

China and the WTO Dispute Settlement Mechanism

A Future Disarray?

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Chapter 1: China's Road to the WTO

China has been working towards accession to the GATT/WTO for more than a decade even though it was one of the founding members of the GATT. In early 1950, the Taipei government notified the GATT of China's withdrawal from GATT membership. Since then, the relationship between China and GATT has been suspended.

GATT/WTO Accession Process

Under the old GATT rule, there were two ways in which a state or a customs territory could become a contracting party. The first way was governed by Article XXXIII of GATT. The accession of new members required a two-thirds vote of the membership. The second way to become a member was through the method of sponsorship. Article XXVI 5(C) provided that a GATT contracting party could sponsor any customs territory possessing full autonomy in conduct of its external commercial relations to be a member. Many newly independent countries became members of GATT in this manner.

Under the WTO Agreement, a state or a customs territory that possesses full autonomy in the conduct of its trade policies may become a member of the WTO on terms agreed with WTO members.¹ The procedure used in the consideration of an application for accession to the WTO is as follows.² Upon receiving an application to join the WTO, the Director-General of the WTO notifies all Members. The application is considered by the General Council and a working party is established to consider the application. The term of reference of the working party is to "examine the application for the accession to the WTO under Article XII and to submit to the General Council/Ministerial Conference recommendations which may include a draft Protocol of Accession."³ The applicant is required to provide to the WTO a country memorandum covering basic information about its economic and trade policies. The

¹ Article XII of the Agreement Establishing The World Trade Organization.

² "Accession to The World Trade Organization – Procedure for Negotiations under Article XII," WTO Document WT/ACC/1.

³ *Ibid.*, p.1.

Memorandum is titled "Memorandum on the Foreign Trade Regime," which covers the following aspects:⁴

1. Economy, Economic Policies and Foreign Trade.
2. Framework for Making and Enforcing Policies Affecting Foreign Trade in Goods and Trade in Services.
3. Policies Affecting Trade in Goods
4. Trade-related Intellectual Property Regime.
5. Trade-related Service Regime.
6. Institutional Base for Trade and Economic Relations with Third Countries.

Based on the information within the Memorandum, members of the working group raise questions so as to seek clarification of the applicant's foreign trade regime. This is considered the fact finding stage of the accession process as the working party studies in detail the information provided by the applicant about its foreign trade regime. The fact finding stage could take several years to complete; and even in an easy case it can take longer than three years.⁵

Concurrent with the work of the working party, the applicant has to conduct bilateral market access negotiations on goods and on services with interested members of the WTO. The outcome of the examination and negotiations are a report of the working party, a draft protocol of accession and schedules on commitments. The three documents are submitted to the General Council/Ministerial Conference for adoption. The decision to approve the applicant's access to the WTO is to be taken by a two thirds majority of the members of the WTO.

China's Accession Process

In 1986, the People's Republic of China notified the GATT of its wish to resume its status as a contracting party. In February 1987, China submitted a memorandum on its foreign trade regime. On March 4 the same year, the GATT Council set up a working party to examine China's request.⁶ The Chinese Government laid down three major principles for its entry into the GATT, which were (1) request for resuming

⁴ *Ibid.*, Attachment.

⁵ Chulsu Kim, "Process of Accession to the World Trade Organization," *Journal of Northeast Asian Studies*, Fall 1996, pp. 4-13 at p.7.

⁶ Tang Yufeng,, "Progress on the Resumption of China's GATT Membership," in *Almanac of China's Foreign Economic Relations and Trade 1988* (China: China Resources Advertising Co.,

China's original contracting party status; (2) joining the GATT as a developing country; (3) participating in the GATT on the basis of tariff reductions, rather than on a pledge to accept imports from other contracting parties.⁷

In pursuing its GATT membership, China had insisted on the resumption of its original contracting party status, rather than re-accession into the GATT.⁸ The issue of resumption vs. accession disappeared as China failed to join the GATT before its termination.

Between 1987 and 1995, the GATT working party on China met over twenty times.⁹ By the spring of 1989, there were signs of significant progress. However, following the violent suppression in the Tiananman Square in June 1989, the whole process came to a standstill for more than two and a half years. Discussions on China's GATT membership were restarted in late 1992. In 1994, following the completion of the Uruguay Round, China stepped up its efforts to enter into GATT, hoping that it could become a founding member of the WTO. China's efforts finally failed because Japan, Canada, the European Union (EU) and the United States (US) insisted that China's accession should be based on "commercially viable terms."¹⁰

In November 1995, the United States presented China with a secret road map, detailing a full range of basic issues that China needed to address. They included (1) tariff reduction and market opening; (2) liberalizing government-controlled trading rights; (3) dropping protective investment and industrial policies; (4) entering the WTO as a developed country; (5) accepting safeguards against import surges from China; and (5) providing import quotas to permit more imports from other WTO members.¹¹

When the WTO came into being on 1 January 1995, China's accession work was transferred to a Working Party under the WTO system. The Working Party held its

Ltd. 1988) pp. 75-77.

⁷ You Xianxun Zhu, *Shijie Maoyi Zuzhifa (The Law of the World Trade Organization)* (Shanghai: Lixin Kuaiji Chubanshe, 1997) p. 388.

⁸ See Ya Qin, "China and GATT: Accession Instead of Resumption," *Journal of World Trade*, Vol.27, No.2, 1993, pp. 77-98.

⁹ Jeffrey L. Gertler, "The Process of China's Accession to the World Trade Organization," Remarks presented at the Third Annual Conference of the Library of International Relations at Chicago-Kent College of Law, 6-7 November 1997.

¹⁰ China claimed that the real reason behind this failure was that these countries lacked political determination, see Jen Chuan, *Chungkuo Chiaju Shihchieh Maoi Tsuchih Chihshih Wenta: 400 Wen (400 Questions on China's Accession to the WTO)* (Beijing: Tangtai Shihchieh Chupahshe, 1997) pp. 273-4.

¹¹ "U. S. Map Puts China on Road to WTO," *Financial Times*, December 7, 1995.

first meeting in March 1996 in Geneva. In that meeting, a Chinese negotiator stressed that China's participation in the Multilateral Trading System would remain unchanged.¹² Since then, there have been intensive negotiations on both the multilateral protocol track and the bilateral market access track. The Working Party has now met on seven occasions, the latest being in April 1998.

In terms of the Protocol aspect¹³, there is complete agreement in some areas, which including China's commitment to subject its state-owned enterprises to applicable WTO rules, to ensure import and export licensing are in full compliance with WTO rules, to grant full trading rights for Chinese and foreign companies, and to maintain independent tribunals for the review of administrative actions. There are some areas in which agreement has been reached in principle, which including the phasing out of non-tariff measures and all subsidies, simplifying statutory inspection procedures and implementing a review mechanism to oversee China's implementation of the WTO Agreement. Finally, there are major disagreements in areas such as selective safeguards against China's products, the use of balance-of-payments restrictions, and the methods used to determine the existence of dumping and subsidies.

The market access negotiation has proceeded concurrently with the discussion of the draft Protocol. By the end of 1997, China had conducted bilateral market access negotiations with 35 WTO members, with had approached the final stage with more than 20 members.¹⁴ Since 1992, China has gradually reduced its tariff rate, lowering its overall tariff level by 60% , which reduces the average tariff from 42.5% to 15%. In November 1997, China promised to reduce its average tariff rate for industrial products to 10% by 2005.¹⁵

In terms of market access commitments, the most difficult is the services area. Developed WTO members have generally regarded China's services offer to be inadequate.¹⁶ Western negotiators wanted China to open up its services market. At the

¹² Statement of Mr. Long Yongtu, at the First Meeting of the Working Party on China's Accession to WTO, March 22, 1996. Internet Source: <http://www3.itu.int/missions/China/wp1.ht>

¹³ The discussions here are largely based on Jeffrey L. Gertler's remarks (note 9 above).

¹⁴ Statement of Mr. Long Yongtu, at the Sixth Meeting of the Working Party on China's Accession to WTO, December 5, 1997. Internet Source: <http://www3.itu.int/missions/China/wp6.ht>

¹⁵ See John Wong, "China's WTO Membership," in Mark A. Buchauan ed., *The Asia-Pacific Region and the Expanding Borders of the WTO: Implications, Challenges and Opportunities* (Canada: University of Victoria, 1996) pp. 160-179 and "China Slashes Tariff Rate Once Again," *Beijing Review*, December 1-7, 1997, p. 18.

¹⁶ See for example, Testimony of Susan Esserman (US Trade Representative General Counsel) at a House Ways and Means Committee Trade Subcommittee Meeting on November 4, 1997.

sixth session of the Working Party, held in December 1997, China submitted a revised services offer in banking, insurance, telecommunication, and legal services.¹⁷ To western negotiators, the revised offer still falls far short of their expectations.¹⁸

Significant Barriers for China's WTO Accession

Unlike GATT (1947), which consisted of various stand-alone agreements, the WTO code is a unified system embracing agreements in relation to trade in goods, in services and in intellectual property. The single undertaking under the WTO has produced significant changes to the accession process. Accession to the WTO requires acceptance of all multilateral agreements. When compared to the GATT system, accession to the WTO is more difficult because a new member needs to assume more extensive obligations.¹⁹ For a huge country with a changing economy like China, it would be a formidable task for it to comply with all the requirements.

China's economic status as a non-market economy poses a major difficulty in joining the WTO. The rules and principles of the WTO are largely based on free-market oriented economies. Although China has liberalized its economic institutions since the late 70s, there are still various aspects of its economy that are not in line with market economic principles.²⁰ Certain non-market economies, such as Poland, Romania and Hungary, became GATT members in the 60s and 70s. However, their accessions were not based on reciprocal tariff reduction, but rather on a commitment to increase imports from other contracting parties or to fundamental economic reforms.²¹ From the beginning, China has insisted that its accession should be based on tariff reductions.

Jackson proposes to establish a "two-track" safeguard system for dealing with

¹⁷ Statement of Mr. Long Yongtu, at the Sixth Meeting of the Working Party on China's Accession to WTO, December 5, 1997. Internet Source: <http://www3.itu.int/missions/China/wp6.ht>

¹⁸ See "Keep the Deal on Hold," *Business China*, December 8, 1997.

¹⁹ For implications of the WTO for accession, see Murray G. Smith, "Accession to the WTO: Key Strategic Issues," in Jeffrey J. Schott ed., *The World Trading System: Challenges Ahead* (Washington D. C.: Institute for International Economics, 1996) pp. 167-81 at pp. 170-3.

²⁰ It was estimated that 53% of China's total industrial output was from the state-owned enterprises in 1995. Quoted in Xun Wang, "Whither Troubled Chinese State-owned Enterprises," in Joseph Y. S. Cheng ed., *China Review 1998* (Hong Kong: The Chinese University Press, 1998) pp. 393-394.

²¹ See OECD, *Integrating Emerging Market Economics into International Trading System*, (Paris: OEDC, 1994) Chapter III.

non-market economies wanting to become members of the WTO.²² The first track would require a non-market economy country to provide transparency and procedural fairness for its trade administration and regulations. A working party would be established under the accession protocol to regularly review the trade relationships between the non-market economy and WTO members. The second track is specifically used to deal with the interface between the non-market sector within the country and WTO members, in which certain special safeguard measures and negotiating mechanisms are built in to lessen any serious injury caused by the differences. Even if the above framework was adopted, there could still be major disagreements on what kind of specific requirements should be laid down in the protocol of accession. For example, the United States' position has been that China's protocol should place an emphasis on the need for further market reform. The European Community's position has been that the protocol should place more emphasis on the provision of liberal safeguard measures.²³ China is opposed to any discriminatory safeguards that go beyond the WTO agreements.²⁴

The flexibility of the existing accession process is also one of the reasons why China's accession has taken so long. There is no legal restriction on the subject matter that may be regulated by the accession protocol; for example — a proposal has been put forward to include a selective safeguards clause in China's protocol of accession despite the fact the WTO code already contains a general safeguards clause (GATT Article XIX). The criteria by which the working party evaluates an acceding country's foreign trade regime is not specified in the WTO code.²⁵ Nor are there specifications as to whether an applicant joining the WTO as a developing or a developed country. As a result, non trade-related matters such as human rights and political considerations could become conditions for entry.²⁶

²² John H. Jackson, 2nd ed., *The World Trading System* (Cambridge: The MIT Press, 1997) pp. 328-32.

²³ See George D. Holliday, "China and the World Trade Organization," in Joint Economic Committee, Congress of the United States, *China's Economic Future: Challenges to U.S. Policy* (New York: M. E. Sharpe, 1997) pp.466-7. For an analysis of the EU's role on China's accession, see Michaela Eglin, "China's Entry into the WTO: With a Little Help from the EU," *International Affairs*, Vol. 73, No.3, 1997, pp. 489-508.

²⁴ Lei Wang, "Are Trade Disputes Fairly Settled?" *Journal of World Trade*, Vol. 31, No. 1, 1997.

²⁵ For a criticism of WTO's accession process, see Asif H. Qureshi, *The World Trade Organization — Implementing International Trade Norms* (Manchester: Manchester University Press, 1996) pp. 129-30.

²⁶ China has complained that the obstruction to China's entry to the WTO comes mainly from

Potential Conflicts in the Future

It is difficult to anticipate the precise content of China's accession protocol and schedules of commitments when China eventually joins the WTO. However, it is clear that China's accession protocol will be a complex document. Suggestions have been made that China's protocol should not only cover commitments pertaining to trade-related matters such as tariffs, quotas and non-tariff barriers, but also include commitments relating to future economic and legal reforms.²⁷ If this is the case, the implementation of the protocol will be a highly contentious issue. Some particular areas are certain to cause major disputes within the WTO system.

The first area is whether China can accede to the WTO as a developing country. China has argued that it should be allowed to join the WTO as a developing country, while WTO developed members insist that a significant part of China's industry sectors are sufficiently developed. One possible outcome is that China could be classified as a developing country in some industries, such as auto and telecommunication, and as a developed country in other industries, such as textile manufacturing.²⁸ However, the WTO code is a unified system of rules. The special and differential treatment provisions in the WTO rules are geared towards a developing country, rather than towards a developing industry. For example, if China were only considered to be a developing country in some particular industries, disputes would arise with respect to whether China could invoke GATT Article XVII, which allows a developing country to apply quantitative restrictions to safeguard its balance of payments problems and to promote infant industries.

The second area is the problem of state-owned enterprises. The state-owned enterprises still play a dominant role in China's economic system despite two decades of economic reforms.²⁹ There are only a handful of provisions in the WTO code that deal with this problem; the existing provisions are primarily used for regulating state trading in mainly market economics. GATT Article XVII requires that a state trading enterprise must not discriminate in the import and export of products and must make

certain countries and that the interference to the reinstatement is due to political and ideological considerations.

²⁷ George D. Holliday (note 23 above) p. 463.

²⁸ *South China Morning Post*, Hong Kong, November 11, 1995.

²⁹ See note 20 above.

purchases and sales in accordance with commercial considerations. The Uruguay Round results include an "Understanding on the Interpretation of Article XVII of GATT 1994", which aims at enhancing the transparency of state trading enterprises through notifications and policy reviews. It is questionable whether these provisions can effectively monitor the state-owned enterprises in China.³⁰ It would not be surprising if many disputes occur in this area when China joins the WTO.

The third area is the most-favoured-nation treatment (MFN) issue. China would like to see its WTO membership guarantee MFN treatment from all other members, especially the US. Nevertheless, the granting of MFN status in the US is linked to a domestic legislation — the Jackson-Vanik Amendment to the Trade Act of 1974.³¹ Article XIII of the Agreement Establishing the WTO gives an existing member the right to withhold MFN treatment for a new member. Even if China joins the WTO, the US Congress could still retain the power to review China's MFN status. If this is the case, serious disputes will emerge pertaining to whether US domestic legislation violates the WTO Agreement.

The fourth area is how to monitor the progress of China's economic and legal reforms if they are conditions for entry to the WTO. The US has been keen on insisting on China's continuation and deepening of economic and legal reforms as a condition for China's accession to the WTO. The EU has advocated a special trade review mechanism to monitor China's economic reforms.³² But the problem is how to monitor China's reform process. If China fails to undertake adequate reforms in particular areas, should the WTO have the right to grant authorization to suspend concessions or other obligations?

³⁰ See John H. Jackson, note 22 above, pp. 326-7.

³¹ For a detailed discussion, see James M. Montgomery, "China's Entry to the WTO and the Jackson-Vanik Amendment," *Journal of Northeast Asian Studies*, Fall 1996, pp. 59-69.

³² Lei Wang, note 24 above, p. 62.

Chapter 2: Trade Dispute Settlement Process

According to Jackson, techniques for settlement of international disputes can be divided into the power-oriented technique and the rule-oriented technique.³³ The power-oriented technique suggests that disputes are settled by negotiations with reference to power differences, while the rule-oriented technique implies that disputes are resolved through negotiations with reference to agreed rules. The GATT/WTO dispute settlement system is specifically designed to promote the rule-oriented method for the settlement of international trade disputes. The WTO agreement states that the dispute settlement system "is a central element providing security and predictability to the multilateral trading system."³⁴

Although the GATT dispute settlement procedure was considered to be quite a successful international legal institution³⁵, there were a number of defects in the system, such as constant delays in the establishment of panels, the persistent blocking of the adoption of panel reports, a dramatic increase in noncompliance with dispute settlement rulings, a lack of transparency and infrequent use of the system by developing countries.³⁶

The WTO Dispute Settlement System

A new dispute settlement system, which built on the previous GATT dispute settlement system, was set up when the WTO Agreement came into force on January 1, 1995. The new system is described in the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Understanding). A number of changes have been incorporated into the new dispute settlement system. First, the new

³³ John H. Jackson, 2nd ed., *The World Trading System* (Cambridge: The MIT Press, 1997) pp. 331-2.

³⁴ Article 3(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

³⁵ Robert C. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (New Hampshire: Butterworths, 1993) p. 353.

³⁶ See Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System---International Law, International Organizations and Dispute Settlement* (London: Kluwer Law International, 1997) pp. 90-1 and Kofi Oteng KuFuor, "From the GATT to the WTO: the Development Countries and the Reform of the Procedures of the Settlement of International Trade Disputes," *Journal of World Trade*, Vol. 31, No. 5, 1997.

system prevents a responding country from blocking the establishment of a panel and the adoption of a panel report. Second, the WTO dispute settlement system becomes the exclusive framework for disputes concerning any of the WTO texts, including agreements on trade in services and on trade in intellectual property rights. Third, it is a system which is more structured and legalistic in nature; for example, flexible deadlines are set at various stages of the settlement process and an appellate procedure has been established. Fourth, the system contains detailed provisions to ensure prompt compliance with final recommendations and rulings.³⁷

The Dispute Understanding has created the Dispute Settlement Body (DSB) to administer the understanding. The WTO dispute settlement process starts from a consultation stage, in which countries in dispute try to settle their differences through discussion. If that fails, the complaining party has the right to the establishment of a panel to consider the dispute, unless there is a consensus not to establish a panel. The panel should submit its report within six months. The Dispute Understanding requires that the panel report be adopted within 60 days, unless there is a consensus not to adopt the report or there is an appeal against the report. Each appeal is heard by three members of a standing appellate body. In general, the appellate procedure should conclude within 60 days, and in no case should it exceed 90 days. The DSU must adopt the appellate report within 30 days, unless there is a consensus not to adopt the report. Further details of the WTO dispute settlement process are given in Figure 1, which is self-explanatory.

Its Relevance to Developing Countries

It has been noted that a very large number of cases brought under the GATT dispute settlement system involved the US, the EC, and Japan.³⁸ During the GATT period, only 16.1% of the total disputes handled by the dispute settlement system were

³⁷ For detailed discussions of the WTO dispute settlement process, see Ernst-Ulrich Petersmann, note 4 above, Chapter 5 and John H. Jackson, "Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects," in Anne O. Krueger ed., *The WTO as an International Organization*, (Chicago: The University of Chicago Press, 1998) pp. 161-80.

³⁸ Ernst-Ulrich Petersmann, note 4 above, at p. 202.

Figure 1. WTO Dispute Settlement Procedure

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Source: Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System –International Law, International Organizations and Dispute Settlement* (London: Kluwer Law International, 1997) p. 184.

brought by developing countries.³⁹ Developing countries generally felt that the GATT dispute settlement procedure was flawed as it did not serve their interests.⁴⁰

There are a number of provisions granting special treatment to developing countries in the WTO dispute settlement system. It is worth mentioning some of the more important ones. First, developing countries are allowed to extend the time limit for the establishment of a panel.⁴¹ Second, when a developing nation is involved in a dispute, one of the panelists should be from a developing country upon request of the developing country.⁴² Third, when a dispute involves developing countries, the panel report should give a clear indication that the relevant special and differential treatment for developing countries has been taken into account.⁴³ Fourth, in the area of surveillance of the implementation of recommendations and rulings, special attention is to be paid to the interests of developing countries.⁴⁴

Some legal commentators, based on the first two years WTO dispute statistics (1995-97), argue that developing countries became actively involved in the WTO dispute settlement process because of its new improvements and its special attention to developing countries' concerns.⁴⁵ For example in 1996, one third of the consultation requests under the new dispute settlement process came from developing countries.⁴⁶ But this optimism may be premature. Recent statistics show that the number of complaints brought by developed countries have increased dramatically. In the one-year period between August 1997 and August 1998, the number increased from sixty-five to one hundred. In the same period, the number of complaints brought by developing countries only increased from twenty-four to twenty-nine.⁴⁷ The WTO dispute settlement system, like its GATT counterpart, remains dominated by the

³⁹ See Pretty Elizabeth Kuruvila, "Developing Countries and the GATT/WTO Dispute Settlement Mechanism," *Journal of World Trade*, Vol. 31, No. 6, 1997, pp. 171- 208. at p.179.

⁴⁰ See Kofi Oteng KuFuor, "From the GATT to the WTO: the Development Countries and the Reform of the Procedures of the Settlement of International Trade Disputes," *Journal of World Trade*, Vol. 31, No. 5, 1997, pp. 117-45.

⁴¹ Article 12 (10) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁴² *Ibid.*, Article 8 (10).

⁴³ *Ibid.*, Article 12 (11).

⁴⁴ *Ibid.*, Article 21 (7) and (8).

⁴⁵ See for example: Ernst-Ulrich Petersmann, note 4 above, pp 202-4. and Pretty Elizabeth Kuruvila, note 7 above, at p. 203.

⁴⁶ Quoted in Ernst-Ulrich Petersmann, note 4 above, at p. 202.

⁴⁷ Based on a comparison of the "Overview of the State-of-play of WTO Disputes" published on August 20, 1997 and August 12 1998, Internet source: <http://www.wto.org/wto/dispute/buttletin.htm>.

developed country members.

Of the one hundred complaints brought by the developed country members, forty-two cases are against developing country members.⁴⁸ Table 1 below gives a summary of countries involved in cases brought by developed countries against developing countries. The US is the most frequent complainant against developing country members, with seventeen cases. The EU has brought fifteen cases against developing country members. The developing country member that is targeted the most by the developed country members is India, a total of nine cases. Korea and Brazil have been targeted eight times and six times respectively.

Table 1: Countries involved in cases brought by developed countries against developing countries

Developed Country	no. of cases	Developing Country	no. of cases
US	17	India	9
EU	15	Korea	8
Canada	3	Brazil	6
Japan	3	Indonesia	4
Others*	4	Others**	15
Total	42	Total	42

* Australia (1), New Zealand (1), Switzerland (1) and Poland (1).

** Chile (3), Argentina (3), Mexico (3), Philippine (2), Pakistan (2), Turkey (1) and Thailand (1).

Source: "Overview of the State-of-play of WTO Disputes," August 12, 1998

Of the forty-two cases, thirty-one of them relate to alleged violations of various sections of GATT 1994, nine cases involve the Agreement on Agriculture, and eight cases relate to the Agreement of Import Licensing Procedures. Also, some of the cases involve 'new' issues like the Agreement on Trade-Related Investment Measure (seven cases) and the Agreement on the Trade-Related Aspects of Intellectual Property Rights (four cases).

In relation to complaints brought by developing country members, twenty-one cases are against developed country members. There are also ten cases initiated by developing countries against other developing countries. A large portion of the cases brought by developing countries involves anti-dumping, subsidies and countervailing duty issues.

China's Experience in International Trade Disputes

Since China is not yet a member of WTO, trade disputes between China and other nations are still resolved exclusively through bilateral diplomatic means. One author argues that consultation and negotiation have been the two major methods used by the Chinese Government to settle trade disputes with other nations.⁴⁹ Consultation is usually used for monitoring the implementation of a bilateral trade agreement. As trade disputes arise, negotiations are used to find solutions which are mutually acceptable to China and its trade partners.

The four largest trading partners of China are Japan, the EU, the US and Hong Kong. Japan has been China's largest trading partner since 1993. Sino-Japan trade reached US\$60.8 billion in 1997, which accounted for 18.8% of China's total trade.⁵⁰ The trade relations between Japan and China have been relatively good, excepting some problems in textile trading. Japan has been very concerned by the dramatic increase of textile products imported from China and has suggested China to impose self-restrictive measures on its textile products.

The trade between China and the EU reached US\$43 billion in 1997, which accounted for 13.2% of China's total trade.⁵¹ One major area of trade dispute between China and the EU has been the EU's anti-dumping practice aimed at China. The EU has investigated 70 products from China for alleged dumping.⁵² The Chinese Government has branded the EU's anti-dumping practice as unfair mainly because the EU refuses to grant individual treatment to Chinese exports in determining the dumping margin.⁵³

Although trade between China and the US reached US\$48 billion in 1997⁵⁴, there are quite a number of problems in the Sino-US trade relations. These include most favoured nation status, trade surplus, textile import quotas, anti-dumping issue

⁴⁸ "Overview of the State-of-play of WTO Disputes," August 12 1998.

⁴⁹ Yu Ming You, "Chinese Policies in Response to Resolution of Disputes in World Trade Organization," *Chinese Legal Sciences*, Vol. 73, No. 5, 1996, pp.77-85 at pp. 77-8.

⁵⁰ *China's Customs Statistics*, 12/1997 (Hong Kong: Economic Information and Agency) p. 4.

⁵¹ *Ibid.*, p. 7.

⁵² See Tian Chunhua, "EU Trade Policy toward China and Recommended Strategies for China," *Kuoji Maoi Wenti (The Problem of International Trade)*, Vol. 183, 1998, pp. 26-9 at p. 27.

⁵³ See Donghui Fu, "EC Anti-Dumping Law and Individual Treatment Policy in Cases involving Imports from China," *Journal of World Trade*, Vol. 31, No. 1, 1997, pp. 72-105.

⁵⁴ *China's Customs Statistics*, note 18 above, p. 7.

and problems relating to the protection of intellectual property rights.⁵⁵ An area that has caused significant trade friction between China and the US is the protection of intellectual property rights (IPR). In order to settle various trade disputes in this area, the two countries went through many rounds of hard negotiations and signed three separate memoranda of understanding in 1989, 1992 and 1995.

In 1995 and 1996, when the US accused China of failing to implement the memorandum of IRP and threatened to impose trade sanctions, the Chinese Government invoked Article 7 of the Foreign Trade Law to counteract the US proposed retaliation measures. With the passing of the Foreign Trade Law in 1994, China formally laid down a legal framework for its foreign trade relations. Article 7 of the law is a counteractive clause which states that China shall have the right "to adopt, in according with the actual circumstances, corresponding measures against any country or region to counter their discriminatory banning, restrictions or other acts on trade with China."

China also enacted its anti-dumping and anti-subsidy Law in 1997.⁵⁶ In December 1997, China launched its first anti-dumping investigation against newsprint companies based in the US, Canada and South Korea.⁵⁷

⁵⁵ *Almanac of China's Foreign Economic Relations and Trade 1997/98* (China: China National Economy Publishing House, 1997) pp. 438-9.

⁵⁶ See Yi Dong, Huijun Xu and Fang Liu, "Antidumping and the WTO—Implications for China," *Journal of World Trade*, Vol. 32, No. 1, 1998, pp. 19-27.

⁵⁷ "First Anti-dumping Case Investigated," *Beijing Review*, May 4-10, 1998, pp. 13-14.

Chapter 3: A Future Disarray ?

China's accession to the WTO poses the important question of whether a market-driven trading system has the capacity to accommodate a major non-market economy as a member. On the one hand, some would argue that the WTO's integrity and coherence could be preserved better if there is a shared belief on trade practice among the members.⁵⁸ Also, there is a strong argument that free trade requires the harmonization of domestic institutions and policy among trading nations.⁵⁹ Those who are inclined to this view would prefer a new member's trade regime to be as compatible with the WTO system as possible. On the other hand, those who place an emphasis on global trade benefits would tend to favour the early accession of major economies into the WTO system.⁶⁰

Past experiences with the integration of some non-market economics such as Hungary, Poland and Romania into the GATT were not satisfactory.⁶¹ Clearly, the existing market-based WTO code is incapable of accommodating the non-market system's trading practices. This is the main reason why developed WTO members want to go beyond the WTO code and propose a new set of rules especially for China.

As discussed in Chapter 2, the protocol governing China's accession would be written to incorporate detailed commitments with a tight review mechanism. However, the interface between the WTO code and China's accession protocol could easily become a matter of dispute, especially in areas such as China's developing country status, the state-owned enterprises, MFN and the future monitoring process. Of course, when disputes arise, both China and other WTO members can bring the issue to the WTO dispute-resolution system. But the major difficulty is that some disputes are not simply a matter of the violation of WTO rules, but originate from a problem of

⁵⁸ Murray G. Smith calls this group of policy makers as the consolidationists, see Murray G. Smith, "Accession to the WTO: Key Strategic Issues," in Jeffrey J. Schott ed., *The World Trading System: Challenges Ahead* (Washington D. C.: Institute for International Economics, 1996) pp. 167-81 at pp. 173-4.

⁵⁹ See Jagdish Bhagwati, "The Demands to Reduce Domestic Diversity among Trading Nations," in Jagdish Bhagwati and Robert E. Hudec ed. *Fair Trade and Harmonization — Prerequisites for Free Trade? Vol. I* (Cambridge: The MIT Press, 1996) pp. 9-40.

⁶⁰ See for example, Nicholas R. Lardy, *China in the World Economy* (Washington, DC: Institute for International Economics, 1994) and Kym Anderson, "On the Complexities of China's WTO Accession," *The World Economy*, Vol. 20, No. 6, 1997.

⁶¹ OECD, *Integrating Emerging Market Economics into International Trading System*, (Paris: OECD, 1994) Chapter III.

systems friction (a friction between two different political-economic systems).⁶²

Even though China and other WTO members can make claims through the non-violation complaints provision under Article XXIII (b) of GATT, the chance of resolving conflicts in relation to a measure that is not covered by the WTO code is rather slim.⁶³ Past panel experiences suggested that non-violation complaints serve mainly to protect the balance of tariff concessions.⁶⁴ Also, under the new WTO Dispute Understanding, there is no obligation to withdraw a measure that "has been found to nullify or impair benefits under, or impede the objectives, of the relevant covered agreement without violation thereof."⁶⁵

If stringent requirements for reviewing China's economic and legal reform process were attached to the accession protocol, it would inevitably raise the "sovereignty" issue. Should a nation's basic economic and legal policy decisions be subject to an international organization's scrutiny? Legal scholars have pointed out that the WTO dispute procedures have to constantly face the problem of "standard of review."⁶⁶ A WTO panel must adopt a proper standard of review when examining whether a member's economic decisions and actions are consistent with the various WTO agreements and when deciding whether these decisions and actions are subject to WTO dispute procedures. The problem of finding a proper standard of review is much more acute if there is a fundamental difference between two systems. China is obsessed with upholding its sovereignty. A Chinese official has criticized the existing WTO dispute settlement process for being too confrontational and argued that "some members may be inclined to handle controversies in a friendly manner in order to keep the dignity of sovereignty, and a co-operative spirit."⁶⁷

Besides the above mentioned institutional conflicts, many aspects of the Chinese trade regime will likely become areas of disputes when it becomes a WTO member,

⁶² See Richard Steinberg, "Institutional Implications of WTO Accession for China," a paper presented at the Third Meeting of the Trilateral Forums in Berkeley, November 11-12, 1997.

⁶³ *Ibid.*, p. 6-7.

⁶⁴ Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System – International Law, International Organizations and Dispute Settlement*, (London: Kluwer Law International, 1997) p. 171.

⁶⁵ Article 26(b) of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

⁶⁶ See Steven P. Croley and John H. Jackson, "WTO Dispute Procedures, Standard of Review, and Deference to National Governments," *The American Journal of International Law*, Vol. 90, 1996, pp. 193-213.

⁶⁷ Lei Wang, "Some Observations on the Dispute Settlement System in the World Trade Organization," *Journal of World Trade*, Vol. 29, No. 2, pp. 173-8 at p. 176.

simply because China is a huge and a changing market. Both the developed and developing country members will use the dispute settlement process to challenge Chinese trade measures that they consider to be breaking the WTO agreement. It is inevitable that China will have to face a lot of complaints in the early years of its WTO membership. It is questionable whether China would have enough resources, for example legal expertise, to deal with all these complaints. Chinese legal scholars have already called for the government to speed up its efforts to provide more trained personnel.⁶⁸

Developing countries have been frequent targets of the antidumping measures of western developed countries. However, many developing countries have now used antidumping measures against other nation's products.⁶⁹ More and more cases handled by the WTO dispute settlement process relate to antidumping matters.⁷⁰ It is envisaged that antidumping will continue to be a contentious issue between China and other WTO members. How to figure out a special method for calculating dumping margins on imports from a non-market economy like China is obviously a highly contentious issue. On the other hand, because of a lack of transparency in administrative and legal proceedings, China's antidumping practice would be subject to challenge on the basis of whether the procedures used by the Chinese Government are consistent with the WTO codes.

China's intellectual property regime will be strongly affected by its entry into the WTO. The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs) is the only WTO agreement that does not contain any special and differential treatment for developing countries. All WTO members are expected to pursue similar intellectual property protection policies together with strict national enforcement.⁷¹ Entry into the WTO would provide China with a better defense against certain unilateral measures from developed countries. However, China would have to show a strong commitment to intellectual property rights and to face multilateral challenges

⁶⁸ Jiang De'en, "WTO's Dispute Settlement Mechanism and Its Use for Developing Countries," *Kuoji Maoi Wenti (The Problem of International Trade)* Vol. 170, 1997, pp. 29-32 at p. 32.

⁶⁹ See Kenneth W. Abbott, "Trade Remedies and Legal Remedies: Antidumping, Safeguards, and Dispute Settlement After the Uruguay Round," in Arvind Panagariya *et al.*, *The Global Trading System and Developing Asia* (Oxford: Oxford University Press, 1997) pp. 365-421.

⁷⁰ *Ibid.*, Annex III--WTO Disputes Involving Developing Countries, 1995/96.

⁷¹ To examine how TRIPs affects Asian developing countries including China, see Arvind Subramanian, "Trade-related Intellectual Property Rights and Asian Developing Countries: An Analytical View," in Arvind Panagariya *et al.*, *The Global Trading System and Developing Asia*

regarding any TRIPs violations.

In conclusion, the discussion in this essay is somewhat tentative. It is tentative because China's accession protocol has not yet been settled in detail. In the past, the GATT system allowed legal flexibility for developing countries. However, these countries were relatively small in terms of their impact on trade. Their participation in the GATT dispute settlement process was also minimal. China's situation is completely different. China's accession will inevitably cause "disturbances" to the whole system, especially because of its non-market economy status. As a result, there will be a large number of disputes associated with not only structural differences between the two systems, but also diversity in trade practices. Although one would argue that a large number of cases handled by the dispute settlement process is a healthy sign that members are determined to ensure compliance with the WTO agreements, the WTO dispute settlement system works only when the disputes are covered by the WTO agreements and when there is a proper standard of review. In addition, as Judith H. Bello points out, sovereign nations do not "relinquish their sovereignty by virtue of their memberships in the WTO, including its dispute settlement proceedings."⁷² All these will probably create too much stress for the dispute settlement system. The notion of 'one WTO, two systems' would probably pose a greater challenge than 'one country, two systems'.

(Oxford: Oxford University Press, 1997) pp. 307-361.

⁷² Judith Hippler Bello, "The WTO Dispute Settlement Understanding: Less Is More," *The American Journal of International Law*, Vol. 90, pp. 416-8 at p. 417.

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