.7

However, it might be a case of China wishing to have a general say in the development of customs valuation norms.

The Panel itself accepted the US argument that there was no objection in principle to the idea that as a rule of origin the US could concentrate on a fabric formation rule, allowing very specific types of rule to suit the specificities of different fabric formations. This would reflect most accurately where the most significant fabric formation occurred.[46] There was nothing unreasonable in the US argument that the use of an *ad valorem* criterion would punish those countries that could use inexpensive labor, since their contribution would remain insignificant as against the end value of the product.[47] The rules, as such, were not for trade protection purposes and the Panel concluded that, beyond these criticisms, India had produced no evidence that the new rules were actually used to protect the US textile industry.[48]

China joined in this action with other textile exporters such as Pakistan, Bangladesh and the Philippines. It learned to involve itself in a complex technical argument about customs law and rules of origin, even if it was unsuccessful, because India itself failed to convince the Panel that the US had been wishing to subvert rules of origin for trade protection purposes. Clearly textiles are a major source of China's trade and association with its main partners or competitors in trying to shape the rules of this trade is an example of responsible and engaged behavior. It is clear from the complexity of this issue that China is taking legal advice and acquiring legal skills.

China was in more successful company in the dispute with the EC over sugar subsidies

[46] *ibid.,* 6.86. The term 'ad valorem' is used in trade in reference to certain duties.
[47] *Ibid.*, 6.125
[48] *ibid,* 6.278

cases. The major issue was that where the EC had exceeded its quantity commitment level in a category of sugar, called C sugar, it would be treated as having achieved this goal through sugar export subsidies, unless it could show that the excess quantities were not so due. The issue was that the EC was effectively expected to reduce its exports of sugar. It could subsidize two categories, A and B, but could not then claim that it had not subsidized category C sugar, if the export of C sugar was made possible only because of the savings on market and production cost of the other two subsidized categories could be transferred to export of C sugar. A and B sugar could be sold profitably on the EC domestic market and C sugar, according to internal EC regulation, had to be exported. It could be exported more cheaply because of the profits made on the domestic market, facilitating export of the product at a price well below the actual domestic cost of production. China focused exactly on this weakness in the EC case. It argued that the European Community "must establish the nature of the "export subsidization aspect" with respect to claims of violation of Articles 3, 8, 9, and 10, and the consequences of any doubts about the European Community's evidence of export subsidization should be borne by the European Communities".[49] China made precisely the central argument that: "the higher revenue sales in the EC sugar market effectively financed part of the lower revenue sales on world markets, "by funding the portion of the shared fixed costs of production attributable to the lowered priced products", i.e. C sugar, the demonstrable link between the EC governmental action and the "financing" was well established".[50] This was the very argument that the Panel and Appellate Body (AB) both accepted.[51]

[49] WT/DS265/R, para.18
[50] *ibid.*, 1.10
[51] WT/DS265/R, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, 15 October 2004, 28 April 2005.

China was taking a risk in this case by not involving itself directly. The sugar case, brought by Thailand, Brazil and Australia against the EC was extremely important to China itself. China's sugar prices have dropped 35% by liberalizing its own market. This decline was probably caused by the pressure from EC sugar subsidies on world sugar prices. So, there was clearly a risk that China's interests would not be fully represented by being a mere third party, even if in this way China reduces the financial costs of participation.[52] It probably indicates, however even after several years of members (the AB decision in the case was on 28 October 2005) that China still does not wish to confront the EC on a major issue. The agricultural subsidies issue was a major one for the Doha Round and China was not reluctant to negotiation firmly for the solution reached at Hong Kong (December 2005) regulating agricultural subsidizes further. Yet, in a legal process, China is still clearly only willing just to give its opinion — thereby also acquiring further legal skills for the days when it cannot avoid being a defendant.

The final case taken as an illustration here is *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain Case.* It is important in the sense that it concerns the issue of State Trading Enterprises. The US claimed that the Canadian Wheat Board (CWB), an entity enjoying exclusive rights to purchase and sell Western Canadian wheat for human consumption, was given powers that contravened the WTO. Imported wheat could not be mixed with Canadian domestic grain, received or discharged out of grain elevators and transport of domestic grain could not be charged above a limit for transport, while there was no restriction for foreign grain. The Panel

[52] The People's Republic of China and the WTO: An Overview Two Years Later, 01/11/2003, in *The Canada China Business Forum Magazine*, November/December 2003 Issue, pp, 26-31.

and AB did not accept that the one could deduce from the partial monopoly over production of wheat, and of export, that the CWB made exports for anything other than commercial reasons, although the other two details of policy (grain segregation and rail revenues) were discriminatory.[53] On the first point one would have to show that the CWB did actually make non-commercial sales.

The first point on which Canada was successful, was hugely important for China. As can be seen from the Trade Policy Review (TPR), state trading companies continue to be immensely important in China. The exact importance of these can be seen from the TPR, which China has just made.[54] As of August 2005 the Chinese State-owned Assets Supervision and Administration Commission (SASAC) supervises 168 companies mainly in the areas of "defense, petroleum, electricity, telecommunications, metallurgy, coal, aviation, shipping, machinery and civilian construction"[55]. So China devoted a lot of attention to this issue and opposed the US arguments closely.

It objected to the US position that a government should "ensure" that a state trading enterprise does not engage in trade distorting conduct. The US wants to require government involvement in day to day management to exclude trade distortion.[56] So the non-supervision policy of the Canadian government is in the US view inconsistent with WTO obligations. China's argument continues:

> However, we think that the activities of state trading enterprises could not be ensured to be conducted on the basis of "commercial considerations" if the

[53] WT/DS276/R, Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain (update WTO website 24 Feb. 2006) see especially 6.151.
[54] WT/TPR/S/130 et seq.
[55] *ibid,* p.133.
[56] WT/DS276/R, 1.17.

> government interfered with the daily operation of state trading enterprises. ... [T]he operation of state trading enterprises will be carried out on the basis of "commercial considerations" where their actions are not directed by political considerations, and not under government supervision or control.[57]

China had every reason to note the importance of the fact that the CWB had a producer controlled export monopoly, but it stressed that one still has to produce evidence that it has been influenced by non-commercial considerations or failed to give adequate competing opportunities.[58] This is exactly the argument the Panel accepted.[59]

It is interesting to realize that China does not hesitate to present its case here very strongly against the US when it realizes how much its national interest is at stake:

> According to United State's logic, any monopoly or privilege will entail non-commercial considerations, and all state trading enterprises are presumed to do business with non-commercial considerations. If this is the case, the existence of state trading enterprises itself will be WTO-illegal, and Members will be deprived of the right to establish state trading enterprises and Article XVII will be turned void.[60]

So in conclusion one may note, in the words of a Chinese trade official: "China as third part actively participated in this case and aired its opinion, in its interpretation of the WTO rule and therefore influenced the position on the question of state trading enterprises, indirectly to protect China's interests and rights."[61] This was a case like the sugar case. The former clearly affected China's market interest, while the issue of state owned enterprises, in itself apparently abstract, was bound to be used as a test case by

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[57] *ibid,* 1.21.
[58] *ibid,* 1.26.
[59] WTO DS 276, 6.150.
[60] *ibid,* 1.37.
[61] Ji and Jiang, *op.cit.*, p.325.

the US very quickly afterwards against China.

China has also taken advantage of the third party procedure in many other cases. It is a party to 43 further cases, ranging from fresh fruit and vegetables, sugar, cement, steel, bio-technical products and Oil Tubular goods, involving many of China's trading partners (See Appendix B). In the *US—Subsidies on Upland Cotton case*, though US cotton subsidies has certain effects on China, the main thing China learned from this case is:

> Some cases take place under the background of issues which cannot be solved through WTO multilateral negotiations. Like this case. It is a breakthrough from the deadlock of the multilateral negotiations through the WTO dispute settlement. Participating in these kind of cases, not only is a clarification of present rules, but also a indirect influence on the development of future of WTO rules.[62]

To summarize the review of the panel cases in which China participated as a third party, one might remark that as the third largest trading nation, China certainly has wide economic interests with many countries, especially with the major trading partners such as the EU, US, Japan and Canada.[63] Therefore, the typical trade regimes that will affect its relations with these countries have an important meaning for China. China is also engaged in trade in a very wide range of products, e.g. technology, machinery, as well as the usual textiles and clothing.[64] Hence China has substantial trade interests involving disputes concerning many types of trade. However, there are also non-material interests for China's third party participation, and below I will set four

[62] *ibid.*, pp.322-323.
[63] For a detailed accounts of China's composition of trade with its trading partners see WT/TPR/S/161, pp.21-25.
[64] WT/TPR/161, p.22

factors, which influence its participation policy.

First, as a third party China does not run a great risk of direct confrontation, and also no great diplomatic risk; so from the cultural point of view one can see China can be fully engaged in the DSM process, but without contradicting its traditional Confucian attitude to litigation as such. Culture works at an unconscious level, so it will be indirect, yet basic in affecting policy decisions. This is shown by the following interview extract: "Culture certainly has influence in an indirect way because China wants to participate in and, as it were, belong to the process without what appear to it as breakdowns involved in fighting particular cases to the end".[65] Also, "China's own cultural heritage, particularly with respect to law, means that its attitude to compulsory legal settlement of disputes is not wholly enthusiastic. Equally its lack of expertise in legal training means that it will not feel too confident about taking the lead in panel disputes".[66]

Second, as third party, China can gather great amounts of information and improve its ability to handle future disputes including training human resources. The importance of team work comes into the picture. As pointed out, earlier through the third party participation China can obtain the written submission of the parties to the dispute from the first substantive meeting. Hence during this process China can be acquainted with the other country's trade regime and this kind of information has important value both in China's trade with these countries and also in China's own trade policy decision making. WTO Dispute Settlement requires highly skilled knowledge of rules and

[65] Author's interview with Professor Edward Jingchun Shao from Peking University in Beijing in September 2003.
[66] Author's interview with Mr Zhang honglun from the Chinese Academy of Social Science in Beijing in September 2003.

procedures and high negotiation skill. In China's case the Ministry of Commerce employs domestic lawyers to draft the written submissions and also cooperates with the other relevant departments, chambers of commerce and industry. So this third party involvement allows them to form a certain degree of team work. However there are limits to this team work, as we discussed in chapter 3 concerning the role of Chambers of commerce and also the contradictions the treatment of these brought out in the political system. Nonetheless, as we have already pointed out, through the participation in the WTO as third party does get a lot of human resource training.

Third, as a third party China can be involved in the making and application of the WTO rules, in other words the development of the WTO rules; participation in the trial of the WTO cases is participating in the rule making, although the WTO DSU said the DSB has no right to be making new rules. It is unavoidable that judges make law during the process of dispute settlement process. Because of the blockage in the Doha Round over agriculture issues, the Ministerial Conference is not making progress, therefore it is not surprising that the panels, the adjudication, (in the absence of the legislative process), will have a larger role. It is likely that there will be more place for judge made law. They are not making law out of the air because they still comply with the relevant articles of the Vienna Treaty Law Convention on interpretation. However, the understanding of members on the WTO rules influenced their interpretation of the WTO rules to some extent. So through the written submissions, attending the hearing and answering the Panel's questions China puts forward its own understanding of the WTO rules and thereby influences the Panel and AB 'legislative' process. For example, in the US Cotton Case, which we mentioned above, the Panel Report played an important role in

clarifying the subsidy rules of the WTO and even influenced the agriculture negotiation in the Doha Round.[67]

Fourth, Participation as a third party can increase China's influence, as the frequency and amount of China's participation as third party has already drawn the attention of other WTO parties, showing already China's strength of will. Like the trade officer pointed out, "WTO is a place where 'I talk so I exist'. China is frequently airing its opinion in WTO cases making clear its view and position to the other members, expanding China's influence in the WTO".[68]

Given the above analysis, it is not surprising that China is attempting to amend the rights of third parties in the Doha negotiations about the DSU. These proposed amendments make clear its intention to engage very extensively as a third party. It recommends the insertion of the words "within 10 days after the establishment of the panel" in Art.10 of the DSU. This makes the point of insertion of the third party clear. China follows by recommending a fundamental change in the Working Procedures for third parties. Para.6 of this Appendix 3 to the DSU should be altered as follows: All third parties which have notified their interest in the dispute to the DSB shall be invited in writing to be present at all substantive meetings of the panel. The third parties shall be invited by the panel to present their views and may respond to the questions raised by the panel and the parties to the dispute during the first substantive meeting. With respect to the second session of the panel, in para.7, China wishes to give third parties some rights. It adds to the end of the paragraph the words: "The Third party shall have the right to observe the meeting without entitlement of taking the floor at the second

[67] Opinions from three Chinese trade officials in Beijing involved in the WTO negotiation and dispute settlement in two books just published. Yang, *op.cit.*; Ji and Jiang,*op.cit.*,.
[68] Ji and Jiang, *op.cit.*, p.4.

meeting of the panel." [69] Currently, the Chinese government has set up a special department to deal with the issue related to third party participation.

♣ Step—By—Step Strategies: (循序渐进 Xun Xu Jian Jin[70])

Apart from the active participation in WTO cases, China is also expanding its influence subtly in the other areas, such as panel experts and DSU reform process. Here I will discuss the two issues. For the first time the WTO Panel experts include Chinese.

In WTO dispute settlement, panels are set up on an *ad hoc* basis for the resolution of trade disputes. The way the panel members are selected is quite elaborate. Firstly the role of the panel is defined as to make "an objective assessment of the matter before it", in Art.11 of DSU. As Gallagher explains, [71] the panelists usually comprise people with relevant trade policy, law or economics experience, who are selected by the parties to examine the particular dispute. The panelists serve in their personal capacity and may not be nationals of the countries involved in the dispute unless the disputants agree otherwise. The states parties contribute what is called a members list from which candidates for the panels may be selected by the parties to a dispute. The Secretariat of the DSU keeps this slate of candidates at the ready.[72] Nonetheless the member states may object to persons proposed by the Secretariat and finally the Director General has to choose the panel members. This happens in about 50% of cases.[73]

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[69] TN/DS/W/51/Rev.1, 13 March 2003.
[70] It means to make progress gradually in due order.
[71] Gallagher, *op.cit.*, p.47.
[72] A.W. Shoyer, Panel Selection in WTO Dispute Settlement Proceedings, in *Journal of International Economic Law*, 2003, Vol.6 (1), p.204.

In this spirit of professionalism, responding to these demands of the DSU, the Chinese Ministry of Commerce announced on 19 February 2004, that it was contributing experts to the members list. Three Chinese experts were added to the panel member list of the Dispute Settlement Body of the WTO. Zhang Yuqing, Zeng Lingliang and Zhu Lanye, the three experts for the panel, are renowned figures in China: "The fact that they have been selected brings our country into a wider and deeper participation in the WTO affairs".[74]

Zhang Yuqing, is the former director of the Treaty & Law Department under the Ministry of Commerce who had taken part in China's process to enter the WTO. Upon his selection he said to the press: although our country joined the WTO only two years ago [at the time of his appointment], the timing for having our experts on the list is ripe. There are experts from 43 countries, and I am honored I can represent China by being one of them and accept to shoulder great responsibility and duties.[75]

Zeng Lingliang is the president of the law school of Wuhan University and he is regarded as the leading authority on international law in China. and Zhu Lanye teaches in the East China College of Political Science and Law. Professor Zhu's main expertise is on service trade and intellectual property rights. It is sometimes commented, e.g. by the American law firm lawyer, A. W. Shoyer, that the perceived quality of the members of the list will vary widely as he claims there is no vetting procedure.[76] However these remarks are not applicable to the Chinese members of the list, given their expertise.

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[73] ibid
[74] Author's telephone interview with Chinese Geneva trade officer Rong Min on 18 March 2004.
[75] 'Three Chinese PhD Supervisors Get Selected as 'Judge' in the WTO Panel For the Fist time', available at: http://news.rednet.com.cn/Articles/2004/02/527273.HTM, visited on 25/02/2004

China has made several proposals for the reform of the DSU in the present Doha negotiations. They are concerned both with the problems of delays in panel proceedings and also the technical and administrative difficulties faced by developing countries.[77] Its main proposals are in *Specific Amendments to the Dispute Settlement Understanding- Drafting Inputs from China.*[78] Where the needs of a developing country conflict with the need for speed in reaching decisions China always prefers the first option.

Firstly China proposes that the delay in consultations before one may request the establishment of a panel be reduced from 60 days to 30 days under a revised Article 4 (7). However, when one or more of the parties is a developing country, China proposes that it can, at its request, have the 60 days consultation period extended another 30 days.[79] China also recommends that if a complaining party so requests, the DSB shall establish a panel at the meeting at which the request first appears as an item on the DSB agenda, unless the DSB decides by a consensus not to establish a panel. Yet the story should be different if the party concerned is a developing country. China has another proposal, that in a case involving a complaint against a developing country, if it requests, the establishment of a Panel shall be postponed at the DSB meeting following that at which the request first appears as an item on the DSB agenda.[80]

Under the rubric of Special and Differential Treatment for Developing Countries China becomes even more radical. It proposes that developed country members shall not

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[76] Shoyer, *op.cit.*, pp. 204-205
[77] X Luan, Dispute Settlement Mechanism Reforms and China's Proposal, in *Journal of World Trade*, Vol 37(6), 2003, p.1111.
[78] TN/DS/W/51/Rev.1, 13 March 2003, pp.1-3.
[79] *ibid.*, pp.1-3
[80] *loc.cit.*

bring more than two cases to the DSU against a developing country in one calendar year.[81] This covers a request for a panel and not any lesser activity such as conciliation or mediation.[82] Here China is relying on its role as a leading responsible developing country, to recommend that a way of unblocking the DSU is to restrain developed countries from using it as a form of harassment of developing countries. The harassment can so easily occur because of the lack of human and financial resources of the developing country necessary to sustain frequent DSU litigation as if it were an integral part of attempting to trade with a developed country. China argues expressly: "The proposal is to address the increasing abuse of anti-dumping measures for trade protection rather than trade remedy purposes. The shortened time-frame for anti-dumping cases will help to urge relevant authorities to correct their wrong decisions and avoid making harm to the interests of exporters".[83]

Luan argues that this Chinese proposal should be seen as a cultural symbol. In its cultural traditions Yi, i.e. Right is important, just, impartial and rational legal provisions. However, to actualize the Yi it is also necessary to consider Mou, i.e. Tact. This Chinese proposal would gradually reduce pressure and make more likely the settlement of disputes on the basis of goodwill and trust.[84] This is not going to favor speed in procedure but it will give developing countries time to consult and to prepare for panels.[85]

Equally in line with China's identity as a responsible developing country, it proposes

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[81] *loc.cit.*
[82] Luan, *op.cit.*, p.1113.
[83] TN/DS/57, Specific Amendments to the DSU- Drafting Inputs from China, and responses of China to Questions on the Specific Input of China, 19 May 2003, p.3; see also document TN/DS/57 Rev.1, 13 March 2003.
[84] Luan, *op.cit.*, p.1114.

that when a developed country brings a case against a developing country, if the final rulings of a panel or the Appellate Body show that the developing country does not violate its obligations under the WTO Agreements, the legal costs of the developing country shall be borne by the developed country initiating the dispute settlement proceedings.[86] This is to give the developing countries further protection against harassment through litigation. This is much stronger than the proposal of the Chairman's text (Article 28) that, at its discretion the DSB may award litigation costs, having regard to circumstances, including the need for special and differential treatment for developing countries.[87]

The Steel Dispute is at the back of these Chinese proposals and the arguments it uses to support them. In this final document setting out the reasons for its proposals, China says categorically: "China is a developing country Member. As for the status of other Members, it has been a long tradition and practice of the GATT and the WTO for Contracting Parties or Members to self-declare their respective status. This tradition and practice should be applied within the framework of DSU".[88]

A further very important rubric is intended to speed up matters, but where the developing country, such as China, is likely to be the object of the litigation. There should be a shortened time frame for disputes involving safeguards and anti-dumping measures. The time-periods applicable under the DSU for the conduct of disputes involving these shall be half the normal time frame. Equally, China is aware of the problems of compliance once panels have given judgements. It would require that there

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[85] *ibid.*, p.1114.
[86] TN/DS/W/51/Rev.1.
[87] Luan, *op.cit.*, p.1115.
[88] TN/DS/W/51/Rev.1, p.2.

be added to Article 21(6) a speeding up of written notification of compliance. Also within the Working Procedures of the DSU China proposes cutting the time limits for written submissions and responses thereto.[89]

Conclusion

China has not been engaging actively in direct confrontations with other countries in panel disputes. It has been endeavoring to avoid direct confrontation with other trading partners. China did launch one legal action where the outcome did not pose much uncertainty for China and it is participating frequently as a third party in panel cases so as to make its views known where its interests are affected. This involves less financial expenditure and requires less legal skills than directly acting as a complainant. The main point is, however, that such third party participation is not so confrontational.

Furthermore, in the same spirit, China has made very significant contributions in the Doha negotiations on the reform of the DSU. These call for restraint in the use of compulsory panels against developing countries and for legal costs and assistance to them. China also calls for an increase in the scope of third party participation in panel proceedings.

Perhaps the most distinctive feature of China's approach to WTO DSM is this chapter's exposure of China's preference for very frequent participation in the DSM through third party status rather than directly as a complainant. This suggests a preference for

[89] *ibid.*, Specific Amendments, 13 March, p.2.

indirect influence on the course of disputes rather than direct confrontation. It also reflects a lack of expertise and familiarity with the DSM as a legal mechanism. China has nominated its own experts to be on the panel member list, and this indicates the direction it is heading in attempting to acquire appropriate expertise and profile.

The purpose of this chapter has been to examine the process of institutionalization, in the participation strategies of China. The chapter has examined China and WTO DSM from the perspective of a developing country, with little institutional, legal experience and little historical sympathy for compulsory third party settlement of disputes. The analysis has tested the situation of China against the background of the interplay of law and politics. The legal approach is to participate in the DSM and the political, is to avoid that for negotiation and compromise. The participation in the third party mechanism is better seen as political rather than legal because it really represents at the international level, China's preference for a preventive approach, comparable to the way it wishes to see Chambers of commerce develop domestically as analyzed in Chapter 3. By preparing the ground rules for disputes in advance and pushing their interpretation in its own direction, China hopes to reduce as far as possible the inevitable confrontations that other countries will eventually impose upon it. The Chinese proposals on dispute settlement are, equally consistently, designed to discourage the number of complaints that can be made against developing countries, to slow down the amount of trade conflict that occurs with them being brought to the WTO. Of course China sees itself as a developing country for this purpose.

The frustrating part of this research is that in these very weeks the tripartite attack

against China over auto-parts could very well afford a vital test case of whether and how far China will go to avoid confrontation in the form of legally binding third part decision-making. Would it be willing to suffer a clear loss of material interest to satisfy an ideational interest not to lose face? That could also depend upon how important China judges the import of auto–parts to be. Would it treat an attack on its judgment about its right to tax auto-parts as an occasion where an ideational perspective itself shapes and defines material interests? Will a strong determination to protect a clear material interest lead to it being unwilling to compromise as it did in 2004 over integrated conductors and let it defy the tripartite alliance to push the case to a panel and even on appeal to the AB? A participation in more than fifty cases as litigants and third parties, a very vigorous diplomatic participation in the Doha Round and the relative simplicity of the case, making loss of face for a climb down now more obvious, all suggest that auto-parts may be a case too far for countries that think China will go to any length to avoid legal confrontation.

At present the only large research resources we have for answering any of the questions in the last paragraph are China's involvement as a plaintiff in the steel action brought against the US in the WTO in March 2003, and China's recent very tense negotiations with the US and the EU over textiles. These show resort to firstly legal, and, secondly, political resolution of disputes. The aim, in the next two chapters, will be to analyze how and why China engaged in these two alternative courses of dispute settlement, and then to draw conclusions from the investigations.

Chapter Five Disputing Steel: U.S. Protectionism and China's WTO Response

Introduction

In March 2002 the Bush administration announced it would impose tariffs of up to 30% on certain imported steel products for three years.[1] In response to the US action, the EU, South Korea, Japan, Switzerland, China, Norway, New Zealand and Brazil launched the WTO dispute settlement procedures against the US.

China's first case in the WTO came only three months after its WTO accession. It was labeled by Youngjin Jung as "Aggressive Legalism".[2] But how legitimate is this label? The question posed in this chapter is whether it is truly aggressive legalism, or was China merely legitimately joining many other countries in insisting that the US action was a clear violation of the WTO law? This chapter will assess the implications of the case for China. For the first time in its history, China imposed safeguard measures on certain imported products in retaliation against perceived US unilateral protectionism.

At the same time the case has a global significance apart from the particular implications for China. For example, the steel case itself: "was touted as the international law 'equivalent of *Marbury v. Madison*'".[3] The landmark *Marbury v. Madison* case established the authority of the US Supreme Court to review the constitutionality of American laws.[4] In the Steel Case the US was held to account before the WTO as a supreme world trade tribunal. A very large part of the world trading community was lined up against the US and the DSM had the task of resolving a conflict of gigantic dimensions, in which every side considered its vital interests

[1] The White House, President George Bush, 5 March, 2002, www.whitehouse.gov, visited on 08/03/2002.
[2] See Youngjin Jung, "China's Aggressive Legalism", *Journal of World Trade* 36(6), 2002, pp.1037-1060.
[3] See Joost Pauwelyn, *WTO Victory on Steel Hides Deficiences*, 23 January 2004, http://jurist.law.pitt.edu/forum/Pauwelyn1.php, quoting David Sanger, in "A Blink From the Bush Administration", *New York Times*, 5 December, 2003, p.4.
[4] A detailed background information of the case can be obtained from http://usinfo.state.gov/usa/infousa/facts/democrac/9.htm, visited on 23/02/2005.

affected. That such a case could be resolved by the DSM showed that it was a central player in major disputes among states, just as the US Supreme Court had become a central player in US constitutional struggles, between government and individuals, as between the states of the Union - The case is one of the most complicated cases in the WTO history.[5]

This chapter describes and analyses the background of the steel dispute. This includes a profile of the development of the US and Chinese steel industry in the context of the global industry. The nature of the trade remedy the US adopted and why the US adopted such controversial safeguard measures are both evaluated. This case study explores the reasons why China lodged the complaint without too much hesitation, just after joining the WTO, in spite of its general cautious attitude to international affairs. This requires an examination of how China allied itself with many other countries. Finally I will evaluate the implications of China's response to the steel dispute for its attitude to legal methods of dispute settlement.

The case study draws upon the theoretical perspective and applies the methodological framework developed at the outset of the overall study. The primary source materials which this chapter relies on are the Panel Reports and the Report of the Appellate Body generated by the WTO in July and November 2003; archives by the Chinese Ministry of Commerce; first hand memoirs or recollections by the Chinese trade officials and lawyers who were directly involved in the steel dispute; and interviews conducted by the author with trade officials and academics in Geneva, Beijing and Washington. Secondary source materials include academic articles and media reports on the steel disputes.

The arguments being advanced here are multiple. The research question of the thesis is how does China choose between legal and political means of resolving intergovernmental trade disputes? This question remains complex because China is torn by the dialectical tension between the legal and the political. China's legal rights and obligations, and especially the

[5] A Geneva-based trade lawyer commented "Given the extremely high political profile of this dispute... this is one of the most important Appellate Body decisions in recent memory." In Kawase Tsuyoshi, *The Problems Left by the U.S. Steel Safeguard Dispute - The Success of Rebalancing and the Limits of the Safeguard Agreement*, Research Institute of Economy, Trade and Industry, Columns 0081, http://www.rieti.go.jp/en/columns/a01_0111.html; also see Chinese ambassador to Geneva Sun Zhengyu's comments on the Steel case, http://www.wtolaw.gov.cn/display/displayInfo.asp?IID=200304251852304280, visited on 09/07/2005.

existence of compulsory adjudication of these rights and duties, means that China can never escape the possible option of a final compulsory adjudication. Other states can compel it to appeal as a defendant before a panel. So it cannot ignore how the "law of the WTO" develops through the Panel and AB decisions. We have seen that it must participate as often as possible as a third party in panel proceedings and contribute to the development of the new procedural law of the DSM in the Doha Round, since it knows it cannot avoid the impact upon it of the development of new rules of law in the WTO. At the same time its own culture of good relations with other states (Guanxi) and its anxiety not to lose face in open confrontations means that it has to be very astute in assessing just how far Panel and AB proceedings do follow a classical legal path, where one can rely on clear legal standards and procedures, excluding unpredictable shock defeats. The second chapter suggested that a majority consensus was that a variety of forms of politicization so permeated the adjudicatory proceedings that they were merely an aggravated form of political dispute resolution, only one out of the diplomatic control of the parties. This chapter is a major case study intended to verify whether this majority suspicion is well grounded.

The acute question for China as an actor in this case, is to assess which are the factors that determined China's decision to participate in the legal proceedings, and, then, in conclusion, to assess as well what effect the outcome of the case may have had on future Chinese decisions about direct participation in legal proceedings as plaintiff or defendant. Was China's involvement compelled by its material interests in the steel industry and were these satisfied or not by the outcome? Did China's concern about its own identity, e.g. as a developing country, or a country having the capacity or willingness to defend its legal rights count? Would the support of numerous other plaintiffs affect China's judgment on the last question? Did China possibly see this case as another occasion of virtual third party participation, where it felt it could also influence the development of the law regulating trade in industries where it had certain comparative advantages? Was China influenced by its

experience of trying to negotiate with the US in this case, to try instead a legal method to resolve its disagreements with the US? Can any lessons be drawn from this major case about how China would choose in future between the diplomatic costs of a legal course of action and the difficulties of trying to pursue a diplomatic course against a state which was not hesitating to beat it as hard as possible with a legal stick (the issue in the Textile Disputes, which are discussed in the next chapter)

So the conclusions of this chapter will have to broach two broad questions: what does the steel dispute tell us about the role of the politics-law dialectic in the WTO DSM and how does this experience impact upon China; what does the steel dispute tell us about how China arrives at the decision to embark upon a legal method of resolving an intergovernmental trade dispute, both in the present case and for the future?

Background of the Steel Disputes

A. Global Steel Industry, US Steel Industry and Chinese Steel Industry

In 2001, the global steel industry was in a serious situation facing a number of major challenges. Due to fast rising productivity and slow demand, the excess capacity in the global steel industry has led to protectionism. Governments often intervened both to create new steel production capacity and to keep open unproductive plants. Inevitably the global steel market was saturated and many companies were running at a loss. Many companies responded by calling for protectionist measures.[6] In 1998 global steel excess capacity ran at about a third of the market level of demand, i.e. 275 million metric tons against a correct production level of 776 million metric tons: "These underlying forces—persistent overcapacity, rapid productivity growth, and slow demand growth—have again erupted, as in past episodes, in measures principally designed to limit steel imports—measures mounted by the steel industry,

[6] Gary Clyde Hufbauer, Ben Goodrich, *Steel: Big Problems, Better Solutions*, Institute for International Economics, Policy Brief 01-9, http://www.iie.com/publications/pb/pb.cfm?researchid=77, visited on 02/12/2005.

by Congress, and by President Bush".[7]

The key to the dispute was the targeting of finished steel products. In 2001 the US imported twenty seven million tons of these, producing itself ninety million tons of crude steel. Global crude steel production was then about 840 million tons, while production of finished products was at 733 million tons.[8] The US was the third largest steel producing country. Section 201 of the US Trade Act of 1974, concerned with safeguards investigations, was used to target finished steel products. The US had many countries supplying it with imported finished steel products. The first was the EU with about five million tons to the United States in 2001. The other large exporters to the US market were, in order of importance, Canada (four million tons), South Korea (two million tons), Japan (1.8 million tons) and Mexico (1.5 million tons). In this picture China's role was therefore quite minor, belonging among those exporting less than a million tons. In 2001, alongside Turkey and Brazil, China exported approximately seven hundred to eight hundred thousand tons.[9]

According to Sagara: "The US steel industry has relied on restrictive import measures for the past 30 years, lagging behind in structural reform and thereby losing international competitiveness".[10] There is a long history of US protectionism in the steel sector. In the 1960s integrated steel producers had also relied on it, according to a European Communities complaint. "Using the threat of the imposition of quantitative restrictions, the United States Government negotiated VRAs with the major exporters to the United States market".[11] These restrictions lasted five years, from 1969 until 1974.[12] So already at this time a pattern in US behavior had emerged in the US steel industry, to resist competition with protection rather than innovation. This would happen through a whole range of devices in the field of anti-

[7] *loc.cit.*
[8] Figures from the Iron and Steel Industries Institute, http://www.worldsteel.org/?action=publicationdetail&id=48, visited on 08/01/2003.
[9] Zhang Qingfeng, A Comparison of the United States and Chinese Steel Industries, *Perspectives*, Vol.3 (6), http://www.oycf.org/perspectives/18_093002/Compare_USChina_Steel.htm, visited on 02/12/2004.
[10] Nozomi Sagara, "Lessons to Learn from U.S. President Bush's Decision on Safeguards on Steel Imports", http://www.rieti.go.jp/en/columns/a01_0034.html, visited 16/12/2005.
[11] WTO Appellate Body (AB) Report, European Communities' First Written Submission, para. 35.
[12] WTO AB Report, European Communities' First Written Submission, para. 35.

dumping and countervailing duties. Korea points the finger sharply at the US.[13] The European Communities is equally sharp in its criticism of US protectionist practice.[14]

In the United States' submission to the WTO panel, it states that from December 1997 through to October 2001, 25 steel producers in the United States filed for protection under Chapter 11 of the United States bankruptcy law. These firms accounted for 30% of United States' crude steel making capacity.[15] Industry giants like Bethlehem Steel Corporation declared bankruptcy, and LTV Corporation, one of the largest steelmakers in the United States, was forced out of business altogether. These bankruptcies accelerated job losses in the industry and total employment in the sector fell to the lowest levels in decades.[16] It will be seen from the EU arguments in the Panel and AB reports (below), that the EU main claim is the US is not willing to go through the inevitable process of domestic industrial adjustment that other countries, particularly the EU itself, accepted in the 1980s. So the problem for the US is not coming from outside despite what it claims.

For the Chinese steel industry it was quite a different story. China is the number one steel producing country with an output of 149m tons in 2001 versus 128m tons in 2000. However the significance of its export trade is marginal because of its enormous importance as a consumer of steel products, with demand reaching 160m tons in 2001. This demand will probably go up by 5% a year for several years. This scale of demand is large enough to affect world prices and will probably lead to price increases on the Chinese market even while they are decreasing internationally. So, for example in 2001 China was an even more important steel importer than the US (25m tons net against 23m tons). In contrast its exports of less than one million tons to the United States are so marginal that the US steel tariffs have limited effect.[17]

The main concern of this chapter, and hence of the interest in these claims and counter-claims, is not to make an independent assessment from first hand source materials, of exactly

[13] WTO AB Report, Korea's First Written Submission, para. 9.
[14] WTO AB Report, European Communities' First Written Submission, para. 35.
[15] WTO AB Report, USITC Report, pp. OVERVIEW-11 and OVERVIEW-25.
[16] WTO AB Report, United States' First Written Submission, para. 17.

how the world steel industry is developing. This would be an exercise in contemporary international economic history, with a political economy dimension. It could only be the work of an economist. Instead the concern is to focus on the arguments used by the parties before the DSM to assess how they were using the mechanism and, at the same time, to assess from the responses of the DSM, i.e. its judgments, how much weight it attached to what were supposed to be the deciding factors in the judgment it reached, the quality of the legal arguments employed by the parties. From these factors it is possible to weigh up how far the parties were politicizing a legal process and how far the DSM itself tried to or could resist this process.

B. Section 201 and Safeguard Measures

As we have noted above, 'Section 201' refers to Section 201 of the US Trade Act of 1974 (Global Safeguard Investigations). A section 201 investigation looks into whether imported products are a substantial cause of serious injury to a US industry. Under Section 201, domestic industries seriously injured or threatened with serious injury by increased imports may petition the United States International Trade Commission (ITC) for import relief. The ITC is legally entrusted with responsibility for determining whether, as a matter of fact, there are increased quantities of imports of a product that are actually a substantial cause of serious injury to a comparable domestic product. The ITC then recommends to the President relief that would remedy the injury once it makes a determination. The President makes the final decision whether to provide relief for the industry.

The investigation process is as following. First, there are many different groups that can request the ITC to act, besides its acting on its own motive. The most important are those directly affected economically, either a firm or a trade union, or a representative trade association or group of workers. However, also either the House or the Senate, the USTR or

[17] Zhang Qingfeng, *op.cit.*

the President himself can require the ITC to initiate an investigation. The second stage is the injury finding, which must follow within 120 days (150 days in more complicated cases) of the investigation starting. The ITC must then report to the President, within 180 days, also with its relief recommendations. The President then determines the appropriate measure of relief, i.e. protection to be imposed, whether quantitative restrictions, orderly market arrangements or a tariff increase. The President has to act within 60 days, once the ITC has affirmed and found that harm has occurred. The President has a complete discretion as to how to proceed, subject only to having to report to Congress the action he decides to take. So it could be to take no action, or take some other action within his authority, but if he does not follow the guidance of the ITC he has to explain why to Congress. The Congress can retaliate within 90 days with a joint resolution telling the President to comply with the course of action wanted by the ITC.

Afterwards the ITC has to keep the President informed of future developments, particularly how the industry is economically affected by the measures taken and whether, as a consequence, the relief measures need to be modified. There will always be some limit to the period in which relief is granted and the ITC has to explain, at the end of this, whether that relief has helped to bring about any effective change in the structure of the domestic industry to be better able to withstand competition.[18]

According to the Trade Remedy Investigation launched by the ITC, "Section 201 does not require a finding of an unfair trade practice, as do the antidumping and countervailing duty laws and section 337 of the Tariff Act of 1930".[19] However, the injury requirement under section 201 is more difficult. According to ITC, criteria for emergency (safeguard) import relief are based on article XIX of the GATT and the WTO Agreement on Safeguards.

In theory, safeguard measures are permitted by the WTO. Article *XIX* (Emergency Action on

[18] Above information are mainly summarized from the Trade Remedy Investigation Section of the ITC. For further information, see section 201 of the 1974 Trade Act, available at: http://www.usitc.gov/trade_remedy/trao/us201.htm, visited on 23/03/2005.
[19] *loc.cit.*

Imports of Particular Products) of GATT 1994, often referred to as the escape clause, permits a country to "escape" temporarily from its obligations in response to "serious injury" or the threat of such injury to its domestic industries due to increased imports.[20] Article *XIX* was refined in the WTO Agreement on Safeguards during the Uruguay Round negotiations. For example, on the issue of conditions for imposing such trade remedy measures, the Agreement provides: "A member may apply a safeguard measure to a product only if that Member determined...that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products".[21] However, Article XIX and the WTO Agreement on Safeguards have raised lots of concern over their conceptual and operational problems in recent years.

In practice no country, which adopted safeguard measures has ever won such law-cases. The application of safeguards measures is very strictly reviewed by the WTO. If we wish to know why the WTO has adopted such strict discipline towards safeguards measures, we might find some answer from the Appellate Body [AB] Report on the US Steel Safeguards Case.

> Members of the WTO have agreed in the *Agreement on Safeguards* that Members may suspend their trade concessions temporarily by applying import restrictions as safeguard measures if certain prerequisites are met. These prerequisites are set forth in Article XIX of the GATT 1994, dealing with "Emergency Action on Imports of Particular Products", and in the *Agreement on Safeguards*, which, by its terms, clarifies and reinforces the disciplines of Article XIX. Together, Article XIX and the *Agreement on Safeguards* confirm the right of WTO Members to apply safeguard measures when, as a result of unforeseen developments and of the effect of obligations incurred, including tariff concessions, a product is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. However, as Article 2.1 of the *Agreement on Safeguards* makes clear, the right to apply such measures arises "*only*" if these prerequisites are shown to exist.[22]

In other words, the AB has said safeguards are very special and may only be adopted under an

[20] See Article XIX of GATT 1994 and Article 2 of the WTO Agreement on Safeguards.
[21] See Article 2 of the WTO Agreement on Safeguards.
[22] See Report of the Appellate Body, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, WTO 03-5966, p.80

emergency. This kind of measure being adopted means, you do not need to prove there is unfair trade going on. So, this distinguishes them from countervailing and dumping cases. Because the latter are aimed at unfair trade, there is a difference from safeguards measures, which can be aimed at other members' fair trade. The AB and Panels are not denying the members' right to impose safeguards measures, but it is very difficult actually to apply legitimate safeguards measures on the technical level. From this Steel Dispute, the judgement of the Panel and AB show that if one cannot provide sufficient explanation one will risk losing the case. In this case the AB did not rule or make a judgement on the Causation and the issue of injury. Mainly they concentrated on the parallelism and the Unforeseen Developments of imports. So, in fact the requirements that the WTO safeguard case law has established for adopting safeguards measures have made it impossible in practice to impose safeguards measures legitimately.

According to Chinese Trade Officer Ji Wenhua interviewed in Beijing for the present study, one of the important lessons emerging from the Panel Report on the Steel Case was that: "although the WTO in theory allows members to adopt safeguards measures, as a trade remedy, to protect domestic industry in an emergency situation one must be careful in practice in using safeguards measures because if we are challenged in the WTO, then we will risk losing the action".[23]

C. Why did the Disputes Arise?

As discussed above, the US steel industry was in a difficult situation largely due to its own domestic structural problems, which were causing a lack of competitiveness. But the US tried to characterize the problem as being due to increased imports. In June 2001, US President Bush issued a press statement that "he had called upon the United States International Trade Commission (ITC) to investigate the impact of imports on the US steel industry under section

[23] Author's interview with Chinese trade officer Ji Wenhua in Beijing, September 2003.

201 of the 1974 Trade Act. The ITC subsequently found (in December 2001), that increased steel imports are a substantial cause of serious injury to our domestic industry"[24]. Then the Bush administration announced it would impose tariffs "ranging from 8 to 30% on ten categories of steel imports" for three years in March 2002.[25] As we shall see below, the reaction from many parts of the world was extremely critical.

The Presidential statement of 5 March, 2002, further justified its action in terms that it was necessary "to give our domestic industry an opportunity to adjust to surges in foreign imports, recognizing the harm from 50 years of foreign government intervention in the global steel market, which has resulted in bankruptcies, serious dislocations, and job loss. We also continue to urge our trading partners to eliminate global inefficient excess capacity and market-distorting practices, such as subsidies"[26]. In other words the entire blame for the crisis was placed outside the US. It will be seen that the US arguments submitted to the DSM are marked by the same vagueness about the actual contradictions in the domestic industry between integrated and mini-mill producers, about actual levels of foreign imports and about actual market prices for steel.

In addition the Presidential action determined that, quite apart from North American Free Trade Area (NAFTA) imports coming from Canada and Mexico, certain steel products were a substantial cause of injury to the domestic industry and could be excluded even if the NAFTA countries were not targeted. Finally, the President decided to exclude from the safeguards measures developing countries that exported only small amounts of steel.[27] This last point was to prove especially important for China because China thought it should also have been treated as a developing country, and this was to be a reason for its participation in the case.

The international reaction to this measure was unusually strong. The Wall Street Journal said: "The President's imposition of stiff steel tariffs was the most protectionist move of any US President in at least two decades."[28] British Prime Minister Tony Blair slammed the move as

[24] The White House, President George Bush, *op.cit.*
[25] Fact Sheet: The Presidential Determination on Steel, , USTR Online Information, 12/04/2003.
[26] The White House, President George Bush, *op.cit.*
[27] *ibid.*, and also the terms are provided in WTO DS252 Definitive Safeguard Measures on Imports of Certain

"unacceptable and wrong" in a speech to Parliament. German Chancellor Gerhard Schroeder said the decision ran completely contrary to the principles of "free world markets."[29] An official statement from China claimed that "the US flouts WTO rules" and condemned this action.[30] In response to the US action, the EU, South Korea, Japan, Switzerland, China, Norway, New Zealand and Brazil launched the WTO dispute settlement procedures against the US.

In this case concerning the US, the domestic pressure from the interest groups was there. Thirty-one American steel firms had gone bankrupt in the past four years. The industry blamed the decline on the unchecked influx of cheap foreign steel. However, the steel is hardly the only factor in play. It is well known that Bush had a political agenda in imposing the steel tariffs, the so-called safeguard measures. If he could win over the Steel Caucus in Congress, this would certainly make it easier for him to get Congress to accept him obtaining a fast-track trade negotiating authority and the creation of a Free Trade Area for the whole of the Americas. USTR Zoellick described this as part of "managing the home front".[31] The EU trade commissioner Pascal Lamy criticized the tariff decision as political at heart and said it had no justification under WTO rules.[32] Indeed, for Peking University's Edward Jingchun Shao and Li Yihu and Zhang Honglun and Han Tao from the Chinese Academy of Social Science (all leading Chinese observers of the WTO), the evidence supported the view that the US action was mainly motivated by political interests. In research interviews with these researchers in Beijing, they all expressed the same view: "For the US there are primarily political factors behind it".[33]

Steel Products, p.7, referring to the Presidential proclamation para.12

[28] Neil King JR. and Geoff Winestock, Bitter World Reaction to US Tariffs Means Steel Gamble May Backfire, *The Wall Street Journal*, 07/03/2002, http://mail.list.ucsb.edu/pipermail/gordon-newspost/2002-March/002203.html, visited on 06/05/2002.

[29] *loc.cit.*

[30] *China Daily*, 'China Files First WTO Complaint Against US', 15/03/2002, http://www.chinadaily.com.cn/chinagate/doc/2002-03/15/content_248674.htm, visited on 06/04/2002.

[31] Neil King JR. and Geoff Winestock, *op.cit.*

[32] *loc.cit.*

[33] Author interviews conducted in Beijing in September 2003, with Professor Li Yihu and Professor Edward Jingchun Shao from Peking University; Mr Zhang Honglun and Mr Han Tao from the Chinese Academy of Social Science.

These perceptions of the states involved in the trade dispute show that the economic self-interest model to explain state conduct has to be combined with the importance of states' ideological and institutional structures in shaping international economic policies.[34] What is remarkable is that all the parties quickly resolved to deal with this dispute through legal procedures, *because of their perception that the dispute itself was political, and not a controversy about ambiguous economic norms.* That such was the case will emerge from the following presentation of the legal proceedings, and particularly the character of the arguments of the parties. The US seems to have been resigned to or indifferent to this course, and one will try to find explanations for this as the chapter progresses. The role of Wendt's theory of the dominance of agency as against structure (Part 4 of Chapter One) helps to explain how far apparently subjective, ideational factors, rather than purely material economic interests, brought about this legal conflict. The neo-liberal institutional theory that something like the DSM was necessary to reduce the transaction costs of market failure does not capture the irrationality of the conflict as graphically as Wendt's insistence that "states are real actors to which we can legitimately attribute anthropomorphic qualities like desires, beliefs and intentionality" [35] He adds to George and Keohane's litany of national interests, including economic well being, the element of "collective self-esteem" and warns that where this is challenged states will compensate with self-assertion or devaluation of the other.[36]

How Was the Dispute Managed and Resolved

As the following analysis will seek to demonstrate, closer analysis of how the US presented its case to the WTO Panel and Appellate Body appears to show a disregard of the requirements of careful legal argument, so that the apparently strong rhetorical arguments of politicians such as then EU Trade Commissioner Pascal Lamy and German Chancellor Gerhard Schröder that the US was simply flouting WTO rules do appear to have considerable substance. Here the methodological criteria are drawn from Archer's breakdown of ideational structures into the distinction between the Cultural System (CS) and the Socio-Cultural

[34] Robert Baldwin, 'The Political Economy of Trade Policy: Integrating the Perspectives of Economists and Political Scientists', in R Feenstra, G Grossman and Douglas ed., *The Political Economy of Trade Policy*, The MIT Press, 1996, p.155.
[35] Wendt, *Social Theory of International Politics*, p.197.

Interaction (SC). The WTO Principles and Rules are the CS, it will be argued, are, in this steel dispute subjected to a bare faced assault from within the SC. There are no significant internal contradictions within the CS, which could have assisted anyone challenging it. Instead there was disruption within the SC, but not a disruption sufficiently significant, *in terms of either ideational or material forces,* to threaten seriously, at this point in time, the CS, i.e. the rules of the WTO on free and open trading. One witnesses a rather elementary reassertion of the CS in terms of its own internal logic, particularly with the rejection of the weakness of the logic that the US tried to draw out of the CS. Without Archer's framework of analysis, it would not be so clear how one can give an autonomous place to purely legal logic and reasoning in what is also obviously a highly politicised confrontation.

The American side to this dispute has been rather strange. It can be seen from the arguments before the Panel and the AB that the US did not seem to have any interest in detailed argument about how the safeguard measures were necessary to protect the US steel industry. One can gain a very clear impression of the state of this industry from the beginning of the Panel proceedings where particularly Brazil and the EU set out the state of the US steel industry. [37] While the integrated section of the US steel industry traditionally sought protection, there were considerable improvements in the running of the mini-mill share of US raw steel production, which increased substantially during the 1990s. The latter was reforming and constituted almost half US steel production by 2000. While there had not been restructuring in integrated steel mills, there had been heavy investment in new, green-field electric arc furnace plants. Japan and Brazil argued that well before the initiation of the US safeguards action, steady expansion in US mini-mills capacity had left mini-mills in complete control of domestic long product production. In fact the USITC's period of investigation captures the most prolific period of mini-mill expansion.[38]

So it appeared that the closing of integrated mill production in the US was due to domestic

[36] *ibid,* pp.235-7.
[37] WT/DS252, from page 40 onwards.
[38] Ibid, pp. 43-44.

competition. The USITC reported findings that between 3 and 6 million tons of integrated capacity would have to close because of the relative escalating costs of running such plants. The EU and New Zealand said it was the US mini-mills that could produce more cheaply. The use of scrap metal as a source and less use of labour enable this. Also the smaller companies have a less integrated or unionised labour force also leading to reduced costs. The really bitter competition, with falling demand in 1998 and 1999 was between these two sectors of the domestic US steel industry.[39] With the US economy moving into recession in 2000 – 2001, this competition intensified. The conclusion of this analysis, stressed by the EU and others was that the significant changes in the US scene were internal. New efficient mini-mills were able to undercut integrated producers on price while providing a product of equal quality. "The increase in capacity growth in the US market is perhaps the most significant factor that emerges and far outstrips any increase in imports. The excess capacity exacerbates prices depression caused by intra-industry competition and falling demand as a result of the 2001 recession in the United States."[40]

The American response to these arguments was very brief and vague, running to barely two pages as summarised by the Panel Findings.[41] It referred to the very substantial number of US steel bankruptcies in the period under investigation (1996-2001), but did not bother to distinguish between the two sectors of the US industry, while naming bankrupted companies that were in fact from the integrated sector. It did refer to the great investments in the steel industry but then said in the most general way that prior to the Asian crisis the US industry had performed comparatively well and had been undergoing a continuous process of restructuring.[42]

It can also be seen from the language of the AB, confirming the decision of the Panel, that the rejection of the legal arguments of the Americans was in a quite strong terms. Broadly the US argument was that such factors as the Asian financial crisis, the collapse of the Soviet Union,

[39] *ibid*, pp.48-49.
[40] *ibid*, pp. 50-51.
[41] *ibid*, pp. 51-53.
[42] *ibid*, p.52.

the robust character of the US economy leading to a revaluation of the US dollar, etc led to a vast excess of steel production capacity which was finding its way onto the US market. Yet the statistical data was that, while imports had been increasing into the US from 1996 till 1998, thereafter they had very substantially declined until 2001.

For instance, with respect to CCFRS, Hot-Rolled Bar and Stainless Steel Rod, the Panel had found that a significant decrease between 2000, 2001 in imports from 11.5 million short tons to 6.9 million short tons. Indeed already by 2000 levels of imports were as low as in 1996.[43] The fact that the US went on to argue that there were significant increases in imports of these items so as to justify safeguards measures provoked the following type of comment from the Appellate Body. Under article 3.1 of the Agreement on Safeguards the competent national authority preparing safeguards action must set out "reasoned conclusions" on all "pertinent issues of fact and law". The AB went on:

> In our view, therefore, it was for the USITC to provide a "reasoned conclusion" on "unforeseen developments". A "reasoned conclusion" is not one where the conclusion does not even refer to the facts that may support that conclusion. ...A competent authority has the obligation under article 3.1 to provide reasoned conclusions: *it is not for the panels to find support for such conclusions by cobbling together disjointed references scattered throughout a competent authority's report.* [44]

This strong AB language amounted to a firm response for the way the US legal team was treating the WTO. The passage refers to the issue of unforeseen developments rather than the increase in imports, but it relates also to the fact that the two were not being connected. And indeed how could they be? There had been no sudden sharp increase in imports. China itself, along with the EU and others, had made the argument that the US was:

> In effect, asking us (the AB) to find that "any increase is sufficient" to satisfy the requirement in art.2.1 of the *Agreement on Safeguards*. The European Union quotes, in this respect, a passage from the USITC report where it is stated that, for US domestic purposes, there "is no minimum quantity by which imports must have increased" and a "simple increase is sufficient".[45]

[43] WTO US-Definitive Safeguards Measures on Imports of Certain Steel products, WT/DS252, involving China in a parallel action to the other complainants, (11 July 2003), para 10.181, cited in WT/DS252/AB/R page 117, 10 November 2003

[44] WT/DS252/AB/R p. 102, emphasis added by the author.

[45] *ibid*, pp. 108-109.

The argument is clear later where the AB notes the Panel as commenting on another American argument, that "from the absence of *absolute* standards one cannot conclude that there are no standards at all and that any increase between two identified points in time meets the requirements of Art.2.1".[46] The AB concludes, noting the huge decline in imports from 1998 to 2001, already mentioned, by using italics to stress that the US should provide an *explanation* which would *demonstrate* how there had been an increase, in this case, of CCFRS.[47]

It is hardly surprising that the AB eventually upheld the Panel conclusions, with respect to the safeguards measures the US had imposed against China's and other countries' steel products, that they contravened Art XIX: 1(a) of GATT and Art.3.1 of the *Agreement on Safeguards,* because "the US had failed to provide a reasoned and adequate explanation demonstrating that "unforeseen developments" had resulted in increased imports causing injury to the relevant domestic producers".[48]

So, in November 2003, the WTO AB ruled the US steel safeguard measures were inconsistent with WTO rules and China welcomed the result. The spokesman of the MOC said that "As a WTO member, China has exercised its due right in trying to solve the trade dispute with other WTO members through the WTO dispute settlement mechanism and protect the legitimate interests of Chinese enterprises".[49] In December 2003, President Bush announced the ending of steel safeguard measures, "These safeguard measures have now achieved their purpose. And as a result of changed economic circumstances, it is time to lift them".[50]

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[46] *ibid*, p. 115.
[47] *ibid,* p. 120.
[48] *ibid*, p. 170.
[49] "China Welcomes WTO report on US Steel Safeguard Measures", available at: http:// english.people.com.cn/200311/11/print20031111_128072.html, visited on 10/12/2003.
[50] "U.S. Explains Failures at Cancun-WTO Negotiations, Repeals Steel Tariffs Following Adverse WTO Ruling", *Foreign Policy Bulletin: The Documentary Record of United States Foreign Policy*, Vol.15 (1), Winter 2005, Cambridge University Press, p.251.

One of the most authoritative commentators on the WTO, a European based in the United States, Joost Pauwelyn, remarks on the strangeness of the whole of the behaviour of the US.[51] As he puts it: "Actually, when explaining the action (i.e. the lifting of the so-called safeguard measures), the US administration did not even mention the World Trade Organization. Rather than scape-goating the WTO, it went to great pains to explain that the steel safeguard had met its objective and that it was withdrawn solely because of "changed economic circumstances". At the same time there was a realistic threat of especially EU sanctions targeted at states crucial for the Bush re-election campaign. While the WTO may like to congratulate itself that it succeeded in getting the safeguards restrictions lifted, it is a fact, points out Pauwelyn, that in many other cases the US has not bowed to the WTO after a decision against it. The *Foreign Sales Corporation, Anti-Dumping Act of 1916, the Byrd Amendment* are cases where there has not been compliance. In the steel case, compliance appears to have been easy for the US. There was no need for Congressional approval. Anyway the US did not even try to sell the protection as being a response to unfair or dumped steel imports "rather it was labelled as a "safeguard"; that is, in the words of the WTO Appellate Board, import restrictions on perfectly "fair trade" from other WTO members. Thus, for Pauwelyn, if in these circumstances, "the US would have refused to comply, it would have lost a tremendous amount of credibility".[52]

Despite the apparent success of other countries against the US in the Steel Dispute, and despite the WTO general policy of not agreeing to safeguards actions, there are a number of problems that remain with the WTO response to the US Section 201 action in this case. They make it difficult to determine whether disputes are being decided politically or not and therefore do not give effective guidance to traders for the future.[53]

Despite eight rulings,[54] the WTO, also in this Steel Case, does not provide a clear answer as to what sort of safeguards measures are permissible. It remains unclear how much imports

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[51] Joost Pauwelyn, 'WTO Victory on Steel Hides deficiencies', available at: http://www.jurist.aw.pitt.edu/forum/Pauwelyn1.php, visited on 06/11/2005.
[52] *loc.cit.*
[53] .Kawase Tsuyoshi, "The Problems Left by the US Steel Safeguards Dispute (Part II)", http://www.rieti.go.jp/en/columns/a01_0111.html, visited on 21/11/2005.
[54] ibid

should increase and how to analyze the causal relationship between import and damage to domestic industry. While increases have to be separated in analysis and the nature of the injury identified, there are no sufficient guidelines for a very complex quantitative analysis. This vagueness of the law was disturbing in the WTO handling of the Steel Dispute. A Japanese trade policy expert, Kawase Tsuyoshi argues that the political profile of the case was one of the most important ever, the legal decision itself was minimalist focussing only on rejecting the weakness of the American legal arguments. Because of the political nature of the case, the AB adjudicated as minimum a claim as possible just to condemn the US measures and refrained from providing much of clear reasoning. One might speculate that the Panel and the AB both recognised that there was a conflict of gigantic proportions in play, virtually the whole of the world trading community pitted against the world's first trading power. In these circumstances it was conceivable that a split in the foundations of the SC could reverberate onto the CS and shatter it. Hence, the most summary resolution of the conflict in terms of a minimalist appeal to the internal logic of the CS would be the best means for the DSM, the guardian of the CS, to preserve it. As will be seen later, this was to have a very frustrating effect for China, which found its own particular question to the DSM concerning its interpretation of the CS left unanswered.

So, to pursue the way issues of CS were handled in this case, at the domestic US level, the ITC, of the six US members one deemed that imports hurt the tin-mill industry, while two others accepted injury to a more broadly defined industry that included products other than tin-mill. The Bush Administration combined these to get the three votes necessary under the US trade laws to invoke the safeguards measures. Kawase Tsuyoshi argues that multiple injury findings in different product and industry definitions are based on different sets of imports and injury data and are in essence irreconcilable. Yet the WTO Panel ruled, pointing out this contradiction within the USITC, which the imposition of the US safeguards measures was against WTO rules because they were not based on substantial grounds. The AB reversed

the Panel conclusion because it failed to consider the individual views in the USITC and had not ruled on whether one can accumulate different injury findings for different industries without asking whether they are incompatible. Yet the AB avoided any debate that could have been taken as interference in the internal doings of the US trading institutions, particularly the USITC. On the issue of causation the AB was also cautious, saying that since the measures were in obvious violation of the WTO the issue of causation did not need to be addressed.

In the light of the analysis offered by Kawase Tsuyoshi on the detail of the AB finding, it is interesting to consider the comments of the US Trade representative on the AB finding. The former USTR representative Robert Zoellick stated in the joint press conference with the White House Press Secretary McClellan on the Steel Disputes in December 2003: "One of our unhappinesses is I think the WTO panels are a little tougher on safeguards than they should be. It is useful to know that they did not challenge our underlying safeguard law, what's called Section 201. They challenged its application in this case."[55] While the US may say it was unhappy, in fact the WTO is not challenging the detail of the US practice on safeguards and thereby not challenging the structures it had in place. It could be said the WTO only objects to the use of Section 201 measures in this case, and it could very well only be because of the huge political weight of this case, i.e. the vast range of countries lined up against the US.

In research interviews conducted for this study at the USTR in Washington, the China Director Neureiter was asked whether the US behaviour in the Steel Dispute did not indicate that it was adopting a generally protectionist attitude and undermining the whole liberalisation of trade. Neureiter's evasive answer was that the US was continuously concluding free trade agreements and that it was willing to discipline subsidies and cut tariffs with other countries on a reciprocal basis: "At the same time we still think that the WTO is too severe in its attitude to safeguards measures". So pressed again to elaborate on whether the USTR still

[55] 'U.S. Explains Failures at Cancun-WTO Negotiations, Repeals Steel Tariffs Following Adverse WTO Ruling', *Foreign Policy Bulletin: The Documentary Record of United States Foreign Policy*, Vol.15 (1), Winter 2005, Cambridge University Press, p254.

disputed the WTO decision on steel, he agreed, arguing that: 'Yes we disagree with that. We consider that technically the measure was legal. We appealed it and the AB did make some concessions on some aspects of first level rulings about ITC decisions.' Finally, asked if "politics play a role in the American decision to impose the safeguards measures and then to withdraw them again", Neureiter's answer was the very general one, that while he favoured free trade and the US had very low tariffs, it was still necessary to bring the domestic sector along with you, to help them to adjust and to give them time to do so. So, in that sense politics are part of the picture.[56]

The Winners Takes It All? — Issue of Developing Country Status

Although China won the case, this was not a satisfactory outcome for China because the WTO Panel and AB did not decide issues relating to China's argument about its developing country status.[57] As mentioned, the major difference between China's claim and the other complaints is its claim regards the developing country status. It was agreed in joint meetings with other complainants to let the EU take the lead, but China did request to speak directly to the Panel about its developing country status and the quota assignment it should have enjoyed, according to its status.

China had been trying to argue that even if the safeguards measures could be justified the US was applying them in a discriminatory fashion because it was treating other countries it, the US, characterised as developing countries, and excluding China arbitrarily from that category, for the purposes of exemption from the safeguards measures. The WTO Panel exercised judicial economy, i.e. gave the minimum of reasons necessary to bring the dispute to an end and did not have to decide this question, because it decided the more general one in China's favour, that all of the safeguards measures were, in any case in valid. Nonetheless the discrepancy between the American and the Chinese arguments at the Panel stage of the case

[56] Interview with USTR official Paul A. Neureiter, Director for China, Office of China Affairs, in Washington November 2004.
[57] Chinese political scientist Zha Daojiong also mentioned this failure in his article 'Comment: Can China Rise', in *Review of International Studies*, Vol.31 (4), October 2005, pp.779.

show just how difficult negotiation is on this issue.

China chose to take a very firm and persistent line on this question precisely because it concerns its economic and political as well as legal identity; how it is recognised in the international community and how it will be treated in future were, according to the evidence, significant factors in lodging its challenge.[58] China argued that the US unilaterally and arbitrarily linked developing country status of Art. 9.1 of the Agreement on Safeguards with the US' Generalised System of Preferences (GSP). Clearly in determining who should benefit from one's own GSP, this is fair enough. However, there is a generally accepted criterion of "developing country" which should apply to the WTO, and it is not possible that a single member should be considered a developing country by say the US and not by the EU.[59] Again, the US was quite categorical in its style. It was perfectly possible for the same member to be considered a developing country by the US and not by the EU "in respect of the same dispute or the same provision." For example the US treated Baltic and Eastern European states as developing countries in this case, while the EU did not, when it was applying its own steel safeguard measures. The US argued that China itself accepted this principle by agreeing in its Protocol of accession to developing country treatment in some areas and non-developing country status in others. These differences arise from Art.9.1, which does not indicate how a member must comply with its obligations under that article. The interesting aspect of the US argument follows immediately, in a way, another form of US unilateralism:

"Since it (Art.9.1) is an obligation relating to application of a safeguard measure, it falls to the Member applying a measure to identify, in the first place, Members eligible for treatment as developing countries for purposes of Art 9.1. Since different Members may apply different procedures, they may reach different results".[60]

At the same time, one can point out an interesting difficulty for IR theory here. Archer's

[58] Author's interviews with three Chinese trade officials of Chinese Ministry of Commerce in Geneva and Beijing, June and September 2003.
[59] WT/DS252/R, p. 630.
[60] *ibid.*, p.630.

framework of analysis gives an autonomous space to the logic of the CS. We have argued in Part 3 of Chapter One that this space is an adequate conceptual equivalent to law. The US is relying here, in a confrontation with one single power that is not as overwhelming as the coalition otherwise ranged against it, on a basic gap rather than contradiction in the wider CS. It is not just WTO Law that is engaged here, but the wider context of international economic law. This context, unlike the narrower WTO on which the coalition of plaintiffs relies, is contradictory, and since the SC addressing it is fairly equally divided (the US and China being fairly equal) there is no element of compulsion from within either the CS or the SC to resolve it.

The US continues, using the argument that since the WTO rules do not provide any role in this process for exporting countries this indicates that importing members alone have the obligation to identify which members are developing countries and which are not etc. This will not in practice cause difficulties, because in most cases Members have not disagreed as to the treatment they will afford one another. [61] However, it has to be admitted that China does try to use a similar style of argument. It also claims that it is a long-standing practice under the GATT and the WTO for the determination of a Member's development status to be by self-selection and the US response to this is that China provides no evidence of such a practice. Even if such a practice existed it would merely show that individual members considered they met the definition, and it would not have wider implications.[62]

There appeared to be also fundamental disagreement about a more concrete aspect of the status of a developing country. The US said that China would have to show that the safeguards measures were applied to a developing country member accounting for less than three percent of total imports, when total imports from such countries did not exceed nine percent of total imports. China has not met this threshold requirement.[63]

[61] *ibid.*, p.630.
[62] *ibid,* p. 633.
[63] *ibid,* p. 634.

China came back to say that self-selection should apply until the right is challenged by another member on the basis of an adequate and reasoned explanation. It is clear that although some important achievements have been made China is still a developing country. The accession Protocol accepted this, except that there were specific agreements to which the status did not apply. These included agriculture, TRIMS and subsidies. Since there was no specific mention of that kind of China in relation to safeguards, it must be assumed that here China would enjoy special and differential treatment. This is all the more understandable because, under Art.9.1, any developing country, which is above the 3% threshold would not benefit from the Article 9.1.[64]

The US counter argued that the whole approach to China's membership adhesion negotiations was pragmatic because of China's significant size, rapid growth and the transitional nature of its economy. Since the Adhesion Protocol did not specifically address treatment under the Safeguards Agreement, the only possible conclusion was that the Protocol and the Working party Report do not establish China's entitlement to treatment as a developing country under Art.9.1.[65]

In turn China argued that while it was not primarily up to it to apply the *de minimis* test, it appears, on the basis of preliminary calculations and of USITC statistics available to the US President, that China had a share of imports into the United States accounting for less than 3% "with the de minimis exporting developing countries members collectively accounting for no more than 9% of total imports, for at least the following products: slab, hot rolled steel sheets, coated steel, hot-rolled bar, cold-rolled bar, rebar, tin mill products, stainless steel bar and stainless steel rod". The fact that at the time of applying the safeguard measure the US did not even attempt to use the de minimis argument was that the US had already denied the first step, that China was a developing country.[66]

[64] *ibid,* p. 635.
[65] *ibid,* pp. 635-636.
[66] *ibid*, p. 636.

China strengthened this argument with the more general one, applied to the whole of the case against the US, that whether under Art.9, or Art.3, on due process, the US was not explaining in any adequate or reasoned manner the reasons why China was not a developing country, nor why Chinese products did not meet the de minimis test under Art.9.1. [67] This indicates how deep the disagreement between the countries was and how difficult it would be to negotiate anything to do with the identity status of China. Indeed, it is quite remarkable that the US attempted to argue that the issue of determining a country's status was not subject to the "due process" requirement of Art3.1 Reasoned explanation was only necessary for the investigation of the issue of serious injury itself. [68]

China's insistent frustration with the firm US line led it to respond that:

> The US is trying to create an illogical line of reasoning between the investigation and the application of the measure. In particular China argues that the US wrongly asserts that the question of non-application of the measure to developing countries under Art.9.1comes after the investigation. In China's view, this is misleading, as all imports are subject to investigation. The imports from developing countries, in particular, are placed, under the scrutiny of the competent authorities whose role is to determine which individual country's imports are under the 3% threshold, and whether the sum of imports from developing countries does or does not exceed 9%. China asserts that, clearly, the findings on Art.9.1. are not only relevant when the measure is applied, but these findings constitute a part of the investigation process, and therefore must be covered by the obligation expressed in Art.3.1 of providing a reasoned and adequate explanation.[69]

However, there was no end to this argument, precisely because, as already explained, there were contradictions within both the CS and the SC, both about equally divided, and hence both without any means of resolving the divisions. So, the US responded that it is well established that the burden, under the WTO, rests with the party who asserts the affirmative of a particular claim or defence. Where China asserts that the US failed to comply with art.9.1, China has the burden of proof to demonstrate that the US has applied a measure to a developing country that accounts for less than 3% of total imports. The US argued that China did not meet this burden.[70] Clearly this does not meet the Chinese objection that the US was

[67] *ibid*, p. 637.
[68] *ibid*, pp. 637-638.
[69] *ibid*, p. 638.
[70] *ibid*, p. 640.

giving no reasoned explanation at all for its safeguard measure against China, never mind why it would not explain why China was not given an exceptional developing country status. The WTO, as has been seen, decided on the more general ground and therefore did not deal specifically with China's arguments about its status.

This was also frustrating for China and it has subsequently raised the matter again in the context of the Doha Round Ministerial Meetings.[71] At the time of the Doha Round Negotiations in Hong Kong in December 2005 the Chinese Commerce Minister, Bo Xilai, made it clear that it regarded the issue as of major importance. Particularly in the context of agricultural negotiations, China situated itself alongside other developing countries and refused to accept the idea of categories of developing countries. China has a farming population of 740 million, of whom more than 200 million are living on less than US $1 a day. He stated:

> China is firmly opposed to any attempt of sub-categorizing developing Members. Big developing nations such as Brazil, India, Indonesia, Egypt, South Africa, Mexico, Argentina and China are still under tremendous pressures along the course of their development, and they are the ones who are shouldering the burden of feeding the majority of the world's population.[72]

The developing country coalition on agriculture of which China is a vital part, continue effectively to block a successful conclusion of the Doha Round.

An Evaluation of China's Participation in the Steel Dispute within the DSM

As noted earlier, China's response to the steel tariff dispute has been termed "aggressive legalism". This section studies and assesses the reasons lying behind China's decision to bring this case to the WTO and explores the way that China responded during the process of the WTO DSU procedure. It also analyses the main factors accounting for China's response, i.e., legal and political culture, interests, rules, institutional factors, country relationships, and

[71] "Responses to Questions on the Specific Input of China [on Specific Amendments to the Dispute Settlement Understanding] – Communication from China", WTO TN/DS/W/57, 19 May 2003.
[72] 2005 Statement by Minister of Commerce at 6th WTO Ministerial Conference at Hong Kong, China.

interest groups. Why did China bring the case to the WTO? As explained in Chapter 3, historically China has adopted a diplomatic negotiation approach to conflicts. International trade disputes would normally be settled through diplomacy rather law.[73] However, in the Steel case, a different approach was adopted.

There was a combination of economic, material interests and cultural interests in participating in the large coalition of states, which ranged themselves against the US in this case. Firstly the world steel industry taken as a whole was, perhaps, too important for China to stay out of a generalised dispute with the US about the impact its protectionist behaviour was having on the global industry, of which China was a significant part. Secondly, it appeared that US conduct was dictated almost completely by domestic political factors and that it would not be amenable to international negotiation. Thirdly, it appeared that the legal standards violated were so clear to so many countries that there was little diplomatic risk in China having to go it alone in a confrontation with the US. Fourthly, closely related to the last point, Chinese participation could constitute a learning exercise with respect to the compulsory DSM, which China accepts it has to understand and try to influence in its own direction.

♣ Economic interests: China was the world's largest steel producer and the third largest steel importer in 2001. The proportion of China's imports account for 17.8% of domestic demand for steel, which is relatively low in comparison to that of other countries- e.g. 28% in South Korea.[74] The domestic steel industry strongly demanded that the government should take appropriate measures to protect the domestic industry from steel imports. Especially on this score, the sense of the need for self-protection was growing among the Chinese enterprises. They saw the need to think in terms of their rights and to adopt a sensible and practical attitude towards trade dispute settlement. The steel case brought the Industry Associations formally to the stage of dispute settlement along with the government. It made people realized the Chambers of Commerce and Chinese Business Associations could play an important

[73] This accounts focus on China's response, excluding the situation that China as defendant.
[74] Yongjin Jung, China's Aggressive Legalism: China's First Safeguard Measure, in *Journal of World Trade*, 2002, Vol.36 (6), pp. 1037-1060.

role.[75] A senior economist Lei Da stated, "The US steel tariffs may divert large amounts of steel exports into the China market." And steel makers from the EU, Japan and South Korea are likely to more strongly target China, one of the world's biggest steel markets, bringing much pressure onto Chinese firms.[76] So China had a very strong interest in participating in this WTO controversy directly.

However, these arguments from material interest are not of themselves absolutely compelling, for at least two reasons. Firstly, as Zhang Qingfeng argues: "Although diverted steel from the United States to the international market can be a negative factor on steel prices in China, China's strong economy and recovering economies in other regions can easily digest the extra production".[77] Secondly, in fact, China exports a relatively small amount of steel to the US, so it was not as affected by the US action as the EU, Japan and South Korea. In 2001, China exported steel products 474.14m tons, including 74.34m tons to the U.S., about 15.68% of China's steel exports. But it only amounts to 0.47% of China's total steel output.[78] Hence, China's economic interest to confront the US was quite insignificant in this case. It could, conceivably, have itself had recourse to safeguards measures if there had been a very significant surge in diverted steel exports to China.

♣ US Domestic Politics and Impossibility of Negotiation: As has been seen already from the analysis of the case itself within the DSM, the principal reasons behind the US action show how Chinese style negotiation and compromise could not work in this case. As discussed earlier, the object of the safeguard measure was to protect the domestic steel industry, by giving it the breathing space that the full running of the DSM procedure afforded (21 months), and to win the support of the steel lobby in Congress so as to obtain fast track authority from Congress to conclude other trade agreements. As President Bush openly stated: "I took action to give the industry a chance to adjust to the surge in foreign imports...these safeguard measures have now achieved their purpose. And as a result of changed economic

[75] Yang Guohua, *A Study On WTO Dispute Settlement Mechanism and China*, China Commercial Press, Beijing, 2005.
[76] WTO Panel On Horizon, 07/06/2002, China Daily, http://www.chinadaily.com.cn/chinagate/doc/2002-06/07/content_248751.htm, visited on 08/09/2002.
[77] Zhang Qingfeng, *op.cit.*
[78] See "The Impact of the U.S. Steel Tariffs on China", WTO Information Center, http://www.wtoinfo.net.cn/cgi-

circumstances, it is time to lift them. The U.S. steel industry wisely used the 21 months of breathing space we provided to consolidate and restructure".[79] We have already noted the comments of Pauwelyn, one of the world's leading WTO academic lawyers,[80] assertion that the US knowingly pursued an illegal course of action, realising they could get away with it for as long as it took to complete dispute settlement proceedings.[81] That is why one will have to look later to how China tries to improve upon and tighten the DSS in such matters as the status and rights of developing countries, the costs of proceedings and the tightening up of time limits so that developing countries do not have to wait so long before the final decision is reached; 21 months in the steel case.

The analysis of the above shows that the possibility of negotiation and compromise was not really open to China. So, indeed, it is not surprising that, as China's reaction to the US steel safeguard was to talk with the US and ask the US to exempt China from the tariffs as it did many other countries or provide compensation in accordance with WTO rules,[82] this was not successful. So, on 17 May 2002, China notified to the WTO its own retaliation against certain steel products from the US, unless the US offered to maintain a substantially equivalent level of concession in imposing its safeguard measure. On 21 May 2002, China announced that it would impose a provisional safeguard measure against steel imports. The measure primarily aimed to block steel imports to it that might be diverted from the US market as a result of the protectionist measures.

However, this action put China in a dilemma situation. In fact China did not benefit from this safeguard measure – its own protectionist measure. As has been seen, one economist's view was that China needed the steel and could easily absorb it.[83] This made China very cautious in using such 'political leverage' again. So far, it is the only safeguard measure China ever adopted. In fact, more importantly by the time China took this action, it was aware that a

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bin/news/Xhot_detail.php?, visited on 15/09/2003.

[79] Foreign Policy Bulletin: The Documentary Record of United States Foreign Policy, *op.cit.*, p.251.

[80] See his authoritative book length commentary on the role of international law in WTO jurisprudence.

[81] Joost Pauwelyn, *op.cit.*

[82] The tariffs exempted countries include Canada, Israel, Jordan and Mexico which have signed free trade agreements with the U.S., and developing countries with only limited steel exports to the U.S. http://www.china.com.cn/english/2002/MAR/29380.htm, visited on 12/09/2002.

[83] Zhang, *op.cit.*

world coalition had built up against the US, with eight complainants demanding consultations with the US and they were only a couple of weeks away from requiring the setting up of a panel.[84] So, in this particular case, it cannot be said that China deliberately risked confrontation with the US because of its fear of imports diverted from the US market. Instead the Chinese action was more of a routine involvement in a coalition's activities. This is not to deny China's economic interest in taking action, nor to deny whatever frustration it might have felt at the US unwillingness to negotiate. However, to understand China's intentions one needs to look to the whole of the political and institutional situation in which China found itself.

♣ The Clarity of the US Illegality: In practice, closely tied to the certainty that negotiation with the US was impossible, was the certainty that they were illegal – indeed, the near certainty that the US itself was merely exploiting the DSM procedure to give its industry a breathing space. In this case a country could not obtain relief from the protectionist measures without bringing a legal action. There was really virtually no element of choice in the decision.

Article XIX of GATT and the WTO Agreement on Safeguards have raised lots of concern over their conceptual and operational problems. The WTO is very strict with members' practice in imposing safeguard measures. As a Chicago University law professor Sykes puts it, "Every safeguards measure that has been challenged has been ruled to be a violation of WTO law, and there is no end in sight to this string of adverse rulings".[85] So against this background, China knew it had a great chance of winning the case if China submitted it to the WTO. A Chinese trade expert Yang Jijian stated"...China will win the case, it's just a matter of time".[86] In other words, the problems of "losing face" did not exist in this particular case. Indeed, if China had not participated in the legal action with the other seven plaintiffs, it might have appeared as an over timid "free rider", eventually benefiting from battles fought

[84] WT/DS252, 10/11/03, pp.1-4
[85] See Alan O.Sykes, "The Safeguards Mess: A Critique of WTO Jurisprudence", The Chicago John M. Olin Law & Economics Working Paper No.187.
[86] See Yang Jinrui, 07/06/2002, 'Expert: China Shall Win the Steel Dispute with the U.S. Sooner or Later', http://past.people.com.cn/GB/jinji/31/181/20020607/747044.html, visited on 09/08/2002.

on its behalf by others. In itself this last argument is fairly speculative, but it is clear enough that China was joining a much larger side in the case, with an almost certainty of winning.

♣ Chinese Participation in a Collective Action could be a Learning Exercise: As the Chinese Ambassador to Geneva Sun Zhenyu put it, "This is China's first WTO case. It shows China starts participating in management of WTO affairs. We can learn a lot of practical knowledge about the WTO through this case. It's not enough to learn the rules only from books; we must learn the rules from the practice".[87] Hence, most importantly, China could learn from the strategies and detailed measures adopted by the US and the EU to take advantage of the WTO DSM and protect its national interests in international trade. The fact that there were seven other countries that filed complaints against the US before the WTO meant China was not running a great diplomatic risk in joining such a large company of complainants. In a way, China was following the behaviour of others.

Primary research interview evidence taken from Chinese trade officials in Beijing and Geneva, they also confirmed the importance of the collective aspect of the action. I asked the Trade Officials why did China bring the steel case to the WTO. They said firstly this case had a very significant symbolic meaning for China. We gained great experience from this. Also there were seven other complainants; to some extent China was just following the others and the rules.[88] Of the three Chinese WTO Panel experts,[89] Professor Zhu Lanye also stated: "In terms of the Steel Case, the Chinese mainly followed the other complainants, making parallel arguments. China drafted a document almost the same as the others and just listened for the experience".[90] This can easily be seen to be the case by looking at the parties' arguments in the AB stage. China's arguments ran along the same times.[91] The one exceptional point to

[87] There are few first hand accounts of the backroom scenes in the Chinese delegation in the preparation of the WTO Steel Case at the level of the first Panel. See Li Jingbing,' China's first case in the WTO-US 201 Steel Safeguards measures, notes on the first substantive meeting', March 11, 2003. Also see Yang Guohua, 2005, A Study On WTO Dispute Settlement Mechanism and China, China Commerce and Trade Press; Ji Wenhua and Jiang Liyong, 2005, WTO Dispute Settlement Rules and China's Practices, Peking University Press.

[88] Author's interviews with trade officials (Rong Min and Liu Gang) in Geneva and Beijing, June and September 2003.

[89] See further about these in chapter 4.

[90] Zhu Lanye's interview with Gao Yanping and Ji Ming, in Liao Wang Weekly, http://cn.globaltexnet.com/data/info/2005/06-14/001001-49673.html

[91] WT/DS252/AB/R, page 22 et seq.

which one will come later is the issue of China's status as a developing country under WTO law.

There is clear evidence, which the Chinese do not try to hide, that China needs learning experiences, and that it lacks the capacity to engage alone in legal proceedings, for instance in cases where the legal issues are uncertain. The felt lack of knowledge about WTO dispute settlement within the Chinese delegation, involved in the steel case, was shown by the fact that they purchased seven copies of a 310 Swiss franc, 935 page book on WTO Litigation in Geneva at the beginning of the case. Even the shop assistant was quite surprised at selling this expensive book in so many copies in one go to the same people.[92] This account shows the Chinese delegates are still in the learning stage eager to learn knowledge about WTO Dispute settlement. This account is consistent with one of the important reasons why China brought this case—precious learning experience.[93]

From the composition of the members of the delegation, one can see that China still mainly relies on foreign lawyers, primarily because of issues of language and experience. This can be seen from the Lawyer Li Jingbing's memorial note and two books of the trade official Yang Guohua and Jiang Liyong who were actually involved in this procedure. Li commented in his note, "Although the WTO stresses the non-discrimination principle, because it only adopts three official working languages, objectively that is a hurdle for the other countries whose native languages are not these three working languages...the American lawyers who have the language advantage are very active at the stage of WTO dispute settlement ".[94] Here is a very interesting cultural phenomenon requiring specific attention.

The Chinese lawyer, Li Jingbing, noticed Japan and Korea kept their four American lawyers in the cafeteria at Geneva and did not allow them to speak in the hearings. He thought it was a

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[92] *loc.cit.*

[93] The Chinese delegation consisted of thirteen people: seven of them are trade officials from the Ministry of Commerce, two people from the Chinese delegation in Geneva, one person from the State economic and trade committee, one person from the China Chamber of Commerce of Metal Minerals & Chemicals Importers & Exporters (CCCMC), one person from the Steel association, and the author of this article, the only Chinese lawyer, Li Jingbing, who was a member of the delegation. Finally there were also two French lawyers, Oliver Prost and Erwan Berthelot from the French Law Firm, Gide Loyrette Nouel.

[94] *loc.cit.*

litigating strategy to keep them out (the four American lawyers who were paid $450/hour were just doing word games in the cafeteria), but then in the end, he could see this was not a strategy but an interesting phenomenon to understand. So he had an interesting conversation with the Chief of the Chinese delegation Zhang Yuqing. And Zhang's answers are very revealing of cultural psychology.[95]

> L: Why do Japan and Korea not let their lawyers go to the hearing?
>
> Z: This is an issue of image.
>
> L: What image issue?
>
> Z: First, one has to understand the Eastern culture. Geographically they are small countries, but psychologically they are big countries. Hence if one regards oneself as a big country, it is uncomfortable emotionally to ask American lawyers to defend oneself in litigation with America.
>
> L: Then why do they still employ them?
>
> Z: Their own Japanese and Korean lawyers are all present in the hearing. Their English is very good. However, they still lack experience of the WTO litigation. Originally the WTO was an American idea. So they have more strength in the WTO litigation. So one has to employ them. As East Asians, they still think they lose face if Americans speak for the Japanese or Korean government. That is why the American lawyers can only be consultants behind the scenes.

In Beijing, I asked Chinese trade official, Liu Gang, what he thought of this conversation. He said:

> I understand the fact that Japan and Korea kept their American hired lawyers in the Cafeteria for the sake of face. They did not want to be represented by foreigners, but they were not sufficiently expert in WTO law. So they kept their American advisers near at hand. Compared to China, Japan and Korea have already had many years of WTO dispute settlement experience, and yet they still rely on foreign resource. Sometimes even the rules are fair, but because of unequal capacity, so the operation is unfair. China hired European lawyers in this

[95] *loc.cit.*

case ".[96]

From the above accounts, one can see the negotiating language and style are closely related. It is also interesting that Li Jingbing's account is that the Chinese delegation regarded the Steel proceedings as a debate mainly between the US and the EU.

Indeed, China's response to the Steel case can be gleaned from Ambassador's Sun Zhenyu's statement,

> In Geneva no one is an ally forever. The official consultation does not usually solve the problem. Instead it is often solved through the informal consultation. Holding a formal meeting is sometimes merely to satisfy a formality. The China delegation certainly must pay attention to maintaining our national interest when we attend the public hearing, both adhering to principle and being subtle. There are important similarities and differences in the negotiation process between the domestic and the international.[97]

So what are the implications of this case for China's attitude to methods of inter-governmental trade dispute settlement? The last reflection of the Chinese delegation before leaving the WTO DSM in the Steel case, was that the system was very effective, because it was flexible and democratic in its exchange of views. The EU and the US frequently used the system to solve disputes. China was a big country and a new member, which should use the WTO DSM to solve trade disputes, cleverly stating its position and using it to protect its interests.[98] Yet a point for reflection and research is that it did not do so, except as a third party. I also asked two Chinese academics what did they think of the impact of the WTO resolution of the Steel Dispute on China. They thought that:

> Our China's steel industry is primarily for domestic consumption and so the impact on the steel industry was limited. But this dispute could have social significance. It is our first case in the WTO. In terms of the US there were primarily political factors behind its action. I also asked if in future China would adopt trade remedy measures frequently. They said they did not think so, because China is still in the learning stage.[99]

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[96] Interview with Chinese Trade Officer Liu Gang in Beijing, September 2003.
[97] *loc.cit.*
[98] Yang Guohua, supra note 87, p.200.
[99] Author's interviews with Li Yihu and Edward Shao in Beijing, September 2003.

Far from calling the Chinese participation in the steel case an "aggressive legalism", one should conclude China was still very cautious in using the WTO dispute settlement mechanism. Until now it did not bring another case. Actually the steel case is still the only case that China brought to the WTO during its first four years of membership. None of the case study evidence contradicts the thesis that China is reluctant to litigate. It appears that the exceptional conduct of China in not bringing cases itself into the DSM continues to show that reasons have to be found which have to do primarily with China's identity, what Ruggie and Wendt call, the social fact of China, its collective intentionality. The way the US brought the case, the carelessness of its arguments before the WTO, the equally pragmatic way the WTO resolved the case, probably responding only to pressure of a diplomatic nature from many countries hostile to the US, all go to show that politics plays a large role in WTO dispute settlement. This indicates exactly the political nature of the WTO framework confronting China. Given the clear social fact of China's historical and cultural reluctance to engage in international litigation, and given that its trading objectives and trade needs do not clearly contradict its culture and history by dictating a contrary imperative, it is not surprising that, till now, the steel case is the exception that proves the rule. It would not be in the spirit of a non-confrontational diplomacy for China to declare opposition to the DSM, which it openly accepted when it joined the WTO. Its vast participation in the third party option in panel proceedings shows that it recognizes the existence of the DSM as a compulsory element that it has to take into account. It is being more often threatened with the role of defendant in the system. Nonetheless, it is the absence of a Chinese history of litigation, which is to be explained out of other aspects of Chinese WTO and other practice. The history of the textile disputes, which follows in the next chapter, is more revealing of Chinese attitudes to serious trading differences with major powers.

Chapter Six In the Shadow of WTO: The Textile Disputes Between China, the U.S. and the EU

Introduction

In the previous chapter, I assessed how China has engaged with the WTO dispute settlement, i.e. where the approach China adopted was to go for a legal settlement of the dispute. In this chapter I am going to consider the choice of a purely political settlement of a dispute. I will address the international and domestic structural constraints which are operating to restrict and shape China's decision-making process and then I will go on to assess, as far as possible, the elements which went into China's decision making process, and, where relevant, the decision-making process of the EU and the US. The theoretical framework has been set out primarily in chapters one and three and reference will only be made back to them, without re-elaborating this theory again here. The aim of this chapter is to use the theoretical framework of analysis to see how it can help us to understand why China acted as it did. At the same time it has to be recognized that the textile industry is so important to all the parties that it can allow some wider conclusions to be drawn.

The Material Constraints on China

It was inevitable that China was going to come into conflict with the US and the EU over textiles and that China would have no choice but to put up as strong a resistance as possible to the protectionist measures it faced. The economic, i.e. material interest of China, as of the EU and US was simply too large for any of them to be able to avoid a conflict. China became the world's biggest textile producing and exporting country since 1994. From 1986 to 1995 it was China's number one export industry.[1] At the same time, the textile industry in China is still a labour-intensive industry. It employs 19 million people who are mostly very poor and this number could

[1] See 2003 China's Industrial Development Report (Zhong Guo Gong Ye Fa Zhan Bao Gao), published by the Chinese Academy of Social Science, 2003, p.154.

be even bigger if textile-related industries are factored in.[2] Because of this scale of the industry, the Chinese government could not afford to overlook the consequences of serious EU and US textile restrictions. Avoidance of conflict was, indeed, not an option for any of the parties.

According to the WTO international trade statistics, the international textile and clothing trade is dominated by a small number of economies, i.e., the EU, China, Hong Kong, the US, South Korea, Mexico, India, Turkey, etc. (see Tables 6.1& 6.2).

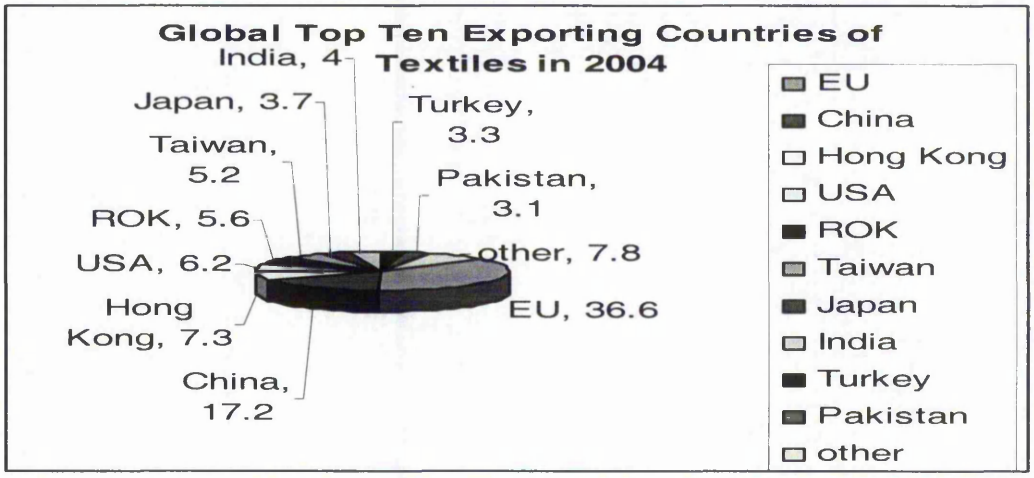
Table 6.1 Global Top Ten Exporting Countries of Textile Products in 2004 (US$ billion)

Rank	Country & Region	Export value	Share of global exports of textiles (%) 2004
1	EU	71.29	36.6
2	China	33.43	17.2
3	Hong Kong	14.30	0.4*
4	USA	11.99	6.2
5	ROK	10.84	5.6
6	Taiwan	10.04	5.2
7	Japan	7.14	3.7
8	India	6.85	4
9	Turkey	6.43	3.3
10	Pakistan	6.12	3.1
Total		164.8	85.3

*Source: WTO International Trade Statistics 2005; * Hong Kong's re-exports are excluded from the world aggregates, only Hong Kong's domestic exports $0.68billion are included in the totals. See the technical notes of WTO International Trade Statistics 2005*

[2] See Chinese Commerce Minster Bo Xilai at the Press Conference hosted by the Chinese State Council. Information

Figure 6.1 Global Top Ten Exporting Countries of Textile Products in 2004 (US$ billion)



Source: WTO International Trade Statistics 2005

The top ten exporting countries and regions in the world accounted for 85.3% of the global export value of textile products in 2004. The global market share of Chinese textile products increased from 4.6% in 1980 to 17.2% in 2004. The top ten exporting countries and regions in the world accounted for 73.4% of the global export value of clothing products in 2004. And the global market share of Chinese clothing products increased from 4.0% in 1980 to 24% in 2004. In terms of revealed comparative advantage indices, the clothing industry had a much stronger comparative advantage than the textile industry in China in 2004.[3] This is partly due to the massive relocation of export-oriented clothing firms from Hong Kong to southern China since the 1980s to take advantage of the much lower factor costs.

One can see quite clearly from the figures above that China, the EU and the US are the three main players in world textile trade, and that China's position in that triangle is changing dramatically all the time. Also Korea, Taiwan, Turkey and Pakistan are bound to feel threatened by China's rapid rise. China's textile and clothing industry are not only the key traditional

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Office in 30 May, 2005. http://boxilai.mofcom.gov.cn/column/print.shtml?/speeches/200505/2...,visited 09/08/2005.

[3] The revealed comparative advantage index is the value of net exports as a percentage of gross exports plus imports. The closer the index is to positive 1.0, the more competitive the industry in the global economy, and vice versa, ceteris paribus.

industrial pillar but also one of the country's main foreign exchange earning industries.

What is maybe even more significant in indicating the strength of China's "rapid rise" is since the 1990s, the textile and clothing industry have been thoroughly reorganized. In terms of industrial structure, there are four forms of enterprises: state-owned enterprises (SOEs), foreign-funded firms in the form of Sanzi Qiye[4], collective enterprises[5] and private enterprises. In terms of trade, general trade accounts for a majority (67.67%) of the total export of textile and clothing. Processing trade accounts for 29%.[6]

Table 6.2 China's Textile and Clothing Exports to the EU and the US, 2004

Enterprises	Export Value EU	Export value US	The same ratio 04/03 EU	The same ratio 04/03 US	% of total trade EU	% of total trade US
SOEs	5.73	4.60	-3.09	2.85	49.0	42.1
Sanzi Qiye	2.57	3.81	19.75	29	22.0	34.9
Collective Enterprises	1.20	0.99	12.66	9.41	10.3	9.0
Private Enterprises	2.18	1.53	57.65	100.09	18.7	14.0
Total	11.68	10.93	11.17	20.16	100	100

Source: Chinese Custom and China Chamber of Commerce for Import & Export of Textile 2004/2005 Report

All of this dynamism bears directly on the EU and the US. China's textile and clothing exports to

[4] Sanzi Qiye Incorporats three forms of enterprises: equity joint ventures, contractual joint ventures and wholly foreign-owned ventures.
[5] Township and village enterprises.

the EU and the US show that the EU and the US have been two of China's top five textile and clothing export markets. (See Table 6.3 below)

Figure 6.2 China's Textile and Clothing Exports to the EU and the US, 2004

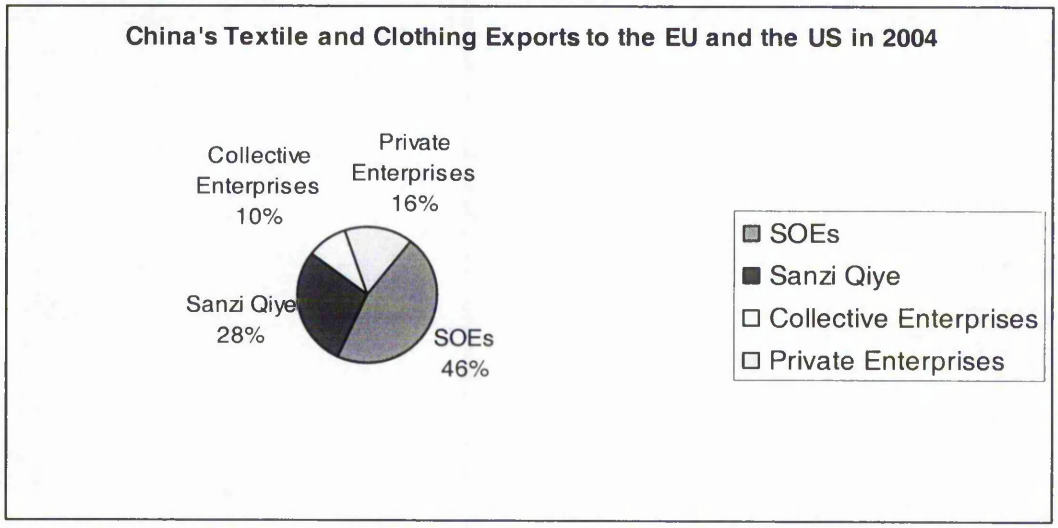


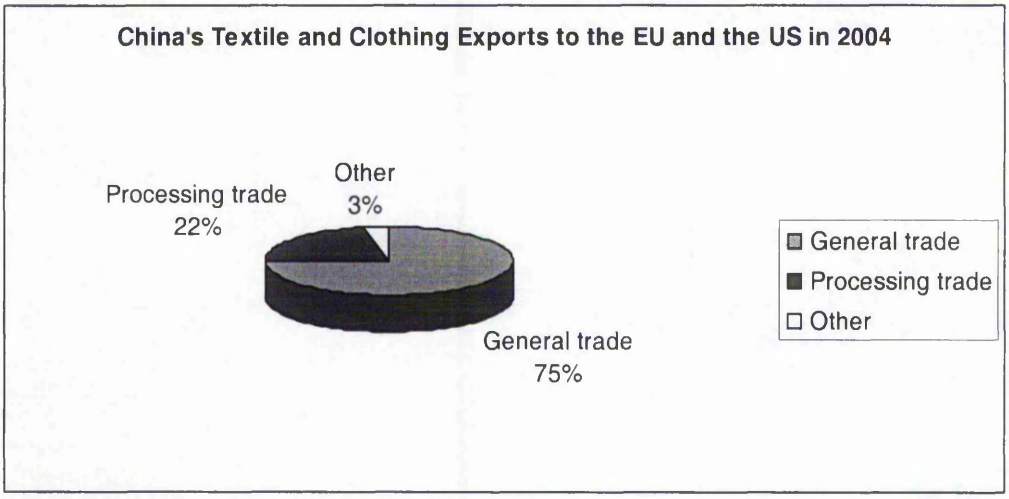
Table 6.3 China's Textile and Clothing Exports to the EU and the US, 2004

Trade Term	Export Value EU	Export Value US	Same Ratio04/03 EU	Same Ratio04/03 US
General Trade	9.66	7.72	9.56	23.17
Processing Trade	1.95	3.10	18.77	12.47
Other	0.67	0.11	48.16	7.68
Total	11.68	10.93	11.17	20.16

Source: *Chinese Custom and China Chamber of Commerce for Import & Export of Textile 2004/2005 Report*

[6] See '2004/2005 China-US, China-EU Textile and Clothing Trade Report', China Chamber of Commerce for Import & Export of Textile, 2005/07.

Figure 6.3 China's Textile and Clothing Exports to the EU and the US, 2004



Source: *Chinese Custom and China Chamber of Commerce for Import & Export of Textile 2004/2005 Report*

One can see from the above analysis that the "battle for textiles and clothing" has still huge significance for the shape of the industry globally. The dynamic of Chinese expansion has huge implications especially for the EU and the US but also for lesser textile and clothing producers, developing countries such as Turkey, Pakistan. What is at issue is not just shares of global export trade but also the struggle for developed country domestic markets. The global situation is in a state of radical movement and as such a cause of much anxiety. Textile disputes have been an old and traditional form of dispute in China's international trade relations. They were resolved either through bilateral negotiation or in national courts before China joined the WTO in 2001.

It is clear from these tables that almost half of this Chinese trade is coming from state owned enterprises, and that both the elements of domestic employment and of value added that can be transferred to other sectors of the economy make the development of this industry strategically very weighty for China. At the same time the significance of the Chinese textile exports to the EU, and particularly the US is so great that a strategic response from both countries is to be expected.

The potential for conflict was seriously accentuated by the fact that the fifty-year-old global quota system that regulated textile trade was phased out and finally terminated on 1st January 2005. First, thousands of suppliers switched their operations to China because of cheaper labour and manufacturing costs. As a result, there was a huge increase in exports from China to the rest of the world, especially the EU and the US. Since the beginning of 2005 there have been very large surges of Chinese textiles exports to both US and the EU countries, well above the 7.5% annual increase allowed under the Protocol of Accession that China signed.[7] This brings one to the second equally constraining factor.

Ideational and Institutional Constraints on China

(a) China's WTO Accession Agreement on Textiles

If gradually evolving trade patterns were making conflict inevitable, at the same time, these conflicts were anticipated and China had been required to sign an agreement, which had a hugely determining effect on the outcome of the dispute. In other words, in spite of the scale and the gravity of the dispute, the constraining effect of this ideational structure greatly restricted the options open to China in seeking to resolve the dispute. Para 242 of the Working Party Report on China's Accession to the WTO provided

> In the event that a WTO member believed that imports of Chinese origin textiles and apparel products...were due to market disruption, threatening to impede the orderly development of trade in these products, such Member could request consultations with China with a view to easing or avoiding such market disruption.[8]

The effect of making such a request was that China had agreed at once to limit growth in relevant Chinese imports to 7.5 percent above the level imported during the first 12 months of the previous 14-month period. There is a 90 days consultation period and detailed reasons are supposed to be given, but they do not affect the outcome, unless the importing state wishes. The term of any quota begins on the date of the request for consultations with China and ends on

[7] See Paragraph 242 of the Working Party Report on China's Accession to the WTO.

December 31 of the same year. When 3 or fewer months remain in the year at the time of the request for consultations, the quota ends 12 months after the request date.[9] Admittedly, no quota is supposed to outlast a year without reapplication, unless the member and China agree otherwise and the China textile safeguard can only be applied through the end of 2008. Thus, under China's existing WTO legal commitments, it has been possible for the EU and the US to argue that huge surges in textile exports to them cause market disruption and that therefore they are entitled to restrict them.

Nonetheless, while the categorical nature of unsatisfactory legal rules is inevitably going to push China to look to political means of resolving its textile disputes, it is worth noting there is a minimum level of flexibility in the rules which provides a little help to China in pressing for a modification of their apparently clear rigor. So their ambiguous language and the discriminatory nature of the textile safeguard rules make the disputes that will arise under the mechanism very controversial, and thereby leaves space for the interplay between politics and law. This is because the textile safeguard has lots to explain in terms of operation. It is unclear in nature. As the US Government Accountability Office (GAO) Report to Congressional Committees pointed out: "The relevant language in China's WTO accession agreement neither defines 'market disruption' nor 'orderly development of trade' nor establishes any criteria for making determinations on these matters".[10] Thus, "[b]ecause of the many ambiguous parts of Para. 242, some members can impose restrictions according to their own understanding of the rules. Moreover, the 'sheep effect' of behaviour results in the imitation of other members. Thus, it's necessary to adopt both legal and diplomatic methods of resolving disputes".[11]

So one could expect objections from China in being bound to these rules. One of the big benefits Chinese expected from the WTO membership was the free trade in the textile area. As the Minster of Commerce Bo Xilai puts it,

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[8] *loc.cit.*
[9] *loc.cit.*
[10] United States Government Accountability Office, Report to Congressional Committees, U.S.-China Trade: Textile Safeguard Procedures Should Be Improved, GAO-05-296, April 2005, p.12.
[11] Ji Wenhua and Jiang Liyong, *WTO Dispute Settlement Rules and China's Practice*, Peking University Press, 2005, Beijing, p.302.

> China is justifiably entitled to its right from the textile trade integration. It took China 15 years to negotiate its way into the WTO. China's accession to the WTO was a result of balanced rights and obligations. Textile trade is a rightful claim of China. It is a taking in return for our giving in other areas of market opening and is thus balanced. Chinese companies are therefore entitled to the benefits of the integration.[12]

However, after the ending of the global quota restriction in January 2005, the Chinese textile industry found itself in a dilemma situation, not as sweet as they thought it should be. Nonetheless, at the end of the dispute with the US in November 2005, Minister Bo Xilai argued that while China had expected there to be integration of textiles trade worldwide after the end of the textile quotas on January 1, 2005, he accepted that China agreed by article 242 of the Accession Protocol to an annual 7.5% limit to annual increases to its textile exports and China accepted that it is bound by its word. The dilemma of China in this situation is very intense because on the one hand the economic pressure towards greater trade is very strong and, on the other hand the institutional constraints are very severe.

The latter are so severe that despite the words of the Minister of Commerce just quoted, the Chinese do try throughout the dispute, to introduce considerations of equity and politics to assuage the rules. Indeed, one will find that as the parties move to negotiations, the very fact that there are any at all — since the EU and the US consider themselves within their rights, a huge weight of ideational factors come into play as China resolutely takes the diplomatic course to resolve the dispute. Many attempts are made by all sides to characterise the other negotiating party very much in terms of ideational, or ideological perception. The social constructivist is right to observe here the challenging of the identity of the parties in their relations with one another. At the same time the CS (WTO law) is so clear that each tries to shake the SC (socio-cultural power configurations) by strategies to delegitimize the other. There is even an attempt to split the logic of the CS by arguing that there is an insufferable contradiction between the WTO rules themselves and the principles that China has had to agree to in the Protocol of Accession.

[12] Also see MOFCOM Spokesman Talking about Textile, 26/05/2005, Network Center of MOFCOM. See also the accounts from senior economist Yongzheng Yang in the International Monetary Fund, "If it is not a member of the WTO, China may face increasingly discriminatory measures against its exports. China will be forced to rely entirely on bilateral efforts to deal with such trade restrictions so long it is not a WTO member", in 'China's textile and clothing exports: changing international comparative advantage and its policy implications', 1999, Asia Pacific Press

(b) The Role of Chinese Textile Chambers in the Textile Disputes

The dilemma and the changing role of chambers of commerce can be seen in reflections within China on the course and outcome of the textile disputes between China, the US and the EU. It is a good context in which to study the role of official chambers in the dispute resolution in the context of China's membership of the WTO, to assess how their deficiencies hamper Chinese trade negotiating capacity.

The reaction from China to the restrictive textile measures was quite strong. The textile enterprises wanted the government to adopt tough action against the US and the EU. They wanted an effective representative role like the role Industry Associations have played in Europe and America, passing on their voice to the government. Meanwhile, the government wanted the textile enterprises to stop the vicious competition that was bringing China into conflict with its trading partners (lowering prices as far as necessary in order to get into the European and American market before restrictive measures came into effect).[13] So all the attention came to focus on one question, "Where are the Textile Chambers?"

So the enterprises in China and Chinese trade experts now call for enhancing the strength of the chambers. In fact the Chinese textile chambers have already called on the enterprises to enhance self-discipline about vicious competition practices, but how strong is their voice? The Vice Chair of the official Textile Chambers Cao Xinyu said to the press: "We have called on the companies to exercise self-discipline, but no company listens. The voice of the Chambers is too weak".[14] The Vice Chair of China Textile Industry Association Gao Yong criticized the enterprises' lack of discipline saying that it resulted in the whole textile industry suffering, i.e. the price undercutting making the whole industry vulnerable to anti-dumping. Also he argued that textile enterprise behavior made Chinese Government and Chinese Textile Chambers efforts to negotiate

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at the Australian National University.

[13] Yao Zhide, 'The Globe watching the Escalation of the Textile Disputes Between China, the EU and the US', available at: http://72.14.207.104/search?q=cache:lxxATs5aYiAJ:finance.news.tom.com/1638/20050531-241410.html+%E5%A7%9A%E5%BF%97%E5%BE%B7+,+%E7%BA%BA%E7%BB%87%E5%93%81&hl=zh-CN&gl=cn&ct=clnk&cd=15, visited on 16/06/2005.

[14] See Chinese Commercial Weekly, 20/07/2005.

with the West more difficult. Meanwhile textile enterprises complain about the Chambers, e.g. Beijing Tongniu Import & Export company Yu Housheng complained to the press that the official Textile Chambers did not do enough to inform the textile enterprises about the special textile protocol China had signed, and so the industry was not informed about rules about special safeguard measures.[15] This was the reason most companies had no idea how serious the international trade situation in textiles had become. Beijing Clothing Import & Export Company's Chief Executive Officer (CEO) Gao Peikun confirmed they learned of the special textile protocol from the website of the USTR (with respect to Para.242 of the WTO China Accession Protocol). Other medium and small enterprises just learned about the textile limits imposed by the WTO after the dispute happened. Chinese Commercial Weekly journalists tried to interview Textile Chambers people to follow up this point, but were refused an interview on this case.[16] So, the suspicion exists that there was no effective internal organization of the textile industry in this case.

Meanwhile the Textile Chambers feels a sense of grievance because they think they are very active in passing on industry voices to the Government, but the degree of recognition of their work is not high. However, in my own interview of a CEO of a Shandong textile company he said: "The chamber is an offshoot working for the Ministry of Commerce. Yet the Ministry of Commerce will not give them power to do what it asks of them. So an official Chambers is like a state enterprise in a planned economy".[17] The fundamental question about Chambers is whether they really represent enterprises.

"There are 70,000 textile and clothing enterprises in China, of which only 2% of clothing companies and 20% of spinning mills are state-owned or state-controlled".[18] Yet they are covered by an official chamber framework, which does not really represent them. This is the central problem. The private chambers in this area are small and too scattered throughout China. Thus

[15] *loc.cit.*
[16] *loc.cit.*
[17] Author's telephone interview with Liu Xuequn, CEO of Shangdon Qunli Textile Ltd., on 16/11/2005.
[18] 'Chinese Textile, Clothing Sector Forms Business Association', available at: http://english.people.com.cn/200211/19/print20021119_107039.html, visited on 21/04/2004. Also see *The Development of Private Enterprise in People's Republic of China*, Asian Development Bank, 2003, prepared by Centennial Group Holdings, especially Sections 4 and 5.

given the context of increasing intensity of Chinese trading relations with other countries and the pressing need for an effective contribution of Chinese industry itself to the Chinese trade policy decision-making, this requires independent Chinese Chambers that are legitimate and accountable, independent of government and representative of their members.

US—China Textile Dispute: A Case of Tough US Trade Diplomacy

Under the pressure of the domestic interest groups, the US adopted restrictive practices against Chinese textile products. With the end of the Textile Arrangement that made quotas possible in 2004 there had been a huge surge throughout the world in China's exports of textiles. The US response was expressed largely through apparently legal considerations. The US expected this surge and as part of the Accession Protocol, it has the right to limit the expansion of Chinese exports (their increase) to 7.5% p.a. until the end of 2008. American producers have the right to call on the Department of Commerce to impose the appropriate quotas to achieve this goal and the President has specifically delegated this role to a Committee on the Implementation of the Textile Agreement. A typical decision in August 2004 to impose this 7.5% quota on the imports of Chinese origin cotton and man made fibre brassieres and other body support garments (Cat 349/649) and other synthetic filament fabric (Cat 620), is simply in accordance with the terms of the Para 242 of the Accession Agreement. The US exercises its legal right to insist unilaterally that there exists market disruption coming from China, threatening to impede the orderly development of trade in these products. The Committee points, for instance, to a 35% increase in the former category.[19] This is typical of the style of the US negotiating stance. These unilateral acts continue as a supposedly background pressure to China to make it break down in its demands for immediate liberalisation of trade in textiles (more are scheduled for November and December) The *Washington Post* of 31 May, 2005 reports that, not surprisingly negotiations, conducted at a fairly low diplomatic level, have already broken down five times and the Americans are reporting the Chinese to be intransigent. China is, in turn, accusing the US of violating the spirit of free trade: "Officials in Beijing maintain that China is simply using its advantages — an abundance of cheap labour and natural resources — to produce high quality

[19] See Committee for the Implementation of Textile Agreements (CITA) Announces China Safeguard Decisions, available at: www.ita.doc.gov/media/PressReleases/0905/cita_090105.html, visited on 16/10/2005.

goods at a lower price".

There was now in place an institutionalised framework for ongoing questions of US China trade. The US-China Joint Commission on Commerce and Trade (JCCT) is an annual inter-governmental forum for on going and not just crisis management purposes. It should actively promote the US-China commercial relationship. However, the US gives the forum a practical focus; a stance with which China is equally sympathetic. One might describe it as crisis prevention rather than crisis management, both resolving problems and improving trade opportunities. "We value the open, productive, problem-solving approach China has taken at the 2004 and 2005 JCCT meetings, and hope that the JCCT will continue to function as a meaningful forum for the resolution of trade frictions."[20] Still, the presuppositions of the US in this conflict were less diplomatic and more critical. They eventually called for much higher official level intervention in a much more intense way.

There is no clearer illustration of the power of social constructivism to explain the course of a dispute than the way the US regards the nature of its economic relations with China and the extent to which it allows this to influence its negotiating strategy towards China, to which, in turn China has to respond, i.e. China's policy is reactive to how the US defines its relationship with it. This is almost severe enough to unravel the consensus about the relationship between the economic and the political, which has underlain behaviouralism and pragmatism in the US since 1945. It will be suggested that the US ideational reconstruction of economic facts is probably more important than its insistence upon its legal rights. The legal instrument of Para 242 of the Protocol is merely an instrument appropriate for what the US tends to regard as more a strategic opportunity, which the US does not have in many other difficult trading situations that it faces with China.

Firstly let us consider the present character of US China economic relations, and then go on to look at the *construction* the US puts on these, which it brings together with its *style of confrontational negotiation* to produce the diplomatic situation, which China has to face.

The China and US trade relationship is one of the most important bilateral relationships for these two countries. Trade relations are the foundation of bilateral ties of these two nations. When the US and China started to have renewed cooperative contact with each other in 1972, there was hardly any trade.[21] When China and the US established diplomatic relations, a bilateral trade agreement was signed in July 1979. Indeed since 1979 the China-US trade rose rapidly. Bilateral ties have centred on this rapidly growing economic interaction, and the interdependence of these two economies has grown rapidly in the past decade. Both sides attach great importance to the trade issues. The trade relation is called "one of the few bright spots" in the unstable (up and down) US-China relationship.[22] However, this bilateral trade relationship is not always smooth. It involves very complicated ideological, political and economic factors. As the *People's Daily* puts it: "The economic and trade ties between China and US are the most complicated economic and trade ties that the world has ever seen in the recent 30 years".[23] It has also led to new strains on the overall China-US relationship and to a challenging economic agenda for China-US co-operation.

So far, China and the US have signed 14 bilateral trade agreements. Indeed, the economic ties between the two nations have expanded substantially over the past several years. The US is now the second largest trading partner to China and the largest export market (see Graph 6.4). Currently, the United States purchases 21.3% of China's exports. Total trade between the two countries rose from US$116.28 billion in 2000 to US$285 billion in 2005 (see Graph 6.5), making China the third largest U.S. trading partner: "America's exports to China increased by an impressive 20% in 2005, building on 22% growth in 2004 and making China our fastest growing export market among our major trading partners".[24] According to the Assistant USTR, Timothy Stratford, China and the US together "have accounted for roughly half of the economic growth

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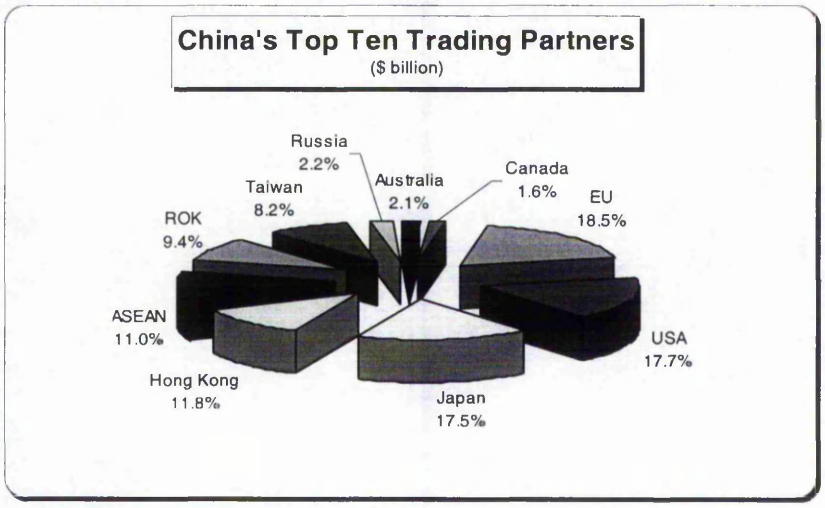
[20] Testimony of Assistant USTR Timothy Stratford before the U.S.-China Economic and Security Review Commission, 4 April 2006, p.6.
[21] At the time the Shanghai Communiqué was issued in 1972, trade between China and the US was virtually zero.
[22] Author's interview in Washington with USTR officer Neureiter, 23 November, 2004.
[23] 'China-US Textile Trade: A Win-Win Game', available at: http://www.sme.gov.cn/web/assembly/action/browsePage.do;jsessionid=7999BEFD7C533F95E66D348FCB5FCC94?channelID=1085219651120&contentID=1131064630651, visited on 11/11/2005.

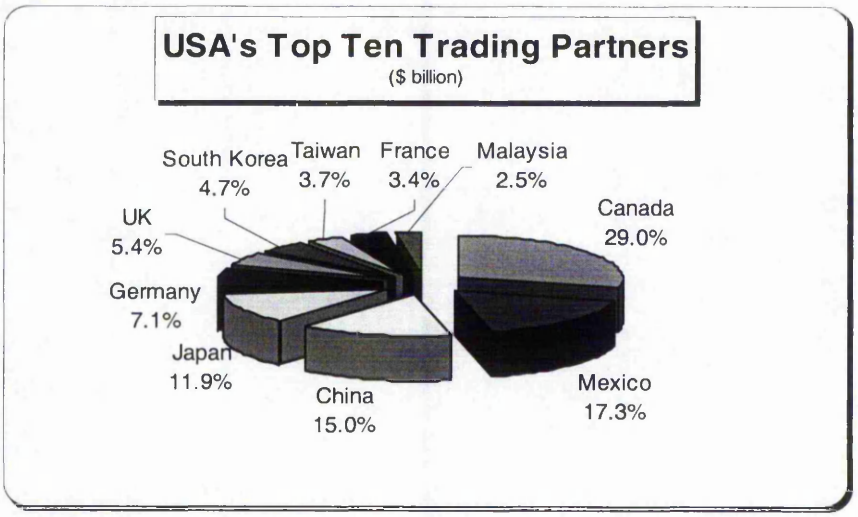
globally in the past four years. Market forces continue to drive broader and deeper economic ties between our two countries".[25]

Figure 6.4 China's Top Ten Trading Partners 2005 (USS billion)



Source: China's Customs Statistics, 2005

Figure 6.5 USA's Top Ten Trading Partners 2005 (US$ billion)



Source: US Bureau of the Census, US Department of Commerce & US International Trade Commission

[24] *U.S.-China Trade Relations: Entering a New Phase of Greater Accountability and Enforcement, Top-to-Bottom Review*, February 2006, United States Trade Representative, p.3.

[25] Testimony of Assistant USTR Timothy Stratford before the U.S.-China Economic and Security Review Commission, 4 April 2006, p.2.

The basic controversial feature of US China trade is that China enjoys a very large trade surplus with the US, over US$201 billion in 2005. The February 2006 Top-to-Bottom Review on U.S.-China Trade Relations stated: "A large and growing trade deficit with China remains a significant concern".[26] The review further explained:

> We recognize that the imbalance is not solely a function of trade policy. The relative growth of imports and exports—and thus the trade imbalance—are affected by macroeconomic factors outside of trade. In particular, economists note that differences between the U.S. and our trading partners in national economic growth rates and patterns of saving, investment and consumption are primary reasons U.S. imports exceed exports. Nevertheless, United States and Chinese trade policies can positively affect the trade imbalance to the extent it arises from closed markets or unfair trade practices.[27]

Since 2000 the US has granted China Permanent Normal Trade Relations status (PNTR). Now very large ranges of products consumed in the US are made in China, including televisions, computer monitors, other electrical equipment and more traditional goods such as a whole range of textiles, furniture. The comparative advantage is in low cost labour, but these enterprises are run through investment from mainly US multinational companies in China. The value added through export, marketing, rebranding and distribution goes mainly to the US companies. In addition the absolute value of this type of now relatively low technology intense production is, in absolute terms, a small part of overall US GNP.[28] An additional feature of this trade imbalance is that the overall US trade imbalance has not changed. What has happened is that China has replaced other primarily Asian producers in the US domestic market.[29]

The above analysis is relatively uncontentious and remains at the level of economic analysis. However, from now onwards it becomes more complicated. Ideational factors come into play. These have the inter-subjective character that we have seen in our earlier chapters social constructivists attribute to ideational factors. This means impressions, fears, and subjective

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[26] USTR Top-to-Bottom Review on U.S.-China Trade Relations, *op.cit.*, p.11.
[27] *ibid.*, p.11
[28] See Jialin Zhang, 2000, *US China Trade Issues after the WTO and the PNTR Deal: A Chinese Perspective*, Hoover Inst. Stanford.
[29] *loc.cit.*

feelings are shared and one cannot be exactly sure where they were first located. For instance it is China's view that a US readiness to distort principles of *natural comparative advantage,* i.e. in favour of China, has its roots in the US security concerns.[30] The US is best situated to export the highest state of the art technology, but its security legislation is used to block such sales and to punish US companies that try to engage in it. The zero sum game is that any significant transfer of technology implicit in such sales is seen as capable of being transformed into military uses. These prohibitions affect the whole range of advanced technological exports, the very foundation of comparative advantage between the two countries. For instance, Jialin Zhang argues China no longer needs US wheat, fertilizer, steel and other commodities. But, in turn, the US blocks sales of high-performance computers, machine tools, telecommunications equipment with encryption capability, mobile phone technology, not to mention nuclear power plant equipment. So that while the US is the most advanced country in the world in terms of science and technology, it accounts for only a relatively small share of China's technology imports.[31]

Two further serious bones of contention from the US appear rooted in the belief that China has a state controlled financial and technology strategy to increase Chinese power. Firstly, there is the issue of China's currency exchange rate and the enforcement of Intellectual Property Rights (IPR). China is alleged by US agencies such as the US Congressional Research Service (CRS) to be manipulating its currency by not allowing it to be re-valued against the dollar over the last ten years. A CRS Briefing paper argues that China should make its currency freely convertible. It is not fully so, and China maintains controls over capital transactions.[32] Yet China objects that American thinking on this issue is confused. China argues that during the financial collapse in East Asia in 1997 China was praised for keeping its currency steady and "[i]t is no longer necessary for us to take one-off administrative means to affect the fluctuation of the Renminbi exchange rate either upwards or downwards". [33] The US Government counters, however, that: "While China's exchange rate policy offered stability in the past, times have changed...much

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[30] *loc.cit.*
[31] Ibid, p16.
[32] July 2003 CRS Brief on Issues in US-China Relations, available at: http://fpc.state.gov/documents/organization/23187.pdf, visited on 27/02/2004.
[33] 'Government responds to US criticism', available at: http://english.people.com.cn/200603/22/eng20060322_252554.html, visited on 28/03/2006.

more remains to be done to permit markets to adjust to imbalances".[34] There are no specific WTO rules on this issue and so China can argue that its intention is not to manipulate currency to gain a trade advantage, but to keep it fixed for the sake of economic stability.

IPR has always been a significant problem between China and the US. As Assistant Timothy Stratford testified before the US-China Economic and Security Review Commission in April 2006: "While China has made noticeable improvements to its framework of laws and regulations, the general lack of effective IPR enforcement remains an enormous challenge."[35] He claims too that the US has developed a comprehensive strategy for addressing this issue, including "the possible use of WTO mechanisms".[36]

A significant further factor, which could make for stabilisation of US China's relations, but which could equally frighten the US, is the engagement of Chinese in the US capital markets, especially the government bond markets. China is now the second largest investor in the US Treasury securities. The People's Bank of China — the central bank is the main holder. It has been said: "If for any reason China needs to sell these securities, if not done in an orderly manner, it could significantly affect the market for such securities...could lead to a higher rate of interest and a somewhat lower rate of economic growth for the United States".[37] This form of investment is occurring despite the sinking dollar and is paying for some of the US consumption of Chinese goods.[38]

The US reaction to these economic developments appears to be one of increasing concern. Its approach can be gleaned from a combination of the representations by Congress and, to some extent, a calming effect attempted by the executive Administration, when the President resisted

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[34] U.S. Deputy Secretary of State Robert Zoellick's Policy Address on U.S.-China Relations, 21 September, 2005, 'Whither China: From Membership to Responsibility? Remarks to National Committee on U.S.-China Relations', p.3, available at: http://www.state.gov/s/d/rem/53682.htm, visited on 08/11/2005.
[35] Testimony of Assistant USTR Timothy Stratford before the U.S.-China Economic and Security Review Commission, 4 April 2006, p.4.
[36] Testimony of Assistant USTR Timothy Stratford before the U.S.-China Economic and Security Review Commission, 4 April 2006, p.5.
[37] K. C. Fung, Lawrence Lao and J. Lee, 2004, *United States Direct Investment in China*, The AEI Press, Washington D.C., p.126.
[38] *loc.cit.*

Congressional demands. Congress and Administration are under a lot of the usual pressure from special interest groups within domestic industries, particularly textiles and consumer manufacturing. The 2004 Annual Report to Congress by the US-China Economic and Security Review Commission is fairly alarmist. Far from being motivated by pure concerns of free trade it says that anything that allows China to develop a challenge the US competitiveness in technology is a vital matter for US economic security. This is to deny the very foundations of the post war consensus on taking a behaviouralist and pragmatist view of trade and it marks a return to realist politics. In this case it encourages the use of a legal instrument in a matter relatively unimportant for the US (see below the discussion of its relative importance for China), but in another case it is easy to imagine it leading to the destruction of the WTO. The language transfers US ambitions of permanent military supremacy into permanent economic supremacy, denying the whole foundation of free trade.

The Report goes on to say China is responsible for about 23% of the total US trade in goods deficit. So the US should respond with measures, which tackle the Chinese manipulation of their currency for unfair trade advantage, the systematic hidden Chinese subsidies to industry and the failure of the Chinese labour market to grant adequate protection to workers' rights. China abuses intellectual property rights, uses bogus standards of health and safety etc to protect itself. So there must be a much more vigorous US government effort to ensure WTO compliance by China.

Sinologist Ian Williams considers this as a matter not simply of observing China's growing competitiveness, but of "moving towards fingering China as part of the problem of the US economy".[39] According to this perspective, then, while it shows a realisation of the dire situation of the US economy it also shows a self-centred blaming of the Chinese as sneaky and unfair, instead of accepting responsibility for the US to reform its industry and finance.

Basically, this perspective views the US is the present global economic, military and political hegemon and China as an up and coming hegemonic challenger that will eventually threaten the

[39] Ian Williams, 22 June 2004, US feels the heat of dragons breath, The Asia Times.

global power and influence of the US:[40]

> Many Americans worry that the Chinese dragon will prove to be a fire-breather. There is a cauldron of anxiety about China...Uncertainties about how China will use its power will lead the United States and others as well to hedge relations with China. Many countries hope China will pursue a 'Peaceful Rise', but none will bet their future on it.[41]

The US views its trade dispute in relation to China's textiles in this wider context of its huge (US$201 billion in 2005) trade deficit with China.[42] It feels threatened without having a coherent strategy for responding. As Zoellick stated in a 2005 policy address: "How we deal with China's rising power is a central question in American foreign policy".[43]

Finally, the general direction and tone are provided in the USTR's 'Top-to-Bottom' Review on US trade policy with China. The theme of the review was how the US approached its trade relationship with China. The review concluded that: "U.S.-China trade relations are entering a new phase in which greater accountability on China's part and greater enforcement on the Administration's part are needed."[44] Ambassador USTR Robert Portman further stated in a press conference: "In this new phase of our US-China relationship, the United States will vigorously enforce our rights when we find that a bilateral dialogue is not effective at resolving trade disputes".[45]

For its part, in its reactive response, China uses a mixture of WTO legal and more general ideational arguments to resist quotas. Here there is a fundamental methodological point to make about how China presents its argument which will have to be explored in this chapter. Following the analysis of Deborah Cao,[46] I will seek to demonstrate below that a close analysis of both the

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[40] See The 2004 and 2005 Annual Reports to Congress by the US-China Economic and Security Review Commission, available at: http://www.uscc.gov.
[41] U.S. Deputy Secretary of State Robert Zoellick's Policy Address on U.S.-China Relations, 21 September, 2005, *op.cit.*, p.2.
[42] Wang Hongru, China-US Textile Trade Dispute Wait for the Fire Extinguisher, 20/06/2005, China Economic Weekly.
[43] Robert Zoellick, *op.cit.*, p.5.
[44] USTR Top-to-Bottom Review on U.S.-China Trade Relations, February 2006.
[45] Remarks of Ambassador Rob Portman, United States Trade Representative, Media Availability Following Announcement of a WTO Case Against China Over Auto Parts, Washington. DC, 30 March, 2006.
[46] Deborah Cao, Chinese Law: A Language Perspective, Ashgate, 2004.

English and Chinese versions of China's Minster of Commerce speeches show how legal right, the idea of law, is tied to the ideas of both power and justice in China. The rights China has under the WTO are severely compromised by the huge safeguards powers against market disruption that the EU and the US have retained. This means it is not necessary for them to go to the WTO Panels to get permission to impose trade restrictions. However, Cao's argument is that Chinese law and legal right are always connected with power, in the sense of empowering, and with justice in the sense that people must see the reasonableness of the order in which they have to fit. China's argument to the EU and the US is that if it cannot get immediate substantial access to the Western textile market — effectively whatever the terms of the Accession Protocol, *although this is not explicitly stated in the form of a legal argument* — the whole adhesion to the WTO is in danger of collapsing. It is fundamental that the West cannot respond continuously to the developing world comparative advantage in labour intensive industries by introducing insurmountable quotas. This Chinese position will be illustrated through close analysis of the use of concepts of law, power and justice in official Chinese speeches and presentations.

The US Government exercises its legal right to insist unilaterally that there exists market disruption coming from China, threatening to impede the orderly development of trade in these products. The US CITA points, for instance, to a 35% increase in the former category.[47] This is typical of the style of the US negotiating stance. These unilateral acts continue as a supposedly background pressure to China to make it break down in its demands for immediate liberalisation of trade in textiles (more are scheduled for November and December). The *Washington Post* of 31 May, 2005 reported that, not surprisingly, negotiations conducted at a fairly low diplomatic level have already broken down five times and the Americans are reporting the Chinese to be intransigent. China is, in turn, accusing the US of violating the spirit of free trade: "Officials in Beijing maintain that China is simply using its advantages — an abundance of cheap labour and natural resources - to produce high quality goods at a lower price".

Again, China is using a mixture of WTO legal and more general arguments to resist quotas. It says that the EU and the US must be able to demonstrate that it is China's exports, which are

[47] US International Trade Commission Press Release, *op.cit.*

causing the disruption. China argues that in fact the cause of the disruption is that during the ten years when the Agreement on Textile and Clothing (ATC) quotas were to be phased out it, neither country did any thing to prepare its countries, so that in December 2004 about 90% of quotas were still in place. The upsurge was due to the consequence of removing all quotas in one go.[48] The GAO report also stated, "Upon China's accession to the WTO, the United States began removing quotas on China textile and apparel products in accordance with the terms of the 1994 Agreement on Textiles and Clothing. Nonetheless, a majority of all imports from China remained subject to quota limits through 1 January 2005".[49]

However, this kind of quasi-legal argument is matched by more general arguments about the justice and rationale of the WTO. China says that it has worked for 15 years to join the WTO and the area of textiles is where it has a comparative advantage. The EU and the US enjoy comparative advantage in most other areas. Even the WTO Director General Pascal Lamy argued that "the US holds many products of comparative advantage in world trade and can and should restrain competition with developing countries for the textile trade, instead of wrangling over the production and sales of socks".[50] So how can the Chinese Government continue to create any confidence in the WTO in the Chinese population if in the one area affecting large sections of its population, the EU and the US do not allow China to obtain the only major benefit it can hope to gain from its membership of the WTO?

However, there is yet another quite distinctive dimension to China's approach, which cannot be confined to its view of how to interpret Archer's CS (the WTO regime of rules). It concerns more what Wendt would understand as the agent's own prior self-organisation as a type. So, this other crucial Chinese view is represented by "Tao Guang Yang Hui" (Bide Our Time, Build Our Capacities). The ideas of "Tao Guang Yang Hui" concerning international affairs were introduced by Deng Xiaoping after the Tiananmen Square Incident. Deng said that: "Although

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[48] Chinese Minster of Commerce Bo Xilai at the Press Conference hosted by the Chinese State Council Information Office in 30 May, 2005. The following Chinese arguments are mainly from the speeches of the leader and the spokesman of MOFCOM.

[49] United States Government Accountability Office, *Report to Congressional Committees, U.S.-China Trade: Textile Safeguard Procedures Should Be Improved*, GAO-05-296, April 2005, p.10.

[50] 'Sino-US Textile Trade: a Win-Win Game', Available at: http://eg2.mofcom.gov.cn/aarticle/chinanews/200511/20051100758696.html, visited on 25/11/2005

there exist estrangements, differences, and problems of one sort or another between China and the United States, the two nations eventually have to get on with each other, it is needed for the peace and development of the world."[51] The Chinese will therefore view this trade dispute as something, which must not be allowed to break down US-Chinese relations. China is realistic about the wider context of trade disputes with the US. Thus, on 27 Oct. 2004, the official government-backed journal *Perspectives*, argued that trade disputes between China and the US are unavoidable and will continue for a long time.[52] This is because China is growing economically and the US strategy is to try to constrain China especially in the economic area. So they are something to get used to, as normal and ordinary.

So China had to take a Realist view of where it actually is at the moment and to what extent it has the material power to resist a blocking action of the US at this stage. Whatever force China may think there is in its arguments, the textile trade dispute mattered materially more to it than to the US. Material and institutional constraints combined to force China in the direction of a compromise, which suited it much less than the US. The harsh reality is that, according to the *Asia Times,* China's negotiating position was weak. The textile industry, says the *Asia Times*, "...has far more political and economic importance in China, where it is a major source of urban employment, than in the US, where it is basically a sunset industry that is important in only a few states."[53] So, if China had refused to compromise, for example, on the issue of the year of expiry of the final agreement, the US could easily have walked away and imposed the 7.5% increase safeguard. While there are increased percentages, the benefits are staged over three years, so that by the time they will come, there will be a new Presidential administration, which may be less interested in trade liberalization than the Bush administration.[54]

Even worse, Lenard comments, as has been argued above in this chapter, the US is linking trade in textiles in practice with a wider attitude that regards China as a general threat, even if neither side wants to go to the extreme of total breakdown: US-China relations have been rocky over the

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[51] Gong Li, Deng Xiaoping Dui Mei Zheng Che Shi Xiang Yu Zhong Mei Guan Xi (Deng Xiaoping thoughts on China's US policy and China-US relations), *Journal of International Studies*, Vol6, 2004.
[52] See http://www.zaobao.com.sg/newspapers/2004/10/1wothers261004d.html, visited on 05/11/2004.
[53] David Lenard, US China textile breakthrough, *Asia Times*, 9 November, 2005.
[54] *loc.cit.*

past several months, due to a variety of issues ranging from currency violations to intellectual property, oil deals, Iraq, and the perennial issues of human rights, democracy and the status of Taiwan. But stabilizing the relationship remains extremely important to both sides on both economic and political levels, so the apparent resolution of the textile spat will doubtlessly be welcomed in both Washington and Beijing".[55]

So, the conclusion, as to choice of method of resolving this dispute, whether legal or political, was in actuality no genuine choice at all, given how China had to respond to the US pressure, and given the general US attitude to resisting China's increasing trading power. Although not directly relevant to the textile dispute itself the following interview that I made with a US trade official is representative of the attitudes of both sides in this case.

Gu: What's the US strategy in dealing with trade disputes with China, is it a bilateral strategy or does it have a multilateral strategy? What is the reason for the choice the US makes? Does it choose a mixture of both strategies for different areas? Should the US adopt a multilateral strategy?

N: US-China trade is good for everyone. Opening of trade relations maximizes benefits for everyone. Our aim is to open up markets for US exporters. China's role is very important. It took a long time to bring China into the World Trading System. The WTO is good, but the Dispute Settlement System has lots of faults. For example the DSM Process is too long. And it is not always the way to solve the problem. It seems to me, the Chinese Government feels always more comfortable with dealing with things bilaterally. So, we try to solve problems bilaterally with China, even if we prefer the multilateral approach. In the long run the bilateral approach is not healthy. With the multilateral approach sometimes we can avoid political conflict.

Gu: What's the role and importance of the WTO DSM in dealing with US-China trade disputes? If it only plays a limited role, what's the reason for that?

N: The DSM in the WTO is very important, but it has a kind of symbolic role, and does not play

[55] *loc.cit.*

an active role in solving China US trade disputes.

Gu: As the US Trade Representative Zoellick said about the United States, Europe and the world trading system: "We (the US and EU) will have occasional disputes, but the root of our relationship remains strong and healthy - the deep, historic root that honours an individual's right to economic, political and human freedom. And if we tend to it properly, that route will spawn a century of prosperity and freedom unequalled in human history. We must work together to advance these shared values and common interests".

Obviously the US and China have no such shared values and common basis. So what do you think of the different nature of US-EU disputes compared to US-China disputes? What's the implication of any difference for the ways of dealing with US-China trade disputes?

N: Yes, we have more shared history with the EU. The relationships are not fragile. The China US relationship is different, because of the security concerns and also the Taiwan issue. Nonetheless the US and China need each other. So the relationship is not weak. It is a special challenge. In terms of open trade I do not think the Chinese are acting in the best interests of the Chinese consumers. Instead they prefer the interests of their industry. China has to prove to the world that it has accepted the idea of open trade through its actions and not just words. China has to prove that it has the political capacity to implement open trade. At the same time, the US Government sought to limit the politicization of its trade relations with China.

The two sides finally signed agreement on 8 November 2005, which made only minor concessions to the Chinese. Commerce Minister Bo Xilai, said that China had expected there to be integration of textiles trade worldwide after the end of the textile quotas on 1 January 2005. However, he accepts that China agreed in article 242 of the Accession Protocol to an annual 7.5% limit to annual increases to its textile exports and China accepts that it is bound by its word. At the same time the Minister stressed both the wider perspective and the ongoing nature of the negotiation of such agreements with the words: "We don't expect that this single achievement can help us to solve all the conflicts or problems between us, but we don't want to see such a small trade obstacle to impede the overall trade and economic cooperation between the two

countries".[56]

The most positive interpretation of the Agreement reached is that "exports of most Chinese clothing and textile goods to the US will be allowed to rise between 8% and 10% in 2006, by 12.5% in 2007 and by 15 to 16% in 2008".[57] Evidently these are an increase on the 7.5% China was allowed under the Protocol of Accession. However, China had initially sought for the limits to finish at the end of 2007 rather than the agreed 2008.[58] Also this limit on expansion is only marginally more than the Protocol, when one considers that Chinese clothing and textile exports to the US rose by more than 50% in the first eight months of this year to almost US$17.7bn, following the expiry of the Multi-Fibre Agreement.[59] A *Fact Sheet* produced by the USTR stresses that: "In general, quotas established by the Agreement for 2006 on "core" products[60] are lower than the safeguard threshold, about the same as the safeguard threshold for 2007, and higher than the safeguard threshold for 2008. Over the life of the Agreement, China can export 3.2% more of the covered products for all three years."[61]

Yet this is a quite negative picture for China. It is being apparently boxed into a classical diplomatic negotiation of a trade dispute as if the WTO DSM did not exist and all that counted was the power of the two sides. The Chinese Minister said, "This textile issue between China and the United States has been (very) difficult over the past few years. We do not expect that this single achievement can help solve all the conflicts or problems between us".[62] China is trying the informal way of negotiation and compromise, but it is finding that the power element of trade diplomacy, which first produced Para 242 of the Protocol of Accession, depriving it of much effective use from the WTO DSM, is being largely maintained by individual subsequent agreements with the US.

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[56] Office of the USTR, Media Availability of USTR Portman and Minister Bo Zilai on the US China Textile Agreement, 11/08/2005.
[57] *loc.cit.*
[58] BBC News, 8 November 2005, US and China sign textiles deal, http://news.bbc.co.uk , visited on 11/11/2005.
[59] *loc.cit.*
[60] Such as cotton knit shirts, man made fiber knit shirts, woven shirts, cotton trousers, mmf trousers, brassieres and underwear
[61] Facts on Textiles, Office of USTR Policy Brief, November 2005. The actual terms of the Agreement set out the increases per tariff classification numerically: See Memorandum of Understanding between the US and PRC on Trade in textile and Apparel Products.

It is precisely in this sense that one might be able to see a difference between the EU-China relation and the US-China relation is that the latter is tending to a negative/realist stance. China is trying to get the US to follow the EU model, although even the textile compromise with the latter (see below) is only temporarily acceptable. However, in the US it is possible to read beyond specific reliance upon the terms of the Accession Protocol to justify subjective, arbitrary determinations of textile trade disruption, also a tendency of the US to use this incident to challenge the very geopolitical developments that, as we shall see later, EU Trade Commissioner Peter Mandelson considers are inevitable. The US sees its trade deficit and its general financial indebtedness, particularly to China, as something that it should try to reverse by putting pressure on China. China is aware that the US is making linkages not only with the general gradual and relative economic decline of the US, but also with so-called questions of military and security interest. The US identifies whatever economic success that China can be having with the possibility to increase its overall material power. That encourages the US to rely very firmly on its Accession Protocol rights.

However, through an application of the key ideas of Cao and of Archer, a close analysis of both English language and Chinese language versions of official Chinese speeches and declarations has been able to demonstrate how the Chinese Government considers that the US is violating the spirit and the overall system of the WTO and subordinating the principles of free trade and comparative advantage to specific instruments being used to prop up a declining US power. This does not mean a pure politicization of the WTO but a Chinese understanding of it that connects legal right, justice and power in ways that appear already reasonable to its European negotiating partners. Chinese Ministry arguments say that reliance upon the Accession Protocol by the US is not possible, because such reliance presupposes that the US is itself faithful to the overall free trade principle of the WTO and, in particular, to the Trade Integration Principle of the removal of textile quotas in January 2005, the real reason for the trade disruption in the US. China has taken numerous measures, e.g. export tariffs to moderate its textile exports, while the US made no use of the ten year Uruguay Round breathing space for its textile industries to help them restructure.

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[62] *loc.cit.*

The basic fact is that the EU and US dominate the higher value-added, quality niche textile markets (also in design and marketing) abandoning the middle and low value-added market to a country like China that has not only low labour costs but a complete production line and textile manufacturing infrastructure.

Anything else violates the justice dimension of the WTO and attempts to condemn China to a continued geo-political powerlessness. The textual analysis of Chinese position follows the cultural constructivist approach of Cao, relating legal right, justice and power, also in a context where China's arguments are also shaped by the context of the WTO whose overall framework is guiding her arguments.

The EU, in contrast to the US, is anxious to be conciliatory to China and not regarding it — whether mistaken or not — as a threat either militarily or economically, as the EU has no strategic presence in Asia and sees China as a huge potential market.[63] The EU's style of negotiation and concept of power has been famously characterised by senior EU diplomat Robert Cooper as oriented towards the post-modern soft power of negotiation and compromise. [64]

The Mutual Construction of the Trade Dispute between the EU and China

"China is not our enemy. This, in my view, is an excellent investment in our close and growing relations" "There is no greater challenge for Europe than to understand the dramatic rise of China and to forge new ties of partnership" with it. (Mandelson)

As for the US, so also for the EU, there is a settled institutional framework for trade negotiations. In May 2004, Premier Wen Jaiba visited the European Commission with Commerce Minister Bo Xilai. The latter set up such a framework with the EU Trade Commissioner, Pascal Lamy, to ensure high level effective exchanges of views on trade matters in the face of the rapidly growing

[63] See EU Trade Commissioner Peter Mandelson's Speech, 'The EU and China: Partnership and Responsibility in the Global Economy', 24 February 2005. Available at: http://europa.eu.int/com/commission_barroso/mandelson/speeches_ar..., visited on 30/09/2005.
[64] Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century*, London: Atlantic Books, 2003.

bilateral trade relations as well as on WTO issues. This is called the EU-China Trade Policy Dialogue. It is an ongoing framework and not simply a crisis management unit. The dialogue meets once a year in Brussels and Beijing on a rotating basis. EU Trade Commissioner Pascal Lamy said: "Setting up a dialogue over trade issues shows how the EU and China can use cooperation and discussion to deal with issues of common interest, sometimes difficult, for the benefit of both sides".[65]

To some extent Commissioner Mandelson shows an awareness of this wider dimension, which threatens the behaviouralist, pragmatist consensus and foresees possibly a return to realism in international relations. It is possible to see the EU China September 2005 compromise on the quotas that the EU imposed in June 2005 against Chinese textiles as a realization that there can be no logic in these restrictions. Half the concessions are to be counted against China's quota for next year. But arguably a concession for today will do for tomorrow. Commissioner Mandelson recognizes in a long speech on China, the EU and globalization that the EU is vitally dependent upon the willingness of China to accept inward investment from the EU. Anyway 50% of all textile exports are also through EU and US companies in China.[66] The EU is dependent upon being able to export other goods to China and it is always possible for China to retaliate against the EU in other areas. So in Peter Mandelson's view, it is necessary to adopt a complete, holistic understanding of EU China relations, even to the point of encouraging the transfer of Chinese talent and skills to Europe. As a European Commissioner, Mandelson does not project Europe's problems onto China. The root cause of the huge upsurge in Chinese exports to the EU is the choice of European consumers and retailers, not especially aggressive or predatory salesmanship by the Chinese themselves. The trade represents an elaborate series of interlocking relationships.

The Chinese literature analyzing Chinese official policy, especially in relation to the EU, makes a distinction not between legal rights, precisely defined, and political and economic power, but broadly between a positive and a negative character to the attempts of the two Powers to resolve

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[65] See China-trade: Launch of EU-China Trade Policy Dialogue, available at: http://ec.europa.eu/comm/trade/issues/bilateral/countries/china/pr060504_en.htm, visited on 02/07/2005.

[66] Peter Mandelson PC European Commissioner for Trade "Challenges and opportunities for EU and China in the age of Globalisation", Central Party School, Beijing, 6 September 2005. http://europa.eu.int/rapid/pressReleaseAction.do?reference=SPEECH/05/484&forma..., visited 10/09/2005.

differences. This analysis asks what are the criteria for judging whether there is a trade war? It calls for a total analysis of all of the arguments made and measures being taken to assess whether the parties to the dispute are resistant to each other in the trade issue and show vengeful behaviour, whether retaliation extends beyond the issue to a wider area, and whether the parties are clearly ignoring WTO rules. Mandelson's approach is to see the need to accommodate China in a geopolitical sense.[67] China is becoming one of the world's greatest consumers of petrol, consumers of steel and a third of world growth since 2000. It is essential to understand that what is happening in this one country is changing the whole of world economic relations. He points out that China's foreign exchange reserves are 17 times larger than the UK's, i.e. China's own foreign investment or banking strategy matters to the West. Therefore, while really serious issues like textile market disruption cannot be ignored they need to be managed in a positive/peaceful and not negative/warlike way, or vast areas of international economic activity could become destabilized. These interpretations can be seen in official Chinese interpretations of the latest EU China agreement on textiles. The speeches of the Commerce Ministry can be analyzed in these terms. China for its part also sees its textile exports as 10% of its exports and not enough to justify a complete breakdown of all its relations with Europe, e.g. in the area of technology transfer and foreign direct investment, also of China in Europe.

The legal foundations of the EU China Textile Dispute are the same as US China and an initial EU reaction in the late spring of 2005 was the same as the US. There was an imposition of 7.5% limit on certain Chinese textile imports on the same basis that the January 2005 removal of quotas had caused a huge surge of Chinese imports into the EU. However, following the highest level negotiation between the Chinese Trade Minister and the EU Trade Commissioner, crowned with speeches of the EU President and the Chinese Prime Minister it was decided on a further compromise agreement, allowing Chinese imports blocked in European ports (ordered by European retailers when the June Agreement was concluded) to be released on the basis that they would be counted towards China's next year quota.

A Memorandum of Understanding between the European Commission and the Ministry of

[67] *loc.cit.*

Commerce of the People's Republic of China on the Export of Certain Chinese Textile and Clothing Products to the EU (China-EU MOU) was signed on 11 June 2005. Under the China-EU MOU, China has to control the growth rates of the export of 10 categories of textile and clothing products between 8% and 12.5% per annum, up to the end of 2007. A further mark of cooperation between the two parties was the undertaking to provide for a 'double checking' system. EU authorities would issue import licences when an equivalent export authorisation had been granted by the Chinese MOC. This makes sense only on the basis of mutual trust and supposes some element of self-discipline by the Chinese textile industry itself, through its textile associations:

> The reason why China and Europe could swiftly achieve a rational solution after the eruption of the disputes over textiles and could settle within a short period of time the new problems that emerged in the course of implementation should be, to a great extent, attributed to the all-round strategic partnership already established between the two sides, which was capable of withstanding the test of temporary setbacks.[68]

This is quite simply a case of the EU not insisting upon its strict legal rights in relation to China in exactly the same material context as with the US. Indeed, it is clear from the first table on world participation in trade (above) that textiles are relatively much more important to the EU and than to the US economy. However, the *construction* of the importance of that trade in the context of the meaning or significance of textiles for the overall *collective knowledge constituted by EU-China relations* was so profoundly different, that, in this case, the diplomatic or political approach did achieve for China, at least temporarily, a suspension of the WTO legal rules, and thereby a radically different outcome from what China could have expected from resort to a legal method of resolving the conflict.

This was still not a principled, long term solution. But underlying this short term compromise was a mutual determination to find a breathing space to sustain a harmonious relationship on numerous fronts. Trade Commissioner Mandelson had appealed to the Chinese Government to share the burden, while admitting that there is no legal basis for China to rework the agreement.

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[68] 'Sino-EU strategic partnership not an empty talk', available at: http://english.people.com.cn/200509/07/eng20050907_207126.html, visited on 09/09/2005.

The September 5 2005 agreement was formally based on the principle of equally sharing the burden. The *People's Daily* of 9th September argued that the agreement showed that China and the EU have the political will to solve their trade disputes by negotiations and friendly consultations. The tone of this reporting is reinforced by the European Press (particularly the *Economist*) calling for trade liberalisation and exploitation of comparative advantage.

This is also clear in the accompanying speeches of the European and Chinese leaders. Mandelson insists, as a principle that: "I will continue to resist unilateral action so long as China, too, maintains the spirit of dialogue and cooperation".[69]

Intervention in markets is a cul-de-sac, inhibiting innovation and adjustment. He recognises that a third of world growth since 2000 has come from China, whose foreign exchange reserves are 17 times the size of the UK's. It consumes a third of the world's steel and increases its own production each year by the equivalent of half the total of Japanese steel output. Mandelson says, "our role as officials and political leaders is to show that we manage these shifts in everyone's interests so that globalisation brings in more advantages than drawbacks".[70] For instance, again, the increase in oil prices and other raw materials is often represented as a consequence of Chinese demand, but this trend is counterbalanced by the lower costs of production in China.

Peter Mandelson stressed the need for a coherent strategy in relation to globalisation. The European approach was marked by four characteristics: attracting new talent from all over the world; a domestic focus on producing high quality maths and science graduates and attracting overseas young researchers to work in Europe; launching a drive to promote inward investment and industrial collaboration, with companies coming from India and China. Europe must engage more in a policy of openness to ensure mutual investment and industrial cooperation; there must be a public debate to show that growth in China means higher living standards in Europe and can create new job opportunities.[71]

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[69] Peter Mandelson, "Challenges and opportunities for EU and China in the age of Globalisation", *op.cit.*, p.2.
[70] *loc.cit.*
[71] *loc.cit.*

The reception of the September compromise on textiles was given an equally broad contextualization in the Chinese *People's Daily* on 7 September 2005. The EU was described as China's number one trade partner, the fourth largest source of foreign direct investment and the largest source of cumulative technology introduction, making it the only partner in China's ties with developed countries in terms of the high level of technology cooperation. China is the second largest trading partner of the EU: "A rational solution of trading frictions is vitally important to the further development of bilateral economic and trading relations".[72]

The Chinese paper stressed also that Sino-EU summits deny a geo-political view of the world, where international cooperation extends well beyond trade (of which Chinese textiles are only 10% of its exports). The strategic quality of the wider Sino-European partnership is not empty talk in the words of the Chinese Commerce Minister Bo Xilai. The Summit of EU-China, accompanying the textile Agreement, with Blair and Premier Wen, included six agreements on social affairs, space exploration and bio-diversity, and, finally, a 500 million Euro loan from the European Investment Bank for the expansion of Beijing Airport. There should also be an agreement on technical cooperation in civil aviation. There is even to be a China-EU partnership on climate change, and EU assistance to China to build a coal-fired power station. Premier Wen said trade between China and the EU was likely to grow to US$US200 billion this year, and Blair said that in this context disputes had to be resolved so that trade could increase. This was the tone, for example, of the *People's Daily* on 6 September 2005.

Ironically it is the *Detroit News* which recognises that behind the EU China textile dispute is a vast interdependent relationship[73]. It is not simply European retailers who put such pressure to have the import quotas lifted. The actual manufacture of textiles is (as also in the US) outsourced in part to China and then completed in Europe. There are 30 billion Euro invested in China and China will contribute 230 million Euro to participate in Galileo, the EU's planned satellite-navigation system that is a competitor to the US' Global Positioning System. Currently 100,000

[72] Sino-EU strategic partnership not an empty talk, *People's Daily*, 7th Sep 2005.
[73] 'Behind the EU-China Textiles Dispute Is A Vast, Interdependent Relationship', 27/08/2005, available at: http://www.detnews.com/2005/business/0508/27/biz-294684.htm, visited on 19/09/2005.

Chinese students are enrolled at European universities.[74]

In contrast, notes the *Detroit News*, legislation has been introduced in Congress to place 27.5% tariffs on all Chinese imports to the US unless the Chinese allow their currency, the Yuan, to strengthen against the dollar. It notes that a further complication of Washington's relations with Beijing is that much of China's foreign exchange reserves of some US$740 billion are in US Treasury bills. Finally there is the US dispute with Europe about the risk that it will lift its arms embargo on China, allowing it access to sophisticated weapons. The difference in tone from the European and Chinese press is unmistakable.

Conclusion

The overall rationale of this chapter takes the context of the WTO as an ideational structure, more closely defined by Archer as a CS. The WTO as the CS does provide a clear ideational context in which the states parties contend. However, the very clarity of the CS, at the level of legal rule, leads China, more than ever to try to evade the rules in terms of the choice of method of settlement (i.e. political rather than legal) while, at the same time arguing strongly that rules should be understood in a wider terms of principles, i.e. China tries to modify the existing CS, recognizing its disadvantageous force.

The chapter recognizes as well that there are clear material interests on all sides of the triangular textile dispute. These interests concern production and marketing of textiles in the different countries and also the place of textiles in the wider trade of the countries. However, the chapter strongly favours the social constructivist view that these material interests are profoundly reconstructed by the three states, as agents, in quite different ways. This is where Wendt's notion of the state, as fundamentally, a pre-social self-organizing entity comes into play. There is, of course, an interactive shared knowledge, which emerges between China and the EU and between China and the US. It is within such shared knowledge that the two compromise textile agreements emerge. However, of prior importance is the constitution of the three states as self-

[74] *loc.cit.*

organizing agents and how they then project their images of the others. China is a political, economic and military power that has clear interests, in a neo-institutional sense. However, fundamental to the final shape of the two compromises is how the US and the EU respectively *envisage and construct* China. China itself tries to adopt a similar stance to both the EU and the US.

So it is the *construction* of China by the EU and the US which has a very significant effect on the interpretation of the CS (WTO rules). Both the EU and the US see the CS as clear. China tries to argue that the CS has contradictions, not within the rules themselves, but between the rules and the underlying principles. Because of its different stance towards China, the EU appears implicitly to accept China's viewpoint. It is willing to revert to fundamental principles of free trade as guidelines for the dispute, while not leaving entirely aside its rights under the CS rules. However, the US sticks firmly to the CS rules, despite the fact that the dispute is much less important for it, materially, than it is for the EU. It insisted on its legal rights, *also because of its wider view of China as a threat.* However, the US is also determined to continue its relationship with China and not let it break down over a relatively materially unimportant matter. So, the US, as to the choice of the means of resolving a dispute — whether legal or political — is inclined to defer to what it knows is the Chinese preference in the matter, as long as it gets most of the substance of its demands, and China is suitably brought into line.

China has embedded itself in the WTO framework and must accept that it will determine the context of its economic relations with its great trading partners. At the same time the nature of these obligations (of the WTO) involves interpretation. Questions about the violations of obligations involve possible confrontations with particular other states. The textile dispute shows that how China raises questions of interpretation and manages issues of disagreement depends also upon its culture of legal understanding, in particular wider concepts of the relation of law to justice and power. At the same time how China manages disagreements, the issue of dispute settlement, is also a function of the dichotomy that it places between positive/negative, peaceful/warlike interpretations, questions of tone and attitude that then permeate down to the details of specific conflicts of interests.

The present chapter helps to ground the hypotheses of the whole thesis. There is a parallel place for economic state interest and cultural identity in understanding China's approach to dispute settlement. The economic neo-institutional interest defines the context but the constructivist-cultural dimension determines the manner in which the conflicts of interest are managed. Economic interest is therefore also defined holistically and a holistic view of the WTO is seen as the way of regarding it as the litmus test for China's harmonious relations with its neighbours.

Chapter Seven Conclusion

The thesis has argued for a completely original approach to dispute settlement within the WTO, in order then to understand the approach of China to the WTO DSM. It marries a neo-liberal institutionalist and a social constructivist approach to international relations, encompassing, at the same time international economic law and institutions as no more than one specific deontic framework on the spectrum of material to ideational interests. The thesis aims to provide a framework that can be applied to China in the future and indeed, a model framework that can also help to understand any state's approach to the DSM, i.e. whether to adopt a legal or political settlement of disputes. Legal studies of the WTO, some of which are mentioned in the thesis, are purely descriptive accounts of the decisions of the panels and their implementation. Political studies have been able to provide frameworks of analysis to understand some of the limitations of the WTO. However, this study fully accepts the place of international law in the study of dispute settlement, but places it in the context of a permanent dialectic or mutual polarisation between law and politics. That is to say, neither operates without the other, its opposite, in the context of the continuing dynamic situations where a state moves, or is swayed between political and legal ways of resolving an intergovernmental trade dispute.

There are two elements to this analysis, a legal-political understanding of the WTO itself as a cultural system, and a legal-political understanding of a state, such as China, for example, as a social fact. The WTO is not a logical, grammatical framework, but the institutionalisation of ideals and ideology about international economic relations, supposing also a dynamic ideal about how far states are willing to transform the regulation of their trade disputes from horizontal to vertical regulation. As a Cultural System (the WTO rules and the DSM), subject always to underlying Socio-Cultural forces (the states which constructed and have the power to maintain or undo the Cultural System), the WTO is also an institutional framework, which is constantly evolving. At the same time the analysis explains within a historical context, i.e. the Socio-Cultural configuration of forces, how this has come about and the likely

conditions *for* it to continue. In other words it is *not law or politics but law and politics.*

The second element is the understanding of the state as a social fact. The state is not simply a formal legal institution, with internal structures of legal competence and international legal commitments, and a pattern of litigation history about the compatibility of the two. This has to be included in a wider picture of material and ideational structures, which provides a decision-making framework for understanding when and how the state will resort to horizontal or vertical means of resolving disputes. Social Constructivism, with the idea of the state as a social fact, helps to bring to life the way institutional frameworks are formed and change. It allows one to observe just how far the state absorbs the WTO as a Cultural System into itself, and also just how far the state itself, as part of the Socio-Cultural forces in turn, impact upon and changes the WTO, especially the significance of its DSM. The wider concept of social fact includes the narrower one of shared knowledge, collective beliefs and intentions, which have become routine to the point of being legal rules and legal institutions of the state. Also the idea of social fact incorporates the ideas of material interest and inherited traditions, which constitute the very actor or agent, which is the state. However, it also encompasses the space, impossible to determine in advance, which must remain for originality of choice in the actions of the state. Still, the thesis does not leave this spontaneity as a magical extra, but offers a decision-making framework in which state interests and ideals interact with one another to stimulate the decisions reached with respect to approaches to the WTO DSM. As Zoellick pointed out "Cooperation as stakeholders will not mean the absence of differences, we will have disputes that we need to manage. But that management can take place within a larger framework where the parties recognize a shared interest in sustaining political, economic, and security systems that provide common benefits"[1].

The purpose of the theory is, again, specifically, to explore whether, despite the legalisation of the WTO DSM, which has undoubtedly taken place as a matter of institutional fact, states still, to a significant degree, treat intergovernmental trade

[1] U.S. Deputy Secretary of State Robert Zoellick's Policy Address on U.S.-China Relations, 21 September, 2005, 'Whither China: From Membership to Responsibility? Remarks to National

disputes as matters to be resolved within the logic of the pre-legalistic, diplomatic or political way of resolving disputes. To answer this question the theory treats both the WTO and the state, actor/agent as social facts and shows that they are in dialectic with one another. This fresh perspective of international institution and nation state deepens our understanding of China's approaches to inter-governmental trade disputes.

However, given the insufficient empirical work in existing studies, a more significant contribution of my research can be found in the empirical studies. I have conducted comprehensive studies about China's engagement with the WTO dispute settlement. In particular I have analyzed its third party strategy and two major trade disputes. Through this analysis of China's engagement with the WTO and, in particular the third party strategy and the two important case studies (Steel and Textile), our empirical findings of the thesis are:

First, the settlement of international trade dispute is never either law or politics, but it lies in the dynamic interaction of law and politics, as showed by China's experience.

Second, WTO dispute settlement is a framework; under this framework China as actor still has free space to choose how far to go towards or away from legal settlement. In the DSM system consultations are also part of the exercise, where the factors analyzed in chapter 3 play the role of locating the influences upon China's decisions; China has, nonetheless mostly adopted a bilateral way to solve the trade disputes under the WTO framework, as many scholars and policy-makers have recommended (and my thesis has demonstrated).

Third, China's approach to international trade disputes prominently emphasizes prevention through anticipation in advance. Quite in contrast the position of the US anticipates conflict by threatening and warning: "As US expectations shift from the establishment of basic regulations and implementation of specific WTO commitments to measurable improvements in market access for US products and services, there will

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Committee on U.S.-China Relations', p.5, available at: http://www.state.gov/s/d/rem/53682.htm, visited on 08/11/2005.

be decreasing tolerance for Chinese efforts to protect domestic industries".[2] The Chinese Ministry of Commerce, on the other hand, "calls on Chinese companies to encourage innovation and create self-owned brands to develop technology and profit rates, and to control quantity and avoid trade disputes."[3]

Fourth, the empirical findings of the thesis have had to be modest because of the time frame but they, nonetheless, fully support the conclusion that the ideational dimension of inter-state relations helps to shape the definition of material interests that states such as China, the US and the EU endeavour to represent in their trade disputes with one another in the WTO Framework. For instance we have seen how the EU and the US differed in their willingness to use legal remedies in the textile dispute, depending on their different views of China. The thesis shows how China's reluctance to engage directly either as a plaintiff or as a defendant is unusually clear, and not disproved by the sole exception of the steel dispute with the US. The thesis also shows how great trading powers, such as the EU, the US and China do define the boundaries of their trading disputes with one another, to a very considerable extent, horizontally, in terms of their shared (EU-China) and mutually contested (US-China) knowledge of one another.[4] The conclusion is that the balance between neo-liberal institutionalism and social constructivism is somewhat in favour of the latter.

The study also has policy implications. As the US recognized, "As the size of its market and trade flows have increased, China's constructive participation is increasingly critical to the international regimes governing trade practices-regimes that foster free and open markets, a level playing field, and transparent regulations".[5] However, despite the prominent role of the WTO and China's rising trading status,

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[2] Prepared Testimony of Assistant USTR Timothy Stratford before the U.S.-China Economic and Security Review Commission, 4 April 2006, p.6.

[3] 'China examines trade growth in face of international disputes', available at: http://english.peopledaily.com.cn/200604/03/eng20060403_255546.html, visited on 06/04/2006.

[4] See the remarks: "We have many common interests with China. But relationships built only on a coincidence of interests have shallow roots. Relationships built on shared interests and shared values are deep and lasting. We can cooperate with the emerging China of today, even as we work for the democratic China of tomorrow." U.S. Deputy Secretary of State Robert Zoellick's Policy Address on U.S.-China Relations, 21 September, 2005, 'Whither China: From Membership to Responsibility? Remarks to National Committee on U.S.-China Relations', p.5, available at: http://www.state.gov/s/d/rem/53682.htm, visited on 08/11/2005. Also See Sino-EU strategic partnership not an empty talk', http://english.people.com.cn/200509/07/eng20050907_207126.html, visited on 25/10/2005.

there have been relatively few studies on trade dispute settlement that have combined theoretical arguments and empirical research in the international relations field. As mentioned earlier most studies in the international law field have focused on the formulation and application of legal rules or the evaluation of particular cases based on these legal rules. Exploring the logical relationships and complex interactions of international dispute settlements are the main tasks that IR studies need to tackle.

One particular policy implication of my study is evident when considering China's foreign trade policy. Since China joined the WTO, it has considerably reformed the institutional and legal framework. However, the fact that China has not been able to resolve its legislative policy options on the constitution of the chambers of commerce means that they lack the representative character in relation to their members and the independence of the Government necessary to play an effective role in Chinese trade policy decision-making.

Limitations of the Research

The most significant limitation in my research comes from the fact that China is still a young member of the WTO. Empirical evidence – especially, the intergovernmental data –from the first four years of developments allows for only tentative rather than decisive conclusions. Thus my arguments concerning China's intergovernmental trade dispute settlement are limited to these tentative interpretations.

For example, the amount of theory may appear over-elaborate to explain the relatively limited amount of experience that China has of the use of the DSM in the four plus years that it is in the WTO. It does have to be said again that the thesis is trying to piece together China's policy choices between legal and political means of settling trade disputes on the basis of very little experience, simply because little time has elapsed since China has joined the WTO. At the same time the hypothesis of the thesis, that China is reluctant to litigate, in a way makes the thesis even more difficult to present, because to the extent that it is true it deprives me of positive research material. Also, I do not wish to fall into the trap of forcing too general and too

[5] USTR, US-China Trade Relations, *Top-to-Bottom Review*, February 2006, USTR, Washington DC,

extensive theoretical conclusions on the basis of too little evidence. Instead I have presented so elaborate and thorough a theoretical framework in order for it to be applied repeatedly to China in the years to come, and to other states, most easily to others in East Asia, but in fact to any state.

Admittedly a great deal of the data that exists has to be subjected to evaluation. There is the fact that China has not made a single official statement criticising the WTO DSM. The farthest it has got is to make a series of proposed amendments in the Doha Round Negotiations, which all point in the way of reducing the use and impact of the DSM, especially for developing countries. At the same time there is the remarkable contrast between the forty seven (at the latest count) panel cases in which China has participated as a third party and the one single case in which it has allowed itself to be directly involved to the extent of going to a panel as a plaintiff. It once moved quickly to avoid being a defendant and may soon do so again. Could there not have been a significant number of these cases in which a more litigious state would have considered itself directly implicated and have become directly involved? Also are there not such a remarkable number of cases, where Chinese businesses are affected by hostile trade remedies practices in other countries that China should by now have been provoked to retaliate? For instance, the USTR reports that the US Department of Commerce "currently has approximately 70 anti-dumping proceedings pending against Chinese merchandise, more than for goods from any other country".[6] For the moment, the undoubted fact is the lack of reaction from the Chinese authorities. It appears clear that the social constructivist argument that it is ideational factors, which help shape definitions of material factors, continues to operate for the moment. What elements of the ideational factors are decisive cannot be definitely stated, but the chapters on steel and textiles provide illustrations of the detailed working out of relevant factors in concrete cases. Particularly the evaluation of the Chinese participation in the steel dispute outlines what it might take for China to intervene in the future as a direct party.

In other words it is no part of our thesis to advance the essentialist argument that because China is, for instance, a state culturally defined immutably by Confucianism,

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p.4.

it has not been and never will be litigious in the WTO or anywhere else. The basic starting point of a social constructivist perspective is that it is always a changeable fact whether an agent, as an historically constituted social fact, or collective entity of shared knowledge, will continue to redefine its material interests in a particular way, related to ideational factors. China could in the future decide that its national interest did require it to become very active as litigant in the DSM. There are a number of factors, which are indeed likely to change so as to lead China in this direction.

In particular, China has considered that it is on a learning curve in relation to the complexities of the DSM. Yet it is heavily engaged as a third party and one reason it gives is that it wants to learn as much as possible about the system. This is not simply to have an impact upon the development of WTO rules, but also to understand the procedures of the DSM itself and how the rules of the DSM are applied in concrete cases. As China becomes more confident that it is mastering the system of the DSM it may become less worried about the loss of face coming from being firmly beaten in a litigation. On the very meagre evidence we have so far, which may be quickly contradicted, China will settle a case quickly (the integrated circuits case) rather than become a losing defendant. That may not be the case with the auto parts case if China feels the right is much more clearly on its side as it was in the steel dispute.

Indeed, as hostility builds up to China's growing trade surpluses with the EU and the US, China may find itself more and more faced with a measure of aggression from its trading "partners", particularly the US, that it has no choice, at least in some cases, to slip into the role of the reluctant defendant. Its opponents may give it less and less choice. For instance a prominent US professional law journal has noted very recently:

> Faced with a $201 billion trade deficit and a flood of Chinese origin imports, the US is playing every political and economic card it can to force China to raise the value of its currency, the RMB and realign the deficit while reducing Chinese products' competitiveness in the US market ...with a spate of retaliatory measures in both the private and public sectors...While the public sector efforts ...will not get past the White House veto, the private efforts, principally in the form of anti-dumping actions, are thriving, producing a

[6] *ibid.*, p.16.

> cottage industry of legal, accounting and computer service providers to assist in unravelling the many complexities of this law.[7]

It has been very carefully argued that the Chinese do, in all probability seriously believe that international society is best served by natural principles of harmony, coming from Confucianism, principles that are not best served by the practice of litigation. At the same time, as Nakamura has stressed, this belief is also tempered by a belief that the situations of life are infinitely changing and complex, so that the very principle of harmony itself might require a more litigious stance. For instance, if China was to be more and more confronted with cases like the auto part cases, it might well decide that to enter the DSM as a defendant might be less disruptive than continually resorting to the highest level diplomatic negotiations in summits with its major trading partners. If China's trading surpluses were to continue to cause deep anxiety among its neighbours it might be that to have decided in concrete panel cases the principles to cover the issues of trade surpluses could serve to depoliticise trade conflict and transfer away responsibility from Beijing to Geneva.

All of this appears rather unlikely at the moment. However, it has been a fundamental aspect of our elaboration of the idea of China as an agent/actor, following Wendt, that there is a distinction between the social fact of the state as a type, which is pre-social, and the state as a social fact in relation, where its identity depended upon recognition and shared knowledge. The theory of the thesis is certainly that China will gradually absorb more and more of the culture of the DSM into its own world.

Future Directions

As discussed earlier, one significant aspect of China's approach to international trade disputes that the thesis has demonstrated, and which I regard as the major area for future research, is the changing relations of state and business in China. These are now quite disorganised but there is pressure to develop them institutionally to make Chambers of Commerce more representative of their members (actual trading companies) and more independent of the government. The Government is especially

[7] The Metropolitan Corporate Council, *China-Law Firms, US Trade Regulations and retaliation Against Chinese Origin Goods*, Part I Interview with Andrew B. Schroth, Partner, Grunfeld, Desiderio, Lebowitz, December 2005,

keen that the COC become more competent at disciplining their members so as to reduce unnecessary trade conflict attributable to an excessive trading ruthlessness and indiscipline in the companies. However, change here could be a two way process, affecting the very identity of China as an actor/agent in inter-state trade disputes.

This major question merits more elaborate development, since internally changes in China's identity and constitution could change its whole attitude to the WTO in the long run. Of all the themes mentioned it most merits further research. Since the late 1980s, Chambers of Commerce (Chambers)[8] have emerged to become a factor in China's economic development and trade diplomacy. "These organizations are changing the structures by which China is governed and policy is made".[9]

This is an entirely inevitable development of Chinese government policy given China's membership of the WTO. Chambers, as Non-government organizations (NGOs), do not have direct access to the WTO dispute settlement mechanism. Yet virtually all disputes about a violation of a WTO obligation affect, in the first instance, the private economic interests within a state, rather than the state directly. It is up to private companies to warn their governments that foreign companies are dumping products in their markets, or that another state has imposed unfair anti-dumping penalties against it. The economic hardship to the state will be indirect and of a microeconomic rather than a macroeconomic character.

Therefore, in the US, it is normal for business associations to bring to the attention of the government the need for action. Indeed the rules of the WTO usually require that a state demonstrate that the number of its businesses affected by a measure make up a substantial part of a sector. Not merely interest but also information has to come from this sector. In the US and the EU the companies advised by lawyers firms specialised in the area, bring pressure to bear on state authorities and are involved in every stage of the proceeding, including the litigation at Geneva. At the same time, the fact that

[8] In Chinese terminology, the phrases, Chambers of Commerce, Business Association and Industry Association are sometimes used interchangeably. They are subtypes of two more general type of NGOs referred to as "Social organizations (Shehui tuanti)" and "Private non-enterprise unit (Fei qiye danwei)". Chambers in China are divided into 'officially organized chambers' and 'private chambers', for detail information see section 3.

[9] Joseph Fewsmith, 'Chambers of Commerce in Wenzhou Show Potential and Limits of "Civil Society" in China', *China Leadership Monitor*, Vol.16, Fall 2005, p.1.

they do not have direct legal status at the WTO also reflects the freedom of their states to decide that it is not in the overall economic interest of their country, or in the interest of economic or wider political relations with the defendant country, to pursue an action to its full and literal legal limits. Many attempts to give companies direct legal rights, above all, under their own national legal systems, have not been successful.

What would be very interesting to explore is the parallel role for business associations in China in the WTO DSM context. One would have to consider all of the above issues. However, the main focus has to be on the role of Chinese Chambers in the context of the privatisation process of the Chinese economy, where they continue to play a regulatory role. This means in practice that they are closely regulated by the state and the research question which arises is whether they can also really serve the independent private interest function in the WTO context. So the Chambers need to be looked at in comparison, with a view to how they could be most effectively regulated. Within China itself there are many studies and also many distinctions. Some Chambers are directly created and regulated by public law. Others arise from private initiative, but are still closely regulated by the state to prevent them from becoming effective in all parts of the country.

Wider questions about the future development of Chinese civil society arise. As USTR Zoellick argued, "Closed politics cannot be a permanent feature of Chinese society. It is simply not sustainable. As economic growth continues, better-off Chinese will want a greater say in their future, and pressure builds for political reform".[10] So just how far can Chinese officials cope with the idea of unpredictable measures of pressure or the 'voice' coming from the private sector for the state to take action in the WTO context? It will be common in the West for companies to resort to the usual measures of public pressure through the media, political allies and economic influence, to achieve their ends. Chinese officials have spoken about the need to maintain balance in the activities of its Chambers. How is this achieved in practice? Is it the case that China appears to fear there could be such a growth in the power of Chambers that they could exercise irresistible pressure on the government?

[10] Robert Zoellick's Policy Address on U.S.-China Relations, *op.cit.*, p.4.

This area of research is of huge theoretical and practical significance for the WTO. It exists on the borderline between law and political economy. The WTO gives states specific rights to fair trade, which are mainly about preventing states from using unequal economic and political power to bring advantages to their own private sector in its competition with foreign private sectors. However, the WTO regime does not give automatic legal rights to these private sectors. Nor do any national legal systems, even the US, where the final decision whether to act rests with the President.

One would need to undertake primarily field research in China. Interviews should have to be made with the members and representatives of the Chambers and with officials in the WTO department of the International Trade Ministry. There are also collections of the publications and available official proceedings of the Chambers and reviews of the professional, specialist press and academic literature.

Studies of specific Chambers should be related to industrial sector areas and issues, which have actually come into dispute or are likely to, between China, on the one hand, and the EU or the US on the other. However, this future research should also take account of trading friction between China and its other Asian and developing country rivals. These are not countries with which it has trading surpluses at the moment[11], but they are countries, which will claim that China is replacing them from their traditional markets in the developed countries. The major question will be whether there needs to be a distinctive Chinese way of balancing the potential power of these Chambers representing these vital sectors of Chinese industry. What are the prospects of a new legal framework for Chambers in China and what forms could it take?

Supposing that an effective transformation of the organisation of Chinese industry did occur and China had business associations completely representative of their members and completely independent of the Government that could mean a profound change in China's attitude to the DSM. Its own internal composition and identity would much more closely resemble that of a Western country with respect to the characteristics of

[11] See Appendix G.

economic democracy. One might think that would lead immediately to automatic demands for retaliatory measures whenever Chinese industry suffers "unfair" anti-dumping measures in other countries.

However, it has to be admitted that the picture, in any case speculative and in the future, remains immensely complex. That is why so much attention was devoted to the third chapter of the thesis, and in particular to the elaboration of the nature of China's political and legal culture. The explanation of Chinese culture – in the widest sense of views about how to relate to one another socially – has little to do with the common Western divide between the private and civil culture and the public, state and administrative culture. Instead Chinese culture has emanated from the individual and family virtues and extended, by analogy to the public sphere. The values, which the thesis has argued continue to permeate the elite areas of Chinese life, the public administration etc, come from an individual and family morality. They concern how, particularly, the individual person relates to the cosmos and endeavours to remain in harmony with it. It could hardly be a more open and difficult question whether the core of Chinese society, which Wendt argues every society will have, is to be changed fundamentally by the globalisation process of free trade and the tendencies to legalisation and litigation usually accompanying this in the West. It remains to be seen.

Many tasks continue after the thesis is finished. One has to update the progress on the reform of the DSM at the stalled Doha Round negotiations. One has to continue to accumulate trade dispute data emerging out of the WTO (for example, the ongoing auto parts case), and, most particularly, one has to explore both empirically and in legislative policy terms, the resolution of the status of Chambers of Commerce in contemporary China.

Appendix A: List of Persons Interviewed

Geneva, 24/06-28/06 2003

Susan Hainsworth, Counsellor in the Rules Division, WTO, Geneva
Xuewei Feng, Legal Affairs Officer, WTO, Geneva
Min Rong, Second Secretary, Permanent Mission of the People's Republic of China to the World Trade Organization, Geneva
Xiaochun Yang, Counsellor, Permanent Mission of the People's Republic of China to the UN, Geneva
Oliver Slocock, First Secretary, European Commission Delegation in Geneva

Beijing, 12/08-26/09 2003

Gang Liu, Department for WTO Affairs, Ministry of Commerce, China
Wenhua Ji, Department of Treaty and Law, Ministry of Commerce, China
Liang Wang, Department of Treaty and Law, Ministry of Commerce, China
Honglun Zhang, Assistant Head of Publishing of WTO & China, Chinese Academy of Social Science
Edward Jingchun Shao, Professor of Law, Head of International Economic Law Institute and Director of WTO Law Study Center, Peking University. Arbitrator, China International Economic & Trade Arbitration
Yihu Lee, Director of International Relations Department, Peking University
Jordan Zongdong Shan, Professor of Finance and Economics. Director of the Institute of the Chinese Economy and WTO Studies, Guanghua School of Management, Peking University
Shengping Zhang, Deputy Director of Institute of the Chinese Economy and WTO Studies, Guanghua School of Management, Peking University
Tao Han, Researcher in Chinese Legal History, Chinese Academy of Social Science

Washington DC, 23/11-28/11 2004

Paul A. Neureiter, Director for China, Office of China Affairs, Executive Office of the President, USTR
R. Mark Mechem, Director of Business Advisory Services, The US-China Business Council
Lin Su, Analyst, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission

Telephone Interviews 16/11/ 2005 & 05/12/2005

Xuequn Liu, Chief Executive of Shandong Zaozhuang Qunli Industry Co., Ltd, China
Famei Chong, Director of the Office of Public Relations, Shandong Zaozhuang Qunli Industry Co., Ltd, China
Qian Mu, Chief Executive of Shandong Ruide Co., Ltd, China

Appendix B: Involvement in the WTO dispute settlement mechanism, as at 30 April 2006

Dispute	Complainant (WTO document)	Request for consultation	Panel established	Panel report circulated	Appeal requested	Appellate Body Report adopted
Against China (4)						
Value-added tax on integrated circuits	United States (WT/DS309/1)	18/03/2004				
Measures Affecting Imports of Automobile Parts[a]	European Communities (WT/DS339/1)	30/03/2006				
Measures Affecting Imports of Automobile Parts[a]	United States (WT/DS340/1)	30/03/2006				
Measures Affecting Imports of Automobile Parts[a]	Canada (WT/DS342/1)	13/04/2006				
By China (1)						
Definitive Safeguard Measures on Imports of Certain Steel Products	China (WT/DS252/1)	26/03/2002	24/06/2002		11/08/2003	10/12/2003
China as a third party (47)						
United States– Tax Treatment for "Foreign Sales Corporations"[b]	EC (WT/DS108/27)	05/11/2004	02/05/2005	30/09/2005		
European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs[c]	United States (WT/DS174/1/Add.1)	04/04/2003	01/10/2003	15/03/2005		
United States– Countervailing Measures Concerning Certain Products from the European Communities[b]	EC (WT/DS212/14)	17/03/2004	27/09/2004	17/08/2005		
United States – Rules of Origin for Textiles and Apparel Products	India (WT/DS243/1)	11/01/2002	24/06/2002	20/06/2003		
Japan – Measures Affecting the Importation of Apples	United States (WT/DS245/1)	01/03/2002	03/06/2002	15/07/2003	28/08/2003	10/12/2003
United States – Definitive Safeguard Measures on Imports of Certain Steel Products	EC (WT/DS248/1)	07/03/2002	03/06/2002	11/07/2003	11/08/2003	10/12/2003
United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Japan (WT/DS249/1)	20/03/2002	14/06/2002	11/07/2003	11/08/2003	10/12/2003
United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Korea (WT/DS251/1)	20/03/2002	14/06/2002	11/07/2003	11/08/2003	10/12/2003
United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Switzerland (WT/DS253/1)	03/04/2002	24/06/2002	11/07/2003	11/08/2003	10/12/2003

Dispute	Complainant (WTO document)	Request for consultation	Panel established	Panel report circulated	Appeal requested	Appellate Body Report adopted
United States – Definitive Safeguard Measures on Imports of Certain Steel Products	Norway (WT/DS254/1)	04/04/2002	24/06/2002	11/07/2003	11/08/2003	10/12/2003
United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada	Canada (WT/DS257/1)	03/05/2002	01/10/2002	29/08/2003	02/10/2003 21/10/2003	17/02/2004
United States – Definitive Safeguard Measures on Imports of Certain Steel Products	New Zealand (WT/DS258/1)	14/05/2002	08/07/2002	11/07/2003	11/08/2003	10/12/2003
United States – Final Dumping Determination on Softwood Lumber from Canada[b]	Canada (WT/DS264/16)	19/05/2005	03/06/2005			
European Communities – Export Subsides on Sugar	Australia (WT/DS265/1)	27/09/2002	29/08/2003	15/10/2004	13/01/2005 25/01/2005	19/05/2005
European Communities – Export Subsides on Sugar	Brazil (WT/DS266/1)	27/09/2002	29/08/2003	15/10/2004	25/01/2005 13/01/2005	19/05/2005
United States – Subsidies on Upland Cotton	Brazil (WT/DS267/1)	27/09/2002	18/03/2003	08/09/2004	18/10/2004	21/03/2005
European Communities – Customs Classification of Frozen Boneless Chicken Cuts	Brazil (WT/DS269/1)	11/10/2002	07/11/2003	30/05/2005	13/06/2005 27/06/2005	27/09/2005
Australia – Certain Measures Affecting the Importation of Fresh Fruit and Vegetables	Philippines (WT/DS270/1)	18/10/2002	29/08/2003			
Korea – Measures Affecting Trade in Commercial Vessels	EC (WT/DS273/1)	21/10/2002	21/07/2003	07/03/2005		
Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain	United States (WT/DS276/1)	17/12/2002	11/07/2003 31/03/2003	06/04/2004	01/06/2004	27/09/2004
United States – Investigation of the International Trade Commission in Softwood Lumber from Canada[b]	Canada (WT/DS277/8)	14/02/2005	02/03/2005			
United States – Countervailing Duties on Steel Plate from Mexico	Mexico (WT/DS280/1)	21/01/2003	29/08/2003			
United States - Anti-Dumping Measures on Cement from Mexico	Mexico (WT/DS281/1)	31/01/2003	29/08/2003			
United States - Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico	Mexico (WT/DS282/1)	18/02/2003	29/08/2003	20/06/2005	04/08/2005 16/08/2005	
European Communities – Export Subsides on Sugar	Thailand (WT/DS283/1)	14/03/2003	29/08/2003	15/10/2004	25/01/2005 13/01/2005	19/05/2005
European Communities – Customs Classification of Frozen Boneless Chicken Cuts	Thailand (WT/DS286/1)	25/03/2003	21/11/2003	30/05/2005	13/06/2005 27/06/2005	27/09/2005
Australia – Quarantine Regime for Imports	EC (WT/DS287/1)	03/04/2003	07/11/2003			
European Communities – Protection of Trademarks and Geographical Indications for Agricultural products and Foodstuffs	Australia (WT/DS290/1)	17/04/2003	02/10/2003	15/03/2005		

Dispute	Complainant (WTO document)	Request for consultation	Panel established	Panel report circulated	Appeal requested	Appellate Body Report adopted
European Communities – Measures Affecting the Approval and Marketing of Biotech Products	United States (WT/DS291/1)	13/05/2003	29/08/2003			
European Communities – Measures Affecting the Approval and Marketing of Biotech Products	Canada (WT/DS292/1)	13/05/2003	29/08/2003			
European Communities – Measures Affecting the Approval and Marketing of Biotech Products	Argentina (WT/DS293/1)	14/05/2003	29/08/2003			
United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")	EC (WT/DS294/1)	12/06/2003	19/03/2004			
Mexico – Definitive Anti-dumping Measures on Beef and Rice	United States (WT/DS295/1)	16/06/2003	07/11/2003	06/06/2005	20/07/2005	
United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (Drams) from Korea	Korea (WT/DS296/1)	30/06/2003	23/01/2004	21/02/2005	11/04/2005 29/03/2005	20/07/2005
European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea	Korea (WT/DS299/1)	25/07/2003	23/01/2004	17/06/2005		
European Communities – Measures Affecting Trade in Commercial Vessels	Korea (WT/DS301/1)	03/09/2003	19/03/2004	22/04/2005		
Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes	Honduras (WT/DS302/1)	08/10/2003	09/01/2004	26/11/2004	07/02/2005 24/01/2005	19/05/2005
Mexico – Tax Measures on Soft Drinks and Other Beverages	United States (WT/DS308/1)	16/03/2004	06/07/2004			
Korea – Anti-dumping Duties on Imports of Certain Paper from Indonesia	Indonesia (WT/DS312/1)	04/06/2004	27/09/2004			
European Communities – Selected Customs Matters	United States (WT/DS315/1)	21/09/2004	21/03/2005			
European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft	United States (WT/DS316/1)	06/10/2004	20/07/2005			
United States – Measures Affecting Trade in Large Civil Aircraft	EC (WT/DS317/1)	06/10/2004	20/07/2005			
United States – Continued Suspension of Obligations in the EC – Hormones Dispute	EC (WT/DS320/1)	08/11/2004	17/02/2005			
Canada – Continued Suspension of Obligations in the EC - Hormones Dispute	EC (WT/DS321/1)	08/11/2004	17/02/2005			

Dispute	Complainant (WTO document)	Request for consultation	Panel established	Panel report circulated	Appeal requested	Appellate Body Report adopted
United States – Measures Relating to Zeroing and Sunset Reviews	Japan (WT/DS322/1)	24/11/2004	28/02/2005			
Japan – Import Quotas on Dried Laver and Seasoned Laver	Korea (WT/DS323/1)	01/12/2004	21/03/2005			
Egypt – Anti-Dumping Duties on Matches from Pakistan	Pakistan (WT/DS327/1)	21/02/2005	20/07/2005			

a On dispute WT/DS309, no panel was established. On 14 July 2004 China and the United States signed a Memorandum of Understanding (MOU). On 5 October 2005, the parties notified the DSB that a mutually agreed solution has been reached.

b Consultations or panels requested pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Source: WTO Secretariat.

APPENDIX C: MAIN DEPARTMENT/AGENCY INVOLVED IN TRADE POLICY IMPLEMENTATION

Department/Agency	Main responsibility
MINISTRY OF COMMERCE	Policy coordination and implementation for all trade-related issues
Policy Research Department	Proposing trade policy
Department of Treaty and Law	Formulating laws and regulations related to trade, international economic cooperation and foreign investment; facilitating bilateral and regional trade negotiations and IPR related issues; and dispute settlement negotiations
Department of Foreign Investment Administration	Guiding foreign investment, formulating relevant laws and regulations, and administering foreign-invested projects
Department of Market Operation Regulation Department of Market System Development Department of Commercial Reform and Development	Countering monopoly activities and handling provincial protectionism
Bureau of Fair Trade for Import and Export Bureau of Industry Injury Investigation	Formulating anti-dumping, countervailing, and safeguard regulations, and taking relevant measures
Bureau of Quota and License Affairs	Administering import and export quotas
Investment Promotion Agency	Promoting foreign investment
Trade Development Bureau	Promoting international trade
Executive Bureau of International Economic Cooperation	Organizing and administering foreign-aid programs
The Office of the Representative for International Trade Negotiation	facilitating bilateral and regional trade negotiations

Source: WTO Secretariat, Chinese Ministry of Commerce

Appendix D: China's major trade-related laws and regulations, as of October 2005

Legislation (comment)	Adoption of latest amendment	Entry into effect	Date of first adoption
Foreign trade, exchange restrictions and foreign investment			
Foreign Trade Law (G/LIC/N/1/CHN/4)	6 Apr 2004	1 July 2004	12 May 1994
Regulations on Origin of Import and Export Goods	18 Aug 2004	1 Jan 2005	
Regulation on the Administration of the Import and Export of Goods (G/LIC/N/1/CHN/4)	31 Oct 2001	1 Jan 2002	
Rules for the Registration of Foreign Trade Operators	19 June 2004	1 July 2004	
Rules on Investigations of Foreign Trade Barriers (Replaced 2002 Provisional Rules on Investigations of Foreign Trade Barriers)	21 Jan 2005	1 Mar 2005	
Regulations on the Export Control of Arms Products	15 Oct 2002[a]	15 Nov 2002	
Regulations on the Export Control of Nuclear Products	1 Aug 1997	10 Sept 1997	
Regulations on the Export Control of Dual-purpose Biological Products and Relevant Equipment and Technology	14 Oct 2002[a]	1 Dec 2002	
Regulations on the Export Control of Dual-purpose Nuclear Products and Related Technologies	10 June 1998	10 June 1998	
Regulations on the Export Control of Missiles and Related Items and Technologies	22 Aug 2002[a]	22 Aug 2002	
Regulations on the Export Control of Certain Chemicals and Related Equipment and Technologies	19 Oct 2002[a]	19 Oct 2002	
Regulations on Foreign Exchange Control	14 Jan 1997[a]	14 Jan 1997	5 Dec 1980
Decision of the Standing Committee of the NPC on Punishing Crimes of Fraudulently Purchasing, Evading and Illegally Trading in Foreign Exchange	29 Dec 1998	29 Dec 1998	
Law on Chinese-Foreign Equity Joint-Ventures	15 Mar 2001	15 Mar 2001	1 July 1979
Regulations for the Implementation of the Law on Chinese-Foreign Equity Joint-Ventures	22 July 2001[a]	22 July 2001	
Law on Chinese-Foreign Contractual Joint-Ventures	31 Oct 2000	31 Oct 2000	13 Apr 1988
Regulations for the Implementation of the Law on Chinese-Foreign Contractual Joint-Ventures	4 Sept 1995[a]	4 Sept 1995	
Law on Foreign-Capital Enterprise	31 Oct 2000	31 Oct 2000	12 Apr 1986
Regulations for the Implementation of the Law on Foreign-Capital Enterprises	12 Apr 2001[a]	12 Apr 2001	
Law on the Protection of Investment of Taiwan Compatriots	5 Mar 1994	5 Mar 1994	
Provisions on Guiding Foreign Investment Direction	11 Feb 2002	1 Apr 2002	
Customs- and tariff-related regulations			
Customs Law	8 July 2000	1 Jan 2001	22 Jan 1987
Regulations on Import and Export Tariff (G/VAL/N/1/CHN/4)	29 Oct 2003	1 Jan 2004	
Anti-dumping Regulations (G/ADP/N/1/CHN/2/Suppl.3)	31 Mar 2004[a]	1 June 2004	26 Nov 2001
Regulations on Countervailing Measures (G/SCM/N/1/CHN/1/Suppl.3)	31 Mar 2004[a]	1 June 2004	31 Oct 2001
Safeguard Regulations (G/SG/N/1/CHN/2/Suppl.3)	31 Mar 2004[a]	1 June 2004	26 Nov 2001
Regulations on Customs Protection of Intellectual Property (IP/N/1/CHN/2/Add.1)	26 Nov 2003	1 Mar 2004	
Standards and technical regulations			
Law on Import and Export Commodity Inspection	28 Apr 2002	1 Oct 2002	21 Feb 1989
Regulations for Implementation of Import and Export Commodity Inspection	10 Aug 2005	1 Dec 2005	
Standardization Law	29 Dec 1988	1 Apr 1989	
Regulations for the Implementation of the Standardization Law	6 Apr 1990	6 Apr 1990	
Law on the Entry and Exit Animal and Plant Quarantine	30 Oct 1991	1 Apr 1992	
Regulations for Implementation of the Law on the Entry and Exit Animal and Plant Quarantine	2 Dec 1996	1 Jan 1997	
Food Hygiene Law	30 Oct 1995	30 Oct 1995	
Law on Product Quality	8 July 2000	1 Sept 2000	22 Feb 1993
Regulations for Compulsory Product Certification	3 Dec 2001	1 May 2002	

Legislation (comment)	Adoption of latest amendment	Entry into effect	Date of first adoption
Regulations on Inspection and Quarantine of Entry and Exit Aquatic Products	18 Oct 2002	10 Dec 2002	
Frontier Health and Quarantine Law	2 Dec 1986	1 May 1987	
Regulations on Authentication and Approval	20 Aug 2003	1 Nov 2003	
Regulations for Safety Control of Dangerous Chemical Products	9 Jan 2002	15 Mar 2002	
Regulations on Imposing Administrative Penalties related to Certification and Accreditation	9 Dec 2003	9 Dec 2003	
Intellectual property rights			
Copyright Law (IP/N/1/CHN/C/1)	27 Oct 2001	27 Oct 2001	7 Sept 1990
Regulations for the Implementation of the Copyright Law (IP/N/1/CHN/C/3)	2 Aug 2002[a]	15 Sept 2002	
Trademark Law (IP/N/1/CHN/T/1)	27 Oct 2001	1 Dec 2001	23 Aug 1982
Regulations for the Implementation of the Trademark Law (IP/N/1/CHN/T/2)	2 Aug 2002[a]	15 Sept 2002	
Patent Law (IP/N/1/CHN/I/1)	25 Aug 2000	1 July 2001	12 Mar 1984
Regulations for Implementation of the Patent Law (IP/N/1/CHN/I/3)	28 Dec 2002[a]	1 Feb 2003	
Regulations on Computer Software Protection (IP/N/1/CHN/C/2/Rev.1)	20 Dec 2001[a]	1 Jan 2002	
Regulations on the Protection of Layout-Design of Integrated Circuits (IP/N/1/CHN/L/1/Rev.1)	28 Mar 2001	1 Oct 2001	
Regulations on Protection of New Varieties of Plants (IP/N/1/CHN/P/1)	20 Mar 1997	1 Oct 1997	
Regulations on the Administration of Technology Import and Export	31 Oct 2001	1 Jan 2002	
Tax regime			
Law on the Administration of Tax Collection	28 Apr 2001	1 May 2001	4 Sept 1992
Decision of the Standing Committee of the NPC Regarding the Application of Provisional Regulations on such Taxes as Value-added Tax, Consumption Tax and Business Tax to Enterprises with Foreign Investment and Foreign Enterprises	29 Dec 1993	29 Dec 1993	
Interim Regulations on Value-added Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Consumption Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Business Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Land Appreciation Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Resources Tax	26 Nov 1993	1 Jan 1994	
Interim Regulations on Income Tax for Enterprises	26 Nov 1993	1 Jan 1994	
Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises	9 Apr 1991	1 July 1991	
Rules for the Implementation of the Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises	30 June 1991	1 July 1991	
Income Tax Law for Individuals	27 Oct 2005	27 Oct 2005	10 Sept 1980
Sectoral laws			
Agriculture			
Agricultural Law	28 Dec 2002	1 Mar 2003	2 July 1993
Law on Land Contract in Rural Areas	29 Aug 2002	1 Mar 2003	
Land Administration Law	28 Aug 2004	28 Aug 2004	25 June 1986
Law on the Popularization of Agricultural Technology	2 July 1993	2 July 1993	
Grassland Law	28 Dec 2002	1 Mar 2003	18 June 1985
Seed Law	28 Aug 2004	28 Aug 2004	8 July 2000
Fisheries Law	28 Aug 2004	28 Aug 2004	20 Jan 1986
Forestry Law	29 Apr 1998	1 July 1998	20 Sept 1984
Law on Prompting Agricultural Mechanization	25 June 2004	1 Nov 2004	
Regulations on Management to Grain circulation	19 May 2004	26 May 2004	
Regulations on the Management to Central Grain Reserves	6 Aug 2003	15 Aug 2003	
Manufacturing			
Law on Tobacco Monopoly	29 June 1991	1 Jan 1992	
Pharmaceutical Administration Law	28 Feb 2001	1 Dec 2001	20 Sept 1984

Legislation (comment)	Adoption of latest amendment	Entry into effect	Date of first adoption
Steel Industry Development Policy	20 July 2005	20 July 2005	
Industrial Policy for the Automobile Industry	21 May 2004	1 June 2004	19 Feb 1994
Automobile Trade Policy	10 Aug 2005	10 Aug 2005	
Administrative Regulations on Recalls of Defective Automobile Products	15 Mar 2004	1 Oct 2004	
Energy, utilities and natural resources			
Mineral Resources Law	29 Aug 1996	29 Aug 1996	19 Mar 1986
Water Law	29 Aug 2002	1 Oct 2002	21 Jan 1988
Regulations on Exploitation of Offshore Petroleum Resources in Cooperation with Foreign Enterprises	23 Sept 2001	23 Sept 2001	30 Jan 1982
Regulations on Exploitation of On-shore Petroleum Resources in Cooperation with Foreign Enterprises	23 Sept 2001	23 Sept 2001	7 Oct 1993
Provisional Measures for Administration of the Market of Processed Oil	1 Jan 2005	1 Jan 2005	
Law on the Administration of the Use of Sea Areas	27 Oct 2001	1 Jan 2002	
Law on Water and Soil Conservation	29 June 1991	29 June 1991	
Law on Conserving Energy	1 Nov 1997	1 Jan 1998	
Mineral Resources Law	29 Aug 1996	1 Jan 1997	19 Mar 1986
Law on Coal Industry	29 Aug 1996	1 Dec 1996	
Electric Power Law	28 Dec 1995	1 Apr 1996	
Regulations for Administration of Electricity Industry	2 Feb 2005	1 May 2005	
Financial services			
Law on the People's Bank of China	27 Dec 2003	1 Feb 2004	18 Mar 1995
Law on Commercial Banks	27 Dec 2003	1 Feb 2004	10 May 1995
Law on Regulation of and Supervision over the Banking Industry	27 Dec 2003	1 Feb 2004	
Law on Funds for Investment in Securities	28 Oct 2003	1 June 2004	
Regulations on Closure of Financial Institutions	23 Nov 2001	15 Dec 2001	
Regulations on Administration of Foreign-funded Financial Institutions	12 Dec 2001	1 Feb 2002	
Insurance Law	28 Oct 2002	1 Jan 2003	30 June 1995
Regulations on Administration of Foreign-funded Insurance Companies	5 Dec 2001	1 Feb 2002	
Trust Law	28 Apr 2001	1 Oct 2001	
Securities Law	27 Oct 2005	1 Jan 2006	29 Dec 1998
Rules on the Establishment of Foreign-shared Fund Management Companies	1 June 2002[a]	1 July 2002	
Rules for the Establishment of Foreign-shared Securities Companies	1 June 2002[a]	1 July 2002	
Provisions of the State Council on Foreign Capital Stocks Listed in China by Joint Stock Limited Companies	2 Nov 1995	25 Dec 1995	
Auction Law	28 Aug 2004	28 Aug 2004	5 July 1996
Guaranty Law	30 June 1995	1 Oct 1995	
Decision of the Standing Committee of the NPC on Punishment of Crimes of Disrupting Financial Order (Refer also to the 1997 Criminal Law Appendix II)	30 June 1995	30 June 1995	
Other services			
Accounting Law	31 Oct 1999	1 July 2000	21 Jan 1985
Law on Certified Public Accountants	31 Oct 1993	1 Jan 1994	
Regulations on Telecommunications (Telecommunications Decree)	20 Sept 2000	25 Sept 2000	
Provisions on the Administration of Telecommunications Enterprises with Foreign Investment	5 Dec 2001	1 Jan 2002	
Highway Law	28 Aug 2004	28 Aug 2004	30 July 1997
Regulations on Road Transportation	14 Apr 2004	1 July 2004	
Provisions on the Administration of Road Transport Services with Foreign Investment	20 Nov 2001[a]	20 Nov 2001	
Railway Law	7 Sept 1990	1 May 1991	

Legislation (comment)	Adoption of latest amendment	Entry into effect	Date of first adoption
Maritime Code	7 Nov 1992	1 July 1993	
Regulations on International Maritime Transportation	5 Dec 2001	1 Jan 2002	
Implementing Rules of Regulations on International Maritime Transportation	25 Dec 2002	1 Mar 2003	
Special Maritime Procedure Law	25 Dec 1999	1 July 2000	
Provisions on Administration of Foreign Investment in International Maritime Transportation	2 Mar 2004[a]	1 June 2004	
Regulations on Administration of Pilotage	12 Oct 2001	1 Jan 2002	
Port Law	28 June 2003	1 Jan 2004	
Regulations on Administration of Port Operation	26 Dec 2003	1 June 2004	
Regulations on Port Facility Security	14 Nov 2003	14 Nov 2003	
Civil Aviation Law	30 Oct 1995	1 Mar 1996	
Regulations of Restriction for Universal Aviation	10 Jan 2003	1 May 2003	
Postal Law	2 Dec 1986	1 Jan 1987	
Law on Licensed Doctors	26 June 1998	1 May 1999	
Higher Education Law	29 Aug 1998	1 Jan 1999	
Education Law	18 Mar 1995	1 Sept 1995	
Compulsory Education Law	12 Apr 1986	1 July 1986	
Vocational Education Law	15 May 1996	1 Sept 1996	
Law on Promotion of Privately-run Schools	28 Dec 2002	1 Sept 2003	
Regulations on Sino-Foreign Cooperative Education	19 Feb 2003	1 Sept 2003	
Construction Law	1 Nov 1997	1 Mar 1998	
Regulations on Foreign-invested Construction Design Enterprises	27 Sept 2002[a]	1 Dec 2002	
Regulations on Construction Enterprises with Foreign Investment	27 Sept 2002[a]	1 Dec 2002	
Regulations on Property Management	28 May 2003	1 Sept 2003	
Advertisement Law	27 Oct 1994	1 Feb 1995	
Rules on Administration of Foreign-invested Advertising Enterprises	2 Mar 2004[a]	2 Mar 2004	
Regulations on Administration of Travel Agencies	11 Dec 2001[a]	1 Jan 2002	
Regulations on Administration of Tourist Guides	14 May 1999[a]	1 Oct 1999	
Provisional Rules on the Establishment of Travel Agencies with Majority Foreign Equity and Solely Foreign Investment	12 June 2003[a]	12 July 2003	
Law on Entry and Exit of Aliens	22 Nov 1985	1 Feb 1986	
Others			
Constitution	14 Mar 2004	14 Mar 2004	4 Dec 1982
Organic Law of the State Council	10 Dec 1982	10 Dec 1982	
Organic Law of the Local People's Congress and Local People's Government at Different Levels	27 Oct 2004	27 Oct 2004	
Criminal Procedure Law	17 Mar 1996	1 Jan 1997	1 July 1979
Civil Procedure Law	9 Apr 1991	9 Apr 1991	
Administrative Procedure Law	4 Apr 1989	1 Oct 1990	
Law on the Procedure of the Conclusion of Treaties	28 Dec 1990	28 Dec 1990	
Legislation Law	15 Mar 2000	1 July 2000	
Regulations on Procedures for the Formulation of Administrative Regulations	16 Nov 2001[a]	1 Jan 2002	
Regulations on Procedures for the Formulation of Rules	16 Nov 2001[a]	1 Jan 2002	
Regulations on Submission of Regulations and Rules for the Record	14 Dec 2001[a]	1 Jan 2002	
Decision of the Third Session of the Sixth National People's Congress on Authorizing the State Council to Formulate Interim Provisions or Regulations Concerning the Reform of the Economic Structure and the Open Policy	10 Apr 1985	10 Apr 1985	
Law Countering Unfair Competition	2 Sept 1993	1 Dec 1993	

Legislation (comment)	Adoption of latest amendment	Entry into effect	Date of first adoption
Provisions of the State Council on Prohibiting of Imposition of Regional Blockage on Market Economic Activities	21 Apr 2001	21 Apr 2001	
Notice on Cleaning up Local Protectionism in Market Economy Activities (issuing authorities: MOFCOM, Ministry of Supervision, LAOSC, MOF, Ministry of Communications, SAT, AQSIQ)	18 June 2004	18 June 2004	
Administrative Permission Law	27 Aug 2003	1 July 2004	
Judges Law	30 June 2001	30 June 2001	28 Feb 1995
Labour Law	5 July 1994	1 Jan 1995	
Law on Administrative Reconsideration	29 Apr 1999	1 Oct 1999	
Company Law	27 Oct 2005	1 Jan 2006	29 Dec 1993
Pricing Law	29 Dec 1997	1 May 1998	
Regulation on Government Pricing	26 Dec 2001	1 Feb 2002	
Interim Provisions on Preventing the Acts of Price Monopoly	18 June 2003	1 Nov 2003	
Administrative Regulations (Rules) Governing the Registration of Companies[b]	24 June 1994	1 July 1994	
Law on the Protection of Consumer Rights and Interests	31 Oct 1993	1 Jan 1994	
Law on Enterprise Bankruptcy (Trial Implementation)	2 Dec 1986	1 Nov 1988	
Law on Industrial Enterprises Owned by the Whole People	13 Apr 1988	1 Aug 1988	
Law on Individual Proprietorship Enterprises	30 Aug 1999	1 Jan 2000	
Administrative Rules Governing the Registration of Individual Proprietorship Enterprises	13 Jan 2000[a]	13 Jan 2000	
Law on Partnership Enterprises	23 Feb 1997	1 Aug 1997	
Administrative Regulations Governing the Registration of Partnership Enterprises	19 Nov 1997[a]	19 Nov 1997	
Law on Promotion of Small and Medium-Sized Enterprises	29 June 2002	1 Jan 2003	
Law on Township Enterprises	29 Oct 1996	1 Jan 1997	
Provisions on the Merger and Division of Enterprises with Foreign Investment	22 Nov 2001[a]	22 Nov 2001	23 Sept 1999
Law on Bid Invitation and Bidding	30 Aug 1999	1 Jan 2000	
Rules for the Administration of Employment of Foreigners in China	22 Jan 1996	1 May 1996	
Administrative Regulations Governing The Registration of Legal Corporations	3 June 1988[a]	1 July 1988	
Code of Corporate Governance for Listed Companies	9 Jan 2002	9 Jan 2002	
Several Opinions on Promoting the Reform, Opening and Steady Development of the Capital Market – State Council	31 Jan 2004	1 Feb 2004	
Contract Law	15 Mar 1999	1 Oct 1999	
Interim Regulations on Supervision and Management of Corporate State-owned Assets	13 May 2003	27 May 2003	
Provisional Measures on Transfer of State-Owned Property Rights in Enterprises	8 Jan 2004	1 Feb 2004	
Government Procurement Law of China	29 June 2002	1 Jan 2003	
Environmental Protection Law	26 Dec 1989	26 Dec 1989	
Law on Evaluation of Environmental Effects	28 Oct 2002	1 Sept 2003	
Marine Environment Protection Law	25 Dec 1999	1 Apr 2000	23 Aug 1982
Regulations on Administration of Collection and Utilization of Sewage Discharge Levies	2 Jan 2003[a]	1 July 2003	
Law on Lawyers	29 Dec 2001	1 Jan 2002	15 May 1996
Trade Union Law	27 Oct 2001	27 Oct 2001	

a Date of promulgation.
b MOFCOM online information. Available at: http://english.mofcom.gov.cn/aarticle/topic/lawsdata/chineselaw/200306/20030600095908.html.

Source: Ministry of Commerce, China.
WTO Secretariat

Appendix E: Merchandise exports by destination, 1998-05

(US$ million and per cent)

	1998	1999	2000	2001	2002	2003	2004	2005
Total exports (US$ million)	183,809.1	194,930.9	249,202.6	266,098.2	325,596.0	438,227.8	593,325.6	761,999.1
				(Per cent)				
America	24.7	25.5	25.1	24.8	25.7	25.1	25.5	26.0
United States	20.7	21.5	20.9	20.4	21.5	21.1	21.1	21.4
Other America	4.0	3.9	4.1	4.3	4.2	4.0	4.4	4.7
Canada	1.2	1.2	1.3	1.3	1.3	1.3	1.4	1.5
Mexico	0.4	0.4	0.5	0.7	0.9	0.7	0.8	0.7
Europe	17.3	17.5	17.5	17.5	17.0	19.0	19.3	20.2
EC(25)	16.2	16.4	16.4	16.6	16.1	17.9	18.1	18.9
Germany	4.0	4.0	3.7	3.7	3.5	4.0	4.0	4.3
Netherlands	2.8	2.8	2.7	2.7	2.8	3.1	3.1	3.4
United Kingdom	2.5	2.5	2.5	2.5	2.5	2.5	2.5	2.5
Italy	1.4	1.5	1.5	1.5	1.5	1.5	1.6	1.5
France	1.5	1.5	1.5	1.4	1.3	1.7	1.7	1.5
Belgium-Luxembourg	0.9	1.0	0.9	1.0	0.9	1.0	1.1	1.3
Spain	0.8	0.9	0.9	0.9	0.8	0.9	0.9	1.1
EFTA	0.5	0.5	0.5	0.4	0.4	0.4	0.4	0.4
Other Europe	0.5	0.5	0.6	0.5	0.5	0.7	0.8	0.9
CIS[a]	1.3	1.1	1.3	1.3	1.6	2.1	2.3	2.8
Russian Federation	1.0	0.8	0.9	1.0	1.1	1.4	1.5	1.7
Africa	2.2	2.1	2.0	2.2	2.1	2.3	2.3	2.5
Middle East	2.2	2.3	2.5	2.7	2.9	3.0	2.9	2.9
United Arab Emirates	0.7	0.7	0.8	0.9	1.1	1.1	1.2	1.1
Asia	52.3	51.5	51.7	51.5	50.6	48.4	47.6	45.6
Japan	16.1	16.6	16.7	16.9	14.9	13.6	12.4	11.0
Six East Asian Traders	30.3	28.8	28.7	28.3	29.3	28.3	28.4	27.7
Hong Kong, China	21.1	18.9	17.9	17.5	18.0	17.4	17.0	16.3
Korea, Rep. of	3.4	4.0	4.5	4.7	4.8	4.6	4.7	4.6
Singapore	2.1	2.3	2.3	2.2	2.1	2.0	2.1	2.2
Chinese Taipei	2.1	2.0	2.0	1.9	2.0	2.1	2.3	2.2
Malaysia	0.9	0.9	1.0	1.2	1.5	1.4	1.4	1.4
Thailand	0.7	0.7	0.9	0.9	0.9	0.9	1.0	1.0
Other Asia	5.9	6.0	6.3	6.3	6.4	6.5	6.8	6.8
Australia	1.3	1.4	1.4	1.3	1.4	1.4	1.5	1.7
India	0.6	0.6	0.6	0.7	0.8	0.8	1.0	1.2
Indonesia	0.6	0.9	1.2	1.1	1.1	1.0	1.1	1.1
Memorandum:								
APEC	73.5	73.5	73.4	72.8	73.3	70.9	70.2	68.6
ASEAN	6.1	6.3	7.0	6.9	7.2	7.1	7.2	7.3
EC(15)	15.3	15.5	15.3	15.4	14.8	16.5	16.8	17.7

a Commonwealth of Independent States (CIS) includes Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

Source: UNSD, Comtrade database (SITC Rev.3); and General Administration of Customs (2005), *China's Customs Statistics: Monthly Exports & Imports*, 12, Series No. 196. WTO Secretariat

Appendix F: Merchandise imports by origin, 1998-05

(US$ million and per cent)

	1998	1999	2000	2001	2002	2003	2004	2005
Total imports (US$ million)	140,236.8	165,699.1	225,093.7	243,552.9	295,170.1	412,759.8	561,228.7	660,118.5
				(Per cent)				
America	15.8	15.0	14.0	15.2	13.3	12.9	13.1	12.6
United States	12.0	11.8	9.9	10.8	9.2	8.2	8.0	7.4
Other America	3.7	3.2	4.1	4.4	4.0	4.7	5.2	5.2
Brazil	0.8	0.6	0.7	1.0	1.0	1.4	1.5	1.5
Canada	1.6	1.4	1.7	1.7	1.2	1.1	1.3	1.1
Europe	15.7	16.5	14.9	16.0	14.6	14.3	13.6	12.1
EC(25)	14.9	15.6	13.9	14.9	13.3	13.2	12.5	11.1
Germany	5.0	5.0	4.6	5.7	5.6	5.9	5.4	4.7
France	2.3	2.3	1.8	1.7	1.4	1.5	1.4	1.4
Italy	1.6	1.6	1.4	1.6	1.5	1.2	1.1	1.0
United Kingdom	1.4	1.8	1.6	1.4	1.1	0.9	0.8	0.8
EFTA	0.8	0.9	0.9	1.0	1.0	0.9	0.9	0.8
Other Europe	0.1	0.1	0.1	0.2	0.2	0.3	0.2	0.2
CIS[a]	3.1	3.2	3.3	4.0	3.6	3.2	2.9	3.1
Russian Federation	2.6	2.5	2.6	3.3	2.8	2.4	2.2	2.4
Africa	1.1	1.4	2.5	2.0	1.8	2.0	2.8	3.2
Angola	0.1	0.2	0.8	0.3	0.4	0.5	0.8	1.0
Middle East	2.3	2.2	4.4	3.8	3.2	3.5	3.9	4.7
Saudi Arabia	0.6	0.6	0.9	1.1	1.2	1.3	1.3	1.9
Asia	59.9	59.2	57.7	55.5	58.4	58.0	56.8	55.9
Japan	20.2	20.4	18.4	17.6	18.1	18.0	16.8	15.2
Six East Asian Traders	34.0	32.6	32.5	31.3	33.6	33.2	32.5	32.5
Korea, Rep. of	10.7	10.4	10.3	9.6	9.7	10.4	11.1	11.6
Chinese Taipei	11.9	11.8	11.3	11.2	12.9	12.0	11.5	11.3
Malaysia	1.9	2.2	2.4	2.5	3.1	3.4	3.2	3.0
Singapore	3.0	2.5	2.2	2.1	2.4	2.5	2.5	2.5
Thailand	1.7	1.7	1.9	1.9	1.9	2.1	2.1	2.1
Hong Kong, China	4.7	4.2	4.2	3.9	3.6	2.7	2.1	1.9
Other Asia	5.8	6.2	6.8	6.7	6.6	6.9	7.5	8.2
Australia	1.9	2.2	2.2	2.2	2.0	1.8	2.1	2.5
Philippines	0.4	0.5	0.7	0.8	1.1	1.5	1.6	1.9
India	0.6	0.5	0.6	0.7	0.8	1.0	1.4	1.5
Indonesia	1.8	1.8	2.0	1.6	1.5	1.4	1.3	1.3
Other	2.2	2.5	3.2	3.6	5.1	6.1	6.9	8.4
Free zones	2.2	2.5	3.2	3.6	5.1	6.1	6.9	8.4
Memorandum:								
APEC	75.5	74.5	71.9	71.0	71.6	69.3	67.8	74.8
ASEAN	9.0	9.0	9.9	9.5	10.6	11.5	11.2	11.4
EC(15)	14.8	15.4	13.7	14.7	13.1	12.8	12.2	10.9

a Commonwealth of Independent States (CIS) includes Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

Source: UNSD, Comtrade database (SITC Rev.3); and General Administration of Customs (2005), *China's Customs Statistics: Monthly Exports & Imports,* 12, Series No. 196.
WTO Secretariat

Appendix G: Trade surplus or deficit by country and region, 1998-05

(US$ million)

	1998	1999	2000	2001	2002	2003	2004	2005
World	43,572.3	29,231.8	24,108.8	22,545.3	30,425.9	25,468.0	32,096.8	101,880.7
America	23,285.1	24,850.0	30,926.7	28,929.4	44,541.4	56,812.1	77,669.5	115,318.0
United States	21,100.1	22,517.3	29,781.9	28,137.7	42,789.0	58,682.1	80,401.1	114,173.3
Other America	2,185.0	2,332.8	1,144.9	791.7	1,752.4	-1,870.1	-2,731.6	1,144.7
Canada	-110.3	98.9	-593.2	-682.2	676.6	1,257.7	808.2	4,142.5
Europe	9,744.3	6,609.0	10,019.8	7,607.3	12,401.8	24,177.4	38,481.4	74,163.3
EC(25)	8,943.3	6,273.2	9,587.4	7,937.9	13,132.9	23,943.0	37,153.5	70,116.2
EFTA	-137.6	-478.8	-835.0	-1,223.5	-1,795.2	-1,793.8	-2,474.8	-1,728.5
Other Europe	938.7	814.7	1,267.4	892.8	1,064.1	2,028.2	3,802.7	5,775.7
CIS[a]	-1,938.4	-3,049.2	-4,184.2	-6,165.2	-5,523.0	-3,846.0	-2,407.2	676.0
Russian Federation	-1,801.1	-2,725.3	-3,536.5	-5,248.3	-4,885.9	-3,698.1	-3,029.3	-2,678.7
Africa	2,554.0	1,709.2	-546.5	1,169.7	1,492.5	1,767.4	-1,913.4	-2,379.9
Middle East	867.4	981.2	-3,820.4	-2,070.8	39.0	-1,158.2	-4,686.6	-8,850.7
Asia	12,080.9	2,271.7	-1,109.8	1,840.6	-7,552.0	-27,178.4	-36,354.9	-21,863.3
Japan	1,385.0	-1,352.8	144.6	2,153.2	-5,032.2	-14,739.4	-20,817.7	-16,459.5
Six East Asian Traders	8,034.1	2,139.5	-1,631.6	-774.3	-3,798.5	-12,699.2	-13,699.6	-3,138.1
Chinese Taipei	-12,762.0	-15,576.9	-20,454.6	-22,337.7	-31,475.3	-40,356.1	-51,214.5	-58,134.8
Hong Kong, China	32,083.8	29,970.9	35,089.3	37,118.7	47,736.9	65,155.7	89,071.8	112,254.0
Korea, Rep. of	-8,762.8	-9,418.6	-11,915.0	-10,858.2	-13,033.4	-23,033.3	-34,422.5	-41,712.7
Malaysia	-1,077.5	-1,931.8	-2,915.1	-2,982.9	-4,322.1	-7,845.5	-10,088.7	-9,489.3
Singapore	-291.5	441.1	701.4	662.4	-62.3	-1,621.1	-1,306.9	116.2
Thailand	-1,155.9	-1,345.2	-2,137.5	-2,376.7	-2,642.3	-4,998.9	-5,738.9	-6,171.4
Other Asia	2,661.8	1,485.0	377.2	461.7	1,278.7	260.3	-1,837.5	-2,265.7
Australia	-317.6	-902.8	-1,595.1	-1,856.5	-1,265.5	-1,036.5	-2,714.2	-3,299.0
India	111.0	336.2	207.3	196.7	397.3	-908.2	-1,742.0	-833.7
Indonesia	-1,290.7	-1,271.8	-1,340.1	-1,052.2	-1,081.9	-1,265.1	-959.2	-86.2
Memorandum:								
APEC	29,227.0	19,792.5	21,054.7	20,820.9	27,393.4	24,562.9	35,996.3	29,015.0
ASEAN	-1,470.0	-2,652.3	-4,840.3	-4,838.6	-7,612.3	-16,400.8	-20,068.0	-19,627.8
EC(15)	7,423.6	4,794.0	7,383.4	5,231.3	9,724.2	19,114.3	31,712.7	63,096.6

a Commonwealth of Independent States (CIS) includes Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan.

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