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CHINA-UNITED STATES TRADE NEGOTIATIONS AND DISPUTES: THE WTO AND BEYOND

*Pasha L. Hsieh**

ABSTRACT

This article examines trade negotiations and disputes between China and the United States. It begins by ascertaining the unique political aspects of China-U.S. bilateral economic ties and explains the historical background underlying the relations. The article then argues that trade frictions between China and the United States are unlikely to repeat the Depression-era trade wars. The article observes that both the Chinese and U.S. governments are aware that the adoption of WTO-inconsistent measures may result in retaliatory actions from the other side. Hence, the two governments have attempted to resolve potential disputes through high-level official talks. Even when certain issues cannot be solved through dialogue, the WTO dispute settlement system has proven to be efficient as an instrument of final resort to deal with bilateral trade frictions. Finally, the article submits that the change in China's attitude toward WTO disputes further integrates the country into the international economic order and paves the way for a more positive development of China-U.S. trade relations.

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KEYWORDS: *China-U.S. relations, Strategic Economic Dialogue, WTO disputes, TPRM, TRM, DSU*

I. INTRODUCTION

The economic power of the United States is facing challenges due to the rise of the People's Republic of China (P.R.C.). Since its economic reform in 1978, China's economic scale and foreign trade have been growing at a substantial rate. The country is currently the world's third largest economy, and its foreign exchange reserve of nearly USD 2 trillion is by far the world's largest.¹ China's role on the global stage has grown to be even more significant amid the recent financial crisis. This is well demonstrated by the attention that China received at the recent G-20 summit² and by the country's request for additional voting rights in the International Monetary Fund (IMF).³ It is widely acknowledged that with China's rise, the bilateral relationship between the G2 – the United States and China – will be a crucial determinant of the world's direction in the new century.

Accordingly, it is important to understand China-U.S. trade relations and the impact of the two nations' increasing interdependence on the globe. The existing literature, which rarely examines these issues, focuses mostly on the legal issues of bilateral trade litigation under the World Trade Organization (WTO).⁴ This article, instead, will explore the economic ties between China and the U.S. from a more holistic perspective, by providing a political and economic analysis of their trade relations and disputes under bilateral and multilateral frameworks. The article will also discuss the implications of China-U.S. WTO disputes and explain, in particular, their importance to the bilateral relationship.

Some commentators surmise that the underlying reason for the proliferation of China-U.S. trade conflicts is the United States' large trade deficit with China,⁵ which may in turn lead to a "trade war" between the

¹ Guy de Jonquières, *China and the Global Economic Crisis*, ECIPE POL'Y BRIEFS NO. 02/2009 (Eur. Centre for Int'l Pol. Econ., Brussels, Belg.), Apr. 6, 2009, at 1; China's Foreign Exchange Reserves, 1977-2008, <http://www.chinability.com/Reserves.htm> (last visited Sept. 17, 2009).

² See generally *China and the G20: Taking the Summit by Strategy*, THE ECONOMIST, Apr. 6, 2009, available at http://www.economist.com/displayStory.cfm?story_id=13447015 (last visited Sept. 17, 2009).

³ Andrew Batson, *China Seeks More Involvement – And More Clout*, WALL ST. J., Mar. 31, 2009, at A10, available at <http://online.wsj.com/article/SB123837953546968375.html> (last visited Sept. 17, 2009) (describing that China wishes to provide more funding for the IMF in exchange of additional voting rights).

⁴ See, e.g., Stuart S. Malawer, *United States-China Trade Litigation in the WTO*, 56(5) VA. LAW 28, 30 (2007), available at <http://www.worldtradelaw.net/articles/malawerchinalitigation.pdf> (last visited Sept. 17, 2009); see generally Henry S. Gao, *Taming the Dragon: China's Experience in the WTO Dispute Settlement System*, 34(4) LEGAL ISSUES OF ECON. INTEGRATION 369, 372-90 (2007); see generally Glenda Mallon & John Whalley, *China's Post Accession WTO Stance* (Nat'l Bureau of Econ. Research, Working Paper No. W10649, 2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=579796 (last visited Sept. 17, 2009).

⁵ See, e.g., Heather Stewart, *U.S.-China Trade War Looms*, THE OBSERVER, Mar. 26, 2006, at A1,

two nations. A trade war refers to an economic conflict between two countries, caused by the fact that one country has imposed trade restrictions against the other, prompting the latter to retaliate in a tit-for-tat fashion by imposing higher tariffs or non-tariff barriers. Trade wars, which spiraled into a vicious circle during the Great Depression, would lead to a deterioration of bilateral trade relations. This article will refute such a pessimistic assessment of China-U.S. trade relations, and argue instead that the increasing disputes between China and the U.S. should be seen as a positive development because it shows that the two sides are working to reduce trade frictions through a legalized framework. In addition, China's launching of WTO disputes against the U.S. also demonstrates a shift in China's attitude toward the WTO dispute settlement system. This new mindset not only further integrates China into the global economic order, but also increases the WTO's legitimacy.

This article will proceed in the following sections. In Section II, I will provide an overview of China-U.S. trade relations and identify the unique aspects of that relationship. In Section III, I will explore the structure of trade monitoring mechanisms under domestic U.S. and Chinese laws and the WTO framework, and discuss how bilateral and multilateral trade dialogues have worked in practice. I will propose that these mechanisms and dialogues have diminished potential trade frictions between China and the United States. In Section IV, I will examine the role of the WTO dispute settlement mechanism in solving China-U.S. trade disputes. In this respect, I will analyze the respective litigation patterns of Washington and Beijing, as well as the implications of those legal actions. Finally, I will provide a conclusion on how my analyses above substantiate my propositions.

II. CHINA-UNITED STATES TRADE RELATIONS: THE HISTORICAL AND POLITICAL BACKGROUND

Trade relationship between China and the United States has been uneasy and politically sensitive. Part of this can be attributed back to how the Chinese were first exposed to the concept of "free trade." Following its defeat in the Opium War, China in 1842 concluded the Treaty of Nanjing with the United Kingdom,⁶ under which the United Kingdom imposed a

available at <http://www.guardian.co.uk/money/2006/mar/26/business.china> (last visited Sept. 17, 2009); Antoaneta Bezlova, *China: Headed for Trade Wars with U.S.*, INTER PRESS SERVICE, Apr. 27, 2007, <http://ipsnews.net/news.asp?idnews=37521> (last visited Sept. 17, 2009); See generally *Economist Foresees U.S. Trade Sanctions Against China*, CHINA DAILY, July 4, 2007, available at http://www.chinadaily.com.cn/bizchina/2007-07/04/content_909975.htm (last visited Sept. 17, 2009).

⁶ History: East Meets West, <http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/2001/chpt04-1.htm> (last visited Sept. 17, 2009). For the text of the Treaty of Nanjing, see USC-UCLA Joint

unilateral most-favored nation (MFN) clause on China and gained possession of Hong Kong. This treaty marked the beginning of a series of “unequal treaties” between China and Western powers and heralded China’s “century of humiliation” at the hands of imperialism.⁷ In 1844, following the U.K. example, the United States forced China to sign the Treaty of Wangxia, which accorded the U.S. the same trade privileges that Britain obtained.⁸ This was the first treaty between China and the United States.

These unequal treaties, which introduced the Chinese to the West’s concepts of international law and “free trade”, degraded the country to a semi-colonial status. For this reason, Chinese intellectuals for decades were suspicious of the role of international law and perceived it as a rule that is “reasonable but not reliable.”⁹ Moreover, the sense of national humiliation brought upon by unequal treaties fuelled subsequent Chinese governments’ goal to abrogate them and restore China’s superpower status. This historical experience, to some extent, explains China’s attitude toward participating in international organizations, including the WTO.

A. *China’s Economic Reform and WTO Accession*

Although the Peoples’ Republic of China was established in 1949, official high-level contact between the P.R.C. and the U.S. did not begin until President Richard Nixon’s ice-breaking visit to China in 1972. The visit paved the way for the normalization of relations between the two nations, a process which culminated in the establishment of bilateral diplomatic ties in 1979. Trade was not of prime concern to either country at this time because Washington’s decision to recognize the P.R.C. was driven by a geopolitical strategy to align with China to counterbalance the Soviet Union and Beijing, for its part, intended to leverage the new relationship to assert its legitimacy as the sole government of China.

China’s economic policy in the 1960s focused on the

East Asian Studies Center, Treaty of Nanjing (Nanking), 1842, <http://www.international.ucla.edu/eas/documents/nanjing.htm> (last visited Sept. 17, 2009).

⁷ PEOPLE’S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY, VOLUME 1, at 6 (Jerome Alan Cohen & Hundah Chiu eds., 1974) [hereinafter PEOPLE’S CHINA AND INTERNATIONAL LAW]. See also David M. Lampton, *The Faces of Chinese Power*, 86(1) FOREIGN AFFAIRS 115, 117-18 (2007), available at <http://www.comw.org/cmp/fulltext/0701lampton.pdf> (last visited Sept. 17, 2009).

⁸ U.S. Dep’t of State, The Opening to China Part I: the First Opium War, the United States, and the Treaty of Wangxia, 1839-44, <http://www.state.gov/r/pa/ho/time/dwe/82011.htm> (last visited Sept. 17, 2009).

⁹ PEOPLE’S CHINA AND INTERNATIONAL LAW, *supra* note 7, at 10. Japanese intellectuals in the Meiji era similarly stated that “[a] hundred volumes of international . . . are weaker than the barrel of the gun.” *Id.* For discussions on ancient China’s view on the relationship between China and the non-Chinese world, refer to Jacques deLisle, *China’s Approach to International Law: A Historical Perspective*, 94 AM. SOC’Y INT’LL. PROC. 267, 268-70 (2000).

inwardly-oriented goal of achieving self-reliance. Thus, the country had little interest in establishing economic ties with foreign states. Its economic isolation further worsened after Beijing severed its ties with the Soviet Union and most of the communist bloc due to ideological differences.¹⁰ On the other hand, China's trade with the U.S. took off after Nixon's trip – bilateral trade volume rose from USD 5 million in 1971 to USD 800 million in 1973.¹¹ These numbers affirm the above description of the China-U.S. economic relationship as a “politically sensitive” one. Since 1978, China has embraced Deng Xiaoping's reform agenda, which was intended to replace the country's Soviet-style central planning with a market economy and end China's isolation. This decision was not simply an economic one, but symbolized a political and ideological turning point. Deng's goal was to raise China's living standards and to prevent the erosion of the Chinese Communist Party's political legitimacy after ten years' turmoil caused by the Cultural Revolution. Deng's policy to create a “socialist market economy with Chinese characteristics” proved to be successful. The once “sleeping giant” is now awake, with its economic strength rising at a remarkable rate.

There are salient political and economic reasons why China aspired to join the WTO.¹² First, China's initiation of the WTO application process signified Chinese leaders' acceptance of, and commitment to, an outwardly-oriented economic policy. The Chinese elite were well aware that China's accession to the WTO would ensure the fruits of the reform, as WTO membership would deepen China's integration into the global economy and thus prevent the country from reverting back to isolation.¹³ Second, WTO membership would adequately recognize China's expanding economic role in the world and affirm, to some extent, that the country has ascended to the ranks of modern states on par with Western nations. Such an affirmation would do much to fulfill the nation's superpower aspirations. Finally, from a more pragmatic perspective, WTO membership would be an efficient way to “delink” human rights issues from trade relations with the United States. From 1979 to 2002, under the Jackson-Vanik

¹⁰ U.S. Dep't of State, United States Relations with China: Separation and Reopening (1950-2001), <http://www.state.gov/r/pa/ho/pubs/fs/90835.htm> (last visited Sept. 17, 2009).

¹¹ Jiangyu Wang, *The Evolution of China's International Trade Policy: Development Through Protection and Liberalization*, in *ECONOMIC DEVELOPMENT THROUGH WORLD TRADE: A DEVELOPING WORLD PERSPECTIVE* 191, 194 (Yong-shik Lee ed., 2007). See also WAYNE M. MORRISON, CRS REPORT FOR CONGRESS, CHINA-U.S. TRADE ISSUES 2, Order Code RL 33536 (2008).

¹² See generally Nicholas R. Lardy, *Issues in China's WTO Accession*, http://www.brookings.edu/testimony/2001/0509foreignpolicy_lardy.aspx (last visited Sept. 17, 2009); see also Pasha L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39(6) J. WORLD TRADE 1195, 1196-1203 (2005).

¹³ See also de Jonquière, *supra* note 1, at 4 (explaining China's decision to join the WTO was “to tie its own hands and prevent backsliding on economic reforms”).

Amendment of the Trade Act of 1974, China needed the U.S. president's yearly waiver to obtain "normal trading relations" status, as the Amendment denied non-market economies MFN status subject to presidential waiver.¹⁴ Congressional efforts to overturn the amendment created a yearly debate on China, linking China's trade status with its human rights records. As the Amendment would be inconsistent with the MFN principle at the core of the WTO, China's WTO membership would thus guarantee its access to the U.S. market and save the Chinese government from the yearly embarrassment of having its human rights record publicly scrutinized.

China's participation in the WTO demonstrates the nation's willingness to engage the global economic order and is consistent with the country's foreign policy mantra of "peaceful rise".¹⁵ To pursue economic development, China needs to safeguard its market access externally and maintain social stability internally. These considerations determine China's attitude toward market concessions and trade disputes.¹⁶

B. U.S. Trade Policy Toward China

China's accession to the WTO is also consistent with U.S. interests because it has been Washington's goal to bring China into a rule-based international economic order. Hence, the United States consistently supported China's WTO membership in spite of interruptions caused by political events such as the Tiananmen Square incident in 1989 and the NATO bombing of the Chinese embassy in Belgrade in 1999. After China joined the WTO in 2001, the China-U.S. trade relationship entered a new stage in which the U.S. objective was to monitor whether China met its WTO obligations. The United States did not initiate trade litigation against China at this stage because the U.S. intended to provide China some leeway to implement its overall WTO obligations. In the end, China in fact carried out its commitments, including substantially lowering its tariffs and

¹⁴ For discussions on the Jackson-Vanik amendment, see generally VLADIMIR N. PREGELJ, CRS REPORT FOR CONGRESS, THE JACKSON-VANIK AMENDMENT: A SURVEY 6-9, Order Code 98-545 (2005), available at <http://www.fas.org/sgp/crs/row/98-545.pdf> (last visited Sept. 17, 2009); WILLIAM H. COOPER, CRS REPORT FOR CONGRESS, THE JACKSON-VANIK AMENDMENT AND CANDIDATE COUNTRIES FOR WTO ACCESSION: ISSUES FOR CONGRESS 306, Order Code RS 22398 (2006), available at http://www.us-asean.org/Vietnam/CRS_JacksonVanik.pdf (last visited Sept. 17, 2009).

¹⁵ The goal of "peaceful rise" exhorts the country to pursue peaceful development instead of hegemony. Peaceful Rise: Strategic Choice for China <http://www.china.org.cn/english/features/93939.htm> (last visited Sept. 17, 2009).

¹⁶ See Michael Overmyer, *With China's WTO Entry Requirements Winding Down, Will 2006 Become China's "Year of the Bank"?*, THE CHINA BUS. REV., available at <http://www.chinabusinessreview.com/public/0601/overmyer.html> (last visited Sept. 17, 2009) ("PRC trade officials also face pressure from domestic companies and their bureaucratic champions to limit the market access of foreign competitors.").

opening its market,¹⁷ and U.S. exports to China increased dramatically.¹⁸ As the deadline for China's phase-in period to meet most of its WTO commitments passed in 2006, the China-U.S. trade relationship moved to the next stage.¹⁹ The U.S. now intends to tackle those "harder" obligations yet to be fulfilled by China. This gradually intensifying attitude is primarily driven by domestic groups and Congress, which deem America's large trade deficit²⁰ with China to be the result of Chinese "unfair trade practices".

Today, with the Democrats controlling both the administration and Congress, it is expected that Washington will take a more offensive approach against China and that bilateral trade disputes will therefore rise dramatically. It is commonly suggested that a trade war may be prompted by the large U.S. trade deficit with China, which rose from less than USD 7 billion in 1987 to USD 266 billion in 2008.²¹ The deficit has generated repercussions beyond the economic realm, including increasing resentment toward China that is manifesting in the form of "China bashing".²² Empirical studies confirm that the trade deficit contributed to a sharp rise in unfavorable news coverage about China in the U.S.²³

However, even those who perceive China as a threat can hardly ignore the increasing interdependence between the two nations. For the last 30 years, U.S. exports to China have increased more than 300 times.²⁴ Current China-U.S. trade amounts to USD 387 billion, making China the United States' second largest trading partner.²⁵ China is now also the largest holder of U.S. treasury bonds and is further expected to be a prime purchaser of the new U.S. government debt issued to finance the financial rescue program.²⁶ These data demonstrate the depth of China-U.S.

¹⁷ For example, China lowered tariffs on goods important to U.S. industries from 25% in 1997 to 7% in 2006. UNITED STATES TRADE REPRESENTATIVE [USTR], U.S.-CHINA TRADE RELATIONS: ENTERING A NEW PHASE OF GREATER ACCOUNTABILITY AND ENFORCEMENT, TOP-TO-BOTTOM REVIEW 9 (2006) [hereinafter 2006 USTR REVIEW], available at <http://www.ustr.gov/sites/default/files/Top-to-Bottom%20Review%20FINAL.pdf> (last visited Sept. 17, 2009).

¹⁸ U.S. exports to China arose from USD 3.8 billion in 1980 to USD 55.2 billion in 2006.

¹⁹ 2006 USTR REVIEW, *supra* note 17, at 10. See also Overmyer, *supra* note 16 (discussing China's implementation of WTO commitments).

²⁰ See MORRISON, *supra* note 11, at 2. GARY CLYDE HUFBAUER ET AL., US-CHINA TRADE DISPUTES: RISING TIDE, RISING STAKES 8 (2006) ("The grace period is now over as U.S. manufacturers and labor unions scramble to file complaints.").

²¹ U.S. Census Bureau, Trade in Goods (Imports, Exports and Trade Balance) with China, <http://www.census.gov/foreign-trade/balance/c5700.html#2008> (last visited Sept. 17, 2009).

²² CARLOS D. RAMIREZ & RONG RONG, CHINA BASHING: DOES TRADE DRIVE THE "BAD" NEWS ABOUT CHINA IN THE U.S. 4 (2009).

²³ *Id.* at 13.

²⁴ MORRISON, *supra* note 11, at 1.

²⁵ KERRY DUMBAUGH, CRS REPORT FOR CONGRESS, CHINA-U.S. RELATIONS IN THE 110TH CONGRESS: ISSUES AND IMPLICATIONS FOR U.S. POLICY 18, Order Code RL 33877 (2009), available at <http://www.fas.org/sgp/crs/row/RL33877.pdf> (last visited Sept. 17, 2009).

²⁶ *Id.* at 1. China holds U.S. Treasury securities totaling more than USD 1,200 billion in 2008.

economic interdependence and the complexity of the two powers' love-hate trade relationship.

III. MONITORING SCHEMES AND NEGOTIATIONS

It should be kept in mind that U.S. trade action against China can even incur Chinese retaliation and harm U.S. business interests, as aggressive U.S. measures will likely reinforce China's protectionist camp, which includes domestic industries and the bureaucracy. Thus, trade matters may be elevated to sensitive political issues.

Both Washington and Beijing realize that they have much to lose and little to gain from an outright trade war. Consequently, both governments have resorted to various means of resolving bilateral trade conflicts. Among these measures are monitoring schemes, including government reports on trade barriers required under domestic laws, and the Trade Policy Review Mechanism and the Transitional Review Mechanism undertaken under the auspices of the WTO. These monitoring schemes have increased interactions among trading partners and enhanced their mutual understanding of where their differences lie. The governments of China and the U.S. have also held high-level negotiations, such as the Strategic Economic Dialogue, in order to settle trade conflicts without resorting to WTO litigation, which would incur substantial expenses and time. To understand China-U.S. trade relations, these monitoring schemes and negotiations are as important as the WTO dispute settlement process.

A. *Government Reports on Trade Barriers*

U.S. trade policy toward China is based on a careful analysis conducted under a monitoring scheme administered by an inter-agency group. This inter-agency group, headed by the United States Trade Representative (USTR), consists of several U.S. government agencies in Washington and China. This group is responsible for the "top-to-bottom" review of the United States' China policy and for providing recommendations on the trade strategy toward China.²⁷ Under the

WAYNE M. MORRISON & MARC LABONTE, CRS REPORT FOR CONGRESS, CHINA'S HOLDINGS OF U.S. SECURITIES: IMPLICATIONS FOR THE U.S. ECONOMY 4, Order Code RL 34314 (2009), available at <http://www.fas.org/sgp/crs/row/RL34314.pdf> (last visited Sept. 17, 2009).

²⁷ The inter-agency agency entitled "the Trade Policy Staff Committee Subcommittee on China WTO Compliance" includes the USTR, the Departments of Commerce, State, Agriculture, and Treasury. USTR, 2008 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 1 (2008), available at http://www.ustr.gov/sites/default/files/asset_upload_file192_15258.pdf [hereinafter 2008 USTR REPORT]; 2006 USTR REVIEW, *supra* note 16, at 21 (stating that the U.S. Department of State established a large economic section in the U.S. embassy in China to review China's trade policy and related issues).

U.S.-China Relation Act of 2000, the USTR also submits to Congress annually a report on China's WTO compliance.²⁸ Based on the USTR's own assessment, as well as written comments from industry groups and experts' testimonies, this report thoroughly reviews China's compliance with its WTO obligations, ranging from import/export regulations, agricultural policy, to intellectual property rights issues. In addition to these government-initiated efforts, private persons can also invoke Section 301 of the 1974 Trade Act to investigate foreign unfair trade practices.²⁹ This mechanism strengthens U.S. public-private collaboration in dealing with China on trade issues.

Similar to the USTR reports, China's Ministry of Commerce (MOC) began issuing the Foreign Market Access Report in 2003.³⁰ The purpose of this report is to assess trade barriers against Chinese businesses. For instance, the 2009 report examines trade measures imposed by 16 major trading partners, including the United States.³¹ It also emphasizes the importance of tackling foreign trade barriers because in 2008 alone, Chinese exports were subject to 93 trade remedy investigations in 21 countries, and the total value of these exports amounted to USD 61.4 billion.³² From 2009, the MOC's Fair Trade Bureau of Import and Export also began compiling and publishing information on foreign trade barriers.³³ Furthermore, in 2005, China enacted the Foreign Trade Barrier Investigation Rules, under which a private person is able to petition to the government to investigate foreign trade barriers.³⁴ As China-U.S. trade frictions grow, it is expected that these mechanisms will be used with increasing frequency.

B. The Trade Policy Review Mechanism

²⁸ Pub. L. No. 106-286, div. B, tit. IV, § 401, 22 U.S.C.A. § 6951, 114 Stat. 900 (Oct. 10, 2000).

²⁹ An Introduction to Section 301, <http://www.aflcio.org/issues/jobseconomy/globaleconomy/intro301.cfm> (last visited Sept. 17, 2009).

³⁰ *Kuo Pie Mao Yi Tou Tzu Huan Ching Pao Kao 2009 Fa Pu Ti Shih Wai Mao Han Tou Tzu Feng Hsien (Foreign Market Access Report 2009 Published – Remind Foreign Trade and Investment Risks)*, XINHUA NEWS, Apr. 23, 2009, http://news.xinhuanet.com/newscenter/2009-04/23/content_11245782.htm (last visited Sept. 17, 2009).

³¹ *Id.*

³² MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA, *KUO PIE MAO YI TOU TZU HUAN CHING PAO KAO 2009 [FOREIGN MARKET ACCESS REPORT 2009]* 1, available at <http://gpj.mofcom.gov.cn/accessory/200904/1240391651251.pdf> (last visited Aug. 31, 2009).

³³ Yan Luo, *Engaging the Private Sector: EU-China Trade Disputes under the Shadow of WTO Law?*, 13(6) EURO. L.J. 800, 808 (2007).

³⁴ Tui Wai Mao Yi Pi Lei Tiao Cha Kuei Tse [Foreign Trade Barrier Investigation Rules] (2005), available at <http://www.asianlii.org/cn/legis/cen/laws/iroftb414/> (last visited Sept. 18, 2009). As of now, only one Chinese company, Jiangsu Laver Association, filed a petition on behalf of its members challenging Japan's import restriction on Chinese laver exports. Luo, *supra* note 33, at 809.

Both the USTR and MOC reports were originally initiated for transparency purposes. But, more importantly, today they send a signal to the country's trading partners: "We are watching you." Moreover, allowing private parties to play a role in governmental trade investigations reinforces public-private partnership against foreign trade barriers. In addition to these unilateral monitoring schemes, there are also multilateral monitoring mechanisms under the WTO. The most commonly known mechanism is the Trade Policy Review Mechanism (TPRM), set forth in Annex 3 of the WTO Agreement. The purpose of the TPRM is to increase the transparency and international understanding of each member's trade policies and practices.³⁵ To this end, all WTO members are subject to periodic reviews under the TPRM. The frequency of such reviews depends on their share of world trade: the first four members are reviewed every two years, the next 16 every four years, and the remaining members every six years, with the exception being granted to the least-developed countries.³⁶

The WTO General Council, consisting of all members, convenes as the Trade Policy Review Body to conduct these reviews. The reviews are based on reports prepared by the member under review and by the WTO Secretariat's Trade Policy Review Division. During the TPRM meeting, the member under review is required to respond orally and in writing to written questions that other members have submitted in advance. Other members may also make observations and comments during the meeting. All of the reports, along with the minutes of the meeting, are made available to the public.

From 1995 to 2009, there have been 212 TPRM reviews.³⁷ The TPRM exerts peer-pressure on members to improve their trade frameworks. For this reason, newly acceded WTO members often consider the TPRM meeting to be their first "exam" after accession. The United States has been reviewed six times from 1996 and China has been reviewed twice.³⁸ Both China and the U.S. have used this multilateral forum to submit questions to each other in order to seek further clarification on each other's trade regimes. For instance, during China's 2008 TPRM process, the U.S. alone proposed more than 120 questions to China.³⁹ Such a large number of inquiries demonstrates Washington's keen interest in understanding

³⁵ Trade Policy Review Mechanism art. A(i), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter Trade Policy Review Mechanism].

³⁶ *Id.* art. C(ii).

³⁷ World Trade Organization [WTO], Trade Policy Reviews: The Reviews, http://www.wto.org/english/tratop_e/tp_r_e/tp_rep_e.htm (last visited Sept. 17, 2009).

³⁸ *Id.* The U.S. was reviewed in 1996, 1999, 2001, 2004, 2006 and 2008. China was reviewed in 2006 and 2008.

³⁹ 2008 USTR REPORT, *supra* note 27, at 18.

Chinese trade practices, many of which are still based on “internal guidelines” not available to the public.

C. The Transitional Review Mechanism

As the globe’s third largest trading country, China is subject to the TPRM review once every two years. China is also subject to annual reviews for 10 years after its accession to the WTO under the Transitional Review Mechanism (TRM). The legal basis for the TPM is Section 18 of China’s Protocol of Accession to the WTO. The TRM is considered to be a “WTO-plus” obligation,⁴⁰ which can be considered discriminatory because only China is subject to this mechanism. The U.S. insisted on the inclusion of this annual review requirement and explicitly stated that it was the “objective” of U.S. trade policy to do so.⁴¹ Based on the U.S. view, the TRM is a tradeoff for China’s WTO membership because at its accession, China lacked a market economy and was thus not yet ready to be admitted to the WTO.⁴² The TRM, therefore, serves as a unique “precautionary” device to ensure China’s compliance with its WTO commitments.⁴³

In addition to the frequency of review, there are two further aspects of the TRM that distinguish it from the TPRM. First, the review process is more comprehensive and entails two steps. In the first step, the information submitted by China, specified in Annex 1A of the Protocol, is reviewed by 16 WTO subsidiary bodies.⁴⁴ In the second step, the General Council reviews the reports made by these bodies and makes a recommendation.⁴⁵

Second, China’s obligations under the TRM are “enforceable” in the WTO dispute settlement system because the TRM is set forth in the Protocol, which itself forms “an integral part of the WTO agreement.”⁴⁶ In

⁴⁰ See generally Julia Ya Qin, “WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System: An Appraisal of the China Accession Protocol, 37(3) J. WORLD TRADE 483, 507-09 (2003).

⁴¹ Pub. L. No. 106-286, div. B, tit. IV, § 401, 22 U.S.C.A. § 6951, 114 Stat. 900 (Oct. 10, 2000).

⁴² General Council, *Minutes of Meeting – Held in the Centre William Rappard on 13 December 2004*, ¶ 63, WT/GC/M/90 (Feb. 10, 2005).

⁴³ Paolo D. Farah, *Five Years of China’s WTO Membership: EU and U.S. Perspectives on China’s Compliance Commitments and the Transitional Review Mechanism*, 33(3) LEGAL ISSUES OF ECON. INTEGRATION 263, 292 (2006).

⁴⁴ Protocol on the Accession of the People’s Republic of China, ¶ 18(1), WT/L/432 (Nov. 23, 2001). 16 bodies include Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights, Council for Trade in Services, Committees on Balance-of-Payments Restrictions, Market Access, Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Anti-dumping Measures, Customs Valuation, Rules of Origin, Import Licensing, Trade-Related Investment Measures, Safeguards, Trade in Financial Services. See also 2008 USTR REPORT, *supra* note 27, at 19 (“China has refused to provide advance written responses and instead provides oral responses at the meetings . . .”).

⁴⁵ *Id.* ¶ 18(1)-(2).

⁴⁶ *Id.* ¶ 1(2).

contrast, the TPRM is unenforceable, given that it is expressly excluded from the scope of the “covered agreements” specified in the Dispute Settlement Understanding (DSU).⁴⁷ As the TRM is both enforceable and conducted more often than the TPRM, the US uses the TRM as a forum to gain more detailed and up-to-date information about Chinese trade measures which the U.S. intends to challenge. Therefore, the TRM serves a function similar to the “discovery” phase of civil litigation and thus information gathered during the TRM review facilitates subsequent consultation and litigation proceedings. For example, during China’s 2008 TRM review, the U.S. submitted detailed questions to China about its “famous brand programs.”⁴⁸ About two month later, the U.S. filed a complaint against China, contending that the programs involve WTO-inconsistent subsidies.⁴⁹ The TRM thus accords a litigation “advantage” to the U.S., whereas China bears a more onerous burden when investigating U.S. trade measures that it deems to be WTO-illegal.

D. The Strategic Economic Dialogue

The USTR and MOC reports, along with the TPRM and TRM, are primarily for transparency purposes in order to help China and the U.S. understand and assess each other’s trade barriers. Once the trade barriers have been identified, the two nations would then engage in discussions in an attempt to prevent possible frictions. China-U.S. bilateral dialogues at the “highest official level” were made possible in 2006, when U.S. President George W. Bush and Chinese President Hu Jintao decided to create the “Strategic Economic Dialogue” (SED).⁵⁰ The purpose of the SED was to provide a forum to discuss “long-term strategic issues” related

⁴⁷ Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU]. The TPRM is not listed in the Appendix 1 of the DSU. *See also* Qin, *supra* note 40, at 508-09 (explaining that the TPRM is not enforceable under the WTO dispute settlement system). It should be kept in mind that the TPRM is not “intended to serve as a basis for the enforcement of specific obligations . . . for dispute settlement procedures.” Trade Policy Review Mechanism art. A(i).

⁴⁸ *See generally* Communications from the United States, *Transitional Review Mechanism of China*, IP/C/W/520 (Oct. 14, 2008).

⁴⁹ The U.S. filed the consultation request on December 19, 2008. WTO, Dispute Settlement: Dispute DS387, China: Grants, Loans and Other Incentives, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds387_e.htm (last visited Sept. 18, 2009).

⁵⁰ MORRISON, *supra* note 11, at 24. Other bilateral consultative mechanisms include, for instance, the U.S.-China Joint Commission on Commercial Trade (JCCT, established in 1983) and the U.S.-China Joint Economic Committee (JEC, established in 1980). 2006 USTR REVIEW, *supra* note 17, at 21; Press Release, U.S. Dep’t of the Treasury, Fact Sheet Creation of the U.S.-China Strategic Economic Dialogue, HP-107 (Sept. 20, 2006), *available at* <http://www.treasury.gov/press/releases/hp107.htm> (last visited Sept. 18, 2009) [hereinafter Fact Sheet Creation of the U.S.-China Strategic Economic Dialogue].

to the economy.⁵¹

From 2006 to 2008, five SED meetings took place and were chaired by the U.S. treasury secretary and a Chinese vice premier.⁵² These cabinet-level meetings signify the ascent of bilateral trade to a “strategic” level for both nations. However, a fundamental question remains as to whether these meetings were simply “talk shops” or did achieve substantive results. Indeed, the SED meetings do possess the nature of “talk shops” because the two sides tend to use the forum to discuss rather “big” issues over which there are major differences. These issues include China’s market economy status in U.S. anti-dumping proceedings, currency reforms and protection of intellectual property rights (IPR). These issues are “ongoing”, meaning that both sides simply “agreed to continue to discuss” them.⁵³ Nonetheless, consensus has been reached on certain fundamental issues, the most important among which is the opening of China’s financial market to U.S. businesses. For instance, U.S. banks are now allowed to issue Reminbi bank cards, and the New York Stock Exchange and NASDAQ are permitted to operate branches in China. Although these “achievements” do not represent a significant portion of those the U.S. requested, the U.S. did gain market access to China with lower costs in comparison to the expenses and time that litigation would incur.

SED meetings serve to avoid a trade war between the U.S. and China and are more “efficient” for the U.S. to achieve its goals. First, SED meetings allow the U.S. administration to have a justified “excuse” to put on hold Congress’ “China bashing” demands. These demands, including intensive WTO litigation, would likely lead to a tit-for-tat retaliation from the Chinese side. The U.S. would ultimately be forced to expend more resources to deal with China. Second, through the SED meetings, the U.S. can handle relatively “soft” issues and reserve WTO litigation as a final resort to deal with “hardcore” issues. It should be noted that even if the U.S. defeats China in a WTO action, the litigation and implementation process could take years. Thus, it is far more economical to resolve potential disputes through talks and induce Beijing to implement its promises in good faith.

Turning to the Chinese side, while some may question how much

⁵¹ Fact Sheet Creation of the U.S.-China Strategic Economic Dialogue, *supra* note 50.

⁵² Press Release, U.S. Dep’t of the Treasury, Joint U.S.-China Fact Sheet: The Fifth U.S.-China Strategic Economic Dialogue, HP-1317 (Dec. 5, 2008).

⁵³ See also Iana Dreyer & Fredrik Erixon, *An EU-China Trade Dialogue: A New Policy Framework to Contain Deteriorating Trade Relations*, ECIPE POL’Y BRIEFS NO. 03/2008 (Eur. Centre for Int’l Pol. Econ., Brussels, Belg.), at 5 (“[D]amage limitation’ in one key outcome of the Strategic Economic Dialogue. . . . It is wrong to say that there have been strong, substantive, negotiated outcomes of the SED. It is, however, equally wrong to say the results have been weak.”). For information on the SED results, see *id.* at 6.

China actually has gained from SED meetings, the talks do allow Beijing to more accurately weigh the political risks and costs of not opening its market. China views its trade relationship with the U.S. as a politically sensitive one. The Chinese leadership does not want to appear to “succumb to” U.S. requests after losing in the WTO dispute settlement process. In their view, defeat in a WTO legal battle would cause the government to “lose face” and may even incur strong criticism from the Chinese population, as it would remind them of the nation’s subordinate international status in the past. SED meetings, on the contrary, accord China “big state status” on par with the U.S. and illustrate the opening up of the domestic market as mutually beneficial. Consequently, bilateral talks, in particular the SED meetings, play an important role in preventing the U.S. and China from sliding into a full-scale trade war.

IV. WTO DISPUTES

If efforts through the monitoring schemes and dialogues fail to achieve what Washington or Beijing expected, either government may resort to the WTO dispute settlement mechanism. The U.S. administration has carefully assessed its litigation strategy against China from several angles. First, litigation against China may cause a backlash, as the Chinese leadership may see the U.S. move as an insult or an “act of bad faith”.⁵⁴ The matter may be seen as a political rather than trade issues and may unite Chinese groups in a protectionist font to the detriment of American exporters. Second, WTO litigation may also harm U.S. domestic industries because they will inevitably incur higher costs to purchase Chinese raw materials, such as steel, if the WTO finds Chinese imports to be WTO-illegal. In the end, U.S. consumers may spend more on consumer products.

For these external and domestic considerations, the U.S. government prefers to resolve trade disputes with China through bilateral talks, and has been reluctant to take a harsh stance on China. For instance, the Bush administration once declined a Section 301 petition asking the government to launch a WTO case against China’s currency policy.⁵⁵ As for China, due to the reasons provided in the last section, the government also prefers bilateral talks to litigation. Consequently, since China joined the WTO, it has mostly been on the defensive side of WTO litigations. In the following sections, I will explore how the two countries’ litigation strategies have

⁵⁴ Steven R. Weisman, *Trade War Thwarts China’s Burgeoning Capitalists: U.S. Tariffs Idle a Worker-Owned Plant*, INT’L HERALD TRIB., Dec. 11, 2007, available at <http://www.iatp.org/China/headlines.cfm?AccountID=451&refID=101079> (last visited Sept. 18, 2009).

⁵⁵ Press Release, USTR, Administration Declines Section 301 Petition on China’s Currency Policies (June 13, 2007), available at http://hongkong.usconsulate.gov/uscn_t_ustr_2007061301.html (last visited Sept. 18, 2009).

changed and argue that the proliferation of trade disputes in fact strengthens bilateral economic ties by legalizing rather than “politicizing” trade frictions.

A. *The United States as the Complainant*

The U.S. government understood the importance of bilateral dialogues, but it also recognized that the threat of litigation might coax China back to the negotiating table. Hence, the strategy was not to “win” the case in the legal battlefield but to force China to yield to U.S. requests before litigation. This strategy worked in the initial years when China was not yet familiar with the WTO legal system and was inclined to settle cases brought against it. However, the strategy of using litigation as a “supplement to negotiations” changed, to some extent, in the second term of the Bush administration (2005-2009). The prime reason was that the Democratic Congress passed various bills to take a tougher stance on China, including one on the use of “WTO litigation as a sanction.”⁵⁶ As the fast-track Trade Promotion Authority (TPA) ended in June 2007, the Bush administration needed to respond to these congressional demands in order to receive an extension of the TPA. For this reason, the WTO cases the U.S. brought against China increased in recent years.

1. *Settled Cases.* — The United States has brought seven complaints against China, including one case in 2004, one in 2006, three in 2007 and two in 2008.⁵⁷ These cases primarily concerned three categories: China’s prohibited subsidies, industrial policies and IPR protection. Of the seven cases, the U.S. and China settled three.⁵⁸ In 2004, the U.S. brought the first case, *China – Value-added Tax on Integrated Circuits*, against China.⁵⁹ In this case, the U.S. alleged that China allowed for a partial refund of value-added tax (VAT) for domestically produced integrated circuits (ICs) and ICs that are designed in China and manufactured abroad.⁶⁰ For instance, while U.S. ICs were subject to a 17% VAT, causing

⁵⁶ Malawer, *supra* note 4, at 30. The bill was sponsored by Max S. Baucus and Charles E. Grassley. *Id.*

⁵⁷ 2004 (*China – Value-added Tax on Integrated Circuits*, WT/DS309); 2006 (*China – Measures Affecting Imports of Automobile Parts*, WT/DS340); 2007 (*China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358; *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362; *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363); 2008 (*China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, WT/DS373; *China – Grants, Loans, and Other Incentives*, WT/DS387).

⁵⁸ WT/DS309, WT/DS358 and WT/DS373.

⁵⁹ See generally Request for Consultations by the United States, *China – Value-added Tax on Integrated Circuits*, WT/DS309/1, G/LJ/675, S/L/160 (Mar. 23, 2004) [hereinafter Request for Consultations by the United States].

⁶⁰ The U.S. identified six regulations, issued by China from 2000-2002. See *id.* For detailed

a loss of USD 344 million, China-made ICs were subject to only 3% VAT due to the refund.⁶¹ The U.S. argued that China's rebate policy constituted discrimination against imported ICs in violation of WTO rules, including Articles I and III of the GATT 1994.⁶² This was the first WTO case against China by a WTO member. China and the U.S. held consultation on this matter and decided to settle the case by signing the Memorandum of Understanding (MOU) in July 2004.⁶³ According to the MOU, China agreed to stop providing refunds for China-made ICs. In 2005, both countries notified the Dispute Settlement Body (DSB) that China "successfully implemented" the mutual agreement.⁶⁴ This case is a prime example of how litigation could coax China back to the negotiating table. The U.S. had attempted to negotiate with China regarding the IC policy, but the effort failed. Yet, after the U.S. filed the case with the WTO, the two sides reached an agreement in only four months.

In 2007, China also settled in *China-Prohibited Subsidies*, which was brought by the U.S.⁶⁵ In that case, Washington contended that Beijing's tax regulations and government circulars, which provided domestic enterprises with export and import substitution subsidies, violated various WTO agreements, including Article 3 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).⁶⁶ On the one hand, the U.S. requested the establishment of a WTO panel and, on the other hand, continued to engage in consultations with China.⁶⁷ Just four months after DSB established a panel for the case, China agreed to repeal all WTO-inconsistent measures.⁶⁸

information on this case, refer to Gao, *supra* note 4, at 374-80.

⁶¹ Press Release, USTR, U.S. Files WTO Case Against China over Discriminatory Taxes that Hurt U.S. Exports (Mar. 18, 2004), available at <http://www.us-mission.ch/press2004/0318ChinaWTO.htm> (last visited Sept. 18, 2009).

⁶² See Request for Consultations by the United States, *supra* note 59, at 2 (stating that in the U.S.'s view, China violated "Articles I and III of the GATT 1994, the Protocol on the Accession of the People's Republic of China (WT/L/432), and Article XVII of the GATS").

⁶³ See generally Notification of Mutually Agreed Solution, *China – Value-added Tax on Integrated Circuits*, WT/DS309/8, G/L/675/Add.2, S/L/160/Add.2 (Oct. 6, 2005).

⁶⁴ *Id.*

⁶⁵ Request for Consultations by the United States, *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, at 1, WT/DS358/1, G/L/813, G/SCM/D74/1, G/TRIMS/D/25 (Feb. 7, 2007).

⁶⁶ *Id.* at 3. Subsidies were provided on the conditions that the enterprises purchased domestic over imported goods or meet certain export performance criteria.

⁶⁷ The consultations were held in March and June 2007, respectively. The DSB deferred the establishment of the panel in July and established the panel in the following meeting in August. WTO, Dispute Settlement: Dispute DS358, *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds358_e.htm (last visited Sept. 18, 2009); Communication from China and the United States, *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, at 2, WT/DS358/14 (Jan. 4, 2008) [hereinafter Communication from China and the United States].

⁶⁸ Communication from China and the United States, *supra* note 67, at 4.

In 2008, China and the U.S. settled another case, *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*.⁶⁹ Here, the U.S. challenged China’s regulatory regime that required foreign financial information suppliers, such as Dow Jones and Bloomberg, to operate through the state-owned Xinhua News Agency.⁷⁰ Foreign financial information suppliers were also required to submit confidential information about their services and customers to the Chinese government and were prohibited from establishing commercial presence in China.⁷¹ The U.S. alleged that China’s regime violated several WTO provisions, including Articles XVI, XVII and XVIII of the General Agreement on Trade in Services (GATS).⁷² In December 2008, both governments decided to settle the case by signing an MOU in which China committed to amend the regime.⁷³

In these three cases, China conceded to U.S. requests in no more than 10 months after the U.S. officially initiated legal action. Several reasons may have contributed to settlement of these cases. First, the Chinese government was concerned about its lack of expertise to deal with WTO disputes. This concern was particularly reasonable, given that the complainant, the United States, possesses substantial experience in WTO litigation. Second, many of the Chinese measures that the U.S. challenged had been in effect for a few years. After weighing the benefits that Chinese companies had gained and the expenses that may be incurred in defending these disputes in the WTO, Beijing decided to settle these cases. From the U.S. perspective, these cases indicate that the threat of litigation may be “helpful” to deal with trade disputes with China.

2. *Prevailing Cases.* — Two cases brought by the U.S. against China actually went beyond the consultation stage and were eventually won by the U.S. The first case was *China-Auto Parts*, which the U.S. filed in 2006. The U.S. alleged that the tariff that China imposed on imported auto parts constituted discrimination in violation of several WTO provisions.⁷⁴ In general, China charged a 10% tariff on auto parts. Yet, imported auto parts were subject to a 25% tariff if they were “characterized as complete vehicles” – meaning that such auto parts constitute 60% or

⁶⁹ Request for Consultations by the United States, *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, at 1, WT/DS373/1, S/L/320 (Mar. 5, 2008).

⁷⁰ *Id.*

⁷¹ *Id.* at 1-2.

⁷² *Id.* at 3.

⁷³ Joint Communication from China and the United States, *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, at 2-4, WT/DS373/4, S/L/320/Add.1 (Dec. 9, 2008).

⁷⁴ WTO, Dispute Settlement: Dispute DS340, *China – Measures Affecting Imports of Automobile Parts*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds340_e.htm (last visited Sept. 18, 2009).

more of the value of a complete automobile.⁷⁵ The practical effects of the regulations were twofold. First, domestic auto industries would prefer to use local auto parts because imported ones incurred higher costs. Moreover, foreign auto companies would move their manufacturing bases to China in order to avoid the 25% tariff. The shift of US auto parts factories to China would in turn increase unemployment in the U.S. *China-Auto Parts* was the first case against China to reach the panel stage and was so far the only case in which China appealed to the Appellate Body.

The Appellate Body issued its report in December 2008 and agreed with the panel on most of the issues, finding that China's measures, which constituted "an internal charge", violated the national treatment requirements under Articles III:2 and III:4 of the GATT 1994.⁷⁶ Following the Appellate Body's decision, China indicated that it would revise the WTO-inconsistent regulations by September 2009.⁷⁷ However, it would be premature to simply conclude that this case was China's "first defeat" in WTO tribunals,⁷⁸ given that the case has several salient implications. To begin with, the change in the alleged regulations may not actually have a significant impact on foreign auto industries because China's auto regulations, which were implemented in 2004, have already achieved their purpose of enhancing local auto part industries. Even foreign auto companies, such as BMW and Mercedes-Benz, have indicated that their vehicles sold in China would achieve 40% or more of the "localized rate" and that they would decrease the volume of imported auto parts.⁷⁹ More importantly, from the perspective of China's WTO capacity building, the country, for the first time, went through all stages of WTO litigation and thereby gained first-hand litigation experience.⁸⁰ While the immediate result of the case may not be satisfactory to Beijing, the experience that it gained may well turn out to be a profitable one in the future.

In 2007, the U.S. initiated another complaint, *China-IPR*, against China.⁸¹ Washington had been deeply concerned about IPR issues in

⁷⁵ Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, ¶¶ 1-10, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (Dec. 15, 2008).

⁷⁶ *Id.* ¶¶ 253-254.

⁷⁷ Agreement under Article 21.3(b) of the DSU, *China – Measures Affecting Imports of Automobile Parts*, WT/DS340/15 (Mar. 3, 2009).

⁷⁸ *China Suffers First Defeat at WTO*, BBC NEWS, Feb. 13, 2008, available at <http://news.bbc.co.uk/2/hi/business/7244027.stm> (last visited Sept. 18, 2009).

⁷⁹ *WTO Chung Shen Pan Chuen Nan Tang Hao Che Kuo Chan Hua Feng Chao [WTO Final Decision Can Hardly Stop the Trend of Luxury Cars' Localization]*, XINHUA NEWS, Feb. 3, 2009, http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/auto/2009-02/03/content_10754849.htm (last visited Sept. 18, 2009).

⁸⁰ In this case, China's Ministry of Commerce retained Steptoe & Johnson, a trade firm based in Washington D.C. Steptoe & Johnson LLP, *What We Say About the Firm's Legal Practice in US: Labor and Employment*, <http://www.legal500.com/firms/2774/offices/52981> (last visited Sept. 28, 2009).

⁸¹ WTO, Dispute Settlement: DS362, *China – Measures Affecting the Protection and Enforcement*

China, given that U.S. businesses suffered enormous losses in the Chinese market due to the lack of sufficient IPR protection. The U.S. government listed China on the Section 301 Priority Watch List and IPR issues maintained a high priority on the agenda of bilateral dialogues. Despite Beijing's "positive efforts" to improve IPR protection, Washington decided to bring action against China in the WTO as a final resort to bring further changes to China's legal framework.⁸²

In 2008, the panel issued its report, finding in favor of the U.S. on most claims. The panel held that Chinese copyright law's exclusion of works that are prohibited by Chinese law from protection works that are prohibited by Chinese law violated Article 41.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The panel explained that censorship cannot eliminate copyright entirely. Additionally, the panel found China's customs regulations to be inconsistent with Article 46 because Chinese regulations allowed confiscated goods to be auctioned after their infringing features have been removed.

Nonetheless, the panel did not rule in favor of the U.S. challenge to Chinese law's high threshold for criminal prosecution of copyright infringement. Although Article 61 of the TRIPS requires WTO members to criminalize "willful trademark counterfeiting or copyright piracy on a commercial scale, the panel found that the U.S. did not provide sufficient evidence to establish quantitative thresholds for a "commercial scale." Thus, even though the panel found in favor of the U.S. on most issues, the U.S. did not prevail on its Article 61 claim, which was presumably the most important claim from the perspective of U.S. businesses. At the end of the proceedings, China did not appeal the case. The two governments are now determining the reasonable period of time for China to implement the panel's decision.⁸³ The panel's mixed ruling on this case shows China that it is actually capable of defending its legal regime under the WTO and, in the long term, may make China more inclined to accept the rulings of the panel.

3. *Ongoing Cases.* — Currently, there are two pending WTO cases that the U.S. filed against China. The first concerns China's restriction on trading rights and distribution services for certain U.S. publications and audiovisual products, and the second relates to China's alleged subsidies to domestic enterprises under the "famous brand programs."⁸⁴ A panel is expected to issue a report on the former case in

of Intellectual Property Rights, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm (last visited Sept. 18, 2009).

⁸² 2008 USTR REPORT, *supra* note 27, at 73, 79.

⁸³ See generally Communication from China, *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/11 (Apr. 15, 2009).

⁸⁴ See generally WTO, Dispute Settlement: Dispute DS363, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*,

2009, whereas the latter case is still under consultation.

Based on the seven cases filed by the U.S. against China, the U.S. strategy has largely been successful – either China settled or the U.S. obtained a favorable decision. These cases also exemplify how the legalized framework of the WTO can prevent the peril of a trade war. This conclusion can be further buttressed by China’s reaction to these litigations. Instead of seeing them as a political matter as in the early days, China has gradually come to consider WTO litigation to be a technical matter and has begun to make confident legal arguments to defend its interests in recent cases.

B. China as the Complainant

The cases discussed above seem to suggest that China has been exclusively on the defensive side of WTO litigations. This may have been true in the initial years after China joined the WTO when China was hesitant to file complainants in the WTO. From 2001 to 2009, 14 cases were brought by various WTO members, including seven brought by the U.S.⁸⁵ Even as China was busy handling these cases, Chinese trade officials were well aware that the nation needed to enhance its WTO litigation capacity.

To this end, China has actively participated in WTO proceedings. As of April 2009, China has participated as a third party in 62 cases.⁸⁶ For these cases, China’s Ministry of Commerce routinely selected Beijing-based law firms through a bidding process and engaged them to research legal issues and draft third party submissions. As a general practice, an official in the Ministry would be “paired with” private lawyers and work on a particular WTO case together. The Chinese government sees these cases as training opportunities to develop “its own” trade lawyers. This explains why China did not join the Advisory Centre on WTO Law (ACWL), an international organization aimed at providing legal service for less-developed countries.⁸⁷ It should be noted that although the ACWL may help a government to handle a WTO case, it does not necessarily enhance the member’s overall litigation capacity. In addition to

http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last visited Sept. 18, 2009); WTO, Dispute Settlement: Dispute DS387, China – Grants, Loans and Other Incentives, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds_387_e.htm (last visited Sept. 28, 2009).

⁸⁵ WTO, Dispute Settlement: The Disputes, Disputes by Country, http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Sept. 18, 2009).

⁸⁶ WTO, Dispute Settlement: The Disputes, Map of Disputes Between WTO Members, http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm?country_selected=CHN&sense=e (last visited Sept. 20, 2009).

⁸⁷ For information on Advisory Centre on WTO Law (ACWL) members, see ACWL, Introduction, http://www.acwl.ch/e/members/members_e.aspx (last visited Sept. 18, 2009).

the involvement of private law firms, China has also set up various WTO research centers in Shanghai and Beijing to further the country's WTO understanding.⁸⁸ Although these centers are primarily funded by municipal governments, they also receive grants from the central government for WTO-related research projects.

China has gradually learned how to actively assert its rights in the WTO. The country has initiated four cases, all of which were aimed at the U.S. In 2002, China brought its very first case, *US-Steel Safeguards*, challenging the procedural flaws of U.S. safeguard measures imposed on imported steel products. The Appellate Body issued its report in 2003, finding that the U.S. measures violated the procedural requirements under the Safeguards Agreement. Some may suggest that this was China's first success in WTO litigation and signifies a fundamental change in China's litigation strategy. However, this would be a premature conclusion. It should be noted that China officially joined the WTO only in December 2001, and that this case was filed only four months after China's accession. Thus, China's filing of this case was presumably due to the strong partnership among the eight co-complainants, which included frequent WTO litigation users such as the European Communities, Japan and Korea.⁸⁹ Subsequent history also suggests that *US-Steel Safeguards* did not represent a shift in China's WTO litigation strategy because after the case, the country did not file a second case until 2007.

The second case, along with the third filed in 2008, challenged U.S. procedures on assessing anti-dumping and countervailing duties and finally revealed a change in China's attitude toward asserting its right under the WTO.⁹⁰ The most recent case that China initiated against the U.S. is *US-Poultry Ban*, filed in April 2009. In that case, China found Section 727 of the U.S. Omnibus Appropriation Act of 2009 to be "clearly discriminatory" because it bans poultry imports from China.⁹¹ While the U.S. alleged that its ban was due to sanitary reasons, China considered the measure to be "protectionist" and cannot be justified under the Agreement

⁸⁸ These centers include, for instance, the Beijing WTO Affairs Center, the Shanghai WTO Affairs Consultation Center and the WTO Dispute Settlement Mechanism Center in Shanghai.

⁸⁹ Complaints include Brazil, China, European Communities, Japan, Korea, New Zealand, Norway and Switzerland. WTO, Dispute Settlement: Dispute 252, United States – Definitive Safeguard Measures on Imports of Certain Steel Products, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds252_e.htm (last visited Sept. 18, 2009).

⁹⁰ See generally *United States – Preliminary Anti-dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368/1, G/L/826, G/SCM/D77/1, G/ADP/D72/1 (Sept. 18, 2007); *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds379_e.htm (last visited Sept. 20, 2009).

⁹¹ *China Blasts US Ban on its Poultry*, CHINA DAILY, Mar. 13, 2009, available at http://www.chinadaily.com.cn/china/2009-03/13/content_7575560.htm (last visited Sept. 18, 2009).

on Sanitary and Phytosanitary Measures (SPS Agreement).⁹² Interestingly, China's position was supported by certain U.S. industrial groups, particularly the National Chicken Council, which argues that the U.S. ban should have been based on scientific evidence.⁹³

What do these China-initiated cases tell us? The WTO dispute settlement mechanism is the first and only state-to-state "international court" under which China has consented to mandatory jurisdiction. China's accession to the WTO thus represents its first move in being integrated into the international legal order. Since 2007, instead of "observing" the WTO cases as a third party as it did in the earlier years, China has actively asserted its rights in the system. Recent litigations saw China making arguments based on WTO rather than radical remarks. While the term "aggressive legalism" has been used to depict the behavior of some East Asian countries in dealing with WTO disputes,⁹⁴ a more accurate phrase to describe China's evolving trade litigation strategy should be "assertive legalism." The reason is that China's litigation strategy is not yet "aggressive", but protects its legitimate trade interests under the WTO system. It is also noteworthy that the United States' reaction to China's assertive legalism has been positive, as Washington considers that it is "normal and constructive" for the two trading partners to solve trade disputes in the WTO.⁹⁵ This benign interaction between the U.S. and China also supports my argument that China-U.S. trade frictions can be resolved under the WTO legal framework, so as to avoid a trade war sparked by misguided unilateral measures.

V. CONCLUSION

Due to China's rising economic power, its trade relations with the United States are of great importance to the global economic order. While it has been suggested that the two countries' increasing trade frictions may lead to a tit-for-tat trade war and thus damage bilateral economic ties, this article disagrees with such a proposition. As the article explains, both Beijing and Washington are well aware that unilateral trade measures may lead to retaliatory actions from the other side and therefore have attempted to resolve their differences via monitoring mechanisms and high-level bilateral dialogues. Moreover, the article provides an overview of the WTO disputes between China and the U.S. and demonstrates a positive development of bilateral interactions within the WTO framework. Even in cases in which the

⁹² International Centre for Trade and Sustainable Development [ICTSD], *China Instigates WTO Dispute Case Against U.S. Poultry Ban*, 13(14) BRIDGES WKLY. TRADE NEWS DIG. 7, 7-8 (2009).

⁹³ *Id.*

⁹⁴ See generally, e.g., SAADIA M. PEKKANEN, *JAPAN'S AGGRESSIVE LEGALISM: LAW AND FOREIGN TRADE POLITICS BEYOND THE WTO* (2008).

⁹⁵ ICTSD, *supra* note 92, at 7-8.

U.S. had prevailed, China has agreed to implement the WTO decisions rather than challenge the legitimacy of the WTO dispute settlement process. The recent cases also show that China has changed its litigation strategy and is more inclined to assert its trade interests in the WTO. These efforts not only further integrate China into the international economic order, but also pave the way for the future positive development of China-U.S. trade relations.

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