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CHINA AND THE WTO DISPUTE SETTLEMENT MECHANISM

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CHINA AND THE WTO DISPUTE SETTLEMENT MECHANISM

by

Jacques H. J. Bourgeois ♦*

Abstract:

This working paper elaborates on China's approach towards and use of the World Trade Organisation (WTO) Dispute Settlement Mechanism (DSM). It builds on statistical data and existing opinions in the literature to demonstrate the evolution of China's behaviour as a participant in the DSM. It also endeavours however to take the analysis one step further and to determine whether China's adherence to the DSM may be less genuine than this of the other WTO Members, notably in comparison to its main trading partners – the European Union (EU) and the United States of America (US). To this end, an examination of China's arguments put forward as a respondent in WTO proceedings is undertaken in search of suggested restrictive interpretations of its obligations under the WTO Agreement. The paper goes on and poses the question whether indeed such attitude could be characterised as systematic and whether traditional sovereignty-bound considerations underlie it. Conclusions are drawn as to the existing balance between national regulatory autonomy and global governance in the WTO legal system, the importance of which may go beyond China's economic and political context.

Keywords: China; World Trade Organisation; Dispute Settlement Mechanism.

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A. INTRODUCTION

One may wonder about how the topic of this working paper fits in the general theme of a conference on alternative dispute resolution models.

First, the WTO DSM, laid down in the Dispute Settlement Understanding (DSU) contained in Annex 2 of the WTO Agreement¹, has some characteristics that set it apart from classical international dispute resolution models. It is a compulsory and binding system: any dispute between WTO Members about any of the covered agreements can only be solved by recourse to the DSU². Moreover, a WTO Member against whom another WTO Member initiates a dispute settlement proceeding has to accept this and the DSU provides for a number of rules that prevent the respondent WTO Member from evading the proceeding³. In addition, the final rulings and recommendations of a dispute settlement panel are binding on the parties. In theory the WTO political organs can review such rulings and recommendations but only a consensus of these political organs to reject the panel or the Appellate Body (AB) report prevent such reports from becoming binding⁴. In practice, so far no such report has been rejected. Finally, the DSU contains detailed rules on surveillance of implementation of recommendations and rulings issued by panels and the AB⁵ and binding prescriptions on remedies^{6,7}.

Second, in view of these characteristics can conclusions be drawn from a comparison of China's approach towards the WTO DSM and China's approach towards alternative dispute resolution models? When China ratified the Vienna Convention on the Law of Treaties (VCLT) in 1997, it entered a reservation to its Article 66 on the submission of disputes to the International Court of Justice (ICJ).

It has since entered reservations on the dispute settlement provisions of all its international agreements.⁸ The only instance in which China accepted an international judicial body jurisdiction prior to the WTO, was its accession to the International Centre for Settlement of Investment Disputes

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¹ Marrakesh Agreement Establishing the World Trade Organization, available at: http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm, last visited 08.12.2011

² DSU, Article 23(1).

³ E.g. DSU, Articles 6,7 and 8.

⁴ DSU, Articles 16(4) and 17(14).

⁵ DSU, Article 21

⁶ In the absence of withdrawal of the measure found to be contrary to a WTO obligation, compensation and suspension of concessions (DSU, Article 22)

⁷ Or to use still other qualifications: "contentious, compulsory and exclusive" – J. Bourgeois and R. Soopramanien, "The World Trade Organisation Dispute Settlement System: Embedded in Public International Law?", in: C. Baudenbacher (ed.), *Dispute Resolution*, GLP, Stuttgart (2009), at 315; featuring "four automaticities: automatic jurisdiction, automatic acceptance of panel report, automatic acceptance of Appellate Body reports, and automatic authorization of retaliation" - S. Wenhua, "Redefining the Chinese concept of sovereignty", in: W. Gungwu and X. Yongnian, *China and the New International Order*, Routledge, Oxon (2008) 53, at 66.

⁸ M. D. Harpaz, "Sense and Sensibilities of China and WTO Dispute Settlement", 44 *Journal of World Trade*, 6 (2010), at 1166.

(ICSID) in 1993 whose jurisdiction, however, covers a given dispute subject to prior consent from both parties to it⁹. Its record of non-participating in dispute resolution is confirmed by the fact that so far China has not initiated any proceedings before the Centre and it was only in May 2011 that the ICSID registered what is believed to be the first ever investment treaty claim filed against China¹⁰.

It would probably be wrong to draw from China's acceptance of the WTO DSM conclusions regarding China's approach towards (other) alternative dispute resolution models. When acceding to the WTO, China could not pick and choose. It was bound to accept the whole of the WTO Agreement including the DSU.¹¹

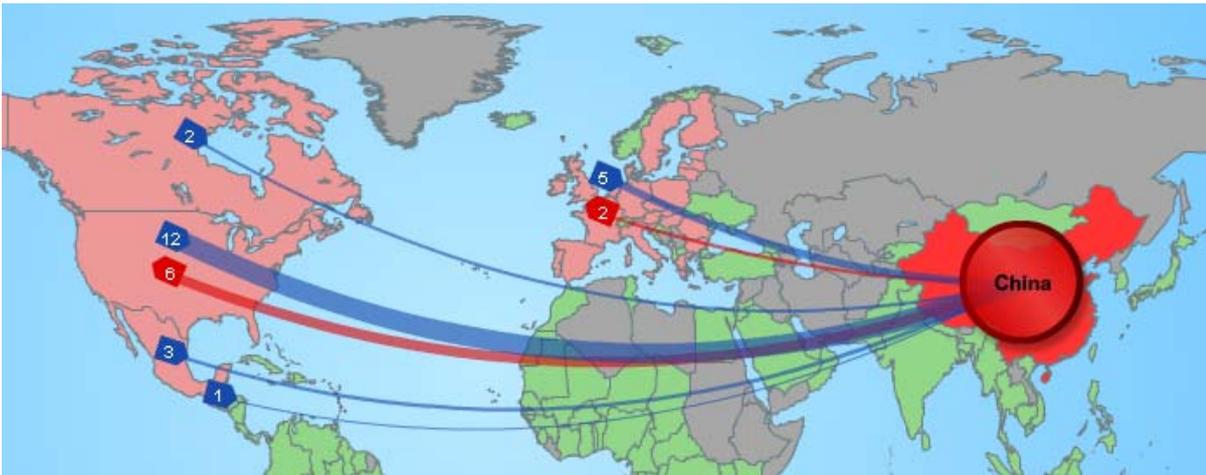
However, it appears worthwhile to attempt to verify to what extent China has itself made use of the WTO DSM how it acted as a respondent. This working paper presents first some facts and figures (Section B), it then looks at China's behaviour in concrete cases and the different interpretations given to it in the literature (Section C). In a further section the draft report examines the positions taken by China on more systemic issues (Section D).

⁹ Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States

¹⁰ The case, *Ekras Berhad v. People's Republic of China* (ICSID Case No. ARB/11/15), involves a dispute in the sphere of arts and cultural facilities and arises under the Agreement Between the Government of the People's Republic of China and the Government of Malaysia Concerning the Reciprocal Encouragement and Protection of Investments.

¹¹ Marakesh Agreement, Article XII(1)

B. FACTS & FIGURES



I. PARTICIPATION OF CHINA IN THE WTO DISPUTE SETTLEMENT

Statistical data show that the percentage of disputes initiated by a WTO member is proportional to its amount of trade and the number of its trading partners, as well as to its market access interest in a particular case.¹² In 2009 China overtook Germany to become the world's largest exporter¹³ and foreign direct investment (FDI) in the country has increased considerably in the last decade reaching \$185 billion in 2010. It is the second largest recipient of FDI globally.¹⁴

Judging by these criteria, a surge of cases was expected after accession of China to the WTO in 2001, both by and against China. Some even expressed concerns that the system would crush under this additional workload.¹⁵ Non-compliance with AB rulings on the part of China was another fear.¹⁶ So far as a complainant in the WTO DSM, China has filed 8 cases, 2 of which against the EU and another 6 against the US, focusing mainly on trade remedies, border issues. 7 of them have been initiated in the last 5 years with an average of 1 per year (only in 2009 3 requests for consultations were made). In comparison with China's leading trade partners, the EU has commenced 9 proceedings during the same period and the US – 14.¹⁷

¹² C. P. Bown, "China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement", *NBER Working Paper Series*, Vol. w13349, 2007 (revised version September 2008), at 33, footnote 43

¹³ Available at: <http://www.economist.com/node/15502811>, last visited 16.11.2011

¹⁴ Available at: <http://greyhill.com/fdi-by-country/>, last visited 16.11.2011

¹⁵ H. Gao, "Taming the Dragon: China's Experience in the WTO Dispute Settlement System", *Legal Issues of Economic Integration*, 34, 4 (2007)

¹⁶ D. Z. Cass, "China and the 'constitutionalization' of international trade law", in: D. Z. Cass (ed.), *China and the World Trading System: Entering the New Millennium*, at 45

¹⁷ Available at: <http://www.worldtradelaw.net/dsc/database/complaintscomplainant.asp>, last visited 16.11.2011

Interestingly, in a classification of WTO disputes by income level of the parties' economies¹⁸, China being classified as a 'lower middle income' country, it has participated as a complainant in 8 out of a total of 58 disputes, initiated in its group but has been challenged in 23 out of 67 proceedings, followed by Turkey – respondent in 8 cases only.¹⁹ That is, in a group of more active complainants than respondents, China displays a contrasting tendency. It should also be noted however that 3 of the 5 AB reports (ABR) from this year concern initial proceedings commenced by China.²⁰ To compare, in 2008 there were 10 notices of appeal filed by WTO Members, in 2009 and 2010 – 3 and in 2011 – 6.²¹

China has been a respondent in a total of 23 cases concerning 14 different issues. 2 of those were initiated by Canada, 5 by the EU and 12 by the US. While it has yet to commence a dispute against another developing economy, disputes filed against China have included challenges by developing economies like Mexico (3 times) and Guatemala (once). In parallel, since 2001 the EU has been confronted 40 times within the WTO DSM, while the complaints against the US for the same period amount to 63.²² China and the US have filed against each other a total of 18 disputes – 12 of them filed by the US and 6 – by China. 15 of these cases have been initiated since 2007, taking also into consideration that since China's accession in 2001 the US has filed a total of 29 cases against all WTO Members. Thus, the majority of China's complaints have been filed against the US and the latter has initiated almost half of its proceedings against China. For the period 2002-2009 the US requested 3.2 consultations for every trillion dollars of two-way merchandise trade flow with China and just 1.2 consultations with the world as a whole. At the same time China's complaint intensity, relative to merchandise trade with the US, is below average for all Members that lodged complaints against it. China has requested 2.7 consultations for every trillion dollars of two-way merchandise trade flow with the US and 0.5 with the world as a whole (noting that it has only requested consultations with the US and the EU).²³

¹⁸ Classified as "high income"; "upper middle income"; "lower middle income"; and "low income" countries and based on data and terminology from the World Bank. Available at:

http://www.worldtradelaw.net/dsc/database/complaintsclassification.asp?f1001=&f1002=&f1003=&f1004=turkey&f1005=&datefieldstart=&datefieldstarty=0&datefieldstartm=0&datefieldstartd=0&datefieldd=&datefielddy=0&datefielddm=0&datefieldddd=0&backlink=http%3A%2F%2Fwww.worldtradelaw.net%2Fdsc%2Fdatabase%2Fcomplaintsclassification.asp&form1_btn5=Search&id=&form1_mode=1, last visited 16.11.2011

¹⁹ Available at:

http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm?year=none&subject=none&agreement=none&member1=CHN&member2=none&complainant1=true&complainant2=false&respondent1=false&respondent2=false&thirdparty1=false&thirdparty2=false#results, last visited 16.11.2011

²⁰ *Ibid.*

²¹ Available at: <http://www.worldtradelaw.net/dsc/database/noticecount.asp>, last visited 16.11.2011

²² Available at: <http://www.worldtradelaw.net/dsc/database/complaintsrespondent.asp>, last visited 16.11.2011

²³ G. C. Hufbauer and J. C. Woollacott, "Trade Disputes between China and the United States: Growing Pains so Far, Worse ahead?", in: *Working Paper Series*, WP 10-17 (2010), Peterson Institute of International Economics, at 6-7 (some figures updated)

Insofar as trade remedies are concerned, 2010 statistics reveal that since China joined the WTO, the US has conducted 71 AD investigations against Chinese exporters and has imposed AD duties in 61 of them. China is thus the most frequent target of the US, followed by Korea with only 9 cases. Similar statistics, though with lower frequency apply to the US imposition of countervailing duties (CVD). China has however challenged just 4 of these AD duties in WTO proceedings. For the same period it imposed AD duties in 22 cases against the US and a similar number has been imposed on other countries. Moreover, China has investigated only 3 and imposed duties in only 2 CVD cases, concerning US exports of steel and chicken products.²⁴ Until recently the US had not challenged any of those measures but presently already two cases are pending, notably concerning both instances of CVD imposed on US products by China²⁵.

As to safeguard measures, since 2001 the US has implemented only 1 global safeguard (subsequently challenged in the WTO by several Members, including China²⁶) but has conducted 7 China-specific safeguard investigations, finding affirmatively in 5 instances. Only one of those cases was an action taken by the US president and subsequently brought before the WTO tribunals by China²⁷. Finally, between January 2002 and June 2010 255 investigations in the field of intellectual property rights were initiated by the US, 104 of which cited China as a respondent. In 2009 the US Customs and Border Protection seized \$ 1 in goods for every \$ 1,874 worth of goods imported from China and \$ 1 in goods for every \$ 1,174 imported from Hong Kong, whereas in a recent study Hong Kong was identified as the leading source of counterfeited goods trade relative to the volume of exports and China only occupied 15th place.²⁸

The EU has lodged 5 complaints against China and so with slightly higher merchandise inflows, the EU complaint intensity with China is much lower than the US one.²⁹ In addition, a framework for negotiation-through-dialogue has been established in the form of sectoral dialogues. At the same time, the EU has made explicit its determination to use more formal legal channels to effect dispute resolution in the event of failure to reach a negotiated settlement of outstanding issues.³⁰

²⁴ *Ibid.*, at 21-25

²⁵ See *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the US* WT/DS414 and *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the US* WT/DS427.

²⁶ See *US — Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248-9, 251-4, 258-9/AB/R, from 10 November 2003.

²⁷ See *US — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R from 05 September 2011.

²⁸ Hufbauer & Woollacott, *op. cit.*, at 21

²⁹ *Ibid.*, at 7-8

³⁰ In a document entitled “EU-China Trade and Investment: Competition and Partnership” the EU has stated with regard to WTO dispute settlement: “Where trade irritants arise between China and the EU, the EU will always seek to resolve them through dialogue and negotiation. However, where this fails, the Commission will use the WTO dispute settlement system to resolve trade issues with China and to ensure compliance with multilaterally agreed rules and obligations. This is not a

However, China is the major target also of EU's trade defence investigations and the EU has not hesitated to use the DSM to engage China over specific trade concerns.³¹

II. OBSERVATIONS

Most of China's disputes as a complainant concern trade remedies but in light of the frequency with which WTO Members have challenged foreign anti-dumping (AD) measures, the number of disputes is seen by some as strikingly small, taking account of the number of AD measures China's exporters have been subjected to.³² China has also not taken the matter into its own hands – use of AD has been limited and evenly-concentrated.³³ Thus, although recent complaints illustrate that China is willing to resort to the WTO DSM if bilateral negotiations do not provide satisfaction, it still remains much less active as a complainant than other large developing countries, such as Brazil or India.³⁴

As a respondent, China has been frequently involved in the WTO dispute settlement and while initially the cases concerned mainly behind-the-border measures, a clear tendency has recently emerged from both the EU and the US to challenge China's AD and CVD measures.³⁵ In Section D the paper will examine in more detail China's strategy as a respondent in particular disputes and attempt to draw conclusions as to its attitude towards the DSM.

question of replacing cooperation with confrontation but of creating a sound relationship based on objective application of agreed multilateral rules." Available at: http://trade.ec.europa.eu/doclib/docs/2006/november/tradoc_131234.pdf

³¹ K. Qingjiang, "Trade Disputes between China and the EU", in: *East Asian Policy* 1, 2 (2008), at 86 and 89

³² Bown, *op. cit.*, at 34

³³ *Ibid.*, at 35

³⁴ H. Liyu and H. Gao, "China's experience in utilizing the WTO Dispute Settlement Mechanism", in: G.C. Shaffer, R. Meléndez-Ortiz (eds.), *Dispute Settlement at the WTO. The Developing Country Experience* (Cambridge University Press, 2011), at 159

³⁵ See *China — Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the EU* WT/DS425 and *China — Broiler Products (US)* WT/DS427

C. CHINA'S BEHAVIOUR AS A MEMBER OF THE WTO

The first question to ask is how exactly the aforementioned facts and figures are to be interpreted within the WTO legal and political context and whether China's attitude towards the WTO DSM appears to be one of an average new Member, given the circumstances of its accession and its economy, or whether it is indeed avoiding formal WTO dispute settlement.

Non-compliance with Panel and AB rulings was not a viable option for China, even upon the assumption that after its accession it still adhered to the traditional policy of not recognizing binding international dispute resolution, as this would go against the country's political, economic or strategic interests in the WTO³⁶. Equally debateable is however to what extent China broadly used, as expected by many authors, the possibilities to appeal under the DSU or took advantage of the uncertainties relating to the DSU's interpretation, a conduct hardly untypical among WTO Members.³⁷

I. TYPICAL BEHAVIOUR

According to one view, taking the *Auto parts*³⁸ case as a turning point in China's attitude, the country has started to demonstrate faith in public law and international rules "at the expense of its sovereignty, historically one of its most sacred policy goals"³⁹. According to a socialisation hypothesis, China's legal culture and traditional foreign policy of avoiding binding international adjudication is perceived as changing through the exposure to the WTO dispute settlement.⁴⁰ Some claim that not only is China realising that its interests cannot be effectively protected through compromise only, but that a change in mentality among Chinese decision-makers has occurred: they no longer see WTO litigation as a political defeat. A parallel is drawn even with the EU integration literature as providing guidance to the process of identity formation.⁴¹ Moreover, it is claimed that the Chinese authorities clearly view the WTO dispute settlement as a legitimate means for challenging foreign trade barriers and publicly express disapproval of other Members' infringements.⁴²

Gao also views the WTO as an example of China's readiness to accept certain limitations to its sovereignty and embrace a compulsory dispute settlement. He considers that China's participation in the process of trade negotiation and trade policy review has been subject to severe constraints on its accession.

³⁶ D. Cass (*op. cit.* at 45) suggests that a refusal to comply would lead to other Members' reluctance to bargain trade concessions in China in subsequent negotiation rounds

³⁷ *Ibid.*

³⁸ *China — Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R of 15 December 2008

³⁹ Harpaz, *op. cit.*, at 1156

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, at 1161

⁴² *Ibid.*, at 1176

However, in the area of dispute settlement no restriction was imposed to it from the very beginning.⁴³ It would thus seem natural for China to endeavour asserting its rights through that system and softening the negative impact of its accession terms through interpretation in WTO dispute settlement proceedings. 5 out of 6 cases filed since 2008 aim at changing the terms of China's Accession Protocol (AP). The author suggests that insofar as the panel and the AB have a traditionally critical stance towards trade remedies, it is plausible that the unclear terms in the AP would be interpreted in a restrictive manner. These arguments support a thesis that China has made a successful transition to a WTO Member using the DSM increasingly skilfully and more confidently.⁴⁴ While this might be true for earlier cases⁴⁵, it should also be noted that the two latest rulings pursuant China's challenges – the ABR in *US – Tyres*⁴⁶ and the Panel Report in *EU – Footwear*⁴⁷ – largely support the interpretation of the respondents.

The conclusions drawn are that in view of its overall performance and experience, China's attitude towards the WTO dispute settlement is typical for an average large WTO Member. A further argument is that in terms of issues rather than number of cases China's defensive and offensive stances are balanced (an assessment made in mid 2010).⁴⁸ It is also argued, in view of its recent accession to the WTO and inexperience of international dispute settlement, that it is unfair to judge China's performance only in terms of trade volume and economic size, and that the country is gradually developing a more assertive attitude.⁴⁹ China is even described as having undergone a successful transition from a passive rule taker to an active rule maker, advancing its interests with sophistication and confidence through the WTO litigation system. The prediction is that an increasing amount of claims will follow.⁵⁰

⁴³ H. Gao, "China in the WTO Dispute Settlement System: From Passive Rule-Taker to Active Rule-Maker?", submitted to International Centre for Trade and Sustainable Development, available at: <http://ictsd.org/downloads/2011/07/ictsd-gao-paper.pdf>, last visited 16.11.2011, at 1

⁴⁴ *Ibid.*, at 5-6

⁴⁵ See *US – Anti-Dumping and Countervailing Duties* WT/DS379/AB/R; *US – Poultry* WT/DS392/R ; *EC – Fasteners* WT/DS397/AB/R

⁴⁶ *US – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China* WT/DS399/AB/R from 5 September 2011. The AB upheld the Panel's finding that the US did not act inconsistently with its obligations under Section 16 of China's AP, which allows other WTO Members to impose safeguard measures on imports from China alone when such imports are "increasing rapidly" so as to be a "significant cause" of material injury to the domestic industry.

⁴⁷ *EU – Anti-Dumping Measures on Certain Footwear from China* WT/DS405/R from 28 October 2011. The Panel found that Article 9(5) of the Basic AD Regulation was inconsistent with the EU's WTO obligations, and that the EU had acted inconsistently with the AD Agreement in some aspects of the original investigation and expiry review, but rejected the bulk of China's specific claims of violation in connection with the original investigation and expiry review, and the resulting Definitive and Review Regulations.

⁴⁸ W. Ji and C. Huang, "China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective", in: *Journal of World Trade* 45, 1 (2011), at 30

⁴⁹ *Ibid.*

⁵⁰ Gao, "From passive rule-taker...", *op. cit.*, at 6

II. OBJECTIVELY JUSTIFIED BEHAVIOUR

Undoubtedly, at least during the first years of its accession, China preferred to avoid formal WTO disputes as a complainant and as a respondent and expressed clear preference for settling cases through “out-of-court” negotiation. The statistics still show a relatively low participation as a complainant and even authors that defend China’s commitment to the WTO dispute settlement system express doubts whether its attitude towards binding international adjudication has changed and consider it might remain an exception.⁵¹ Different arguments have been adduced to justify China’s attitude, involving a case-by-case analysis or putting the disputes into a broader economic, bilateral relations’ context.⁵²

China’s culture embracing the Confucian values appears to be an important factor, since litigation is traditionally equated with coercion and seen as a last resort option which destroys social relationships. Failure to come to a successful resolution through informal means implies that the parties are not able to honourably settle their dispute. Particular attention has been given in the literature even to the drafting of international arbitration clauses in view of ensuring neutral resolution of disputes and goodwill. It remains however that China has participated in very few genuine international arbitration proceedings.⁵³

In at least two cases in 2004 and 2005, concerning coke and draft linerboard, China yielded to the demands of the EU and the US when they threatened to bring the matter to the WTO.⁵⁴ While this is often explained by China’s traditional partiality for mediation and avoidance of international dispute settlement, it is also argued⁵⁵ that this culture has limited bearing on China’s attitude towards WTO dispute settlement since it could not amount to “unilateral concession or self-surrender” and has already made place for the rule of law in China’s international relations. But even if accepting “a latent dispute avoidance preference in the Chinese approach to trade conflicts”, those cases are argued to be strategically and wisely kept away from adjudication. For example, the settlement with the EU in the coke export quota case purportedly resulted in a 5-year effective delay of the EU’s systematic challenge of China’s export regulatory regime of raw materials.⁵⁶

⁵¹ Ji & Huang, *op.cit.*, at 37

¹*ibid.*, at 33-35

⁵³ A. J. Farina, "Talking Disputes Into Harmony" China Approaches International Commercial Arbitration, in: *American University International Law Review* 4, 1 (1989), at 157

⁵⁴ Harpaz, *op. cit.*, at 1171

⁵⁵ Ji & Huang, *op.cit.*, at 35

⁵⁶ *Ibid.*

A more cautious view is expressed by Gao in applying the aggressive legalism theory, i.e. the active, strategic use of the WTO substantive rules to serve both as ‘shield’ and ‘sword’ in trade disputes. He compares China’s early experience in the WTO DSM to Japan and Korea’s attitude and finds a clear reluctance of China to make use of the DSM. Referring to the coke case, he notes that it was the EU’s fear of losing essential coke supplies for its domestic industries that prompted its attack against China’s export quotas, and that the latter would have had sound legal arguments in case the dispute had gone to the WTO.⁵⁷ However, China’s future attitude towards the DSM is seen as dependent upon rather objective factors – proper understanding of the dispute settlement system, improvement and the latter itself, availability of expertise in China and its trade surplus.⁵⁸

A central issue around which the question revolves is China’s traditional view on national sovereignty. It is described as one of its most sacred foreign policy goals⁵⁹ and accepting the binding nature of the WTO DSM is in itself a considerable departure from its former model of avoiding international judicial adjudication. Another factor may be the bureaucratic decision-making process and the caution of the Chinese government which leads it to avoid taking definitive positions but does not necessarily amount to reluctance to litigate.

III. RELATIONSHIP WITH THE EU AND THE US

It might seem strange that complaints from China have been brought only against the US and EU, particularly because developing countries like India and Argentina have also frequently applied AD and CVD measures to Chinese products. This could be explained by the non-comparable economic importance of the US and EU markets, as well as by the common interests and support that developing countries share⁶⁰. One may nonetheless wonder whether avoidance of disputes with WTO Members that have not yet challenged it in the WTO DSM, shows excessive caution on the part of China.

As of 2009, both the volume and imbalance of US merchandise trade with China had increased dramatically. Although in 2007 it was overtaken by the EU as China’s number one export destination, the US still remains by far the largest single-country destination for Chinese merchandise. Both countries have also invested directly in each other’s economies. The great majority of the cumulated historical trade flows between them have been governed by the terms of the WTO legal framework.⁶¹ The figures in Section B clearly outline a very aggressive line of conduct in the field of trade remedies on the part of the US which so far has not been entirely reciprocated by China.

⁵⁷ H. Gao, “Aggressive Legalism: The East Asian Experience and Lessons for China”, in: H. Gao and D. Lewis (eds.), *China’s Participation in the WTO*, Cameron May (2005), at 335 and 348

⁵⁸ *Ibid.*, at 348-351

⁵⁹ Harpaz, *op.cit.*, at 1166

⁶⁰ Ji & Huang, *op.cit.*, at 32

⁶¹ Hufbauer & Woollacott, *op. cit.*, at 2-3

Until 2010 proceedings initiated by the EU and the US were exclusively focused on “behind the border” measures. But since then, both Members have launched complaints against China’s AD and CVD measures. Conversely, China’s complaints remain to date entirely focused on US and EU border measures. Reliance on border protection may be understandable for the EU and the US, seeking to protect mature domestic industries, rather than to support the growth of nascent ones. However, they also have “behind the border” measures, a number of which may be motivated by a desire to guard certain sectors of the economy or may have the effect of hindering import trade. An example of border measures is the reclassification by the US Customs and Border Protection of certain solar panels under a dutiable tariff heading, contrary even to the US calls for free trade in environmental goods and services during the Doha Round. Having in mind the jurisprudence of the AB as to tariff reclassification⁶² and the trade interests of China in the field⁶³, one may wonder about the reasons underlying the absence of proceedings brought to date.⁶⁴

Insofar as EU measures are concerned, potential areas of conflict could be the EU technical/sanitary and phytosanitary (SPS) standards/environmental criteria, that have a negative impact on EU-bound Chinese exports. From a Chinese point of view, EU standards are either complex or opaque, or not necessarily scientifically based.⁶⁵ Again, in view of the strict approach adopted by the AB in applying the ‘precautionary principle’ in the SPS Agreement, possible claims could be brought successfully.

China’s large trade surpluses in relation to the EU and the US are seen as a major reason mitigating China’s “political toughness and enthusiasm” for asserting its rights through the DSM. A parallel is drawn in this respect with Japan (in relation to the EU and the US), Chinese Taipei and Korea (in relation to China).⁶⁶ Furthermore, both the EU and the US have claimed that the exchange rate of China’s currency is unfairly helping it gain shares in global markets and should either be raised or left to the market forces. There is a contention that the undervaluation of the renminbi violates Article XV(4) of the GATT and the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).⁶⁷ The latter might also be an argument against more aggressive attitude in bringing claims before the WTO tribunals but authors have noted that such claims are in fact likely to be rejected⁶⁸.

⁶² See for example *EC — Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R from 12 September 2005

⁶³ In 2009, the US imported \$ 0.1 billion of electric motors and generators (under the dutiable heading) from China, which account for 21.1 % of the \$ 0.7 billion Chinese exports of these devices.

⁶⁴ Hufbauer & Woollacott, *op. cit.*, at 35-36

⁶⁵ K. Qingjiang, *op. cit.*, at 88

⁶⁶ Ji & Huang, *op. cit.*, at 34

⁶⁷ K. Qingjiang, *op. cit.*, at 86

⁶⁸ *Ibid.*

However, a recent paper⁶⁹ suggests an interesting analysis of the current undervaluation of the Chinese currency which might render this trade-surpluses justification at the very least debatable. After examining China's export statistics, the author concludes that the almost exclusive concern traditionally attached to the maximisation of export earnings does not reflect the reality of the international economy. In the case of China for example, 60% of its exports are operated by 'foreign-invested enterprises', more than half of them involve 'processing trade'⁷⁰ and imports have not been substantially lower than them.⁷¹ Also, while admittedly a country with a savings surplus would build up claims on the rest of the world, the imbalances between the US and China have narrowed pursuant to the financial crisis, plus China's savings ratio is dependent on domestic specificities of its financial system.⁷² Finally, it is suggested that complaints from the US and the EU about some of China's policies (such as IPR violations, discrimination and protection against foreign firms) should lie on a different plane.⁷³

At any rate, authors suggest that the political friction between the US and China is unlikely to subside unless considerable appreciation of the renminbi is allowed. And if trade disputes of the sort that has already arisen before the WTO tribunals can be managed if each country respects potential adverse decisions, more troublesome are sweeping measures with the potential to isolate entire parts of the economy from foreign competition, such as the 'Buy American' provisions in the American Recovery and Reinvestment Act (February 2009) or the US Currency Bill which passed the Senate in October 2011.⁷⁴ It remains to be seen whether the channelling of such measures into targeted policies will be challenged before the WTO tribunals by either Member and what the effect of an adverse judgement would be.

IV. OBSERVATIONS

Wu argues that China has become a strong stakeholder in the WTO and its membership could be beneficial to the world but on the condition that its relationships with the established WTO powers are grounded in the rules-based multilateral system. He suggests that while the US and the EU should not abuse China's non-reciprocal concessions and should treat it as an equal partner, China should react by discontinuing its strategies of regionalism and unilateralism. He appeals for fairness and equality in

⁶⁹ S. Plasschaert, "Is the Renminbi Undervalued", European Centre for International Political Economy Working Paper, No. 02/2011, available at: <http://www.ecipe.org/publications/ecipe-working-papers/is-the-renminbi-undervalued-the-myths-of-china2019s-trade-surplus-and-global-imbalances/PDF>, last visited: 21.11.2011

⁷⁰ In 'processing trade', components and other intermediaries are imported from abroad, prior to their further elaboration and finishing.

⁷¹ *Ibid.*, at 5-9

⁷² *Ibid.*, at 12

⁷³ *Ibid.*, at 15

⁷⁴ Hufbauer & Woollacott, *op. cit.*, at 37

China–US and China–EU bilateral relations as the only one politically and economically sustainable in the long term.⁷⁵

The more pragmatic views however find other arguments to explain China’s attitude towards the WTO dispute settlement. It could be reasoned that the driving force behind it is not China’s changing approach towards international dispute resolution but rather its desire to balance against the US power.⁷⁶

It remains that since May 2010 five new dispute settlement proceedings have been initiated against China, while it has brought only one. If China’s inactivity could have been initially due to the uncertainty surrounding its non-market economy status (i.e. discretion given to other Members in constructing dumping margins for example), the AB has endeavoured to apply to it a relatively strict and balanced interpretation. In addition, it seems that the benefits for the real economy from China’s own cases have not been great and it needs to engage in more and winning cases in order to improve domestic recognition for the importance of the WTO legal framework.⁷⁷

⁷⁵ X. Wu, “No Longer Outside, Not Yet Equal: Rethinking China’s Membership in the World Trade Organization”, in: *Chinese Journal of International Law* (2011), at 268

⁷⁶ Harpaz, *op.cit.*, at 1158

⁷⁷ Ji & Huang, *op.cit.*, at 31

D. WHETHER CHINA'S ADHERENCE TO THE WTO DSM IS GENUINE

The proper question is whether China's adherence to the WTO is less genuine than that of the other WTO Members. If reasonable doubt could be raised about the reasons underlying China's approach towards the dispute resolution system of the WTO, a question arises whether its adherence to the DSM is genuine or if it has rather been accepted grudgingly. In the latter case it would only be natural for China to be pushing for a narrow interpretation of the WTO Agreement and its commitments under it. An ancillary issue to verify is whether, if China is defending a narrow interpretation, this amounts to a systemic attitude and not just an ordinary course of defence, thus attempting to approximate the WTO DSM to alternative dispute resolution.

I. PREMISES OF THE QUESTION

There is an obvious tension between the binding nature of the DSB rulings and the objective assessment standard of review adopted by the AB⁷⁸, on the one hand, and China's insistence on sovereignty and its wish to exclude certain state or local government measures from the scope of judicial review, on the other. It has been noted for example that some of China's trade-restrictive sanitary measures might not prove scientifically justified.⁷⁹

Does part of the explanation lie in the important role played in China by arbitration, particularly in resolving disputes with foreign investors⁸⁰? As opposed to adversarial proceedings, it keeps many procedural and substantive factors within the parties' control: they may negotiate the forum, the procedural rules, the arbitrators, often even the substantive law used. The Chinese find arbitration especially appealing because the rule of law need not be followed strictly but may be substituted by other norms, including morality. The arbitrators are not bound by precedent and can decide the issue on the equities of the particular case.⁸¹

Further doubts are raised by certain authors elaborating on the Chinese understanding of judicial review and independence. Judicial independence is a concept subjected to the ideological understanding of the society. In the Western sense it is grounded upon the notion of liberalism – which sees law as neutral and above everything. By contrast, in China the law is viewed as an instrument that helps the communist party leadership in the construction of the ideal society; thus, judges' fidelity to the law

⁷⁸ EC – Measures affecting Meat and Meat Products (Hormones) WT/DS26/AB/R from 13 February 1998.

⁷⁹ Cass, *op. cit.*, at 49-50

⁸⁰ R. Yu, "Dispute Resolution in the People's Republic of China" (1996), available at: <http://raymondyu.net/pub/papers/dispute.html>, last visited 18.11.2011

⁸¹ Farina, *op. cit.*, at 155-156

must not subvert their loyalty to the party leadership.⁸² It has been suggested that there is not likely to be any change while the present political climate persists.⁸³

Moreover, the current Chinese constitution seems to reserve the power of its interpretation, enforcement and amendment to the legislator⁸⁴ and concerns have been raised with regard to the powers of constitutional supervision by the Standing Committee of the NPC, realised, among others, through inspecting the implementation of selected laws and supervising the work of the administrative and judicial organs.⁸⁵ Hence the attempt by some local legislatures to control individual cases before the judiciary.⁸⁶

Indeed concerns have been raised about possible idiosyncratic interpretations of key provisions of the WTO Agreement by China. For instance, China, notwithstanding the fears of some WTO Members, has stated that it would make ‘full use’ of the balance-of-payments provision and would “decide whether to apply and on which conditions to apply the developing country provisions [of the SCM] in the light of its own conditions and needs”.⁸⁷

II. CHINA’S ARGUMENTS AS A RESPONDENT IN WTO PROCEEDINGS

An examination of China’s submissions in its capacity of a respondent in dispute settlement proceedings could reveal its attitude towards the WTO DSM. In the following sub-section three recent cases will be analysed, identifying interpretations put forward by China narrowing the scope of its obligations under the WTO Agreement.

1. China – Intellectual Property Rights⁸⁸

The case was a follow-up of an ancient controversy between the US and China concerning IPRs protection in China. After its accession to the WTO bilateral negotiations were held on the matter. Pending such negotiations the US initiated a WTO dispute settlement proceeding, probably as a result of internal political pressure. China reacted with much displeasure and freezing of the bilateral

⁸² The author cites: “The practice in recent years is apparently that the courts still receive instructions from relevant party authorities regarding cases which are regarded as ‘important’, ‘difficult’ or politically sensitive, sometimes because the courts seek such instructions themselves in order to avoid any suspicion that they are not obeying the fundamental principle of party leadership, and sometimes because the party authorities seek to intervene in matters they consider crucial.”

⁸³ R. Yu, *op. cit.*

⁸⁴ J. Chen, “Constitutional Judicialization and Popular Constitutionalism in China: Are we there yet?”, in: G. Yu (ed.), *The Development of the Chinese Legal System: Change and Challenges*, Routledge, Oxon (2011), at 4. The author states that in practice, there are no mechanisms for enforcement and supervision, interpretations of the Constitution have been rare and all amendments have been proposed by the Party, none of which has ever been rejected or even modified by the National People’s Congress (NPC)

⁸⁵ *Ibid.*, at 8

⁸⁶ See the famous ‘Seeds Case’ where, after invalidation of a local regulation for conflict with national law, the local Standing Committee intervened seeking the rectification of the ruling and severe punishment for the judges even before a decision on appeal. (*Ibid.*)

⁸⁷ Cass, *op. cit.*, at 46

⁸⁸ *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R from 26 January 2009

discussions. Both parties acclaimed the Panel decision and did not appeal but some analyses have suggested that on most of the important issues Chinese measures were upheld and the decision was in reality a loss for the US.⁸⁹

a. Copyright Law

It was claimed by the US that Article 4(1) of China's Copyright law denied protection to certain works of creative authorship. China drew a distinction between "copyright" and "copyright protection/enforcement", claiming that insofar as Article 2 of its Copyright Law "directly implement[ed] an author's rights under the Berne Convention (1971) into Chinese law"⁹⁰ (enumerated in Article 10), the minimum set of exclusive rights guaranteed by this Convention was protected in accordance with its obligations. Nevertheless, Article 4 of the same national law was interpreted by the Panel to provide for the denial of copyright protection to works which have failed content review⁹¹. It considered the distinction made by China as inapposite since it would be difficult to conceive that copyright would continue to exist, undisturbed, after the competent authorities had denied copyright protection to a work on the basis of its nature and the prohibition in the Copyright Law itself. In any event, the TRIPS Agreement provided for certain subject matter to enjoy protection and Members were to ensure that procedures to enforce that protection are available.⁹²

China also supported a broad interpretation of Article 17 of the Convention – a provision confirming that governments have certain rights to control the exploitation of works.⁹³ It asserted, contrary to the Panel's finding, that this right of the government could involve denial of all copyright with respect to certain works⁹⁴, thus completely eliminating copyright for materials that have not been approved for publication or distribution. Moreover, the provision was seen by China as a non-exhaustive codification of the sovereign right to censor and as drafted using very expansive language that effectively denied WTO jurisdiction in the area.⁹⁵

Article 4(1) of the Chinese Copyright law provided for complete denial of protection in relation to certain works and thus censorship interfered directly with copyright owners' rights. China argued however that since these economic rights were pre-empted by public prohibition copyright enforcement in case of censorship became meaningless and unnecessary and that its protection would

⁸⁹ Ji & Huang, *op.cit.*, at 19-20

⁹⁰ Panel Report, Para 7.70

⁹¹ Para 7.103

⁹² Paras 7.66 and 7.68

⁹³ It provides: "The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."

⁹⁴ Para 7.124

⁹⁵ Para 7.120

amount to “legal and material nullity”. To this end, it was noted by the Panel that copyright and government censorship addressed different rights and interests.⁹⁶

Finally, with regard to China’s obligation under Article 41.1 of the TRIPs to ensure effective enforcement procedures against infringement of IPRs, China asserted that the ban on publication of a work is a form of “effective action” and that “it is in a sense an alternative form of enforcement against infringement”. The Panel rejected also this argument, on the ground that the TRIPs Agreement contained a minimum set of enforcement procedures that Members must make available to right holders against any infringement of IPRs.⁹⁷

b. Customs Measures

The contention of the US was that the competent Chinese authorities lacked the scope of discretion to order the destruction or disposal of infringing goods required by Article 59 of the TRIPs Agreement. Instead, a “compulsory scheme” was created in which customs authorities were obliged to give priority to disposal options allowing infringing goods to enter the channels of commerce or otherwise cause harm to the right holder. China alleged that the determination of what constituted an appropriate grant of authority under the TRIPs Agreement was highly circumstantial. The circumscribed discretion granted for the customs authorities to choose among the options for disposal of confiscated infringing goods was appropriate, considering that the rules constraining this authority serve legitimate government interests.⁹⁸ The US failed on this claim.

China also opted for a broad interpretation of sentence 4 of Article 46 of the TRIPs Agreement, which allowed for much broader scope of manoeuvre in relation to those goods. According to this provision “[i]n regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in *exceptional* cases, to permit release of the goods into the channels of commerce”. The term “exceptional” as seen by China included “special” (which suggested a qualitative test), and “unusual”, (referring to frequency and suggesting a quantitative test), so that an interpretation in terms of the set of circumstances, and an interpretation in terms of the number of cases, were both consistent with the plain meaning of “exceptional cases”.⁹⁹ The Panel disagreed finding ultimately that China's customs measures provided that the simple removal of the trademark unlawfully affixed was sufficient in more than just “exceptional cases”.¹⁰⁰

⁹⁶ Paras 7.133-7.136

⁹⁷ Para 7.180

⁹⁸ Para 7.200

⁹⁹ Para 7.388

¹⁰⁰ Para 7.393

c. Criminal Thresholds

The approach of China was particularly defensive in this field. One of the claims concerned the application of the first sentence of Article 61 of the TRIPs Agreement, under which Members should provide for criminal procedures and penalties at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. As a procedural claim, China argued that for criminal law matters the complainant should satisfy “a significantly higher burden [of proof] than it would normally encounter”. Thus, the Panel was expected to treat sovereign jurisdiction over police powers as a powerful default norm, departure from which could only be authorized in light of explicit and unequivocal consent of the Members. The interpretative rule *in dubio mitius* was seen to have particular justification in the field of criminal law.¹⁰¹

Concerning the standard of compliance with Article 61 of the TRIPs, China:

- i. Advocated absence of a specific obligation under sentence 1 of Article 61, TRIPs as its wording left to the national authorities to define when a right has been substantively infringed¹⁰²
- ii. Argued lack of sufficient specificity of Article 61 as compared to the ADA and the SCM Agreement and no specific article in the TRIPs to require states to ensure conformity of their laws with its provisions (ignoring Article XVI: 4 of the WTO Agreement)¹⁰³
- iii. Referred to the freedom provided for in the agreement to determine the appropriate implementation method and interpreted it as a specific establishment of boundaries on the enforcement obligations of the Members.¹⁰⁴
- iv. In relation to the scope of the obligation under the article, China adopted a restrictive interpretation of the term “commercial scale”, decisive for determination of its obligations. It argued in particular that the term should refer to a “significant magnitude of infringement activity”¹⁰⁵ and that low-scale thresholds for criminalisation IP infringements would go contrary to the logic of the agreement¹⁰⁶.

The Panel disagreed in its reasoning with most of the interpretations suggested by China. Ultimately however, it concluded that the US had not established that the criminal thresholds were inconsistent with China's obligations.

¹⁰¹ Para 7.497

¹⁰² Para 7.506

¹⁰³ Para 7.508

¹⁰⁴ Para 7.511

¹⁰⁵ Para 7.564

¹⁰⁶ Paras 7.591 and 7.597

2. China – Publications and Audiovisual Products¹⁰⁷

The case was filed simultaneously with the previous one. The Panel supported 32 of about 70 claims raised by the US, most of which were upheld upon appeal. Compliance actions were however not promptly initiated by China and it was almost a year and a half later that the file was closed with agreed procedures under Articles 21 and 22 of the DSU.

The importance of these proceedings lies in the fact that cultural products in China are deemed essential for the purpose of disseminating government policy and shaping public opinion. In the pre-WTO accession period these industries were largely state-owned, a general ban on foreign investment existed and a licensing system controlled market access. China's GATS commitments are however one of the broadest – an ambitious undertaking in view of its heavy domestic regulation. Authors note that notwithstanding China's efforts a large part of the country's cultural sector still contains severe limitations for foreign producers and distributors.¹⁰⁸

In response of the US claims, China invoked UNESCO instruments and Article XX(a) of the GATT to defend the measures as necessary for the protection of culture and public morals. Plus, it argued that some of the products at issue were not goods and were therefore out of the scope of its trading rights commitments and national treatment obligation.

a. 'Measures' which the Panel should arguably not examine

China raised a general issue that certain documents should not be examined by the Panel since they were not regulatory documents but mere internal guidance or summaries of procedures and requirements of other measures aimed at providing guidance. The Panel considered that this was an issue that went to the root of its jurisdiction – that is, to its authority to deal with and dispose of matters – and should be examined even on its own motion under Article 3.3 of the DSU, so as to satisfy itself that it had the authority to proceed.¹⁰⁹

b. China's trading rights commitments

- i. The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

China invoked the latter instrument in order to justify its domestic measures by reference to the unique nature of the products at stake. This line of defence, used to counterbalance the generality of China's

¹⁰⁷ *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R from 12 August 2009 and WT/DS363/AB/R from 21 December 2009

¹⁰⁸ J. Shi and W. Chen, "The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations: Reflecting on 'China – Publications and Audiovisual Products'" in: *Journal of World Trade*, 45, 1 (2011), at 161-162

¹⁰⁹ Panel Report, Paras 7.163 and 7.170

trade obligations, could be seen as delicate for a number of reasons. First, the WTO tribunals, in interpreting the provisions of the Agreement, should not add to or diminish the Member's existing obligations¹¹⁰. Second, the case law seems to show that 'rules of international law applicable in the relations between the parties' would be taken into consideration in accordance with Article 31(3)(c) of the VCLT, if they have been ratified by all parties to the WTO agreement.¹¹¹ And third, the US not only is not a member of the UNESCO Convention but is in fact strongly opposed to the latter.

ii. Interpretation of the relevant articles from China's AP

Under its AP, China has the obligation to progressively liberalize the availability and scope of the right to trade, so that, essentially within three years after accession, all enterprises shall have the right to trade in all goods throughout China's customs territory, however without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement. China assumed that this implied a derogation enabling it to regulate trade in a WTO-consistent manner, without breaching its obligation to ensure trading rights to all enterprises. On the contrary, the Panel interpreted it in a more restrictive manner, asserting that such a measure would be inconsistent with its commitments but it could nevertheless be maintained if at the same time it regulated trade in a WTO-consistent manner.¹¹²

China maintained that the sentence "foreign enterprises and individuals with trading rights" (i.e. foreign enterprises and individuals which under China's AP have to be accorded treatment no less favourable than enterprises in China with respect to the right to trade) comprised only such foreign enterprises and individuals to which it had already granted trading rights and so it had no obligation not to apply "requirements relating to minimum capital and prior experience" in situations where trading rights are being restricted. Also, "foreign enterprises" meant according to China only foreign enterprises not registered in it, to the exclusion of foreign-invested ones. However the reasoning was rejected by the Panel as not in conformity with the logic of the drafters.¹¹³

iii. Products/services at issue and applicable rules

China argued that the relevant paragraphs of its AP governed only trade in goods while the measures at issue in the dispute regulate services related to the licensing of rights for the exploitation of motion pictures (films for theatrical release, unfinished AVHE products and unfinished sound recordings) and so fell exclusively under the GATS and China's Schedule of Commitments. In any event, it claimed that any effect these measure may have on goods (i.e. on who may import hard-copy cinematographic films)

¹¹⁰ Article 3.2 of the DSU

¹¹¹ See *EC – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/293, paras 7.68-7.70

¹¹² Paras 7.254-7.255

¹¹³ Paras 7.294-7.299

should be regarded as accessory and not examined under its trading rights commitments. To substantiate this argument China interestingly referred *inter alia* to an European Court of Justice case in which the latter determined that licensing agreements between film producers came under the provisions of free movement of services.¹¹⁴ In the US' view such an interpretation would transform all goods commercially exploited through associated services, into services themselves.¹¹⁵

The Panel, drawing on the AB jurisprudence determined that the different aspects of the measures could be scrutinised under the GATS but that did not preclude the application of the trading rights commitments in China's AP to the extent they affect who may import a good. Furthermore, it concluded that the AP should be applied even if the import transaction involving hard-copy cinematographic film was not the essential feature of the film exploitation.¹¹⁶ The same argument was advanced and rejected for audiovisual products intended for publication (tangible master copies).¹¹⁷

Upon appeal the AB confirmed these findings and stressed that China's view was based on an artificial dichotomy between films as content and the physical carrier on which this content was embedded.¹¹⁸ As noted however, the tribunals' conclusion that the WTO agreements coexist and that one obligation cannot override the other is not an exception.¹¹⁹

iv. Right to regulate trade in cultural goods

China submitted that Chinese regulations establishing a content review mechanism and a system for the selection of import entities (and thus denying trading rights both to foreign and privately owned Chinese importers) had the purpose of protecting public morals. They reflected a longstanding policy of a complete prohibition of cultural goods with inappropriate content and of a high level of protection against dissemination of such goods with potentially negative impact on public morals¹²⁰:

(...) imported cultural goods, because they are vectors of different cultural values, may collide with standards of right and wrong conduct which are specific to China.¹²¹

China emphasized the essential role of these goods in "the evolution and definition of elements such as societal features, values, ways of living together, ethics and behaviours"¹²². With reference the content review mechanism, it has been argued that the case was more about conflict between liberalisation,

¹¹⁴ Paras 7.540, 7.547 and 7.553

¹¹⁵ Para 4.301

¹¹⁶ Paras 7.542 and 7.555

¹¹⁷ Para 7.642

¹¹⁸ AB Report, paras 193-195

¹¹⁹ Shi & Chen, *op.cit.*, at 176

¹²⁰ Panel Report, Para 4.277

¹²¹ Para 7.712

¹²² Para 4.276

political censorship and ideological control in China.¹²³ Both the Panel and the AB however sidestepped the sensitive question of whether China could conduct censorship of cultural goods and determined that it had either not made a prima facie case that the measures were “necessary”, or had not demonstrated that an alternative put forward by the US was not a genuine one or not reasonably available.¹²⁴

v. Distribution of sound recordings in electronic form

The US claimed that China's commitments on “sound recording distribution services” included the distribution of sound recordings through electronic means. China however submitted that its Services Schedule was to be interpreted in light of the circumstances of its conclusion and that at the time of its accession to the WTO these services were largely illegal. It again invoked the *in dubio mitius* principle, stating that “one should not lightly assume that a sovereign state intends to impose upon itself the more onerous, rather than the less burdensome, obligation” and consequently when a GATS commitment could be interpreted clearly to include a new service, it should not be interpreted to do so.¹²⁵ The Panel admitted, though with caution, that evidence that such sound recordings were not commercially feasible at the time China's Schedule was negotiated, could be relevant as a supplementary means of interpretation with respect to the scope of that commitment¹²⁶ but eventually concluded that the electronic distribution of sound recordings had become a commercial reality in many markets before China's accession to the WTO and that China was aware of this fact.¹²⁷

vi. Discrimination through internal regulations

Article III:4 of the GATT calls into question the legality of domestic regulations that fail to grant foreign products national treatment. It is thus interesting to note that China failed to fully address the US' charges concerning reading materials, sound recordings and films for theatrical release. Aside from defending a narrow definition of the term “distribution”¹²⁸ and generally arguing absence of less favourable treatment¹²⁹ it provided no other meaningful arguments. A crucial element was the question of ‘likeness’ between domestic and imported products and notwithstanding the absence of argumentation, the Panel found that only the measures affecting newspapers and periodicals were inconsistent with China's national treatment obligations. Authors have pointed out however that sound

¹²³ Shi & Chen, *op. cit.*, at 170, referring to H. Gao, “The Mighty Pen, the Almighty Dollar, and the Holy Hammer and Sickle: An Examination of the Conflict between Trade Liberalization and Domestic Cultural Policy with Special Regard to the Recent Dispute between the United States and China on Restrictions on Certain Cultural Products” in: *Asian Journal of WTO & International Health Law and Policy*, 2, 2 (2007)

¹²⁴ Panel Report, para 7.911 and AB Report, para 337

¹²⁵ Paras 7.1164-7.1165

¹²⁶ Para 7.1237

¹²⁷ Para 7.1246

¹²⁸ Paras 7.1454-7.1455

¹²⁹ Para 7.1475

considerations existed as to the absence of likeness of these products and that the Panel's findings, not appealed, represented a big loss for China and greatly expanded its national treatment obligations.¹³⁰

3. China – Raw Materials Exports¹³¹

Here the US complained that the downstream Chinese markets were afforded considerable competitive benefits as a consequence of the export restraints on raw materials. These resulted in higher export prices of the products at issue, creating substantial competitive benefits to downstream Chinese producers. What is interesting is that higher prices of Chinese goods is something the US has always solicited and has imposed trade remedy measures for that purpose, including on some of the raw materials at issue. Authors have suggested that the case had a potential to affect fundamentally the framework of China's export regulatory regime.¹³²

a. Export Duties

The Panel found that China's measures resulted in imposition of export duties on the various raw materials. China defended a restrictive interpretation of its obligation under Paragraph 11.3 of its AP to eliminate all its taxes and charges applied to exports unless (pursuant Annex 6 of the AP) in exceptional circumstances or in application of Article VIII of the GATT (fees or charges applied at the border and related to importation/exportation). It claimed that Article XX of the GATT could also be invoked to justify such measures since in imposing an obligation on China to forego export duties in certain circumstances, the WTO did not exclude its inherent right to regulate trade. The Panel found however that China has exercised its sovereign right to regulate trade in negotiating the terms of its accession into the WTO and could not rely on Article XX in these circumstances.¹³³ This line of argumentation is consistently repeated throughout the Panel report to reject China's sovereignty claims.

b. Export Quotas

China did not contest the imposition of quotas on the products at issue which would consequently be inconsistent with Article XI:1 of the GATT which provides for general elimination of quantitative restrictions. It maintained however that the complainants failed to establish China's non-compliance with Article XI:2(a) with respect to the export quotas on all of the products at issue. That is, they did not prove that the quotas were "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party". This interpretation was rejected by the Panel in line with the AB's jurisprudence – the provision amounted to a limited

¹³⁰ Shi & Chen, *op. cit.*, at 183

¹³¹ China – Measures Related to the Exportation of Various Raw Materials, WT/DS394,395,398/R from 5 July 2011

¹³² Ji & Huang, *op. cit.*, at 23

¹³³ Panel Report, Paras 7.155-7.156

exception and it was only reasonable that the burden of establishing such a defence should rest on the party asserting it.¹³⁴

c. Defences to the Application of Export Restrictions

China sought to justify the application of export duties and quotas for part of the products at issue. Notwithstanding its finding as to the non-application of Article XX of the GATT to China's export duties, the Panel, in view of the extensive evidence and arguments submitted and in order not to undermine the parties' right to prompt settlement of the dispute, decided to examine, *arguendo*, the possibility of this article justifying the WTO-inconsistent export duties.¹³⁵

i. Article XI:2(a)

China advocated a more extensive interpretation of Article XI:2(a) allowing for temporarily applied prohibitions/restrictions to prevent or relieve critical shortages of essential products. China argued that the defence could apply for an extended period of time, provided the measure was regularly reviewed but the Panel interpreted it as permitting the application of a measure "for a limited time under limited circumstances".¹³⁶ Similarly, the Panel did not support China's view that the a Member could on its own determine whether a product is essential to it, that the essential nature of a product should be measured in terms of its significance to a Member's GDP, employment, welfare or any other variable, or that a panel should view products to be more or less "essential" by considering the development of a given WTO Member.¹³⁷ Finally, the Panel put a particular emphasis on the temporal dimension of the defence and found that the term "critical shortage" referred to situations that may be relieved/prevented through the application of measures on a temporary, and not indefinite or permanent, basis.¹³⁸ This was contrary to China's contentions that the temporary situation of a preventive action would depend on the essentiality of a product, that the degree of shortage need not be so extreme and that a Member's tolerance in case of a potential shortage should be evaluated.¹³⁹ It could not therefore be considered that:

(...) China's restriction on exports of refractory-grade bauxite, which has already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will

¹³⁴ Paras 7.209-7.211

¹³⁵ Paras 7.227-7.230

¹³⁶ Paras 7.251 and 7.257

¹³⁷ Paras 7.276-7.277 and 7.280

¹³⁸ Paras 7.297-7.305

¹³⁹ Paras 7.285-7.288 and 7.2

remain in place until the reserves have been depleted, can by any definition be considered to be "temporarily applied" to address a critical shortage within the meaning of Article XI:2(a).¹⁴⁰

ii. Article XX(g)

China invoked Article XX(g) with regard to certain raw materials deemed to be scarce exhaustible natural resources which need to be managed or protected.¹⁴¹ It maintained that the exception must be interpreted in a manner recognizing a WTO Member's "sovereign rights over their own natural resources" and that these rights must be exercised in the interests of a Member's own social and economic development.¹⁴² The Panel addressed the argument in an elaborate and intriguing manner. It acknowledged that the principle of state sovereignty is one of the fundamental principles of international law and that the principle of sovereignty over natural resources was an important part of it.¹⁴³ It went on to observe however that the ability to enter into international agreements is a quintessential example of the exercise of sovereignty and that in joining the WTO, China obtained significant commercial and institutional benefits, including with respect to its natural resources, but it also committed to abide by WTO rights and obligations:

Exercising its sovereignty over its own natural resources while respecting the requirements of Article XX(g) that China committed to respect, is an efficient way for China to pursue its own social and economic development.¹⁴⁴

With regard to the need of such measures to be made effective in conjunction with restrictions on domestic production/consumption, China was of the opinion that Article XXXVI:5 of the GATT confirmed its right to use and conserve its natural resources for itself with a view to diversifying its own economy and that export restrictions are needed to support it. To this end, proportionately higher burden on foreigners was justified.¹⁴⁵ The Panel, recalling China's own decision to exercise its sovereignty in accordance with the WTO Agreement, confirmed that the justification could be used for GATT-inconsistent trade measures applied only along with parallel domestic restrictions and cannot be invoked for measures whose goal or effects is to insulate domestic producers from foreign competition in the name of conservation.¹⁴⁶

The ultimate conclusion was that, first, China did not establish that its export quotas related to the conservation of the said natural resources (on the contrary, such an export restriction, by reducing the

¹⁴⁰ Para 7.350

¹⁴¹ Para 7.356

¹⁴² Para 7.364

¹⁴³ Paras 7.378 and 7.380

¹⁴⁴ Paras 7.382-7.383

¹⁴⁵ Para 7.403

¹⁴⁶ Para 7.408

domestic price of the materials, worked as a subsidy to the downstream sector, which could result in an substantial increase of domestic demand)¹⁴⁷, secondly, Chinese restrictions are neither intended, nor enforcing a reduction on domestic production or consumption¹⁴⁸, and, thirdly, the domestic measures did not impose an even-handed burden on foreign and domestic consumers¹⁴⁹.

iii. Article XX(b)

This justification was invoked by China in order to justify certain restrictions as necessary for the protection of the environment and the Chinese population. However, the Panel, engaging in a lengthy discussion as to the content and substance of the Chinese measures, found that these were neither contributing to, nor formed part of, a comprehensive programme for the fulfilment of the stated environmental objective¹⁵⁰, did not materially contribute to the alleged goal¹⁵¹, and WTO-consistent or less-restrictive alternative measures existed¹⁵².

d. Export quota allocation and administration

The claim addressed the requirement imposed by China to exporters to meet certain prior export performance and minimum registered capital criteria in order to receive an allocation of a quota. Notwithstanding China's allegations that the relevant provisions of its AP recognized its right to impose a WTO-consistent quota and to administer it consistently with the WTO covered agreements, the Panel had no difficulty to find that China expressly committed through these provisions to eliminate any "examination and approval system" after December 2004, including eliminating "export performance" and "prior experience requirements" and minimum registered capital requirements.¹⁵³

It remains to be seen whether the AB will confirm the findings of the Panel in the proceedings currently pending before it.

III. ATTITUDE IN OTHER CASES

China's involvement in cases that have not ended with a panel or an AB ruling, as well as in still pending proceedings could also offer important indications. In particular, some authors have endeavoured to justify China's strategy and reluctance engage in formal proceedings. The first case of China as respondent, *China – Value-Added Tax*¹⁵⁴, created ample public interest and a variety of opinions. Some commentators translated China's readiness to negotiate and make concessions by

¹⁴⁷ Paras 7.430 and 7.435

¹⁴⁸ Para 7.458

¹⁴⁹ Para 7.466

¹⁵⁰ Paras 7.511-7.512

¹⁵¹ Para 7.550

¹⁵² Para 7.590

¹⁵³ Paras 7.662 and 7.665

¹⁵⁴ *China – Value-Added Tax on Integrated Circuits*, DS309

reaching a Memorandum of Understanding with the US rather than going through the entire dispute settlement process as a preference for a more discrete diplomatic resolution of conflicts. Others observed that the incentive policy for domestic enterprises at issue had not brought the expected results and the negotiations process allowed China to adjust to a more effective regime. Consequently its behaviour was prompted by more practical considerations.¹⁵⁵

*China – Taxes*¹⁵⁶ involved Chinese preferential tax treatment accorded in reality mainly to foreign investment companies. At the time a new income tax law was adopted in China, which aimed at establishing an equal tax burden on all enterprises and steps were already made towards complying with its provisions. Thus, reaching of a mutually agreed solution could be viewed as a logical step and the request for establishment of a panel by the US is seen only as a pressurising technique – it would have been “politically unnecessary and legally meaningless for both sides to continue to litigate”.¹⁵⁷

In *China – Financial Information Services*¹⁵⁸ the outcome of the consultations was successful and China agreed to reform its requirements for foreign financial information suppliers. It also implemented the settlement efficiently. However, the solution is said to reflect China’s own conviction that regulators should be independent, so that a fair legal environment is ensured, and that it was internal allocation of powers and domestic considerations, rather than external ones, that finally contributed to the agreement.¹⁵⁹

Two particularities of the case *China – Export Subsidies*¹⁶⁰ have been mentioned: first, it concerned mainly regional measures and, second, the latter’s number was extremely high – 107. Commentators have noted that in view of the specificity of the WTO subsidy legislation and the large number of the measures at issue, a dispute would have consumed a great amount of resources and the mutually agreed solutions reached by the parties may have been prompted largely by such considerations.¹⁶¹

*China – Fasteners*¹⁶² was the first WTO dispute involving China’s trade remedy measures. The background of the proceedings is telling because the case was brought to the WTO after China had conducted investigations, had imposed preliminary AD measures and had brought a WTO complaint against the EU trade remedy measures on fasteners from China. Commentators have suggested that if China had withdrawn its measures as a result of the litigation threat on the part of the EU, it would in

¹⁵⁵ Ji & Huang, *op.cit.*, at 15

¹⁵⁶ *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, DS358, 359

¹⁵⁷ Ju & Huang, *op.cit.*, at 17

¹⁵⁸ *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, DS372, 373, 378

¹⁵⁹ Ju & Huang, *op.cit.*, at 22

¹⁶⁰ *China – Grants, Loans and Other Incentives*, DS387, 388, 390

¹⁶¹ Ju & Huang, *op.cit.*, at 22 and 23

¹⁶² *China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the EU*, DS407

the future be greatly hindered in conducting AD investigations and would provide support to the domestic criticism about its cautious attitude in defending its WTO rights¹⁶³. Indeed, 2010 and 2011 saw a wave of trade remedy complaints in the WTO against China.

Notwithstanding the above justifications, the fact that 9 of the complaints against China were settled at the consultation stage and that in all cases of adverse findings China agreed to withdraw its WTO-inconsistent measures, reaffirms the country's traditionally 'soft' approach in solving international disputes.¹⁶⁴ However, it has been suggested that China's attitude is gradually changing and although certain deficiencies in its litigation skills remain¹⁶⁵, the strategy will continue. This is required, on the one hand, by China's trade interests and by the fact that it is increasingly being challenged before the WTO tribunals in politically sensitive areas, such as censorship policy and economic sovereignty over raw materials' exports. On the other hand, these cases frequently result in domestic ultra-nationalist reactions from the public, thus further compelling the government to actively defend itself.¹⁶⁶

And indeed, in the recent *China — Electronic Payment Services*¹⁶⁷ and *China — GOES*¹⁶⁸ China seems to be adopting a resolutely defensive stand from the very beginning. Using its veto power, China has blocked the establishment of a panel for the two US requests concerning Chinese measures affecting electronic payment services and Chinese duties on flat-rolled electrical steel. Since the second establishment of a panel would be automatic upon a second request on the part of the US, the step has been characterised as a tactical procedural move to slow the process down.¹⁶⁹

IV. INTERPRETING THE JURISPRUDENCE

Xiaohui Wu¹⁷⁰ argues that China's terms of membership were particularly unfavourable, asymmetric and non-reciprocal and that this creates a difficulty of ascertaining the appropriate interpretative approach towards China-specific substantive obligations to be adopted by WTO panels and the AB. He explains that a rigid textualist even inconsistent approach has been applied towards the customary rules of interpretation in the VCLT and too little attention has been given to systematic or policy issues in light of the object and purpose of the provisions or agreements as a whole.

¹⁶³ Ju & Huang, *op.cit.*, at 25

¹⁶⁴ P. L. Hsieh, "China's Development of International Economic Law and WTO Legal Capacity Building", *Journal of International Economic Law* 13, 4 (2010) 997, at 1031

¹⁶⁵ For example in the *Publications and Audiovisual Products* case China failed to provide English translations of key provisions of its own laws, which were at the core of the case (*Ibid.*)

¹⁶⁶ *Ibid.*

¹⁶⁷ *China — Certain Measures Affecting Electronic Payment Services* WT/DS413

¹⁶⁸ *China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* WT/DS414

¹⁶⁹ Available at: <http://economyincrisis.org/content/china-blocks-wto-dispute-settlement-panel>, last visited 17.11.2011

¹⁷⁰ X. Wu, "No Longer Outside, Not Yet Equal: Rethinking China's Membership in the World Trade Organization", in: *Chinese Journal of International Law* 10 (2011), at 227

The adoption of a new, “truly holistic and multifaceted approach” is advocated for the interpretation of China-specific obligations in view, first, of the fact that their object and purpose “are primarily unknown or questionable” if the adjudicative bodies only rely on the text and context of the provisions. Second, a contradiction is said to emerge between their unilateral and discriminatory character, on the one hand, and the WTO objectives of entering into reciprocal and mutually advantageous agreements, on the other. In particular, the author suggests that a restrictive interpretation should be given to the meaning of a term (*in dubio mitius*), i.e. limitations to the State’s sovereignty in case of doubt are to be interpreted narrowly. The rationale lies in the fact that “due to the voluntary nature of treaties between sovereign States, a treaty provision should be interpreted narrowly in order to avoid extending the consent of States”¹⁷¹.

Thus, for instance China’s national-treatment obligation towards foreign investors, being both broader than general WTO rules and non-reciprocal, should, in case of more than one permissible interpretation, be interpreted restrictively. However, the AB disagreed with this approach in *China – Publications and Audiovisual products* and reasoned that:

(...) interpreting the terms of GATS specific commitments based on the notion that the ordinary meaning to be attributed to those terms can only be the meaning that they had at the time the Schedule was concluded would mean that very similar or identically worded commitments could be given different meanings, content, and coverage depending on the date of their adoption or the date of a Member’s accession to the treaty. Such interpretation would undermine the predictability, security, and clarity of GATS specific commitments (...)¹⁷²

To put the issue in a broader context, Shan Wenhua¹⁷³ examines the concept of Chinese sovereignty and points at three distinctive “Chinese characteristics” of the principle: first, it features a “sovereignty-bound thinking” on international law; second, it implies faithful adherence to the principle of inviolability of state sovereignty; third, it emphasises on “reciprocity” or “mutuality”. The author highlights the most significant aspects of China’s international practice and draws a distinction between the BITs concluded by China¹⁷⁴ and its participation in the WTO. The DSM is viewed as “[t]he WTO’s final and probably most significant threat to state sovereignty” and an Order by the Supreme People’s Court that rules out the “direct effect” of the WTO agreements, while consistent with the practices of other WTO Members, is seen as signalling an attitude of caution towards the WTO dispute settlement system. Interestingly, the conclusion reached is double. On the one hand, China seems to have become

¹⁷¹ *Ibid.*, at 261

¹⁷² Para. 357

¹⁷³ S. Wenhua, *op.cit.*, at 57 *et seq.*

¹⁷⁴ Which only change the way sovereign powers are exercised, not sovereignty per se, insofar as the BITs are bilateral treaties and can be renegotiated and modified as parties see necessary (*Ibid.*, at 64)

ready to give up certain “economic sovereignty” in return for perceived opportunities of economic development.¹⁷⁵ On the other hand, however, an analysis of recent Chinese government officials’ statements leads to the finding that, “despite significant concessions of important sovereign powers through those treaties and organizations, China’s official perception of “sovereignty” has hardly changed”¹⁷⁶.

V. PROVISIONAL CONCLUSIONS

One major contentious issue in these cases was the interpretation of various provisions in China’s AP. While it is evident that China was pushing for a restrictive interpretation of its obligations under the latter, this could not be regarded as exceptional or unnatural in view, first, of the broad WTO-plus obligations undertaken by China during the accession process and, secondly, of the often imprecise language of the AP.

For their part, the WTO tribunals seem to be endeavouring to come to an objective and balanced interpretation. While leaning towards a stricter interpretation in earlier years, they have recently developed a more demanding attitude towards China’s obligations under its AP and, as could be observed from the latest judgements, did not hesitate to reject China’s sovereignty claims.

It could only be conjectured whether the compelling language used by the Panel in *China – Raw Materials* and the AB’s refusal to support China’s interpretation in *US – Tyres (China)* might mean an end of the narrower interpretation given to China’s AP and how this approach would be consistent with the recent appeals for leaving more space to national regulatory autonomy.

¹⁷⁵ The latter in the author’s opinion provides a sharp contrast with China’s general standing, which still adheres to the traditional concept of “inviolable sovereignty”, particularly in respect of issues such as territorial sovereignty and integrity, humanitarian intervention, and universal human rights. (*Ibid.*, at 66-67)

¹⁷⁶ *Ibid.*, at 53

E. CONCLUDING REMARKS

The figures show that China's attitude towards the WTO DSM has been gradually developing. Its use of formal dispute settlement may still remain relatively low, as compared to its strategic trade interests in the US and the EU and to the frequency with which it has been a target of other Members' trade remedies or its own measures have been challenged before adjudicative bodies. It is difficult however to draw definite conclusions about a possible deliberate choice to abstain from asserting its rights and defending its interests as a member of the WTO through its formal (and binding) DSM. China's reluctance could be explained by various factors, including the circumstances surrounding its accession, the insufficient expertise in the field of international litigation, its lack of familiarity with WTO substantive rules and its traditional preference for informal dispute settlement.

An increasingly assertive approach in advancing its claims through the means of the WTO DSM could be considered natural for China. It must not be forgotten that accession to the WTO was a package deal and the compulsory jurisdiction of its adjudicative bodies was only one of the concessions made by China for the benefits it gained as a member of the organisation. Having accepted it and thus limited its sovereignty, it would be both economically and politically to the detriment of China to abstain from using the mechanism, even if it could contribute to the improvement of its position in the organisation.

Another issue is to what extent China might be trying, by using its rights as a Member or complainant/respondent in WTO proceedings, to circumscribe the powers of the adjudicative bodies, for instance, by promoting restrictive interpretations of the WTO legislative framework or of the range of its domestic measures that can be reviewed. The analysis of China's respondent pleas in recent cases does not provide a clear-cut answer to this question either.

But even if China's adherence to and use of the binding WTO DSM is genuine and evolving, broader conclusions as to the general conduct of its foreign policy and use of binding international adjudication should only be drawn with caution. The balancing exercise between economic opportunities and restraints to sovereignty, which proved favourable to accepting the binding DSM, does not necessarily apply in other situations where China might still remain reluctant to accept limitations to its sovereign powers.

Whether China's sovereignty concerns have valid grounds outside its political and economic context is a further query. In a recent article¹⁷⁷ Michael Ming Du reflects on where to draw the line between global governance expressed in the WTO system and its binding rules, on the one hand, and the national

¹⁷⁷ "The Rise of National Regulatory Autonomy in the GATT/WTO Regime", *Journal of International Economic Law* 14 at 659 (September 2011)

regulatory autonomy, on the other, and particularly how much interference into that national regulatory autonomy from the WTO “tribunals” is appropriate. Michael Ming Du argues that national regulatory autonomy merits a deferential treatment despite the legalisation of the GATT/WTO regime. He reviews recent WTO case law which marks a start of a better balancing between trade liberalisation and national regulatory autonomy and submits that the pendulum has swung in favour of affording more policy space to nation state in the GATT/WTO regime¹⁷⁸.

To the extent that Michael Ming Du reflects the sensitivities of the Chinese authorities on this, it is interesting from the perspective of the theme of this conference focusing on China that in the US criticism has been voiced in Congress¹⁷⁹ and in the academic literature in the US¹⁸⁰ and the EU¹⁸¹ precisely on the interference into national regulatory autonomy from WTO dispute settlement panels and the WTO AB.

¹⁷⁸ *Ibid.* at 673

¹⁷⁹ “US DSU Proposals Receives Mixed Reaction”, Bridges Weekly Trade News Digest (20 September 2002)

¹⁸⁰ P. Schlafly, “The World Trade Organisation is no Friend to U.S.” (2008), available at: http://townhall.com/columnists/phylisschlaflly/2008/01/07/world_trade_organization_is_no_friend_to_us/page/full/, last visited 09.12.2011

¹⁸¹ L. Bartels, “The Separation of Powers in the WTO: How to Avoid Judicial Activism”, 53 *International and Comparative Law Quarterly* 861 (2004), at 871

F. INDEX¹⁸²TABLE 1
CHINA AS COMPLAINANT

Dispute Number	Issue	Respondent	Course of Dispute	Findings / Outcome	Implementation
1 DS252	Definitive Safeguard Measures on Imports of Certain Steel Products	US	RC* - Mar 2002; ABR - Nov 2003	All safeguard measures <i>inconsistent</i> with US obligations under the GATT and the Agreement on Safeguards	All safeguard measures terminated - December 2003
2 DS368	Preliminary AD and CVD Determinations on Coated Free Sheet Paper	US	RC - Sep 2007	Terminated when US did not implement the trade restriction after negative final injury determination - 2007	
3 DS379	Definitive AD and CVD on Certain Products	US	RC - Sep 2008; ABR - Mar 2011	Measures <i>inconsistent</i> with US obligations under the SCM Agreement	Reasonable period of time - February 2012
4 DS392	Certain Measures Affecting Imports of Poultry	US	RC - Apr 2009; PR - Sep 2010	Measures <i>inconsistent</i> with US obligations under the SPS Agreement and the GATT	No recommendation - measure already expired
5 DS397	Definitive AD Measures on Certain Iron or Steel Fasteners	EU	RC - Jul 2009; ABR - Jul 2011	Measures <i>inconsistent</i> with EU obligations under the WTO Agreement, the ADA and the GATT	
6 DS399	Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres	US	RC - Sep 2009; PR - Dec 2010; ABR - Sep 2011	Measures <i>consistent</i> with US obligations under China's AP and the GATT; Upheld on appeal	August 2011, the EU informed the DSB that it intends to implement its recommendations and rulings and needs a reasonable period of time.
7 DS405	AD Measures on Certain Footwear	EU	RC - Feb 2010; PR - Oct 2011	Article 9(5) of the Basic Regulation inconsistent but the bulk of China's specific claims <i>rejected</i>	
8 DS422	AD Measures on Shrimp and Diamond Sawblades	US	RC - Feb 2011	Pending – alleged inconsistencies with Article VI:1 and VI:2 of the GATT and with the ADA (use of zeroing and sunset reviews)	

*Request for Consultations

¹⁸² Last updated: 09.12.2011

TABLE 2
CHINA AS RESPONDENT

Dispute Number	Issue	Complainant	Course of Dispute	Findings / Outcome	Implementation
1 DS309	Value-Added Tax on Integrated Circuits	US	RC - Mar 2004; Mutually Agreed Solution - Oct 2005	Agreed to amend / revoke the measures allegedly inconsistent with Article XVII of the GATS and Articles I and III of the GATT	The terms of the agreement successfully implemented
2 DS339 DS340 DS342	Measures Affecting Imports of Automobile Parts	EU US Canada	RC - Mar/Apr 2006; ABR - Dec 2008	Measures <i>inconsistent</i> with Articles III:2, first sentence, and III:4 of the GATT	New decree, in force from 1 Sep 2009, intended to bring the measures into conformity
3 DS358 DS359	Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments	US Mexico	RC - Feb 2007; supplemental consultations - Apr 2007; requested the establishment of a panel - Jul 2007	Terminated	Agreement between China and the US/Mexico - Dec 2007
4 DS362	Measures Affecting the Protection and Enforcement of Intellectual Property Rights	US	RC - Apr 2007; PR - Jan 2009	Copyright Law and custom measures <i>inconsistent</i> with Articles 9.1, 41.1 and 59 of the TRIPS Agreement	Legislative amendments but the US not yet in a position to share China's claim that it had complied - March 2010; Agreed Procedures - Apr 2010
5 DS363	Measures Affecting Trading Rights and Distribution Services for Publications and Audiovisual Entertainment Products	US	RC - Apr 2007; ABR - Dec 2009	Measures <i>inconsistent</i> with China's AP, Article XVII of the GATS and Article III:4 of the GATT	Concern of the US over the lack of progress by China in bringing its measures into compliance; discussion on requests for a compliance proceeding and for authorization to suspend concessions - Mar 2011; Agreed Procedures - Apr 2011

6	DS372 DS373 DS378	Measures Affecting Financial Information Services and Foreign Financial Info Suppliers	EU US Canada	RC - Jun 2008	Terminated	Agreement between China and the EU/US/Canada - Dec 2008
7	DS387 DS388 DS390	Grants, Loans and Other Incentives	US Mexico Guatemala	RC - Dec 2008 / Jan 2009	Terminated	Agreement - all of the export-contingent benefits in the challenged measures - Dec 2009
8	DS394 DS395 DS398	Measures Related to the Exportation of Various Raw Materials	US EU Mexico	RC - Jun / Aug 2009; PR - July 2011	Export restraints <i>inconsistent</i> with China's AP and the GATT	All parties - decisions to appeal
9	DS407	AD Duties on Certain Iron and Steel Fasteners	EU	RC - May 2010	Pending - alleged inconsistencies with the ADA, the DSU, and the GATT	
10	DS413	Measures Affecting Electronic Payment Services	US	RC - Sep 2010	Pending - alleged inconsistencies with Articles XVI and XVII of the GATS	
11	DS414	CVD and AD Duties on Grain Oriented Electrical Steel	US	RC - Sep 2010	Pending - alleged inconsistencies with the SCM Agreement, the ADA, and Article VI of the GATT; envisaged final report – May 2012	
12	DS419	Measures concerning wind power equipment	US	RC - Dec 2010; EU and Japan requested to join	Pending - alleged inconsistencies with the SCM Agreement, China's Protocol of Accession, and Article XVI:1 of the GATT	
13	DS425	AD Duties on X- Ray Security Inspection Equipment	EU	RC - Jul 2011	Pending - alleged inconsistencies with the ADA and Articles VI:1 and VI:6(a) of the GATT	
14	DS427	AD and CVD measures on Broiler Products	US	RC - Sep 2011	Pending - alleged inconsistencies with the ADA, the SCM Agreement and Articles VI of the GATT	