

China's Evolving Role in Developing the WTO Dispute Settlement Rules

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Since its accession to the WTO in 2001, China has been involved in 21 cases as complainant, 44 as respondent, and 179 as a third party. However, China-related cases have not overburdened the WTO dispute settlement system. Instead, China has assisted in the development of international trade law through the creative interpretations of different provisions achieved in the WTO dispute settlement proceedings. This article seeks to provide an overview of China's participation in the WTO dispute settlement mechanism and contribution to the rules over the past decade. In doing so, the article not only highlights the jurisprudential and doctrinal contributions of some of the critical disputes, but also examines the role of various interest groups and stakeholders in shaping China's dispute settlement activity. Overall, the article provides an overview of China's WTO dispute settlement activities and its role in assisting the development of international trade law.

Keywords: Anti-Dumping Measures, China Accession Protocol, Tariff Concessions, SPS measures, WTO Dispute Settlement Mechanism

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1. Introduction

After long trade negotiations in different rounds¹ from Geneva Round (1947) to the Uruguay Round (1986-1994) and signing of the Marrakesh Agreement² by 124 nations on April 15, 1994, the World Trade Organization (“WTO”) established on January 1, 1995.³ As China was the world’s fastest-growing economy⁴ and one of the 23 original signatories of the General Agreement on Tariffs and Trade (“GATT 1947”), the Working Party on China’s status was initially established under the GATT in 1987 for goods only. On December 7, 1995, the Working Party on the Accession of China to the GATT 1947 transformed into a WTO Accession Working Party,⁵ whose scope was broadened to include trade in services, new rules on non-tariff measures and rules relating to intellectual property rights. With almost 15 years of negotiations,⁶ China became the 143rd Member of the WTO on December 11, 2001 at the WTO Ministerial Conference in Doha, Qatar.

More than 18 years have passed since China joined the WTO. It is thus meaningful to review China’s participation in the WTO dispute settlement mechanism. To date, China has been involved in 21 cases as complainant, 44 as respondent, and 179 as a third party.⁷ Providing a skeletal review of China’s participation in the WTO dispute settlement over the past decade, the authors have tried to examine the role of China in developing international trade law through the jurisprudential and doctrinal contributions in the key disputes. In this article, the authors address that China-related cases have helped China to improve its trade and social-political governance regimes and to maintain healthy and constructive trade relations with other WTO members. In addition, they submit that China-related cases have not overburdened the WTO dispute settlement system; instead, those cases have benefitted both China and other WTO members in the long run, especially for the least developing and developing countries.

This paper is composed of four parts including Introduction and Conclusion. Part two will discuss the accession of China in the WTO. Part three will review China’s participations in the WTO dispute settlement mechanism.

2. The Accession of China in the WTO

Being a communist country holding a “socialist legal”⁸ and “socialist economic system,”⁹ China is trying to catch up with the developed countries by employing a socialist market economy. China has developed the legal framework by establishing relevant laws for governing foreign investment such as Sino-Foreign Contractual Joint Venture (1985), the Law on Wholly Foreign Owned Enterprises (1986), and General Principles of Civil Law (1986).¹⁰ Until China joined the WTO, however, China’s Most Favored Nation (“MFN”) status was subject to yearly renewal and the trade disputes were handled on a bilateral basis.¹¹ In order to further accommodate “global economic system,” China joined the WTO in 2001 through the longest and most arduous negotiations in the history of the GATT/WTO.¹²

With the membership of the WTO, China opened up its market and finally integrated into the global economy.¹³ To implement the commitments in the Accession Protocol,¹⁴ China had to bring reforms in its legal framework consistent with the WTO rules.¹⁵ This has turned out as the country’s biggest transition from a “socialist planned economy” to a “socialist market economy.”¹⁶ In this course, nearly 830 laws were repealed and 325 laws were proposed to amend.¹⁷ Whether and how much such reform in law and 15 years’ negotiation has benefited China?

Many researchers argued reforms according to the WTO rules and commitments encourages economic growth as the WTO rules guide a country on the best way to achieve its economic goals. China’s economic growth supports their argument. Some argued that China’s WTO membership has brought impressive economic growth and development in various sectors of its economy.¹⁸ Actually, the reforms according to the WTO rules and commitments have encouraged its economic growth.¹⁹ Both exports and imports have grown enormously making it “the world’s third-largest trading power.” Pascal Lamy, the former Director-General of the WTO said: “The scope for trade friction increases as countries trade more.”²⁰ The increased numbers of disputes between China and other countries supports Lamy’s statement.

3. China’s Participation in the WTO Dispute Settlement

Each WTO Member has different experience with the Dispute Settlement Mechanism (“DSM”). For China, the DSM has acted as a “trade policy and strategic consultant.” This part will address the trends in China’s participation in DSM and jurisprudential aspects of China’s cases.

Table 1: Trend of China’s Participation in DSM²¹

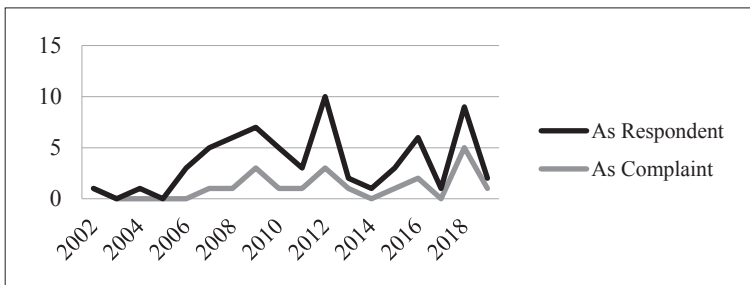
Year	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	Total Number
As Complainant	1	0	0	0	0	1	1	3	1	1	3	1	0	1	2	0	5	1	21
As Respondent	0	0	1	0	3	4	5	4	4	2	7	1	1	2	4	1	4	1	44

Source: WTO website Dispute by Members

A. Trends in China’s participation in DSM

Table 1 shows that China’s position during its first five years of the WTO membership was a perennial third party in panel proceedings.²² Afterwards, however, China became a frequent principal party in its own right at the consultations, panel and appellate stages.²³ China was entitled to more than three years to implement trading rights,²⁴ phase out certain nontariff measures,²⁵ and enforce certain GATS commitments.²⁶ After 2006, China involved in DSM more frequently. In 2018, China has logged the most cases than the previous years.

Figure 1: Volume of WTO Disputes



Source: Statistics in Table 1

There is a keen gap between the number of complainant and respondent cases. However, the chart reveals that there is a similarity between the trend in which cases are filed against China and the trend China followed to bring the cases against the developed-country members. These shows: (1) the developed-country members are increasingly concerned about China's trade policy and strategy; (2) the developed-country members are inclined towards DSM rather than bilateral negotiations to address their concerns; (3) China is adhering to the strategy of the developed-country members but in a sedated way.

B. Jurisprudential Aspects of China's Cases

Until today, China has brought 21 cases before the WTO Dispute Settlement Body ("DSB"). Out of which five cases were brought against the European Union ("EU"), 1 case against Greece (Request for Consultations), 1 case against Italy (Request for Consultations) and 16 cases against the United States ("US").

1. European Union

Table 2 shows the cases brought by China against the EU. The first case launched against the EU was in 2009 (DS397), while the EU filed the first case against China in 2006 (DS339). Since 2006, the EU has brought nine (9) cases against China while China has brought five (5) cases against the EC. Out of the five (5) cases launched against the EU by China, three (3) cases were finished; the DSB gave the decision in favor of China in two cases among them.

Table 2: List of the Cases brought against the European Union

No.	Short Title	Request for Consultations	Decision Supported
1.	DS397: Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China	31 July 2009	China
2.	DS405: Anti-Dumping Measures on Certain Footwear from China	4 February 2010	China
3.	DS452: Certain Measures Affecting the Renewable Energy Generation Sector	5 November 2012	Panel Not Formed

4.	DS492: Measures Affecting Tariff Concessions on Certain Poultry Meat Products	8 April 2015	EU
5.	DS516: Measures Related to Price Comparison Methodologies	12 December 2016	Panel Not Formed

Source: WTO website Dispute by Members²⁷

Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China

In this case China made the claim that Article 9(5) of the EC Basic Anti-Dumping Regulation (Council Regulation (EC) No. 384/96) and Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners in China is inconsistent with the EC's obligations under the WTO rules such as: Article XVI:4 of the WTO Agreement; Articles I:1, VI:1, and X:3(a) of the GATT 1994; and Articles 6.10, 9.2, 9.3, 9.4, 12.2.2 and 18.4 of the Anti-Dumping Agreement; Articles VI and X:3(a) of the GATT 1994; Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.1, 6.2, 6.4, 6.5, 6.10, 9.2, 9.4 and 17.6(i) of the Anti-Dumping Agreement; as well as Part I, paragraph 15 of China's Protocol of Accession; Articles 9.3 and 12.2.2 of the Anti-Dumping Agreement. The moot question, in this case, was whether Article 9(5) of the Basic AD Regulation, as applied in the fasteners investigation, is inconsistent with Articles 6.10, 9.2 and 9.4 of the AD Agreement.²⁸

The Panel stated: "Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties but also the calculation of margins of dumping"²⁹ because "there is a close and necessary link between the calculation of a margin of dumping and the imposition of anti-dumping duty"³⁰ and "normally, an investigating authority would calculate the margin of dumping and impose the consequent anti-dumping duty on the same basis."³¹ Supporting the Panel, the Appellate Body stated: "The Panel did not err in finding that Article 9(5) of the Basic AD Regulation not only concerns the imposition of anti-dumping duties but also the calculation of dumping margins, and that it could be challenged "as such" under Article 6.10 of the Anti-Dumping Agreement, which addresses the calculation of margins of dumping for each exporter or producer."³²

Furthermore, in analyzing the consistency of Article 9(5) of the Basic AD Regulation with Article 6.10 of the Anti-Dumping Agreement, the Panel stated:

“The first sentence of Article 6.10 provides that the investigating authorities must, “as a rule,” calculate an individual dumping margin for each known exporter or producer of the product under investigation”³³ and that “[t]he wording of Article 6.10, particularly the fact that the exception is stated immediately after the rule, seems to suggest that sampling is the sole exception to the rule of individual margins.”³⁴ Addressing the Panel’s interpretation of Articles 6.10 and 9.2 and then its application, the Appellate Body stated:

Article 6.10 of the Anti-Dumping Agreement as expressing an obligation, rather than a preference, for authorities to determine individual margins of dumping. This obligation is qualified and is subject not only to the exception specified for sampling in the second sentence of Article 6.10, but also to other exceptions to the rule to determine individual dumping margins that are provided for in the covered agreements.³⁵

Additionally, the Panel explored whether an importing Member may determine that the exporters and producers from an NME constitute a single legal entity together with the State to apply Articles 6.10 and 9.2 of the Anti-Dumping Agreement. The Panel has invoked the decision in *Korea – Certain Paper*, which stated that when “companies were in a structural and commercial relationship that justified treating them as a single exporter or producer for purposes of Article 6.10 of the Anti-Dumping Agreement.”³⁶ The Panel held that in this case “there is a fundamental difference between the IT test and the test applied by the panel in *Korea - Certain Paper*.”³⁷ According to the Panel, considering NMEs, the State and exporters as a single entity “would seriously undermine the logic of Article 6.10, which requires that individual margins be calculated for each known exporter or producer.”³⁸ Furthermore, the Appellate Body has stated:

[w]here certain exporters or producers are separate legal entities, that evidence will be taken into account in treating them as separate exporters or producers for purposes of Articles 6.10 and 9.2 of the Anti-Dumping Agreement. An investigating authority, however, may also need to consider other evidence that demonstrates that legally distinct exporters or producers are in a sufficiently close relationship to constitute a single entity and should thus receive a single dumping margin and anti-dumping duty.³⁹

[w]hether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the

existence of a number of situations, [...] (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output.⁴⁰

Anti-Dumping Measures on Certain Footwear from China

The dispute in this case raised due to three measures introduced by the EC: (1) Article 9(5) of Council Regulation (EC) No. 1225/2009 on Protection against Dumped Imports from Countries not Members of the European Community (Basic AD Regulation); (2) Council Implementing Regulation (EU) No. 1294/2009 of 22 December 2009 maintaining the definitive anti-dumping duties on imports of certain footwear with uppers of leather originating, *inter alia*, in China following an expiry review (Review Regulation); and (3) Council Regulation (EC) No. 1472/2006 of 5 October 2006 imposing definitive anti-dumping duties on imports of certain footwear with uppers of leather originating, *inter alia*, in China (Definitive Regulation).⁴¹

China contended, “Article 17.6(i) of the AD Agreement implicitly imposes an obligation on investigating authorities in anti-dumping cases to properly establish facts, and to evaluate those facts in an unbiased and objective manner.”⁴² Rejecting the China’s claims of violation of Article 17.6(i) of the AD Agreement, Panel stated: “Article 17.6(i) of the AD Agreement is clear on its face, and only creates obligations on panels and not on investigating authorities of WTO Members in the conduct of anti-dumping investigations.”⁴³ Though China cited the Appellate Body Report in *US – Hot-Rolled Steel* in support of its assertion.⁴⁴ However, the Panel has rejected it stating that: “the Appellate Body made no findings suggesting that Article 17.6(i) imposes obligations on investigating authorities. On the contrary, the Appellate Body stressed the different roles of panels and investigating authorities, and indicated in the quoted passage that Article 17.6(i) only contains obligations for panels when assessing determinations taken by investigating authorities.”⁴⁵

Furthermore, addressing China’s claims that Article 9(5) of the Basic AD Regulation is inconsistent with various provisions of the AD Agreement, GATT 1994, and the WTO Agreement, the Panel held that:

Article 9(5) sets out two circumstances in which a duty for each supplier will not be specified: (1) where it is impracticable to name each supplier, and (2) in general, where Article 2(7)(a) of the Basic AD Regulation applies [...]. In these cases, the regulation imposing the duty will specify a duty rate for the “supplying country concerned” rather than for “each supplier.” In other words, a single “country-wide” duty rate will be specified, rather than an individual duty rate for “each supplier.”⁴⁶

Considering *EC-Fasteners*, the Panel stated: “We find that panel’s analysis and reasoning persuasive on the issues arising in our consideration of China’s “as such” claims with respect to Article 9(5) of the Basic AD Regulation, and have therefore largely adopted its reasoning and conclusions as our own in this dispute.”⁴⁷ The Panel concluded: “Article 9(5) of the Basic AD Regulation is inconsistent with Article 6.10 of the AD Agreement as such, because it conditions the calculation of individual dumping margins for producers/exporters in investigations involving NMEs on the satisfaction of the IT conditions in the provision.”⁴⁸

Measures Affecting Tariff Concessions on Certain Poultry Meat Products

This case dealt with the modification introduced by the EC in tariff concessions on certain poultry products pursuant to negotiations held under GATT Article XXVIII, and the measures appear to be inconsistent with the EU’s obligations under Articles I, II, XIII and XXVIII of the GATT 1994. In this case, China claimed three moot questions before the Panel. Firstly, whether the SPS measures that restricted Chinese poultry imports over the reference periods used by the European Union in both the First and Second Modification Packages constitute “discriminatory quantitative restrictions” within the meaning of the Ad Note to Article XXVIII:1. Secondly, whether, in the context of negotiations under Article XXVIII:5, the importing Member is under a legal obligation to reappraise which the WTO Members hold a principal or substantial supplying interest to reflect changes in import shares that have taken place following the initiation of the negotiations.⁴⁹ And lastly, whether the EC was entitled to disregard China’s claims of a principal and substantial supplying interest on the grounds that they were not presented in a timely manner.⁵⁰

Addressing the first moot question, the Panel went to interpret the terms “discriminatory quantitative restrictions” by examining the context and object and purpose of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1 and stated:

[t]he terms “discriminatory quantitative restrictions” only cover situations in which differential treatment is accorded to imports from Members that are similarly situated. Applying this general concept of discrimination to the SPS measures, we consider that restrictions applied to imports based on sanitary grounds are “discriminatory,” within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1, only if imports from different countries that are similarly situated in terms of the sanitary situation or sanitary risks are not similarly restricted.”⁵¹

It concluded: “The SPS measures do not constitute “discriminatory quantitative restrictions” within the meaning of paragraphs 4 and 7 of the Ad Note to Article XXVIII:1.”⁵²

Furthermore, analyzing the ordinary meaning of the provisions that regulates the determination of which Members hold a supplying interest in the context of Article XXVIII negotiations, the Panel stated that, “the text of Article XXVIII:1 itself does not go into detail on the modalities of negotiations to modify concessions, and is silent on the question of when and how determinations of principal and supplying interest are to be made.”⁵³ Additionally, the Panel has stated that “when this silence is read in the light of the need to strike a delicate balance between the different objectives of Article XXVIII, it leads us to the conclusion that we cannot, as treaty interpreters, formulate a general rule on this matter.”⁵⁴

2. United States

Table 3 shows until 2019, China had challenged the US practices 16 times in the WTO, out of nine (9) cases have been decided; the win-loss record is 5-1, with three-split decision and 1 settled during consultation. The disputes between China and the US, mostly, covers five (5) issues as follows: Antidumping and Countervailing Duty Measure, Safeguard Measure, Measures Affecting Imports, and Tariff Measures.

Table 3: List of the Cases brought against the United States⁵⁵

No.	Short Title	Request for Consultations	Decision Supported
1.	DS252: Definitive Safeguard Measures on Imports of Certain Steel Products	26 March 2002	China
2.	DS368: Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China	14 September 2007	Settled
3.	DS379: Definitive Anti-Dumping and Countervailing Duties on Certain Products from China	19 September 2008	Split decision
4.	DS392: Certain Measures Affecting Imports of Poultry from China	17 April 2009	China
5.	DS399: Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China	14 September 2009	China
6.	DS422: Anti-Dumping Measures on Shrimp and Diamond Sawblades from China	28 February 2011	China
7.	DS437: Countervailing Duty Measures on Certain Products from China	25 May 2012	Split decision
8.	DS449: Countervailing and Anti-dumping Measures on Certain Products from China	17 September 2012	China
9.	DS471: Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China	3 December 2013	Split decision
10.	DS515: Measures Related to Price Comparison Methodologies	12 December 2016	Panel not formed
11.	DS543: Tariff Measures on Certain Goods from China	4 April 2018	Panel formed
12.	DS544: Certain Measures on Steel and Aluminium Products	5 April 2018	Panel formed
13.	DS562: Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products	14 August 2018	Panel formed
14.	DS563: Certain Measures Related to Renewable Energy	14 August 2018	Panel not formed
15.	DS565: Tariff Measures on Certain Goods from China II	23 August 2018	Panel not formed
16.	DS587: Tariff measures on certain goods from China III	2 September 2019	Panel not formed

Source: WTO website Dispute by Members

C. Cases relating Antidumping and Countervailing Duty Measure

Anti-Dumping and Countervailing Duties on Certain Products from China

In this case, China claimed that the measures, which include the conduct of the underlying anti-dumping and countervailing duty investigations, are inconsistent with the obligations of the US under, *inter alia*, Articles I and VI of the GATT 1994, Articles 1, 2, 10, 12, 13, 14, 19 and 32 of the SCM Agreement, Articles 1, 2, 6, 9 and 18 of the Anti-Dumping Agreement, and Article 15 of the Protocol on the Accession of the People's Republic of China (the Protocol of Accession). With this case, China challenged the US' new policy and claimed the country has ignored its obligations under the Agreement on Subsidies and Countervailing Measures (SCM Agreement). China's claim was regarding "double remedies," sometimes referred to as "double counting." The country argued that in various investigations the application of both ADDs and CVDs on the same products from China created a situation where the same instance(s) of subsidization was offset twice.⁵⁶ Although China could not establish its claim of "double remedies," with this case the Appellate Body⁵⁷ has interpreted the relevant provisions and held that:

Article 19.3 of the SCM Agreement does not address the issue of double remedies and that China did not establish that offsetting of the same subsidization twice through the concurrent imposition of anti-dumping duties calculated on the basis of an NME methodology and countervailing duties is inconsistent with Article 19.3 of the SCM Agreement.⁵⁸ And concluded stating that the United States acted inconsistently with its obligations under Article 19.3, and, consequently, under Articles 10 and 32.1 of the SCM Agreement.⁵⁹

Anti-Dumping Measures on Shrimp and Diamond Sawblades from China

Relying on the Appellate Body Report in *US – Softwood Lumber V*, China brought three claims against the US under the following reasons: (1) The US acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement; (2) in the calculation of the separate rate in the Shrimp investigation, the US acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement; and (3) in the calculation of the dumping margin for AT&M in the Diamond Sawblades investigation, the US acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.⁶⁰ Analyzing the facts of the cases and scrutinizing the *US – Softwood Lumber V*, the Panel stated: "We conclude that the USDOC acted inconsistently

with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing in the calculation of dumping margins.”⁶¹ It also held that “the United States has acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement.”⁶²

Countervailing Duty Measures on Certain Products from China

This concerns the preliminary and final countervailing duty measures introduced by the United States Department of Commerce (“USDOC”).⁶³ China claims that these countervailing duty measures are inconsistent with the obligations of the US under, *inter alia*, Article VI of the GATT 1994, Articles 1, 2, 10, 11, 12, 14, and 32 of the SCM Agreement, and Article 15 of the Protocol of Accession of China. Addressing the moot question, whether US acted inconsistently with Article 14(d) and Article 1.1(b) of the SCM Agreement, the Panel has analyzed the Appellate Body report in the *US – Softwood Lumber IV* and the *US - Anti-Dumping and Countervailing Duties (China)* and stated that “neither the Panel nor the Appellate Body in that dispute provide[d] an exhaustive list of the circumstances under which an authority can resort to out-of-country benchmarks.”⁶⁴ However, the Appellate Body has reversed the finding of the Panel and stated that:

[t]he USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement by rejecting in-country prices in China as benefit benchmarks in the context of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations.⁶⁵

Additionally, the Appellate Body went to give the legal grounds behind it and stated:

[i]n the 12 countervailing duty investigations challenged by China the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement [...]. The Panel also found that the USDOC acted inconsistently with the obligations of the United States under Article 2.1(c) of the SCM Agreement in making its specificity determinations in the context of these investigations [...] Furthermore, we have found above that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement in making its benefit determinations in the context of the investigations in OCTG, Line Pipe, Pressure Pipe, and Solar Panels.⁶⁶

Countervailing and Anti-dumping Measures on Certain Products from China

The matter in this dispute concerns Public Law 112-99, an act to apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes. The dispute also concerns others measures relating to the imposition or collection of countervailing duties on products imported into the territory of the US from China, where such determinations or actions were made or performed in connection with countervailing duty investigations or reviews; including the conduct of maintaining and enforcing countervailing duty measures along with the anti-dumping measures.⁶⁷ The first moot question addressed by the Panel was whether Section 1 of PL 112-99 is the law of general application pertaining to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports. The Panel stated that Section 1 of PL 112-99 “is a provision of law and as such is part of a law.”⁶⁸ Furthermore, the Panel added to assess whether a law or another relevant measure is of “general application” within the meaning of Article X:1. Two aspects are usefully: (i) its subject-matter or content; and (ii) the persons or entities to whom it applies, or the situations or cases in which it applies.⁶⁹ Reviewing the subsections of Section 1 as well as PL 112-99, the Panel held that: “Section 1 contains a provision of general application. That this provision applies to events or circumstances that pre-date the publication of PL 112-99 do not detract from it being a provision of general application.”⁷⁰

Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China

In this case China’s claim focused on three issues related to certain antidumping measures applied by the USDOC which includes the use of the weighted average-to-transaction (WA-T) method in dumping margin calculations, the treatment of multiple companies as a non-market economy-wide entity (NME-wide entity), and the way that USDOC determines anti-dumping duty rates for this type of entity and the level of these duty rates.⁷¹

Supporting China’s argument, the USDOC acted inconsistently with the pattern and explanation clauses of that provision.⁷² The Panel held that the USDOC violated the pattern clause of Article 2.4.2 in the OCTG and Coated Paper investigations because of a quantitative flaw concerning the Nails test and a SAS programming error. However, the Panel rejected China’s claim in relation to all the flaws with the

Nails test in respect of the Steel Cylinders investigation.⁷³ The Panel stated:

[t]he USDOC acted inconsistently with the explanation clause of Article 2.4.2 in all three challenged investigations because it did not explain why neither the weighted average-to-weighted average (WA-WA) nor the transaction-to-transaction (T-T) methodologies could take into account adequately “the significant difference in the relevant export prices, within the meaning of that clause.”⁷⁴

Furthermore, China appealed the Panel’s findings and requested the Appellate Body to complete the analysis in two respects: (1) to find that the AFA Norm can be challenged “as such” in the WTO dispute settlement; and (2) to find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II.⁷⁵ Addressing China’s claim the Appellate Body went to complete the analysis and found that “the AFA Norm has prospective application as it reflects USDOC policy, provides administrative guidance for future action, and generates expectations among economic operators.”⁷⁶

Additionally, the Appellate Body stated: “The AFA Norm is a rule or norm of general and prospective application and can be challenged “as such “. It will thus continue to be used in the future.”⁷⁷ Moreover, reversing the Panel’s findings, the Appellate Body held that “the Panel erred in concluding China did not demonstrate that the AFA Norm has prospective application.”⁷⁸

D. Cases relating Safeguard Measure

Definitive Safeguard Measures on Imports of Certain Steel Products

This is the first case China launched against a developed-country member of the WTO. China has initiated the case with regard to the definitive safeguard measures imposed by the US on imports of certain steel products and claimed violations of Articles 2.1, 2.2, 3.1, 3.2, 4.1, 4.2, 5.1, 5.2, 7.1, 8.1, 9.1 and 12 of the Agreement on Safeguards and Articles I:1, II, X:3, XIX:1 and XIX:2 of the GATT 1994.⁷⁹ In this case, the Appellate Body emphasized on: (1) the right to apply a safeguard measure; (2) the standard of review for claims of violation of the unforeseen developments requirement of Article XIX of the GATT 1994; and (3) the application of Article 11 of the DSU to address the claim under Article XIX of GATT 1994.⁸⁰ Addressing the right to apply a safeguard measure, the Appellate Body articulated:

To trigger the right to apply a safeguard measure, the development must be such as to result in increased imports of the product ('such product') that is subject to the safeguard measure. Moreover, any product, as Article XIX:1(a) provides, may, potentially, be subject to that safeguard measure, provided that the alleged "unforeseen developments" result in increased imports of that specific product (such product). We, therefore, agree with the Panel that, with respect to the specific products subject to the respective determinations, the competent authorities are required by Article XIX:1(a) of the GATT 1994 to demonstrate that the unforeseen developments identified ... have resulted in increased imports [of the specific products subject to] ... each safeguard measure at issue.⁸¹

For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. [...] Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for each product subject to a safeguard measure.⁸²

[W]hen an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that "unforeseen developments" resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority [...] Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of "unforeseen developments" must be performed for each product subject to a safeguard measure.⁸³

Addressing the standard of review for claims of violation of the unforeseen developments requirement of Article XIX of the GATT 1994, meanwhile, the Appellate Body articulated:

[t]he Panel must examine whether the United States demonstrated in its published report, through a reasoned and adequate explanation, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers.⁸⁴

[..] to the extent that the Panel looked for a "reasoned and adequate explanation" that was 'explicit' in the sense that it was "clear and unambiguous" and "did not merely

imply or suggest an explanation,” the Panel was, in our view, correctly articulating the appropriate standard of review to be applied in assessing compliance with Article XIX of the GATT 1994 and the Agreement on Safeguards.⁸⁵

As regard the competent authority’s “reasoned and adequate explanation” of how the facts support its determination for those prerequisites, including “unforeseen developments,” the Appellate Body added:

We do not see how a panel could examine objectively the consistency of a determination with Article XIX of the GATT 1994 if the competent authority had not set out an explanation supporting its conclusions on “unforeseen developments.” Indeed, [...] the competent authority must provide a “reasoned and adequate explanation” of how the facts support its determination for those prerequisites, including “unforeseen developments” under Article XIX:1(a) of the GATT 1994.⁸⁶

Further putting light on the application of Article 11 of the DSU to address the claim under Article XIX of GATT 1994, the Appellate Body articulated:

We explained in the *US – Lamb*, in the context of a claim under Article 4.2(a) of the Agreement on Safeguards, that the competent authorities must provide a “reasoned and adequate explanation of how the facts support their determination.” More recently, in *US – Line Pipe*, in the context of a claim under Article 4.2(b) of the Agreement on Safeguards, we said that the competent authorities must, similarly, provide a “reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports.”⁸⁷

This case established that “the logical connection between tariff concessions and increased imports causing serious injury is proven once there is evidence that the importing Member has tariff concessions for the relevant product.”⁸⁸

E. Cases relating Measures Affecting Imports

Certain Measures Affecting Imports of Poultry from China

In this case, China claimed that the US, through Section 727 of the Omnibus Appropriations Act of 2009, and closely related measures, has violated Articles I:1 and XI:1 of GATT 1994 and Article 4.2 of the Agriculture Agreement. So, the Panel has first given importance to analyze the relationship between Article XX(b)

of the GATT 1994 and the SPS Agreement. In order to analyze the relationship, the Panel has looked at the text of the chapeau of Article XX of the GATT 1994 and, in particular, its paragraph (b).⁸⁹ The Panel stated:

There is obviously no explicit reference to the SPS Agreement in the text of Article XX(b) of the GATT 1994 because the text of this provision is a restatement of the GATT 1947 which pre-dates the SPS Agreement. It does, however, refer to measures necessary to protect human, animal or plant life or health.⁹⁰

Furthermore, the Panel has analyzed the preamble of the SPS Agreement and stated:

[..] the preamble explicitly states that the purpose of the SPS Agreement is to “elaborate rules for the application of..., in particular, Article XX(b),” including a clarification in footnote 1 that such a reference to Article XX(b) also includes the chapeau of that Article. We note that the preamble actually commences by paraphrasing the wording of Article XX(b) and that of the chapeau of Article XX of the GATT 1994.⁹¹

[t]he preamble uses the word “elaborate” to qualify the relationship of the SPS Agreement with Article XX(b). The ordinary meaning of the word “elaborate” is to “explain something in detail.” Accordingly, when the preamble states that the SPS Agreement elaborates the rules for the application of Article XX(b), it is thus saying that the SPS Agreement “explains in detail” how to apply Article XX(b). Because the SPS Agreement only applies to SPS measures, this conclusion would apply in respect of measures found to be SPS measures, such as Section 727.⁹²

Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China

This case concerns the restrictions announced by the US on imports of certain passenger vehicle and light truck tires from China and the legal basis for those restrictions. China claimed that the higher tariffs were inconsistent with Article I:1 of the GATT 1994 and were not properly justified pursuant to Article XIX of the GATT 1994 and the Agreement on Safeguards. Additionally, it claimed that these measures were inconsistent with the US’ obligations under China’s Protocol of Accession. The moot question, in this case, were: (1) whether imports from China were in “such increased quantities,” “increasing rapidly” and “significant cause” as required by Paragraphs 16.1 and 16.4 of the Protocol; (2) whether the

transitional safeguard measure for a three year period goes beyond the “extent necessary,” so that it is inconsistent with Paragraph 16.3 and 16.6 of the Protocol; (3) whether the transitional safeguard measures are inconsistent with Article I:1 and Article II:1(b) the GATT 1994 .

Addressing the first moot question, the Panel has reviewed import data collected by the USITC for each year of the 2004-2008 and the percentage increased in imports from China year-on-year between 2005 and 2008. And it observed that there were absolute import increases in each year of the period.⁹³ And it concluded “imports from China were “increasing rapidly” in absolute terms.”⁹⁴

Furthermore, the view of the Panel was also supported by the Appellate Body by stating: “We agree with the Panel that the USITC’s finding that imports were “increasing rapidly” in absolute terms would have, on its own, satisfied the requirements of Paragraph 16.4.”⁹⁵ Moreover, the Panel made a few observations regarding the moot questions as follows:

It thus raises questions that have not yet been dealt with in WTO dispute settlement, including the question of the relationship of this particular safeguard measure to the global safeguards mechanisms under the WTO Agreements: GATT Article XIX and the WTO Safeguards Agreement. Thus, the case raises important questions of the interpretation of the transitional product-specific safeguard mechanism that will obviously be of interest to other WTO Members.⁹⁶

4. Conclusion

China has gradually become one of the top three principal parties in the DSM, but still is working on its efficiency to deal with international litigation. The volume of disputes to which China is the party has maintained a significant impact not only on the WTO dispute settlement system, but also on the provisions of the WTO rules. The issues with its cases played an important role in developing the WTO rules and practice. Through interpretation, these cases have removed the ambiguity in some of the provisions of the WTO rules. In addition, such interpretations gave a better understanding of the WTO rules as well as its implications. Analyzing the cases we can surely conclude that China has demonstrated the strong need

in reforming international trade obligations to address current disputes over investment, intellectual property rights, and other issues. And China is using DSM as the guarantor of rights, to check against economic hegemony, and finally, as a mechanism to ensure that systemic changes are brought about through the WTO jurisprudence. China's active participation in the DSM has helped not only China but also other developing countries to work on their trade rights.

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