

中國與 WTO 的爭端解決體系

保羅·戴維森

加拿大卡爾敦大學法律系教授兼亞洲研究委員會主席

關鍵字：中國、爭端解決、WTO

中文摘要

世界貿易組織（WTO）是治理與管控經濟國際化過程的主要國際機構。WTO 已從以外交關係為基礎的前身關稅暨貿易總協定（GATT）進化到或許是最著名的以規則為基礎的管理國際經濟關係的例子，如管理國際貿易的規則與統合的爭端解決機制即為最佳的例證。WTO 為其會員國的經貿關係提供法律規則的架構。本文主旨在檢視 WTO 的爭端解決機制以及中國自 2001 年加入 WTO 後所曾利用過的爭端解決機制的概況分析。

一般而言，中國與其貿易伙伴都不願輕易啓動爭端解決機制。自入世以後，中國曾經利用過爭端解決機制，但其目的僅止於學習如何處理 WTO 的訴訟文化以及如何使用這些程序。當中國對此一體系較為熟悉時，自然會像其他大經濟體一樣會涉入大量案件，但不應將此視為對 WTO 長期存在構成威脅，而應將之視為促進中國完全而有效融入世界貿易體系的必經的一步。若中國要變成爭端解決機制的有效使用

者，就必須對 WTO 有更深入的瞭解以及對如何運用 WTO 爭端解決機制更擅長。

總之，中國運用 WTO 爭端解決機制可以是防衛性的，也可以是攻擊性的。雖然未來中國可能會是個積極利用爭端解決機制的國家，但應該確保中國仍然是個負責任的爭端解決機制的使用者，以利建立尊敬 WTO 規則與法規的好形象。

China and the Dispute Settlement System of the WTO

Paul J. Davidson

Professor, Department of Law
Chair of the Committee on Asian Studies
Carleton University, Ottawa, Canada
paul_davidson@carleton.ca

Key Words: China, WTO, Settlement of Disputes (DSU)

It is no secret that one of the main pillars of strength of the WTO trading system since its inception has been the successful performance of the WTO dispute settlement system. ... there is little doubt that China's entry into the rules-based system of the WTO, where the rules are enforced through an effective dispute settlement mechanism, has been a major contributing factor to China's stunning economic success in recent years¹

Introduction

The WTO is the principal international institution for the management and regulation of the process of

¹ Pascal Lamy, Director-General of the WTO, "Lamy commends Beijing dialogue on WTO dispute settlement", 9 July 2008, message to "International Dialogue on WTO Dispute Settlement Mechanism: Experience Sharing Among Developing Countries", held in Beijing on 9-10 July 2008.

economic globalization.² The WTO has evolved from its early diplomatic relations-based origins in the GATT, to become perhaps the best known example of rules-based governance of international economic relations. This is exemplified by its rules for regulating international trade and its unified dispute settlement mechanism.³ The WTO framework provides the legal rules for international economic trade relations among its members. At its heart are the WTO agreements, which are the legal 'rules' for international economic trade relations. The WTO framework establishes rights and obligations - it guarantees member countries' important trade rights, and binds governments to keep their trade policies within agreed limits.⁴ Significantly, a WTO Member can enforce its rights through binding third-party adjudication under the

² Peter Van den Bossche and Iveta Alexovicová, "Effective Global Economic Governance by the World Trade Organization", (2005) 8(3) *Journal of International Economic Law*, 667-690, at 667. See generally: Jackson, John H., *The World Trading System - Law and Policy of International Economic Relations* (2nd ed.), (Cambridge/ London: The MIT Press, 1997); and Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 3rd ed., (Oxford and New York: Routledge, 2005).

³ Reich, Arie, 'From Diplomacy to Law: The Juridicization of International Trade Relations', (1996/97) 17 *Northwestern Journal of Intl L & Business*, 775-849.

⁴ "The rules of the WTO can also be beneficial by reducing uncertainty regarding the policies that will be applied by governments - thus potentially helping to increase domestic investment and reduce risks." Bernard Hoekman, Constantine Michalopoulos and L. Alan Winters, "Special and Differential Treatment of Developing Countries in the WTO: Moving Forward After Cancún", *World Economy*, Vol. 27 Issue 4 - Apr2004, pp.481-506, at 482.

Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").

The WTO trading system is a “rule-oriented international trade order” as opposed to a “power-oriented international trade order. A final resolution of any dispute is made by an independent third party according to the rules of the system, rather than simply by negotiations between the parties, where the party with the stronger economic, political or even military power has more leverage than the other party. “This system provides more stability, fairness and predictability in international trade relationships than does a power-oriented international trading system.”⁵ Dispute settlement is based on strict equality among all nations. One of the WTO's first disputes, for example, centred on a complaint brought by Costa Rica against the United States. The panel found in favour of Costa Rica, and the United States complied.⁶

China became a member of the World Trade Organization on December the 11th, 2001. Membership in the World Trade Organization provides benefits and opportunities. As a member of the WTO, China can trade with others in a secure and predictable rules-based multilateral trading system. On the other hand, however,

⁵ Mitsuo Matsushita, “Accomplishment of the WTO Dispute Settlement system - A Review of Some WTO Jurisprudence”, available at <http://www.adb.org/Documents/Events/2006/WTO-Dispute-Settlement-Mechanisms/paper-matsushitsa.pdf>], at 5 - accessed September 28, 2008.

⁶ “US - Underwear”, Complainant: Costa Rica, Respondent: United States, WT/DS24, details available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds24_e.htm, accessed, September 29, 2008.

China is also subject to the rules and disciplines of the multilateral trading system. Importantly, China will now be able to participate in the WTO dispute settlement mechanism that is central to the success of the WTO and the multilateral trading system. Participation in the dispute settlement mechanism (DSM) is mandatory, and all members of the WTO must submit any disputes with other members to dispute resolution under the process if attempts to settle the dispute by negotiation fail, and abide by the decisions of the Dispute Settlement Body (“DSB”). How China participates in the DSM will have important implications not only on its own trading partners, but the system itself.

When China was joining the World Trade Organization, many WTO experts such as Sylvia Ostry suggested that one of the most important effects of its accession would be on the WTO dispute settlement system.

Seen through the prism of the legal template, the most significant impact of Chinese accession on the WTO will be on the dispute-settlement mechanism.⁷

Ostry noted two views that had been expressed:

⁷ Sylvia Ostry, “WTO Membership for China: To Be and Not to Be: Is that the Answer?”, in Patrick Grady and Andrew Sharpe (eds.), *The State of Economics in Canada: Festschrift in Honour of David Slater*, (CSLS and John Deutsch Institute, distributed by McGill-Queen's University Press, October 2001), pp 257-266, at 262, available at <http://www.csls.ca/events/slt01/ostry.pdf>, accessed September 27, 2008.

[O]ne view of the impact of Chinese accession expressed in the corridors in Geneva is that a flood of disputes could overwhelm the already over-burdened system. There is serious concern that China would likely regard these actions as political and, to save face, simply reject the process itself. ... A Chinese rejection or attack on the dispute-settlement mechanism would seriously undermine its credibility.

But another view shared by some, .. is that there will be very few, if any, disputes. Businesses will be fearful of complaining to their governments because of retaliation by Chinese officials. They would prefer informal behind-the-scene, government-to-government talks so that some new deal could be worked out. This scenario would involve a two-track trading system: one set of transparent dispute-settlement rules for all WTO members except China and another set of opaque bilateral arrangements for China...

Both scenarios could threaten the long-term viability of the WTO. Both would involve an indefinite period of “partial integration” for the Chinese⁸

⁸ Ibid., at 263.

This paper examines the WTO dispute settlement mechanism and its use by China since its accession to the WTO. Neither of the above scenarios has transpired. Both China and its trading partners have shown restraint in lodging disputes. China has used the time since its accession to learn how to deal with the litigious culture of the WTO, and how to use its processes. As China becomes more familiar with the system, it will be natural for China, like other large economies, to become involved in a large number of cases, but this should not be seen as a threat to the long-term viability of the WTO. Rather, it should be seen as a step to facilitate the full and effective integration of China into the world trading system.

To “set the stage”, the paper starts with a brief description of the WTO’s dispute settlement system.⁹

The WTO Dispute Settlement Mechanism

An effective dispute settlement system is critical to the operation of any legal framework, and is central to the operation of the WTO. In the WTO, dispute settlement is governed by the Dispute Settlement Understanding (“DSU”)¹⁰, which is effectively an interpretation and elaboration of GATT Articles XXII and XXIII, which are the

⁹ For a more detailed description on the operation of the WTO system, see William J. Davey, *The WTO Dispute Settlement Mechanism* (Ill. Pub. L. Res. Paper No. 03-08, 2003), available at <http://papers.ssrn.com/abstract=419943>.

¹⁰ “Understanding on Rules and Procedures Governing the Settlement of Disputes” (hereafter, DSU), Annex 2 to the Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last accessed September 21, 2008).

Articles in the original GATT providing for dispute settlement. The DSU contains a highly formalised set of rules and procedures with specific time frames and deadlines for every step of the proceedings. “The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements...”¹¹ The dispute settlement mechanism represents “the new teeth” of the World Trade Organization. In the DSU, WTO members have committed themselves not to take unilateral action against perceived violations of the trade rules. Instead, they have pledged to seek recourse in the new dispute-settlement system, and abide by its rules and procedures.¹²

An increasing number of WTO Members, including developing countries in Asia, are determined to uphold their WTO rights and obtain the benefits of the system. They are finding WTO dispute resolution more accessible and the assertion of rights a necessity. Davey has found that in the last few years, developing countries have made increasing use of the system and have had considerable success in resolving disputes amongst themselves, as well as against developed countries.¹³

¹¹ Ibid., Article 3, para.2.

¹² Ibid., Article 23.

¹³ William J. Davey, “The WTO Dispute Settlement System: How Have Developing Countries Fared?”, Draft, March 8, 2007, p.31, available at http://www.luc.edu/law/activities/publications/ilrsymposium/2008sym/davey_wto_dispute_paper.pdf, accessed September 25, 2008.

A Dispute Settlement Body ("DSB") is established by paragraph 1 of Article 2 of the DSU to administer the rules and procedures of the DSU and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. The General Council shall convene as appropriate to discharge the responsibilities of the Dispute Settlement Body (Article IV:3 of the WTO Agreement) and, therefore, the DSB is composed of representatives of all WTO Members.

Stages in the Process

There are essentially four stages to the WTO dispute settlement process: consultations, the panel process, the appellate process and surveillance of implementation.

1. Consultations

Under the procedures of the WTO dispute settlement system, the first step in the dispute settlement process is consultations. Consultations are governed by Article 4 of the DSU. Paragraph 2 of Article 4 provides

Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement ...

The goal of the consultation stage is to enable the disputing parties to better understand the factual situation and the legal claims in respect of the dispute, with a view to reaching a mutually satisfactory solution of the complaint. The DSU provides time limits for responding to requests for consultation and for entering into consultations pursuant to a request, but, aside from a requirement that parties shall enter into the consultations in good faith, the manner in which the consultations are conducted is left up to the parties. All requests for consultations shall be notified to the Dispute Settlement Body and the relevant Councils and Committees by the Member which requests consultations, and any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.¹⁴ Whenever a Member other than the consulting Members considers that it has a substantial trade interest in consultations being held, or the corresponding provisions in other covered agreements, such Member may request to be joined in the consultations, or, failing agreement to participate, request separate consultations.¹⁵

2. The Panel Process

If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the DSB to establish a panel to rule on the dispute. The complaining party may request a panel during the 60-day period if the

¹⁴ DSU, Article 4, para.4.

¹⁵ Ibid., Article 4, para.11.

consulting parties jointly consider that consultations have failed to settle the dispute.¹⁶ Parties are not required to request a panel at any particular point in time and in most cases, a panel is not requested until considerably more than 60 days after the start of consultations. The establishment of a panel is almost automatic. The panel must be established, at the latest, at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless the DSB decides by consensus not to establish a panel,¹⁷ i.e., unless the member requesting the establishment of a panel consents to delay, a panel will be established.

After the panel is established, it is necessary to select the individuals who will serve as panelists. Panels are generally composed of three panelists. The WTO Secretariat suggests nominations for the panel to the parties to the dispute. If the parties cannot agree on the panelists within 20 days after the date of the establishment of the panel, either party may request the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, to determine the composition of the panel, and the Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.¹⁸

The task of the panel is to examine, in the light of the relevant provisions in the relevant agreement(s), the matter

¹⁶ *Ibid.*, Article 4, para.7.

¹⁷ *Ibid.*, Article 6, para.1.

¹⁸ *Ibid.*, Article 8, para.5-7

referred to the DSB by the complainant, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).¹⁹ Panels are to apply settled law to the facts, to resolve disputes according to pre-existing principle; panels are not intended to be simply another forum for the political resolution of controversies.

The DSU provides specific procedures and a time schedule for the work of the panel. The period in which the panel conducts its examination of the case - that is, from the time the terms of reference and composition of the panel are agreed, to the time the panel's final report is given to the parties to the dispute - should not exceed six months. In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months.²⁰

The panel report is not binding on the parties until it has been adopted by the Dispute Settlement Body. After its circulation to WTO members, the final report is referred to the DSB for formal adoption, which is to take place within 60 days unless there is a consensus not to adopt the report or an appeal of the report to the WTO Appellate Body.²¹ This is the so-called "negative consensus rule", which is a fundamental change from the GATT dispute settlement system process where a positive consensus was needed to adopt a panel report. Under the GATT procedures, a dissatisfied losing party could block any action on a panel

¹⁹ Ibid., Article 7, para.1.

²⁰ Ibid., Article 12, para.94.

²¹ Ibid., Article 16, para.4.

report. Now, as long as one member wants the report adopted, it will be adopted. However, while the losing party cannot block adoption of a report, it has a right of appeal.

3. The Appellate Process

A new feature of the WTO dispute settlement mechanism gives the possibility of appeal to either party in a panel proceeding. Only parties to the dispute, not third parties,²² may appeal a panel report. Third parties which have notified the DSB of a substantial interest in the matter may make written submissions to, and be given an opportunity to be heard by, the Appellate Body.²³ Any appeal is limited to issues of law covered in the panel report and the legal interpretation developed by the panel.²⁴

All appeals are heard by a standing Appellate Body established by the DSB. The Appellate Body is composed of seven persons - broadly representative of the WTO membership - who serve four-year terms. They are to be persons of recognized standing in the field of law and international trade, and not affiliated with any government. Each person may be reappointed once. In November, 2007, Ms Yuejiao Zhang, a Professor of Law at Shantou University in China, was appointed as a Member of the Appellate Body for the term 1 June 2008 to 31 May 2012. She is the first Chinese judge on the Appellate Body.

²² See discussion *infra*, re “third parties”.

²³ DSU, Article 17, para.4.

²⁴ Ibid., Article 17, para.6.

Three members of the Appellate Body sit at any one time to hear appeals. They can uphold, modify or reverse the legal findings and conclusions of the panel.²⁵ As a general rule, the appeal proceedings are not to exceed 60 days but in no case shall they exceed 90 days.²⁶

The Appellate Body report is circulated to the Members of the WTO and, is to be adopted by the DSB and unconditionally accepted by the parties to the dispute within thirty days after issuance, unless there is a consensus against its adoption.²⁷

4. Surveillance of Implementation

The Dispute Settlement Understanding stresses that prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.²⁸

At a DSB meeting held within 30 days of the adoption of the panel or appellate report, the party concerned must state its intentions in respect of the implementation of the recommendations. If it is impractical to comply immediately, the member will be given a "reasonable period of time" - to be set by the DSB - to do so.²⁹

²⁵ Ibid., Article 17, para.13.

²⁶ Ibid., Article 17, para.5.

²⁷ Ibid., Article 17, para.14.

²⁸ Ibid., Article 21, para.1. "[I]t is recognized that the WTO dispute settlement system, has been highly successful. ... in the majority of cases, losing parties implemented WTO decisions in one way or other." - Mitsuo Matsushita, supra, note 5.

²⁹ Ibid., Article 21, para.3.

airiti

If a party fails to implement the report within the reasonable period of time, it is obliged to enter into negotiations with the complainant in order to determine a mutually-acceptable compensation. If after 20 days, no satisfactory compensation is agreed, the complainant may request authorization from the DSB to suspend concessions or obligations against the other party.³⁰ Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.³¹

If the member concerned objects to the level of suspension, the matter will be referred to arbitration. This will be carried out by the original panel members, and if this is not possible, by an arbitrator appointed by the WTO Director-General. Arbitration should be completed within 60 days of the expiry of the "reasonable period of time", and the resulting decision should be accepted by the parties concerned as final and not subject to another arbitration. The DSB, upon request, then authorizes the suspension of concessions consistent with the findings of

³⁰ Ibid., Article 22, para.2.

³¹ Ibid., Article 22, para.1.

the arbitrator, unless there is a consensus to reject the request.³²

In principle, concessions should be suspended in the same sector as that in issue in the panel case. If this is not practicable or effective, the suspension can be made in a different sector of the same agreement. In turn, if this is not effective or practicable and if the circumstances are serious enough, the suspension of concessions may be made under another agreement.³³ This follows from the requirement for all Members of the WTO to take on all the obligations of the WTO as a single undertaking. Countries are not able to choose to obey the rules they like and ignore the ones they dislike. All participants agree to apply all of the agreements on goods, services and intellectual property.

In any case, the DSB will keep the implementation of adopted recommendations or rulings under surveillance, and any outstanding case will remain on its agenda until the issue is resolved. The issue of implementation of the recommendations or rulings may be raised at the DSB by any Member at any time following their adoption. Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's agenda until the issue is resolved.³⁴

³² Ibid., Article 22, para.6-7.

³³ Ibid., Article 22, para.3.

³⁴ Ibid., Article 21, para.6

Third Parties

The DSU makes provision for third parties to be involved in the panel process. Any Member of the WTO having a substantial interest in a matter before a panel and having notified its interest to the DSB shall have an opportunity to be heard by the panel and to make written submissions to the panel, and to have their submissions reflected in the panel report.³⁵ Third parties are also entitled to receive the submissions of the other parties to the dispute.³⁶

Procedures for Multiple Complainants³⁷

Where more than one Member requests the establishment of a panel related to the same matter, a single panel should be established to examine the complaints taking into account the rights of all Members concerned. The written submissions by each of the complainants shall be made available to the other complainants, and each complainant shall have the right to be present when any one of the other complainants presents its views to the panel. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

³⁵ Ibid., Article 10, para.2

³⁶ Ibid., Article 10, para.3.

³⁷ Ibid., Article 9.

China's Use of the WTO DSM

Historically, the senior leadership in China preferred to avoid using the WTO dispute settlement system. This approach was in part as a result of a general aversion to litigation which is part of the traditional Asian approach to dispute settlement.

According to the Confucian philosophy which is deeply rooted in the Chinese society, litigation would cause irreparable harm to the normal relationships and should be pursued only as a last resort, or, better still, as the great philosopher himself would have preferred, avoided as much as possible.³⁸

Also, as Henry Gao has pointed out, the inherent nature of China seems to be at odds with the WTO dispute settlement system:

While the WTO dispute settlement system is a legalistic rule-based dispute settlement system ... China is a country that has long been perceived as one that defies international standards, one that cherishes its hard-won sovereignty so much that it

³⁸ Henry Gao, "Taming the Dragon: China's Experience in the WTO Dispute Settlement System", (2007) 34(4) *Legal Issues of Economic Integration*, pp.369-392, at 376.

generally shuns the jurisdictions of international tribunals.³⁹

As well, by its very nature, the dispute settlement system runs counter to China's insistence on non-interference in domestic affairs. Although WTO rights accrue to the sovereign members, their obligations increasingly affect local authorities and private actors, and what governments do in the management of their domestic economy may matter far more to foreign competitors than what they do at the border. As China pursues its national rights in the WTO, it will necessarily interfere in the domestic affairs of its trading partners, just as those partners will interfere in China's own domestic affairs.⁴⁰

Thus, initially, China was not very active as a complainant or respondent in the WTO. Until the beginning of 2007, China was a claimant in only one case and was a respondent in only four cases.⁴¹ However, China's participation in the dispute settlement process of

³⁹ *Ibid.*, at 370.

⁴⁰ Ellen L. Frost, "China, the WTO, and Globalization: What Happens Next", Article written for the ChinaOnline Web site, July 19, 2001, reprinted by The Peterson Institute for International Economics, with permission from ChinaOnline, available at <http://www.iie.com/publications/papers/paper.cfm?ResearchID=416> (accessed, September 24, 2008)

⁴¹ In the WTO, a single trade measure of a Member may be simultaneously challenged by several WTO members. Each member may bring a separate complaint. In order to ensure consistency and efficiency in the proceedings, the WTO normally would establish only one Panel for such complaints, and the Panel will examine all complaints in this one hearing. Therefore, the number of Panels in which a Member participates may be less than the number of cases in which they are involved.

the WTO is increasing. As of September, 2008, China was a claimant in three cases, a respondent in eleven cases.⁴² China's participation is shown in Table 1.

Table 1

Dispute cases involving China: (compiled from WTO website - http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm)

| Short Name | Complainant | Respondent | Request for Consultations received: |
|-----------------------------|----------------------|-------------------|--|
| US - Steel Safeguards | China | United States | 26 March 2002 |
| coated free sheet paper | China | United States | 14 September 2007 |
| A/D and C/Duties on Certain | China | United States | 19 September 2008 |
| VAT on integrated circuits | United States | China | 18 March 2004 |
| China - Auto Parts (a) | European Communities | China | 30 March 2006 |
| China - Auto Parts (b) | United States | China | 30 March 2006 |
| China - Auto Parts (c) | Canada | China | 13 April 2006 |
| China - Taxes (a) | United States | China | 2 February 2007 |

⁴² WTO website, Member Information - China and the WTO, http://www.wto.org/english/thewto_e/countries_e/china_e.htm, (accessed September 26, 2008).

| | | | |
|--------------------------------------|----------------------|-------|------------------|
| China - Taxes (b) | Mexico | China | 26 February 2007 |
| China — Intellectual Property Rights | United States | China | 10 April 2007 |
| China — Audiovisual Services | United States | China | 10 April 2007 |
| financial information services (a) | European Communities | China | 3 March 2008 |
| financial information services (b) | United States | China | 3 March 2008 |
| financial information services (c) | Canada | China | 20 June 2008 |

In its first case as complainant, China participated as one of fifteen complainants. China initially joined the dispute as a third party to the complaint lodged by the European Communities and only subsequently converted its participation into full complainant status with the launch of its own complaint and distinct request for consultations. Formal complaints were also lodged against the United States by the EC, Japan, Korea, Switzerland, Norway, New Zealand and Brazil, and, thus, this first case as a complainant did not draw undue attention to the actions of China or imply that China would be an aggressive user of dispute settlement.

Its posture as reluctant complainant appears to be changing as China becomes more confident with the WTO and its processes. In September 2007 China lodged its first independent formal complaint against the US.⁴³ And, on 19 September, 2008, China requested consultations with the United States regarding Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.⁴⁴ However, the number of cases in which China is complainant is still less than those in which the EC or the US⁴⁵ is complainant. In the period 2007-2008 (as of September 22nd), China was complainant in 2 cases, the EC, complainant in 3 cases, the US, complainant in 6 cases.⁴⁶

On the defensive side, there has not been a “flood of disputes”.⁴⁷ However, “[a]fter a six-year grace period,

⁴³ DS/368, 14 September, 2007. China requested consultations with the United States on the preliminary anti-dumping and countervailing duty determinations made by the US Department of Commerce in respect of coated free sheet paper from China.

⁴⁴ DS/379, 19 September, 2008

⁴⁵ China’s rank in world trade in 2006 (exports and imports) was number 3, after the US and the EC. - WTO website, “Trade Profiles”, <http://stat.wto.org/CountryProfile/WSDBCountryPFReporter.aspx?Language=E>, accessed October 8, 2008.

⁴⁶ WTO website, “Chronological list of disputes cases”, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm, accessed October 9, 2008.

⁴⁷ “[I]t has become clear even in the very short time since China’s accession that its trading partners have no intention of flooding the Dispute Settlement Body with complaints ... there is no evidence of a rush on anyone’s part to bring large numbers of complaints” - Donald C. Clarke, *China’s Legal System and the WTO: Prospects for Compliance*, (2003) vol. 2, no. 1 *Washington University Global Studies Law Review*, pp.97-118. Available at http://docs.law.gwu.edu/facweb/dclarke/pubs/wto_china.pdf, accessed 2008.09.14.

China's trading partners have started to make use of the dispute settlement mechanism against what they consider to be WTO-inconsistent trade practices."⁴⁸

To date, eleven cases have been brought against China, seven of which were filed in the past two years. The US is set to file a case against China at the World Trade Organization challenging export restrictions on raw materials used in steelmaking and other industries.⁴⁹ The US has also indicated that "[i]n 2008, the United States will continue to pursue vigorous bilateral engagement to resolve the serious disagreements that remain over a number of China's industrial policy measures", and "will continue to engage China and will closely monitor developments in an effort to ensure that China fully adheres to its services commitments". "If dialogue fails to address U.S. concerns, however, the United States will not hesitate to take further actions including WTO dispute settlement, where appropriate."⁵⁰

Although it might be thought that this indicates an increasing use of the dispute process against China, the

⁴⁸ Marcia Don Harpaz, "Sense and Sensibilities of China and WTO Dispute Settlement", available at gradcon.huji.ac.il/2008/harp.doc, accessed, September 27, 2008.

⁴⁹ "US plans to file case against China at WTO over export restrictions" by James Politi in Washington and Geoff Dyer in Beijing, *The Financial Times*, 4th September 2008, available online at <http://www.ft.com/cms/s/0/b195ed3e-7a1a-11dd-bb93-000077b07658.html>, accessed September 28, 2008.

⁵⁰ "2007 Report to Congress On China's WTO Compliance", available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file625_13692.pdf, accessed September 28, 2008

number of cases is not disproportionate to those brought against other major trading Members,⁵¹ especially if one considers the number of disputes, rather than simply the number of cases. (See Table 2)

Table 2

Disputes as Respondent (compiled from WTO website - http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)⁵²

2008 - as of September 22

| Member | Disputes |
|--------|---|
| China | 1 - Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (Complainants: Canada, United States, European Communities) |
| US | 1 - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (Complainant: China) |
| EC | 1 - Tariff Treatment of Certain Information Technology Products (Complainants: Chinese Taipei, Japan, United States) |

⁵¹ Supra, note 45.

⁵² Disputes with more than one complainant have been counted as one dispute.

2007

| Member | Disputes | |
|--------|----------|--|
| China | 3 | <ol style="list-style-type: none"> 1. Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Complainant: United States) 2. Measures Affecting the Protection and Enforcement of Intellectual Property Rights (Complainant: United States) 3. Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments (Complainants: Mexico, United States) |
| US | 3 | <ol style="list-style-type: none"> 1. Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China (Complainant: China) 2. Domestic Support and Export Credit Guarantees for Agricultural Products (Complainant: Brazil) 3. Subsidies and Other Domestic Support for Corn and Other Agricultural Products (Complainant: Canada) |
| EC | 2 | <ol style="list-style-type: none"> 1. Regime for the Importation of Bananas (Complainants: Panama, Colombia) 2. Certain Measures Prohibiting the Importation and Marketing of Seal Products (Complainant: Canada) |

Although China was initially reluctant to resolve trade disputes using the WTO dispute settlement system, China has gradually become more comfortable with the DSM, and has taken a more and more legalistic approach to dispute settlement in the WTO.⁵³ This more “aggressive legalism”⁵⁴ should not be viewed negatively. It is merely an indication of China’s adjustment to the norms of the international economic order.

China’s approach is consistent with the changing nature of the WTO dispute settlement system. While the earlier approach to dispute settlement in the GATT took a much more diplomatic approach, the dispute settlement mechanism of the WTO takes a much more juridical approach.⁵⁵ The new Dispute Settlement Understanding explicitly provides that “requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts”.⁵⁶ “Thus, the active use of the WTO dispute settlement system is not in conflict with China’s policy of peaceful development;

⁵³ See, e.g., Henry Gao, “Taming the Dragon ...”, *supra*, note 38.

⁵⁴ Aggressive legalism has been defined as “a conscious strategy where a substantive set of international legal rules can be made to serve as both ‘shield’ and ‘sword’ in trade disputes among sovereign states”, Saadia M. Pekkanen, “Aggressive Legalism: The Rules of the WTO and Japan’s Emerging Trade Strategy”, *The World Economy* 24 (2001): pp. 707-737, as quoted in Henry S. Gao, “Aggressive Legalism: The East Asian Experience and Lessons for China”, in Henry Gao, Donald Lewis, eds., *China’s Participation in the WTO*, (Cameron May Publishers, November 2005), available at <http://www.worldtradelaw.net/articles/gaolegalism.pdf>, accessed September 27, 2008).

⁵⁵ Reich, Arie, *supra*, note 3.

⁵⁶ Dispute Settlement Understanding, *supra*, note 10, Article 3(10).

instead, it should be an integral part of this policy.”⁵⁷

The Auto Parts Dispute

An example of China's evolving approach to the dispute settlement process at the WTO is the “Auto Parts” case. The complaint centres on tariffs for whole vehicles and for imports of spare parts making up 60 per cent or more of the value of a final vehicle. In a complaint filed at the WTO at the end of March, the European Union and the United States claimed that China was imposing a discriminatory tariff regime on foreign car parts. Canada joined them several days later. When the case was first brought by the US and the EU in March 2006, the Chinese government expressed regret⁵⁸ but did not offer to settle the case. Rather, China proceeded to hold consultations under the DSU provisions. The two sides held consultations on this issue, but, the three powers that brought the complaint requested the WTO to establish a panel after the talks failed to make any progress. China's Ministry of Commerce expressed “regret” over the World Trade Organization's decision to launch a panel to oversee the issue,⁵⁹ but defended its duties on imported auto parts and proceeded to the Panel stage of the proceedings. When the Panel ruled against China, China indicated that it

⁵⁷ Henry S. Gao, “Aggressive Legalism ...”, *supra*, note 54, at 349.

⁵⁸ China regrets US action on auto parts (Reuters/chinadaily.com.cn), (available at <China regrets US action on auto parts(Reuters/chinadaily.com.cn)>, accessed, September 24,2008).

⁵⁹ China 'regrets' WTO auto parts decision, China Daily, 2006-10-30, (available at <http://www.chinadaily.com.cn/chinagate/doc/2006-10/30/content_719764.htm>, accessed, September 24,2008).

“respects the procedures of the WTO to solve the dispute”,⁶⁰ but disagreed with the ruling and said it reserved the right to appeal.⁶¹ Just hours before the Dispute Settlement Body was due to meet to formally adopt the ruling, China indicated that it would appeal the Panel decision to the Appellate Body.⁶² EU trade commission spokesman Peter Power said, “China is perfectly within its rights to seek an appeal. ...”⁶³

As Henry Gao indicated in his article, “Taming the Dragon: China’s Experience in the WTO Dispute Settlement System”,

All these seem to indicate that China has started to change its attitude and strategy towards the WTO dispute settlement system. In terms of the attitude, when it first joined the WTO, China had difficulty disentangling the legal issues from political and diplomatic concerns and viewed the initiation of legal disputes in the WTO as synonymous with the

⁶⁰ “WTO steps to resolve tax dispute respected”, By Diao Ying (China Daily), 2008-02-15, available at http://chinadaily.com.cn/china/2008-02/15/content_6456601.htm.

⁶¹ “China says it disagrees with WTO ruling in auto parts dispute, reserves right to appeal”, The Associated Press, Tuesday, July 22, 2008, International Herald Tribune <<http://www.ihf.com>> (accessed, September 24, 2008).

⁶² “China appeals WTO car parts ruling: spokeswoman”, Geneva (AFP) Sept 15, 2008, TerraDaily, (available at, http://www.terradaily.com/reports/China_appeals_WTO_car_parts_ruling_spokeswoman_999.html), (accessed, September 24, 2008).

⁶³ Ibid.

breakup of a diplomatic relationship. Now, however, China seems to regard WTO dispute settlement activities as nothing unusual.⁶⁴

Statements by the Chinese Government on the use of the WTO DSM

Chinese Government officials have also made statements indicating that China is prepared to make use of the WTO dispute settlement mechanism. At a press conference hosted by the State Council Information Office on May 30, 2005 to give updates on the textile issue, Mr. Bo Xilai, Minister of Commerce of the People's Republic of China, stated:

On your third question about the possibility of bringing the case to the WTO dispute settlement mechanism, let me make three points: First, the DSM is a legitimate right that China is entitled to. We will use this right when it is time to do so. Second, bilateral negotiations have advantages of them (sic) own. However, they also easily lead to a situation where each party claims to be right and no solution is possible as there is no judge. Third, sometimes one-to-one talk is less effective than a multilateral mechanism, whereby the public can judge who is right and who is wrong. ... Of course, whether and

⁶⁴ Henry Gao, "Taming the Dragon ...", *supra*, note 38, at 389.

when we will resort to the DSM is completely up to the Chinese side.⁶⁵

Further, while affirming that China prefers to resort to consultation for settlement of trade friction with its trade partners rather than to the World Trade Organization, Mr. Bo has stated, "It is a normal practice to solve some trade frictions within the framework of the WTO mechanism for dealing with trade disputes", and, "If the consultations fail, we would respect the choice of our trade partners and resort to the WTO mechanism."⁶⁶

With regard to the most recent case concerning China before the WTO, dealing with requests filed by the United States and the European Union over financial information services regulations, a spokesman of the Ministry of Commerce of China indicated that China will seriously study the requests and settle the problem under World Trade Organization (WTO) rules.⁶⁷

The Learning Curve

⁶⁵ "Transcript of Press Conference by Mr. Bo Xilai, Minister of Commerce of the People's Republic of China", May 30, 2005, <http://gr.chineseembassy.org/eng/xwtd/t200344.htm>, accessed September 24, 2008.

⁶⁶ "Minister: China prefers to solve trade friction through consultations", Monday, March 12, 2007 Posted: 01:27 BJT(1727 GMT) xinhua, available at <http://english.mofcom.gov.cn/aarticle/subject/lhsessions/lanmua/200703/20070304450630.html>, accessed September 24, 2008.

⁶⁷ "China to follow WTO rules to settle dispute", Xinhua, 2008-03-05, available at http://www.chinadaily.com.cn/china/2008-03/05/content_6507517.htm, accessed September 26, 2008.

If China is to become a more “aggressive” user of the dispute settlement mechanism, then China has to become more knowledgeable about the WTO, and gain more expertise in the use of its Dispute Settlement Mechanism. The legalised mechanism of dispute settlement in the WTO is complex and resource-demanding. One reason that, to date, China has not been involved to a significant extent in the WTO Dispute Settlement Mechanism is that China has lacked expertise and resources on WTO dispute settlement. There is a lack of expertise in China regarding the WTO rules and procedures. As a result, the government is often unable to interact with industries to determine if there are potential claims that should be brought, and the industries themselves may be unaware of their rights under the WTO rules. Even if a potential case is brought to the attention of the government, the government may have difficulty evaluating the claim, and determining how to proceed. More expertise has to be developed, both within the government and within industry.

PRC companies, now required to globalise and become internationally competitive, also need to educate themselves about China's rights to market access and not to be obstructed by trade barriers. The PRC government may need to be persuaded to take up WTO issues and be assisted in the dispute settlement forum, and also to defend cases to ensure that China and its corporate entities take their rightful place on the

international trade stage.⁶⁸

China is developing some expertise in this area, although further action is required in this regard. It may be anticipated that China will become a more active principal player in dispute settlement in the years ahead.⁶⁹ The following considers some steps which have been taken.

Participating as a Third Party in Disputes

One way in which China has gained expertise in WTO dispute settlement has been through participating as a third-party in disputes brought by other Members. China has been a frequent participant in disputes as a third party, having participated as a third party in 62 cases as of September, 2008.⁷⁰ Such participation not only allows China to present its views and protect its economic interests, but it also provides China with an opportunity to learn from other Members of the WTO, and to become more familiar with the WTO and its dispute settlement system. Participation as a third-party enhances the ability

⁶⁸ Leora Blumberg, “WTO Dispute Settlement: Implications for China and Opportunities for Hong Kong”, cover story, *Hong Kong Lawyer*, December, 2001, available at <http://www.hk-lawyer.com/2001-12/Default.htm>, accessed September 25, 2008.

⁶⁹ Davey has noted that although it is commonly suggested that Asian countries are less litigious, and therefore less likely to use a formal dispute settlement system, where an Asian country has devoted resources to improving its dispute settlement expertise, it does use the system more frequently. Davey, *supra*, note 13, at 27.

⁷⁰ WTO website, Member Information - China and the WTO, *supra*, note 28.

of China to handle its own trade disputes in the future not only by increasing knowledge of the rules of the WTO, but also knowledge of strategy and experience of litigation.

The China-WTO Dispute Settlement Mechanism Center (CWTODSMC)⁷¹ and The Shanghai WTO Affairs Consultation Center

A research centre on the World Trade Organization (WTO) dispute settlement mechanism was set up in Shanghai on May 11th, 2008. The China-WTO Dispute Settlement Mechanism Center (CWTODSMC) will offer suggestions and solutions to trade disputes for government and businesses.

"Such a research institute will help Chinese government and businesses further familiarize themselves with WTO rules and learn how to resolve disputes using the dispute settlement mechanism," said Zhang Yuejiao, one of the five counselors for the center.⁷²

The centre was jointly founded by the Shanghai Institute of Foreign Trade and the Shanghai WTO Affairs

⁷¹ "China launches first research center on WTO dispute settlement mechanism", People's Daily Online, May 12, 2008, <http://english.people.com.cn/90001/90776/90884/6408352.html>, accessed September 25, 2008.

⁷² Ibid. In November last year, Zhang was appointed by the WTO Dispute Settlement Body (DSB) as a member of the Appellate Body. She is the first Chinese judge on WTO's highest court.

airiti

Consultation Center (SCC/WTO),⁷³ a non-profit, public, non-governmental, service organization. The SCC/WTO was founded on October 26, 2000 shortly before China's accession to the World Trade Organization. The function of the centre is to provide governments, enterprises and the public with law and policy consulting and information as well as WTO-related training services, and to keep WTO members informed on the creation and enforcement of trade-related laws, regulations and policies in both Shanghai and China as a whole.

China is not a member of The Advisory Centre on WTO Law (ACWL) which was established in 2001 to provide legal advice on WTO matters to developing country members of the WTO.⁷⁴ The ACWL is independent of the WTO. It was created by an agreement separate from that establishing the WTO and has a membership different from that of the WTO. In accordance with the mandate set out in the Agreement Establishing the Advisory Centre on WTO Law,⁷⁵ the Centre has three principal functions: It provides (i) general legal advice, (ii) legal assistance in WTO dispute settlement proceedings and (iii) training in WTO dispute settlement. Fees charged by the Centre vary based on world trade shares and per capita income of Members. Hong Kong, China was one of the original developing country members, and Chinese Taipei became a member by accession in May 2004.

⁷³ www.sccwto.net.

⁷⁴ Detailed information about the operation of the Centre and its constitutive documents may be found at its website –www.acwl.ch.

⁷⁵ Available at http://www.acwl.ch/e/pdf/agreement_estab_e.pdf, accessed, October 10, 2008.

Limits on WTO Dispute Settlement Mechanism

Although the WTO DSM is an effective mechanism for enforcing or defending a member's rights under the WTO, it must be remembered that, although the WTO framework provides an expansive set of legal rules for regulating international economic trade relations among its members, it is limited in its application to rules regarding international trade in goods, under the GATT, and now, trade in services, under the GATS. Although the WTO contains rules regulating Trade Related Investment Measures, it doesn't cover the regulation generally of Foreign Investment. Disputes relating to foreign investment will have to be dealt with in a different forum, e.g., the International Centre for the Settlement of Investment Disputes (ICSID).⁷⁶ China ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention") in 1993. A fuller treatment of this topic is beyond the scope of this paper.

The application of the WTO Dispute Settlement Mechanism may also be limited by other agreements to which China is a party. For example, China has entered into a Framework Agreement on Comprehensive Economic Co-operation with ASEAN.⁷⁷ China and ASEAN have

⁷⁶ See ICSID website, <http://icsid.worldbank.org/ICSID/FrontServlet>.

⁷⁷ "Framework Agreement on Comprehensive Economic Co-operation between ASEAN and the PRC", signed by the Heads of Government/State of ASEAN Member States and China in Phnom Penh on the 4th day of November 2002, reproduced in Paul J. Davidson, editor, *Trading Arrangements in the Pacific Rim* (New York: Oceana/Oxford University Press. 1995-) (hereafter *TAPR*), Document III.B.2.a.1.

agreed that disputes arising under the Framework Agreement will be settled under the “Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People’s Republic of China”.⁷⁸ Again, a fuller treatment of this topic is beyond the scope of this paper.

Conclusion

The WTO is the principal international institution for the multilateral governance of international trade relations. The WTO framework provides the legal rules for international economic trade relations among its members, and, a mechanism for settling disputes which arise between/among its members in accordance with those rules. The WTO trading system is a “rule-oriented international trade order” which provides more stability, fairness and predictability in international trade relationships than does a power-oriented international trading system. As a member of the WTO, China is able to trade with others in a secure and predictable rules-based multilateral trading system. Importantly, China will now be able to participate in the WTO dispute settlement mechanism that is central to the success of the WTO and the multilateral trading system. Since its entry into the WTO, China has placed a strong emphasis not only on increasing trade opportunities, but also on using the dispute settlement system (DSU) in the WTO to help establish more stable and predictable trade relations with

⁷⁸ *TAPR*, Document III.B.2.a.1.3.

airiti
its partners.

China is a major international trading country and the sheer volume of imports and exports is bound to guarantee that China will have disputes with its trading partners from time to time. However, how China deals with these disputes will define the way in which China is perceived in the WTO system. It is of mutual advantage to all Members of the WTO that the system work efficiently. Members should ideally work to correctly implement their obligations under the WTO system and avoid challenges from others under the DSU, and, when challenged, should bring nonconforming behaviour into compliance as soon as possible. In order to work effectively, it is important that the system not be “clogged up” with unnecessary or frivolous disputes. Only when it is necessary to stand up for its rights should a Member aggressively assert or defend its case.

To date, China has taken a conservative approach to dispute settlement. When claims have been brought against China, China appears to have made a real effort to resolve the disputes before they needed to go to formal adjudication in the system. “From a review of China’s early experience with the WTO DSU, we can say that China is behaving well in dispute settlement and is generally playing the role of a good WTO citizen.”⁷⁹

⁷⁹ Andrew L. Stoler, “China’s Role in the World Trade Organization and the Doha Round of Multilateral Trade Negotiations”, Second World Forum on China Studies, Shanghai, China, 21-22 September 2006, available at http://www.iit.adelaide.edu.au/speech/paper_final_210906_shanghai_sass_v2_1408.pdf, accessed October 1, 2008, at 5.

China has also been constructive and conservative on the other side of dispute settlement. It has brought relatively few cases against other WTO Members. “ At least to this point in time, China appears to be a constructive user of the WTO dispute settlement system.”⁸⁰

China could take a more legalized approach to trade disputes as it develops a greater comfort level with the WTO’s dispute settlement mechanism and as it comes to see that mechanism as an effective way for more vigorously supporting its international trade practices. However, “[w]hile China as well as any other WTO member is legally entitled to make full use of the WTO dispute settlement system an aggressive defensive policy and over emphasis on legal rights could well push the multi-lateral trading system into (sic) the wrong direction”⁸¹

On the other hand, “other WTO members might discover that they can no longer rely on an over-aggressive litigation strategy against China in the WTO: when the WTO dispute settlement system is used too frequently, China might just snap at one point and decide to defend these cases rigorously, regardless of their legal merits”⁸²

If China is to become an effective user of the dispute settlement mechanism, then China has to become more knowledgeable about the WTO, and gain more expertise in the use of the WTO Dispute Settlement Mechanism.

⁸⁰ Ibid., at 9.

⁸¹ Henry Gao, “Taming the Dragon ...”, supra, note 38, at 391.

⁸² Ibid.

Steps that China has taken to achieve this goal have been discussed above. China should continue in this vein.

In sum, the WTO dispute settlement mechanism can be utilized by China either offensively or defensively. Although China may become a more “aggressive” user of the DSU, it should ensure that it remains a “responsible” user of the DSU, in order to build a good image of respecting the WTO rules and the rule of law.