A Look at China's Antidumping Policies and Practices

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I. INTRODUCTION

A. Some Questions, and the Intent of This Paper

The current economic crisis has arguably brought about at least one very positive result for the world; It has drawn attention away from trade disputes and criticism of certain countries' trade policies as protectionist or otherwise unfair. Indeed, some of the world's largest economies have reduced barriers to trade in hopes of encouraging international trade during these difficult economic times. Nevertheless, economic recovery will undoubtedly bring new trade disputes – perhaps even more intense than those of the past – as the nations of the world struggle to gain or regain strong economic positions in the modern world order.

In this context, China has become one of the most important trading nations in the world; perhaps the most important trader of goods in the world. Indeed China will likely recover from the current economic crisis sooner than any other major nation. Therefore, we might all look to China as the nation most likely to bring the rest of the world out of the economic crisis as well.

However, notwithstanding all the good it has done and will undoubtedly continue to do, China still receives a great deal of criticism from the rest of the world regarding its trade policies and progress with respect to its WTO commitments. Does any merit exist with respect to such complaints? Given recent world events, should we

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look to China's successes for guidance when re-thinking how we perceive the trade regime developed under the WTO?

Consider some of the most frequent criticisms as China as a powerful trading nation, and how politicians and academics frame them: What "improper" import calculation techniques has China adopted in order to employ antidumping measures pursuant to World Trade Organization ("WTO") rules? How have China's domestic laws and policies contributed to its ability to "skew calculations" in its favor in order to employ antidumping measures? How did China choose those methods; did the methods originate in long-standing Chinese policy, or has China emulated similar methods used by the U.S., the EU and other countries?

To many readers, the above questions will seem like a reasonable place to begin exploring whether China has misused the WTO to employ antidumping measures. However, those questions rely heavily on several assumptions that informed scholars should consider before or while examining the questions themselves. For example, consider the following: Notwithstanding political protests of the U.S. Congress and U.S. lobbyists, has China fulfilled the commitments it made upon entering the WTO in 2001? Has China made its antidumping and other systems transparent enough for anyone to make a meaningful judgment with respect to the legality of many of its actions? If China has not become fully compliant with those commitments, has China moved toward greater compliance, or greater noncompliance, with its commitments? To what extent do China's 'bad' policies harm or help the world economy and impede or foster fair trade? In addition to whether China's policies originated within China or as emulations of other countries' policies, why has China adopted such policies? What special features of China as a nation and as a global economic player have contributed to its policy development?

This paper will not venture to answer all, or even most, of these questions. Thorough exploration of all of the above questions would require volumes. This paper will explore what we *do* know about China and antidumping. It will also examine some aspects of the extent to which China has become compliant with WTO antidumping policies and procedures, and point out some often forgotten facts and factors that trade scholars and China scholars should keep in mind in their own examination of China's antidumping and other policies.

B. Overview

Between January 1, 1995 and June 30, 2007, WTO members initiated more than twice as many antidumping challenges against the

People's Republic of China ("China") as against any other country.[1] Even during its last double-digit economic growth year before the economic crisis, "China remained the most frequent subject of the new investigations."[2] However, in 2002, only its second year in the WTO, China also already ranked third in antidumping initiations; behind only India and the United States.[3] Today China remains one of the most frequent antidumping initiation notifying WTO Members.[4] Does this *use* of the WTO mechanism indicate China has become more compliant with WTO rules? Does it mean the rest of the world has become less compliant? Not necessarily.

In the U.S., many protectionist lobbying groups, politicians, and even the U.S. Congress, would like the general public (and other WTO Members) to believe that China's use of antidumping measures in and of themselves fail to comply with WTO rules and procedures.[5] They claim that China, failing to comply with its WTO entry commitments, inappropriately takes antidumping actions to benefit its own economy at the expense of others'.[6] Has China complied with the commitments it made in 2001?[7] This paper does not aim to respond to this question authoritatively. However, in the spirit of

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[1] WTO Comm. on Antidumping Practices, *AD Initiations by Exporting Country from 01/01/96 to 30/06/07*, available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Exporting Country"). This paper focuses primarily on events through the end of 2007, as statistics and comparisons after that time will become unrepresentative due to the economic crisis. Note, though, that the trend also started quite early. *See, e.g.*, Chad P. Bown, Trade Remedies and World Trade Organization Dispute Settlement: *Conference: International Dispute Resolution: Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Chal-Challenged?*, 34 J. LEGAL STUD. 515, 546 (June, 2005).
(stating "between 1991 and 2002, exporting firms from the United States were the third-most investigated producers worldwide in foreign antidumping investigations and ranked third in number of instances of being targeted by trade remedy measures (antidumping duties and price undertakings) worldwide, behind only China and South Korea.")(citations omitted)).

[2] Press Release, *Anti-Dumping—WTO Secretariat Reports Renewed Declines in New Anti-Dumping Investigations and New Final Anti-Dumping Measures*, Press/497 (Oct. 30, 2007) http://www.wto.org/english/news_e/pres07_e/pr497_e.htm.).

[3] W.T.O. Comm. on Antidumping Practices, AD Initiations by Reporting Member from 01/01/96 to 30/06/07, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Reporting Member") (showing that in 2002 China initiated 30 measures, the United States initiated 35 measures, and India initiated 81 measures).

[4] *Id.*

[5] *See, e.g.*, Susan Hamrock et al., *China's Entry into the WTO: What it Means for U.S. Industry*, EXPORT AMERICA, *available at* http://www.mac.doc.gov/China/Docs/exportamerica/WTOChina.html. *See also* US-China Business Council, *China Must Move Beyond WTO Commitments to Open Markets, Says USCBC*, *available at* http://www.uschina.org/public/documents/2007/09/wto-testimony-pr-rel.html ("China has not fully met its obligations in a number of areas").

[6] *See, e.g.,* Esther lam, *U.S. Complains to WTO of China's Nontransparent Antidumping Proceedings*, WTO REP., Oct. 10, 2006, at 1, 2.

[7] *See*, Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services, *available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn (then follow hyperlinks to the right of "China").

unbiased scholarship, readers should consider both sides of the argument. As noted above, the U.S. Congress and others would have us believe that China has not fulfilled its obligations.[8] They often provide very well supported arguments for this contention.[9] However, notwithstanding such opinions, many parties that responded to the U.S.-China Business Council's ("USCBC") "USCBC 2007 Member Priority Survey" indicated satisfaction and optimism with respect to China's compliance with its WTO commitments and its general policies and development.[10]

Reading the USCBC's survey results, can we assume that U.S. businesses doing business in China generally feel quite satisfied with China's policies? Should we believe that China has become compliant with all WTO rules potentially relevant to antidumping and dumping calculations? Absolutely not. Notwithstanding any contentions that China has complied with its WTO entry obligations, scholars and businesspeople alike continue to argue that China's laws and policies continue to violate other WTO rules and regulations.[11] Examining China's laws and policies, we also find that remaining problems appear with respect to "China's laws, policies, and practices that deviate from the WTO's national treatment principle, its inadequate protection of intellectual property rights, its insufficiently transparent and regulatory processes, and its opaque development of technical and product standards that may favor local companies."[12]

While focusing on related issues with respect to antidumping policies and actions, this paper will peripherally aim to suggest that, irrespective of the degree of truth or legitimacy to common accusa-

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[8] *See, e.g.*, Susan Hamrock et al., *China's Entry into the WTO: What it Means for U.S. Industry*, EXPORT AMERICA, *available at* http://www.mac.doc.gov/China/Docs/exportamerica/WTOChina.html. *See also* US-China Business Council, *China Must Move Beyond WTO Commitments to Open Markets, Says USCBC*, *available at* http://www.uschina.org/public/documents/2007/09/wto-testimony-pr-rel.html.

[9] *Id.*

[10] *See, e.g.*, US-China Business Council, *USCBC 2007 Member Priorities Survey Executive Summary*, *available at* http://www.uschina.org/public/documents/2007/10/uscbc-member-survey-2007.pdf (among other notable statistics, respondents even gave China a better ranking than the U.S. with respect to "protectionism").

[11] *See, e.g.,* US-China Business Council, *US Companies' China Outlook: Continuing Optimism Tempered by Operating Challenges, Protectionist Threats*, *available at* http://www.uschina.org/public/documents/2007/10/uscbc-member-survey-2007.pdf. *See also* Susan Hamrock et al., *China's Entry into the WTO: What it Means for U.S. Industry*, EXPORT AMERICA, *available at* http://www.mac.doc.gov/China/Docs/exportamerica/WTOChina.html. *See also* US-China Business Council, *China Must Move Beyond WTO Commitments to Open Markets, Says USCBC*, *available at* http://www.uschina.org/public/documents/2007/09/wto-testimony-pr-rel.html ("China has not fully met its obligations in a number of areas").

[12] US-China Business Council, *China's Implementation of Its World Trade Organization Commitments: An Assessment by the US-China Business Council*, Trade Policy Staff Committee Hearing, Oral Statement, *available at* http://www.uschina.org/public/documents/2007/09/uscbc_china_wto_implementation_oral_statement.pdf (Sept. 27, 2007).

tions of purely protectionist intent underlying China's policies, China's policies in fact continue to move steadily closer to full compliance with WTO rules and international norms of free trade, while simultaneously controlling risks to the stability of the Chinese, Asian, and world economies. This paper will also briefly comment on particular protectionist (or, with respect to many methods, one might even argue "stabilizing") policies and methods China continues to use, including the origins of such policies and why they continue to persist.

C. *Structure of This Paper*

Section II of this paper provides some basic explanation of the definition of "antidumping" in the WTO context, and discusses China's situation with respect to antidumping. Section III evaluates China's legislation and policies related to antidumping. Section IV provides some commentary regarding antidumping in China, and discusses some of China's unrelated policies that could impact the application and applusicability of the WTO antidumping regime in China. Finally, Section V concludes with the author's brief comment on the implications of the ideas expressed in this paper.

II. ANTIDUMPING

A. *Antidumping Defined*

This paper will cover antidumping in its meaning in the WTO context, as well as other protective measures relating directly or indirectly to China's antidumping-related policies. The WTO General Agreement on Tariffs and Trade ("GATT") defines "dumping," and provides that, under certain circumstances, a country into which another country dumps goods has the right to take certain actions in response thereto.[13] Extensive scholarship exists on various methods used to calculate imports for the purpose of legitimizing antidumping actions.[14] This essay will present basic explanation of the relevant

[13] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 , Art. VI (*available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm).

[14] *See, e.g.*, Heng Wang, *Chinese Views on Modern Marco Polos: New Foreign Trade Amendments*, 39 CORNELL, INT'L L.J. 329 (2006). *See also* John D. Greenwald and Lynn Fischer Fox, *The WTO's Emphasis on Adjudicated Dispute Settlement May Be More Drag Than Lift*, 24 ARIZ. J. INT'L & COMP. LAW 133 (2007). *See also* Raj Bhala and David A. Gantz, *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299 (2007). *See also* Kristy L. Balsanek et al., *International Trade*, 40 INT'L LAW. 217 (2006). *See also* Curtis Beaulieu, *Shrimp Dumping: An Analysis of Antidumping Laws in the United States and the World Trade Organization*, 2 S.C. J. INT'L L. & BUS. 217 (2005-06). *See also* Richard O. Cunningham, *Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and countervailing Measures*, 31 LAW & POL'Y INT'L BUS. 897 (2000). *See also* Christo-

antidumping rules under the GATT and related legislation, and will comment on China's use thereof and compliance (or failure to comply) therewith.

"Price discrimination is possible when a seller is able to identify separate markets for its product and charge a higher price in the market that attaches a greater utility to the product."[15] "Many economists think predatory behavior is rare and unlikely to occur," or even that "consumers benefit from international price discrimination or dumping and that the benefit is a long-term one."[16] Nevertheless, in the interest of short-term protection of domestic economies, the Members of the WTO have decided to permit the imposition of antidumping measures under certain circumstances.[17] Under the GATT, dumping occurs when "products of one country are introduced into the commerce of another country at less than the normal value of the products."[18] Dumping "is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry."[19] Notably, "the GATT does not prohibit dumping."[20] It does, however, permit WTO members to "impose anti-dumping measures, if, after investigation in accordance with the Agreement, a determination is made (a) that dumping is occurring, (b) that the domestic industry producing the like product in the importing country is suffering material injury, and (c) that there is a causal link between the two."[21] These three criteria and their determinations deserve examination with respect to China as a country that imposes a significant number of antidumping measures."[22]

pher F. Corr, *Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures*, 18 NW. J. INT'L L. & BUS. 49 (1997).

15 William J. Davey, *Antidumping Laws: A time for Restriction*, *in* INTERNATIONAL ECONOMIC RELATIONS 673, 673 (Third ed. 1995).

16 *Id*. at 675-76.

17 *See generally*, GATT, *supra* note 13.

18 *Id*. at Art. VI, 1.

19 *Id*. In fact, however, "economic analysis does not support the application of antidumping duties to counteract price discrimination so as to protect the market into which goods are dumped." Davey, *supra* note 15 at 677. *See also* JOHN H. BARTON, JUDITH L. GOLDSTEIN, TIMOTHY E. JOSLING, & RICHARD H. STEINBERG, THE EVOLUTION OF THE TRADE REGIME 34-35 (2006) (stating "Exporting nations in Asia argued that antidumping rules hampered free trade and that sanctions should be allowed only under the most extreme circumstances.") However, these arguments extend beyond the scope of this paper.

20 Richard H. Steinberg, International Trade Law Lecture at the University of California School of Law (Oct. 22, 2007).

21 W.T.O., *Anti-Dumping: Technical Information on Anti-Dumping*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

22 W.T.O. Comm. on Antidumping Practices, *AD Initiations by Reporting Member from 01/01/96 to 30/06/07*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Reporting Member").

1. Dumping

(a) WTO Rules

Fundamentally, calculation of introduction of goods "at less than the normal value of the products" means "the price of the product exported from one country to another . . . is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[23] "In the absence of such domestic price," the importing country may calculate the price according to either "the highest comparable price for the like product for export to any third country in the ordinary course of trade" or "the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."[24] The GATT and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Implementing Agreement") provide that "due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."[25] The Implementing Agreement's explanation of such "differences" includes a wide range of considerations ranging from "conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."[26] Other exceptions also exist, such as for "economies where the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State" ("non-market economies").[27] However, only "a few major users of anti-dumping duties continue to treat China as a 'non-market economy'," and this should end soon as China "stay[s] firmly on its impressive road of reform."[28]

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[23] GATT, *supra* note 13 at Art. VI, 1.

[24] *Id*. at Art. VI, 1, b-c.

[25] *Id*. at Art. VI, 1. *See also* Uruguay Round Agreement: the Implementing Agreement, Art. 2 (containing more detailed rules for determination of dumping), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm.

[26] *Id*. at Art. 2.4. *See also, generally,* related discussion of detailed rules in Implementing Agreement, Art. 2.

[27] W.T.O., *supra* note 21.

[28] Dg Supachai Panitchpakdi, Speech at the WTO Forum of the 6th Shanghai – International Industry Fair, *China and the WTO: Challenges and Opportunities for the Future* (Dec. 2, 2004), *available at* http://www.wto.org/english/news_e/spsp_e/spsp32_e.htm. Notably, however, the U.S. still generally considers China a nonmarket economy. ("The Clinton administration, however, proposes to worsen the situation by continuing to define China as a 'nonmarket economy' for 15 years, thereby perpetuating an even more arbitrary methodology to determine whether Chinese exports are 'unfairly' traded." (Richard H. Steinberg, *A Summary of Some U.S. Views on the China-U.S. WTO Accord*, *in* Law 270A Course Reader: International Trade Law, Vol. 2, 361, 363 (Richard H. Steinberg, 2007-08) (citing Barfield and Groombridge editorial, ASIAN WALL ST. J. (Nov. 17, 1999))). *See also* Press Release from the office of

(b) China

As noted above, the GATT and its Implementing Agreement provide for consideration of a wide variety of factors a WTO Member may use to calculate dumping in its own favor.[29] Substantial precedent exists for such use.[30] Unfortunately, the details of antidumping actions taken by China remain somewhat unclear due to what some countries claim constitutes a "lack of transparency," as discussed below.[31] As is normal, China undoubtedly uses many such legitimate protectionist factors to calculate dumping in its favor.[32] However, documents on record at the WTO and China's Ministry of Commerce ("MOFCOM"), which handles most of China's antidumping cases, do not yet facilitate proper examination of their methods.[33] Accordingly, discussions to date remain limited to "China's

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Congressman Artur Davis, *U.S. Reps. Artur Davis and Phil English Announce Legislation to Target Nonmarket Economy Countries—Senator Bayh Slated to Unveil Similar Legislation in the Senate* (Mar. 1, 2007), *available at* http://www.house.gov/apps/list/press/al07_davis/CVDNME030107.html. *See also* USCBC Fact Sheet: Countervailing Duties and China's Nonmarket Economy Status (Jul. 7, 2005), *available at* http://www.uschina.org/info/china-briefing-book/factsheet_cvd_nme.html. Some authors have taken a cynical but muted position with respect to this situation. ("Presumably, after fifteen years of 'managed trade,' China and the United States might finally engage in more laissez-faire trade relations." (Richard H. Steinberg, *A Summary of Some U.S. Views on the China-U.S. WTO Accord*, *in* Law 270A Course Reader: International Trade Law, Vol. 2, 361, 363 (Richard H. Steinberg, 2007-08)).

[29] GATT, *supra* note 13 at Art. VI, 1.

[30] *See, e.g.*, World Trade organization AD Initiations by Exporting Country from 01/01/96 to 30/06/07, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Exporting Country") and initiations cited therein.

[31] Daniel Pruzin, *China Reports to WTO Sharp Drop in New Antidumping Probes in First Half*, WTO REP., Oct. 10, 2006, at 1:

"China's trading partners have long complained that Chinese antidumping procedures lack transparency. In a communication dated Oct. 5 submitted as part of the latest transitional review of China's compliance with its WTO membership commitments, the United States noted that it was still hearing complaints from firms involved in Chinese antidumping proceedings concerning the lack of transparency in the facts being considered by the Bureau of Fair Trade (BOFT) of China's Ministry of Commerce in its investigations and a lack of adequate explanation of BOFT's interpretation of those facts."

[32] *See, e.g.*, Lester Ross and Susan Ning, *Perfecting Protectionist Measures: An Update on China's Antidumping Regulations*, CHINA BUS. REV., May-Jun. 2001, *available at* http://www.chinabusinessreview.com/public/0105/ross.html.

[33] *See, e.g.*, Questions from the United States to China, *Committee on Anti-Dumping Practices—Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China*, G/ADP/W/462 (Sept. 27, 2007):

The United States has previously reported on complaints from interested parties in Chinese antidumping proceedings about a lack of transparency with respect to the factual information before MOFCOM and a lack of adequate explanation by MOFCOM of its interpretation of those facts. For example, respondents have complained that the disclosures of anti-dumping margin calculations in preliminary and final determinations have not contained sufficient information needed to replicate certain calculations and identify the specific adjustments that were made.

See also Ross, *supra* note 32:

[S]erious deficiencies remain in the administration of China's antidumping regulations. In particular, respondents are not given sufficient opportunity to see all relevant information. Much information is trading partners . . . complain[ing] that Chinese antidumping procedures lack transparency."[34]

2. *"Domestic industry producing the like product in the importing country is suffering material injury"*[35]

(a) "Domestic industry" of the importing country[36]

i. Implementing Agreement

The Implementing Agreement defines "domestic industry," with some exceptions, as "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."[37]

ii. China

Public WTO records do not reveal that any WTO Member has disputed China's consideration of what constitutes its own "domestic industry."[38] Furthermore, the above-mentioned "complaints" regarding lack of transparency do not explicitly dispute China's considerations of what constitutes its domestic industry.[39] In fact, in unrelated disputes, the Australia, Canada, the European Union, Japan, Mexico and the United States have identified Chinese measures that arguably

protected by the applicant under confidentiality shields that so far have been immune to challenge. The investigative authorities also have tended to accept the allegations in the application at face value without a sufficiently detailed explanation of the rationale underlying their determinations.

[34] Pruzin, *supra* note 31.

[35] W.T.O., *Anti-Dumping: Technical Information on Anti-Dumping*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

[36] *Id*.

[37] Implementing Agreement, s*upra* note 25 at Art. 4.1.

[38] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (Oct. 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[39] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*. *See also* Pruzin, *supra* note 31.

decrease the scope of what constitutes China's domestic industry.[40] To the extent that China tries to limit the scope of what constitutes its domestic industry for some reasons (such as increasing tariffs on imported goods or imposing limitations on importation of certain goods), it should also *narrow* the scope of what it deems to constitute domestically produced goods for the purpose of calculating amounts of goods domestically produced versus amounts of goods imported (and potentially deemed dumped).[41] Therefore, as China makes its dumping calculation mechanism more transparent, trade lawyers and others should pay close attention to China's designation of what constitutes its own domestic industry.[42]

Notwithstanding the lack of complaints to date, one aspect of China's legislation has given rise to at least one comment on the prospect for China to fall out of compliance with the WTO definition of "domestic industry."[43] China scholars Won-Mog Choi and Henry S. Gao have pointed out that "there is no definition clause of the term

[40] *See, e.g.*, Request for Consultations by the European Communities, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339 (April 3, 2006); Request for Consultations by the United States, *China—Measures Affecting Imports of Automobile Parts*, WT/DS340 (April 3, 2006); Request for Consultations by Canada, *China—Measures Affecting Imports of Automobile Parts*, WT/DS342 (April 19, 2006). The above-listed countries claim that, under certain Chinese measures, "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". (Request for Consultations by the European Communities, *China—Measures Affecting Imports of Automobile Parts*, WT/DS339 (April 3, 2006)). China cannot legitimately claim that a particular automobile (or automobile part, as the case may be) simultaneously constitutes both a domestic industry product and an imported product. Accordingly, to the extent that China's measures continue to subject the imported automobile parts to tariffs equal to those on complete vehicles, one could argue that China should exclude not only those parts, but also the entire vehicles, from any calculations of products of its domestic industry.

[41] As explained in note 40 above, any claim that a certain item constitutes a domestically produced item for the purposes of one claim, such as the imposition of a tariff, should preclude it from constituting a domestic product for the purposes of dumping calculations.

[42] Trade lawyers should watch for two things. First, they should ensure that China does not try to "double-dip" by charging import tariffs on an item and then including it in its domestic industry in order to claim that China produces a product similar to a given imported product. Second, trade lawyers should ensure that China does not intentionally label an item as imported for the dual purposes of charging an import tariff on it and excluding it from the pool of what constitutes China's domestic products; because decreasing the size of such pool makes it easier to prove material damage to the domestic industry, as explained above.

In any case, readers should note that the vast majority of China's antidumping actions have focused on finite chemicals and similar products, rather than parts or finished products. (*See* Committee on Anti-Dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, G/ADP/N/158/CHN (October 2, 2007). While not exhaustive, and while also including CVD measures, this gives a general idea). Accordingly, it remains unlikely, at least at this point, that one would find any conflicts between China's calculations of domestic industry for purposes of calculating antidumping measures and its other measures such as tax or import policies with respect to which WTO Members have already lodged formal complaints under the Dispute Settlement Understanding. Nevertheless, other conflicts might exist, as discussed below in this essay.

[43] W.T.O., *Anti-Dumping: Technical Information on Anti-Dumping*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

'related' under the Chinese law and regulations (as opposed to in the WTO agreement.)"[44] In fact, Chinese laws construe the word "related" very broadly.[45] Consequently, they say, the Chinese authorities "may define related producers in a broader sense than as defined under the WTO agreement."[46] "If such broader interpretation occurs, any producers who are otherwise unrelated to exporters or importers could be treated as related producers and excluded from the scope of domestic industry."[47] Such "excessive exclusion" would minimize the deemed size of China's domestic industry for purposes of calculating dumping, which in turn would result in calculations that show a greater impact on the domestic industry resulting from a lesser number of imported goods.[48] No WTO Member has yet complained of this possibility or any instance of it actually occurring.[49] However, again, as China makes its dumping calculation mechanism more transparent, trade lawyers should pay close attention to China's designation of what constitutes its own domestic industry.

(b) "Like product"[50]

i. Implementing Agreement

The Implementing Agreement defines "like product" as "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."[51]

ii. China

Public WTO records do not reveal that any WTO Member has accused China of taking antidumping actions with respect to prod-

[44] Won-Mog Choi and Henry S. Gao, *Procedural Issues in the Anti-Dumping Regulations of China: A Critical Review under the WTO Rules*, 5 Chinese J. Int'l L. 663 (2006).

[45] *Id*.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[50] W.T.O., *Anti-Dumping: Technical Information on Anti-Dumping*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

[51] Implementing Agreement, *supra* note 25 at Art. 2.6.

ucts that such other WTO Member claims do not constitute like products.[52] Additionally, the above-mentioned "complaints" regarding lack of transparency do not explicitly dispute whether any such product might constitute a like product.[53] Finally, given the finite and specific nature of the goods with respect to which China has taken antidumping action to date, it remains unlikely that China would try to include unlike products in the goods to which it applies such measures, as other WTO Members would undoubtedly notice and challenge such inclusion immediately.[54] Nevertheless, readers should remain cognizant of the possibility of conflicts, as mentioned in the "domestic industry of the importing country" section of this essay above, with respect to which China might try to subject certain goods to import taxes or other restrictions while simultaneously claiming that those goods constitute domestic products that it can include as "like products" of its own domestic industry.[55]

[52] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[53] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[54] *See* Committee on Anti-Dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, G/ADP/N/158/CHN (October 2, 2007).

[55] In fact, several countries have already accused China of doing so with respect to measures other than antidumping measures. *See, e.g*., Request for Consultations by the United States, *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1 (February 7, 2007). (accusing China of "provid[ing] refunds, reductions or exemptions to enterprises in China on the condition that those enterprises purchase domestic over imported goods, or on the condition that those enterprises meet certain export performance criteria.") *See also* Request for Consultations by Mexico, *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1 (February 28, 2007). To the extent that such "measures accord imported products treatment less favorable than that accorded 'like' domestic products," they create the effect of protecting China's domestic industry. (Request for Consultations by the United States, *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358/1 (February 7, 2007)). To the extent that its industry remains improperly protected from international competition, any products properly allowed to compete will cause a magnified affect on the protected industry. However, readers should also remain aware that China could argue such protectionism would actually make it less likely that any competition would cause calculable injury, because to the extent that domestic producers maintain a controlled percentage of the industry, the minimized competition from foreign producers will result in a similarly minimized impact on the protected domestic industry. Accordingly, foreign trade lawyers should examine (a) any protectionist measures and (b) China's calculations of what constitutes "like products," and also consider how these two issues might impact one another.

(c) "Suffering material injury"[56]

i. Implementing Agreement

The Implementing Agreement provides detailed explanation of "determination of injury."[57] Consideration of whether introduction of goods "causes or threatens to cause material injury to an established industry in a territory" of a WTO Member involves examination of both "*(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products."[58] Importantly, the Implementing Agreement requires "positive evidence and . . . an objective examination" of both of those factors.[59] The Implementing Agreement provides detailed explanation of appropriate determination of "suffering material injury."[60] However, as no WTO Member has challenged China's antidumping measures on these grounds, this paper will not examine them in detail.[61]

ii. China

Public WTO records do not show that any WTO Member has challenged whether China has failed to adhere to the appropriate methods of determining whether any of its domestic industries have suffered material injury.[62] However, China has only recently opened its

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[56] W.T.O., *Anti-Dumping: Technical Information on Anti-Dumping*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

[57] Implementing Agreement, *supra* note 25 at Art. 3.

[58] GATT, *supra* note 13 at Art. VI.1. and Implementing Agreement, *supra* note 25 at Art. 3.1.

[59] Implementing Agreement, *supra* note 25 at Art. 3.1.

[60] *Id*. at Art. 3.

[61] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*. *See also* Chad P. Bown, *Conference: International Dispute Resolution: Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?*, 34 J. LEGAL STUD. 515, 522 (June, 2005).

[62] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (October 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

existing domestic markets to competition from other countries.[63] Furthermore, China's economy has changed, but merely to a "socialist market economy" (more recently often referred to as a "planned market economy" or "centrally planned market economy") in which we still see many economic influences and their impacts tightly controlled by the government.[64] Accordingly, to the extent that China does not make its policies more transparent, other WTO Members will encounter difficulties in disputing any of China's claims of "suffering material injury."[65] However, to the extent that the WTO requires China, as a country implementing antidumping measures, to present "positive evidence" and demonstrate "an objective examination," China in fact may not use nontransparent policies to hide its calculations in this respect.[66]

3. *Causal link between the dumping and the material injury*[67]

The GATT, as compared to earlier bilateral agreements, introduced "more narrow rules on dumping and countervailing duties (inserting the need for the product to not only be dumped or subsidized but also to hurt a domestic industry as a result of the action."[68] However, since the inception of the GATT, few WTO Members have challenged any causal link between dumping and material injury.[69] Furthermore, the causal relationship requirement "has been interpreted [so] broadly" as to essentially hold the meaning that "if a dump even *partly caused* the injury then it is covered"[70] Accordingly, it remains unlikely that any WTO Member will challenge, or could successfully challenge, China on such grounds.[71] Notwithstanding this caveat, at least one country has already expressed concern about China's calculations with respect to which imports caused

[63] James M. Zimmerman, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 1 (2d ed., American Bar Association 2005).

[64] In Defense of Marxism, *available at* http://www.marxist.com/china-socialist-market-economy200106.htm; Chinain Brief, *available at* http://www.china.org.cn/e-china/marketeconomy/index.htm; Zhou Xiaochuan, *Experience and Lessons from China's Gradual Reforms* Speech at the Practitioners of Development Seminar Series (April 26, 2004) (streaming video *available at* http://info.worldbank.org/etools/bSPAN/PresentationView.asp?PID=1090&EID=328).

[65] Implementing Agreement, *supra* note 25 at Art. 3.

[66] Implementing Agreement, *supra* note 25 at Art. 3.1. *See also* Implementing Agreement, *supra* note 25 at Art. 3.7 ("A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility").

[67] W.T.O., *Anti-Dumping: Technical Information on Anti-Dumping*, *available at* http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm.

[68] JOHN H. BARTON, JUDITH L. GOLDSTEIN, TIMOTHY E. JOSLING, & RICHARD H. STEINBERG, THE EVOLUTION OF THE TRADE REGIME 34-35 (Princeton Univ. Press 2006).

[69] Richard H. Steinberg, International Trade Law Lecture at the University of California School of Law (October 24, 2007).

[70] *Id*. (emphasis added).

[71] *Id*.

what amount of injury to China's domestic industry.[72] The following section discusses this issue in more detail.

B. Calculation of Duties

(a) GATT

The GATT provides that "in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."[73] It further states that "the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1" of GATT Article VI, discussed in Section II.A. of this paper above.[74]

(b) China

Even to the minimal extent to which China has begun to report its detailed calculation procedures, the U.S. has already "raised concerns about [China's] published formula for calculating the amount of antidumping duty collected upon entry at the port of products subject to antidumping measures.[75] The WTO still awaits China's response to the first challenge presented regarding this issue.[76] Trade lawyers and scholars should seek updated information about this topic accordingly.

Aside from such explicit concerns about calculation of duties, since the calculation of duties depends directly on the dumping calculations discussed above in this paper, trade lawyers should consider the same factors with respect to antidumping duties that they consider with respect to calculation of dumping.[77] Failure to disclose

[72] *See, e.g.*, Committee on Anti-Dumping Practices, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from Japan to China*, G/ADP/W/463 (October 15, 2007) (in which Japan criticizes China, claiming that that electrolytic capacitor paper "imports from countries and areas other than Japan showed a rapid increase" in 2006-07, but that:
"MOFCOM's final determination merely concluded that such imports had little effect on injury, without detailed explanations as to how the authority conducted its analysis on the injurious effect of those imports from Japan by properly separating and distinguishing the injurious effects of those imports from countries and areas other than Japan.")

[73] GATT, *supra* note 13 at Art. VI.2.

[74] *Id*. at Art. VI.2.

[75] Lam, *supra* note 6, at 2.

[76] *See* Lam, *supra* note 6, at 2. ("China is expected to respond to questions and comments when meetings of the concerned WTO bodies take place later this year.")

[77] Cynical scholars and lawyers might also note the possibility that MOFCOM will compound foreign parties' difficulty in challenging antidumping measures by both allowing nontransparent antidumping initiations to ensue and simultaneously assisting Chinese parties by providing extensive data that will help their cases. One Chinese author wrote:

and lack of transparency still constitutes the most common complaint about China's antidumping duties.[78] However, we have begun to see complaints regarding inequitableness of China's antidumping determinations.[79] Accordingly, trade lawyers should pay close attention to the relative duties imposed on individual exporters when examining the appropriateness of China's antidumping measures.

III. PROCEDURE AND DOMESTIC LEGISLATION

A. China's obligations

China undertook certain obligations to enact legislation and implement certain procedures upon entering the WTO in 2001.[80] The Implementing Agreement contains certain provisions regarding the passing of certain fundamental legislation and creation of procedures that impact antidumping and related matters.[81] Furthermore, China must report the passing of such legislation and the implementation of such procedures to the WTO.[82] Similarly, to some extent it must

"A single Chinese enterprise, however much it may wish to negotiate, simply does not at the present time have the expertise or resources to conduct such negotiations against very sophisticated foreign counterparts, with sophisticated legal teams. Probably only MOFCOM is in the best position at this time to develop, collect experience, and optimize negotiation practices. MOFCOM can collect specific data, amass experience on negotiating strategies, and maximize the usage, providing suggestions and guidance to relatively inexperienced Chinese enterprises … regarding their strategies for negotiation and settlement." Heng Wang, *Chinese Views on Modern Marco Polos: New Foreign Trade Amendments*, 39 CORNELL, INT'L L.J. 329, 349 (Spring, 2006).

[78] *See, e.g*., Pruzin *supra* note 31, at 1 ("China's trading partners have long complained that Chinese antidumping procedures lack transparency.")

[79] Committee on Anti-Dumping Practices, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from Japan to China*, G/ADP/W/463 (October 15, 2007) (criticizing that "imports from countries and areas other than Japan showed a rapid increase," but that:

MOFCOM's final determination merely concluded that such imports had little effect on injury, without detailed explanations as to how the authority conducted its analysis on the injurious effect of those imports from Japan by properly separating and distinguishing the injurious effects of those imports from countries and areas other than Japan.")

[80] *See* Protocols of Accession for New Members Since 1995, Including Commitments in Goods and Services, *available at* http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm#chn (then follow hyperlinks to the right of "China").

[81] *See, e.g*., Implementing Agreement, s*upra* note 25 at Art. 13 ("Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews of determinations"). *See also* Implementing Agreement, *supra* note 25 at Art. 18.4 ("Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.")

[82] Implementing Agreement, *supra* note 25 at Arts. 5 ("*Initiation and Subsequent Investigation* "), 12 (*Public Notice and Explanation of Determinations*), 16.4 ("members shall report without delay to the Committee all preliminary or final anti-dumping actions taken") and 18.5 ("Each Member shall inform

alert the parties involved and even the general public to certain matters; i.e., it must make its laws and procedures transparent to involved parties and, to some extent, the general public.[83] Finally, like all WTO Members, China must ensure that it does not exceed the allowed period for antidumping measures as prescribed in the Implementing Agreement.[84]

1. *China's WTO accession obligations*

"As part of its accession package, China committed to make its trade laws and regulations compatible with the WTO agreements."[85] China immediately moved toward compliance in this respect by repealing certain noncompliant regulations and implementing its "Anti-dumping Regulations" and "Anti-subsidy Regulations" effective January 1, 2002; almost immediately after China's November 11, 2001 accession.[86] Since then, China has implemented several new pieces of legislation to bring its laws and procedures into compliance with its WTO accession commitments.[87] Nevertheless, several countries continue to accuse China of not complying with WTO agreements regarding fundamental legislation and procedures, as explained in the following section of this essay.[88]

2. *Fundamental legislation and procedures*

(a) Legislation

China has passed a substantial amount of legislation relating to antidumping, and has generally reported such new legislation to the

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the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.")

[83] *See* Implementing Agreement, *supra* note 25 at Arts. 5 (*Initiation and Subsequent Investigation*) and 6 (*Evidence*).

[84] Implementing Agreement, *supra* note 25 at Art. 11 (*Duration and Review of Anti-Dumping Duties and Price Undertakings*).

[85] Won-Mog Choi and Henry S. Gao, *supra* note 44 at 665 (citing the *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (November 10, 2001), para. 148).

[86] *See* Zimmerman, *supra* note 63 at 4-7. *See also* Won-Mog Choi and Henry S. Gao, *supra* note 44 (containing extensive discussion of China's antidumping-related legislation to date).

[87] *See* Won-Mog Choi and Henry S. Gao, *supra* note 44. *See also* Zimmerman, *supra* note 63, at 672 (containing an English language list of relevant legislation through 2002. *See also* WTO documents G/ADP/N/1/CHN/1 *et seq*. for English language translations of the relevant legislation China has reported to the WTO to date.

[88] *See, e.g.,* Committee on Anti-Dumping Practices, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the United States to China*, G/ADP/W/462 (September 27, 2007) ("It is the United States' understanding that these regulations still have not been notified. Will China notify these regulations without further delay?")

WTO accordingly.[89] "Since China's accession to the World Trade Organization (WTO) at the end of 2001, it has made substantial, even heroic, efforts to change its laws and regulations."[90] "WTO accession has brought not only amendments to formal written laws, but greater transparency in government administration, enhanced opportunities for Chinese entrepreneurs, and more equal treatment between foreign and domestic business organizations."[91] "It is apparent that Chinese laws seek to incorporate rules consistent with those of the WTO.[92] In certain situations, the Chinese laws even set a standard higher than the WTO obligations require."[93] "All of these new rules will help China fight against potential violations of foreign trade laws."[94] Some scholars even claim that China has already brought itself to near full compliance with not only its accession obligations, but also its other obligations as a WTO Member.[95] Notwithstanding such contention, though, scholarship by Won-Mog Choi and Henry S. Gao on this topic suggests that "China should continue to proceed with the task of clarification and improvement of its trade rules."[96] Choi and Gao discuss, among other things, two specific concerns regarding language in China's legislation.[97]

First, they point out their concern about Chinese interpretations of the word "related," as discussed in the "domestic industry" portion of this essay above.[98]

Second, Choi and Gao state that:

> Controversy might arise, however, in regard to the "negligible imports" standard. According to WTO rules, if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like products in the importing Member, the volume of dumped imports must be regarded as negligible, and the authority must terminate the investigation procedure. In comparison, under the Chinese Antidumping Regulations, the 3 per cent negligible import standard is stated in Article 9 which is about the cumulative assessment

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[89] *See* WTO documents G/ADP/N/1/CHN/1 *et seq*. for English language translations of the relevant legislation China has reported to the WTO to date.

[90] For a thorough discussion of China's legislative developments, *see* Heng Wang, *Chinese Views on Modern Marco Polos: New Foreign Trade Amendments*, 39 CORNELL, INT'L L.J. 329 (Spring, 2006). *See also* William Steinberg, *Monitor with no Teeth: An Analysis of the WTO China Trade Review Mechanism*, 6 U.C. DAVIS BUS. L.J. 13 (Fall, 2005).

[91] *Id*.

[92] *Id*. at 342.

[93] *Id*.

[94] *Id*. at 344.

[95] *See also, generally,* Won-Mog Choi and Henry S. Gao, *supra* note 44.

[96] *Id*. at 666.

[97] *See generally,* Won-Mog Choi and Henry S. Gao, *supra* note 44.

[98] *Id*. at 669.

> of dumping, whereas such a standard is not stated in Article 27, a general provision dealing with any negligible import situations. Theoretically, one might doubt whether the MOFCOM would use the 3 per cent standard in assessing whether the volume of dumped imports is negligible in contexts other than those in which "dumped imports from more than one country" are cumulatively assessed. Therefore, a breach of WTO rules will occur if MOFCOM initiates any investigations, or do not terminate any investigations, even though the volume of dumped imports from a particular country account for less than 3 per cent of imports of the like products in China.[99]

Choi and Gao claim that "MOFCOM has adopted the 3 per cent standard as the threshold for determining negligible imports in all scenarios."[100] However, until China becomes fully compliant with respect to its reporting and transparency requirements, any such claim remains questionable.[101]

Furthermore, notwithstanding the extent to which China might have already made "its trade laws and regulations compatible with the WTO agreements", two other problems remain.[102] First, as noted above and discussed in the next section of this paper, some countries remain dissatisfied with China's failure to notify the WTO of certain legislation.[103] Second, China continues to use, as an alleged but not "valid excuse" for passing of legislation and failure and delay of information reporting, the "unavailability" of data at levels below the "central government" level.[104] Given the size and fast pace with which China's economy has developed at all levels, obtaining such data remains a significant challenge. China continues to struggle with this, and is making significant progress. However, doubting the legitimacy of such an excuse, which in fact remains invalid under the WTO rules, the European Communities have referred to such

[99] *Id*. at 668

[100] *Id*.

[101] Without the ability to review and recreate the entirety of China's calculations, it remains impossible to assess the truth of any claim that they have adhered strictly to the three percent standard.

[102] Won-Mog Choi and Henry S. Gao, *supra* note 44 at 665.

[103] *See, e.g*., Committee on Anti-Dumping Practices, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the United States to China*, G/ADP/W/462 (September 27, 2007) ("It is the United States' understanding that these regulations still have not been notified. Will China notify these regulations without further delay?").

[104] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007). *See also* Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007) (stating that "unavailability of the data is not a valid excuse").

excuses as indications of the "unwillingness of China to abide by its WTO obligations."[105] Even if China has in fact tried but failed to obtain such data, one might question whether China could ever hope to enforce its local governments' compliance with WTO commitments if it cannot obtain fundamental data from them.

(b) Procedures

Aside from the reporting requirements discussed herein above and below, several WTO Members have repeatedly criticized China for its failure, or apparent failure, to abide by procedural rules in two respects. First, lack of transparency in its antidumping hearing mechanism make it unclear whether China has complied with the procedural requirements set forth in the Implementing Agreement.[106] Second, as noted in the "calculation of duties" section of this essay above, even to the minimal extent to which China has begun to report its detailed calculation procedures, some countries have already begun to challenge those calculations themselves.[107]

3. WTO reporting requirements

Three provisions of the Implementing Agreement call for WTO Members to notify the WTO of certain events relating to antidumping measures.[108] Other WTO Members have issued complaints about China's lack of compliance with these provisions.[109]

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[105] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007).

[106] *See* Implementing Agreement, *supra* note 25 at Art. 5.

[107] *See, e.g.,* Lam, *supra* note 6 at 2 (The U.S. has already "raised concerns about [China's] recently published formula for calculating the amount of antidumping duty collected upon entry at the port of products subject to antidumping measures").

[108] *See, e.g.*, Implementing Agreement, *supra* note 25 at Arts. 16.4 ("Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken.") 16.5 ("Each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations."), and 18.5 ("Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations").

[109] *See, e.g.*, Questions from the United States to China, *Committee on Anti-Dumping Practices—Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China*, G/ADP/W/462 (September 27, 2007) ("It is the United States' understanding that these regulations still have not been notified. Will China notify these regulations without further delay?") *See also, generally*, Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007).

(a) Committee on Anti-Dumping Practices

Article 16 provides for the establishment of "a Committee on Anti-Dumping Practices . . . composed of representatives from each of the Members."[110] Articles 16.4, 16.5 and 18.5 set forth requirements for WTO Members to report certain information to the Committee on Anti-Dumping Practices.[111] China has enacted domestic legislation imposing parallel requirements on itself.[112] China has reported most of such legislation to the Committee on Anti-Dumping Practices.[113]

i. Reporting preliminary and final anti-dumping actions

Article 16.4 also provides that "Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken."[114] The WTO makes "such reports . . . available in the Secretariat for inspection by other Members."[115] Unfortunately, the Secretariat does not seem to make the reports available to scholars such as the author of this essay.[116]

The European Communities have expressed frustration with China's "apparent unwillingness . . . to abide by its WTO obligations, including the fundamental principles of transparency and accountability" with respect to subsidies and otherwise.[117] In fact, "it was only on 11 April 2006 that China submitted its first subsidy notification for the period 2001 to 2004 following its accession in 2001."[118] Furthermore, that April 11, 2006 notification only covered the period from 2001 to 2004.[119] However, WTO Members have not complained explicitly about any failure on China's part to notify the Se-

[110] *See* Implementing Agreement, *supra* note 25 at Art. 16.1.

[111] *Id*. at Arts. 16.4-5 and 18.5.

[112] *See*, Heng Wang, *Chinese Views on Modern Marco Polos: New Foreign Trade Amendments*, 39 Cornell, Int'l L.J. 329 (Spring, 2006).

[113] *See* WTO documents G/ADP/N/1/CHN/1 *et seq*.

[114] Implementing Agreement, *supra* note 25 at Art. 16.4.

[115] *Id*. at Art. 16.4.

[116] The author attempted to contact the Secretariat by email on several occasions over a period of more than two months, but did not receive any response.

[117] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007).

[118] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007)*Id*. (citing Committee on Subsidies and Countervailing Measures, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement*, G/SCM/N/123/CHN (April 13, 2006)).

[119] Committee on Subsidies and Countervailing Measures, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement*, G/SCM/N/123/CHN (April 13, 2006) ("In general, the period to which the following information applies is 2001 to 2004.")

cretariat of new preliminary or final antidumping actions taken.[120] Additionally, the "Report under Article 16.4 of This Agreement" issued by WTO Committee on Anti-Dumping Practices in November included disclosure from China regarding new preliminary or final anti-dumping actions that it had taken with respect to three products imported into China by one, three, and four countries respectively, in October 2007 alone.[121] This seems to suggest that China continues to report many, if not all, of its anti-dumping actions.

Furthermore, the web page of MOFCOM's Bureau of Fair Trade for Imports and Exports ("BOFT") includes basic notifications regarding the results of all completed preliminary and final antidumping actions and re-hearings that the WTO Secretariat has made public.[122] Unfortunately, the BOFT website includes such information only in Chinese language.[123] The English language website does not include a section for reporting such notifications.[124]

[120] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (Oct. 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[121] *See, generally*, Committee on Anti-Dumping Practices, *Reports Under Article 16.4 of the Agreement (October 2007)—Note by the Secretariat*, G/ADP/N/164 (November 13, 2007).

[122] 中华人民共和国商务部进出口公平贸易局：政府消息之窗：进口倾销案件公告 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: Zhengfu xiao xi zhi chuang jin kou qing xiao an jian gong gao (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Government Information Portal), *available at* http://gpj.mofcom.gov.cn/static/column/xxfb/c.html/1. *Cf.* U.S. Products Subject to Foreign Antidumping and Countervailing Duty Measures: China, http://ia.ita.doc.gov/trcs/foreignadcvd/china.html; Committee on Anti-Dumping Practices, *Reports Under Article 16.4 of the Agreement (October 2007)—Note by the Secretariat*, G/ADP/N/164 (Nov. 13, 2007).

[123] 中华人民共和国商务部进出口公平贸易局：政府消息之窗：进口倾销案件公告 Zhonghua Renmin Gongheguo wu bu jin chu kou gong ping mao yi ju: Zhengfu xiao xi zhi chuang jin kou qing xiao an jian gong gao (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Government Information Portal), *available at* http://gpj.mofcom.gov.cn/static/column/xxfb/c.html/1.

[124] *See*, 中华人民共和国商务部进出口公平贸易局：政府消息之窗：进口倾销案件公告 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: Zhengfu xiao xi zhi chuang jin kou qing xiao an jian gong gao (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Import and Export), http://gpj2.mofcom.gov.cn/. The Chinese page containing the notifications is indicated as including "反倾销年公告" Fan qing xiao nian gong gao (antidumping case announcements). No such page exists on the English website. The URL for the Chinese page indicates "statistic." The English website does include a "statistics" page. (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Government Information Portal: Statistics), *available at* http://gpj2.mofcom.gov.cn/statistic/statistic.html. However, that page does not contain links to any documents.

ii. Reports

Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months.[125] Again, the WTO public website does not contain any complaints by WTO Members accusing China of failing to fulfill this requirement at this time.[126]

(b) Other Notifications

Article 16.5 of the Implementing Agreement stipulates that "each Member shall notify the Committee *(a)* which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and *(b)* its domestic procedures governing the initiation and conduct of such investigations."[127]

i. "Which authorities are competent to initiate and conduct investigations"[128]

(1) Notification by providing laws to the WTO

The Rules on Industry Injury of Anti-Dumping Investigation and the Rules on Industry Injury of Anti-Subsidy Investigation specify the MOFCOM Bureau of Fair Trade for Imports and Exports as the entity that shall handle China's antidumping cases.[129] "The WTO agreements [also] require all WTO members, including China, to provide a judicial, arbitral, or administrative review mechanism for reviewing the final determinations in anti-dumping investigations."[130] "In 2002, the Supreme People's Court issued a decision

[125] Implementing Agreement, *supra* note 25 at Art. 16.4.

[126] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (Oct. 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[127] Implementing Agreement, *supra* note 25 at Art. 16.5.

[128] *Id*.

[129] 中华人民共和国反倾销和反补贴条例 Zhonghua Renmin Gongheguo fan bu tie he fan qing xiao tiao li (Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China), adopted by Order 214 of the State Council of the People's Republic of China on 25 March 1997; 中华人民共和国反倾销和反补贴条例 Zhonghua renmin gongheguo fan bu tie he fan qing xiao tiao li (Anti-Dumping and Anti-Subsidy Regulations of the People's Republic of China), adopted by Order 214 of the State Council of the People's Republic of China on 25 March 1997.

[130] Qiang Bjornbak, et al., *International Legal Development Review: 2005 Regional and Comparative Law: China*, 40 INT'L LAW. 547, 553 (2006) (citing "Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, annex 1A, Agreement on Implementa-

providing specific guidance on bringing final determinations to the people's courts."[131] A 2002 Supreme People's Court decision provides specific guidance on bringing final determinations to the people's courts.[132] "The Supreme People's Court later designated the Beijing No. 1 Intermediate People's Court as the appropriate court to hear these cases."[133] However, the author of this essay has failed to identify any instance of this or any other court reviewing any MOFCOM decision on antidumping.[134]

(2) Direct notification

Pursuant to Article 16.5 of the Implementing Agreement, China has notified the WTO Committee on Anti-Dumping Practices of the names and addresses of its Ministry of Commerce ("MOFCOM") Bureau of Fair Trade for Imports and Exports ("BOFT") and Ministry of Agriculture Department of Development Planning, as well as the telephone, facsimile, and email particulars of the latter.[135] China recently additionally notified the Committee on Anti-Dumping Practices of the telephone and facsimile numbers and email address for the BOFT, as well as the address, telephone number, facsimile number and email of its Investigation Bureau of Industry Injury (IBII).[136] The Regulations of the People's Republic of China on Anti-Dumping also dictate that "[t]he State Economic and Trade Commission . . . shall be responsible for the investigation and determination of injury," and that "the anti-dumping investigation of injury to a domestic industry involving agricultural products shall be conducted by

tion of Article VI of the General Agreement on Tariffs and Trade 1994 (1994), *available at* www.wto.org/english/docs_e/legal_e/19-adp.pdf").

[131] *Id*. *See also* M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43, 74-75 (2005).

[132] 最高人民法院关于审理反倾销行政案件应用法律若干问题的规定 Zuigao Renmin Fayuan guan yu shen li fan qing xiao xing zheng an jian ying yong fa lü ruo gan wen ti de gui ding (Supreme People's Court Regulation on Certain Questions about the Appropriate Law in Handling Anti-Dumping Administrative Cases) (Nov. 21, 2002, effective Jan. 1, 2003) (*available at* http://www.law-lib.com/law/law_view.asp?id=42303).

[133] Qiang Bjornbak, et al., *International Legal Development Review: 2005 Regional and Comparative Law: China*, 40 INT'L LAW 547, 554, n.49 (2006).

[134] *See id*. at n.50 ("At this time, however, there are no reports of any of these cases being reviewed"). The author of this paper also contacted each of the relevant agencies by email twice and telephone at least once, as well as the Beijing No. 1 Intermediate People's Court. They all failed to respond by email, and via telephone each refused to unequivocally state that no such judicial review has taken place. However, none of them provided any reference to a specific case or could tell me where this author might find information about one.

[135] Committee on Anti-Dumping Practices, Competent Authorities: Notifications Pursuant to Articles 16.5 and 25.12 of the Agreements—Addendum, G/ADP/N/14/Add.24, p.5 (Oct. 15, 2007).

[136] *Id*.

SETC jointly with the Ministry of Agriculture."[137] Unfortunately, the author of this essay did not receive any response to his email messages to those three email addresses, and the individuals who answered the telephone in those three offices refused to provide antidumping information to someone who did not represent a party involved in an antidumping case or a WTO Member.[138]

ii. "Domestic procedures"[139]

As noted above, China has implemented, and in many if not most cases notified the WTO of, extensive legislation setting forth its domestic procedures governing the initiation and conduct of antidumping investigations.[140] Notwithstanding the minor questions, discussed above, regarding whether certain points might differ slightly from WTO rules, concerned parties should focus most on whether China will in fact strictly adhere to such laws.[141]

4. Transparency

In addition to the above requirements for each WTO Member to keep the WTO Committee on Anti-Dumping Practices informed, Articles 5 and 6 of the Implementing Agreement provide notification requirements with respect to informing WTO Members, parties involved, and the general public of antidumping actions.[142]

(a) Generally

These requirements have given rise to the most complaints by WTO Members, and perhaps represent China's most serious failure with respect to WTO compliance:[143]

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[137] Committee on Anti-Dumping Practices, *Notifications of Laws and Regulations Under Article 18.5 of the Agreement—People's Republic of China*, 3, G/ADP/N/1/CHN/2 (Sept, 11, 2002).

[138] Admittedly, no WTO rules require them to disclose such information to uninterested parties.

[139] Implementing Agreement, *supra* note 25 at Art. 16.5.

[140] *See*, Heng Wang, *supra* note 112.

[141] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007) (referring to the "apparent unwillingness of China to abide by its WTO obligations.")

[142] Implementing Agreement, *supra* note 25 at Arts 5-6.

[143] *See, e.g.* Questions from the United States to China, *Committee on Anti-Dumping Practices—Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China*, G/ADP/W/462 (September 27, 2007) pp. 1-2, stating as follows:

The United States has previously reported on complaints from interested parties in Chinese anti-dumping proceedings about a lack of transparency with respect to the factual information before MOFCOM and a lack of adequate explanation by MOFCOM of its interpretation of those facts. For example, respondents have complained that the disclosures of anti-dumping margin calculations in pre-

i. Notifying WTO Members pursuant to Article 5

"After receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned."[144] After 2006, WTO Members have not complained about any failure by China to report initiation of any investigations.[145] However, even as of October 2007 some WTO Members continued to express concern about China's tardiness, to the extent of more than half a decade, in notifying them of subsidies.[146] One might wonder whether the WTO Members remain ignorant of certain antidumping investigations as well.[147]

ii. Notification of new investigations, and ample opportunity to respond

The Implementing Agreement provides detailed requirements with respect to notifying interested parties of investigations and timely provision to such parties of all documents and other information

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liminary and final determinations have not contained sufficient information needed to replicate certain calculations and identify the specific adjustments that were made.

See also GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (Oct. 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[144] Implementing Agreement, *supra* note 25 at Art. 5.5.

[145] *See* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (Oct. 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[146] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007). ("[I]t was only on 11 April 2006 that China submitted its first subsidy notification for the period 2001 to 2004 following its accession in 2001." (citing Committee on Subsidies and Countervailing Measures, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement*, G/SCM/N/123/CHN (April 13, 2006))).

[147] In other words, if the WTO Members remained unaware of or unclear about certain subsidies, for a period of more than five years, to the extent that they could not even adequately form a complaint to submit to the WTO until this year, then it seems likely that they might remain similarly unaware of or unclear about certain antidumping measures that still exist today. This seems particularly true when China continues to use, as an excuse for non-reporting various subsidies and such, its inability to obtain accurate information from local governments.

they might need in order to present proper defenses.[148] As noted above, several countries have expressed concern regarding the amount of information provided and, therefore, the ability to present adequate defenses.[149] Additionally, Japan has recently questioned whether China does in fact notify "all interested parties," and asks what China will do "should they fail to supply the required information."[150]

(b) Other factors that limit transparency

i. MOFCOM English website[151]

The English website for MOFCOM's BOFT contains several articles promoting China's general (i.e., not necessarily relating to dumping and antidumping) actions in the WTO, and condemning those of the U.S. and other countries.[152] However, the "Policy Re-

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[148] Implementing Agreement, *supra* note 25 at Art. 6.1 ("All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.") Implementing Agreement, *supra* note 25 at Art. 6.1.1 ("Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.") Implementing Agreement, *supra* note 25 at Art. 6.1.2 ("Evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.") Implementing Agreement, *supra* note 25 at Art. 6.1.3 ("As soon as an investigation has been initiated, the authorities shall provide the full text of the written application [therefor] to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved.") Implementing Agreement, *supra* note 25 at Art. 6.2 ("Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.") Implementing Agreement, *supra* note 25 at Art. 6.3 ("Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.") Implementing Agreement, *supra* note 25 at Art. 6.4 ("The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation.") Implementing Agreement, *supra* note 25 at Art. 6.9 ("The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.")

[149] *See, e.g.*, Lam, *supra* note 6 at 2. (Stating the U.S. "continues to hear complaints from interested parties in Chinese antidumping proceedings about a lack of transparency regarding the facts being considered by the [BOFT] and a lack of adequate explanation of BOFT's interpretation of those facts.")

[150] Committee on Anti-Dumping Practices, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from Japan to China*, G/ADP/W/463 (October 15, 2007).

[151] 中华人民共和国商务部Zhonghua renmin gongheguo shang wu bu (Ministry of Commerce of the People's Republic of China) http://english.mofcom.gov.cn/.

[152] *See, e.g.*, 新华社，世界贸易组织调查中国电影音乐出口限制案Xin hua she, WTO diaocha Zhongguo dian ying yin yue chu kou xian zhi an (XINHUA, *WTO Panel to Probe Alleged Limits of Chinese Film, Music Imports*)
(Nov. 28, 2007) http://gpj2.mofcom.gov.cn/aarticle/workaffair/200711/20071105251199.html; 新华社，访谈：西方国家对中国的出口的愤怒没有道理Xin hua she, fang tan: xi fang guo jia dui

lease" page includes only two announcements.[153] Similarly, the "Statistics" page (analogous, as mentioned above, to the Chinese page that includes announcements of antidumping cases) does not include any entries at all.[154] Even using the website's own search engine to search for "dumping" and "anti-dumping" only yielded two documents each, while searches for "dump" and "antidumping" yielded zero results each.[155]

ii. MOFCOM Chinese website[156]

(1) Apparently well-organized and comprehensive

Fortunately, the Bureau of Fair Trade for Imports and Exports ("BOFT") has created an at least apparently well organized and complete website including many links to various topics and introductory materials.[157] However, closer inspection reveals that some of the most important portions of the Chinese page also remain blank or outdated.

(i.) Basics

Even the "About Us" (关于我们) introductory page, which you can reach by no fewer than three hyperlinks that appear on the main page, contains no information at all.[158]

Zhongguo chu kou de fen nu mei you dao li (XINHUA, Interview: Western Anger over Chinese Imports 'Unreasonable.') (Oct. 8, 2007) http://gpj2.mofcom.gov.cn/aarticle/workaffair/200710/20071005153108.html.

[153] 中华人民共和国商务部进出口公平交易局 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping jiao yi ju (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports), http://gpj2.mofcom.gov.cn/policyreleasing/policyreleasing.html.

[154] *See*, 中华人民共和国商务部进出口公平交易局 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping jiao yi ju (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Import and Export: Statistics), http://gpj2.mofcom.gov.cn/statistic/statistic.html, there is no statistic section on Chinese website

[155] *See*, Search Engine for the Ministry of Commerce of PRC, http://sousuo.mofcom.gov.cn/query/departmentsQuerySearch.jsp.

[156] 中华人民共和国商务部 Zhonghua Renmin Gongheguo shang wu bu (Ministry of Commerce of the People's Republic of China) http://www.mofcom.gov.cn/.

[157] 中华人民共和国商务部进出口公平贸易局 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping jiao yi ju (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports), http://gpj.mofcom.gov.cn/.

[158] 中华人民共和国商务部进出口公平贸易局：关于我们 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: guan yu wo men (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: About Us), http://gpj.mofcom.gov.cn/gywm/gywm.html.

(ii.) Legislative documents

Similarly, the "WTO 协议" (WTO Agreement) link still does not contain any content.[159]

The page for 国外法规 (foreign laws and regulations) includes a number of entries, but only dated through January of 2006.[160] Furthermore, even within that page, as an example, the page for the all of North and South America includes only one entry; 2005 sanitary implementation measures regarding certain Mexican goods for import.[161]

The 国内法规 (domestic laws) portion of the website remains similarly sparse, with the "国内法规法律法规" (sic) (domestic laws and regulations) portion left completely blank and the "部门规章" (department regulations) section including only one notice newer than January 2003.[162]

Finally, the policy (决策公文) page also contains no entries.[163]

(iii.) The good news: antidumping case notifications[164]

Fortunately, the BOFT seems to have focused its energy on ensuring that it keeps the "antidumping case notifications" portion of

[159] 中华人民共和国商务部进出口公平贸易局：法规公文：WTO 协议 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: fa gui gong wen*: WTO xie yi* (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Legislative Documents: WTO Agreements), http://gpj.mofcom.gov.cn/static/column/bi/bq.html/1.

[160] 中华人民共和国商务部进出口公平贸易局：法规公文：外国法规Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: fa gui gong wen: wai guo fa gui (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Legislative Documents: Foreign Laws and Regulations), http://gpj.mofcom.gov.cn/bm/bm.html.

[161] 中华人民共和国商务部进出口公平贸易局：法规公文：国外法规美大地区 Zhonghua renmin gongheguo shang wu bu jin chu kou gong ping mao yi ju: fa gui gong wen: guo wai fa gui mei da di qu (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Legislative Documents: Foreign Laws and Regulations of the Americas), http://gpj.mofcom.gov.cn/static/column/bi/bm/bn.html/1.

[162] 中华人民共和国商务部进出口公平贸易局：法规公文：国内法规 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: fa gui gong wen: guo nei fa gui (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Legislative Documents: Domestic Laws and Regulations), http://gpj.mofcom.gov.cn/bj/bj.html.

[163] 中华人民共和国商务部进出口公平贸易局：法规公文：决策公文 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: fa gui gong wen: jue ce gong wen (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Legislative Documents: Policy Documents), http://gpj.mofcom.gov.cn/static/column/bi/ae.html/1.

[164] 中华人民共和国商务部进出口公平贸易局：政府消息之窗：进口倾销案件公告 Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: Zhengfu xiao xi zhi chuang: jin kou qing xiao an jian gong gao (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Government Information Portal), http://gpj.mofcom.gov.cn/static/column/xxfb/c.html/1.

its website very much up to date.[165] The BOFT appears to have posted timely notifications, with basic information, regarding the results of every preliminary and final antidumping case it has reported to the WTO.[166]

iii. Lack of response from authorities

China has notified the WTO of the contact information of the department and two bureaus in charge of antidumping matters.[167] In China, often when an agency has not yet issued legislation on a particular point, or when legislation needs clarification, the authorities will provide oral explanation of the appropriate interpretations over the telephone.[168] Both foreign and domestic law firms in China use this method of obtaining important provisional information quite frequently.[169] However, western lawyers and scholars know that callers might encounter difficulty holding anyone accountable for oral comments if related problems later arise. Additionally, authorities' refusal to discuss even basic topics with certain individuals result in lack of transparency in the system as a whole.[170]

iv. Need for Chinese counsel

The Ministry of Justice does not permit foreign lawyers to represent Chinese or foreign parties in antidumping hearings or disputes in China.[171] Therefore, foreign parties that wish to involve themselves in antidumping investigations, hearings and disputes in China must hire local Chinese counsel to represent them.[172] Legal representation in China continues to improve, but remains arguably inferior to representation by legal professionals of other jurisdictions.[173] This factor exacerbates the problems of lack of transparen-

[165] *Id*.

[166] *Id*. *Cf.*, 中华人民共和国商务部进出口公平贸易局：政府消息之窗：进口倾销案件公告Zhonghua Renmin Gongheguo shang wu bu jin chu kou gong ping mao yi ju: Zhengfu xiao xi zhi chuang: jin kou qing xiao an jian gong gao (Ministry of Commerce of the People's Republic of China Bureau of Fair Trade for Imports and Exports: Government Information), http://gpj.mofcom.gov.cn/static/column/xxfb/c.html/1.

[167] Committee on Anti-Dumping Practices, Competent Authorities: Notifications Pursuant to Articles 16.5 and 25.12 of the Agreements—Addendum, G/ADP/N/14/Add.24, p.5 (Oct. 15, 2007).

[168] Adam W. Schorr, Lecture, International Trade Law lecture at the University of California School of Law: Doing Business in China (Sept. 13, 2007).

[169] *Id*.

[170] As noted above, the representatives at each of the relevant offices each failed to respond to this author's email messages and refused to provide the requested information over the telephone.

[171] Zimmerman, *supra* note 63 at 849.

[172] *Id*.

[173] Toshiro Nishimura, Vice President, Int'l Bar Ass'n, Keynote Address at the Ministerial Forum on WTO & the Modernization of Legal System of the International Symposium on WTO & Legal Services

cy and, for example, difficulty of a foreigner to prepare and present their case in defense within the deadlines provided under the Implementing Agreement and Chinese laws and regulations.[174]

5. Expiration of antidumping measures

Current WTO rules do not provide for an automatic sunset of antidumping measures.[175] In fact, "according to the U.S. International Trade Commission (ITC), from July 1998 to March 2003, 191 out of 360 cases (54%) were extended for another five years in the United States."[176] "The situation is no better in the European Union, which reports that 60% of its cases from 1999 to 2002 were extended."[177] China has recently called for an amendment that would preclude such extensions and require antidumping duty-imposing nations to wait for at least 365 days after the end of the first five-year period of antidumping measures before they could revive hearings regarding the possibility of imposing additional antidumping measures.[178] "Currently, no WTO member supports China's proposal," probably due to its inclusion of especially relaxed provisions for developing nations.[179] However, on this debate, China stands at a position most nearly aligned with the "Friends Group," which "wants negotiations 'aimed at clarifying and improving disciplines'" under the Implementing Agreement.[180] This position seems to make sense, consider-

(Sept. 18, 2002 ("the internationalization of China's legal practices certainly deserves praise," but "further development is needed for the internationalization of Chinese legal practices [and] China's legal infrastructure.") However, according to some scholars, "incompetence on the part of local counsel was rarely a factor" adversely impacting arbitral, legal, and other cases in China." Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 255 (2001).

[174] *See* Implementing Agreement, *supra* note 25 at Art. 6.1.1 (providing a deadline of thirty days, with "due consideration" for "any request for an extension" thereof). *See also* Committee on Anti-Dumping Practices, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from Japan to China*, G/ADP/W/463 (October 15, 2007) ("*The anti-dumping regulation of China allows for a procedure of setting aside an extra 20 days for potential respondents to express their intention to co-operate to a given investigation*" (therein quoting "the explanation given by China during the regular meeting of the Committee in 2006")) (emphasis in original).

[175] Richard H. Steinberg, International Trade Law Lecture at the University of California School of Law (Oct. 22, 2007).

[176] Won-Mog Choi, *People's Republic of China's Proposals for Anti-Dumping in WTO/DDA Negotiations*, 2 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 25, 49 (citations omitted).

[177] *Id*. (citations omitted).

[178] Negotiating Group on Rules, *Communication from the People's Republic of China, Proposal of the People's Republic of China on the Negotiation on Anti-Dumping*, TN/RL/W/66 (March 6, 2003).

[179] Choi, *supra* note 177 ("It proposes that the automatic sunset and one-year grace period apply in cases of anti-dumping measures taken by developed countries against exports from developing countries.")

[180] *Id*. at 27.

ing the number of antidumping initiations against China since it joined the WTO.[181] Nevertheless, as noted above, China has become one of the most common instigators of antidumping actions in recent years.[182] Therefore, perhaps this indicates a step towards greater compliance with WTO rules.

IV. Commentary on Antidumping in China

A. Introduction

Opinions expressed below do not necessarily reflect the opinions of the author. However, interested parties should keep the following ideas in mind when examining China's antidumping and other policies.

1. Can we say China engages in "bad" practices with respect to antidumping?

Certainly many WTO Members feel China should make its policies and actions more transparent. Lack of transparency has prevented WTO Members from fully assessing China's compliance with dumping regulations thus far. Therefore, as China improves the extent of its transparency, other WTO Members should carefully examine the policies revealed.

2. Politics as Usual?

Although one of the top antidumping measure reporting countries, the U.S. has also become subject to as many antidumping initiations as any other country.[183] Only China (397), Korea (139) and Chinese Taipei (110) have become subject to more than the U.S.

[181] World Trade organization AD Initiations by Exporting Country from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Exporting Country") (indicating that during the period January 1, 2005 to June 30, 2007 China became subject to more than twice as many antidumping initiations (551) as the country with the second most; Korea (235), which in turn became subject to more than 50% more than any other county (others include Chinese Taipei (178), the United States, (176), Japan (138), Indonesia (132), India (129), Thailand (121), and Russia (102)).

[182] World Trade Organization AD Initiations by Reporting Member from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Reporting Member").

[183] World Trade Organization AD Initiations by Reporting Member from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Reporting Member"); World Trade Organization AD Initiations by Exporting Country from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Exporting Country").

(106).[184] Many of the disputing WTO Members present legitimate claims about "unfairness" of U.S. dumping calculations and anti-dumping measures.[185] However, China already reported having imposed ninety-seven official antidumping measures under the GATT as of June 30, 2007. At this rate, China might soon become one of the largest antidumping measure imposers as well.[186] Does this constitute "politics as usual?" Should we expect this to happen, and operate with a mindset that each WTO Member should carefully inspect all other WTO Members' actions against them and defend themselves accordingly? Should we believe a need exists to do so when most scholars and politicians feel that WTO Members in fact do abide by WTO rules?[187]

3. *Does China deserve protection as a developing nation or a new entrant into the WTO?*

Notwithstanding certain other WTO Members' treatment of China, most scholars, politicians and businesspersons agree that China has received ample allowances for its status as a "nonmarket economy" and a new entrant into the WTO.[188] Additionally, China re-

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[184] World Trade Organization AD Initiations by Exporting Country from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Exporting Country").

[185] *See, e.g.,* Questions from the United States to China, *Committee on Anti-Dumping Practices—Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China*, G/ADP/W/462 (September 27, 2007). *See also* GATT Secretariat, *Update of WTO Dispute Settlement Cases*, WT/DS/OV/1 (Oct. 18, 2001) *et seq*.; Special Session of the Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 16 April 2002* (Restricted), TN/DS/M/1 (June 12, 2002) *et seq*.; Special Session of the Dispute Settlement Body, *Improving the Special and Differential Provisions in the Dispute Settlement Understanding—Communications from China*, TN/DS/W/29 (January 22, 2003) *et seq*.; Special Session of the Dispute Settlement Body, *Report by the Chairman, Ambassador Péter Balás, to the Trade Negotiations Committee*, TN/DS/5 (February 4, 2003) *et seq*.

[186] World Trade Organization AD Initiations by Reporting Member from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Reporting Member").

[187] *See*, Chad P. Bown, *Conference: International Dispute Resolution: Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?*, 34 J. LEGAL STUD. 515, 546 (June, 2005).

[188] Dg Supachai Panitchpakdi, Speech at the WTO Forum of the 6th Shanghai – International Industry Fair: China and the WTO: Challenges and Opportunities for the Future (December 2, 2004) (*available at* http://www.wto.org/english/news_e/spsp_e/spsp32_e.htm). Notably, however, the U.S. still generally considers China a nonmarket economy. ("The Clinton administration, however, proposes to worsen the situation by continuing to define China as a 'nonmarket economy' for 15 years, thereby perpetuating an even more arbitrary methodology to determine whether Chinese exports are 'unfairly' traded." (Richard H. Steinberg, *A Summary of Some U.S. Views on the China-U.S. WTO Accord*, *in* Law 270A Course Reader: International Trade Law, Vol. 2, 361, 363 (Richard H. Steinberg, 2007-08) (citing Barfield and Groombridge editorial, ASIAN WALL ST. J. (Nov. 17, 1999))). *See also* Press Release from the office of Congressman Artur Davis, *U.S. Reps. Artur Davis and Phil English Announce Legislation to Target Nonmarket Economy Countries—Senator Bayh Slated to Unveil Similar Legislation in the*

ceived many special provisions to make it easier for China to accede into the WTO slowly and carefully, without harming its own economy or others'.[189] Many argue that China should abide by those rules.[190] Others argue that a realistic option did not exist for China to not join the WTO, and that it therefore only accepted certain terms unwillingly.[191] Such arguments exceed the scope of this paper. However, while reading the remainder of this essay, readers should continue to ask themselves whether certain of China's "unfair" policies create a net positive or negative effect on global economies.

B. China's Use of Antidumping

Certain aspects of China's traditional dispute settlement culture would seem to suggest that China would not use WTO mechanisms as much as countries whose judicial systems developed earlier than China's.[192] However, China has reported a significant number of antidumping actions in each year since its 2001 WTO accession.[193] In fact, during the period from 1994 to 2005, during only the second half of which China had yet become a WTO Member, China already accounted for 4% of all antidumping, countervailing duty and safeguard measures.[194] One could argue both for and against the proposition that China has adopted increasingly sophisticated antidumping measures. In particular, much of China's relevant new legislation merely constitutes insertion of language and principles from the Implementing Agreement into its own domestic laws.[195] Furthermore, with such a serious problem with lack of transparency, one cannot

Senate (March 1, 2007) http://www.house.gov/apps/list/press/al07_davis/CVDNME030107.html. *See also* USCBC Fact Sheet: Countervailing Duties and China's Nonmarket Economy Status (Jul. 7, 2005) http://www.uschina.org/info/china-briefing-book/factsheet_cvd_nme.html. Some authors have taken a cynical but muted position with respect to this situation. ("Presumably, after fifteen years of 'managed trade,' China and the United States might finally engage in more laissez-faire trade relations." (Richard H. Steinberg, *A Summary of Some U.S. Views on the China-U.S. WTO Accord*, *in* Law 270A Course Reader: International Trade Law, Vol. 2, 361, 363 (Richard H. Steinberg, 2007-08)).

[189] William Steinberg, *Monitor with no Teeth: An Analysis of the WTO China Trade Review Mechanism*, 6 U.C. DAVIS BUS. L.J. 13 (2005).

[190] *Id.*

[191] *Id.*

[192] *See, e.g.*, Ji Li, *From "See You in Court!" to See You in Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT'L L. 485, 497 (2007) (stating "high-ranking government officials in China favor informal dispute resolution channels, and thus using the formal mechanism in the WTO falls outside their comfort zone.")

[193] *Id.*

[194] Tarence P. Stewart, Amy S. Dwyer & Elizabeth M. Hein, *Trends in the Last Decade of Trade Remedy Decisions: Problems and Opportunities for the WTO Dispute Settlement System*, 24 ARIZ. J. INT'L & COMP. LAW 251, 263-64 (2007).

[195] *See*, Heng Wang, *supra* note 112.

tell exactly what measures China has adopted, or even the extent to which China abides by the legislation it has implemented.[196]

"China has reported a decline in the number of new antidumping investigations opened by its authorities as well as the number of final dumping measures imposed."[197] "China [also] reported a sharp drop in the number of new antidumping investigations initiated during the first half of 2006."[198] However, no indication exists as to whether this downward trend will continue even after the world economy recovers from the current economic crisis.[199] In any case, the large number of antidumping measure impositions to date, including the large number that remain in effect today, suggests that China aims to take full advantage of the WTO system to its own advantage in formulating its trade policy.[200]

Notwithstanding the possibility that China's antidumping measures have become increasingly sophisticated, the focus of many countries remains the lack of transparency of those measures.[201] As explained above, the U.S. and other nations have accused China of taking too long to respond to questions asked by other WTO Members, or of not responding at all.[202] WTO member nations have also complained about China's failure to adequately explain its calculations of imports.[203] China cannot hide forever behind a purported "lack of available statistics," where "unavailability of the data is not a valid excuse."[204]

[196] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007). *See also* Pruzin, *supra* note 31.

[197] *See* Daniel Pruzin, *Drop in Chinese Antidumping Investigations, Final Measures Reported in WTO in First Half*, WTO REP., Oct. 4, 2007.

[198] Pruzin, *supra* note 31.

[199] *See* Pruzin, *supra* note 31.

[200] *See*, World Trade Organization AD Initiations by Reporting Member from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: by Reporting Member"); Committee on Anti-Dumping Practices, *Semi-Annual Report Under Article 16.4 of the Agreement—China*, G/ADP/N/158/CHN (October 2, 2007).

[201] *See, e.g.*, Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007). *See also* Pruzin, *supra* note 31.

[202] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007). *See also* Pruzin, *supra* note 31.

[203] Lam, *supra* note 6.

[204] Committee on Subsidies and Countervailing Measures, *Transitional Review Mechanism Pursuant to Section 18 of the Protocol on the Accession of the People's Republic of China—Questions from the European Communities to China*, G/SCM/Q2/CHN/32 (October 5, 2007).

C. Other Protectionist Measures in China

The previously mentioned "lack of available statistics," as well as several other issues discussed above, admittedly extends beyond what some might consider calculation of imports or antidumping measures, per se.[205] However, some such issues clearly impact China's calculation of imports, and others accomplish the same results as official antidumping measures.[206] In fact, one could argue that some of China's most sophisticated antidumping measures and other measures that impact consist of domestic laws and regulations that have the direct or indirect effects of skewing import calculations or that make official antidumping measures essentially irrelevant.[207] Examining China's various laws and policies that might impact dumping calculations, one might begin by considering some of the following:

1. Currency Exchange Rate

U.S. lawmakers and policymakers continue to "push . . . China to ease tight control over the yuan's exchange rate, which they say Beijing keeps artificially undervalued, making Chinese goods less expensive and fueling a destabilizing trade surplus."[208] "Artificially undervalued" Chinese currency makes it more difficult for foreign producers and importers to sell foreign products at competitive prices in China.[209] This in turn increases the likelihood that goods imported from other countries will become subject to antidumping duties.[210] On the other hand, though, low production costs in China act as in-

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[205] *Id*.

[206] For more examples, *see also* Committee on Subsidies and Countervailing Measures, *New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement*, G/SCM/N/123/CHN (April 13, 2006). *See also* Chunyu Jean Wang, *The WTO Violations in China's New Automobile Policy as It Seeks to Protect Its Domestic Conglomerates Through Non-Market Means*, 14 CURRENTS: INT'L TRADE L.J. 3 (2005).

[207] *See, e.g*., Chunyu Jean Wang, *The WTO Violations in China's New Automobile Policy as It Seeks to Protect Its Domestic Conglomerates Through Non-Market Means*, 14 CURRENTS: INT'L TRADE L.J. 3, 5 (2005) ("Although the government has eliminated the foreign currency balance and local production-related requirements on investment, the government has replaced these WTO-prohibited requirements with others designed to force domestic production and development.")

[208] Jason Leow, *U.S., China Split on Risks of Financial Reforms*, WALL ST. J., Dec. 13, 2007, at A8.

[209] *Id*.

[210] Note, however, that following this logic one would expect to see only very few instances of China's dumping goods into other countries. However, as noted above, other WTO Members frequently initiate antidumping actions against China. (*See*, World Trade Organization AD Initiations: Reporting Member vs Exporting Country from 01/01/96 to 30/06/07, http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (follow hyperlink under "Anti-dumping Initiations: Reporting Member vs Exporting Country")). Furthermore, some might even criticize the very principle of criticizing China for undervaluing its currency on the one hand while at the same time claiming that China has dumped products into any country that has not similarly undervalued its own currency.

centive for foreign companies to produce more goods in China.[211] To the extent that more producers locate in China and their goods become goods produced in China's domestic industry, fewer goods will exist with respect to which China could implement antidumping measures.

2. *Other Methods of Moving Industry into China's Domestic Economy*

(a) Technology

Certain Chinese laws and policies result in the absorption of technology into the Chinese domestic economy:

i. Weak IP Protection

China frequently receives criticism for its weak intellectual property protection, and even outright failure to abide by the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS").[212] Often this means that Chinese companies appropriate foreign technology.[213] Foreign companies use various methods to address this risk.[214] However, consider the consequences of one of the most common, which among other problems relinquishes the technology to China's domestic industry directly: In the face of weak protection within China, often companies will maintain their intellectual property rights outside of China, but will license or even sell all relevant rights to a Chinese business partner.[215] This enables them to immediately collect a flat fee sales price or to collect a royalty (annually, or by some other arrangement) and then let the Chinese business partner worry about enforcement within China's borders.[216] This results in more production within China.[217] In that way, China's failure to protect intellectual property rights within its borders, and China's failure to abide by TRIPS, arguably makes antidumping policy to some extent irrelevant. However, some risk does exist that this would exacerbate their risk of becoming subject to antidumping actions. Often when a seller imports and sells a product (like spandex or a chemical compound that required specialized technology) in China, they relinquish, for consideration, their intellectual property rights within China for that product. In cases where they have done

[211] *See*, Zimmerman, *supra* note 63 at 75.
[212] Chunyu Jean Wang, *supra* note 208 at 12.
[213] *Id*.
[214] Zimmerman, *supra* note 63 at 197-239, 563-618.
[215] *Id*.
[216] *Id*.
[217] *Id*.

that, they will probably sell the goods for much cheaper than they sell for in their home country, where the sales price includes an allowance for the intellectual property rights that remain valid and enforced. If challenged in this way, they would need to defend their case at MOFCOM accordingly.

ii. Legislation

(1) Joint Venture ("JV") Laws and Regulations

Often companies will enter into JV agreements with Chinese business partners in order to align their Chinese counterparts' interests in protecting IP with their own.[218] In other words, to the extent that a JV partner has a stake in the JV, they also have a stake in protecting the JV's intellectual property rights within China.[219] However:

Under Chinese law, all technology contributed to a JV stays with the JV when its original contract expires.[220] Even when entering into a JV agreement, some companies will retain their intellectual property rights by having the foreign parent company license them to the JV, as noted above.[221] However, also as noted above, certain problems exist with respect to this method of addressing the issue as well.[222] Additionally, to the extent that a company relinquishes its technology to its Chinese counterpart, under whatever circumstances, that company will often continue importing, into China, the raw materials and components needed to employ such technology to produce the final products that they will most likely thenceforth produce in China.[223] Consequential increases in importation of such raw materials creates a higher likelihood of China initiating dumping actions. Furthermore, once the technology or technology rights belong to a Chinese party, the likelihood increases that that party or other parties will use the same technology within China, which could also increase the likelihood that Chinese domestic industry will produce and use the same raw materials in conjunction with such technology.[224] To the extent this occurs, a new like product might become available in the Chinese domestic market, which would increase the likelihood that Chinese industry or government will want to protect

[218] Zimmerman, *supra* note 63 at 89-148.
[219] Zimmerman, *supra* note 63 at 89-148, 563-618.
[220] Zimmerman, *supra* note 63 at 280-89.
[221] *Id*.
[222] Zimmerman, *supra* note 63 at 89-148, 563-618.
[223] Zimmerman, *supra* note 63 at 75-148.
[224] *Id*.

the industry that produces such raw materials.[225] This might lead Chinese industry or government to initiate antidumping actions against the foreign importing company that hopes the Chinese business partner will continue to use its imported raw materials in conjunction with the technology that it has relinquished to such party. Specifically regarding such legislation, consider the following:

Economic consequences with respect to relinquishment of technology: Regardless of whether a company has licensed their technology to their Chinese business partner or sold or otherwise relinquished it entirely, they will probably continue to import any raw materials they originally imported for use in conjunction with such technology.[226] From an economic standpoint, the company also cannot build the price of the raw materials into the products themselves, as they might do in the U.S. (e.g., the company might sell the raw materials to a company of which it owns 33% at a high price but then have an agreement that the selling company shall only receive a small percentage of the profits of the company that produces the goods.[227] This helps reduce the amount at which the company becomes subject to double taxation.[228] The inability to sell raw materials to a Chinese business partner for such purposes could make it more difficult to engage in the same business activities profitably in China as the company can do in the U.S.

Chinese law requires that all newly developed technology also stay with the Chinese JV partner.[229] Accordingly, the same risks as described above apply to technology newly developed by a Chinese JV.[230] In addition to the risks relating to antidumping measures described above, this might also lead to a general discouragement of the creation of Chinese JVs with respect to any goods the production of which might lead to development of new or improved technologies.[231] This of course could result in more production outside of China, which could result in more importation into China, and thus a higher risk of China initiating antidumping actions.

Moratorium on share-swaps: One desirable method does exist for the avoidance of the technology turnover described above.[232] Offshore entities established by or controlled by Chinese companies or

[225] Lester Ross and Susan Ning, *supra* note 32.

[226] Zimmerman, *supra* note 63 at 280-89.

[227] Adam W. Schorr, Lecture at the University of California School of Law: Doing Business in China (Aug. 30, 2007).

[228] *Id*.

[229] Zimmerman, *supra* note 63 at 89-148.

[230] *Id*.

[231] *Id*.

[232] James Hsu, Speech US-China Business Law Conference, UCLA School of Law: Venture Capital Financing in China: Processes and Issues (Oct. 2007)

residents could theoretically acquire affiliated Chinese domestic companies (also known as "round-trip investments").[233] This method enables foreign parties to avoid some of China's technology transfer laws and some of the risks of using its technologies in China.[234] However, this method also puts the entity outside of China, which gives rise to the same adverse possibilities with respect to antidumping mentioned above. Furthermore, "MOFCOM is currently not approving share swaps unless an overseas IPO is contemplated.[235] This basically means that foreign companies cannot currently establish JVs with Chinese entities in low tax or no-tax jurisdictions.[236] Accordingly, this again increases the likelihood that forforeign companies will need to relinquish their technologies to Chinese counterparts while continuing to import raw materials against which Chinese industry or government might want to initiate antidumping actions.[237]

(2) Difficulty in collecting profits from China

China uses several methods to control the extent to which foreign entities operating in China can extract profits.[238] Consequently, foreign companies become less likely to engage in profit-making activities in China.[239] Again, to the extent that businesses decide to operate outside of China and import into China instead of producing locally, the likelihood of becoming subject to antidumping measures increases. China uses several methods to actively impede removal of profits from China:

Non-convertible currency: China has kept its Yuan nonconvertible on international markets.[240] Accordingly, a company cannot use its Chinese profits without first converting them to an internationally exchangeable currency.[241]

Currency exchange requires Chinese government approval.[242] Even simply "[i]n order to open foreign exchange bank account, an enterprise must first file an application with the State Administration of Foreign Exchange for a Foreign Investment Enterprise Foreign

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[233] *Id.*

[234] *Id.*

[235] Adam W. Schorr, Lecture at the University of California School of Law: Doing Business in China (Aug. 30, 2007).

[236] *Id.*

[237] *Id.*

[238] Adam W. Schorr, Lecture at the University of California School of Law: Doing Business in China (Oct. 24, 2007).

[239] *Id.*

[240] Zimmerman, *supra* note 63 at 440-53.

[241] *Id.*

[242] *Id.*

Exchange Registration Certificate.[243] Complex, time-consuming, and in fact expensive procedures exist with respect to obtaining such certificates.[244] This makes it difficult for foreign enterprises to remove profits from China, which discourages their establishment, which results in the factors that could impact antidumping issues as described above.

(3) General difficulty establishing businesses in China

The Chinese government imposes strict regulations on foreign entities that wish to establish profit-making entities in China.[245] Fewer restrictions, procedures, and other impediments apply to establishment of representative offices.[246] However, the Chinese government restricts representative offices from making profits in China at all.[247] Establishment of a JV involves significantly more difficulty.[248] The Chinese government imposes the most regulation and often prohibition (in certain industries, for example) on the establishment of wholly foreign-owned entities or even majority owner-ownership.[249] This rank-order of difficulty in establishing entities in China results in a large number of representative offices instead of foreign-owned companies operating in China.[250] Furthermore, to the extent that foreign entities do establish operating entities in China, they often do so in the form of JVs.[251] This situation, as explained above, results in a heightened likelihood of China's ability to initiate antidumping measures.

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[243] *Id*. at 441-42.

[244] *Id*. at 442.

[245] Furthermore, "Chinese enterprises also prefer to cooperate with relevant parties, including downstream producers, nongovernmental organizations (NGOs), and importers." (Heng Wang, *Chinese Views on Modern Marco Polos: New Foreign Trade Amendments*, 39 CORNELL, INT'L L.J. 329, 349 (2006)).

[246] Zimmerman, *supra* note 63 at 75-76.

[247] *Id*.

[248] *Id*. at 89-148.

[249] *See, e.g*., Chunyu Jean Wang, *supra* note 208 at 6 (stating "China clearly protects its domestic manufacturers against foreign manufacturers by prohibiting the foreign partner of a Sino-joint venture from achieving majority ownership.") This remains true, despite that "China's Protocol provides that 'foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favorable than what is accorded to other individuals and enterprises in respect of the distribution of import and export licences and quotas.'" (Chunyu Jean Wang, *supra* note 208 at 10).

[250] Zimmerman, *supra* note 63 at 89-148.

[251] *Id*.

(4) Difficulty in obtaining licenses or approvals to import into China[252]

"Under [China's Foreign Trade Act ("FTA") of 1994], foreign trade operations were required to either obtain special permits or to engage a foreign trade dealer as its agent to conduct foreign trade on its behalf."[253] "The FTA 2004 . . . abolished [that] special permit requirement."[254] However, complex "registration procedures" remain in effect, and still constitute a significant hurdle for potential importers into China.[255] Such barriers both make China's antidumping policies less relevant and constitute restraints of trade in and of themselves.[256]

(5) Other licenses

"Even if a particular import or export trade transaction were not prohibited or restricted under the FTA 2004, it still might be subject to automatic licensing."[257]

(6) Vague language in legislation, generally

"The vague and very general provisions of" China's Foreign Trade Act of 2004 and certain other Chinese laws and regulations relevant to antidumping issues "leave considerable room for administrative agencies."[258] This could function as a protectionist measure for China, or as a measure that inhibits China's ability to protect itself in the globalized economy.[259]

[252] *See, e.g.*, Chunyu Jean Wang, *supra* note 208 at 14.
[253] *Id*. at 335-36.
[254] *Id*. at 336.
[255] *Id*.
[256] *Id*.
[257] *Id*. at 339.
[258] Heng Wang, *supra* note 112 at 344.
[259] *Id*., stating:

The imprecision of FTA 2004 provisions makes it difficult for authorities to effectively handle the challenges they encounter in the fast paced world of international trade. For example, the lack of clear guidelines for investigation and response hinders the Chinese administrative agencies' ability to respond effectively to unfair trade barriers imposed by foreign trade partners, the abuse of intellectual property rights (IPRs), or other such problems. It would be better if the FTA 2004 had more detailed provisions.

However, ambiguity in Chinese laws and regulations often results in "government by man rather than rule of law." (Adam W. Schorr, Lecture at the University of California School of Law: Doing Business in China (Aug. 30, 2007)). *See also* William Steinberg, *Monitor with no Teeth: An Analysis of the WTO China Trade Review Mechanism*, 6 U.C. DAVIS BUS. L.J. 13 (2005) (discussing drafting ambiguities in Chinese laws and regulations).

(7) High capital requirements for establishing businesses in China[260]

China imposes higher contributed capital requirements for foreign invested enterprises than for Chinese enterprises. [261] This limits foreign competition's ability to enter the Chinese domestic economy, which results in a higher likelihood that foreign entities will import goods into China. [262] This in turn results in a higher likelihood that any given importing company will become subject to Chinese antidumping measures.[263]

(8) Lack of access to credit[264]

The Chinese government restricts the amount of loans that a foreign entity can take out based on the amount of its contributed capital.[265] This acts as yet another barrier to foreign parties' entry into the Chinese market.[266]

iii. Available responses

As with respect to antidumping measures taken by any WTO Member, defendants against Chinese antidumping actions can usually request several other common adjustments to dumping calculations that Chinese industry and government might put forth.[267] For example, certain charges exist in the U.S. that might not exist in China with respect to certain products.[268] These might include "warranty of purity," high legal costs and insurance costs in, for example, the U.S., the European Communities, and so forth.[269]

Conversely, importers could also argue that advertising costs in China will generally not reach as high as in the U.S. Chinese industry or government might also try to include supposed bribery charges in China as amounts paid in China that should reduce the total receipts from sales in China.[270] Accordingly, they would claim, to the

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[260] Chunyu Jean Wang, *supra* note 208 at 14.
[261] *Id*.
[262] *Id*.
[263] *Id*.
[264] *See, e.g*., Konstantina K. Athanasakou, *Why Invoking the SCM Argument May Not Be a Good Response to Chinese Textiles*, 3 LOY. INT'L L. REV. 281, 288-29 (2006).
[265] Adam W. Schorr, Lecture at the University of California School of Law: Doing Business in China (Oct. 4, 2007).
[266] *Id*.
[267] Richard H. Steinberg, Lecture at the University of California School of Law: International Trade Law (Oct. 24, 2007).
[268] *Id*.
[269] *Id*.
[270] *Id*.

extent that importers pay bribes in China, they have reduced their actual selling prices by such amounts.[271] This would impact dumping calculations to the detriment of importers.[272] Fortunately, China has enacted strict anti-bribery laws.[273] Accordingly, it has become less likely that any Chinese entity will want to try to substantiate bribery claims in an antidumping action.[274]

D. General Background of Protectionist Measures: Planned Market Economy Rising from a Communist Background

One should remember that China only began embracing market economic concepts in 1978.[275] Since then, we have seen dramatic changes in China.[276] When U.S. President Richard Nixon visited China in 1972, China had not yet opened its doors to the world economy.[277] China had created a virtual great wall protecting itself from international politics and economic influences after undergoing conflicts with England, Japan and others decades earlier.[278]

After Nixon's visit, the Communist nation of the People's Republic of China began to adopt planned market economic policies.[279] Specifically, the government began to take slow steps toward engaging in trade with the market economies of the world.[280] The government limited its first such steps to allowing controlled trade with foreign countries and enterprises in specified economic zones.[281] By the 1980s, though, China had begun privatizing major industries.[282] By the 1990s, the government had already opened even certain highly profitable industries to free market forces; permitting Chinese and even foreign participation.[283] Although still imposing many restrictions and stringent regulations, by the beginning of the 21st century, China strongly resembled a market economy.[284] The key phrase de-

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271 *Id*.
272 *Id*.
273 *See, e.g.*, 关于禁止商业贿赂行为的暂行规定 Guan yu jin zhi shang ye hui lu xing wei de zan xing gui ding (Temporary regulations regarding the prohibition of business bribery), enacted Nov. 15, 1996, effective November 15, 1996.
274 Adam W. Schorr, Lecture at the University of California School of Law: Doing Business in China (Nov. 27, 2007).
275 Zimmerman, *supra* note 63 at 1.
276 Chunyu Jean Wang, *supra* note 208 at 13.
277 *The Nixon Visit*, http://www.pbs.org/wgbh/amex/china/sfeature/nixon.html.
278 *Id*.
279 Chunyu Jean Wang, *supra* note 208 at 13.
280 *Id*.
281 Zimmerman, *supra* note 63 at 933-966.
282 Chunyu Jean Wang, *supra* note 208 at 13.
283 *Id*.
284 *Id*.

scribing this communist-originated market economy became "planned market economy."[285]

E. WTO Entry and Its Impact on Chinese Economic and Trade Policy: Advancements and Shortcomings Affecting Trade

1. WTO Entry and Commitments

Most scholars agree that China's entry into the WTO constitutes its greatest step towards an open market economy and free trade.[286] Prior to entering the WTO, intense negotiations ensued regarding the commitments China would need to make in order to enjoy the benefits of WTO membership.[287] China's obligations upon entry spanned a wide range of areas.[288] Scholars and politicians alike generally recognize the substantial steps China has made in its "transition from Maoist communism to a mixture of political authoritarianism and market economics."[289]

However, China has not shifted entirely to a pure market economy.[290] The government instead wisely and effectively directs China as a fairly tightly controlled "planned market economy."[291] Furthermore, industry and industry support groups that can contribute to China's advancement as a modern player in the global economy have not necessarily developed to the extent appropriate to function smoothly in the WTO and in the global economy in general.[292] Notwithstanding such criticisms, U.S. businesses in China continue to

[285] Zhou Xiaochuan, Address at the Practitioners of Development Seminar Series: Experience and Lessons from China's Gradual Reforms (April 26, 2004) (*streaming video available at* http://info.worldbank.org/etools/bSPAN/PresentationView.asp?PID=1090&EID=328).

[286] Chunyu Jean Wang, *supra* note 208 at 13.

[287] William Steinberg, *supra* note 190.

[288] *Id*.

[289] *Id*.

[290] Zhou, *supra* note 287.

[291] *Id*.

[292] *See, e.g*., Heng Wang, *supra* note 112 at 345 ("[B]ecause of the influence of the former planned economy, many trade associations have failed to enhance self-disciplinary procedures or provide services to members towards protecting their legitimate rights." Furthemore:

[d]eveloping stronger trade associations for Chinese enterprises would also greatly help protect their legitimate rights under the WTO, especially in persuading the Chinese government to initiate complaints against other members that violate WTO rules. In order to challenge practices inconsistent with WTO rules by recourse to the Dispute Settlement Body, a Member may request conciliation and use the dispute settlement procedures. Where settlement of the dispute is not feasible, Chinese enterprises must persuade the Chinese government to bring a case before the Dispute Settlement Body. A single enterprise is not normally sufficiently strong to persuade the government to launch such an effort, so trade associations become important. Because of China's recent accession to the WTO, it is unclear how this problem will develop.

Finally, "Strengthened Chinese trade associations would be able to coordinate Chinese exporters in a cooperative way before any market disruption occurs.")

report high levels of satisfaction with China's advancements toward market economic policies and free trade.[293]

2. *China's Compliance with WTO Obligations Other Than Entry Commitments*

China continues to move toward compliance.[294] However, many still argue that China needs to continue adjusting its domestic laws and policies to the extent of full compliance with other WTO rules.[295] As noted above, actual antidumping policies as well as other restrictive policies can shift the balance in WTO trade negotiations. Also as explained above, such policies can in fact go quite far beyond the scope of legitimate antidumping measures; causing significant and often inappropriate restrictions on free trade.

3. *Other Chinese Laws and Policies Affecting Trade*

Section IV.C. of this essay mentioned several other measures that potentially skew China's measurements of what it calls dumping and its measures that arguably make such measurements irrelevant by way of making importation difficult or even impossible. Although not necessarily claimed by other countries as WTO violations, these methods clearly can skew or make irrelevant China's calculations of imports for the purpose of imposing antidumping measures.

V. CONCLUSION

As with all WTO members, as China continues to grow and progress, room remains for China to improve the transparency of its antidumping policy and procedures. However, close analysis will show that many measures used by China do not significantly differ from those used by the U.S. and other WTO members. In fact, expert analysis might even show that other countries have more to learn from China than to teach it. Hopefully, readers of this paper now understand some of the ways China's domestic laws and policies have, intentionally or not, contributed to its calculations in its favor in order to employ antidumping measures. Scholars and trade lawyers alike should continue to actively examine China's and other countries' antidumping practices in hopes of ensuring smooth and

[293] *See, e.g.*, US-China Business Council, *USCBC 2007 Member Priorities Survey Executive Summary*, http://www.uschina.org/public/documents/2007/10/uscbc-member-survey-2007.pdf (among other notable statistics, respondents even gave China a better ranking than the U.S. with respect to "protectionism").

[294] *Id.*

[295] *Id.*

open trade negotiations among WTO Members. Given China's economic success and continued strength in the face of the global economic crisis, readers should also closely observe China's effective policies as potential guidance for re-thinking global trade rules in the new millennium.