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M. Ulric Killion

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*M. Ulric Killion*

**ABSTRACT**

The anti-dumping law of China, in conjunction with the WTO Anti-Dumping Code, should provide for meaningful judicial review for foreign exporters. A problem with China’s anti-dumping law, however, is that despite requiring judicial review, a legal safeguard via court of law proceedings remains a hope, as opposed to a reality. China’s anti-dumping law addresses the problem of judicial review with vague and general language. Proposed cures and implementation strategies for meaningful judicial review are included in the Provisions of the Supreme People’s Court that took effect on January 1, 2003.

The Provisions of the Supreme People’s Court present an issue of whether China’s anti-dumping law will result in the construct of a positive discursive model for independent judicial review. Although the Provisions provide specifics on how to implement judicial review, the question remains whether the Provisions will result in legal safeguards for foreign exporters. In terms of international trade, a supposed Western universalizing cosmopolitanism, its concepts of rule of law and independent judicial review could serve as a much-needed source of uniformity and predictability for foreign exporters. The only viable solution may be a new formulation of WTO Anti-Dumping Code that implements the requirement of judicial review.

* M. Ulric Killion, A.A., B.S. (Economics), J.D., Lecturer, Guangdong University of Foreign Studies and Trade and LaSalle-Guangzhou International College, Business Administration Program and LaSalle-Guangzhou International College, Business Administration Program (P.R.C.).
I. Introduction

This article presents the issue of whether the anti-dumping law of the People’s Republic of China, taken in conjunction with ongoing legal reform, will result in the construct of a positive discursive model for independent judicial review. A recent announcement by the People’s Republic of China Supreme People’s Court concerning judicial review of anti-dumping proceedings sets forth details portending to comply with WTO standards, Western rule of law, and its attendant concept of independent judicial review.


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1 The People’s Republic of China Supreme People’s Court Proclamation, Provisions on Some Issues Concerning the Application of Law in Trial of Administrative Cases Relating to Antidumping and Provisions on Some Issues Concerning the Application of Law in Trial of Administrative Cases Relating to Anti-Subsidy, January 1, 2003 [hereinafter Provisions of Supreme People’s Court].

Trade Organization (WTO).\(^3\) For China, accession represents a prescription for broad systemic reforms in the areas of transparency (*toumingdu*),\(^4\) independent judicial review (*duli sifa shencha*),\(^5\) and non-discrimination (*gongping*).\(^6\) More specifically, in areas of international trade, reforms such as rule of law (*fazhi*), independent judicial review (*duli sifa shencha*), and especially anti-dumping (*fanqingxiao*). Since the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 requires judicial review,\(^7\) China must now strive to closely comply with WTO standards for anti-dumping measures.

For China, a commitment to rule of law and its attendant independent judicial review derives from its acceptance of a key provision in the Protocol on Accession.\(^8\) Article 2(A)3 of the Protocol on Accession reads: “China shall administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures . . . pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange.”\(^9\) The Protocol on Accession, at Article 2(D), further specifies judicial review in the administration of the trade regime.\(^10\) Moreover, as previously mentioned, judicial review is a requirement of Article X of GATT,\(^11\) which reads “each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and


\(^7\) Anti-Dumping Regulation, *supra* note 5, art. 13.

\(^8\) Protocol on Accession, *supra* note 2.

\(^9\) *Id.* art. 2(A)2.

\(^10\) *Id.* art. 2(D).

correction of administrative action relating to customs matters." An amended Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, at Article 13, on judicial review, also reads:

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 within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

An earlier WTO report confirms that WTO members must establish sound legal mechanisms for implementing their obligations under the WTO Agreement. Implementation of the rule of law, and its attendant independent judicial review, is necessary, in terms of Western legal norms, to legal reform and economic development.

Moreover, China's polity recognizes an obligation and need to reform its legal system. China's major legislative goals are three-fold: "Continuing to revise laws that are not in conformity with China's obligations under the WTO rules; revising laws that are not conducive to enhancing the competitive power of Chinese enterprises in the international market; and improving laws offering protection to domestic enterprises and ensuring industrial safety." For China, a well-established socialist market economic system requires a well-established socialist market legal system.

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12 Id. art. X, 3(B) (provisions of The General Agreement on Tariffs and Trade 1994, with exceptions have entered into effect under GATT 1947 before the date of effect of the WTO Agreement).

13 Anti-Dumping Regulation, supra note 5, art. 3.


16 See WANG MENGKUI, CHINA: ACCESSION TO THE WTO AND ECONOMICS REFORM, (Beijing Foreign Language Press, 2002).

17 Id.
This article examines the question of whether the WTO standard for anti-dumping, taken in conjunction with China’s anti-dumping law and mechanism, can serve as an external force in China for legal reform, especially in terms of developing a positive discursive model for independent judicial review. In terms of western legal norms, business law standards, and taxonomies, the latter concern is of crucial importance for future and existing foreign exporters. Moreover, in terms of international trade, the western concepts of rule of law and independent judicial review could serve as a source, if not legal safeguard, of uniformity and predictability for foreign exporters. In this respect, notwithstanding issues of transparency, fairness, and other tariff and non-tariff related issues, a prescription for independent judicial review, in a newly formulated WTO Anti-Dumping Code may offer the best safeguard to create uniformity and predictability. Nonetheless, an issue yet to be determined is the ability of both the WTO Anti-Dumping Code and China’s anti-dumping law to serve as catalysts yielding a positive discursive model for independent judicial review.

II. WTO Anti-Dumping Code

A. Remedy for Price Dumping

Generally, dumping is a trade practice of an exporter selling in a foreign market at a price lower than it charges in other markets, which is usually the exporter’s home country. The WTO and GATT provide anti-dumping measures under both GATT Article VI, and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Although WTO and GATT do not proscribe a trade practice of dumping, Article VI of GATT allows a country to act appropriately against price dumping. The Anti-Dumping Agreement both clarified and expanded Article VI, by adding more detail addressing procedural and substantive requirements.

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18 See David R. Grace et al., China’s Anti-dumping Regime Worth Keeping an Eye on, WORLD TRADE MAGAZINE (Mar. 2003).
19 WTO Agreement, supra note 3.
20 Anti-Dumping Regulation, supra note 5.
for anti-dumping measures.\textsuperscript{21} Practically speaking, the WTO Anti-
Dumping Code implicitly allows a country to act contrary to
GATT principles of binding a tariff and not discriminating against
a trading partner or country.\textsuperscript{22} Generally, an affirmative finding
of anti-dumping will result in an additional import duty on a
particular dumped product from a particular exporting country.\textsuperscript{23} The purpose of this added duty is to bring a price closer to a
"normal value," or to remove the injury to domestic industry in the
importing country.\textsuperscript{24} A problem with anti-dumping measures is
that resulting special duties may be so high that they effectively
close off markets to foreign imports.\textsuperscript{25}

\textbf{B. Revisions to the Remedy}

One of many supplementary post-GATT 1947 agreements is
the Anti-Dumping Code Agreement of 1967, which was subject to
revision in 1979.\textsuperscript{26} At the Tokyo Round (1973-79), there was an
agreed revision of an Anti-Dumping Code, which was earlier
negotiated by developed countries and economies in the Kennedy
Round (1964-67).\textsuperscript{27} The Kennedy Round produced an agreement
known as "the code," the Anti-Dumping Code, on multilateral
rules for anti-dumping.\textsuperscript{28} Because of these negotiations, a revised

\textsuperscript{21} Id.

\textsuperscript{22} In the WTO, when countries agree to open their markets for goods and services,
they "bind their commitments." For goods, these bindings are usually ceilings on
customs tariff rates. Sometimes countries tax imports at rates lower than the bound rates.
Frequently, this is the case in developing countries. In developed countries, the rates
actually charged and the bound rates tend to be the same. World Trade Organization,
Understanding the WTO: Basics, Principles of the Trading System, Predictability:
whatis_e/tif_e/fact2_e.htm (last visited Jan. 26, 2004).

\textsuperscript{23} World Trade Organization, Understanding the WTO: Anti-Dumping, Subsidies,
Safeguards: Contingencies, etc., available at http://www.wto.org/english/thewto_e/
whatis_e/tif_e/agrm8_e.htm (last visited Jan. 26, 2004).

\textsuperscript{24} Id.

\textsuperscript{25} Grace, supra note 18.

\textsuperscript{26} See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO

\textsuperscript{27} Agreement on Implementation of Article VI of the General Agreement on

\textsuperscript{28} Final Act Embodying the Results of the Protocols from the 1964-67 Trade
Conference, May 21, 1963, Agreement on Implementation of Article VI of the General
GATT Anti-Dumping Code covered dumped products which now are more broadly defined as imports sold at prices below those charged by the producer, or exporter, in an exporter’s domestic market.\textsuperscript{29} The Anti-Dumping Agreement allows an importing country to impose an anti-dumping duty to offset the dumping margin of dumped goods or products if such dumping is proven to cause or threaten to cause material injury to domestic industries in the importing country.\textsuperscript{30}

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 was further subject to revision in the Uruguay Round (1986-1994).\textsuperscript{31}

In particular, the revised Agreement provides for greater clarity and more detailed rules in relation to the method of determining that a product is dumped, the criteria to be taken into account in a determination that dumped imports cause injury to a domestic industry, the procedures to be followed in initiating and conducting anti-dumping investigations, and the implementation and duration of anti-dumping measures. In addition, the new agreement clarifies the role of dispute settlement panels in disputes relating to anti-dumping actions taken by domestic authorities.

On the methodology for determining that a product is exported at a dumped price, the new Agreement adds relatively specific provisions on such issues as criteria for allocating costs when the export price is compared with a “constructed” normal value and rules to ensure that a fair comparison is made between the export price and the normal value of a product so as not to arbitrarily create or inflate margins of dumping.

The agreement strengthens the requirement for the importing country to establish a clear causal relationship between dumped imports and injury to the domestic industry. The examination of


the dumped imports on the industry concerned must include an evaluation of all relevant economic factors bearing on the state of the industry concerned. The agreement confirms the existing interpretation of the term "domestic industry". Subject to a few exceptions, "domestic industry" refers to 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.

Clear-cut procedures have been established on how anti-dumping cases are to be initiated and how such investigations are to be conducted. Conditions for ensuring that all interested parties are given an opportunity to present evidence are set out. Provisions on the application of provisional measures, the use of price undertakings in anti-dumping cases, and on the duration of anti-dumping measures have been strengthened. Thus, a significant improvement over the existing Agreement consists of the addition of a new provision under which anti-dumping measures shall expire five years after the date of imposition, unless a determination is made that, in the event of termination of the measures, dumping and injury would be likely to continue or recur.

A new provision requires the immediate termination of an anti-dumping investigation in cases where the authorities determine that the margin of dumping is de minimis (which is defined as less than two percent, expressed as a percentage of the export price of the product) or that the volume of dumped imports is negligible (generally when the volume of dumped imports from an individual country accounts for less than three percent of the imports of the product in question into the importing country).

The agreement calls for prompt and detailed notification of all preliminary or final anti-dumping actions to a Committee on Anti-dumping Practices. The agreement will afford parties the opportunity of consulting on any matter relating to the operation of the agreement or the furtherance of its objectives, and to request the establishment of panels to examine disputes.32

However, the resulting revisions to the Agreement on

Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, during the Uruguay Round (1986-1994), while improving on many substantive and procedural issues surrounding anti-dumping measures, failed to improve on one significant aspect of price dumping. For developing countries and economies, like China, the WTO standards could provide more details regarding implementation of meaningful judicial review as a legal safeguard for foreign traders and exporters. Under the WTO standards, review could take many forms such as judicial, arbitral, or administrative. Nonetheless, the WTO standards simply maintain a requirement of judicial review. Moreover, the WTO standards, at Article 13, only require members to institute a review mechanism that is independent of the authorities responsible for the determination or review in question. What is perhaps amiss in the formulations of Article 13 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade is explicit language specifying that members of the WTO shall maintain independent judicial review, as opposed to traditional judicial review.

III. China and Anti-Dumping

Historically, developed countries and economies, especially the United States, Canada, Australia, and the European Union have resorted to anti-dumping for the purposes of restraining imports from developing countries and economies. In recent years, however, there is also a growing tendency of developing countries and economies, such as Mexico, South Korea, Brazil, and China to employ antidumping investigations.

The WTO Secretariat, on May 2, 2003, reported that in the period from July 1 to December 31, 2002, seventeen Members initiated 149 anti-dumping investigations against exports from a total of forty-three different countries or customs territories.

33 Id.
34 GATT, supra note 19.
35 Id.
36 Id.
37 Yoshimatsu, supra note 30.
38 Id.
39 See Anti-Dumping, WTO Secretariat Reports Significant Decline in New Anti-
Although the WTO generally governs anti-dumping trade practices, each member state remains free to promulgate its own anti-dumping law. In 1994, China, pursuant to ongoing legal reform, promulgated its first anti-dumping law. In employing its anti-dumping mechanism, China has initiated twenty anti-dumping cases against foreign imports. The overall figure, however, is somewhat misleading because fourteen of these proceedings have been initiated within the last two years, including nine cases in 2002. Given the increase in the number of Chinese anti-dumping proceedings, foreign producers and exporters intending to export or sell to a Chinese market should heed the potential impact of these proceedings because China’s anti-dumping law and regulations contain strict deadlines and present a host of substantive and procedural issues.

A question of China complying with WTO standards for anti-dumping mechanisms presents issues of international trade concerns potentially clashing with national, domestic, and local interests. Typically, domestic and local interests translate into dumping Investigations, WTO NEWS, May 2, 2003, available at http://www.wto.org/ english/news_e/pres03_e/pr339_e.htm. This represents a significant decline from the corresponding period of 2001, during which twenty-three WTO Members had initiated 210 anti-dumping investigations. Forty of the 149 initiations during the second semester of 2002 were reported by developed countries. China, with twenty-seven investigations on its exports, is at the top of the list of countries subject to anti-dumping investigations, although this number is a slight decrease from the twenty-nine investigations initiated on Chinese exports during the second semester of 2001. Exports from China were the subject of the largest number of final measures (eighteen) imposed during the second semester of 2002. This represents a slight decrease from the twenty-one measures imposed against its exports during the second semester of 2001. Id.

40 GATT, supra note 19. Art. VI provides for the right of contracting parties to apply anti-dumping measures.

41 People’s Republic of China Foreign Trade Law, available at http://www.netd.com.cn/english/w_zcfg/ws_zcfg_14c.html (adopted at the seventh session of the standing committee of the Eight National People’s Congress on May 12, 1994) [hereinafter Foreign Trade Law]. The Foreign Trade Law was adopted at the Seventh Meeting of the Standing Committee of the Eighth National People’s Congress on May 12, 1994, promulgated by Order No. 22 of the President of the People’s Republic of China on May 12, 1994, and became effective as of July 1, 1994.

42 Grace, supra note 18.

43 Id.

44 Id.
local protectionism or administration by trade or region. What has been historically characteristic of China's bureaucracy is a combination of centralized leadership and administration at all levels, allowing for facile formation of departmental interests and local protectionism. The latter is necessarily true because of a distinctive Chinese ontology, which constantly has presented, since accession to the WTO, thin integration into a global economy, and partial liberalization in international trade. Forces of tradition are perhaps stronger in China than in any other country, and China and its leadership, many of whom lived through the suffering and upheavals of the twentieth century, are well aware of the chaos and disaster that may ensue from political changes spiraling out of control. In this respect, forces of cultural relativism such as tradition, Asian values, Confucianism, and even perhaps China's ontological base in tradition find an outlet in China's trade practices, protectionism, and nationalism. Notwithstanding motivation of profit, issues of cultural relativism may well serve as one of many sources of local protectionism in mainland China. In terms of international trade, China's trade policy is dominated by both ideological preferences of party leaders and national interests, including Chinese nationalism.

Despite a motivation of supposed localized protectionism, a

45 Wang, supra note 16, at 381 (Gao Shangquan, chairman of the China Economic Restructuring Society and president and professor of the China (Hainan) Institute of Reform Development).

46 "Post-World War II dictators in both South Korea and Vietnam also tried to induce compliance with central government decrees by exploiting traditional respect for Confucian values. Like Chiang, they reduced Confucian teachings to mere slogans intended to serve highly un-Confucian ends." Michael Nylan, The Five "Confucian" Classics, 327 (1), available at http://www.yale.edu/yup/nylan/nylan7notes.html (last visited Jan. 26, 2004).


49 Killion, supra note 47.

question of compliance with WTO standards also presents the issue of China’s newly promulgated anti-dumping regulations and recently announced provisions of the People’s Supreme Court. The latter is an important consideration for foreign exporters, especially those hailing from Western developed countries and economies. A problem for China is a seemingly Western consensus that it is a “non-yet market oriented, non-yet rules based economy.” The latter is especially important in terms of rule of law and China’s ongoing evolution to a socialist market economy. All of this makes the issue of independent judicial review under WTO of the anti-dumping standard and China’s anti-dumping law a matter of paramount interest for foreign exporters. It is perhaps also for this reason that the Ministers of Uruguay Round recognized a need for the consistent resolution of disputes arising from anti-dumping measures. Moreover, implicit in this recognized need for consistency is a call for transparency, fairness, and especially independent judicial review.

A. China’s First Anti-Dumping Law

In 1994, China promulgated its first anti-dumping law, the People’s Republic of China Foreign Trade Law (Foreign Trade Law). Article 7 of the Foreign Trade Law reads: “where a country or a region adopts prohibitive, restrictive or other similar measures that are discriminative in nature against the People’s Republic of China in Trade, the People’s Republic of China may,

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51 Provisions of Supreme People’s Court, supra note 1.
53 Amendment to the Constitution of the People’s Republic of China. Adopted at the Second Session of the Ninth National People’s Congress on March 15, 1999, and promulgated by the Announcement of the National People’s Congress on March 15, 1999. The amendment to the preamble adds Deng Xiaoping’s theory and the words “developing a socialist market economy,” thereby bestowing constitutional import upon both the theory and words.
55 Foreign Trade Law, supra note 41.
in the light of the actual conditions, adopt corresponding counter-measures against such a country of region." Article 7 authorizes an imposition of counter-measures against a country or region for discriminatory trade practices, including price dumping.

The history of China's first Foreign Trade Law strongly links with China's 1988 request for resumption of its original GATT 1947 membership. A working party was convened to consider China's request of resumption of its original membership. In 1988, a Chinese delegation indicated that China originally assumed contracting party status by accepting the protocol of provisional acceptance, dated October 30, 1947. When requesting resumption, China also declared itself ready to negotiate rights and obligations ensuing from its resumption.

An initial problem of resumption was the China (PRC) –

56 Id. art 7.
57 Id.
59 WANG YI, GATT & WTO – LAW AND RULES FOR WORLD TRADE, ENGLISH READINGS IN LEGAL STUDIES (Beijing Publishing House of Law, 1998). At the meeting in May of 1983, members of the Working Party [hereinafter Working Party of China] requested the Secretariat to prepare a structured summary of the information provided by China on its foreign economic and trade regime since the circulation of the last such summary. The present note was prepared in response to this request. It is a consolidation of information provided by China in documents (Spec (88) 13 /Add. 4, Add. 5, Add. 6, Add. 8, Add. 11, Add. 4 /Rev. 1), China's further clarifications of October 21-23, 1992, December 2, 1992, February 18, 1993, April 23, 1993, and July 23, 1993, the Foreign Trade Law of the People's Republic of China (Draft) of April 1993, and China's statements made during meetings of the Working Party. The present summary has been checked for accuracy by the Chinese authorities. The structure of the paper, in particular the choice of the headings under which different aspects of the trade regime are described, while based to a large extent on that of Spec (88) 13 /Add. 4, is the sole responsibility of the Secretariat. For presentational reasons, minor changes of a technical, non-substantive nature have been made to the texts of Chinese statements incorporated in this conclusion.
60 See Yi, supra note 59, at 168-74.
61 Id.
Chinese Taipei debate. In 1965, Taiwan was granted observer status at sessions of the GATT 1947.\textsuperscript{62} Observer status was subsequently removed in 1971 following a decision by the United Nations Assembly (UN) wherein the UN recognized the People’s Republic as the legitimate government of China.\textsuperscript{63} In September 1992, GATT’s Council of Representatives decided to establish a separate working party to examine a request for accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Mastu (“Chinese Taipei”).\textsuperscript{64} During consultations of the working party, eventually all contracting parties acknowledged China’s viewpoint that Chinese Taipei, as separate customs territory, should not accede to GATT 1947 before China.\textsuperscript{65} Issues of China’s accession, or resumption, also involved the territories of Hong Kong and Macau, which China resumed sovereignty over on July 1, 1997 and December 20, 1999 respectively.\textsuperscript{66}

The subject of anti-dumping is also a pending issue in these negotiations. In 1988, although Chinese authorities studied the Anti-Dumping Subsidies, Customs Valuation and Import Licensing Agreements, China did not assent to these agreements, while maintaining that these agreements were under consideration.\textsuperscript{67} China did, however, eventually indicate an intention to join the Anti-Dumping Subsidies, Customs Valuation, and Import Licensing Agreements.\textsuperscript{68} Subsequently, in April of 1993, China submitted to the working party a proposed Draft Foreign Trade Law, which eventually culminated in the 1994 Foreign Trade Law.\textsuperscript{69}

In 1996, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) promulgated the Interim Provision of the Ministry of Foreign Trade and Economic Cooperation on


\textsuperscript{63} Id.

\textsuperscript{64} Id.

\textsuperscript{65} Id.

\textsuperscript{66} Id.

\textsuperscript{67} Yi, supra note 59, at 168-74.

\textsuperscript{68} Id.

\textsuperscript{69} Id.
Punishment for Conduct of Exporting at Lower Than Normal Price. This interim provision is formulated in accordance with both the Foreign Trade Law and, interestingly, the Anti-Unfair Competition Law of the People's Republic of China (Competition Law), for purposes of developing orderly export trade practices. Building anti-dumping regulations grounded on a foundation of competition law is especially interesting because of two debates. First, whether anti-dumping issues should be governed by a field of competition law and second, whether there is a positive side, in terms of a social welfare maximization, in employing anti-dumping mechanisms.

One problem of China’s first anti-dumping law, the Foreign Trade Law, is that it manifests a host of procedural and substantive issues. Perhaps the problems have evolved from inadequate law and investigative resources or procedural and transparency determinations. One of the most important of these pitfalls, considering the development of the rule of law, is the problem of transparency. Generally, court rulings in China have created vague generalities and conclusory language, exhibiting a tacit practice of non-transparency (neibu guiding). For instance, Article 21 provides that MOFTEC and SETC shall allow the applicant and the parties concerned to have access to the materials related to their case, provided that confidential information shall not be accessed. Moreover, earlier State Economic and Trade Commission (SETC) decisions manifest non-transparency by

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72 Foreign Trade Law, supra note 41, arts. 1, 2.


76 Grace, supra note 18.
simply summarizing data and methodologies employed by MOFTEC in determining dumping margin calculations. 77

In terms of due process, a more obvious problem with the Foreign Trade Law is the lack of explicit due process language. The Foreign Trade Law did not explicitly provide for hearings before a judicial or quasi-judicial tribunal, the right to summon witnesses, the right to cross-examine witnesses, or the right of judicial review. An additional problem is that the anti-dumping mechanism itself did not provide for judicial review, in terms of the WTO standards. Admittedly, however, there is an earlier understanding that China's polity, through the Supreme People's Court, will eventually attempt to provide some form of judicial review in anti-dumping proceedings. 78

Notwithstanding issues of inadequate law and investigative resources, procedure, and transparency of determinations, potential conflicting issues of regulating bodies are equally a problem of China's 1994 Foreign Trade Law and the subsequently enacted 2001 Anti-Dumping Regulations. 79 In China, anti-dumping actions proceed simultaneously through two different state agencies, MOFTEC and SETC. 80 It is the responsibility of MOFTEC to determine whether imported products are, or are likely to be sold in China at less than its normal value or, in other words, whether imported products are being sold at dumped prices. 81 Comparatively, it is the responsibility of SETC to determine whether dumped imports are currently causing or threatening to cause a material injury to a domestic Chinese industry or are materially slowing the establishment of such industry. 82 Therefore, an antidumping duty order may not be issued unless both dumping and injury are found. 83

Another problem with the 1994 Foreign Trade Law, and the more recent Anti-Dumping Regulations, is that irrespective of their responsibilities in the antidumping mechanism, MOFTEC

77 Id.
78 Cowling, supra note 73.
79 Anti-Dumping Regulation, supra note 5.
80 Id. art. 24.
81 Id. art. 3.
82 Id. art. 7.
83 Id. arts. 8, 24, 28-29.
and SETC also exercise various governmental functions relating to the management and planning of the Chinese economy.\textsuperscript{84} Historically, since earlier reforms, conflicting lines of authority are a persistent problem in Chinese reforms.\textsuperscript{85} In terms of MOFTEC and SETC, such conflicts may be described as a legislative-administrative (or regulatory) dichotomy which leads to a conflict of interests between state decision-making authority and state regulatory authority.

The previously mentioned problems of earlier anti-dumping law, and the surviving revisions and amendments, also present a question of credibility, in terms of a scrutiny by a WTO panel in review.\textsuperscript{86} A problem of earlier anti-dumping law, although it embodies well-known principles established in WTO Anti-Dumping Code, is the drafting of rules in a summary fashion, as opposed to a more detailed fashion, which produced a host of substantive and procedural issues.\textsuperscript{87}

\textbf{B. China's Revised Anti-Dumping Law}

The most important revision to the 1994 Foreign Trade Law is the promulgation of the People's Republic of China Regulations on Anti-Dumping (Anti-Dumping Regulation).\textsuperscript{88} Although there are other regulations addressing related discriminatory trade practices,\textsuperscript{89} such as the Countervailing Regulation of the People's

\textsuperscript{84} Grace, \textit{supra} note 18.

\textsuperscript{85} Chow, \textit{supra} note 48. \textit{See also} Mengkui, \textit{supra} note 16, at 195. A case in point is an earlier proposed variation in taxation involving VAT. In 1996, there was a proposal for a decrease in VAT rebate for exports from 17% to 9%, due to the deterring formation of export-processing ventures. This led to a faulty coordination by the agencies of China. In December of 1996, an assistant minister of Ministries and Commissions ("MOFTEC"), which has administrative interpretation power over departmental rules and regulations, stated that the VAT on exports of FIEs would be subject to elimination which contradicted the State Tax Administration officials.

\textsuperscript{86} Grace, \textit{supra} note 18.

\textsuperscript{87} Cowling, \textit{supra} note 73.

\textsuperscript{88} Anti-Dumping Regulation, \textit{supra} note 5.

Republic of China, the Anti-Dumping Regulation specifically addresses price dumping. The newly enacted Anti-Dumping Regulation replaced previously enacted anti-dumping and countervailing regulations but still failed to alleviate many earlier substantive and procedural problems. The problem surrounding potential conflicting interests of both MOFTEC and SETC remains.

China's government by its very nature creates conflict of interests. China's legislative power, pursuant to the Constitution of the People’s Republic of China (1982 Constitution) vests with the National People’s Congress (NPC). The NPC is the highest organ of state power and exercises the typical legislative functions of enacting and amending basic laws. Issues of interregional and international trade policy are undertaken by the NPC through its Standing Committee of the National People’s Congress (SCNPC), as opposed to State Councilors and Ministers. In terms of governmental powers, there is a distinction between the legislative interpretation power (lifajieshi quanli) of the SCNPC, the administrative interpretation power (xingzheng jieshi quanli) of the State Council (which is the constitutional power to interpret all administrative regulations), and the administrative interpretation powers of the Ministries and Commissions such as MOFTEC.

Assuming a genuine separation of governmental powers in the

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91 Grace, supra note 18.


93 Id. art. 57.

94 Id. art. 58.

95 1982 Constitution, supra note 92.

96 Id. arts. 62, 67.

97 Id. arts. 57, 58.

98 Id. arts. 67(1), 67(4).
executive, as opposed to the legislature, the Standing Committee of the State Council (SCSC) reigns in power. In actual practice, however, the powers of the SCSC are often subordinated to the Central Finance and Economic Leading Group of the Chinese Communist Party. This results in a few party members having power over all crucial economic issues. These few members exercise their executive authority through a Joint Commission of the Politibureau and State Council.\(^99\) This alignment of power is best described as a governmental principle-agency relationship, with the party as principle and the government as agent.\(^100\)

In China's governmental structure, MOFTEC and SETC are the most important organizations for purposes of trade and antidumping. MOFTEC mainly negotiates international trade agreements and formulates national trade policy.\(^101\) In addition, the State Planning Commission (SPC), which is the institutional legacy of the economic planning system, and SETC primarily focus on trade management reforms in state-owned foreign trade companies and enterprises.\(^102\)

Lack of a lone integrated department responsible for trade policy, however, results in a by-product of guikou (proper channel) and zhenchuduomen (a policy made by several institutions), namely "participatory bureaucracy" or "institutional pluralism."\(^103\) A result of this fragmentation is conflict among the various agencies, departments, and persons overseeing trade policy. Conceivably, foreign exporters subject to antidumping investigations could find themselves wedged between conflicting interests and objectives of China's ideology and bureaucracy.\(^104\)

In terms of Western legal norms, there also remain problems of non-transparency and procedural issues. Hearings in antidumping proceedings remain relatively closed, at least in terms of Western legal norms, when compared with typical proceedings in the United States and the European Union.\(^105\) Moreover, access to

\(^{99}\) Bin, supra note 50.

\(^{100}\) Id.

\(^{101}\) Id.

\(^{102}\) Id.

\(^{103}\) Id.

\(^{104}\) Grace, supra note 18.

\(^{105}\) Id.
information remains a problem because the regulation fails to specify the precise modalities of such access and to provide for automatic (or even timely) right of access to confidential information.\footnote{106}

Despite such limitations, China’s anti-dumping law is evolving into a more effective and legal (in terms of WTO standards) mechanism for handling dumping cases. The increasing use of anti-dumping proceedings by China in recent years lends credence to the growing effectiveness of China’s anti-dumping law.\footnote{107} In particular, recent Provisions of the Supreme People’s Court provide a detailed mechanism for judicial remedy via court of law proceedings.\footnote{108} In terms of rule of law, the Provisions are perhaps among the most important recent changes in China’s anti-dumping law. As previously mentioned, the latter change presents a question of the viability of China’s newly promulgated Anti-Dumping Regulations and the attendant WTO Anti-Dumping Code because it serves as an external force for legal reform in modern China. In terms of China’s anti-dumping law, it serves as prospective legal safeguard for foreign exporters.

IV. Chinese and Western Juris Prudential

A. Legal Reform with Chinese Characteristics

In 1982, China adopted its present constitution,\footnote{109} which has undergone constitutional amendments, most of which are for economic reform.\footnote{110} The amendments address Deng Xiaoping’s

\footnote{106} Id.

\footnote{107} Id.

\footnote{108} Provisions of the Supreme People’s Court, \textit{supra} note 1.

\footnote{109} See 1982 Constitution, \textit{supra} note 92.

\footnote{110} Id. On April 12, 1988, the first amendment was passed at the First Session of the Seventh National People’s Congress (“NPC”). It comprises two articles, both of which address the private sector of the economy (Article 1) and a prohibition on unlawful activities in the use and transfer of land (Article 2). \textit{THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA} (Pei-ching, Foreign Language Press 1990) (1997-98). On March 29, 1993, the constitution was subjected to a second amendment at the First Session of the Eighth NPC. It comprises Articles 3–11, all of which address economic reform. \textit{THE LAWS OF THE PEOPLE’S REPUBLIC OF CHINA} (Pei-ching, Foreign Language Press 1994) (1993). On March 15, 1999, the constitution was again subjected to amendment by adding Articles 12-17, which mostly address economic reform.
theory for modernizing China. In 1992, Deng Xiaoping visited Shenzhen, in the Guangdong Province, and declared that China would adopt a socialist market economy, which is historically attributable to commencing modernization.\textsuperscript{111} Except for the wealth and abundance of earlier dynastic China and, possibly, periods of colonization by foreign powers, this modernization has commenced legal reform and economic development that is unsurpassed and unprecedented in Chinese history.

In 1992, in the aftermath of the Tiananmen Square tragedy, the Fifth Session of the Fifth NPC affirmed Deng Xiaoping's Four Cardinal Principles,\textsuperscript{112} and China adopted a policy of a socialist market economy, which signaled the end of price controls and encouraged development of private enterprise.\textsuperscript{113} The NPC added the words "developing a socialist market economy"\textsuperscript{114} to the preamble of the 1982 Constitution,\textsuperscript{115} which resulted in these words being elevated to constitutional status. Many hailed the amendment as a formula that could have avoided the tragedy of June 4, 1989.\textsuperscript{116}

There was a changing of the guard on November 16, 2002; its new leadership, in order of ranking, is Hu Jintao, Wu Bangguo,

\begin{flushleft}
\textsuperscript{112} Id.
\textsuperscript{113} Id. at 298-99.
\textsuperscript{115} See 1982 Constitution, supra note 92, preamble.
\textsuperscript{116} ROBERTS, supra note 111, at 298-99.
\end{flushleft}
Wen Jiabao, Jia Qinglin, Zeng Qinghong, Huang Ju, Wu Guanzheng, Li Changchun, and Luo Gan. It was of elemental concern to the new leadership, as they headed towards the January election of the Tenth NPC and the March 2003 Tenth NPC, to avoid another Tiananmen Square tragedy. The latter is important in understanding that China’s policy now prioritizes socio-economic rights over civil-political rights. For China, a prioritization of socio-economic interest, as previously mentioned, results in a trade policy dominated by both ideological preferences of party leaders and national interests, or Chinese nationalism.

Deng Xiaoping’s reforms, and the ensuing modernization, present an issue of whether there is a causal relation between economic reforms and Chinese constitutionalism. If there is a nexus, then Deng Xiaoping’s reforms affect, albeit indirectly, civil-political rights. A problem of such a nexus is a possible correlation of individual civil-political rights, as oppose to socio-economic rights, with legal safeguards for foreign exporters, being corporations and individuals.

Jeffrey Sachs, Wing Thye Woo, and Xiaokai Yang contend that, because of Deng Xiaoping’s reforms, constitutional order is a product of reforms and institutionalized state opportunism. Deng Xiaoping’s era shares two fundamentals of Stalin and Mao’s socialism: 1) the party’s monopoly of political power; and 2) the

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119 Id.

120 Sisci, supra note 117.


122 Bin, supra note 50.

123 Id. at 62.


125 Id.

126 Id.
dominance of state-owned enterprises (SOEs).\textsuperscript{127} "The government institutions use their dual positions as regulation makers and enforcers and players in the economic arena to pursue state opportunism."\textsuperscript{128} They describe characteristics of China's market-oriented reform as absence of constitutional order and rule of law, which implies institutionalized state opportunism, self-dealings of the ruling class, and rampant corruption.\textsuperscript{129}

First, China's success in avoiding a deep recession while transitioning to rapid growth is partly attributable to the decision of China's polity to liberalize prices in 1984 through a dual-track system.\textsuperscript{130} One of the primary reasons China is able to avoid the Asian financial crisis\textsuperscript{131} is attributable to its economy and financial system being relatively closed.\textsuperscript{132}

Secondly, economic transition is part of the transition in constitutional rules\textsuperscript{133} because Chinese constitutionalism will reflect ongoing legal reform and economic development. However, a contention that reforms result in an absence of constitutional order and rule of law denies a potential for development of Chinese constitutionalism and rule of law.\textsuperscript{134} It is a matter of recognizing the existence of a genuine Chinese jurisprudence, and the phenomenon of natural evolution of legal systems.\textsuperscript{135} It is an issue of whether there is a Chinese jurisprudence, which evolved in a fashion similar to Western

\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{133} ROLAND, \textit{supra} note 130, at 15.
\textsuperscript{134} \textit{Id.}
\textsuperscript{135} \textit{Id.}
jurisprudence,\textsuperscript{136} as opposed to evolving into a Western style of jurisprudence. A problem of Western universalizing cosmopolitanism is that China demonstrates the potency of nationalism and embodies possible alternatives to Western conceptions of democracy and capitalism.\textsuperscript{137} Moreover, assuming the existence of Chinese jurisprudence, one must assume that it will experience periods of evolution.\textsuperscript{138}

An additional problem for Western universalism is the direction and path of the evolution of Chinese jurisprudence and constitutionalism. It is a path best described as legal change responding in an \textit{ad hoc} fashion to socio-economic change.\textsuperscript{139} China's polity, responding to socio-economic conditions, implements policy change and the NPC then enacts legislation implementing these changes.\textsuperscript{140} A problem being that following enactment of a law, the actual socio-economic changes prompting policy change have typically gone beyond the scope of the law, which then requires the State Council to implement regulations in response to the new challenges.\textsuperscript{141}

China's legal system and constitutionalism bear distinctive Chinese characteristics because of their interrelationship with China's polity, NPC, and economic development. Ongoing reforms prioritize socio-economic rights over individual civil-political rights, which, to the disdain of foreign exporters, may well translate into a denial of their legal, or civil-political rights. It is for this reason that the construct of a positive discursive model for independent judicial review, as a legal safeguard for foreign exporters, is critical.\textsuperscript{142}

\textsuperscript{136} See Harold J. Berman, \textit{The Origins of Historical Jurisprudence: Coke, Sheldon Hale, 103 Yale L.J. 1651, 1651 (1994).}

\textsuperscript{137} See Steven Chan, \textit{Problematic Approaches Versus Feasible Emphasis, AFFAIRS,} Spring 1999.

\textsuperscript{138} Berman, \textit{supra} note 136.


\textsuperscript{140} \textit{Id.}

\textsuperscript{141} \textit{Id.}

\textsuperscript{142} \textit{Id.}
B. Historicity of Western Judicial Review

Western universalism, especially in terms of United States constitutionalism, evolves around interrelated legal concepts of popular sovereignty, separation of powers, and independent judicial review. Rule of law is important in terms of independent judicial review because independent judicial review evolves from rule of law. In terms of Western universalism, rule of law, in the context of a developed country’s membership in the WTO, bares distinctive Western legal norms and history.

Historically, most hail the United States Supreme Court decision of Marbury vs. Madison as establishing the legal concept of independent judicial review. Chief Justice John Marshall’s (1755-1835) legacy is that he asserted for the first time the notion of supremacy of the constitution, by establishing the independent judicial powers of the United States Supreme Court. However, the notion itself predates his infamous 1803 decision in Marbury vs. Madison.

It was employed by the parlements of the Ancien Regime to justify their refusal to record acts contrary to the basic laws of the kingdom. Abbe Siees also invoked it, declaring in 1795 that either the constitution is binding or it is a nullity. The same idea was later proposed by Carre de Malberg, establishing a link between the possibility of review on the one hand and the separation of constituent and constituted powers on the other.

Moreover, notwithstanding the contributions of Thomas Hobbes (1588-1679) to Western jurisprudence, Baron de

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143 Id.
144 Id.
147 Id.
149 Id. at 103.
Montesquieu (1689-1755) is best known for the concept of separation of the powers of government. One source finds that Machiavelli anticipated Montesquieu in his enthusiasm for a mixed government. Machiavelli wrote in *Discourses*, "in fact, when there is combined under the same constitution a prince, nobility, and the power of the people, then these three powers will watch and keep each other reciprocally in check." The latter is especially important in terms of Western constitutionalism and rule of law because there are many who advocate United States constitutionalism and its concepts of popular sovereignty.

Antithetically, in terms of both a Chinese governmental regime and ontology, there is empirical data intimating that we can get similar outcomes across constitutionalized and non-constitutionalized situations. A problem of Western constitutionalism is a post-Cold War history intimating a contrary historicism of Western constitutionalism. A reality of world constitutionalism is constitution-writing countries adopting variants attributable to cultural and economic forces. The latter result is attributable to recent failures of developing countries attempting to adopt a United States constitutional model or alternatively, liberal constitutional political economy design (such as the failures of Russia, British ex-colonies in Africa, and other countries intending to promote a Western market system). The post-colonial constitution of India is a prime example. Constitutional writers avoided the term of "equality" associated with United States constitutionalism, hoping to avoid a *Lochner*

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151 *Id.*


153 Bronowski, *supra* note 150, at 41.

154 *Id.* *See also* THE *DISCOURSES OF NICCOLO MACHIAVELLI* (Leslie J. Walker trans., New Haven 1950).


157 *Id.*
(Lochner vs. New York)\(^{158}\) era of jurisprudence, which would have blocked progressive social legislation and been antithetic to goals of much-needed social transformation.\(^{159}\)

Nonetheless, in terms of Anglo-American jurisprudence, England's Revolution of 1866 resulted in a divergence between the American notion of constitutional supremacy and England's doctrine of parliamentary sovereignty.\(^{160}\) In England, the principle of *The Case of the College Physicians* ("Dr. Bonham's Case") falls from grace, while continuing to flourish in the American colonies.\(^{161}\) In *Dr. Bonham's Case*, the famous words of Lord Coke read:

> And it appears in our books, that in many cases the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act to be void.\(^{162}\)

Western rule of law eventually established itself as the dominant legal system in America, and culminated in the landmark decision of *Marbury vs. Madison*.\(^{163}\)

Western jurisprudence, and especially United States jurisprudence, stems from several Western origins such as the Enlightenment Thinkers during the Age of Reason, *The Case of the College Physicians*,\(^{164}\) and *Marbury vs. Madison*.\(^{165}\) An important distinguishing feature of Western jurisprudence and its independent judicial review is that it emanates from philosophical ideals, fear of oppressive government, and the need to limit the exercise of popular democracy.\(^{166}\)


\(^{159}\) Klug, *supra* note 155.


\(^{162}\) *Id.*

\(^{163}\) Marbury v. Madison, 5 U.S. 137 (1803).

\(^{164}\) See Plucknett, *supra* note 161.

\(^{165}\) *Marbury*, 5 U.S. at 137.

\(^{166}\) See Donald P. Kommers, *Limiting Government: An Introduction to*
V. People’s Court Provisions and Judicial Review

Despite the admonitions of the West, there is rule of law in China. Given great strides by China in promoting its legal reform,¹⁶⁷ a Chinese jurisprudence and rule of law is developing amidst ongoing legal reform and economic development. In light of both ongoing reforms, especially China’s anti-dumping law, an important issue is the direction and path of judicial review. Article 53 of China’s Anti-Dumping Regulation reads:

Where any interested party refuses to accept the final ruling made pursuant to Article 25 of these Regulations, or the decision made pursuant to Chapter Four of these regulations on whether or not to impose the anti-dumping duty, or the decisions on retroactive imposition, duty refund and duty imposition on new exporters, or the decision made by the review pursuant to Chapter Five of these regulations, they may either apply in accordance of law for an administrative reconsideration, or institute a proceeding with a people’s court.¹⁶⁸

The prospects are arguably high for China’s anti-dumping regulation to serve as an external force to develop a positive discursive model for independent judicial review. A problem of its efficacy, however, in terms of serving as a legal safeguard for foreign exporters is a contingency on Chinese constitutionalism. China’s constitution, not unlike its rule of law, bares distinctive Chinese characteristics, and does affect the viability of anti-dumping measures serving as a vehicle for legal change.

The Supreme People’s Court’s recent announcement, however, does bolster the viability of Article 52 of the Anti-Dumping Regulation as a legal safeguard for foreign exporters. In December 2002, China’s Supreme People’s Court announced that effective January 1, 2003, the Chinese court system would accept lawsuits challenging government decisions that impose trade barriers to protect domestic industry.¹⁶⁹ The intent of this

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¹⁶⁷ For example, the First Session of the 10th National People’s Congress (NPC) received 1,050 bills, which marks the third straight year the number of new bills submitted exceed the 1,000-mark. First Session of 10th NPC Receives 1,050 Bills, XINHUA NEWS AGENCY, Mar. 12, 2003, available at http://www.china-embassy.ch/eng/44402.html.

¹⁶⁸ Anti-Dumping Regulation, supra note 5, art. 53.

¹⁶⁹ China Issues Rules on Anti-dumping, Anti-subsidy Cases, PEOPLE’S DAILY
proclamation was to bring China's processing of anti-dumping cases more in line with WTO standards. The Supreme People's Court announced two sets of provisions for the handling of administrative cases involving anti-dumping and anti-subsidy cases that came into effect on January 1, 2003: 1) Provisions on Some Issues Concerning the Application of Law in Trial of Administrative Cases Relating to Anti-dumping; and 2) Provisions on Some Issues Concerning the Application of Law in Trial of Administrative Cases Relating to Anti-Subsidy (Provisions of the Supreme People's Court). The two provisions stipulate the scope and standard for judicial investigation, parties to litigation, jurisdiction, and burden of proof.

The Provisions of the Supreme People's Court, which are deemed a judicial interpretation by China's polity, provide that the People's Courts shall handle the following types of administrative cases:

cases where the ruling concerning anti-dumping and anti-subsidy given by a supervisory department under the State Council is challenged; 2) cases where the ruling by a supervisory department under the State Council to impose anti-dumping duty or otherwise is challenged, or where the ruling concerning retrospective duty collection, tax rebate or imposition of duty on new imports is challenged; 3) cases where the ruling by a supervisory department under the State Council to impose anti-subsidy duty or otherwise is challenged, or where the ruling concerning retrospective duty collection is challenged; 4) cases where the reconsideration decision by a supervisory department under the State Council to continue the imposition of anti-dumping duty or concerning the necessity of keeping a price pledge is challenged; and 5) cases where the reconsideration decision by a supervisory department under the State Council concerning the continuation, revision, cancellation of anti-dumping duty, or concerning a price pledge is

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170 Id.
171 Provisions of the Supreme People's Court, supra note 1.
challenged.173

A. Procedural Due Process Issues

Notwithstanding issues of substantive due process in the sense of Western constitutionalism, the Provisions of the Supreme People’s Court appear to afford litigants many adequate procedural safeguards. In addition, the Provisions read more like a list of procedures for administrative hearings, as opposed to a civil procedure manual, because of the minute detail given to procedure. There are provisions on the production of evidence in Articles 8 and 9, the burden of proof in Article 7, and venue in Article 5.174

The specifics of the Provisions of the Supreme People’s Court lend themselves to greater compliance and uniformity, in terms of WTO standards. The Provisions designate duties of the People’s Court in the handling of administrative cases involving anti-dumping disputes. There are many procedural safeguards set forth in the Provisions. China’s polity recognized a need for clarity in its anti-dumping law, especially concerning how to implement judicial review.175 The anti-dumping law failed to clarify how the Supreme People’s Court should actually implement judicial review.176

One source hails the Provisions as judicial interpretations, having the same force and effect of law made by the NPC and SCNPC.177 Yet another source attributes greater significance to these Provisions, hailing them as being tantamount to judicial review178 in the sense of Western constitutionalism and justiciability:

In a development that brings China closer to its obligations

173 Provisions of the Supreme People’s Court, supra note 1, art. 10.
174 Id. arts. 5, 7, 8-9.
175 New Rules on Anti-dumping, Anti-subsidy Cases, XINHUA NEWS AGENCY, Dec. 4, 2002, at http://www.china.org.cn/english/2002/Dec/50312.htm (Li Guoguang, vice president of China’s Supreme People’s court stated that the two old regulations mentioned the judicial examination of the anti-dumping and anti-subsidy cases, but failed to clarify how the people’s courts should deal with them).
176 Id.
178 Grace, supra note 18.
under the WTO, the Supreme People's Court ruled in December that importers and exporters could challenge government decisions to implement trade barriers, such as antidumping and antisubsidy measures. The move is also significant because it permits judicial review of government actions, which remains rather uncommon in China. The ruling also allows lawsuits by domestic enterprises that initially petitioned the government for the antidumping measures. This could potentially pave the way for Chinese firms to sue the government if the government decides not to impose antidumping duties in a specific case.\footnote{Id.}

Arguably, the Provisions evidence in-place procedural legal safeguards for the rights and interests of foreign traders and exporters. In terms of Western constitutionalism, especially United States constitutionalism, procedural due process entails "an opportunity to be heard... at a meaningful time and in a meaningful manner."\footnote{Fuentes v. Shevin, 407 U.S. 67, 80 (1972).} Notwithstanding a blatant disregard of procedures set forth in the Provisions, the words contained in the Provisions do substantially afford procedural due process safeguards for foreign exporters. However, procedural legal safeguards will not necessarily protect substantive due process rights of litigants or foreign exporters. Substantive due process rights generally fall within the province and protection of independent judicial review.

\textit{B. Substantive Due Process Issues}

The Provisions of the Supreme People's Court arguably are not tantamount to judicial review, do not protect the rights and interests of foreign exporters, and do not provide meaningful legal safeguards. One particular problem that the Provisions create is a contingency on Chinese constitutionalism.

Moreover, employing nomenclature of judicial interpretation implies a history of case law precedent. Except for periods in earlier dynastic China and the Republic of China (1912-1949), legal precedent (in the sense of Western case law precedent or legal precedent) is virtually non-existent in China.\footnote{Liu, supra note 75.} Renderings of the Supreme People's Court are judicial explanations, as

\footnote{Id.}
\footnote{Fuentes v. Shevin, 407 U.S. 67, 80 (1972).}
\footnote{Liu, supra note 75.}
opposed to judicial interpretations, which is an important distinction when seeking to ascertain a viability of genuine powers of judicial review. The Supreme People’s Court, in its responsibility to the NPC and SCNPC, is responsible for “giving judicial explanations of the specific utilization of laws in the judicial process that must be carried out nationwide." A problem for China’s polity, and especially the interests and rights of foreign traders, is that it is the Western legal norm of case law precedent that provides the much-needed uniformity and predictability of genuine independent judicial review.

The fact that China’s polity, through its judiciary and Provisions, sought to address the issue of how to implement judicial review may speak to a problem of substantive due process. Procedural due process addresses a right to be heard and does not pose a threat to China’s polity, as opposed to substantive due process, which addresses both what government may do and the protection of fundamental rights. A problem in terms of a legal system with Chinese characteristics is defining what a China polity and judiciary deem to be fundamental rights and legal norms.

The latter also engenders a tangential issue of whether the Provisions of the People’s Supreme Court constitute legal norms, in terms of Chinese constitutionalism. While constitutional provisos of the 1982 Constitution do not in and of themselves constitute legal norms, because of the process of converting fundamental rights into legal norms, it is tenuous to claim or infer that Provisions of the Supreme People’s Court constitute legal norms. In terms of defining fundamental rights and legal norms in China, in order for a proviso in the 1982 Constitution to be enforceable in a court of law, the proviso must first undergo a process of reduction to an ordinary legal norm. This is the judicial norm of converting fundamental rights into ordinary laws and

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183 Id.
regulations.\textsuperscript{186} Substantive due process, in the sense of Western constitutionalism, involves a review of substantive judgments of the legislative branch of government.\textsuperscript{187} For China’s judiciary, the limited powers of judicial interpretation (\textit{sifa jieshi quanli}),\textsuperscript{188} bear little resemblance to Western judicial activism. The hallmarks of judicial activism are judicial interpretations calling for social engineering, which occasionally represent intrusions into legislative and executive matters.\textsuperscript{189}

The Supreme People’s Court has judicial interpretation power (\textit{sifa jieshi quanli}), but it is a limited power to interpret laws and regulations of China arising from actual cases, which is not the same power constitutionally vested with the SCNPC to interpret the constitution and laws of China (\textit{lifa jieshi quanli}).\textsuperscript{190} China’s judiciary has repeatedly failed in attempts to establish an independent judiciary resembling U.S. constitutionalism, which is associated with the landmark decision of the United States Supreme Court in \textit{Marbury v. Madison}.\textsuperscript{191} An example of such failed attempts are \textit{Ng Siu Tung vs. Director of Immigrations} (Hong Kong’s right of abode cases)\textsuperscript{192} and the July 24, 2001 Reply of Supreme People’s Court.\textsuperscript{193} This constitutional alignment of governmental power places the NPC and SCNPC in greater power over the Supreme People’s Court because Article 128 of the 1982 Constitution provides that “The Supreme People’s Court is responsible to the National People’s Congress and its Standing

\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Richardson}, 404 U.S. at 81.
\textsuperscript{188} 1982 Constitution, \textit{supra} note 92, arts. 67(1, 4), sec. 1.
\textsuperscript{189} \textit{BLACK’S LAW DICTIONARY} 847 (6th ed. 1990). Judicial activism is defined as a “judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies which are not always consistent with the restraint expected of appellate judges.” \textit{Id.}
\textsuperscript{190} 1982 Constitution, \textit{supra} note 92, arts. 67(1, 4), sec. 1.
\textsuperscript{191} \textit{Marbury v. Madison}, 5 U.S. 137 (1803).
\textsuperscript{193} Songyou, \textit{supra} note 184 (citing the July 24, 2001 Reply of the Supreme People’s Court, adopted at the 183rd Session of the Judicial Committee of the Supreme People’s Court on June 28, 2001).
Committee.”

Given China’s alignment of governmental powers as set forth in the 1982 Constitution, litigants such as foreign traders will never enjoy the fairness and finality of judgments associated with Western jurisprudence. The contingency of Chinese constitutionalism results in a meaningless access to judicial review for foreign traders and exporters because ultimately, the Supreme People’s Court is responsible to the NPC and SCNPC. The case of *Ng Siu Tung vs. Director of Immigrations* presents a prime illustration. A background of the case follows.

Many of Hong Kong’s first constitutional test cases have revolved around the question as to who has the right of abode (permanent residency) in Hong Kong under the Basic Law after reunification on July 1, 1997. These cases resulted in two Court of Final Appeal (CFA) decisions delivered on January 29, 1999. These decisions set in motion a number of other legal challenges on the issue. The January 1999 decisions gave the right of abode to two categories of people whose right of abode claims had not previously been recognized. Significantly, that CFA judgment also held that all claimants who arrived in Hong Kong after July 10, 1997, had to make their Right of Abode applications from the Mainland and could be removed from Hong Kong if they entered or remained before their applications had been processed and their status confirmed. The government requested the State Council to seek an interpretation from the Standing Committee of the National People’s Congress (SCNPC) on the true legislative intent of the Basic Law articles in question. Under the Basic Law, the CFA has the power of final adjudication while the SCNPC has the power of final interpretation of the Basic Law. In keeping with common law tradition and Basic Law provisions, the government did not seek to overturn the effect of the January 29 ruling on the parties to that case. On June 26, 1999, the SCNPC issued an interpretation of the relevant Basic Law provisions. This interpretation has since been followed by the courts in other cases.

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195 *Id.*
196 *Id.*
197 *Ng Siu Tung*, FACV at Nos. 1-3.
dealing with the right of abode matter.198

The Court of Final Appeal (CFA) in Hong Kong exercised an assumed power of independent judicial review. Subsequently, however, the CFA was required to yield to the superior authority of the SCNPC. Under the Basic Law of Hong Kong, the CFA has the power of final adjudication, while the SCNPC has the power of final interpretation of the Basic Law.199 Despite Article 84 of the Basic Law, which allows the Hong Kong Special Administration Region (HKSAR) to refer to precedents of other common law jurisdiction, the SCNPC and its power of judicial interpretation prevails.200

An expansion of the judicial review powers of China’s judiciary from *sifa jieshi quanli* to the power to interpret the constitution and laws of China (*lifa jieshi quanli*),201 directly contravenes Articles 67(1) and 67(4) of the 1982 Constitution, which does constitutionally vest *lifa jieshi quanli* with the SCNPC.202 Moreover, the NPC, the “highest organ of state power,” acts through its standing committee, the SCNPC.203 Both the NPC and SCNPC “exercise the legislative power of the state.”204 Given that the Supreme People’s Court is responsible to both the NPC and SCNPC, an expansion of the judicial review

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200 *Id.* art. 85 (“The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.”) See also *id.* art.8 (“The laws previously in force in Hong Kong, that is, the common law, rule of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.”).

201 *Xianfa* (P.R.C.) art. 67 (1, 4) (1982).

202 *Id.*

203 *Id.* art. 57.

204 *Id.* art. 58.
powers of China’s judiciary is improbable, unconstitutional, and would result in a disruption of the fundamental structure of China’s government. An unlikelihood of such expansion is further attenuated by the fact that it would result in a displacement of legislative supremacy with constitutional supremacy.

Another attenuating force prohibiting expansion of the judicial review powers of the Supreme People’s Court is the power of the legislature as manifested in the People’s Republic of China Legislation Law (Lifa Fa) ("Legislation Law"). In March of 2000, there was a promulgation of new legislative procedure law, Lifa Fa, which sought to better define roles of lawmakers and procedures, and attempted to establish legal hierarchy between the constitution, laws, administrative regulations and orders, at both national and local levels. Although promulgated in March 2000, the history of the Legislation Law dates back to as early as 1993. Its purpose in streamlining China’s law making process was to set forth “a clear line between legislative powers” of the NPC and SCNPC, and most importantly, between laws and administrative regulations. The intent of the NPC in drafting this law was to “curb irregular practices in law making,” such as authority being exceeded, and problems of overlapping and conflicts between laws and regulations. In terms of judicial power, the law maintains that the NPC, SCNPC, and the Supreme People’s Court continue to enjoy the power to interpret law when necessary. However, and most important, in the wake of the 1982 Constitution, and its explicit grant of authority to the SCNPC to interpret the constitution and laws of China, lifa jieshi quanli,

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205 Id. art. 128.
206 Id. arts. 57, 58, 128.
207 Legislation Law of the People’s Republic of China, July 1, 2000 [hereinafter Lifa Fa].
208 See id.
210 Id.
211 Id.
212 Lifa Fa, supra note 206.
213 XIANFA (P.R.C.) arts. 67(1), 67(4) (1982).
the NPC confirms that the Supreme People’s Court is to be limited in its judicial interpretation power, *sifa jieshi quanli*, which is no more than a limited power to interpret laws and regulations of China arising from actual cases.²¹⁴

The Chinese Communist Party (CCP) resembles a parliamentary form of government such as that of Great Britain, due to a vesting of supreme legislative power in the NPC and SCNPC.²¹⁵ However, there are great dissimilarities between the legislative supremacy of the NPC and SCNPC and parliamentary supremacy in Great Britain. The role of courts, interpretative means, and popular sovereignty, are contrasting features.²¹⁶ However, the most important distinction lies in the fact that the courts assume Parliament “legislates for a European liberal democracy founded”²¹⁷ on common law principles, and approaches such legislation under a “presumption that Parliament intends to legislate consistently” with these principles.²¹⁸ Indeed, the Provisions of the Supreme People’s Court may read similar to Western legal norms, but the foundings of political democratic liberalism as voiced by European philosophers Hobbes, Montesquieu, Locke, and other Enlightenment thinkers is amiss.²¹⁹ The *Ng Siu Tung vs. Director of Immigrations*²²⁰ case leads one to a stark realization that genuine judicial interpretation authority, if any, is constitutionally vested with the NPC, through its SCNPC.²²¹ When one correlates the outcome in *Ng Siu Tung vs. Director of Immigrations* with judicial review for potential anti-dumping litigants, or foreign exporters, one inevitably concludes that finality and fairness will always be contingent on China’s NPC and SCNPC, if not China’s polity, and the influences of

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²¹⁴ *Id.*

²¹⁵ *Id.* arts. 57, 58, 128.


²¹⁷ *Id.* at 16 (quoting Regina v. Sec’y of State for the Home Dep’t, 1998 A.C. 539, 587 (appeal taken from Eng. C.A.) (Steyn, L.J.)).

²¹⁸ *Id.*


²²⁰ *Ng Siu Tung*, FACV at Nos. 1-3.

²²¹ XIANFA (P.R.C.) art. 67 (1982).
administration by trade and region, and local protectionism.

VI. Conclusion

The anti-dumping law of China, taken in conjunction with WTO standards, should provide for meaningful judicial review for foreign exporters. The problem with China's anti-dumping mechanism is that despite law and regulations specifying judicial review, the safeguard of court proceedings remains a hope, as opposed to a reality. The Provisions of the Supreme People's Court, unlike China's anti-dumping law, provide specific details regarding the implementation of judicial review.

The Provisions do not, however, offer meaningful judicial review for foreign exporters. A problem of the Provisions is that their efficacy is contingent on Chinese constitutionalism. When one examines the 1982 Constitution, in terms of governmental alignment of powers and the explicit grant of powers to the Supreme People's Court, it becomes obvious that Western legal norms are not in play. The primary problem is that the People's Supreme Court is, ultimately, politically and constitutionally responsible to the NPC and SCNPC. As previously mentioned, in terms of judicial review, one will inevitably conclude that finality and fairness will always be contingent on China's NPC and SCNPC, if not China's polity, and the influences of administration by trade and region, and local protectionism.

In terms of Western legal norms, China's governmental regime lacks concepts of popular sovereignty, separation of powers, and independent judicial review. It is difficult to envision fairness and meaningful judicial review, in the sense of Western jurisprudence, without either popular sovereignty or separation of powers. While China may employ the language of Western constitutionalism, reflecting Western norms of the developed countries of the WTO, China does not embrace the underlying concepts of natural law philosophy and independent judicial review.

In this respect, China may well be developing a constitutionalism reflective of its own distinctive cultural and economic forces, which is a unique ontology influenced by the

222 Anti-Dumping Regulation, supra note 5.
223 XIANFA (P.R.C.) arts. 57, 58,128 (1982).
dynamics of the “transplant effect.” Despite motivations and Provisions of the Supreme People’s Court, the successful transplant of a law, or legal concept, into a given culture is contingent on many factors.

Law and legal evolution are part of the idiosyncratic historical development of a country, and that they are determined by multiple factors, including culture, geography, climate, and religion. Although law is by no means static, legal evolution in each country is distinct and will produce vastly different outcomes. Far from converging over time, legal institutions remain different.

The latter theory is especially applicable to China’s polity and constitutionalism, because the concept of Asian values, which China often espouses in justification for prioritizing socio-economic rights over civil-political rights, also represents this view. In this respect, China’s ontology speaks to issues of cultural relativism, as typically manifested in the nomenclatures of Confucianism, Asian values, tradition, China’s ontological base in tradition, and even nationalism. For these reasons, the Provisions of the Supreme People’s Court may well be an exercise in political rhetoric, as opposed to a source of meaningful legal safeguards for foreign exporters.

I do not intend to suggest that rule of law in China is non-existent. To the contrary, China has evolved into a rule of law society. However, one has to consider that its judiciary is still evolving amidst ongoing legal reform and economic development.

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225 Provisions of the Supreme People’s Court, supra note 1.


227 Id.

228 Provisions of the Supreme People’s Court, supra note 1.

229 “While the general consensus is that there is no real rule of law in China, we actually have a great deal of difficulty explaining why.” Michael W. Dowdle, Heretical Laments: China and the Fallacies of “Rule of Law,” CULTURAL DYNAMICS, NOV. 1999, at 287.
The evolution of China's legal system is inevitable, but one can only speculate as to that end. Ideally, in terms of providing meaningful legal safeguards for foreign exporters, one hopes that its evolution will at least resemble some aspects of Western jurisprudence, especially independent judicial review. A failure of China's polity to provide much-needed uniformity and predictability via genuinely meaningful judicial review results in the interests and rights of foreign exporters being contingent on China's polity and NPC.

In terms of international trade, a supposed Western universalizing cosmopolitanism and its attendant concepts of rule of law and independent judicial review could serve as a much-needed source, if not legal safeguard, of uniformity and predictability for foreign exporters. The implementation of Western legal norms such as the rule of law and independent judicial review is contingent on the willingness of China's polity to embrace taxonomies that are more Western. This embracing of Western norms may evoke a situation in which China's court must choose between a centralized or decentralized constitutional framework.231 The latter contentions, however, speak to alternatives that seem diametrically opposed to a legal system with Chinese characteristics. One intimates that the only viable solution may be a new formulation of WTO Anti-Dumping Code that specifically requires that members of the WTO shall maintain independent judicial review, as opposed to mere judicial review.

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230 See generally Berman, supra note 136 (discussing historical jurisprudence).